5. According to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each Member State to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person.

6. Article 5 (1) of Council Directive No 76/207, which prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, may be relied upon as against a State authority acting in its capacity as employer, in order to avoid the application of any national provision which does not conform to Article 5 (1).

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 18 September 1985

My Lords,

This case comes to the Court by way of a reference dated 12 March 1984 for a preliminary ruling under Article 177 of the EEC Treaty by the English Court of Appeal in an action proceeding before that court on appeal from the Employment Appeal Tribunal.

Miss Marshall was born on 4 February 1918. The Southampton and South-West Hampshire Area Health Authority (Teaching) (hereinafter 'the Authority') was at all material times constituted under section 8 (1A) (b) of the National Health Service Act 1977. The Court of Appeal states 'it was accordingly an emanation of the State'. Miss Marshall worked for the Authority from June 1966 and had a contract of employment with them as Senior Dietician from 23 May 1974 until her dismissal. Since about 1975 the Authority has had a written policy that in general their female employees should retire at the age of 60 and their male employees at the age of 65. Paragraph 1 of this policy states: 'The normal retirement age will be the age at which social security pensions become payable.' The policy was an implied term of Miss Marshall's contract of employment. The Authority is prepared to waive the policy partly or wholly in respect of a particular individual in particular circumstances. It waived its policy partly in the case of Miss Marshall who, if the policy had

been applied to her without qualification, would have been dismissed on 4 February 1978, but who in fact was employed until 31 March 1980. On that date the Authority dismissed her. The only reason for the dismissal was that Miss Marshall was a woman who had passed the retiring age applicable to women: the Authority would not have dismissed her when it did had she been a man. At the date of this dismissal, Miss Marshall was able and willing to continue in the employment of the Authority and would, if she had been allowed to do so, have continued in its employment until she had reached the age of 65, i.e. until 4 February 1983. Since she could not go on working, Miss Marshall suffered financial loss, i.e. the difference between what she would have earned in employment with the Authority and her pension. She also lost the satisfaction which she derived from her employment.

At the date of her dismissal, pension legislation in the United Kingdom provided that men were eligible to receive State pensions from the age of 65 and that women were eligible to receive State pensions from the age of 60 (section 27 (1) of the Social Security Act 1975). Where an employee continues in employment, that legislation provides for the deferment of the payment of State pensions. Thus when dismissed, Miss Marshall was entitled to a State pension. She would have been so entitled since the age of 60 had she not remained in employment after reaching that age.

Miss Marshall complains that her dismissal at the date and for the reasons established constituted less favourable treatment by the Authority on the grounds of her sex and accordingly that she has been unlawfully discriminated against contrary to the Sex Discrimination Act 1975 and European Community law. As to the latter she relies in particular on Council Directive 76/207 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 (Official Journal 1976, L 39/40). Both the Industrial Tribunal and the Employment Appeal Tribunal dismissed her claim under the Sex Discrimination Act 1975 on the grounds that the Authority's act was not unlawful because section 6 (4) of the Act excluded from the prohibition of discrimination by an employer on the ground of sex 'provision in relation to death or retirement'. Miss Marshall's claim under EEC law was upheld by the Industrial Tribunal on the ground that her dismissal violated the principle of equal treatment set out in Directive 76/207, in particular Articles 1 (1), 2 (1) and 5 (1) thereof; the Employment Appeal Tribunal, however, dismissed this claim also, on the ground that the violation of the Directive could not be relied on in proceedings before a United Kingdom court or tribunal. Miss Marshall appealed against this decision to the Court of Appeal.

The Court of Appeal has referred the following two questions to the Court:

(1) Whether the Authority's dismissal of Miss Marshall after she had passed her 60th birthday pursuant to the Authority's retirement age policy and on the grounds only that she was a woman who had passed the normal retiring age applicable to women, was an act of discrimination prohibited by Directive 76/207.

(2) If the answer to (1) above is in the affirmative, whether or not Directive 76/207 can be relied upon by Miss Marshall in the circumstances of the present case in national courts or tribunals notwithstanding the inconsistency (if any) between the Directive and section 6 (4) of the Sex Discrimination Act 1975.

Miss Marshall and the Commission consider that the first question should be answered in the affirmative, i.e. to the effect that a dismissal in circumstances such as those described is contrary to the Directive, in particular to Article 5 thereof. Reliance is placed on Case 149/77 *Defrenne* v *Sabena* [1978] ECR 1365 ('*Defrenne (No 3)*').

The Authority and the United Kingdom Government, on the other hand, submit that the first question should be answered in the negative. They rely on Article 7 (1) of Council Directive 79/7 of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Official Journal 1979, L 6, p. 24) and on the Court's judgment in Case 19/81 *Burton* v *British Railways Board* [1982] ECR 555.

As to the second question, Miss Marshall and the Commission again agree in submitting that the question should be answered in the affirmative. Miss Marshall argues that in the first instance the national court is under an obligation to interpret national law in such a way as to make it conform to the Directive (see the judgment of the Court of 10 April 1984 in Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, particularly paragraph 26 at p. 1909) and it is only in so far as any inconsistency between national law and Community law cannot be removed by such interpretation that a national court is obliged to declare that inconsistent provisions of national law are inapplicable to the case in question. The Commission asserts that section 6 (4) of the Act as it has been interpreted by the English courts is not compatible with Directive 76/207. Both contend that an individual can rely on the Directive in the circumstances of this case, once the date for the implementation of that Directive (12 August 1978) has passed.

The Authority and the United Kingdom Government both submit that the second question should be answered in the negative. The Authority argues, firstly, that the Directive is neither unconditional nor sufficiently clear and precise to produce direct effects. Secondly, it is said that a directive which has not been implemented cannot be relied on by one private individual against another; and that where the State is acting as an employer, it should be treated in the same way as a private employer. The UK Government makes similar submissions.

Before examining the two questions in general terms, rather than in relation to the specific facts of this case, which it is of course for the national court to decide, it is right to recall that the Court has already held that the elimination of discrimination based on sex forms part of the fundamental rights the observance of which the Court has a duty to ensure (*Defrenne (No 3)*, paragraph 27; and more recently paragraph 13 of the decision in Case 165/82 *Commission* v *United Kingdom* [1983] ECR 3431 at p. 3448, and paragraph 16 of the

decision in Joined Cases 75 and 117/82 *Razzouk and Beydoun* v *Commission* [1984] ECR 1509 at p. 1530).

The first question

Directive 76/207 recites the Council's Resolution of 21 January 1974 concerning a social action programme (Official Journal 1974, C 13, p. 1) which included as one of its priorities the undertaking of action to achieve equality between men and women as regards access to employment and vocational training and advancement and as regards working conditions, including pay, and adds that 'equal treatment for male and female workers constitutes one of the objectives of the Community, in so far as the harmonization of living and working conditions while maintaining their improvement are *inter alia* to be furthered'.

The relevant provisions are these:

Article 1 (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".'

Article 1 (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.'

Article 2 (1)

'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.'

Article 5

'1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.

2. To this end, Member States shall take the measures necessary to ensure that:

(a) . . . ;

(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;

(c) . . .'

A provision in a person's contract of employment that in general he or she must retire at a certain age is, in my view, part of that person's 'working conditions, including the conditions governing dismissal'. It means in effect that the employer can terminate the employment at that age, in the absence of a

decision to prolong the employment or a practice, under which extensions are normally granted, which is substituted for that term of the contract.

If a different age is provided for men, on the one hand, and women on the other, that is on the face of it a failure to guarantee the same conditions without discrimination on grounds of sex within the meaning of Article 5 (1) of the Directive.

In the present case the normal retiring age, in general, for men was 65, for women 60. The Court of Appeal has accepted that the provision as to 60 for Miss Marshall was an implied term of her contract. It is to be assumed that there would be an implied term in a man's contract that he would continue to 65. The Court of Appeal finds that, even after an extension, she was dismissed because she had passed 60 and that she would not have been dismissed if she had been a man.

On those facts there was *prima facie* a failure to comply with Article 5 (1).

To rebut this, reliance is placed firstly on those parts of Article 1 (1) and (2) of Directive 76/207 which deal with social security. This was plainly a matter to be dealt with by further provisions adopted by the Council.

The only such provisions so far adopted are those of Directive 79/7. The ambit of that Directive is defined in Article 3 (1), which provides:

'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).'

Article 7 of Directive 79/7 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) . . .

(c) . . .

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.'

It is commonplace that people normally cease work when they become entitled to a pension, either under a social security scheme or under arrangements which, so far as age is concerned, are geared to the social security scheme. There is frequently a factual link between the two. It does not, however, follow that rules as to 'working conditions, including the conditions governing dismissal' have to be on the same footing as rules as to social security entitlement or access to it. A person may not

necessarily be liable to be dismissed because he has satisfied the conditions for a pension, including that of reaching a certain age.

In my view, shorn of authority of this Court, Directive 76/207 draws a distinction between conditions governing dismissal and matters of social security, and Directive 79/7 deals only with matters of social security.

Article 7 (1) (a) of the latter does not itself exclude from the principle of equal treatment the determination of pensionable age for the purposes and consequences referred to. It enables Member States to make such exclusions subject to their duty under paragraph (2) of the Article, to review from time to time whether such exclusions continue to be justified. Moreover, the discretion is to determine 'pensionable age' (the age at which entitlement to pension arises) and not 'retirement age', which I take to mean the age at which a person must retire or normally retires. There may thus be continued (or *sed quaere* introduced) only differentials between pensionable ages for men and women 'for the purposes of granting old-age and retirement pensions'.

A provision that a person must cease work at 60 or 65 is not the determination of a pensionable age for the purpose of granting such a pension, even if the one age may coincide with the other. Nor is it the determination of pensionable age for 'the possible consequences thereof for other benefits'. That, as I read it, is dealing with other benefits under State schemes which are geared to the pensionable age fixed by the Member States. The right to continue at work, or to retire, and the liability to be retired are not 'other benefits' for the purposes of Article 7 (1) (a).

Accordingly, in my opinion, the fixing of an age at which a person must cease work is not the determination of pensionable age for the purposes or consequences referred to in Article 7 (1) (a) of Directive 79/7. That Article accordingly does not exempt from the overriding obligation in Article 5 (1) of Directive 76/207 that discrimination on the grounds of sex, in regard to working conditions, including conditions governing dismissal, are to be prohibited. It does permit discrimination as to the age at which old-age and retirement pensions may be taken. Under these Directives the fact that a woman can take a pension earlier does not involve that she can be retired earlier than a man.

It is said, however, that discrimination between men and women as to the age at which they must retire is permitted as a consequence of the Court's decision in *Burton*.

That case was concerned with access to a voluntary redundancy scheme which was made available to men and women, on the same financial basis, within five years of the normal minimum pensionable age for men and women (namely 65 and 60) under national legislation for social security purposes, so that it was available at 60 and 55 respectively. That age was treated as being the retirement age though there is not, according to the Commission and so far as I am aware, any fixed 'retirement age'

in United Kingdom legislation. The Court held on the basis of Article 7 of Directive 79/7 that 'the determination of a minimum pensionable age for social security purposes which is not the same for men as for women does not amount to discrimination prohibited by Community law' (paragraph 14). The difference in the scheme adopted by the employers 'stems from the fact that the minimum pensionable age under the national legislation is not the same for men as for women' (paragraph 15). It was accordingly held not to be discriminatory within the meaning of Directive 76/207.

The fact that access at different ages to benefits in the context of social security is in certain circumstances not discrimination, does not mean, and the Court did not say that it did mean, that different retirement ages which prevent a woman from working as long as a man are not discriminatory. In any event in the present case Miss Marshall was not dismissed at the State pensionable age, and in that respect this case is different from *Burton*. I do not read the judgment in that case as deciding the present issue against the applicant.

Accordingly in my opinion the first question should be answered on the following lines:

For an employer to dismiss a woman employee after she has passed her 60th birthday pursuant to a policy of retiring men at the age of 65 and women at the age of 60 and on the grounds only that she is a woman who has passed the said age of 60 is an act of discrimination prohibited by Article 5 (1) of Directive 76/207.

The second question

Directive 76/207 has not been specifically implemented in the United Kingdom, nor, since the date when it should have been implemented, have the measures prescribed by Article 5 (2) (b) thereof been adopted — i.e. those measures necessary to ensure that any provisions contrary to the principle of equal treatment which are included in individual contracts of employment shall be, or may be declared null and void or may be amended.

If the Sex Discrimination Act 1975 achieved the same result there would, of course, be no problem. Section 6 (2) (b) of that Act provides that 'it is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain to discriminate against her by dismissing her'. On the face of it that seems, in the present context, capable of producing the same effect as Article 5. Section 6 (4) however, provides that section 6 (2) (b), *inter alia*, does 'not apply to provision in relation to death or retirement'. It has been suggested in this case that the reference to retirement can be read as covering a provision only as to pensionable age within the meaning of Article 7 (1) (a) of Directive 79/7 and, therefore, as not excluding section 6 (2) (b) in respect of ages of termination of employment. The Court of Appeal in *Roberts* v *Cleveland Area Health Authority* [1979] 1 WLR 754, however, decided that provision 'in relation to' retirement means provision 'about' retirement. Per Lord Denning MR 'the phrase . . . is very wide'; per Lawton LJ 'to fix a retiring age is to make a provision in relation to retirement'.

On that basis the Sex Discrimination Act 1975 does not produce a result which satisfies Article 5 of Directive 76/207.

It is clearly not for this Court to construe that section of the Act. It is contended, however, that national courts have a duty to construe domestic legislation in such a way as to be consistent with Community legislation and that the Sex Discrimination Act 1975 can be construed in such a way as to satisfy Article 5 of the Directive. It is clear that in *Roberts* v *Cleveland*, the Court of Appeal did not refer to either of the Directives in issue in the present case, and as far as can be seen was not referred to them. In *Garland* v *British Railway Engineering Limited* [1983] 2 AC 751, at p. 771, Lord Diplock, with whom the other members of the House of Lords concurred, said that, 'it is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority, that the words of the statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it. *A fortiori* is this the case where the Treaty obligation arises under one of the Community Treaties to which section 2 of the European Communities Act 1972 applies'. He expressed the view that if Article 119 of the Treaty had been cited, the Court of Appeal would have construed section 6 (4) of the Sex Discrimination Act 1975 so as not to be inconsistent with it.

That, however, does not cover the present case which is concerned with two Directives made *after* the Sex Discrimination Act 1975 was enacted, one of which should have been implemented seven months before the judgment in *Roberts* v *Cleveland* in 1979, the other of which was adopted three months before that judgment, though the period within which it was to be implemented had not then expired. In paragraph 26 of the Court's judgment in Case 14/83, *Von Colson and Kamann* v *Land Nordrhein-Westfalen*, it was said that, 'the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law *and in particular the provisions of a national law specifically introduced in order to implement Directive 76/207*, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189'.

It is said that the use of the words which I have underlined indicates that even national legislation not specifically introduced in order to implement a directive, including prior legislation, must be, if possible, so construed. The operative part of the judgment is, however, more limited. 'It is for the national court to interpret and apply the legislation *adopted for the implementation of (Directive 76/207)* in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law.'

It is thus plain that where legislation is adopted to implement a directive, or consequent upon a Treaty obligation, national courts should seek so far as possible to construe the former in such a way as to comply with the latter. To construe a pre-existing statute of 1975 or even 1875 in order to comply with a subsequent directive, which the legislature or executive has not implemented, in breach of its obligation, when it has a discretion as to the form and method to be adopted, is, in my view, wholly different. I am not satisfied that it is a rule of Community law that national courts have a duty to do so — unless it is clear that the legislation was adopted specifically with a proposed directive in mind. It seems to me that it is a matter for the national courts, and subject to the limits imposed on them by domestic rules, as to whether section 6 (4) of the Sex Discrimination Act 1975 is to be construed in such a way that it does in fact comply with the Directive — subject of course to the right of any court to refer questions of Community law to this Court under Article 177 of the Treaty (Case 166/73 *Rheinmühlen-Düsseldorf* v *Einfuhr- und Vorratsstelle Getreide* [1974] ECR 33).

I proceed, therefore, on the basis that the Directive has not been implemented and that the English statute has been construed by the Court of Appeal in such a way that it does not achieve the principle set out in Article 5 (1) of Directive 76/207.

The Court has consistently accepted that if the provisions of a directive are unconditional and sufficiently precise they may not be without effect even if in the absence of implementing measures within the prescribed period.

In the present case the time limit for the implementation of Directive 76/207 expired on 12 August 1978 — before the events in question here. In my opinion the obligation to put into effect the principle of equal treatment - that there should be no discrimination whatever on grounds of sex in respect of the matters specified in Article 1 of the Directive and more particularly with regard to working conditions including the conditions governing dismissal as spelled out in Article 5 — is sufficiently precise as to satisfy the Court's test. It is also in my view unconditional. Article 5 (1) — the overriding obligation in the present context — is in no sense made conditional by the specific obligation to adopt measures, which is imposed on Member States under Article 5 (2).

The question then arises as to whether such a directive can be relied on generally by a citizen falling within its provisions.

In Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53 at pp. 70-71) the Court said in paragraph 23: 'Particularly in cases in which the Community authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and national courts were prevented from taking it into consideration as an element of Community law.' If that sentence is taken in isolation it can be argued that the principle is of general application. Paragraph 24 of the Court's judgment, however, is more limited; a Member State 'which has not adopted the implementing measures required by the directive within the prescribed period may

not plead as against individuals, its own failure to perform the obligations which the directive entails'.

In paragraph 25 it is said that a directive which satisfies the test to which I have referred 'may . . . be relied upon as against any national provision which is incompatible with the directive *or* in so far as the provisions define rights which individuals are able to assert against the State' (the underlining is mine).

The first of these two alternatives may suggest that the right is of general application and that the second alternative is the more specific case of a right asserted against a defaulting State.

In my opinion the decision in *Becker* is to be taken as limited to the situation before the Court — where a litigant was held entitled to say that a Member State could not rely on national provisions kept alive by its own failure to adopt a Community directive which would have conferred rights on the litigant. As against the State in default the litigant could assert those rights.

I remain, despite the arguments in this case and in the case of *Roberts*, of the view expressed in my opinion in *Becker* that a directive not addressed to an individual cannot of itself impose obligations on him. It is, in cases like the present, addressed to Member States and not to the individual. The obligations imposed by such a directive are on the Member States. Such a directive does not have to be notified to the individual and it is only published in the *Official Journal* by way of information — in my view far too tenuous a link with the individual concerned to create a legal obligation.

Despite the general phrases to which I have referred, I read the Court's judgment as saying implicitly, as I said explicitly, that a directive comes into play *only* to enable rights to be claimed by individuals against the State in default. The State cannot rely on its own failure to confer those rights. The citizen may assert them against the State either as a sword or as a shield.

To give what is called 'horizontal effect' to directives would totally blur the distinction between regulations and directives which the Treaty establishes in Articles 189 and 191. I do not read the Court in *Defrenne (No 3)* as saying the opposite. Mr Advocate General Capotorti's Opinion is relied on to the contrary. It does not, however, consider the distinction between the position of the Member State in default and a private person against whom such a right is asserted. If, which I doubt, he is saying that a directive may be relied on generally even though it has not been implemented, his Opinion is, in my view, overtaken by the decision in *Becker*.

Moreover, it does not follow that because a directive has not been implemented, conflicting national legislation is void. The Court has power only to declare that national law is incompatible with Community law, when national courts are under an obligation not to apply conflicting

national provisions (Case 106/76 *Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] ECR 629), and not declare it void. If the Member State is in default it is for the Commission to proceed under Article 169 of the Treaty.

This raises the question whether the Authority in the present case is to be treated as the State for this purpose, so that the provisions of the Directive can be relied upon against it, since if it is not, Miss Marshall cannot rely on it in national proceedings. What constitutes the 'State' in a particular national legal system must be a matter for the national court to decide. However (even if contrary to the trend of decisions in cases involving sovereign immunity where the exercise of imperium is distinguished from commercial and similar activities) as a matter of Community law, where the question of an individual relying upon the provisions of a directive as against the State arises, I consider that the 'State' must be taken broadly, as including all the organs of the State. In matters of employment, which is what Directive 76/207 is concerned with, this means all the employees of such organs and not just the central civil service.

I would, thus, reject the argument put to the Court that a distinction should be drawn between the State as employer and the State in some other capacity. For present purposes the State is to be treated as indivisible, whichever of its activities is envisaged. It was argued that, where the State is acting as an employer, it should be treated in the same way as a private employer, and that it would be unfair to draw a distinction. I reject that argument. The State can legislate but a private employer cannot. It is precisely because the State can legislate that it can remedy its failure to implement the directive concerned. This consideration puts it at the outset in a fundamentally different position from a private employer, and justifies its being treated differently as regards the right of a person to rely upon the provisions of a directive. The Court has already accepted that in the Community's relations with its officials fundamental principles may be relied on which are not necessarily applicable to other employees *(Razzouk)*. I see no reason why Member States in default in implementing Community rules should not be in an analogous position to that of the Community. If this means that employees of private employers are at a disadvantage compared with State employees, it is for the State, as its duty is to do, to remedy the position by conferring the same advantages upon other employees.

In the present case the United Kingdom asserted in its observations that in terms of United Kingdom constitutional law, health authorities are Crown bodies and their employees, including hospital doctors and nurses and administrative staff, are Crown servants: *(Wood* v *Leeds Area Health Authority* [1974] Industrial Cases Reports 535), even if not civil servants and even if excluded from the Employment Protection (Consolidation) Act 1978. Secondly, the Employment Appeal Tribunal in the decision appealed against in the present

proceedings, stated that Miss Marshall was employed by the Authority 'who are agents for the Ministry of Health. In effect therefore her employers were the State'. Finally, in the order for reference the Court of Appeal stated that the Authority was 'an emanation of the State'. If the latter two findings are maintained, it seems to me that Miss Marshall can assert the right she claims against the Authority.

The questions referred to this Court by the Court of Appeal should therefore in my opinion be answered as follows:

(1) For an employer to dismiss a woman employee after she has passed her 60th birthday pursuant to its policy of retiring men at the age of 65 and women at the age of 60 and on the grounds only that she is a woman who has passed the said age of 60 is an act of discrimination prohibited by Article 5 (1) of Directive 76/207.

(2) If national legislation, in this case section 6 (4) of the Sex Discrimination Act 1975 is held by national courts to be inconsistent with Directive 76/207, a person who has been dismissed from his or her employment by a Member State which has failed to implement the Directive, and in breach of Article 5 (1) of the Directive, may rely on the terms of that Article as against that Member State.

The costs of the parties to the main action fall to be dealt with by the national court. The costs incurred by the Government of the United Kingdom and the Commission are not recoverable.