



## Post-mortem examination of baby's body against mother's will led to violations

In today's **Chamber judgment**<sup>1</sup> in the case of [Polat v. Austria](#) (application no. 12886/16) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 8 (right to respect for private and family life) and Article 9 (freedom of thought, conscience and religion)** of the European Convention on Human Rights in respect of the post-mortem examination of the applicant's baby carried out against her will and against her religious convictions, and

**a violation of Article 8** in respect of the authorities' failure to disclose information to the applicant about her son's post-mortem examination.

The case concerned a post-mortem examination of the applicant's son carried out against her will.

The Court found in particular that the Austrian authorities had failed to balance the needs of science and the protection of public health against the applicant's rights in carrying out the post-mortem against her will and against her religious convictions, and examining the issue later in the courts. It also found that the failure to disclose to the applicant information regarding the extent of the examination given her specific circumstances had been a violation of her rights.

### Principal facts

The applicant, Leyla Polat, is an Austrian national who was born in 1974 and lives in Bregenz (Austria).

In 2006 the applicant became pregnant. Doctors indicated to her that the baby was likely to be born with a disability as a result of Prune-Belly syndrome. She gave birth prematurely on 3 April 2007. Her son, Y.M., died from a cerebral haemorrhage two days later.

Doctors asked the applicant and her husband for permission to carry out a post-mortem examination, in the interests of science. They refused, as they wanted to bury their child in accordance with their Muslim religious beliefs, which required the body to remain unscathed. The treating doctor told them that it would have to be carried out in any case in order to clarify the exact reasons for their son's death.

On 6 April 2007, the post-mortem examination was performed at the Feldkirch Regional Hospital. Practically all the internal organs were removed, along with the urinary tract, with the hollows filled with cotton wool.

The boy's body was returned to his parents. The applicant asserted that they had not been informed of the extent of the examination and could not see it as the body had been clothed. Believing the body to be in the correct state for burial, the parents took it to Turkey for interment.

During the funeral rites, the state of the body was discovered, leading to a disturbance among those performing the ceremonies and mourners. The boy had to be buried in another village without the religious ritual washing and Islamic ceremony, at additional cost to the parents.

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).

Y.M.'s organs – after an initial denial by the hospital that they had been removed – were returned to the applicant some time later following several requests by her and an intervention by the regional patients ombudsman. She buried them in her son's grave in Turkey.

The applicant took a case against the hospital management company, seeking damages. The Feldkirch Regional Court allowed the initial claim, concluding that there had been no scientific interest in carrying out the post-mortem without the parents' consent in this case. However, the applicant lost on appeal and the Innsbruck Court of Appeal remitted the case.

In the second-round of proceedings expert testimony from medical professionals asserted that the post-mortem examination had been necessary to confirm the diagnosis of Prune-Belly syndrome or to clarify alterations in the belly, lungs and brain that had not been clearly identifiable, or to see the effect of the disease on the organs. It was noted that in the case of post-mortem examinations of fetuses or deceased newborns, the removal and preservation of the organs was indispensable and therefore standard practice. Nevertheless, the first-instance court allowed the claim and awarded damages.

That judgment was overturned on appeal by the Innsbruck Court of Appeal. The hospital was awarded costs of almost 33,000 euros (EUR). The applicant lodged an appeal on points of law, relying on, among other law, Article 9 of the Convention and the Austrian Constitution, requesting a preliminary ruling from the European Court of Justice in the latter connection. The applicant was unsuccessful, with the Supreme Court ruling in 2015 that the post-mortem had been necessary scientifically and had been a legitimate restriction on freedom of religion. They saw the duty to disclose information as a rule to prevent future damage and to protect the patient, which had not been applicable in this case. It held that the specific religious background in the case could not change that assessment.

## Complaints, procedure and composition of the Court

Relying on Articles 8 (right to respect for private and family life), 9 (freedom of thought, conscience and religion) and 13 (right to an effective remedy), the applicant complained, in particular, that the post-mortem on her son had been carried out without her permission, that the domestic courts had not balanced the issues at play correctly, and that the hospital had failed to comply with its duty to inform her of the extent of the post-mortem and the removal of the inner organs of her deceased son.

The application was lodged with the European Court of Human Rights on 29 February 2016.

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

Yonko **Grozev** (Bulgaria), *President*,  
Tim **Eicke** (the United Kingdom),  
Armen **Harutyunyan** (Armenia),  
Gabriele **Kucsko-Stadlmayer** (Austria),  
Pere **Pastor Vilanova** (Andorra),  
Ana Maria **Guerra Martins** (Portugal),  
Iulia Antoanella **Motoc** (Romania),

and also Ilse Freiwirth, *Deputy Section Registrar*.

## Decision of the Court

### Article 8 and 9 in relation to the post-mortem examination

The Court reiterated that under the Convention there was no absolute right to object to a post-mortem taking place. The post-mortem of Y.M. had been carried out in accordance with the law, namely on the basis of section 25 of the Hospital Act and section 12(3) of the Funeral Act. Under those provisions, a post-mortem examination could be carried out against the relatives' wishes in the interests of science and public health, in particular where there were diagnostic doubts. The Court was satisfied that there had been a legitimate interest in carrying out the examination.

However, the Court stated that the applicant's views had not been taken into account when that decision had been made, either by hospital staff or by the domestic courts. It noted in particular that the States ordinarily have a wide discretion in assessing the balance between private and public interests. Specifically with regard to post-mortem examinations against the will of the family, they had to be carried out with maximum respect for the family members' rights.

The authorities had therefore failed to balance the competing interests involved, namely the State's obligation to protect public health and the applicant's rights under Articles 8 and 9.

The Court concluded that the decision to perform a post-mortem on the applicant's child against her will and against her religious convictions had been an interference with her "family life" and her right to manifest her religion which had not been justified, leading to violations of the Convention.

### Article 8 in relation to the duty to disclose information

The applicant argued that she had not been told that a post-mortem examination would be performed, or the extent of that examination.

The Court noted that there appeared to be no law in Austria regulating how much information had to be provided in circumstances such as the applicant's.

It also noted the delicacy of the situation: a mother, who had just lost her child, faced with a post-mortem that she objected to, even though she had informed the authorities of the need to have the body as unscathed as possible for the funeral rites. Those specific circumstances had required a high degree of diligence and prudence on the part of the hospital staff when interacting with the applicant. Even if there was some confusion as to exactly what had been said to the applicant, the Court adjudged that the authorities had not made clear to her the extent of the post-mortem.

Although the Supreme Court had held that not giving information regarding the removal of organs and so forth had been possibly less painful for relatives in such situations, the Court considered that the particularities of the applicant's case had meant that the hospital staff had had a duty to inform her of their removal. They also should have returned the organs to her, rather than keeping them for a considerable period, also since the applicant had pointed out the importance to bury them in her son's grave.

In sum, not disclosing the information to the applicant had led to a violation of the Convention.

### Other articles

The Court found that it was not necessary to examine the complaints under Article 13.

### Just satisfaction (Article 41)

The Court held that Austria was to pay the applicant EUR 10,000 euros (EUR) in respect of non-pecuniary damage and EUR 37,796.92 in respect of costs and expenses.

## Separate opinions

Judges **Pastor Vilanova** and **Harutyunyan** expressed a joint partly dissenting opinion. This opinion is annexed to the judgment.

*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.