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

COURT (PLENARY)

CASE OF JOHNSTON AND OTHERS v. IRELAND

(Application no. 9697/82)

JUDGMENT

STRASBOURG

18 December 1986

In the case of Johnston and Others*

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

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

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

Having deliberated in private on 30 June, 1 July and 27 November 1986,

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

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 21 May 1985, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The case originated in an application (no. 9697/82) against Ireland lodged with the Commission in 1982 under Article 25 (art. 25) by Roy H.W. Johnston, an Irish citizen,

* Note by the Registrar: The case is numbered 6/1985/92/139. 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.

Janice Williams-Johnston, a British citizen, and Nessa Williams-Johnston, their daughter, an Irish citizen.

2. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Ireland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The request sought a decision from the Court as to the existence of violations of Articles 8, 9, 12 and 13 (art. 8, art. 9, art. 12, (art. 13) and of Article 14 (taken in conjunction with Articles 8 and 12 (art. 14+8, art. 14+12)).

3. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, Roy Johnston and Janice Williams-Johnston stated that they wished to take part in the proceedings pending before the Court, adding that their declaration was to be construed as including their daughter as the third applicant; they also designated the lawyers who would represent them (Rule 30). The Government of the United Kingdom of Great Britain and Northern Ireland, having been informed by the Registrar of their right to intervene (Article 48, paragraph (b) (art. 48-b), of the Convention and Rule 33 § 3 (b)), did not indicate any intention of so doing.

4. The Chamber of seven judges to be constituted included, as ex officio members, Mr. B. Walsh, the elected judge of Irish nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 28 June 1985, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. W. Ganshof van der Meersch, Mr. J. Cremona, Mr. G. Lagergren, Mr. F. Gölcüklü and Mr. R. Macdonald (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

5. Mr. Ryssdal, who had assumed the office of President of the Chamber (Rule 21 § 5), consulted, through the Registrar, the Agent of the Irish Government ("the Government"), the Commission's Delegate and the applicants' representative on the necessity for a written procedure (Rule 37 § 1). Thereafter, in accordance with the Orders and directions of the President of the Chamber, the following documents were lodged at the registry:

- on 31 October 1985, applicants' memorandum setting out their claim under Article 50 (art. 50) of the Convention;
- on 28 November 1985, memorial of the Government and memorial of the applicants.

By letter of 31 January 1986, the Secretary to the Commission informed the Registrar that the Delegate would present his observations at the hearing.

6. On 24 January 1986, the Chamber decided under Rule 50 to relinquish jurisdiction forthwith in favour of the plenary Court.

7. After consulting, through the Registrar, the Agent of the Government, the Commission's Delegate and the applicants' representative,

the President directed on 30 January that the oral proceedings should open on 23 June 1986.

8. The hearings were held in public at the Human Rights Building, Strasbourg, on 23 and 24 June 1986. Immediately before they opened, the Court had held a preparatory meeting. There appeared before the Court:

- for the Government
  Mrs. J. LIDDY, Deputy Legal Adviser,
  Department of Foreign Affairs, *Agent*,
  Mr. D. GLEESON, Senior Counsel,
  Mr. J. O'REILLY, Counsel, *Counsel*,
  Mr. M. RUSSELL, Office of the Attorney General,
  Mr. P. SMYTH, Department of Foreign Affairs, *Advisers*;
- for the Commission
  Mr. Gaukur JÖRUNDSSON, *Delegate*;
- for the applicants
  Senator M. ROBINSON, Senior Counsel,
  Dr. W. DUNCAN, Lecturer in Law, *Counsel*,
  Mrs. M. O'LEARY, Solicitor.

The Court heard addresses by Mr. Gleeson and Mr. O'Reilly for the Government, by Mr. Gaukur Jörundsson for the Commission and by Senator Robinson and Dr. Duncan for the applicants, as well as replies to questions put by the Court and one of its members.

9. Various documents were filed by the Government during the hearings and, at the request of the President of the Court, by the Commission on 16 June and 30 July 1986.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

10. The first applicant is Roy H.W. Johnston, who was born in 1930 and is a scientific research and development manager. He resides at Rathmines, Dublin, with the second applicant, Janice Williams-Johnston, who was born in 1938; she is a school-teacher by profession and used to work as director of a play-group in Dublin, but has been unemployed since 1985. The third applicant is their daughter, Nessa Doreen Williams-Johnston, who was born in 1978.

11. The first applicant married a Miss M in 1952 in a Church of Ireland ceremony. Three children were born of this marriage, in 1956, 1959 and 1965.

In 1965, it became clear to both parties that the marriage had irretrievably broken down and they decided to live separately at different levels in the family house. Several years later both of them, with the other's knowledge and consent, formed relationships and began to live with third parties. By mutual agreement, the two couples resided in self-contained flats in the house until 1976, when Roy Johnston's wife moved elsewhere.

In 1978, the second applicant, with whom Roy Johnston had been living since 1971, gave birth to Nessa. He consented to his name being included in the Register of Births as the father (see paragraph 26 below).

12. Under the Constitution of Ireland (see paragraphs 16-17 below), the first applicant is unable to obtain, in Ireland, a dissolution of his marriage to enable him to marry the second applicant. He has taken the following steps to regularise his relationship with her and with his wife and to make proper provision for his dependents.

(a) With his wife's consent, he has consulted solicitors in Dublin and in London as to the possibility of obtaining a dissolution of the marriage outside Ireland. His London solicitors advised that, in the absence of residence within the jurisdiction of the English courts, he would not be able to do so in England, and the matter has therefore not been pursued (see also paragraphs 19-21 below).

(b) On 19 September 1982, he concluded a formal separation agreement with his wife, recording an agreement implemented some years earlier. She received a lump-sum of IR£8,800 and provision was made for maintenance of the remaining dependent child of the marriage. The parties also mutually renounced their succession rights over each other's estates.

(c) He has made a will leaving his house to the second applicant for life with remainder over to his four children as tenants in common, one half of the residue of his estate to the second applicant, and the other half to his four children in equal shares.

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

(e) He contributed towards the maintenance of his wife until the conclusion of the aforementioned separation agreement and 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.

13. The second applicant, who is largely dependent on the first applicant for her support and maintenance, 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 him and of any potential rights of succession in the event of intestacy (see also paragraph 23 below). As is permitted by law, she has adopted the first applicant's surname, which she uses amongst

friends and neighbours, but for business purposes continues to use the name Williams. According to her, she has felt inhibited about telling employers of her domestic circumstances and although she would like to become an Irish citizen by naturalisation, she has been reluctant to make an application, not wishing to put those circumstances in issue.

14. The third applicant has, under Irish law, the legal situation of an illegitimate child and 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 (see paragraphs 30-32 below). They are also concerned about the possibility of a stigma attaching to her by virtue of her legal situation, especially when she is attending school.

15. 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 receives a Christian upbringing.

II. RELEVANT DOMESTIC LAW

A. Constitutional provisions relating to the family

16. The Constitution of Ireland, which came into force in 1937, includes the following provisions:

> "40.3.1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> 40.3.2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.
>
> 41.1.1° 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.
>
> 41.1.2° 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 the State.
>
> (...)
>
> 41.3.1° 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.
>
> 41.3.2° No law shall be enacted providing for the grant of a dissolution of marriage.

(...)

42.1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

(...)

42.5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."

17. As a result of Article 41.3.2º of the Constitution, divorce in the sense of dissolution of a marriage (divorce a vinculo matrimonii) is not available in Ireland. However, spouses may be relieved of the duty of cohabiting either by a legally binding deed of separation concluded between them or by a court decree of judicial separation (also known as a divorce a mensa et thoro); such a decree, which is obtainable only on proof of commission of adultery, cruelty or unnatural offences, does not dissolve the marriage. In the remainder of the present judgment, the word "divorce" denotes a divorce a vinculo matrimonii.

It is also possible to obtain on various grounds a decree of nullity, that is a declaration by the High Court that a marriage was invalid and therefore null and void ab initio. A marriage may also be "annulled" by an ecclesiastical tribunal, but this does not affect the civil status of the parties.

18. The Irish courts have consistently held that the "Family" that is afforded protection by Article 41 of the Constitution is the family based on marriage. Thus, in The State (Nicolaou) v. An Bord Uchtála The Adoption Board 1966 Irish Reports 567, the Supreme Court said:

"It is quite clear from the provisions of Article 41, and in particular section 3 thereof, that the family referred to in this Article is the family which is founded on the institution of marriage and, in the context of the Article, marriage means valid marriage under the law for the time being in force in the State. While it is quite true that unmarried persons cohabiting together and the children of their union may often be referred to as a family and have many, if not all, of the outward appearances of a family, and may indeed for the purposes of a particular law be regarded as such, nevertheless as far as Article 41 is concerned the guarantees therein contained are confined to families based upon marriage."

The Supreme Court has, however, held that an illegitimate child has unenumerated natural rights (as distinct from rights conferred by law) which will be protected under Article 40.3 of the Constitution, 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 Irish Reports 32).

B. Recognition of foreign divorces

19. Article 41.3.3º of the Constitution provides:

> "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 dissolved."

20. A series of judicial decisions has established that the foregoing provision does not prevent the recognition by Irish courts, under the general Irish rules of private international law, of certain decrees of divorce obtained, even by Irish nationals, in another State. Such recognition used to be granted only if the parties to the marriage were domiciled within the jurisdiction of the foreign court at the time of the relevant proceedings (Re Caffin Deceased: Bank of Ireland v. Caffin 1971 Irish Reports 123; Gaffney v. Gaffney 1975 Irish Reports 133; however, since 2 October 1986 a divorce will be recognised if granted in the country where either spouse is domiciled (Domicile and Recognition of Foreign Divorces Act 1986). To be regarded as domiciled in a foreign State, a person must not only be resident there but also have the intention of remaining there permanently and have lost the animus revertendi. Moreover, the foreign divorce will not be recognised if domicile has been fraudulently invoked before the foreign court for the purpose of obtaining the decree.

21. If notice is served for a civil marriage before a Registrar of Births, Marriages and Deaths in Ireland and he is aware that either of the parties has been divorced abroad, he must, under the regulations in force, refer the matter to the Registrar-General. The latter will seek legal advice as to whether on the facts of the case the divorce would be recognised as effective to dissolve the marriage under Irish law and as to whether the intended marriage can consequently be permitted.

C. Legal status of persons in the situation of the first and second applicants

1. Marriage

22. Persons who, like the first and second applicants, are living together in a stable relationship after the breakdown of the marriage of one of them are unable, during the lifetime of the other party to that marriage, to marry

each other in Ireland and are not recognised there as a family for the purposes of Article 41 of the Constitution (see paragraphs 17 and 18 above).

2. Maintenance and succession

23. Such persons, unlike a married couple, have no legal duty to support or maintain one another and no mutual statutory rights of succession. However, there is no impediment under Irish law preventing them from living together and supporting each other and, in particular, from making wills or dispositions inter vivos in each other's favour. They can also enter into mutual maintenance agreements, although the Government and the applicants expressed different views as to whether these might be unenforceable as contrary to public policy.

In general, the married member of the couple remains, at least in theory, under a continuing legal obligation to maintain his or her spouse. In addition, testamentary dispositions by that member may be subject to the rights of his or her spouse or legitimate children under the Succession Act 1965.

3. Miscellaneous

24. As compared with married couples, persons in the situation of the first and second applicants:

(a) have no access, in the event of difficulties arising between them, to the system of barring orders instituted 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); they can, however, obtain analogous relief by seeking a court injunction or declaration;

(b) do not enjoy any of the rights conferred by the Family Home Protection Act 1976 in relation to the family home and its contents, notably the prohibition on sale by one spouse without the other's consent and the exemption from stamp duty and Land Registry fees in the event of transfer of title between them;

(c) as regards transfers of property between them, are less favourably treated for the purposes of capital acquisition tax;

(d) enjoy different rights under the social welfare code, notably the benefits available to deserted wives;

(e) are unable jointly to adopt a child (see also paragraph 29 below).

D. Legal situation of illegitimate children

1. Affiliation

25. In Irish law, the principle mater semper certa est applies: the maternal affiliation of an illegitimate child, such as the third applicant, is established by the fact of birth, without any requirement of voluntary or judicial recognition.

The Illegitimate Children (Affiliation Orders) Act 1930, as amended by the Family Law (Maintenance of Spouses and Children) Act 1976 and the Courts Act 1983, provides procedures whereby the District Court or the Circuit Court may make an "affiliation order" against the putative father of a child directing him to make periodic payments in respect of the latter's maintenance and also whereby the court may approve a lump-sum maintenance agreement between a person who admits he is the father of an illegitimate child and the latter's mother. Neither of these procedures establishes the child's paternal affiliation for all purposes, any finding of parentage being effective solely for the purposes of the proceedings in question and binding only on the parties.

26. Under the Registration of Births and Deaths (Ireland) Act 1863, as amended by the Births and Deaths Registration (Ireland) Act 1880, the Registrar may enter in the register the name of a person as the father of an illegitimate child if he is so requested jointly by that person and the mother. The act of registration does not, however, establish paternal affiliation.

2. Guardianship

27. The mother of an illegitimate child is his sole guardian as from the moment of his birth (section 6(4) of the Guardianship of Infants Act 1964) and has the same rights of guardianship as are jointly enjoyed by the parents of a legitimate child. The natural father can apply to the court under section 11(4) of the same Act regarding the child's custody and the right of access thereto by either parent; however, he cannot seek the court's directions on other matters affecting the child's welfare nor is there any means whereby he can be established as guardian of the child jointly with the mother, even if she consents.

3. Legitimation

28. An illegitimate child may be legitimated by the subsequent marriage of his parents, provided that, unlike the first and second applicants, they could have been lawfully married to one another at the time of the child's birth or at some time during the preceding ten months (section 1(1) and (2) of the Legitimacy Act 1931).

4. Adoption

29. Under the Adoption Act 1952, as amended, an adoption order can only be made in favour of a married couple living together, a widow, a widower, or the mother or natural father or a relative of the child.

5. Maintenance

30. The effect of the Illegitimate Children (Affiliation Orders) Act 1930, as amended by the Family Law (Maintenance of Spouses and Children) Act 1976, is to impose on each of the parents of an illegitimate child an equal obligation to maintain him. This obligation cannot be enforced against the father until an "affiliation order" has been made against him (see paragraph 25 above).

6. Succession

31. The devolution of estates on intestacy is governed by the Succession Act 1965 which provides, basically, that the estate is to be distributed in specified proportions between any spouse or "issue" who may survive the deceased. In O'B v. S 1984 Irish Reports 316, the Supreme Court held that the word "issue" did not include children who were not the issue of a lawful marriage and that accordingly an illegitimate child had, under the Act, no right to inheritance on the intestacy of his natural father. Whilst also holding that the resultant discrimination in favour of legitimate children was justifiable by reason of sections 1 and 3 of Article 41 of the Constitution (see paragraph 16 above), the Supreme Court stated that the decision to change the existing rules of intestate succession and the extent to which they were to be changed were primarily matters for the legislature. The relevant rules in the Act formed part of a statute designed to strengthen the protection of the family in accordance with Article 41, an Article which created not merely a State interest but a State obligation to safeguard the family; accordingly, the said discrimination was not necessarily unjust, unreasonable or arbitrary and the said rules were not invalid having regard to the provisions of the Constitution.

An illegitimate child may, on the other hand, in certain circumstances have a right to inheritance on the intestacy of his mother. A special rule (section 9(1) of the Legitimacy Act 1931) lays down that where the mother of an illegitimate child dies intestate leaving no legitimate issue, the child is entitled to take any interest in his mother's estate to which he would have been entitled if he had been born legitimate.

32. As regards testate succession, section 117 of the Succession Act 1965 empowers a court to make provision for a child for whom it considers that the testator has failed in his moral duty to make proper provision. An illegitimate child has no claim against his father's estate under this section, but may be able to claim against his mother's estate provided that she leaves no legitimate issue.

33. An illegitimate child inheriting property from his parents is potentially liable to pay capital acquisition tax on a basis less favourable than a child born in wedlock.

E. Law reform proposals

1. Divorce

34. In 1983, a Joint Committee of the Dáil (Chamber of Deputies) and the Seanad (Senate) was established, inter alia, to examine the problems which follow the breakdown of marriage. In its report of 1985, it referred to figures suggesting that approximately 6 per cent of marriages in Ireland had broken down to date, but noted the absence of accurate statistics. The Committee considered that the parties to stable relationships formed after marriage breakdown and the children of such relationships currently lacked adequate legal status and protection; however, it expressed no view on whether divorce legislation was at present necessary or desirable.

In a national referendum held on 26 June 1986, a majority voted against an amendment of the Constitution, which would have permitted legislation providing for divorce.

2. Illegitimacy

35. In September 1982, the Irish Law Reform Commission published a Report on Illegitimacy. Its basic recommendation was that legislation should remove the concept of illegitimacy from the law and equalise the rights of children born outside marriage with those of children born within marriage.

After considering the report, the Government announced in October 1983 that they had decided that the law should be reformed, and that reform should be concentrated on the elimination of discrimination against persons born outside marriage and on the rights and obligations of their fathers. However, the Government decided not to accept a proposal by the Law Reform Commission that the father be given automatic rights of guardianship in relation to a child so born.

36. In May 1985, the Minister of Justice laid before both Houses of Parliament a Memorandum entitled "The Status of Children", indicating the scope and nature of the main changes proposed by the Government. On 9 May 1986, the Status of Children Bill 1986, a draft of which had been annexed to the aforesaid Memorandum, was introduced into the Seanad. If enacted in its present form, the Bill - which has the stated purpose of removing as far as possible provisions in existing law which discriminate against children born outside marriage - would have, inter alia, the following effects.

(a) Where the name of a person was entered on the register of births as the father of a child born outside marriage, he would be presumed to be the father unless the contrary was shown (cf. paragraph 26 above).

(b) The father of a child born outside marriage would be able to seek a court order making him guardian of the child jointly with the mother (cf.

paragraph 27 above). In that event, they would jointly have all the parental rights and responsibilities that are enjoyed and borne by married parents.

(c) The proviso qualifying the possibility of legitimation by subsequent marriage would be removed by the repeal of section 1(2) of the Legitimacy Act 1931 (see paragraph 28 above).

(d) The legal provisions governing the obligation of both of the parents of a child born outside marriage to maintain him would be similar to those governing the corresponding obligation of married parents (see paragraph 30 above).

(e) For succession purposes, no distinction would be made between persons based on whether or not their parents were married to each other. Thus, a child born outside marriage would be entitled to share on the intestacy of either parent and would have the same rights in relation to the estate of a parent who died leaving a will as would a child of a family based on marriage (cf. paragraphs 31 and 32 above).

The Explanatory Memorandum to the Bill states that any fiscal changes necessitated by the proposed new measures would be a matter for separate legislation promoted by the Minister for Finance.

3. Adoption

37. Work is also in progress on legislation reforming the law of adoption, following the publication in July 1984 of the Report of the Review Committee on Adoption Services. That Committee recommended that, as at present (see paragraph 29 above), unmarried couples should not be eligible to adopt jointly even their own natural children.

PROCEEDINGS BEFORE THE COMMISSION

38. The application of Roy Johnston, Janice Williams-Johnston and Nessa Williams-Johnston (no. 9697/82) was lodged with the Commission on 16 February 1982. The applicants complained of the absence of provision in Ireland for divorce and for recognition of the family life of persons who, after the breakdown of the marriage of one of them, are living in a family relationship outside marriage. They alleged that on this account they had been victims of violations of Articles 8, 9, 12 and 13 (art. 8, art. 9, art. 12, art. 13) of the Convention and also of Article 14 (taken in conjunction with Articles 8 and 12) (art. 14+8, art. 14+12).

39. The Commission declared the application admissible on 7 October 1983.

In its report adopted on 5 March 1985 (Article 31) (art. 31), the Commission expressed the opinion that:

- there was no breach of Articles 8 and 12 (art. 8, art. 12) in that the right to divorce and subsequently to re-marry was not guaranteed by the Convention (unanimously);

- there was no breach of Article 8 (art. 8) in that Irish law did not confer a recognised family status on the first and second applicants (twelve votes to one);

- there was a breach of Article 8 (art. 8) in that the legal regime concerning the status of the third applicant under Irish law failed to respect the family life of all three applicants (unanimously);

- there was no breach of the first applicant's rights under Article 9 (art. 9) (unanimously);

- there was no breach of Article 14 in conjunction with Articles 8 and 12 (art. 14+8, art. 14+12) in that the first and second applicants had not been discriminated against by Irish law (twelve votes to one);

- it was not necessary to examine the third applicant's separate complaint of discrimination;

- there was no breach of Article 13 (art. 13) (unanimously).

The full text of the Commission's opinion is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS MADE TO THE COURT

40. The applicants invoked before the Court the same Articles (art. 8, art. 9, art. 12) as they did before the Commission, other than Article 13 (art. 13).

At the hearings on 23-24 June 1986, the Government maintained in substance the submissions in their memorial of 28 November 1985, whereby they had requested the Court:

> "(1) With regard to the preliminary submission: to decide and declare that (a) the applicants cannot claim to be victims within the meaning of Article 25 (art. 25) of the Convention; (b) the applicants have not exhausted their domestic remedies.
>
> (2) With regard to Articles 8 and 12 (art. 8, art. 12): to decide and declare that there has been no breach of Articles 8 and 12 (art. 8, art. 12) of the Convention in regard to the claim of the first and second-named applicants of a right to divorce and re-marry.
>
> (3) With regard to Article 8 (art. 8): to decide and declare that there has been no breach of Article 8 (art. 8) of the Convention in respect of the family life of all three applicants or any of them.
>
> (4) With regard to Article 9 (art. 9): to decide and declare that there has been no breach of Article 9 (art. 9) of the Convention.

(5) With regard to Article 14 in conjunction with Articles 8 and 12 (art. 14+8, art. 14+12): to decide and declare that there has been no breach of Article 14 read in conjunction with Article 8 and Article 12 (art. 14+8, art. 14+12) of the Convention.

(6) With regard to Article 13 (art. 13) of the Convention: to decide and declare that there has been no breach of Article 13 (art. 13) of the Convention.

(7) With regard to Article 50 (art. 50): (i) to decide and declare that an award of compensation is not justified or appropriate; (ii) alternatively, if and in so far as a breach of any Article of the Convention is found, to decide and declare that a finding of violation in itself constitutes sufficient just satisfaction."

The Government noted, however, that the claim of violation of Article 13 (art. 13) had been abandoned by the applicants; they also made some additional submissions regarding the admissibility of certain of the applicants' complaints (see paragraph 47 below).

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY PLEAS

A. Whether the applicants are entitled to claim to be "victims"

41. The Government pleaded that the tranquil domestic circumstances of the applicants showed that they were not at risk of being directly affected by those aspects of Irish law of which they complained. In a dispute which was manufactured or contrived, they had raised problems that were purely hypothetical and could therefore not properly claim to be "victims", within the meaning of Article 25 § 1 (art. 25-1) of the Convention, which, so far as is relevant, provides:

"The Commission may receive petitions ... from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the] Convention ..."

42. The Government had already - unsuccessfully - made this plea at the admissibility stage before the Commission; accordingly, they are not estopped from raising it before the Court (see, amongst various authorities, the Campbell and Fell judgment of 28 June 1984, Series A no. 80, p. 31, § 57).

However, the Court considers that the plea cannot be sustained. Article 25 (art. 25) entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it (see the Marckx judgment of 13 June

1979, Series A no. 31, p. 13, § 27). And, in fact, the applicants raise objections to the effects of the law on their own lives.

Furthermore, the question of the existence or absence of detriment is not a matter for Article 25 (art. 25) which, in its use of the word "victim", denotes "the person directly affected by the act or omission which is in issue" (see, amongst various authorities, the de Jong, Baljet and van den Brink judgment of 22 May 1984, Series A no. 77, p. 20, § 41).

The applicants are therefore entitled in the present case to claim to be victims of the breaches which they allege.

43. The Court does not consider that it should accede to the Government's invitation to defer judgment until after the enactment of the Status of Children Bill, which is designed to modify the relevant Irish law in a number of respects (see paragraph 36 above). On several occasions the Court has proceeded with its examination of a case notwithstanding the existence of proposed or intervening reforms (see, for example, the Marckx, the Airey and the Silver and Others cases, judgments of 13 June 1979, 9 October 1979 and 25 March 1983, Series A nos. 31, 32 and 61).

B. Whether the applicants have failed to exhaust domestic remedies

44. According to the Government - which had already raised a similar plea at the appropriate time before the Commission -, the constitutionality of each of the provisions of Irish law complained of by the applicants could have been tested in the Irish courts. Since, however, they had failed to exhaust such domestic remedies as they might have been advised, the Commission had erred in declaring their application admissible.

45. The only remedies which Article 26 (art. 26) of the Convention requires to be exhausted are those that relate to the breaches alleged; the existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; and it falls to the respondent State, if it pleads non-exhaustion, to establish that these various conditions are satisfied (see, amongst many authorities, the above-mentioned de Jong, Baljet and van den Brink judgment, Series A no. 77, p. 19, § 39).

46. In so far as the applicants' complaints relate to the prohibition of divorce under the Constitution of Ireland, no effective domestic remedy is available.

As regards the remaining issues, the Court, bearing particularly in mind the established case-law of the Irish courts (see paragraphs 18 and 31 above), does not consider that the Government have established with any degree of certainty the existence of any effective remedy.

C. Whether certain of the applicants' complaints are inadmissible on other grounds

47. At the hearings on 23-24 June 1986, the Government maintained that since the Commission's admissibility decision in the present case the applicants had advanced, before both the Commission and the Court, a number of new complaints, relative to their status under Irish law, which had not been declared admissible in that decision. In the Government's view, these complaints - which concerned the availability of barring orders, the applicability of the Family Home Protection Act 1976, rights of intestate succession as between the first and second applicants, the incidence of taxation and stamp duty, entitlement under the social welfare code and alleged discrimination in employment - were "not properly before the Court".

48. The Commission's Delegate pointed out that these matters were relied upon by the applicants as illustrations of the general complaint submitted to and declared admissible by the Commission, namely that the applicants "are placed in a position whereby it is impossible to establish a recognised family status under Irish law or to ensure that their child becomes a fully integrated member of their family".

Likewise, the Court notes that the applicants' original application to the Commission states that they "complain that, by the manner in which their family relationships are treated under law, Ireland is in breach of Article 8 (art. 8)...". Moreover, at the hearings before the Court the Government argued that the case presented to the Court and to which they had to respond was "a package".

In these circumstances, the matters in question do not fall outside the compass of the case brought before the Court, which compass is delimited by the Commission's admissibility decision. Besides, the Court has already found, at paragraph 46 above, that none of them is inadmissible for non-exhaustion of domestic remedies (see the James and Others judgment of 21 February 1986, Series A no. 98, p. 46, § 80).

II. SITUATION OF THE FIRST AND SECOND APPLICANTS

A. Inability to divorce and re-marry

1. Articles 12 and 8 (art. 12, art. 8)

49. The first and second applicants alleged that because of the impossibility under Irish law of obtaining a dissolution of Roy Johnston's marriage and of his resultant inability to marry Janice Williams-Johnston,

they were victims of breaches of Articles 12 and 8 (art. 8, art. 12) of the Convention. These provisions read as follows:

Article 12 (art. 12)

"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."

Article 8 (art. 8)

"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."

This allegation was contested by the Government and rejected by the Commission.

50. The applicants stated that, as regards this part of the case, the central issue was not whether the Convention guaranteed the right to divorce but rather whether the fact that they were unable to marry each other was compatible with the right to marry or re-marry and with the right to respect for family life, enshrined in Articles 12 and 8 (art. 12, art. 8).

The Court does not consider that the issues arising can be separated into watertight compartments in this way. In any society espousing the principle of monogamy, it is inconceivable that Roy Johnston should be able to marry as long as his marriage to Mrs. Johnston has not been dissolved. The second applicant, for her part, is not complaining of a general inability to marry but rather of her inability to marry the first applicant, a situation that stems precisely from the fact that he cannot obtain a divorce. Consequently, their case cannot be examined in isolation from the problem of the non-availability of divorce.

(a) Article 12 (art. 12)

51. In order to determine whether the applicants can derive a right to divorce from Article 12 (art. 12), the Court will seek to ascertain the ordinary meaning to be given to the terms of this provision in their context and in the light of its object and purpose (see the Golder judgment of 21 February 1975, Series A no. 18, p. 14, § 29, and Article 31 § 1 of the Vienna Convention of 23 May 1969 on the Law of Treaties).

52. The Court agrees with the Commission that the ordinary meaning of the words "right to marry" is clear, in the sense that they cover the formation of marital relationships but not their dissolution. Furthermore, these words are found in a context that includes an express reference to

"national laws"; even if, as the applicants would have it, the prohibition on divorce is to be seen as a restriction on capacity to marry, the Court does not consider that, in a society adhering to the principle of monogamy, such a restriction can be regarded as injuring the substance of the right guaranteed by Article 12 (art. 12).

Moreover, the foregoing interpretation of Article 12 (art. 12) is consistent with its object and purpose as revealed by the travaux préparatoires. The text of Article 12 (art. 12) was based on that of Article 16 of the Universal Declaration of Human Rights, paragraph 1 of which reads:

"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."

In explaining to the Consultative Assembly why the draft of the future Article 12 (art. 12) did not include the words found in the last sentence of the above-cited paragraph, Mr. Teitgen, Rapporteur of the Committee on Legal and Administrative Questions, said:

> "In mentioning the particular Article of the Universal Declaration, we have used only that part of the paragraph of the Article which affirms the right to marry and to found a family, but not the subsequent provisions of the Article concerning equal rights after marriage, since we only guarantee the right to marry." (Collected Edition of the Travaux préparatoires, vol. 1, p. 268)

In the Court's view, the travaux préparatoires disclose no intention to include in Article 12 (art. 12) any guarantee of a right to have the ties of marriage dissolved by divorce.

53. The applicants set considerable store on the social developments that have occurred since the Convention was drafted, notably an alleged substantial increase in marriage breakdown.

It is true that the Convention and its Protocols must be interpreted in the light of present-day conditions (see, amongst several authorities, the above-mentioned Marckx judgment, Series A no. 31, p. 26, § 58). However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate.

It should also be mentioned that the right to divorce is not included in Protocol No. 7 (P7) to the Convention, which was opened to signature on 22 November 1984. The opportunity was not taken to deal with this question in Article 5 of the Protocol (P7-5), which guarantees certain additional rights to spouses, notably in the event of dissolution of marriage. Indeed, paragraph 39 of the explanatory report to the Protocol states that the words "in the event of its dissolution" found in Article 5 (P7-5) "do not imply any obligation on a State to provide for dissolution of marriage or to provide any special forms of dissolution."

54. The Court thus concludes that the applicants cannot derive a right to divorce from Article 12 (art. 12). That provision is therefore inapplicable in the present case, either on its own or in conjunction with Article 14 (art. 14+12).

(b) Article 8 (art. 8)

55. The principles which emerge from the Court's case-law on Article 8 (art. 8) include the following.

(a) By guaranteeing the right to respect for family life, Article 8 (art. 8) presupposes the existence of a family (see the above-mentioned Marckx judgment, Series A no. 31, p. 14, § 31).

(b) Article 8 (art. 8) applies to the "family life" of the "illegitimate" family as well as to that of the "legitimate" family (ibid.).

(c) Although the essential object of Article 8 (art. 8) is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective "respect" for family life. However, especially as far as those positive obligations are concerned, the notion of "respect" is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals (see the Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, pp. 33-34, § 67).

56. In the present case, it is clear that the applicants, the first and second of whom have lived together for some fifteen years (see paragraph 11 above), constitute a "family" for the purposes of Article 8 (art. 8). They are thus entitled to its protection, notwithstanding the fact that their relationship exists outside marriage (see paragraph 55 (b) above).

The question that arises, as regards this part of the case, is whether an effective "respect" for the applicants' family life imposes on Ireland a positive obligation to introduce measures that would permit divorce.

57. It is true that, on this question, Article 8 (art. 8), with its reference to the somewhat vague notion of "respect" for family life, might appear to lend itself more readily to an evolutive interpretation than does Article 12 (art. 12). Nevertheless, the Convention must be read as a whole and the Court does not consider that a right to divorce, which it has found to be excluded from Article 12 (art. 12) (see paragraph 54 above), can, with consistency, be derived from Article 8 (art. 8) a provision of more general purpose and scope. The Court is not oblivious to the plight of the first and second applicants. However, it is of the opinion that, although the protection of private or family life may sometimes necessitate means whereby spouses can be relieved from the duty to live together (see the above-mentioned

Airey judgment, Series A no. 32, p. 17, § 33), the engagements undertaken by Ireland under Article 8 (art. 8) cannot be regarded as extending to an obligation on its part to introduce measures permitting the divorce and the re-marriage which the applicants seek.

58. On this point, there is therefore no failure to respect the family life of the first and second applicants.

2. Article 14, taken in conjunction with Article 8 (art. 14+8)

59. The first and second applicants complained of the fact that whereas Roy Johnston was unable to obtain a divorce in order subsequently to marry Janice Williams-Johnston, other persons resident in Ireland and having the necessary means could obtain abroad a divorce which would be recognised de jure or de facto in Ireland (see paragraphs 19-21 above). They alleged that on this account they had been victims of discrimination, on the ground of financial means, in the enjoyment of the rights set forth in Article 8 (art. 8), contrary to Article 14 (art. 14), which reads as follows:

> "The enjoyment of the rights and freedoms set forth in the 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."

This allegation, contested by the Government, was rejected by the Commission.

60. Article 14 (art. 14) safeguards persons who are "placed in analogous situations" against discriminatory differences of treatment in the exercise of the rights and freedoms recognised by the Convention (see, as the most recent authority, the Lithgow and Others judgment of 8 July 1986, Series A no. 102, p. 66, § 177).

The Court notes that under the general Irish rules of private international law foreign divorces will be recognised in Ireland only if they have been obtained by persons domiciled abroad (see paragraph 20 above). It does not find it to have been established that these rules are departed from in practice. In its view, the situations of such persons and of the first and second applicants cannot be regarded as analogous.

61. There is, accordingly, no discrimination, within the meaning of Article 14 (art. 14).

3. Article 9 (art. 9)

62. The first applicant also alleged that his inability to live with the second applicant other than in an extra-marital relationship was contrary to his conscience and that on that account he was the victim of a violation of Article 9 (art. 9) of the Convention, which guarantees to everyone the "right to freedom of thought, conscience and religion".

The applicant supplemented this allegation, which was contested by the Government and rejected by the Commission, by a claim of discrimination in relation to conscience and religion, contrary to Article 14 taken in conjunction with Article 9 (art. 14+9).

63. It is clear that Roy Johnston's freedom to have and manifest his convictions is not in issue. His complaint derives, in essence, from the non-availability of divorce under Irish law, a matter to which, in the Court's view, Article 9 (art. 9) cannot, in its ordinary meaning, be taken to extend.

Accordingly, that provision, and hence Article 14 (art. 14) also, are not applicable.

4. Conclusion

64. The Court thus concludes that the complaints related to the inability to divorce and re-marry are not well-founded.

B. Matters other than the inability to divorce and re-marry

65. The first and second applicants further alleged that, in violation of Article 8 (art. 8), there had been an interference with, or lack of respect for, their family life on account of their status under Irish law. They cited, by way of illustration, the following matters:

(a) their non-recognition as a "family" for the purposes of Article 41 of the Constitution of Ireland (see paragraph 18 above);

(b) the absence of mutual maintenance obligations and mutual succession rights (see paragraph 23 above);

(c) their treatment for the purposes of capital acquisition tax, stamp duty and Land Registry fees (see paragraph 24 (b) and (c) above);

(d) the non-availability of the protection of barring orders (see paragraph 24 (a) above);

(e) the non-applicability of the Family Home Protection Act 1976 (see paragraph 24 (b) above);

(f) the differences, in the social welfare code, between married and unmarried persons (see paragraph 24 (d) above).

The Government contested this allegation. The Commission, for its part, considered that the fact that Irish law did not confer a recognised family status on the first and second applicants did not give rise to a breach of Article 8 (art. 8).

66. In the Court's view, there has been no interference by the public authorities with the family life of the first and second applicants: Ireland has done nothing to impede or prevent them from living together and continuing to do so and, indeed, they have been able to take a number of steps to regularise their situation as best they could (see paragraph 12 above). Accordingly, the sole question that arises for decision is whether an

effective "respect" for their family life imposes on Ireland a positive obligation to improve their status (see paragraph 55 (c) above).

67. The Court does not find it necessary to examine, item by item, the various aspects of Irish law relied on by the applicants and listed in paragraph 65 above. They were put forward as illustrations to support a general complaint concerning status (see paragraph 48 above) and, whilst bearing them in mind, the Court will concentrate on this broader issue.

68. It is true that certain legislative provisions designed to support family life are not available to the first and second applicants. However, like the Commission, the Court does not consider that it is possible to derive from Article 8 (art. 8) an obligation on the part of Ireland to establish for unmarried couples a status analogous to that of married couples.

The applicants did, in fact, make it clear that their complaints concerned only couples who, like themselves, wished to marry but were legally incapable of marrying and not those who had chosen of their own volition to live together outside marriage. Nevertheless, even if it is circumscribed in this way, the applicants' claim cannot, in the Court's opinion, be accepted. A number of the matters complained of are but consequences of the inability to obtain a dissolution of Roy Johnston's marriage enabling him to marry Janice Williams-Johnston, a situation which the Court has found not to be incompatible with the Convention. As for the other matters, Article 8 (art. 8) cannot be interpreted as imposing an obligation to establish a special regime for a particular category of unmarried couples.

69. There is accordingly no violation of Article 8 (art. 8) under this head.

III. SITUATION OF THE THIRD APPLICANT

A. Article 8 (art. 8)

70. The applicants alleged that, in violation of Article 8 (art. 8), there had been an interference with, or lack of respect for, their family life on account of the third applicant's situation under Irish law. In addition to the points mentioned at paragraphs (d) and (e) of paragraph 65 above, they cited, by way of illustration, the following matters:

(a) the position regarding the third applicant's paternal affiliation (see paragraphs 25 and 26 above);

(b) the impossibility for the first applicant to be appointed joint guardian of the third applicant and his lack of parental rights in relation to her (see paragraph 27 above);

(c) the impossibility for the third applicant to be legitimated even by her parents' subsequent marriage (see paragraph 28 above);

(d) the impossibility for the third applicant to be jointly adopted by her parents (see paragraph 29 above);

(e) the third applicant's succession rights vis-à-vis her parents (see paragraphs 31 and 32 above);

(f) the third applicant's treatment for the purposes of capital acquisition tax (see paragraph 33 above) and the repercussions on her of her parents' own treatment for fiscal purposes (see paragraph 24 (b) and (c) above).

The Government contested this allegation. The Commission, on the other hand, expressed the opinion that there had been a breach of Article 8 (art. 8), in that the legal regime concerning the status of the third applicant under Irish law failed to respect the family life of all three applicants.

71. Roy Johnston and Janice Williams-Johnston have been able to take a number of steps to integrate their daughter in the family (see paragraph 12 above). However, the question arises as to whether an effective "respect" for family life imposes on Ireland a positive obligation to improve her legal situation (see paragraph 55 (c) above).

72. Of particular relevance to this part of the case, in addition to the principles recalled in paragraph 55 above, are the following passages from the Court's case-law:

> "... 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 family life. As envisaged by Article 8 (art. 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. In this connection, the State has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of Article 8 (art. 8-1) without there being any call to examine it under paragraph 2." (above-mentioned Marckx judgment, Series A no. 31, p. 15, § 31)

> "In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention ... In striking this balance the aims mentioned in the second paragraph of Article 8 (art. 8-2) may be of a certain relevance, although this provision refers in terms only to 'interferences' with the right protected by the first paragraph - in other words is concerned with the negative obligations flowing therefrom ... " (Rees judgment of 17 October 1986, Series A no. 106, p. 15, § 37)

As the Government emphasised, the Marckx case related solely to the relations between mother and child. However, the Court considers that its observations on the integration of a child within his family are equally applicable to a case such as the present, concerning as it does parents who have lived, with their daughter, in a family relationship over many years but are unable to marry on account of the indissolubility of the existing marriage of one of them.

73. In this context also, the Court will concentrate on the general complaint concerning the third applicant's legal situation (see, mutatis

mutandis, paragraph 67 above): it will bear in mind, but not examine separately, the various aspects of Irish law listed in paragraph 70 above. It notes in any event that many of the aspects in question are inter-related in such a way that modification of the law on one of them might have repercussions on another.

74. As is recorded in the Preamble to the European Convention of 15 October 1975 on the Legal Status of Children born out of Wedlock, "in a great number of member States of the Council of Europe efforts have been, or are being, made to improve the legal status of children born out of wedlock by reducing the differences between their legal status and that of children born in wedlock which are to the legal or social disadvantage of the former". Furthermore, in Ireland itself this trend is reflected in the Status of Children Bill recently laid before Parliament (see paragraph 36 above).

In its consideration of this part of the present case, the Court cannot but be influenced by these developments. As it observed in its above-mentioned Marckx judgment, "respect" for family life, understood as including the ties between near relatives, implies an obligation for the State to act in a manner calculated to allow these ties to develop normally (Series A no. 31, p. 21, § 45). And in the present case the normal development of the natural family ties between the first and second applicants and their daughter requires, in the Court's opinion, that she should be placed, legally and socially, in a position akin to that of a legitimate child.

75. Examination of the third applicant's present legal situation, seen as a whole, reveals, however, that it differs considerably from that of a legitimate child; in addition, it has not been shown that there are any means available to her or her parents to eliminate or reduce the differences. Having regard to the particular circumstances of this case and notwithstanding the wide margin of appreciation enjoyed by Ireland in this area (see paragraph 55 (c) above), the absence of an appropriate legal regime reflecting the third applicant's natural family ties amounts to a failure to respect her family life.

Moreover, the close and intimate relationship between the third applicant and her parents is such that there is of necessity also a resultant failure to respect the family life of each of the latter. Contrary to the Government's suggestion, this finding does not amount, in an indirect way, to a conclusion that the first applicant should be entitled to divorce and re-marry; this is demonstrated by the fact that in Ireland itself it is proposed to improve the legal situation of illegitimate children, whilst maintaining the constitutional prohibition on divorce.

76. There is accordingly, as regards all three applicants, a breach of Article 8 (art. 8) under this head.

77. It is not the Court's function to indicate which measures Ireland should take in this connection; it is for the State concerned to choose the means to be utilised in its domestic law for performance of its obligation under Article 53 (art. 53) (see the above-mentioned Airey judgment, Series

A no. 32, p. 15, § 26, and the above-mentioned Marckx judgment, Series A no. 31, p. 25, § 58). In making its choice, Ireland must ensure that the requisite fair balance is struck between the demands of the general interest of the community and the interests of the individual.

B. Article 14 (art. 14)

78. The third applicant alleged that, by reason of the distinctions existing under Irish law between legitimate and illegitimate children in the matter of succession rights over the estates of their parents (see paragraphs 31-32 above), she was the victim of discrimination contrary to Article 14, taken in conjunction with Article 8 (art. 14+8).

The Government contested this allegation.

79. Since succession rights were included amongst the aspects of Irish law which were taken into consideration in the examination of the general complaint concerning the third applicant's legal situation (see paragraphs 70-76 above), the Court, like the Commission, does not consider it necessary to give a separate ruling on this allegation.

IV. THE APPLICATION OF ARTICLE 50 (art. 50)

80. Under Article 50 (art. 50) of the Convention,

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

The applicants sought under this provision just satisfaction in respect of material loss, non-pecuniary loss and legal costs and expenses.

A. Material loss

81. By way of compensation for material loss, the first applicant claimed specified amounts in respect of the potential loss of the tax allowance available to married persons and in respect of accountant's fees relative to this issue; the second applicant claimed IR£2,000 for curtailment of job opportunities attributed to her lack of family status. The Government pleaded the absence of any supporting evidence.

82. The Court finds that these claims have to be rejected. They both stem from matters in respect of which it has found no violation of the Convention, namely the inability to divorce and re-marry and other aspects of the second applicant's status under Irish law (see paragraphs 49-64 and 65-69 above).

B. Non-pecuniary loss

83. The applicants claimed IR£20,000 as compensation for non-pecuniary loss in the shape of the severe emotional strain and worry which they had endured as a direct result of the lack of recognition of their family relationship and the inability to marry. The Government submitted that it was not necessary to award just satisfaction under this head.

84. In support of their claim, the applicants listed a number of inconveniences or areas of concern affecting them. The Court notes, however, that several of those matters originate either in the inability of the first and second applicants to marry or in other aspects of their own status under Irish law. Since these issues have not given rise to any finding of violation of the Convention, they cannot ground an award of just satisfaction under Article 50 (art. 50).

If and in so far as the remaining matters are connected with the legal situation of the third applicant - a point which does not emerge clearly from the material before the Court -, they could in principle form the object of such an award. Nevertheless, the Court considers that, in the particular circumstances of the case, its findings of violation on that issue (see paragraphs 70-76 above) of themselves constitute sufficient just satisfaction.

The applicants' claim cannot therefore be accepted.

C. Legal costs and expenses

85. The applicants sought reimbursement of their costs and expenses referable to the proceedings before the Commission and the Court. Whilst particulars of their claim were incomplete in some respects, they indicated at the hearings before the Court that they could supply further information in writing if so requested. The Government confined themselves to submitting that details of the computation of the fees should have been furnished initially.

Notwithstanding the foregoing, the Court considers that this aspect of the question of the application of Article 50 (art. 50) can also be regarded as ready for decision.

86. The applicants had the benefit of legal aid before the Convention institutions. However, the Court sees no reason to doubt that they have incurred liability for costs additional to those covered by the legal aid or that the quantified items of their claim satisfy the Court's criteria in the matter (see, amongst many authorities, the Zimmermann and Steiner judgment of 13 July 1983, Series A no. 66, p. 14, § 36).

Nevertheless, although the proceedings in Strasbourg have led to findings of violation as regards the legal situation of the third applicant, the applicants' remaining complaints were unsuccessful. In these circumstances, the Court considers that it would not be appropriate to award

them the full amount (some IR£20,000) of the fees incurred (see the Le Compte, Van Leuven and De Meyere judgment of 18 October 1982, Series A no. 54, p. 10, § 21). Making an assessment on an equitable basis, as is required by Article 50 (art. 50), the Court finds that the applicants should be awarded IR£12,000 in respect of their costs and expenses. This figure is to be increased by any value added tax that may be chargeable.

FOR THESE REASONS, THE COURT

1. Rejects unanimously the Government's preliminary pleas;

2. Holds by sixteen votes to one that the absence of provision for divorce under Irish law and the resultant inability of the first and second applicants to marry each other do not give rise to a violation of Article 8 (art. 8) or Article 12 (art. 12) of the Convention;

3. Holds by sixteen votes to one that the first and second applicants are not victims of discrimination, contrary to Article 14 taken in conjunction with Article 8 (art. 14+8), by reason of the fact that certain foreign divorces may be recognised by the law of Ireland;

4. Holds by sixteen votes to one that Article 9 (art. 9) is not applicable in the present case;

5. Holds unanimously that, as regards the other aspects of their own status under Irish law complained of by the first and second applicants, there is no violation of Article 8 (art. 8);

6. Holds unanimously that the legal situation of the third applicant under Irish law gives rise to a violation of Article 8 (art. 8) as regards all three applicants;

7. Holds by sixteen votes to one that it is not necessary to examine the third applicant's allegation that she is a victim of discrimination, contrary to Article 14 taken in conjunction with Article 8 (art. 14+8), by reason of the disabilities to which she is subject under Irish succession law;

8. Holds unanimously that Ireland is to pay to the three applicants together, in respect of legal costs and expenses referable to the proceedings before the Commission and the Court, the sum of twelve thousand Irish pounds (IR£12,000), together with any value added tax that may be chargeable;

9. Rejects unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 18 December 1986.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

A declaration by Mr. Pinheiro Farinha and, in accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the separate opinion of Mr. De Meyer are annexed to the present judgment.

R.R.
M.-A.E.

DECLARATION BY JUDGE PINHEIRO FARINHA

(Translation)

With great respect to my eminent colleagues, I consider that the following sentence should have been added to sub-paragraph (b) of paragraph 55 of the judgment: "The Court recognises that support and encouragement of the traditional family is in itself legitimate or even praiseworthy."

This is a citation from paragraph 40 of the Marckx judgment of 13 June 1979, the omission of which might cause the present judgment to be interpreted - incorrectly - as meaning that the Court attaches no importance to the institution of marriage.

SEPARATE OPINION, PARTLY DISSENTING AND PARTLY CONCURRING, OF JUDGE DE MEYER

(Translation)

I. The impossibility for the first applicant to seek the dissolution of his 1952 marriage and the resultant inability of the first and second applicants to marry each other

1. As the Court observes, in paragraph 50 of the judgment, these two questions cannot be separated: in fact, they come down to a single question, namely the first.

The fact that the first and second applicants are unable to marry each other so long as the first applicant's 1952 marriage is not dissolved cannot, of itself, constitute a violation of their fundamental rights.

It is only the fact that the first applicant cannot seek the dissolution of his 1952 marriage that may constitute such a violation. It may, of itself, do so, as regards the first applicant, in that he is a party to that marriage. It may also do so, as regards the second as well as the first applicant, in that it necessarily means that neither of them can marry the other during the lifetime of the first applicant's wife.

2. In the present case, the facts found by the Commission are, basically, fairly simple.

The first applicant and the lady whom he married in 1952, in a Church of Ireland ceremony, separated by mutual consent in 1965, having recognised that their marriage had irretrievably broken down[1]. They entered into a separation agreement that regulated their own rights and also those of their three children[2], who were born in 1956, 1959 and 1965[3]. They have complied with their obligations under that agreement[4]. Each of them, with the other's consent, entered into a new relationship with another partner[5]: in the first applicant's case, this relationship was established with the second applicant in 1971 and it led to the birth, in 1978, of the third applicant[6].

Since divorce is forbidden in Ireland, the first applicant, apparently with his wife's consent, sought advice as to the possibility of obtaining a divorce elsewhere. For this purpose he consulted lawyers in Dublin and in London, but he has not pursued the matter since they indicated that he could not

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[1] Commission's report, § 34.
[2] Ibid., § 38 (b).
[3] Ibid., § 34.
[4] Ibid., § 38 (e).
[5] Ibid., § 35.
[6] Ibid., §§ 35 and 36.

obtain a divorce in England unless he was resident within the jurisdiction of the English courts[7].

3. These findings on the part of the Commission were not contested.

The respondent Government confined themselves to observing that the attitude of the first applicant's wife and of their children towards the divorce which he wishes to obtain was not known for certain[8].

This point would have merited clarification, but it is not decisive for the issue raised in the present case. This is because the sole question is whether the fundamental rights of the first and second applicants have or have not been violated in that, in the factual situation recalled above, the first applicant cannot request the dissolution of his 1952 marriage: if that were possible, his wife would of necessity have to be invited to participate in the proceedings, to the extent that she had not associated herself with the request, and the deciding authority would of necessity have to have regard to the interests of the children.

4. Of course, the issue raised in the present case concerns only the civil dissolution of the marriage, since the latter, as a religious marriage celebrated in a Church of Ireland ceremony, cannot fall within the respondent State's jurisdiction: it can only do so as a marriage recognised by that State as regards its civil effects.

5. We are thus faced with a situation in which, by mutual consent and a considerable time ago, two spouses separated, regulated their own and their children's rights in an apparently satisfactory fashion and embarked on a new life, each with a new partner.

In my view, the absence of any possibility of seeking, in such circumstances, the civil dissolution of the marriage constitutes, firstly and of itself, a violation, as regards each of the spouses, of the rights guaranteed in Articles 8, 9 and 12 (art. 8, art. 9, art. 12) of the Convention. Secondly, in that it perforce means that neither spouse can re-marry in a civil ceremony so long as his wife or husband is alive, it constitutes a violation of the same rights as regards each of the spouses and each of the new partners.

The absence of the aforesaid possibility is consonant neither with the right of those concerned to respect for their private and family life, nor with their right to freedom of conscience and religion, nor with their right to marry and to found a family.

In fact, it seems to me that in cases like the present the effective exercise of these rights may require that the spouses be allowed not only to apply to be relieved of their duty to live together but also to apply to be completely released in civil law from their marital ties, by means of legal recognition of their definitive separation[9].

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[7] Ibid., § 38 (a).
[8] Observations of Mr. Gleeson at the hearing on 23-24 June 1986.
[9] See, mutatis mutandis, the Airey judgment of 9 October 1979, A 32, § 33.

The prohibition, under the Constitution of the respondent State, of any legislation permitting the dissolution of marriage is, as seems already to have been recognised in 1967 by a Committee of that State's Parliament, "coercive in relation to all persons, Catholics and non-Catholics, whose religious rules do not absolutely prohibit divorce in all circumstances" and "at variance with the accepted principles of religious liberty as declared at the Vatican Council and elsewhere". Above all, it is, as that Committee stated, "unnecessarily harsh and rigid"[10].

In what the Convention, in several provisions and notably those concerning respect for private and family life and freedom of conscience and religion, calls "a democratic society", the prohibition cannot be justified.

On more than one occasion, the Court has pointed out that there can be no such society without pluralism, tolerance and broadmindedness[11]: these are hallmarks of a democratic society[12].

In a society grounded on principles of this kind, it seems to me excessive to impose, in an inflexible and absolute manner, a rule that marriage is indissoluble, without even allowing consideration to be given to the possibility of exceptions in cases of the present kind.

For so draconian a system to be legitimate, it does not suffice that it corresponds to the desire or will of a substantial majority of the population: the Court has also stated that "although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position"[13].

In my opinion, this statement must also be applicable in the area of marriage and divorce.

6. The foregoing considerations do not imply recognition of a right to divorce or that such a right, to the extent that it exists, can be classified as a fundamental right.

They simply mean that the complete exclusion of any possibility of seeking the civil dissolution of a marriage is not compatible with the right to

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[10] "It can be argued, therefore, that the existing constitutional provision is coercive in relation to all persons, Catholics and non-Catholics, whose religious rules do not absolutely prohibit divorce in all circumstances. It is unnecessarily harsh and rigid and could, in our view, be regarded as being a variance with the accepted principles of religious liberty as declared at the Vatican Council and elsewhere" (Report of the Informal Committee on the Constitution, 1967, § 126, cited in the Report of the Joint Committee on Marriage Breakdown, 1985, § 7.8.8, which document formed Annex 3 to the respondent Government's memorial of 28 November 1985).

[11] See the Handyside judgment of 7 December 1976, A 24, § 49, and the Lingens judgment of 8 July 1986, A 103, § 41.

[12] See the Young, James and Webster judgment of 13 August 1981, A 44, § 63.

[13] Ibid., loc. cit.

respect for private and family life, with the right to freedom of conscience and religion and with the right to marry and to found a family.

7. I also believe that there is discrimination as regards the exercise of the rights involved.

Although it totally prohibits divorce within Ireland itself, the respondent State recognises divorces obtained in other countries by persons domiciled there at the time of the divorce proceedings[14].

Thus, Irish citizens who move abroad and stay there long enough for it to be accepted that they intend to remain there permanently escape their inability to obtain a divorce in Ireland.

This state of affairs is in unfortunate contradiction with the absolute character of the principle of indissolubility of marriage, in that the principle thus appears to warrant observance only in Ireland itself and not elsewhere.

The distinction so made between Irish citizens according to whether they are domiciled in Ireland itself or elsewhere appears to me to lack an objective and reasonable justification[15].

8. Unlike the majority of the Court, I am therefore of the opinion that in the present case the first and second applicants rightly complain of a violation of their right to respect for their private and family life, of their right to freedom of conscience and religion and of their right to marry and to found a family, as well as of discrimination in the exercise of these rights.

II. The other aspects of the situation of the first and second applicants, independently of their relations with or concerning the third applicant

On this issue I consider, like the other members of the Court, that no fundamental right has been violated in the present case.

From the point of view of fundamental rights, the State has no positive obligation vis-à-vis couples who live together as husband and wife without being married: it is sufficient that the State abstains from any illegitimate interference.

It is only to the extent that children are born of unions of this kind, and of transient relationships also, that there may arise positive obligations on the part of the State concerning the situation of those children, including, of course, their relations with their parents[16] and with the latter's families[17].

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[14] See §§ 19-21 of the judgment.

[15] See the judgment of 23 July 1968 in the case relating to certain aspects of the laws on the use of languages in education in Belgium, A 6, § 10.

[16] See the Marckx judgment of 13 June 1979, A 31, § 31.

[17] Ibid., §§ 45-48.

Such obligations may likewise arise, to the extent that the interests of those children so require, as regards the mutual relations of their parents or the latter's families.

In cases of this kind, it is therefore always a question solely of obligations concerning the situation of those children. This is particularly so in the present case.

III. The situation of the third applicant and the situation of the first and second applicants in their relations with or concerning the third applicant

1. On this issue, I agree almost entirely with what is said in the judgment concerning the violation, as regards the three applicants, of the right to respect for private and family life.

However, it seems to me that it is not sufficient to say that the third applicant should be placed "in a position akin to that of a legitimate child"[18]: in my view, we ought to have stated more clearly and more simply that the legal situation of a child born out of wedlock must be identical to that of a child of a married couple and that, by the same token, there cannot be, as regards relations with or concerning a child, any difference between the legal situation of his or her parents and of their families that depends on whether he or she was the child of a married couple or a child born out of wedlock.

I also note that, as a daughter of the first applicant - who is still bound by his 1952 marriage -, the third applicant is a child of an adulterous union: this does not exclude the applicability in her case, as well as in that of any other child born out of wedlock, of the principles enounced in both the present and the Marckx judgments.

2. I consider that in the present case the Court should, as in the Marckx case, have found not only a violation of the right to respect for private and family life but also a violation, as regards that right, of the principle of non-discrimination.

In my view, the latter violation arises from the very fact that, on the one hand, the legal situation of the third applicant, as a child born out of wedlock, is different from that of a child of a married couple and that, on the other hand, the legal situation of the first and second applicants in their relations with or concerning the third applicant is different from that of the parents of a child of a married couple in their relations with or concerning that child.

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[18] § 74 of the judgment.

In this respect, the facts of the case thus disclose not only a violation of the right to respect for private and family life but also, at the same time, a violation, as regards that right, of the principle of non-discrimination.

I would observe, for the sake of completeness, that the principle of non-discrimination appears to me to have been so violated as regards the first and second applicants as well as the third applicant, and as regards those aspects of the legal situation of the persons concerned that do not relate to their succession rights as well as those aspects that do so relate.

IV. The just satisfaction claimed by the applicants

1. Although I dissent from the majority as regards points 2, 3, 4 and 7 of the operative provisions of the judgment, I agree, in principle, with the Court's decision on the applicants' claim for just satisfaction. However, my reasons are somewhat different.

The applicants are not the only victims of the situation complained of, a situation which affects, in a general and impersonal manner, everyone whose circumstances are similar to theirs.

In my view, the just satisfaction to be afforded to the applicants in such a case should normally be confined to reimbursement of the costs and expenses referable to the proceedings before the Commission and the Court and should not include compensation for material or non-pecuniary loss.

However, such compensation would be warranted if there were measures or decisions which, in the guise of provisions of general or impersonal application, had had the object or the result of affecting the applicants directly and individually. But that is not the situation here.

2. As regards the quantum of the reimbursement, I agree, having regard to the majority's decision on the merits of the case, with point 8 of the operative provisions of the judgment.