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

SECOND SECTION

CASE OF ELLI POLUHAS DÖDSBO v. SWEDEN

(Application no. 61564/00)

JUDGMENT

STRASBOURG

17 January 2006

FINAL

03/07/2006

In the case of Elli Poluhas Dödsbo v. Sweden,

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

Jean-Paul Costa, *President*,
András Baka,
Rıza Türmen,
Karel Jungwiert,
Mindia Ugrekhelidze,
Antonella Mularoni,
Elisabet Fura-Sandström, *judges*,
and Sally Dollé, *Section Registrar*,

Having deliberated in private on 13 December 2005,

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

PROCEDURE

1. The case originated in an application (no. 61564/00) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swedish national, Mrs Elli Poluha ("the applicant"), on 11 August 2000.

2. The applicant was born in 1913. She died on 21 February 2003. Her five children and sole heirs decided to pursue the application. They were represented by Mr S.S. Poluha. The respondent Government were represented by their Agent, Mrs E. Jagander of the Ministry of Foreign Affairs.

3. The applicant, relying on Article 8 of the Convention, complained of the refusal of the authorities and the County Administrative Court to allow her to transfer the urn containing her husband's ashes to the family burial plot in Stockholm.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 31 August 2004, the Chamber declared the application partly admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. In 1938 the applicant married an Austrian national of Ukrainian origin who had entered Sweden that same year. Five children were born of the marriage. The family lived in Fagersta, where the applicant's husband worked as a sales manager until his death on 11 May 1963. His ashes were buried in a family grave at a cemetery in Fagersta. The grave has room for at least eight other urns. The contract on the burial plot is to expire on 31 December 2019, but will automatically be renewed for twenty-five years when a new burial takes place there. Moreover, the person in possession of the right to the burial plot when the contract is about to expire is entitled to renew it.

9. In 1980 the applicant moved to Västerås to be closer to her children. The distance between Fagersta and Västerås is 70 kilometres.

10. On 15 August 1996 the applicant requested the cemetery authorities (*Västanfors-Västervåla Kyrkogårdsförvaltning*) to allow the transfer of her husband's urn to her family burial plot in Stockholm, which had been established in 1945 and had room for thirty-two urns. The applicant's parents were buried there and the applicant intended to be buried there after her death. Stockholm is situated 180 kilometres from Fagersta. The applicant submitted in addition that she had no connection to Fagersta any more, that all her children agreed to the removal and that she was sure her husband would not have objected to the transfer.

11. By a decision of 16 September 1996, her request was refused by the authorities in deference to the notion of "a peaceful rest" under the Funeral Act (*Begravningslagen*, 1990:1144).

12. On appeal, the County Administrative Board in Västmanland (*Länsstyrelsen i Västmanlands Län*) upheld the refusal.

13. The applicant appealed to the County Administrative Court in Västmanland (*Länsrätten i Västmanlands Län*) which, by a decision of 5 September 1997, found against her. It stated as follows:

> "Pursuant to Chapter 1, section 6, of the Funeral Act, remains or ashes which have been buried in a cemetery may not be removed from a burial plot in order to be buried in another burial plot. However, permission may be granted if there are special reasons therefor and the place to which the remains or ashes are to be removed has been determined.
>
> According to the explanatory notes to the Act (Prop. 1990/91:10, pp. 35-37), the decision on a request for the removal of remains or ashes shall be restrictive, having regard to the deceased's right to a peaceful rest. Determination [of such a request] should be guided by the wishes expressed by the deceased whilst alive. As a general rule, it must be assumed that such a wish, if expressed, was taken into account when the

burial took place. The paramount condition for allowing a transfer is obviously that it would not contravene the wishes expressed by the deceased when alive. Moreover, some connection between the deceased and the intended destination would usually be required.

In the present case [the applicant's husband] worked as a sales manager at the Fagersta factory until 1958. He died on 11 May 1963, and the urn containing his ashes was placed in grave no. 208/017, quarter no. 208, in Västerfors. [The applicant's husband] came from Ukraine and had a Catholic Church tradition. It appears that he did not express any wishes about his burial when he was alive.

The County Administrative Court makes the following assessment:

Making an overall assessment, the County Administrative Court finds that [the applicant's husband] did not have a closer natural connection to Stockholm than he had to Fagersta. No other reasons have been submitted which could justify the disturbance of the peace of the grave after thirty-four years."

14. The applicant's request for leave to appeal was refused by the Administrative Court of Appeal in Stockholm (*Kammarrätten i Stockholm*) on 29 October 1997, and by the Supreme Administrative Court (*Regeringsrätten*) on 22 February 2000.

15. The applicant died on 21 February 2003. In accordance with her wishes, she was buried in her family burial plot in Stockholm.

II. RELEVANT DOMESTIC LAW AND PRACTICE

16. Domestic provisions of relevance to the present case are to be found in the Funeral Act 1990 (*Begravningslagen* – "the Act"), which came into force on 1 April 1991. Previously, they were contained in the Funeral Service Act 1957 (*Lagen om jordfästning m.m.*).

It is mainly the parishes of the Church of Sweden which are responsible for burial grounds (Chapter 2, section 1, of the Act) and for decisions concerning, *inter alia*, graves and burials. It is also in the first instance for the church authorities to determine requests to move the remains or ashes of a deceased person (Chapters 5, 6 and 7 of the Act). A decision may be appealed to the county administrative board (Chapter 11, section 6, of the Act). Further appeals lie with the competent administrative court of appeal and, subject to the granting of leave to appeal, with the Supreme Administrative Court (Chapter 11, section 7, of the Act).

When a person dies, his or her wishes concerning cremation and burial should, as far as possible, be followed (Chapter 5, section 1 of the Act). This was also the rule under the Funeral Service Act 1957, the legislation applicable at the time of the applicant's husband's death. If there is a dispute between the survivors about where the burial should take place, it is for the county administrative board to decide (Chapter 5, section 4, of the Act).

Once remains or ashes have been buried, moving them from one place to another is in principle not allowed. However, permission to move remains or ashes may be granted if special reasons exist and if the place to which they will be moved has been clearly stated (Chapter 6, section 1, of the Act). However, the grave must not be opened in such a way that the remains or ashes are damaged (Chapter 2, section 13, of the Act).

The provisions of Chapter 6, section 1, of the Act are based on respect for the sanctity of the grave. This is also why the provisions regarding the removal of remains and ashes are restrictive; a deceased's grave must be left in peace and may only be disturbed under special circumstances. According to the explanatory notes to the Act (Government Bill 1990/91:10, p. 35), the removal of remains or ashes may be permitted if a mistake occurred at the time of burial, if the remains of a husband, wife, parent or young child are to be brought together or, in some cases, if a refugee or immigrant wishes to take the remains of a deceased relative back to his or her country of origin. The deceased's own wishes should serve as guidance for the transfer decision. When such wishes are not known, regard should be had to the deceased's attachment to the place where he or she is buried. As a rule, removal should not be permitted if the deceased is buried in a place where he or she was active for a large part of his or her life. If, however, the cemetery is situated in a place where the deceased lived only temporarily, removal may be permitted.

In addition, the deceased should have had some connection with the place to which the remains are to be removed. According to the explanatory notes (ibid., pp. 36-37), examples of such a connection could be that the deceased grew up in that place, had relatives or a family grave there, or perhaps had a holiday home there. As regards husbands and wives, it may be permitted to move one of the deceased's remains to bring them together in a common grave, especially if the one who died last cannot, for some reason, be buried in the same place as the first. Particular regard may be had to the wishes of the last survivor concerning the common burial place.

17. In 1994 the Supreme Administrative Court ruled on several cases concerning the interpretation of Chapter 6, section 1, of the Act (*Regeringsrättens Årsbok* 1994 ref. 93 I-IV). These judgments reveal a restrictive interpretation. For instance, the fact that the surviving relatives have moved, that there is a long distance between the burial place and their new home, or that public transport to a burial place may be lacking, are not considered to be sufficient grounds for a transfer. In three cases the Supreme Administrative Court, referring to the explanatory notes to the Act and the reasons stated in the requests, found that those reasons were not sufficient to permit removal of the deceased's remains or ashes. These cases concerned, respectively, a fiancée who wanted to move her fiancé's remains, a husband who wanted to move his wife's remains, and a daughter who wanted to move her father's remains. In another case, however, which

concerned a mother's request to move her child's remains to her husband's burial place, the Supreme Administrative Court found that there were sufficient reasons to allow the transfer.

In the case concerning a daughter's request to move her father's remains, the former wanted to bury the latter in the same cemetery as the one in which her recently deceased mother had chosen to be buried. The Supreme Administrative Court noted that the complainant's father had lived and worked in Malmö, and was buried there in his grandfather's family grave. Having regard to the father's connection to Malmö, the Supreme Administrative Court found no reason to presume that his burial there had been a mistake, and it held that there were no other sufficient reasons, after thirty years, to permit the removal of the remains.

THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

18. The applicant complained that the refusal to allow her to transfer the urn containing her husband's ashes to the family burial plot in Stockholm was in breach of Article 8 of the Convention, the relevant parts of which provide:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder ..., for the protection of ... morals, or for the protection of the rights and freedoms of others."

19. The Government did not dispute that the refusal to grant permission to remove the urn from one burial place to another involved an interference with the applicant's private life. They maintained, however, that the interference was in accordance with the law, that it served legitimate aims and that it was justified under Article 8 § 2 of the Convention.

20. As to the legitimate aims, the Government observed that the principle of the sanctity of graves had a long-standing tradition and was founded on respect for the deceased, which was common to all mankind and existed in most cultures. Thus, the strict approach taken by the law, and by the public authorities in its application, served to prevent disorder and to protect morals in society at large. In addition, the Government submitted that this restrictive approach was also important in order to prevent conflicts on the subject arising amongst relatives. Moreover, cemeteries and burial places should not be regarded as temporary repositories for the deceased's

remains or ashes. In other words, it could be said that what was at stake was the right of the living to be assured that, after death, their remains would be treated with respect. Thus, in the present case, the interference also served to protect the rights of others.

21. As to the issue of necessity, the Government submitted that States should be afforded a wide margin of appreciation in cases of this kind, where the authorities and the courts had to balance the interests of the person requesting the removal with society's role in ensuring that graves were not disturbed. In addition, in the present case there were no indications that the applicant's husband had not been buried in accordance with his wishes; he was buried in the region where he had lived and worked for twenty-five years; he had settled in Fagersta with his wife at the start of their marriage and raised five children there; the burial site was a family grave, large enough for his entire family, eventually. It should also be noted that, after her husband's death in 1963, the applicant continued to live in Fagersta until 1980. Moreover, there was no obstacle to the applicant having her final resting place in the same cemetery as that of her husband.

22. The applicant disagreed with the Government and maintained that the burial plot in Stockholm was the "real" family burial plot, as shown, *inter alia*, by the fact that the contract on it was irrevocable, whereas that in Fagersta was only temporary. In addition, the applicant's children had a connection with Stockholm but not with Fagersta any longer.

23. The Court reiterates that the concepts of "private and family life" are broad terms not susceptible to exhaustive definition (see, for example, *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III, and *Pannullo and Forte v. France*, no. 37794/97, § 35, ECHR 2001-X). It notes the findings of the Commission that an applicant's wish to have his ashes spread over his own land fell within the sphere of private life (see *X v. Germany*, no. 8741/79, Commission decision of 10 March 1981, Decisions and Reports 24, p. 137). However, in that case, the Commission also found, given the personal choices involved, that not every regulation on burials constituted an interference with the exercise of this right, and thus it declared the application inadmissible.

24. In the present case, the Government have not disputed that the refusal to allow the removal of the urn involved an interference with the applicant's private life. The Court does not consider it necessary to determine whether such a refusal involves the notions of "family life" or "private life", cited in Article 8 of the Convention, but will proceed on the assumption that there has been an interference, within the meaning of Article 8 § 1 of the Convention.

25. Accordingly, it must be determined whether that interference was justified under Article 8 § 2, or more specifically whether the domestic authorities and courts were entitled to consider that the refusal to allow the removal of the urn was "necessary in a democratic society" for the

prevention of disorder, for the protection of morals, and/or for the protection of the rights of others. This assessment entails weighing the individual's interest in having a burial transfer against society's role in ensuring the sanctity of graves. In the Court's view, this is such an important and sensitive issue that the States should be afforded a wide margin of appreciation.

26. In the present case, on the one hand, the removal of the urn appears, in practical terms, to be quite easy and no public-health interests seem to be involved. On the other hand, there are no indications that the applicant's husband was not buried in accordance with his wishes, on the contrary. In principle, it must be assumed that account was taken of any such wish when the burial took place. Moreover, at the relevant time, although he had no connection to Stockholm, the applicant's husband or the applicant herself, or both together, could have chosen that he be buried with his in-laws in the family burial plot in Stockholm, established in 1945. Instead, when the applicant's husband died in 1963, the family burial plot in Fagersta was established and he was buried there, in the town where he had lived for twenty-five years, since his arrival in Sweden, and where he had worked and raised his family.

27. Finally, nothing prevented the applicant from having her final resting place in the same burial ground as her husband, albeit in Fagersta, the town where she continued to live until 1980, seventeen years after her husband's death.

28. The Court finds that the Swedish authorities took all relevant circumstances into consideration and weighed them carefully against each other; the reasons given by them for refusing the transfer of the urn were relevant and sufficient; and the national authorities acted within the wide margin of appreciation afforded to them in such matters.

29. Accordingly, there has been no violation of the applicant's rights under Article 8 of the Convention.

FOR THESE REASONS, THE COURT

Holds, by four votes to three, that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 17 January 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé Registrar	Jean-Paul Costa President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Judges Türmen, Ugrekhelidze and Mularoni is annexed to this judgment.

J-P.C.
S.D.

JOINT DISSENTING OPINION OF JUDGES TÜRMEN, UGREKHELIDZE AND MULARONI

We regret we are unable to agree with the majority that there has been no violation of the applicant's rights under Article 8 of the Convention.

According to domestic provisions, permission to move remains or ashes may be granted if special reasons exist and if the place to which they will be moved has clearly been stated. Nevertheless, the grave must not be opened in such a way that the remains or ashes are damaged.

According to the explanatory notes to the Funeral Act 1990, the removal of remains or ashes may be permitted if the remains of spouses are to be brought together. It may be permitted to move one of the deceased's remains to bring them together in a common grave, especially if the one who died last cannot, for some reason, be buried in the same place as the first. Particular regard may be had to the wishes of the last survivor concerning the common burial place (see paragraph 16 of the judgment).

The Government did not dispute that the refusal to grant permission to remove the urn from one burial place to another involved an interference with the applicant's private life. They maintained, however, that the interference was in accordance with the law, that it served legitimate aims and that it was justified under Article 8 § 2 of the Convention.

As to the legitimate aims relied on by the Government (see paragraph 20 of the judgment), we are firmly convinced that the principle of the sanctity of graves is a very important one and must be respected. However, we have difficulty in seeing how the removal of the urn of the applicant's husband from a burial plot in Fagersta to the family burial plot in Stockholm could infringe that principle. The requested removal would have taken place from one sacred place to another, without any risk of disorder or outrage to morals. No conflict amongst the relatives arose, both the applicant and her five children and sole heirs having agreed to the removal. Although we agree that the removal of remains or ashes should be strictly regulated so as to ensure their respect, nothing in the circumstances of the case could make us believe that the applicant and her children regarded cemeteries and burial places as temporary repositories for the deceased's ashes. Regard for the sanctity of graves and respect for the deceased can be shown in many ways, including by visiting graves or placing flowers on them. We consequently doubt that it could be said that the interference with the applicant's rights under Article 8 pursued a legitimate aim.

However, even assuming that the interference with the applicant's rights under Article 8 could be said to pursue one or more legitimate aims, we consider unconvincing the Government's arguments (see paragraph 21 of the judgment) and those of the majority (see paragraphs 26 and 27) concerning the "necessity of the interference in a democratic society".

As the majority highlights, the removal of the urn appears, in practical terms, to be quite easy and no public-health interests seem to be involved: such matters were never raised by the domestic authorities. The applicant's husband died thirty-four years before the 5 September 1997 decision of the County Administrative Court in Västmanland, and his remains were in an urn.

It is true that there are no indications that the applicant's husband was not buried in accordance with his wishes. However, it is also true that he did not express any wish as to his resting place, and the Funeral Act 1990 provides for particular regard to be had for the wishes of the last surviving spouse concerning the common burial place.

When her husband died in May 1963, the applicant and her children were living in Fagersta. It is for us perfectly understandable that the applicant should have decided at that time to have her husband buried in the town where she and her children lived, since it would make it easier for the whole family to visit the cemetery. In 1980, when the children had grown up, the applicant moved to Västeras to be closer to them. In 1996, having decided to be buried after her death in the family burial plot in Stockholm, she asked the cemetery authorities and then the national courts to allow the transfer of her husband's urn to her family burial plot in Stockholm, specifying that she had no connection to Fagersta anymore, that all her children agreed to the removal and that her husband would not have objected to the transfer.

In addition, the burial plot in Stockholm is a family plot and the contract on it is irrevocable, whereas that in Fagersta is only temporary.

In view of all these considerations, we are of the opinion that the applicant's interest in moving the ashes of her spouse to the family grave in Stockholm weighs more heavily than the public interest relied on by the Government.

We therefore conclude that, even assuming that the interference with the applicant's rights under Article 8 pursued legitimate aims, it was not necessary in a democratic society. We consequently consider that there has been a violation of Article 8 of the Convention.