

Publication:	A 246 A	
Title:	Open Door Counselling Ltd and Dublin Well Women Centre Ltd and others v. Ireland	
Application No:	14234/88	
Respondent:	Ireland	
Referred by:	Commission; Respondent State	
Date of reference by Commission:	24-04-1991	
Date of reference by State:	03-07-1991	
Date of Judgment:	29-10-1992	
Articles:	10	Conclusion: Violation of article 10
	8	Not necessary to examine article 8
	14	Not necessary to examine article 14
	17	Not necessary to examine article 17
	50	Compensation under article 50 awarded
Keywords:	BEING A VICTIM / RECEIVE SEEK AND IMPART INFORMATION / FREEDOM OF EXPRESSION / PRIVACY / LIMITATIONS TO PROTECT DEMOCRATIC SOCIETY / LIMITATIONS TO PROTECT HEALTH OR MORALS	

Summary:

The applications concern restrictions imposed on the two applicant companies as a result of a court injunction prohibiting them from providing information to pregnant women as to the location or identity of, or method of communication with, abortion clinics in Great Britain. The applicant companies were engaged at the time in non-directive counselling of pregnant women. The other applicants are two of the counsellors employed by one of the companies, and two women of child-bearing age (X and Y). The applicant complain that the injunction was in violation of their right to freedom of expression, that it was in violation of X.'s and Y.'s right to respect for private life, and of any such right which the first applicant company could claim, and that it discriminated against women. The Government submitted, as they had done before the Commission, that only the corporate applicants could claim to be "victims" of an infringement of their Convention rights. Ms Maher, Ms Downes, Mrs X and Ms Geraghty had not been involved in the proceedings before the Irish courts. It stated also that the applicants had failed to identify a single pregnant woman who could claim to be a "victim" of the matters complained of. In this respect the case was in the nature of an actio popularis, particularly as regards Mrs X and Ms Geraghty. The Court decided, as did the Commission, that Ms Maher and Ms Downes can properly claim to be "victims" of an interference with their rights since they were directly affected by the Supreme Court injunction. Moreover, it considered that the Government are precluded from making submissions as regards preliminary exceptions which are inconsistent with concessions previously made in their pleadings before the Commission. Regarding Mrs X and Ms Geraghty, the Court stated that the Supreme Court injunction restrained the corporate applicants and their servants and

agents from providing information to pregnant women. Although it has not been ascertained that Mrs X and Ms Geraghty are pregnant, it is not disputed that they belong to a class of women of child-bearing age which may be adversely affected by the restrictions imposed by the injunction. They are not seeking to challenge in abstracto the compatibility of Irish law with the Convention since they run a risk of being directly prejudiced by the measure complained of. They can thus claim to be "victims" within the meaning of Article 25-1.

The Government submitted that domestic remedies had not been exhausted. As regards the complaints relating to Articles 8 and 14 of the Convention, the Court observed that Open Door would have had no prospect of success in asserting these complaints having regard to the reasoning of the Supreme Court concerning the high level of protection afforded to the right to life of the unborn child under Irish law. As regards the introduction in their complaint under Article 10 evidence and submissions concerning abortion and the impact of the Supreme Court injunction on women's health that had not been raised before the Irish courts, the Court observed that these applicants are not introducing a fresh complaint in respect of which they have not exhausted domestic remedies. It stated that they are merely developing their submissions in respect of complaints which have already been examined by the Irish courts. As regards the allegation that Ms Maher, Ms Downes, Mrs X and Ms Geraghty had not been involved in any capacity in the relevant proceedings before the Irish courts, the Court stated that it emerges from the judgments of the Supreme Court in the present case and in subsequent cases that any action brought by the four individual applicants would have had no prospect of success. Accordingly, the Court held that the Government's objection based on non-exhaustion of domestic remedies fails.

The Court noted that the Government accepted that the injunction interfered with the freedom of the corporate applicants to impart information. Having regard to the scope of the injunction which also restrains the "servants or agents" of the corporate applicants from assisting "pregnant women", there can be no doubt that there was also an interference with the rights of the applicant counsellors to impart information and with the rights of Mrs X and Ms Geraghty to receive information in the event of being pregnant. To determine whether such an interference entails a violation of Article 10, the Court examined whether or not it was justified under Article 10-2 by reason of being a restriction "prescribed by law" which was necessary in a democratic society on one or other of the grounds specified in Article 10-2. The Court stated in this respect that taking into account the high threshold of protection of the unborn provided under Irish law generally and the manner in which the courts have interpreted their roles as the guarantors of constitutional rights, the possibility that action might be taken against the corporate applicants must have been, with appropriate legal advice, reasonably foreseeable. In the opinion of the Court, the restriction was accordingly "prescribed by law". The Court did not accept the Government's argument that the restriction aimed at the prevention of crime, since

neither the provision of the information in question nor the obtaining of an abortion outside the jurisdiction involved any criminal offence. Regarding the protection of morals the Court stated that it is evident that the protection afforded under Irish law to the right to life of the unborn is based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion as expressed in the 1983 referendum. It concluded that the restriction thus pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect. In the light of this conclusion, the Court did not find it necessary to decide whether the term "others" under Article 10-1 extends to the unborn, as the applicants had argued it did not.

The Government argued that the Court should take into account Article 2 of the Convention. The Court did not accept this reasoning, since the applicants did not claim that the Convention contains a right to abortion, but merely that their right to provide and receive information concerning abortion abroad was at stake. The only issue to be addressed is whether the restrictions on the freedom to impart and receive information contained in the relevant part of the injunction are necessary in a democratic society for the legitimate aim of the protection of morals. The Government stressed the limited nature of the restriction in question. It argued that the traditional approach of weighing competing rights and interests in the balance was inappropriate where the destruction of unborn life was concerned. They emphasised that the determination by the Irish courts that the provision of information by the relevant applicants assisted in the destruction of unborn life was not open to review by the Convention institutions. The Court rejected the Government's arguments and held that the State's discretion in the field of protection of morals is not unfettered and unreviewable. Regarding the application of the "proportionality" test, the logical consequence of the Government's argument is that measures taken by the national authorities to protect the right to life of the unborn or to uphold the constitutional guarantee on the subject would be automatically justified under the Convention where the infringement of a right of a lesser stature was alleged. It is, in principle, open to the national authorities to take such action as they consider necessary to respect the rule of law or to give effect to constitutional rights.

However, they must do so in a manner which is compatible with their obligations under the Convention and subject to review by the Convention institutions. To accept the Government's pleading on this point would amount to an abdication of the Court's responsibility under Article 19 of the Convention. The Court then examined whether the question of the "necessity" of the restriction, in accordance with the principles developed in its case-law. It recalled that freedom of expression is also applicable to "information" or "ideas" that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". The Court takes into account that, while the relevant restriction is limited to the provision of information, it is not a criminal offence under Irish law for a pregnant woman to travel abroad in order to

have an abortion. Furthermore, the injunction limited to the freedom to receive and impart information with respect to services which are lawful in other Convention countries and may be crucial to a woman's health and well-being. Limitations on information concerning activities which, notwithstanding their moral implications, have been and continue to be tolerated by national authorities, call for careful scrutiny by Convention institutions as to their conformity with the tenets of a democratic society. The Court is first struck by the absolute nature of the Supreme Court injunction which imposed a "perpetual" restraint on the provision of information to pregnant women concerning abortion facilities abroad, regardless of age or state of health or their reasons for seeking counselling on the termination of pregnancy. The sweeping nature of this restriction has since been highlighted by the case of the Attorney-General v. X and Others and by the concession made by the Government at the oral hearing that the injunction no longer