DIRECTION

1. I stay these proceedings for a period of three months from the date on which this Direction is sent to the parties. I give the parties liberty to apply for the stay to be removed or to be extended.

REASONS

2. I held an oral hearing of this appeal on 7 October 2003. The claimant was represented by Ms Sally Robertson of counsel, instructed by Messrs French & Co, solicitors, of Nottingham, and the Secretary of State was represented by Mr Nicholas Paines QC, instructed by the Solicitor to the Department of Health and the Department for Work and Pensions. I am very grateful to both counsel for their clear and helpful submissions.

Directive 79/7/EEC and "pensionable age" in British legislation

3. This appeal is concerned with the compatibility of British legislation relating to incapacity benefit with Council Directive 79/7/EEC, on the progressive implementation of the principle of equal treatment for men and women in matters of social security. It turns on the interpretation of Article 7(1)(a) of the Directive, which permits derogation from the principle of equal treatment for the purpose of determining pensionable age for the purposes of granting old-age and retirement pensions "and the possible consequences therefore for other benefits".

4. Article 4(1) of the Directive provides –

> "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."

Article 5 provides –

> "Member States shall take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished."

Article 7 provides –

> "1. This Directive shall be without prejudice to the right of Member States to exclude from its scope;
>
> (a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences therefore for other benefits;
>
> (b) ...;
>
> (c) ...;
>
> (d) ...;

(e) ....

2. Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned."

5. In the United Kingdom, the power conferred by Article 7(1)(a) to exclude from the scope of the Directive the determination of pensionable age for the purpose of granting what are still called retirement pensions – but have in fact since 1989 been old-age pensions – was initially exercised in respect of Great Britain by maintaining in force section 27(1) of the Social Security Act 1975, which provided that pensionable age for a man was 65 and for a woman was 60. This was re-enacted in the definition of "pensionable age" in section 122(1) of the Social Security Contributions and Benefits Act 1992 but that definition has now been amended to refer to the rules in paragraph 1 of Schedule 4 to the Pensions Act 1995. These provide that a man attains pensionable age when he attains the age of 65 and a woman born before 6 April 1950 attains pensionable age when she attains the age of 60, thus maintaining the old distinction. However, they then provide for the gradual equalisation between 2010 and 2020 of pensionable age at 65. As this process of equalisation affects only women born after 5 April 1950, it does not directly affect this appeal.

Cases on Article 7(1)(a) of the Directive

6. There have been a number of cases in which the European Court of Justice has considered the extent to which British legislation is compatible with the Directive. I need refer to only four of them in detail. The first case was Case C-9/91 *Regina v. Secretary of State for Social Security, Ex parte Equal Opportunities Commission* [1992] E.C.R. I-4297, [1992] I.C.R. 782 in which the Court was concerned with the legitimacy, in the light of Article 7(1)(a) of the Directive, of the requirement that a man pay contributions for a longer period than a woman in order to gain entitlement to a full retirement pension and, in particular, the requirement that a man pay contributions between the ages of 60 and 65, whereas a woman is not entitled to pay contributions between those ages. The Court concluded that –

"19. To exclude from the derogation discrimination concerning contribution periods, determined according to pensionable age, would ... be contrary to the very objective of Article 7(1). Article 7(1)(a) of the Directive must therefore be interpreted as authorizing the maintenance of different contribution periods for male and female workers under pension schemes such as the one concerned in the main proceedings."

7. In Case C-328/91 *Secretary of State for Social Security v. Thomas* [1993] E.C.R. I-1247, [1993] Q.B. 747 (also reported as R(G) 2/94), the Court was concerned with severe disablement allowance and invalid care allowance, which were non-contributory benefits to which claimants over pensionable age were generally not entitled. The Court of Appeal (whose decision is reported at [1991] 2 Q.B. 164 and also as an appendix to R(G) 3/89) had held that defining entitlement to severe disablement allowance and invalid care allowance by reference to unequal pensionable ages was not "necessary" and for that reason was outside the scope of Article 7(1)(a). The Secretary of State had appealed to the House of Lords who had referred four questions to the European Court of Justice. The Court said –

"8. In considering the scope of the derogation provided for by that provision, it is to be noted, first, that, in view of the fundamental importance of the principle of equal treatment, which the Court has reaffirmed on numerous occasions, the exception to the prohibition of discrimination on grounds of sex provided for in Article 7(1)(a) of

Directive 79/7 must be interpreted strictly (see the judgments in Case 152/84 *Marshall v. Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, paragraph 36, and Case 262/84 *Beets-Proper v. Van Landschot Bankiers* [1986] ECR 773, para. 38).

9. Next, in its judgment in Case C-9/91 *The Queen v. Secretary of State for Social Security, ex parte the Equal Opportunities Commission* [1992] ECR I-4297, paragraph 15, the Court held that, although the preamble to Directive 79/7 does not state the reasons for the derogations which it lays down, it can be deduced from the nature of the exceptions contained in Article 7(1) of the directive that the Community legislature intended to allow Member States to maintain temporarily the advantages accorded to women with respect to retirement in order to enable them progressively to adapt their pension systems in that respect without disrupting the complex financial equilibrium of those systems, the importance of which could not be ignored. The Court also held in that judgment that those advantages include the possibility for female workers to qualify for a pension earlier than male workers, as envisaged by Article 7(1)(a) of Directive 79/7.

10. In that judgment, which was concerned not with the "possible consequences... for other benefits" of setting different retirement ages for men and women but with discrimination regarding contribution periods, the Court interpreted Article 7(1)(a) as authorizing the determination of a statutory pensionable age which differs according to sex for the purposes of granting old age and retirement pensions and also such forms of discrimination as are necessarily linked to that difference.

11. There must, for the same reasons, be a similar link as regards the possible discriminatory consequences for other benefits of the determination of a different statutory retirement age according to sex for the purposes of granting old age and retirement pensions.

12. It follows that forms of discrimination provided for in benefit schemes other than old age and retirement pension schemes can be justified, as being the consequence of determining a different retirement age according to sex, only if such discrimination is objectively necessary in order to avoid disrupting the complex financial equilibrium of the social security system or to ensure consistency between retirement pension schemes and other benefit schemes.

13. Although it is for the national court, in preliminary-ruling proceedings, to establish whether such a necessity exists in the specific case before it, the Court of Justice, which is called upon to provide the national court with worthwhile answers, has jurisdiction to give guidance based on the documents before the national court and the written and oral observations which have been submitted to it, in order to enable the national court to give judgment.

14. As regards the requirement of preserving financial equilibrium as between the old age pension scheme and the other benefit schemes, it should be noted that the grant of benefits under non-contributory schemes, such as severe disablement allowance and invalid care allowance, to persons in respect of whom certain risks have materialized, regardless of the entitlement of such persons to an old age pension by virtue of contribution periods completed by them, has no direct influence on the financial equilibrium of contributory pension schemes.

15. Furthermore, as the Advocate General shows in paragraph 10 of his opinion, discrimination between men and women under non-contributory schemes, such as those of the severe disablement allowance and the invalid care allowance, is unnecessary to preserve the financial equilibrium of the entire social security system, particularly since the national rates contain provisions to prevent overlapping between benefits such as severe disablement allowance or invalid care allowance and the old age pension and, in fact, the grant of those benefits takes the place of benefits paid under other non-contributory schemes, such as benefits paid to people who have insufficient resources to support themselves.

16. As regards preservation of the consistency between schemes such as those of the severe disablement allowance and the invalid care allowance, on the one hand, and the pension scheme on the other, the United Kingdom's argument that those benefits are intended to replace income in the event of materialization of the risk, far from generally precluding the grant of such benefits to women who have attained retirement age, should, on the contrary, justify it in circumstances such as those at issue in the main proceedings.

17. In its judgment in *Marshall,* cited above, the Court held that women are entitled to go on working beyond the qualifying age for an old age pension, that is to say at least until the age at which a man is supposed to retire.

18. Where women have continued to work, as they may under the national legislation, after attaining the normal retirement age for women and before attaining the normal retirement age for men or do not yet receive benefits under the old age pension scheme despite their having attained the normal retirement age, they are entitled, in the event that the insured risk materializes, to receive benefits such as severe disablement allowance or invalid care allowance.

19. As to the United Kingdom's argument that the vast majority of women receive an old age pension once they have attained the age of 60, suffice it to say that the grant of benefits such as severe disablement allowance or invalid care allowance constitutes, for women who are not yet in receipt of old age pension despite their having attained the normal retirement age, an individual right which cannot be, denied them on the ground that, statistically, their situation is exceptional by comparison with that of most women.

20. For these reasons, the answer to the first question submitted by the House of Lords must be that where, pursuant to Article 7(1)(a) of Directive 79/7, a Member State prescribes different retirement ages for men and women for the purposes of granting old age and retirement pensions, the scope of the permitted derogation, defined by the words 'possible consequences thereof for other benefits', contained in Article 7(1)(a) is limited to the forms of discrimination existing under the other benefit schemes which are necessarily and objectively linked to the difference in retirement age.

21. In view of the answer given to the first question, it is unnecessary to answer the other three questions."

In the light of that decision, the appeal to the House of Lords was dismissed by consent. The legislation was subsequently amended by regulations, made under the European Communities Act 1972, implementing the Directive so as to equalise the conditions of entitlement to severe

disablement allowance and invalid care allowance (see the Social Security (Severe Disablement Allowance and Invalid Care Allowance) Amendment Regulations 1994).

8. Meanwhile, between the date when the Court of Appeal considered *Thomas* and the date when the European Court of Justice did, Mr Commissioner Skinner had, in R(S) 2/95, considered the case of a claimant who had been in receipt of invalidity benefit. When she reached the age of 60, the amount of her entitlement to benefit was reduced. A man in her position would not have suffered a similar reduction in entitlement until he reached 65. Mr Commissioner Skinner held that it was no more necessary for entitlement to invalidity benefit to be geared to pensionable age than it was in the cases of severe disablement allowance or invalid care allowance.

9. He did not consider the position in relation to contributions of women who became incapable of work after reaching pensionable age. Doubtless that was because that question did not arise directly on the facts of the case before him, but, in appealing from his decision, the Secretary of State and the Chief Adjudication Officer made much of the fact that some women who became incapable of work when over pensionable age would not have paid the contributions necessary to gain entitlement to sickness benefit and therefore invalidity benefit.

10. The Court of Appeal ultimately allowed the appeal from the Commissioner's decision by consent, but that was after they had referred a number of questions to the European Court of Justice who answered them in Case C-92/94 *Secretary of State for Social Security v. Graham* [1995] E.C.R. 2521, [1996] I.C.R. 258 (also reported with R(S) 2/95). It appears from paragraph 14 of the opinion of Mr Advocate General Lenz that the Court of Appeal referred the questions because they perceived that the *Equal Opportunities Commission* case and *Thomas* represented distinct lines of authority and they were not sure which to follow.

11. The European Court of Justice said –

> "9. It must also be remembered that Article 7(1)(a) of Directive 79/7 allows Member States to exclude from its scope not only the setting of pensionable age for the purposes of granting old age and retirement pensions but also the possible consequences thereof for other benefits.
>
> 10. In those circumstances, the questions referred for a preliminary ruling must be understood as seeking to ascertain whether, in the event that a Member State, pursuant to Article 7(1)(a) of Directive 79/7, has set the pensionable age for women at 60 and that for men at 65, that provision also allows it, first, to provide that the rate of invalidity pension payable to persons becoming incapacitated for work before they reach pensionable age is to be limited to the actual rate of retirement pension from the age of 60 in the case of women and from the age of 65 in the case of men and, second, to reserve entitlement to invalidity allowance, paid in addition to invalidity pension, to those persons who are aged under 55, in the case of women, and under 60, in the case of men, at the time when they first become incapacitated for work.
>
> 11. In its judgment in Case C-328/91 *Thomas and Others* [1993] ECR I-1247, the Court ruled that where, pursuant to Article 7(1)(a) of Directive 79/7, a Member State prescribes different pensionable ages for men and women for the purposes of granting old age and retirement pensions, the scope of the permitted derogation, defined by the words "possible consequences thereof for other benefits", contained in Article 7(1)(a), is limited to the forms of discrimination existing under the other benefit schemes which are necessarily and objectively linked to the difference in pensionable age.

12. That is the position where such forms of discrimination are objectively necessary in order to avoid disturbing the financial equilibrium of the social security system or to ensure coherence between the retirement pension scheme and other benefit schemes (para. 12 of the judgment in *Thomas and Others*, cited above).

13. As regards the forms of discrimination at issue in the main proceedings, the Court finds that they are objectively linked to the setting of different pensionable ages for women and men, inasmuch as they arise directly from the fact that that age is fixed at 60 for women and 65 for men.

14. As to the question whether the forms of discrimination are also necessarily linked to the difference in pensionable age for men and women, it should be noted, first, that since invalidity benefit is designed to replace income from occupational activity, there is nothing to prevent a Member State from providing for its cessation and replacement by a retirement pension at the time when the recipients would in any case stop working because they have reached pensionable age.

15. Further, to prohibit a Member State which has set different pensionable ages from limiting, in the case of persons becoming incapacitated for work before reaching pensionable age, the rate of invalidity benefit payable to them from that age to the actual rate of the retirement pension to which they are entitled under the retirement pension scheme would mean restricting to that extent the very right which a Member State has under Article 7(1)(a) of Directive 79/7 to set different pensionable ages.

16. Such a prohibition would also undermine the coherence between the retirement pension scheme and the invalidity benefit scheme in at least two respects.

17. First, the Member State in question would be prevented from granting to men who become incapacitated for work before reaching pensionable age invalidity benefits greater than the retirement pensions which would actually have been payable to them if they had continued to work until reaching pensionable age unless it granted to women over pensionable age retirement pensions greater than those actually payable to them.

18. Second, if women did not have their invalidity pension reduced to the level of their retirement pension until they reached the age of 65, as in the case of men, women aged between 60 and 65, thus over pensionable age, would receive an invalidity pension at the rate of a full retirement pension if their incapacity for work commenced before they reached pensionable age and a retirement pension corresponding to the rate actually payable if it did not.

19. Having regard to the foregoing, it must be concluded that the derogation provided for in Article 7(1)(a) of Directive 79/7 also extends to differences between the rates of invalidity pension payable to men and women from the time when they reach pensionable age."

The Court ruled –

"Where, pursuant to Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1975 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, a Member State has set the pensionable age for women at 60 and that for men at 65, that provision also allows it, first, to provide that the rate of invalidity pension payable to persons becoming incapacitated for work before they reach pensionable age is to be limited to the actual rate of retirement pension from the age of 60 in the case of women and from the age of 65 in the case of men and, second, to reserve entitlement to invalidity allowance, paid in addition to

invalidity pension, to those persons who are aged under 55, in the case of women, and under 60, in the case of men, at the time when they first become incapacitated for work."

12. In Case C-196/98 *Hepple v. Adjudication Officer* [2000] E.C.R. I-3701 (also reported as R(I) 2/00), which concerned the linking to pensionable age of entitlement to reduced earnings allowance, the Court said –

> "30. As regards, second, coherence between the retirement pension scheme and other benefit schemes, it must be considered whether it is objectively necessary for different age conditions based on sex to apply to the benefit at issue in this case.
>
> 31. In that respect, the principal aim of the successive legislative amendments mentioned in paragraphs 12 and 13 of this judgment was to discontinue payment of REA – an allowance designed to compensate for an impairment of earning capacity following an accident at work or occupational disease – to persons no longer of working age by imposing conditions based on the statutory retirement age.
>
> 32. Thus, as a result of those legislative amendments, there is coherence between REA, which is designed to compensate for a decrease in earnings, and the old-age pension scheme. It follows that maintenance of the rules at issue in the main proceedings is objectively necessary to preserve such coherence."

The background to the present case

13. The claimant in the present case is a woman who was born on 3 May 1937 and she therefore attained pensionable age upon reaching the age of 60 on 3 May 1997. She became entitled to a retirement pension, but not to a Category A retirement pension at the standard rate because there were gaps in her contribution record. In June 1997, she commenced work as a care assistant in a residential care home, working about 30 hours a week. On 8 March 2001, when aged 63, she suffered a severe stroke. She has been incapable of work since then. She was paid statutory sick pay by her employers but, on 27 December 2001, she claimed incapacity benefit with effect from 30 September 2001, on which date her entitlement to statutory sick pay had ceased. She had then been aged 64 and, due to the effects of the stroke, had become entitled to the highest rate of the care component of disability living allowance. Her claim for incapacity benefit was disallowed because she was over pensionable age.

14. It has never been suggested that, as a matter of domestic law, that decision was incorrect. Section 30A of the Social Security Contributions and Benefits Act 1992 provides –

> "(1) Subject to the following provisions of this section, a person who satisfies
> (a) either of the conditions mentioned in subsection (2) below; or
> (b) if he satisfies neither of those conditions, each of the conditions mentioned in subsection (2A) below,
> is entitled to short-term incapacity benefit in respect of any day of incapacity for work "the relevant day" which forms part of a period of incapacity for work.
>
> (2) The conditions mentioned in subsection (1)(a) above are that –
> (a) he is under pensionable age on the relevant day and satisfies the contribution conditions specified for short-term incapacity benefit in Schedule 3, Part I, paragraph 2; or

(b) on that day he is over pensionable age but not more than 5 years over that age, the period of incapacity for work began before he attained pensionable age, and –

(i) he would be entitled to a Category A retirement pension if his entitlement had not been deferred or if he had not made an election under section 54(1) below, or

(ii) he would be entitled to a Category B retirement pension by virtue of contributions of his deceased spouse, but for any such deferment or election.

(2A) ...

(3) ...

(4) In any period of incapacity for work a person is not entitled to short-term incapacity benefit for more than 364 days.

(5) Where a person ceases by virtue of subsection (4) above to be entitled to short-term incapacity benefit, he is entitled to long-term incapacity benefit in respect of any subsequent day of incapacity for work in the same period of incapacity for work on which he is not over pensionable age.

(6) ...

(7) ..."

There is no upper age limit for entitlement to short-term incapacity benefit by virtue of satisfaction of the conditions in section 30A(2A), but those conditions can be satisfied only by a person who has been incapable of work since youth and the 364 day maximum period of entitlement will in practice always have expired long before the claimant reaches pensionable age. Subsection (2)(b) allows a person who has become entitled to short-term incapacity benefit before reaching pensionable age to continue receiving it until the 364 day period has elapsed, but only to the extent that he or she could have qualified for a retirement pension had entitlement to the pension not been deferred. For all other cases, including the present case, subsections (2)(a) and (5) make it clear that incapacity benefit is not payable to a person who has attained pensionable age.

15. However, the claimant appealed to the appeal tribunal on the ground that, as a man in her position would have been under pensionable age and therefore entitled to incapacity benefit, section 30A of the 1992 Act was inconsistent with Article 4(1) of Directive 79/7/EEC and also Article 14 of, and Article 1 of Protocol I to, the European Convention on Human Rights. It was acknowledged that there was a further difficulty facing the claimant because she had not paid the National Insurance contributions necessary to establish entitlement to incapacity benefit, but it was submitted that a man in the claimant's position would have done so and that there was further unlawful discrimination in section 6(3) of the 1992 Act, which provides that "no primary Class 1 contribution shall be payable in respect of earnings paid to or for the benefit of an employed earner after he attains pensionable age".

16. The tribunal dismissed the appeal. In relation to Directive 79/7/EEC, he relied on *Graham* and held that the challenged discrimination fell within the scope of the derogation permitted by Article 7(1)(a) of the Directive. In relation to the Convention, he held that, even having regard to section 3 of the Human Rights Act 1998, it was not possible to interpret

section 30A of the 1992 Act so as to remove the challenged discrimination. The claimant now appeals with my leave. Ms Robertson does not pursue the challenge under the Convention and relies solely on the Directive.

Preliminary issues

17. It is not in dispute that, as the claimant was entitled to the highest rate of the care component of disability living allowance, a man in her position would have received short-term incapacity benefit at a rate equivalent to the rate of long-term incapacity benefit (see section 30B(4) of the 1992 Act) from 30 September 2001 until about 7 March 2002 and would have received long-term incapacity benefit from then until 2 May 2002.

18. Mr Paines concedes that the claimant falls within the personal scope of the Directive, that incapacity benefit falls within its material scope and that the Directive has direct effect and may be relied upon by a claimant in proceedings such as these. He further concedes that the relevant provisions of the Social Security Contributions and Benefits Act 1992 do give rise to direct discrimination on the ground of sex and so would be incompatible with Article 4(1) were it not that, as he submits and as the tribunal found, the provisions are permitted by Article 7(1)(a).

19. Ms Robertson concedes that Article 7(1)(a) permits the maintenance of unequal pensionable ages "for the purposes of granting old-age and retirement pensions". She further concedes that Article 7(1)(a) permits the operation of regulation 4(5) of the Social Security (Overlapping Benefits) Regulations 1977 so that the amount of benefit in issue in this appeal is only the difference between the amount of incapacity benefit that would have been payable to a man in the claimant's position and the amount of retirement pension she in fact received.

20. There are two separate substantive issues on this appeal because, under domestic law, the claimant is not entitled to incapacity benefit both because she was over pensionable age when she became incapable of work and because she had not paid the necessary contributions. These issues are related because the claimant's failure to satisfy the contribution conditions was itself due to her being over pensionable age. Ms Robertson argues that carrying the permissible discrimination in having unequal pensionable ages into the legislation governing entitlement to incapacity benefit and the right to pay National Insurance contributions goes further than is permitted by Article 7(1)(a) because the phrase "the possible consequences thereof for other benefits", must be construed strictly. It is necessary for the claimant to succeed on both the age issue and the contributions issue.

The link with pensionable age

21. The tribunal in the present case considered that this case was not materially distinguishable from that considered by the European Court of Justice in *Graham*. I granted leave to appeal because the Court's ruling in that case was expressly limited to cases where the claimant's incapacity for work arose before she reached pensionable age and I suggested that it was arguable that *Thomas* applied to the present case rather than *Graham*.

22. Ms Robertson argues that there are a number of additional reasons for distinguishing this case from *Graham*, based on differences between the incapacity benefit scheme and the sickness and invalidity benefit scheme which it has replaced and which was considered in *Graham*. However, I agree with Mr Paines that those differences are immaterial and that it is unnecessary for Ms Robertson to rely upon them. There is nothing in the judgment of the European Court of Justice in *Graham* to suggest that, apart from the contributions issue and

the related issue of coherence, the Court disagreed with Mr Commissioner Skinner's view that it would not be impractical to remove the link between entitlement to invalidity benefit and pensionable age.

23. Mr Paines also points out that not all the five claimants whose cases were before the Court in *Thomas* were over pensionable age when they gave up work and he submits that the only basis upon which *Thomas* and *Graham* can be distinguished so that the decisions can be reconciled is that *Thomas* involved non-contributory benefits and *Graham* involved contributory benefits. Alternatively, he submits that the logic of *Thomas* was not followed in *Graham* and that, if there is an inconsistency between the decisions the latter case should be preferred both because it was later and because it has been followed in *Hepple*.

24. The reasoning in *Graham* seems to me to be in two parts, both concerned with "coherence", or what was called in *Thomas* "consistency", between the retirement pension scheme and the invalidity benefit scheme. Essentially, the United Kingdom's argument in both cases was that the logic of the British social security system was that retirement pensions were for people over pensionable age and other income-replacement benefits were for people under pensionable age and that, insofar as the scheme allowed a person to qualify for a benefit other than a retirement pension after he or she reached pensionable age, it was permissible to base entitlement on the amount of retirement pension that the person would have received if receipt of the retirement pension had not been deferred. In *Thomas*, that argument was rejected at paragraphs 16 to 19 of the Court's decision. The Court acknowledged that some women continued to work after pensionable age and that not all women over pensionable age qualified for retirement pensions and they rejected as irrelevant the United Kingdom's argument that the vast majority of women did not fall into the latter category. They took the view that the fact that severe disablement allowance and invalid care allowance were income-replacement benefits justified the grant of those benefits to women over pensionable age rather than precluded it.

25. However, in *Graham*, at paragraphs 14 and 15, the Court appear at first sight to have been content to accept the assumption that women would in any case stop working when they reached pensionable age and regarded it as acceptable that the amount of invalidity benefit payable after the claimant reached pensionable age should be restricted to the amount of retirement pension to which she would have been entitled had she claimed it. No explanation is given in those paragraphs for apparently differing from *Thomas*. However, it is important to note that what is said in paragraph 14 is not predicated on there being *different* pensionable ages for men and women and in paragraph 15, where the impact of there being different pensionable ages *is* raised, the language echoes that used in paragraph 19 of the *Equal Opportunities Commission* case. Those paragraphs must then be read with the second part of the Court's reasoning.

26. This is at paragraphs 16 to 18, where the Court considered the anomalies that would arise if the United Kingdom's arguments were not accepted. Thus, in paragraph 17, the Court made the point that the scope of Article 7(1)(a) could not sensibly be interpreted as requiring that a man aged between 60 and 65 be paid reduced incapacity benefits unless women were paid greater retirement pensions. Crucially, in paragraph 18, the Court said it would be anomalous if women whose incapacity for work commenced before they reached pensionable age were paid invalidity benefit at the same rate as a man but women whose incapacity for work commenced after they reached that age were entitled only to a retirement pension or an equivalent rate of incapacity benefit. Essentially, the Court concluded that those anomalies were not to be tolerated and that is what made it necessary to carry the unequal treatment

permitted in relation to the determination of pensionable age into the invalidity benefit scheme.

27. Mr Paines places considerable reliance on paragraph 18, submitting that it covers the very case of this claimant. It seems to me that he is right. The Court took as a given fact that a woman whose incapacity for work commenced after she had reached pensionable age could not possibly be entitled to invalidity benefit at the same rate as a man, which seems to me to be the same assumption that underlies paragraph 17. This also explains the language of paragraph 15 and, in particular, the echoing of the reasoning in the *Equal Opportunities Commission* case. In other words, the whole decision was predicated on the view that a woman over pensionable age was not able to pay the contributions necessary to secure the entitlement to sickness benefit upon which entitlement to invalidity benefit depended.

28. Mr Paines has therefore satisfied me both that the reasoning in *Graham* was firmly based on the contributory nature of the benefit and also that the Court had in mind the case of a woman who became incapable of work when over pensionable age and was of the view that a woman in that situation was not entitled to invalidity benefit. He did suggest that *Thomas* might have been decided differently had it been decided after *Graham*, but I do not consider that that is so. The Court in *Graham*, which included three members of the Court which had sat in *Thomas*, expressly endorsed the general principles set out in *Thomas* and there is no hint in *Graham* that the Court did not accept the argument in *Thomas* that the fact that some women worked after reaching pensionable age justified giving them the same protection, as regards non-contributory benefits, against loss of earnings as a man. Once that is accepted, the argument in paragraph 18 of *Graham* works in reverse in the *Thomas* situation; it would be anomalous if women who become incapable of work when under pensionable age did not continue to be entitled to non-contributory benefits after attaining pensionable age when women who first become incapable of work after attaining that age are entitled to them.

29. Ms Robertson draws attention to Article 7(2) of the Directive, which requires Member States to keep the exercise of the power to derogate from the principle of equal treatment under review. She submits that time had passed since *Graham* was decided, as indeed it has, and submits that it was for the Secretary of State to produce evidence that the rationale of the decision still applied. However, I agree with Mr Paines that that question does not arise in this context. The Court's judgment was not based on necessity relating to the financial equilibrium of the benefits scheme, which is something that can change, but merely upon its coherence. What was a logical anomaly in 1995 remains a logical anomaly in 2003. Furthermore, it is easy to see why Parliament decided in 1995 to equalise pensionable ages over a long period running from 2010 to 2020, because that gives women the opportunity of making additional provision for income from the age of 60 to the new pensionable age. If other benefits are necessarily geared to pensionable age, it follows that the consequential unequal treatment will not be eliminated until the pensionable ages are themselves equalised.

30. However, it remains the fact that the Court's formal ruling in *Graham* referred specifically to women who became incapable of work *before* reaching pensionable age. It seems to me that the reason for that is that the Court did not regard themselves as having to *decide* what the law was in relation to women who were over pensionable age when they became incapable of work. There was an assumption that such women could not qualify for invalidity benefit on the same basis as younger women. It is apparent from the opinion of the Advocate General, and particularly from paragraph 44 of that opinion, that that assumption was not challenged in the proceedings in *Graham*. It *is* challenged in the present case, because Ms Robertson does not accept that a woman cannot pay, or be treated as having paid, the necessary contributions.

The contributions issue

31. There are two contribution conditions that must, by virtue of section 30A(2)(a) of the 1992 Act, be satisfied if a claimant under pensionable age is to be entitled to short-term incapacity benefit (see paragraph 2 of Schedule 3 to the 1992 Act). The first requires that, in respect of one of the three tax years before the beginning of the relevant benefit year (which is more or less the calendar year in which falls the first day of the period of incapacity for work), he or she should actually have paid contributions to the requisite extent rather than being credited with contributions or earnings. Furthermore, the contributions must have been paid before the date in respect of which the claim for benefit is made. Primary Class 1 contributions and Class 2 contributions are relevant and it is not possible to pay Class 1 or Class 2 contributions in respect of a period when one is over pensionable age (see sections 6(3) and 11(2)). Below that age, payment of such contributions is compulsory unless weekly earnings are very low. Consequently, while a man aged 64 on the date from which the claimant claimed incapacity benefit would undoubtedly have paid primary Class 1 contributions to the necessary extent while employed in all three of the relevant tax years (1997-98, 1998-99 and 1999-2000), the claimant had not. (The claimant appears not to be assisted by the saving provision in regulation 3(1) of the Welfare Reform and Pensions Act 1999 (Commencement No. 9 and Transitional and Savings Provisions) Order 2000 because the period of incapacity for work did not actually start until 30 September 2001. A period of entitlement to statutory sick pay may count towards the 364-day qualifying period for long-term incapacity benefit by virtue of regulation 7 of the Social Security (Incapacity Benefit) Regulations 1994 but does not form part of the period of incapacity for work save where regulation 4A applies.)

32. The second contribution condition is that the claimant has, in respect of the last two tax years before the beginning of the relevant benefit year, paid or been credited with National Insurance contributions, or been credited with earnings, to the requisite extent. Primary Class 1 contributions, Class 2 contributions and credited contributions or earnings are relevant. Again, while a man aged 64 on the date from which the claimant claimed incapacity benefit would undoubtedly have paid primary Class 1 contributions to the necessary extent while employed in the two relevant tax years (1998-99 and 1999-2000), the claimant had not.

33. Ms Robertson first submits that, in the *Equal Opportunities Commission* case, the European Court of Justice was concerned only with the payment of contributions in respect of retirement pensions. Entitlement to retirement pension depends on the claimant's contribution record throughout his or her "working life" from the age of 16 to pensionable age. Although it is clear from the Court's ruling that Article 7(1)(a) of the Directive permits a Member State to require contributors to pay contributions up to pensionable age for the purpose of securing entitlement to retirement pensions, Ms Robertson submits that it does not follow that it is permissible to gear liability to pay contributions in respect of other benefits to pensionable age, where pensionable age for men is different from that for women.

34. There seems to me to be some force in that submission. The view of the Court that forbidding the linking of the payment of contributions to unequal pensionable ages would take away the whole point of allowing a member State to have unequal pensionable ages in the first place has relevance only where the benefits in issue are retirement or old-age pensions. It was made clear in paragraphs 10 to 12 of *Thomas* that different considerations apply when considering whether it is necessary to maintain the link to pensionable age for contributions in respect of other benefits. Then, the only material consideration is whether the link is objectively necessary in order to avoid disrupting the complex financial equilibrium of the

social security system or to ensure consistency between the retirement pension scheme and other benefit schemes.

35. There are a number of options that would be open to Parliament in considering how the contribution system might be adjusted if the link between pensionable age and the incapacity benefit scheme were removed. It would be possible either to require or to enable a woman to pay the same contributions as a man between the ages of 60 and 65. Alternatively, it would be possible either to require or to enable a woman to pay a reduced contribution (to reflect the fact that it would not count towards a retirement pension). If a woman were to be required or enabled to pay the same contributions as a man, it might be decided to enable her to choose to have her retirement pension to be calculated in the same way as a man's in those cases where it would make a difference. In that case, a fifth option for Parliament would be to require a woman at least to pay reduced contributions but enable her to pay the same contributions as a man. None of these options appears impractical at first sight. Employers making deductions from pay already have to draw a distinction between employees over pensionable age and those under pensionable age and also between the majority of contributors and those women still paying the reduced primary Class 1 contribution under regulation 127 of the Social Security (Contributions) Regulations 2001. Certainly, there is no evidence before me to suggest that any of the options I have suggested would disturb the financial equilibrium of the social security scheme. It might be arguable that *requiring* all working women to pay, after reaching pensionable age, contributions for benefits other than retirement pensions might be inconsistent with the retirement pension scheme under which they might be entitled to sufficient benefit to eliminate any possible entitlement to other benefits. But when it comes to the possibility of *enabling* women to pay contributions, the arguments in paragraphs 16 to 19 of *Thomas* seem apt.

36. It seems to me to be important to bear in mind that, although the same contributions are capable of giving rise to entitlement to retirement pensions and other benefits and the benefits are paid out of the fund derived from the contributions, that is the full extent of the practical link between the schemes. Mr Paines was driven to submit that even if contributions in respect of incapacity benefit were different in kind from contributions in respect of retirement pensions and even if they were paid to a different institution, it would be necessary to gear incapacity benefit to pensionable age in order to maintain consistency between the incapacity benefit scheme and the retirement pension scheme. He relies in particular on paragraphs 14 and 15 of *Graham* and on *Hepple*, for the general proposition that the United Kingdom is entitled to maintain a system in which entitlement incapacity benefit as an income-replacement benefit is superseded at pensionable age by retirement pension in that role, notwithstanding that there are different pensionable ages for men and women.

37. The reliance on *Graham* raises the question whether the chicken precedes the egg, since it is the presumption upon which *Graham* is based that is under challenge here. *Hepple* raises other difficulties. I do not find it clear why the Court in *Hepple* found it necessary to link reduced earnings allowance to pensionable age any more than it was necessary to link severe disablement allowance and invalid care allowance to pensionable age in *Thomas*. The anomaly that it was assumed in *Graham* would arise if the link between pensionable age and invalidity benefit were removed does not arise in relation to reduced earnings allowance, entitlement to which does not depend on the payment of contributions. Certainly, *Hepple* provides considerable support to Mr Paines' arguments. On the other hand, if Ms Robertson's challenge to the assumption apparently made in *Graham* were to succeed, it may be that the foundations of *Hepple* would fall with it. This may all raise the question how a national court should approach a point that has been assumed, rather than decided, by the European Court of Justice. I would incline to the view that even a mere assumption is entitled to considerable

deference. Nonetheless, like all human institutions, the Court is not infallible and, where a national court forms the view that the Court may wish to reconsider one of its decisions, it seems to me that the national court must be entitled to refer questions to enable it to do so. Whether a national court may itself decide that an assumption made by the European Court of Justice was wrong and may depart from the decision of the Court on that ground may depend on the nature of the assumption and the extent to which the Court was giving guidance on an issue that is fundamentally a matter for a national court (see paragraph 13 in *Thomas*).

38. In any event, I am satisfied that Ms Robertson has an arguable case on the contributions issue and if the claimant were to succeed on that, it seems to me arguable that the link between incapacity benefit and pensionable age must go. However, there arises the question whether I have jurisdiction to determine the contributions issue.

Jurisdiction

39. Ms Robertson submits that I should deem the claimant to have paid the necessary contributions. That cannot be right. To deem a woman to have paid contributions in circumstances in which a man must actually have paid them would place the woman in a more favourable position than the man and so one inequality would have been replaced by another. Mr Paines refers me to Case C-78/98 *Preston v. Wolverhampton Healthcare NHS Trust* [2000] E.C.R. I-3201, [2000] I.C.R. 961, which supports the view that if the claimant is to be entitled to incapacity benefit, she must actually pay the necessary contributions. Ms Robertson relies on Case C-66/95 *Regina v. Secretary of State for Social Security, ex parte Sutton* [1997] E.C.R. I-2163, [1997] I.C.R. 961, but that case seems to me to be concerned with compensation. It may be relevant as to the assessment of damages if the claimant is not allowed to pay contributions due to delay and wishes, as an alternative, to sue the Secretary of State for failing to implement the Directive, but I do not consider that it shows that I have the power to deem a claimant to have paid contributions that have not actually been paid.

40. Mr Paines submits that if I were going to make any ruling as regards the claimant's entitlement to pay contributions, the Commissioners of Inland Revenue should be joined as a party to these proceedings. However, I do not consider that I have any power to make any ruling at all as to the claimant's liability or entitlement to pay contributions. By section 8(1)(c) and (d) of the Social Security Contributions (Transfer of Functions, etc.) Act 1999, such matters fall within the jurisdiction of an officer of the Commissioners of Inland Revenue. They therefore do not fall within the jurisdiction of the Secretary of State or of appeal tribunals or of Social Security Commissioners (see sections 8(1) and (5), 12(1) and (2) and 14(1) of the Social Security Act 1998). If it is necessary for questions on the contributions issue to be referred to the European Court of Justice, the reference must be made by a tribunal or court with jurisdiction to determine that issue.

Conclusion

41. I consider that the claimant has an arguable case on the contributions issue and that, if she is able to establish the right to pay contributions, it may no longer be necessary to gear incapacity benefit to pensionable age.

42. In these circumstances, it seems to me to be necessary to stay this appeal to give her the opportunity of bringing appropriate proceedings in a different forum. When I raised the question of a stay at the hearing, the parties asked for the opportunity to make submissions before I imposed a stay. However, it seems preferable to impose a temporary stay, setting out my reasons in full, and give the parties the opportunity of making submissions as to whether it

should be extended or lifted. Whether or not further proceedings should be brought and, if so, what form they should take are very much questions for the parties rather than me.

43. How long the stay should last seems to me to depend upon how the claimant chooses to proceed. If she seeks to pay the contributions either by obtaining a suitable decision of an officer of the Commissioners and, if necessary, pursuing a statutory appeal or, perhaps more expeditiously, by bringing appropriate proceedings in the Administrative Court, it seems to me that the stay should be extended until those proceedings are concluded. Alternatively, if it is too late to pay contributions – which is not an issue into which I have looked deeply, although regulation 60 of the Social Security (Contributions) Regulations 2001 appears to be of some relevance – the claimant would be obliged instead to seek an appropriate declaration and compensation, as in *Sutton*. In those circumstances, or if no proceedings at all are brought, it seems to me that the stay should be removed and this appeal dismissed on the simple ground that the claimant has not satisfied the contribution conditions.

44. If the claimant wishes to have the stay extended, she should make a written application before the three-month temporary stay expires.

(Signed) **MARK ROWLAND**
Commissioner
3 November 2003

CIB/4497/2002

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I dismiss the claimant's appeal against the decision of the Hull appeal tribunal dated 21 July 2002.

REASONS

2. I stayed this appeal on 3 November 2003 and subsequently extended the period of the stay. The claimant's solicitors have now written to say that no proceedings are to be brought on her behalf to enable her to pay contributions in respect of the relevant contribution years.

3. As the contribution conditions for entitlement to incapacity benefit from 30 September 2001 are not satisfied by the claimant, the tribunal was correct to decide that she was not entitled to incapacity benefit from that date.

(Signed) **MARK ROWLAND**

Commissioner
26 March 2004