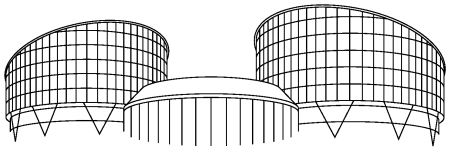

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF PETROVA v. LATVIA

(Application no. 4605/05)

JUDGMENT

STRASBOURG

24 June 2014

FINAL

24/09/2014

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Petrova v. Latvia,

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

Päivi Hirvelä, *President,*
Ineta Ziemele,
George Nicolaou,
Nona Tsotsoria,
Paul Mahoney,
Krzysztof Wojtyczek,
Faris Vehabović, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 3 June 2014,

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

PROCEDURE

1. The case originated in an application (no. 4605/05) against the Republic of Latvia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Latvian national, Ms Svetlana Petrova ("the applicant"), on 18 January 2005.

2. The applicant was represented by Mr A. Kuzmins, a lawyer practising in Riga. The Latvian Government ("the Government") were represented by their Agents, Mrs I. Reine and subsequently by Mrs K. Līce.

3. The applicant alleged, in particular, that the removal of her son's organs had taken place without her consent.

4. On 17 November 2009 the application was communicated to the Government under Articles 3 and 8 of the Convention. On 9 July 2013 it was decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1955 and lives in Riga. She is the mother of Mr Oļegs Petrovs (the applicant's son), a Latvian national who was born in 1979 and who died on 29 May 2002.

A. Events leading to the organ transplantation

6. On 26 May 2002 at approximately 7 a.m. the applicant's son sustained very serious injuries in a car accident near Bauska. At approximately 8.45 a.m. he was taken to hospital in Bauska. Later, at 2.45 p.m., he was transferred to Riga's First Hospital (*Rīgas 1. slimnīca* – "the Hospital") – an entity that was registered as a "non-profit municipally-owned limited-liability company" (*Rīgas pašvaldības bezpeļņas organizācija sabiedrība ar ierobežotu atbildību*) at the material time – where surgery was carried out on his head. Following the operation his condition remained very serious; he remained in the emergency department of the Hospital (*reanimācijas nodaļa*) and did not regain consciousness.

7. At 11.50 p.m. on 28 May 2002 a call from the Hospital was received by the transplantation centre of Pauls Stradiņš Clinical University Hospital – an entity that was registered as a "non-profit State-owned joint stock company" (*bezpeļņas organizācija valsts akciju sabiedrība*) at the material time – providing information about a potential donor who was undergoing resuscitation. A coordinator from the transplantation centre, together with another doctor, went to the Hospital.

8. At 0.45 a.m. on 29 May 2002 the applicant's son's condition was noted in his medical record as being fatal. It was noted that medical resuscitation had been started. The death of the applicant's son was recorded at 1.20 a.m. in his medical record at the Hospital.

9. Between 1.35 a.m. and 3.45 a.m. a laparotomy was performed on the body, in the course of which the kidneys and the spleen were removed for organ transplantation purposes. This operation was carried out by the transplantation centre's transplant surgeon, urologist and operating nurse, in the presence of the coordinator and the Hospital's resuscitation specialist. On the death certificate the time of death was recorded as 2.45 p.m. on 29 May 2002 (probably by mistake – see 15 below).

10. According to the applicant, during her son's stay in the Hospital she was in permanent contact with the doctors there. On 29 May 2002, although her son's condition was deteriorating, the applicant was not informed of it. She was also not asked whether her son had consented to being an organ donor and whether she would consent to organ transplantation in the absence of any wishes expressed by her son.

11. According to the Government, the Hospital did not have information on record providing the contact details of any relatives, and they had informed the police about the son's hospitalisation by dialling the emergency telephone number for the police. It had therefore, not been possible to contact any relatives. In this regard the Government referred to information provided by the Hospital which stated that "given the fact that no telephone numbers of any relatives were recorded on the patient's medical card ... there was apparently no contact with the applicant".

12. On 30 May 2002, in the context of criminal proceedings against the person held liable for the car accident, a forensic (post-mortem) examination on the applicant's son's body was carried out. It was noted, *inter alia*, that on 29 May 2002 between 1.35 a.m. and 3.45 a.m. a laparotomy had been performed on the body. The applicant obtained a copy of the forensic report on 11 February 2003 and realised only then that nine months earlier certain organs had been removed from her son's body for transplantation purposes.

B. Review of complaints at domestic level

13. In response to a complaint lodged by the applicant, on 12 March 2003 the Hospital stated that the transplantation had been carried out by the transplant doctors in accordance with domestic law. It was noted that the applicant had not been informed of her son's health condition because she had not visited the doctors at the Hospital.

14. In response to further complaints by the applicant to the police and the prosecutor's office, several examinations were carried out.

15. In response to a query by the Security Police (*Drošības policija*), the Inspectorate of Quality Control for Medical Care and Working Capability ("the MADEKKI") analysed the medical file and met with doctors and managers from the two medical institutions involved – Riga's First Hospital and Pauls Stradiņš Clinical University Hospital. On 7 May 2003 it completed the examination and informed the Security Police of its conclusions. The MADEKKI provided an answer to the question of whether the medical practitioners had complied with the applicable domestic law in the following terms:

> "In taking the decision [to remove organs] and in carrying out the removal of organs, the medical practitioners have complied with section 10 of the Law on Protection of the Body of a Deceased Person and Use of Human Organs and Tissue and provisions of regulation no. 431 (1996) ...
>
> There is no information at the MADEKKI's disposal as to whether there was a stamp in Mr Petrovs' passport signifying his objection to the use of his body tissue and organs.
>
> [The applicant] was not informed about the possible removal of organs (the kidneys and the spleen) for transplantation purposes."

The MADEKKI also explained in their letter to the Security Police that the time of biological death was 1.20 a.m. on 29 May 2002 and not 2.45 p.m. as recorded, probably by mistake, on the death certificate.

16. On 27 May 2003 the Security Police replied to the applicant on the basis of the MADEKKI report that the organs of her son had been removed in compliance with domestic law. They relied on section 10 of the Law on Protection of the Body of a Deceased Person and Use of Human Organs and

Tissue ("the Law") and regulation no. 431(1996). The applicant was forwarded a copy of the MADEKKI's letter to the Security Police.

17. On 17 June 2003 the prosecutor's office forwarded the applicant's complaint to the Security Police with a view to instituting an additional inquiry.

18. On 15 July 2003 the MADEKKI replied to questions put by the Ministry of Health, which had been contacted by the National Human Rights Bureau further to a complaint by the applicant. They answered that there was no information at their disposal as to whether, at the time of her son's death, any refusal of or consent to the use of his body, organs or tissue after his death had been recorded in the Population Register (*Iedzīvotāju reģistrs*). They also answered that the applicant had not been informed of the possible removal of organs (the kidneys and the spleen) for transplantation purposes. There was no information at the MADEKKI's disposal as to whether there had been a stamp in Mr Petrovs' passport signifying an objection to the use of his body tissue and organs. On 13 August 2003 the Ministry of Health, replying in turn to the National Human Rights Bureau, concluded on the basis of the information provided by the MADEKKI that, because the applicant had not been informed about the possible transplantation, she had neither consented to it nor refused it.

19. On 29 July 2003 the Security Police informed the applicant that her complaint was still being examined.

20. On 12 November 2003 the Security Police adopted a decision not to institute criminal proceedings. For the same reasons as were given in the above-mentioned reports, it was concluded that the transplantation had been carried out in compliance with domestic law. The reports indicated that in his lifetime Mr Petrovs had not indicated any objection to the use of his body tissue and organs after death and that no objection to the use of his organs had been received from his relatives before the start of the transplantation. The coordinator of the transplantation centre had been responsible for informing the relatives about the issues pertaining to transplantation, and for obtaining records, consent, signatures and other relevant information. Taking into account the fact that the relatives had not been at the hospital at the time of the son's biological death and that the removal of organs in such cases has to be performed immediately, it had not been possible to obtain their consent or refusal in relation to the organ removal.

21. On 14 November 2003 the applicant was informed of this decision.

22. On 23 January 2004 the National Human Rights Bureau replied to the applicant. According to the information at their disposal, there was nothing on record in the Population Register indicating whether Mr Petrovs would have allowed or refused the use of his body, tissue and organs after his death. According to the information provided by the Ministry of Health and on the basis of the conclusions established by the MADEKKI, the

applicant had not been informed about the imminent removal of her son's kidneys and spleen, and she had therefore neither consented to it nor refused it. Finally, the applicant was advised that she should contact the prosecutor's office because the Security Police had not indicated any procedure or time-limits for lodging an appeal.

23. On 4 March 2004, further to a subsequent complaint, a meeting was convened at which the Minister for Health discussed with the representatives of the Hospital and the transplantation centre the case of the removal of the applicant's son's organs. The Minister for Health was of the opinion that the relatives should have been informed about the organ removal and that their consent should have been obtained. The representatives stated that the organ removal had been conducted in compliance with the applicable law. The meeting record contained a note to the effect that in autumn 2003 a working group which had been established by the Ministry of Health had prepared amendments to the above-mentioned Law in order to define its provisions more clearly. They had made two proposals. The first proposal was to include in the Law a provision stating that on all occasions inquiries were to be made about the deceased person's wishes with his or her closest relatives. The second proposal was to rely on the person's wishes as expressed during his or her lifetime and, in the absence of any such wishes, to presume consent (no inquiries made with the closest relatives). It was also noted that the relevant committee of the Parliament had opted for the second option (see paragraph 41 below for the adopted text). It was also noted that once the proposed amendments were passed by the Parliament, the occurrence of such "problematic situations would be practically ruled out". On 17 March 2004 the applicant received reply from the Ministry of Health to this effect.

24. On 6 May 2004 a prosecutor dismissed the applicant's complaint concerning the refusal of 12 November 2003 to institute criminal proceedings. She relied on section 11 of the Law and indicated that consent from parents or from a legal guardian was required only in cases relating to the removal of organs for transplantation purposes from a dead child's body. Accordingly, the actions of the medical practitioners did not constitute a crime and the 12 November 2003 decision had been lawful.

25. On 29 June 2004 a superior prosecutor dismissed the applicant's complaint concerning the prosecutor's decision of 6 May 2004. He stated that – according to the information provided by the Ministry of Health – the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (see paragraph 28 below) had not been ratified by the Latvian Parliament and that Latvia had not even signed the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin; Latvia was therefore not a party to this Convention. The prosecutor relied on Article 17 of the Additional Protocol

and indicated that at the relevant time (May 2002) in Latvia these issues were regulated in sections 4 and 11 of the Law. These provisions did not require consent from close relatives unless the removal was from the body of a dead child. The rules relating to transplantation coordinators obliged them to obtain relatives' consent only in cases prescribed by law. The prosecutor concluded that there were no grounds to consider that the medical practitioners, in taking the decision to remove organs and in carrying out the removal of those organs, had infringed legal provisions. Therefore, there were no grounds to charge them with a crime under section 139 of the Criminal Law; at that time no other person had been charged with the crime. At the same time, the applicant was informed about the 2 June 2004 amendments to sections 4 and 11 of the Law, in which it was specified that the organs of a deceased person might be removed for transplantation purposes if there was no information recorded in the Population Register indicating any objection and if the relatives of the deceased had not, before the start of the transplantation, informed the hospital in writing of the deceased person's objection – expressed during his or her lifetime – to the use of his or her organs and tissue after death.

26. On 23 August 2004 the Prosecutor General in a final decision dismissed the applicant's complaint concerning the decision of 29 July 2004. He also referred to sections 4 and 11 of the Law and noted that these provisions prohibited removal in cases where a refusal or objection had been received but not in cases where wishes of the closest relatives had not been established. These provisions, as in force in May 2002, therefore did not oblige medical practitioners to actively search for and inform the closest relatives of a deceased person about the possible removal for transplantation purposes of his or her body tissue and organs unless that person was a child. On 29 May 2002 the medical practitioners did not have any information at their disposal concerning a refusal of or objection to the removal of Mr Petrovs' organs. He concluded that the organ removal had been performed in accordance with domestic law. The Prosecutor General also observed that activities performed on the body of a deceased person could not be treated as interference with his or her private life.

II. RELEVANT INTERNATIONAL DOCUMENTS AND DOMESTIC LAW

A. The Council of Europe documents

27. On 11 May 1978 the Committee of Ministers of the Council of Europe adopted Resolution (78) 29 on harmonisation of legislations of member states relating to removal, grafting and transplantation of human substances, which recommended that the governments of the Member States ensure that their laws conform to the rules annexed to the resolution or

adopt provisions conforming to these rules when introducing new legislation. Article 10 of this Resolution provides:

> "1. No removal must take place when there is an open or presumed objection on the part of the deceased, in particular, taking into account his religious and philosophical convictions.
>
> 2. In the absence of the explicit or implicit wish of the deceased the removal may be affected. However, a state may decide that the removal must not be effected if, after such reasonable inquiry as may be practicable has been made into the views of the family of the deceased and in the case of a surviving legally incapacitated person those of his legal representative, an objection is apparent; when the deceased was a legally incapacitated person the consent of his legal representative may also be required."

28. The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Council of Europe Treaty Series no. 164) is the first international treaty in the field of bioethics ("the Convention on Human Rights and Biomedicine"). It entered into force on 1 December 1999 in respect of the States that had ratified it. Latvia signed the Convention on Human Rights and Biomedicine on 4 April 1997, ratified it on 25 February 2010, and it entered into force in respect of Latvia on 1 June 2010. The Convention on Human Rights and Biomedicine does not concern organ and tissue removal from deceased persons. It concerns organ and tissue removal from living donors for transplantation purposes (Articles 19, 20).

29. In relation to organ and tissue removal from deceased persons, an Additional Protocol on Transplantation of Organs and Tissues of Human Origin was adopted (Council of Europe Treaty Series no. 186). On 1 May 2006 it entered into force in respect of the States that had ratified it. Latvia has neither signed nor ratified this Protocol.

30. The relevant Articles of the Additional Protocol read:

Article 1 – Object

> "Parties to this Protocol shall protect the dignity and identity of everyone and guarantee, without discrimination, respect for his or her integrity and other rights and fundamental freedoms with regard to transplantation of organs and tissues of human origin."

Article 16 – Certification of death

> "Organs or tissues shall not be removed from the body of a deceased person unless that person has been certified dead in accordance with the law.
>
> The doctors certifying the death of a person shall not be the same doctors who participate directly in removal of organs or tissues from the deceased person, or subsequent transplantation procedures, or having responsibilities for the care of potential organ or tissue recipients."

Article 17 – Consent and authorisation

"Organs or tissues shall not be removed from the body of a deceased person unless consent or authorisation required by law has been obtained.

The removal shall not be carried out if the deceased person had objected to it."

31. In May 2002 the Secretary General of the Council of Europe sent a questionnaire to the Council of Europe member States concerning aspects of law and practice in relation to transplantation.[1] The Latvian Government replied in the affirmative to the question of whether removal from a living donor required authorisation and referred to Articles 19 and 20 of the Convention on Human Rights and Biomedicine and section 13 of the Law on Protection of the Body of a Deceased Person and Use of Human Organs and Tissue. They noted that written consent was required. In their response to the question "What kind of relationships should exist between the living donor of an organ and the recipient?" they referred to Articles 19 and 20 of the Convention on Human Rights and Biomedicine. In their response to the question "What sanctions are provided for [organ-trafficking] offenders, in particular, for intermediaries and health professionals?" the Latvian Government referred to section 139 of the Criminal Law (see paragraph 44 below).

B. The European Union documents

32. On 21 July 1998 the European Group on Ethics in Science and New Technologies (EGE)[2] to the European Commission issued Opinion no. 11 "On Ethical aspects of human tissue banking". Its relevant parts read:

"2.3 Information and consent

The procurement of human tissues requires, as a principle, the prior, informed and free consent of the person concerned. This does not apply in the case of tissue procurement ordered by a judge in the context of judicial, in particular criminal, proceedings.

While consent is a fundamental ethical principle in Europe, the procedures involved and forms of such consent (oral or in writing, before a witness or not, explicit or presumed, etc.) are a matter for national legislation based on the legal traditions of each country.

...

2.3.2 Deceased donors

[1] http://www.coe.int/t/dg3/healthbioethic/Activities/05_Organ_transplantation_en/CDBI_INF(2003)11rev2.pdf

[2] Established in December 1997, the EGE is an independent advisory body. Its predecessor was the Group of Advisers to the European Commission on the Ethical Implications of Biotechnology, an *ad hoc* advisory body.

Consent of a donor for retrieval of tissues after death may take different forms depending on the national systems ("explicit" or "presumed" consent). However, no retrieval of tissues may take place, with the exception of judicial proceedings, if the party concerned formally objected while alive. Furthermore, if there has been no expression of will and the applicable system is that of "presumed" consent, doctors must ensure as far as possible that relatives or next of kin have the opportunity to express the deceased person's wishes, and must take these into account."

33. Directive 2010/45/EU of the European Parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs intended for transplantation provides:

[Preamble]

"(21) Several models of consent to donation coexist in the Union, including opting-in systems in which consent to organ donation has to be explicitly obtained, and opting-out systems in which donation can take place unless there is evidence of any objection to donation. In order to enable individuals to express their wishes in this regard, some Member States have developed specific registries where citizens record them. This Directive is without prejudice to the broad diversity of the systems of consent already in place in the Member States. In addition, by means of its Action plan on Organ Donation and Transplantation the Commission aims to increase public awareness of organ donation and in particular to develop mechanisms to facilitate the identification of organ donors across Europe." ...

CHAPTER III
DONOR AND RECIPIENT PROTECTION AND DONOR SELECTION AND EVALUATION
Article 13 - Principles governing organ donation

"1. Member States shall ensure that donations of organs from deceased and living donors are voluntary and unpaid.

2. The principle of non-payment shall not prevent living donors from receiving compensation, provided it is strictly limited to making good the expenses and loss of income related to the donation. Member States shall define the conditions under which such compensation may be granted, while avoiding there being any financial incentives or benefit for a potential donor.

3. Member States shall prohibit advertising the need for, or availability of, organs where such advertising is with a view to offering or seeking financial gain or comparable advantage.

4. Member States shall ensure that the procurement of organs is carried out on a non-profit basis."

Article 14 - Consent requirements

"The procurement of organs shall be carried out only after all requirements relating to consent, authorisation or absence of any objection in force in the Member State concerned have been met."

C. Domestic law

1. *Law on Protection of the Body of a Deceased Person and Use of Human Organs and Tissues*

34. The Law on Protection of the Body of a Deceased Person and Use of Human Organs and Tissue (*likums* "*Par miruša cilvēka ķermeņa aizsardzību un cilvēka audu un orgānu izmantošanu medicīnā*" – "the Law"), as in force at the relevant time (with amendments effective as of 1 January 2002), provides in section 2 that every living person with legal capacity is entitled to consent or object, in writing, to the use of his or her body after death. The wish expressed, unless it is contrary to the law, is binding.

35. Section 3 provides that a person must apply to the Office of Citizenship and Migration Affairs, in accordance with a procedure prescribed by regulations issued by the Cabinet of Ministers, to exercise the right to consent or object to the use of his or her body after death. Only such refusal or consent as is recorded in the Population Register has legal effect. The procedure which, in accordance with the Law, the State institutions have to follow to request and receive this information from the Population Register had not been adopted by the Cabinet of Ministers at the time the applicant's son went into a coma. It was adopted on 11 June 2002 and entered into force on 15 June 2002 in the form of amendments to regulation of the Cabinet of Ministers no. 89 (1999).

36. Pursuant to section 4, which is entitled "The rights of the closest relatives", the organs and tissues of a deceased person may not be used against his or her wishes as expressed during his or her lifetime. In the absence of express wishes, they may be used if none of the closest relatives (children, parents, siblings or spouse) objects. Transplantation may be carried out after the biological or brain death of the potential donor (section 10).

37. More specifically, section 11 of the Law provides that organs and tissue from a deceased donor may be removed for transplantation purposes if that person has not objected to such removal during his or her lifetime and if the closest relatives have not prohibited it.

38. By virtue of a transitional provision of the Law, a stamp in a person's passport added before 31 December 2001 denoting objection or consent to the use of his or her body after death has legal effect until a new passport is issued or an application to the Office of Citizenship and Migration Affairs is submitted.

39. Section 17 provides that the State is responsible for protecting the body of a deceased person and for using organs or tissues for medical purposes. At the material time this function was entrusted to the Ministry of Welfare (as of 30 June 2004 – the Ministry of Health). No organisation or

authority can carry out the removal of organs or tissues without an authorisation issued by the Ministry (as of 30 June 2004 – the Minister).

40. Section 18 prohibits the selection, transportation and use of the removed organs and tissues for commercial purposes. It also provides that the removal of organs and tissues from any living or deceased person can only be carried out with strict respect for that person's expressed consent or objection.

41. On 2 June 2004 amendments to sections 4 and 11 of the Law were passed in the Parliament, effective as of 30 June 2004. From then on section 4 provides that if there is no information recorded in the Population Register about a deceased person's refusal or consent to the use of his or her body, organs or tissue after death, the closest relatives have the right to inform the medical institution in writing about the wishes of the deceased person expressed during his or her lifetime. Section 11 provides that the organs and body tissue of a deceased person may be removed for transplantation purposes if there is no information recorded in the Population Register about the deceased person's refusal or consent to the use of his or her organs or body tissue after death and if the closest relatives of the deceased have not, before the start of the transplantation, informed the medical institution in writing about any objection by the deceased person to the use of his or her organs and body tissue after death expressed during his or her lifetime. It is forbidden to remove organs and body tissue from a dead child for transplantation purposes unless one of his or her parents or his or her legal guardian has consented to it in writing.

2. Regulation of the Cabinet of Ministers no. 431 (1996)

42. This regulation (*Noteikumi par miruša cilvēka audu un orgānu uzkrāšanas un izmantošanas kārtību medicīnā*) provides that removal of organs may be carried out after the biological or brain death of a person if his or her passport and medical record contain a stamp signifying consent to such removal (paragraph 3). In the absence of such a stamp, the provisions of the Law (see above) are to be followed.

43. If a potential donor arrives at the hospital, the coordinator of the transplantation centre must be contacted (paragraph 11). Kidney removal must be carried out by two transplant doctors, the coordinator and one or two nurses from the transplantation centre (paragraph 12).

3. Criminal law provisions

44. Section 139 of the Criminal Law provides that unlawful removal of organs or tissues from a living or deceased human being in order to use them for medical purposes is a criminal offence if carried out by a medical practitioner.

45. Relevant provisions pertaining to the rights of civil parties in criminal proceedings under the former Code of Criminal Procedure (effective until 1 October 2005) are described in *Liģeres v. Latvia* (no. 17/02, §§ 39-41, 28 June 2011) and *Pundurs v. Latvia* ((dec.), no. 43372/02, §§ 12-17, 20 September 2011).

4. Civil law provisions

46. All relevant provisions pertaining to compensation for pecuniary and non-pecuniary damage under the Civil Law (before and after the amendments that were effective from 1 March 2006) are quoted in full in *Zavoloka v. Latvia* (no. 58447/00, §§ 17-19, 7 July 2009). Sections 1635 and 1779 are further described in *Holodenko v. Latvia* (no. 17215/07, § 45, 2 July 2013).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

47. The applicant alleged a violation of Article 8 of the Convention in that the removal of her son's organs had been carried out without his prior consent or that of the applicant herself. Article 8 reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

48. The Government denied that there had been a violation of that Article.

A. Scope of the applicant's complaint

1. The parties' submissions

49. The Government raised an argument pertaining to the scope of the applicant's complaint. They submitted that on the application form the applicant had complained of a violation of her son's rights under Article 8 on account of the removal of his organs without his or the applicant's prior consent. It was their contention that nothing in the case-file demonstrated that the applicant had ever complained of a violation of her own rights under the Convention.

50. The Government also objected that the applicant could not claim to be a victim of the alleged violation of Mr Petrovs' rights under the Convention.

51. The applicant disagreed and maintained that she had raised the complaint on her own behalf. She had indicated her name in "the applicant" field in the application form and it was evident that, in the absence of any specific indication to the contrary, she had complained of a violation of her rights under the Convention. She also relied on quotes from her application form to further substantiate this. The applicant indicated that her submissions had been as follows: "I consider Article 8 of the Convention to be violated" and that she as "the mother of Oļegs Petrovs was refused rights, granted by law, to object to removal of organs".

52. The applicant considered herself to be a victim.

2. The Court's assessment

53. Having examined the case material in its possession, the Court observes the following. The application form, sent to the Court on 18 January 2005, contains several indications that it was lodged in the name of the applicant, Ms Svetlana Petrova. The application form contains the necessary information about the applicant herself – full name and contact details. The application form was signed by the applicant's sister, Ms Ļuda Belruse, who had received an authorisation from the applicant to act on her behalf. The applicant in her observations further specified that her intention had been to lodge an application on her own behalf. She quoted her submissions from the application form and confirmed that the application concerned her own rights.

54. The Court notes at the outset that an application cannot in principle be brought in the name of a deceased person, because he or she cannot be considered to be a "person" ("*personne physique*" in French) for the purposes of Article 34 of the Convention (see *Dvořáček and Dvořáčková v. Slovakia*, no. 30754/04, § 41, 28 July 2009, and *Aizpurua Ortiz and Others v. Spain*, no. 42430/05, § 30, 2 February 2010).

55. The Court reiterates the need to distinguish cases in which the applicant died in the course of the proceedings from cases where the application was lodged with the Court by the applicant's heirs after the death of the victim (see *Fairfield v. the United Kingdom* (dec.), no. 24790/04, ECHR 2005-VI; *Biç and Others v. Turkey*, no. 55955/00, § 20, 2 February 2006; and, more recently, *Ergezen v. Turkey*, no. 73359/10, § 28, 8 April 2014 (not yet final) and the case-law cited therein). In cases where the applicant died before an application was lodged with the Court, the Court has emphasised that Article 8 rights are eminently personal and non-transferable (see *Sanles Sanles v. Spain* (dec.), no. 48335/99, ECHR 2000-XI). Therefore, in principle Article 8 cannot be relied on by relatives

or next-of-kin unless they are personally affected by the interference at issue.

56. In the present case the rights of the deceased, Mr Petrovs, and his mother, the applicant in the present case, are closely related. The domestic law at the material time explicitly provided that the right to express one's wishes in relation to removal of organs or body tissue after death pertained not only to the person concerned but also to his or her closest relatives, including parents (see paragraphs 36 and 37 above). The Court considers, however, that there is no need to examine the issue of transferability of rights in more detail in the present case since the applicant complains of a violation of her own rights in connection with the removal of her son's organs after his death. Contrary to what has been argued by the Government, the Court finds that on the application form the applicant expressly indicated her wish to complain in her name and she maintained that position in her observations on the admissibility and merits of the case.

57. The Government's objection relating to the scope of the applicant's complaint is therefore dismissed.

58. Having found that the applicant's complaint relates to her rights under the Convention and not to the rights of her deceased son, the Court does not consider it necessary to address separately the Government's argument pertaining to the applicant's victim status.

B. Admissibility

1. The parties' submissions

59. First of all, the Government raised a preliminary objection concerning the exhaustion of domestic remedies, relying on the Court's decision in *Grišankova and Grišankovs v. Latvia* ((dec.), no. 36117/02, ECHR-2003 II (extracts)). They considered that the applicant should have lodged a complaint with the Constitutional Court since the removal of her son's organs had been carried out in accordance with the procedure laid down in sections 4 and 11 of the Law. She should have raised the issue of the compliance of these legal provisions with the Latvian Constitution.

60. Secondly, the Government argued that the applicant had not submitted a complaint to the MADEKKI. The Government emphasised that at the material time the MADEKKI had been the competent body to examine the applicant's complaints. Moreover, the applicant had not appealed against the MADEKKI's report, which it had submitted to the Security Police and to the prosecutor's office. It was the Government's submission that the MADEKKI's examination of the compliance of the organ removal procedure with domestic law was a necessary precondition for instituting any civil or criminal proceedings against those responsible. They did not provide any further information in this regard.

61. Thirdly, the Government submitted that the applicant could rely on section 1635 of the Civil Law (as effective from 1 March 2006) and claim compensation for pecuniary and non-pecuniary loss in the civil courts. The possibility of using this remedy was still open to the applicant. Citing the Court's decision in *Andrasik and Others v. Slovakia* (no. 57984/00, 22 October 2002), the Government argued that the proposed remedy had become available shortly after the applicant had submitted her application to the Court on 18 January 2005. The Government provided some examples of domestic case-law pertaining to the application of section 1635 in practice. They referred to the proceedings in case PAC-714 (instituted on 7 February 2005), where a claimant had sought compensation for non-pecuniary damage from a hospital where she had given birth and where tubal ligation (surgical contraception) had been performed without her consent (see *L.H. v. Latvia*, no. 52019/07, § 8, 29 April 2014 (not yet final)). On 1 December 2006 that claim had been upheld and the claimant had been awarded compensation for physical injury and moral suffering in the amount of 10,000 Latvian lati (LVL) in respect of the unlawful sterilisation on the basis of section 2349 of the Civil Law. This judgment had taken effect on 10 February 2007. The Government also referred to one of the "Talsi tragedy" cases (instituted on 15 September 2006), where on 16 March 2010 the appellate court had awarded compensation payable by the State in the amount of LVL 20,000 in connection with the incident of 28 June 1997 in Talsi where, among other children, the claimant's daughter had died. The final decision in this case was adopted on 28 September 2011. The Government did not provide copies of the decisions in the latter case.

62. Lastly, proceeding on the assumption that the alleged violation stemmed from the actual wording of the relevant provisions of the domestic law, the Government argued that the applicant had failed to comply with the six-month time-limit since, in their view, complaints to the Security Police or the prosecutor's office were not effective remedies. Even if they had been, the outcome of proceedings before these institutions would have been largely dependent on the examination carried out by the MADEKKI, the report of which institution the applicant had not contested. The Government insisted that the applicant had found out about the organ removal on 11 February 2003 and that the MADEKKI report had been adopted on 7 May 2003. They concluded that the applicant had failed to lodge an application with the Court within six months from either of these dates.

63. The applicant disagreed. In response to the first remedy invoked by the Government – recourse to the Constitutional Court – the applicant pointed out that the Constitutional Court's competence did not include examining whether a specific legal provision had been correctly interpreted. The case of *Grišankovs and Grišankova* concerned a legal provision which the applicants in that case considered to be contrary to the Convention. The applicant in the present case referred to section 11 and pointed out that the

system of "presumed consent" in Latvia had been limited by the wishes expressed by the relatives. She considered that the issue in the present case was not a legal provision itself but rather the fact that persons responsible for the removal of the organs had carried out the procedure without trying to establish the wishes of the closest relatives. Therefore, *Grišankovs and Grišankova* did not apply.

64. In response to the second remedy invoked by the Government, namely a complaint to the MADEKKI, the applicant agreed that she had not personally submitted a complaint to that authority. However, in response to her complaint to the Security Police and the prosecutor's office, both had requested the report. Even if the applicant had personally submitted such a complaint, the result would have been the same. According to the applicant, she could not have appealed against the MADEKKI report since it was not an administrative act but rather an expert report drawn up in the course of criminal proceedings, against which no appeal lay. In any event, the MADEKKI report in itself had been neither sufficient to provide redress for the applicant nor legally binding. The applicant referred to the case of *Manoussakis and Others v. Greece* (26 September 1996, § 33, *Reports of Judgments and Decisions* 1996-IV) in support.

65. In response to the third remedy invoked by the Government, the applicant pointed out that section 139 of the Criminal Law provided for criminal responsibility *expressis verbis* for the unlawful removal of organs or body tissue. She pointed out that, making use of her right to choose the remedy, she had sought to find out who was responsible and bore criminal responsibility for the removal. The applicant had done everything that could have been expected of her within the criminal proceedings; she could not have been required to start civil proceedings on the same matter. She relied on the cases of *Assenov and Others v. Bulgaria* (28 October 1998, § 86, *Reports* 1998-VIII) and *Fredriksen and Others v. Denmark* (no. 12719/87, Commission decision of 3 May 1988, DR 56, p. 237) in this regard.

66. Lastly, as regards compliance with the six-month time-limit, the applicant did not agree that criminal proceedings were not an effective remedy. She reiterated that the issue in the present case was not the compatibility of a legal provision with the Constitution but rather the fact that persons responsible for the removal had carried it out without allowing the applicant to express her wishes. The MADEKKI report had merely contained an expert's opinion obtained in the course of criminal proceedings on some of the many questions arising in those proceedings; it had not been a final decision.

2. The Court's assessment

67. In so far as the Government refer to a constitutional complaint as a remedy relevant in the applicant's circumstances, the Court considers that

such a complaint was not an effective means of protecting the applicant's rights under Article 8 of the Convention for the following reasons.

68. The Court has already examined the scope of the Constitutional Court's review in Latvia (see *Grišankova and Grišankovs*, cited above; *Liepājnieks v. Latvia* (dec.), no. 37586/06, §§ 73-76, 2 November 2010; *Savičs v. Latvia*, no. 17892/03, §§ 113-117, 27 November 2012; *Mihailovs v. Latvia*, no. 35939/10, §§ 157-158, 22 January 2013; *Nagla v. Latvia*, no. 73469/10, § 48, 16 July 2013; and *Latvijas jauno zemnieku apvienība v. Latvia* (dec.), no. 14610/05, §§ 44-45, 17 December 2013).

69. The Court has noted that the Constitutional Court examined, *inter alia*, individual complaints challenging the constitutionality of a legal provision or its compliance with a provision having superior legal force. An individual constitutional complaint can be lodged against a legal provision only when an individual considers that the provision in question infringes his or her fundamental rights as enshrined in the Constitution. The procedure of an individual constitutional complaint cannot therefore serve as an effective remedy if the alleged violation resulted only from an erroneous application or interpretation of a legal provision which, in its content, is not unconstitutional (see *Latvijas jauno zemnieku apvienība*, cited above, §§ 44-45).

70. In the present case, the Court considers that the applicant's complaint concerning the organ removal does not relate to the compatibility of one legal provision with another legal provision having superior force. The Government argued that the organ removal had taken place in accordance with the procedure laid down in law. The applicant, for her part, did not contest the constitutionality of this procedure. Instead, she argued that her wishes as the closest relative had not been taken into account. The Court finds that the applicant's complaint relates to the application and interpretation of domestic law, in the light particularly of the absence of relevant administrative regulation; it cannot be said that any issues of compatibility arise. In such circumstances the Court considers that the applicant need not have exhausted the proposed remedy.

71. As regards recourse to the MADEKKI, the Court observes that its report was produced for the purposes of the criminal investigation into the applicant's complaints (contrast with *Žarskis v. Latvia* (dec.), no. 33695/03, § 23, 17 March 2009; *Ruža v. Latvia* (dec.), no. 33798/05, § 19, 11 May 2010; *Buks v. Latvia* (dec.), no. 18605/03, § 11, 4 September 2012; and *Fedosejevs v. Latvia* (dec.), no. 37546/06, § 17, 19 November 2013). The fact that the applicant herself had not complained to the MADEKKI is not relevant in the circumstances of the present case, in relation to which that institution had prepared a report for the purposes of criminal proceedings. The Court does not see how the applicant could have contested the MADEKKI's findings in this context, given that they merely relayed the experts' opinion as to whether or not the medical practitioners had complied

with the law in carrying out the removal of organs. In any event, the Court notes that it is normally the task of the investigating and prosecuting authorities to establish whether any crime has been committed and that, in doing so, these authorities would take into account all evidence, including any specialists' reports. Since the applicant had complained about all the decisions adopted by the investigating and prosecuting authorities, the Court cannot hold it against her that she did not lodge a separate complaint with the MADEKKI.

72. As regards the possibility of lodging a civil claim for damages, in *Calvelli and Ciglio v. Italy* ([GC], no. 32967/96, § 51, ECHR 2002-I), the Court ruled:

> "In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged."

73. The Court has further stated that this principle applies when the infringement of the right to life or personal integrity is not caused intentionally (see *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII, and *Öneryıldız v. Turkey* [GC], no. 48939/99, § 92, ECHR 2004-XII).

74. However, the Court has also found that in the event of there being a number of domestic remedies which an individual can pursue, that person is entitled to choose the remedy which addresses his or her essential grievance (see *Jasinskis v. Latvia*, no. 45744/08, § 50, 21 December 2010). The Court observes that the applicant in the present case availed herself of the criminal avenue of redress in accordance with the applicable provisions of domestic law. The remedy pursued by her could have given rise to a finding that the removal of her son's organs had been carried out contrary to the domestic procedure and that her rights as the closest relative had been breached. It could eventually have led to an award of compensation, given that the Latvian legal system recognises victims' rights to lodge civil claims in criminal proceedings and to request compensation for damage suffered as a result of a crime (see paragraph 45 above). In such circumstances, there is nothing to suggest that the applicant could legitimately have expected that the criminal-law remedy would not be an effective one in her case.

75. The Court considers that the applicant was not required to submit to the civil courts a separate, additional request for compensation, which could also have given rise to a finding that the removal of her son's organs had been carried out contrary to the domestic procedure and that her rights as the closest relative had been breached (see also *Sergiyenko v. Ukraine*, no. 47690/07, §§ 40-43, 19 April 2012; *Arskaya v. Ukraine*, no. 45076/05, §§ 75-81, 5 December 2013; and *Valeriy Fuklev v. Ukraine*, no. 6318/03,

§§ 77-83, 16 January 2014, where the applicants were not required to lodge separate civil claims for the alleged medical malpractice).

76. Finally, bearing in mind the above-mentioned considerations in connection with the recourse to the Constitutional Court and the criminal-law remedy, the Court does not consider that the complaint was lodged out of time. Contrary to the Government's submission, the last domestic decision for the purposes of calculating the six-month period was adopted by the Prosecutor General on 23 August 2004.

77. Taking the foregoing into account, the Court considers that the applicant's complaint under Article 8 of the Convention cannot be declared inadmissible for non-exhaustion of domestic remedies or for non-compliance with the six-month time-limit. Accordingly, the Government's objections in this regard must be dismissed. Furthermore, the Court reiterates that the concepts of private and family life are broad terms not susceptible to exhaustive definition (see *Hadri-Vionnet v. Switzerland*, no. 55525/00, § 51, 14 February 2008). In the case of *Pannullo and Forte v. France* (no. 37794/97, § 36, ECHR 2001-X), the Court considered the excessive delay by the French authorities in returning the body of their child following an autopsy to be interference with the private and family life of the applicants. It has also considered that the refusal of the investigative authorities to return the bodies of deceased persons to their relatives constituted an interference with the applicants' private and family life (see *Sabanchiyeva and Others v. Russia*, no. 38450/05, § 123, ECHR 2013 (extracts) and *Maskhadova and Others v. Russia*, no. 18071/05, § 212, 6 June 2013). The Court notes that there is no dispute between the parties that the applicant's right – established under domestic law – to express consent or refusal in relation to the removal of her son's organs (see paragraph 87 below) comes within the scope of Article 8 of the Convention. The Government did not contest this. The Court sees no reason to hold otherwise and thus considers that this Article is applicable in the circumstances of the case. The Court notes that this complaint is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

1. The parties' submissions

(a) The applicant

78. The applicant considered that the removal of her son's organs without her consent had constituted an interference with her private and family life. The applicant emphasised that she had been deprived of her rights, granted by domestic law, to object to her son's organ removal. She pointed out that analysis of the organs later removed from his body had been carried out and blood tests had been performed while he was still alive

in order to determine compatibility for transplantation purposes with the potential recipient's body.

79. Relying on *X and Y v. the Netherlands*, she argued that although the object of Article 8 was essentially that of protecting the individual against arbitrary interference by public authorities, it did not merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there were positive obligations inherent in an effective respect for private or family life; these obligations involved the adoption of measures designed to secure respect for private or family life (see *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91). She further referred to the case of *Ciubotaru v. Moldova*, confirming that the positive obligations included certain positive procedural safeguards, for example, an effective procedural framework whereby applicants could assert their rights under Article 8 under conditions of fairness, not least in relation to questions of proof and evidence (see *Ciubotaru v. Moldova*, no. 27138/04, § 51, 27 April 2010).

80. The applicant further reasoned that the interference with her rights had been neither in accordance with law nor necessary within the meaning of Article 8 § 2 of the Convention. As concerns the first of these considerations, the applicant's view was that by granting the closest relatives the right to express binding wishes in relation to organ removal, the domestic law had struck the right balance between private and family life and the rights of others. In the applicant's case, the domestic authorities had not fulfilled their duty to provide conditions for these wishes to be expressed. For the interference to be in "accordance with the law", the law had to be clear and had to provide the possibility of exercising the protected rights. As regards the second consideration, the applicant argued that the interference had not been proportionate. There had to be some mechanism to establish the wishes of a dying person through his or her closest relatives if that person had not made such wishes known during his or her lifetime. The existence of such a mechanism would be proportionate, imposing less of a limit on the right to private and family life and not hindering society's legitimate interests, since the circle of close relatives who could object to organ removal would remain very limited. In such cases, the lack of an answer from the relatives – after a specified period and after contacting them and requesting them to express their wishes – could be presumed to constitute consent. The applicant concluded that there had been no pressing social need which could have exempted the authorities from their duty of seeking to establish the wishes of the closest relatives concerning organ removal.

(b) The Government

81. The Government argued that the "presumed consent system" permitted interference with an individual's right to private life under

Article 8 of the Convention. They argued that the organ removal had been carried out in accordance with domestic law. The Law had implied the "presumed consent system" that had served the aim of protecting the heath and the rights of others. The Government pointed out that that the "presumed consent system" was not innovative and that Latvia was not even the only country employing this system; it was also instituted in eleven other States.

82. At the same time, the Government acknowledged that the issue of whether or not presumed consent was sufficient or explicit consent was required for organ removal for transplantation purposes had been neither resolved nor unanimously applied among the Contracting States themselves. They contended that the subject of debate was rooted in national legal traditions and there was no European consensus on the rigid application of either system. The Government argued that the legislator's action in establishing a "presumed consent system" fully complied with the generally accepted rule that the removal of organs from a deceased person could not take place against the expressed or presumed wishes of the person concerned. They submitted that the Member States could decide if and under what conditions – for example vis à vis the wishes of the deceased's next-of-kin – the removal could be carried out in the absence of the expressed wishes of the deceased. In this regard, the Government referred to Article 10 § 1 of Resolution (78) 29 (see paragraph 27 above). The Government reiterated that domestic law at the material time provided for the possibility to register a person's wishes in relation to the removal of his or her organs.

83. Given the wide margin of appreciation in this area, the Government emphasised that the "presumed consent" laid down in domestic law was a process which required a person or his or her closest relative to actively express their objection to certain procedures on that person's body. The Government argued that the relevant domestic law provision set out the procedure in accordance with which a person who objected to the removal of his or her organs or another person's organs (the applicant's son's organs in the present case) was to take positive steps to intervene, thereby effectively vetoing such removal.

84. The Government disagreed with the applicant, arguing that under the "presumed consent system" the applicant had not in any way been deprived of her right to object to the removal of her son's organs. The Government's submission was that the applicant herself had failed to take any steps to establish her son's whereabouts, obtain information about his medical condition, or make known in good time any wishes in relation to possible organ removal. They pointed out that when a deceased person's closest relatives were not present at the hospital, national laws did not impose any obligation on a doctor or on the medical institution itself to make specific inquires in order to ascertain if there was any objection from those persons

as regards possible organ removal. In this connection they referred to a domestic decision (in case no. 1840000303) where a city court had confirmed that section 4 of the Law provided for the right of the closest relatives to object to removal of the deceased person's organs, but did not impose any obligation on the medical expert to explain these rights to the relatives. In addition, they pointed to the opinions of legal and medical scholars who considered that complicated ethical issues arose due to the inevitable conflict between the devastating emotional impact of the death on the family and the speed with which a decision on organ transplantation had to be made.

2. The Court's assessment

(a) General principles

85. The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. Any interference under the first paragraph of Article 8 must be justified in terms of the second paragraph, namely as being "in accordance with the law" and "necessary in a democratic society" for one or more of the legitimate aims listed therein. The notion of necessity implies that the interference correlates with a pressing social need and, in particular, that it is proportionate to one of the legitimate aims pursued by the authorities (see *A, B and C v. Ireland* [GC], no. 25579/05, §§ 218-241, 16 December 2010).

86. The Court refers to the interpretation given to the phrase "in accordance with the law" in its case-law (as summarised in *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, §§ 95-96, ECHR 2008). Of particular relevance in the present case is the requirement for the impugned measure to have some basis in domestic law, which should be compatible with the rule of law, which, in turn, means that the domestic law must be formulated with sufficient precision and must afford adequate legal protection against arbitrariness. Accordingly the domestic law must indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise (see, most recently, *L.H.*, cited above, § 47).

(b) Application in the present case

87. As to the alleged interference, turning to the circumstances of the present case, the Court notes that following a car accident the applicant's son sustained life-threatening injuries of which, after an attempt to save his life had been made, he had died. Immediately after his death, his kidneys and spleen had been removed for organ transplantation purposes. The applicant, who was one of his closest relatives, was not informed of this and could not therefore exercise certain rights allegedly established under

domestic law – to express consent or refusal in relation to the removal of her son's organs.

88. The Court further notes that it has not been contested that both hospitals involved – Riga's First Hospital and Pauls Stradiņš Clinical University Hospital – were public institutions and that the acts and omissions of its medical staff were capable of engaging the responsibility of the respondent State under the Convention (see *Glass v. the United Kingdom*, no. 61827/00, § 71, ECHR 2004-II).

89. The Court considers that the above-mentioned circumstances are sufficient for it to conclude that there has been an interference with the applicant's right to respect for her private life under Article 8 of the Convention.

90. As to whether the interference was "in accordance with the law", the Court observes that Latvian law at the material time explicitly provided for the right on the part of not only the person concerned but also his or her closest relatives, including parents, to express their wishes in relation to removal of organs after that person's death (see paragraphs 36 and 37 above). The parties did not contest this. However, their views differed in so far as the exercise of this right was concerned. The applicant's view was that the domestic authorities had not fulfilled their duty to provide conditions whereby her wishes in relation to the removal of the applicant's son's organs for transplantation purposes could be expressed. According to the Government, the "presumed consent system" in Latvia was an active process and the persons involved were expected to take positive steps if they wished to veto any organ removal. It is the Court's view that these issues appertain to the quality of domestic law, in particular, whether the domestic legislation was formulated with sufficient precision or afforded adequate legal protection against arbitrariness in the absence of the relevant administrative regulation.

91. In this context, the Court observes that the principal disagreement between the parties is whether or not the law – which in principle afforded the closest relatives the right to express wishes in relation to imminent organ removal – was sufficiently clear as regards the implementation of this right. The applicant argued that there was no mechanism permitting her to exercise her right, but the Government considered that the mechanism was in place and that it was up to the closest relatives to take action if they wished to prevent any organ removal.

92. The Court must point out, however, that where national legislation is in issue, it is not the Court's task to review the relevant legislation in the abstract. Instead, it must confine itself, as far as possible, to examining the issues raised by the case before it (see *Taxquet v. Belgium* [GC], no. 926/05, § 83 *in fine*, ECHR 2010).

93. The Court is mindful of the fact that for almost three days, from 26 to 29 May 2002, the applicant's son's medical condition was very serious

and that he remained unconscious until his death was recorded at 1.20 a.m. on the latter date. Against this background, while clearly there was a medical emergency given his critical condition, it cannot be said that it had been practically impossible to contact his closest relatives or at least to make an attempt to contact them, informing them of his condition and making enquiries about the possible organ transplantation. Indeed, the applicant submits that she was in contact with the doctors at the Hospital; the Government deny this for the simple reason that no contact details were recorded on her son's medical card. Be that as it may, the starting point of the Court's analysis is that, as established by the domestic authorities, the applicant was not informed about the possible removal of her son's organs for transplantation purposes (see paragraphs 15, 18, 20 and 22 above).

94. As to whether the domestic law was formulated with sufficient precision, the Court notes that the domestic authorities, most notably the Security Police and the prosecutor's office, considered that the failure to inform the applicant about the possible removal of her son's organs did not contravene domestic law (see paragraphs 16, 20, 24-26 above). However, the Minister for Health was of the opinion that the applicant should have been informed; it has been mentioned that as a result of a proposal by a working group established in the Ministry, certain amendments to the Law had been proposed to improve clarity (see paragraph 23 above). These amendments were later adopted by Parliament with effect from 30 June 2004 (see paragraph 41 above). Such disagreement and the subsequent changes in the legislation indicate a lack of reasonable clarity as to the nature of the discretion conferred on the public authorities under domestic law at the time. While Latvian law set out the legal framework allowing the closest relatives to express their wishes in relation to organ removal for transplantation purposes, it did not define with sufficient clarity the scope of the corresponding obligation or the discretion conferred on medical practitioners or other authorities in this respect.

95. At the time when the applicant's son was still alive, between 26 and 29 May 2002, no procedure was laid down in law for State institutions to follow in order to establish that person's own views on organ transplantation (see paragraph 35 above). Following the death of the applicant's son, as explained by the prosecution, only sections 4 and 11 of the Law were applicable (see paragraphs 25-26 above). The Government referred to domestic case-law, confirming that there was no legal duty to inform the closest relatives about imminent organ removal, and argued that the Law implied that action was needed to be taken by the relatives. The Court reiterates that the principle of legality requires States not only to respect and apply, in a foreseeable and consistent manner, the laws they have enacted, but also, as a necessary part, to ensure the legal and practical conditions for their implementation (see *mutatis mutandis Broniowski v. Poland* [GC], no. 31443/96, §§ 147 and 184, ECHR 2004 V). In the

present case, it remains unclear how the "presumed consent system", as established under the Latvian law, operates in practice in the circumstances in which the applicant found herself, whereby she had certain rights as the closest relative but was not informed – let alone provided with any explanation – as to how and when these rights might have to be exercised.

96. As to whether the domestic law afforded adequate legal protection against arbitrariness, the Court observes that the Security Police admitted that the co-ordinator of the transplantation centre had been responsible for informing relatives of issues pertaining to organ transplantation (see paragraph 20 above), but according to the prosecution there was no obligation laid down in law to obtain their consent (see paragraph 25 above). The prosecution also explained that the relevant provisions prohibited organ removal in cases where a refusal or an objection had been received but not in cases where the wishes of the closest relative had not been established (see paragraph 26 above). The Government, while arguing that the removal of organs from the deceased person could not take place against the expressed or presumed wishes of the person concerned, nevertheless admitted that it was not necessary for the medical expert to explain the rights of the closest relatives or to make any inquires as to their wishes. The Court notes a considerable uncertainty as to the applicable law in these various positions. As noted by the applicant and uncontested by the Government, several medical examinations were carried out prior to the actual organ transplantation to establish whether the applicant's son's organs were in fact compatible with the potential recipient's body. The amount of time required to carry out such examinations, short as it might have been, could have been sufficient to provide a real opportunity for the applicant to express her wishes in the absence of those of her son. As noted, however, no mechanism was in place for the applicant to express her wishes, which she was entitled to do under domestic law.

97. In the light of the above-mentioned considerations, the Court cannot find that the applicable Latvian law was formulated with sufficient precision or afforded adequate legal protection against arbitrariness.

98. The Court accordingly concludes that the interference with the applicant's right to respect for her private life was not in accordance with the law within the meaning of Article 8 § 2 of the Convention. Consequently, there has been a violation of Article 8. Having regard to this conclusion, the Court does not consider it necessary to review compliance with the other requirements of Article 8 § 2 in this case (see, for example, *Kopp v. Switzerland*, 25 March 1998, § 76, *Reports* 1998-II, and *Heino v. Finland*, no. 56720/09, § 49, 15 February 2011).

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

99. The applicant alleged that she had been subjected to inhuman and degrading treatment on account of the fact that the removal of her son's organs had been carried out without his prior consent or that of the applicant herself.

100. The Government contested that argument.

101. The Court notes that this complaint is linked to the complaint examined above and must therefore likewise be declared admissible.

102. Having regard to the finding relating to Article 8 (see paragraphs 97 and 98 above), the Court considers that it is not necessary to examine whether, in this case, there has also been a violation of Article 3 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

103. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

104. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage suffered because of a violation of Article 8 of the Convention.

105. The Government considered that the applicant did not sufficiently demonstrate that she had incurred non-pecuniary damage to the extent claimed. The Government considered the amount claimed by the applicant excessive and exorbitant. With reference to the case of *Shannon v. Latvia* (no. 32214/03, § 84, 24 November 2009), the Government considered that the finding of a violation alone would constitute adequate and sufficient compensation.

106. Having regard to the nature of the violation found in the present case and deciding on an equitable basis, the Court awards the applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

107. The applicant also claimed EUR 500 for the costs and expenses incurred before the Court.

108. The Government did not contest the applicant's claim under this head. They considered it sufficiently substantiated and reasonable.

109. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 500 covering costs under all heads.

C. Default interest

110. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning Articles 3 and 8 of the Convention admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds* that it is not necessary to examine whether there has been a violation Article 3 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 500 (five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 June 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Päivi Hirvelä
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate concurring opinion of Judge Wojtyczek is annexed to this judgment.

P.H.
F.A.

CONCURRING OPINION OF JUDGE WOJTYCZEK

1. I agree with the conclusions reached by the majority; however, I have serious doubts about certain points in the reasoning.

2. The judgment states that the applicant was not required to lodge a constitutional complaint. I agree with this conclusion; however, I would have given different reasons. In my view, it suffices to state that the Latvian Government did not provide sufficient evidence that the remedy would have been effective in the circumstances of the case.

There seems to be a contradiction in the reasons set out in the Court's judgment with regard to the nature of the main legal issue in the instant case. On one hand, when considering the question of the exhaustion of domestic remedies, the majority affirms (in paragraph 70) that "the applicant's complaint relates to the application and interpretation of domestic law, in the light particularly of the absence of relevant administrative regulation; it cannot be said that any issues of compatibility arise". For the purpose of deciding on the issue of the complaint's admissibility, the nature of the legal issue at stake is the manner in which the law is construed and applied, not the content of the law. At the same time, the judgment states (in paragraph 90) that the issues under consideration "appertain to the quality of domestic law, in particular, whether the domestic legislation was formulated with sufficient precision or afforded adequate legal protection against arbitrariness in the absence of the relevant administrative regulation." Thus, for the purpose of considering the merits of the case, the main legal issue is no longer the interpretation and application of the law, but its content. If this is so, then the issue of the compatibility of the legislation with the principle of its foreseeability and precision inevitably arises. *Prima facie* there is no obstacle to lodging a constitutional complaint against legislation lacking precision and pertaining to fundamental constitutional rights. I note that in many countries a statute lacking sufficient precision and clarity may be declared contrary to the national Constitution by a constitutional court or by other courts entrusted with the constitutional review of legislation.

3. The legitimacy and the credibility of the European Court of Human Rights depends, among other things, on the depth and precision of the legal argumentation it develops to justify its decisions and judgments. The instant case raises fundamental questions concerning the substantive and temporal scope of human rights protection. I regret that the majority found it unnecessary to address these issues in a more precise and detailed way. Avoiding discussion of fundamental human rights questions which arise in cases under consideration, and which are of utmost relevance in ascertaining the correct judicial answer, does not seem to be the most efficient argumentative strategy for a human rights court.

The effectiveness of the European system of human rights protection depends on a precise delimitation of the international obligations of the States. Therefore, one of the prerequisites for adjudication under the Convention is the definition of the substance and scope of the rights protected. In the instant case, the correct methodology required defining with sufficient precision the notions of private and family life. To date the Court has not formulated such a definition. To justify such a situation, it reiterates in the present case the view that "concepts of private and family life are broad terms not susceptible to exhaustive definition" (see paragraph 77). I cannot agree with such an approach, which entails a high level of uncertainty as to the meaning and scope of Article 8 of the Convention.

Furthermore, the present case raises the question of the necessity of ensuring protection of human rights after the death of the right-holder. The reasoning rightly stresses that the rights of the deceased, Mr Petrovs, and his mother, the applicant in the present case, are closely related (see paragraph 56). However, not only does this entire question deserve deeper consideration, but, in my view, the different rights at stake and their nature were not properly identified in the judgment.

4. The judgment reiterates the view, expressed many times by the Court, that an application may not be brought in the name of a deceased person. I am not persuaded that this view is correct. In any event, such a statement is not convincingly supported by the applicable rules of treaty interpretation. The wording of the Convention does not rule out adopting a less categorical approach in this respect. The possibility of lodging an application in the name of a deceased person depends on the nature of the right under consideration and, more precisely, on the nature of the specific entitlement coming within the scope of the particular Convention right in question.

It is necessary to stress in this context, that various international instruments, and also some national constitutions, proclaim specific human rights which are intended to ensure protection after one's death. Such rights are proclaimed in several international documents quoted in the judgment. In particular, they protect every person against post-mortem removal of one's organs against one's wishes. This protection extends beyond the death of the right-holder. It is obvious that death cannot extinguish such rights. The enforceability of such rights depends on the attitude of the closest members of the family, who act as guardians of the deceased person's rights. The very nature of the rights in question entails special duties and a particular responsibility on the relatives.

5. The reasoning in the judgment seems to focus on the right of the applicant to oppose the transplantation of her deceased son's organs. Such a right was recognised by the Latvian legislation. The wording in the reasoning suggests that the applicant's right to object to the transplantation of her deceased son's organs is one of her personal rights protected under

the Convention. It may further suggest that this right may be exercised freely by the relatives, who can chose to agree or to object to transplantation.

In my view, however, the whole situation is much more complex. The right of the relative of a deceased person to object to transplantation is not her or his own personal right, and may not be exercised *ad libitum*. In such situations, the relatives do not act as autonomous right-holders, but as depositaries of a right which belonged to the deceased person. They should exercise this right according to the wishes of the deceased. This important aspect of the right under consideration has not been sufficiently stressed in the judgment.

At the same time, there is no doubt that the applicant's human rights were affected and infringed. In my view, protection of family life under Article 8 of the Convention encompasses the right to respect for the dignity of a deceased close relative. In particular, a mother may legitimately claim the right to respect for the dignity of her deceased son.

In the instant case, an organ was illegally taken from a deceased person for the purpose of transplantation, without his consent and without consent being expressed in his name by his closest relatives. The removal of an organ from the deceased person in such circumstances violated that person's right. At the same time, such treatment violated the applicant's own right to respect for the dignity of her deceased son. Her right was violated not because she could not assert a personal entitlement to decide on transplantation of her son's organs, but because she was denied the possibility to express her son's wishes.

6. I agree with my colleagues that the Latvian legislation pertaining to the different rights at stake in the instant case was not compatible with the Convention standards. Therefore, I voted in favour of finding a violation of Article 8 of the Convention. However, I am not persuaded that we should lay so much stress on the absence of relevant administrative regulation (see paragraphs 70 and 90 of the judgment). Firstly, why is an administrative regulation the preferred solution, rather than a better drafted statute? Such a stance would require more thorough consideration under the Latvian Constitution. Secondly, the Court is entering the domain of the States' constitutional autonomy. In any event, it is for the Latvian authorities to identify the level of the legal hierarchy at which the legal rules require modification.