ICA S37(5) limiting entitlement to pensionable age is discrimination in breach of EEC Directive 79/7/EEC. Women entitled if satisfy conditions before reaching 65.

VGHH/19/LM

Commissioner's File: CG/29/1987

Region: Wales & South Western

SOCIAL SECURITY ACTS 1975 TO 1986

CLAIM FOR INVALID CARE ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Francis Iris Cooze (Mrs)

Appeal Tribunal: Swansea

Case No: 219/4

[ORAL HEARING]

Decision

1. My decision is

(1) The decision of the social security appeal tribunal dated 3 August 1987 is erroneous in law

(2) It is expedient to make fresh and further findings of fact and give the appropriate decision

(3) My decision is that invalid care allowance (ICA) is payable to the claimant

(a) from 1 October 1986 to 20 August 1987 and

(b) subject to showing good cause for the delay in claiming, from 5 May 1986 to 30 September 1986

(4) Failing agreement as to whether good cause has been shown, there is to be liberty to apply for determination of this question.

Representation

2. This is one of four appeals by different claimants relating to invalid care allowance. The other three appeals are CG/15/1987 (Hood), CG/29/1987 (Beard) and CG/12/1988 (Murphy). Mr R. Plender, of counsel, instructed by the Solicitor's Office of the Departments of Health and Social Security, represented the adjudication officer and the Secretary of State in all four cases, all of which were listed for hearing on the same day. Hood was disposed of by a consent order made under regulation 22(2) of the Social Security Commissioners Procedure Regulations 1987. Copies of my decision in the other two cases accompany this decision.

3. In the present appeal, the claimant did not appear and was not represented. Miss Judith Beale, of counsel, instructed by Mr J.A. Lakin, legal adviser, Equal Opportunities Commission, appeared (with my leave) and argued on behalf of the Commission and in accordance with the interests of the claimant.

4. Written submissions have now been made by Miss Beale and Mr Plender. There is an

agreed and numbered bundle of documents (paged from 1 to 381) common to all three appeals. I shall refer to this as "the Bundle".

Nature of this appeal

5. This is the first of three contested appeals. In each of them the claimant, a woman, has been held (pursuant to section 37(5) of the Social Security Act 1975), not to be entitled to ICA because she was not so entitled immediately before attaining pensionable age (60 for a woman). In each appeal the woman in question would, it is not in dispute, have been entitled under that section if she had been a man. For pensionable age for a man is 65 and each woman was under that age at the material time.

6. The question in all three appeals is whether by reason of Directive 79/7/EEC of the Council of European Communities ("Directive 79/7") the claimant is entitled to ICA notwithstanding section 37(5) of the Social Security Act 1975. The answer to this question turns on whether Article 7(1)(a) of Directive 79/7 excludes section 37(5) of the Social Security Act 1975 from the scope of Directive 79/7.

The adjudication officer's decision

7. In the present case, the following decision of an adjudication officer was issued on 6 April 1987:

> "The claimant is not entitled to invalid care allowance because she has attained pensionable age and was not entitled and cannot be treated as having been entitled to invalid care allowance immediately before attaining that age.
>
> (Social Security Act 1975 sec 37(5) and the Social Security (Invalid Care Allowance) Regulations reg 10))."

8. The claimant appealed against this decision saying that she became 60 years of age on 23 February 1985 and Mrs Y[...] received the Attendance Allowance in the following May 1985 [sic].

9. The adjudication officer, in his written submission on the appeal stated that the facts before him were that on 13 December 1986 the claimant had made a claim for ICA on the grounds that she was engaged in caring for her friend Mrs Y[...], who had been in receipt of attendance allowance since 5 May 1986 [sic]. The claimant on her claim form asked for consideration of benefit from 1 January 1986 and gave her date of birth as 23 February 1925.

10. The adjudication officer submitted that a person is entitled to ICA for any day on which she is engaged in caring for a severely disabled person if she is regularly and substantially engaged in caring for that person and is not gainfully employed. In this respect a severely disabled person is a person in respect of whom an attendance allowance is payable (Social Security Act 1975 section 37(1) and (2) and Social Security (ICA) Regulations 1976, regulation 3). But section 37(5) of the Act provided that a person who had attained pensionable age should not be entitled to ICA unless she was so entitled immediately before attaining that age and Schedule 20 of the Act defined pensionable age as 65 for a man and 60 for a woman. On the ICA claim form the claimant had stated she was born on 23 February 1925. In those circumstances, it was his submission that the claimant was not entitled to ICA from and including 1 January 1986 because she had attained pensionable age (as defined in the Act) and she was not entitled to ICA immediately before attaining that age nor could she be treated as so entitled by virtue of regulation 10 of the Social Security (ICA) Regulations 1976. The claimant did not satisfy the conditions for ICA as laid down in section 37(2) of the Act which states "a severely disabled person in respect of whom an attendance allowance is payable", as in this particular case the disabled person was not in

receipt of attendance allowance until 5 May 1986.

The social security appeal tribunal's decision

11. The claimant did not appear before the tribunal. The presenting officer relied on the adjudication officer's written submission.

12. The tribunal's decision was:

> "Appellant not entitled to Invalid Care Allowance."

Their recorded findings of fact were:

> "The appellant was 65 on 23 February 1985. She has been looking after Mrs Yorke who has received attendance allowance since 5 May 1986. The appellant claimed Invalid Care Allowance on 13 12 86."

Their recorded reasons for this decision were:

> "At the date of her claim (13 12 86) the appellant had reached pensionable age and could not be treated as having been entitled to Invalid Care Allowance immediately before reaching pensionable age.
>
> She was therefore prevented by Section 37 (5) of the Social Security Act 1975 from establishing an entitlement to Invalid Care Allowance."

Was the tribunal's decision erroneous in law?

13. Yes, it was. As the chairman, in granting leave to appeal, pointed out, there was an error in the findings of fact in that the claimant was not 65 on 23 February 1985, but 60 years of age. Their finding was contrary to the only evidence before them, which was that her date of birth was 23 February 1925.

14. The mistake as to the claimant's age was crucial. Where a claimant is a woman and she is aged 60 years or more, but less than 65 years, at the date when attendance allowance first became payable to the person for whom she is caring, the question of discrimination on the grounds of sex, which is the subject of Directive 79/7, arises. This is because pensionable age is 65 for a man and 60 for a woman: see section 27(1) of the Social Security Act 1975. If the claimant had been a man, she would not have attained pensionable age. Section 37(5) of the Social Security Act 1975 would not then have operated to disentitle her to ICA. That section operates to discriminate against her on the grounds of her sex. It was accordingly essential to consider, and make findings, as to whether Directive 79/7 (which prohibits sex discrimination) applies, or whether Article 7(1)(a) operated to exclude section 37(5) from the scope of Directive 79/7. The failure to do so was a further error of law.

The facts

15. Since the tribunal's decision was erroneous in law, I have jurisdiction, under section 101(5) of the Social Security Act 1975, to make fresh or further findings of fact. These are not now in dispute. The claimant attained the age of 60 years (pensionable age for women) on 23 February 1985. On 30 December 1986 she claimed ICA on claim form DS700. Her claim was made in respect of Mrs Y[...], a severely disabled person, for the period commencing on 1 January 1986. The claimant had cared for Mrs Y[...] for approximately 9 years. Since the oral hearing before me, enquiry has been made by the Solicitor's Office of the Departments of Health and Social Security and it has been ascertained that Mrs Y[...] first claimed attendance allowance on 17 October 1985. That

claim was rejected on 8 November 1985. Mrs Y claimed again on 14 March 1986 and lower rate attendance allowance was awarded from 5 May 1986. The claimant ceased to look after Mrs Y[...] on 20 August 1987, on which date Mrs Y[...] went into an old persons' home.

The relevant law

16. Subsections (5) and (6) of s.37 of the Social Security Act 1975 provide:

> "(5) Subject to subsection (6) below, a person who has attained pensionable age shall not be entitled to an allowance under this section unless he was so entitled (or is treated by regulations as having been so entitled) immediately before attaining that age
>
> (6) Regulations may make provision whereby a person who has attained retiring age (meaning 70 in the case of a man and 65 in the case of a woman), and was entitled to an allowance under this section immediately before attaining that age, continues to be so entitled notwithstanding that he is not caring for a severely disabled person or no longer satisfies the requirements of subsection (1)(a) or (b) above."

NOTE 1) The requirements in subsection (1)(a) and (b) are that:-

> "(a) he is regularly and substantial engaged in caring for that person; and
>
> (b) he is not gainfully employed"

2) Regulation 8 of the Social Security (Invalid Care Allowance) Regulations 1976 (as amended) provides that a person shall not be treated as gainfully employed on any day in a week unless his earnings in the immediately preceding week have exceeded £12

3) Regulation 10 of those Regulations provides:

> "A person who has attained pensionable age shall for the purposes of section 37(5) of the Act be treated as having been entitled to an invalid care allowance immediately before attaining that age if immediately before attaining it he would have satisfied the conditions for entitlement to that allowance but for the provisions of the Social Security (Overlapping Benefits) Regulations 1975, as amended"

4) Regulation 11 of those Regulations provides:

> "Where a person is entitled to an invalid care allowance immediately before he attains retiring age he shall not be disentitled to that allowance after that age by reason only of the fact that he is not caring for a severely disabled person or no longer satisfies the requirements of section 37(1)(a) or (b) of that Act."

17. (1) Article 2 of Directive 79/7 provides:

> "This Directive shall apply to the working population - including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment - and to retired or invalid workers and self-employed persons"

(2) Article 3(1)(a) of Directive 79/7 states that it shall apply to:

> "statutory schemes which provide protection against the following risks: sickness, invalidity, old age, accidents at work and occupational diseases,

unemployment"
(Bundle page 245).

(3) Article 4(1) of Directive 79/7 (Bundle page 246) provides (in so far as relevant):

> "The principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex ... in particular as concerns:
> - the scope of the schemes and the conditions of access thereto ... "

(4) 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".

(5) 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 thereof for other benefits;

(b) ....."

(6) Article 8(1) provides:

"Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within six years of its notification".

[This period expired on 22 December 1984]

Is section 37(5) Social Security Act 1975 excluded from the scope of Directive 79/7?

(a) Common ground

18. The claim for ICA must fail if section 37(5) is excluded from the scope of Directive 79/7. For the claimant cannot satisfy the requirements of that section. This is because Attendance Allowance did not become payable to Mrs Y[...] until after the claimant had attained pensionable age (60); and, as explained by the adjudication officer in his submission referred to in paragraph 10 above, entitlement to ICA dates from the day when that allowance became payable. The only way in which section 37(5), which imposes the condition of entitlement before attaining pensionable age, can be disregarded, is if Directive 79/7 is found to be applicable.

19. It is not in doubt, and is indeed common ground between the Equal Opportunities Commission, the Secretary of State and the adjudication officer that the claimant, who gave up her job to look after Mrs Y[...], is part of "the working population" within the meaning of Article 2 of Directive 79/7. It is also clear that ICA falls within the scope of Directive 79/7: see Article 3(1)(a) and the decision of the European Court of Justice in Drake v Chief Adjudication Officer [1987] Q.B. 166 (Bundle pages 71-75).

20. Section 37(5) of the Social Security Act 1975 is admittedly discriminatory, between men and women, in its effect and it is common ground that by failing to abolish section 37(5) and to amend it so as to remove that effect, there has been a failure on the part of

Her Majesty's Government to carry out its obligation to implement Directive 79/7 unless section 37(5) is excluded by Article 7(1)(a) of Directive 79/7.

21. In the absence of implementing measures, individuals may rely on Directive 79/7 against the state as from 23 December 1984 in order to preclude the application of any national provision inconsistent with Directive 79/7. In particular, in such circumstances women are entitled to be treated in the same manner, and to have the same rules applied to them, as men who are in the same situation: see Netherlands v FNV [1987] 3 C.M.L.R. 767 at paragraphs 13, 21, 22, 23 and Ruling 1 (Bundle, pages 110-113), McDermott and Cotter v Minister for Social Welfare and the Attorney General [1987] 2 C.M.L.R. 607 paragraphs 11, 16, 17, 19 and Rulings 1 and 2 (Bundle pages 139-143), Borrie-Clarke v Chief Adjudication Officer [1987] 3 C.M.L.R. 277 rectified as shown in Commissioner's decision R(S) 2/88 (reported), paragraphs 9, 11, 12, 13 and the Ruling (Bundle pages 94-7); and Commissioner's decision CS 98/1987 (Thomas).

22. (1) Any derogation from the fundamental principle of equal treatment for men and women must be interpreted strictly. This is so wherever the Member State is required by a directive to implement the principle of equal treatment within a specified area, and in particular in the case of Directives 79/7 and 76/207: Beets-Proper v F. van Lanschot Bankiers NY [1987] 2 C.M.L.R. , paragraph 38 (Bundle page 130); Marshall v Southampton Hampshire Area Health Authority (Teaching) [1986] Q.B. 401; [1986] C.M.L.R. 688 paragraph 36 (Bundle page 214); Johnston v Chief Constable of the Royal Ulster Constabulary [1987] Q.B. 189; [1986] 3 C.M.L.R. 240 paragraphs 36 and 44 (Bundle pages 174 and 177 and CS 98/1987 (Thomas) paragraph 7, last sentence (Bundle page 67).

(2) In determining the scope of any derogation of the principle of equal treatment of men and women, the principle of proportionality, one of the general principles underlying the Community legal order, must be observed. That principle requires that derogation remains within the limits of what is appropriate and necessary for achieving the aim in view: see Johnston paragraph 38 (Bundle pages 174-5).

23. The expression "possible consequences" in Article 7(1)(a) must be construed restrictively and restrictive interpretation means that there must be a tie or link between the rule laying down different pensionable ages and the rule providing for dissimilar treatment for men and women in relation to the other benefit. The European Court has itself intimated that Article 7(1)(a) must be read in this sense: see Burton v British Railways Board [1982] 1 Q.B. 1080 at page 1112 letters G and H (Bundle page paragraph 15) and the Advocate General's opinion (not in Bundle) page 1094 B and C Beets-Proper (supra) at pages 631-2 paragraphs 32 and 37 (Bundle pages 129-130) and the Advocate General's opinion page 621 (Bundle page 119).

24. Miss Beale and Mr Plender both accept that the above mentioned tie or link must be an objective link: see decision CS/98/97 (Thomas) paragraph 9, where the Commissioner (who was considering the qualifying condition for severe disablement allowance set out in section 36(4)(d) of the Social Security Act 1975, which is in similar terms to section 37(5) of that Act) said:

> "In this case severe disablement allowance has been geared to the age differential in pensionable ages of men and women. I have reached the conclusion that it is not sufficient to escape the directive simply to gear a different benefit to the differential pensionable ages if the resulting differential between sexes in that benefit cannot be shown to have some objective link with pensionable age. If it were it would make it all too easy to evade the provisions of the directive ..... I have reached the conclusion that something more is needed than the mere reference to pensionable age with its inherent element of discrimination. There must be some objective link with the differentiation in pensionable ages."

They also accept that, in ascertaining whether there is such a tie or link, the Member State (in this case the United Kingdom) must act in accordance with the principle of proportionality (as to which see paragraph 22(2) above). I agree.

(b) The disputed question

25. Thus, in determining whether section 37(5) of the Social Security Act 1975 is excluded by Article 7(1)(a) from the scope of Directive 79/7, I must ask myself whether there is any objective tie or link, proportionate to the "aim in view", between the different pensionable ages and the dissimilar treatment under that section of men and women in relation to ICA? If the answer to this question is "Yes", section 37(5) is excluded from the scope of Directive 79/7, that section is valid and fully enforceable and the claimant's appeal must fail. If the answer to this question is "No" then, notwithstanding section 37(5), women are entitled to ICA on the same terms as men and continue to be eligible for that benefit if they become entitled to it before attaining the age of 65. The claimant's appeal will then succeed. Mr Plender, on behalf of the Secretary of State submits that the question should be answered in the affirmative, and Miss Beale, on behalf of the EOC, submits that it should be answered in the negative.

26. Mr Plender submits that the aim in view is "to provide a replacement for the income of people of working age who have foregone employment or self-employment in order to look after others who are severely disabled" (paragraph 3 of his written submission). He submits that the United Kingdom is entitled, having regard to this aim, to make access to ICA contingent on the claimant's being under pensionable age. The object, he says, is plainly that ICA should be paid to those who would be part of the working population but for the fact that they care for an invalid. In common with Severe Disablement Allowance, ICA is designed to provide a replacement for income during working life together with credits towards a retirement pension payable on pensionable age to persons who are unable to work in consequence of illness. "Working life" is defined in section 27(2) of the Social Security Act 1975 by reference to pensionable age. Reliance is placed by him on the definition of "working life" and "on the fact that Invalid Care Allowance and Severe Disablement Allowance have always been tied to category C retirement pension in amount as well as in the statutory scheme: see schedule 4, Part II, paragraphs 2-3 of the 1975 Act". It was indicated in the White Paper, Social Security Provision for Chronically Sick and Disabled People H.C. 276, 31 July 1974 that ICA was designed to replace lost income of "those of working age who would be breadwinners in paid employment but for the need to stay at home and act as unpaid attendants to people who are severely disabled and need care". There must be a closing date for determining eligibility to a statutory scheme designed to replace lost income and there is no other workable criterion than pensionable age which could be used for that purpose.

27. Miss Beale accepts that the White Paper can be looked at for assistance in the determination of the question of interpretation and application of European Community Law and cites in this connection Pickston v Freemans PLC [1988] 3 W.L.R. 265 265 (H.L.). Mr Plender submits that even if there were no point of European Community Law in issue, I would be entitled to look at the White Paper as a report presented to Parliament containing proposals for legislation which resulted in the enactment of the statute, in order to determine "the mischief which the statute was intended to remedy" (in other words, "the aim in view"): Black-Clawson International v Papierwerke [1975] 1 All. E.R. 819 (HL). I agree with the submissions on this point.

28. Miss Beale submits, that, as the principle of proportionality requires, the adjudication officer and Secretary of State seek to justify the sex discrimination here in issue by showing that it is appropriate and necessary having regard to the aim in view. The aim in view on the present case involves describing the group of persons intended to benefit from ICA ("the target group") and it must then be shown that those who satisfy the condition of entitlement to ICA prescribed in the legislation ("the prescribed group") approximate as closely to the

target as relevant considerations (such as practicability and equity) allow and in particular the AO must show that it is appropriate and necessary in order to reach the target group for the prescribed group to be defined in a discriminatory manner by inclusion of the pensionable age condition rather than in a non-discriminatory manner. It is accepted that ICA is intended to be an income replacement benefit for those who are caring for invalids and that this is a legitimate and proper aim. The substance of the aim in view put forward by the AO is to provide an income replacement benefit for those who are prevented from earning their living because they care for an invalid (the target group). The question is whether it is appropriate and necessary in order to direct ICA to a target group with reasonable accuracy, to prescribe a cut-off point at all and if so whether that point should be a common age for both sexes or 60 for women and 65 for men. In the EOC's submission, it is neither appropriate nor necessary to prescribe a cut-off point which discriminates against women rather than a common, or no, cut-off point. If the appeal succeeds, the result will be that women will be entitled to ICA on the same terms as men and will continue to be eligible up to the age of 65: see paragraph 21 above. This was administratively practicable and non-discriminatory. Women in receipt of a pension would have their ICA reduced by deducting from it the amount of any Category A or B retirement pension actually payable to them, by virtue of paragraph 4(5) of the Overlapping Benefits Regulations, which would not happen in the case of a man, but that involves no discrimination other than the present permitted discrimination of earlier entitlement to pension.

29. I agree with Miss Beale's submission (summarised above and set out more fully in her two written submissions in the case papers). For the reasons set out below, I answer the disputed question as to the tie or link (see paragraph 25 above) in the negative. Directive 79/7 applies to section 37(5) of the Social Security Act 1975.

30. As explained in paragraph 23 the key word in Article 7(1)(a) of Directive 79/7 is "consequence" implying a link or causal connection between the benefit in issue and the attainment of the age of eligibility for pension. The use of the word "possible" in that Article does not weaken the requirements of strict interpretation and proportionality and, as the EOC submits, "is a mere grammatical acknowledgment that there may, or may not, in any member State, be consequences for other benefits of the difference in pensionable ages (since, for example, social security schemes may be organised in different ways in different Member States)".

31. The provision adjusting benefits which applies to cases where a person is entitled both to a pension and to ICA so that such person does not receive the full amount of both, which is effected by the Social Security (Overlapping Benefits) Regulations 1979 [SI 1979 No 597], paragraph 12, is an example of such a "consequence". Due to the way social security is organised in the UK (Great Britain in the present case), a woman can be entitled to a social security contributory pension at age 60, while a man must wait until he is 65. Where she is also entitled to ICA, her total benefit entitlement is reduced. This is a consequence of the different pensionable ages of men and women and is preserved from the scope of Directive 79/7 by the concluding words of Article 7(1)(a) (set out in paragraph 17(5) above). There is, here, a clear objective tie or link.

32. But the provision excluding from ICA any woman who was not entitled to ICA prior to attaining age 60 and any man who was not entitled to ICA prior to attaining age 65 is different. It has no objective connection with the different ages at which a man and a woman can obtain a contributory pension. The ages of 60 and 65 (themselves discriminatory but specifically permitted by Article 7(1)(a)), are the respective ages when a woman or a man, if the contribution conditions are satisfied, can obtain a Category A or Category B pension, provided that that person is accepted as retiring and (until, under present proposals, October 1989) does not exceed the current earnings limit for the receipt of pension. ICA is a non-contributory benefit unrelated to contributory benefits (except where they overlap, when the Overlapping Benefits Regulations already referred to apply). Nor has the

attainment of pensionable age any connection with Category D retirement pension, which is non-contributory and for which the qualifying age is 80: see section 39 of the Social Security Act 1975. Category C pensions, on which Mr Plender relied as providing a tie or link, are in my judgment entirely unconnected with ICA. They were introduced by the National Insurance Act 1970 and were, and still are, transitional in purpose. As explained on Ogus and Barendt's "The Law of Social Security" Third Edition (1988) page 225:

> "Category C pensions were a response to political pressure to help those who were uninsured under the pre-1948 schemes and, being over pensionable age when the 1946 Act came into effect, had not had the chance to establish eligibility to a pension under this legislation. They were to receive a non-contributory flat-rate pension of 60 per cent of the basic contributory pension, with the exception of married women who were to get a similar proportion of the contributory pension for a dependent wife. It was considered inappropriate to pay the same amount as those who had contributed fully to the National Insurance Fund"
>
> (A footnote refers as authority to "Mr P. Dean, Under-Secretary of State, 803 HC Official Report (5th series) col 1551".)

The same work comments:

> "The Category C pension is of little importance, since nearly all those entitled to it would otherwise be entitled to a Category D pension. Moreover, given that entitlement depends on the claimant, or the claimant's husband, having been over pensionable age in 1948, it is now virtually confined to widows, very few of whom are still under 80 and therefore depend on Category C (their husbands would have been 105 or over in July 1988)" (page 226).

33. The "aim in view" in respect of a benefit where the legislation establishing it has been amended, as in the present case, from 22 December 1984 in order to take account of Directive 79/7, must relate to the legislation as so amended. This is, of course, obvious in the case of severe disablement allowance, which replaced non-contributory invalidity benefit when the time limit for complying with Directive 79/7 expired (22 December 1984). But the position must be the same where the original benefit continues in amended form. In the present case, married women living with their husbands, and others living with a partner on similar terms, have been added to the class of those eligible for ICA.

34. Nevertheless, the aim in view remains, in this case, basically the same, in my opinion, as that when it was first introduced. It was, and still is, as described in the White Paper at paragraph 60, to provide a benefit for

> "those of working age who would be breadwinners in paid employment but for the need to stay at home and act as unpaid attendants to people who are severely disabled and need care."

In other words, "to provide a replacement for the income of people of working age who have foregone employment or self-employment in order to look after those who are severely disabled" (para 3, Mr Plender's submission). ICA has always been paid without test of means or of contributions in order to include the few who have never been to work as well as those who have had to give up a paid job.

35. Mr Plender submits that in common with Severe Disablement Allowance, ICA is designed to provide a replacement for income during working life. Working life, he points out, is defined in section 27(2) of the 1975 Act, which defines it by reference to pensionable age. But the underlined expression relates to a notional "working life" for contributions purposes. It has nothing whatever to do with ICA, which is non-contributory. ICA is a benefit for those of working age, not "working life" as so defined.

36. The "cut-off" excluding from ICA any woman who was not entitled to that benefit prior to attaining age 60, in so far as it bears any relationship to "the aim in view", is directed to defining the upper limit of "working age". The different upper limit for working age for men (65) and for women (60) is achieved in section 37(5) by a reference to "pensionable age", which is defined in section 27(2) as 65 for men and 60 for women. But there is no objective tie or link between the upper limit of "working age" and "pensionable age": see paragraph 32 above. I agree with the remarks of Mr J.G. Monroe in decision CS/98/87 quoted in paragraph 24 above.

37. It is not necessary or appropriate in order to achieve the aim in view to discriminate between men and women in fixing the upper limit for "working age". There is no nexus requiring a common age for entitlement to a contributory pension and entitlement to ICA. Receipt of both a contributory pension and of ICA is adjusted by the Overlapping Benefit Regulations, which apply to any overlapping, whatever the age of the person concerned. It can provide no justification for denying ICA to those who have not become entitled to it while under age 60, simply because persons over 60 may have become entitled to a contributory pension or, just conceivably, to a Category C pension. (Neither the present claimant nor the claimants in the associated appeals, is so entitled).

38. The difference between the pensionable ages for women and men is an anomaly which can only be explained by reference to its history. Ogus and Barendt's "The Law of Social Security" (2nd ed) explains it as follows:-

> "The first condition of eligibility for a retirement pension (Category A or Category B) is that the claimant has attained pensionable age. 'Pensionable age' is 65 for men and 60 for women. The lower age for women dates from 1940, when the war-time government made the change under pressure from women's organisations. The principal object was to enable the typical married couple, where the husband was 65 and the wife a few years younger, to draw the full married couple's pension. However, this reason can no longer support the distinction, since the National Insurance Act 1946. The allowance raises the husband's total pension to the sum payable to a married couple both of whom are over pensionable age." (p. 194)

The 3rd (1988) edition comments (page 181)

> "The discrepancy between the relevant ages for men and women is now widely regarded as indefensible; in an attempt to remove one anomaly, the 1940 Act created another."

39. The anomaly between the pensionable ages for pension purposes is preserved, for the time being, by Article 7(1)(a) of Directive 79/7. But the anomaly is only preserved by that Article in respect of ICA if there is an objective tie or link proportionate to (i.e. necessary and appropriate for achieving) the "aim in view" between the different pensionable ages and the dissimilar treatment of men and women in s.37(5). In my judgment, it has not been shown that there is. Accordingly, I have answered (in paragraph 29) the question posed at the beginning of paragraph 25 above, in the negative. It is not in dispute that section 37(5) is discriminatory and, since I have held that Directive 79/7 applies to that section, the result is that women are entitled to ICA on the same terms as men and continue to be eligible for that benefit if they become entitled to it before the age of 65. There is no doubt that in the present case, if the claimant were a man, she would be entitled to ICA from 1 October 1986 (3 months before the date of claim) to 20 August 1987 (when Mrs Y[...] ceased to be cared for by the claimant) and, subject to showing good cause for late claim, back to the date when attendance allowance first became payable (5 May 1986).

40. (1) My decision is set out in paragraph 1.

(2) Before parting with this case, it is appropriate to comment on one submission

made by Mr Plender in respect of the case of Thomas (CS 98/1987) relating to paragraph 12, where the Commissioner (Mr J.G. Monroe) concludes, he submits, that the objective link is established in the case of those benefits where the rate of benefit changes or entitlement disappears at pensionable age or five years later. In the Commissioner's words (as amended):

> "I should be disposed to think that these provisions fell to be associated with the fact that the beneficiary, having reached pensionable age, fell to be treated by whatever provision he has made for pension and could not expect to look beyond that."
>
> [Note: The words "as sufficiently provided for" in fact appear in the Commissioner's decision after the words "fell to be treated". The Commissioner was referring to sickness, invalidity and unemployment benefit and mobility allowance as originally introduced]

Mr Plender says that these remarks assist him and that Parliament appears to have taken the view that the beneficiary "fell to be treated by whatever provision he made for pension". While I do not feel that it is useful or appropriate for me to comment generally on a decision which is shortly to be considered by the Court of Appeal, I must express my disagreement with this submission. When a beneficiary (i.e. a person already entitled to ICA) reaches pensionable age, ICA does not cease nor does the rate of benefit change. It continues. Five years later, the recipient of ICA (who has then attained retiring, as opposed to pensionable, age) continues to receive ICA, whether or not he or she is still caring for a disabled person and whether or not he or she is earning. Parliament appears to have taken a different view to that relating to sickness, invalidity and unemployment benefit (and mobility allowance as originally introduced) by letting the benefit (ICA) continue unchanged up to retiring age and then providing for its continuance on terms under which, in effect, at retiring (not pensionable) age it becomes a non-contributory pension.

(Signed) V G H Hallett
Commissioner

Date: 6 April 1989