

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

FIRST SECTION

CASE OF MARIĆ v. CROATIA

(Application no. 50132/12)

JUDGMENT

STRASBOURG

12 June 2014

FINAL

12/09/2014

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 Marić v. Croatia,

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

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Linos-Alexandre Sicilianos,
Erik Møse,
Ksenija Turković,
Dmitry Dedov, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 20 May 2014,

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

PROCEDURE

1. The case originated in an application (no. 50132/12) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Miodrag Marić ("the applicant"), on 31 July 2012.

2. The applicant was represented by Mr P. Marović, a lawyer practising in Split. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

3. The applicant complained of a violation of his right to respect for his private and family life under Article 8 of the Convention.

4. On 3 June 2013 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1966 and lives in Žrnovica.

A. Background to the case

6. On 7 August 2003 the applicant's wife, in the ninth month of pregnancy, gave birth to a stillborn child at Split Clinical Hospital (*Kliničkibolnički centar Split*), a publicly owned health institution.

7. After the birth the applicant and his wife did not want to take their child's remains, so the hospital assumed the responsibility for the body.

8. An autopsy carried out in the hospital on 18 August 2003 showed that the child had died as a result of gestational complications.

9. On 13 October 2003 the hospital disposed of the child's body together with other clinical waste (human tissue and amputated body parts). The clinical waste was taken by the hospital's contractor, company L., to the Zagreb cemetery for cremation.

10. Soon afterwards the applicant and his wife started to enquire about their child's burial, but were unable to obtain any specific information.

B. Civil proceedings instituted by the applicant

11. On 2 June 2004 the applicant and his wife brought a civil action against the hospital in the Split Municipal Court (*Općinski sud u Splitu*), seeking damages for distress caused by the manner in which it had disposed of their child's body. They argued that they had given their consent to an autopsy and burial of their child, but the hospital had failed to show that they had performed the burial and to inform them where it had taken place.

12. The hospital raised the defence that they had acted in accordance with section II of the Ministry of Health's Instructions on the Disposal of Clinical Waste, allowing them to dispose of the child's body together with other clinical waste.

13. At a hearing on 24 November 2004 the court heard evidence from pathologist Š.A., who carried out the autopsy of the child's body. He explained that in situations in which parents did not want to assume responsibility for the body of their stillborn child, the hospital was required by law to treat the body as clinical waste and to dispose of the remains by cremation or burial. He further explained that before concluding the contract with company L. in 2002, the hospital had buried bodies of stillborn babies in a communal grave. Company L. had then suggested cremating the bodies rather than burying them, because the communal grave had been full. The applicant's child's remains had therefore been packed together with other clinical waste and taken to the Zagreb cemetery for cremation. The applicant's wife disputed Š.A.'s version of events, arguing that Š.A. had first told her that her baby had been buried. Š.A. replied that he had initially thought that to be the case, not finding out until later what had actually happened.

14. Another hearing was held on 1 February 2005, at which a nurse from the hospital, M.K., gave oral evidence. She testified that after the child's body had been taken to the pathology department, she had spoken to the applicant who had told her that he wanted the hospital to bury his child. She had seen the applicant on another occasion, and he had told her that he did not want to assume responsibility for the funeral. When the applicant had

again approached her to ask where the burial had taken place, she had told him that his child had been buried in the communal grave, although she had not been sure, but in any event she had considered cremation in the communal grave to be a form of burial. The witness also expressed her regret that the applicant might have been under the impression that the child would be buried in an individual grave. The applicant disputed M.K.'s version of events, asserting that he had asked for all the documents and invoices concerning the burial to be forwarded to him. Nurse M.K. admitted that that was true, but that no such documents existed, which she had told the applicant already.

15. At the same hearing two other witnesses, Z.S. and V.T., technicians in the hospital's pathology department, gave evidence. Z.S. testified that the hospital had abandoned its practice of burials in 2002 and had started cremations. The same procedure had been applied in the case of the applicant's stillborn child, whose remains had been taken together with other clinical waste and cremated. V.T. confirmed that he had personally placed the remains of nine children in a box, which had been taken away by company L., but he did not know what had happened to them later.

16. At a hearing on 23 March 2005 the director of company L. testified that the remains of the applicant's child had not been buried at the cemetery, but had been disposed of with other clinical waste and cremated. He explained that there was a communal grave in which bodies could be buried, if parents so requested and were granted the necessary authorisation. Otherwise the bodies were cremated. The practice was to place the bodies in one large wooden box together with other clinical waste and to take them to the Zagreb cemetery for cremation.

17. At the same hearing the applicant and his wife Ž.M. gave their oral evidence. Ž.M. stated that she had been in a state of shock after the birth of her stillborn child and had been suffering psychologically ever since. They had therefore requested that nurse M.K. arrange for the child to be buried in the local graveyard. As soon as she was feeling better, Ž.M. had requested information from the hospital about the child's burial and was told that her child was buried in the local graveyard. However, at the graveyard she was told that no such burial had taken place. For some time afterwards nobody could tell her what had happened to her child's body, until a meeting was held in November 2003 at the hospital where she learned that the child had been cremated at the Zagreb cemetery. She and her husband had contacted the cemetery, who replied that they did not know anything about the cremation of their child, and that the remains of a stillborn child would not be cremated without the relevant documentation. The applicant testified that nurse M.K. had never advised him exactly what would happen to his child's body, and that he would have never allowed his child to be cremated in such a manner. He also confirmed that he had learned from the Zagreb cemetery

that the body of a stillborn child would not be cremated without the relevant procedural documentation.

18. On 6 April 2005 the Split Municipal Court dismissed the civil action on the grounds that after the applicant and his wife had declined to assume responsibility for the body, the hospital had, in accordance with the law, disposed of the child's body together with other clinical waste. The relevant part of the judgment reads:

> "There is no dispute between the parties that on 7 August 2003 [Ž.M.] gave birth to a stillborn child, and that an autopsy of the remains and placenta has been carried out, and that in the pathologist's office [the applicant] declined nurse M.K.'s suggestion that he assume responsibility for the burial of the stillborn child. The defendant therefore, in accordance with the Instructions on the Disposal of Clinical Waste (Official Gazette no. 50/2000) in conjunction with section 58 of the Protection from Infectious Diseases Act (Official Gazette nos. 60/1992, 26/1993 and 29/1994), considered the placenta and foetus to be clinical waste within the meaning of section 20 of the by-law on the measures of preventing and combating hospital infections (Official Gazette no. 93/2002), which provides that foetuses are clinical waste in cases where the mother was up to twenty-two weeks (five-and-a-half months) pregnant, although there is no dispute in the case at issue that [Ž.M.] gave birth to a stillborn child after nine months of pregnancy, who was not however reported as living, unlike in cases where the child was born alive and then died.
>
> ...
>
> It therefore follows that the defendant, in disposing of the plaintiffs' stillborn child (in a situation in which they had refused to assume responsibility for the burial and did not have a family grave), acted in compliance with the above-mentioned regulations and the contract with company L. The defendant therefore is under no obligation to pay compensation."

19. The applicant and his wife appealed to the Split County Court (*Županijski sud u Splitu*) on 13 May 2005. They argued that the relevant facts had not been properly established, and that it remained unclear where and how the body of their child had been buried. They also pointed out that the regulations to which the first-instance court had referred did not stipulate that the body of a stillborn child could be treated as clinical waste.

20. On 24 May 2007 the Split County Court dismissed the appeal and upheld the first-instance judgment. It considered, however, that the first-instance court had erred in finding that the child's body had been disposed of in accordance with the law, but that given that no provision of the law obliged the hospital to inform parents where their stillborn child was buried, the applicant and his wife could not claim any damages in that regard. The Split County Court in particular held:

> "It should be noted at the outset that this court does not accept the findings of the first-instance court, which found the defendant's exoneration from liability under the provisions of the Instructions on the Disposal of Clinical Waste (Official Gazette no. 50/2000; hereinafter 'the Instructions') and the by-law on the measures of preventing and combating hospital infections (Official Gazette no. 93/2002; hereinafter 'the by-law'). These regulations do not concern the question as to the manner in which

hospitals should deal with the bodies of stillborn children. They concern, *inter alia*, the manner in which clinical waste should be disposed of, including foetuses in cases where the mother was up to twenty-two weeks pregnant (section 20(3) of the by-law), which is not the case in the present case, in which [Ž.M.] gave birth to a stillborn child after nine months of pregnancy.

Although the existing legislation has not regulated the issue of the legal status of a stillborn child coherently, this court finds that the aforementioned Instructions and by-law are not applicable. This is because there are specific provisions which clearly differentiate between a foetus and a stillborn child. Unlike a foetus:

- a stillborn child must be registered in the register of births (sections 9 and 12 of the State Registers Act – Official Gazette no. 96/1993)

- a stillborn child, just like any other deceased person, may only be buried or cremated after examination by a coroner (sections 2 and 8 of the by-law on the examination and establishment of the time and cause of death – Official Gazette nos. 121/1999, 133/1999 and 112/2000).

There is therefore no doubt for this court that a stillborn child, unlike a foetus, can be buried (or cremated) in the same manner as any other deceased person under the relevant provisions of the Cemeteries Act (Official Gazette no. 18/1998), which provides that a deceased person shall be buried in his [or her] local cemetery or another graveyard chosen by the deceased or his or her next-of-kin (section 12).

However, neither the above-mentioned provisions, any other provisions regulating the conduct of the defendant towards its patients (Health Care Act – Official Gazette nos. 121/2003, 48/2005 and 85/2006), nor any other provisions of the law, oblige the defendant, as a healthcare institution, to bury a body not taken away by the next-of-kin at a location which is known to them.

The defendant is therefore not liable for damages because the grounds for liability, within the meaning of section 154 of the Obligations Act (Official Gazette nos. 53/1991, 73/1991, 3/1994, 7/1996, 91/1996, 112/1999 and 88/2011) in conjunction with section 1163 of the Obligations Act (Official Gazette no. 35/2005), have not been established. The plaintiffs' reliance on liability for breach of a contractual duty is not applicable because the relevant provisions of the Obligations Act do not provide for such damages."

21. The applicant and his wife also lodged an appeal on points of law with the Supreme Court (*Vrhovni sud Republike Hrvatske*) on 28 September 2007, arguing that they found it incomprehensible that the hospital could not be held to account despite failing to act in compliance with the relevant domestic law when disposing of the body of their stillborn child.

22. On 12 November 2008 the Supreme Court dismissed the appeal on points of law, endorsing the reasoning of the Split County Court. It added:

"It should also be noted that the mental anguish the parents are suffering because they do not know where their child's grave is and thus are unable to visit it, is not a form of non-pecuniary damage within the meaning of sections 200 and 201 of the Obligations Act (Official Gazette nos. 53/1991, 73/1991, 3/1994, 7/1996 and 112/1999) ... only mental anguish caused by loss of amenities of life, disfigurement, breaches of reputation, honour, liberty or personality rights or the death and serious disability of a close relative warrant the award of non-pecuniary damages. Any other

> mental anguish arising from other situations is not a legal basis for the award of damages."

23. The applicant and his wife then lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*) reiterating his previous arguments. He argued that the remains of his stillborn child had been disposed of improperly and that he was unable to obtain information about where the child was buried.

24. On 1 February 2012 the Constitutional Court declared it inadmissible as manifestly ill-founded, holding the following:

> "In their constitutional complaint, the appellants were unable to show that the competent courts had acted contrary to the constitutional provisions concerning human rights and fundamental freedoms or had arbitrarily interpreted the relevant statutory provisions. The Constitutional Court therefore finds that the present case does not raise an issue of the complainants' constitutional rights. Thus, there is no constitutional law issue in the case for the Constitutional Court to decide on. ... "

25. This decision was served on the applicant on 27 February 2012.

C. Criminal proceedings instituted by the applicant

26. On 9 June 2005 the applicant lodged a criminal complaint with the Split Municipal State Attorney's Office (*Općinsko državno odvjetništvo u Splitu*) against the employees of the hospital and company L., alleging that the burial of his stillborn child had not been documented or conducted properly.

27. The Split Municipal State Attorney's Office questioned the pathologist (see paragraph 13 above), who explained that foetuses and the bodies of stillborn children were disposed of together with other clinical waste, as had happened with the body of the applicant's stillborn child. There was no need for parents to give any special written consent, because it was not required by law.

28. On 10 February 2006 the Split Municipal State Attorney's Office rejected the applicant's criminal complaint on the grounds that the body of his stillborn child had been disposed of in accordance with the relevant law and procedures.

29. The applicant took over the prosecution as a subsidiary prosecutor and on 29 January 2007 lodged an indictment in the Split Municipal Court against V.T., M.K. and Z.S. (see paragraphs 14 and 15 above) on charges of negligent performance of duties.

30. On 24 October 2008 the Split Municipal Court rejected the indictment on the grounds that the hospital's employees had acted in accordance with the relevant legislation, namely the Ministry of Health's Instructions on the Disposal of Clinical Waste, the Protection from Infectious Diseases Act, and the by-law on the measures of preventing and combating hospital infections.

31. The applicant appealed to the Split County Court, but on 3 March 2009 it was dismissed as groundless.

32. In September 2009 the applicant brought his case to the attention of media, which prompted the State Attorney's Office to re-examine his complaints.

33. In a report dated 8 September 2009, the Split Municipal State Attorney's Office informed the Split County State Attorney's Office (*Županijsko državni odvjetništvo u Zagrebu*) of the course of the applicant's case. It referred to the civil proceedings in which the applicant's damages claim against the hospital had been dismissed, and reiterated that the body of the stillborn child had been disposed of in accordance with the procedure required by law and thus did not constitute a criminal offence.

II. RELEVANT DOMESTIC LAW

A. Constitution

34. The relevant provision of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette nos. 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001 and 41/2001, 55/2001, 76/2010 and 85/2010) reads:

Article 35

"Everyone has a right to respect for and legal protection of his private and family life, dignity, reputation and honour."

B. Criminal Code

35. The relevant provision of the Criminal Code (*Kazneni zakon*, Official Gazette nos. 110/1997, 27/1998, 50/2000, 129/2000, 51/2001) provides:

Negligent performance of official duties

Article 339

"An official or responsible person who fails to supervise or in any other way acts negligently in the performance of his or her duties, thereby causing a serious breach of the rights of others or considerable material damage, shall be fined or sentenced to imprisonment for a term of up to three years."

C. Obligations Act

36. The Obligations Act (*Zakon o obveznim odnosima*, Official Gazette nos. 53/1991, 73/1991, 111/1993, 3/1994, 7/1996, 91/1996 and 112/1999) provides:

Grounds for liability

Section 154

"Anyone who causes damage to another shall be liable to pay compensation unless he or she proves that the damage occurred through no fault of his or her own."

Non-pecuniary damages

Section 200

"(1) The court shall award non-pecuniary damages for physical pain, for mental anguish caused by loss of amenities of life, disfigurement, breaches of reputation, honour, liberty or the rights of personality or the death of a close relative, and for fear, if it finds that the circumstances of the case, in particular the intensity of the pain, anguish or fear and their duration, justify such an award, irrespective of any award of pecuniary damages, and even in the absence of pecuniary damage.

(2) When deciding on a claim for non-pecuniary damages and its amount, the court shall take into account ... the purpose of those damages, as well as that it should not favour aspirations that are incompatible with its nature and social purpose."

Section 201

"(1) In the event of the death of a person entitled to damages, the court can award appropriate non-pecuniary damages to members of his or her immediate family (spouse, child, or parent). ..."

D. Other relevant legislation

1. Protection from Infectious Diseases Act

37. The relevant part of the Protection from Infectious Diseases Act (*Zakon o zaštiti pučanstva od zaraznih bolesti*; Official Gazette no. 60/1992) provides:

Section 57

"Every healthcare institution and every healthcare professional shall ensure sanitary and other conditions and put in place sanitary-technical, hygienic, organisational and other measures of protection from infectious diseases within the healthcare institution (hospital infections). ... "

Section 58

"The Ministry of Health shall adopt the detailed legislation on the measures of preventing and combating hospital infections."

2. By-law on the measures of preventing and combating hospital infections

38. The relevant provision of the by-law on the measures of preventing and combating hospital infections (*Pravilnik o uvjetima i načinu obavljanja mjera za sprječavanje i suzbijanje bolničkih infekcija*; Official Gazette no. 93/2002) reads:

Section 20

"Infectious waste which is part of hospital waste and which could contain pathogens (bacteria, viruses, parasites) at a concentration sufficient to cause health issues shall be considered to be:

...

3. clinical waste: parts of human bodies – amputated limbs, tissue and organs removed during surgery, tissue taken for diagnostic purposes, placentas and foetuses at a gestational stage of less than twenty-two weeks ..."

3. The Ministry of Health's Instructions on the Disposal of Clinical Waste

39. The Ministry of Health's Instructions on the Disposal of Clinical Waste (*Naputak o postupanju s otpadom koji nastaje pri pružanju zdravstvene zaštite*; Official Gazette no. 50/2000), in its relevant parts, provide:

II

"The types of waste generated by healthcare institutions are:

1. Hazardous clinical waste:

1.1. Pathological waste: parts of human bodies – amputated limbs, tissue and organs removed during surgery, tissues taken for diagnostic purposes, placentas and foetuses, and test animals and their parts ... "

IV

"Waste shall be collected from the same place it was created in containers adapted to its characteristics, quantity, and the requirements of storage, transport and the manner of disposal. ..."

4. Cemeteries Act

40. The relevant provisions of the Cemeteries Act (*Zakon o grobljima*; Official Gazette, no 19/1998) provide:

Section 12

"(1) The deceased shall in principle be buried in the cemetery closest to where he lived.

(2) The deceased may also be buried in any cemetery chosen during his lifetime or which has been chosen by his family or those who have assumed responsibility for the funeral.

(3) The deceased may be buried at any other location to the cemetery only if authorised by the competent local authority and after prior consultation with the local healthcare authorities."

Section 16

"...

(3) The cemetery administration shall keep logbooks of all deceased persons which shall contain their surname, [fore]name, father's name and identification number, with an indication as to where they are buried ..."

5. State Registers Act

41. The relevant provisions of the State Registers Act (*Zakon o državnim maticama*; Official Gazette, no. 96/1993) provide:

Section 12

"...

(2) The birth of a stillborn child must be declared within forty-eight hours from the moment of the birth. ..."

6. By-law on the examination and establishment of the time and cause of death

42. By-law on the examination and establishment of the time and cause of death (*Pravilnik o načinu pregleda umrlih te o utvrđivanju vremena i uzroka smrti*; Official Gazette nos. 121/1999, 133/1999 and 112/2000):

Section 2

"No deceased or stillborn person can be buried or cremated before the examination [by a coroner]."

Section 8

"(1) During the examination the coroner shall establish death or stillbirth and the time and cause of death.

..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

43. The applicant complained that the body of his stillborn child had been disposed of improperly, which had consequently prevented him from obtaining information about where the child was buried. He relied on Article 8 of the Convention, which reads as follows:

> "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."

A. Admissibility

1. The applicant's victim status

44. The Court notes from the outset that the Government have not raised an objection as to whether, in the circumstances of the case, the applicant could still claim to be a victim of the violation alleged. The Court will examine this issue of its own motion (see, *mutatis mutandis*, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 27, ECHR 2009).

45. In this connection the Court reiterates that under Article 34 of the Convention it "may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto ...". It falls first to the national authorities to redress any alleged violation of the Convention. In this regard, the question whether an applicant can claim to be a victim of the violation alleged is relevant at all stages of the proceedings under the Convention. A decision or measure favourable to an applicant is not, in principle, sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention. Redress so afforded must be appropriate and sufficient, failing which a party can continue to claim to be a victim of the violation (see, among others, *Burdov v. Russia (no. 2)*, no. 33509/04, §§ 54-56, ECHR 2009, with further references).

46. The Court observes in the case at issue that on 24 May 2007 the Split County Court found that the body of the applicant's stillborn child had not been disposed of in accordance with the relevant domestic law. It, however,

considered that no provision of the domestic law obliged the hospital to inform parents where their stillborn child was buried and that therefore the applicant could not claim any damages in that regard (see paragraph 20 above). This decision of the Split County Court was upheld by the Supreme Court (see paragraph 22 above).

47. Whereas these decisions of the competent domestic courts could be understood as being favourable to the applicant as they have expressly acknowledged that the alleged interference with the applicant's rights under Article 8 of the Convention had not been in accordance with the law, this acknowledgment did not lead to awarding any compensation to the applicant at the national level.

48. The Court therefore considers that the applicant can still claim to be a victim in respect of his complaint under Article 8 of the Convention.

2. Non-exhaustion of domestic remedies

(a) The parties' arguments

49. The Government submitted that the applicant had not argued his case before the Constitutional Court properly, because he had merely reiterated his complaints before the lower courts and had not raised any issues concerning his constitutional rights. In the Government's view, the applicant had failed to properly exhaust all available and effective domestic remedies.

50. The applicant considered that he had properly exhausted domestic remedies.

(b) The Court's assessment

51. The Court reiterates that under Article 35 § 1 of the Convention, it may only deal with an application after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII). The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances. To be effective, a remedy must be capable of directly resolving the impugned state of affairs (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004).

52. The rule of exhaustion of domestic remedies normally requires that complaints intended to be made subsequently at the international level should have been raised before the domestic courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law. The purpose of the rule requiring domestic remedies to be exhausted is to allow the national authorities (primarily the judiciary) to

address an allegation that a Convention right has been violated and, where appropriate, to afford redress before that allegation is submitted to the Court. In so far as there exists at national level a remedy enabling the national courts to address, at least in substance, any argument as to an alleged violation of a Convention right, it is that remedy which should be used (see *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III).

53. The Court notes that throughout the proceedings before the domestic courts, the applicant argued that the hospital had unlawfully and improperly disposed of the body of his stillborn child, which had prevented him from obtaining information about where the child was buried. He raised these arguments before the Split Municipal Court and the Split County Court (see paragraphs 11 and 19 above) and subsequently before the Supreme Court (see paragraph 21 above) and Constitutional Court (see paragraph 23 above). In addition, relying essentially on the same reasons, the applicant pursued the criminal law remedies before the competent authorities (see paragraphs 26-33 above). The applicant thereby provided the national authorities with the opportunity, which is in principle intended to be afforded to Contracting States by Article 35 § 1 of the Convention, of putting right the violations alleged against them (see, for example, *Tarbuk v. Croatia*, no. 31360/10, § 32, 11 December 2012).

54. The Government's objection therefore must be rejected.

3. Conclusion

55. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

56. The applicant contended that the hospital had disposed of the body of his stillborn child improperly. The location of the child's grave had thus remained unknown and he had been unable to obtain simple information about where his child was laid to rest. It was true that instead of taking care of the funeral arrangements himself he had requested the hospital to bury the body, but that had not precluded his right to know where his child was laid to rest. In the applicant's view, the domestic courts had prevented him from obtaining accurate and satisfactory information about the burial of his child, which had unjustly infringed his right to respect for his family life. The applicant also maintained that he had acted in good faith when asking the hospital to take care of the body of his stillborn child, and had only later learned that the body had been disposed of in a manner inappropriate for a

human being. The event itself had caused a considerable amount of distress for him and his wife, and they had been suffering its consequences ever since.

57. The Government submitted that there had been no interference with the applicant's rights under Article 8. They pointed out that after the child's birth the applicant had decided not to assume responsibility for the burial of the body, even though he had been well aware of the hospital's procedure in such cases. The applicant had thus waived his right to bury his stillborn child and to know details of where the body was laid to rest. The hospital had never promised the applicant or his wife that it would bury the child's body in a particular manner, and no circumstances had existed which could have prompted the hospital to believe that the applicant or his wife would ever have wanted to visit the child's grave. The applicant had thus tacitly accepted that the hospital take care of the child's body in accordance with established procedure. The applicant and his wife had been left with sufficient time to think about whether they wished to take care of the body so they could not blame the hospital for their own failures, especially since no provision of the relevant domestic law obliged the hospital to take care of the child's body in a manner the applicant considered appropriate. Lastly, the Government pointed out that the decisions of the domestic authorities in the applicant's case had been based on the relevant domestic law and had not been unfair.

2. The Court's assessment

(a) Whether a right protected by Article 8 is in issue

58. The first question the Court has to address is whether the applicant may arguably claim that he had a right protected by Article 8.

59. 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). It has considered the "private life" aspect of Article 8 to be applicable to the question of whether a mother had the right to change the family name on the tombstone of her stillborn child (see *Znamenskaya v. Russia*, no. 77785/01, § 27, 2 June 2005), and also the excessive delay by the domestic authorities in returning the body of the applicants' child following an autopsy to be an interference with the private and family life of the applicants (see *Pannullo and Forte v. France*, no. 37794/97, § 36, ECHR 2001-X), just as the refusal of the investigative authorities to return the suspects body to his relatives (see *Sabanchiyeva and Others v. Russia*, no. 38450/05, § 123, ECHR 2013 (extracts)). The Court has also considered that a mother being unable to carry out her religious duties on the grave of her stillborn child raises an issue under the concept of "family life" under Article 8 (see *Yıldırım v. Turkey* (dec.), 25327/02, 11 September 2007). The Court has further held

that a refusal to authorise the transfer of an urn containing the applicant's husband's ashes was a matter falling within the scope of Article 8 (see *Elli Poluhas Dödsbo v. Sweden*, no. 61564/00, § 24, ECHR 2006-I). It has reached the same conclusion with regard to the question of whether or not the applicant was entitled to attend the burial of her child (see *Hadri-Vionnet*, cited above, § 52).

60. In view of the above case-law, the Court finds that Article 8 of the Convention is applicable to the case at issue, in which the applicant complained that the body of his stillborn child had been disposed of improperly, which had consequently prevented him from obtaining information about where the child was buried.

(b) Whether there has been an interference with the applicant's rights

61. The Court notes that it has not been contested that the hospital was a public institution 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).

62. The Court further observes that the central issue in the present case is whether the hospital was authorised to dispose of the body of the applicant's stillborn child by treating the remains as clinical waste, leaving no trace of their whereabouts. Thus it is not a question of whether the applicant had the right to a particular type of ceremony or to choose the exact location of the child's place of rest, as could be understood from the Government's arguments, but whether there has been an interference with the applicant's rights under Article 8 by the body of his stillborn child being disposing of as clinical waste.

63. Being mindful of the fact that the birth of a stillborn child must have been extremely emotionally disturbing for the applicant and his wife (compare, *inter alia*, *Hadri-Vionnet*, cited above, § 54), the Court notes that the Government did not submit any records or other documentation to the Court attesting to the information the hospital had provided to the applicant about what would happen to his child's remains. The ambiguity of the manner in which the hospital dealt with the matter is apparent from the evidence given by its employees before the domestic authorities. The nurse in charge of the child's body expressed her regret that the applicant had misunderstood the information she had given him and confirmed that no relevant documents in this regard existed (see paragraph 14 above). Similarly, the hospital's pathologist, when questioned by the State Attorney's Office, confirmed that there was no such document as a consent form for the disposal of the remains, since it was not required by domestic law (see paragraph 27 above).

64. In an area as personal and delicate as the management of the death of a close relative, where a particularly high degree of diligence and prudence

must be exercised (see *Hadri-Vionnet*, cited above, § 56), the Court does not consider that by relying on an oral agreement with the hospital that it would take care of the burial of his stillborn child, the applicant tacitly accepted that the child's body would be disposed of together with other clinical waste, leaving no trace of the remains or their whereabouts, especially since the relevant domestic law, the Cemeteries Act – which, according to the Split County Court was applicable to the case at issue (see paragraph 20 above) – provides that the cemeteries must keep a logbook of all burials, with an indication of where the deceased is buried (see paragraph 40 above).

65. The Court therefore considers that by disposing of the body of the applicant's stillborn child as clinical waste, leaving no trace of the remains or their whereabouts, there has been an interference with the applicant's rights under Article 8 of the Convention.

(c) Justification of the interference

66. Interference with the exercise of the right to respect for private and family life can only be justified if the conditions of the second paragraph of Article 8 are satisfied. It therefore remains to be seen whether the interference was "in accordance with the law", had an aim which is legitimate under this paragraph and was "necessary in a democratic society" for the aforesaid aim (see *Smith and Grady v. United Kingdom*, nos. 33985/96 and 33986/96, § 72, ECHR 1999-VI).

67. The Court must therefore first examine whether there was a sufficient basis in law for the actions of the hospital to dispose of the body of the applicant's stillborn child as clinical waste (see *Hadri-Vionnet*, cited above, § 59).

68. The Court observes that the Government did not cite any relevant legislation which would have allowed the hospital to dispose of the remains of the applicant's stillborn child together with other clinical waste, and the Court is unable, for its part, to ascertain the existence of any such relevant domestic law.

69. It notes that the Ministry of Health's Instructions on the Disposal of Clinical Waste and the by-law on the measures of preventing and combating hospital infections, on which the Split Municipal Court relied when dismissing the applicant's civil action (see paragraph 18 above), concerned only foetuses in cases where the mother was up to twenty-two weeks pregnant (see paragraphs 38 and 39 above), which was clearly not the case with the applicant's stillborn child (see paragraph 6 above).

70. Thus the Court, without going into the question of the conditions for obtaining the award of damages under the domestic law, has no reason to doubt the findings of the Split County Court, confirmed by the decision of the Supreme Court that under the relevant domestic law the body of the applicant's stillborn child should not have been disposed of together with clinical waste (see paragraphs 20 and 22 above). This makes it sufficient for

the Court to conclude that the interference in the case at issue has been contrary to the relevant domestic law. It notes moreover, that the Split County Court found that the appropriate procedures concerning the remains of stillborn children had not been regulated coherently, which the hospital's pathologist also implied in his evidence (see paragraphs 20 and 27 above). This indicates an issue of the lack of certainty and foreseeability of the relevant domestic law and raises a question whether the domestic law failed to afford adequate legal protection against possible arbitrariness as mandated by the requirement of lawfulness under Article 8 of the Convention (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 95, ECHR 2008).

71. In view of the foregoing, the Court finds that the interference with the applicant's rights guaranteed under Article 8 was not in accordance with the law, as required under that provision, which makes it unnecessary to investigate whether the interference pursued a "legitimate aim" and whether it was "necessary in a democratic society" (see, for example, *Dobrev v. Bulgaria*, no. 55389/00, § 165, 10 August 2006).

72. There has accordingly been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

73. 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

74. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

75. The Government considered the applicant's claim excessive and unfounded.

76. Having regard to all the circumstances of the present case, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant 12,300 euros (EUR) in respect of non-pecuniary damage, plus any tax that may be chargeable to him.

B. Costs and expenses

77. The applicant failed to submit any claim for costs and expenses as required under Rule 60 of the Rules of Court. Accordingly, the Court considers that there is no call to award him any sum on that account.

C. Default interest

78. 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 application admissible;

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

3. *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, EUR 12,300 (twelve thousand three hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Croatian kunas at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 12 June 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President