COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF AIREY v. IRELAND

(Application no. 6289/73)

JUDGMENT

STRASBOURG

9 October 1979

In the Airey case,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr. G. WIARDA, *President*,
Mr. P. O'DONOGHUE,
Mr. Thór VILHJÁLMSSON,
Mr. W. GANSHOF VAN DER MEERSCH,
Mr. D. EVRIGENIS,
Mr. L. LIESCH,
Mr. F. GÖLCÜKLÜ

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 23 and 24 February and on 10 and 11 September 1979,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The Airey case was referred to the Court by the European Commission of Human Rights ("The Commission"). The case originated in an application against Ireland lodged with the Commission on 14 June 1973 under Article 25 (art. 25) of the Convention by an Irish national, Mrs. Johanna Airey.

2. The Commission's request, to which was attached the report provided for under Article 31 (art. 31) of the Convention, was filed with the registry of the Court on 16 May 1978, within the period of three months laid down by Articles 32 para. 1 and 47 (art. 32-1, art. 47). The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration made by Ireland recognising the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the Commission's request is to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Articles 6 para. 1, 8, 13 and 14 (art. 6-1, art. 8, art. 13, art. 14).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. P. O'Donoghue, the elected judge of Irish nationality (Article 43 of the Convention) (art. 43), and Mr. G. Balladore Pallieri, the President of the Court (Rule 21 para. 3 (b) of the Rules of Court). On 31 May 1978, the President of the Court drew by lot, in the presence of the Deputy

Registrar, the names of the five other members, namely Mr. J. Cremona, Mr. Thór Vilhjálmsson, Mr. W. Ganshof van der Meersch, Mr. L. Liesch and Mr. F. Gölcüklü (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

Mr. Balladore Pallieri assumed the office of President of the Chamber (Rule 21 para. 5). He was subsequently prevented from taking part in the consideration of the case and was replaced by Mr. Wiarda, the Vice-President of the Court (Rule 21 paras. 3(b) and 5). At a later stage and for the same reason the first substitute judge, Mr. Evrigenis, replaced Mr. Cremona (Rule 22 para. 1).

4. The President of the Chamber ascertained, through the Deputy Registrar, the views of the Agent of the Government of Ireland ("the Government") and the Delegates of the Commission regarding the procedure to be followed. On 15 July 1978, he decided that the Agent should have until 17 October 1978 to file a memorial and that the Delegates should be entitled to file a memorial in reply within two months from the date of the transmission of the Government's memorial to them by the Registrar.

The Government's memorial was received at the registry on 16 October 1978. On 15 December 1978, the Delegates of the Commission filed a memorial, together with the applicant's observations on the Government's memorial; they lodged a further document on 22 January 1979.

5. After consulting, through the Registrar, the Agent of the Government and the Delegates of the Commission, the President decided on 1 February 1979 that the oral hearings should open on 22 February 1979.

6. The oral hearings were held in public at the Human Rights Building, Strasbourg, on 22 February 1979. The Court had held a short preparatory meeting earlier that morning.

There appeared before the Court:

- for the Government:

Mrs. J. LIDDY, Assistant Legal Adviser,
Department of Foreign Affairs, *Agent*,
Mr. O. N. McCARTHY, S.C.,
Mr. J. COOKE, Barrister-at-Law, *Counsel*,
Mr. L. DOCKERY, Chief State Solicitor
Mr. A. PLUNKETT, Legal Assistant,
Attorney-General's Office, *Advisers*;

- for the Commission:

Mr. J. FAWCETT, *Principal Delegate*,
Mr. T. OPSAHL, *Delegate*,
Senator M. ROBINSON, Barrister-at-Law, and
Mr. B. WALSH, Solicitor, who had represented the applicant before the Commission, assisting the Delegates under Rule 29 para. 1, second sentence, of the Rules of Court.

The Court heard addresses by Mr. Fawcett, Mr. Opsahl and Senator Robinson for the Commission and by Mr. McCarthy for the Government, as well as their replies to questions put by the Court and by its President.

At the hearings, the Commission produced a document to the Court.

7. On the Court's instructions, the Registrar transmitted to the Agent of the Government on 26 February 1979 certain questions on a particular aspect of the case. Replies thereto were received at the registry on 26 March 1979 and were communicated on the same day to the Delegates of the Commission. On 6 April 1979, the Deputy Secretary to the Commission advised the Registrar that the Delegates had no observations to make on those replies.

AS TO THE FACTS

Particular facts of the case

8. Mrs. Johanna Airey, an Irish national born in 1932, lives in Cork. She comes from a humble family background and went to work at a young age as a shop assistant. She married in 1953 and has four children, the youngest of whom is still dependent on her. At the time of the adoption of the Commission's report, Mrs. Airey was in receipt of unemployment benefit from the State but, since July 1978, she has been employed. Her net weekly wage in December 1978 was £39.99. In 1974, she obtained a court order against her husband for payment of maintenance of £20 per week, which was increased in 1977 to £27 and in 1978 to £32. However, Mr. Airey, who had previously been working as a lorry driver but was subsequently unemployed, ceased paying such maintenance in May 1978.

Mrs. Airey alleges that her husband is an alcoholic and that, before 1972, he frequently threatened her with, and occasionally subjected her to, physical violence. In January 1972, in proceedings instituted by the applicant, Mr. Airey was convicted by the District Court of Cork City of assaulting her and fined. In the following June he left the matrimonial home; he has never returned there to live, although Mrs. Airey now fears that he may seek to do so.

9. For about eight years prior to 1972, Mrs. Airey tried in vain to conclude a separation agreement with her husband. In 1971, he declined to sign a deed prepared by her solicitor for the purpose and her later attempts to obtain his co-operation were also unsuccessful.

Since June 1972, she has been endeavouring to obtain a decree of judicial separation on the grounds of Mr. Airey's alleged physical and mental cruelty to her and their children, and has consulted several solicitors in this connection. However, she has been unable, in the absence of legal aid and

not being in a financial position to meet herself the costs involved, to find a solicitor willing to act for her.

In 1976, Mrs. Airey applied to an ecclesiastical tribunal for annulment of her marriage. Her application is still under investigation; if successful, it will not affect her civil status.

Domestic law

10. In Ireland, although it is possible to obtain under certain conditions a decree of nullity - a declaration by the High Court that a marriage was null and void ab initio -, divorce in the sense of dissolution of a marriage does not exist. In fact, Article 41.3.2º of the Constitution provides: "No law shall be enacted providing for the grant of a dissolution of marriage."

However, spouses may be relieved from the duty of cohabiting either by a legally binding deed of separation concluded between them or by a court decree of judicial separation (also known as a divorce a mensa et thoro). Such a decree has no effect on the existence of the marriage in law. It can be granted only if the petitioner furnishes evidence proving one of three specified matrimonial offences, namely, adultery, cruelty or unnatural practices. The parties will call and examine witnesses on this point.

By virtue of section 120 (2) of the Succession Act 1965, an individual against whom a decree of judicial separation is granted forfeits certain succession rights over his or her spouse's estate.

11. Decrees of judicial separation are obtainable only in the High Court. The parties may conduct their case in person. However, the Government's replies to questions put by the Court (see paragraph 7 above) reveal that in each of the 255 separation proceedings initiated in Ireland in the period from January 1972 to December 1978, without exception, the petitioner was represented by a lawyer.

In its report of 9 March 1978, the Commission noted that the approximate range of the costs incurred by a legally represented petitioner was £500 - £700 in an uncontested action and £800 - £1,200 in a contested action, the exact amount depending on such factors as the number of witnesses and the complexity of the issues involved. In the case of a successful petition by a wife, the general rule is that the husband will be ordered to pay all costs reasonably and properly incurred by her, the precise figure being fixed by a Taxing Master.

Legal aid is not at present available in Ireland for the purpose of seeking a judicial separation, nor indeed for any civil matters. In 1974, a Committee on Civil Legal Aid and Advice was established under the chairmanship of Mr. Justice Pringle. It reported to the Government in December 1977, recommending the introduction of a comprehensive scheme of legal aid and advice in this area. At the hearings on 22 February 1979, counsel for the Government informed the Court that the Government had decided in principle to introduce legal aid in family-law matters and that it was hoped to have the necessary measures taken before the end of 1979.

12. Since Mrs. Airey's application to the Commission, the Family Law (Maintenance of Spouses and Children) Act 1976 has come into force. Section 22 (1) of the Act provides:

> "On application to it by either spouse, the court may, if it is of the opinion that there are reasonable grounds for believing that the safety or welfare of that spouse or of any dependent child of the family requires it, order the other spouse, if he is residing at a place where the applicant spouse or that child resides, to leave that place, and whether the other spouse is or is not residing at that place, prohibit him from entering that place until further order by the court or until such other time as the court shall specify."

Such an order - commonly known as a barring order - is not permanent and application may be made at any time for its discharge (section 22 (2)). Furthermore, the maximum duration of an order given in the District Court - as opposed to the Circuit Court or the High Court - is three months although provision is made for renewal.

A wife who has been assaulted by her husband may also institute summary criminal proceedings.

PROCEEDINGS BEFORE THE COMMISSION

13. In her application of 14 June 1973 to the Commission, Mrs. Airey made various complaints in connection with the 1972 proceedings against her husband, with a claimed assault on her by the police in 1973 with the unlawful detention she affirms she underwent in 1973. Her main complaint was that the State had failed to protect her against physical and mental cruelty from her allegedly violent and alcoholic husband:

- by not detaining him for treatment as an alcoholic;
- by not ensuring that he paid maintenance to her regularly;
- in that, because of the prohibitive cost of proceedings, she could not obtain a judicial separation.

As regards the last item, the applicant maintained that there had been violations of:

- Article 6 para. 1 (art. 6-1) of the Convention, by reason of the fact that her right of access to a court was effectively denied;
- Article 8 (art. 8), by reason of the failure of the State to ensure that there is an accessible legal procedure to determine rights and obligations which have been created by legislation regulating family matters;
- Article 13 (art. 13), in that she was deprived of an effective remedy before a national authority for the violations complained of;
- Article 14 in conjunction with Article 6 para. 1 (art. 14+6-1), in that judicial separation is more easily available to those who can afford to pay than to those without financial resources.

14. On 7 July 1977, the Commission accepted the application in so far as Mrs. Airey complained of the inaccessibility of the remedy of a judicial separation and declared inadmissible the remainder of the application.

In its report of 9 March 1978, the Commission expresses the opinion:

- unanimously, that the failure of the State to ensure the applicant's effective access to court to enable her to obtain a judicial separation amounts to a breach of Article 6 para. 1 (art. 6-1);

- that, in view of the preceding conclusion, there is no need for it to examine the case under Articles 13 and 14 (art. 13, art. 14) (unanimously) or under Article 8 (art. 8) (twelve votes to one, with one abstention).

FINAL SUBMISSIONS AND OBSERVATIONS MADE TO THE COURT

15. At the hearings on 22 February 1979, the Government maintained the following submissions made in their memorial:

> "The Court is asked to find that the Commission should not have declared this application admissible.
>
> The Court is asked to find that even if the case was correctly admitted by the Commission, it should have been dismissed on the merits.
>
> The respondent Government is not in breach of its obligations under the European Convention on Human Rights."

On the same occasion, counsel for Mrs. Airey resumed her client's position as follows:

> "The applicant claims that the total inaccessibility and exclusiveness of the remedy of a judicial separation in the High Court is a breach of her right of access to the civil courts which the Irish Government must secure under Article 6 para. 1 (art. 6-1); she submits that the absence of a modern, effective and accessible remedy for marriage breakdown under Irish law is a failure to respect her family life under Article 8 (art. 8); she submits that the exorbitantly high cost of obtaining a decree of judicial separation, which results in fewer than a dozen decrees in any year, constitutes a discrimination on the ground of property in violation of Article 14 (art. 14); and she submits that she lacks an effective remedy under Irish law for her marriage breakdown and that this in itself is a breach of Article 13 (art. 13)."

AS TO THE LAW

I. PRELIMINARY ISSUES

16. The Government plead that Mrs. Airey's application was inadmissible on the ground, firstly, that it was manifestly ill-founded and, secondly, that she had not exhausted domestic remedies.
According to the Commission, whilst the Court undoubtedly has jurisdiction to determine all issues of fact or of law arising in the course of the proceedings, it is not within the Court's competence to hold that the Commission erred in declaring an application admissible. At the hearings, the Principal Delegate expressed the opinion that issues related to the admissibility decision are examined by the Court as questions going to the merits of the case and not in the capacity of a court of appeal.

17. The Court has established two principles in this area. One is that the Commission's decisions by which applications are accepted are without appeal; the other is that, once a case is referred to it, the Court is endowed with full jurisdiction and may determine questions as to admissibility previously raised before the Commission (see, inter alia, the Klass and others judgment of 6 September 1978, Series A no. 28, p. 17, para. 32). A combination of these principles shows that, when considering such questions, the Court is not acting as a court of appeal but is simply ascertaining whether the conditions allowing it to deal with the merits of the case are satisfied.

18. A submission by a Government to the Court that an application is manifestly ill-founded does not in reality raise an issue concerning those conditions. It amounts to pleading that there is not even a prima facie case against the respondent State. A plea to this effect is an objection of which the Commission must take cognisance before ruling on admissiblity (Article 27 para. 2 of the Convention) (art. 27-2) ; once it has dismissed any such objection, the Commission is normally required, after examining the merits of the case, to state an opinion as to whether or not there has been a breach (Article 31) (art. 31). On the other hand, the distinction between finding an allegation manifestly ill-founded and finding no violation is devoid of interest for the Court, whose task is to hold in a final judgment that the State concerned has observed or, on the contrary, infringed the Convention (Articles 50, 52 and 53) (art. 50, art. 52, art. 53).

The same does not apply to a submission that domestic remedies have not been exhausted. The rule embodied in Article 26 (art. 26) "dispenses States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system" (De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 29, para. 50); it concerns the possibility in law of bringing into play a

State's responsibility under the Convention. It is thus clear that such a submission may well raise issues distinguishable from those relating to the merits of the allegation of a violation.

Accordingly, the Court does not have to rule on the first of the preliminary pleas relied on by the Government but must do so on the second; this latter plea was, moreover, raised by the Government before the Commission so that there is no question of estoppel (forclusion) (see the above-mentioned De Wilde, Ooms and Versyp judgment, p. 30, para. 54).

19. The Government maintain that the applicant failed to exhaust domestic remedies in various respects.

(a) In the first place, they contend that she could have entered into a separation deed with her husband or could have applied for a barring order or for maintenance under the 1976 Act (see paragraphs 10 and 12 above).

The Court emphasises that the only remedies which Article 26 (art. 26) of the Convention requires to be exercised are remedies in respect of the violation complained of. The violation alleged by Mrs. Airey is that in her case the State failed to secure access to court for the purpose of petitioning for judicial separation. However, neither the conclusion of a separation deed nor the grant of a barring or a maintenance order provide such access. Accordingly, the Court cannot accept the first limb of this plea.

(b) In the second place, the Government lay stress on the fact that the applicant could have appeared before the High Court without the assistance of a lawyer. They also contend that she has nothing to gain from a judicial separation.

The Court recalls that international law, to which Article 26 (art. 26) makes express reference, demands solely recourse to such remedies as are both "available to the persons concerned and ... sufficient, that is to say capable of providing redress for their complaints" (see the above-mentioned De Wilde, Ooms and Versyp judgment, p. 33, para. 60). However, the Court would not be able to decide whether the possibility open to Mrs. Airey of conducting her case herself amounts to a "domestic remedy", in the above sense, without at the same time ruling on the merits of her complaint under Article 6 para. 1 (art. 6-1), namely the alleged lack of effective access to the High Court. Similarly, the argument that a judicial separation would be of no benefit to the applicant appears intimately connected with another aspect of this complaint, namely whether any real prejudice was occasioned. The Court therefore joins to the merits the remainder of the plea.

II. ON ARTICLE 6 PARA. 1 TAKEN ALONE (art. 6-1)

20. Article 6 para. 1 (art. 6-1) reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be

pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Mrs. Airey cites the Golder judgment of 21 February 1975 (Series A no. 18) where the Court held that this paragraph embodies the right of access to a court for the determination of civil rights and obligations; she maintains that, since the prohibitive cost of litigation prevented her from bringing proceedings before the High Court for the purpose of petitioning for judicial separation, there has been a violation of the above-mentioned provision.

This contention is unanimously accepted in substance by the Commission but disputed by the Government.

21. The applicant wishes to obtain a decree of judicial separation. There can be no doubt that the outcome of separation proceedings is "decisive for private rights and obligations" and hence, a fortiori, for "civil rights and obligations" within the meaning of Article 6 para. 1 (art. 6-1); this being so, Article 6 para. 1 (art. 6-1) is applicable in the present case (see the König judgment of 28 June 1978, Series A no. 27, pp. 30 and 32, paras. 90 and 95). Besides, the point was not contested before the Court.

22. "Article 6 para. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal" (above-mentioned Golder judgment, p. 18, para. 36). Article 6 para. 1 (art. 6-1) accordingly comprises a right for Mrs. Airey to have access to the High Court in order to petition for judicial separation.

23. It is convenient at this juncture to consider the Government's claim that the applicant has nothing to gain from a judicial separation (see paragraph 19 (b) above).

The Court rejects this line of reasoning. Judicial separation is a remedy provided for by Irish law and, as such, it should be available to anyone who satisfies the conditions prescribed thereby. It is for the individual to select which legal remedy to pursue; consequently, even if it were correct that Mrs. Airey's choice has fallen on a remedy less suited than others to her particular circumstances, this would be of no moment.

24. The Government contend that the application does enjoy access to the High Court since she is free to go before that court without the assistance of a lawyer.

The Court does not regard this possibility, of itself, as conclusive of the matter. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see, mutatis mutandis, the judgment of 23 July 1968 in the "Belgian Linguistic" case, Series A no. 6, p. 31, paras. 3 in fine and 4; the above-mentioned Golder judgment, p. 18, para. 35 in fine; the Luedicke, Belkacem and Koç judgment of 28 November 1978, Series A no. 29, pp. 17-18; para. 42; and

the Marckx judgment of 13 June 1979, Series A no. 31, p. 15, para. 31). This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see, mutatis mutandis, the Delcourt judgment of 17 January 1970, Series A no. 11, p. 15, para. 25). It must therefore be ascertained whether Mrs. Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.

Contradictory views on this question were expressed by the Government and the Commission during the oral hearings. It seems certain to the Court that the applicant would be at a disadvantage if her husband were represented by a lawyer and she were not. Quite apart from this eventuality, it is not realistic, in the Court's opinion, to suppose that, in litigation of this nature, the applicant could effectively conduct her own case, despite the assistance which, as was stressed by the Government, the judge affords to parties acting in person.

In Ireland, a decree of judicial separation is not obtainable in a District Court, where the procedure is relatively simple, but only in the High Court. A specialist in Irish family law, Mr. Alan J. Shatter, regards the High Court as the least accessible court not only because "fees payable for representation before it are very high" but also by reason of the fact that "the procedure for instituting proceedings ... is complex particularly in the case of those proceedings which must be commenced by a petition", such as those for separation (Family Law in the Republic of Ireland, Dublin 1977, p. 21).

Furthermore, litigation of this kind, in addition to involving complicated points of law, necessitates proof of adultery, unnatural practices or, as in the present case, cruelty; to establish the facts, expert evidence may have to be tendered and witnesses may have to be found, called and examined. What is more, marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court.

For these reasons, the Court considers it most improbable that a person in Mrs. Airey's position (see paragraph 8 above) can effectively present his or her own case. This view is corroborated by the Government's replies to the questions put by the Court, replies which reveal that in each of the 255 judicial separation proceedings initiated in Ireland in the period from January 1972 to December 1978, without exception, the petitioner was represented by a lawyer (see paragraph 11 above).

The Court concludes from the foregoing that the possibility to appear in person before the High Court does not provide the applicant with an effective right of access and, hence, that it also does not constitute a domestic remedy whose use is demanded by Article 26 (art. 26) (see paragraph 19 (b) above).

25. The Government seek to distinguish the Golder case on the ground that, there, the applicant had been prevented from having access to court by reason of the positive obstacle placed in his way by the State in the shape of the Home Secretary's prohibition on his consulting a solicitor. The Government maintain that, in contrast, in the present case there is no positive obstacle emanating from the State and no deliberate attempt by the State to impede access; the alleged lack of access to court stems not from any act on the part of the authorities but solely from Mrs. Airey's personal circumstances, a matter for which Ireland cannot be held responsible under the Convention.

Although this difference between the facts of the two cases is certainly correct, the Court does not agree with the conclusion which the Government draw therefrom. In the first place, hindrance in fact can contravene the Convention just like a legal impediment (above-mentioned Golder judgment, p 13, para. 26). Furthermore, fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and "there is ... no room to distinguish between acts and omissions" (see, mutatis mutandis, the above-mentioned Marckx judgment, p. 15, para. 31, and the De Wilde, Ooms and Versyp judgment of 10 March 1972, Series A no. 14, p. 10, para. 22). The obligation to secure an effective right of access to the courts falls into this category of duty.

26. The Government's principal argument rests on what they see as the consequence of the Commission's opinion, namely that, in all cases concerning the determination of a "civil right", the State would have to provide free legal aid. In fact, the Convention's only express provision on free legal aid is Article 6 para. 3 (c) (art. 6-3-c) which relates to criminal proceedings and is itself subject to limitations; what is more, according to the Commission's established case law, Article 6 para. 1 (art. 6-1) does not guarantee any right to free legal aid as such. The Government add that since Ireland, when ratifying the Convention, made a reservation to Article 6 para. 3 (c) (art. 6-3-c) with the intention of limiting its obligations in the realm of criminal legal aid, a fortiori it cannot be said to have implicitly agreed to provide unlimited civil legal aid. Finally, in their submission, the Convention should not be interpreted so as to achieve social and economic developments in a Contracting State; such developments can only be progressive.

The Court is aware that the further realisation of social and economic rights is largely dependent on the situation - notably financial - reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions (above-mentioned Marckx judgment, p. 19, para. 41) and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals (see paragraph 24 above). Whilst the Convention sets forth what are essentially civil and

political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.

The Court does not, moreover, share the Government's view as to the consequence of the Commission's opinion.

It would be erroneous to generalize the conclusion that the possibility to appear in person before the High Court does not provide Mrs. Airey with an effective right of access; that conclusion does not hold good for all cases concerning "civil rights and obligations" or for everyone involved therein. In certain eventualities, the possibility of appearing before a court in person, even without a lawyer's assistance, will meet the requirements of Article 6 para. 1 (art. 6-1); there may be occasions when such a possibility secures adequate access even to the High Court. Indeed, much must depend on the particular circumstances.

In addition, whilst Article 6 para. 1 (art. 6-1) guarantees to litigants an effective right of access to the courts for the determination of their "civil rights and obligations", it leaves to the State a free choice of the means to be used towards this end. The institution of a legal aid scheme - which Ireland now envisages in family law matters (see paragraph 11 above) - constitutes one of those means but there are others such as, for example, a simplification of procedure. In any event, it is not the Court's function to indicate, let alone dictate, which measures should be taken; all that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6 para. 1 (art. 6-1) (see, mutatis mutandis, the National Union of Belgian Police judgment of 27 October 1975, Series A no. 19, p. 18, para. 39, and the above-mentioned Marckx judgment, p. 15, para. 31).

The conclusion appearing at the end of paragraph 24 above does not therefore imply that the State must provide free legal aid for every dispute relating to a "civil right".

To hold that so far-reaching an obligation exists would, the Court agrees, sit ill with the fact that the Convention contains no provision on legal aid for those disputes, Article 6 para. 3 (c) (art. 6-3-c) dealing only with criminal proceedings. However, despite the absence of a similar clause for civil litigation, Article 6 para. 1 (art. 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.

As regards the Irish reservation to Article 6 para. 3 (c) (art. 6-3-c) , it cannot be interpreted as affecting the obligations under Article 6 para. 1 (art. 6-1); accordingly, it is not relevant in the present context.

27. The applicant was unable to find a solicitor willing to act on her behalf in judicial separation proceedings. The Commission inferred that the reason why the solicitors she consulted were not prepared to act was that she would have been unable to meet the costs involved. The Government question this opinion but the Court finds it plausible and has been presented with no evidence which could invalidate it.

28. Having regard to all the circumstances of the case, the Court finds that Mrs. Airey did not enjoy an effective right of access to the High Court for the purpose of petitioning for a decree of judicial separation. There has accordingly been a breach of Article 6 para. 1 (art. 6-1).

III. ON ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 6 PARA. 1 (art. 14+6-1)

29. The applicant maintains that, since the remedy of judicial separation is more easily available to those with than to those without financial resources, she is the victim of discrimination on the ground of "property" in breach of Article 14 taken in conjunction with Article 6 para. 1 (art. 14+6-1).

The Commission was of the opinion that, in view of its conclusion concerning Article 6 para. 1 (art. 6-1), there was no need for it to consider the application under Article 14 (art. 14). The Government made no submissions on this point.

30. Article 14 (art. 14) has no independent existence; it constitutes one particular element (non-discrimination) of each of the rights safeguarded by the Convention (see, inter alia, the above-mentioned Marckx judgment, pp. 15-16, para. 32). The Articles enshrining those rights may be violated alone and/or in conjunction with Article 14 (art. 14). If the Court does not find a separate breach of one of those Articles that has been invoked both on its own and together with Article 14 (art. 14), it must also examine the case under the latter Article (art. 14). On the other hand, such an examination is not generally required when the Court finds a violation of the former Article (art. 6-1) taken alone. The position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case but this does not apply to the breach of Article 6 para. 1 (art. 6-1) found in the present proceedings; accordingly, the Court does not deem it necessary also to examine the case under Article 14 (art. 14).

IV. ON ARTICLE 8 (art. 8)

31. Mrs. Airey argues that, by not ensuring that there is an accessible legal procedure in family-law matters, Ireland has failed to respect her family life, thereby violating Article 8 (art. 8) , which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In its report, the Commission expressed the opinion that, in view of its conclusion concerning Article 6 para. 1 (art. 6-1), there was no need for it to consider the application under Article 8 (art. 8). However, during the oral hearings the Principal Delegate submitted that there had also been a breach of this Article (art. 8). This contention is disputed by the Government.

32. The Court does not consider that Ireland can be said to have "interfered" with Mrs. Airey's private or family life: the substance of her complaint is not that the State has acted but that it has failed to act. However, although the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (see the above-mentioned Marckx judgment, p. 15, para. 31).

33. In Ireland, many aspects of private or family life are regulated by law. As regards marriage, husband and wife are in principle under a duty to cohabit but are entitled, in certain cases, to petition for a decree of judicial separation; this amounts to recognition of the fact that the protection of their private or family life may sometimes necessitate their being relieved from the duty to live together.

Effective respect for private or family life obliges Ireland to make this means of protection effectively accessible, when appropriate, to anyone who may wish to have recourse thereto. However, it was not effectively accessible to the applicant : not having been put in a position in which she could apply to the High Court (see paragraphs 20-28 above), she was unable to seek recognition in law of her de facto separation from her husband. She has therefore been the victim of a violation of Article 8 (art. 8).

V. ON ARTICLE 13 (art. 13)

34. Alleging that she was deprived of an effective remedy before a national authority for the violations complained of, Mrs. Airey finally invokes Article 13 (art. 13), which provides:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Commission was of the opinion that, in view of its conclusion concerning Article 6 para. 1 (art. 6-1), there was no need for it to consider the application under Article 13 (art. 13). The Government made no submissions on this point.

35. Mrs. Airey wishes to exercise her right under Irish law to institute proceedings for judicial separation. The Court has already held that such proceedings concern a "civil right" within the meaning of Article 6 para. 1 (art. 6-1) (see paragraph 21 above) and, further, that Ireland is obliged under Article 8 (art. 8) to make the possibility of instituting them effectively available to Mrs. Airey so that she may organise her private life (see paragraph 33 above). Since Articles 13 and 6 para. 1 (art. 13, art. 6-1) overlap in this particular case, the Court does not deem it necessary to determine whether there has been a failure to observe the requirements of the former Article (art. 13): these requirements are less strict than, and are here entirely absorbed by, those of the latter Article (art. 6-1) (see, mutatis mutandis, the above-mentioned De Wilde, Ooms and Versyp judgment of 18 June 1971, p. 46, para. 95).

VI. ON ARTICLE 50 (art. 50)

36. At the hearings, the applicant’s counsel informed the Court that, should it find a breach of the Convention, her client would seek just satisfaction under Article 50 (art. 50) under three headings: effective access to a remedy for breakdown of marriage; monetary compensation for her pain, suffering and mental anguish; and monetary compensation for costs incurred, mainly ancillary expenses, fees for lawyers and other special fees. The last two items were not quantified.

The Government made no observations on the question of the application of Article 50 (art. 50).

37. Accordingly, although it was raised under Rule 47 bis of the Rules of Court, the said question is not ready for decision. The Court is therefore obliged to reserve the question and to fix the further procedure, taking due account of the possibility of an agreement between the respondent State and the applicant (Rule 50 paras. 3 and 5 of the Rules of Court).

FOR THESE REASONS, THE COURT

I. ON THE GOVERNMENT'S PRELIMINARY PLEAS

1. Rejects unanimously the plea based by the Government on the application's manifest lack of foundation;

2. Rejects by six votes to one the first limb of the Government's plea that domestic remedies have not been exhausted (paragraph 19 (a) of the reasons);

3. Joins to the merits, unanimously, the second limb of the last-mentioned plea (paragraph 19 (b) of the reasons), but rejects it by six votes to one after an examination on the merits;

II. ON THE MERITS OF THE CASE

4. Holds by five votes to two that there has been a breach of Article 6 para. 1 (art. 6-1) of the Convention, taken alone;

5. Holds by four votes to three that it is not necessary also to examine the case under Article 14 taken in conjunction with Article 6 para. 1 (art. 14+6-1);

6. Holds by four votes to three that there has been a breach of Article 8 (art. 8);

7. Holds by four votes to three that it is not necessary also to examine the case under Article 13 (art. 13);

8. Holds unanimously that the question of the application of Article 50 (art. 50) is not ready for decision;

accordingly,

(a) reserves the whole of the said question;

(b) invites the Commission to submit to the Court, within two months from the delivery of this judgment, the Commission's observations on this question, including notification of any settlement at which the Government and the applicant may have arrived;

(c) reserves the further procedure.

Done in English and in French, both texts being authentic, at the Human Rights Building, Strasbourg, this ninth day of October, one thousand nine hundred and seventy-nine.

Gérard J. WIARDA
President

Marc-André EISSEN
Registrar

The following separate opinions are annexed to the present judgment in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 50 para. 2 of the Rules of Court:

- dissenting opinion of Mr. O'DONOGHUE;

- dissenting opinion of Mr. THÓR VILHJÁLMSSON;

- dissenting opinion of Mr. EVRIGENIS.

G.J.W.
M.-A.E.

DISSENTING OPINION OF JUDGE O'DONOGHUE

As I am unable to agree with the main trend of and the principal conclusions in the judgment of the Court, I think I should first state the general position and then deal shortly with the rulings of the Court under the separate Articles invoked under the Convention.

A. General observations

It is not contested that there is no right under the Convention to obtain free legal aid in civil matters. Recognition of this may be deduced from a number of cases and the history of events which led to the adoption by the Committee of Ministers in March 1978 of Resolution (78) 8. This followed much discussion and sympathetic consideration of the desirability of making provision for aid and advice in this field. The Resolution recommended Governments of member States to "take or reinforce, as the case may be, all measures which they consider necessary with a view to the progressive implementation of the principles set out in the appendix" to the Resolution. These principles embraced free legal aid and advice for necessitous persons. The reference to progressive implementation of these principles shows that it was recognised that the position was not the same in the several States Parties to the Convention. The Court has been made aware that the respondent Government will introduce legislation to provide legal aid in family-law matters before the end of 1979. Having regard to the tardiness of States generally to promote legislation of a socially reforming character, I do not think the undertaking in the present case shows any unreasonable delay in complying with the recommendations of the Committee of Ministers.

The applicant, being aware that no right to legal aid is to be found in the Convention, makes the claim that her right of access to the High Court has been impeded by the absence of such legal aid. The judgment of this Court in the Golder case is cited in support of this contention. One must point out, however, that there was a positive prohibition to prevent Golder obtaining access to a court. Here, however, there is no bar or impediment on Mrs. Airey's seeking access to the High Court. Quite apart from the right and the freedom of any lay person to take and pursue civil proceedings in any Irish court without the aid or intervention of any member of the legal profession to assist him or her, there is no evidence whatever that Mrs. Airey made any effort or attempt formally or informally to approach or communicate with the High Court. At the same time, the papers lodged by Mrs. Airey show that she freely communicated with the Human Rights Commission and carried on a protracted correspondence with the Ecclesiastical Authorities on the nullity issue.

In the "Vagrancy" case the failure of the State to provide by law any tribunal competent to hear complaints under Article 5 para. 4 (art. 5-4) of the Convention was held to constitute a breach. In this case, there is no such omission. The century-old remedy to obtain judicial separation in the High Court is still available to Mrs. Airey. The antiquity of this remedy and the qualified relief afforded to a successful petitioner may have contributed to its being had recourse to in fewer and fewer cases. There is, however, another explanation. The description of this process as a petition for divorce a mensa et thoro leads to confusion when the relief available is merely a separation of the spouses and not a divorce as that term is usually understood, ie, divorce a vinculis. Separation is more conveniently achieved by agreement between the parties and if protection from threats or physical assault is desired, a barring order can be obtained in a local court. Judicial separation ordered on a petition for divorce a mensa et thoro does not affect the married status of the parties or terminate the marriage. At the same time I agree that it is for Mrs. Airey to select the legal process she wishes to pursue.

It may be appropriate to refer to the facts and to the cautionary observation at paragraph 14 of the report that the Commission did not make any finding concerning the facts of Timothy Airey's behaviour and the allegations made by the applicant against him. There is enough material to show that a breakdown has occurred in the Airey marriage. It is understandable that Timothy Airey should be described by his wife's counsel as a violent and drunken husband from whom his wife shrinks in constant terror. What are the facts? On one occasion only did Mrs. Airey proceed in court against her husband for assault and in January 1972 the Justice fined the defendant 25 pence and declined to order him to enter into a bond as to his future behaviour. The vindication of the Justice's action has been seen in the fact that no complaint has been made by his wife against Timothy Airey as to any approach, threat or attempted entry to the matrimonial home by him since 1972. Moreover, until he became unemployed in December 1978, the husband paid the maintenance ordered by the court. There has been in fact a complete separation effected between husband and wife by the events. It strikes me as peculiar that no attempt has been made to obtain any statement from Timothy Airey beyond the assertion that he declined to attend his wife's solicitor's office to sign a deed of separation. It is regretted that the Court did not see fit to repeat the restraint shown by the Commission in their absence of comment on Mr. Airey's behaviour.

Another reason why the judicial remedy for separation is sought in such a small number of cases is, of course, that a decree would not dissolve the marriage. To say that divorce a vinculis was available to Irish people in the United Kingdom from 1857 until 1922 is somewhat naive because it involved process in the courts in Ireland in the first instance and the

intervention of the legislative omnipotence of the House of Lords to break the link. In fact, that little more than 20 instances of this remedy took place between 1857 and 1922 shows that it is conveying a false impression to say it provided a means of legally dissolving a marriage for the ordinary Irish citizen.

There is no doubt about the present position under the Irish Constitution. It may be a little strange for some members of the Court to appreciate the rigidity of this position but it will be seen that for over a century the law in Ireland placed many obstacles in the way of obtaining a dissolution of marriage.

The Court has always been careful to abstain from recommending or suggesting the blue-print of any constitutional or legislative changes in the law of member States.

Many changes have taken place in recent times in the law enabling marriages to be dissolved in the several member States. I am not aware that it has ever been contended that divorce legislation is either required or prohibited by any Article of the Convention. There is a great variety in the laws enabling marriages to be dissolved and it is quite understandable that the rigid position at the moment in Ireland owing to the Constitutional prohibition is somewhat hard to be fully understood and appreciated by those from countries where divorce can be obtained with great facility and expedition.

B. Particular observations on the judgment

Paragraph 11

In the 255 cases, decrees were made in 30, which supports my view that this archaic procedure has a limited appeal to the great number of parties involved in matrimonial disputes, and is invoked chiefly where questions as to custody of children or settlement of matrimonial property arise. The Court has not been told if Timothy Airey would defend a petition or resist a move to obtain judicial separation, and we are left with his conduct since 1972 - observing the order for the payment of maintenance and in fact recognizing the state of separation. Reliance on statistical tables to furnish an absolute guide in all cases of marriage disputes between spouses is likely to be disappointing, and the delicacy and variety in the intimate relations between husband and wife will not in many cases respond to computerisation.

Paragraph 13

There is nothing to support the complaint that suggested treatment as an alcoholic was ever put forward in relation to Timothy Airey, and seeing that he was in employment until 1978 and made payments of maintenance over the years, any judgment of the Court should acknowledge these facts. I am

not aware that in any country an effective or fruitful process has been devised to recover payments from a penniless defaulting husband.

Paragraph 18

The failure in the "Vagrancy" case as I understand it consisted in the Belgian State's making no provision in its laws for the existence of an independent tribunal to hear and determine complaints under Article 5 para. 4 (art. 5-4) of the Convention. There is no such failure or omission here and the tribunal, viz. the High Court, is and has been in existence over the years. The case therefore has no relevance here.

Paragraph 19

It is admitted that under Irish law, as distinct from some other countries, any person without the assistance of a lawyer is entitled to seek the assistance of and institute proceedings in the High Court. It would have been of particular relevance and help to me in this case if a statement had been obtained from the High Court as to whether the particulars which Mrs. Airey furnished to the Commission would, or would not, have been accepted as the material content of a petition seeking judicial separation. In the absence of any evidence on this vital question, there must arise a doubt, and I am unable to find the requisite proof to establish a violation of Article 6 (art. 6).

Paragraph 20

The distinction between this case and the Golder judgment is plain to me. No prohibition or barrier has been imposed on Mrs. Airey. The absence of legal aid, the right to which in civil cases is not guaranteed by the Convention, cannot and should not, in my view, be so manipulated as to constitute an infringement without evidence that the High Court would not have entertained Mrs. Airey's complaint.

Paragraph 24

I agree that rights guaranteed under the Convention must be practical and effective. The issue in this case would be a simple one, viz was there evidence of cruelty? To hold on the case as presented that there was a breach of Article 6 (art. 6) would be to depart from the principle I have regarded as fundamental - that breaches of the Convention must be proved affirmatively and not presumed in the absence of any evidence that Mrs. Airey would not be heard on her own in the High Court. I have commented above, in connection with paragraph 11, on the few cases where petitions reached the stage of decrees. I would again refer to my general observations as to the uniqueness of marriage law in Ireland and the difficulty experienced by those not familiar with its history and features.

Paragraph 25

I must record my disagreement with the conclusion of the Court on this point. Of course, hindrance can contravene the Convention if there was evidence of such hindrance. Here I must reiterate that there is an absence of

any such evidence, and we are left in the realm of conjecture and "plausible" inference.

Paragraph 26

The Court has had to recognize that access to the High Court under Article 6 (art. 6) does not in every case require to be satisfied by the assistance or intervention of a lawyer. Applications for Habeas Corpus are made frequently to any Judge of the High Court in the most informal manner and without legal aid, and extend to any form of custody which may be complained of, even if it arose out of civil litigation. Notwithstanding this recognition, however, the Court does not seem to see Mrs. Airey's position as similar to that where she was complaining that she or one of her infant children were being detained unlawfully in custody.

Paragraph 27

The case does not disclose that any statement or explanation was proffered by or sought from any of the several solicitors consulted by Mrs. Airey. Again, there is an example in the judgment of inferences being made in the absence of affirmative proof. I am quite unable to find a breach of the Convention where the foundation is derived from "plausible inferences".

Paragraph 28

For the reasons outlined in this opinion, I do not find a breach of Article 6 para. 1 (art. 6-1).

Paragraphs 29 and 30

I do not find any evidence of discrimination under Articles 6 and 14 (art. 6, art. 14).

Paragraphs 31-33

For the reasons already stated above, I cannot find that a breach of Article 8 (art. 8) has been established.

Paragraphs 34 and 35

It follows from my opinion above that no breach of Article 13 (art. 13) has been established.

Paragraphs 36 and 37

The question of satisfaction under Article 50 (art. 50) must, of course, be reserved.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

It is not disputed in this case that the applicant, Mrs. Johanna Airey, cannot afford to pay the full costs of legal representation in order to apply to the High Court of Ireland for judicial separation. She alleged that Articles 6, 8, 13 and 14 (art. 6, art. 8, art. 13, art. 14) of the Convention had been violated. The legal submissions related to the facts of the case have been complicated by the argument, reiterated before the Court by the respondent Government, that the case should have been declared inadmissible by the Commission.

It seems to me permissible to begin the examination of the merits of the case by asking whether the respondent Government are obliged under the Convention to grant the applicant legal aid and thereby make it financially possible for her to apply to the High Court for judicial separation.

It is not in dispute that the applicant has access to the High Court in the formal sense. There is no legal rule and no decision by a Minister or official to the effect that she may not avail herself of the remedies that the High Court can grant.

Thus, the difficulties which, according to the applicant, bar her from the remedy formally open to her under Irish law are factual in their nature. These difficulties do not, or at least only to a very small degree, concern payments which she would have to make to the Irish Treasury. The payments would mainly be to such lawyers as would represent her before the High Court.

Bearing this in mind I have, without much hesitation but admittedly with regret, come to the conclusion that the applicant does not have a case under Article 6 para. 1 (art. 6-1) of the Convention. I find in this provision no obligation for the Contracting States to grant free legal aid in civil cases, which is what is really at issue here. An individual's ability or inability to claim his or her rights under the Convention may stem from several reasons, one of them being his or her financial position. It is, of course, deplorable that this should be so. To correct this situation, the States which have ratified the Convention have taken and are taking countless measures, thus promoting economic and social development in our part of the globe. The ideas underlying the Convention, as well as its wording, make it clear that it is concerned with problems other than the one facing us in this case. The war on poverty cannot be won through broad interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms. Where the Convention sees financial ability to avail oneself of a right guaranteed therein as so important that it must be considered an integral part of the right, this is so stated. This is borne out by Article 6 para. 3 (art. 6-3). When this is not the case, the Convention has nothing to say on how, when and if the financial means should be made available. Any other interpretation of the Convention, at least at this particular stage of the

development of human rights, would open up problems whose range and complexity cannot be foreseen but which would doubtless prove to be beyond the power of the Convention and the institutions set up by it.

As regards the alleged violation of Article 8 (art. 8) of the Convention, it is clear that the same facts are involved as in the claim under Article 6 para. 1 (art. 6-1). In my opinion, it is a far-fetched interpretation of Article 8 (art. 8) to come to the conclusion that the duty to respect Mrs. Airey's private and family life includes the duty to help her to seek judicial separation in the High Court. I find it sufficient in this connection to refer to what is stated above on the lack of obligation under the Convention to give financial support. For me, this has the same weight in respect of Article 8 (art. 8) as it has in respect of Article 6 para. 1 (art. 6-1).

Although I am of the opinion that there is no breach in this case of either Article 6 para. 1 (art. 6-1) or Article 8 (art. 8), it cannot be denied that the facts of the case come within the scope of these provisions. There is, therefore, a possibility in law of finding a violation of one or both of the above-mentioned Articles taken in conjunction with Article 14 (art. 14+6-1, art. 14+8). Article 14 (art. 14) states, inter alia, that the enjoyment of the rights set forth in the Convention shall be secured without discrimination on the ground of property. There are no legal obstacles preventing the applicant from having access to the High Court. The alleged difficulties are of a factual nature. In addition, they concern her dealings with the legal profession rather than with the Irish Government. Because of this and the underlying arguments enunciated above, I find no violation of Article 14 (art. 14) in this case.

The applicant has invoked Article 13 (art. 13) of the Convention, alleging that she did not have "an effective remedy before a national authority" when seeking the protection granted under Articles 6 para. 1, 8 and 14 (art. 6-1, art. 8, art. 14). Neither the Government nor the Commission expanded in their memorials or at the oral hearings on the arguments concerning Article 13 (art. 13). It seems from the Commission's report that the applicant alleges that a violation was constituted by the lack of an alternative remedy to compensate for the absence of a system of legal aid. This argument presupposes a violation of Articles 6 para. 1, 8 and/or 14 (art. 6-1, art. 8, art. 14) and is therefore not valid when seen from my point of view. Another and probably more substantial argument would have been that because the applicant alleged a violation of her rights under the Convention she was entitled to an effective remedy in order to test the point whether or not she had the right to legal aid. Such an argument would have been in line with the Court's judgment in the case of Klass and others[1]. However, this argument has not been pursued before the Court and there is no evidence that the applicant could not have used the ordinary means available to all

[1] Note by the Registry: 6 September 1978, Series A no. 28, pp. 28-29, paras. 62-64.

citizens to approach her Government or courts on this matter without prohibitive costs. For these reasons, I find no violation of Article 13 (art. 13) in this case.

DISSENTING OPINION OF JUDGE EVRIGENIS

(Translation)

I was, to my great regret, unable to agree with the majority of the Court on three points. The following considerations prompted my dissent:

1. The applicant alleges a violation of Article 14 of the Convention, taken in conjunction with Article 6 para. 1 (art. 14+6-1). She complains, notably, that she is the victim of treatment involving discrimination on the ground of property: in view of her financial situation, the high costs of judicial separation proceedings in fact block her access to the courts.

This claim should have been examined by the Court. On the one hand, following the same approach as the judgment and taking its actual wording (paragraph 30), there can be no doubt that in making the claim in question the applicant was complaining of a "clear inequality" of treatment which is based on property and is a "fundamental aspect" of the case. On the other hand, the fact that the Court had found a violation of Article 6 para. 1 (art. 6-1) taken alone did not dispense it from examining the case under Article 14 (art. 14) as well. It does not appear to me that paragraph 30 of the judgment is correct when it draws, in relation to the taking into consideration of Article 14 (art. 14), a distinction that depends on whether or not there is a violation of a provision of the Convention enshrining a particular right. Discrimination in the enjoyment of a right protected by the Convention contravenes Article 14 (art. 14) irrespective of whether such discrimination lies within or outside the area of violation of that right. The word "enjoyment", within the meaning of Article 14 (art. 14), must cover all situations that may arise between, at the one extreme, plain refusal of a right protected by the Convention and, at the other, full embodiment of that right in the domestic system. It is for these reasons that I replied in the affirmative to the question whether it was necessary to rule on the possible violation of Article 14 taken in conjunction with Article 6 para. 1 (art. 14+6-1) (point 5 of the operative provisions of the judgment).

2. I voted for the absence of a violation of Article 8 (art. 8) (paragraphs 31-33 of the judgment and point 6 of the operative provisions). I was, in fact, unable to perceive a violation of a right protected directly or indirectly by this provision. In my view, the facts put before the Court disclose a violation which goes not to the substance of a right but to its procedural superstructure and is, therefore, covered and absorbed by Article 6 para. 1 (art. 6-1).

3. The Court should, in my opinion, have undertaken an examination of the claim based on the violation of Article 13 (art. 13) (paragraphs 34-35 of the judgment and point 7 of the operative provisions). The judicial proceedings contemplated by Article 6 para. 1 (art. 6-1) concern civil rights, in the present case the right to a judicial separation. On the other hand, the

remedy mentioned in Article 13 (art. 13) refers to the fundamental rights protected by the Convention, in the present case the right of access to the courts, as it results from Article 6 para. 1 (art. 6-1). Accordingly, there was not any overlapping or absorption as regards the two provisions.