



## The authorities failed to respect the rights of a widow who wished to exhume and move her husband's remains

In today's **Chamber** judgment<sup>1</sup> in the case of [Dražković v. Montenegro](#) (application no. 40597/17) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 8 (right to private and family life) of the European Convention on Human Rights.**

The case concerned the applicant's wish to have her husband's remains removed from Montenegro to Bosnia and Herzegovina, which another member of the family refused to allow.

The Court found in particular that such a dispute fell to be examined under both the private and family life aspect of Article 8 of the European Convention.

In the circumstances, the authorities should have balanced the applicant's wish for the exhumation and transfer against the State's interest in preserving the sanctity of graves and the other family member's rights.

However, there was no legal mechanism by which to resolve such disputes, while the domestic courts had refused to recognise that the applicant had any legal interest. There had thus been no examination which would have weighed the competing interests at stake.

### Principal facts

The applicant, Dragica Drašković, is a national of Bosnia and Herzegovina who was born in 1945 and lives in Trebinje (Bosnia and Herzegovina).

Ms Drašković's husband died in Belgrade in 1995. Owing to the war in the former Yugoslavia, he was buried in a family plot in Montenegro owned by his nephew. In June 2014 Ms Drašković asked the nephew for permission to move her husband's remains to a grave in Trebinje, which she owns, but the nephew refused.

The applicant began court proceedings but in February 2015 the Court of First Instance in Herceg Novi rejected her claim. It found that she had no legal interest in lodging such a claim as she had no right to her husband's remains or any rights arising from their place of burial. In April 2015 the High Court in Podgorica upheld the first-instance decision.

In June 2015 the applicant lodged a constitutional appeal, arguing that the basis for her claim had been to obtain the nephew's consent as without it she could not get official permission for an exhumation or a transfer. She had no other way to exercise her right except through the courts, but by rejecting her claim they had left her subject to the will of the respondent party. She had therefore been deprived of her right to fair trial and the right to family life in a broader sense. The Constitutional Court dismissed her appeal in February 2017.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution).

In August 2019 the sanitary inspectorate informed the applicant by letter that the sanitary inspector was in charge of issuing exhumation and transfer permits. It stated that the inspectorate did not know who had the authority to resolve disputes but assumed that it was the courts.

### Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life) and Article 6 § 1 (access to court), the applicant complained about the courts' refusal to rule on her claim on the merits.

The application was lodged with the European Court of Human Rights on 31 May 2017.

Judgment was given by a Chamber of seven judges, composed as follows:

Robert **Spano** (Iceland), *President*,  
Marko **Bošnjak** (Slovenia),  
Egidijus **Kūris** (Lithuania),  
Ivana **Jelić** (Montenegro),  
Arnfinn **Bårdsen** (Norway),  
Darian **Pavli** (Albania),  
Peeter **Roosma** (Estonia),

and also Stanley **Naismith**, *Section Registrar*.

### Decision of the Court

#### Article 8

The Court first dismissed an objection by the Government that the applicant had failed to exhaust effective domestic remedies. Notably, she had never lodged a request for the exhumation and transfer of her husband's remains with the sanitary inspectorate or the municipal burial company.

The Court noted that no procedures existed for cases where the owner of a burial plot had refused permission for an exhumation. Indeed, the sanitary inspectorate had informed the applicant that it did not have the authority to resolve such disputes. The existence of the legal remedy in question was therefore not sufficiently certain, either in theory or in practice, and thus lacked accessibility and effectiveness.

The Court noted that it had not previously taken an explicit position on whether a request to exhume the remains of a relative for transfer to a new resting place fell under Article 8, although in [Elli Poluhas Dödsbo v. Sweden](#) it had proceeded on the "assumption" that the refusal to allow the removal of a burial urn to a new resting place was an interference with the widow's private life.

It now found that an exhumation and transfer request by a close relative, such as in the applicant's case, could indeed fall in principle to be examined under both aspects of "private and family life" of that provision. The nature and scope of the right, and the extent of the State's obligations, depended on the particular circumstances and facts of the case.

In contrast to *Elli Poluhas Dödsbo*, the key aspect of the applicant's complaint was that the courts had failed to carry out a substantive examination of her claim against a third party.

Her case thus concerned the State's duties in the area of relations between individuals, where States had some discretion ("margin of appreciation") when choosing how to secure respect for private or family life. As far as the State's obligations were concerned, regard had to be had to the fair balance to be struck between the competing interests of the individual and of the community.

What had to be weighed in Ms Drašković's case was her interest in exhuming and transferring her husband's remains against society's role in ensuring the sanctity of graves and the nephew's rights.

The Court noted that in *Elli Poluhas Dödsbo*, it had found that the national authorities had acted within the wide margin of appreciation afforded to them in such matters, given that they had taken all the relevant circumstances into consideration and had weighed them carefully against each other, giving relevant and sufficient reasons for their decision.

However, in Ms Drašković's case, the courts had not only failed to consider whether the exhumation and removal had been possible or easy in practical terms, and whether any public-health interests were involved, but had failed to clarify several other issues too. That had included whether the husband had wished to be buried in Montenegro, whether he had lived in Bosnia Herzegovina or Belgrade, or whether he and Ms Drašković had acquired the plot in Bosnia Herzegovina so they could be buried together.

The Court also examined whether the State had put in place an appropriate legal framework to balance any competing interests, and whether it had identified and properly balanced such interests.

It first noted that domestic legislation did not appear to regulate situations such as the applicant's, thus not providing a mechanism to review the proportionality of the restrictions on her Article 8 rights. Indeed, no legislation provided for mechanisms to resolve a dispute among family members regarding exhumation or a late relative's final resting place.

Nor did the administrative body in charge of exhumations have the power to resolve such disputes. Rather, it instructed parties first to resolve the matter and only then to lodge a request for exhumation. Any such proceedings clearly lacked the ability to balance the competing interests, which might have been achieved via contentious proceedings in court.

However, the civil courts had found that the applicant had no "property-related, status-related and any other interests in her claim".

The domestic courts had thus failed to recognise the existence of any rights for the applicant under Article 8 or to properly balance them against the competing interests of her husband's nephew. The Court concluded that there had been a violation of this provision of the Convention.

### Other articles

Given its conclusions on Article 8, the Court saw no need for a separate examination of the applicant's complaints under Article 6. Nor was it appropriate to take up complaints by her under Articles 9 and 13 of the Convention as they had not been included in the initial application and had not been raised until the applicant had submitted observations in September 2019.

### Just satisfaction (Article 41)

The Court held that Montenegro was to pay the applicant 4,500 euros (EUR) in respect of non-pecuniary damage and EUR 3,250.97 in respect of costs and expenses.

*The judgment is available only in English.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.