



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

COURT (CHAMBER)

CASE OF INZE v. AUSTRIA

(Application no. 8695/79)

JUDGMENT

STRASBOURG

28 October 1987

In the Inze case*,

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

Mr. J. CREMONA, *President*,

Mr. Thór VILHJÁLMSSON,

Mr. G. LAGERGREN,

Mr. F. GÖLCÜKLÜ,

Mr. F. MATSCHER,

Mr. L.-E. PETTITI,

Mr. R. BERNHARDT,

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

Having deliberated in private on 25 April and 25 September 1987,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Republic of Austria ("the Government") on 14 May and 16 July 1986, respectively, within the period of three months laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. The case originated in an application (no. 8695/79) against the Republic of Austria lodged with the Commission on 20 June 1979 by Mr. Maximilian Inze, an Austrian national, under Article 25 (art. 25).

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Article 48 (art. 48). Their object was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 14 of the Convention, taken together with Article 1 of Protocol No. 1 (art. 14+P1-1).

* Note by the Registrar: The case is numbered 15/1986/113/161. 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.

2. In response to the enquiry made in accordance with Rule 33 § 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 of seven judges to be constituted included ex officio Mr. F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 5 June 1986, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. Thór Vilhjálmsson, Mrs. D. Bindschedler-Robert, Mr. G. Lagergren, Mr. R. Bernhardt and Mr. J.A. Carrillo Salcedo (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

4. Having assumed the office of President of the Chamber (Rule 21 § 5), Mr. Ryssdal consulted, through the Registrar, the Agent of the Government, the Delegate of the Commission and the lawyer for Mr. Inze regarding the need for a written procedure (Rule 37 § 1). On 8 July 1986, he decided, having particular regard to their concurring statements, that it was not necessary for memorials to be filed and reserved the further procedure.

On 2 March 1987, after consulting, through the Registrar, the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant, the President directed that the oral proceedings should open on 23 April 1987 (Rule 38). He had previously granted the applicant's lawyer leave to use the German language in the proceedings (Rule 27 § 3).

On 1 April, the Commission submitted several documents. On 6 April, the applicant filed with the registry his claims for just satisfaction under Article 50 (art. 50) of the Convention.

As Mr. Ryssdal was unable to attend the hearing, Mr. Cremona, the Vice-President of the Court, acted as President of the Chamber (Rules 9 and 21 § 5).

5. The hearings were held in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately before they opened, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government

Mr. H. TÜRK, Legal Adviser,

Ministry of Foreign Affairs,

Agent,

Mr. N. OKRESEK, Federal Chancellery,

Mrs. I. DJALINOUS, Ministry of Justice,

Advisers;

- for the Commission

Mr. S. TRECHSEL,

Delegate;

- for the applicant

Mr. H. WALTHER, Rechtsanwalt,

Counsel.

The Court heard their addresses and their replies to its questions. The Agent of the Government and counsel for the applicant filed a number of documents.

6. On 12 August and 17 September respectively, the Registrar received the observations of the Government and of the Commission on the question of the application of Article 50 (art. 50) of the Convention in the present case.

7. Subsequently, Mrs. Bindschedler-Robert and Mr. Carrillo Salcedo, who were prevented from taking part in the final deliberations on 25 September 1987, were replaced by Mr. F. Gölcüklü and Mr. L.-E. Pettiti, substitute judges (Rules 22 § 1 and 24 § 1).

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

8. The applicant, who was born out of wedlock in 1942, is an Austrian citizen and resides at Stallhofen, Carinthia.

9. Until 1965, the applicant lived on a farm at St. Bartlmä, Carinthia, which had belonged first to his maternal grandmother and then to his mother, Theresia Inze. When his mother married Mr. Rudolf Fischer, the applicant remained in the house not only with his grandmother and his mother, but also with her husband and subsequently with their son, Manfred Fischer, who was born in wedlock in 1954. At the age of 23, he left the farm and later he married and settled down a few kilometers away.

The applicant's mother died intestate on 18 April 1975 and left as her heirs, apart from the applicant, her husband and her second son. According to the provisions of the Civil Code, the widower was entitled to a one-fourth part of the inheritance (Article 757) and each of the sons (irrespective of their illegitimate or legitimate birth) to three-eighths thereof (Articles 732 and 754). In proceedings commenced ex officio before the Klagenfurt District Court (Bezirksgericht), the applicant, his step-father and his half-brother stated that they were willing to accept these shares. The District Court decided on 31 March 1976 that the declarations of acceptance were valid.

10. However, the farm in question was subject to the special regulations in the Carinthian Hereditary Farms Act of 1903 (Erbhöfegesetz, Provincial Law Gazette, no. 33/1903, "the Provincial Act") providing that farms of a certain size may not be divided in the case of hereditary succession and that one of the heirs must take over the entire property and pay off the other heirs (see paragraph 25 below).

The applicant had claimed on 8 August 1975 that he should be called to take over his mother's farm as he was the eldest son. He later submitted that the regulation giving precedence to legitimate children had in the meantime been abrogated, and that both his step-father and his half-brother were in any event excluded as being unfit to work the farm, under section 7(4) of the Provincial Act (see paragraph 25 below).

A. Classification of the farm

11. On 28 April 1976, the District Court held a hearing in the presence of the parties. On 26 August, it appointed an expert to submit an opinion concerning the following matters: first, the classification of the farm as a "hereditary farm" within the meaning of the Provincial Act; second, its value for the purpose of determining the sums to be paid to the ceding heirs; and third, the conditions of its exploitation since the death of the applicant's mother.

12. The opinion, dated 1 October 1976, was filed with the court on 27 October. According to the expert, the farm was subject to the provisions of the Provincial Act, and its value was 331,040 Austrian schillings (ATS). However, the property was in a very bad condition and could not by itself provide a sufficient livelihood for a family. After the previous owner's death, it had been worked mainly by her widower, who had kept only a few cattle and used all the land for pasture. The grassland had partly run wild and the fields had no longer been tilled.

13. After a further hearing on 18 January 1977, the court decided on 25 January that the property had the character of a "hereditary farm" and fixed its value, in accordance with the expert opinion, at 331,040 ATS. This decision became final, as none of the parties appealed.

B. Determination of the heir

14. The question of the determination of the heir entitled to take over the farm, including the applicant's claim that his step-father and half-brother should be excluded for this purpose, was referred to the Klagenfurt Regional Court (Landesgericht) in accordance with section 7(4) of the Provincial Act (see paragraph 25 below).

The District Court communicated its file to the Regional Court on 20 July 1977. After a hearing scheduled to take place on 16 January 1978 had been cancelled, the Regional Court returned the file to the District Court on 17 January 1978, with the request to take further evidence relating to the ability of the applicant's half-brother to work the farm. The expert opinion was therefore to be supplemented in this respect, and the District Court was asked to add its own legal opinion when re-submitting the file (section 7(4) of the Provincial Act; see paragraph 25 below).

15. The District Court then ordered a supplementary expert opinion which was lodged on 6 April 1978. It stated that the conditions of the exploitation of the farm had further deteriorated, some lands having been left to a motor-cross club and some to a neighbour who had deposited various construction materials there. It was therefore hardly possible to speak of an orderly exploitation of the farm.

As regards the ability of the applicant's half-brother to run the farm at the same time as continuing with his job as an unskilled worker, the expert answered in the affirmative. Not very much was required to be done on the farm and his workplace was not so far away as to prevent his daily presence on the property.

16. At a hearing held on 31 January 1979, after several postponements, the parties failed to arrive at any agreement as to who should take over the farm even just for the duration of the proceedings, the applicant's step-father and half-brother being opposed to the appointment of a curator.

17. The District Court re-submitted the file to the Regional Court in February 1979. The Regional Court decided on 25 June 1979 to declare the applicant's claim inadmissible in so far as he sought a ruling that his step-father was excluded from taking over the farm, since the latter had not in fact maintained that he was entitled to do so. As regards the claim for exclusion of the applicant's half-brother, the Regional Court found that he was neither prevented by his profession from working the farm, nor incapable of doing so at the same time as continuing with his job. Furthermore, he could not be held responsible for the negligent exploitation since his mother's death because it was his father who had run the farm in the meantime.

18. The applicant appealed against this decision to the Graz Court of Appeal (Oberlandesgericht), claiming that certain evidence had been disregarded by the Regional Court when refusing the exclusion of his half-brother. He also submitted that the provision in section 7(2) of the Provincial Act giving precedence to legitimate children (see paragraph 25 below) had been abrogated by the new version of Article 754 § 1 of the Civil Code, enacted in 1970, and by Article 14 (art. 14) of the European Convention on Human Rights. He requested the court to submit the question of the constitutionality of the provision to the Constitutional Court (Verfassungsgerichtshof).

19. The Court of Appeal dismissed the appeal on 26 September 1979. After confirming the Regional Court's finding that the applicant's half-brother was not excluded, it stated that it had no doubts as to the constitutionality of the provision giving precedence to legitimate children. In its opinion, the provision had an objective justification because it was a peculiarity of the rural family and economic structure that legitimate children lived with the family on the farm, whereas illegitimate children were not infrequently brought up elsewhere and therefore did not have the

same close link with the farm as legitimate children. This was also the situation in the present case. The Court of Appeal therefore saw no reason to submit the issue of constitutionality to the Constitutional Court.

20. The applicant appealed against this decision to the Supreme Court (Oberster Gerichtshof), adducing essentially the same arguments as before the Court of Appeal. The Supreme Court rejected the appeal by a decision of 9 April 1980, on the ground that it was directed against a decision of the Court of Appeal confirming a previous decision of the Regional Court; in such a case, an appeal is admissible only when a decision is clearly contrary to law or inconsistent with the file, or when there has been a procedural defect entailing nullity of the proceedings. As to the first condition, the Supreme Court denied that section 7(2) of the Provincial Act had been abrogated by Article 754 § 1 of the Civil Code, as amended.

The Supreme Court also held that there was no reason to submit the matter to the Constitutional Court, on the following grounds.

As regards the conformity of section 7(2) with the constitutional provision in Article 14 (art. 14) of the Convention, Article 14 (art. 14) was applicable only in relation to the enjoyment of the rights and freedoms set forth in the Convention. In its opinion, the Convention did not deal with the question of hereditary succession, and Article 1 of Protocol No. 1 (P1-1), which secured the right to the peaceful enjoyment of possessions, did not exclude regulations providing for different rules of succession according to birth in wedlock or out of wedlock.

Furthermore, there was no doubt as to the compatibility of section 7(2) with the constitutional principle of equality. This principle required that legislation make no legal distinction based on the personal status of an individual unless this was justified by objective reasons. The impugned regulations in the Provincial Act did not, however, appear to be unjustified. Similar provisions also existed in the provincial legislation of Tyrol (Höfegesetz) and in the federal legislation for the other provinces (Anerbengesetz) and these limited illegitimate children's rights even further, in that they could take over a hereditary farm only if they had been brought up on it.

The preparatory materials on this legislation showed that the precedence accorded to legitimate children was based on convictions of rural society. Neither was the regulation in question contradicted by attempts to assimilate the legal position of illegitimate children to that of legitimate children, because it reflected the special convictions and attitudes of the rural population which, among other things, also affected the legal position of the widower. Furthermore, the Supreme Court observed, the family was an important element of the legal organisation of human relationships. Having regard to all these circumstances, it could not be said that the regulations contained in the Provincial Act were not based on objective considerations.

21. After the European Convention on the Legal Status of Children born out of Wedlock, of 15 October 1975, had entered into force in respect of Austria with effect from 29 August 1980, the applicant again appealed to the Supreme Court, asking it to reconsider its decision of 9 April 1980. Article 9 of this Convention provides that "a child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of a member of its father's or mother's family, as if it had been born in wedlock". However, Austria ratified that Convention with the following reservation:

"In pursuance of Article 14 § 1 of the Convention, the Republic of Austria reserves the right not to accord to a child born out of wedlock, as provided for in Article 9 of the Convention, the same right of succession in the estate of its father and of a member of its father's family, as if it had been born in wedlock."

On 6 October 1980, the Supreme Court rejected the appeal as inadmissible, having regard to the binding effect of its previous final decision and to the absence of a legal possibility to re-open the procedure.

C. Settlement reached between the applicant and his half-brother

22. The first-instance proceedings were resumed in October 1981. On 12 October, a judicial settlement was reached between the applicant and his half-brother whereby the applicant renounced any claim to take over his mother's hereditary farm, which would pass to his half-brother. In return, he was to receive a certain piece of land which had been promised to him by his mother during her lifetime, but no other compensation.

The judicial proceedings in the hereditary case were then terminated on 31 December 1981 by the transfer (*Einantwortung*) of the title to the whole farm to the applicant's half-brother.

23. The implementation of the above settlement was left to subsequent agreement between the parties, which they concluded on 26 May 1982.

However, the separating-off of the piece of land, which consisted of forest, assigned to the applicant under the agreement still required the approval of certain administrative authorities, including in particular the competent forestry authority, having regard to the provisions of the Carinthian Provincial Forestry Act (Provincial Law Gazette, no. 77/1979). Certain difficulties arose in this respect. The piece of land was not sufficiently large for its separating-off to be permissible under the above Act except in the case of a predominant public interest, the existence of which the authority denied. The difficulties were apparently overcome after the Constitutional Court had in a different case found the relevant provisions of the Carinthian Provincial Forestry Act to be unconstitutional.

The land was then registered in the applicant's name in the official land register. This has been confirmed in an extract from the land register, dated 13 January 1984.

II. THE RELEVANT LEGISLATION

A. Civil Code

24. The relevant provisions of the Civil Code read as follows (translation from German):

Article 545

"Capacity to inherit can be determined only when the estate actually passes. This is generally when the *de cuius* dies (Article 703)."

Article 547

"Once he has accepted the inheritance, the heir represents the *de cuius* in respect of the estate. Both shall be regarded as being one and the same person as regards third parties. Until the heir has accepted the inheritance, the estate shall be treated as if it were still in the deceased's possession."

Article 550

"Where there is more than one heir, they shall be regarded, in respect of their joint right to inherit, as being one person. Until the estate is transferred by court order, the heirs shall be jointly and severally liable. The extent to which they shall be liable thereafter is laid down in the chapter on taking possession of the estate."

B. The Carinthian Hereditary Farms Act

25. The Carinthian Hereditary Farms Act, while leaving unaffected the general rules in the Civil Code on the determination of hereditary shares, regulates the attribution of these shares in cash or in kind.

The following provisions of this Act are relevant (translation from German):

Section 6 § 1

"If the estate of the owner of a farm devolves on several persons, only one person, the principal heir (*Anerbe*), may inherit the farm and its equipment ..."

Section 7

"The principal heir shall be determined according to law and the order which it prescribes for the devolution of estates. When there are several heirs and no agreement can be reached among them, they shall be called to take over the farm in the following order:

(1) In general, male heirs shall take precedence over female, and older over younger heirs of the same sex; lots shall be drawn between heirs of the same age. Those more closely related shall, however, take precedence over those more distantly related.

(2) Children related by blood shall always take precedence over adopted children and legitimate children over illegitimate children.

...

(4) The following shall, in general, be excluded from taking over the farm:

...

(b) persons who, by reason of a mental or physical disability, seem incapable of running the farm themselves,

...

(d) persons who are prevented by their profession from managing the farm on the spot and working it in person.

... The decision regarding ... the existence of grounds of exclusion under paragraphs (b) to (e) shall be reserved to the court of first instance (Landesgericht and Kreisgericht), to which the District Court (Bezirksgericht) shall submit the file on the administration of the estate, together with its own opinion."

Section 8

"When the estate is being divided, the farm (section 6) shall devolve on the principal heir, who shall become the estate's debtor for the value of the farm free of charges."

Section 9

"(1) The value of the farm shall be determined by agreement among the persons concerned.

(2) If no such agreement can be reached, the court shall call on experts to make an assessment, shall hear the municipal council and the parties and shall determine on an equitable basis the value of the farm in such a way that the principal heir is not burdened with undue financial difficulties (wohl bestehen kann)."

Section 14

"(1) The law on reserved portions (Articles 765 and 766 of the Civil Code) is not affected by the regulations on division of estates.

(2) The value of reserved portions shall be assessed with reference to the value of the farm, determined in accordance with section 9(2) ..."

26. To meet social changes that have occurred in recent years, the Federal Minister of Justice has prepared two Bills, one for all provinces except Tyrol and Carinthia and another concerning only Carinthia. The latter Bill was, in accordance with the usual practice, the subject of a consultation procedure in 1985. It is being amended in the light of the views expressed and will be laid before Parliament in the near future. Section 8 of the Bill reads as follows (translation from German):

"If the deceased was the sole owner of the farm, the person taking it over shall be determined according to law and the order which it prescribes for the devolution of estates. If there are several heirs and no agreement has been reached among them, they shall be called to take over the farm in the following order:

1. Heirs who have been trained as farmers shall take precedence over those who have not. If several heirs have been trained as farmers, those who were brought up on the farm in question shall take precedence over those who were not.
2. Children, including adopted children, of the deceased shall take precedence over a surviving spouse; a surviving spouse shall, however, take precedence over descendants who were not brought up on the farm and over other relatives."

..."

The explanatory report states that this provision is designed to eliminate, *inter alia*, the disadvantages suffered by illegitimate and adopted children as compared with legitimate children.

PROCEEDINGS BEFORE THE COMMISSION

27. The applicant applied to the Commission on 20 June 1979 (application no. 8695/79). He complained that he was discriminated against, on account of his illegitimate birth, in the enjoyment of property rights relating to his mother's hereditary farm. He alleged a violation of Article 1 of Protocol No. 1, taken in conjunction with Article 14 of the Convention (art. 14+P1-1).

28. The Commission's proceedings were adjourned from May 1982 to October 1984 because friendly settlement negotiations were taking place in Austria. Subsequently, on 5 December 1984, the Commission declared the application admissible. In its report of 4 March 1986 (Article 31) (art. 31), the Commission expressed the opinion (by six votes to four) that there had been a breach of Article 14 of the Convention, read in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1). The full text of the Commission's opinion and of the dissenting opinions contained in the report is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS MADE BY THE GOVERNMENT TO THE COURT

29. At the hearing on 23 April 1987, the Government requested the Court to hold

"that in the present case the provisions of Article 1 of Protocol No. 1 (P1-1), whether taken alone or in conjunction with Article 14 (art. 14+P1-1) of the ... Convention, have not been violated and that, therefore, the facts underlying the dispute do not indicate any breach of the Convention by the Republic of Austria; and in event that the decision by the Court that there has been a breach of the Convention amounts in itself to adequate just satisfaction for the purposes of Article 50 (art. 50) of the Convention".

AS TO THE LAW

I. THE APPLICANT'S STATUS AS "VICTIM" (Article 25 of the Convention) (art. 25)

30. According to the Government, the applicant had renounced any claim to his mother's estate under the judicial settlement with his half-brother and his step-father concluded on 12 October 1981 (see paragraph 22 above). Furthermore, the value of the piece of land which he had received in exchange amounted roughly to the value of three-eighths of that estate. In consequence, he could no longer claim to be a "victim" of a breach of the Convention.

The applicant and the Commission took the opposite view; they pointed out in particular that the applicant had been in a weak negotiating position when he accepted the settlement.

31. The Court has jurisdiction to rule on this preliminary plea, since it was raised by the Government before the Commission at the admissibility stage (see, as the most recent authority, the Nölkenbockhoff judgment of 25 August 1987, Series A no. 123, p. 77, § 32).

32. The word "victim" in Article 25 (art. 25) refers to the person directly affected by the act or omission at issue; and the existence of a violation is conceivable even in the absence of prejudice, prejudice being relevant only for the purposes of Article 50 (art. 50) (see, inter alia, the van der Sluijs, Zuiderveld and Klappe judgment of 22 May 1984, Series A no. 78, p. 16, § 37). Therefore, the fact that a judicial settlement, concluded between private parties on their own, may have mitigated the disadvantage suffered by the applicant does not in principle deprive him of his status as "victim". The position might have been otherwise if, for instance, the

national authorities had acknowledged either expressly or in substance, and then afforded redress for, the alleged breach of the Convention (see, *inter alia*, the Eckle judgment of 15 July 1982, Series A no. 51, pp. 30-31, § 66).

33. In any event, the applicant's complaint was directed to the fact that, in the instant case, his illegitimate birth deprived him in law of any possibility of taking over his mother's farm in the partition of her estate. This situation remains unchanged and it is only its financial consequences which have been alleviated by the judicial settlement. In addition, the settlement was concluded at a time when Mr. Inze could no longer hope to obtain the property, since the Supreme Court had already finally decided against him (see paragraphs 20 to 22 above). He was therefore in a position of inferiority, and accepted the settlement as the lesser of two evils.

34. In these circumstances, the applicant can still claim to be a "victim" within the meaning of Article 25 (art. 25) of the Convention.

II. THE ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, TAKEN TOGETHER WITH ARTICLE 1 OF PROTOCOL No. 1 (art. 14+P1-1)

35. Mr. Inze claimed that, as a result of the application of section 7(2) of the Provincial Act (see paragraph 25 above), he had been a victim of a violation of Article 14 of the Convention, taken together with Article 1 of Protocol No. 1 (art. 14+P1-1). As far as is relevant, these provisions read:

Article 14 (art. 14) of the Convention

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as ... birth or other status."

Article 1 of Protocol No. 1 (P1-1)

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions ..."

A. Applicability

36. According to the Court's established case-law, Article 14 (art. 14) complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to the "rights and freedoms" safeguarded by those provisions. Although the application of Article 14 (art. 14) does not presuppose a breach of one or more of such provisions - and to this extent it is autonomous -, there can be no room for its application unless the facts of the case fall within the ambit of one or more of the latter (see, *inter alia*, the

Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 35, § 71).

The applicant did not allege a violation of Article 1 of Protocol No. 1 (P1-1), taken alone, and the Court does not find it necessary to examine this question *ex officio*; it suffices to ascertain whether his complaints fall within the ambit of this provision.

37. The Government submitted that this was not the case. They relied on the Court's *Marckx* judgment of 13 June 1979, according to which Article 1 of Protocol No. 1 (P1-1) "does no more than enshrine the right of everyone to the peaceful enjoyment of 'his' possessions, (...) consequently it applies only to a person's existing possessions and ... does not guarantee the right to acquire possessions whether on intestacy or through voluntary dispositions" (Series A no. 31, p. 23, § 50).

38. The Court recalls that Article 1 of Protocol No. 1 (P1-1) in substance guarantees the right of property (see, *inter alia*, the *AGOSI* judgment of 24 October 1986, Series A no. 108, p. 17, § 48).

Like the Commission, the Court considers that the situation in the instant case is to be distinguished from that in the *Marckx* case. In the latter, the complaint concerned the potential right of the second applicant to inherit from the first applicant, who was still alive. Here, the applicant had already acquired by inheritance a right to a share of his deceased mother's estate, including the farm, subject to a distribution of the assets in accordance with the Provincial Act. Under Articles 545, 547 and 550 of the Austrian Civil Code, on the death of the *de cuius*, the heirs automatically acquire their hereditary rights over his estate, which is vested in them *pro indiviso* (see paragraph 24 above).

Furthermore, the heirs had already accepted the shares provided for by the Civil Code and the *Klagenfurt* District Court had decided on 31 March 1976 that the declarations of acceptance were valid (see paragraph 9 above). The estate was therefore the joint property of the applicant and his co-heirs, although none of them had an immediate right to a specific asset.

39. According to the Government, the provisions of the Provincial Act governing the attribution of hereditary farms on intestacy (see paragraph 25 above) had two aims: to prevent the splitting up of a farm, by providing that it shall pass to only one of the heirs, who shall compensate the others; and to maintain the farm's viability by determining the compensation in such a manner that the principal heir is not burdened with undue financial difficulties.

The Court notes that the applicant did not challenge the system of hereditary farms as such, but only the criteria applicable to the choice of the principal heir. In this respect, section 7(2) of the Provincial Act gives precedence to legitimate over illegitimate children. Accordingly, in the instant case the farm in question went to the younger, legitimate, son,

whereas the applicant was, on the sole ground of his illegitimate birth, deprived of any possibility of obtaining it.

40. The Court thus concludes that the facts at issue fall within the ambit of Article 1 of Protocol No. 1 (P1-1) and that Article 14 of the Convention, taken together with that provision (art. 14+P1-1), is therefore applicable.

B. Compliance

41. For the purposes of Article 14 (art. 14), a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, *inter alia*, the *Lithgow and Others* judgment of 8 July 1986, Series A no. 102, pp. 66-67, § 177).

The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law; the scope of this margin will vary according to the circumstances, the subject-matter and its background (*ibid.*).

In this respect, the Court recalls that the Convention is a living instrument, to be interpreted in the light of present-day conditions (see, amongst various authorities, the *Johnston and Others* judgment of 18 December 1986, Series A no. 112, p. 25, § 53). The question of equality between children born in and children born out of wedlock as regards their civil rights is today given importance in the member States of the Council of Europe. This is shown by the 1975 European Convention on the Legal Status of Children born out of Wedlock, which is presently in force in respect of nine member States of the Council of Europe. It was ratified by the Republic of Austria on 28 May 1980, with a reservation (see paragraph 21 above) which is not relevant to the facts of the present case. Very weighty reasons would accordingly have to be advanced before a difference of treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention (see, *mutatis mutandis*, the above-mentioned *Abdulaziz, Cabales and Balkandali* judgment, Series A n° 94, p. 38, § 78).

42. The Government advanced the following arguments. The criteria for selecting the principal heir were a consequence of the fact that only one heir was entitled to take over a hereditary farm. Furthermore, those criteria were based on objective reasons; in particular, the precedence given to legitimate children corresponded to what could be presumed to be the deceased's intentions. In any event, the provisions of section 7(2) of the Provincial Act only applied to intestate succession and an owner who objected thereto could always make a will.

In addition, the birth criterion reflected the convictions of the rural population and the social and economic condition of farmers. Again, illegitimate children, unlike legitimate children, were usually not brought up on their parents' farm and did not have close links with it.

Finally, one had to bear in mind the special treatment reserved to the surviving spouse, who was normally entitled to stay on the farm and to be maintained by the principal heir.

43. Like the Commission, the Court is not persuaded by the Government's arguments. Most of them are based on general and abstract considerations - concerning such matters as the deceased's intentions, the place where illegitimate children are brought up and the surviving spouse's relations with his or her legitimate children - which may sometimes not reflect the real situation. For instance, Mr. Inze was brought up and had worked on the farm in question until the age of 23 (see paragraph 9 above). Those considerations cannot justify a rule of this kind.

Whilst it is true that the applicant's mother could have made a will in his favour, this does not alter the fact that, in the instant case, he was deprived by law of the possibility of taking over the farm on her death intestate.

44. The Court also considers that the argument relating to the convictions of the rural population merely reflects the traditional outlook. The Government themselves have recognised the ongoing developments in rural society and have accordingly prepared a Bill which takes them into account. In future, the attribution of a hereditary farm is to be based on objective circumstances, notably training for running farms and the fact of having been brought up on the particular property (see paragraph 26 above).

The Court wishes to make it clear that these proposed amendments cannot in themselves be taken as demonstrating that the previous rules were contrary to the Convention. They do however show that the aim of the legislation in question could also have been achieved by applying criteria other than that based on birth in or out of wedlock.

45. The Court therefore concludes that there was a breach of Article 14 of the Convention, taken together with Article 1 of Protocol No. 1 (art. 14+P1-1).

III. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

46. Article 50 (art. 50) provides as follows:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... 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."

Mr. Inze claimed just satisfaction for pecuniary damage resulting from his inability to take over his mother's farm and for costs and expenses. He made no claim for non-pecuniary damage and this is not a matter which the Court has to examine *ex officio* (see, *mutatis mutandis*, the Sunday Times judgment of 6 November 1980, Series A no. 38, p. 9, § 14).

A. Damage

47. The Court notes that, as a result of section 7(2) of the Provincial Act, the applicant had no possibility in this case of taking over his mother's farm, since the precedence given to his half-brother excluded him from the list of prospective principal heirs (see paragraph 33 above).

It is true that Article 1 of Protocol No. 1 (P1-1) did not entitle the applicant to inherit the farm specifically. Nevertheless, he lost, because of the discrimination found by the Court, real opportunities of taking over the farm, which must be taken into account (see, amongst other authorities, *mutatis mutandis*, the Sporrang and Lönnroth judgment of 18 December 1984, Series A no. 88, p. 13, § 25).

Although the judicial settlement of 12 October 1981 (see paragraph 22 above) may have somewhat alleviated the financial consequences of the violation found by the Court, it did not completely efface - and did not therefore provide sufficient reparation for - the initial disadvantage suffered by the applicant (see paragraphs 32-33 above).

48. Mr. Inze's original claims were based on an expert opinion, dated 18 April 1985, which proceeded on the assumption that he would have obtained his mother's farm, but for the discrimination found by the Court.

He subsequently put forward an alternative method which led to a figure of ATS 1,268,476.34. This represented the alleged market value of the farm in 1976 (ATS 1,455,000) less (a) the transfer value (ATS 197,481.83) of the legal shares due to his half-brother and his step-father (see paragraphs 9 and 13 above) and (b) the market value at that time (ATS 455,700) of the piece of land received under the judicial settlement (see paragraph 22 above). The relevant sums had been adjusted to take account of changes in the cost-of-living index up to January 1987.

49. The Government questioned both this method of calculation and its results. They put forward an alternative method, proposed by the Federal Ministry of Finance. In their opinion, if the Provincial Act had not applied, Mr. Inze would have been entitled only to three-eighths of the market value of the entire farm (ATS 1,827,838 in 1985). His material loss would then have amounted only to the difference between his legal share (ATS 685,439.52) and the market value of the piece of land he finally obtained (ATS 607,600).

50. The Commission's Delegate disagreed with both methods of calculation, since they led not to equal treatment between Mr. Inze and his

half-brother, but, respectively, to treatment that was either more favourable or more prejudicial to the former. In his opinion, the applicant's compensation should be calculated by increasing his legal share in reasonable proportion to the surplus value which accrued to his half-brother.

51. Without disregarding the fact that the discrimination found by the Court led to a certain financial imbalance between the applicant and his half-brother, the Court points out that the damage is in this case the applicant's loss of opportunities (see paragraph 47 above). Such a loss does not readily lend itself to precise quantification (see the above-mentioned *Sporrong and Lönnroth* judgment, Series A no. 88, p. 14, § 27).

Accordingly, the Court, taking all the relevant factors into account and, as required by Article 50 (art. 50), making an assessment on an equitable basis, awards Mr. Inze the sum of ATS 150,000.

B. Costs and expenses

52. Mr. Inze claimed the reimbursement of costs and expenses incurred in Austria (ATS 22,780 for lawyer's fees in the succession proceedings, ATS 4,409 for sundry expenses and 2,539 for expert's fees) and before the Convention institutions (ATS 95,857.15 for the Commission's proceedings and ATS 38,493.95 for the Court's).

53. In accordance with its established case-law, the Court must ascertain whether the costs and expenses claimed were actually incurred, necessarily incurred and reasonable as to quantum.

54. As to the costs in Austria, the Court accepts that at least the lawyer's and the expert's fees were actually incurred. Moreover, although the Government contended that the presence of a lawyer in the succession proceedings was not in principle necessary, the Court considers that certain of the issues raised (including the question of constitutionality) were complex and required professional assistance. In addition, it was not unreasonable to have recourse to the services of an expert, having regard to the technicality of real-estate matters (see the above-mentioned *Sporrong and Lönnroth* judgment, Series A no. 88, p. 17, § 39); in fact, the Government themselves also consulted specialists.

In the absence of details as to the lawyer's fees and sundry expenses, the Court awards the sum of ATS 23,000 for these items; to this should be added the ATS 2,539 for the expert's fees.

55. As regards the Commission's proceedings, the applicant claimed ATS 5,067 for lawyer's fees incurred before they were adjourned (see paragraph 28 above) and ATS 90,790.15 for fees incurred thereafter. For the proceedings before the Court, he sought ATS 38,493.95.

56. The Court finds the first amount, which was not contested by the Government, to be reasonable and therefore allows it.

As for the second and third amounts, the Government did not contest that the applicant had incurred liability to pay sums additional to those covered by the legal aid which he had received from the Council of Europe (see the *Unterpertinger* judgment of 24 November 1986, Series A no. 110, p. 16, § 36). However, both they and the Commission argued that the figures claimed were excessive.

The Government questioned the way in which the applicant's lawyer had calculated his fees, the amount of which was twice that provided for proceedings before the Austrian Supreme Court. In the view of the Commission's Delegate, on the other hand, since the guidelines published by the Conference of the Austrian Bar Associations did not apply to the Convention institutions, the applicant's lawyer could not be criticised in this respect. However, the Delegate agreed with the Government that short notes and letters written by the lawyer to Strasbourg should not have been charged in the same way as substantial submissions.

In the circumstances of the case, the Court is unable to award the totality of the sums claimed. It considers, on an equitable basis, that the applicant is entitled, subject as provided below, to be reimbursed ATS 50,000 referable to the proceedings before the Commission after their adjournment and those before the Court.

57. To recapitulate, the sums allowed by the Court for costs and expenses total ATS 80,606. This amount has to be reduced by 4,500 French francs which the applicant has received, for lawyer's fees, by way of legal aid from the Council of Europe and increased by any turnover tax that may be due on the resulting balance or any part thereof.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that the applicant can still claim to be a "victim" within the meaning of Article 25 (art. 25) of the Convention;
2. Holds that there has been a breach of Article 14 of the Convention, taken together with Article 1 of Protocol No. 1 (art. 14+P1-1);
3. Holds that the respondent State is to pay to the applicant, for damage, ATS 150,000 (one hundred and fifty thousand Austrian Schillings) and, for costs and expenses, the sum resulting from the calculations to be made in accordance with paragraph 57 of the judgment;
4. Rejects the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 October 1987.

John CREMONA
President

Marc-André EISSEN
Registrar