OPINION OF ADVOCATE GENERAL VAN GERVEN

delivered on 15 May 1992

Mr President,
Members of the Court,

1. The two cases under consideration are the result of a request made for a preliminary ruling by the Court of Appeal of England and Wales on the scope of Council Directive 76/207/EEC of 9 February 1976 [1] and of Council Directive 79/7/EEC of 19 December 1978. [2] The questions referred to the Court arose in proceedings between Ms Sonia Jackson and Ms Patricia Cresswell, the appellants in the main proceedings, and the Chief Adjudication Officer concerning the compatibility with Community law of two British benefit schemes in so far as they take no account of childminding expenses when calculating the benefit.

Facts and relevant legislation

2. The two benefit schemes can be summarized as follows.

The Supplementary Benefits Act 1976 ('the SBA'), which is in issue in Case C-63/91 (Jackson), introduced supplementary benefit for persons of at least 16 years of age whose resources were insufficient to meet their requirements. This benefit was available to persons of pensionable age in the form of a supplementary pension. The amount of the benefit was the amount by which the person's resources fell short of his requirements (listed in the act). In contrast, persons under pensionable age had as a general rule to be available for employment in order to be entitled to a supplementary allowance. [3] However, under the Supplementary Benefit (Conditions of Entitlement) Regulations 1981, implementing the SBA, that requirement did not apply to a lone person who had a dependent child living with him. [4]

In addition, the Supplementary Benefit (Resources) Regulations 1981 stipulated that, in calculating the claimant's means, reasonable childminding expenses were to be

1 — 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.

2 — 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.

3 — Supplementary Benefits Act 1976, section 5(1)(a).

4 — Supplementary Benefit (Conditions of Entitlement) Regulations 1981, regulation 6(a).

deducted from his earnings from employment. [5] A training allowance payable pursuant to arrangements made by the Manpower Services Commission, a statutory body responsible for vocational training, was to be treated as income for the purposes of calculating benefit. [6] Nevertheless, family costs, including child-minding expenses, were not deductible from the training allowance, which was treated as income, with a view to calculating the claimant's means. Neither could childminding expenses be taken into account by being added to the list of requirements. The implementing rules governing the composition of that list, the Supplementary Benefit (Requirements) Regulations 1983, only allowed an expense incurred for the performance of an 'ordinary domestic task' to be counted as a 'requirement' where the adult members of the family in question were unable to carry out the task themselves 'by reason of old age, ill health, disability or heavy family responsibilities'. [7]

3. As from April 1988, the SBA has been replaced by the Social Security Act 1986 ('the SSA'), which is central to Case C-64/91 (Cresswell). The new act replaces supplementary benefit by 'income support', which is granted to anyone aged at least 18 whose income is insufficient to meet his requirements, who 'is not engaged in remunerative work' or whose partner is not so engaged and who, except in certain circumstances, is available for employment. [8] Under the Income Support (General) Regulations 1987, a lone parent responsible for a child who is a member of his household is not required to be available for work. [9] They also define the expression 'remunerative work' as work averaging not less than 24 hours a week. [10] By contrast with the SBA, the SSA does not allow childminding expenses to be deducted from earnings from part-time work. Neither may such costs be added when calculating a person's financial requirements.

5 — Supplementary Benefit (Resources) Regulations 1981, regulation 10(4)(c)(ii): 'In calculating the amount of a person's earnings, there shall be deducted from the earnings which he derives from any employment (...) expenses reasonably incurred by him without reimbursement in respect of (...) the making of reasonable provision for the care of another member of the assessment unit because of his own necessary absence from home to carry out his duties in connection with that employment (...).'

6 — Supplementary Benefit (Resources) Regulations 1981, regulation 11(2)(h).

7 — In a similar case to that of Ms Jackson it is reported that a Social Security Commissioner held that a person with only one dependent child could not be regarded as having 'heavy family responsibilities' and that her family responsibilities did not become 'heavy' as a result of her decision to undertake a training course.

8 — SSA, section 20(3).

9 — Income Support (General) Regulations 1987, regulation 8 in conjunction with schedule 1, section 1.

10 — Income Support (General) Regulations 1987, regulation 5(1).

4. At the time of the events giving rise to Case C-63/91, Ms Jackson was 23 years old. She was unmarried, unemployed and the mother of a four-year-old child. She received various benefits (child benefit and one-parent benefit) and, as from March 1982, also supplementary allowance under the SBA. In September 1986 she started a training course arranged by the Manpower Services Commission. On that account she received a weekly training allowance. On the ground that her financial income then exceeded her requirements, the competent authority, the Adjudication Officer, withdrew her entitlement to supplementary allowance. At the same time, he refused to take account of childminding expenses incurred while she attended the training course.

At the time of the events giving rise to Case C-64/91, Ms Cresswell was 30 years old. She was a divorced mother with sole charge of two children aged five and two. For some time she was fully unemployed, until September 1988 when she was employed part-time (22 hours a week during the academic year, that is to say on average less than 24 hours a week) as a graphic designer for Exeter University. Until then, she, like Ms Jackson, had received child benefit and one-parent benefit. In addition, she had for some time received income support under the SSA. With effect from the time she took up employment, the Adjudication Officer reduced her income support without deducting from her weekly income the childminding expenses which she incurred.

5. Both Ms Jackson and Ms Cresswell maintain that the failure to take account of childminding expenses constitutes discrimination on grounds of sex, contrary to the applicable Community legislation.

After appealing unsuccessfully to the Social Security Appeal Tribunal and the Social Security Commissioner, they appealed to the Court of Appeal. The Court of Appeal held that both cases necessitated the interpretation of Directives 79/7 and 76/207 and, by two orders of 21 December 1990, referred a number of questions to the Court of Justice for a preliminary ruling.

The questions referred in Case C-63/91 (Jackson) read as follows:

'1. Is supplementary allowance — which was a benefit available in a variety of personal circumstances to persons whose means were insufficient to meet their statutory requirements 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 upon 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 capable of falling within Directive 76/207 where those conditions relate solely to access to supplementary allowance 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 vocational training?'

The same questions have been referred in Case C-64/91 (Cresswell), but there they are directed to income support and to Ms Cresswell's situation:

'1. Is income support — which is 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 upon 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 income support capable of falling within Directive 76/207 where those conditions relate solely to access to 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 part-time employment?'

In addition, in the judgment of the same date which accompanies the two orders for reference, the Court of Appeal asks the Court, if it holds that the two directives are applicable, to furnish guidance on the way in which any infringement of Ms Jackson's and Ms Cresswell's rights should be corrected. [11]

6. Before I start my discussion of the cases I would dwell on that request. The Commission considers that it is not self-evident that the Court should comply with it. It argues in its supplementary observations that the Court of Appeal has no need of an answer on those points, since it has at this stage of the proceedings only to reach a decision as to the applicability of Directives 79/7 and 76/207. The question as to the remedy will not arise until a later stage before another court, namely a 'fact-finding body', to which — if it is held that the two benefit systems fall within the scope of one or other or both of the directives — the cases will be referred and which will have to examine whether or not the systems are discriminatory and whether they are justified. The Commission infers from the judgment in *Pardini* [12] that

11 — Judgment of 21 December 1990, p. 20, D (hereinafter referred to as 'the judgment of the Court of Appeal').

12 — Judgment in Case 338/85 *Pardini* v *Ministero del Commercio con l'Estero* [1988] ECR 2041, para. 11.

the Court has jurisdiction to give a preliminary ruling pursuant to Article 177 of the Treaty only where the national court which asks for the ruling needs it for the purpose of resolving a dispute pending before it.

I do not agree with that view. The Court has consistently held that the national court's discretion to refer a question for a preliminary ruling should be interpreted broadly. [13] The determining factor is the assessment of the national court itself. The national court in this case expressly states that the question of a remedy for Ms Jackson and Ms Cresswell constitutes a question of principle, of general importance, as to the manner in which it should approach the task of giving effect to the directives, which it would like to see answered in case it holds that they apply in this case. [14] Moreover, the Court of Appeal points, absolutely rightly, to the fact that the two proceedings have already been before the courts for a long time (more than five years now) and to the need, in the context of adequate legal protection, to save the time and costs which would inevitably be entailed by a further request for a preliminary ruling made at a later stage in the same cases by a lower court, or possibly also by the Court of Appeal itself in the event of an appeal against the lower court's judgment.

7. In my discussion I shall first consider the question whether the benefits at issue fall within the scope of Directive 79/7 and whether that depends on whether the persons concerned were suffering from one of the risks referred to in that directive. I shall then consider whether the two schemes fall within Directive 76/207. In so far as it appears that the benefits fall within the scope of one or other or both of the directives, I shall examine in the case of each directive whether discrimination on grounds of sex contrary to the relevant directive is involved and under what circumstances such discrimination may be justified. I shall deal with the question of the remedy at the end.

Scope of Directive 79/7

8. Directive 79/7 aims at the progressive implementation of the principle of equal treatment for men and women in matters of social security (to which I shall refer as 'the principle of equal treatment'). Its progressive character is clear from the title (see section 1 above), the preamble (reference to Article 1(2) of Directive 76/207 and the recital stating that the principle of equal treatment should be implemented 'in the first place' in the areas covered by the directive) [15] and the wording of Article 1.

Article 1 mentions that the progressive implementation of the principle of equal treatment is intended to take place 'in the field of social security and other elements of

13 — The case-law is summarized in the judgment in Case 14/86 *Pretore di Salò* v *Persons unknown* [1987] ECR 2545. In my view, the judgment in *Pardini* in no way detracts from that case-law but, on the contrary, is consistent with it.

14 — Judgment of the Court of Appeal, p. 20, C.

15 — First and second recitals in the preamble to Directive 79/7.

social protection'. What is meant is more closely specified in Article 3(1), which provides as follows:

'This Directive shall apply to:

(a) statutory schemes which provide protection against the following risks:

— sickness,

— invalidity,

— old age,

— accidents at work and occupational diseases,

— unemployment;

(b) social assistance, in so far as it is intended to supplement or replace the schemes referred to in (a).'

It appears from these provisions that the Community legislature sought to give priority to implementing the principle of equal treatment in the sphere of schemes providing protection against the 'classical' risks: sickness, invalidity, old age, accidents at work, occupational diseases, and unemployment. [16] Survivors' benefits and family benefits are expressly excluded from the scope of Directive 79/7 (Article 3(2)). [17]

9. As is to be expected, the interpretation of Article 3(1) is the subject of discussion between the parties to the main proceedings. On the basis of the judgment in *Drake* [18] the United Kingdom argues that neither supplementary allowance nor income support fall within the scope of Directive 79/7. In its view, the benefits in question are intended to protect their recipients against the risk of poverty and not against one of the risks listed in Article 3(1). The United Kingdom goes on to argue that entitlement to supplementary allowance depended, and entitlement to income support depends, upon a person's resources and not upon the occurrence of one of the risks specified in Article 3(1). In other words, the fact that a person suffered from one of the risks specified in Article 3(1) did not entitle him automatically to supplementary allowance and the same is now true of income support; on the other hand, there are many people who, although not suffering from one or more of the specified risks, nevertheless qualified or qualify for benefit.

For their part, Ms Jackson, Ms Cresswell and the Commission consider that both benefits fall under Directive 79/7. According to Ms Jackson and Ms Cresswell, the benefits do fall under the directive, because they were intended to provide protection against the

16 — Historically, too, those risks were the first to be covered by forms of social security: cf. J. Van Langendonck, *Handboek sociaal zekerheidsrecht*, Antwerp, Kluwer, 1991, p. 7; J. J. Dupeyroux, *Sécurité sociale*, Paris, Dalloz, 1986, p. 38 et seq.

17 — Except that family benefits granted by way of increases in benefits due in respect of the risks referred to in Article 3(1)(a) are covered by the directive (Article 3(2)).

18 — Judgment in Case 150/85 *Drake* v *Chief Adjudication Officer* [1986] ECR 1995.

risks listed in Article 3(1). They maintain that the decisive criterion is the role which the benefits play in practice. Even if one had to stick to the aim with which the benefits were designed, according to the judgment in *Drake* a broad interpretation must be given to the scope of the directive. Its scope may not be restricted to classic contributory schemes, which would result in more general means-tested schemes being left on one side. Lastly, the Commission argues that in order for Directive 79/7 to apply it is sufficient that the benefit schemes do, as a matter of fact, cover one of the risks listed in Article 3(1).

10. As the Court of Appeal rightly observes, [19] the question is not whether supplementary allowance and income support must be regarded as a statutory scheme or social assistance within the meaning of Article 3(1). I shall therefore not discuss that difference. The central question here is whether, in order to fall within Directive 79/7, a scheme must be intended by the legislature to constitute protection against risks listed in Article 3(1)(a) or whether it is sufficient that it does in fact afford protection against such risks. Two judgments of the Court seem to me to be crucially relevant to that question: *Drake* and *Smithson*. [20]

11. The judgment in *Drake* was concerned, *inter alia*, with whether an invalid care allowance provided for under British legislation was to be regarded as being a benefit granted under a statutory scheme providing protection against invalidity, to which Directive 79/7 applies as a result of Article 3(1)(a) thereof.

The Court answered that question in the affirmative. It pointed out that invalidity was one of the risks referred to in Article 3(1)(a). It considered that:

'In order to fall within the scope of the directive (...) 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.' [21]

The Court also took account of the fact that Member States protect against the risk of invalidity in different ways. Thus, the United Kingdom, unlike other Member States, provides for two separate allowances, one payable to the disabled person himself and the other payable to a person who provides care. However, such technical differences are irrelevant and the Court held that:

'In order (...) to ensure that the progressive implementation of the principle of equal treatment referred to in Article 1 of Directive 79/7 and defined in Article 4 is carried out in a harmonious manner throughout the

19 — Judgment of the Court of Appeal, p. 11, C.

20 — Judgment in Case 243/90 *The Queen* v *Secretary of State for Social Security, ex parte Smithson* [1992] ECR I-467.

21 — *Drake*, para. 21.

Community, Article 3(1) must be interpreted as including any benefit which in a broad sense forms part of one of the statutory schemes referred to or a social assistance provision intended to supplement or replace such a scheme.' [22]

In addition, the Court observed that:

'the payment of the benefit to a person who provides care still depends on the existence of a situation of invalidity inasmuch as such a situation is a condition *sine qua non* for its payment, as the Adjudication Officer admitted during the oral procedure. It must also be emphasized that there is a clear economic link between the benefit and the disabled person, since the disabled person derives an advantage from the fact that an allowance is paid to the person caring for him.' [23]

The upshot was that the benefit in question fell within the scope of Directive 79/7: otherwise, the Court held, it would be possible, by making formal changes to existing benefits covered by the directive, to remove them from its scope. [24]

12. The very recent judgment in *Smithson*'s case starts out from the reasoning in *Drake* but adds a number of important explanations. That case was concerned with the British scheme of housing benefit for persons of low income. Entitlement to housing benefit and the amount thereof are calculated on the basis of the relationship between the claimant's income and a notional income known as the 'applicable amount'. One of the elements which may be taken into account in order to determine that applicable amount is the 'higher pensioner premium', which is applicable, *inter alia*, to persons aged between 60 and 80 who live alone and are in receipt of one or more other social security benefits including, in particular, an invalidity pension. Anyone who has retired (the retirement age in the United Kingdom is 60 for women and 65 for men) but not yet reached the age of 65 (for women) or 70 (for men) may elect to withdraw from the pension scheme in order to obtain an invalidity pension.

Ms Smithson ceased at the age of 60 to draw the invalidity pension which she had been receiving for some years. Although she was entitled at that time to opt for an invalidity pension, she did not do so and received thereafter an ordinary pension. Later, in connection with the housing benefit which she was granted, she was refused the benefit of higher pensioner premium because she did not fulfil the supplementary condition of being in receipt of an invalidity pension. She was not entitled to fulfil the condition by switching from a pension to an invalidity pension since she had by that time reached the age of 67.

22 — Para. 23.
23 — Para. 24; cf. judgment in *Smithson*'s case, para. 13.
24 — Para. 25.

It was argued that the fact that a woman — unlike a man — could not elect between the ages of 65 and 70 to switch from a pension to an invalidity pension constituted discrimination within the meaning of Article 4 of Directive 79/7. It was claimed that housing benefit was (part of) a statutory scheme providing protection against three of the risks listed in Article 3(1)(a) of the directive, namely invalidity, old age and unemployment.

The Court reformulated the question put by the national court (also the Court of Appeal of England and Wales), which referred to Article 4 of Directive 79/7, so as to ask whether Article 3(1) of Directive 79/7 applies to a scheme for housing benefit the amount of which is calculated by reference to a notional income if criteria concerning protection against certain risks covered by the directive, such as sickness or invalidity, are applied in order to determine the amount of that notional income. [25]

After citing the first and third passages quoted above from *Drake*, the Court went on to state as follows:

'It is therefore clear that although the mode of payment is not decisive as regards the identification of a benefit as one which falls within the scope of Directive 79/7, in order to be so identified the benefit must be directly and effectively linked to the protection provided against one of the risks specified in Article 3(1) of the directive.' [26]

'However, Article 3(1)(a) of Directive 79/7 does not refer to statutory schemes which are intended to guarantee any person whose real income is lower than a notional income calculated on the basis of certain criteria a special allowance enabling that person to meet housing costs.' [27]

The Court further observed that age and invalidity are only two of the criteria applied in order to determine the beneficiary's financial need for such an allowance. The fact that those criteria are decisive as regards eligibility for the higher pensioner premium is not sufficient to bring that benefit within the scope of Directive 79/7. [28] Such a premium is simply

'an inseparable part of the whole benefit which is intended to compensate for the fact that the beneficiary's income is insufficient to meet housing costs, and cannot be characterized as an autonomous scheme intended to provide protection against one of the risks listed in Article 3(1) of Directive 79/7.' [29]

25 — Para. 10.

26 — *Smithson*, para. 14.

27 — *Smithson*, para. 15.

28 — *Smithson*, para. 16. The terminology used in the French version of the judgment is not completely clear: 'allocation majorée', it appears from paragraph 3 of the judgment, should read 'prime majorée'.

29 — *Smithson*, para. 17.

13. The judgment in *Smithson* needs some interpretation. I understand it in the following way: the fact that a risk covered by Directive 79/7 (such as invalidity in Ms Smithson's case) must be taken into account in calculating a notional income which in turn is the condition for the grant of a benefit which (like Ms Smithson's housing benefit) does not itself afford protection against one of the risks referred to in Directive 79/7 cannot bring that benefit within the scope of Directive 79/7. In other words, the mere fact that criteria are used which are related to a risk covered by the directive cannot bring within the scope of the directive a benefit which itself affords no protection against one of the risks in question. In *Smithson* the relationship between the risks referred to in Directive 79/7 and housing benefit was in fact only *indirect*: invalidity is only a criterion for the grant of an invalidity pension, the grant of which is a precondition for receipt of a higher pension premium; in turn the latter is taken into account (along with other factors) in order to calculate the notional income of the person claiming housing benefit.

14. For the purposes of our inquiry in the present cases the judgments in *Drake* and *Smithson* should be read together. The decisive criterion resulting from that exercise is that, in order to fall within Article 3(1) of Directive 79/7, a benefit must be granted pursuant to an autonomous statutory scheme or a form of social assistance affording protection which is directly and effectively linked (see the judgment in *Smithson*) to one of the risks specified in that provision. That is certainly the case where under the scheme — like the one at issue in *Drake* — the grant of a benefit depends, as a condition *sine qua non*, on the existence of one of the risks referred to in Article 3(1)(a). This is not affected by the fact that the benefit is paid to a third party, provided that the economic advantage accrues to the person covered against that risk. Nevertheless, the mode of payment (according to *Smithson*) is *not* the decisive test for whether there is a direct and effective link. But, again according to *Smithson*, the link between the scheme and the protection provided against one of the risks specified in Article 3(1)(a) of the directive may not be completely indirect (as it was in *Smithson*).

However that may be, in any case it is necessary, according to the judgment in *Drake*, to take a teleological approach to the scope of Article 3(1) of the directive. As the Court emphasized in that case (see section 11 above) the principle of equal treatment defined in the directive must be carried out in a *harmonious* manner throughout the Community. As a result, all benefits granted *in a broad sense* pursuant to a statutory scheme or scheme of social assistance which is intended to provide protection against one or more of the relevant risks are covered. In his Opinion in *Drake*'s case, Advocate General Mancini rightly observed that

'the effectiveness of the directive would be seriously compromised if the limits of its application were defined by the way in which a benefit was paid. It is clear that if that were the case a Member State would need only to make a few slight amendments

to its legislation in order to exclude numerous sectors of its social security system from the application of the principle of equal treatment'. [30]

Consequently, the Court's approach in the judgment in *Drake* dovetails perfectly with a continuous line of judgments in equal-treatment cases in which the effectiveness of the relevant Community rules is appealed to as a matter of prime importance with a view to achieving the aims of the Treaty or of Community legislation amid the tangle of national systems and rules. [31]

15. This analysis of the recent case-law leads me to give the following answer to the question whether, in order to ascertain whether a scheme falls within Directive 79/7, the *legislative intention* or the *practical result*, namely actual protection against one of the risks specified in the directive, is the decisive factor.

As I have already stated (in section 9 above), the United Kingdom supports the first, narrow view. It maintains that neither supplementary allowance nor income support fall within the scope of Directive 79/7, because the schemes are not inextricably linked to the risk of unemployment (or old age). On the contrary, they are intended to protect recipients against the risk of poverty, a risk not specified in Article 3(1)(a) of the directive. Evidence of the absence of such an inextricable link is moreover provided by the fact that none of the risks specified in Article 3(1) operates as a condition *sine qua non* for the payment of supplementary allowance or income support in the sense that it guarantees the beneficiary an automatic entitlement to supplementary allowance or income support. On the contrary, the United Kingdom maintains that there were many people who were not afflicted by one of the risks specified in Article 3(1) yet were still eligible for supplementary allowance or income support.

16. I cannot agree with that view. As far as so-called aim of protection against poverty is concerned, it is correct to say that that situation is not mentioned as such in Article 3(1) of Directive 79/7. Nevertheless, protection against the risks specified in that provision ultimately boils down to protection against loss of income or poverty resulting from the occurrence of one of those risks. Moreover, the fact that legislation gears the amount of protection provided against one of the risks specified in Article 3(1) to financial need does not prevent the relevant scheme from being in the nature of protection against one of those risks.

I also disagree with the United Kingdom with regard to the question whether the scheme is inextricably linked to one of the risks specified in Directive 79/7, as evidenced, in its view, by the conditions laid down in the scheme for entitlement to

30 — [1986] ECR 1996, section 5 at 2000.

31 — See, *inter alia*, the case-law on the application of Article 119 of the EEC Treaty and the prohibition of discrimination contained in Directive 76/207. As far as Article 119 is concerned, see the judgment in Case 157/86 *Murphy* [1988] ECR 673, para. 10; the judgment in Case C-262/88 *Barber* [1990] ECR I-1889, para. 34. For cases where effectiveness is prayed in aid in connection with the interpretation of Directive 76/207, see the judgments in Case C-188/89 *Foster* [1990] ECR I-3313, para. 16, and in Case C-177/88 *Dekker* [1990] ECR I-3941, para. 24.

benefit being in the nature of a condition *sine qua non*. To my mind, the requirement of effectiveness and the need to carry out the directive harmoniously and without formal differences throughout the Community mean that one cannot have regard solely to the — explicit or not so explicit — aims which a national legislature has assigned to a particular scheme. When considering whether a scheme falls within Directive 79/7, attention must also be paid to the *effect* of the scheme, that is to say, whether it affords actual protection to its beneficiaries — also in the light of other schemes existing within the social security system — against one of the risks specified in Article 3(1) of the directive.

The requirement for there to be a direct and effective link between the scheme and one of the risks mentioned in Article 3(1) may therefore not be construed as meaning that the risk in question must be a condition *sine qua non* for the grant of the allowance or support. That is not required by Directive 79/7 or by the case-law of the Court: such an exclusive link — the judgment in *Drake* informs us — is, it is true, an important, but not a necessary, factor in assessing whether a benefit forms part of a statutory scheme or scheme of social assistance for the provision of protection against a risk specified in Directive 79/7. Moreover, the expression 'condition *sine qua non*' was used in that judgment in connection with the grant of benefit to a person caring for an invalid (see section 11 above). Like the economic advantage which the invalid obtained from the benefit, the exclusive link was regarded in that case as evidence that a benefit given *to a third party* also afforded protection to the invalid himself. In any event, as the judgment in *Smithson* expressly states, the decisive factor is not the mode of payment laid down in the scheme but the direct and effective link between the benefit and the *protection* provided against one of the risks specified in Article 3(1)(a).

17. In expressing this view, I also disagree with the view taken by the United Kingdom with regard to the social assistance schemes referred to in Article 3(1). The United Kingdom argues that even if supplementary allowance and income support had to be regarded as being social assistance schemes within the meaning of Directive 79/7, they nevertheless fall outside the scope of the directive because they were '*not intended*' to replace or supplement any of the statutory schemes to which reference is made in Article 3(1)(a). In the United Kingdom's view, two judgments in cases arising under Regulation No 1408/71 [32] afford guidance, namely *Hoeckx* [33] and *Scrivner* [34], where the Court held that the Belgian 'minimex' (minimum means of subsistence) did not fall within Article 4(1) of Regulation No 1408/71 since

32 — Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. For the most recent consolidated version of this regulation, see OJ 1983 L 230, p. 8.

33 — Case 249/83 *Hoeckx* v *Openbaar Centrum voor Maatschappelijk Welzijn* [1985] ECR 973.

34 — Case 122/84 *Scrivner and Cole* v *Centre public d'aide sociale de Chastre* [1985] ECR 1027.

it was a general benefit. The same is true of supplementary allowance and income support vis-à-vis Directive 79/7.

Those arguments are not convincing. In the first place, the United Kingdom wrongly takes advantage of a disparity between the various language versions of Directive 79/7. Whereas other versions of Article 3(1)(b) speak of schemes which supplement or replace statutory schemes referred to in Article 3(1)(a), the English version refers to schemes which are '*intended*' to do so. In view of the need to confer effectiveness on the provisions of the directive, such an 'intentional' interpretation is, however, clearly wrong. Furthermore, the question arises as to whether the aforementioned judgments given in cases arising under Regulation No 1408/71 have any value as precedents in this connection: unlike in the case of Directive 79/7, social assistance schemes are expressly excluded from the scope of Regulation No 1408/71 (Article 4(4)).

18. If the Court agrees with my view that regard must be had, not only to the (express or implied) aim, but also to the practical effect of a national scheme in the context of relevant Member State's social security system taken as a whole, it is for the national court — which is best acquainted with its own national system — to assess whether supplementary allowance and income support are to be regarded in reality as providing protection against one or more of the risks specified in Directive 79/7. With that assessment in view, I would focus on two circumstances which the national court itself submits for consideration.

First, the Court of Appeal points out that in the United Kingdom after a certain time (312 days, not including Sundays, it was stated at the hearing) the unemployed cease to receive unemployment benefit. The following remark concerns supplementary benefit but according to the reasoning set out later it is also true of income support:

'The long-term unemployed exhaust their unemployment benefit after a certain time and have to fall back on supplementary benefit. It is impossible to describe the scheme which protects against unemployment without taking supplementary benefit into account.' [35]

Secondly, the Court of Appeal observes that under the supplementary allowance scheme (see section 2 above; from section 3 it appears that this is also true of income support) claimants must as a general rule be available for employment. The Court of Appeal considers that this is 'a recognition that the scheme has a recognizable role in providing protection against the risk of unemployment'. [36]

The national court could gather from those or other circumstances whether the schemes

35 — Judgment of the Court of Appeal, p. 11, G-H.
36 — Judgment of the Court of Appeal, p. 11, F.

at issue are in fact directly and effectively linked to protection against one of the risks referred to in Article 3(1), namely (in case of claimants who are not pensioners) unemployment, and whether, in view of the absence or insufficient provision of other social security schemes affording protection against that risk, they constitute an integral part of the social security protection provided against that risk. In reply to the Court of Appeal's second question in each of the cases (see section 5 above), I would add that the assessment does not depend on the actual situation of the appellants in the main proceedings — although their situation may well be illustrative of the target group which is protected by the relevant national schemes. What it does depend on is whether the relevant national scheme, viewed globally, directly and effectively affords protection against unemployment (in the case of non-retired, wholly or partly unemployed persons as here) or against old age (in the case of pensioners). I would add that, in my view, the link between the scheme and protection against the risk of unemployment which the national court assumes to exist is a much closer link than that which was involved in *Smithson*'s case. I would recall that that case (as is described in point 13 above) was concerned with taking into account a risk specified in Article 3(1) as a criterion for granting an invalidity pension where the grant of an invalidity pension constituted a supplementary condition for obtaining a higher pension premium, which in turn was taken into account in calculating the notional income taken into consideration for the purposes of housing benefit.

Discrimination within the meaning of Directive 79/7

19. In so far as the national court considers in the light of the criteria set out above that the situation of Ms Jackson and Ms Cresswell falls within Directive 79/7, it must be considered whether discrimination on grounds of sex within the meaning of the directive occurs under the supplementary allowance or income support scheme.

The prohibition of discrimination on grounds of sex is contained in Article 4(1) of the directive:

'The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

— the scope of the schemes and the conditions of access thereto,

— the obligation to contribute and the calculation of contributions,

— the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.'

The failure to take account of childminding expenses when determining or calculating a claimant's financial requirements plainly

relates to the calculation of benefits (last indent). There is no direct discrimination in the methods of determination or calculation since no explicit distinction is made between men and women. Neither is express reference made to factors such as marital or family status. The discriminatory treatment alleged by the appellants in the main proceedings seems instead to stem from the fact that the rules in question fail to take a sociological phenomenon into account or take it into account to an insufficient degree: that is to say, the fact that there is in present-day western society a large and, reportedly, steadily growing number of single parents, the majority of whom, it would seem, are women. [37] Where such parents, from a situation of unemployment, venture to take vocational training or start part-time work, childminding becomes necessary. Generally speaking, the only solution is to have recourse to paid childminding services. In so far as such costs cannot be taken into account in order to secure continuing receipt of certain benefits (at the same level), lone parents, mainly women, suffer *de facto* unequal treatment compared with married parents or parents otherwise living together.

20. Is *indirect discrimination* contrary to Directive 79/7 involved here? Guidance seems to me to be forthcoming from the judgment in *Teuling*. What was at issue in that case was a Netherlands statutory benefit payable in respect of incapacity for work the amount of which depended, *inter alia*, on marital status and on the income from employment of the claimant's spouse. Because account was taken of her husband's income, Mrs Teuling did not qualify for benefit supplements. She argued that the system of benefit supplements, which took account of income arising from or in connection with the work of a spouse, constituted indirect discrimination against women and was therefore incompatible with Article 4(1) of Directive 79/7. The Court ruled that:

'a system of benefits in which (...) supplements are provided for which are not directly based on the sex of the beneficiaries but take account of their marital status or family situation and in respect of which it emerges that a considerably smaller proportion of women than of men are entitled to such supplements is contrary to Article 4(1) of the directive if that system of benefits cannot be justified by reasons which exclude discrimination on grounds of sex.' [38]

In that case, the Court did not decide that the system in question was contrary to Article 4(1) but provided the national court with data in order to assess whether it was justified in the light of the aim (explained by the Netherlands Government) of the deliberate supplements in the context of Netherlands social policy (see also section 21).

The passage cited from *Teuling* constitutes a logical continuation of the case-law which the Court has developed in connection with Article 119 of the Treaty in cases in which a

37 — Reference should be made to the statistics in *Childcare and Equality of Opportunity. Consolidated Report to the European Commission*, Brussels, Commission of the European Communities, April 1988, p. 45 et seq.

38 — Judgment in Case 30/85 *Teuling* v *Bedrijfsvereniging voor de Chemische Industrie* [1987] ECR 2497, para. 13.

considerably higher number of women than men are affected by a particular scheme. As long ago as in the judgment in *Jenkins* the Court was called upon to rule on a system operating in a British company under which a lower hourly rate was paid for part-time than for full-time work and the vast majority of the part-time workers were, apparently, women. The Court held that such a system did not offend against the principle of equal pay laid down in Article 119 in so far as the difference in pay was attributable to factors which were objectively justified and in no way related to any discrimination based on sex. [39] However, the Court went on to state as follows:

'By contrast, if it is established that a considerably smaller percentage of women than of men perform the minimum number of weekly working hours required in order to be able to claim the full-time hourly rate of pay, the inequality in pay will be contrary to Article 119 of the Treaty where, regard being had to the difficulties encountered by women in arranging to work that minimum number of hours per week, the pay policy of the undertaking in question cannot be explained by factors other than discrimination based on sex.' [40]

There the Court did in fact take account of an inequality stemming from a sociological phenomenon, namely the difficulty experienced by women in managing to do full-time work (a 40-hour week in that case). That reasoning was extended in *Bilka*, a case concerning an occupational pension scheme operated by a German department store company under which only full-time employees were eligible for a pension. In considering whether that constituted indirect discrimination against women, the Court, referring to *Jenkins*, held that

'Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.' [41]

The Court stated that, in assessing those factors, account had to be taken of the difficulties encountered by women in working full-time. [42]

Later on, that approach was confirmed in the judgment in *Kowalska*, in which the point at issue was whether a clause in a civil service employees' collective agreement was compatible with Article 119. The Court held that such a clause, under which employers might exclude part-time employees from the

39 — Judgment in Case 96/80 *Jenkins* v *Kingsgate (Clothing Productions) Ltd* [1981] ECR 911.

40 — Para. 13.

41 — Judgment in Case 170/84 *Bilka-Kaufhaus GmbH* v *Karin Weber von Harz* [1986] ECR 1607, para. 31.

42 — Para. 29.

payment of a severance grant on termination of their employment, was contrary to Article 119

'when in fact a considerably lower percentage of men than of women work part-time, unless the employer shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.' [43]

In a judgment given on 7 May 1991, in which reference was made to *Kowalska*'s case, it was confirmed that that case-law applies in its full vigour to the prohibition of discrimination applied by Article 4(1) of Directive 79/7:

'as the Court has consistently held, it is contrary to Article 4(1) of Directive 79/7 for a social group to be treated less favourably where it proves to be composed of a greater number of persons of one sex, unless the measure in question is based on "objectively justified factors unrelated to any discrimination on grounds of sex"' [44]

21. In the event that the national court considers that Directive 79/7 should be applied (see section 18 above) and, having found that the schemes at issue affect a higher percentage of women than of men, holds that the schemes embody indirect discrimination within the meaning of Article 4(1), the roles will be reversed. It will then be for the British authorities to prove that there are objectively justified factors unrelated to any discrimination on grounds of sex for not taking childminding costs into account when calculating a person's means by deducting them from a training grant where application is made for supplementary allowance or by making allowance for them when calculating the means of a claimant for income support.

It is clear from the judgments in *Rinner-Kühn* [45] and *Nimz* [46] that the British authorities may not confine themselves to generalizations. Only if they can show that the means chosen meet a necessary aim of their social policy and that those means are suitable and requisite for attaining that aim, then the fact that the provision affects a much greater number of women than men will not be regarded as constituting an infringement of Article 119. [47] In assessing the principles and aims pursued by the public authorities allowance must, however, be made for the reasonable discretion which, under Community law as it at present stands, each Member State enjoys with regard to social protection measures and the detailed arrangements for their implementation. [48]

43 — Judgment in Case-33/89 *Kowalska* v *Freie und Hansestadt Hamburg* [1990] ECR I-2591, para. 16.

44 — Judgment in Case C-229/89 *Commission* v *Belgium* [1991] ECR I-2205, para. 13.

45 — Judgment in Case 171/88 *Rinner-Kühn* v *FWW Spezial-Gebäudereinigung GmbH&Co. KG* [1989] ECR 2743, para. 14.

46 — Case C-184/89 *Nimz* v *Freie und Hansestadt Hamburg* [1991] ECR I-297, para. 14.

47 — Judgment in *Rinner-Kühn*, paragraph 14; see also the judgment in *Commission* v *Belgium*, cited above, para. 19.

48 — Judgment in Case 184/83 *Hofmann* v *Barmer Ersatzkasse* [1984] ECR 3047, para. 27; *Commission* v *Belgium*, para. 22.

22. I would add one final observation in this connection. Some people would perhaps be inclined to designate the attitude taken here as a measure of 'positive discrimination' (or, to use the expression current in the United States, 'affirmative action') in the sense that by this means legal corrective action is being taken with respect to a group of the population which is disadvantaged by sociological circumstances, namely women in this case. [49] To my mind that would be incorrect. The development of objective criteria in the legislation which take account of the family costs of a lone parent does not disadvantage the male population. Such an arrangement is equally useful to lone male parents with dependent children.

Having regard to the doubts expressed by the Court of Appeal in this connection, [50] I would expressly add that a rule laid down by the national (legislative, administrative or even judicial) authorities under which child-minding costs were deductible only in calculating women's means in connection with the British schemes of supplementary allowance or income support would on the contrary constitute *direct discrimination* on the grounds of sex (against men) contrary to Directive 79/7. In that regard I need refer only to the judgment in the *Integrity* case, in which the Court held that Article 4(1) of Directive 79/7 precludes:

'national legislation which reserves to married women, widows and students the possibility of being assimilated to persons not liable to pay any social security contributions without granting the same possibility of exemption from liability to pay contributions to married men or widowers who *for the rest satisfy the same conditions*.' [51]

The scope of Directive 76/207

23. The Court of Appeal's third question in each of the cases is concerned with the applicability of Directive 76/207 to the conditions of entitlement for receipt of supplementary benefit or income support.

Directive 76/207 was one of the first directives implementing the principle of equal treatment. [52] Article 1

49 — A good example of cases in which Community law expressly authorizes such positive discrimination on the part of the Member States is afforded by Article 2(3) of Directive 76/207 and Article 4(2) of Directive 79/7. According to those provisions, the directives are without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity (Directive 76/207) and on the grounds of maternity (Directive 79/7). As far as the aim of the relevant provision of Directive 76/207 is concerned, see the judgment in Case 184/83 *Hofmann* [1984] 3047, especially paragraph 25; see also the very brief statement in the judgment in Case 222/84 *Johnston* [1986] ECR 1651, para. 44; the judgment in Case 312/86 *Commission* v *France* [1988] ECR 6315, para. 13; and the judgment in Case C-345/89 *Stoeckel* [1991] ECR I-4047, para. 13.

50 — Judgment of the Court of Appeal, p. 18, A-C.

51 — Judgment in Case 373/89 *Caisse d'Assurances Sociales pour Travailleurs Indépendants 'Integrity', ASBL* v *Rouvroy* [1990] ECR I-4243, para. 15, my emphasis; see also the Opinion of Advocate General Jacobs, in which he reached the same conclusion, in particular at I-4254, section 13.

52 — That directive was preceded by 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, OJ 1975 L 45, p. 19. The structure of Directive 76/207 is the same as that of Directive 75/117: cf. the judgment in Case 248/83 *Commission* v *Germany* [1985] ECR 1459, para. 7.

defines its scope in the following terms:

'1. The purpose of this Directive 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. This principle is hereinafter referred to as "the principle of equal treatment".

2. 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.'

24. The United Kingdom argues that neither supplementary allowance nor income support fall within the scope of Directive 76/207. It argues that it follows from the wording of Article 1(2) that social security provisions are not within the scope of the directive. It is expressly stated in the preamble to the directive that the definition and progressive implementation of equal treatment in matters of social security should be ensured by means of subsequent instruments. [53] It maintains that the Court's judgment in *Newstead* [54] confirms that Directive 76/207 does not apply to social security provisions. Although in *Marshall*'s case [55] the Court held that the exclusion contained in Article 1(2) must be interpreted strictly, the United Kingdom maintains that the present cases have more in common with *Newstead*'s case in so far as they directly relate to the content of the social security system.

Ms Cresswell's and Ms Jackson's interpretation of Directive 76/207 and of the Court's case-law is completely different. They argue that the directive prohibits any discrimination within the financial arrangements made by a Member State for support during a period of vocational training or in access to employment. The exclusion set out in Article 1(2) applies only to 'pure' social security. In contrast, where discrimination within a social security system has the effect of preventing equal access to vocational training or employment, it is caught by Directive 76/207. They argue that the Court's judgment in *Newstead* was concerned with a social security system under which men had to pay higher contributions than women, not with pay or other working conditions. In contrast, the two cases now before the Court fall specifically within the directive since they turn on equal access to vocational training or employment.

The Commission, for its part, agrees with the appellants in the main proceedings in so far as it takes the view that a social security matter falls within the scope of Directive 76/207 if it has a discriminatory effect in relation to access to work, promotion, vocational training or working conditions. There was such discrimination in the present cases in so far as the British benefit schemes at issue discourage women from taking up vocational training or employment. The

53 — See the last recital in the preamble to Directive 76/207.

54 — Judgment in Case 192/85 *Newstead* v *Department of Transport and Her Majesty's Treasury* [1987] ECR 4753.

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

Commission infers from the Court's judgment in *Barber* that some conditions governing State social security may be regarded as working conditions within the meaning of Directive 76/207.

25. It is true that in *Newstead* the Court endorsed the view taken by the United Kingdom and the Commission that Directive 76/207 is not intended to apply in social security matters. [56] However, contrary to the United Kingdom's contention, it does not follow that social security schemes as a general rule fall outside the scope of that directive.

In my opinion, an initial argument against that view is contained in the actual wording of Article 1 of Directive 76/207. Rather than excluding social security, Article 1(1) provides on the contrary that social security does fall within the scope of the directive, albeit on the conditions referred to in Article 1(2). Article 1(2) refers to further action by the Council in the field of social security with a view to defining the substance of the principle of equal treatment, its scope and the arrangements for its application in that (extensive) area. To date, two directives have been adopted pursuant thereto, namely Directive 79/7 (statutory schemes) and Directive 86/378/EEC (occupational schemes). [57] If it was the aim of the Community legislature to exclude social security completely from the scope of Directive 76/207, I cannot understand why Article 1(1) nevertheless brings it within its scope in general terms.

In addition, the Court has reaffirmed on numerous occasions that the exclusion set out in Article 1(2) must be interpreted strictly in view of the fundamental importance of the principle of equality in the Community legal order. [58]

If those two elements are combined, it seems to me that Article 1 as a whole must be interpreted as meaning that the provisions of Directive 76/207 must likewise be intended to apply in matters relating to social security — as Community law stands at present, those matters which *are* covered by Directives 79/7 and 86/378 — which have been the subject of an implementation of the principle of equal treatment. In practical terms, this means that the arrangements in question are subject, not only to the prohibition of discrimination formulated in the said 'social security directives', but also to the prohibition set out in Directive 76/207 of discrimination as regards access to employment (including promotion) and to vocational training and as regards working conditions and conditions governing dismissal.

This does justice both to the progressive implementation of the principle of equal treatment in matters of social security and to the effectiveness of Directive 76/207. I also

56 — Para. 24.

57 — Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ 1986 L 225, p. 40.

58 — Judgment in Case 151/84 *Roberts* v *Tate & Lyle* [1986] ECR 703, para. 35; judgment in Case 262/84 *Beets-Proper* v *Van Lanschot Banquiers* [1986] ECR 773, para. 38; judgment in *Marshall*, cited above, para. 54. The Court has expressly stated on numerous occasions that the principle of equal treatment is one of the fundamental rights which form part of the Community legal order: see the judgment in Case 149/77 *Defrenne* v *Sabena* [1978] ECR 1365, paras 26 and 27, and the judgment in Joined Cases 75 and 117/82 *Razzouk and Beydoun* v *Commission* [1984] ECR 1509, para. 16.

consider that this obviates the danger of a unilateral reduction of the scope of Directive 76/207, as illustrated in the form of an example by the Commission and the appellants in the main proceedings. If social security fell completely outside the scope of Directive 76/207 — the reasoning runs — a Member State which granted educational grants for a training course on discriminatory terms would be caught by the directive, yet a Member State which achieved the same end by means of discriminatory social security benefits would not. In so far as such a social security benefit falls within Directive 79/7 — which can, however, only be the case if there is a direct and effective link with protection against the risk of unemployment (see section 14 above) — it can also be reviewed in the light of Directive 76/207.

26. Contrary to the view taken by the United Kingdom, I consider that that view is implicitly confirmed by the judgment in *Newstead*. That case was concerned with a British 'contracted-out' scheme under which unmarried male civil servants were obliged to contribute 1.5% of their gross salary to a widows' pension fund. The contributions were returned to such a civil servant upon his leaving the civil service or, should he die before, were paid to his estate. Newstead, who was unmarried, argued, *inter alia*, that this was contrary to the prohibition of discrimination as regards working conditions contained in Directive 76/207. In discussing that point the Court considered whether the Council had already adopted directives on survivors' pensions (including widows' pensions) pursuant to Article 1(2) of Directive 76/207. In doing so, it examined in detail whether the directives which had already been adopted (79/7 and 86/372) covered such benefits. The Court held that they did not, and decided that:

'In the absence of more specific directives extending the application of the principle of equal treatment to benefits for surviving spouses, whether these are provided under a statutory social security scheme or under an occupational scheme, and having regard to the fact that the difference in treatment affecting Mr Newstead as regards the immediate enjoyment of all his net pay is the direct consequence of a difference in treatment in the occupational scheme in question with regard to this type of benefit, it must be concluded that the case before the Employment Appeal Tribunal falls within the exception to the application of the principle of equal treatment provided for in Article 1(2) of Directive 76/207.' [59]

If the Court had taken the view that an occupational scheme for widows' pensions was a social security scheme and for that reason only did not fall within Directive 76/207, all that inquiry would have been unnecessary. In contrast, the Court's approach strengthens my conviction that a social secu-

59 — *Newstead*, para. 28.

rity scheme which was already caught by a directive adopted to implement the principle of equal treatment in the field of social security would also fall within the scope of Directive 76/207.

27. I therefore consider that, in so far as it is decided that supplementary allowance and income support fall within the scope of Directive 79/7, there is nothing to prevent those schemes' also falling within Directive 76/207 and, in particular as regards the real effect of their conditions of operation, there is nothing to prevent its being considered whether they are compatible with the provisions of Directive 76/207.

Again that task falls to the national court: it is for that court to consider whether the conditions of entitlement to benefit under the two schemes — namely the fact that child-minding costs may not be set against income from vocational training or from employment — affects the possibility for a lone parent to undergo vocational training or take up part-time work. In other words, the national court must inquire into the real impact of those conditions of entitlement in the fields covered by Directive 76/207, namely access to vocational training (Article 4) and to employment (Article 3). It is precisely here that the added value lies of the applicability of that directive to social security schemes which were already subject to the principle of equal treatment as a result of Directive 79/7: whereas Directive 79/7 applies that principle to the actual *detailed rules* of the schemes at issue (Article 4), Directive 76/207 makes it possible to examine whether or not those detailed rules have a discriminatory *effect* in areas lying outside the field of social security which are within its scope, namely access to employment, including promotion, and to vocational training and working conditions, including conditions governing dismissal.

Discrimination within the meaning of Directive 76/207

28. Whether the British benefit schemes embody discrimination contrary to Directive 76/207 is quite another question. Article 2(1) of that directive provides as follows:

'For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.'

The following provisions impose specific obligations on the Member States with regard to the application of the principle so defined with regard to conditions of access to employment (Article 3), access to vocational guidance and vocational training (Article 4) and conditions of employment and conditions governing dismissal (Article 5).

The considerations set down (sections 20-22 above) with regard to discrimination within the meaning of Directive 79/7 also

apply here: in order for there to be indirect discrimination within the meaning of Article 2(1) of Directive 76/207 it is sufficient that an ostensibly neutral measure should in fact affect for the most part employees of one of the sexes and it is unnecessary to prove intention to discriminate. That requirement would be met if it were established that the non-deductibility of childminding expenses from a vocational training allowance or from income from a part-time job in practice mainly affected women.

It is irrelevant in this connection that the contested scheme did not place an insurmountable obstacle in the way of lone mothers' access to vocational training or employment or that that was not the legislature's intention: a real impact on the possibility to engage in vocational training or take up a job is sufficient.

The remedy open to the appellants in the main proceedings

29. It remains for me to consider the Court of Appeal's request for guidance on the way in which the appellants' rights should be corrected in the event that it should appear that Directive 79/7 or Directive 76/207 or both are applicable, there is found to have been indirect discrimination and the British authorities provide no objective justification. It is certainly clear that both prohibitions of discrimination have direct effect, since each of them

'standing by itself, and in the light of the objective and contents of the directive, (...) is sufficiently precise to be relied upon in legal proceedings and applied by a court.' [60]

This means that, as from the date for the implementation of the two directives, individuals can rely on the prohibitions of discrimination which they embody in order to preclude the application of any national provision which is inconsistent with them. [61]

The Court has consistently held that the national court may not apply the provision which is contrary to Community law. [62] Yet the problem in the situation in question is that the frame of reference which the Court of Justice offers the national court in equal-treatment cases with regard to remedies for individuals does not provide a solution here. In the event that discrimination is established, the Court requires the national court

60 — Judgment in Case 384/85 *Borrie Clarke* v *Chief Adjudication Officer* [1987] ECR 2865, para. 9; see also the judgment in Case 71/85 *Netherlands* v *FNV* [1986] ECR 3855, para. 21; judgment in Case 286/85 *McDermott and Cotter* v *Minister for Social Welfare and Attorney-General* [1987] ECR 1453, para. 14; judgment in Case C-31/90 *Johnson* [1991] ECR I-3723, para. 34.

61 — See with regard to Directive 79/7 the judgment in *McDermott and Cotter*, para. 16; *Borrie Clark*, para. 12, *Johnson*, para. 35.

62 — See, in particular, the judgment in Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] ECR 629; cf. the express reference to this line of cases in the judgment in *Nimz*, para. 19.

invariably to apply the same rules to the members of the group placed at a disadvantage, be they men or women, as are applied to members of the other group. [63] That approach affords no comfort to the appellants in the main proceedings: even in the case of lone fathers, childminding expenses are not deductible from income from vocational training (supplementary allowance) or from income from work (income support).

Neither does the doctrine of applying the national legislation consistently with the directive, which the Court has developed since the judgment in *Von Colson and Kamann*, seem to me to afford a solution. [64] That case-law was devised for bringing provisions of national law into line with provisions of directives which do not have direct effect, whilst here (assuming that unjustified discrimination is present) it is a case of national law conflicting with a provision of a directive which does have direct effect. Moreover, as the case-law stands at present, it is not yet clear — although the Court will shortly have an opportunity to clarify the matter [65] — whether the obligation to apply legislation consistently with the relevant directive extends to a national rule which is clear and, as such, not susceptible of differing interpretations, which would seem to be true of the rule under the two benefit schemes at issue that childminding costs are not deductible.

30. However, under both directives (Directive 79/7, Article 5; Directive 76/207, Article 3(2) (access to employment) and Article 4(2) (access to vocational training)), the Member States undertook to take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment were abolished.

Consequently, as Community law stands at present, the most realistic solution seems to me for the national court to decide, where appropriate, at the request of the appellants in the main proceedings that, having regard to the criteria developed in this connection, the British authorities have not complied with their obligations under Directives 76/207 and 79/7, and to declare them liable to pay compensation to Ms Jackson and Ms Cresswell on the basis of the rules specified in the Court's case-law, in particular in the recent judgment in *Francovich and Bonifaci* [66].

63 — Judgment in *FNV*, para. 23; judgment in *McDermott and Cotter*, para. 18; judgment in *Borrie Clark*, para. 12; judgment in *Johnson*, para. 36; judgment in Case C-102/88 *Ruzius-Wilbrink* v *Bestuur van de Bedrijfsvereniging* [1989] ECR 4311, para. 20; judgment in *Kowalska*, para. 20; judgment in *Nimz*, para. 18.

64 — Judgment in Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, para. 26. This has since become established case-law: see recently in particular the judgment in Case C-106/89 *Marleasing* v *La Comercial Internacional de Alimentación* [1990] ECR I-4135, para. 8; judgment in Case C-373/90 *Complaint against X* [1992] ECR I-131.

65 — I am referring to the second *Marshall* case (C-271/91), in which the maximum compensation payable under the British Sex Discrimination Act to victims of sex discrimination is at issue. In that case the House of Lords has referred the following question to the Court for a preliminary ruling: (i) where a Member State's legislation provides for such statutory maximum compensation, does that make the Member State guilty of a failure to implement Article 6 of Directive 76/207; (ii) is it required by that article that the compensation paid may not be less than the amount of the loss found to have been sustained by reason of the discrimination, plus interest; and (iii) if so, can an individual rely as against a public authority on Article 6 as overriding the statutory limit on the amount of compensation recoverable? I would point out that the Court held in *Von Colson and Kamann* that Article 6 does not have direct effect (para. 27).

66 — Judgment of 19 November 1991 in Joined Cases C-6/90 and C-9/90 [1991] ECR I-5357 para. 40.

31. In conclusion, I propose that the Court should answer the questions referred by the national court as follows:

1. A social security scheme falls within the scope of Article 3(1) of Directive 79/7/EEC in so far as, in the national court's assessment, it is established that in a broad sense it forms part of an autonomous statutory scheme or form of social assistance providing protection which is directly and effectively linked to one of the risks specified in Article 3(1)(a).

2. If the national court comes to the conclusion that a social security scheme falls within the scope of Directive 79/7/EEC and that, on the basis of proof that the relevant scheme affects a greater percentage of women than of men, there is indirect discrimination within the meaning of Article 4(1) of that directive, it will be for the competent authority to prove that the rule giving rise to the discrimination is based on objectively justified factors unrelated to any discrimination on grounds of sex.

3. The conditions of operation of a social security scheme fall within the scope of Directive 76/207/EEC in so far as the scheme comes within the field of application of a Community measure for the implementation of the principle of equal treatment of men and women in matters of social security and the national court establishes that the said conditions of operation had or have an impact on one of the fields covered by that directive, including access to vocational training and to employment.

4. If the national court reaches the conclusion that the conditions of operation of a scheme fall within the scope of Directive 76/207/EEC and that, on the basis of proof that the relevant scheme affects a greater percentage of women than of men, there is indirect discrimination within the meaning of Article 2(1) of that directive, it will be for the competent authority to prove that the rule giving rise to the dis-

crimination is based on objectively justified factors unrelated to any discrimination on grounds of sex.

5. If it appears that the legislation of a Member State infringes the prohibition of discrimination contained in Directives 79/7/EEC and 76/207/EEC and it is not a solution to apply to the members of the group placed under a disadvantage the rules applying to other persons entitled to benefit, it is, as Community law stands at present, for the national court where appropriate — acting at the request of the parties and applying the rules specified in the Court's case-law — to declare the Member State liable for the damage caused by that infringement.