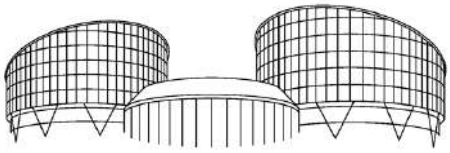

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF POLAT v. AUSTRIA

(Application no. 12886/16)

JUDGMENT

Art 8 and Art 9 • Private and family life • Manifest religion or belief • Positive obligations • Post-mortem and organ removal for preservation of prematurely born child with rare disease despite mother's objection • No requirement on Contracting States to grant an absolute right of objection to post-mortems • Domestic authorities' failure to strike a faire balance between competing interests at stake • Precedence to the interests of science and the health of others • Lack of consideration to applicant's interest in burying her son in accordance with religious beliefs
Art 8 • Private and family life • Positive obligations • Hospital's failure to provide mother with sufficient information • Lack of diligence and prudence required in the delicate circumstances • Justified post-mortem to clarify the diagnosis, but no necessity to keep the organs for scientific or other reasons for several weeks or months

STRASBOURG

20 July 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Polat v. Austria,

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

Yonko Grozev, *President,*
Tim Eicke,
Armen Harutyunyan,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Ana Maria Guerra Martins,
Iulia Antoanella Motoc, *judges,*
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 12886/16) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Ms Leyla Polat ("the applicant"), on 29 February 2016;

the decision to give notice to the Austrian Government ("the Government") of the complaints concerning Articles 8, 9 and 13 of the Convention, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 20 April and on 15 June 2021,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. The application concerns the applicant's objection on religious grounds to the post-mortem examination of her prematurely born and subsequently deceased son, which she alleged had violated her rights under Articles 8 and 9 of the Convention. Moreover, under Article 8 of the Convention, she complained that she had not been informed of the extent of the post-mortem or the removal of her son's organs for preservation purposes. In addition, she complained under Article 13, read in conjunction with Articles 8 and 9, that she had not had any legal remedy available to challenge *ex ante* the carrying-out of the post-mortem.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

2. The applicant was born in 1974 and lives in Bregenz. She was represented by Mr K.P. Pichler, a lawyer practising in Dornbirn.

3. The Austrian Government ("the Government") were represented by their Agent, Mr H. Tichy, Ambassador, Head of the International Law Department at the Austrian Ministry for European and International Affairs.

A. The birth and death of the applicant's son

4. The applicant became pregnant in 2006 and received medical treatment at the Feldkirch Regional Hospital (*Landeskrankenhaus* – hereinafter, "the hospital"), a public hospital.

5. The prenatal examinations carried out in that hospital indicated that the foetus showed clear symptoms of "Prune-Belly-Syndrome" and thus would likely be born with a disability.

6. "Prune-Belly-Syndrome" is a birth defect which is classified as a rare disease, the cause of which is not yet known, although there are several theories. Essential characteristics are, *inter alia*, wrinkled skin over the abdomen, a lack of abdominal musculature, serious malformations of the urinary tract and undescended testicles. In addition, other malformations of the body may occur. It is possible to detect via ultrasound before birth whether a foetus shows these characteristics.

7. Apart from that preliminary diagnosis, the applicant did not have enough amniotic fluid in the womb. She was informed that her child would most likely not survive. The attending physician at the hospital, Dr Sch., spoke with the applicant concerning a possible need for a post-mortem examination of the body of her as yet unborn child, to clarify the exact cause of death but also to assess whether such a malformation could occur in another child (in particular the offspring of siblings already born). The applicant and her husband refused to agree to a post-mortem examination for religious reasons. They explained that, in accordance with their Muslim beliefs, they wished to ritually wash the corpse prior to the funeral. For that purpose, the corpse had to remain as unscathed as possible.

8. The applicant gave birth to her son, Y.M., in the hospital on 3 April 2007. It was a premature birth, which took place in the twenty-fifth week of the pregnancy. The child weighed less than 900 grams at that time. Y.M. received intensive medical care but died two days later on 5 April 2007 from a cerebral haemorrhage.

9. After Y.M.'s death, the applicant and her husband were asked again whether they would agree to a post-mortem examination. The doctors explained to her that that was necessary in order to determine the exact cause of death. Moreover, as the disease could possibly be genetic, it was in the interests of the child´s already born and future siblings to assess whether Prune-Belly-Syndrome was likely to arise in any future pregnancies. The applicant and her husband refused to give their consent. The primary physician Dr S. told them that it would be carried out nonetheless, in order to clarify the diagnosis.

B. The post-mortem examination

10. On 6 April 2007, the post-mortem examination was performed at the hospital. The relevant provisions – section 25 of the Hospital Act (*Kranken- und Kuranstaltengesetz* – hereinafter "the Hospital Act") and section 12(3) of the Dead Body and Funeral Act of the *Land* of Vorarlberg (*Vorarlberger Gesetz über das Leichen- und Bestattungswesen* – hereinafter "the Funeral Act") – do not specify that the consent of relatives of a deceased person is required in order for a post-mortem to be carried out, provided that it is necessary for the safeguarding of scientific interests (*wissenschaftliches Interesse*), in particular to clarify a diagnosis (see paragraphs 38 and 42 below).

11. A detailed post-mortem report was drawn up. It was noted that the parents had objected to the intervention, but that it had been performed nonetheless because of the uncertain pathology of several organs, which the paediatricians had not been able (in the absence of a post-mortem) to classify with complete certainty. The report confirmed the diagnosis reached before birth – namely that Y.M. had suffered from "Prune-Belly-Syndrome". The report was initially not issued to the applicant.

12. During the post-mortem examination, practically all the internal organs were removed from the child's body and preserved at the hospital for a comprehensive assessment. This was considered to be necessary because an accurate detection of the pathological changes of the organs is considered easier after formalin fixation. A large part of the urinary tract was removed, too, which meant that the sex of the child was not apparent anymore. The body was filled with cotton wool in order to soak up blood and other body liquids.

13. The applicant was informed that a post-mortem examination had taken place. She was upset, and on 8 April 2007, 5.10 h, she went to the police and reported that the hospital had examined her son's body without her consent.

14. The hospital handed over their son's corpse to the applicant and her spouse after 8 April 2007. They were not informed about the extent of the post-mortem. The applicant was under the impression that only a "small cut" (*kleiner Schnitt*) had been made. The corpse was completely dressed and was wearing a cap at the time. The face was haggard, but it was not discernible from the clothed corpse whether a post-mortem examination had taken place (and if so, how extensive it had been) or that organs had been removed.

15. The applicant and her husband thus believed that the body was in an appropriate state to be taken to Turkey and to be buried in accordance with their Muslim beliefs. Their deceased child was brought to their home village for the funeral. The transfer was organised by a Turkish association who

obtained the necessary documents from the district authorities. There is no information in the file how and on which date this transfer was carried out.

C. The funeral in Turkey of the applicant's son

16. During the funeral ceremony, which took place at an unknown date in the applicant´s home village in Turkey, about 100-300 guests were present. The body of the child was undressed by the wife of the *Hodja* (Turkish for "learned man" – the religious person performing the ceremony) and the applicant herself. During that procedure, the two women noticed that the deceased child had undergone a full body post-mortem – that is to say the whole body and head had been cut open and sewn back together. It was noticeable that the internal organs of the child had been removed, as the body was stuffed with cotton wool. The genitals were not recognisable (see paragraph 12 above). Besides, the corpse was in a poor condition as a result of the decomposition that had already taken place in the meantime.

17. At the sight of the state of the child's body, both women were left in a state of shock and the applicant fainted. She then started to scream and cry and was inconsolable. The guests rushed to see the body, resulting in turmoil. Since the genitals of the deceased child were no longer identifiable, the ritual washing could not take place (because there are different washing rituals for male and female deceased), and the funeral had to be cancelled. The applicant and her husband were reproached by the guests owing to the bad condition of the body. They had to leave their home village the next day. They stated that they had had incurred significant costs because the funeral ceremony had been halted.

18. The deceased child then had to be buried in another community, without the ritual washing and the ceremony required by the applicant's Muslim faith. The applicant and her husband had to bear the additional costs of this funeral.

D. The return of Y.M.'s organs

19. After the applicant returned to Austria, she asked the hospital that the organs of her deceased child be returned to her. The hospital initially denied that any organs from the body had been removed. Upon the intervention of the Vorarlberg Patients' Ombudsperson (*Patientenanwalt*), on 24 April 2007 the hospital agreed to return some (but not all) of the removed organs, so that they could be buried with the rest of the body.

20. Only on 1 October 2007, upon further intervention by the Vorarlberg Patients' Ombudsperson, did the applicant receive the remainder of the organs. She buried these, too, in her son's grave in Turkey.

E. The ensuing civil proceedings for damages

21. On 30 March 2010 the applicant lodged a civil claim for damages against the Vorarlberg Hospital Operating Company Ltd. (*Krankenhaus Betriebsgesellschaft mbH*), the owner of the hospital – namely for the costs of the halted burial ceremony, the trips to Turkey in order to bury the child's organs after they had been returned, and compensation for non-pecuniary damage for mental pain and suffering, as well as the future costs of psychological treatment. She alleged that: her child's body had not been treated with the appropriate dignity; the post-mortem had been performed despite her objections on religious grounds; and it had been in any case unlawful to remove the organs, as she had not agreed to their removal. She furthermore alleged a failure to comply with the doctors' duty to properly inform her of the post-mortem on her child's body and of its extent, which had caused her post-traumatic stress disorder.

22. The defendant responded that the post-mortem examination had been justified since (i) only histological proof of severe lung hypoplasia could have shown that the death could not have been prevented, and (ii) without such an examination, an absolute confirmation of the diagnosis of "Prune-Belly-Syndrome" (as opposed to a similar kind of malformation) would not clinically have been possible. Moreover, an analysis of the reasons for the death of a newborn was a vital tool for lowering newborn mortality rates. In the defendant's view, there had been no conduct on the part of the treating doctors that could have given rise to liability for damages.

1. The first round of proceedings

23. In the first round of proceedings, the Feldkirch Regional Court (*Landesgericht*) allowed the applicant's claim by a judgment of 9 July 2012. The court noted that it was true that the post-mortem examination had been necessary for a safe diagnosis of Prune-Belly-Syndrome because it could have been mistaken for another disease on the basis of the symptoms alone. A prerequisite for conducting a post-mortem on a child without the parents' consent was, however, not only the existence of diagnostic uncertainty, but also a scientific interest in so doing. The court concluded that there had been no such scientific interest in respect of the present case. The post-mortem had only been carried out because the doctors had wanted to satisfy their curiosity (*Neugierde befriedigen*) about this very rare disease; however, that had not constituted proper justification for conducting a post-mortem examination without first securing the consent of the close relatives, pursuant to section 25 of the Hospital Act.

24. A psychiatric expert opinion ordered by the Feldkirch Regional Court concluded that the applicant was suffering from post-traumatic stress disorder, which was connected to the post-mortem of her deceased child and

the manner in which she had found out about it. While the death of her newborn in itself had constituted a significant cause of stress, the applicant described the events at the child's funeral as the trigger for a feeling of acute stress, which in turn had led to her post-traumatic stress disorder. The psychiatrist who examined her stated that the sight of the disfigured body must have significantly surpassed that which a non-medical professional would have expected.

25. The defendant lodged an appeal against that judgment with the Innsbruck Court of Appeal (*Oberlandesgericht*); the appeal was allowed on 8 November 2012. The Court of Appeal found that there had been a procedural defect, given the fact that the first-instance court had failed to obtain two expert opinions that it had ordered relating to the fields of pathology and neonatology. It therefore remained to be determined whether the post-mortem examination – which had clearly been carried out against the applicant's will – had been permissible, within the meaning of section 25 of the Hospital Act. The case was remitted to the first-instance court in respect of that question, for a new decision.

2. The second round of proceedings

26. In the second round of proceedings, the above-mentioned expert opinions were obtained by the Feldkirch Regional Court.

27. Dr V., an expert paediatrician, noted that there had been two reasons for conducting a post-mortem: firstly, to determine whether Y.M. had really been suffering from Prune-Belly-Syndrome, an illness not yet sufficiently explored, and second, as a measure of quality control in view of the intensive medical interventions that had been performed before and after his birth. Dr V. noted that neither the post-mortem report nor the personal file of Y.M. contained an indication regarding which scientific questions had been expected to be answered by the post-mortem or what methods had been used. It was not known whether the information obtained had been used for the furtherance of science – for example, whether it had been published. The expert concluded that the necessity for a post-mortem had possibly been indicated by the need to evaluate the intensive-care measures that the patient had received, but that there was no documentation confirming that in Y.M.'s file. The diagnosis of Prune-Belly-Syndrome could be confirmed through the post-mortem. However, it was not apparent whether the post-mortem had touched specific scientific questions or that it served the research into new forms of disease, their causal course or combating infant mortality.

28. Dr L., an expert pathologist, stated that Prune-Belly-Syndrome was a very rare, complex, insufficiently explored disease. According to Y.M.'s patient file, the reason for the post-mortem examination had been to clarify alterations in the belly, lungs and brain that had not been clearly identifiable. Under Austrian law, the post-mortem had therefore been

required in order to clarify the quality of the diagnostic and therapeutic measures taken before his death. Dr L. found, moreover, that the post-mortem had been carried out in an appropriate and professional manner and that a comprehensive report had been prepared. Filling the body with cotton wool or a similar material was necessary after a post-mortem in order to soak up blood and other body liquids. Removing the organs had been necessary in the interests of science, as malformations were more easily detected when the organs in question were preserved outside the body, which took between one and two days. In the case of post-mortem examinations of foetuses or deceased newborns, the removal and preservation of the organs was indispensable and therefore standard practice. Dr L. further explained that in the case of the Prune-Belly-Syndrome, the exact role (*Beteiligung*) of the organs was not sufficiently explored and therefore still needed to be documented. The body was usually released for burial immediately after the post-mortem examination, although the organs might still have to be examined. Waiting for the organs to be released would unnecessarily delay any subsequent funeral. He concluded that the provisional removal of Y.M.'s organs had been part of standard post-mortem procedure and thus *lege artis*. As to the state of the body at the funeral, Dr L. explained that the pictures on file were of bad quality and did not allow any exact evaluation. However, the fact that Y.M.'s corpse had been transported to Turkey without being preserved, and given that several days had passed between his death and the ceremony, the corpse must have shown signs of decay at that point.

29. On 13 August 2014 the Feldkirch Regional Court again allowed the claim and held that the hospital was to pay the applicant the full sum claimed in damages – namely 58,500 euros (EUR), the costs of the proceedings (EUR 29,105.52), and compensation for any future damage (such as the cost of future psychiatric care of the applicant) arising from the post-mortem examination of Y.M. It reiterated that there had been an indication that a post-mortem examination was needed because of the above-mentioned diagnostic uncertainty. Such an indication, however, did not mean that it was permitted to carry out a post-mortem examination without the consent of the deceased's relatives. For such an examination to take place without the relatives' consent, there had additionally to be a scientific interest in so doing under section 25 of the Hospital Act. Since it had not been asserted that there was any scientific interest in the post-mortem being conducted, it should not have been carried out against the will of the applicant and her husband. The court found that in the event that the post-mortem examination had been lawful, it would have been irrelevant that Muslim practice had demanded that the corpse remain intact. It furthermore held that even assuming that such a scientific interest had existed, the hospital staff would still have been obliged to inform the applicant in detail of how the post-mortem had been carried out (in

particular of its scope) and to warn her of the external appearance of the body. The psychiatrist had stated in his expert opinion (see paragraph 24 above) that the applicant would most likely not have suffered post-traumatic stress disorder if she had at least been informed that a post-mortem examination had been carried out and that the organs had been removed. The court accordingly held that the unlawful behaviour of the doctors had caused the shocked reaction of the applicant, which is why the hospital was liable to pay damages.

30. On 4 December 2014 the Innsbruck Court of Appeal allowed an appeal lodged by the hospital and dismissed the applicant's claim. It held that the applicant was to refund the hospital the costs and expenses for its legal representation in the amount of EUR 29,963.96 for the proceedings in the first instance, and EUR 2,832.96 for the appeal proceedings (thus EUR 32,796.92 in total). It found that the lower-instance court had not properly taken into account the two expert opinions on the post-mortem examination, which had concluded that it had in fact been performed in accordance with the law. The Court of Appeal noted that an indispensable prerequisite for the defendant to be held liable for damages was that doctors in its employ be shown to have acted unlawfully. The post-mortem examination had, however, been carried out lawfully because there had been a scientific interest in ascertaining that the diagnosis had been correct (for example, in view of the fact that "Prune-Belly-Syndrome" shared certain symptoms with other, similar complaints). Moreover, there had not been an obligation to inform the applicant of the state of her son's body after the examination. The reason for the post-mortem had been, in particular, the unclear clinical diagnosis and the need to assess the quality of the pre- and postnatal treatment administered. It was irrelevant whether the results of the post-mortem had been used for the furtherance of scientific research or whether they had been publicised (which in the instant case they had not). The term "scientific interest" also included an interest in completing the personal file of the applicant's son, Y.M., by confirming the initial diagnosis. The court furthermore held that the applicant had been informed by the hospital that the post-mortem would also be carried out without her consent (see paragraph 9 above). Concerning the removal of the organs, the court held that it was common knowledge that a post-mortem could also include the removal of organs, if necessary. In any event the applicant had not proved that the doctors had promised her, as she alleged, that the post-mortem would only consist of a small four-centimetre-cut. The fact that the organs had only been returned to her later was irrelevant in that regard, as the applicant alleged that it was the events at her son's funeral ceremony that had caused her post-traumatic stress disorder, not the late return of his organs.

31. The applicant lodged an appeal on points of law with the Supreme Court, repeating the arguments submitted in her previous appeals, and

adding that her rights under Article 9 of the Convention had been violated. She requested the Supreme Court to institute proceedings before the Constitutional Court to review the constitutionality of section 25(1) of the Hospital Act, and to request a preliminary ruling from the European Court of Justice in that respect.

3. The Supreme Court's final decision

32. The Supreme Court (*Oberster Gerichtshof*) rejected the applicant's extraordinary appeal on points of law on 25 September 2015. It noted that according to the clear wording of section 25(1) of the Hospital Act and section 12(3) of the Funeral Act, the case's lack of diagnostic clarity constituted an example of the kind of public and scientific interest that justified a post-mortem examination – even without the consent of the deceased's relatives. Since the diagnosis in the case at issue could only have finally been confirmed by means of a post-mortem, the Innsbruck Court of Appeal had rightly taken the view that there had been a lack of diagnostic clarity, within the meaning of section 25 of the Hospital Act. The Supreme Court deemed that the relevant legal provisions were clear in that respect and that they therefore did not require further judicial interpretation. Moreover, the preparatory work on section 25 of the Hospital Act (see paragraph 39 below) showed that the aim of the legislature had been to enable the furtherance of scientific knowledge, without imposing a requirement that any knowledge thus acquired should then be, in a narrower sense, "scientifically processed" (*wissenschaftlich verwerten*).

33. As regards the alleged infringement of Article 9 of the Convention, the Supreme Court found that carrying out the post-mortem against the applicant's will had constituted an interference with her rights under that provision. However, in the light of its importance for the development of medicine and in order to assess the quality of the medical treatment provided in the instant case, it had been in the interest of public health to eliminate any diagnostic ambiguities by carrying out a post-mortem. The post-mortem had thus pursued a legitimate aim justifying a possible restriction of the exercise of religion within the meaning of Article 9 § 2 of the Convention. The Supreme Court saw no reason to institute proceedings before the Constitutional Court to review the provisions in question, or to request a preliminary ruling from the European Court of Justice.

34. Turning to doctors' duty to inform relatives of a post-mortem, the Supreme Court noted that the existence and scope of that duty depended on the circumstances of the individual case. It did not consider that its case-law (regarding the comprehensive medical duty to disclose information) had been applicable to the present case, as it had not affected the right to self-determination of the patient himself. Moreover, the duty to disclose information was aimed at preventing any potential future damage. The Supreme Court conceded that the way in which post-mortem examinations

were carried out, and the fact that organs were removed from the corpse in the case of a post-mortem carried out on a newborn, was not common knowledge, but it held that it did not appear unpredictable or highly surprising either. It found that doctors therefore rightly refrained from giving detailed explanations. In addition, the omission of such detailed explanations – which could also be burdensome for a relative – were not very likely to cause any psychological impairment to a relative of the subject of a post-mortem. Regard had to be had to the state of the body of the applicant's son when it had been handed over to her, which appeared to have been much less shocking than its state at the funeral. The specific religious background of the case could not change that assessment.

35. The Supreme Court's decision was served on the applicant on 20 October 2015.

II. RELEVANT DOMESTIC LAW AND PRACTICE

36. Article 17 of the Basic Law (*Staatsgrundgesetz*) of 1867 reads:

> "Science and its teaching are free. ..."

37. Section 5a of the Hospital Act, as in force at the relevant time, concerned patients' rights. It stipulated, among other things, that hospitals had to ensure that patients could exercise their right to clarification and information regarding their treatment options (including the risks in respect of those options). Upon a patient's demand, medical information should be provided by a doctor in (as far as possible) a comprehensible and sensitive manner.

38. Section 25(1) of the Hospital Act stipulates that corpses of patients who have died in public hospitals shall be examined *post mortem* if a post-mortem has been ordered by the sanitary police (*Sanitätspolizei*) or during criminal proceedings, or if it is necessary for the safeguarding of other public or scientific interests – in particular because the case is not diagnostically clear or there has been a surgical intervention. In all other cases, a post-mortem may only be carried out with the consent of the deceased's closest relatives, unless the deceased agreed to it while still alive, pursuant to section 25(2) of the Hospital Act. In respect of each post-mortem, a written statement shall be prepared and preserved in the medical history of the deceased (section 25(3) of the Hospital Act).

39. The preparatory work on section 25 of the Hospital Act (AB 164 BlgNR VIII. GP. 10; 1956) notes in this respect that the development of modern medicine was only possible through the opening of corpses of the deceased in hospitals in order to clarify beyond doubt the morphological causes of many diseases. The practical value of post-mortem examinations stemmed from the fact that the doctor treating the patient could not only review his or her own diagnosis and the therapy applied, but

also determine the reasons for any failure thereof. Thanks to the fact that post-mortem examinations are a regular occurrence, the health authorities also obtain reliable information about the existence and frequency of individual diseases and causes of death and may thus take general measures designed to prevent or combat such diseases. In addition, the result of a post-mortem may turn out to be highly valuable for the relatives of the deceased, since the clarification of often minor additional findings may give rise to important conclusions pointing to peculiarities in the constitution of family members that encourage the development of certain diseases. If such peculiarities become known to the medical community, then it is possible to prevent unfavourable health developments at an early stage.

40. Even before the adoption of the Hospital Act, autopsy law had a long tradition in Austria. Since 1867, it is perceived as an integral part of the constitutionally guaranteed freedom of science (see paragraph 36 above). The motto *"mors auxilium vitae"* not only adorns many buildings housing university departments for anatomy and pathology, but expresses a long-standing concept of overriding importance of public interests in science and health care by excluding rights of individuals to object against an autopsy, at least if it is performed in a public hospital (see Kopetzki, C. *Obduktionen im wissenschaftlichen Interesse: Rechtlicher Rahmen und verfassungsrechtliche Grenzen*, in Kopetzki/Körner (ed.), *Leichenöffnung für wissenschaftliche Zwecke* (2021), p. 88). The scope of "scientific interests" in section 25 of the Hospital Act (see paragraph 38 above) is subject of a vivid academic discussion (*ibid.*, pp. 106 onwards).

41. Under section 3(2) of the Funeral Act, it is for relatives – unless the deceased issued instructions before his or her death – to determine in particular the nature and place of the funeral and to give their consent to an opening of the deceased's corpse that has not been ordered by the Public Prosecutor's Office or the local mayor or is not provided for in section 12(3) of the of the Funeral Act (see below). Unless the deceased issued an order to the contrary while still alive, his/her relatives may, instead of a funeral, leave the corpse to an institution devoted to scientific or medical research and education, for the purposes of determining the causes of diseases or of research into methods of curative treatment.

42. Under section 12(3) of the Funeral Act, a post-mortem of the corpse of a patient who has died in a public hospital must be carried out, *inter alia*, if the opening of the corpse in question is necessary in order to safeguard public or scientific interests – in particular if the case is diagnostically unclear or if there has been a surgical intervention.

43. Under section 13(4) of the Funeral Act a written report must be prepared regarding the opening of a corpse, which apart from the deceased's personal details, must contain the pathological findings in respect of the corpse and the cause of death. The written report must be signed by the doctor who carried out the post-mortem. If a patient died in a hospital and

his or her corpse was opened, a copy of the relevant written report shall be annexed to his or her medical history. Under section 13(5) the opening must be carried out in such a manner as not to constitute a risk to health, nor to violate the sense of respect for the deceased's remains. Under section 65, anyone who violates the above-mentioned provisions of the Funeral Act shall be punished by a fine of up to EUR 2,000.

44. An ordinance issued by the Sanitary Authority of the Vorarlberg Regional Government on 14 January 2003 aimed at combating infant mortality expressly stipulates that:

> "... in most cases of infant death, a sanitary-police post-mortem is necessary from a professional point of view, except where the cause is clearly discernible (for example, in the case of accidents [or] for forensic reasons ...). In all other cases, the cause of death in particular (especially in the case of babies [who die] away from hospital – for example, [of] sudden infant death syndrome) can be determined only by opening the corpse ... A circle of experts will then consider the adduced documents, information and data ..., [and] – on the basis of an analysis and discussion of each individual instance of an infant's death – will draft proposals for the further reduction of infant mortality."

45. Section 30(2) of the Hospital Act of the *Land* of Vorarlberg (*Vorarlberger Gesetz über Krankenanstalten*) stipulates that hospitals shall ensure that patients are able to exercise their right to receive an understandable and sufficient explanation and information regarding the diagnosis and possibilities for treatment (and attendant risks) in order that they may be able to actively participate in decisions affecting their state of health. Information about their state of health and the progress of treatment must be provided to them (or, at their request, to a person that has their confidence) by a physician in – as far as possible – an easily understandable and gentle manner, having regard to the personality of the patient. Moreover, patients are entitled to inspect their own medical records and to receive a copy thereof, to careful and respectful treatment and (should they so request) to pastoral care and psychological support.

46. In order to safeguard patients' rights and interests, there is an Information and Complaints Office in each hospital in Vorarlberg, in accordance with section 3 of the Protection of Patients and Clients Act of the *Land* Vorarlberg (*Vorarlberger Patienten- und Klientenschutzgesetz*); such offices have to consider complaints about accommodation, care and health treatment, examine suggestions for improvement, and provide information about patients' stays in the hospital in question. In addition, an independent Patients' Ombudsperson (who is not subject to any kind of control) and an arbitration commission tasked with hearing disputes involving damage caused to patients and clients (hereinafter, "the Arbitration Commission") have been established. Under section 5 of the Act, the Patients' Ombudsperson has the task of providing advice and information to patients and clients (and persons enjoying their confidence) free of charge, to consider complaints about accommodation, care and

health treatment, to assist patients and clients before the Arbitration Commission (section 7 et seq.) and to grant patients compensation for injuries or damage caused by the hospital (section 6).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 8 AND 9 OF THE CONVENTION RELATING TO THE POST-MORTEM EXAMINATION

47. The applicant complained under Articles 8 and 9 of the Convention that the carrying out of the post-mortem on her son's body against her will had violated both her right to respect for her private and family life and her right to freedom of religion, and that the domestic courts had not conducted a balancing exercise regarding the conflicting interests in that respect.

Article 8 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."

Article 9 reads as follows:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. Applicability of Article 8 of the Convention

48. The Court observes that the exercise of Article 8 rights concerning family and private life pertains, predominantly, to relationships between living human beings. However, the possibility cannot be excluded that respect for family and private life extends to certain situations after death (see *Sargsyan v. Azerbaijan* [GC], no. 40167/06, § 255, ECHR 2015; *Jones v. United Kingdom* (dec.), no. 42639/04, 13 September 2005). In the cases of *Petrova v. Latvia* (no. 4605/05, § 77, 24 June 2014) and *Elberte v. Latvia* (no. 61243/08, § 89, ECHR 2015) the Court recognised that the removal of

a deceased relative's organs or tissues without consent fell within the scope of the "private life" of the surviving family members.

49. The Court notes that the Government did not contest the applicability of Article 8. Having regard to its case-law, the Court sees no reason to come to a different conclusion. It considers that the complaint relating to the performance, against the applicant's will, of the post-mortem examination conducted on her son comes within the scope of Article 8 in so far as her right to respect for her private and family life is concerned. This Article is therefore applicable in the present case.

2. Applicability of Article 9 of the Convention

50. The Court reiterates that freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the Convention. While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 of the Convention lists a number of forms that manifestation of one's religion or belief may take – namely worship, teaching, practice and observance. Nevertheless, Article 9 does not protect every act motivated or inspired by a religion or belief (see *Johannische Kirche and Peters v. Germany* (dec.), no. 41754/98, 10 July 2001).

51. The Court has previously held that the manner of burying the dead represents an essential aspect of religious practice and falls under the right to manifest one's religion within the meaning of Article 9 § 2 of the Convention (*ibid.*). Article 9 is therefore applicable to the applicant's complaint that the post-mortem had been carried out against her declared religious convictions, as she submitted that it had prevented her from burying her son in accordance with her beliefs.

3. Conclusion

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

B. Merits

1. Has there been an interference with the applicant's rights?

53. The Court considers that the post-mortem of the corpse of the applicant's deceased son, carried out despite her and her husband's objections, could be regarded as impinging on her relational sphere in such a manner and to such a degree as to disclose an interference with her right to

respect for her private and family life under Article 8 of the Convention (compare *Solska and Rybicka v. Poland*, nos. 30491/17 and 31083/17, § 110, 20 September 2018).

54. As regards Article 9 of the Convention, the Court has held that in their activities, religious communities abide by rules that are often seen by followers as being of divine origin. Religious ceremonies have their meaning and sacred value for believers if they have been conducted by ministers empowered for that purpose, in compliance with those rules. Participation in the life of the community thus constitutes a particular manifestation of their religion, which is in itself protected by Article 9 (see *İzzettin Doğan and Others v. Turkey* [GC], no. 62649/10, § 111, 26 April 2016). The Court considers that the applicant burying her son in accordance with her Muslim beliefs, which required the body to remain unscathed, constituted a manifestation of her religion.

55. Regard being had to its case-law and the above-mentioned circumstances of the case, the Court finds that the post-mortem conducted on the body of the applicant's son against her will and against her declared religious convictions constituted an interference with her "private" and "family life" within the meaning of Article 8 of the Convention, as well as her right to manifest her religion under Article 9 of the Convention.

2. Was the interference justified?

56. In order to be justified under Articles 8 § 2 and 9 § 2 of the Convention, any interference must be in accordance with the law, pursue one of the listed legitimate aims and be necessary in a democratic society (*ibid.*, § 98).

(a) Accordance with the law

57. The applicant did not dispute that holding the post-mortem had been in accordance with the law.

58. The Government argued that Article 8 of the Convention did not *per se* stipulate that a domestic legal regulation – if formulated with sufficient clarity – required in any event the consent of the relatives of the deceased in question in order for a post-mortem examination to be carried out (with reference to the above cited judgments in the cases of *Petrova* and *Elberte*). They contended that section 25 of the Hospital Act complied with the clarity requirements.

59. The Court reiterates that the expression "prescribed by law" in Articles 8 § 2 and 9 § 2 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects. However, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see,

among many other authorities, *Delfi AS v. Estonia* [GC], no. 64569/09, § 120, ECHR 2015).

60. The Court observes that the post-mortem was carried out on the basis of section 25 of the Hospital Act and section 12(3) of the Funeral Act. The domestic courts based their assessment of the applicant's case on those provisions (see paragraphs 38 and 42 above). Given that the Court sees no valid reason to question the interpretation of those provisions by the domestic courts, it accepts that the interference complained of was "prescribed by law".

(b) Legitimate aim

61. While the applicant conceded that post-mortem examinations might serve the aim of the protection of health, she argued that her son's post-mortem had not contributed to the advancement of science or to the attainment of new findings, but in the end had only served to confirm his individual diagnosis. Hence, this legitimate aim had not been achieved in the instant case.

62. The Government submitted that section 25 of the Hospital Act served a legitimate aim – namely the protection of health, which was rendered clear by the preparatory work on that provision:

- Firstly, a post-mortem examination often constituted the only possibility for the doctor in charge to review his/her own diagnosis and applied therapy. Moreover, the reasons for a failure in treatment could also be determined as a result of a post-mortem examination.

- Secondly, post-mortem examinations carried out systematically permitted the collection of secure data by the health authorities regarding the existence and frequency of individual diseases and causes of death, thus enabling them to take general preventive and combative measures.

- Thirdly, the result of a post-mortem examination could also be particularly valuable for the relatives of the deceased, since it often provided essential indications of genetic predispositions towards certain diseases, thus permitting early prevention.

63. The Government submitted that post-mortem examinations were therefore not only important in order to achieve diagnostic clarity and quality control; the examination of the exact nature of Y.M.'s illness could also – by detecting any possible genetic defects – be important for the applicant and any offspring that she might have in the future.

64. The Government argued that the Austrian Supreme Court had thus rightly noted in its judgment in respect of the instant case that the legal aim of the provisions referred to was to enable experts to acquire additional (medical) knowledge without there having to be a prior intention or possibility on the part of those experts to use data and information obtained in any individual case for strictly scientific purposes. The interests of living

individuals were thus given more weight than those of the deceased, in accordance with the principle *mors auxilium vitae*.

65. The Court notes that the Supreme Court has held that the aim of the protection of public health could also be served by eliminating any diagnostic ambiguities (see paragraph 33 above), as has been the case with the applicant's son. The Court therefore accepts that the post-mortem was conducted for the safeguarding of scientific interests and served the legitimate aim of the protection of the health of others, as extensively demonstrated by the Supreme Court's reasoning as well as the Government's submissions above.

(c) Proportionality of the interference

(i) The applicant's submissions

66. The applicant alleged that the post-mortem and the removal of the organs had not been conducted *lege artis*, which constituted *per se* a violation of Article 9 of the Convention, as the body of Y.M. had thereby been disfigured.

67. Furthermore, the applicant argued that the conducting of a balancing exercise was not provided in section 25 of the Hospital Act or section 12 of the Funeral Act, and had not been conducted in respect of her case, either. The law did not provide for any possibility to object to post-mortem examinations for religious reasons.

68. The applicant maintained that the post-mortem of Y.M. had been ordered without any medical necessity. The above-mentioned expert, Dr V., had confirmed in his opinion that the results of the post-mortem had not been entered into the personal file of the deceased Y.M., and had not resulted in any new medical discoveries. Consequently, it had not served the aim of advancing public health or safety. The post-mortem had merely served to confirm the diagnoses already arrived at. The applicant contended that the aim of quality control had not been proportionate to such a severe interference with her rights under Articles 8 and 9 of the Convention.

(ii) The Government's submissions

69. The Government submitted that the Austrian legislature had struck a fair balance of interests in the relevant provisions (section 25 of the Hospital Act and the corresponding section 12(3) of the Funeral Act – see paragraphs 38 and 42 above), defining for the purposes of the protection of health those cases where, in a public hospital, a post-mortem examination had to be carried out in any event and there was no room for discretion in respect of any individual case. If the doctor treating a patient found that there was a scientific interest (in particular, in view of a lack of diagnostic clarity) in conducting a post-mortem examination following that patient's death, the individual interests of the relatives of that patient had to be disregarded. The

applicable legal provisions ensured in any event that post-mortem examinations would be carried out only to the absolutely necessary extent.

70. The Government submitted that at all three levels of jurisdiction the domestic courts had considered the applicant's submissions carefully and comprehensively, examining point by point whether the physicians' activities had been in conformity with the law. The courts had examined all the relevant evidence, heard numerous witnesses (including the doctors involved and other physicians), consulted the Patients' Ombudsperson, and obtained several expert opinions. It was for the national courts to weigh evidence; that the courts had made a mistake in this respect was not discernible.

71. The Government reiterated that both the domestic courts and the experts in their opinions had unanimously come to the conclusion that the diagnosis had been unclear within the meaning of section 25 of the Hospital Act. It was true that a diagnosis of Prune-Belly-Syndrome had been strongly indicated. However, a final confirmation of that diagnosis – especially in view of the fact that some symptoms were common to other, similar malformations – had been possible only by means of conducting a post-mortem examination. A post-mortem had thus been carried out, on the one hand in order to clarify beyond doubt the cause of death, and on the other, to clarify whether such a disease might occur in any future siblings or in descendants of siblings already born. The post-mortem of the corpse of the applicant's son had therefore been necessary for reasons of scientific interest within the meaning of section 25 of the Hospital Act and had been rightly carried out without the applicant's consent. It could also be seen from the experts' opinions that the post-mortem had been carried out *lege artis* and that a detailed, high-quality post-mortem report had been produced. The provisional removal and storing of organs outside a corpse was part of standard post-mortem procedure and necessary in order to safeguard scientific interests; in the case of the applicant's son, it had been carried out in an appropriate and professional manner.

72. The Government therefore took the view that the post-mortem of the corpse of the applicant's son had not constituted a violation of her rights under Article 8 of the Convention.

73. Referring to the Supreme Court's findings on the issue (see paragraph 33 above), the Government submitted that there had been no violation of Article 9 of the Convention either.

(iii) The Court's assessment

1. General principles

74. The Court reiterates that in determining whether an impugned measure was "necessary in a democratic society", it will consider whether, in the light of the case as a whole, the reasons adduced to justify that

measure were relevant and sufficient for the purposes of paragraph 2 of Article 8 (see, among many other authorities, *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 179, 24 January 2017, with further references).

75. In cases arising from individual applications the Court's task is not to review the relevant legislation or practice in the abstract; it must as far as possible confine itself, without overlooking the general context, to examining the issues raised by the case before it (*ibid.*, § 180, with further references).

76. According to the Court's established case-law, the notion of necessity implies that the interference in question corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued, regard being had to the fair balance which has to be struck between the relevant competing interests (see *A, B and C v. Ireland,* cited above, § 229).

77. In determining whether an interference was "necessary in a democratic society" the Court will take into account the fact that a margin of appreciation is left to the national authorities, whose decision remains subject to review by the Court for conformity with the requirements of the Convention (see *X, Y and Z v. the United Kingdom*, 22 April 1997, § 41, *Reports* 1997-II).

78. The Court reiterates that a number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State when deciding any case under Article 8 of the Convention (see, among many other authorities, *S.H. and Others v. Austria* [GC], no. 57813/00, § 94, ECHR 2011; and *Hämäläinen v. Finland* [GC], no. 37359/09, § 67, ECHR 2014). Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I). Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it (particularly where the case raises sensitive moral or ethical issues), the margin will be wider (*ibid.*, § 77; see also *A, B and C v. Ireland*, cited above, § 232). There will usually be a wide margin of appreciation accorded if the State is required to strike a balance between competing private and public interests or Convention rights (see *Evans*, cited above, § 77, and *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-V; see also, *mutatis mutandis, Vavřička and Others v. the Czech Republic* [GC], no. 47621/13 and 5 others, §§ 275 and 280, 8 April 2021).

79. In a case relating to an exhumation conducted against the will of the surviving family members for the purpose of a criminal investigation, the Court has held that the State authorities are required to find a due balance between the requirements of an effective investigation under Article 2 and

the protection of the right to respect for private and family life of the parties to the investigation and other persons affected under Article 8. The Court has found, in that context, that the requirements of the investigation's effectiveness have to be reconciled to the highest possible degree with the right to respect for private and family life. There may be circumstances in which exhumation is justified, despite opposition by the family (see *Solska and Rybicka*, cited above, § 121).

2. Application to the instant case

80. The Court considers that the case at issue concerns the regulation of post-mortem examinations in public hospitals and the question of whether and in which cases close relatives of the deceased should be granted the right to object to a post-mortem examination for reasons related to private life and religion where interests of public health clearly call for such a measure. It thus relates to sensitive moral and ethical issues, and requires a balance to be struck between competing private and public interests. The Court reiterates in this context that the Contracting States are under a positive obligation, by virtue of Article 8, to take appropriate measures to protect the health of those within their jurisdiction (see *Vavřička and Others*, cited above, § 282). Consequently, the State's margin of appreciation must be considered to be wide.

81. In particular, the present case required a balancing exercise between, on the one hand, the protection of the health of others through the conduct of the post-mortem examination (see paragraph 65 above) and, on the other, the protection of the applicant's right to respect for her private and family life (Article 8) and her right to manifest her religion (Article 9).

82. In the instant case, the applicant alleged, first of all, that her son's post-mortem had not been carried out *lege artis*. However, the Court notes that the expert opinion issued by the pathologist, Dr L. (see paragraph 28 above) explicitly concluded that the post-mortem had been carried out *lege artis*. The Court sees no reason to question that finding.

83. Secondly, the applicant alleged, essentially, that her religious convictions should have been taken into account by the hospital when deciding whether to carry out a post-mortem examination. She complained that no balancing exercise was provided for by the applicable laws, nor had such an exercise been conducted by the hospital.

84. The Court notes that Austrian law does not grant in all cases a right to object to a post-mortem examination of close relatives on religious or any other grounds. The Court sees no reason to call this legislative choice into question. The rights under Articles 8 and 9 are not absolute and therefore do not require the Contracting States to grant an absolute right to lodge an objection in that regard.

85. Thirdly, the Court observes that the post-mortem was carried out on the basis of section 25 of the Hospital Act and section 12(3) of the Funeral

Act (see paragraph 60 above). It therefore considers it appropriate for it to assess the relevant legislative choices. Pursuant to section 25 of the Hospital Act, as well as the corresponding section 12(3) of the Funeral Act (see paragraphs 38 and 42 above), in cases of a death in a public hospital, a post-mortem shall be carried out - irrespective of the consent of the close relatives - if it is necessary, *inter alia*, in order to safeguard scientific or other public interests. If it is not necessary to safeguard such interests and none of the other criteria enumerated in section 25 of the Hospital Act apply, a post-mortem may only be carried out with the consent of the deceased's closest relatives. The law therefore does not give the authorities the right to conduct post-mortem examinations in each and every case. The Court notes, however, that the Austrian legislature has chosen to give precedence to the interests of science and the health of others over religious or any other reasons for objection on the part of the relatives of a deceased person in cases of necessity for safeguarding scientific interests - in particular if a case is diagnostically unclear.

86. The Court emphasises the Government's submissions to the effect that the advancement of modern medicine has in part been made possible by post-mortem examinations establishing the cause of death and contributing to the prevention of thereby discovered illnesses and ailments in those still alive (see also the preparatory work on section 25 of the Hospital Act, cited in paragraph 39 above) – irrespective of religious or other convictions. In other words, *mortui vivos docent* – "the dead teach the living". In that connection, the Court also notes the long and carefully preserved tradition of autopsy law in Austria, which is perceived as an integral part of the constitutionally guaranteed freedom of science (see paragraphs 36 and 40 above). This right is closely related to the positive obligations under the Convention, notably Articles 2 and 8, to take appropriate measures to protect the life and health of those within a State´s jurisdiction (see *Vavřička and Others*, cited above, § 282).

87. The Court thus considers that the legitimate aim cited by the Government, namely the protection of the health of others through the conduct of post-mortem examinations, is of particular importance and weight in the instant case. At the same time, the Court is mindful of the relevance in this context of the applicant's interest in ensuring that the remains of her deceased son were respected for the purpose of the funeral, a concern that she had expressed from the outset (see paragraphs 7, 9 and 11 above; compare *Solska and Rybicka*, cited above, § 122).

88. The Court notes that the evidence taken during domestic proceedings confirmed the lawfulness of the performance of the post-mortem. Two independent expert opinions found that the post-mortem had been performed in order to confirm a previous diagnosis (see paragraphs 27-28 above) and had clearly served the safeguarding of scientific interests. They stated that so-called "Prune-Belly-Syndrome" was a disease that had not yet

been sufficiently explored; moreover, there also existed an illness with similar symptoms, and Y.M.'s post-mortem had served to secure diagnostic clarity in respect of his case. The Court is therefore satisfied, in line with the domestic courts' findings, that the legal requirement that there be a scientific interest in performing a post-mortem examination was met in the instant case.

89. However, even though there was indeed a scientific interest in performing the post-mortem examination, the Court reiterates that section 25 of the Hospital Act stipulates that a post-mortem examination can only be performed in such circumstances if it is "necessary" in order to safeguard such a scientific interest, which leaves a certain scope of discretion, including as to the extent of the intervention necessary, to the doctors deciding on whether a post-mortem examination should be carried out in any given case. It therefore does not exclude that a balancing of competing rights and interests could or should be carried out. The Court considers that in the applicant's case, however, her reasons for opposing the post-mortem of her son's body were not taken into account by the public hospital's staff in charge of that decision (see paragraph 9 above). Nor did the Court of Appeal, which dismissed the applicant's claim for damages (see paragraph 30 above), weigh the importance of the scientific interest in the post-mortem against the applicant's particular private interest in having her son's body "as unscathed as possible" for the religious funeral (see paragraph 7 above). While the Court accepts the wide margin of appreciation of the domestic authorities (see paragraph 80 above), in the instant case they do not appear to have conducted any balancing exercise between the competing interests.

90. The Court notes that the applicant had been able to submit her complaints as to the violation of her rights under Articles 8 and 9 to the Supreme Court, and that the latter addressed, to some extent, the proportionality of the interference with her rights, agreeing with the legislative choices and confirming the scientific interest in the material post-mortem examination. It considered that in the present case, the carrying out of the latter had been in the interest of public health in order to assess the quality of the medical treatment given to the applicant's son, to eliminate any diagnostic ambiguities and to promote scientific knowledge (see paragraph 33 above). However, the applicant's reasons for opposing the post-mortem were given little to no consideration. The Supreme Court therefore did not sufficiently address her individual rights under Articles 8 and 9 of the Convention and the "necessity" of the post-mortem in that light.

91. The foregoing considerations are sufficient to enable the Court to conclude that the authorities in the instant case have not struck a fair balance between the competing interests at stake by reconciling the requirements of public health to the highest possible degree with the right to respect for private and family life (compare *Solska and Rybicka*, cited

above, § 121; see paragraph 79 above), nor did they weigh the applicant's interest in burying her son in accordance with her religious beliefs in the balance. This failure to conduct a balancing exercise constituted a violation of Articles 8 and 9 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION REGARDING THE DUTY TO DISCLOSE INFORMATION

92. The applicant complained under Article 8 of the Convention 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. She submitted that this lack of information on the post-mortem had an impact on the choice of her son's funeral arrangement, which she and her husband expressly wished to organise according to their religious beliefs.

A. Admissibility

1. Applicability of Article 8 of the Convention

93. The Court reiterates that the right of access to information relating to one's private and/or family life raises an issue under Article 8 of the Convention (see, among other authorities, *Roche v. the United Kingdom* [GC], no. 32555/96, §§ 155-56, ECHR 2005-X; and, in particular, *Lozovyye v. Russia*, no. 4587/09, § 32, 24 April 2018, in which the Court found that Article 8 was applicable to a situation where the family of a murder victim had not been informed of his death and had not been able to attend the funeral).

94. The Court has held that the concepts of "private life" and "family life" encompass the right to bury a close relative and to be present when that burial takes place (see *Gülbahar Özer and Yusuf Özer v. Turkey* (no. 64406/09, § 26, 29 May 2018, with further references). In the cases of *Pannullo and Forte v. France* (no. 37794/97, §§ 35-36, ECHR 2001-X) and *Girard v. France* (no. 22590/04, § 107, 30 June 2011) the Court recognised that an excessive delay in the restitution of a body after a post-mortem or of bodily samples upon completion of the relevant criminal proceedings could constitute an interference with both the "private life" and the "family life" of the surviving family members. In the case of *Hadri-Vionnet v. Switzerland* (no. 55525/00, § 52, 14 February 2008) the Court decided that the possibility for the applicant to be present at the funeral of her stillborn child, along with the related transfer and ceremonial arrangements, was also capable of falling within the ambit of both "private" and "family life", within the meaning of Article 8. The Court has also held that a mother being unable to carry out her religious duties at 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).

95. Regard being had to its case-law concerning surviving family members and the above-mentioned circumstances, the Court finds that the applicant's complaint concerning the hospital's duty to disclose information relating to her son's post-mortem falls within the scope of the right to respect for private and family life.

2. The Government's objection relating to the non-exhaustion of domestic remedies

96. The Government submitted that if it could be said that the applicant had indeed alleged a violation of Article 8 before the domestic courts in relation to the hospital's duty to disclose information, she had done so only in substance – that is to say without mentioning Article 8. They therefore considered that complaint to be inadmissible for non-exhaustion of domestic remedies.

97. The applicant did not comment on the admissibility of that complaint.

98. The Court notes that the question of the extent of the information provided regarding her son's post-mortem was indeed one of the subjects of the domestic liability proceedings (see paragraph 21 above), even though the applicant did not specifically refer to Article 8 of the Convention during those proceedings. It reiterates that it is sufficient that the applicant raised the above complaint in substance before the domestic courts (see, among many other authorities, *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 72, 25 March 2014). It therefore dismisses the Government's objection of non-exhaustion in respect of this complaint.

3. Conclusion

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

B. Merits

1. The applicant's submissions

100. The applicant alleged that medical staff had at first told her that no post-mortem would be performed, after she had told them that she objected to it for religious reasons. Later, the hospital explained to her that the planned post-mortem of the body would only be carried out to a minor extent, and would entail making just a small incision measuring about 4 cm. She had continued to object, but the post-mortem had been performed nonetheless, without her or her husband's consent.

101. She furthermore contended that she had not been informed that the removal of all internal organs had taken place (including the urinary tract, which had rendered the child's sex unrecognisable) or that the body had been refilled with cotton wool. The post-mortem and the removal of the organs had made a burial in accordance with her religious beliefs impossible.

102. The applicant submitted that the post-traumatic stress disorder from which she suffered was a direct result of the shock that she had had when seeing her child's body in such an unexpected state at the funeral ceremony. She would never have planned and conducted a funeral ceremony in Turkey (but would instead have buried her son in Austria) had she known that her child's body had undergone such an extensive post-mortem.

2. The Government's submissions

103. The Government submitted that physicians' duty to provide information and explanations to the relatives of deceased patients stemmed *mutatis mutandis* from section 5a of the Hospital Act and section 30 of the Vorarlberg Hospital Act as a subsidiary duty under the treatment contract. Such clarifications typically served the purpose of preventing foreseeable damage. The Government added that according to the Supreme Court's case-law, the existence and scope of the obligation, under a private-law contract, to provide information always depended on the circumstances of each individual case. It was difficult to issue general statements regarding precisely when there was a duty to warn and inform. However, it could be said that the standard to be applied became stricter the higher the damage that could emanate from a certain risk. But in any event, the duty to disclose information ended at the point where it became clear such a disclosure would threaten the interests of the person to be informed.

104. The Government argued that a physician's duty to inform a patient about a medical treatment was not applicable to the same extent in respect of the case at issue: in the present case there had been no duty to disclose information, as the case had not concerned the right to self-determination of a patient whose physical integrity had been unlawfully and with irreversible consequences affected by a certain treatment measure (see the above-mentioned Supreme Court judgment, paragraphs 32-34 above). What the Government considered to be at issue in the instant case was rather the rights of the relatives after the death of a patient, which is why another standard had to be applied regarding doctors' duty to provide information.

3. The Court's assessment

105. At the outset, the Court notes that it has not been contested that the hospital was a public institution and that the acts or omissions of its medical staff – including the doctors and physicians who decided to perform and

who carried out the post-mortem – 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, and *Elberte*, cited above, § 106).

106. The Court points out that while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in effective "respect" for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole, and in both contexts the State is recognised as enjoying a certain margin of appreciation (see *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, p. 20, § 55; and *Pannullo and Forte*, cited above, § 35).

107. In choosing how to comply with their positive obligations, States enjoy a broad margin of appreciation (see *A, B and C v. Ireland* [GC], no. 25579/05, § 249, ECHR 2010).

108. The substance of the applicant's complaint is not that the State acted in a certain way, but that it failed to act (see *Airey v. Ireland*, 9 October 1979, § 32, Series A no. 32); namely, she alleged that the hospital omitting to inform her of the extent of the post-mortem and the removal of the organs had violated her rights, as guaranteed by Article 8 of the Convention. The Court finds it appropriate to approach the present case from the perspective of a positive obligation on the part of the respondent State under Article 8 of the Convention (see, to similar effect, *Lozovyye*, cited above, § 37).

109. In order to establish whether the requirements of Article 8 of the Convention were met in the present case the Court will examine, firstly, whether an appropriate legal framework was in place in Austria concerning any possible duty to disclose information to close relatives regarding the extent and manner of a post-mortem conducted on a deceased person (see, *mutatis mutandis*, *Lozovyye*, cited above, § 39).

110. The Court notes that in the instant case, the Supreme Court held that the laws concerning a patient's right to information were not directly applicable, as they concerned the treatment of the living and aimed at enabling patients to take informed choices in respect of their own health (see paragraph 34 above). The Government submitted that the physicians' duty to provide information and explanations to the relatives of a deceased person stemmed *mutatis mutandis* from section 5a of the Hospital Act, but did not apply to the same extent as it applied to the living.

111. The Court notes that there appears to be no clear rule under Austrian law governing the extent of information that must or must not be given to close relatives of a deceased person in respect of whom a post-mortem has been performed.

112. Nonetheless, in the Court's view this lack of a clear rule is not sufficient in itself to find a violation of the respondent State's positive obligations under Article 8 of the Convention in the present case (compare *Lozovyye*, cited above, § 42).

113. The Court will therefore next examine whether the Austrian authorities undertook reasonable steps to provide the applicant with information as to the extent the post-mortem performed, given the circumstances.

114. The Court has held, in a case where State employees organised the burial of the applicant's child without informing her of the time or place thereof, that it is the duty of the Contracting States to organise their services and to train their agents in such a way that they can meet the requirements of the Convention. It furthermore stated that in an area as personal and delicate as the management of the death of a close relative, a particularly high degree of diligence and prudence must be exercised by the authorities (see *Hadri-Vionnet*, cited above, § 56).

115. In the instant case, the applicant had just lost a child and was confronted with a situation in which she had no legal right to object to a post-mortem examination being conducted on that child. She had informed the hospital staff that according to her religious beliefs the deceased child's body needed to be as unscathed as possible for the burial ceremony. The Court considers that these specific circumstances are as delicate as those in the case of *Hadri-Vionnet* (cited above) and required an equally high degree of diligence and prudence on the part of the hospital staff when interacting with the applicant. Given the fact that the hospital staff was made aware by the applicant of the reasons for her objection to the post-mortem, the Court considers that the hospital had an even greater duty to provide her with appropriate information regarding what had been done and what would be done with her child's body. The Court notes that after her son's death, the applicant was informed that a post-mortem would be performed despite her objections (see paragraph 9 above). Whether she was indeed told that "only a small incision of about 4 cm" would be made cannot be confirmed from the documents at hand (see paragraph 13 above), moreover it was not established by the domestic courts. However, the Court finds it established that the hospital had not informed the applicant of the extent of the post-mortem, which led her to believe that a ritual washing and a funeral ceremony in accordance with her beliefs could be held. Therefore, she and her husband proceeded to organise such a ceremony in Turkey.

116. The Court reiterates that the Supreme Court stated in its final judgment that the doctors concerned had rightly refrained from giving detailed explanations to the applicant and her husband regarding the extent of the post-mortem (see paragraph 34 above). It conceded, at the same time, that the routine removal of organs during post-mortem examinations was not common knowledge but considered that omitting to give detailed

explanations regarding a post-mortem examination would potentially be less burdensome to the relatives of the deceased. The Court considers that the Supreme Court's argument that omitting to give detailed information would be less burdensome to the relatives may be valid in some situations, but did not take into account the specific situation in the applicant's case: she had made it clear that she wished to have a funeral in accordance with her beliefs which required her son's body to remain as unscathed as possible. The details on the extent of the post-mortem were therefore of particular importance for her, a fact which she had communicated to the hospital at several occasions.

117. Moreover, the Court considers that in the specific circumstances of the instant case, the hospital had a duty to inform the applicant about the removal of her son's organs. The Court notes, in this regard, that the Supreme Court held that it could not be seen as common knowledge that all organs are removed during the post-mortem of a new-born. It remained undisputed by the Government that the hospital staff initially denied having removed any organs, but later admitted that they had in fact done so. The applicant was handed her son's organs only after two interventions by the Patients' Ombudsperson. This was not disputed by the Government, either.

118. In sum, the Court considers that the behaviour of the hospital staff towards the applicant clearly lacked the diligence and prudence required by the situation. It finds (as did the Feldkirch Regional Court, as the court that examined the matter at first instance – see paragraph 29 above) that the hospital staff should have informed the applicant and her husband of the extent of their son's post-mortem. This information was important to them, in particular for religious reasons, as it was crucial to the planning of the burial ceremony, of which they had informed the hospital very early (see paragraph 7 above).

119. The Court furthermore notes that while the expert opinions unanimously found that the post-mortem had been justified in order to be able to clarify the diagnosis, nothing therein mentioned any necessity to keep the organs for scientific or other reasons for several weeks or months (see paragraphs 18 and 19 above). The Court considers that in the specific circumstances of the case, where the applicant had informed the hospital that her son´s body should remain as unscathed as possible for the funeral (see paragraph 7 above), it was the hospital's duty to inform the applicant without undue delay of the removal and the whereabouts of her son's organs.

120. The foregoing considerations are sufficient to enable the Court to conclude that, in the specific circumstances of the case, there has been a violation of Article 8 of the Convention on account of the hospital omitting to provide the applicant with sufficient information on the extent of her son's post-mortem, and of the removal and whereabouts of his organs.

III. ALLEGED VIOLATION OF ARTICLE 13 READ IN CONJUNCTION WITH ARTICLES 8 AND 9 OF THE CONVENTION

121. The applicant complained under Article 13, read in conjunction with Articles 8 and 9 of the Convention, that there been no legal remedy at her disposal by which to challenge the performance of the post-mortem examination before it took place. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

122. The Government submitted that the applicant had not raised that complaint before the domestic courts. They therefore considered the complaint to be inadmissible for non-exhaustion of domestic remedies.

123. The applicant did not comment on the admissibility of the complaint.

124. The Court reiterates that it is incumbent on the Government pleading non-exhaustion to satisfy it that the remedy was an effective one available in theory and in practice at the relevant time, that is to say that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (*Molla Sali v. Greece* [GC], no. 20452/14, § 89, 19 December 2018, with further references). It notes that the Government have not specified which remedy the applicant should have used to raise this complaint, or why such remedy would have been effective in the circumstances. It therefore dismisses the Government's objection as to the alleged non-exhaustion of domestic remedies.

125. The Court furthermore notes that this complaint is closely linked to the one examined above regarding the post-mortem and must therefore likewise be declared admissible.

126. However, having regard to its finding in relation to Articles 8 and 9 (see paragraphs 80-91 above), the Court does not consider it necessary to examine separately whether, in this case, there has been a violation of Article 13 (see, *mutatis mutandis*, the above-cited cases of *Elberte*, § 147, and *Solska and Rybicka*, § 131).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

127. 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

128. The applicant claimed EUR 8,500 in respect of pecuniary damage (namely, the fee that she had had to pay for the halted burial ceremony in Turkey). Under the head of non-pecuniary damage, she claimed 50,000 euros (EUR) for the stress and frustration that she had suffered as a result of the violation of the Convention. In addition, she claimed EUR 25,800 in respect of "future non-pecuniary damage".

129. The Government considered those claims to be excessive. They submitted that the applicant had not itemised her claims in respect of pecuniary damage or submitted any bills as evidence that those costs had actually been incurred.

130. According to Rule 60 of the Rules of Court, an applicant must submit itemised particulars of his claims, supported by relevant documents, failing which the Court may reject the claims in whole or in part. It therefore rejects the applicant's claim for pecuniary damage. On the other hand, the Court accepts that the applicant has suffered considerable distress on account of the violations found. It therefore awards the applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

131. The applicant also claimed EUR 89,660.42 for the costs and expenses incurred before the domestic courts (comprising EUR 32,796.92, which she had had to pay to the opposing party for its legal fees, and EUR 56,863.50 for her own legal representation as well as court fees), and EUR 20,000 for legal fees that she had incurred in respect of proceedings before the Court.

132. The Government pointed out that the applicant had failed to submit a detailed itemisation of her claims in respect of costs and expenses.

133. Regard being had to Rule 60 of the Rules of Court (see paragraph 130 above) and the documents in its possession, the Court grants the applicant EUR 32,796.92, which she had to pay in legal fees to the opposing party at the domestic level, but rejects the claim for the costs and expenses sustained at the domestic level for her own legal representation, as the applicant has failed to adduce itemised bills thereof. Moreover, it considers it reasonable to award EUR 5,000 for the proceedings before the Court. In

total, the Court therefore awards the applicant EUR 37,796.92 in respect of costs and expenses and rejects the remainder of her respective claims.

C. Default interest

134. 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

1. *Declares*, unanimously, the application admissible;

2. *Holds*, unanimously, that there has been a violation of Articles 8 and 9 of the Convention in respect of the failure to conduct a balancing exercise between the applicant's interests and the public interest in relation to the carrying-out of the post-mortem examination on her son's body;

3. *Holds*, unanimously, that there has been a violation of Article 8 of the Convention in respect of the authorities' failure to disclose information to the applicant about her son's post-mortem examination;

4. *Holds*, by five votes to two, that there is no need to examine the complaint under Article 13 of the Convention;

5. *Holds*, unanimously,
   (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, the following amounts:
      (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 37,796.92 (thirty-seven thousand seven hundred ninety-six euros and ninety-two cents), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

6. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 July 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Ilse Freiwirth	Yonko Grozev
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Pastor Vilanova, joined by Judge Harutyunyan is annexed to this judgment.

Y.G.R.
I.F.

PARTLY DISSENTING OPINION OF JUDGE PASTOR VILANOVA, JOINED BY JUDGE HARUTYUNYAN

1. The case concerns the applicant's objection on religious grounds to the post-mortem examination of her prematurely born and subsequently deceased son, which she alleged had violated her rights under Articles 8 and 9 of the Convention. Moreover, under Article 8 of the Convention, she complained that she had not been informed of the extent of the post-mortem or the removal of her son's organs for preservation purposes. In addition, she complained under Article 13, read in conjunction with Articles 8 and 9, that she had not had any legal remedy available to challenge *ex ante* the carrying out of the post-mortem.

2. My partly dissenting opinion only concerns the fourth point of the operative part of the judgment. Indeed, the great majority of the Chamber Judges considered that it was unnecessary to examine the applicant's complaint under Article 13 of the Convention.

3. The reasons for that refusal to examine the complaint are set out in paragraph 126 of the judgment, which explains that its finding in relation to Articles 8 and 9 made it unnecessary to consider the right to an effective remedy expressly relied upon by the applicant. That is the usual wording of a refusal by the Court implying that the complaint in question (in this case under Article 13) has already been analysed under a different provision of the Convention and that consequently no separate examination is required. I consider that that was not the case here, because Article 13 was not covered by the assessment of the substantive rights in issue. I consider that the complaint under Article 13 was fully "detachable" from the Chamber's previous findings in respect of Articles 8 and 9 of the Convention. This is borne out by the fact that in the analysis of those two provisions, the question of the lack of an effective remedy against the performance of the post-mortem examination had simply not arisen. Indeed, the Chamber based its finding of a violation on Articles 8 and 9 on account of: (a) the failure of the national authorities to balance the competing public and private interests (see paragraph 91 of the judgment), and (b) the failure to provide the applicant with sufficient information on the extent of the post mortem (see paragraph 120).

4. In order to justify the refusal to examine Article 13, the Chamber refers, in particular, to the cases of *Elberte v. Latvia*, no. 61243/08, § 147, ECHR 2015, and *Solska and Rybicka v. Poland*, nos. 30491/17 and 31083/17, § 131, 20 September 2018. The former case concerned possible interpretations of domestic law in a case concerning the unlawful removal of tissue from a dead body. Logically, the applicant had never had any opportunity to object to the operation because of its secretive nature. I do not consider that case-law relevant.

The latter case concerned the exhumation, in the framework of a criminal investigation and against the wishes of their families, of the remains of deceased persons. The applicants had complained, *inter alia*, of an inability to contest the order given by a prosecutor. The Court found a violation of Article 8 of the Convention on the grounds that "the domestic law did not provide a mechanism to review the proportionality of the restrictions on the relevant Article 8 rights of the persons concerned resulting from the prosecutor's decision" (§ 126). The Court further considered that it was no longer necessary to examine the complaint concerning Article 13 (§ 131). Accordingly, the Court decided not to examine the applicants' right to an effective remedy since it had already been taken into account in the violation of their right to respect for private and family life. It can easily be deduced that, unlike in the present case, the Chamber clearly criticised the absence of a preventive remedy *vis-à-vis* the prosecutorial order.

5. In the present case the applicant explicitly complained of her inability, under domestic law, to challenge the performance of the post-mortem examination before it had taken place (see paragraph 121 of the judgment). There can be no doubt that under the applicable law, Austrian doctors can perform a post mortem without the family's authorisation for scientific reasons. Not only can doctors override any explicit opposition from the family, but also their decisions cannot be the subject of any prior scrutiny before a court or any other independent domestic body. That is not a neutral issue, inasmuch as a finding of a violation by the Court could require Austria to introduce into its legal system a remedy (whether judicial or not) against unilateral decisions by medical doctors to perform a post-mortem operation in such cases.

6. The facts of the case are uncontroversial. The applicant's child died a few days after its birth of a rare, incurable disease (Prune Belly Syndrome). The medical staff of the Feldkirch Regional Hospital (Austria) promptly informed the parents of the necessity of a post-mortem examination in the interests of their descendants (see paragraphs 7 and 9 of the judgment). They categorically refused because such an operation was against their Muslim faith, which requires the deceased's body to remain as unscathed as possible for the purposes of the funeral (see the same paragraphs). Notwithstanding that explicit opposition, the doctors performed the post-mortem examination, removing practically all the internal organs from the child's body, including the sexual organs (see paragraph 12). The parents were not informed of the extent of the post mortem (see paragraph 14). Moreover, they only realised the full extent of the operation some time later, during the religious funeral in Turkey. That was when they discovered that the child's body and head had been cut open and sewn back together (see paragraph 16). Since the child's sex could not be established visually (the funeral rites differ according to the sex of the deceased person), the funeral was cancelled (see paragraph 17). The subsequent action for damages

lodged by the applicant against the company owning the hospital was ultimately rejected out of hand by the domestic courts.

7. The question put to the Chamber by the applicant had therefore been whether or not the lack of a preventive remedy in Austrian law had been contrary to the Convention. The majority of the Chamber tersely affirm that this legislative choice is not problematic *per se* (see paragraph 84). This was, to my mind, the main reason for the decision not to examine the complaint under Article 13.

8. With all due respect to the majority, I cannot follow this argument. Indeed, I take the view that this conclusion has not been properly reasoned, and that it is also contrary to the Court's case-law. The case-law cited in the actual judgment (*Solska and Rybicka,* cited above) would suggest otherwise. In that case the Court largely based the finding of a violation under Article 8 of the Convention on the absence of a preventive judicial remedy against a prosecutorial order to exhume a corpse. Secondly, in *Macready v. the Czech Republic* (nos. 4824/06 and 15512/08, §§ 47-48, 22 April 2010), the Court considered that in "special cases with particular issues at stake ... a purely compensatory remedy ... would not seem capable (at least on its own) of redressing the violations alleged in the instant case ... Indeed, the positive obligation on States to take appropriate action to ensure respect for the applicants' family life within the meaning of Article 8 could be rendered illusory if the applicants only had access to a compensatory remedy liable to lead solely to the ex-post award of pecuniary reparation ...". The Court was careful to add the following: "The Court notes, moreover, that if the applicant had put forward a complaint under Article 13, the same considerations would be applicable to it" (§ 51). That case-law was reproduced, indeed extended, in *Bergmann v. the Czech Republic* (no. 8857/08, 27 October 2011, § 46): "The Court has already determined, in cases concerning the various situations complained of under Article 8, that an action which could only lead to compensation could not be considered as an effective remedy to put an end to the alleged violation"; it was also reiterated in many other cases, including *Kuppinger v. Germany* (no. 62198/11, § 137, 15 January 2015): "The Court has observed in this respect that the State's positive obligation to take appropriate measures to ensure the applicant's right to respect for family life risked becoming illusory if the interested parties only had at their disposal a compensatory remedy, which could only lead to an *a posteriori* award for monetary compensation (see *Macready*, *ibid.*)".

9. Those latter cases concerned Article 8, but in my view this case-law is completely transposable to other substantive rights, including those secured under Article 9. We all know that the remedy required under Article 13 must be "effective", in practice as well as in law (see *İlhan v. Turkey* [GC], no. 22277/93, § 97, ECHR 2000-VII). I consider that that applies particularly to an action or omission whose consequences are irreversible,

irreparable or difficult to repair, as in cases concerning conditions of detention (see *Ramirez Sanchez v. France* [GC], no. 59450/00, § 165, ECHR 2006-IX, and *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 98, 10 January 2012), removal of aliens (see *De Souza Ribeiro v. France* [GC], no. 22689/07, §§ 83 and 93, ECHR 2012) or the exercise of the right of assembly (see *Lashmankin and Others v. Russia*, nos. 57818/09 and 14 others, § 345, 7 February 2017), among others. The common thread running through all these judgments is the requirement of a remedy capable of directly redressing the situation complained of, in order to avoid the destructive effect of the *fait accompli*.

10. That plainly applies to the case before the Chamber, which was not deemed worthy of an examination on the merits by the majority. Indeed, in the absence of a preventive remedy in Austrian law, the child's body was completely mutilated, which definitively prevented its burial in accordance with the rites of its family's religion. The compensatory remedy was incapable of repairing the damage caused.

11. I would emphasise that the Oviedo Convention enshrines the primacy of the human being over the interest of science (Article 2), and also requires States to provide appropriate judicial protection to prevent or to put a stop to an unlawful infringement of the dignity of the human being at short notice (Article 23). The Court has even acknowledged that a dead body retains its dignity (see *Magnitskiy and others v. Russia*, no. 32631/09, § 281, 27 August 2019).

12. It was this structural shortcoming which led me to vote against the decision not to examine the complaint under Article 13 of the Convention. I consequently consider that this case raises a serious issue of consistency in the Court's case-law, particularly since the long-standing Grand Chamber judgment *Kudła v. Poland* [GC], no. 30210/96, § 159, ECHR 2000-XI) – stating that Article 13 allowed the State to choose between preventive and compensatory remedies – seems to have been overtaken by the most recent case-law. Moreover, the Court has already clearly stated its preference for prevention (see *Sürmeli v. Germany* [GC], no. 75529/01, § 100, ECHR 2006-VII).