COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

(Or. English)

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 9697/82

R. JOHNSTON and others against IRELAND

Report of the Commission

(Adopted on 5 March 1985)

STRASBOURG

TABLE OF CONTENTS

9697/82

9697/82

INTRODUCTION

1. The following is an outline of the case submitted to the European Commission of Human Rights and of the proceedings before the Commission.

The substance of the application

2. The case concerns the absence of provision in Ireland for divorce and for recognition of the family life of persons living in a family relationship outside marriage after the breakdown of the marriage of one of those persons.

3. The first applicant is a citizen of Ireland at present living in Dublin. He was married in 1952 and has three children from this marriage. He and his wife agreed to separate in 1965.

4. From 1971 the first applicant lived with the second applicant, who in 1978 gave birth to their daughter - the third applicant.

5. The first applicant is unable to seek a divorce a vinculo matrimonii in Ireland to enable him to marry the second applicant because of the constitutional prohibition of divorce contained in Article 41.3.2. of the Irish Constitution. This provision provides that "no law shall be enacted providing for the grant of a dissolution of marriage".

6. The applicants complain, under Arts. 8 and 12 of the Convention, of the lack of provision for divorce under Irish law. They claim that they are thus placed in the position where it is impossible for them to establish a recognised family status under Irish law. In addition, they claim that specific aspects of Irish family law in the areas of maintenance, succession rights, guardianship and paternal affiliation, fail to respect their family life, contrary to Art. 8.

7. The first and second applicants further complain that they are the victims of discrimination on the grounds of property in the enjoyment of their rights under Arts. 8 and 12. They submit that there is evidence of divorces being obtained outside Ireland by Irish couples, with sufficient resources, who subsequently remarry within the State. The third applicant also alleges discrimination, by reason of the various disabilities she is subject to under Irish succession law as an illegitimate child. Unlike a legitimate child, she possesses no legal right to inherit from her father if he were to die intestate. Further, she could only inherit from her mother in the event of an intestacy if she were to die leaving no surviving legitimate issue.

8. The first applicant further complains that the lack of a divorce law in Ireland denies him the freedom to manifest his religion and beliefs in practice, contrary to Art. 9 of the Convention.

9. Finally, the applicants complain under Art. 13 of the Convention, which guarantees the right to an effective remedy, that Irish law affords them no effective remedy or redress in respect of their complaints.

Proceedings before the Commission

10. The application was lodged with the Commission on 16 February 1982 and registered on 22 February 1982. On 5 July 1982 the Commission decided to give notice of the application to the Government of Ireland in accordance with Rule 42 (2)(b) of its Rules of Procedure, and to request the Government to submit its observations on the admissibility and merits of the application. The respondent Government submitted their observations on 2 November 1982 after being granted a three-week extension of the time limit by the President of the Commission. The applicants' observations in reply were received on 10 January 1983.

11. On 2 March 1983 the Commission decided, in accordance with Rule 42 (3) of the Commission's Rules of Procedure, to invite the parties to make further submissions at an oral hearing on the admissibility and merits of the application. The hearing was held in Strasbourg on 7 October 1983. The applicants were represented by Senator Mary Robinson, S.C., Mr William Duncan, counsel, and Ms. Maire Bates, solicitor. The respondent Government were represented by Mrs Jane Liddy, Agent, Department of Foreign Affairs, Mr Peter Sutherland, S.C., Attorney General, Mr Dermot Gleeson, S.C. and Mr James O'Reilly, counsel, and Mr Declan Quigley, Adviser, of the Office of the Attorney General.

12. Following the oral hearing, the Commission declared the application admissible as a whole.

13. After declaring the case admissible, the Commission, acting in accordance with Art. 28 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the communications from the parties, the Commission finds that there is no basis on which such a settlement can be made.

The present Report

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

C. A. NØRGAARD
G. SPERDUTI
J. A. FROWEIN
J. E. S. FAWCETT
T. OPSAHL
E. BUSUTTIL
G. JÖRUNDSSON
G. TENEKIDES
S. TRECHSEL
L. KIERNAN
A. S. GÖZÜBÜYÜK
J. C. SOYER
G. BATLINER

15. This Report was adopted by the Commission on 5 March 1985 and will now be sent to the Committee of Ministers in accordance with Art. 31 (2) of the Convention.

16. A friendly settlement of the case not having been reached, 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 under the Convention.

17. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application forms Appendix II.

18. 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.

ESTABLISHMENT OF THE FACTS

19. The facts of the case have been fully set out in the admissibility decision and for the convenience of the reader are reproduced below.

20. In general, unless otherwise indicated, the relevant law and practice and the particular facts of the case are not in dispute between the parties.

Relevant domestic law and practice

Constitutional provisions relating to the family

21. Article 41.3.2. of the Constitution provides that

"No law shall be enacted providing for the grant of a dissolution of marriage".

This provision does not prohibit divorce a mensa et thoro (judicial separation) which is available in Ireland.

22. Article 41.3.3. provides that

"No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved."

23. Other relevant provisions of Article 41 provice that

- the State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law;

- the State, therefore guarantees to protect the Family in its Constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the nation and State;

- the State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

24. The Supreme Court, interpreting the above provisions, has held:

- that the natural parents of an illegitimate child and the child itself are not a family for the purposes of Article 41 (The State (Nicolaou) v. An Bord Uchtála(1) [1966] I.R. 567).

- that an illegitimate child has unenumerated natural rights which will be protected under Article 40.3 (which deals generally with personal rights) such as the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being as well as the same natural rights under the Constitution as a legitimate child to religious and moral, intellectual, physical and social education (G. v. An Bord Uchtála [1980] I.R. 32).

---

(1) The Adoption Board

Recognition of Foreign Divorce Decrees

25. A series of judicial decisions have established that a foreign decree of divorce a vinculo matrimonii will be recognised in the State, even in respect of Irish nationals abroad, if obtained in the parties' common domicile (see Bank of Ireland v. Caffin, [1971] I.R. 123 and Gaffney v. Gaffney [1975] I.R. 133. A domicile of choice may be obtained if two factors are present, namely residence and the intention of permanent or indefinite residence. In determining whether the intention is permanent a court will take into account all the circumstances of a person's life. A divorce obtained in a foreign jurisdiction by a person domiciled in Ireland will not be recognised by the Irish courts

26. Under the regulations for Registrars and Deputy Registrars of marriages in Ireland, if notice is served for the marriage of a divorced person the Registrar refers the case to the Registrar General. The papers are referred by him to a legal advisor who advises as to whether or not on the facts furnished the divorce would be recognised as effective to dissolve the marriage under Irish law. If insufficient facts have been established, then further information is sought. The matter is then referred back to the legal adviser who ultimately gives his advice as to whether the marriage can be permitted.

Legal provisions concerning illegitimate children

27. The Illegitimate Children (Affiliation Orders) Act 1930 as amended by the Family Law (Maintenance of Spouses and Children) Act 1976 provides procedures whereby:

- the District Court may make an affiliation order in respect of the putative father of the child;

- A District Justice may approve a maintenance agreement between a person who admits himself to be the father of an illegitimate child and the mother of the child.

28. The Guardianship of Infants Act 1964 provides that in any proceedings about the custody, guardianship or upbringing of an infant, a court shall regard the welfare of the infant as the first and paramount consideration (Section 3). The mother of an illegitimate child is the child's sole guardian from the moment of its birth (Section 6 (4)). She has the same rights and duties of guardianship as have the parents of a legitimate child jointly. The natural father of an illegitimate child may make an application under the Act for custody and access orders (Section 11 (4)).

An illegitimate child may be legitimated by the subsequent marriage of his parents provided that the father and mother of the child could have been lawfully married to one another at the time of the child's birth. (Legitimacy Act 1931, Section 1 (1) and (2)).

Succession rights of illegitimate children

29. The rules, which are of relevance for the present application, concerning the succession rights of illegitimate children, may be summarised as follows:

- an illegitimate child can only inherit from its mother's estate, on an intestacy, if there are no surviving legitimate issue (Legitimacy Act 1931, Section 9(1));

- an illegitimate child has no rights to inheritance on the intestacy of his natural father. The expression "issue" in Sections 67 and 69 of the Succession Act 1965 has been held by the courts to refer to "legitimate issue" only. The Supreme Court in the case of O'Brien v. M.S. (Decision of 20 January 1984) has upheld the constitutionality of these provisions of the Succession Act holding that they do not infringe the principle of "equality before the law" and that such differential treatment between children cannot be described as unreasonable, unjust or arbitrary since its purpose is to protect the marriage-based family. The court stated:

"The provisions of Article 41 of the Constitution of Ireland create not merely a State interest but a State obligation to safeguard the family." (at p. 35);

- an illegitimate child has no rights to inherit on the intestacies of relatives of the natural parents;

- an illegitimate child has no claim against his father's estate under Section 117 of the Succession Act 1965. This Section empowers a court to make provision for a child where it considers that the testator has failed in his moral duty to make proper provision for the child. It would appear that an illegitimate child may, however, claim against his mother's estate under Section 117 for an order that proper provision be made. It would seem that such a claim would only succeed where the mother leaves no surviving legitimate issue (Section 117 and Section 116 of the Succession Act 1965).

Adoption

30. An adoption order may not be made unless those seeking to adopt are a married couple living together or the mother or natural father or a relative of the child, or a widow (Adoption Act 1952).

Registration of births

31. The law relating to registration of births of illegitimate children enables the Registrar to enter in the register the name of a person as father of the child at the joint request of the mother and of the person acknowledging himself to be the father of the child. In such cases the natural father and mother both sign the register.

The law is set out in the Registration of Births and Deaths (Ireland) Act 1863 as amended by the Births and Deaths Registration (Ireland) Act 1880. Provision is also made for the issue of a short form of birth certificate omitting the information about the parents of the child: Vital Statistics and Births, Deaths and Marriages Registration Act 1952.

Law Reform proposals

32. In September 1982 the Irish Law Reform Commission published a report on Illegitimacy under Irish law, recommending the elimination of discrimination between legitimate and illegitimate children and other reforms of the law. On 24 October 1983 the Government anounced its intention to implement most of the reforms proposed.

THE PARTICULAR FACTS OF THE CASE

33. The applicants are:

- Roy H. W. Johnston, born in 1930, a Scientific Research and Development Manager, at present residing in Rathmines, Dublin. He is a citizen of the Republic of Ireland;

- Janice Williams-Johnston, born in 1938, a teacher residing at the same address. She is a citizen of the United Kingdom.

- Nessa Doreen Williams-Johnston, born in 1978, who is the daughter of the first and second applicants.

34. The first applicant married Miss H in 1952 in a Church of Ireland ceremony. There are three children of the marriage born in 1956, 1959 and 1965 respectively. In 1965 it became clear to both parties to the marriage that the relationship had irretrievably broken down and they decided to live separately at different levels in the family house.

35. Several years later both parties formed relationships with third parties with whom they began to live. From 1971 the first applicant lived with Janice Williams who subsequently adopted the surname Johnston. Both couples resided by mutual agreement, in separate self-contained flats in the house until 1976, when the first applicant's wife moved to another residence. The first applicant and his wife established their new relationships with each other's knowledge and consent.

36. In 1978 the second applicant gave birth to a daughter who is the third applicant. The first applicant gave his consent, as permitted under Irish law, to his name being included in the Register of Births as father of the third applicant.

37. Under Art. 41.3.2. of the Irish Constitution, the first applicant is unable to obtain a divorce to enable him to marry the second applicant. Irish law does not provide for the possibility of obtaining a full divorce a vinculo matrimonii.

38. The first applicant has taken the following steps to regularise his relationship with his wife and with the second applicant and to make proper provision for his dependents:-

(a) He has investigated, with the consent of his wife the possibility of obtaining a divorce outsice Ireland, by consulting solicitors in Dublin and London. He was advised by his London solicitors that in the absence of residence within the jurisdiction, he would not be able to obtain an English divorce. The matter has not therefore been pursued.

(b) On 19 September 1982 a formal separation agreement was concluded between the first applicant and his wife recording an agreement which had been implemented some years earlier. Under this agreement his wife received a lump sum of £8,800 and provision was made for maintenance of the remaining dependent child of the marriage.

(c) He has made a will making provision after his death for the second applicant and his four children. Under the terms of the will a life interest in his house is conferred on the second applicant with the remainder to be shared by his four children as tenants in common. The second applicant would also receive one half of his residual estate and the remaining half would be divided equally among his four children.

(d) He has supported the third applicant throughout her life and has acted in all respects as a caring father.

(e) He has continued to contribute towards the maintenance of his wife up to the present. He has supported the three children of his marriage during their dependency.

(f) The second applicant has been nominated as beneficiary under the pension scheme attached to his employment.

(g) He has taken out health insurance in the names of the second and third applicants, as members of his family.

39. The second applicant works as Director of a play group in the City of Dublin. She is largely dependent on the first applicant for her support and maintenance. She has adopted the first applicant's surname, which she uses among friends and neighbours but for business purposes continues to use the name Williams. She has felt inhibited about telling her employers of her domestic circumstances. The second applicant is concerned at the lack of security provided by her present legal status, in particular, the absence of any legal right to be maintained by the first applicant and the absence of any potential rights of successsion.

40. The third applicant, has, under Irish law, the status of an illegitimate child. Her parents are concerned at the lack of any means by which she can, even with their consent, be recognised as their child with full rights of support and succession in relation to them. They are also concerned about the possibility of a stigma attaching to her by virtue of her legal status, especially when she begins to attend school.

41. The first and second applicants state that although they have not practised any formal religion for some time they have recently joined the Religious Society of Friends (the Quakers) in Dublin. This decision was influenced in part by their concern that the third applicant receive a Christian upbringing.

SUBMISSIONS OF THE PARTIES

The applicants

Articles 8 and 12: Rights to divorce and to remarry

42. The applicants accept that it is within the competence of the State under Art. 12 to impose certain restraints on the capacity to marry. However, a restriction on that right imposed by the State must be shown to be necessary in achieving some permissible social objective. As the Court has said in the Rudgeon case, the concept of 'necessity' implies the existence of a 'pressing social need' for the interference in question (Eur. Court H.R., judgment of 22.10.81, paras. 50-52). Moreover, the means employed must be shown to be proportionate to the end sought to be achieved. If it were to be argued that the prohibition of divorce existed to promote the stability of marriages generally, the applicants would contend that it is neither necessary nor effective in achieving that end and that its absolute nature breaches the principle of proportionality.

43. The right to marry under Art.12 revives after the dissolution of a first marriage whether that dissolution arises out of the death of the first spouse, or in countries which permit divorce, by virtue of a judicial decree. If a State, for example, were to forbid re-marriage after the death of a first spouse, it could scarcely be denied that the right to marry under Art. 12 would be infringed. In principle, therefore, any limitation on re-marriage is reviewable under Art. 12 and the burden falls on the State imposing such limitation to justify its need by reference to a permissible social objective.

44. The Commission's remarks in the case of X v. Switzerland (Dec. No. 9057/80, 5.10.81, D.R. 26 p. 207) that the Convention does not contain a right to divorce, were obiter dicta on issues which did not arise for full and proper consideration in that case. That case is distinguishable from the present application in that the issue was essentially one concerning the recognition to be accorded to the decree of an Argentinian court.

45. The applicants accept that the constitutional prohibition on divorce pre-dates the Convention and that no question relating to it was raised when Ireland became a Contracting Party. However, as the Court has stated the Convention is a living instrument which must be interpreted in the light of present-day conditions. A similar evolutive and teleological approach to interpretation has also been employed by the Supreme Court in respect of the Irish Constitution. (See e.g. McGee v. Attorney-General [1974] I.R. 284, per Walsh J, p. 319).

46. Moreover, in the Marckx judgment, the Court rejected the arguments of the Belgian Government that the fact that its law on illegitimacy existed at the time of coming into force of the Convention rendered it compatible with the Convention (Eur. Court H.R., judgment of 13.6.79, para. 41).

47. In this respect it is contended that the social conditions prevalent in Ireland in 1983 are completely different from the situation in 1937. For example, 50% of the population in Ireland is at present under 25 and in the past decade the population of three million has grown by a further half a million. Further, the stresses and strains of modern living have led to a marked increase in the incidence of marriage breakdown which is now recognised as a major social problem in Ireland. It has been estimated that there are 70,000 persons who are separated from their spouses. Moreover, opinion polls taken between 1971 and 1983 reveal that the figure of those in favour of divorce has risen from 22% to a present-day figure of 66%.

Article 8: Allegation that their family is not recognised under Irish law

48. The applicants accept that a State may be justified in making some distinctions between the legal regime applicable to married couples and couples cohabiting outside marriage. However, a couple cohabiting outside marriage, together with their child, do constitute a family under Art. 8. As such, their family status deserves some recognition and respect under national law and a legal system which adopts an extreme policy of non-recognition of such a family unit is failing to offer that minimum of respect which is required by Art. 8. Accordingly, where differences exist between the laws applicable to the two types of family, they should be capable of justification under the second paragraph of Art. 8.

49. In addition to the specific problems in the areas of maintenance and succession rights, and paternal affiliation, the policy of total non-recognition of the second family unit is illustrated by the following aspects of Irish law:

1. The applicants, in the event of difficulties arising at some future date, have no access to the system of "barring orders" instituted under Irish law to provide remedies in respect of violence

within the family (Family Law (Maintenance of Spouses and Children) Act 1976) as amended by the Family law (Protection of Spouses and Children) Act 1981. This remedy is not applicable to unmarried persons living together and their dependents. The applicants could only seek protection by way of an injunction before the High Court which is a less accessible and effective remedy.

2. The second applicant does not have any of the many rights in relation to the family home which are conferred on spouses by the Family Home Protection Act 1976.

3. If the first applicant decided to disinherit the second applicant she would have no remedy.

4. If the first applicant sought to transfer the title of his house in which he and the second and third applicants reside into the joint names of himself and the second applicant, he would not be entitled to exemption either from stamp duty or Land Registry Fees. Such an exemption has been provided for a married couple under Section 14 of the Family Home Protection Act 1976.

5. The second and third applicants, as beneficiaries under the first applicant's will would be potentially liable to pay inheritance tax under Section 36 of the Capital Acquisition Tax Act 1976. Under that Act, inheritance tax is payable by a "stranger" to the will, if the value of the inheritance exceeds £10,000. The threshold under the Act for a legitimate child or a lawful spouse is £150,000.

Maintenance and succession rights

50. The protections provided by the law for married couples in the areas of maintenance and succession are not always needed or availed of by married couples. However, such protections exist as part of a web of legal measures designed to give security to family relationships. It cannot be an answer to argue that the State allows the applicants to enter into private arrangements concerning maintenance and to make testamentary dispositions favouring each other. Contractual arrangements for maintenance may be defective, brought to an end by agreement and a will may be revoked at any time before a testator's death.

51. With respect to the third applicant, it is stated that matters of intestate succession and disposition by will are connected with family life and they come within the ambit of Art. 8 (Eur. Court h.R., Marckx case judgment of 13.6.79, para. 52).

52. The applicants dispute the validity of the Government's claim that if either of the first two applicants makes a will but fails to provide for the third applicant it would be open to the third applicant to formulate a claim under Section 117 of the Succession Act 1965. No such claim on the part of an illegitimate child has yet

succeeded. It is arguable that the effect of Section 117 read in conjunction with Section 110 of the 1965 Act would seem to give the illegitimate child the right to apply for provision out of his mother's estate alone and only where she has no legitimate child or children. There would appear to be no right under Section 117 to apply for provision out of the father's estate.

53. The third applicant's rights of intestate succession to the estate of her mother are liable to extinction should her mother at any time in the future marry and give birth to a legitimate child.

54. While it is true that the first applicant has made provision for the third applicant by his will, this may be revoked at any time before his death, or it might for some other reason be found to be invalid. Accordingly, the legal position of the third applicant is that she, in contrast to the position of a legitimate child, risks losing all rights of succession in relation to the estate of her father.

Parental affiliation and the rights of the natural father

55. It is contended that the State has a positive duty under Art. 8 to provide a legislative framework within which normal family life is made possible. In particular, the State has a duty to provide "legal safeguards that render possible as from the moment of the child's birth integration in its family" (Marckx case, loc. cit., para. 31).

56. It is submitted that the law in Ireland is such as to inhibit a normal parent-child relationship to the prejudice of the child's interest. This is illustrated by the following aspects of the father's status vis-à-vis his illegitimate child:

- the father is not recognised as a member of his child's family under Article 41 of the Constitution;

- there is no legal means by which the father may, even with the consent of the mother, be established as guardian of his child jointly with the mother;

- the father of an illegitimate child is not recognised as a parent of his child for the purposes of Article 42 of the Constitution which guarantees respect for "the inalienable right and duty of parents to provide ... for the education of their children";

- the father is not entitled in law to exercise the normal parental function of deciding jointly with the mother any matter relating to upbringing, education or welfare of his child;

- the mother may voluntarily allow the father to participate in such decision-making but in the event of a dispute, the father is not given a right under Section 11 of the Guardianship of Infants Act 1964 to apply for the court's direction on a matter affecting the welfare of his child. He is limited solely to an application for custody or access. Unlike a married father, he has no right to be consulted by the custodial parent in relation to important decisions concerning the upbringing, welfare and education of his child;

- the natural father is devoid of any parental rights to such an extent that there is no legal obligation for him to be consulted in the event of the natural mother seeking to have the illegitimate child adopted; (The State (Nicolaou) v. An Bord Uchtála [1966] I.R. 567).

- the third applicant cannot be legitimated by subsequent marriage under the Legitimacy Act 1931. Legitimation by subsequent marriage is only possible where the father and mother of the child could have been lawfully married to one another at the time of the child's birth. (Section 1 (2))

57. The applicants state that there is no existing method under Irish law whereby the paternal affiliation of an illegitimate child may be established for all purposes. It is true that an agreement made between the mother and father relating to the maintenance of an illegitimate child may be submitted to the court for its approval to be recorded (Illegitimate children (Affiliation Orders) Act 1930, Section 10). However, what is recorded is the judge's approval of a maintenance agreement. It does not establish paternity for any purpose other than the maintenance agreement. Furthermore, affiliation proceedings do not result in a paternity order in the full sense of a judgment in rem establishing the father-child relationship for all purposes.

58. Neither is the possibility of adoption a method of establishing paternal affiliation. Under Irish law an illegitimate child may be adopted by either the mother or the father (with the consent of his mother) but he may not be jointly adopted by both mother and father. The effect of adoption by the father would be to terminate the legal relationship as between mother and child. Adoption by the mother would render the child unadoptable by the father during the mother's life. Finally, the fact that the first and second applicants have been registered as parents of the third applicant on the registration of her birth does not affect the status of the applicants nor their legal relations with one another. The act of registration does not establish paternal affiliation nor is the legal integration of the child within his family thereby in any way facilitated.

Article 9

59. It is submitted that the constitutional provision forbidding dissolution of marriages embodies and enforces a moral principle of the Roman Catholic Church. As such this is an interference with the applicant's right to manifest his belief under Art. 9(1) which falls to be justified under the second paragraph of Art. 9.

60. The first applicant claims the right to manifest his belief to follow the guidance of his religion and to have his first marriage, which is irretrievably broken down, dissolved, so that he may enter a marriage relationship with the second applicant. He seeks to manifest that belief without being subject by law to the moral constraints imposed by a different religion where no attempt has been made to justify that constraint as being necessary to preserve the values in a democratic society under the second paragraph of Art. 9.

Article 14

Succession rights

61. The Government's claim that there exists a reasonable and objective justification for the distinction between the succession rights of the legitimate and illegitimate child is rejected. Under existing Irish law the child is devoid of intestate succession rights even where paternity has been established or acknowledged. While some marginal differentiation between the rights of legitimate and illegitimate children may perhaps be justified in the interests of the efficient administration of estates, the absolute denial of rights to the illegitimate child which is characteristic of Irish law goes far beyond what is necessary to achieve that objective.

Recognition of foreign divorce decrees

62. A foreign divorce obtained by a couple who are domiciled in Ireland will not be recognised as valid by the Irish courts. However, in the absence of any judicial investigation into its validity, the divorce may achieve de facto recognition in Ireland. It is noteworthy that the Government are unable to state, in each case where a divorced person has re-married in a civil ceremony in Ireland, that the divorce in question was one which would necessarily be recognised as valid by the Irish courts. Moreover, when a re-marriage occurs subsequent to a foreign divorce, the marriage certificate would be treated by most Irish authorities (e.g. the revenue authorities) as proof that a second marriage exists. Accordingly, genuine advantages, including taxation advantages, may therefore be derived from a foreign divorce even though it is one which the Irish courts might not recognise were they called upon to do so.

Respondent Government

Articles 8 and 12: The rights to divorce and to remarry

63. The Commission should refuse to interpret these provisions so widely as to include the duty to provide for a dissolution of marriage. It was not the intention of the contracting States when the Convention was drawn up that the question of whether divorce should be permitted or prohibited should be within the scope of the Convention. The fact that of the original 15 signatories to the Convention in November 1950, various States did not permit divorce and did not enter a reservation in respect of it, is a clear indication that the right to divorce was not intended by the parties to be covered by the Convention.

64. The legal regulation of marriage is a matter primarily for social policy. The Irish State has adopted means other than divorce a vinculo matrimonii to regulate situations of marital breakdown and of extra-marital relationships and to provide for the protection of the relationship of parents to their children and of the property and succession rights of all concerned.

65. In 1950 when the Convention was opened for signature, the Irish constitutional provisions on the subject were over a decade in existence. Neither the travaux préparatoires nor the subsequent jurisprudence under the Convention support the view that those provisions are incompatible with the Convention.

66. The Commission, in the case of X. v. Switzerland, has clearly held that the Convention does not oblige States to provide for a full divorce. In that case the applicant had claimed that Switzerland was in breach of its obligations under the Convention by refusing to recognise an Argentinian decree and allow the applicant to remarry under Swiss law. The Commission stated as follows:

> "The fact that the law applied by the Swiss authorities in this case does not provide for a full divorce and consequently does not permit a divorced person to remarry cannot constitute a violation of Art. 12 of the Convention as this provision does not require even the Convention States themselves to organise their matrimonial laws in such a way as to provide for the possibility of a full divorce involving the dissolution of the legal ties of marriage. Some Convention States in fact have, or had until only recently in their statute books restrictions on the right to marry very similar to those provided for under Argentinian law. This situation existed at the time of the drafting of the Convention, but none of the original signatory States having such a legal regime found it necessary to

declare an express reservation in this respect, nor was such reservation subsequently declared by any acceding State with a similar legal regime. The existence of restrictions of the kind in question here cannot, therefore, be considered to be contrary to the Convention."

(Dec. No. 9057/80, 5.10.81, D.R. 26 p. 207)

67. With respect to the Travaux préparatoires, the Teitgen Report of 5 September 1949 indicates the intention of the Committee on Legal and Administrative Questions to limit the guarantee of the right to marry to something less than that contained in the United Nations Declaration of Human Rights. Accordingly, the proposal did not contain the additional words which appear in Art. 16 of the Declaration "equal rights to marriage, during marriage and at its dissolution". (See Vol. 1, Travaux Préparatoires at p.67, Doc. H(61)4). This approach was subsequently confirmed by M. Teitgen in his Rapporteur's statement to a Consultative Assembly meeting, held from 5 to 8 September 1949 (ibid., p. 127). (1)

68. In addition, in a draft Protocol to the Convention which has recently been prepared, a provision concerning the equality of rights during marriage does not contain the expression "and at its dissolution" as in the Declaration and the United Nations Covenant on Civil and Political Rights. It was specifically decided to use the words "during marriage, and in the event of its dissolution" (emphasis added).

69. Finally, the Government do not accept that a teleological or evolutive approach to the interpretation of the Convention can give rise to a right which was never contemplated to be within the scope of the Convention.

Article 8: Allegation that the applicants are not recognised as a family under Irish law

Maintenance and succession rights

70. The Government submit that there is no violation of the applicants' rights since both are in employment and neither has suffered as a result of the absence of a duty to support the other. Both can claim supplementary welfare allowances from the State should the need arise under the Social Welfare (Supplementary Welfare Allowances) Act 1975. Moreover, Art. 8 does not require that a member of a family should have an absolute right to be maintained by another member or to have a share in the other's estate. It does not oblige the State to provide by law that two adults whether friends, relatives or otherwise who are living together should support each other. The first and second applicant are free to enter into a binding inter

(1) Published in the Collected Edition of the Travaux préparatoires, Vol. 1, p. 218 and p. 268

vivos agreement providing for mutual support during their lifetimes and to make testamentary dispositions in favour of each other. The State has not interfered with the exercise of these rights.

71. As far as this complaint concerns the third applicant, there is nothing to prevent her parents from disposing of their property in her favour. If either of the first two applicants makes a will that fails to provide for the third applicant she could formulate a claim under Section 117 of the Succession Act 1965. It has not been established that an illegitimate child is in a more disadvantageous position than a legitimate child in this regard.

72. Moreover, the third applicant's rights have not been infringed, since the first applicant has availed of the means open to him by making a will giving her a legal right in his estate.

Parental affiliation and the rights of the natural father

73. Art. 8 does not oblige the State to provide a procedure whereby the first and second applicants may be recognised as the parents of their child. Both applicants have been registered as parents of the third applicant. What they are seeking is some judicial process whereby they could be declared joint parents of the child. However, there is no right under Art. 8 whereby questions of status must be determined in a particular way. Such matters fall within the State's margin of appreciation. This is evident from the widely differing legal rules of member States of the Council of Europe relating, for example, to matters of guardianship, curatorship and capacity.

74. The evidence does not show that the first applicant has been in any way excluded from the legal category of father or parent. He participates actively in a relationship involving the illegitimate child and the mother. He has not been prevented in any way from ordering his affairs in respect of all of the children, his wife and the second applicant.

75. Finally, Irish law provides for voluntary acknowledgement of paternity in an agreement which may be submitted to the court for its approval to be recorded. It provides also for a judicial ruling on paternity and for the recording on an illegitimate child's birth certificate of the names of both parents. In addition, under the Guardianship of Infants Act 1964, the natural father of an illegitimate child may apply for custody of the child and a right of access.

Article 9

76. It is submitted that the applicant cannot derive a right from Art. 9 to terminate his marriage merely because he feels obliged in conscience to do so. He is, in effect, claiming that it is contrary

to his conscience to live with the consequence of certain actions he freely undertook and is seeking to use the Convention to impose his own view that there exists a fundamental right to a full divorce.

77. Reference is made to the interpretation of the freedom of conscience clause in Article 44.2.1. of the Irish Constitution. In the case of McGee v. Attorney General [1974] I.R. 284, Mr Justice Walsh stated as follows:

> "Because a person feels free or even obliged to pursue some particular activity which is not in itself a religious practice, it does not follow that such activity is guaranteed protection by Article 44. It is not correct to say, as was submitted, that the Article is a constitutional guarantee of a right to live in accordance with one's conscience subject to public order or morality. What the Article in fact guarantees is the right not to be compelled or coerced into living in a way which is contrary to one man's conscience and in the context of the Article that means contrary to one's conscience in so far as the exercise, practice or profession of religion is concerned". (p. 316)

78. Finally, the first applicant has not produced any evidence that the Church of Ireland requires him to divorce his wife in the present circumstances.

Article 13

79. Referring to the case law of the Commission, it is contended that this complaint is manifestly ill-founded since Art. 13 does not oblige the State to provide a remedy in respect of legislation.

Article 14

Foreign divorce decrees

80. As a general principle there can be no discrimination when a State recognises the validity of the judicial acts of foreign countries in accordance with the generally recognised principles of international law and that any differentiation of treatment is an inevitable and justifiable consequence of the regulation of legal issues by reference to conflict of law rules.

81. Irish courts will only recognise foreign decrees where there has been a change of domicile. Unlike civil law systems, the principle governing recognition of foreign decrees is not that of nationality but domicile. A foreign divorce decree based on a change of residence which has been undertaken purely for the purpose of obtaining the divorce would not be recognised in Ireland. In this regard it is

pointed out that the figures supplied by the applicants for marriages (where one or both parties were divorced) registered in Dublin do not disclose where any of the parties in question obtained a divorce or their domicile at the date of divorce. In the Government's view a proportion of the figures may reflect the number of expatriate Irish citizens who, having obtained a divorce, wish to marry in Ireland for sentimental reasons.

Succession rights of an illegitimate child

82. Art. 8 does not apply to matters of intestate succession to the estate of a putative father or mother. In the absence of such a right, Art. 14 is inapplicable. However, even if Art. 14 were applicable, it is submitted that the distinction between the position of a legitimate and an illegitimate child has a reasonable objective justification. The State has an interest in establishing an accurate and efficient means of disposing of property at death. After the death of a man alleged to be the father of a child, paternity cannot be established with the same confidence as during his lifetime. Having regard to the difficulty of proving paternity and the related danger of spurious claims, the State must provide for the orderly settlement of estates and must ensure the dependability of titles of property passing on intestacy.

83. The Government state that pursuant to a Law Reform Commission Report on Illegitimacy, the law in this area is about to be reformed. However, it is not accepted that there can be any one way of regulating rights on the status of children born out of marriage and it submits that even if the present law provides an unsatisfactory solution to problems arising in certain cases it does not violate Art. 8 in conjunction with Art. 14.

OPINION OF THE COMMISSION

POINTS AT ISSUE

84. The following are the principal points at issue in the application.

1. Whether the absence of provision for divorce under Irish law constitutes a breach of the rights of the applicants under Arts. 8 and 12 of the Convention;

2. Whether the failure of Irish law to confer a recognised family status on the first and second applicants involves a breach of their right to respect for family life contrary to Art. 8;

3. Whether the failure of Irish law to confer a recognised family status on the third applicant constitutes a breach of the right to respect for family life contrary to Art. 8.

4. Whether the inability of the first applicant to secure a divorce and thereby be free to marry the second applicant constitutes a breach of his right to freedom of thought, conscience and religion contrary to Art. 9;

5. Whether the first and second applicants are victims of discrimination in the enjoyment of their rights under Arts. 8 and 12 contrary to Art. 14;

6. Whether the third applicant is the victim of discrimination in the enjoyment of her rights under Art. 8 contrary to Art. 14;

7. Whether the applicants are denied an effective remedy in respect of their complaints contrary to Art. 13.

As regards Articles 8 and 12 and the absence of divorce

85. The first and second applicants, submit that the constitutional prohibition of divorce in Ireland prevents them from getting married and regularising their family situation. They allege that the inability of the first applicant to secure a divorce to enable him to marry the second applicant constitutes an interference with their right to respect for family life (Art. 8) and their right to marry (Art. 12).

The Government maintain that the right to divorce is not a matter which falls within the scope of the Convention.

86. Art. 8 states as follows:

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

87. Art. 12 provides that:

> "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."

9697/82

88. The Commission first observes that the right to divorce and subsequently to remarry cannot be derived from the plain wording of these provisions. Neither the ordinary meaning nor the context of Arts. 8 and 12, viewed in the light of the object and purpose of the Convention, indicate that they can be interpreted as imposing an obligation on State parties to provide for the dissolution of family or marriage ties.

89. In this connection the Commission recalls the following statement by the Court in the Airey Case:

> "In Ireland, many aspects of private or family life are regulated by law. As regards marriage, husband and wife are in principle under a duty to cohabit but are entitled, in certain cases, to petition for a decree of judicial separation; this amounts to recognition of the fact that the protection of their private or family life may sometimes necessitate their being relieved from the duty to live together".
>
> (Eur. Court H.R., judgment of 9.10.79, para. 33).

90. In the Commission's opinion, however, the above remarks are not to be understood as a finding that "respect" for family life might, in certain circumstances, require a State to provide for full divorce. It is clear from the above statement that the Court was referring to judicial separation, in this context, and not divorce.

91. While respect for private and family life may require provision to be made relieving parties from the obligation to live together, it must, in principle, be left to State Parties to decide what form the remedy should take. The Commission considers, having regard to the object and purpose of Art. 8, that such an interpretation accords with the realities of the pressures and strains on private and family life when marriages break down. Such matrimonial remedies are commonly found in the legal systems of all State Parties to the Convention.

92. The Commission also considers that Art. 12 is limited to conferring, "a right to form a legal relationship, to acquire a status" as opposed to the right to terminate a relationship or dissolve a status. (See, in this connection, No. 7114/75, Hamer v. United Kingdom, Comm. Report 13.12.79, D.R. 24 p. 13).

93. The Commission considers it appropriate, given the difficulties in assessing the issue under consideration by applying ordinary principles of interpretation, to have recourse to the Travaux

Préparatoires of the Convention and the circumstances of its conclusion, to confirm its interpretation of these provisions.

94. The Travaux show that the right to marry contained in Art. 12 was originally based on the text of Art. 16 of the Universal Declaration of Human Rights, which provides as follows:

> "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution."

95. The Comittee on Legal and Administrative Questions, responsible for the drafting of the Convention, however, omitted the words in the last sentence of Art. 16:

> "equal rights as to marriage, during marriage and at its dissolution".

96. In his report to the Consultative Assembly, the Rapporteur of the Committee on Legal and Administrative Questions, Mr Teitgen, explained this omission as follows:

> "In mentioning the particular Article, we have used only that part of the paragraph of the Article which affirms the right to marry and found a family, but not the subsequent provision of the Article concerning equal rights after marriage since we only guarantee the right to marry." (1)

97. The Commission must also attach particular significance to the fact that at the time of the drafting of the Convention, various State Parties did not provide for the dissolution of marriage and ratified the Convention without finding it necessary to declare an express reservation under Art. 64 on the basis that an incompatibility existed between the absence of a divorce law and any provision of the Convention. Nor was such a reservation subsequently entered by any acceding State with a similar legal regime.

98. In Ireland, the prohibition of divorce is contained, not in ordinary legislation, but in Article. 41.3.2 of the Irish Constitution which has been in force since 1937. Thus it cannot be in doubt that the Government of Ireland considered that the right to divorce was not a matter which fell within the scope of the Convention since it did not enter a reservation in respect of Article 41.3.2. when it ratified the Convention in 1953.

(1) (Collected Edition of the Travaux Préparatoires, Vol. 1, p. 266)

99. In the Commission's view the above drafting history confirms its opinion that neither Art. 8 nor Art. 12 was intended to contain a right to dissolve the ties of marriage and subsequently to remarry. A similar interpretation was given in Dec. No. 9057/80, 5.10.81, D.R. 26 p. 207. If the drafters of the Convention had intended to confer a right to divorce in any other provision of the Convention there would not have been any reason to omit the last sentence from the draft Art. 12. A different interpretation, therefore, would not be in harmony with what was intended at the time of signing the Convention. The respondent Government must be able to rely on this understanding of the scope of the Convention which reflects in explicit terms, a clear policy choice on behalf of the drafters.

100. The applicants contend with reference inter alia to the decisions of the Court in the Marckx case (Eur. Court H.R., judgment of 13.6.79, para. 41) that the Convention is a living instrument which ought to be interpreted in the light of present-day conditions. Account should, therefore, be taken of the significant change in social attitudes towards divorce and the increasingly high rate of marital breakdown.

101. The Commission considers, however, that such an approach to interpretation must be limited to rights which fall within the Convention and cannot be extended to include within the Convention matters which have been explicitly and deliberately excluded from its ambit. Thus it cannot be used to derive from Arts. 8 and 12 a right to divorce and subsequently to remarry when such a right was intentionally left outside the scope of the Convention.

102. The Commission thus finds that the right to divorce and subsequently to remarry is not guaranteed by the Convention.

Conclusion

103. The Commission concludes by a unanimous vote, that there has been no breach of Arts. 8 and 12 in that the right to divorce and subsequently to remarry is not guaranteed by the Convention.

As regards Article 8 and the complaints concerning the lack of a family status under Irish law

104. The first and second applicants complain, with reference to various aspects of Irish law, that they are unable to achieve the status of a family under Irish law or to ensure that their child becomes a fully integrated member of their family. They point inter alia to the absence of any legal duty on the first applicant to support the second applicant during his life or to provide for her

on his death; the inferior nature of the third applicant's rights of succession in relation to her parents compared with those of a legitimate child, the absence of a procedure by which the first and second applicants may be established jointly as the parents of their child and the exlusion of the first applicant from the category of legal guardian.

105. The Government contest that there has been an interference with the applicant's rights under this provision. They submit that the right to respect for family life does not require an obligation of maintenance between members of the family or a right to a share in the estate of a family member. Nor does it oblige the State to provide for a specific judicial procedure whereby the first and second applicants could be declared parents of their child.

General principles applicable to the present case:

A. The "Illegitimate" family

106. The Commission notes, firstly, that the European Court of Human Rights have stated that "although the object of Art. 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life" (Eur. Court H.R., Airey Case, judgment of 9.10.79, para. 32). Further, it is clear that the concept of family life under Art. 8 is not limited to the marriage-based family and applies to members of a second "family" who actually live together in a family relationship . As the Court has emphasised in the Marckx case Art. 8 applies to the family life of the "illegitimate" family as it does to that of the "legitimate" family (Eur. Court H.R., judgment of 13.6.79, para. 31, see also, Dec. No. 7626/76, 11.7.77, D.R. 11 p. 160; Dec. No. 7349/76, 14.7.77, D.R. 9 p. 57).

107. However, this does not mean that the "illegitimate" family is entitled to benefit from the same legal regime as the "legitimate" family in every respect. Thus, for example, the Commission considered that Art. 8 did not oblige the State to grant a right to custody and care to a natural father of a child born out of wedlock where the parents were free to marry but had chosen not to do so. (See Dec. No. 9639/82, 15.3.84, to be published in D.R., p. 13; also Dec. No. 9519/81, 15.3.84; Dec. No. 9558/81, 15.3.84, unpublished).

The scope of the obligation to respect family life in respect of members of an illegitimate family will depend on the circumstances of each case and, in particular, whether there exists a genuine family relationship and whether parents are free to regularise their situation by either marrying one another or dissolving existing marriage relationships. The position of children born out of wedlock with which the Marckx case was primarily concerned calls, however, for special consideration (see below paras. 110-112).

B. Scope of the obligation under Art. 8 where there is no divorce law

108. The Commission recalls its above conclusion (para. 103) that the Convention does not guarantee the right to divorce and, subsequently to remarry. It follows from this finding that the Convention cannot impose an obligation on a State, which does not have a divorce law, to confer on the second family unit a legal status equivalent to and in conflict with that of the legally recognised family. To require such a State to invest the second family unit with the same rights and duties as the family based on marriage or with an equivalent legal status would undermine the legal prohibition of divorce and render it empty of meaning. The State must be entitled under the Convention to maintain the primacy of the marriage-based family and to safeguard the rights of the spouse. It must, therefore, be recognised that where a new family relationship is formed by a party to an existing marriage, in a State which does not provide for divorce, it may not be possible to devise a legal framework which reconciles the competing claims of the persons involved and enables the marriage-based family and the non-marriage based family to lead, at the same time, a family life which is the same in all respects.

109. On the other hand, the Commission recognises that the second family unit is not deprived of all protection afforded by this provision merely because the State makes no provision for divorce. The reality of the existing ties between members of the second family unit, who live together in a family relationship cannot be ignored. Accordingly, it would not be consonant with respect for family life for the State to adopt a policy of total non-recognition of such units in its law and practice. The policy of maintaining the primacy of the traditional family based on lawful marriage and protecting it against attack cannot absolve the State of its obligations under Art. 8 towards the second family unit which has in fact been formed.

C. Children born out of wedlock

110. The Commission recalls the opinion of the Court in the Marckx case concerning the scope of the obligation on the State to respect the family life of the child born out of wedlock. The Court has emphasised the following principles:

> (1) "When the State determines in its domestic legal system the regime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal life. As envisaged by Article 8, respect for family life implies, in particular, in the Court's view, the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family" (loc. cit., para. 31). ...

"'Respect' for a family life so understood implies an obligation for the State to act in a manner calculated to allow these ties to develop normally" (ibid., para. 45).

(2) "The Court recognises that support and encouragement of the traditional family is in itself legitimate or even praiseworthy. However, in the achievement of this end recourse must not be had to measures whose object or result is, as in the present case, to prejudice the 'illegitimate' family; the members of the 'illegitimate' family enjoy the guarantees of Article 8 on an equal footing with the members of the traditional family ... " (ibid., para. 40).

(3) "The choice of the means calculated to allow everyone to lead a normal family life is left to the Contracting States." (ibid., para. 61).

111. The Commission has recognised in its case-law that the situation of children born out of wedlock necessitates a distinct legislative regulation which takes into account the special nature of the problems involved. Thus the Commission has stated as follows:

"Between a child and his mother a first and strong family relation is already established by the very event of the birth itself and usually also the unmarried mother maintains this family tie while the father of a child born out of wedlock may often not be willing to assume any family obligations. Thus, a general regulation conveying the right to care and custody to the mother in general responds to the circumstances which prevail in cases of children born out of wedlock.

If, as in the present case, both parents wish to maintain family relations they are free to marry and thus to obtain those legal advantages they require. If, however, they choose not to marry in order to avoid the application of marriage and family law, they are themselves responsible for the legal consequences of their choice."
(Dec. No. 9639/82, 15.7.84, to be published in D.R.).

112. Finally the Commission notes the provisions of the European Convention of 15 October 1975 on the Legal Status of Children born out of Wedlock which reflects the tendency in many European states to assimilate the legal status of children born out of wedlock with that of children born in wedlock. The evolution of rules and attitudes in this direction was the subject of particular comment by the Court in the Marckx case (loc. cit., para. 41).

Application of general principles to the facts of the case:

A. Legal status of first and second applicant

113. The first and second applicant have complained, in effect, that the law does not recognise their relationship. In particular, there exists no legal duty for them to support one another or to make provision for one another in their wills.

114. The Court in the Marckx case has affirmed that the scope of "family life" extends to "interests of a material kind as is shown by the obligations in respect of maintenance and the position occupied in the domestic legal system of the majority of the Contracting States by the institution of the reserved portion of an estate (réserve héréditaire) ..." (loc. cit., para. 52).

115. The Commission first observes that a genuine family relationship clearly exists between the first and second applicant and their child.

116. However the obligation on the respondent Government to respect family life, in the instant case, cannot give rise to an obligation to undermine the prohibition of divorce either by granting some form of legal recognition of the relationship between the first and second applicant or by conferring on them maintenance and patrimonial rights. At the very least the obligation on the respondent Government is one of non-interference in the family life which exists between the first and second applicants. In this respect, the Commission notes that there exists no legal impediment under Irish law preventing the applicants from living together, supporting each other and, in particular, making dispositions inter vivos or by will or from entering into maintenance agreements.

Conclusion

117. The Commission concludes, by twelve votes to one, that there is no breach of Art. 8 in that Irish law does not confer a recognised family status on the first and second applicants.

B. Legal status of the third applicant

118. The applicants complain that Irish law fails to ensure the full integration of the third applicant in their family.

119. The Commission observes that the relevant provisions of Irish law embody a general State policy not to recognise family law relationships between all members of a family formed outside marriage. Although the Supreme Court had held that the child born out of wedlock

is the beneficiary of certain natural rights, the family, for purposes of Irish Constitutional law, is the marriage-based family alone. (see above, para. 24).

120. The response of the legal system to the existence of family ties outside marriage, as in the case of the applicants, is to give special emphasis to the relationship between mother and child as opposed to that of the family of which the child forms part. Thus in law, maternal affiliation is established by the fact of birth (mater semper certa est) without any requirement of voluntary or judicial recognition. Moreover, the mother is the child's sole legal guardian and her consent is necessary to enter the name of the natural father in the Register of births (see above, para. 31).

121. It would be open to the first applicant under Irish law to apply to a court for custody or access orders, if need be, but he is not regarded, as of right, as the third applicant's legal guardian. This disability may have far-reaching consequences for the child, as well as for the first applicant, since he possesses no legally enforceable rights to be consulted concerning the welfare, education and religious upbringing of his child and no possibility during the lifetime of the second applicant of ever being granted such rights by a court (see above, paras. 28 and 56).

122. In addition, under Irish law the third applicant could not be legitimated by a subsequent valid marriage in the event of the death of the first applicant's wife since he was not free to marry at the time of her birth (see above, para. 28).

123. Further, it would appear that the third applicant could not benefit from the protection afforded under the Family law (Protection of Spouses and Children) Act 1981 of either parent obtaining a "barring order" and a separate remedy would have to be sought by a parent by way of injunction before the High Court (see above, para. 49).

124. Finally, the Commission notes that the third applicant enjoys inferior succession rights than legitimate children in the event of her parents dying intestate or failing in their moral duty to make proper testamentary provision for her (see above, para. 29). Such distinctions in the succession provisions applicable to children born in wedlock and children born out of wedlock in the event of an intestacy have been held, in the case of O'Brien v. M.S. (decision of the Supreme Court, 20.1.84.) to be justified under Irish constitutional law to protect the primacy of the marriage-based family. Similarly, the third applicant's liability to pay inheritance tax under the Capital Acquisitions Tax Act 1967 is also on a different basis from that of a child born in wedlock (see above, para. 49).

125. The above analysis of the legal status of the third applicant under Irish law shows that she is not regarded as forming part of a family as such and that her status is, in important respects,

different to that of a child born in wedlock. In the opinion of the Commission the above described general policy of non-recognition of the reality of her family ties, in contradistinction to the legal position of the child born in wedlock, represents a failure by the State to provide a framework for the proper ordering of relations between the third applicant and her parents.

126. Since Irish law does not recognise the family of the applicant, it does not provide an appropriate legal regime for the proper development of her family ties and thus, in this way, denies to her the same enjoyment of the right to respect for family life as that enjoyed by a child born in wedlock (see Marckx case, loc. cit.). Such a legal situation constitutes a failure to respect the family life of all three applicants.

127. The Commission considers that a legal regime which regards the third applicant as part of a family would not interfere with the rights of the marriage-based family and would not, in any way, undermine the legal prohibition of divorce. In that context the Commission notes that in many Convention States the family law relationship between a father and a child born out of wedlock has been recognised in recent times.

128. In these circumstances, the Commission is of the opinion that there has been an interference with the rights of the three applicants under this provision of such a nature that it admits of no justification under the second paragraph of Art. 8 of the Convention. Moreover, it notes, in this regard, that the respondent Government have limited their submissions to the first paragraph of this provision.

129. In view of the above general conclusion the Commission does not consider it necessary to examine the applicants' further allegations that specific provisions of Irish law constitute separate breaches of this provision.

Conclusion

130. The Commission concludes, by a unanimous vote, that there has been a breach of Art. 8 in that the legal regime concerning the status of the third applicant under Irish law fails to respect the family life of all three applicants.

As regards Article 9

131. The first applicant complains that he is unable to terminate his former marriage in accordance with the dictates of his conscience. He states that the constitutional prohibition of divorce enforces a moral principle of the Roman Catholic Church and, as such, prevents him from following the guidance of his religion and dissolving his first marriage.

9697/82

132. The respondent Government contend that the applicant has not shown that his religion would require him to divorce his wife and that Art. 9 of the Convention does not guarantee a general right to live in accordance with one's conscience in all respects.

133. Art. 9 (1) provides as follows:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

134. The Commission considers that Arts. 8 and 12 must be considered to be the lex specialis in respect of the complaint concerning the absence of divorce in Ireland as regards the other provisions in the Convention. It recalls its conclusion that these provisions do not guarantee the right to divorce and subsequently to remarry (see above para. 103). The applicant cannot, therefore, derive from Art. 9 a right to divorce and to remarry.

Conclusion

135. The Commission concludes, by a unanimous vote, that there has been no breach of the first applicant's rights under Art. 9 of the Convention.

As regards Article 14 in conjunction with Articles 8 and 12

136. The first and second applicants complain that they are victims of discrimination in the enjoyment of their right to respect for family life and their right to marry.

137. Art.14 of the Convention provides as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

138. They complain that they are discriminated against on grounds of property in their enjoyment of the above rights in that it is open to Irish citizens with sufficient resources to obtain a divorce in another country which would be recognised by Irish courts and which would enable them to remarry within the State.

139. The respondent Government point out that the recognition by Irish courts of divorces obtained by parties who are domiciled abroad accords with the recognised principles of private international law.

They further point out that a foreign divorce decree would only be recognised if the parties were domiciled in the jurisdiction where the divorce was obtained. A divorce decree, which was based on a change of residence undertaken purely for purposes of obtaining a divorce, would not be recognised under Irish law.

140. The Commission recalls that a difference of treatment in the enjoyment of a Convention right is discriminatory if it "has no objective and reasonable justification". As the Court has stated in the Belgian Linguistic Case:

> "The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim; Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. (Eur. Court. H.R., judgment of 23.7.68, para. 10).

141. The Commission accepts that there is a difference in treatment between the first and second applicant and other couples resident in Ireland whose foreign divorces may be recognised by Irish courts. It leaves open the question whether they are placed in analagous situations.

142. However, it must be observed that Irish law only recognises foreign divorces which have been obtained by spouses domiciled in the country where the divorce has been obtained. Residence alone in the country concerned is not sufficient for recognition of a foreign divorce. Moreover, under Irish law, a foreign divorce would not be recognised by Irish courts where domicile has been fraudulently invoked before a foreign court for the purpose of obtaining a divorce. Further, if a divorced person seeks permission to marry within the State, the Registrar-General for marriages will seek legal advice as to whether or not on the facts of the case the divorce obtained abroad would be recognised as effective to dissolve the marriage under Irish law. (see above, para. 26).

143. The applicants, in this connection, have provided statistical information concerning the percentage of marriages registered in Ireland, at particular times, where one or both of the parties had obtained a divorce abroad. However, the Commission notes that no evidence has been provided concerning the domicile of those who obtained the divorce. Accordingly, the information which has been submitted does not substantiate the applicant's claim that Irish citizens, who are normally resident in Ireland, are able to obtain a divorce in another country which would be recognised by the Irish authorities.

144. Having regard to the above, the Commission considers that the above difference in treatment between the first and second applicants and other couples resident in Ireland finds a reasonable and objective justification on the grounds that the State, in recognising divorce decrees obtained in other countries is applying generally recognised principles of private international law. It considers therefore, in this respect, that there has been no discrimination under Irish law contrary to Art. 14 in conjunction with Arts. 8 and 12.

145. The third applicant also alleges that she is the victim of discrimination in the enjoyment of her right to respect for family life. She refers in this respect to the distinctions which exist under Irish succession law between her capacity as a child born out of wedlock to inherit from her natural parents and that of a child born in wedlock. (See above, para. 29).

146. However, the Commission recalls that it has found that the failure of the Irish legal system to regard the third applicant as part of a family and to deny to her the same enjoyment of the right to respect for family life as that enjoyed by children born in wedlock constitutes a breach of Art. 8 of the Convention. In reaching this conclusion, it has taken into consideration, together with other aspects of Irish law concerning the status of the child born out of wedlock, the distinctions between legitimate and illegitimate children which exist under Irish succession law.

147. In these circumstances, the Commission finds that it is not necessary to examine the third applicant's separate complaint of discrimination.

Conclusion

148. The Commission concludes, by twelve votes to one, that there has been no breach of Arts. 14 in conjunction with Arts. 8 and 12 in that the first and second applicants have not been discriminated against by Irish law.

As regards Article 13

149. Finally, the applicants complain that because of the constitutional prohibition of divorce which forms the basis of their complaints to the Commission, they have no effective remedy under Irish law in respect of their complaints.

150. Art. 13 provides that:

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

151. The Commission recalls its decision in the Young, James and Webster case that Art. 13 does not guarantee a remedy against legislation as such (Nos. 7601 7806/77, Comm. Report, 14.12.79, paras. 174-178).

152. It follows, a fortiori, that Art. 13 does not guarantee an effective remedy in respect of a constitutional provision.

Conclusion

153. The Commission concludes, by a unanimous vote, that there has been no breach of Art. 13.

SUMMARY OF THE COMMISSION'S CONCLUSIONS AND FINDINGS

154. The following constitutes a summary of the Commission's conclusions and findings in the present application.

1. The Commission concludes, by a unanimous vote, that there has been no breach of Arts. 8 and 12 in that the right to divorce and subsequently to remarry is not guaranteed by the Convention (para. 103).

2. The Commission concludes, by twelve votes to one, that there is no breach of Art. 8 in that Irish law does not confer a recognised family status on the first and second applicants (para. 117).

3. The Commission concludes, by a unanimous vote, that there has been a breach of Art. 8 in that the legal regime concerning the status of the third applicant under Irish law fails to respect the family life of all three applicants (para. 130).

4. The Commission concludes, by a unanimous vote, that there has been no breach of the first applicants' rights under Art. 9 of the Convention (para. 135).

5. The Commission concludes, by twelve votes to one, that there has been no breach of Art. 14 in conjunction with Arts. 8 and 12 in that the first and second applicants have not been discriminated against by Irish law (para. 148).

6. The Commission finds that it is not necessary to examine the third applicants' separate complaint of discrimination (para. 147).

7. The Commission, concludes, by a unanimous vote, that there has been no breach of Art. 13 (para. 153).

Secretary to the Commission

H. C. KRUGER

President of the Commission

C. A. NØRGAARD

9697/82

APPENDIX I

History of Proceedings

Item	Date	Note
Introduction of the application	16 February 1982	
Registration of the application	22 February 1982	
Commission's decision to communicate the application to the respondent Government pursuant to Rule 42(2)(b) of the Rules of Procedure	5 July 1982	M: Sperduti Ermacora Fawcett Kellberg Tenekides Trechsel Kiernan Melchior Sampaio Özübüyük Weitzel Soyer
Government's observations	2 November 1982	
Applicants' observations in reply	10 January 1983	
Commission's decision to invite the parties to make oral submissions on admissibility and merits pursuant to Rule 42(3)(b) of the Rules of Procedure	2 March 1983	M: Nørgaard Sperduti Frowein Fawcett Opsahl Tenekides Trechsel Kiernan Melchior Sampaio Özübüyük Weitzel Schermers

9697/82

Hearing of the parties pursuant to Rule 42(3)(b) of the Rules of Procedure. Deliberations on admissibility and merits. Decision to declare the application admissible (As to the parties' representatives - see p. 2 above)	7 October 1983	M. Nørgaard Sperduti Frowein Ermacora Fawcett Triantafyllides Busuttil Opsahl Trechsel Kiernan Melchior Sampaio Weitzel Soyer Danelius
Commission's deliberations	6 Mars 1984	M. Sperduti Nørgaard Frowein Fawcett Opsahl Trechsel Melchior Sampaio Weitzel Soyer Danelius
Further deliberations, vote and consideration of the Report	13 December 1984	M. Nørgaard Sperduti Frowein Fawcett Opsahl Busuttil Jörundsson Tenekides Trechsel Kiernan Cözübüyük Soyer Batliner