

January 2015

Elberte v. Latvia - 61243/08

Judgment 13.1.2015 [Section IV]

Article 3

Degrading treatment

Emotional suffering caused by removal of tissue from the applicant's deceased husband's body without her knowledge or consent: *violation*

Article 8

Article 8-1

Respect for private life

Lack of clarity in domestic law on consent of close relatives to tissue removal from dead body: *violation*

Facts – Following the death of the applicant's husband in a car accident, tissue was removed from his body during an autopsy at a forensic centre and sent to a pharmaceutical company in Germany with a view to creating bio-implants, pursuant to a State-approved agreement. When the body was returned to the applicant after the completion of the autopsy its legs were tied together. The applicant only learned of the removal of the tissue two years later, in the course of a criminal investigation into allegations of the wide-scale illegal removal of organs and tissues from cadavers. However, no prosecutions were ever brought as the time-limit had expired.

Law – Article 8: The domestic authorities' failure to secure the legal and practical conditions to enable the applicant to express her wishes concerning the removal of her deceased husband's tissue constituted an interference with her right to respect for private life.

As to the lawfulness of that interference, the question was whether the domestic legislation was formulated with sufficient precision and afforded adequate legal protection against arbitrariness in the absence of relevant administrative regulation.

As to the first aspect, the domestic authorities had disagreed over the scope of the domestic legislation, with the forensic centre and security police considering there existed a system of "presumed consent" while the investigators thought that the Latvian legal system relied on the concept of "informed consent" with removal permissible only with the consent of the donor (during his or her lifetime) or of the relatives. By the time the security police accepted the prosecutors' interpretation and decided that the applicant's consent had been required, they were out of time to bring a criminal prosecution.

This disagreement among the authorities inevitably indicated a lack of sufficient clarity. Indeed, although Latvian law set out the legal framework for consenting to or refusing tissue removal, it did not clearly define the scope of the

corresponding obligation or the discretion left to experts or other authorities in this regard. The Court noted that the relevant European and international materials on this subject attached particular importance to establishing the relatives' views through reasonable enquiries. The principle of legality likewise required States to ensure the legal and practical conditions for implementation of their laws. However, the applicant had not been informed how and when her rights as closest relative could be exercised or provided with any explanation.

As to whether the domestic law afforded adequate legal protection against arbitrariness, it had been important, given the large number of people from whom tissue had been removed, for adequate mechanisms to be put in place to balance the relatives' right to express their wishes against the broad discretion conferred on the experts to carry out removals on their own initiative, but this was not done. In the absence of any administrative or legal regulation on the matter, the applicant had been unable to foresee how to exercise her right to express her wishes concerning the removal of her husband's tissue.

Consequently, the interference with her right to respect for her private life was not in accordance with the law within the meaning of Article 8 § 2.

Conclusion: violation (unanimously).

Article 3 (*substantive aspect*): The applicant's suffering had gone beyond that inflicted by grief following the death of a close family member. The applicant had had to face a long period of uncertainty, anguish and distress as to which organs or tissue had been removed, and the manner and purpose of their removal. Following the initiation of the general criminal investigation, the applicant had been left for a considerable period of time to anguish over the reasons why her husband's legs had been tied together when his body was returned to her for burial. Indeed, she had discovered the nature and amount of tissue that had been removed only during the proceedings before the European Court.

The lack of clarity in the regulatory framework as regards the consent requirement could only have intensified her distress, regard being had to the intrusive nature of the acts carried out on her husband's body and the failure of the authorities themselves during the criminal investigation to agree on whether or not they had acted lawfully when removing tissue and organs from cadavers.

Finally, no prosecution had ever been brought for reasons of prescription and uncertainty over whether the authorities' acts could be considered illegal. The applicant had thus been denied redress for a breach of her personal rights relating to a very sensitive aspect of her private life, namely the right to consent or object to the removal of tissue from her dead husband's body.

In the specialised field of organ and tissue transplantation, it was common ground that the human body had to be treated with respect even after death. Indeed, international treaties including the Convention on Human Rights and Biomedicine and the Additional Protocol had been drafted to safeguard the rights of organ and tissue donors, living or deceased. Moreover, respect for human dignity formed part of the very essence of the European Convention. Consequently, the suffering caused to the applicant had undoubtedly amounted to degrading treatment.

Conclusion: violation (unanimously).

Article 41: EUR 16,000 in respect of non-pecuniary damage.

(See also *Petrova v. Latvia*, 4605/05, 24 June 2014, [Information Note 175](#); *Svinarenko and Slyadnev v. Russia* [GC], 32541/08 and 43441/08, 17 July 2014, [Information Note 176](#); *Salakhov and Islyamova v. Ukraine*, 28005/08, 14 March 2013, [Information Note 161](#); and the Factsheet on [Health](#))

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