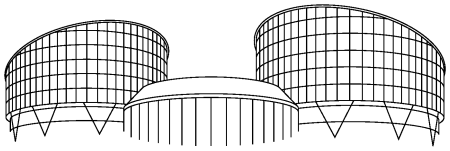

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF BABIARZ v. POLAND

(Application no. 1955/10)

JUDGMENT

STRASBOURG

10 January 2017

FINAL

10/04/2017

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Babiarz v. Poland,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

András Sajó, *President,*
Vincent A. De Gaetano,
Paulo Pinto de Albuquerque,
Krzysztof Wojtyczek,
Iulia Motoc,
Gabriele Kucsko-Stadlmayer,
Marko Bošnjak, *judges,*

and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 22 November 2016,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 1955/10) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Artur Babiarz ("the applicant"), on 15 December 2009.

2. The applicant was represented by Mr W. Osak, a lawyer practising in Lublin. The Polish Government ("the Government") were represented by their Agent, Ms J. Chrzanowska of the Ministry of Foreign Affairs.

3. The applicant alleged that his right to respect for family life and his right to marry and found a family had been breached.

4. On 3 June 2014 the application was communicated to the Government. The applicant and the Government each filed written observations on the admissibility and merits. In addition, third-party comments were received from the European Centre for Justice and Human Rights (*Centre européen pour la justice et les droits de l'homme*), which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1971 and lives in Dębowa Kłoda.

6. In 1997 the applicant married R. In 2004 R. underwent infertility treatment so she could conceive a child with him.

7. In autumn 2004 the applicant met A.H. In January 2005 he moved out of the flat he had lived in with R.

8. On 31 October 2005 A.H. gave birth to their daughter, M.

9. On 25 September 2006 the applicant filed a petition for divorce. At first he requested a no-fault divorce. In his petition the applicant referred to various marital misunderstandings and quarrels for which he blamed the respondent. He admitted that he had moved out of the matrimonial home, but did not mention his involvement with a new partner.

10. At a hearing held on 15 November 2006 the applicant refused to undergo the mediation process provided for by divorce law. R. did not agree to a divorce, declared that she loved the applicant and asked the court to dismiss the divorce petition.

11. Subsequently, the applicant requested a divorce on fault-based grounds.

12. During the proceedings thirteen witnesses were heard. Most of them were of the opinion that the marriage seemed happy until autumn 2004. Only the applicant's mother, his two colleagues and his cousin recalled minor arguments between the spouses.

13. During the final hearing on 9 February 2009 the respondent reiterated her refusal to divorce.

14. On 17 February 2009 the Lublin Regional Court refused to grant the divorce to the applicant. The court held that he was the only person responsible for the breakdown of his marriage because he had failed to respect the obligation of fidelity. The court did not find it credible that problems had already begun within the first year of the marriage. It observed that until 2004 the applicant had not wanted children. In that year he had changed his mind. For that reason R. had undergone surgery, the operation having taken place in August 2004.

15. The marital situation had subsequently changed when the applicant had met A.H. He had no longer wished to have a child with his wife. The court noted contradictions between the testimony given by the applicant, who had referred to the alleged serious problems in marital life prior to 2004 on the one hand, and the decision to treat R.'s infertility in summer 2004 on the other. The respondent had been shocked by the applicant's unfaithfulness and had been treated for depression since autumn 2004.

16. The court acknowledged that there had indeed been "a complete and irretrievable marriage breakdown" within the meaning of Article 56 § 1 of the Family and Guardianship Code. Reconciliation was unlikely as the applicant had consistently rejected all attempts made by R. to reconcile their differences. Moreover, he had been in a relationship with A.H. for almost four years and had a child with her.

17. The court emphasised that under Article 56 § 3 of the Family and Guardianship Code, a divorce could not be granted if it had been requested by the party whose fault it was that the marriage had broken down, if the other party refused to consent and the refusal of the innocent party was not "contrary to the reasonable principles of social coexistence" (*zasady współżycia społecznego)* within the meaning of Article 5 of the Civil Code.

18. The court considered that R.'s refusal to divorce should be presumed to be compatible with those universally accepted principles. It referred to the case-law of the Supreme Court to the effect that a refusal of consent to a divorce was to be presumed to be compliant with those principles unless there were case-specific indications to the contrary. There was no indication that when refusing to give her consent R. had acted out of hatred, was motivated by vengeance, or simply wanted to vex the applicant. The court emphasised that she had repeatedly stated during the proceedings that she was ready to reconcile with him despite the fact that he had a child with another woman.

19. The court stressed that the duration of the applicant's new relationship could not by itself be considered to be a sufficient reason for granting the divorce.

20. The applicant appealed against the judgment. He argued, *inter alia*, that the court had erred in holding that a spouse's refusal to consent to a divorce could be disregarded only when it was of an abusive nature or was dictated by hostility towards the spouse seeking the divorce. The court should have examined the negative social consequences caused by continuing the formal existence of failed marriages. In his case, it had failed to do so.

21. On 16 June 2009 the Lublin Court of Appeal dismissed the applicant's appeal.

22. The applicant did not request to be served with the written grounds for the appellate judgment. The grounds were therefore not prepared.

23. The judgment was final, a cassation appeal against a divorce judgment not being available in law.

II. RELEVANT DOMESTIC LAW AND PRACTICE

24. Pursuant to Article 56 § 1 of the Family and Guardianship Code (*Kodeks rodzinny i opiekuńczy*), either spouse may file a petition for divorce if there has been a complete and irretrievable marriage breakdown (*zupełny i trwały rozkład pożycia*). For the purposes of establishing whether a complete breakdown has occurred, the established judicial practice is to examine *ex officio* whether the financial, emotional and sexual ties between the spouses have ended (Supreme Court decision no. III CKN 386/98 of 22 October 1999, and Katowice Court of Appeal decision no. I ACa 51/10 of 12 March 2010). The courts establish it applying the general procedural

rules governing the taking of evidence, in addition to certain specific rules provided for by the Code of Civil Procedure for the purposes of divorce proceedings.

25. In particular, under Article 431 of the Code of Civil Procedure, a decision in a divorce case cannot be based exclusively on the admission of the claim or of certain facts by the respondent. Article 432 of the Code provides that both parties to a divorce case are to be heard in person. Under Article 442, if the respondent admits the divorce claim and the spouses have no minor children, the court may limit the taking of evidence to hearing the parties.

26. Under Article 56 §§ 2 and 3 of the Family and Guardianship Code, a divorce may not be granted even where there has been a complete breakdown of the marriage, if:

> "(2) ... it would be detrimental to the well-being of [the] minor children [of the marriage] or if, for other reasons, granting the divorce would be contrary to the principles of social coexistence (*zasady współżycia społecznego*);
>
> (3) ... it has been requested by the spouse who is at fault for the breakdown of the marriage, unless the other spouse has expressed his or her consent thereto, or the refusal of such consent by the other spouse is – in the circumstances at issue – contrary to the reasonable principles of social coexistence..."

27. Article 5 of the Civil Code reads:

> "No one shall exercise any right of his in a manner contrary to its socio-economic purpose or to the principles of social coexistence (*zasady współżycia społecznego*). An act or omission [fulfilling this description] on the part of the holder of the right shall not be deemed to be the exercise of the right and shall be protected [by law]."

28. The courts have developed ample case-law addressing situations where a respondent spouse refuses to consent to a divorce. In particular, they have held that an innocent respondent has a right to refuse to consent. A presumption of good faith was therefore applicable to such a refusal, until it was demonstrated, with reference to the specific circumstances of a case, that the refusal ran counter to the principles of social coexistence within the meaning of Article 5 of the Civil Code (Supreme Court decision nos. II CKN 956/99 of 26 October 2002 and I CKN 305/01 of 26 February 2000). In particular, the respondent spouse's intention to frustrate the petitioner's plans to formalise his or her extramarital relationship should not, by itself, be regarded as being incompatible with these principles, if it has been shown that the refusal was inspired by a wish to continue the marriage, consistent with ethical and social standards (Supreme Court decision no. CKN 305/01 of 26 February 2002).

29. The courts are obliged to assess whether or not a refusal to consent to a divorce amounts to an abuse of rights in the light of the spouses' situation and conditions caused by the breakdown of their marriage, both of the innocent respondent and the petitioner. It is only in the light of these findings that a thorough assessment can be made whether a refusal is

consonant with universally accepted morality rules (*reguły moralności*) and whether or not it is detrimental to other interests worthy of legal protection (Supreme Court decision no. I CKN 871/00 of 4 October 2001). The factors to be taken into account include, *inter alia*, the spouses' health, age and ability to earn a living and the length of the marriage (Supreme Court decision nos. I CR 565/57 of 22 May 1958 and III CKN 573/98 of 9 October 1998, and Białystok Court of Appeal decision no. I ACa 48/97 of 6 March 1997). The fact that the petitioner has children born from an extramarital relationship is also of relevance (Supreme Court decision no. C 1115/52 of 8 July 1952).

30. The refusal of an innocent spouse should be overridden if it is shown that the respondent is motivated merely by a wish to harass the petitioner and to prevent him or her from formalising his or her new relationship (Supreme Court decision no. III CKN 665/00 of 21 November 2002).

31. The respondent's conduct after the marriage breakdown also has to be taken into consideration; if it is spiteful and reprehensible, the refusal of consent can be overridden (Supreme Court decision no. II CKN 1270/00 of 21 March 2003). Likewise, the causes of the breakdown and the circumstances which have arisen thereafter, including the existence of other relationships and extramarital children, have to be taken into consideration by the court (Supreme Court decision no. III CKN 1032/99 of 10 May 2000).

THE LAW

ALLEGED VIOLATION OF ARTICLES 8 AND 12 OF THE CONVENTION

32. The applicant complained under Articles 8 and 12 of the Convention that by refusing to grant him a divorce the authorities had prevented him from marrying the woman with whom he had been living.

33. The relevant provisions read as follows:

Article 8

"1. Everyone has the right to respect for his private and family life ... .

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."

Article 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."

A. Admissibility

34. The Government argued that the applicant's complaint fell outside the scope of Article 12 and was incompatible *ratione materiae* with the provisions of the Convention. The applicant disagreed.

35. The Court finds that the Government's objection is closely linked to the substance of the applicant's complaints and should be joined to the merits of the case.

36. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

37. The applicant argued that his right to marry and found a family had been breached by the court's refusal to grant him a divorce. The public authority had, as a result, interfered with his plans related to both his private and family life and those of his daughter and partner.

(b) The Government

38. The Government were of the view that there had been no breach of the State's obligations under Article 8. The authorities had not interfered with the applicant's desire to marry, with his married life for seven years or, last but not least, with his decision to move out of the matrimonial home and start an affair with another woman. The sole fact that formalised judicial divorce proceedings existed under national law and that certain conditions had to be met for a divorce to be granted did not *per se* contradict Article 8 of the Convention. Such a view would run counter to the very foundations of the European concept of family law, since such matters were regulated in every legal system of the Contracting Parties to the Convention.

39. It was further argued that the rights guaranteed under Article 8 of the Convention were not absolute in nature and interference with these rights was permissible under certain conditions. In the present case, interference was prescribed by Article 56 §§ 2 and 3 of the Family and Guardianship Code. This interference pursued at least two legitimate aims: the protection of the rights and freedoms of others, namely the interests and well-being of the applicant's wife, and the protection of morals. They counteracted the menace of arbitrary and unilateral terminations of marriages in a society adhering to the principle of monogamy (see *Johnston and Others v. Ireland*, 18 December 1986, § 52, Series A no. 112).

40. Nevertheless, the weight of these limitations was reduced by the possibility of obtaining a divorce under certain conditions defined by law. The Government averred that the Convention neither imposed a positive obligation on the Contracting States to permit a divorce, nor positive duties on the State to refrain from introducing substantive or procedural conditions on which marriages could be legally dissolved.

41. The Government noted that the case had been examined by independent and impartial domestic courts. The first-instance judgment had been subject to a review by the appellate court. The reasoning of the judgment of the Lublin Regional Court contained a reasonable and convincing explanation of whose interests had been taken into account, how the evidence had been evaluated and what the grounds had been for their decision to dismiss the applicant's petition for divorce. The respondent had exercised her right to oppose the applicant's petition for divorce. The courts had examined the applicant's petition with reference to interests both private and public in nature, namely those of the applicant's wife and the need to counteract the menace of arbitrary and unilateral terminations of marriages. In the circumstances of the case, the applicant's request to be granted a divorce on fault-based grounds could not be recognised as justified under the applicable provisions of family law.

42. The Government further argued that the case should be distinguished from the case of Johnston v. Ireland, in that the dismissal of the divorce petition had not affected the legal situation of the child conceived by the applicant and his new partner. Under the provisions of Article 72 § 1 of the Family and Guardianship Code, paternity of a child born out of wedlock could be established by the recognition of paternity or by the court. The legal situation of children born out of wedlock under Polish law was absolutely equal to the situation of the children born within a marriage.

43. The Government further argued that the applicant apparently had not been interested in familiarising himself with the written reasoning of the appellate court since he had not applied for such grounds to be prepared and had not been entitled to have them prepared ex officio. Nevertheless, he had decided to submit his case to an international court. It was the applicant's conduct which had made it impossible for the Court to be made aware of the grounds on which the appellate court had decided to uphold the first-instance judgment.

44. The Government concluded by stating that there had been no violation of the Convention in the present case.

(c) The third party intervener

45. The European Centre for Justice and Human Rights submitted that it was important to society that marriages remained stable and that they could fulfil their social role, in particular in the context of raising children. Family was universally recognised as a fundamental element of society and as such

should be protected by law. The right to marry originated essentially in the individuals' wish to found a family and should, as such, be protected. European law did not recognise the right to divorce. The legal prohibition of divorce was not contrary to either Article 8 or Article 12 of the Convention. In any event, there was no European consensus as to the possibility of obtaining a divorce when an innocent party opposed it, even in situations where there had been a definitive breakdown of marital relations. An approach which would confer on a party at fault a right to divorce despite the opposition of an innocent party would be tantamount to upholding a purely individualistic concept of liberty, understood essentially as having no societal and family obligations.

2. The Court's assessment

46. The Court observes that the applicant's complaint about the alleged breach of his rights guaranteed by Articles 8 and 12 of the Convention is based on the same fact, namely the courts' refusal to grant him a divorce (see *Ivanov and Petrova v. Bulgaria*, no. 15001/04, §§ 55 *et seq*., 14 June 2011).

47. In so far as the applicant relies on Article 8 of the Convention, the Court reiterates that while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *Mikulić v. Croatia*, no. 53176/99, § 57, ECHR 2002-I). 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 nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests (see *S.H. and Others v. Austria* [GC], no. 57813/00, § 87, ECHR 2011-V); and in both contexts the State enjoys a certain margin of appreciation (see, among other authorities, *Mizzi v. Malta*, no. 26111/02, § 106, ECHR 2006-I (extracts) and *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 106, ECHR 2014). In the area of framing their divorce laws and implementing them in concrete cases, the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention and to reconcile the competing personal interests at stake (compare and contrast, *Johnston and Others*, cited above, § 55).

48. As regards Article 12 of the Convention, the Court reiterates in this connection that this Article secures the fundamental right of a man and woman to marry and found a family. The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the laws

of the Contracting States but the limitations thereby introduced must not restrict or reduce the right to marry in such a way or to such an extent that the very essence of the right to marry is impaired (see *Rees v. United Kingdom*, 17 October 1986, § 50, Series A no. 106; *F. v. Switzerland*, 18 December 1987, § 32, Series A no. 128; and *B. and L. v. United Kingdom*, no. 36536/02, § 34, 13 September 2005).

49. The Court has already held that neither Article 12 nor 8 of the Convention can be interpreted as conferring on individuals a right to divorce (see *Johnston and Others*, cited above, § 57). Moreover, the *travaux préparatoires* of the Convention indicate clearly that it was an intention of the Contracting Parties to expressly exclude such right from the scope of the Convention (ibid., § 52). Nevertheless, the Court has reiterated on many occasions that the Convention is a living instrument to be interpreted in the light of present-day conditions (see, among many other authorities, *Marckx v. Belgium*, 13 June 1979, § 41, Series A no. 31, and *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32). It has also held that, if national legislation allows divorce, which is not a requirement of the Convention, Article 12 secures for divorced persons the right to remarry (see *F. v. Switzerland*, 18 December 1987, § 38, Series A no. 128).

50. Thus, the Court has not ruled out that the unreasonable length of judicial divorce proceedings could raise an issue under Article 12 (see *Aresti Charalambous v. Cyprus*, no. 43151/04, § 56, 19 July 2007). The Court did not rule out that a similar conclusion could be reached in cases where, despite an irretrievable breakdown of marital life, domestic law regarded the lack of consent of an innocent party as an insurmountable obstacle to granting a divorce to a guilty party (see *Ivanov and Petrova*, referred to above, § 61). However, that type of situation does not obtain in the present case, which concerns neither a complaint about the excessive length of divorce proceedings nor insurmountable legal impediments on the possibility to remarry after divorce.

51. The circumstances of the present case also differ from those examined in the context of the case of *Johnston and Others* (cited above), as it concerns neither a blanket restriction nor a blanket prohibition imposed by the domestic law. The applicant's argument is not based on an absolute impossibility to obtain a divorce under family law in Poland but on a dismissal of his divorce action by the domestic courts.

52. The Court notes that Polish divorce law provides detailed substantive and procedural rules which can lead to a divorce being granted. In particular, Article 56 § 3 of the Family and Guardianship Code can be regarded as intended to be a safeguard to protect one party, usually the weaker, against the machinations and bad faith of the other party. There is also ample domestic case-law on the application of the relevant substantive provisions to situations where an innocent party and, on the other hand, a party at fault for the breakdown of marital relations are involved in the

divorce proceedings, providing further clarification and guidance to the courts (see Relevant domestic law).

53. In the present case, the courts examined the facts in detail and in the proper context of domestic law. During the divorce proceedings comprehensive evidence was gathered. The applicant had an opportunity to present his position to the court and put questions to the witnesses. The first-instance judgment was subject to a review by the appellate court. The reasoning of that judgment contained a detailed explanation of the interests that were taken into account, how the evidence was assessed and what the grounds were for its decision to dismiss the applicant's petition for divorce.

54. The Court is well aware that the applicant had a daughter with his new partner, that he was apparently in a stable relationship and that the domestic courts had acknowledged a complete and irretrievable breakdown of his marriage. This, however, does not detract from that which is mentioned above. To contemplate otherwise would mean that a request for a divorce would have to be allowed regardless of the procedural and substantive rules of domestic divorce law, by a person simply deciding to leave his or her spouse and have a child with a new partner. While under Article 8, *de facto* families and relationships are protected, such protection does not mean that particular legal recognition has to be accorded to them. It has not been argued, let alone shown, that failure to obtain a divorce and the legal fiction of his continuing marriage prevented the applicant from recognising his paternity in respect of the child he had with A.H.

55. The Court further notes that it has not been argued that under Polish law a refusal to divorce creates *res iudicata*, thereby preventing the applicant from submitting a fresh petition for divorce to the courts at a later stage if and when circumstances change.

56. In the Court's view, if the provisions of the Convention cannot be interpreted as guaranteeing a possibility, under domestic law, of obtaining divorce, they cannot, *a fortiori*, be interpreted as guaranteeing a favourable outcome in divorce proceedings instituted under the provision of that law allowing for a divorce.

57. In view of all the above, the Court considers that there has been no violation of the applicant's right to marry and that in the circumstances of the present case the positive obligations arising under Article 8 of the Convention (see paragraph 47 above) did not impose on the Polish authorities a duty to accept the applicant's petition for divorce.

58. It follows that there has been no violation of either Article 8 or 12 of the Convention, assuming this last provision to be applicable.

59. This conclusion dispenses the Court from addressing the Government's preliminary objection of incompatibility *ratione materiae* (see paragraph 34 above; see also, *mutatis mutandis*, *Kotov v. Russia* [GC], no. 54522/00, § 133, 3 April 2012).

FOR THESE REASONS, THE COURT

1. *Joins to the merits*, by a majority, the Government's objection that the applicant's complaint under Article 12 of the Convention is incompatible *ratione materiae* with the provisions of the Convention;

2. *Declares*, unanimously, the application admissible;

3. *Holds*, by five votes to two, that there has been no violation of Article 8 of the Convention;

4. *Holds*, by five votes to two, that there has been no violation of Article 12 of the Convention and that it is not necessary to consider the Government's preliminary objection.

Done in English, and notified in writing on 10 January 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti	András Sajó
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) separate opinion of Judge Sajó;
(b) separate opinion of Judge Pinto de Albuquerque.

A.S.
A.N.

DISSENTING OPINION OF JUDGE SAJÓ

1. To my regret, I cannot agree with the majority's finding that there has been no violation of Articles 8 or 12 of the Convention. I find that the case presents first and foremost a violation of the Article 8 right to private and family life, but also that the refusal to grant a divorce, being a precondition to remarriage, inevitably violates the applicant's right to marry under Article 12.

I. Preliminary remarks

2. The starting point of the judgment for the examination of the applicant's claim is that neither Article 12 nor Article 8 of the Convention can be interpreted as conferring on individuals a right to divorce (see paragraph 49). Yet in so finding, the judgment relies on *Johnston and Others v. Ireland* (18 December 1986, Series A no. 112) and its progeny, and on the broad margin of appreciation that States enjoy in this respect. I cannot share this assessment.

3. To begin with, neither *Johnston* nor its progeny can be upheld by the Court today. In a case concerning a blanket ban on divorce in Ireland, and thus a practical impossibility of remarriage, it was stated in *Johnston* that individuals could not claim a right to divorce either under Article 12 or under Article 8. The decision was based on the fact that, according to the *Travaux Préparatoires*, Article 12 deliberately omitted rights after marriage such as the right to divorce. After this finding, the Court in *Johnston* decided that it simply could not find in Article 8 a right that was intentionally omitted from Article 12 (ibid., § 57). In the same vein, it said that the Court could not take into account the social developments that had occurred since the Convention was drafted for that same reason (ibid., § 53).

The *Travaux* themselves do not indicate that the right to marriage does not include the elimination of an obstacle to marriage. In *Johnston* the Court used an odd reasoning in paragraph 52 to deny that the right to marry entailed the right to divorce (a valid marriage being an obstacle to a new marriage):

> "... 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 any guarantee of a right to have the ties of marriage dissolved by divorce."

In fact, the Court has recently found in a Grand Chamber judgment that the *Travaux préparatoires* "are not delimiting for the question whether a right may be considered to fall within the scope of an Article of the Convention if the existence of such a right was supported by the growing measure of common ground that had emerged in a given area" (see *Magyar Helsinki Bizottsag v. Hungary* [GC], no. 18030/11, § 125, 8 November 2016).

It simply does not follow that just because a certain expression was excluded from the text we cannot find a right in other principles of the Convention and in the social developments in such matters. The Court in *Johnston* created a special barrier to divorce that is unprecedented in any other area of the Convention.

4. The Convention is "a living instrument to be interpreted in the light of present-day conditions" (paragraph 49 of the judgment). It is precisely for this reason that *Johnston* has to be revisited thirty years later.

II. Article 8 of the Convention

5. The Court has adopted an evolutive interpretation of Article 8 with regard to "respect for family life". Already prior to *Johnston*, in *Airey v. Ireland* (9 October 1979, §§ 31-33, Series A no. 32), it found that in order to protect family life the State must sometimes allow a couple relief from the duty to live together. It went on to say that "in addition to this primarily negative undertaking [protecting the individual against arbitrary interference by the public authorities], there may be positive obligations inherent in an effective respect for private or family life" (ibid., § 33, citing the *Marckx v. Belgium* judgment of 13 June 1979, § 31, Series A no. 31).

The evolutive interpretation and broadening of what "family life" represents should allow us to find proper relief for the applicant under Article 8. This is especially true since, given the context of this case, and as I will explain, the Government's restriction cannot circumvent the balancing test that Article 8 § 2 demands. Even if the Court decided in *Johnston* to depart from that evolutive interpretation, creating an unexplained exception to its standard approach thirty years ago, this cannot apply to Article 8 today.

6. I agree with the majority that States enjoy a certain margin of appreciation when it comes to Article 8 and the protection of private and family life (paragraph 47). It is simply not true, however, that they enjoy a wide margin of appreciation in both framing their divorce laws and implementing them in concrete cases in such a way that *any* outcome falls under such margin. Especially where the legitimate interests involved are not properly taken into account and yield an unacceptable outcome like that in the present case.

According to the majority, a wide margin of appreciation should also be afforded to States where a case presents two competing rights under the Convention (paragraph 47). It is simply not true, however, that the right to family life of the applicant's wife, R., entails the right to family life with a specific person against that person's will. R.'s claims are nothing but an interest that cannot be translated into the language of rights under the Convention and the situation cannot be construed as one of two competing Convention rights where a wide margin is applicable. Even assuming that to marry, or to remain married to, a specific person is part of family life, it cannot be placed on an equal footing with the right not to be forced to live with someone in a legal union and not to be able to marry.

7. Even without the revision of the Article 12 case-law, a right has clearly been interfered with in the present case. This is the private life right not to be forced to live in a marital union with another person, whether as an instance of self-determination or as a precondition to family life. Save in very particular circumstances, the denial of regulatory or judicial support for the exercise of a right that cannot be made practical is not necessary in a democratic society, and is thus in violation of Article 8 § 2. At least I see no reason here to decide otherwise.

The ground for such interference could be morals or the rights of others. In view of the European consensus in this matter, there can be no wide margin of appreciation for the denial of divorce. As to the interest of the other party to live in a marital union, it is not at the level of the interest of the party who would like to have the marriage dissolved. (Of course, I can envision exceptions where a delay would be understandable in very peculiar temporary situations on compassionate grounds, for example, where a dying spouse would like to spend his or her last days as a married person). The claim to keep someone as spouse is not of the same weight as the autonomy-based demand of the other person to be free, and it is asymmetrical because it imposes an undue restriction, whereas leaving is a right accorded to both parties equally.

The party who refuses the divorce will certainly lose out and will suffer if divorce is granted. The individual's hopes, namely that he or she will be considered a married person or that the spouse will return because of the continued legal relationship, will be frustrated in this case. But this person will not be losing something that he/she owns. As to the suffering: not to suffer in these circumstances does not constitute a right but a mere interest.[1]

8. This specific case does not stand up to any form of proportionality test.

---

1. For the unacceptability of the denial of divorce on religious grounds in the Jewish context see *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 SCR 607.

9. According to the Government, the two legitimate aims pursued by the challenged norm (Article 56 § 2 and 3 of the Family and Guardianship Code) were: (i) the protection of the rights and freedoms of others (in this case, the interest and well-being of the applicant's wife), and (ii) the protection of morals. In order for this aim to justify the present interference with Article 8 in terms of its second paragraph, the interference must be necessary in a democratic society.

10. The first legitimate aim is unfounded in general but even more so in this particular case. Emotional well-being in this case is not a right. The Convention speaks of rights and not of interests. To accept interests and not rights as grounds for legitimate interference would denaturalise the Convention.

There is no right to live as a married couple against the will of the other party, as secular law considers marriage to be a voluntary union. Such voluntary union exists where two wills come together as one. Where the union of the wills ceases to exist, little remains for marriage. One must not follow Kant's odd marriage theory in this respect.[2] The possibility of divorce cannot be a matter of lack of fault. Continued marriage cannot be determined on grounds of guilt or marital inappropriateness in the twenty-first century.

It might be morally reprehensible that the applicant left his wife after all that she had had to undergo and the conditions under which he left her, but denial of divorce cannot be a punishment for immorality. Of course, the law may determine adverse consequences for such behaviour, but these are unrelated to the possibility of divorce.

11. Furthermore, in this particular case, by refusing the applicant's divorce in the name of the alleged right of R., the State is unduly affecting not only the applicant's right to private and family life, but also the rights of A.H. and M. to family life. These rights, particularly those of M., were considered neither by the judgment nor by the respondent Government.

12. As to the rights of the applicant and A.H., it appears that the judgment reflects the idea that not being married (either for not being able to get a divorce, or for being in love with a person who cannot get divorced) does not interfere with the full enjoyment of life by a couple if they can live in cohabitation. But the respondent Government and the Court should have shown that living in partnership is socially and legally equivalent to living in marriage in Polish society. The evidence, however, points in the opposite direction, both legally and socially.

Legally, cohabitation in Poland does not grant any rights or obligations to the cohabiting partners. The applicant and A.H. cannot file taxes jointly;

---

2. See Immanuel Kant, *Metaphysics of Morals.* Cambridge University Press, United States of America, 1991, p 96.

they cannot co-insure the non-working partner; they cannot inherit property from the deceased partner or collect survivor's pensions or alimonies; they cannot claim financial support from their partner if they lose their job or face financial problems; to name but a few examples.[3]

Socially, the applicant argued that living in a small village meant that the couple were subjected to "crude remarks and acerbities from the neighbours" and to "constant pressure and anxiety" owing to their situation. The Government did not reflect on these allegations of fact. According to some experts, cohabitation in Poland is "less socially acceptable than it is in many other European countries"[4]; and that since "there is a lesser degree of social acceptance of informal unions, cohabiters might continue to experience certain forms of stigmatisation."[5] Neither the respondent Government nor the judgment gives any consideration to these facts.

13. As to M., the judgment asserts that the denial of the divorce does not prevent the applicant from recognising his paternity in respect of her (paragraph 54). Yet to say that the Court does not allow discrimination against children out of wedlock is of little comfort where the social stigmatisation of cohabitation is still strong in the society, as mentioned above.

The applicant well argues that her daughter, since birth, "has not had a chance to be raised in a legally registered family". Notwithstanding the alleged equality of being raised in cohabitation, a child has the right to be brought up in a formal marriage-based family. The reaction of the social environment to which this judgment subjects M. must be given appropriate weight. This is even more true after the adoption of the Convention on the Rights of the Child and the need for "the best interests of the child [to] be a primary consideration" in all actions concerning children (Article 3 § 1 of that Convention).[6]

It is not for this Court to strike the right balance and rule on whether or not the decision is indeed in the best interests of the child, although it is hard to argue how the best interests of M. have been taken into account in this case. But when domestic courts have not given any weight to such

---

3. See Monika Mynarska, et al., "Free to stay, free to leave: Insights from Poland into the meaning of cohabitation", 31 *Demographic Research* 36, 12 November 2014, 1107-1136, at 1113.

4. See Mynarska, cited above, p. 1114.

5. Ibid., p. 1111.

6. See also *Obergefell v. Hodges* (576 U.S. ___ (2015)), at p. 15: "Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life".

interests whatsoever in their decision, a violation of the Convention must be found.

14. The second legitimate interest alleged by the Government is the protection of morals. While I acknowledge that the protection of the traditional family may be justified by certain moral concerns, I consider that the protection of morals does not provide sufficient justification for the restriction of the applicant's rights in this case. It is not at all clear why the State should grant a right to refuse to agree to a divorce as a means of forcing an unwilling partner to continue to be married. I cannot imagine how allowing two unmarried people to live together with a child for eleven years while one of them is still legally married to someone else (something that no one does or would argue the State can prohibit) is more of a threat to morals – a threat that the Government claims to be the basis of the interference – than granting the divorce and actually allowing them to marry. The Government have certainly not proved as much. As a matter of fact, the Government did not even substantiate how the interference (which, after eleven years, amounts to an impossibility to remarry) serves the cause of morals. As already mentioned, to be forced to maintain a legal relationship with a person no longer out of choice is not moral. Or is punishment by marriage an enforcement of morals?

15. Divorce is subject to formalities and conditions. It is understandable that the State requires that the various interests of the parties be considered and that the parties be driven by mature decisions. But eleven years is too long and even at the time of the first domestic judgment four years had already passed since the tragic breakup (see paragraphs 7 and 14).

16. On another note, the judgment states that Article 8 protects *de facto* families (namely, the applicant's right to live together with A.H. and his daughter), but that this does not mean that particular legal recognition should be accorded to them (see paragraph 54). Yet this is not simply just a case of legally recognising a *de facto* family. This is a case of impeding the dissolution of a *de jure* fiction violating the very rights it seeks to protect. What kind of family should be protected here? The fictional marriage after separation for eleven years and recognised by the domestic courts as "a complete and irretrievable marriage breakdown" (see paragraph 16)? Or the other *de facto* family which is and has been together for eleven years, which seeks recognition and involves the interests of a child of similar age?

The Convention cannot be interpreted as upholding *de jure* fictions to the detriment of a *de facto* situation that the Convention itself allows and the case-law protects (see *Marckx*, cited above, § 31; *Keegan v. Ireland*, 26 May 1994, § 44, Series A no. 290; and *Kroon and Others v. the Netherlands*, 27 October 1994, § 30, Series A no. 297-C). The Court has even ascertained that factors such as "whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other

means" are all factors to be taken into account when deciding if a relationship amounts to the "family life" protected by Article 8 (see *X, Y, and Z v. the United Kingdom*, no. 21830/93, § 36, 22 April 1997). All of these factors are foregone conclusions in the present case.

I fail to see how a *de jure* protection would threaten public morals any more than the already protected *de facto* situation does. This renders the result of the balancing test once again at odds with the Government's arguments.

Even more paradoxical is the judgment's argument that it had not been argued that this refusal of divorce under Polish law had the effect of *res judicata* (paragraph 55). After eleven years of cohabitation and with a child of similar age, such argument even goes against the idea that an unreasonable length of judicial divorce proceedings could raise an issue under Article 12 (see paragraph 50, citing *Aresti Charalambous v. Cyprus*, no. 43151/04, § 56, 19 July 2007).

17. I find that in the present case the domestic courts, by disregarding the irretrievable nature of the separation, the interests of the child and those of her mother, left out relevant considerations from their analysis. There is no evidence that the grave interference with the applicant's family life was necessary in a democratic society. Even if one applies a balancing approach the same conclusion is inevitable given that the domestic courts' perception borders on the arbitrary.

III. Article 12 of the Convention

18. The case-law of the Court, as understood in the judgment, indicates that the Convention cannot be interpreted as guaranteeing a possibility, under domestic law, of obtaining a divorce (let alone a favourable outcome in such proceedings) under Article 12. However, this is not an absolute position, and yet this judgment refuses to engage in a full analysis of this point (see *Ivanov and Petrova v. Bulgaria*, no. 15001/04, 14 June 2011).

19. As the judgment recognises, the Court has explicitly not ruled out the possibility of facing an issue under Article 12 where, "despite an irretrievable breakdown of marital life, domestic law regarded the lack of consent of an innocent party as an insurmountable obstacle to granting a divorce to a guilty party" (see paragraph 50, citing *Ivanov and Petrova*). Yet the Polish domestic courts themselves recognised that there had indeed been "'a complete and irretrievable marriage breakdown' [and that] [r]econciliation was unlikely" (see paragraph 16). They highlighted, to this effect, that the applicant had consistently rejected all attempts made by R. (his wife) to reconcile their differences and that he had been in a relationship with A.H. for almost four years at that time (now eleven years) and had had a child with her (M., now eleven years of age).

Thus, in the present case, the "irretrievable breakdown of marital life" and the prohibition on marrying the person the applicant has been living with (and had a child with) for eleven years (resulting from a denial of divorce) can and should also constitute a violation of Article 12 as it originates from the innocent party and is enforced by the national law.

20. Divorce, at least in the present case, becomes a necessary precondition of the right to marry.

As a recent landmark ruling of the Supreme Court of the United States has said, "the right to personal choice regarding marriage is inherent in the concept of individual autonomy", it being "a fundamental right inherent in the liberty of the person", and "decisions concerning marriage are among the most intimate than an individual can make" (see *Obergefell v. Hodges*, 576 U.S. ___ (2015), at §§ 12, 22 and 12 respectively).

21. Articles 8 and 12 were extremely narrowly construed by this Court in *Johnston* (cited above), turning the Irish exception into a ground for denial of a right to divorce across Europe where divorce is a precondition to marriage (see the dissenting opinion of Judge De Meyer, § 6).

Thirty years after that judgment, and with the millions of divorces in the meantime, now nineteen years since Ireland abolished the absolute constitutional ban enshrined in its Constitution, it is time to revisit *Johnston* and without considering this to be a matter of "profound moral values deeply embedded in the fabric of society" (see *A, B and C v. Ireland* [GC], no. 25579/05, § 180. ECHR 2010).

This is not a case of abortion where moral concerns about the understanding of life and the status of the foetus come into play. Furthermore, in so far as *Ivanov and Petrova* rests its holding on the same analytical framework, there is no good principle behind such decision; at least, not one worth upholding today. The exercise of the right to marry is subject to the laws of the Contracting States, but any limitations thereby introduced must not restrict or reduce the right to marry in such a way or to such an extent that the very essence of the right to marry is impaired (see *Rees v. the United Kingdom*, 17 October 1986, § 50, Series A no. 106; *F. v. Switzerland*, 18 December 1987, § 32, Series A no. 128; and *B. and L. v. the United Kingdom*, no. 36536/02, § 34, 13 September 2005). By denying divorce to the applicant in an irreparable marriage the authorities impaired the essence of his right to marry.

IV. Final remarks

22. I see no reason why the State should be able to force citizens to live in a partnership contrary to their choosing. A marriage between two citizens cannot provide the State with the prerogative of its perpetuation once one of the parties has taken the private and family life decision not to continue

living under such a legal bond – even more so with the irretrievable conditions and length in this particular case.

23. It is bad enough that a person has to deal with the fact that a lifelong decision such as marriage went wrong, for whatever reason. To allow the State to force people to live with their regretted life choices, thus preventing them from moving on with their private lives, inevitably entails an impermissible intrusion that cannot be considered necessary in a democratic society.

DISSENTING OPINION OF JUDGE PINTO DEALBUQUERQUE

Table of contents

I. Introduction (§ 1)

1. I had the benefit of reading the opinion of my learned colleague Judge Sajó and I share some of his thoughts on this case. Nonetheless, I would like to add some thoughts of my own, since I disagree with the majority for fundamental substantive and methodological reasons. Firstly, I do not agree with the majority's odd methodological decision to deal jointly with the claims of violations of Articles 8 and 12 of the European Convention on Human Rights ("the Convention"), as if these Articles did not have their own, different, applications, ambits and requirements. This approach resulted in a total lack of consideration of the factual situation of the applicant's new family, as well as the rights of the applicant and A.H. to marry and to found a legally protected family with their daughter and the right of the minor M. to live in a legally recognised family. Secondly, the majority reasoning suffers from noticeable logical defects which prejudice the legal assessment, both with regard to the lawfulness and the

proportionality of the State's interference with the applicant's Convention rights. Thirdly, I am convinced that the present judgment is not in line with the case-law subsequent to *Johnston and Others v. Ireland*[1]. If not for that reason, at least in view of the seriousness and the general importance of the legal issues at stake, I am of the view that this case should have been relinquished to the Grand Chamber.

I will not analyse this case on the basis of the principle of the personal autonomy of the spouses, as my learned colleague Judge Sajó did. It is true that the Court's case-law recognises this principle[2]. But since the present case involves third persons (A. H. and her daughter M.), this opinion will be focused on the confrontation between the right of the innocent spouse to maintain the marriage bond and the applicant's right to be released of this bond in order to found a new legally based family with A. H. and their daughter M.. Hence, I will concentrate my attention on the protection of *de facto* family life under Article 8 of the Convention and the right to divorce as a pre-condition for the exercise of the right to remarry under Article 12 of the Convention.

Part I (§§ 2-11)

II. Convention law on family life (§§ 2–6)

A. The protection of marriage-based family life (§§ 2–3)

2. The Convention offers strong protection of the family founded by way of marriage. The notion of family in Articles 8 and 12 of the Convention is based primarily on interpersonal relationships that have been formalised in law, as well relations of biological kinship[3]. Such an approach does not exclude extending the protection of Article 8 to interpersonal relationships with more distant relatives, such as the relationships between grand-parents and grand-children[4] and between an uncle or aunt and his/her nephew or niece[5].

3. By guaranteeing the right to respect for family life, Article 8 presupposes the existence of a family[6]. However, this does not mean that all intended family life falls entirely outside its ambit. Family life includes the

1. *Johnston and Others v. Ireland*, 18 December 1986, Series A no. 112.
2. Among others, *Pretty v. the United Kingdom*, no. 2346/02, §§ 65-67, ECHR 2002-III; and *Christine Goodwin v. the United Kingdom [GC]*, no. 28957/95, § 90, ECHR 2002-VI
3. The Court has already noted the "close affinity" between Articles 8 and 12 rights (*Jaremowicz v. Poland*, no. 24023/03, § 50, 5 January 2010).
4. *Bronda v. Italy*, no. 22430/93, § 51, 9 June 1998.
5. *Jucius and Juciuviene v. Lithuania*, no. 14414/03, § 27, 25 November 2008.
6. *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, p. 14, para. 31.

relationship that arises from a lawful and genuine marriage, even if a family life has not yet been fully established[7].

B. The protection of *de facto* family life (§§ 4–6)

4. The notion of family life under Article 8 of the Convention is not confined to marriage-based relationships and may encompass other *de facto* family ties where the partners are living together out of wedlock. As a rule, cohabitation is a requirement for a relationship amounting to family life. Exceptionally, other factors may also serve to demonstrate the existence of a close personal relationship with sufficient constancy to create *de facto* family ties[8]. When deciding whether a relationship between two adult persons can be said to amount to family life, a number of circumstances other than cohabitation, such as the length of the relationship, the demonstration of their commitment to each other and the existence of children, may be relevant.

5. A child born of a lawful and genuine marriage is *ipso jure* part of that relationship. Hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to family life, even if the parents are not then living together[9]. However, a biological kinship between a natural parent and a child alone, without any further legal or factual elements indicating the existence of a close personal relationship, may be insufficient to attract the protection of Article 8[10]. In the absence of any biological or legally recognised parental link, family life between one or more adults and a child may be established on the basis of various factors such as the duration of cohabitation, the commitment of the adults to the well-being of the child and the social role assumed by the adults towards the child, and in particular whether they planned to have a child; whether they subsequently recognised the child as theirs; contributions made to the child's care and upbringing; and the quality and regularity of contact[11]. For example, family life may exist between a man and his child even where the man never cohabited with the child's mother or

---

7. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 62, Series A no. 94.
8. *Kroon and Others v. the Netherlands*, 27 October 1994, § 30, Series A no. 297-C; *L. v. the Netherlands*, no. 45582/99, § 36, ECHR 2004 IV; and *Chbihi Loududi and Others v. Belgium*, no. 52265/10, § 78, 16 December 2014.
9. *Berrehab v. the Netherlands*, 21 June 1988, Series A no. 138, p. 14, para. 21; *Keegan v. Ireland*, 26 May 1994, § 44, Series A no. 290; *L.*, cited above, § 35; *Elsholz v. Germany* [GC], no. 25735/94, § 43, ECHR 2000-VIII; *Yousef v. the Netherlands*, no. 33711/96, § 51, ECHR 2002-VIII; and *Znamenskaya v. Russia*, no. 77785/01, § 26, 2 June 2005.
10. *L.*, cited above, § 37.
11. *Khan A. W. v. the United Kingdom*, no. 35394/97, § 34, 12 May 2000.

provided for the child[12], between a couple and their child, where the father had never lived with the child and the mother had been separated from the child for six years[13] and between a father and his child who had been separated for over seven years but where the father continued visiting him[14]. In immigration cases the Court has held that there will be no family life between parents and adult children unless they can demonstrate additional elements of dependence[15].

6. Hence, the Court has extended the Article 8 right to protection of family life to an unmarried person with no biological link to the child[16], an unmarried person with a biological link to the child[17], a divorced person with biological link to the child[18], a divorced person with no biological link to the child[19], unmarried couples with their biological children[20], married couples with foster children[21], and adoptive parents and the adopted children[22].

III. Application of Convention law to the present case (§§ 7-11)

A. The acknowledgment of a "complete and irretrievable marriage breakdown" (§§ 7–9)

7. The domestic courts acknowledged that there had been a "complete and irretrievable marriage breakdown" between the applicant and his spouse R. They also acknowledged that the applicant had been in a relationship

---

12. *Boughanemi v. France*, no. 22070/93, § 35, 24 April 1996.
13. *Sen v. the Netherlands*, no. 31465/96, 21 December 2001.
14. *Gül v. Switzerland*, 19 February 1996, Reports of Judgments and Decisions 1996-I, pp. 173-74, para. 32.
15. *Slivenko v. Latvia* [GC], no. 48321/99, § 97, ECHR 2003 X.
16. *Wagner and JMWL v. Luxembourg*, no. 76240/01, 28 June 2007.
17. *Kroon and Others*, cited above, § 30, and *L.*, cited above, § 38. In the latter case, the Court concluded that the applicant had not sought to recognise his biological child born outside wedlock and he had never formed a "family unit" with his child and her mother as they had never cohabited. In the former case, Mrs Kroon and Mr Zerrouk requested the Amsterdam registrar of births to allow Mrs Kroon to make a statement before him to the effect that her spouse was not Samir's father and thus make it possible for Mr Zerrouk to recognise the child as his. Mrs Kroon and Mr Zerrouk had chosen not to marry and it was from choice that the latter did not reside with Mrs Kroon and Samir.
18. *Berrehab*, cited above, § 21.
19. *Nazarenko v. Russia*, no. 39438/13, 16 July 2015.
20. *Johnston and Others*, cited above, and *Muñoz Díaz V. Spain*, no. 49151/07, 8 December 2009.
21. *Moretti and Benedetti v. Italy*, no. 16318/07, 27 April 2010, and *Kopf and Liberda v. Austria*, no. 1598/06, 17 January 2012; but see also *Giusto and Others v. Italy (dec.)*, no. 38972/06, ECHR 2007-V.
22. *Söderbäck v. Sweden*, no. 24484/94, 28 October 1998.

with another woman (A.M.) since the breakdown of his marriage and that a child (R.) was born out of this new relationship. But the domestic courts failed to consider the existence of this relationship as a new *de facto* family, attracting the protection of Article 8 of the Convention, as they also failed to consider the negative legal, social and psychological consequences caused to this new family by the continued formal existence of the applicant's marriage in spite of its definitive collapse.

8. The Government were of the view that there had been an interference with the applicant's Article 8 right, but submitted that this interference pursued legitimate aims (see paragraph 39 of the judgment). The majority admitted that the applicant was "apparently in a stable relationship" with his new partner and that his continuing marriage was nothing more than a "legal fiction" (paragraph 54 of the judgment). Indeed, the applicant has been living with A.M. since the breakdown of his marriage in January 2005, eleven years ago. But the majority did not deal with the specific complaint that the failure to obtain a divorce and to remarry had an adverse impact on the new family. The only consideration made by the majority with regard to this point was that it had not been argued that the applicant was prevented from recognising the paternity of his son (paragraph 54 *in fine* of the judgment). The majority reasoned on the false premise that family life inside and outside wedlock is identical in Polish society for the family members concerned, ignoring the detrimental legal, financial and social effects of an almost clandestine life of eleven years' cohabitation for the new couple and their daughter.

9. This is a profoundly unfair analysis of the situation faced by the members of the new family, which reveals a certain degree of indifference, if not harshness, on the part of the majority towards the situation of A.H. and her daughter M. The negative impact of the present "legal fiction" is not restricted to the legal status of the child M., and the denial of her right to live in a legally recognised family[23], but includes many other aspects of the legal, financial and social life of the members of the new family, to which my learned colleague Judge Sajó's opinion refers in detail. These adverse consequences have simply been brushed aside by the majority, although they were invoked by the applicant[24].

---

23. The Court itself has already admitted that "Children born out of wedlock may nonetheless suffer on account of certain prejudices and thus be socially handicapped." (*F. v. Switzerland*, judgment of 18 December 1987, Series A no. 128, § 36).

24. See the applicant's observations of 13 November 2014.

B. The majority´s lack of consideration for the new *de facto* family (§§ 10-11)

10. The majority's logically unsustainable position is synthesised in the following sentence of the judgment (paragraph 54): "While under Article 8, *de facto* families and relationships are protected, such protection does not mean that particular legal recognition has to be accorded to them". The majority is keen to point out that *de facto* families deserve Article 8 protection, but they do not state what form such protection should take, if not the legal recognition by marriage. In fact, the majority's omission is more serious. The majority did not even assess if the State interference with the Article 8 right pursued one of the legitimate objectives of Article 8 § 2 of the Convention and was necessary in a democratic society[25]. The Court's classical methodological steps for the analysis of an admissible Article 8 claim were circumvented and, in particular, no balancing exercise was conducted between the applicant's Article 8 right and the Government's alleged Article 8 § 2 objectives, namely "the interests and the well-being of the applicant's wife" and the "protection of morals" (see paragraph 39 of the judgment)[26].

11. Furthermore, the applicant in *Charamlambous v. Cyprus*[27] complained that he had been unable to remarry and establish a new family life during divorce proceedings, and the Court rejected the Article 8 claim as manifestly ill-founded because the applicant had made no reference to an existing family in respect which he could claim the right to family life. Yet this is precisely the case of the present applicant, who built a new family after the breakdown of his marriage. Following the *Charamlambous* rationale, the applicant's Article 8 claim should be considered as founded, since the majority themselves did not venture to deny the factual existence of a family in the case of the applicant, A.M. and their daughter M., and therefore of family life for the purposes of Article 8. Respect for family life

---

25. It is not clear whether the majority chose to analyse the case from the perspective of a State interference with the applicant's Articles 8 and 12 rights or from the perspective of the positive obligations arising from these Articles. Paragraph 47 is unclear and paragraph 57 even less so, since it refers to "positive obligations arising under Article 8 of the Convention", but then continues with a reference to the "duty to accept the applicant's petition for divorce".

26. The Government saw clearly that a balancing test should be conducted. In paragraph 47 of their observations before the Chamber, they stated "The effectiveness of refusal will depend on the comparison between the situation of the spouse who is not at fault with the situation of the spouse who is at fault for the breakdown of the marriage. Only the evaluation and the comparison between those interests will decide whether the refusal of divorce complies with the rules of social co-existence." Yet the majority failed to proceed with this balancing test.

27. *Aresti Charalambous v. Cyprus*, no. 43151704, 19 July 2007.

requires that biological and social reality prevail over a legal fiction which, as in the present case, flies in the face of both the established fact of the definitive marriage breakdown and the rights of those concerned by the new *de facto* relationship, including the young child M., without actually being of benefit to the innocent spouse.

Part II (§§ 12–33)

IV. Convention law on divorce (§§ 12–20)

A. The right to divorce as a condition for the right to remarry (§§ 12–15)

12. Article 12 of the Convention secures the fundamental right of a man and woman to marry and to found a family. The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired[28]. Limitations on the right to marry laid down in the national laws may comprise formal rules concerning such matters as publicity and the solemnisation of marriage. They may also include substantive provisions based on generally recognised considerations of public interest, in particular concerning capacity, consent, prohibited degrees of affinity or the prevention of bigamy. In the context of immigration laws and for justified reasons, the States may be entitled to prevent marriages of convenience, entered into solely for the purpose of securing an immigration advantage. However, the relevant laws – which must also meet the standards of accessibility and clarity required by the Convention – may not otherwise deprive a person or a category of persons of full legal capacity of the right to marry with the partners of their choice[29].

13. Article 12 of the Convention does not protect the right to terminate a marriage on demand. The *travaux preparatoires* are explicit about this[30]. But the argument that the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset, particularly where the omission was deliberate, is not decisive. The Court itself has done so, for example in its acknowledgment of the negative freedom of association in the case of *Young, James and Webster v. the United Kingdom*, in spite of the explicit rejection of its

28. *Rees v. the United Kingdom*, judgment of 17 October 1986, Series A no. 106, § 50; and *F.*, cited above, § 32.
29. *Jaremowicz*, cited above, § 49.
30. *Johnston and Others*, cited above, § 52.

inclusion during the *travaux preparatoires*[31]. As a pillar of the European human-rights normative framework, evolutive interpretation of the Convention prevails over literal or historical interpretation[32].

14. Nevertheless, if national law allows for divorce, Article 12 secures for divorced persons the right to remarry. In this case, restrictions to the right to remarry must be lawful and proportionate. In *F. v. Switzerland*, the Court concluded that a three-year prohibition on remarriage, applied as a penalty for the guilty spouse with sole responsibility for the breakdown of the marriage, affected the very essence of the right to remarry and was therefore disproportionate to the legitimate aim pursued[33]. This is established case-law of the Court, which the majority accepted in paragraphs 48 and 49 of the judgment. In simple terms, the majority accepted the right of divorced persons to remarry under Article 12. But they added that there is no right for separated spouses to obtain a divorce when one of the spouses, namely the innocent party, does not consent. The reason for such a prohibition is the protection of "one party, usually the weaker, against the machination and bad faith of the other party" (see paragraph 52 of the judgment).

15. I am ready to assume that this is the purpose of the Polish divorce law and particularly of the above-mentioned prohibition on divorce when the innocent spouse does not consent. I am also ready to concede that this legislative purpose is legitimate, since it coheres with the Convention obligation to protect marriage and family life based on marriage and, since divorce is accepted in Poland, the Convention obligation to regulate the right to remarry. But this is not the end of the matter. As will be demonstrated below, the problem lies not in the legislative purpose, but in the vague legal framework adopted to implement the Convention obligations and the disproportionate judgment delivered by the domestic courts in the light of it. Since the State interference with the applicant's right to protection of *de facto* family life finds no justification under Article 8 § 2 of the Convention, it may be assumed *prima facie* that such interference

---

31. *Young, James and Webster v. the United Kingdom*, 13 August 1981, Series A no. 44, §§ 51-52.

32. As I have pointed out elsewhere, the preparatory works of the Convention do not have determinative value for the interpretation of the Convention (see my opinions in *Mursic v. Croatia* [GC], no. 7334/13, 20 October 2016, and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, ECHR 2014).

33. *F.*, cited above, § 40. The Swiss Government had argued that since a total prohibition of divorce was accepted in *Johnston*, as temporary prohibition such as the one in the Swiss law should also be considered as compatible with Article 12. The Court found differently, deciding that the argument *ad maiori ad minus* could not be applied to restrictions of human rights.

also violates Article 12 of the Convention, namely the applicant's right to remarry[34]. The subsequent reflections will confirm this assumption.

B. The majority's logically inconsistent margin of appreciation (§§ 16-20)

16. The Government, as well as the majority, argue that States have a wide margin of appreciation in framing their divorce laws and implementing them in concrete cases[35]. This argument runs counter to the alleged existence of "universal" rules or principles applicable in the field of divorce law (see paragraph 29 of the judgment). There is an intrinsic logical inconsistency in reasoning that, on the one hand, Polish divorce law is interpreted and applied by domestic courts in accordance with "universally accepted" rules or principles and, on the other, that the framing and implementation of divorce law warrants a wide margin of appreciation for States. Either the rules and principles applicable to divorce law are not universal and vary among the Contracting Parties to the Convention, in which case the margin of appreciation accorded to States is a wide one; or the rules and principles applicable to divorce law are indeed universal, but in that case there is no margin of appreciation. You cannot have your cake and eat it.

17. Most of the human rights contained in the Convention and its Protocols are intrinsically related to religious, ethical and moral issues that have been the subject of debate for centuries. Thus, the intrinsically religious, ethical or moral nature of a legal issue under the scrutiny of the Court should not be a factor limiting the latter's competence or determining the margin of appreciation to be afforded to States. Hence, the argument drawing attention to the sensitive religious, ethical or moral nature of the issue at stake is irrelevant in establishing the width of the margin of appreciation.[36] In spite of their profound religious, ethical and moral implications, marriage and divorce are, undoubtedly, fundamental issues pertaining to the social identity of individuals, at the heart of the Convention (Articles 8 and 12) and of Protocol No. 7 (Article 5). Hence, if there should be a margin of appreciation in this field of family law, it should be a narrow one. Quite rightly, the Court took the position in *Jaremowicz* that

> "the matter of conditions for marriage in the national laws is not left entirely to Contracting States as being within their margin of appreciation. This would be

34. *A contrario*, *Boso v. Italy (dec.)*, no. 50490/99, 5 September 2002, and *E.L.H. and P.B.H. v. the United Kingdom*, Commission decision of 22 October 1997, DR 91-A, p. 61.
35. In paragraph 47 of the judgment, the majority invoke paragraph 55 of *Johnston*, cited above. It should be noted that this paragraph did not deal specifically with divorce law, since the Court decided in *Johnston* that Article 12 was not even applicable.
36. *Parrillo v. Italy* [GC], no. 46470/11, ECHR 2015, § 34 of my opinion.

> tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far (*R. and F. v. the United Kingdom (dec.)*, no. 35748/05, 28 November 2006)"[37].

The same reasoning evidently applies to divorce. For these reasons, it is very doubtful that the wide margin of appreciation accorded to States in divorce matters by *Johnston and Others*[38] still makes sense. As was shown above, that margin simply vanished one year later in *F. v. Switzerland*. If one adds the factor of a growing European consensus on divorce law[39], which the majority resolutely declined to do, the pleading for such a wide margin of appreciation lacks any justification.

18. In addition, the legal solution available in Polish law, as applied in the present case, is incompatible with the unequivocal statement in *Ivanov and Petrova v. Bulgaria*[40] to the effect that a violation of Article 12 of the Convention may occur where, "in spite of the finding that there has been an irretrievable breakdown of the marital bond, the domestic law holds up the opposition of the innocent spouse as an absolute obstacle to granting a divorce". Here again, the wide margin of appreciation was practically abandoned.

The majority distinguished the present case from the Bulgarian case, describing the latter as a case of "legal impediments on the possibility to remarry after divorce" (see paragraph 50, *in fine*, of the judgment). This is simply not correct. The majority has seriously misunderstood the legal framework of the Bulgarian case. Let us recall the relevant Bulgarian law and case-law, as set out in § 30 of *Ivanov and Petrova*:

> "Article 99 (4) of the former Family Code provided that divorce would not be granted if the breakdown in the marital bond was entirely imputable to the petitioner and if the other spouse was opposed to the dissolution of the marriage. However, the innocent spouse's objection did not prevent a divorce from being pronounced if there existed serious reasons (важни обстоятелства) requiring the dissolution of the marriage. According to the Supreme Court's case-law, a longstanding spousal separation could constitute a serious reason within the meaning of Article 99 (4) of the former Family Code (see Решение № 102 of 07.02.1991 г. по гр. д. № 1711/90 г., II г. о., for a six-year separation, and Решение № 912 of 29.04.1991 г. по гр. д.

37. *Jaremowicz*, cited above, § 48.
38. *Johnston and Others*, cited above, § 55.
39. Some facts speak eloquently to this point. Even Ireland and Malta, the last two European States with prohibitive laws, have put an end to the blanket ban on divorce, in 1996 and 2011 respectively. 16 European Union countries have adopted a single set of rules to determine which law should apply to cross-border divorces. In this context, notice should also be taken of the recent apostolic exhortation of Pope Francis, *Amoris Laetitia*, and the discussion that it raised on the status of divorced and civilly remarried Catholics, including the Buenos Aires bishops' set of guidelines for implementation of chapter VIII of *Amoris Laetitia*, and Pope Francis's response to those guidelines.
40. *Ivanov and Petrova v. Bulgaria*, no. 15001/04, § 61, 14 June 2011.

> № 25/91 г., II г. о., for a fourteen-year separation). Abandonment of the family by the offending spouse and extramarital cohabitation with a third party have also been considered as serious reasons within the meaning of this provision in the Code (see Решение № 244 of 26.V.1991 г. по гр. д. № 1875/90 г., II г. о.)."

19. Put simply, in Poland, the innocent party's lack of consent is, in principle, an obstacle to divorce, save for those cases where the court considers that granting divorce is consonant with "the principles of social coexistence". The Bulgarian legal framework was exactly the same as in the present case. In Bulgaria, an innocent party's lack of consent was, in principle, an obstacle to divorce, save for those cases where the court considered that there were "serious reasons" for granting the divorce. The abandonment of the family house by the guilty spouse and extramarital cohabitation of one spouse with a third person were considered as examples of such "serious reasons".

20. Had this rationale been applied to the present case, it would mean that the applicant's abandonment of the family house in January 2005 and his extramarital relationship with A.H. from that moment on should have been considered as good reasons, in the light of the "principles of social coexistence", to grant a divorce. In other words, had the *Ivanov and Petrova* rationale been applied to the facts of the present case, there would have been a violation of Article 12, since the Polish domestic courts did not grant the divorce in spite of the existence of good reasons for doing so, and therefore affected the very essence of the right to remarry. Any divergent conclusion, departing from the *Ivanov and Petrova* rationale, would require the intervention of the Grand Chamber. If the majority wanted to depart from *Ivanov and Petrova*, as they did, they should have relinquished the case. They chose not to. In conscience, I could not follow this path, which disrespects previous case-law and the Grand Chamber's jurisdiction.

V. Application of Convention law to the present case (§§ 21-33)

A. The unclear and unforeseeable domestic legal framework (§§ 21-25)

21. According to the domestic court, R. was the innocent part in the divorce proceedings and her refusal to consent to divorce was not "contrary to the reasonable principles of social existence" (see paragraph 17 of the judgment). Quite succinctly, the domestic court added that R.'s refusal to divorce should be presumed compatible with "those universally accepted principles" (see paragraph 18 of the judgment). Such an interpretation by the domestic court is in line with the Supreme Court's own interpretation of Article 5 of the Civil Code as set out in its decision of 4 October 2001, which refers to the "universally accepted morality rules" (see paragraph 29 of the judgment).

22. I agree with the majority that the present case is not a *Johnston and Others* type of situation (see paragraph 51 of the judgment). Formally speaking, there is no blanket prohibition on divorce in Polish law, since the innocent spouse's refusal to divorce must be assessed by the domestic courts under the criterion of "the principles of social coexistence". The domestic courts identify these principles as "universally accepted morality rules" or "principles". The content of these moral rules or principles is specified neither in law nor in case-law. It is also unclear what is meant by "universally accepted", as is the extent of the persons supposedly sharing these rules. The following inescapable question arises: is the term intended to imply that these rules are universally shared in Polish society, or in Europe, or world-wide?

23. More importantly, the boundary between civil law and morality seems unclear in the relevant Polish Supreme Court case-law. According to the relevant Polish case-law, the domestic courts are to impose certain unspecified moral rules or principles when applying divorce law and, more specifically, when assessing the innocent party's refusal to consent to divorce. While the protection of morals is one of the aims accepted by the Convention for restrictions on protection of the right to family life (Article 8 § 2 of the Convention), this aim is not included among the Convention requirements for the framing of marriage and divorce law. Article 12 does not include any permissible grounds for non-fulfilment of the State's obligation, let alone for interference by the State, that can be justified as being "necessary in a democratic society" for such purposes as "the protection of morals".[41] Furthermore, Article 16 of the Universal Declaration of Human Rights itself provides for the spouses' "equal rights as to marriage, during marriage and at its dissolution", but does not restrict the spouses' right to dissolution of marriage on the grounds of morality.

24. This evidently raises an issue with the quality of the national law. The interests of legal certainty, which are of great importance in the field of family law, are at stake. The requirement of lawfulness with regard to any interference by the Polish State with citizens' right to marry and, in the event of divorce, to remarry, is at issue. Article 56 § 3 of the Family and Guardianship Code, as interpreted by the Polish Supreme Court, leaves too much discretion to domestic courts in the application of divorce law. There are no clear standards, either in the law or in the case-law, on the minimum lapse of time necessary for the spousal separation to be considered as sufficient reason for granting a divorce[42]. Worse still, there are no clear standards in terms of the legal relevance of the duration of new *de facto*

41. *Jaremowicz*, cited above, § 50.

42. For example, Article 1781 of the Portuguese Civil Code provides that a minimum period of one year of spousal separation may be considered as sufficient for granting divorce, regardless of any other factor, where one spouse does not consent to divorce.

family relationships after the spouses have separated (see paragraph 19 of the judgment). This legal uncertainty creates an intolerable situation for spouses, including the innocent spouse, in divorce proceedings[43].

25. According to the domestic case-law, there is a presumption of good faith on the part of an innocent spouse who refuses to consent to divorce, until it is demonstrated, with reference to the specific circumstances of a case, that the refusal contradicts the principles of social coexistence (see paragraph 28 of the judgment). The Government added that, according to the Supreme Court, "even a refusal which is caused solely by the defendant's sense of hurt is not sufficient to override that presumption"[44]. Furthermore, the Government stressed that, again according to the same domestic case-law, the duration of the spousal separation does not override the presumption that the refusal complies with those principles[45]. This case-law only compounds the grave lack of clarity and legal certainty, because it allows for the perpetuation of the legal fiction of marriage for an unlimited period of time in spite of its definitive breakdown.

B. The disproportionate judgment of the domestic courts (§§ 26-33)

26. Since the right to divorce is recognised in the Polish legal order and the applicant has a Convention right to remarry[46], the conditions for exercise of the former right must not be so strict that they impair the essence of the latter right[47]. In a society adhering to the principle of monogamy, the right to remarry presupposes the right to divorce[48]. In addition to the lack of clarity and legal certainty in national law, the legal requirements for divorce were interpreted and applied by the domestic courts in the present case in such a disproportionate way that the very essence (the minimum core) of the applicant's right to remarry was impaired. As in the cases of prohibition on prisoners' right to marry[49], the discretion theoretically available in Polish

---

43. This is not the first time that the proportionality of the Polish law on marriage has been assessed (*Frasik v. Poland*, no. 22933/02, 5 January 2010, and *Jaremowicz v. Poland*, no. 24023/03, 5 January 2010).

44. See the Government's observations, citing the Supreme Court judgments of 7 December 1965 (case no. III CR 278/65) and of 16 October 2000 (case no. II CKN 956/99).

45. The Government cited the Supreme Court judgment of 18 August 1965 (case no. III CR 147/65).

46. *F.*, cited above.

47. The need to protect the essence of the right to marry was the major concern in the judgment of *B. and L. v. the United Kingdom*, no. 36536/02, 13 September 2005, concerning the prohibition on marriage between a father-in-law and his daughter-in-law. The Court assessed the "rationality and logic of the measure" and found a violation of the said right.

48. On the principle of monogamy, *Ivanov and Petrova*, cited above, § 60.

49. *Jaremowicz*, cited above, § 64.

divorce law may be very wide, indeed excessively wide, in assessing the compatibility of a refusal to consent to divorce with the principles of social coexistence, but the decisive element is how it is applied in practice.

27. In the applicant's case, the Convention breach was caused by the domestic courts' failure to strike a fair balance of proportionality among the various public and individual interests at stake in a manner compatible with the Convention, with the ultimate result that they nullified the minimum core of the applicant's right to remarry. In other words, the wide discretion left by law, as interpreted by the Supreme Court, was used by the domestic courts to concede to the innocent spouse a one-sided, unconstrained *de facto* veto on divorce.

28. In the present situation, where the conflict between the applicant's right to remarry and found a family with A.H. and their daughter M. and the spouse R's right to remain married to the applicant cannot be solved through any middle-ground solution which could partially accommodate both spouses' rights, but necessarily implies the sacrifice of the rights of one of them, it is manifestly disproportionate to impose the maintenance of the marriage bond after the "complete and irretrievable" failure of the union between the spouses and when reconciliation is "unlikely", one of the spouses having "consistently rejected all attempts ... by R. to reconcile their differences", maintained a new family relationship with a third person for almost four years and had a child with her (see paragraph 16 of the judgment). *A fortiori*, that disproportionality is even more flagrant at the time of this Chamber judgment, eleven years after the breakdown of the marriage, the formation of the applicant's new family and the birth of his daughter. This is not a humane application of law.

29. The majority did not care to establish the breadth of the legal effects of the Lublin Court of Appeal's judgment of 16 June 2009, including its *res judicata* effect, in spite of the crucial importance of this legal aspect for the proportionality test. In the human context of this case, it borders on sarcasm to argue, after eleven years of spousal separation and an extramarital relationship from which a child has been born, that the applicant is not prevented from submitting a fresh petition for divorce "at a later stage if and when circumstances change" (see paragraph 55 of the judgment). The majority's argument is certainly different, and in a way more refined, as it notes only that it had not been argued by the applicant that he was hindered from submitting a fresh petition for divorce.

30. The majority's argument leaves me perplexed. A couple of modest questions come to mind, such as: what could these other "circumstances" be that, in the majority´s understanding, would release the applicant from his marriage bond? Do more children have to be born from the extramarital relationship, and if so, how many, so that it is taken seriously? When, at what "stage", would such a fresh petition for divorce be foreseeably

successful? How many more years does the spousal separation have to last for it to be taken seriously?

31. Be that as it may, the prospects for any fresh divorce petition are plain to see, and, to say the least, they are not promising. Even assuming that the Lublin Court of Appeal's judgment of 16 June 2009 only has the effect of *res judicata sic stantibus*, which the majority did not care to establish, and that the applicant can lodge a fresh divorce petition, it is obvious that the result will be the same, since the "circumstances" have not changed in the meantime and the mere prolongation of the spousal separation is not considered, according to the Supreme Court as cited by the Government themselves, as a decisive factor in favour of the dissolution of the marriage. If the majority wished to open a legal avenue for the applicant, in an effort to give the impression that his case was not totally hopeless, it chose a very unconvincing way to express their opinion.

32. One final, but important note should be added: granting a divorce evidently does not hinder the application of severe adverse pecuniary, patrimonial and other penalties for the spouse who unjustifiably leaves the family home or commences an extra-marital relationship. The Convention obligation to protect marriage-based family life requires such punishment. When disrespect for the obligations of marriage, including the obligations of fidelity and assistance, results in a complete and irretrievable breakdown of marriage, the guilty spouse should be punished adequately by civil law. But these civil sanctions must not be equated, in their features or means of application, to any moral or religious sanctions.

33. As emerges clearly from its own Article 9, the Convention is a religion-friendly text, but it does not permit State imposition of religious or moral values, even when they are shared by the majority of the population[50]. The belief in the sanctity and religious indissolubility of the matrimonial bond, which many millions of Poles and many more millions of Europeans share, may not be imposed by State policy, namely by force of legislative or judicial policy. It could not be otherwise in contemporary, democratic societies, built upon the pillars of State neutrality and religious and moral pluralism[51].

---

50. "In applying the above principles to Turkey the Convention institutions have expressed the view that the principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention", in *Refah Partisi (the Welfare Party) and Others v. Turkey [GC]*, nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 93, ECHR 2003-II.

51. On laicism as a pillar of modern European societies, see "L'église catholique et la loi du 9 décembre 1905, cent ans après", Declaration by the Conférence des évêques de France, 15 June 2005.

VI. Conclusion (§§ 34-35)

34. Article 8 of the Convention protects *de facto* family life that is not based on marriage. The majority took an unbalanced, one-sided approach to this case, considering solely the rights of the spouse R. and disregarding entirely the right of the applicant and A.H. to marry and found a family and the right of M. to live in a legally recognised family. Hence, a proper balance was not struck between the interests involved and there was therefore no reasonable relationship of proportionality between the means employed and the legitimate aim pursued.

35. Article 12 of the Convention does not protect the right to terminate a marriage on demand. If national law allows for divorce, Article 12 secures for divorced persons the right to remarry. The prohibition on divorce may be an admissible restriction to the right to remarry if it is couched in clear terms and applied in a proportionate way. This was not the case. In Poland, the law provides for the right to divorce, but the legal requirements are so vague that they transform the right to remarry into a legal fiction. In fact, the very essence of the applicant's right to remarry was impaired, due to a restrictive interpretation and strict application of the law in his case. The long agony of the applicant's marriage is a telling example of the human costs of this legal fiction both for the spouses and for the third persons affected.