



## The applicants' inability to obtain a review of the prohibition on burying their sons abroad during the criminal investigation breached the Convention

In today's Chamber judgment<sup>1</sup> in the case of [Aygün v. Belgium](#) (application no. 28336/12) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Articles 8 (right to respect for private and family life) and 9 (freedom of thought, conscience and religion) of the European Convention on Human Rights.**

In this case the applicants complained of the investigating judge's refusal to allow them to transfer their sons' bodies to Türkiye, their country of origin, while the investigation was ongoing.

The Court observed that the investigating judge's decision amounted to interference with the applicants' rights under Articles 8 and 9 of the Convention. It accepted that the decision fell within the investigating judge's statutory remit to oversee the criminal investigation and that it had pursued legitimate aims such as the prevention of disorder or crime and the protection of the rights of others, and in particular the defence rights of the accused. Therefore, the Court did not doubt the necessity of the initial decision by the investigating judge from the perspective of Articles 8 and 9 of the Convention.

However, the Court noted that the applicants in the present case had not had any remedy by which to request that the necessity of the initial refusal by the investigating judge be reassessed in the light of the progress of the investigation. All their attempts throughout that period, which had lasted for approximately two and a half years, had been unsuccessful, and during that time they had been prevented from having the necessity of the interference re-examined by the domestic courts from the standpoint of their rights under Articles 8 and 9 of the Convention.

### Principal facts

The applicants, Vahit and Naciye Aygün, are Belgian nationals who were born in 1948 and 1949 respectively. They live in Meulebeke in Belgium.

The applicants' two sons died of multiple gunshot wounds on 8 September 2010. In February 2014, on conclusion of the criminal proceedings, a neighbour was sentenced to 29 years' imprisonment for their murder. Another neighbour was acquitted.

Throughout the investigation, that is, between 24 September 2010 and 4 April 2013, the applicants were prohibited from transferring their sons' bodies to Türkiye, their country of origin, where they wished to bury them in the family grave in accordance with their rites, beliefs and traditions. The investigating judge refused the applicants' request – which they submitted on 24 September 2010, following the full autopsy carried out on the bodies on 19 September 2010 – on the grounds that there was no basis for such a request in domestic law and that the needs of the investigation precluded the transfer of the bodies outside the country. The investigating judge added that the applicants could bury their sons in accordance with their religious beliefs in a Muslim cemetery in Belgium.

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).

The applicants challenged that decision in several Belgian courts. In particular, they relied on Article 9 of the Convention and provided the courts with a letter dated 19 September 2011 from the public prosecutor of Emirdağ in Türkiye, stating that the investigative measures requested by the Belgian authorities would be carried out in full. However, the applicants' requests for the prohibition on transferring their sons' bodies to be lifted were declared inadmissible or dismissed.

## Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life) and Article 9 (freedom of thought, conscience and religion), the applicants complained that they had been prevented throughout the investigation from transferring their sons' bodies to their country of origin in order to bury them in the family grave in accordance with their rites, beliefs and traditions.

Relying on Article 6 (right to a fair hearing) and Article 13 (right to an effective remedy), they alleged that they had not had an effective remedy in domestic law by which to challenge the prohibition imposed by the investigating judge.

The application was lodged with the European Court of Human Rights on 11 May 2012.

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

Georges Ravarani (Luxembourg), *President*,  
Georgios A. Serghides (Cyprus),  
Darian Pavli (Albania),  
Anja Seibert-Fohr (Germany),  
Peeter Roosma (Estonia),  
Andreas Zünd (Switzerland),  
Frédéric Krenc (Belgium),

and also Olga Chernishova, *Deputy Section Registrar*.

## Decision of the Court

### Articles 8 and 9

The Court deemed it appropriate to examine the applicants' allegations under Articles 8 and 9 of the Convention alone. It went on to find that the refusal, for the entire duration of the investigation, to allow the applicants to arrange their sons' funeral in the manner they wished had intruded upon their private and family sphere in a way and to an extent amounting to interference with their right to respect for private and family life. That refusal also constituted interference with the applicants' right to freedom of religion.

As to the legal basis for the interference, the Court accepted that the investigating judge's decision fell within his statutory remit to oversee the criminal investigation. Under Article 55 of the Code of Criminal Procedure, this involved, among other tasks, identifying the offenders, gathering evidence and taking measures to enable the courts to determine the case in full knowledge of the facts. To that end, Article 56 § 1 of the Code of Criminal Procedure expressly empowered the investigating judge to use coercion and to restrict individual rights and freedoms.

Regarding the legitimate aims of the interference, the Court noted that the measure in question had been aimed at the prevention of disorder or crime and at protecting the rights of others, and in particular the defence rights of the two accused, which were also protected by the Convention.

As to whether the interference had been necessary in a democratic society, the Court observed at the outset that the case involved competing fundamental rights: on the one hand, the right to a fair

trial and the defence rights of the two accused, and on the other hand, the applicants' right to respect for their private and family life and their right to freedom of religion. The two sets of rights merited equal respect. Furthermore, Article 2 of the Convention (right to life) required the authorities to carry out an investigation into the death of the applicants' sons.

The Court also noted that the measure taken by the investigating judge had been based on the needs of the investigation and had not amounted to imposing a blanket prohibition on the applicants. The criminal investigation into the killing of the applicants' sons had not been as straightforward as the applicants maintained, as it was clear from the course of the proceedings that the guilt of the two suspects – and in particular of one of the two accused – had been the subject of intense debate before and even during the Assize Court stage. However, the applicants had been prevented from arranging their sons' funeral in accordance with their wishes and their religious beliefs for the entire duration of the criminal investigation, which had lasted from 18 September 2010 to 4 April 2013, a period of approximately two and a half years. The refusal of their requests by the investigating judge had therefore persisted throughout the investigation, the length of which had been, at the very least, significant.

The Court made clear that it had no reason to doubt the necessity of the initial decision by the investigating judge from the perspective of Articles 8 and 9 of the Convention. However, it emphasised that in order to be compatible with those provisions any interference had to continue to be justified throughout the period for which the applicants were affected by it (that is, in the present case, throughout the investigation), as the necessity of an interference was liable to diminish or even cease to exist with the passage of time. The applicants in the present case had had no remedy by which to have the necessity of the initial refusal by the investigating judge reassessed in the light of the progress of the investigation; all their attempts to obtain a review of the investigating judge's decision had been unsuccessful.

Furthermore, the Government had not established before the Court that domestic law afforded a remedy enabling the applicants to obtain a reassessment of the necessity of the interference stemming from the investigating judge's initial decision. Owing to the lack of such a remedy, the additional reassurances provided by the Emirdağ public prosecutor in September 2011 had not been examined by the investigating judge or by any other judicial body. Likewise, the applicants had had no opportunity to request that the autopsy report, which had not yet been available at the time of the investigating judge's initial decision, be taken into consideration.

In addition, there had been no requirement for the investigating judge to reassess the necessity of his initial decision even where, as in the present case, the investigation extended over a lengthy period. Moreover, when the applicants had made a fresh application to the investigating judge on 3 July 2012 to have their sons' bodies released, they had received no response.

In sum, the Court considered that, owing to the applicants' inability to obtain a review of the necessity of the measure in question, taken at the initial stage of an investigation lasting for approximately two and a half years, the domestic courts had been prevented from examining the continuing necessity of the interference with the applicants' rights from the perspective of Articles 8 and 9 of the Convention. There had therefore been a violation of those two Articles.

#### Just satisfaction (Article 41)

The Court held that Belgium was to pay the applicant 10,000 euros (EUR) in respect of non-pecuniary damage and EUR 3,460.81 in respect of costs and expenses.

*The judgment is available only in French.*

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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.