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. THÓR VILHJÁLMSSON,
Mr. W GANSCHOF VAN DER MEERSCH,
Mr. D. EVRIGENIS,
Mr. L. LIESCH,
Mr. F. GÖLCÜKLÜ,
Mr. B. WALSH,

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

Having deliberated in private on 24 November 1980 and 31 January 1981,

Delivers the following judgment, which was adopted on the last-mentioned date, on the application in the present case of Article 50 (art. 50) of the Convention:

PROCEDURE AND FACTS

1. The Airey case was referred to the Court by the European Commission of Human Rights ("the Commission") in May 1978. The case originated in an application against Ireland lodged with the Commission in 1973 by Mrs. Johanna Airey.

The only outstanding matter to be settled is the question of the application of Article 50 (art. 50) in the present case. Accordingly, as regards the facts, the Court will confine itself here to giving the pertinent details; for further particulars, reference should be made to paragraphs 8 to 12 of the Court's judgment of 9 October 1979 (Series A no. 32, pp. 6-8).

2. By that judgment, the Court held, inter alia, that there had been breach of Articles 6 par. 1 and 8 (art. 6-1, art. 8) of the Convention by reason of the fact that the applicant did not enjoy an effective right of access to the Irish High Court for the purpose of petitioning for a decree of judicial separation (points 4 and 6 of the operative provisions and paragraphs 20-28 and 31-33 of the reasons, ibid., pp. 19, 11-16 and 17).

3. At the hearing of 22 February 1979, the applicant's counsel had 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.

In its aforesaid judgment, the Court reserved the whole of the question of the application of Article 50 (art. 50). The Commission was invited to submit to the Court, within two months from the delivery of the judgment, the Commission's observations on that question, including notification of any settlement at which the Government of Ireland ("the Government") and the applicant might have arrived (point 8 of the operative provisions and paragraphs 36-37 of the reasons, ibid., pp. 18-19).

4ø. The above-mentioned time-limit was extended by the President several times, on the last occasion until 30 July 1980.

On 17 July 1980, the Secretary to the Commission, acting on the Delegates' instructions, transmitted to the registry copies of correspondence setting out in detail the course of negotiations between the Government and the applicant and revealing that the applicant had rejected a "without prejudice" offer by the Government to pay to her 3,140 Irish pounds in full and final satisfaction of her claims. At the same time, the Secretary stated that the Delegates were of opinion that there was no useful basis on which efforts to reach a settlement could be pursued and that they submitted to the Court that an award under Article 50 (art. 50) should be made "on the basis of the above offer".

By letter of 21 August 1980, the Agent of the Government informed the Deputy Registrar, inter alia, that the Government consented to an award of £ 3,140. On 8 October, the Secretary to the Commission transmitted to the Registrar a telex received from the applicant's legal representative indicating that the applicant did not consider this amount to be fair and reasonable and requested an award in line with her earlier submissions (see paragraph 5 below). On 10 November, the Agent wrote to the Registrar to advise him that, although her Government disputed the applicability of Article 50 (art. 50) to the present case and although they considered a sum of £ 2,140 - which they had initially offered by way of settlement - to be an adequate award, they remained willing to consent to an award of £ 3,140.

5. During the course of the negotiations, proposals for a settlement had been put forward on the applicant's behalf which may be summarised as follows:

a) Mrs. Airey sought an undertaking from the Government to indemnify her against any future legal costs and expenses reasonably incurred in pursuing before the Irish courts the remedy of judicial separation ("the domestic costs").

b) Compensation was requested in respect of:

- travelling and miscellaneous expenses: £ 140;
- loss on re-housing: £ 1,500;

- legal costs and expenses referable to the proceedings before the Convention institutions ("the Strasbourg costs"): £ 9,984.41.

c) It was alleged that Mrs. Airey had suffered severe mental anxiety and that her own and her children's health had been adversely affected; further, her inability for financial reasons to obtain a maintenance or garnishee order in the High Court was said to have caused her constant financial difficulties, to have obliged her to take unsuitable employment and to have resulted in her children's being denied normal educational facilities and opportunities. The applicant's solicitors suggested a figure of £ 2,000 in respect of this item.

6. On 9 September 1980, Mrs. Airey applied, under the Scheme of Civil Legal Aid and Advice introduced in Ireland on 15 August 1980, for legal aid in order to petition for judicial separation. However, the competent office informed her on 8 October that she appeared to be ineligible on the basis of the means test.

On 10 November, the Secretary to the Commission informed the Registrar that, should the applicant not be granted legal aid, the Delegates would regard it as an important element in any award under Article 50 (art. 50) that her legal costs for a separation action be underwritten by the Government. The Secretary also transmitted to the registry a copy of a letter received from the applicant's solicitors, Messrs. Walsh O'Connor and Company, in which they requested that, if she were denied legal aid, she should be awarded an additional sum to enable her to instruct solicitor and counsel to represent her in separation proceedings.

On 21 November, the Agent of the Government wrote to the Registrar in the following terms.

"...

In the light of the information provided by Walsh, O'Connor and Company indicating that Mrs. Airey, whose financial position appears to have improved since the events which gave rise to the Court's judgment in her case, may not be granted legal aid under the Scheme and in view of the course of the proceedings in this particular case, my Government has decided to underwrite her reasonable costs of retaining Solicitor and Counsel for the purpose of taking proceedings for a legal separation, such costs to be taxed as between solicitor and client (i.e. independently assessed by the Courts) in default of agreement thereon between Mrs. Airey and the Government.

"...

The Secretary to the Commission transmitted to the Registrar on 17 December a copy of a letter of 11 December from Messrs. Walsh O'Connor and Company, which read:

"... We quote from our client's letter of instructions to us 'I
accept the Government's offer of costs for my legal separation but reject their offer of £ 3,140 compensation' etc., from which you will see that we will be instituting proceedings against Mr. Airey on behalf of Mrs. Airey claiming a legal separation and relying on the Government's undertaking to underwrite our client's costs in the matter.

..."

7. In accordance with a request by the President of the Chamber, the Secretary to the Commission filed certain documents with the registry on 20 November.

8. Having consulted, through the Registrar, the Agent of the Government and the Delegates of the Commission, the Court decided on 24 November 1980 that there was no call to hold oral hearings.

Mr. O'Donoghue, the elected judge of Irish nationality who had taken part in the adoption of the judgment of 9 October 1979 and whose term of office expired on 20 January 1980, was in principle called upon to continue to sit in this case (Article 40 par. 6 of the Convention and Rule 2 par. 3 of the Rules of Court) (art. 40-6). However, on account of his inability to attend, his place was taken by his successor, Mr. Walsh.

AS TO THE LAW

I. The applicability of Article 50 (art. 50)

9. Article 50 (art. 50) of the Convention reads as follows:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

Although the Government appeared to question the applicability of this provision in the present case (see paragraph 4 in fine above), they have not indicated their reasons for so doing.

The Article (art. 50) is applicable, in the opinion of the Court. It recalls that there is no room in this context to distinguish between acts and omissions; again, Mrs. Airey is clearly an "injured party" - a phrase synonymous with the term "victim" as used in Article 25 (art. 25) - in the sense that she was the person directly affected by the failure to observe the Convention, which the Court found in its judgment of 9 October 1979 (see the De Wilde, Ooms and Versyp judgment of 10 March 1972, Series A no. 14, pp. 10-11, par. 22-23). Finally, it has not been suggested that Irish law allows complete reparation, as that concept is understood in the Court's case-law (see, inter alia, ibid., pp. 9-10, par. 20), to be made for the consequences of that failure.

II. The application of Article 50 (art. 50)
10. Since its judgment of 9 October 1979, the Court has been informed of an agreement reached between the respondent State and the applicant as regards the claim relative to the domestic costs (see paragraphs 5 (a) and 6 above). As is required by Rule 50 par. 5 of its Rules, the Court has verified the "equitable nature" of this agreement and, having regard to the absence of objection on the part of the Commission's Delegates, it entertains no doubts on the matter. Accordingly, the Court takes formal note of the agreement and concludes that there is no longer any necessity for it to consider this claim further.

11. During the settlement negotiations (see paragraph 4 above), the Government did not contest the amount of £140 claimed for travelling and miscellaneous expenses but rejected the applicant's claims in respect of her alleged loss on re-housing and the Strasbourg costs (see paragraph 5 (b) above). The Court will examine the last two items first.

12. Mrs. Airey moved house in 1977. As a tenant, she had certain possibilities of purchasing her home under the Tenant Purchase Scheme operated by her landlord, Cork Corporation. She claimed that her move, which she attributed to her inability to gain effective access to a remedy for breakdown of marriage, the consequent deterioration in her position and her apprehension that her husband might attempt to return and live with her, had occasioned her a loss of £1,500 representing the difference in market value, as at July 1977, between the two premises in question.

The Government replied that the applicant had not established any loss, her interest in both premises being no more than that of a tenant. They added that there was no causal relation between her decision to move and the absence, in 1977, of legal aid for separation proceedings.

Assuming that Mrs. Airey has suffered the loss which she alleged, the Court does not consider that it can be attributed to the violations found in its judgment of 9 October 1979. Her decision to move appears to have been motivated not by the fact that she did not enjoy an effective right of access to the High Court for the purpose of petitioning for judicial separation but rather by her general situation underlying her wish to have such access and, in particular, by her fear of molestation by her husband. Besides, even if she had obtained a separation decree, she would have remained subject to the risk of the molestation which rightly or wrongly she apprehended. The Court accordingly rejects this claim.

13. The same must apply to the claim in respect of the Strasbourg costs. Mrs. Airey, who alone has the status of "injured party" for the purposes of Article 50 (art. 50), had the benefit of free legal aid before the Commission and then, after reference of the case to the Court, in her relations with the Delegates (addendum to the Commission's Rules of Procedure). She has not established that she paid or is liable to pay to her lawyers additional fees for which she might seek reimbursement; it follows that, in this respect, she has borne no costs herself and has suffered no loss capable of being compensated under Article 50 (art. 50) (see the Luedicke, Belkacem and
14. The Government have expressed their continuing willingness to consent to an award of £3,140 (see paragraph 4 in fine above). The Court considers this figure to be fair and reasonable and accordingly affords to the applicant, as far as the remainder of her claims is concerned, satisfaction of that amount.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Takes formal note of the agreement between the Government and the applicant concerning the domestic costs;

2. Rejects the applicant's claims in respect of her alleged loss on re-housing and the Strasbourg costs;

3. Holds that Ireland is to pay to the applicant, in respect of the remainder of her claims, the sum of three thousand one hundred and forty Irish pounds (£3,140).

Done in English and in French, the English text being authentic, at the Human Rights Building, Strasbourg, this sixth day of February, one thousand nine hundred and eighty-one.

For the President
Signed: Léon LIÉSCH
Judge

Signed: Marc-André EISSEN
Registrar
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. GANSF\HOF 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 41.3.2° 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 admissibility (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 "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, Oom