



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

COURT (PLENARY)

CASE OF F. v. SWITZERLAND

(Application no. 11329/85)

JUDGMENT

STRASBOURG

18 December 1987

In the case of F v. Switzerland*,

The European Court of Human Rights, taking its decision in plenary session pursuant to Rule 50 of the Rules of Court and composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. Thór VILHJÁLMSSON,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. G. LAGERGREN,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. R. MACDONALD,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. A. SPIELMANN,
Mr. J. DE MEYER,
Mr. J.A. CARRILLO SALCEDO,
Mr. N. VALTICOS,

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

Having deliberated in private on 25 June and 25 and 27 November 1987,

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

PROCEDURE

1. The case was referred to the Court by the Government of the Swiss Confederation ("the Government") and by the European Commission of Human Rights ("the Commission") on 22 September and 17 October 1986 respectively, within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 11329/85) against Switzerland lodged with the

* Note by the Registrar. The case is numbered 21/1986/119/168. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

Commission under Article 25 (art. 25) by Mr. F on 12 December 1984. The applicant, who is a Swiss national, requested the Court not to divulge his identity.

The Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48); the Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). Both sought a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 12 (art. 12).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included *ex officio* Mrs. D. Bindschedler-Robert, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 26 September 1986, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr. G. Lagergren, Mr. Matscher, Sir Vincent Evans, Mr. C. Russo and Mr. J.A. Carrillo Salcedo (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr. Ryssdal, who had assumed the office of President of the Chamber (Rule 21 para. 5), consulted those concerned, through the Registrar, on the need for a written procedure (Rule 37 para. 1). In accordance with the order made in consequence, the Registrar received:

- the applicant's memorial, on 16 December 1986; and
- the Government's memorial, on 28 January 1987.

On 25 March 1987, the Secretary to the Commission indicated that the Delegate would submit his observations at the hearings.

5. Having consulted - through the Registrar - the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant, the President of the Court directed on 1 April 1987 that the oral proceedings should commence on 22 June 1987.

6. On 22 April 1987, the Chamber decided under Rule 50 to relinquish jurisdiction forthwith in favour of the plenary Court.

7. The hearing was held in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mr. J. VOYAME, Director

of the Federal Department of Justice,

Mr. R. FORNI, Federal Judge,

Mr. O. JACOT-GUILLARMOD, Head of

Agent,

the Department of International Affairs, Federal
Department of Justice,

Counsel;

- for the Commission

Mr. H. VANDENBERGHE,

Delegate;

- for the applicant

Mr. J. LOB, avocat,

Counsel.

The Court heard addresses by Mr. Voyame and Mr. Forni for the Government, by Mr. Vandenberghe for the Commission and by Mr. Lob for the applicant, as well as their replies to its questions.

AS TO THE FACTS

I. THE FACTS OF THE CASE

8. The applicant, a Swiss national born in 1943, has married four times since 1963. The first three marriages were dissolved by divorce; the sole issue in the instant case is the temporary prohibition on remarriage imposed on him following the third divorce.

A. Background

9. F married Miss G in 1963 and divorced her on 8 May 1964.

On 12 August 1966, he was remarried to Mrs. B, a divorcee, who bore him a son on 26 November of the same year. The couple separated in December 1978, and F cohabited with another woman. Mrs. B obtained a divorce on 27 October 1981. The court prohibited the applicant from remarrying within a year, under Article 150 of the Swiss Civil Code (see paragraph 22 below).

B. The second temporary prohibition on remarriage

10. The applicant advertised for a secretary. On 11 January 1983, Miss N appeared in response to his advertisement. Four days later they were living together and on 26 February the couple married.

1. The Lausanne Civil Court

11. On 11 March 1983, F began divorce proceedings in the Lausanne District Civil Court.

At the beginning of April, his wife left the matrimonial home after he had taken up again with a former mistress.

12. After an attempt at conciliation had failed, the parties signed an agreement covering the ancillary effects of the divorce on 16 May 1983; in particular, the applicant undertook to pay his wife the sum of 17,000 Swiss francs (CHF) as compensation for non-pecuniary damage.

13. The Civil Court gave judgment on 21 October 1983. It dismissed F's petition, allowed the wife's cross-petition of 21 June and approved the agreement reached between them. It also imposed on the applicant a three-year prohibition on remarriage; in its opinion, the applicant's unacceptable attitude rendered him solely responsible for the breakdown of the marriage.

The divorce became final on 21 December 1983.

2. The Appellate Division of the Vaud Cantonal Court

14. The applicant appealed to the Appellate Division of the Vaud Cantonal Court to discharge the order prohibiting remarriage. He denied that the statutory conditions were satisfied, namely that the fault committed was exceptionally serious and had played a decisive role in the breakdown. He also argued that the order complained of contravened Article 12 (art. 12) of the European Convention on Human Rights.

15. On 7 May 1984, the Appellate Division upheld the Civil Court's judgment.

The seriousness of the fault could not be disputed. F's behaviour had so grossly disregarded the laws of marriage and the most elementary requirements of that status that a prohibition on remarriage was imperative.

Article 12 (art. 12) of the Convention was not an obstacle to the application of Article 150 of the Civil Code. Furthermore, the reference to national legislation in Article 12 (art. 12) had the effect of incorporating into the Convention the national law governing the right to marry.

3. The Federal Court

16. F appealed to the Federal Court on points of law (*recours en réforme*), arguing that the conditions for the application of Article 150 of the Civil Code were not satisfied and that the prohibition on remarriage violated Articles 12, 8 and 3 (art. 12, art. 8, art. 3) of the Convention.

17. The Federal Court gave judgment on 18 October 1984. It ruled that the appeal was inadmissible in relation to the alleged incompatibility of Article 150 with the Convention, on the ground that this plea should have been raised by way of a public-law appeal (*recours de droit public*) and not by way of an appeal on points of law. It said:

"It is doubtful whether in an appeal on points of law (*recours en réforme*) the appellant can rely on the incompatibility of Article 150 of the CC [Swiss Civil Code] with the rights secured in the ECHR [European Convention on Human Rights]. Admittedly, under section 43(1), first sentence, of the OJ [Federal Judiciary Act] an appeal on points of law is admissible for violations of federal law, including international treaties concluded by the Confederation. But by the second sentence of

the above-cited provision, the right to enter a public-law appeal (*recours de droit public*) in respect of violations of citizens' constitutional rights remains unaffected. According to the established case-law, the rights protected by the ECHR and which the latter requires Switzerland to guarantee to its own nationals and others, are in the nature of constitutional rights: this close relationship between constitutional rights and the rights protected by the ECHR makes it possible, from a procedural point of view, to treat violations of the Convention on the same footing as violations of a constitutional right within the meaning of section 84(1) of the OJ.

At all events, under Article 113 para. 3 Cst. [the Federal Constitution] the Federal Court has a duty to apply the Acts passed by the Federal Assembly and the decrees of that Assembly which are of general application. It is thus under an obligation to follow this legislation without inquiring whether it is incompatible with the Constitution. The ECHR has made no change in this respect. It does not in any way alter the separation of powers between the legislature and the highest court as governed by domestic law, and accordingly does not confer on the Federal Court any jurisdiction other than the one it hitherto enjoyed under the Constitution and the Judicature Act (judgment of the 1st Public-Law Division, 14 June 1983, in *Hofstetter v. Attorney-General of St. Gall*, unreported). It follows that the question whether Article 150 CC is compatible with the ECHR lies outside the jurisdiction of the Federal Court; the appeal is therefore inadmissible on this point."

For the rest, the Court dismissed the appeal in the following terms:

"The cantonal court held that there was a causal relationship between the husband's adultery and the breakdown of the marriage. This is a finding of fact binding on the Federal Court in an appeal on points of law (section 63(2) OJ). The appellant's behaviour played ... a decisive role in the breakdown, of which it was the sole cause. The wife was bewildered when her husband expressed his intention to divorce: she protested and expressed her affection for him. She only left the matrimonial home after being worn down by all that F had done to force her to go.

The appellant's fault is of exceptional gravity. He pressed his mistress to marry him despite the shortness of their acquaintance and then only a few days after the ceremony said he wanted a divorce without giving any valid explanation. By this capricious attitude he showed that he was making a mockery of the institution of marriage. He was not only offhand, but contemptuous and cruel. When his wife tried to maintain the marriage bonds by showing him her affection, he used the most despicable means to frustrate her efforts. Regardless of the duties imposed by the laws of marriage, he treated his wife as an object and, seeking only to bring about a break, he went so far as to commit adultery and provoke scenes during which he was rude and odious. The respondent has suffered greatly from this broken marriage: the compensation which the court of first instance granted her by approving the agreement on the ancillary effects of the divorce, bears witness that her sufferings went beyond what a wife can humanly be expected to bear.

In view of the above, the cantonal court could, without violating federal law, reasonably take the view that a prohibition on remarriage for three years was necessary."

C. The applicant's third remarriage

18. In a statement dated 14 March 1986, F and the woman with whom he was living stated that they intended to get married as soon as possible.

The woman in question, who was still a party to a previous marriage, had commenced proceedings for divorce. The decree of divorce was granted on 19 March 1986 and became absolute on 21 April 1986. On 22 May 1986, the president of the Lausanne court allowed her application to have the waiting time (*délai de viduité* - Article 103 of the Swiss Civil Code) reduced and gave her leave to remarry as from that date.

19. On 2 September 1986, the Head of the Department of Justice and Legislation refused to publish the banns before the prohibition on the applicant's remarriage had expired.

Two days later, F appealed to the Conseil d'Etat of the Canton of Vaud, which dismissed his appeal on 14 November 1986. It stated, *inter alia*:

"... it cannot be right that the registrar of births, deaths and marriages should take any measure until all impediments to remarriage have been removed, both from considerations of public policy and for elementary reasons of legal certainty."

20. The banns were published as soon as the waiting period imposed on the applicant had expired, and he married Mrs. F on 23 January 1987. A child was born of this marriage on 23 February 1987.

II. TEMPORARY PROHIBITION OF REMARRIAGE IN SWISS LAW

A. Statutory provisions

21. By Article 54 of the Swiss Federal Constitution,

"The right to marry shall enjoy the protection of the Confederation.

No impediment to marriage may be based on denominational grounds, the poverty of either of the spouses, their conduct or any other grounds of administrative policy.

Marriages entered into in a canton or abroad in accordance with local legislation, shall be recognised as valid throughout the Confederation.

...".

22. Although the Civil Code recognises the right to divorce, the right to remarry after divorce cannot be exercised in some cases until a certain time has elapsed. The Swiss Civil Code provides in Article 150, which came into force in 1912:

"When granting a divorce the court shall fix a period of not less than one and not more than two years during which the party at fault shall not be entitled to remarry;

where the divorce is granted on the ground of adultery, this period may be extended to three years.

The period of judicial separation ordered by the court shall be included in this period."

B. Case-law

23. The application of this provision has, however, been made more flexible by decisions of the courts. Thus, in the judgment of 16 December 1981 in *X v. X*, the Federal Court stated:

"[The temporary prohibition of remarriage] is criticised by legal writers (cf. Bühler/Spühler, note 5 on Art. 150 CC and references), some of whom go so far as to suggest that the rule in Article 150 CC should be abandoned because its application gives rise to numerous inequalities and because it is easily evaded by marrying abroad (Deschenaux/Tercier, *Le mariage et le divorce*, 2nd ed., p. 110).

As early as 1912, the Federal Court noted that the penalty of a waiting period entailed a considerable restriction of individual freedom and of the right to marry guaranteed in Article 54 para. 2 of the Constitution: it should not be imposed unless there had been a serious violation of essential conjugal duties and the courts should, therefore, exercise some restraint in applying Article 150 CC (ATF [Judgments of the Swiss Federal Court] 38 II 62; cf. ATF 68 II 149, point 2 of the reasons, and 69 II 353).

The interpretation of this provision must be brought into line with the whole body of case-law on divorce, which shows that the courts are tending to depart from rigorous theory and seeking to avoid unduly severe sanctions by having regard to the circumstances of the particular case. Thus adultery is no longer an absolute ground for divorce (ATF 98 II 161, point 4 (b) of the reasons) and the notion of the innocent spouse, within the meaning of Articles 151 and 152 of the Civil Code, does not exclude all fault (ATF 103 II 169, point 2 of the reasons, and references). From this standpoint, even more restraint should be exercised in applying Article 150 of the Civil Code. Courts should not impose a prohibition on remarriage unless the fault committed is of exceptional gravity and has also played a decisive role in the breakdown of the marriage." (Judgments of the Swiss Federal Court, vol. 107, part II, p. 395)

C. Proposals for legislative reform

24. On 28 June 1965, the Study Group on the partial reform of family law presented its report to the Federal Department of Justice and Police, which had appointed the Study Group. It advocated repeal of Article 150 of the Civil Code, relating to the waiting period:

"For some years now a number of members of Parliament have been disturbed by the application (or more precisely, the non-application) of Article 150 (*Petites questions Obrecht et Bourgknecht, interpellation Schaffer, REC [Revue de l'état civil]* 31, 1963, 228; 32, 1964, 82-83). The issue has also been raised in the press (*Beobachter* of 15 June 1956, 'Wer Geld hat, darf heiraten!').

What is the problem? Under Article 150 the court must prohibit a spouse found to be at fault from remarrying for a given period. But disregard of this prohibition does not in any way affect the validity of a marriage entered into in spite of it (Götz, notes 10 and 14 on Art. 104). Such a breach, however, can scarcely occur in Switzerland, where it would involve a serious dereliction of duty or even connivance on the part of the registrar of births, deaths and marriages. It can happen, on the other hand, that a spouse prohibited from remarrying goes abroad, preferably to England, to enter into a valid marriage there. On returning to Switzerland, he asks to have his marriage registered. In view of Articles 104 and 130, this cannot be refused. At most, cantonal provisions could render such conduct liable to a criminal sanction; this is the case in the cantons of Basle Urban and Basle Rural only. It is understandable that a person can, in good faith, come to the conclusion that money and a journey abroad are all that is needed in order to evade a prohibition on remarriage.

A means must be found of remedying the offensive aspects of this situation. This certainly cannot be done by converting the prohibition on remarriage which is inherent in the waiting period into an impediment to marriage. In Articles 120 et seq. the legislation provides for nullity of marriage only in very exceptional cases. Article 54 para. 3 Cst. would also preclude this solution. Nor can one seriously contemplate a solution which would involve introducing serious criminal sanctions throughout Switzerland. If equality before the law is to be guaranteed, there is only one solution and that is to delete Article 150 CCS [Swiss Civil Code]. This is the solution proposed by Götz (*REC* 32, 1964, 84-88), who has given very convincing reasons. It was strongly supported by the Conference of cantonal authorities responsible for supervising civil status at its assembly on 15 October 1964 (see on this question the report by Heiz, *REC* 32, 1964, 401-404; 33, 1965, 4-8, 54-59, 92-98). The Study Group unanimously supports this suggestion.

It must be expressly stated that this proposal by the Group is not intended to indicate any particular sympathy for behaviour contrary to the spirit of marriage. It is based on a recognition of the fact that Articles 104 and 150 'are not in accordance with the policy of the Constitution' (Knapp in *RDS [Revue de droit suisse]* 71, 1952, I, 293). It is also clear that Article 150 will not have the effect of making spouses at fault think again and mend their ways (Grisel in *JdT [Journal des tribunaux]* 1943, I, 326; Picot in *RDS* 48, 1029, 62(a)). The Group also wishes to point out that the inequalities noted do not only appear in the case of a possible marriage. They may become

apparent during divorce proceedings, because the case-law on the application of Article 150 varies from canton to canton; and in the case of divorce by consent, many spouses, even if at fault, agree to present their case in such a way that no waiting period is imposed (Stocker in RSJ [Revue suisse de jurisprudence] 47, 1951, 19)".

25. The same proposal was repeated by the Committee of Experts on Family Law Reform, which considered the reform of divorce from 1974 to 1976.

After reform of the law on various subjects, the Committee concentrated its attention on the provisions relating to divorce. In 1988, it is due to adopt a Bill which will be submitted to interested organisations and groups for comment. The Federal Government will then draw up a Bill to be laid before Parliament. Parliament will not be able to debate the Bill before 1992, so that the new divorce law is not expected to come into force until 1995 at the earliest.

PROCEEDINGS BEFORE THE COMMISSION

26. F brought his case before the Commission on 12 December 1984 (application no. 11329/85), alleging that the three-year prohibition on remarriage imposed on him was incompatible with his right to marry (Article 12 of the Convention) (art. 12), his right to respect for private and family life (Article 8) (art. 8) and the prohibition of degrading punishment (Article 3) (art. 3).

27. On 12 December 1985, the Commission declared the application admissible with regard to Article 12 (art. 12).

In its report of 14 July 1986 (made under Article 31) (art. 31), it expressed by ten votes to seven the opinion that there had been a violation of Article 12 (art. 12). The full text of the Commission's opinion and of the separate opinion contained in the report is reproduced as an annex to this judgment.

SUBMISSIONS OF THE PARTIES

28. In his memorial of 16 September 1986 the applicant asked the Court to come to the following decision:

"I. By prohibiting the applicant from remarrying for three years, the Swiss courts violated Article 12 (art. 12) of the Convention.

II. Article 150 of the Swiss Civil Code, which provides for prohibition of remarriage, is contrary to Article 12 (art. 12) of the Convention and Switzerland is invited to take all necessary measures to repeal this provision.

III. The Swiss Government is to pay F the sum of 1,877 CHF by way of reimbursement of the costs he was ordered to pay in the domestic proceedings in the Appellate Division of the Vaud Cantonal Court and in the Swiss Federal Court.

IV. Switzerland is to pay F the sums of 3,000 CHF and 10,000 CHF in respect of the costs incurred in the proceedings in the national courts and before the European institutions.

V. Switzerland is to pay F the sum of 5,000 CHF as compensation for non-pecuniary damage."

29. At the hearing, the Government maintained the submissions in their memorial, in which they requested the Court

"to find that in the instant case the temporary prohibition on remarriage that was applied to the applicant does not constitute a violation of Article 12 (art. 12) of the Convention or any other provision of that instrument".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 12 (art. 12)

30. The applicant complained of the three-year prohibition on remarriage which the Lausanne District Civil Court imposed on him on 21 October 1986 (see paragraph 13 above). He claimed that it violated Article 12 (art. 12) of the Convention, which provides:

"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

In his submission, Article 150 of the Swiss Civil Code, on which the divorce court based its decision (see paragraphs 13 and 22 above), in itself contravened the Convention.

31. On this point the Court refers to its settled case-law to the effect that, in proceedings originating in an individual application, it has to confine its attention, as far as possible, to the issues raised by the concrete case before it. Its task is thus not to review in abstracto under the Convention the domestic law complained of, but to examine the manner in which that law has been applied to the applicant or has affected him (see, *inter alia*, the Dudgeon judgment of 22 October 1981, Series A no. 45, p. 18, para. 41, and the Bönisch judgment of 6 May 1985, Series A no. 92, p. 14, para. 27).

32. Article 12 (art. 12) secures the fundamental right of a man and a woman to marry and to found a family. The exercise of this right gives rise to personal, social and legal consequences. It is "subject to the national laws of the Contracting States", but "the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired" (see the Rees judgment of 17 October 1986, Series A no. 106, p. 19, para. 50).

In all the Council of Europe's member States, these "limitations" appear as conditions and are embodied in procedural or substantive rules. The former relate mainly to publicity and the solemnisation of marriage, while the latter relate primarily to capacity, consent and certain impediments.

33. The prohibition imposed on F was applied under rules governing the exercise of the right to marry, as Article 12 (art. 12) does not distinguish between marriage and remarriage.

The Court notes that a waiting period no longer exists under the laws of other Contracting States, the Federal Republic of Germany having abolished it in 1976, and Austria in 1983. In this connection, it recalls its case-law according to which the Convention must be interpreted in the light of present-day conditions (see the Airey judgment of 9 October 1979, Series A no. 32, para. 26). However, the fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect offends the Convention, particularly in a field - matrimony - which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit.

34. The measure complained of ultimately amounts to a civil sanction. According to the Federal Court's case-law, it is an order consequent upon a fault of exceptional gravity that has played a decisive role in the breakdown of a marriage (see paragraph 23 above).

Although automatically applicable because mandatory as a matter of public policy, Article 150 of the Civil Code nonetheless allows the courts some degree of discretion: the prohibition period to be imposed on the party at fault in the event of divorce granted on the ground of adultery may range from one to three years (see paragraph 22 above). In the instant case the Lausanne District Civil Court chose the maximum period, holding that F's unacceptable attitude rendered him solely responsible for the breakdown of the marriage (see paragraph 13 above).

The divorce court therefore did not confine itself to appraising the consequences of the breakdown of marriage, by approving the agreement made between the couple on 16 May 1983, which provided for payment of compensation for non-pecuniary damage (see paragraphs 12-13 above); it also assessed the applicant's past conduct in order to draw conclusions about his right to remarry.

35. The Government contended firstly that the application of Article 150 in the instant case was neither unreasonable nor arbitrary nor disproportionate. The sanction complained of undoubtedly did amount to an interference with the exercise of the right to marry, but it did not impair that right's very essence. As part of the Swiss conception of divorce based on matrimonial fault, the system of temporarily prohibiting remarriage was explained by the legislature's determination to protect not only the institution of marriage but also the rights of others and even the person affected by the prohibition.

36. The Court recognises that the stability of marriage is a legitimate aim which is in the public interest. It doubts, however, whether the particular means used were appropriate for achieving that aim. In Switzerland itself, the Study Group on the partial reform of family law and subsequently the Committee of Experts on Family Law Reform would seem to have had similar doubts, since they recommended the repeal of Article 150 of the Civil Code (see paragraphs 24-25 above and also, *mutatis mutandis*, the Inze judgment of 28 October 1987, Series A no. 126, p. 19, para. 44).

In any event, the Court cannot accept the argument that the temporary prohibition of remarriage is designed to preserve the rights of others, namely those of the future spouse of the divorced person.

On 22 May 1986, the woman with whom F was cohabiting obtained a reduction of the waiting time following her own divorce, which had become absolute a month earlier (see paragraph 18 above). The prohibition on F expired on 21 December 1986, after which the registrar was able to carry out the necessary formalities (see paragraphs 19-20 above). The marriage accordingly took place on 23 January 1987. During the intervening period - of some seven or eight months - the applicant's future wife could consider that she was personally and directly wronged by the measure affecting F. Given that she was neither under age nor insane, her rights were in no way protected by the measure in question.

An unborn child may also be adversely affected by such a prohibition. Admittedly the concept of an "illegitimate child" no longer exists in Swiss law, under which children born out of wedlock now have almost the same status and the same rights as children born in wedlock. Children born out of wedlock may nonetheless suffer on account of certain prejudices and thus be socially handicapped. Whilst in the instant case the applicant's child was born one month after his parents' marriage (see paragraph 20 above), the death of one of the parents or even a delay in completing the legal formalities would have been enough to cause the child to be born out of wedlock.

37. The Government further considered that compelling the person concerned to take time for reflection also helped to protect him from himself. In the Court's view, this argument is not of sufficient weight to

justify the impugned interference in the case of a person of full age in possession of his mental faculties.

38. The Government relied in addition on the Johnston and Others judgment of 18 December 1986, according to which "the prohibition on divorce [cannot], in a society adhering to the principle of monogamy, ... be regarded as injuring the substance of the right guaranteed by Article 12 (art. 12)" (Series A no. 112, p. 24, para. 52). In the Government's submission, the same applied a fortiori to a mere temporary prohibition on remarriage. No right to remarry could be recognised given that the exercise of it necessarily depended on another right - the right to divorce - which did not flow from the Convention; in short, remarriage subsequent to a divorce could not be equated with a first marriage.

The Court is not persuaded by this argument. As was stated in the Deweer judgment of 27 February 1980, "in the area of human rights he who can do more cannot necessarily do less. The Convention permits under certain conditions some very serious forms of treatment ..., whilst at the same time prohibiting others which by comparison can be regarded as rather mild" (Series A no. 35, p. 29, para. 53).

Furthermore, and above all, F's situation is quite distinct from Mr. Johnston's, since what was at issue in the case of the latter was the right of a man who was still married to have his marriage dissolved. If national legislation allows divorce, which is not a requirement of the Convention, Article 12 (art. 12) secures for divorced persons the right to remarry without unreasonable restrictions.

39. There remains the Government's argument that judicial separation, the waiting period required before divorce can be granted or an innocent spouse's right to oppose divorce have consequences for those concerned which are identical with those of a temporary prohibition on remarriage. The Court considers that such situations are different and that in any case they occur prior to any decree of divorce.

40. In conclusion, the disputed measure, which affected the very essence of the right to marry, was disproportionate to the legitimate aim pursued. There was, therefore, a violation of Article 12 (art. 12).

II. APPLICATION OF ARTICLE 50 (art. 50)

41. By Article 50 (art. 50) of the Convention,

"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 ... 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."

Under this provision the applicant sought repeal of Article 150 of the Swiss Civil Code, compensation for damage and reimbursement of costs and expenses.

A. Legislative amendment

42. In the first place, F desired that Switzerland should "take prompt action to abolish the prohibition on remarriage provided for in Article 150 of the Swiss Civil Code".

Neither the Agent of the Government nor the Delegate of the Commission commented on this demand.

43. The Court notes that the Convention does not give it jurisdiction to order Switzerland to alter its legislation (see, *mutatis mutandis*, the *Marckx* judgment of 13 June 1979, Series A no. 31, p. 25, para. 58, and the *Albert and Le Compte* judgment of 24 October 1983, Series A no. 68, pp. 6-7, para. 9).

B. Damage

44. The applicant acknowledged that he could not prove pecuniary damage, but he claimed that having to cohabit unmarried for several years with the person he wished to marry caused him "undeniable non-pecuniary damage", which he assessed at 5,000 CHF.

The Government considered that F would be afforded "sufficient satisfaction" for any non-pecuniary damage by a finding that there had been a violation of Article 12 (art. 12).

The Delegate of the Commission was in favour of an award of compensation, but he made no suggestion as to quantum.

45. In the view of the Court, even if the applicant may have suffered non-pecuniary damage, it was at most during the period from 22 May 1986 (leave to remarry given to the woman with whom F was cohabiting) to 23 January 1987 (F's remarriage), i.e. a period of eight months (see paragraphs 18 and 20 above). At all events, the present judgment affords him adequate just satisfaction under this head (see, *mutatis mutandis*, the *Johnston and Others* judgment previously cited, Series A no. 112, p. 32, paras. 81-84).

C. Costs and expenses

46. F claimed reimbursement of costs and expenses he was ordered to pay by the Appellate Division of the Vaud Cantonal Court and by the Federal Court (1,327 CHF) and of lawyer's fees and expenses for the proceedings in those two courts (3,000 CHF). He additionally claimed 10,000 CHF for lawyer's fees and expenses for the proceedings before the European Commission and Court.

At the hearing the Government did not express any view on the sums claimed by the applicant in his memorial to the Court. They had, however, indicated in writing that the claims put forward by F in a letter to the Commission on 23 December 1985 (1,327 CHF for costs and 6,000 CHF for lawyer's fees) appeared to them to be in accordance with the criteria derived from the Court's case-law.

The Delegate of the Commission considered that the applicant's claim was not unreasonable.

47. The Court has no reason to doubt that the applicant did in fact incur these expenses. As to whether they were incurred necessarily, it notes that F, firstly, sought "rectification" of the violation of Article 12 (art. 12) "through the domestic legal system" (De Cubber judgment of 14 September 1987, Series A no. 124-B, p. 19, para. 29) and, secondly, did not seek legal aid for the proceedings before the Convention institutions. Lastly, it considers that the quantum of expenses and fees incurred is reasonable. The applicant should therefore be reimbursed in the sum of 14,327 CHF.

FOR THESE REASONS, THE COURT

1. Holds by nine votes to eight that there has been a breach of Article 12 (art. 12) of the Convention;
2. Holds unanimously that the respondent State is to pay the applicant 14,327 (fourteen thousand three hundred and twenty-seven) Swiss francs in respect of costs and expenses;
3. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in Paris on 18 December 1987.

For the President
Louis-Edmond PETTITI
Judge

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, the joint dissenting opinion of Judges

Thór Vilhjálmsson, Bindschedler-Robert, Gölcüklü, Matscher, Pinheiro Farinha, Walsh, De Meyer and Valticos is annexed to this judgment.

L.-E.P.
M.-A.E.

JOINT DISSENTING OPINION OF JUDGES THÓR VILHJÁLMSSON,
BINDSCHEDLER-ROBERT, GÖLCÜKLÜ, MATSCHER, PINHEIRO FARINHA,
WALSH, DE MEYER AND VALTICOS

JOINT DISSENTING OPINION OF JUDGES THÓR
VILHJÁLMSSON, BINDSCHEDLER-ROBERT, GÖLCÜKLÜ,
MATSCHER, PINHEIRO FARINHA, WALSH, DE MEYER
AND VALTICOS

(Translation)

In our opinion, the facts of the case disclose no violation of the applicant's fundamental rights.

The circumstances in which, after two previous divorces, the third marriage of the person concerned was dissolved were such that the Lausanne Civil Court was entitled to impose on him, when it granted the third divorce, the waiting period of three years provided for in Article 150 of the Swiss Civil Code.

The restriction thus placed on the exercise by the applicant of his right to marry and found a family did not affect the substance of that right. It was merely temporary. It was neither arbitrary nor unreasonable. It was based on legitimate reasons and could be considered to be commensurate with their gravity. It did not go beyond the powers of the competent national authorities.

Those authorities - both the judiciary and the legislature - were entitled to consider, in the exercise of their discretion in the matter, that the restriction in question was justified in order to protect not only the institution of marriage but also the future spouses of a person who, as the Swiss courts had established, had grossly violated fundamental conjugal rights.

With regard to marriage, the State has more extensive powers than in some other fields. This is particularly apparent when one compares the very brief and non-exhaustive reference to "national laws" in Article 12 (art. 12) of the Convention with the more circumscribed and restrictive wording of the second paragraph of each of Articles 8, 9, 10 and 11 (art. 8-2, art. 9-2, art. 10-2, art. 11-2).

In this context, such doubts as may be felt as to whether a certain legal rule is appropriate or opportune or should be applied in a given case do not suffice to found a breach of the right secured by Article 12 (art. 12) of the Convention. In order for it to be concluded that there has been a breach of this right, it must be shown that the State has impaired the essence of the right or that it has restricted the exercise thereof in an arbitrary or unreasonable manner. That has not been shown in this case.