other predominantly by men, are decided by collective bargaining processes conducted separately for each of the two professional groups concerned, without any discriminatory effect within each group, does not, where the results of those processes show that two groups with the same employer and the same trade union are treated differently, preclude a finding of prima facie discrimination requiring the employer to prove that there is no infringement of Article 119 of the Treaty.

If the employer could rely on the absence of discrimination within each of the collective bargaining processes taken separately as sufficient justification for the difference in pay, he could easily circumvent the principle of equal pay by using separate bargaining processes.

4. It is for the national court, which has sole jurisdiction to make findings of fact, to determine, if necessary by applying the principle of proportionality, whether and to what extent the shortage of candidates for a job and the need to attract them by higher pay constitutes an objectively justified economic ground for the difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men.

REPORT FOR THE HEARING
in Case C-127/92 *

I — Relevant legislation and history of the litigation

A — *Relevant provisions*

1. The first paragraph of Article 119 of the EEC Treaty provides that:

'Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.'

Article 1 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

* Language of the case: English.

men and women (OJ 1975 L 45, p. 19) provides that:

'The principle of equal pay for men and women outlined in Article 119 of the Treaty ... means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.'

In Article 4, it is provided that:

'Member States shall take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended.'

2. In accordance with the regime established by the Equal Pay Act 1970, the Sex Discrimination Act 1975 and the Equal Pay (Amendment) Regulations 1983, contracts of employment of women in Great Britain include, or are deemed to include, an 'equality clause' giving them the right to terms as favourable as those of the contract of a male worker carrying out work of equal value and serving as comparator.

However, section 1(3) of the Equal Pay Act provides that such an equality clause is not to operate if the employer proves that the variation between the woman's and the man's contracts of employment is genuinely due to a factor other than the difference of sex.

Finally, section 1(1) of the Sex Discrimination Act defines the forms of discrimination, direct and indirect, against a woman. Applying to a woman a requirement or condition which applies equally to a man but which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men, which cannot be justified irrespective of the sex of the person to whom it is applied and which is to the detriment of the woman because she cannot comply with it, amounts to indirect discrimination.

B — *Facts and procedure*

1. Dr Enderby is employed as speech therapist (Chief III) by the Frenchay Health Authority (hereafter 'FHA') within the National Health Service (hereafter 'NHS'). She considers herself to be a victim of indirect sex discrimination due to the fact that at her level of seniority within the NHS, members of her profession, overwhelmingly a female profession, are appreciably less well paid than members of comparable professions in which, at an equivalent professional level, there are more men than women.

2. In 1986, Dr Enderby brought proceedings against her employer before an industrial tribunal. Relying on the abovementioned Community and national provisions, she claimed that she was engaged in work of equal value to that of a principal clinical psychologist and a Grade III principal pharmacist. Her

annual pay was only £10 106, while those of employees in the other two professions taken as comparators were respectively £12 527 and £14 106.

The applicant's claim was initially dismissed on the ground that the employer was bound to respect the salary levels set by the Secretary of State for Health in the National Health Service (Remuneration and Conditions of Service) Regulations 1974. But that dismissal was quashed in 1987 by the Divisional Court, moved by the applicant by way of judicial review, and the case was remitted to the Industrial Tribunal to be decided on its merits.

In 1989, that court dismissed the application again on the ground that the differences in pay were the result of structures specific to each profession, and in particular the separate collective bargaining arrangements, which were not discriminatory. The court, however, rejected the FHA's argument that the difference in pay between the speech therapists and the pharmacists was a consequence of market forces in employment, which it considered only constituted a partial defence.

Dr Enderby then appealed to the Employment Appeal Tribunal. On 21 December 1990, that court dismissed the applicant's appeal while allowing a cross-appeal by the respondents based on the 'market forces' argument. It considered that, once it had been found by the Industrial Tribunal that market forces played some part in the difference in pay between speech therapists and pharmacists, that was enough to justify the whole difference.

3. The Court of Appeal, to which the applicant then appealed, considering that the outcome of the proceedings depended on the interpretation of Article 119 of the Treaty, decided to refer questions to the Court of Justice for a preliminary ruling.

In its order of 30 October 1991, the Court of Appeal first set out the facts as follows:

'1. The complainant who is a woman does job A in a profession (speech therapy) in which the staff employed by the employer X are almost all women and in which the holders of job A are almost all women.

2. The comparator who is a man does job B in a profession (pharmacy) in which a majority of the staff employed by the employer X are female but where the majority of the holders of job B are men.

3. Job A and job B are different but are assumed for the purpose of these proceedings to be of equal value in terms of the demands they make upon the job holder.

4. Employees doing job B receive higher remuneration than employees doing job A.

5. The rates of pay for the two professions (including the rates of pay for job A and job B) are and have been determined by collective bargaining between the employer and the representative trade unions.

6. The same trade union (and the same trade union representative) represents the two professions and the collective bargaining in relation to the pay of speech therapists (including employees in job A) is carried out separately and independently from the collective bargaining in relation to pharmacists (including employees in job B).

7. It has been determined by the tribunal of fact that there has been no sex discrimination whether direct or indirect intentional or unintentional in the manner in which the collective bargaining processes (considered separately) have been carried out or in regard to the arrangements for entry or transfer into or promotion within either of the two professions.

8. Despite the absence of sex discrimination in the sense explained in paragraph 7 the system of separate collective bargaining for the two professions has and has had an adverse impact in practice on women in that holders of job A (who are almost all women) receive lower pay than holders of job B (who are mainly men) although the work of job A is of equal value to the work of job B.

9. The employer has established that part (being more than a de minimis part) but not the whole of the difference in pay between jobs A and B is objectively justified by reason of a shortage of suitably qualified pharmacists.'

The Court of Appeal then asked the Court the following questions:

'*Question 1* Does the principle of equal pay enshrined in Article 119 of the Treaty of Rome require the employer to justify objectively the difference in pay between job A and job B?

Question 2 If the answer to question 1 is in the affirmative can the employer rely as sufficient justification for the difference in pay upon the fact that the pay of jobs A and B respectively have been determined by different collective bargaining processes which (considered separately) do not discriminate on grounds of sex and do not operate so as to disadvantage women because of their sex?

Question 3 If the employer is able to establish that at times there are serious shortages of suitable candidates for job B and that he pays the higher remuneration to holders of job B so as to attract them to job B but it can

also be established that only part of the difference in pay between job B and job A is due to the need to attract suitable candidates to job B

(a) is the whole of the difference of pay objectively justified or

(b) is that part but only that part of the difference which is due to the need to attract suitable candidates to job B objectively justified or

(c) must the employer equalize the pay of jobs A and B on the ground that he has failed to show that the whole of the difference is objectively justified?'

4. The order for reference by the Court of Appeal was received at the Court Registry on 17 April 1992.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by:

— Dr Enderby, appellant in the main proceedings, represented by Anthony Lester QC and David Pannick QC, barristers, instructed by Robin Thompson & Partners, solicitors;

— the Frenchay Health Authority, first respondent in the main proceedings, represented by Eldred Tabachnik QC and Adrian Lynch, barristers, instructed by Bevan Ashford, solicitors;

— the United Kingdom, represented by Patrick Elias QC and Eleanor Sharpston, barristers, instructed by Sue Cochrane, Treasury Solicitor's Department;

— the German Government, represented by Ernst Röder and Claus-Dieter Quassowski, respectively Ministerialrat and Regierungsdirektor at the Federal Ministry of Economic Affairs;

— the Commission of the European Communities, represented by Karen Banks, of its Legal Service, 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 inquiry. However, it put certain questions to the parties to the main proceedings and to the United Kingdom.

II — Summary of the written observations submitted to the court

A — *The first question*

1. *Dr Enderby, appellant in the main proceedings,* submits that in the circumstances set out in the order of the Court of Appeal there is indirect sex discrimination contrary to Article 119 of the Treaty and Directive

75/117 unless the employer can objectively justify the difference in pay. That follows from the mere fact that a group of workers consisting almost exclusively of women is paid less than a group of workers consisting mainly of men and the two groups do work of equal value.

According to the appellant, there is no need to establish any requirement or condition or barrier preventing the women in question from becoming pharmacists or psychologists. As held by the Court of Appeal, the fact that the lower paid group, that of speech therapists, are almost exclusively female is not a 'statistical freak' but is due to the fact that the nature of the work, which allows employees to work part-time, makes it particularly attractive to women and the low pay makes it on the contrary especially unattractive to men.

Dr Enderby maintains that numerous cases decided by the Court establish that a pay policy or practice which has an adverse impact on a group consisting wholly or substantially of women constitutes indirect sex discrimination if the employer cannot objectively justify the difference in pay. She cites in support of this the judgments in Case 170/84 *Bilka-Kaufhaus* [1986] ECR 1607, Case 30/85 *Teuling* [1987] ECR 2497, Case 171/88 *Rinner-Kühn* [1989] ECR 2743, Case 102/88 *Ruzius-Wilbrink* [1989] ECR 4311, Case 33/89 *Kowalska* [1990] ECR I-2591, Case 184/89 *Nimz* [1991] ECR I-297 and Case 229/89 *Commission* v *Belgium* [1991] ECR I-2205.

Finally, the applicant considers that the case-law of the United States Supreme Court, to which the Employment Appeal Tribunal and the Court of Appeal referred, is of little assistance in so far as it pre-dates the Civil Rights Act 1991, which amended US legislation concerning indirect sex discrimination wholly consistently with the abovementioned case-law of the Court of Justice.

For these reasons, Dr Enderby invites the Court to answer the first question in the affirmative.

2. *The Frenchay Health Authority*, respondent in the main proceedings, submits that the scope of Article 119 and Directive 75/117/EEC is confined to sex discrimination and cannot be expanded to a general principle directed to the elimination of wage differentials.

According to the FHA, direct sex discrimination is where the discriminator acts on grounds of sex and prima facie indirect sex discrimination occurs where three conditions are satisfied:

(a) a hurdle or a requirement applicable to men and women alike is imposed other than on grounds of sex by the employer and has to be surmounted or satisfied in order to qualify for some advantage;

(b) it is apparent that a considerably smaller proportion of employees of one sex can surmount that hurdle or meet that requirement in comparison with the other

sex, for reasons which are connected with their sex and which may be biological, physiological or social;

(c) the applicant cannot surmount the hurdle.

In the FHA's view, it is only where there is prima facie indirect discrimination that the employer must objectively justify the hurdle imposed. If neither direct discrimination nor prima facie indirect discrimination can be discerned, the inequality in pay is removed from the sphere of Article 119.

The respondent maintains that the findings of fact made by the Industrial Tribunal, from which there is no appeal on behalf of the applicant, make wholly clear not only that there was no direct discrimination but also that no prima facie indirect discrimination existed. Furthermore, both the Employment Appeal Tribunal and the Court of Appeal in their decisions accepted that the elements described above as constituting prima facie indirect discrimination did not exist in the present case.

In those circumstances, employers cannot be required to provide objective justification of their professional practices since it has been established that those practices were not influenced by considerations based on sex. The anomalies which would be entailed by such a requirement, founded on a 'purely numerical basis', were emphasized by the Employment Appeal Tribunal.

In contrast to the appellant in the main proceedings, the FHA considers that the case-law of the Court does not establish that an adverse impact on a group consisting mainly of women is sufficient in itself to trigger the requirement to provide objective justification. The judgments cited above, and others such as Case 96/80 *Jenkins* [1981] ECR 911 and Case 109/88 *Danfoss* [1989] ECR 3199, concerned cases where the adverse impact was not the only issue but where hurdles to be surmounted or requirements to be satisfied were also in question.

Finally, the respondent adds that American case-law since *Griggs* v *Duke Power Co.* (1971) 401 US 424, discussed by the Advocate General in *Jenkins*, supports the idea that 'disparate impact', that is to say indirect discrimination, requires the imposition of some hurdle or barrier which disadvantages one group in contrast with another group. The respondent considers that UK law is also consistent with its submissions.

Accordingly, the FHA invites the Court to answer the first question in the negative, since there have been found to be no circumstances which establish that the pay differential arises from the application of some criteria which a considerably smaller proportion of women than men can comply with and which have discriminatory effects because of the sex of the worker concerned.

3. *The United Kingdom* also considers that Article 119 of the Treaty is directed only at eliminating forms of discrimination on the grounds of sex and is not a general provision requiring the elimination of all forms of pay differentiation between different groups of workers. As is illustrated by the judgment in Case 129/79 *Macarthys* v *Smith* [1980] ECR

1275, a difference in pay may be attributed to factors unconnected with any discrimination on grounds of sex. In such a case, the difference in pay does not constitute an infringement of Article 119.

In this case, Dr Enderby, solely on the basis of the difference in average pay between the groups referred to and on the difference in the distribution of workers of one or the other sex in those groups, concludes that there is a prima facie case of indirect discrimination. According to the United Kingdom, however, indirect discrimination, as indicated by the abovementioned cases, can only exist where criteria are used which have an adverse impact on one sex because they are linked to that sex, for example where there are measures affecting part-time workers or where a minimum height is an entry requirement for a job. The applicant is not claiming that the pay and pay structure of the professions which she is comparing create a hurdle which, by its nature, impedes a much greater proportion of women than of men.

It may, it is true, be tempting to compare the fact that one has to be a pharmacist to receive the higher rate of pay with the requirement, considered in the *Bilka* and *Danfoss* cases, that one has to work full-time to receive certain benefits. But there is, in the United Kingdom's submission, a fundamental difference: the competent national court found as a fact that the differences in pay between speech therapists and their comparators were not sex-related; moreover, large numbers of women also enter the comparator professions, whose pay structures are governed by different processes of collective bargaining.

Accordingly, the United Kingdom invites the Court to reply to the first question in a way that retains the existing requirement that the applicant show that the difference in pay is attributable to a factor that is causally related to sex in order to establish a prima facie case of indirect discrimination.

4. The *German Government* considers that the Court may not, in order to rule on whether the unequal pay for the jobs in question infringes Article 119 of the Treaty, base itself on the assumption that those jobs are of equal value. The criteria according to which two jobs may be compared so that equal value may be attributed to them must first be ascertained.

According to the German Government, jobs in different professions may only be regarded as comparable if it is possible to establish criteria for comparison which can be applied by the courts. When such jobs are in the same undertaking, they may be equivalent by virtue of the fact that, for example, they are both intended to achieve a common tangible end-product or they possess a specific common point of reference. So far as indicated in the order for reference, the jobs of speech therapist and pharmacist do not satisfy such criteria for comparison.

The two jobs not being comparable, the German Government therefore maintains that Article 119 of the EEC Treaty has not been infringed and that there is accordingly no need to provide objective justification for the unequal pay.

5. The *Commission of the European Communities* considers that on the contrary the first preliminary question should be answered in the affirmative.

According to the Commission, the Court's case-law, and in particular the judgments already cited, makes it clear that where a disadvantage is imposed upon a group composed predominantly of women, that disadvantage constitutes discrimination contrary to Article 119 of the Treaty unless the rule from which it derives can be objectively justified on the basis of factors having nothing to do with sex discrimination. No distinction should be made between situations in which the disadvantage derives directly from a 'rule' properly so called and those in which it may stem from discriminatory assumptions or historical accident. In this case, the 'rule' or phenomenon which necessitates objective justification is the difference in pay between two comparable categories of workers.

The fact that nothing indicates that on average women are less well paid than men in the professions in issue or even the fact that those professions are in general predominantly female should not be regarded as significant. The comparison must be made solely between persons doing an equivalent job who are in the senior grades of their respective professions.

In that context, the Commission maintains that the approach which it advocates, even if it may lead to the need to compare the objective worth of various jobs and to justify pay differences only on the basis of statistics which may or may not be stable, is indispensable if it is desired to counter hidden discrimination. As the Court held in Case 237/85 *Rummler* [1986] ECR 2101, 'the principle of equal pay requires essentially that the nature of the work to be carried out be considered objectively', which necessitates a system of objective job evaluation and justification by employers of a failure to remunerate equally work of equal value.

Finally, the Commission considers that, in order to avoid the danger of converting the rule against sex discrimination into a general obligation of equal pay independent of such discrimination, the Court can limit the requirements of its case-law to cases in which the unfavourable rule or phenomenon has a substantially greater impact on women and where, on the other hand, a significant majority of the favoured group are men. In this case, that would at least enable a valid comparison to be made with the group of pharmacists referred to in the order for reference since men constitute 70% of that group.

B — *The second question*

1. *Dr Enderby* submits that the employer cannot rely as sufficient justification for the difference in pay upon the fact that the pay rates derive from different collective

bargaining processes which, considered separately, do not discriminate on grounds of sex.

The appellant, who refers to the identical position taken on this point by the United Kingdom in Case 109/88 *Danfoss*, considers that the existence of different collective agreements cannot, of itself, provide an objective justification for a serious disparate adverse impact on women. In support of that view, she submits among other things that to accept the contrary would amount to denying the possible discriminatory effects of collective agreements, notwithstanding the fact that they are specifically recognized in Article 4 of Directive 75/117/EEC and by the case-law of the Court.

Accordingly, Dr Enderby invites the Court to answer the second question in the negative.

2. The *FHA* submits, on the contrary, that the existence of different collective bargaining processes is capable of providing and in the present case does provide objective justification for the difference of pay.

In its view, since, as found by the Industrial Tribunal, the collective bargaining processes were reasonable and uninfluenced by direct or indirect gender considerations, the employer can naturally rely on them to defend himself against a claim that he had discriminated in pay rates. In issue is a process of industrial democracy in which those affected by the terms and conditions of employment can participate, and in the case of the NHS, within which there are numerous groups of employees, it is plain that separate bargaining processes for different groups are necessary. For each of the relevant professions, many years of negotiations, supported by exhaustive studies, enabled all the factors specific to each to be taken into account, in particular as far as concerns the qualifications required and the state of the employment market.

The respondent also refers to UK case-law, which accepts that collective bargaining can constitute objective justification.

The FHA accordingly invites the Court to answer the second question in the affirmative.

3. The *United Kingdom* also submits, referring in particular to the judgment in Case 170/84 *Bilka* and to the Advocate General's opinion in Case 109/88 *Danfoss*, that the existence of different collective bargaining processes is in principle capable of being considered as objective justification.

Like the FHA, the United Kingdom submits that in this case such justification has been shown since the separate processes of collective bargaining have been found as a fact to be untainted by any form of sexual discrimination.

In the alternative, it submits that the pay structures arrived at as a result of those bargaining processes reflect the undertaking's real needs and are appropriate for the purpose of attaining its economic objectives. That finding is, according to the United

Kingdom, such as to constitute an objective justification within the meaning of the judgment in *Bilka*.

4. The *German Government* observes in substance that there may be a conflict between the prohibition against all discrimination in Article 119 of the Treaty and the freedom of workers and employers to conclude collective agreements. The establishment of a wage structure within the framework of those agreements takes into account very varied economic, social or geographical factors, not limited to criteria for assessing the specific job.

The German Government considers that where an employer has concluded a number of collective agreements with the same union, the fact that those agreements are valid does not in itself automatically justify the difference in pay set in each one. If it were otherwise, the employer could easily, by separate bargaining processes, circumvent the principle of equal pay.

However, it is possible for different collective agreements to be concluded on the basis of an objective criterion of differentiation, and accordingly for any comparison between the jobs to be precluded. In that context, the fact that each agreement considered in isolation is apparently not discriminatory may be significant.

5. The *Commission* submits that it is the result which has to be justified, not the process by which it was reached. In the judgments in *Kowalska* and *Nimz*, the Court has already recognized that the fact that a rule unfavourable to women has been agreed upon by employers and workers is no reason to allow the result to stand if, in itself, it is not justified.

In this case, it is not the difference in pay which was collectively agreed upon since the rates of pay were agreed upon in separate bargaining processes. Even if those processes did not disclose any intention to discriminate, that observation is irrelevant to the problem in issue since, according to the abovementioned case-law, it is necessary to focus on results and not on intentions.

That is why the Commission considers that the second question calls for a negative answer.

C — *The third question*

1. *Dr Enderby* submits that, since only a very small part of the pay difference is due to the state of the employment market, the employer cannot rely on that factor to justify the difference in whole or in part (solution (c)). In the same way as it is for a woman claiming equal pay to show that her work is of equal value, it must be for the employer to show, if he is to justify the pay difference of work of equal value, to show that the whole of the difference is due to a gender-neutral factor.

In the alternative, the appellant submits that to the extent that the employer establishes that the difference is due to a neutral factor,

such as the need to attract suitable candidates to a job, the pay difference is only justified to that extent (solution (b)).

2. The *FHA* invites the Court to reply that the whole of the difference in pay is justified, as held by the Employment Appeal Tribunal, by market forces (solution (a)). It is unrealistic, illogical and artificial to ask an employer to establish what part of the wage paid is attributable to market forces. Since such forces constrain an employer to agree to a particular level of pay in order to attract candidates it is that total amount which is entirely explained by the state of the employment market.

In the alternative, the respondent contends that such part of the differences as can be attributed to market forces is objectively justified (solution (b)).

3. The *United Kingdom*'s position is comparable to that of the FHA.

As its principal argument, it submits that if a national court determines that a particular salary is paid in order to attract suitable candidates, that justifies the whole difference in pay, because the court cannot determine what would have been paid in the absence of the factor deriving from market forces (solution (a)).

In the alternative, the United Kingdom considers that, if the national court can make such a determination, that part of the difference which is attributable to market forces is objectively justified (solution (b)).

4. The *German Government* observes, in the light of the case-law of the Court, that it is permissible for an employer to offer higher wages to attract workers with a particular qualification who are in short supply on the labour market. But the shortage of workers justifies the difference in pay only in so far as necessary in order to fill the vacant post (solution (b)).

5. The *Commission* submits that only that part of the difference in the pay levels which is attributable to the particular need to attract candidates can be justified on that basis (solution (b)). To allow an employer to justify the whole difference in pay by claiming that a part of it is explained by recruitment difficulties would evidently lead to an undervaluing of the female job.

It appears however to follow from Case 129/79 *Macarthys* v *Smith* [1980] ECR 1275, which rules out 'hypothetical' comparisons in favour of concrete situations, that the choice is between totally equal pay and no equality at all, an approach which should clearly be applied both to a woman claiming equal pay and to an employer trying to justify the inequality. But the development of the Court's case-law on the direct effect of Article 119 of the Treaty in cases of disguised discrimination should, according to the Commission, culminate in allowing an employer to justify that part of the difference corresponding to the extra amount he has to pay in order to attract suitable candidates.

III — Replies to the questions put by the court

A — *Questions to Dr Enderby, the Frenchay Health Authority and the United Kingdom*

The United Kingdom included as Annex 1 to its written observations a schedule of comparative information on certain grades, the percentage of women, the pay and the conditions of service of members of the professions of speech therapist and pharmacist. Further details of that schedule are required, in that the data relating to certain grades are for the year 1985 whereas those relating to other grades appear to be for the current period (namely the year 1992, during which the written observations of the United Kingdom were submitted).

In particular, it is apparent from that document that in the profession of speech therapist, in 1985, the pay of Chief III Grade, in which 97.9% were women, was between UKL 9 175 and UKL 10 160, while the pay of Grade 2 (points 25 to 31), in which 98.6% are women, is currently between UKL 15 420 and UKL 19 512. In the profession of pharmacist, in 1985, the pay of Grade III, in which 29.23% were women, was between UKL 13 225 and UKL 17 829, while the pay of Grades C, D and E (points 11 to 20), in which 79.9% are women, is currently between UKL 20 907 and UKL 27 909.

Dr Enderby and the Frenchay Health Authority, parties to the main proceedings, are requested to indicate whether they agree with those data and whether they have any observations to submit on that topic.

The United Kingdom is requested to indicate:

(a) whether, as far as concerns speech therapists, Grade 2 is inferior to Chief III Grade and whether, as far as concerns pharmacists, Grades C, D and E are below Grade III;

(b) if so, the reasons for which the current pay of those 'inferior' grades is higher than the pay of the 'superior' grades in 1985;

(c) if those grades are not inferior, what significance is to be attributed to a comparison between the current circumstances of those grades and those of the other grades in 1985.

In order to remove any uncertainty as to those statistics, the Court would like the United Kingdom to produce a comprehensive comparative table indicating, for 1985, reference year for the main proceedings:

— the total number of speech therapists and pharmacists employed within the National Health Service and the overall breakdown between men and women in those two professions;

— the number, the breakdown between men and women and the pay of persons in Chief III Grade of the profession of speech therapist and in Grade III (or Principal III) of the profession of pharmacist;

— the number, the breakdown between men and women and the pay of persons in the other grades of those professions.

The Court would also like to see, if possible, a table showing the same statistics for the year 1992.

B — *Replies to the questions*

1. *Dr Enderby*, while observing that the relevant facts were agreed by the parties and approved by the Court of Appeal for the purpose of the order for reference, has produced some information, which indicates in particular that:

— in 1985, in the profession of speech therapist, 98% of Chief III Grade (which was that of the appellant) and 99% of the profession as a whole were women; in the profession of pharmacist, 30% of the grade 'Principal' (used as the point of comparison) and 63% of the profession as a whole were women; it was not disputed that in the inferior grades in those professions the pay was similar and that in the superior grades speech therapists were significantly less well paid;

— since 1985, speech therapists have been subject to two successive regrading exercises: the former grade Chief III was assimilated into a new Grade C, which was then assimilated into a new Grade 2 with 25 to 33 pay points; 98.6% of Grade 2 are women and the pay of that grade is between £12 187 (point 19) and UKL 21 103 (point 33);

— pharmacists have also been reclassified, but the appellant, who is no longer employed by the FHA, is not in a position to provide the Court with details.

2. The *Frenchay Health Authority* agrees with the information provided in Annex 1 to the observations of the United Kingdom, subject to two comments:

— the information as to holiday entitlement for speech therapists needs to be corrected (five weeks on entry; five weeks and three days after five years' service; the management may grant up to three additional days before five years' service; six weeks for staff with 30 points or more);

— as far as concerns the equivalence between the 1985 and 1992 grades, the FHA accepts that some health authorities accepted the assimilation of the former Grade III into the new Grade 2 (25 to 31 points). However, it considers that, as the larger health authorities have accepted, the former Grade III equates to

the new Grade 3 (36 to 38 points), the pay of which is between UKL 23 738 and UKL 25 676.

3. The *United Kingdom*, while pointing out that the data which are relevant to the proceedings are those for 1985, has produced the following information to the Court in response to the questions raised:

(a) the grade structures for speech therapists and pharmacists were revised between 1985 and 1992. That revision has not resulted in an exact equivalence between the previous and the new grades, nor to a precise and automatic transfer. Its purpose was to give competent local health authorities greater room for manoeuvre in defining the requirements of each post and in determining the appropriate classification scale.

That having been said, most health authorities concluded that the former Chief III Grade and the new Grade 2 in speech therapy, and the former Principal III Grade and the new C, D, E and sometimes F Grades in pharmacy, should be equated.

(b) Since those new grades are not 'inferior' to the former grades but their approximate equivalents, it is unsurprising, given the general increase in rates of pay between 1985 and 1992, that the corresponding rates of pay are higher.

(c) The comparison between the data for 1985, which are the only data to be taken into account in these proceedings, and those for 1992 was provided to the Court by way of information. It illustrates above all the difficulty of comparing levels of pay in the different grades of two professions which have different structures and which have been separately reclassified.

The United Kingdom has included with its replies a series of tables concerning NHS speech therapists and pharmacists in England in September 1985, which indicate in particular that:

— the number of employees (statistics in 'whole time equivalent') in speech therapy was 2 338, of which 2 296 (98.2%) were women, and in pharmacy was 2 836, of which 1 704 (60.1%) were women;

— the number of Chief III Grade speech therapists was 153, of which 150 (98%) were women, and the number of Principal III Grade pharmacists was 247, of which 84 (34%) were women;

— in speech therapy, the pay of the highest grades [2] (165 employees, of whom 160 were women) was between UKL 10 556 and UKL 13 770, that of the middle grades [3] (1 125 employees, of whom 1 107 were women) between UKL 8 187 and UKL 10 160 and that of the lower grades [4] (1 026 employees, of whom 1 008 were women) between UKL 5 754 and UKL 8 187;

2 — This category comprises grades Chief II, Chief I and Senior Chief.

3 — Senior I, Chief IV and Chief III

4 — Graduate Entry and Senior II.

— in pharmacy, the pay of the highest grades [5] (166 employees, of whom 29 were women) was between UKL 17 820 and UKL 22 166, that of the middle grades [6] (125 employees, of whom 27 were women) between UKL 16 805 and 19 850 and that of the lower grades [7] (2 537 employees, of whom 1 643 were women) between UKL 7 014 and UKL 17 829.

A series of tables covers the same information for March 1992, and indicates in particular that:

— the number of employees in speech therapy was 2 936, of which 2 879 (98%) were women, and in pharmacy was 3 153, of which 2 007 (63.7%) were women;

— the number of Grade 2 speech therapists was 2 090, of which 2 059 (98%) were women, and the number of Grade C to F pharmacists was 2 103, of which 1 445 (68.7%) were women;

— in speech therapy, the pay of Grade 3 (459 employees, of whom 446 were women) was between UKL 21 103 and UKL 30 036, that of Grade 2 (2 090 employees, of whom 2 059 were women) between UKL 12 187 and UKL 21 103 and that of Grade 1 (211 employees, of whom 203 were women) UKL 11 718;

— in pharmacy, the pay of Grades G and H (215 employees, of whom 40 were women) was between UKL 31 799 and UKL 38 801, that of Grades E and F (783 employees, of whom 357 were women) between UKL 25 275 and UKL 33 355 and that of Grades A to D (2 154 employees, of whom 1 610 were women) between UKL 13 905 and UKL 26 353.

Finally, the United Kingdom has provided some corrections to the schedule of comparative information included as Annex 1 to its written observations. Apart from those concerning holiday entitlement, already indicated by the FHA, those corrections concern in substance the current classification of the grades compared (points 25 to 28 instead of 25 to 31 in Grade 2 in speech therapy and Grade F added to Grades C, D and E in pharmacy).

5 — This category comprises Pharmaceutical Officers, Area Pharmaceutical Officers and Regional Pharmaceutical Officers.

6 — Principal Pharmaceutical Officer Grade 4 and Principal Pharmaceutical Officer Grade 5.

7 — Basic Grade Pharmacist, Staff Pharmacist and Principal Grade III Pharmacist.

F. Grévisse

Judge-Rapporteur