

Application Nos. 14234/88 and 14235/88

OPEN DOOR COUNSELLING LTD.

and

DUBLIN WELL WOMAN CENTRE LTD. AND OTHERS

against

IRELAND

REPORT OF THE COMMISSION
(adopted on 7 March 1991)

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I. INTRODUCTION

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

A. The applications

2. The first application (No. 14234/88) is brought by Open Door Counselling Ltd., a company which was engaged, inter alia, in non-directive counselling of pregnant women in Dublin and other parts of Ireland. This company was represented before the Commission by Messrs. Amorys, solicitors, Dublin.

3. The second application (No. 14235/88) is brought by several applicants:

- the Dublin Well Woman Centre Ltd., a company like Open Door Counselling Ltd., which was also engaged, inter alia, in non-directive counselling of pregnant women in Dublin;

- Ms. Bonnie Maher, born in 1945, a citizen of the United States of America, who works as a trained counsellor for the Dublin Well Woman Centre Ltd.;

- Ms. Ann Downes, born in 1960, a citizen of Ireland, who also works as a counsellor for the Dublin Well Woman Centre Ltd.;

- Mrs. X, born in 1950, a citizen of Ireland, who is a television producer and is married with three children.

- Miss Y, born in 1970, a citizen of Ireland, who is, at present, unemployed.

The applicants in the second application were represented by Mmes Barbara Hussey and Co., solicitors, Dublin.

4. The applications are directed against Ireland. The respondent Government were represented by their Agent, Mr. Peter E. Smyth, succeeded by Ms. Emer Kilcullen, both of the Department of Foreign Affairs.

5. The applications concern restrictions placed on the applicant companies to prevent them from providing information to pregnant women as to the location or identity of, or method of communication with, abortion clinics in Great Britain. They raise issues under Articles 8, 10 and 14 of the Convention.

B. The proceedings

6. The first application, brought by Open Door Counselling Ltd., was introduced on 19 August 1988 and registered on 22 September 1988.

7. The second application, brought by the Dublin Well Woman Centre and Others, was introduced on 15 September 1988 and registered on 22 September 1988.

8. After a preliminary examination of the cases by the Rapporteur, the Commission decided on 14 March 1989 to join the applications, to give notice of them to the respondent Government, pursuant to Rule 42 para. 2 (b) of its Rules of Procedure (former version), and to invite the parties to submit their written observations on the admissibility and merits of the applications insofar as they raised issues under Article 10 of the Convention and, as regards the second application No. 14235/88, Article 8 of the Convention. The Government's observations were submitted on 15 September 1989, following extensions of the time-limit until 1 September 1989. The applicants' observations in reply were submitted on 2 November 1989 (first application) and 9 November 1989 (second application).

9. The Commission next considered the applications on 5 February 1990 and decided, in accordance with Rule 42 para. 3 of its Rules of Procedure (former version), to invite the parties to appear before it at a hearing on the admissibility and merits of the applications insofar as they raised issues under Articles 8 and 10 of the Convention.

10. The hearing took place in Strasbourg on 15 May 1990. The Government were represented by Mr. P.E. Smyth, Agent, Mr. D. Gleeson, S.C., and Mr. J. O'Reilly, S.C., of counsel, as well as Mr. J.F. Gormley of the Office of the Attorney General, acting as an adviser. The applicants were represented by Mrs. M. Robinson, S.C., and Mr. F.

Clarke, S.C., of counsel, together with Ms. B. Hussey, solicitor, and Mmes R. Burtonshaw and M. McNeaney from the Dublin Well Woman Centre Ltd. as advisers.

11. Following the hearing and deliberations the Commission declared the two applications admissible. On 12 June 1990 the parties were sent the text of the Commission's decision on admissibility and they were invited to submit such further observations or evidence on the merits as they wished. On 2 August 1990 the Government submitted supplementary observations. The applicants did not submit any further observations. The applicants were granted legal aid on 7 September 1990.

12. After declaring the cases admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which a settlement can be effected.

C. The present Report

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

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
A. WEITZEL
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
Sir Basil HALL
M. F. MARTINEZ
Mrs. J. LIDDY
M. L. LOUCAIDES

14. The text of the Report was adopted on 7 March 1991 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

15. The purpose of the Report, pursuant to Article 31 of the Convention, is

- 1) to establish the facts, and
- 2) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

16. A schedule setting out the history of the proceedings before the Commission is attached hereto as APPENDIX I and the Commission's decision on the admissibility of the applications as APPENDIX II.

17. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

18. The first applicant company, Open Door Counselling Ltd., was, at the material time, a company which was engaged, inter alia, in counselling of pregnant women in Dublin and other parts of Ireland. The second applicant company is a company providing similar services at two clinics in Dublin. It was established in 1977 and is a

registered charity. It provides a broad range of services relating to counselling and marriage, family planning, procreation and health matters. The services offered by the Centre relate to every aspect of women's health, ranging from smear tests to breast examinations, infection testing, screening, gynaecological problems, contraception, infertility, artificial insemination and counselling of pregnant women. This counselling was provided in a non-directive manner, i.e., as regards the question of abortion, neither advising for or against an abortion as the preferred option, but rather providing objective information about such an option if desired by the patient. The Centre employs doctors, nurses and counsellors at its Dublin clinics.

19. The applicant companies were defendants in proceedings in the High Court which were commenced on 28 June 1985 as a private action brought by the Society for the Protection of Unborn Children (Ireland) Ltd. (SPUC), which was converted into a relator action brought at the suit of the Attorney General by order of the High Court of 24 September 1986 (the Attorney General at the relation of the Society for the Protection of Unborn Children (Ireland) Ltd. v. Open Door Counselling Ltd. and the Dublin Well Woman Centre Ltd.).

20. The plaintiff sought a declaration that the activities of the applicant companies in counselling pregnant women within the jurisdiction of the court to travel abroad to obtain an abortion were unlawful having regard to Article 40.3.3° of the Constitution, which provides as follows:

"The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

The plaintiff further sought an order restraining the defendants from such counselling or assistance.

21. No evidence was adduced at the hearing of the action which proceeded on the basis of certain agreed facts which were admitted by each of the two defendants. The relevant agreed facts concerning the second applicant company may be summarised as follows:

- a. it counsels in a non-directive manner pregnant women resident in Ireland;
- b. abortion or termination of pregnancy may be one of the options discussed within the said counselling;
- c. if a pregnant woman wants to consider the abortion option further, arrangements will be made by the applicant to refer her to a medical clinic in Great Britain;
- d. in certain circumstances, the applicant may arrange for the travel of such pregnant woman;
- e. the applicant will inspect the medical clinic in Great Britain to ensure that it operates at the highest standards;
- f. at those medical clinics abortions have been performed on pregnant women who have been previously counselled by the applicant;
- g. pregnant women resident in Ireland have been referred to medical clinics in Great Britain where abortions are performed for many years including the months of November and December 1984.

22. The first applicant company agreed in substance to all of

the above facts with the exception of point (d).

23. The meaning of the concept of non-directive counselling was described by the Supreme Court as follows (judgment of 16 March 1988, Mr. Justice Finlay C.J., p. 6):

"It was submitted on behalf of each of the Defendants that the meaning of non-directive counselling in these agreed sets of facts was that it was counselling which neither included advice nor was judgemental but that it was a service essentially directed to eliciting from the client her own appreciation of her problem and her own considered choice for its solution. This interpretation of the phrase 'non-directive counselling' in the context of the activities of the Defendants was not disputed on behalf of the Respondent. It follows from this, of course, that non-directive counselling to pregnant women would never involve the actual advising of an abortion as the preferred option but neither, of course, could it permit the giving of advice for any reason to the pregnant women receiving such counselling against choosing to have an abortion."

24. On 19 December 1986 Mr. Justice Hamilton found that the activities of the defendants in counselling pregnant women within the jurisdiction of the Court to travel abroad to obtain an abortion or to obtain further advice on abortion within a foreign jurisdiction were unlawful having regard to the provisions of Article 40.3.3° of the Constitution of Ireland.

25. Mr. Justice Hamilton confirmed that Irish common and criminal law makes it an offence to procure or attempt to procure an abortion, to administer an abortion or to assist in an abortion by supplying any noxious thing or instrument (cf. sections 58 and 59 of the Offences against the Person Act 1861). Irish law also protects the right to life of the unborn from the moment of conception onwards.

26. An injunction was therefore granted "... that the Defendants and each of them, their servants or agents, be perpetually restrained from counselling or assisting pregnant women within the jurisdiction of this Court to obtain further advice on abortion or to obtain an abortion." The High Court made no order relating to the costs of the proceedings, leaving each side to bear its own legal costs.

27. The defendants appealed against the decision of the High Court to the Supreme Court which delivered judgment on 16 March 1988 rejecting the appeal.

28. The Supreme Court noted that the appellants did not consider it essential to the service which they provided for pregnant women in Ireland that they should take any part in arranging the travel of such women who wished to go abroad for the purpose of having an abortion or that they arranged bookings in clinics for such women. However, it was considered essential to the service they sought to provide that they should be at liberty to inform such women who wished to have an abortion outside the jurisdiction of the court of the name, address, telephone number and method of communication with a specified clinic which they had examined and were satisfied that it was one which maintained a high standard.

29. As regards the central issue in the case, the Supreme Court, in a judgment delivered by Mr. Justice Finlay C.J., found as follows:

"... the essential issues in this case do not in any way depend upon the Plaintiff establishing that the Defendants were advising or encouraging the procuring of abortions. The essential issue in this case, having regard to the nature of the guarantees contained in Article 40.3.3° of the Constitution is the issue as to whether the Defendants'

admitted activities were assisting pregnant women within the jurisdiction to travel outside that jurisdiction in order to have an abortion. To put the matter in another way, the issue and the question of fact to be determined is: were they thus assisting in the destruction of the life of the unborn?

I am satisfied beyond doubt that having regard to the admitted facts the Defendants were assisting in the ultimate destruction of the life of the unborn by abortion in that they were helping the pregnant woman who had decided upon that option to get in touch with a clinic in Great Britain which would provide the service of abortion. It seems to me an inescapable conclusion that if a woman was anxious to obtain an abortion and if she was able by availing of the counselling services of one or other of the Defendants to obtain the precise location, address and telephone number of, and method of communication with, a clinic in Great Britain which provided that service, put in plain language, that was knowingly helping her to attain her objective. I am, therefore, satisfied that the finding made by the learned trial Judge that the Defendants were assisting pregnant women to travel abroad to obtain further advice on abortion and to secure an abortion is well supported on the evidence ...".

30. The Supreme Court indicated in its judgment that the phrase in Article 40.3.3° "with due regard to the equal right to life of the mother" did not arise for interpretation in the case since the applicants were not claiming that the service they were providing for pregnant women was "in any way confined to or especially directed towards the due regard to the equal right to life of the mother ...".

31. The Supreme Court also considered whether there was a constitutional right to information about the availability of abortion outside the State. The Court stated as follows:

"The performing of an abortion on a pregnant woman terminates the unborn life which she is carrying. Within the terms of Article 40.3.3° it is a direct destruction of the constitutionally guaranteed right to life of that unborn child.

It must follow from this that there could not be an implied and unenumerated constitutional right to information about the availability of a service of abortion outside the State which, if availed of, would have the direct consequence of destroying the expressly guaranteed constitutional right to life of the unborn. As part of the submission on this issue it was further suggested that the right to receive and give information which, it was alleged, existed and was material to this case was, though not expressly granted, impliedly referred to or involved in the right of citizens to express freely their convictions and opinions provided by Article 40.6.1° (i) of the Constitution, since, it was claimed, the right to express freely convictions and opinions may, under some circumstances, involve as an ancillary right the right to obtain information. I am satisfied that no right could constitutionally arise to obtain information the purpose of the obtaining of which was to defeat the constitutional right to life of the unborn child."

32. The Court upheld the decision of the High Court to grant an injunction but varied the terms of the order as follows:

"And it is ordered that the Defendants and each of them, their and each of their servants or agents be perpetually

restrained from assisting pregnant women within the jurisdiction to travel abroad to obtain abortions by referral to a clinic, by the making for them of travel arrangements, or by informing them of the identity and location of and the method of communication with a specified clinic or clinics or otherwise."

33. In a further hearing before the Supreme Court on 3 May 1988 the costs of the Supreme Court appeal were awarded against the defendants, making them liable for costs amounting to £42,166.71.

34. Following the judgment of the Supreme Court the first applicant company ceased to operate. It had no assets and, therefore, the burden of paying the aforementioned legal costs fell on the second applicant company.

35. In a subsequent case concerning abortion information contained in a students' publication the Supreme Court issued an interlocutory injunction restraining students from "publishing or distributing or assisting in the printing, publishing or distribution of any publication produced under their aegis providing information to persons (including pregnant women) of the identity and location of and the method of communication with a specified clinic or clinics where abortions are performed" (Society for the Protection of Unborn Children (Ireland) Ltd. v. Stephen Grogan and Others, judgment of 19 December 1989).

36. Mr. Justice Finlay C.J. considered that the reasoning of the Court in the case brought against the applicant companies applied to the activities of the students (loc. cit., p. 11):

"I reject as unsound the contention that the activity involved in this case of publishing in the students' manuals the name, address and telephone number, when telephoned from this State, of abortion clinics in the United Kingdom, and distributing such manuals in Ireland, can be distinguished from the activity condemned by this Court in the Open Door Counselling case on the grounds that the facts of that case were that the information was conveyed during periods of one-to-one non-directive counselling.

It is clearly the fact that such information is conveyed to pregnant women, and not the method of communication which creates the unconstitutional illegality, and the judgment of this Court in the Open Door Counselling case is not open to any other interpretation."

37. Mr. Justice McCarthy, whilst concluding that an injunction should be made in the Grogan case, nevertheless commented as follows:

"In the light of the availability of such information from a variety of sources, such as imported magazines, etc, I am far from satisfied that the granting of an injunction to restrain these defendants from publishing the material impugned would save the life of a single unborn child."

38. The applicants presented evidence to the Commission that there had been no significant drop in the number of Irish women having abortions in Great Britain, that number being well over 3500 women per year. This evidence also indicated that since the applicant companies ceased their abortion referral service, the Irish women concerned seem to be going to Great Britain for abortions at a later stage of their pregnancy, the increased foetal size resulting in greater health risks. Moreover, not many of these women are having the normal six week medical check-up after the operation, with, again, a greater risk to their health.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

39. The Commission has declared admissible the applicants' complaints that the Supreme Court injunctions prohibiting the dissemination of information to pregnant women about abortion services in the United Kingdom constituted breaches of their rights under Articles 8, 10 and 14 (Art. 8, 10, 14) of the Convention.

B. Points at issue

40. The following are the points at issue in the present cases:

- whether the Supreme Court injunction imposed on Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd. was in violation of freedom of expression, ensured by Article 10 (Art. 10) of the Convention, in respect of those companies and the employees of the second applicant company, Mmes Maher and Downes;
- whether this injunction was also in violation of the freedom of expression of the applicants X and Y;
- whether the injunction was in violation of X's and Y's right to respect for private life, ensured by Article 8 (Art. 8) of the Convention;
- whether the injunction was also in violation of any such right to respect for private life which the first applicant company could claim under Article 8 (Art. 8) of the Convention;
- whether the injunction discriminated against women, as represented by the first applicant company, contrary to Article 14 (Art. 14) of the Convention, read in conjunction with Articles 8 and 10 (Art. 8, 10).

C. As regards Article 10 (Art. 10) of the Convention

41. The relevant part of Article 10 (Art. 10) of the Convention provides as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the prevention of disorder or crime, for the protection of health or morals, for the protection of the ... rights of others ..."

42. On 16 March 1988 the Supreme Court of Ireland imposed on the applicant companies an injunction prohibiting them from "assisting pregnant women within the jurisdiction to travel abroad to obtain abortions by referral to a clinic, by making for them of travel arrangements, or by informing them of the identity and location of and the method of communication with a specified clinic or clinics or otherwise." The applicants claimed that this injunction constituted an unjustified interference with their freedom of expression, in particular their freedom to receive and impart information, regardless of frontiers, within the meaning of Article 10 (Art. 10) of the Convention.

43. The Commission must analyse whether the injunction interfered with the applicants' freedom of expression and, if so, whether that interference was prescribed by law. If there has been an interference which was prescribed by law, the Commission must then proceed to examine whether that interference had a legitimate aim and whether it was necessary in a democratic society to meet that aim, i.e. whether it corresponded to a pressing social need and was proportionate to the pursuit of the aim.

a) As regards the applicant companies and the second applicant company's employees

aa) Interference with freedom of expression

44. It has been conceded by the respondent Government that the injunction imposed on the applicant companies constituted an interference with their freedom to impart information, regardless of frontiers, envisaged by Article 10 para. 1 (Art. 10-1) of the Convention, and a similar interference with the freedom of the two applicant counsellors, Mmes Maher and Downes, to impart information.

bb) Prescribed by law

45. Any interference with freedom of expression must be prescribed by law. The word "law" in the expression "prescribed by law" covers not only statute but also unwritten law such as Irish common law. Two requirements flow from this expression, that of adequate accessibility and that of foreseeability of law, to enable individuals to regulate their conduct in the light of the foreseeable consequences of a given action (Eur. Court H.R., Sunday Times judgment of 26 April 1979, Series A No. 30, pp. 30-31, paras. 47-49).

46. The applicants contended that the imposition of the injunction in the present cases was not "prescribed by law" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention, as under the relevant domestic law it was insufficiently foreseeable. The Government refuted this contention. They submitted that the law relating to the right to life of the unborn was both adequately accessible and foreseeable in Ireland, being covered by the common law, statute law and as an enumerated personal right under the Irish Constitution, confirmed or acknowledged by the constitutional amendment, Article 40.3.3°. The Irish courts have held that the activities of the applicant companies directly threatened the enjoyment of that right and, accordingly, the restrictions on these activities were entirely foreseeable.

47. The Commission considers that the present cases are not limited to the protection of the right to life of the unborn, as suggested by the respondent Government. The present cases involve freedom to receive and impart information on a wider and more complex scale, involving not only the right to life of the unborn, but also women's health, pregnancy, family planning and abortion.

48. In this connection it should be emphasised that the applicant companies were not advocating or promoting abortion. They were providing non-directive counselling on pregnancy matters and, were any of their clients to inquire about abortion, the applicant companies provided objective information about abortion and its implications, including information about reliable and lawful services available in the United Kingdom.

49. The Commission notes that Irish criminal law and common law make it an offence to procure or attempt to procure an abortion, to administer an abortion or to assist in an abortion by supplying any noxious thing or instrument. It also protects the right to life of the unborn from the moment of conception onwards. However, it is not a criminal offence to obtain an abortion abroad or to travel abroad

for that purpose. A woman procuring an abortion outside Irish jurisdiction faces no legal consequences on her return to Ireland. A suggestion by the Government that the applicant companies may have been liable to be prosecuted for aiding and abetting the procurement of an abortion cannot be accepted by the Commission, given the absence of any principal offence being committed by the women concerned. The Government also suggested that the present cases may have had the components of the offence of conspiracy to corrupt public morals, albeit without a sufficient degree of proof. However, the Commission observes that there is no evidence in the present cases that any prosecution on this basis had been contemplated by the competent authorities. The Government did not provide any relevant, well established case-law to demonstrate the criminal nature of the activities of the applicant companies. Thus any lawyer advising whether it would have constituted a criminal offence to provide information in Ireland about abortion services abroad prior to the Supreme Court judgment in the present cases could, in the Commission's opinion, have reasonably concluded that no criminal offence was being committed.

50. Similarly the Commission has not been persuaded by the Government that the provision of such information would have constituted a civil wrong (tort) or breach of contract or other civil right. The Government have made reference to the possibility that an unjustified interference with Irish constitutional rights, whether by the State or a private individual, may amount to a constitutional tort. However, again, the Government were unable to provide the Commission with any relevant, well-established case-law which makes it clear that, on an issue as important as the conflicting constitutional rights of the right to life of the unborn and freedom of expression, the applicant companies could reasonably have foreseen that their non-directional counselling service on abortion matters was a constitutional tort in breach of the civil law. Confirmation of the applicants' position concerning the prevailing legal situation can be found, in the Commission's view, in the fact that no sanctions under civil or criminal law were applied to prevent magazines with advertisements and other information about abortion clinics in Great Britain apparently freely circulating in Ireland.

51. The Commission has also examined the text of the Eighth Amendment to the Constitution, Article 40.3.3°, by which "the State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right". In the Commission's view this provision primarily imposes obligations upon the State, including an obligation to legislate for the protection of the right to life of the unborn. It does not provide a clear basis for the individual to foresee that providing information about lawful services abroad, albeit affecting the right to life of the unborn, would be unlawful. This is supported by the fact that the applicant companies were providing the full counselling/information service for some considerable time without restriction by the State until a private organisation, the Society for the Protection of Unborn Children (Ireland) Ltd, took up the issue as a private action against the applicant companies. It was only after the initiation of those proceedings that the Attorney General of Ireland decided to intervene.

52. In these circumstances the Commission is of the view that the applicants could not reasonably have foreseen that their activities were unlawful and that their freedom to receive and impart information about abortion services in Great Britain could lawfully be restricted under the domestic law prevailing prior to the Supreme Court judgment. The Commission considers that a law which restricts freedom of expression in such a vital area requires particular precision to enable individuals to regulate their conduct accordingly. This is especially so when the matter concerned is information received across

frontiers, as guaranteed by Article 10 (Art. 10). The Commission again recalls, in this context, that newspapers and magazines freely circulating in Ireland apparently describe the conditions prevailing in the United Kingdom as to abortion. The Commission finds, therefore, that the relevant domestic law was insufficiently precise at the material time. Accordingly the Commission is of the opinion that, insofar as it concerned the provision of information, the injunction imposed on the applicant companies was not "prescribed by law" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention. In view of this opinion, it is not necessary for the Commission to explore further the other issues raised by these applicants under Article 10 (Art. 10) of the Convention.

Conclusion

53. The Commission concludes, by 8 votes to 5, that there has been a violation of Article 10 (Art. 10) of the Convention in respect of the Supreme Court injunction of 16 March 1988 as it affected the applicant companies and Mmes Maher and Downes.

b) As regards the applicants X and Y

aa) Interference with freedom of expression

55. The Government did not accept that the Supreme Court injunction interfered with the freedom under Article 10 para. 1 (Art. 10-1) of the Convention of the two individual women of child-bearing age, applicants X and Y, to receive information as neither woman had claimed to be pregnant at the material time.

56. However, the Commission refers to its decision on admissibility of 15 May 1990 in which it held that these two applicants could claim under Article 25 para. 1 (Art. 25-1), first sentence, of the Convention to be "victims" of a violation of Article 10 para. 1 of the Convention, because the Government had not shown that they would be entitled, under the legal situation prevailing in Ireland, to receive information about abortion services in Great Britain in advance of any pregnancy. The Commission also notes that since the Supreme Court judgment of 19 February 1989 in the case of the Society for the Protection of Unborn Children (Ireland) Ltd v. Stephen Grogan and Others and the imposition of an interlocutory injunction on the latter preventing them from informing anyone (including pregnant women) about abortion services abroad, it is clear that the Supreme Court has interpreted its judgment in the present cases to be a total ban on providing any information about such services. In the light of these considerations the Commission considers that the applicants X and Y may require access to this information and that its denial constitutes an interference with their freedom to receive information regardless of frontiers ensured by Article 10 para. 1 (Art. 10-1) of the Convention.

bb) Prescribed by law

56. The Commission is of the opinion that the interference with the freedom of expression of the applicants X and Y was not prescribed by law for the reasons outlined above at paragraphs 45-52. Although these applicants were not a party to the proceedings against the applicant companies and their interests did not directly concern the imparting of information, but the receipt of information, the Commission considers that the state of Irish law at the relevant time was insufficiently precise to enable X and Y to foresee that it would be unlawful for the applicant companies, or indeed anyone else, to provide them with reliable, specific information about abortion clinics in Great Britain should they need to consult such clinics.

Conclusion

57. The Commission concludes, by 7 votes to 6, that there has been a violation of Article 10 (Art. 10) of the Convention in respect of the Supreme Court injunction of 16 March 1988 as it affected the applicants X and Y.

D. As regards Article 8 (Art. 8) of the Convention

58. The relevant part of Article 8 (Art. 8) of the Convention provides as follows:

"1. Everyone has the right to respect for his private ... 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 ... for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

a) The individual applicants, X and Y

59. The individual applicants, X and Y, in the second application (Dublin Well Woman Centre and Others) claimed that the injunction of 16 March 1988 issued by the Supreme Court of Ireland constituted an unjustified interference with their right to respect for private life, within the meaning of Article 8 (Art. 8) of the Convention. They submitted, *inter alia*, that, being two women of child bearing age, they are directly affected by this injunction, clarified and, in effect extended, in the Grogan case (para. 35 above) in that they are unable to have access to reliable information on abortion issues, including specific information of the names and addresses of abortion clinics in Great Britain from reliable sources like the applicant clinics. These applicants were concerned that such information should be available to them prior to becoming pregnant in order to be informed of the necessary health and safety aspects of lawful abortion services which, in the event of pregnancy, might need to be consulted or used quickly. As pregnancy and the incidence of pregnancy are part of private life, they contended that a ban on information about lawful services related to pregnancy and its termination constituted an unjustified interference with their right to respect for private life for the same reasons which they invoked above under Article 10 (Art. 10) of the Convention.

60. The Government submitted, *inter alia*, that X and Y are entitled to receive any information from the Dublin Well Woman Centre which they desire, provided that such information is given in accordance with Irish law and medical ethics. The Supreme Court injunction of 16 March 1988 restrained the Centre from informing pregnant women about abortion services in Great Britain. If either individual applicant were to become pregnant her claim to respect for private life would necessarily be reduced in order to take account of the interests of the right to life of the unborn (cf. No. 6959/75, *Brüggemann and Scheuten v. the Federal Republic of Germany*, Comm. Report 12.7.77, D.R. 10 p. 100, para. 61). They contended that there has been no interference with these applicants' right to respect for private life.

61. The Commission considers that these applicants' right to receive the information in question has been dealt with above in the context of Article 10 (Art. 10) of the Convention. Implicit in the Commission's finding that there had been an interference with the applicants' Article 10 (Art. 10) right is the fact that, as they are women of child bearing age, this information may be important for their private lives. The Commission is, therefore, of the opinion that it is not necessary further to pursue the matter in the light of Article 8 (Art. 8) of the Convention.

Conclusion

62. The Commission concludes, by 7 votes to 2, with 4 abstentions, that it is not necessary to examine further the complaints of the applicants X and Y under Article 8 (Art. 8) of the Convention.

b) The first applicant

63. The first applicant, Open Door Counselling Ltd., also claimed to have suffered a violation of Article 8 (Art. 8) of the Convention. It was contended, *inter alia*, that by preventing the company's clinics from providing any information about abortion services outside Ireland, and thus limiting an individual woman's access to information about her body and her needs, the Irish Supreme Court had effectively nullified her right to privacy in decision-making about her life and family. The injunction issued by the Supreme Court has made non-directive counselling impossible and has thereby harmed the applicant company and the services it provided. The Government in reply refuted the first applicant's claim to have private life which could be protected by Article 8 (Art. 8) of the Convention.

64. The Commission agrees with the Government's submission. It is clear from the arguments submitted by the first applicant that the claim is a general one concerning the rights of their clients. Open Door Counselling Ltd. itself has not made out a case that it had any private life which fell within the protection of Article 8 (Art. 8) of the Convention or with which there had been any interference.

Conclusion

65. The Commission concludes, by a unanimous vote, that there has been no violation of Article 8 (Art. 8) of the Convention in respect of the first applicant company.

E. As regards Article 14 (Art. 14) of the Convention

66. Article 14 (Art. 14) of the Convention provides as follows:

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

67. The first applicant company, Open Door Counselling Ltd., claimed to have suffered a violation of Article 14 (Art. 14) of the Convention. It was submitted, *inter alia*, that the Irish Supreme Court injunction disparately harmed women and persons who supported consideration of lawful abortion abroad as one option among others in non-directive counselling. It constituted sexual discrimination against women in the enjoyment of their right to respect for private life. It also constituted discrimination on the grounds of political or other opinions, as it censored those in favour of communicating information about abortion services in Great Britain, but allowed those against such services to express their views freely.

68. The Commission considers that the first applicant cannot complain on behalf of their clients, or women in general, who might feel they have suffered discrimination in the securement of their right to respect for private life as a result of the Supreme Court injunction. The company had no personal right to respect for private life within the meaning of Article 8 (Art. 8) of the Convention (para. 64 above) which could have been the object of any discrimination.

69. On the question of freedom to express opinions, the Commission does not find that the first applicant was subjected by the injunction to any treatment under the domestic law different from that to which others in a comparable position were exposed. Everyone within the jurisdiction of Ireland, following the injunction, would have been prohibited from providing specific information about abortion services abroad. No one was prevented from expressing their opinion about the availability or desirability of such services, or the expediency of the injunction, or about abortion issues in general. In these circumstances the Commission is of the opinion that the first applicant did not suffer any discrimination in the enjoyment of its Article 10 (Art. 10) rights, contrary to Article 14 (Art. 14) of the Convention.

Conclusion

70. The Commission concludes, by a unanimous vote, that there has been no violation of Article 14 (Art. 14) of the Convention in respect of the first applicant company.

F. Recapitulation

71. The Commission concludes, by 8 votes to 5, that there has been a violation of Article 10 (Art. 10) of the Convention in respect of the Supreme Court injunction of 16 March 1988 as it affected the applicant companies and Mmes Maher and Downes (para. 53).

72. The Commission concludes, by 7 votes to 6, that there has been a violation of Article 10 (Art. 10) of the Convention in respect of the Supreme Court injunction of 16 March 1988 as it affected the applicants X and Y (para. 57).

73. The Commission concludes, by 7 votes to 2, with 4 abstentions, that it is not necessary to examine further the complaints of the applicants X and Y under Article 8 (Art. 8) of the Convention (para. 62).

74. The Commission concludes, by a unanimous vote, that there has been no violation of Article 8 (Art. 8) of the Convention in respect of the first applicant company (para. 65).

75. The Commission concludes, by a unanimous vote, that there has been no violation of Article 14 (Art. 14) of the Convention in respect of the first applicant company (para. 70).

Secretary to the Commission President of the Commission

(H.C. KRÜGER)

(C.A. NØRGAARD)

CONCURRING OPINION OF MR. H.G. SCHERMERS

I agree with the Commission's opinion that the present cases disclose a breach of Article 10 of the Convention in respect of the applicant companies and Mmes Maher and Downes, but I base my decision on different reasons. I think that the Irish law was sufficiently precise as to be "prescribed by law", but that the interference with the applicants' freedom of expression has not been shown to be justified.

a) Prescribed by law

I note that Ireland provides extensive protection of the right to life of the unborn through its criminal and common law and the

Irish Constitution. The paramount importance of this right, overriding other constitutional rights such as freedom of expression, was acknowledged by the Irish people in their referendum leading to the Eighth Amendment to the Constitution, Article 40.3.3°. By this provision "the State acknowledges the right to life of the unborn, and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right." I consider that the emphasis in Irish law on the protection of the right to life of the unborn could reasonably have enabled the individual to conclude that any activity which might at some stage lead to the procurement of an abortion, even abroad, would be condemned, if challenged, before the domestic courts. It would appear to have been the logical consequence of the climate of opinion at the relevant time, and the state of the domestic law, that the Supreme Court would seek to uphold the right to life of the unborn and seek to end the abortion referral service provided by the applicant companies to pregnant women. The ensuing injunction imposed on the applicant companies can, therefore, be said to have been adequately foreseeable. In these circumstances, I conclude that the interference with the applicants' freedom of expression, by the injunction imposed on the applicant companies by the Supreme Court on 16 March 1988, was "prescribed by law", within the meaning of Article 10 para. 2 of the Convention.

b) Legitimate aim

Interference with freedom of expression may only be justified if it pursues a legitimate aim such as the prevention of crime, the protection of morals or the protection of the rights of others. These are the aims relied on by the respondent Government to justify the interference with the applicants' freedom of expression in the present cases.

However, I find no basis in the present cases for the reliance on the prevention of crime. I am not satisfied that, on the basis of the evidence provided by the parties, the applicant companies could be said to have been in breach of Irish criminal law in providing information about services lawfully provided in another Member State of the Council of Europe, albeit services concerning abortion. Moreover, it is clear that it is not a criminal offence under Irish law for a woman to obtain an abortion in Great Britain or to travel there for that purpose. She would not face criminal prosecution on her return to Ireland.

As regards the Government's reliance on the protection of the rights of others, the Commission refers to its constant case-law under Article 2 of the Convention, which guarantees the right to life, but which right does not confer absolute protection on the foetus (No. 8416/79, Dec. 13.5.80, D.R. 19 p. 244). However, I am of the view that wider considerations may apply to the scope of the rights of others envisaged by Article 10 para. 2 of the Convention. I note that in the Member States of the Council of Europe there is a wide divergence of thinking as to the stage at which unborn life requires legal protection, whether it be from conception onwards, as under Irish law, or whether some notion of the viability of the foetus is required, as under English law. In such a controversial area I consider that a High Contracting Party is entitled to confer the protective status of "other", within the meaning of Article 10 para. 2 of the Convention, upon the life of the unborn.

I am also of the view that the issues in the present cases fall within the notion of the protection of morals. Accordingly the justification for the interference with the applicants' freedom of expression must be examined in the context of the legitimate aim of the protection of the rights of others and the protection of morals.

c) Necessary in a democratic society

The decisive question in the present cases is whether it was necessary in a democratic society to impose the injunction on the applicant companies.

For two reasons I consider that in the present cases the requirement of necessity in a democratic society has not been met.

The first reason focuses on notion of a democratic society, an addition to the necessity question which, so far, has received only little separate attention, but to which some particular meaning must be attributed. The second reason concerns the need for the injunction irrespective of the society in which it has been imposed.

1. What kind of democratic society should be the model for deciding the necessity question ?

The Convention is a European convention. Therefore the European democratic society must be the model. Traditionally, European society is a society of nation States. Each European State has its own cultural and moral values which may not be identical to the values of the other European States. For establishing whether an interference with rights is necessary in a democratic society it is therefore justified to look first at the meaning of necessity for the State concerned. Both the European Court of Human Rights (1) and the Court of Justice of the European Communities (2) did so in their case-law.

But what is necessary for the State concerned cannot be decisive. The Convention requires that restrictions on freedom of expression must be necessary in a democratic society in general. Account must therefore be taken of other democratic societies as well.

These other democratic societies are not only the societies of other European States. Since the second half of the twentieth century the nation States are no longer the only societies in Western Europe. Increasingly States have transferred sovereign powers to common institutions. Next to (or above) the national societies a European society is developing. For deciding whether in Europe a specific restriction on freedom of expression is necessary the European society as a whole should also be taken into account.

It is of specific importance that the freedom of movement of persons is one of the freedoms guaranteed by the European Economic Community. It is part of the Community's legal order that people are free to move to any place in the Community, either to establish themselves or to work, or to render or receive services. This freedom of movement is not just another economic right. It is a fundamental principle of the Community and it is part of its cultural richness. The possibility to move freely from one European culture to another is one of the basic values of Europe. The Member States of the Community are prohibited to restrict it in any way. One may therefore safely submit that, although for internal legislation on abortion Irish society may be of decisive importance, the European (Community) society should be paramount when the question of necessity concerns the movement of people or the performance of services across borders. The requirement in the present cases is that the injunction must be necessary in a society in which not only freedom of information but also freedom of movement is one of the fundamental principles.

The question has arisen whether under European (Community) law the injunctions involved in the present cases are permitted. Thereon the Irish High Court has sought a preliminary ruling from the Court of Justice of the European Communities under Article 177 EEC (3). But, even if the injunctions are not prohibited by Community law this would be far from accepting that they are necessary.

In the European context, where the injunction belongs, I

consider that the injunction has not been shown to be necessary in a democratic society.

- (1) In the Handyside case, Eur. Court H.R., judgment of 7 December 1976, Series A No. 24.
- (2) In the Henn and Darby case (34/79), 14.12.79, consideration 15, <1979>ECR 3813.
- (3) Grogan case, 11.10.89, <1990> 1 CMLR 689.

2. The need for the injunction, irrespective of the society

Even in the Irish context the injunction cannot be seen as necessary. The principal ground for the injunction seems to be that the counselling in some indirect way stimulates or contributes to the act of abortion which is a crime in Ireland. It may well be accepted that it is necessary in a democratic society to prohibit counselling on how to commit a crime abroad.

But that is not what actually happens. The counselling (in as far as it concerns abortion) is on how and where to go in England to obtain a lawful abortion there. Travelling abroad to obtain an abortion is lawful in Ireland. An Irish law prohibiting pregnant women seeking an abortion abroad could hardly be enforced and would meet with serious objections under European Community law. It is understandable, therefore, that such a law does not exist. In the absence of such a law seeking an abortion abroad cannot be a criminal offence, which means that a prohibition on help to seek an abortion abroad cannot be necessary for the prevention of crime within the meaning of Article 10 para. 2 of the Convention.

With respect to the question whether the injunction may be necessary for the protection of morals or for the protection of the rights of others one first has to establish whether the injunction can be effective. It is hard to accept that a restriction can be necessary for a particular aim if it is of such a character that it cannot achieve the aim. The possible effectiveness of the injunction in the present cases is subject to serious doubt. Magazines with advertisements and other information about abortion clinics in Great Britain freely circulate in Ireland. Mr. Justice McCarthy, whilst concluding that an injunction should be made in the Grogan case, commented :

"In the light of the availability of such information from a variety of sources, such as imported magazines, etc, I am far from satisfied that the granting of an injunction to restrain these defendants from publishing the material impugned would save the life of a single unborn child" (para. 37 of the Commission's Report above).

According to the case-law of the Court, a restriction on freedom of information under paragraph 2 of Article 10 can only be permitted when there is a pressing social need for such a restriction. In deciding whether there is such a pressing social need the general interest of the protection of morals and the protection of the rights of others should be weighed against the interests of the individual and a fair balance must be struck.

In the present cases the general interest in abortion questions may be great, but the general interest in this particular injunction is relatively small because of its limited effect. The individual interests involved are considerable, on the other hand. For women who have decided to seek an abortion in Great Britain it is

of great interest to obtain objective, reliable information about the existing possibilities. For women under mental stress because they

feel unable to have their baby, objective information, covering all possibilities, including abortion abroad, may be of great support. In this respect it should be underlined that the applicant companies did not advocate abortion but explored all options available to pregnant women. The absence of easily available counselling may even endanger the health of the women concerned as it may cause delay in their decision-making and thus lead to an abortion at a later stage of the pregnancy.

In these circumstances I am of the opinion that it has not been shown that the restriction on the applicants' freedom to receive and impart information effectively met any pressing social need or was proportionate to the aims of protecting morals or protecting the rights of others, within the meaning of Article 10 para. 2 of the Convention. I conclude, therefore, that there has been a violation of Article 10 of the Convention in respect of these applicants.

CONCURRING OPINION OF MRS. G.H. THUNE

I have voted with the majority since I consider that the interference was not "prescribed by law" within the meaning of Article 10 para. 2 of the Convention.

In addition I want to express the view that even if the injunction in these cases may be said to have been "prescribed by law", the applicants' rights under Article 10 have been violated because the interference was not justified as being necessary in a democratic society.

I refer to the partly concurring opinion of Sir Basil Hall below, and I agree with the arguments he makes on the necessity issue.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF SIR BASIL HALL

1. I, like the majority of the Commission, conclude that there has been a breach of Article 10 of the Convention in these cases in respect of the two applicant companies, Open Door Counselling Ltd. and Dublin Well Women Centre Ltd., and of the two counsellors of the latter company, Mmes Maher and Downes. My reasons for reaching that conclusion however differ from those of the majority.

2. On 16 March 1988 the Supreme Court dismissed an appeal by the two applicant companies from a decision of the High Court granting an injunction against them restricting them from counselling pregnant women. The Supreme Court however varied the terms of the injunction. So far as is relevant to these cases the injunction was as follows :

"It is ordered that the Defendants and each of them and each of their servants or agents be perpetually restrained from assisting pregnant women within the jurisdiction ... by informing them of the identity and location of and the

method of communication with a specified clinic or clinics or otherwise."

3. The injunction plainly restricted the four applicants' freedom of expression. The question immediately arises whether the restriction was "prescribed by law" as is required by Article 10 para. 2 of the Convention.

4. It is plain from the judgment of the Supreme Court that the Court was concerned with information as to clinics in Great Britain (England, Scotland and Wales). The point for immediate consideration is whether it was, under the law of Ireland, a foreseeable consequence that an injunction might be granted preventing the giving of such information (Eur. Court H.R., Sunday Times judgment of 26 April 1979, Series A No. 30, pp. 30-31, paras. 47-49). It is of course plain that it could have been an offence to have given information as to the possibilities of terminating pregnancy at a place in Ireland, unless the life of the mother-to-be was at stake. Within Ireland, with that qualification, abortion is unlawful. The laws of Great Britain however permit abortion in other circumstances. Was it then foreseeable that an injunction might be granted to prevent the giving of information about the places where pregnancies might be lawfully terminated outside the territories of Ireland ?

5. The Government contended that the right to life in Ireland was covered by common law, statute law and under the Constitution. In my view it is not established that under the common law or under statute law it was foreseeable that an injunction preventing the giving of information about clinics in Great Britain could be given. To give such information would not appear to be a crime, nor would it be a

delict, apart from the exceptional category of "constitutional tort" referred to below. Foreseeability depends on the interpretation placed on the relevant constitutional provision. Indeed the judgments of the Supreme Court, and its declaratory order, made it plain that Article 40.3.3° of the Constitution was the law under which the injunction was made.

6. Article 40.3.3° reads as follows :

"The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate that right."

It appears to me that if that provision imposes direct responsibilities on individuals, it must have been foreseeable that a court might hold that giving information about clinics in Great Britain where pregnancies could be terminated showed a lack of respect for the life of the unborn. The problem for me was that the Article appeared to impose an obligation on the State and not on individuals.

7. I have however been persuaded that the provision is to be more widely interpreted and that that wider interpretation was foreseeable. The Government contended that it places an obligation on the courts as to the way in which they apply the law. They also contended that such a constitutional provision is directly enforceable, a violation being a "constitutional tort", citing *Meskill v. CIE*, and hence something which the Irish courts can control by injunction.

8. I therefore consider that the restriction placed on the first four applicants' freedom of expression was prescribed by law.

9. It next falls to be examined whether the restriction pursued one or more of the aims specified in paragraph 2 of Article 10 of the Convention. The Government contended that it was justified as being

for the prevention of crime, the protection of morals and the protection of the rights of others. There was no suggestion that information was being, or was likely to be given, which would lead to the performance of criminal acts in Great Britain, nor that the giving of the information was itself a criminal act. The aim of the restriction was not for the prevention of crime. Whether an unborn foetus, at whatever stage of its development, has the status of "other" for the purposes of Article 10 para. 2 of the Convention is to my mind a matter of doubt. I note that the Commission has held that Article 2 of the Convention, which guarantees the right to life, does not confer absolute protection of the foetus (No. 8416/79, Dec. 13.5.80, D.R. 19 p. 244). Unquestionably, however, the aim of the restriction was the protection of morals.

10. Is then the restriction "necessary in a democratic society" ? This, according to the jurisprudence of the Court, does not mean "indispensable". It means that the restriction complained of must correspond to a pressing social need, recognising however that the margin of appreciation available to Contracting States in assessing a pressing social need for the imposition of restrictions on freedom of expression for the protection of morals is a wide one.

11. The applicants contended that there was no pressing need for any injunction. They submitted, inter alia, that thousands of Irish women are seeking abortions in Great Britain every year. These women are in need of objective, reliable information about abortion services abroad in what can be stressful circumstances, particularly if account is taken of the fact that abortion would not be available in Ireland even in extreme circumstances, for example if a woman became pregnant after being raped, or if a teenager became pregnant by her incestuous father. The information services which they offered were non-directive, did not advocate abortion, but explored all the options available to pregnant women. The injunction has been ineffective, not having stemmed the stream of Irish women seeking abortion in Great Britain. Instead it has increased the risk to the health of these women, who are apparently seeking abortions at a later stage of their pregnancy, through lack of proper counselling or knowledge, and who are not availing themselves of medical check-ups after the abortion in order to prevent post-operative complications, and in order to discuss other related matters, such as contraception. The injunction has, therefore, not upheld the right to life of the unborn, but has instead increased the risks to the health and safety of women.

12. The Government replied, inter alia, that the prevention of abortion is a moral question of high seriousness. The Irish people, by way of a referendum and an amendment to the Irish Constitution, have chosen to provide unlimited protection to the right to life of the unborn from conception onwards. It was the domestic courts' duty to sustain the logic of that constitutional protection and uphold the rule of law by restricting the dissemination of certain limited information which, as a matter of fact, constituted a step in the chain of events which could have led to the destruction of life. The injunction was proportionate in that it did not seek to stop women travelling abroad; it was strictly limited, within Irish jurisdiction, to activities which sought to undermine the right to life of the unborn. Given the legitimacy of the Irish views on abortion, a moral view point entrenched in the European tradition despite the absence of any uniform policy in the Member States of the Council of Europe, the State must be allowed to enjoy a wide margin of appreciation in this area.

13. The question then is whether, notwithstanding the wide margin of appreciation a Contracting State has in determining what is necessary for a democratic society, the organs of the Convention should in the exercise of their supervisory role, determine that the restrictions imposed were not within that margin. In this connection it should be emphasised that the applicants were not advocating or

promoting abortion. They were providing non-directive counselling on pregnancy matters and, were any of their clients to inquire about abortion, the applicant companies provide objective information about abortion and its implications, including objective information about reliable and lawful services available in the United Kingdom. However, the Irish Courts decided to give no weight to this trans-frontier element. I consider, therefore, that the Irish Courts have failed to identify the wider and more complex issues raised in the present cases, which concern not only the right to life of the unborn but also freedom of expression and, in particular, freedom to receive and impart information which may be crucial to women's health, pregnancy, family planning and abortion.

14. Whilst the majority of Irish people may not wish to see abortion performed in Irish territory, this cannot, in my view, be seen as a justification to prevent a minority of people receiving reliable information about lawful services elsewhere. It has been acknowledged by the Supreme Court that restrictions on this kind of information will probably not effectively stop abortions abroad (para. 37 above). Magazines with advertisements and other information about abortion clinics in Great Britain freely circulate in Ireland. There is an inconsistency in a situation where women may read about abortion clinics in Great Britain, but may not be informed orally about them through competent professional sources like the applicant clinics. It seems there has been no appreciable diminution in the number of Irish women seeking abortions in Great Britain since the applicant companies were obliged by the Supreme Court injunction to stop providing information about the competent clinics. This might indicate that a wealthier, better educated section of the population is able to obtain information which others are denied by these injunctions. However, a serious consequence of this lack of accessible counselling services is that the women concerned are at a greater health risk, because they are apparently seeking abortions later on in their pregnancies, with the attendant risk of complications, and are not having proper post-operative medical checks. So not only is the Supreme Court injunction of limited effect, but it is also contributing to greater health risks for a substantial group of women (over 3500 per year), who are nevertheless leaving Ireland to procure a lawful abortion abroad.

15. In these circumstances I am of the opinion that it has not been shown that the restriction on the first four applicants' freedom to receive and impart information effectively met any pressing social need or was proportionate to the aims of protecting morals or protecting the rights of others, within the meaning of Article 10 para. 2 of the Convention. I conclude, therefore, that there has been a violation of Article 10 of the Convention in respect of these applicants.

16. I agree with the majority of the Commission that there has been no violation of the right of Open Door Counselling Ltd. to respect for its private life.

17. The fifth and sixth applicants, Mrs. X and Miss Y, were not parties to the proceedings in the Irish Courts, and the injunction did not apply directly to them. The effect of the injunction however was to prevent their receiving information from the two applicant companies and their servants or agents. They were however not pregnant, and the lack of information about clinics in Great Britain carrying out abortions did not directly affect them. They contended that the lack of ability to obtain information from the two applicant companies may affect the way in which they conduct their private lives. Even if this were to be so, it does not appear to me that the Court, in making the order it did, can be said to have shown a lack of respect for their private lives. In my view there was no violation of Article 8 in respect of these two applicants.

18. Mrs. X and Miss Y have also complained that the restriction imposed by the injunction constitutes a violation of Article 10 because it prevents them from receiving information. Undoubtedly it does so, but they were not pregnant, and the considerations which lead me to the conclusion that the restrictions on imparting information imposed by the injunction were not necessary in a democratic society do not apply to them. I conclude that there was no violation of Article 10 in their cases.

DISSENTING OPINION OF MR. E. BUSUTTIL

I find myself unable to subscribe to the opinion of the majority that the Supreme Court ban on the dissemination of information about abortion services in the United Kingdom constituted a breach of the applicant companies' freedom to impart information regardless of frontiers ensured by Article 10 of the Convention. I consider that, while the information ban was an obvious interference within the meaning of Article 10 para. 1, such interference was justified in that it was prescribed by law and was necessary in a democratic society for the protection of morals and the protection of the rights of others under paragraph 2 of the same Article.

(i) Prescription by law

Irish law provides comprehensive protection of the right to life up to the unborn. In terms of the Offences against the Person Act 1861, the procurement of abortion is a criminal offence; in addition, aiding and abetting such an offence is itself an offence under the general criminal law in Ireland. Again, under the Censorship of Publications Act 1946, the Censorship of Publications Appeals Board may ban the sale and distribution of future issues of any publication advocating the procurement of abortion. The ban in the instant cases concerns a roughly parallel situation. Finally, and more importantly, the Eighth Amendment to the Irish Constitution, adopted by the Irish people in a referendum and now enshrined in Article 40.3.3°, acknowledges the right to life of the unborn as an overriding principle of State policy in Ireland, involving a compulsive political obligation of implementation.

In those circumstances, it should have been reasonably foreseeable by any Irish citizen of voting age and ordinary intelligence that any activity which might at some stage have led to the procurement of an abortion, even if it occurred abroad, would sooner or later have been open to challenge in the Irish courts since the effects of such an abortion would ultimately have been felt in Ireland.

(ii) Legitimacy of the aim pursued

I accept the position of the Irish Government that the problem of abortion and information about abortion procurable in neighbouring countries is a moral issue with a profound dimension. The Irish people have rejected abortion in a referendum held fairly recently, culminating in a constitutional amendment by virtue of which the State acknowledges the right to life of the unborn and guarantees respect for that right in its legislation. Accordingly, there is a general acknowledgement in Ireland that the unborn must be protected from the moment of conception, not only from a moral standpoint, but also from a recognition of their status as "others" within the meaning of Article 10 para. 2 of the Convention. Indeed, as the Court pointed out in the Muller case (Eur. Court H.R., Muller and Others judgment of 24 May 1988, Series A No. 133, para. 30), there is a natural link between the protection of morals and the protection of the rights of others.

For these reasons, the interference with the applicants' freedom of expression in the present cases had the legitimate aim of protecting morals and the rights of others.

(iii) Necessity for the interference in a democratic society

The Court has consistently held that the word "necessary" in Article 10 para. 2 implies the existence of a "pressing social need". Contracting States have a certain margin of appreciation in assessing the existence of the need, but such assessment is ultimately subject to the supervisory jurisdiction of the Convention organs embracing both the legislation and the decisions applying it. In exercising their jurisdiction, the Convention organs remain free to determine whether the interference at issue is proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities to justify it are relevant and sufficient.

In the instant cases, the pressing social need emanated from the overriding principle of State policy embodied in Article 40.3.3° of the Irish Constitution protecting the right to life of the unborn. The means employed were a court injunction inhibiting within the Irish jurisdiction the dissemination of information to pregnant women about abortion services in the United Kingdom which could ultimately have resulted in the destruction of the life of the unborn. The information inhibited was thus extremely limited. Viewed against the background of the seriousness of the moral issue involved, it cannot be deemed to have been disproportionate.

Today, as at the time of the Handyside judgment, it is still not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals. In view of the absence of such uniformity, the national authorities are in principle in a better position than the Convention organs to judge the moral requirements of a particular society, as well as the necessity of any restrictions imposed with a view to meeting them. As far as the present cases are concerned, it is also essential not to lose sight of the fact that the Irish authorities had been in direct touch with vital public opinion in Ireland through a recent referendum on the subject.

In all the circumstances, therefore, and having particular regard to the margin of appreciation enjoyed by the national authorities under Article 10 para. 2, I come to the conclusion that the Irish courts were entitled to consider it "necessary" for the protection of morals and the rights of others to restrict the abortion referral information provided by the applicant companies in order to sustain the logic of the constitutional protection afforded to the unborn in the Irish Constitution.

DISSENTING OPINION OF Mr. F. MARTINEZ

While agreeing with the arguments put forward by other members of the Commission who concluded against a breach of the Convention, I should like to explain my view of the case.

The major difficulty in the present case concerns the controversy created by the subject of abortion in ethical terms. This is why it seems preferable to approach the issue from a strictly legal angle and to set aside the moral considerations inherent in the case.

Under Sections 58 and 59 of the "Offences against the Person Act" of 1861, abortion is a criminal offence in the Irish legal system. This is in no way contrary to the European Convention on Human Rights; besides, Ireland is not the only member State of the Council of Europe in which voluntary termination of pregnancy is made criminal.

To ensure a clearer legal approach to the problem the word "abortion" should be replaced by "offence". We then find that the Irish judge is being accused of nothing more than prohibiting the provision of information to women on the possibilities of committing the "offence" in question in another country, in the best possible conditions for their health and, the implication being, with complete impunity.

From the point of view of criminal law, to give information likely to facilitate the commission of a criminally indictable act, may be regarded as an act of incitement to commit the "offence". I find it difficult to accept that the Convention on Human Rights would not allow member States to defend their legal systems by prohibiting the dissemination of information which is to be used to infringe the law.

It would be, at the very least, curious for a State to be unable to prohibit, within its borders, acts of aid or assistance likely to incite citizens of that State to commit an act, condemned under its own legal system, in countries where it is not punishable.

The fact that such an act is not an offence under the legislation of other States does not entitle citizens of the first State to commit it. Impunity does not derive from a personal right but from the limited scope of internal law. It is widely known that no law has unlimited scope, either in space or in time. I therefore find it surprising that the interest of a State in protecting its legal system has been placed on the same footing as the interest of persons wishing to contravene that system by receiving information on how to commit the act that is criminal there but permitted elsewhere.

DISSENTING OPINION OF MRS. J. LIDDY

1. I have approached these cases on the basis that issues of health ("the equal right to life of the mother" clause in Irish law) do not arise for consideration on the facts. The issue is rather whether prohibiting the giving of specified information to pregnant women, which would be a concrete step in the obtaining of an abortion outside Ireland, constituted a violation of the Convention.

2. It is only in exceptional circumstances that a contingent violation of Convention rights can be established. The applicants X and Y are not pregnant, and it is not clear what information they have been unable to obtain. I think they have failed to establish either as a matter of fact, or exceptionally as a contingency, any interference with their own rights.

3. With regard to the two companies and two employees, I consider that the injunction was a restriction "prescribed by law" within the meaning of Article 10 para. 2. The question is whether these applicants could reasonably have foreseen that their activities were unlawful. Having regard to the undisputed information provided to the Commission concerning (a) the pre-existing constitutional case-law on constitutional torts and the right to life of the unborn, even before the explicit addition of Article 40.3.3° after the 1983 Referendum, (b) the Offences against the Person Act 1861, (c) the Censorship of Publications Act 1946, (d) the Civil Liability Act 1961, and (e) the Health (Family Planning) Act 1979, I think that they could so have foreseen. With appropriate legal advice, it could be expected that the courts' jurisdiction would be invoked to prohibit activities which (if proven, or, as here, admitted in the course of proceedings) clearly constituted a concrete step in assisting pregnant women in Ireland to obtain abortions outside the jurisdiction, that is, in ending the life of the unborn.

4. In the case of Muller and Others (Eur. Court H.R., judgment of 24 May 1988, Series A No. 133 para. 35) the Court said, "The view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them."

5. The primary plea in these cases was that the injunction was necessary for the rights of others. Applying by analogy the above quotation, and having regard to Article 60 of the Convention, I consider that it was so necessary.

DISSENTING OPINION OF MR. L. LOUCAIDES
JOINED BY MR. A. WEITZEL

I am unable to agree with the majority that the present cases disclose a breach of Article 10 of the Convention. I consider that the interference with the applicants' freedom of expression was prescribed by law and it was justified for the protection of morals.

a) Prescribed by law

Article 40.3.3° of the Irish Constitution provides as follows:

"The State acknowledges the right to life of the unborn and with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right".

I consider that this constitutional provision is clear enough to enable the individual Irish citizens to foresee that any activity on their part in Ireland that tends to assist or facilitate the procurement of an abortion whether in Ireland or abroad would be considered by the Irish courts as inconsistent with the superior law of Ireland and therefore as illegal. Even though the abortions themselves, for which the information services of the applicant companies were offered, were not expected to take place in Ireland, such services were being offered in Ireland with the aim of assisting or facilitating the procurement of abortion of Irish pregnant women, in other words with the aim of contributing to the deprivation of the life of the unborn, protected by the Irish Constitution. Therefore it should be expected that these services could reasonably be considered by the domestic courts as incompatible with the above constitutional provision. Hence the ensuing injunction imposed on the applicant companies in order to end their abortion referral services can be said to have been adequately foreseeable.

In these circumstances I conclude that the interference with the applicants' freedom of expression, by the injunction imposed on the applicant companies by the Supreme Court on 16 March 1988, was "prescribed by law" within the meaning of Article 10 para. 2 of the Convention.

b) Legitimate aim

I consider that the question of abortion is a serious moral issue in respect of which there is a divergence of views. The arguments in support of the different views are forceful and substantial. In fact in the Contracting States there is no consensus on this issue. It was therefore reasonably open for the respondent

State to seek to protect through its laws the "life of the unborn" as

a moral principle of its own society and to restrict freedom of speech when and to the extent that was reasonably necessary in order to achieve that protection. In this respect it should be borne in mind that the Irish people have expressed their moral belief on the question of abortion in a referendum leading to a constitutional amendment reinforcing their rejection of abortion as far as possible within Irish jurisdiction. There is thus a general consensus in Ireland that the unborn must be protected from conception onwards from a moral standpoint.

In the circumstances I accept the position taken by the respondent Government in these cases that the aim of the interference with the freedom of expression of the applicants was the legitimate aim of the protection of morals within the meaning of Article 10 para. 2 of the Convention.

c) Necessary in a democratic society

The imposition of the injunction on the applicant companies was necessary in order to stop the operation of their information services which were rendering assistance to pregnant women in Ireland to terminate the life of the unborn - such life being protected by the Irish Constitution. As already stated, such constitutional protection was reflecting the moral approach of Irish society on the issue of abortion. Freedom of speech may legitimately, under the Convention, be curtailed in a democratic society if that is necessary in order to uphold and maintain the moral values of such society. The more so when such values are expressed and entrenched in constitutional provisions as in the present cases.

The European Court has acknowledged that the margin of appreciation available to States in assessing the pressing social need for the protection of morals is a wide one (Eur. Court H.R., Handyside judgment of 7 December 1976, Series A No. 24, p. 22 para. 48).

It is important to note that the information services of the applicant companies affected by the injunction in question did not aim at informing people about the question of abortion generally or expressing views or ideas on such a question. They were providing specific information to pregnant women in Ireland as to how they could best have an abortion abroad. Therefore it is reasonable to consider that such an activity was directly undermining the moral values of the Irish people enshrined in their Constitution and that the restriction on the applicants' freedom of expression and freedom to receive and impart information in the circumstances of these cases responded to and was proportionate to a genuine and pressing social need in Ireland.

For the above reasons I conclude that there has been no violation of Article 10 of the Convention in these cases.

Appendix I

HISTORY OF THE PROCEEDINGS

Date	Item
19.08.88	Introduction of first application
15.09.88	Introduction of second application
22.09.88	Registration of both applications

Examination of admissibility

14.03.89	Commission's deliberations and decision to join the applications and to invite the parties to submit their written observations on admissibility and merits
15.09.89	Government's observations
09.11.89	Applicants' reply
05.02.90	Commission's deliberations and decision to hold a hearing
15.05.90	Hearing on admissibility and merits, the parties being represented as follows: Government: Mr. P.E. Smyth, Agent Mr. D. Gleeson, SC, Counsel Mr. J. O'Reilly, SC, Counsel Mr. J.F. Gormley, Adviser, Office of the Attorney General Ms. E. Kilcullen, Adviser, Department of Foreign Affairs Applicants: Mrs. M. Robinson, SC, Counsel Mr. F. Clarke, SC, Counsel Ms. B. Hussey, Solicitor Ms. R. Burtonshaw, Adviser, Dublin Well Woman Centre Ltd. Ms. M. McNeaney, Adviser, Dublin Well Woman Centre Ltd.
15.05.90	Commission's deliberations and decision to declare the applications admissible

Examination of the merits

12.06.90	Parties invited to submit further written observations on the merits
02.08.90	Government's observations
07.09.90	Applicants granted legal aid
03.10.90	Commission's consideration of the state of proceedings
09.01.91	Commission's consideration of the state of proceedings
26.02.91	Commission's deliberations on the merits and on the text of its Article 31 Report. Final votes taken
07.03.91	Adoption of Report