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EUROPEAN COMMISSION
OF HUMAN RIGHTS

Application No. 6289/73

Johanna AIREY
against
IRELAND

Report of the Commission

(Adopted on 9 March 1977)

STRASBOURG

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I. Introduction

1. The following is an outline of the case as it has been submitted by the parties to the European Commission of Human Rights.

2. The applicant, Mrs. Johanna Airey, born in 1932, is an Irish national who is presently living in Cork. She is a married woman with four children, born in 1954, 1955, 1958 and 1965 respectively.

The substance of the applicant's complaints

3. In January 1972, the applicant's husband, Mr. Timothy Airey, appeared in the District Court of Cork City charged with assaulting the applicant. The Court convicted Mr. Airey and ordered him to pay a nominal fine of 25 pence with the sum of £3.15 costs to the applicant. After this case, since about 1972, the applicant's husband has lived apart from the applicant, leaving her in possession of the family home.

4. Before the Commission, the applicant made various complaints in connection with the 1972 proceedings against her husband and in connection with an alleged assault by the police and unlawful detention for three days in 1973. However, her main complaint was that the State had failed to protect her from an allegedly alcoholic and violent husband in that, because of the high cost of separation proceedings in the High Court, she could not obtain a judicial separation. In this respect she invoked Art. 6 (1) on the basis that her right of access to a court was effectively denied due to prohibitive legal costs. She also invoked Art. 8 of the Convention submitting that the failure by the State to provide an accessible legal remedy of judicial separation was an interference with the right to respect for family life and the home. Further the applicant claimed that the situation as described by her was discriminatory contrary to Art. 14 of the Convention because, in reality, the remedy of a full legal separation was a facility for those who could afford to pay the high costs involved and was denied to those without such resources. Finally, the applicant submitted that Art. 13 of the Convention was violated in that the applicant was denied an effective remedy for her complaint.

Proceedings before the Commission

5. The present application was lodged with the Commission on 14 June 1973 and registered on 19 September 1973.

On 1 October 1975 the Commission decided, in accordance with Rule 42 (2)(b) of its Rules of Procedure, to notify the respondent Government of the application and invite them to submit their written observations on the admissibility of the case in the light of Arts. 6 (1) and 8 of the Convention.

6. The Government submitted the said observations on 3 December 1975 to which the applicant replied on 29 December 1975.

On 15 July 1976 the Commission declared the application inadmissible, insofar as the case concerned the applicant's complaints of an unfair hearing in January 1972, an unlawful assault by the police and unlawful detention for four days in June 1973, although no formal partial decision on admissibility was drawn up at that stage in the procedure. It was also decided, in accordance with the aforementioned Rule 42 (2)(b) in fine, to invite the parties to submit further written observations on the admissibility of whether the alleged denial of access to the Courts for judicial separation due to prohibitive costs could raise an issue under Art. 6 (1) of the Convention as interpreted by the European Court of Human Rights in the Golder case.

7. The Government submitted their observations on 28 August 1976. The applicant, after being granted legal aid by the Commission on 17 December 1976, submitted her observations through her solicitors, Messrs. Brendan Walsh & Co., Dublin, on 20 December 1976. The Commission held an oral hearing on the admissibility and merits of the application in Strasbourg on 7 July 1977. The applicant was represented by Senator M. Robinson, Barrister-at-law, Mr. B. Walsh, Solicitor, and Mrs. H. Black, Adviser. The Government was represented by Mrs. J. Liddy, Assistant Legal Adviser, Department of Foreign Affairs, Mr. J. Cooke, Barrister-at-law, Mr. D. Doyle, Attorney-General's Office, and Mr. L. Lysaght, Chief State Solicitor.

8. After the hearing on 7 July 1977 the Commission declared admissible the remaining complaint concerning the accessibility of the remedy of judicial separation. It is this complaint which is the subject matter of the present Report.

9. The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention after deliberations and votes in plenary session, the following members being present:

MM. J.E.S. Fawcett
G. Sperduti
C.A. Nørgaard
E. Busuttil
L. Kellberg
B. Daver
T. Opsahl
J. Custers
C.H.F. Polak
J.A. Frowein
G. Jörundsson
S. Trechsel
B. Kiernan
N. Klecker

10. The text of the Report was adopted by the Commission on 9 March 1978 and is now transmitted to the Committee of Ministers in accordance with Art. 31 (2).

11. A friendly settlement of the case has not been reached and the purpose of the present Report, pursuant to Art. 31 of the Convention, is accordingly:

- (1) to establish the facts; and
- (2) to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

12. A Schedule setting out the history of proceedings before the Commission and the Commission's Decision on Admissibility in the case are attached hereto as Appendices I and II. An account of the Commission's unsuccessful attempt to reach a friendly settlement has been produced as a separate document (Appendix III).

13. The full text of the pleadings of the parties, together with the documents lodged as exhibits, are held in the archives of the Commission and are available to the Committee of Ministers, if required.

II. Establishment of the Facts

14. The facts concerning the admissible complaint about the accessibility in Ireland of the remedy of judicial separation (divorce a mensa et thoro) are as follows:

In January 1972 the applicant's husband, Timothy Airey, appeared in the District Court of Cork City and was convicted of assaulting the applicant and ordered to pay a nominal fine of 25 pence. In June 1972 Mr. Airey left the matrimonial home and has not returned since. The applicant has four children and is in receipt of unemployment benefit from the State and regular maintenance of £20 per week from her husband. Her husband is employed as a lorry driver. The Commission does not, for the purpose of the present application, make any finding concerning the facts of his behaviour and the allegations made against him by the applicant.

15. Since June 1972 the applicant has been seeking to obtain judicial separation from her husband. Under Art. 41 of the Irish Constitution divorce in the sense of a full dissolution of the marriage (divorce a vinculo matrimonii) is not legally possible. However, Irish law does provide the possibility of obtaining either a judicial separation or an agreed separation by way of a deed of separation which is legally binding on the parties. The only grounds for which the relief of judicial separation can be granted are cruelty, adultery or unnatural practices. Both remedies relieve a spouse from the duty of cohabiting with the other by suspending the cohabitation obligation of marriage. It is also possible to seek an annulment of a marriage through the marriage tribunals of the Catholic Church. However, such an annulment does not affect the continuing existence of the marriage under Irish law.

16. It is established from the submissions of both parties that the costs in proceedings for judicial separation depend upon a variety of factors such as whether the action is contested or uncontested, the complexity of the legal issues in the case, the number of witnesses involved and the requirement of psychiatric or other medical evidence. It is not in dispute between the parties that the average range of costs, taking these factors into consideration, could be between £500-£700 in an uncontested separation and £800-£1,200 in contested proceedings. Furthermore, when asked about the worker's average annual wage, the parties tentatively estimated it to be between £2,000-£2,700. This figure is substantially confirmed by statistics on the average wage in manufacturing industries in Ireland issued by the Irish Central Statistics Office (1).

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(1) Average weekly wage in manufacturing industries for 1976 was £52.60 (£2,730 p.a.). (Source: Quarterly Industrial Inquiry (1976) issued by the Central Statistics Office in Dublin)

17. It is also established that legal aid is not obtainable for purposes of seeking judicial separation. The costs of a judicial separation in the case of a successful petition by a wife would be awarded against the husband.

18. In 1972 the applicant tried to obtain a separation by consent by having a deed of separation drawn up by a solicitor but was unable to obtain the agreement of her husband. Furthermore she has consulted several solicitors since the breakdown of her marriage with a view to obtaining a judicial separation but has been unable, in the absence of legal aid, and having no money to pay for proceedings herself, to find a solicitor willing to initiate proceedings.

III. Submissions of the Parties

The applicant's submissions

General observations

19. The applicant first described the present state of the law in Ireland as regards legal aid in family law matters. In this respect she quoted the following passage from a book entitled "Family Law in the Republic of Ireland" by Alan Shatter (1977, Wolfhound Press, Dublin):

"The law as to costs is based on the principle that if a husband was not obliged to pay his wife's costs, as the latter in the majority of cases has little or no means of her own, she would be unable to secure legal assistance and would be powerless no matter how strong her case. In practice, the help that the law gives in this area is not great. If a wife is unable to afford to pay legal fees herself, it is often impossible for her to obtain legal representation for a family law matter. The fundamental drawback is that the majority of husbands against whom wives desire to proceed rarely have sufficient funds to pay their own costs. Solicitors awarded costs in family law matters do not want to have to spend time bringing proceedings themselves against recalcitrant husbands to enforce the award.

.....

The most fundamental defect in the Irish legal system is the absence of a comprehensive state system of free legal aid and advice. Whilst the State does provide free legal aid in limited circumstances for persons charged with criminal offences, no such aid or advice is provided for civil matters. As a consequence of this many of those who cannot afford to pay legal fees are unable to avail of the family law remedies that could be of assistance to them.

The need for the State to provide free legal assistance for family law matters has been clearly demonstrated by the work of the Free Legal Advice Centres (F.L.A.C.) in Dublin. This voluntary organisation has in the eight years of its existence assisted over 16,218 clients, 5,751 of whom have sought help for a problem classified as coming within the category of family law. Despite the number of clients that have sought its help, F.L.A.C. still believes that it is only dealing with a 'small proportion of the problems that arise within the particular areas in Dublin City where the centres operate'." (p. 20)

20. The applicant pointed out that while it was true to say that there was a legal tradition in Ireland of lawyers who were prepared to take matrimonial proceedings for no fee, it had to be recognised that this was something which depended on being fortunate enough to find a barrister or solicitor who was willing, out of charity, to act for nothing. Furthermore it was argued that this tradition of charity was no substitute for the obligation on the Irish Government to ensure observance of the Articles of the Convention and prevent hardship to its citizens.

21. In response to the suggestion by the respondent Government that it would have been open to the applicant to present her own case before the High Court in Ireland, it was agreed that in theory this was a possibility since legal representation was not essential before the Court. However, the applicant maintained that, because of the technical nature of the proceedings and the complexity of High Court practice and procedure it would be very rare for an individual to go into the Irish High Court in matrimonial proceedings without having legal representation. It was submitted that although solicitors in Ireland have a full right of access to every court including the High Court and the Supreme Court it was very unusual for them to exercise their right in full proceedings. It would certainly be beyond the capacity of a person in the circumstances of the applicant to start mounting a High Court case of the nature which she felt was essential to protect her in her family life.

Costs of judicial separation

22. The applicant stated that according to the Rules of the High Court (Rules of the Superior Courts, Order 70, Rules 74-80) the general rule was that a husband would be held liable, after separation proceedings, for all costs reasonably and properly incurred by his wife. The procedure is that the costs were prepared by a cost accountant and then submitted to and ruled on by a Taxing Master.

The applicant pointed out that costs depended on the subjective circumstances of each case and varied according to such factors as the number and type of witnesses (e.g. medical witnesses) and the complexity of the issues involved.

23. In support of the argument that the possible costs of proceedings in her case, assuming it was contested, would be £1,300 (approx.) the applicant submitted six random examples of costs supplied by a legal costs accountant. These costs were drawn up in 1974.

In Case 1 there were no children and no question of custody. The husband did not co-operate with the proceedings and several witnesses were called. Costs were taxed at £1,429.

In Case 2 there was a straightforward uncontested separation proceeding. Costs were taxed at £722.

In Case 3 the application for divorce a mensa et thoro ran concurrently with a procedure for guardianship. Costs were taxed at £1,221 for the separation and £580 for the guardianship proceedings.

In Case 4 again a routine proceeding, uncontested with no special difficulty. Costs were taxed at £867.

In Case 5 the application for separation was coupled with a procedure for guardianship. The husband put in an appearance but did not contest the question of custody. Costs were taxed at £792.

In Case 6, which the applicant submitted came closest to her situation, had she been able to get a solicitor, the proceedings were contested and a lot of witnesses were called to establish the alleged facts. Costs were taxed at £1,366.

24. The applicant concluded that the demonstrably high costs of these proceedings for a woman who had no independent income meant that solicitors who knew that the husband would ultimately have to bear the costs but also knew the husband's level of income would not be prepared to take the risks involved. The result, the applicant claimed, was that there were very few petitions in the Irish High Court for judicial separation. It was pointed out, for example, that in 1976 forty to fifty petitions were filed, but only two or three were actually followed through and finalised.

Alternative remedies under Irish law

25. The applicant noted the possibility of being able to secure a separation by way of a separation agreement. She submitted that she had a solicitor draw up a separation agreement for her in 1972 but claimed that her husband refused to come to her solicitor's office to sign it.

26. Nor did the applicant consider that the remedy for her complaint lay in seeking an order from a court under S.22 of the Family Law (Maintenance of Spouses and Children) Act 1976 (referred to hereafter in this Report as the 1976 Act) (1), barring her husband from coming into the matrimonial home. First the remedy was only available as from 1976 and not 1972 when the applicant was in need of protection. In this regard the applicant submitted that the Commission in determining Ireland's responsibility under the Convention should only look at those remedies which were available at the time the applicant was making her application to the Commission, namely 1973.

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(1) "22.-(1) 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." (Emphasis added.)

27. Secondly, the applicant argued that even if the 1976 Act was at all relevant it would not be open to her to avail of it because it only applied to situations where the husband "resides" with the spouse, which was not the case here. The applicant noted that on a possible construction of the language in S.22 an order could be made whether or not the husband was residing with his wife. However, she submitted that there has as yet been no case-law interpreting S.22 authoritatively on this point and in her view the language of the section could carry other interpretations. For example, the word "and" in the section (see underlining) could convey the meaning that although the husband and wife had been residing together at the time of the application for a barring order, the husband was no longer residing at the matrimonial home when the time for the making of the order arrived. This, it was submitted, was a possible construction of an ambiguous section.

Article 6 (1)

28. The applicant claimed that because of the prohibitive cost of seeking judicial separation in the High Court she could not obtain a legal separation from her husband. She claimed that Art. 6 (1) of the Convention is thereby violated in that she does not have access to a fair and public hearing by an independent and impartial tribunal within a reasonable time to determine her civil rights because the cost of the procedures is prohibitive and has acted as an effective deterrent. She maintained that her position is not unique and that a considerable number of married women in Ireland are similarly prevented from securing the protection of the law and getting access to the courts.

29. In this respect the applicant argued that Art. 6 must be construed as imposing on signatory States the obligation to provide a right of actual access to the court to obtain the necessary remedy, in particular when this concerns basic protection under family law. The applicant wants to be legally separated from her husband. She can only get this remedy in the Irish High Court, but her access to this Court is barred by the fact that in view of the costs of necessary legal representation she cannot afford to institute High Court proceedings and there is no State assistance available to her by way of legal aid and no other means provided of securing effective access of redress.

30. She submitted that the above interpretation of Art. 6 can be derived from the Golder case. In that case the Court said:

"The Court thus reaches the conclusion, without needing to resort to 'supplementary means of interpretation' as envisaged at Article 32 of the Vienna Convention, that 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. In this way the Article embodies the 'right to a court' of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Art. 6 (1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum the whole makes up the right to a fair hearing." (European Court of Human Rights; judgment of 21 February 1975, Series A, Vol. 18, at p. 18.)

31. The applicant submitted that this principle whereby a civil claim must be capable of being submitted to a judge ranked as one of the universally recognised fundamental principles of law, as for example the principle of international law which forbids the denial of justice. Art. 6 must be read in the light of these principles. The fair, public and expeditious characteristics of judicial proceedings detailed in the rest of Art. 6 are of no value at all if there are no judicial proceedings. In the present case it was agreed that Irish Courts are fair and impartial and that if legal representation could be secured there would be no discrimination in obtaining a remedy. However, it was emphasised that the cause of the complaint was that the applicant did not get access at all to the High Court.

Article 8

32. The applicant pointed out that Art. 8 obliges the State to respect a person's private and family life, his home and his correspondence. On its face, Art. 8 does not require the State to do anything positive in relation to family life. However, the State in fact intervenes by regulating family life, e.g. by its laws relating to marriage, separation and divorce, maintenance, the welfare and custody of children and civil nullity. It was submitted that where a State by its laws creates civil rights and obligations concerning marriage, in the civil regulation of family life, and fails to provide an accessible legal remedy to protect such right and obligations it interferes with the right for family life and the home.

33. The relationship of husband and wife gives rise to civil rights as between each of the parties to a marriage and the State which regulates the institution of marriage through its laws. Effective denial of access to the appropriate court in a matrimonial matter, it was stated, is an interference with the right to respect for family life and as such constitutes a violation of Art. 8. The applicant seeks basic protection for herself and her children from an allegedly violent and alcoholic husband, and she claims that Ireland denies her this protection in the form of an effective legal remedy.

Article 14

34. The applicant maintained that Ireland has violated the provisions of this Article insofar as the high cost of bringing proceedings for a legal separation in the High Court, and the absence of civil legal aid or an effective alternative remedy, constitute a discrimination on the basis of property. The reality in Ireland is that the remedy of a full legal separation, divorce a mensa et thoro, is a facility for those who can afford to pay the high costs involved and is denied to those without such resources. Since the applicant has a minimal income and her husband is a lorry driver with relatively low wages, she is effectively deprived of the capacity to take matrimonial proceedings in the High Court in Ireland.

35. The applicant submitted that this amounts to differential treatment which violates Art. 14, and in this context referred to the following statement by Mr. Opsahl as a Delegate of the Commission before the Court in the Golder case:

"Another point of a more general nature should also be made, again regarding differential treatment in respect of access. It may be submitted that differential treatment regarding access to courts may raise an issue under Art. 14 irrespective of the interpretation of Art. 6. I shall try to explain what I have in mind here. This is a point of view which, I should emphasise, has not been brought forward in the pleadings and has not been discussed by the Commission, so it is only a personal observation. I think one can make the point starting with one interpretation of Art. 6 which is not in dispute. Art. 6 grants no access to courts of appeal. It is normally said that the right to a fair hearing does not involve the right to an appeal. But it is also generally recognised that if there are courts of appeal and access to them, then that must be afforded on the same terms to everybody who seeks it, prisoners and others. I think the practice of the United Kingdom Government regarding prisoners who have got pending litigation would be to recognise exactly that. If, on the Government's interpretation of Art. 6, there is not only no right of access to courts of appeal, but there is no right of access to courts at all, would not then the same reasoning apply? Once there are courts in the country, would not access to them be granted under Art. 14 in conjunction with Art. 6, unless the differentiation can be justified as earlier examined by this Court." (European Court of Human Rights, Series B, No. 16, Golder Case, p. 226.)

36. The applicant submitted that this was a proper construction of Art. 14 and Art. 6 and that the differentiation in the present case, whereby a rich neighbour could afford to bring proceedings, was totally unjustified and violated Art. 14.

Article 13

37. The applicant also referred to Art. 13 which provides that where a person's rights and freedoms as set forth in the Convention are violated that person shall have "an effective remedy before a national authority". She conceded that the provision of free legal aid is not the only means of enabling people with small means to have access to the courts to secure a legal separation. For example, provision could be made for access to a less costly tribunal than the High Court. Alternatively, an official could be appointed with the specific functions of assisting persons in bringing their cases before the High Court. It was worth noting that the Committee on Court Practice and Procedure in its 19th Interim Report on "Desertion and Maintenance" published on 12 February 1974 recommended the establishment of a whole time official solicitor to assist deserted wives in Ireland (p. 16).

38. The applicant also pointed out that a separate committee, known as the Pringle Committee on Civil Legal Aid and Advice, was established in 1974 but had as yet not reported.

39. By its failure to provide any alternative remedy to compensate for the absence of a system of free legal aid, it was submitted that Ireland has violated Art. 13 and denied the applicant an effective remedy.

Submissions of the respondent Government

General

40. The Government first pointed out that it would be wrong to get the impression from the applicant's submissions that family law in Ireland was not the subject of continuing reform. Major changes in matrimonial and family law have been enacted in Ireland in the last three years. For example, the Family Law (Maintenance of Spouses and Children) Act of 1976 extended and improved the jurisdiction and powers of the District Court and Circuit Courts in making orders for financial support of spouses and children, and it provided for the making of payments through the courts rather than direct from husband to wife. It also provides for a system of attachment of earnings, and the possibility of a spouse seeking a "barring order" from the District Court in order to prevent one spouse from coming to the matrimonial home. A further act entitled The Family Home Protection Act 1976 prevents one spouse from selling or disposing of the family home without the consent of the other spouse and without going to court and obtaining a court order. In addition a White Paper and a draft Bill were published last year with a view to reforming the law relating to nullity of marriage. It was further pointed out that there was a Committee deliberating on the provision of legal aid in civil matters. The terms of reference of the Committee were to advise on the introduction at an early date of a comprehensive scheme of legal aid and advice in civil matters and to recommend on the form, nature and administration of the scheme and on the legislation that is necessary to establish it, and to consider whether, pending the introduction of a fully comprehensive scheme it would be desirable and possible to develop as a matter of urgency, a system of legal aid and advice in certain categories of cases which the Committee considered merited immediate consideration.

41. Accordingly the Government concluded that it would be wrong to suggest that Irish law in relation to family matters had been virtually static since the last century. On the contrary, it was clear that this area of law had received considerable attention and concentration as far as reform was concerned.

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Remedies

42. The Government submitted that judicial separation is only one of a number of remedies which have the effect in practice of giving a legal and enforceable sanction to the non-cohabitation of a husband and wife. There was, for example, a Deed of Separation. Although under Irish law the marriage itself could never be dissolved, either by a court or by agreement, it is open to the parties to contract in a legally binding manner as to the terms upon which they will live apart from one another. Deeds of Separation provide for all the topics which the parties themselves may wish to cover. For example, they cover the separation itself, custody of children, access, payment of maintenance, and income tax arrangements. The husband and wife would enter into mutual covenants, of which the following is typical:

"That the wife may at all times hereafter live separately from the husband as if she was sole and unmarried and that she should be free from the control and authority of the husband and may reside at such places as she shall think fit. That the husband will not in any manner molest, disturb, or in any way interfere with the wife in her person, or business, or in her manner of living, or at any time hereafter require the wife to cohabit or take any proceedings to compel her to do so, or to enforce restitution of conjugal rights so that the wife may at all times live as if she were sole and unmarried."

43. The Government submitted that there is little difference of effect between a Deed of Separation and a decree of judicial separation. Both have the same practical effect of giving a legal and enforceable sanction to the de facto suspension of the obligation to live together.

44. In relation to the second remedy, namely, judicial separation the Government conceded that at present no legal aid is available for this form of procedure. However, it was argued that the claims made by the applicant as to the expense of this procedure were exaggerated. The Government claimed that the last uncontested case of judicial separation in 1976 which was taxed by the Taxing Master of the High Court cost approximately £484. Further the Chief State Solicitor's advice was that in a defended case, the costs would probably run to around £800. However, the Government pointed out that one of the major factors in bills of costs are witnesses' expenses. The cases vary very much from one to the other, depending particularly upon whether psychiatric and other medical evidence is called. However, it was claimed that in uncontested cases where the facts are not substantially disputed the only witnesses would be the two parties concerned. In this situation the costs would be quite low. It was further pointed out that another factor to be borne in mind when considering the question of costs, was that a large number of cases were settled almost immediately after the proceedings started and long before high expenses were incurred. The method of settlement would take the form of an agreed Deed of Separation.

45. In this respect the Government pointed out that it would be open to the applicant to exercise direct personal access. Under Irish law legal representation is neither obligatory nor essential in an Irish court. Every citizen has a constitutional right of direct personal access to all courts and, in cases where a personal litigant is not represented by lawyers, both judges and officials of the courts are particularly careful to ensure that the applicant's case is properly brought out. There was no basis for the suggestion that legal representation is absolutely essential in a straightforward application for judicial separation where there are good grounds for the separation and no major dispute as to the facts.

46. In addition the Government stated that it was one of the proud traditions of the legal profession in Ireland that any litigant who has no money but who has a "stateable" case will not go unrepresented. Most solicitors would be content, in those circumstances, if their outlay of about £20 for stamp duties on documents was covered. Further the vast majority of solicitors would be willing to act in deserving cases in the hope of obtaining the costs from the other side. Finally it was pointed out that since solicitors have a full right of audience in the High Court it was not necessary to retain counsel.

47. The Government contended that there was a third remedy available to the applicant to prevent her from molestation by her husband. This remedy was to be found in S.22 of the Family Law (Maintenance of Spouses and Children) Act of 1976. This Act provides a simple, cheap and free procedure whereby a spouse can apply to the District Court to obtain both financial support from her husband and at the same time and in the same application an order from the court which bars the husband from going near her home. S.22, paragraph 1, of the Act provides as follows:

"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."

48. The Government pointed out that the significant aspect of the remedy provided by S.22 was that it enabled the wife in the same proceedings as an application for maintenance, to ask the judge to make an order under S.22 barring her husband from coming into the matrimonial home. It was conceded that "barring" orders made by the court have to be renewed every three months, but the Government did not accept that this meant that the spouse must go through the procedure of issuing a summons and returning to court. The Government argued that what happened in practice was that the District Justice makes an order barring the husband from the home for three months and then adjourns the application to the end of the three months period so that he can review

the situation and if necessary extend the order for a further three months. There was no need to start fresh proceedings. Accordingly it was claimed that the barring order has proved of considerable effect and benefit to many people and could not be dismissed as being ineffective.

49. The Government submitted that the applicant, according to her statements, did not appear to seek a matrimonial remedy for its own sake. It was pointed out that what she wanted, in reality, was for the State to protect her from her allegedly violent and alcoholic husband. Accordingly, it was submitted by the Government that this could be achieved both by a barring order under S.22 and by a Deed of Separation. The same protection could be achieved by taking an ordinary action, as the applicant did in 1972, in the courts for assault.

Article 6

50. The Government pointed out that the applicant claims she has a civil right which she is unable to protect because she is denied access to the High Court by the absence of financial assistance for such proceedings.

However, it was not clear which civil right the applicant claims to have been violated. Was it the right to be protected from violence or the right to obtain a judicial separation from her husband? The Government considers that if the civil right she was relying on is the right to be protected from violence, then the answer is clear. Violence and assault are crimes and matters for the criminal law for which the protection of the lowest court is available, just as it was in 1972 when the applicant brought her prosecution. In addition the applicant would have the cheap, effective and accessible remedy under the 1976 Act.

51. The Government conceded, however, that if the civil right which is claimed to be violated is the right to obtain a judicial separation for its own sake, then it was the case that such a decree was only obtainable in the High Court. This was because the decree of judicial separation in Ireland, having regard to the fact that the status of marriage and the family unit receive special protection under the Constitution, is regarded as being a significant aspect of the administration of justice. Since it is the legal remedy which comes closest to putting an end to a marital relationship the administration of the remedy is retained in the High Court and not delegated to the courts of lower jurisdiction.

52. The Government submitted that the fact that the applicant has not so far obtained such a determination does not in itself mean that Art. 6 has been violated. The obligation conferred by that Article is to provide by law for the determination of civil rights and criminal charges by an impartial tribunal in fair and public hearings. This

obligation applies to both criminal charges and to the civil laws of the State. The Government pointed out that it was not being suggested that the tribunals in Ireland were not impartial nor that the applicant is a person who would be in some way precluded from access to the High Court for any reason other than her financial circumstances. The only case made by the applicant is that her financial position renders it impractical for her to exercise the undenied right of access to the Court.

53. The Government submitted that in point of fact the applicant had a constitutional right of personal access to the High Court which she cannot be deprived of by law. The Government saw no reason why she should not appear personally and represent herself. It was something that often occurred for litigants to appear personally in the High Court in Ireland. The only expense involved would be stamp duties on documents filed in Court which would amount to only f20. Further, there is no obligation in law upon her to obtain both a solicitor and counsel. She could have a solicitor alone.

54. The Government submitted that a more compelling criticism of the argument based on Art. 6 was that it lacked legal merit. The Article did not confer on States any obligation to provide legal aid in any form of civil litigation. It was pointed out that under Art. 6 (3) there was an obligation to provide legal assistance for persons of insufficient means. However, it was expressly limited to criminal charges. The Government considered that if there had been an intention to create a right to civil legal aid it would have been expressly provided for in the Article.

55. The Government also claimed that this view was supported by the jurisprudence of the Commission. For example, in the case of X. and Y. v. the Netherlands (Decisions and Reports 1, p. 71), the proposition was confirmed as follows:

"Even assuming that the applicants had exhausted the domestic remedies provided for by Dutch law, no right to free proceedings (or right to repayment of costs and fees) in civil matters is as such guaranteed by the Convention."

56. The furthest the Commission went, in that case, was to say that in certain circumstances high costs of proceedings may raise an issue under Art. 6 (1) of the Convention which secures to everyone a right of access to courts and the right to a fair trial. However, the Government considered that the circumstances referred to there could only arise when a State actively and deliberately restricted access by making prior payment of high fees mandatory or legal representation obligatory, so that there was no way that the right of access could be exercised except by meeting some financial obligation which was fixed in advance. This was clearly not the case in Ireland where everyone has a personal constitutional right of access to court without legal

representation. The Government concluded that high costs of proceedings could only give rise to an issue under Art. 6 (1) where it is shown to be the policy of the State to utilise or impose exorbitant or unnecessary financial conditions as a method of limiting access to a court hearing.

57. The Government noted that there was an implication in parts of the applicant's submissions that an extension of the Commission's case-law on the point was justified in this case because her family rights were involved. The problem with this argument, it was stated, was that Art. 6 covers the determination of all civil rights. The applicant's arguments require that Art. 6 be interpreted as creating a right to legal aid in all civil litigations and not just in matrimonial cases. This argument is in direct conflict with the wording of Art. 6 and with a substantial body of jurisprudence developed by the Commission; /for example, Applications Nos. 89/55; 127/55; 134/55; 180/56; 267/57; 727/60; 1013/61; 2308/64; 2804/66; 2857/66; 3873/68; 3925/69; 3904/69./

Article 8

58. The Government suggested that the applicant's reliance on Art. 8 did not appear to be a separate ground of the case, but merely supplementary to the essential argument the applicant makes under Art. 6. The case has never been made that Ireland has failed to respect the applicant's family as such or that it had interfered in the family life of the applicant and her husband. The Government noted that in effect the argument made by the applicant was exactly the opposite, namely that she has been unable to get the State to interfere in her family life so as to bring it to an end. Neither the wording of Art. 8 itself nor the jurisprudence of the Commission, it was argued, implied any duty on the State to facilitate the separation of husband and wife. In fact in Application No. 1783/63 the Commission expressly held that Art. 12, which deals specifically with marriage and the family, did not extend to the dissolution of the marriage or its consequences.

Article 14

59. The Government maintained that there was no discrimination in the true sense under Art. 14. The applicant had argued that her financial difficulties are a discrimination based on property because it is easier for a wealthy person to obtain a judicial separation. However, discrimination does not occur simply because people find themselves in different personal circumstances. It was submitted that Art. 14 meant invidious discrimination in the sense of an unequal application of the same law based solely on the criteria of race, sex or other factors mentioned in Art. 14. So long as the law is applied exactly the same way to all citizens there is no way to prevent it from having unequal effects because of the fact that all citizens are not in equal personal circumstances.

60. For example, it was suggested that a married man with six children might find a £10 parking fine a severe handicap whereas it would be an insignificant amount to a rich bachelor. However, there could be no question of discrimination since in both cases the law has been applied equally. Similarly in this case the High Court remedy of judicial separation is in fact available on absolutely identical terms to all people and the fact that it may have different effects for different people in different circumstances is not a discrimination as to the availability of the remedy. The difference of effect emanates not from the law itself or the right of access to the remedy but from the personal circumstances of the individuals concerned. The Government pointed to the fact that in the Golder case Mr. Golder could not gain access to a solicitor when in prison because the prison rules prevented it. It was not the fact that Mr. Golder was in jail that prevented access, but rather the fact that the right of access was restricted by law in the form of the prison rules.

61. The Government submitted that there was no way any State could ensure that all civil rights were totally immune from the differences of personal circumstances. It was pointed out that in many respects the applicant was in a position of substantial privilege because she resides in the urban area of Cork, with easy physical access to offices of lawyers and the courts. There are many people in the remote areas of Western Ireland for whom it would be a very great hardship to give up a day's work on a farm to travel to a local town to consult a lawyer or to spend a day in Galway at a court. In that sense the application of the law does discriminate between the applicant and people living in remote areas. However, that was not an invidious discrimination of the sort covered by Art. 14. Rather it was one of the purely accidental discriminations based on personal or geographical circumstances.

62. The Government further maintained that a discrimination based on property was one which had the force of law by reference to property qualifications. For example, if the right to judicial separation was dependent upon having a residence, there would be a genuine discrimination under Art. 14 inasmuch as it would be a discrimination which would have the force of law and would emanate from the way in which the law relating to access to a court for judicial separation operated. However, in the present case, the Government submitted, the law of Ireland does not in itself prescribe any qualification of property as a prerequisite for an application for a judicial separation.

Article 13

63. The Government submitted that the argument based on Art. 13 was really an extension of the argument based on Art. 6. It was pointed out that the entire case made by the applicant was based on the proposition that there does exist an effective remedy in Irish law, namely judicial separation. The applicant claims that this is the effective remedy which enables her to obtain a separation from a violent husband. Accordingly the complaint is not that there is no effective remedy but that she has difficulty in gaining access to that remedy by virtue of her own financial circumstances. The Government therefore submitted that Art. 13 was not of any direct relevance to the application.

IV. Points at issue

64. The applicant alleges the following violations of the Convention:

- (1) Art. 6 (1) of the Convention in that the applicant was unable, due to the high costs of the proceedings, to secure an order in the High Court for judicial separation.
- (2) Art. 14 in conjunction with Art. 6 (1) in that the remedy of judicial separation is more easily available to those who can afford to pay than to those without resources.
- (3) Art. 13, in that the applicant was deprived of an effective remedy before a national authority for the violations complained of.
- (4) Art. 8 in that the applicant's rights have been violated by reason of the alleged failure on the part of the respondent Government to ensure that there is an accessible legal procedure to determine rights and obligations which have been created by legislation regulating family matters.

65. In its decision on admissibility of 7 July 1977 the Commission found that the application gave rise to issues under Art. 6 (1), Art. 14, Art. 13 and Art. 8 of the Convention. The Commission now considers for the reasons given below that the only issue requiring examination is the question under Art. 6 (1) of the Convention.

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V. Opinion of the Commission

As to the alleged violation of Art. 6

66. Art. 6 (1) provides 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"

67. The Commission considers that the central point in this case is whether this provision has been violated because the applicant was unable, due to the high costs of the proceedings, to bring an action in the High Court for judicial separation.

68. The Commission observes that a judicial separation involves the determination of a "civil right" within the meaning of Art. 6 (1).

69. The applicant has claimed that, on the basis of statements derived from the European Court of Human Rights judgment in the Golder case, Art. 6 imposes on States an obligation to provide a right of actual access to the court to obtain the remedy of judicial separation. She further maintained that her access to the court is barred by the fact that she cannot afford to institute High Court proceedings and there is no State assistance available to her by way of legal aid and no other means provided for securing redress.

70. The respondent Government have submitted that the applicant is not denied access since she has a constitutional right of personal access to the High Court which she can always exercise, by representing herself. In addition it was claimed that in accordance with the constant jurisprudence of the Commission Art. 6 (1) does not guarantee the right to free legal aid.

71. In the examination of this complaint the Commission has first had regard to the case-law regarding Art. 6 (1). In this respect it observes that it has constantly held in its previous case-law in relation to Art. 6 (1) that the Convention does not guarantee the right to legal aid as such. (See e.g. Application No. 6202/73, *X. and Y. v. the Netherlands*, Decisions and Reports 1, p. 66 at p. 71; Applications Nos. 3873/68, Collection of Decisions 32, p. 44 and 2857/66, Collection of Decisions 29, p. 15).

72. However, the Commission recalls the development of the concept of "right of access" to the courts under Art. 6 (1) and, in particular, the statement by the European Court of Human Rights in the Golder case concerning the structure of Art. 6 (1):

"In this way the Article embodies the 'right to a court' of which the right to access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Art. 6 (1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing." (Judgment of 21 February 1975, Series A, Vol. 18, at p. 18.)

73. Finally, the Commission notes a principle that it has stated in several decisions, namely, that in certain circumstances high costs of proceedings may raise an issue under Art. 6 (1) concerning the right of access to the court and the right to a fair trial (see e.g. Applications Nos. 6958/75, Decisions and Reports 3, p. 155; 6202/75, Decisions and Reports 1, p. 66).

74. In the light of the above case-law, in approaching the issue of whether the State's failure to secure the applicant's access to the High Court is contrary to Art. 6 (1), the Commission has had regard to the particular circumstances of the present case. It would first observe that the applicant has a constitutional right to appear in person in the High Court to plead her own case. In this sense, access to the High Court is not barred by any legal provision. However, the Commission is not of the opinion that this argument can be considered as an adequate response to the applicant's complaint that her access to court is barred by economic obstacles. The Commission considers that it would be unreasonable to expect a person, untrained in the law and procedures associated with judicial separation in Ireland, and so closely affected by the issues involved, to act as her own lawyer during the proceedings.

75. Further, the Commission recalls its observations in its decision on admissibility (1) that the remedy provided in S.22 of the Family Law (Maintenance of Spouses and Children) Act 1976, namely a court order barring a husband from coming into the matrimonial home, cannot be considered as meeting the applicant's complaint since it relates to the conduct of parties to a marriage and does not purport to affect their marital status. Indeed the Commission notes that in any case the remedy provided under S.22 of the 1976 Act was not available to the applicant when she introduced her application to the Commission in June 1973.

76. The Commission observes that the average annual industrial wage in Ireland for 1976 was £2,730. The costs associated with an action for judicial separation depend on a variety of matters such as whether the separation proceedings are contested or uncontested, the number of witnesses to be called and the general complexity of the legal issues involved in the case. The approximate range of costs involved was £500-£700 in an uncontested action and £800-£1,200 in a contested action. The Commission also notes that the applicant is in receipt of

(1) See Appendix II to the present Report.

unemployment benefit from the State and maintenance of £20 per week from her husband.

In these circumstances it is established that she was not in a financial position to meet the high costs required in proceedings for judicial separation.

77. The Commission considers that a right of access to the court cannot be understood as a merely general right which could be made ineffective by economic and other obstacles. The Commission recalls the statement made by the European Court of Human Rights in another context that "Hindrance in fact can contravene the Convention just like a legal impediment" (European Court of Human Rights, Golder Case, Judgment of 21 February 1975, Series A, Vol. 18, p. 13). The Commission is of the opinion that Art. 6 must rather be understood to impose an obligation on the State to secure proper access by removing such obstacles.

78. The extent of this obligation cannot be delimited in detail in connection with particular situations and the Commission notes the work under the auspices of the Council of Europe concerning measures facilitating access to justice (1).

79. The Commission considers that in the circumstances of the present case as set out above, the applicant has been denied effective access to the competent court to pursue what is, in fact, the only adequate remedy connected with the regulation of her family life, because of the high costs involved in the proceedings. It therefore considers that she has been denied her 'right to a court' or 'access to court' as guaranteed by Art. 6 (1) of the Convention.

80. The Commission would stress that this finding does not amount to a requirement of free legal aid to be granted automatically in this or other civil cases. In this respect the Commission is not departing from its settled jurisprudence that the Convention does not guarantee the right to legal aid as such. The Commission considers that the important feature in the present case is the failure to ensure access to the High Court. It observes that this complaint could be removed in several ways. It could, for example, be removed by introducing a system of legal aid dependent on a means test. The Commission notes from a legal aid and advice survey compiled by the Council of Europe's Committee of Experts on Economic and other Obstacles to Civil Proceedings that the majority of signatory States to the Convention in fact adopt this solution. However, it must be observed that the complaint could also be met by the introduction of simplified and cheaper proceedings or the appointment of an official to help in the presentation of the case to the Court.

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(1) In this respect particular reference is made to Resolution (78) 8 on legal aid and advice adopted by the Committee of Ministers on 2 March 1978.

Conclusion

81. The Commission is unanimously of the opinion 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 Art. 6 (1) of the Convention.

As to the alleged violations of Art. 14 in conjunction with Art. 6 (1), and of Art. 13 and Art. 8

82. The Commission is of the opinion that the alleged violation of Art. 14 in conjunction with Art. 6 (1) is essentially based on the complaint concerning the applicant's effective access to the High Court. Since the Commission has unanimously found that the failure of the State to ensure access to the courts in this case amounts to a breach of Art. 6 (1) of the Convention it considers it unnecessary, as in the case of Luedicke, Belkacem, Koc against the Federal Republic of Germany (Report of the Commission, adopted on 18 May 1977, at p. 16) to pursue its examination of the case under this provision.

The Commission reached this conclusion by a unanimous vote.

83. The Commission further considers that, for the same reasons, it is not required to pursue its examination of the case in relation to the applicant's allegations under Arts. 13 and 8 of the Convention.

The Commission reached this conclusion by a unanimous vote in relation to Art. 13, and by a vote of twelve to one with one abstention in relation to Art. 8.

Secretary to the Commission

President of the Commission

(H.C. KRUGER)

(J.E.S. FAWCETT)

APPENDIX I

History of Proceedings

<u>Item</u>	<u>Date</u>	<u>Note</u>
<u>Examination of admissibility</u>		
Introduction of the application	14 June 1973	
Registration of the application	19 September 1973	
Commission's deliberations and decision to notify the respondent Government of the application and to invite them to submit their observations on admissibility	1 October 1975	MM. Fawcett Sperduti Ermacora Welter Busuttil Kellberg Daver Custers Polak Jörundsson Dupuy Tenekides Trechsel Kiernan
Government's observations on admissibility	3 December 1975	
Applicant's observations in reply	29 December 1975	
Commission's deliberations and decision to :	15 July 1976	MM. Fawcett Sperduti Triantafyllides Busuttil Kellberg Opsahl Custers Polak Frowein Dupuy Tenekides Trechsel Kiernan Klecker
- declare the application inadmissible insofar as it concerned complaints of an unfair hearing in 1972, an unlawful assault by the police and unlawful detention in 1973 ;		
- seek further observations on the admissibility of complaints based on Art. 6 (1).		

Item	Date	Note
Government's further observations on admissibility	28 August 1976	
Commission's decision to grant the applicant legal aid	17 December 1976	MM. Fawcett Sperduti Opsahl Custers Frowein Jörundsson Trechsel Kiernan
Applicant's observations in reply	20 December 1976	
Commission's deliberations and decision to hold an oral hearing on admissibility and merits	16 May 1977	MM. Fawcett Sperduti Nørgaard Ermacora Kellberg Daver Opsahl Custers Polak Jörundsson Tenekides Trechsel Kiernan Klecker
Oral hearing on admissibility and merits; Commission's deliberations and decision on admissibility	7 July 1977	MM. Fawcett Sperduti Nørgaard Ermacora Triantafyllides Busuttil Kellberg Daver Opsahl Custers Frowein Dupuy Tenekides Trechsel Kiernan Klecker

Item	Date	Note
<u>Examination of the merits</u>		
Applicant's letter on friendly settlement	2 August 1977	
Letter from the Agent of the Government concerning friendly settlement	30 September 1977	
Commission's deliberations and decision to proceed to the preparation of a Report under Art. 31	8 October 1977	MM. Nørgaard Fawcett Ermacora Triantafyllides Busuttil Kellberg Daver Opsahl Polak Jörundsson Dupuy Tenekides Kiernan Klecker
Commission's deliberations on its draft Report and final votes	3 March 1978	MM. Fawcett Sperduti Nørgaard Busuttil Kellberg Daver Opsahl Custers Polak Frowein Jörundsson Trechsel Kiernan Klecker
Commission's deliberations and adoption of the Report	9 March 1978	MM. Sperduti Nørgaard Busuttil Kellberg Opsahl Custers Polak Tenekides Trechsel Kiernan