CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

COURT (CHAMBER)

CASE OF KEEGAN v. IRELAND

(Application no. 16969/90)

JUDGMENT

STRASBOURG

26 May 1994

In the case of Keegan v. Ireland*,

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

Mr R. RYSSDAL, *President*,
Mr J. DE MEYER,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA,
Mr J. MAKARCZYK,
Mr J. BLAYNEY, *ad hoc judge*,

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

Having deliberated in private on 26 November 1993 and on 19 April 1994,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 7 April 1993, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 16969/90) against Ireland lodged with the Commission under Article 25 (art. 25) on 1 May 1990 by an Irish citizen, Mr Joseph Keegan.

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 object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6, 8 and/or 14 (art. 6, art. 8, art. 14) of the Convention.

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* Note by the Registrar : The case is numbered 16/1993/411/490. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

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

3. The Chamber to be constituted included ex officio 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 para. 3 (b)). On 23 April 1993, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr J. De Meyer, Mr S.K. Martens, Mrs E. Palm, Mr R. Pekkanen, Mr A.N. Loizou, Mr J.M. Morenilla and Mr J. Makarczyk (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

On 25 May 1993 Mr Walsh withdrew from the Chamber pursuant to Rule 24 para. 2. By letter of 30 June 1993 the Agent of the Government of Ireland ("the Government") notified the Registrar of the appointment of the Hon. Mr Justice John Blayney, a judge of the Supreme Court of Ireland, as an ad hoc judge (Article 43 of the Convention and Rule 23) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the procedure (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received on 23 September 1993 the applicant's memorial and, on 14 October 1993, the Government's. He was subsequently informed by the Secretary to the Commission that the Delegate would submit his observations at the hearing.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 November 1993. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government
  Mrs E. KILCULLEN, Assistant Legal Adviser,
  Department of Foreign Affairs, *Agent*,
  Mr D. GLEESON, Senior Counsel,
  Mr M. HANNA, *Counsel*,
  Mr D. MCFADDEN,
  Mr B. CAREY, *Advisers*;
- for the Commission
  Sir Basil HALL, *Delegate*;
- for the applicant
  Ms D. BROWNE, *Counsel*,
  Mr B. WALSH, Solicitor,
  Ms C. WALSH, *Adviser*.

The Court heard addresses by Sir Basil Hall, Ms Browne and Mr Gleeson as well as replies to questions put by several of its members.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

6. The applicant met his girlfriend Miss V. ("V.") in May 1986. They lived together from February 1987 until February 1988. Around Christmas 1987 they decided to have a child. Subsequently, on 14 February 1988, they became engaged to be married.

On 22 February 1988 it was confirmed that V. was pregnant. Shortly after this the relationship between the applicant and V. broke down and they ceased co-habiting. On 29 September 1988 V. gave birth to a daughter S. of whom the applicant was the father. The applicant visited V. at a private nursing home and saw the baby when it was one day old. Two weeks later he visited V.'s parents' home but was not permitted to see either V. or the child.

7. During her pregnancy V. had made arrangements to have the child adopted and on 17 November 1988 she had the child placed by a registered adoption society with the prospective adopters. She informed the applicant of this in a letter dated 22 November 1988.

A. The proceedings before the Circuit Court

8. The applicant subsequently instituted proceedings before the Circuit Court to be appointed guardian under section 6A, sub-section 1, of the Guardianship of Infants Act 1964, which would have enabled him to challenge the proposed adoption. He also applied for custody of the child. Pursuant to the Adoption Act 1952, an adoption order cannot be made, inter alia, without the consent of the child's mother and the child's guardian (see paragraph 19 below). While a married man is a guardian of his children, an unmarried man is not unless so appointed by the court (see paragraphs 25 and 26 below).

9. On 29 May 1989 the Circuit Court appointed the applicant guardian and awarded him custody.

B. The proceedings before the High Court

10. Following an appeal against the judgment of the Circuit Court by V. and the prospective adopters, the High Court found in July 1989 that the applicant was a fit person to be appointed guardian and that there were no circumstances involving the welfare of the child which required that the father's rights be denied. Mr Justice Barron of the High Court stated:

"I am of the opinion that in considering the applications both for custody and guardianship I must have regard to circumstances as they presently exist and that in considering the welfare of the child I must take into account the fact that she has been placed for adoption. Each application must be taken as part of a global application and not as a separate and distinct one. The test therefore is:

(1) whether the natural father is a fit person to be appointed guardian, and, if so:

(2) whether there are circumstances involving the welfare of the child which require that, notwithstanding he is a fit person, he should not be so appointed.

In the present case, I am of the opinion that he satisfies the first condition and that unless the welfare of the child is to be regarded as the sole consideration, he satisfies the second condition ...

In my opinion, having regard to the purposes of the Status of Children Act 1987, the rights of the father should not be denied by considerations of the welfare of the child alone, but only where - and they do not exist in the present case - there are good reasons for so doing."

C. The proceedings before the Supreme Court

11. After the conclusion of the High Court proceedings Mr Justice Barron acceded to an application by V. and the prospective adopters to state a case for the opinion of the Supreme Court. The questions put to the Supreme Court by the judge were as follows:

"(1) Am I correct in my opinion as to the manner in which section 6A of the Guardianship of Infants Act 1964, as inserted by section 12 of the Status of Children Act 1987, should be construed?

(2) If not, what is the proper construction of that section and what other, if any, principles should I have applied or considered whether in relation to guardianship or custody which derive either from law or from the provisions of the Constitution?"

12. Delivering the majority judgment of the Supreme Court on 1 December 1989, Chief Justice Finlay stated that the High Court had incorrectly construed section 6A of the 1964 Act as conferring on the natural father a right to be a guardian. He considered that the Act only gave the natural father a right to apply to be guardian. It did not equate his position with that of a married father. The first and paramount consideration in the exercise of the court's discretion was the welfare of the child, and the blood link between child and father as merely one of the many relevant factors which may be viewed by the court as relevant to that question. He added, inter alia:

"... although there may be rights of interest or concern arising from the blood link between the father and the child, no constitutional right to guardianship in the father of the child exists. This conclusion does not, of course, in any way infringe on such considerations appropriate to the welfare of the child in different circumstances as

> may make it desirable for the child to enjoy the society, protection and guardianship of its father, even though its father and mother are not married.
>
> The extent and character of the rights which accrue arising from the relationship of a father to a child to whose mother he is not married must vary very greatly indeed, depending on the circumstances of each individual case.
>
> The range of variation would, I am satisfied, extend from the situation of the father of a child conceived as the result of a casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as the result of a stable and established relationship and nurtured at the commencement of his life by his father and mother in a situation bearing nearly all of the characteristics of a constitutionally protected family, when the rights would be very extensive indeed ..."

He concluded that:

> "... regard should not be had to the objective of satisfying the wishes and desires of the father to be involved in the guardianship of and to enjoy the society of his child unless the Court has first concluded that the quality of welfare which would probably be achieved for the infant by its present custody which is with the prospective adoptive parents, as compared with the quality of welfare which would probably be achieved by custody with the father is not to an important extent better".

The matter was then referred back to the High Court for the case to be decided in light of this interpretation.

D. The subsequent proceedings before the High Court

13. The High Court resumed its examination of the case in early 1990. It heard, inter alia, the evidence of a consultant child psychiatrist who considered that the child would suffer short-term trauma if moved to the applicant's custody. In the longer term she would be more vulnerable to stress and be less able to cope with it. She would also have difficulty in forming "trust" relationships.

14. In his judgment of 9 February 1990 Mr Justice Barron recalled that the applicant wished bona fide to have custody of his daughter and that he felt the existence of an emotional bond.

He had also noted that if the child remained with the adopters she would obtain the benefit of a higher standard of living and would be likely to remain at school longer. However, he considered that differences springing solely from socio-economic causes should not be taken into account where one of the claimants is a natural parent. In his view "to do otherwise would be to favour the affluent as against the less well-off which does not accord with the constitutional obligation to hold all citizens as human persons equal before the law".

Applying the test laid down by the Supreme Court in the light of the dangers to the psychological health of the child he allowed the appeal of the natural mother and the prospective adopters and concluded as follows:

"The result, it seems to me, is this. If the child remains where she is, she will if the adoption procedures are completed become a member of a family recognised by the Constitution and freed from the danger of psychological trauma. On the other hand if she is moved she will not be a member of such a family and in the short and long term her future is likely to be very different. The security of knowing herself to be a member of a loving and caring family would be lost. If moved, she will I am sure be a member of a loving and caring unit equivalent to a family in her eyes. Nevertheless the security will be lost and there will be insecurity arising from the several factors which have been enumerated.

In my view these differences and the danger to her psychological health are of such an importance that I cannot hold that the quality of welfare likely to be achieved with the prospective adopters would not be to an important extent better than that likely to be achieved by custody with the father. That being so, his wish and desire to be involved in the guardianship of and to enjoy the society of his child is not a factor which I am to take into account. In these circumstances, the welfare of the infant requires her to remain in her present custody. Accordingly the application for relief must be refused."

15. An adoption order was subsequently made in respect of the child.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Appeals to the Supreme Court

16. A decision of the High Court which determines an appeal from the Circuit Court cannot be appealed to the Supreme Court (Eamonn Andrews Productions Limited v. Gaiety Theatre Enterprises [1978] Irish Reports 295). The High Court can, however, ask for the opinion of the Supreme Court on points of law by way of a case stated.

B. Adoption

17. The adoption of children in Ireland is governed by the Adoption Act 1952. This Act was amended in 1964, 1974 and 1976.

Section 8 of the 1952 Act established a body to be known as the Adoption Board (An Bord Uchtála) to fulfil the functions assigned to it by the Act, its principal function being to make adoption orders on application being made to it by persons desiring to adopt a child.

18. Arrangements for the adoption of a child under the age of seven years may only be made by a registered adoption society or a Health Board (section 34 of the 1952 Act) and where the mother or guardian of a child proposes to place the child at the disposal of a registered adoption society for adoption the society must, before accepting the child, furnish the mother or father with a statement in writing explaining clearly the effect of an adoption order on the rights of the mother or guardian and the provisions of

the Act relating to consent to the making of an adoption order (section 39 of the 1952 Act). When the applicant's child was placed for adoption there was also a requirement that notice in writing had to be given to the Adoption Board before or within seven days after the reception of the child into the home of the proposed adopters (section 10 of the Adoption Act 1964).

1. Consent

19. As regards the requisite consent of the natural parent, section 14 of the 1952 Act provides as follows:

> "(1) An adoption order shall not be made without the consent of every person being the child's mother or guardian or having charge of or control over the child, unless the Board dispenses with any such consent in accordance with this section.
>
> (2) The Board may dispense with the consent of any person if the Board is satisfied that that person is incapable by reason of mental infirmity of giving consent or cannot be found.
>
> ...
>
> (6) A consent may be withdrawn at any time before the making of an adoption order."

2. Entitlement to be heard by the Adoption Board

20. As regards those persons who are entitled to be heard on an application for an adoption order, section 16 of the 1952 Act provides as follows:

> "(1) The following persons and no other persons shall be entitled to be heard on an application for an adoption order -
>
> (a) the applicants,
>
> (b) the mother of the child,
>
> (c) the guardian of the child,
>
> (d) a person having charge of or control over the child,
>
> (e) a relative of the child,
>
> (f) a representative of a registered adoption society which is or has been at any time concerned with the child,
>
> (g) a priest or minister of a religion recognised by the Constitution (or, in the case of any such religion which has no ministry, an authorised representative of the religion) where the child or a parent (whether alive or dead) is claimed to be or to have been of that religion,

(h) an officer of the Board,

(i) any other person whom the Board, in its discretion, decides to hear.

(2) A person who is entitled to be heard may be represented by counsel or solicitor.

(3) The Board may hear the application wholly or partly in private.

(4) Where the Board has notice of proceedings pending in any court of justice in regard to the custody of a child in respect of whom an application is before the Board, the Board shall make no order in the matter until the proceedings have been disposed of."

21. The Supreme Court has held in the leading case of the State (Nicolaou) v. An Bord Uchtála (the Adoption Board) [1966] Irish Reports 567 that the relevant provisions of the Adoption Act 1952, which permitted the adoption of a child born out of wedlock without the consent of the natural father or without the right to be heard by the Adoption Board prior to the making of an adoption order, were not repugnant to the Constitution on the grounds that they discriminated against the natural father or infringed his constitutional rights (Article 40, sections 1 and 3 of the Constitution). It also held that the protection afforded to the "family" in Article 41 of the Constitution related only to the "family" based on marriage.

3. Application to the High Court

22. Section 20 of the 1952 Act provides:

"20. (1) The Board may (and, if so requested by an applicant for an adoption order, the mother or guardian of the child or any person having charge of or control over the child, shall, unless it considers the request frivolous) refer any question of law arising on an application for an adoption order to the High Court for determination.

(2) Subject to rules of court, a case stated under this section may be heard in camera."

C. Custody and guardianship

1. Welfare of the child

23. As regards proceedings relating, inter alia, to the custody or guardianship or upbringing of an infant, the Guardianship of Infants Act 1964 provided as follows:

"3. Where in any proceedings before any court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question,

shall regard the welfare of the infant as the first and paramount consideration."

"Welfare" in relation to an infant is defined as follows in section 2 of the said Act:

"'Welfare', in relation to an infant, comprises the religious and moral, intellectual, physical and social welfare of the infant."

2. Rights of married parents

24. Section 6 of the 1964 Act provided as follows:

"(1) The father and mother of an infant shall be guardians of the infant jointly.

(2) On the death of the father of an infant the mother, if surviving, shall be guardian of the infant, either alone or jointly with any guardian appointed by the father or by the court.

(3) On the death of the mother of an infant the father, if surviving, shall be guardian of the infant, either alone or jointly with any guardian appointed by the mother or by the court."

3. Rights of the natural father

25. The definition of "father" under section 2 of the 1964 Act did not include the father of a child born out of wedlock.

26. The Status of Children Act 1987 amended the Guardianship of Infants Act 1964 in the following way:

"11. Section 6 of the Act of 1964 is hereby amended by the substitution of the following subsection for subsection (4):

'(4) Where the mother of an infant has not married the infant's father, she, while living, shall alone be the guardian of the infant unless there is in force an order under section 6A (inserted by the Act of 1987) of this Act or a guardian has otherwise been appointed in accordance with this Act.'

12. The Act of 1964 is hereby amended by the insertion after section 6 of the following section:

'6A (1) Where the father and mother of an infant have not married each other, the court may on the application of the father, by order appoint him to be a guardian of the infant.

(2) ... the appointment by the court under this section of the father of an infant as his guardian shall not affect the prior appointment of any person as guardian of the infant under section 8 (1) of this Act unless the court otherwise orders ...'"

27. As regards court applications for custody of an infant, the 1964 Act provided as follows:

"11. (1) Any person being a guardian of an infant may apply to the court for its direction on any question affecting the welfare of the infant and the court may make such order as it thinks proper.

(2) The court may by an order under this section

(a) give such directions as it thinks proper regarding the custody of the infant and the right of access to the infant of his father or mother;

..."

28. This section of the 1964 Act was amended by the 1987 Act as follows:

"13. Section 11 of the Act of 1964 is hereby amended by the substitution of the following subsection for subsection (4):

'(4) In the case of an infant whose father and mother have not married each other, the right to make an application under this section regarding the custody of the infant and the right of access thereto of his father or mother shall extend to the father who is not a guardian of the infant, and for this purpose references in this section to the father or parent of an infant shall be construed as including him.'"

4. Powers of guardians

29. The 1964 Act provides, inter alia, that a guardian under the Act shall be entitled (1) to the custody of the infant and to take proceedings for the restoration of his custody of the infant against any person who wrongfully takes away or detains the child and (2) to the possession and control of all property of the infant (section 10).

D. Recent developments in Irish adoption practice

30. The following developments have taken place subsequent to the facts of the present case.

By memorandum of 30 April 1990 from the Registrar of the Adoption Board, the relevant adoption societies and social workers have been notified, inter alia, of the rights of the natural father to apply for joint guardianship and/or custody of or access to his child. The memorandum also draws attention to the desirability of ascertaining from the mother and, where practicable, the father, his intentions in relation to the child as regards adoption although it recognises the practical difficulties which may arise when mothers do not want to involve the father or do not know who or where he is.

Where an adoption agency is given an indication by the natural father that he opposes the placement of the child for adoption the agency is advised to consider the prudence of delaying the placement for a period. The memorandum further states that where a natural father has applied to a

court under no circumstances should the child be placed for adoption pending the determination of the court proceedings.

By a letter of 6 April 1992 the Adoption Board has informed the relevant adoption societies and social workers of a review of its policy in relation to natural fathers of children placed for adoption and the necessity of following new procedures. The letter indicates that whenever a natural father is

(a) named as father on the child's birth certificate, (b) in a continuous relationship with the mother,

he should be notified, if not already aware, of the application to adopt his child and offered a hearing by the Board on the application.

In addition two forms must now be completed by the adoption agency or by the applicant or applicants. These forms make the fullest relevant enquiries for the purpose, inter alia, of ascertaining the identity and intentions of the natural father as regards the proposed adoption.

PROCEEDINGS BEFORE THE COMMISSION

31. Mr Keegan applied to the Commission on 1 May 1990. He complained that there had been a violation of his right to respect for family life (Article 8 of the Convention) (art. 8) in that his child had been placed for adoption without his knowledge or consent and that national law did not afford him even a defeasible right to be appointed guardian. He further complained of a denial of his right of access to court (Article 6 para. 1) (art. 6-1) in that he had no locus standi in the proceedings before the Adoption Board. He also alleged that, as the natural father, he had been discriminated against in the exercise of the above-mentioned rights (Article 14 taken in conjunction with Article 6 and/or Article 8) (art. 14+6, art. 14+8) when his position was compared to that of a married father.

32. The application (no. 16969/90) was declared admissible on 13 February 1992. In its report of 17 February 1993 (Article 31) (art. 31), the Commission expressed the opinion that there had been a violation of Article 8 and of Article 6 para. 1 (art. 8, art. 6-1) (unanimously) and that it was not necessary to examine whether there had been a violation of Article 14 taken in conjunction with Article 6 and/or Article 8 (art. 14+6, art. 14+8) (by eleven votes to one).

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

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* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 290 of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Whether the applicant can complain on his daughter's behalf

33. The Government submitted that the applicant has no locus standi in relation to complaints by his daughter since only a person who exercises parental rights or is a guardian is entitled to bring a complaint under the Convention on behalf of a child.

34. In the course of the hearing before the Court the applicant indicated that it would no longer be appropriate for him to pursue any claim in respect of alleged infringements of his daughter's rights in the light of an adoption order now having been made in respect of her (see paragraph 15 above).

35. In view of this position, the Court considers that it is only called upon to examine allegations concerning violations of the applicant's rights. It is thus unnecessary to examine the Government's objection on this point.

B. Whether the applicant failed to exhaust domestic remedies

36. The Government contended that the application should be rejected for non-exhaustion of domestic remedies, contrary to Article 26 (art. 26) of the Convention, on the grounds:

(1) that the applicant had not appealed to the Supreme Court against the final determination of the guardianship and custody proceedings by the High Court;

(2) that he had failed to complain before the Irish courts of the fact that the law did not enable him to become involved in the adoption process and, in particular, to be consulted by the Adoption Board prior to any adoption;

(3) that he had not challenged the constitutionality of the legal provisions relating to a natural father by bringing proceedings in the High Court alleging that the State had failed to afford him equal treatment compared to a married father and had failed to vindicate his personal rights.

37. Both the applicant and the Commission contended that there was no substance in any of these grounds.

38. The Court notes that the Government had raised points (2) and (3) in the proceedings before the Commission but not point (1). Accordingly they are estopped from raising this objection before the Court.

Apart from this, under Irish law no appeal lies from the decision of the High Court on an appeal from the Circuit Court (see paragraph 16 above).

39. As regards points (2) and (3) the Court recalls that the only remedies required to be exhausted are remedies which are effective and capable of redressing the alleged violation (see, amongst many authorities, the Open Door and Dublin Well Woman v. Ireland judgment of 29 October 1992, Series A no. 246, p.23, para. 48). It considers that the applicant would have had no prospect of success in making these claims before the courts having regard to the case-law of the Supreme Court which denies to a natural father any constitutional right to take part in the adoption process (see paragraph 21 above).

40. It follows that the Government's objections based on non-exhaustion of domestic remedies fail.

II. ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

41. The applicant alleged a violation of his right to respect for family life contrary to Article 8 (art. 8) of the Convention which provides:

> "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."

A. Applicability of Article 8 (art. 8)

42. The Government maintained that the sporadic and unstable relationship between the applicant and the mother had come to an end before the birth of the child and did not have the minimal levels of seriousness, depth and commitment to cross the threshold into family life within the meaning of Article 8 (art. 8). Moreover, there was no period during the life of the child in which a recognised family life involving her had been in existence. In their view neither a mere blood link nor a sincere and heartfelt desire for family life were enough to create it.

43. For both the applicant and the Commission, on the other hand, his links with the child were sufficient to establish family life. They stressed that his daughter was the fruit of a planned decision taken in the context of a loving relationship.

44. The Court recalls that the notion of the "family" in this provision is not confined solely to marriage-based relationships and may encompass other de facto "family" ties where the parties are living together outside of marriage (see, inter alia, the Johnston and Others v. Ireland judgment of 18 December 1986, Series A no. 112, p. 25, para. 55). A child born out of such

a relationship is ipso iure part of that "family" unit from the moment of his birth and by the very fact of it. There thus exists between the child and his parents a bond amounting to family life even if at the time of his or her birth the parents are no longer co-habiting or if their relationship has then ended (see, mutatis mutandis, the Berrehab v. the Netherlands judgment of 21 June 1988, Series A no. 138, p. 14, para. 21).

45. In the present case, the relationship between the applicant and the child's mother lasted for two years during one of which they co-habited. Moreover, the conception of their child was the result of a deliberate decision and they had also planned to get married (see paragraph 6 above). Their relationship at this time had thus the hallmark of family life for the purposes of Article 8 (art. 8). The fact that it subsequently broke down does not alter this conclusion any more than it would for a couple who were lawfully married and in a similar situation. It follows that from the moment of the child's birth there existed between the applicant and his daughter a bond amounting to family life.

B. Compliance with Article 8 (art. 8)

1. Paragraph 1 of Article 8 (art. 8-1)

46. The applicant maintained that the State failed to respect his family life by facilitating the secret placement of his daughter for adoption without his knowledge or consent and by failing to create a legal nexus between himself and his daughter from the moment of birth.

Moreover, the test applied by the Supreme Court to determine the question of custody placed him at a considerable disadvantage vis-à-vis the adoptive parents by requiring him to show that any advantages that they had to offer the child were not important for her welfare. In his submission, to be consistent with Article 8 (art. 8) the law ought to have conferred on him a defeasible right to guardianship and, in any competition for custody with strangers, there ought to have existed a rebuttable legal presumption that the child's welfare was best served by being in his care and custody. He stressed, however, that he was not seeking to overturn the adoption order that had been made in respect of his child.

47. For the Government, Contracting States enjoy a wide margin of appreciation in the area of adoption. The right to respect for family life cannot be interpreted so broadly as to embrace a right to impose the wishes of the natural father over the interests of the child in disregard of the findings of fact made by the courts.

The applicant, as the Supreme Court had held, had a right to apply to be made a guardian, which right he had exercised. Furthermore, the Supreme Court took into account the blood link between him and his daughter as one of the factors to be weighed in the balance in assessing the child's welfare.

In addition, the applicant had every opportunity to present his case and to have his interests considered by the courts. However, in this process the rights and interests of the mother, who had wanted her child to be adopted, had also to be taken into account.

In particular, the Government emphasised that to grant a natural father a defeasible right to guardianship could give rise to complications, anguish and hardship in other cases and concerned a matter of social policy on which the European Court should be reluctant to intervene.

48. In the Commission's view the obstacles under Irish law to the applicant establishing a relationship with his daughter constituted a lack of respect for his family life in breach of a positive obligation imposed by Article 8 (art. 8).

49. The Court recalls that the essential object of Article 8 (art. 8) is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in an effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, none the less, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, for example, the Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172, p. 18, para. 41, and the above-mentioned Johnston and Others judgment, p. 25, para. 55).

50. According to the principles set out by the Court in its case-law, where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be created that render possible as from the moment of birth the child's integration in his family (see, mutatis mutandis, the Marckx v. Belgium judgment of 13 June 1979, Series A no. 31, p. 15, para. 31, and the above-mentioned Johnston and Others judgment, p. 29, para. 72). In this context reference may be made to the principle laid down in Article 7 of the United Nations Convention on the Rights of the Child of 20 November 1989 that a child has, as far as possible, the right to be cared for by his or her parents. It is, moreover, appropriate to recall that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down (see, inter alia, the Eriksson v. Sweden judgment of 22 June 1989, Series A no. 156, p. 24, para. 58).

51. In the present case the obligations inherent in Article 8 (art. 8) are closely intertwined, bearing in mind the State's involvement in the adoption process. The fact that Irish law permitted the secret placement of the child for adoption without the applicant's knowledge or consent, leading to the

bonding of the child with the proposed adopters and to the subsequent making of an adoption order, amounted to an interference with his right to respect for family life. Such interference is permissible only if the conditions set out in paragraph 2 of Article 8 (art. 8-2) are satisfied.

52. In view of this finding, it is not necessary to examine whether Article 8 (art. 8) imposed a positive obligation on Ireland to confer an automatic but defeasible right to guardianship on natural fathers such as the applicant.

2. Paragraph 2 of Article 8 (art. 8-2)

(a) "In accordance with the law" and legitimate aim

53. It is clear that the decision to place the child for adoption without the father's knowledge or consent was in accordance with Irish law as were the decisions taken by the courts concerning the welfare of the child. That they pursued the legitimate aim of protecting the rights and freedoms of the child is evident from the judgments of the High Court and the Supreme Court in this case (see paragraphs 10-14 above).

(b) Necessity in a democratic society

54. For the Government, the interference was proportionate to the protection of the child's health as well as of her rights and freedoms. The interpretation of Irish law by the Supreme Court took proper account of the paramount interests of the child. It remained open to the natural father to apply to the courts to be appointed, where appropriate, the guardian and/or custodian of the child.

They contended that it was fair and wholly consistent with the Convention that special regulations be enforced to protect the interests of a child born out of wedlock. Indeed it would be impractical and potentially harmful to the interests of such a child to grant the natural father rights that extended beyond a right to apply for guardianship. In any event the Adoption Board may, in its discretion, decide to hear the natural father.

55. The Court notes that the applicant was afforded an opportunity under Irish law to claim the guardianship and custody of his daughter and that his interests were fairly weighed in the balance by the High Court in its evaluation of her welfare. However, the essential problem in the present case is not with this assessment but rather with the fact that Irish law permitted the applicant's child to have been placed for adoption shortly after her birth without his knowledge or consent. As has been observed in a similar context, where a child is placed with alternative carers he or she may in the course of time establish with them new bonds which it might not be in his or her interests to disturb or interrupt by reversing a previous decision as to care (see, inter alia, the W. v. the United Kingdom judgment of 8 July

1987, Series A no. 121, p. 28, para. 62). Such a state of affairs not only jeopardised the proper development of the applicant's ties with the child but also set in motion a process which was likely to prove to be irreversible, thereby putting the applicant at a significant disadvantage in his contest with the prospective adopters for the custody of the child.

The Government have advanced no reasons relevant to the welfare of the applicant's daughter to justify such a departure from the principles that govern respect for family ties. That being so, the Court cannot consider that the interference which it has found with the applicant's right to respect for family life, encompassing the full scope of the State's obligations, was necessary in a democratic society. There has thus been a violation of Article 8 (art. 8).

III. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

56. The applicant complained that he had no access to a court under Irish law to challenge the placement of his child for adoption and no standing in the adoption procedure. He invoked Article 6 para. 1 (art. 6-1) of the Convention according to which:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ..."

The Commission upheld his complaint.

A. Applicability

57. The Court considers that Article 6 para. 1 (art. 6-1) is applicable to the present dispute (see, inter alia, the above-mentioned W. v. the United Kingdom judgment, pp. 32-35, paras. 72-79). Indeed this has not been seriously contested by the Government in the proceedings before the Court.

B. Compliance

58. The Government submitted in the first place that the Adoption Board was not a court and thus the fact that the applicant had no statutory right to be heard by that body could not infringe this provision. Secondly, it was open to the applicant to apply to the courts for guardianship and custody of his daughter, which he did. Since these proceedings controlled and determined the activities of the Adoption Board which can make no order where it has notice of such an action, Article 6 para. 1 (art. 6-1) was complied with (see paragraph 20 above).

59. In the Court's view the adoption process must be distinguished from the guardianship and custody proceedings. As has been previously observed, the central problem in the present case relates to the placement of

the child for adoption without the prior knowledge and consent of the applicant (see paragraph 51 above). The applicant had no rights under Irish law to challenge this decision either before the Adoption Board or before the courts or, indeed, any standing in the adoption procedure generally (see paragraphs 20-22 above). His only recourse to impede the adoption of his daughter was to bring guardianship and custody proceedings (see paragraphs 8-14 above). By the time these proceedings had terminated the scales concerning the child's welfare had tilted inevitably in favour of the prospective adopters.

Against this background, it is not necessary to decide whether the Adoption Board, which admittedly exercises certain quasi-judicial functions, is a tribunal within the meaning of Article 6 para. 1 (art. 6-1).

60. There has thus been a breach of this provision.

IV. ALLEGED VIOLATION OF ARTICLE 14 (art. 14)

61. The applicant further complained that he had been discriminated against contrary to Article 14 of the Convention in conjunction with Article 8 (art. 14+8) in the enjoyment of his right to respect for family life and in conjunction with Article 6 para. 1 (art. 14+6-1) as regards his right of access to court. He maintained that a married father in similar circumstances enjoyed the full protection of Articles 8 and 6 (art. 8, art. 6).

62. Having regard to its findings in respect of both of these provisions (see paragraphs 55 and 60 above) the Court does not consider it necessary to examine this complaint (see the above-mentioned Open Door and Dublin Well Woman judgment, p. 32, para. 83).

V. APPLICATION OF ARTICLE 50 (art. 50)

63. Article 50 (art. 50) of the Convention provides as follows:

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

A. Damage

1. Pecuniary loss

64. The applicant claimed IR £2,000 which he had been obliged to pay before his entitlement to legal aid in respect of the guardianship and custody proceedings.

65. The Government made no objection. The Court considers that this sum should be awarded in full.

2. Non-pecuniary loss

66. The applicant submitted that he should be awarded substantial damages having regard to the fact that his daughter has now been adopted following two years of traumatic court proceedings and that it is unlikely that he will ever be re-united with her. He emphasised, as previously mentioned, that he was not seeking to overturn the adoption order (see paragraph 46 above).

67. The Government contended that a finding of a violation would constitute adequate just satisfaction in the circumstances of the case.

68. The Court is of the view that damages are appropriate in this case having regard to the trauma, anxiety and feelings of injustice that the applicant must have experienced as a result of the procedure leading to the adoption of his daughter as well as the guardianship and custody proceedings. It awards him IR £10,000 under this head.

B. Costs and expenses

69. The applicant claimed a total amount of IR £42,863 by way of costs and expenses. He submitted inter alia an affidavit from a practising cost accountant in Ireland by way of substantiation of the reasonableness of his claim.

70. The Government submitted that there should be a reduction of IR £5,000 in respect of solicitor's fees and IR £3,700 in respect of counsel's fees.

71. The Court observes that whereas the applicant has furnished it with a detailed substantiation of his claim the Government have provided no evidence in support of their submission. In such circumstances the claim should be allowed in full less 51,691.29 French francs already paid by way of legal aid in respect of fees and expenses.

This amount is to be increased by any value-added tax that may be chargeable.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that it is not necessary to examine the Government's objection concerning the applicant's standing to complain on behalf of his daughter;

2. Dismisses the remainder of the Government's preliminary objections;

3. Holds that there has been a violation of Article 8 (art. 8);

4. Holds that there has been a violation of Article 6 para. 1 (art. 6-1);

5. Holds that it is not necessary to examine the applicant's complaint under Article 14 (art. 14);

6. Holds that Ireland is to pay to the applicant, within three months, IR £12,000 (twelve thousand) in respect of non- pecuniary and pecuniary damage and, in respect of costs and expenses, the sums resulting from the calculation to be made in accordance with paragraph 71 of the judgment.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 May 1994.

Rolv RYSSDAL
President

For the Registrar
Herbert PETZOLD
Deputy Registrar