



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

Communicated on 21 September 2016

**THIRD SECTION**

Application no. 4460/16  
Yelena Vladimirovna SABLINA and others  
against Russia  
lodged on 28 December 2015

**STATEMENT OF FACTS**

The applicants are:

1. Ms Elena Vladimirovna Sablina, born in 1971;
2. Ms Tatyana Mikhaylovna Biryukova, born in 1950, and
3. Ms Nelly Stepanovna Sablina, born in 1942.

They are Russian nationals. The first two applicants live in Yekaterinburg. The third applicant lives in Galdey, a village in the Irkutsk Region. The applicants are represented by Mr A. Burkov, a lawyer practising in Yekaterinburg.

**A. The circumstances of the case**

The facts of the case, as submitted by the applicants, may be summarised as follows.

The first applicant is the mother of Ms Alina Sablina (Ms A.S.), born in 1994 but now deceased. The second and third applicants are Ms A.S.'s grandmothers.

*1. Events leading to the organ removal*

On 11 January 2014 Ms A.S. was hit by a car while crossing the street, sustained very serious injuries and fell into a coma. At approximately 11.20 p.m. that day she was taken to Moscow City Clinical Hospital No. 1 (*Городская Клиническая Больница № 1 г. Москвы* – “Moscow Hospital No. 1”), where emergency surgery and resuscitation procedures were carried out. Despite those efforts, Ms. A.S. remained in a critical condition and did not regain consciousness.

The first applicant and Ms A.S.'s father were in constant contact with the doctors from Moscow Hospital No. 1 and visited their daughter, who remained unconscious, at least twice a day from 12 to 16 January 2014.

On 17 January 2014 they arrived again at the hospital, but were not allowed to see Ms A.S. because she had been moved to an intensive care ward.

Despite the treatment she received Ms A.S.'s condition deteriorated and on 17 January 2014 at 11.40 p.m. brain death was recorded. According to official records, her relatives were notified immediately about her death. The applicants do not contest that they were informed but submit that they were not provided with details about the circumstances and cause of her death.

On 18 January 2014 the heart and kidneys were removed from Ms A.S.'s body. The operation was performed from 3.42 to 5.50 a.m. by a surgical team consisting of personnel from the Moscow Coordination Centre of Organ Donation (*Московский Координационный Центр Органного Донорства*) and the Federal Scientific Centre of Transplantation and Artificial Organs (*ФГБУ Федеральный научный центр трансплантологии и искусственных органов имени академика Шумакова*).

After the removal of the organs the body was transferred to a forensic-medical mortuary for a post-mortem examination. It does not appear that any of Ms A.S.'s relatives were at any time informed of the operation or asked for their consent.

On 11 February 2014, in the context of the criminal proceedings against the person responsible for the traffic accident, a forensic examination of Ms A.S.'s body was carried out. The forensic report stated, in particular, that a sterno-laparotomy had been performed on the body and that certain organs had been removed.

On 15 February 2014 the first applicant obtained a copy of the report when studying the materials of the criminal case and found out about the organ removal.

## *2. Preliminary criminal inquiry*

In April 2014 the first applicant lodged a complaint with the Main Investigative Department of the city of Moscow (*Главное следственное управление по городу Москве*), seeking an investigation into the organ removal.

On 4 July 2014 an investigator from the Zamoskvoryetskiy Inter-district Investigative Department (*Замоскворецкий межрайонный следственный отдел*) informed the first applicant that there were no grounds to initiate criminal proceedings owing to the absence of any evidence that a crime punishable under Article 120 of the Russian Criminal Code (coercion to human organ and tissue removal for transplantation purposes) had been committed. The investigator examined the events and concluded that the operation had been carried out in accordance with domestic law. It was established that the doctors had had no information that Ms A.S. or her relatives had ever opposed organ removal and therefore the doctors had operated on the presumption of consent. The removal had been carried out only after brain death had been duly recorded and had been on the basis of an authorisation by a senior medical official.

### 3. *Administrative inquiry*

On 7 April 2014 the first applicant filed a complaint with the Healthcare Control Service (*Федеральная служба по надзору в сфере здравоохранения*)

On 4 June 2014 the first applicant was informed that an administrative review had been undertaken with respect to Moscow Hospital No. 1. Some minor violations had been detected, but none of them made the removal of her daughter's organs illegal.

### 4. *Civil proceedings*

#### (a) **Proceedings before the first-instance court**

The applicants then brought civil proceedings against the Moscow City Health Department and the medical institutions involved in the organ removal before the Zamoskvoretskiy District Court of Moscow ("the District Court") seeking compensation of non-pecuniary damage.

On 23 December 2014 Moscow Hospital No. 1 applied at the preliminary stage of the proceedings to have the trial held in camera. The applicants objected. On the same day the District Court granted the application. The court ordered that everyone but the parties to the dispute should be excluded from the preliminary and trial hearings in order to protect confidential information about Ms A.S.'s medical treatment.

On 11 February 2015 the applicants applied to the District Court to open the trial partially and exclude the public only when confidential information was being examined. The application was dismissed. The court reiterated that the exclusion of the public was justified by the necessity to prevent the disclosure of confidential medical information.

On the same day a public prosecutor entered the proceedings. She objected to the applicant's application for a partially open trial. Apart from that occasion, the public prosecutor did not attend the preliminary hearings and made no statements.

On 2 March 2015 the applicants applied to the court to exclude the prosecutor from the proceedings. The applicants state that their application was left unexamined.

On 6 April 2015 the first trial hearing took place and all the evidence and witnesses were examined. The prosecutor was not present at that hearing.

On 7 April 2015 during closing remarks at the second and final hearing the prosecutor again appeared and made a brief statement in support of the defendants' position. In particular, she stated that the applicants' claims were groundless and should be dismissed. She also added that the doctors' actions had been lawful as no breaches of the law had been revealed by previous investigations.

#### (b) **The first-instance court's judgment**

On 7 April 2015 the District Court dismissed the applicants' claims in full.

The District Court examined the relevant Russian legislation and quoted, word for word, the interpretation of that legislation by the Constitutional Court of Russia in its decision no. 459-O of 4 December 2003.

The District Court went on to note that the removal of organs from Ms A.S.'s body had been performed in accordance with domestic law. Neither at the time of her death nor at the moment of the extraction of her organs for transplantation purpose had any of A.S.'s relatives or their legal representatives notified the medical personnel at the hospital about any objections that she or they might have had to such an act. The doctors had had no legal obligation to seek the consent of Ms A.S.'s relatives. Moreover, contrary to the applicants' allegations, the procedure for removal, as established by law, had been complied with: the extraction had been authorised by the competent medical officer and had taken place after brain death had been duly recorded. In support of that conclusion the District Court referred to the results of the preliminary criminal investigation, which had not revealed any breaches of the law.

Lastly, the District Court rejected the applicants' argument that the Russian law on organ transplantation was incompatible with the Convention, stating that there had been no judgment on the matter against Russia.

Only the operative part of the judgment was pronounced publicly.

#### (c) Proceedings before the appellate and cassation courts

The applicants appealed against the judgment to the Moscow City Court. On 30 June 2015 that court fully upheld the reasoning of the District Court and dismissed the appeal. The Moscow City Court also concluded that the decision to hold the trial in camera had been in conformity with both domestic law and the Convention.

On 15 October 2015 the Presidium of the Moscow City Court found no breaches of either material or procedural law and refused the applicants' leave to lodge a cassation appeal.

On 27 November 2015 a judge at the Supreme Court of Russia dismissed an application by the applicants to refer the case for consideration. The judge agreed with the conclusions of the lower courts that the applicants had not been entitled to compensation for the lack of prior notification about the removal of the organs because it had not been against the law.

Neither court decision was published in full.

#### 5. Proceedings before the Constitutional Court

On 27 July 2015 the applicants issued a separate set of proceedings before the Constitutional Court of Russia ("the Constitutional Court"). They challenged the compatibility of the policy of presumed consent enshrined in section 8 of the Transplantation Act with the Russian Constitution and the Convention. They referred, in particular, to the cases of *Petrova v. Latvia* (no. 4605/05, 24 June 2014) and *Elberte v. Latvia* (no. 61243/08, 13 January 2015).

In its decision no. 224-O of 10 February 2016 the Constitutional Court found the applicants' complaint inadmissible. It concluded that, contrary to what was alleged by the applicants, the policy of presumed consent in the sphere of organ donation for transplantation purpose was not, in itself, incompatible with either the Russian Constitution or international instruments and practice. More specifically, the Constitutional Court observed that such a policy aimed at saving as many human lives as

possible by increasing the number of donor organs suitable for transplantation. It further noted that the principles of presumed consent had been clearly formulated in section 8 of the Transplantation Act, which had been duly published, with the result that all individuals concerned, including the applicants, were aware of the policy and able to restrict organ extraction *post mortem* if they wished to do so.

The Constitutional Court went on to observe that in its decision no. 459-O of 4 December 2003 it had already found the existing policy in the field constitutional, but had pointed to the necessity for more detailed regulations, in legal acts and other instruments, for the procedures to be followed by an individual or his or her relatives to express their will regarding organ donation. It had also pointed out in that decision that it was necessary to increase public awareness about existing policy and the relevant legal rules. The Constitutional Court observed that its recommendations had been implemented in the Health Protection Act of 21 November 2011. Section 47 of that Act established a detailed procedure for how a person or a person's relatives could express their views on organ transplantation. Moreover, the Russian Healthcare Ministry had recently prepared a new draft law on organ donation and transplantation, which had been submitted for nationwide public discussion and debate. The final version of that act would take into account the results of the discussion and debate. Once adopted the act would further increase transparency and public awareness of the particularities of organ extraction *post mortem* and provide even greater protection from arbitrariness.

In the light of those considerations, the Constitutional Court concluded that the existing national legislation in the field was sufficiently clear and accessible, and established sufficiently detailed procedures to be followed by an individual or his or her relatives to express their will on the matter. The applicants, in essence, had requested that the existing policy be changed, but that was outside the court's jurisdiction.

## **B. Relevant domestic law and practice**

### *1. The Transplantation Act*

Federal Law no. 4180-1 “On the Transplantation of Organs and/or Body Tissues” of 22 December 1992 (*Федеральный Закон от 22.12.1992 № 4180-1 “О трансплантации органов и (или) тканей человека”* – “the Transplantation Act”) provides in paragraph 2 of its preamble that the transplantation of organs and/or body tissues can be used to save lives and help someone recover and that it must be performed in compliance with Russian laws and international human rights standards, respecting the principles proclaimed by the international community. The interests of a particular individual are to prevail over those of society and science.

Section 8 (“Presumption of consent to extraction of organs and/or tissues”) provides that the extraction of organs and/or tissues from a human body is not allowed where a medical institution has been made aware that the deceased during his or her lifetime, or his or her close relatives or legal representative, have opposed the extraction of that person's organs or body tissues after his or her death for the purposes of transplantation.

Section 10 (“Authorisation of extraction of organs and/or tissues from a dead body”) provides that the extraction of organs from a deceased person can be performed only after authorisation by the chief medical officer of a relevant medical institution.

## *2. The Health Protection Act*

Federal Law no. 323-FZ “On the Basic Principles of Public Health Protection in the Russian Federation” of 21 November 2011 (*Федеральный Закон от 21.11.2011 № 323-ФЗ “Об основах охраны здоровья граждан в Российской Федерации”* – “the Healthcare Act”) provides in section 47(6) that every mentally competent adult person is allowed, either orally in the presence of witnesses or in writing (certified by a notary or the chief medical officer of a medical institution), to express his or her consent or to oppose organ removal from his or her body after death.

Section 47(7) provides that where the deceased has expressed no opinion on organ extraction, his or her spouse or close relatives (children, parents or grandparents) can oppose transplantation.

Section 47(9) states that all the information received from an individual in accordance with section 47(6) of the Act must be included in his or her medical file.

Section 47(10) prohibits performing organ removal where a medical institution is aware that a deceased person during his or her lifetime, or his or her close relatives or a legal representative, have opposed the extraction of organs or body tissues for transplantation purposes.

## *3. Decision of the Constitutional Court of Russia*

In decision no. 459-O of 4 December 2003 the Constitutional Court found that the policy of presumed consent as established in section 8 of the Transplantation Act was compatible with the Russian Constitution, in so far as the latter guaranteed the physical integrity of the bodies of both the living and the dead. The Constitutional Court pointed out that presumed consent had been a legitimate legislative choice based, on the one hand, on the consideration that it was inhumane, before surgery or other medical intervention, or at the moment of informing an individual’s relatives about his or her death, to ask at the same time whether it was possible to take out their loved one’s organs for transplantation. On the other hand, the state of modern medical science did not make it possible to find out the opinion of an individual’s relatives on the matter after death within the time-limit short enough for preserving organs for transplant. The court further noted that the legal provisions in the field had been duly published and had been accessible, and that everyone in Russia could express, in one form or another his or her objection to organ removal, including in a document certified by a notary.

At the same time the Constitutional Court noted that more detailed regulation was still necessary in legal acts and other instruments regarding questions relating to allowing an individual or his or her relatives to exercise their right to express their will regarding organ donation. The system of informing the general public about regulation in that area needed to be further developed and enhanced.

## **C. Relevant international documents**

### *1. Council of Europe documents*

On 11 May 1978 the Committee of Ministers of the Council of Europe adopted Resolution (78) 29 on harmonising the legislation of member states relating to the removal, grafting and transplantation of human substances. It recommended that the governments of the Member States ensure that their laws conform to the rules annexed to the resolution or adopt provisions conforming to those rules when introducing new legislation. Article 10 of this Resolution provides:

“1. No removal must take place when there is an open or presumed objection on the part of the deceased, in particular, taking into account his religious and philosophical convictions.

2. In the absence of the explicit or implicit wish of the deceased the removal may be effected. However, a state may decide that the removal must not be effected if, after such reasonable inquiry as may be practicable has been made into the views of the family of the deceased and in the case of a surviving legally incapacitated person those of his legal representative, an objection is apparent; when the deceased was a legally incapacitated person the consent of his legal representative may also be required.”

In relation to organ and tissue removal from deceased persons, an Additional Protocol to the Convention on Human Rights and Biomedicine on Transplantation of Organs and Tissues of Human Origin was adopted (Council of Europe Treaty Series no. 186). On 1 May 2006 it entered into force in respect of the States that had ratified it. Russia has neither signed nor ratified this Protocol.

The relevant Articles of the Additional Protocol read:

#### **Article 1 – Object**

“Parties to this Protocol shall protect the dignity and identity of everyone and guarantee, without discrimination, respect for his or her integrity and other rights and fundamental freedoms with regard to transplantation of organs and tissues of human origin.”

#### **Article 16 – Certification of death**

“Organs or tissues shall not be removed from the body of a deceased person unless that person has been certified dead in accordance with the law.

The doctors certifying the death of a person shall not be the same doctors who participate directly in removal of organs or tissues from the deceased person, or subsequent transplantation procedures, or having responsibilities for the care of potential organ or tissue recipients.”

#### **Article 17 – Consent and authorisation**

“Organs or tissues shall not be removed from the body of a deceased person unless consent or authorisation required by law has been obtained. The removal shall not be carried out if the deceased person had objected to it.”

#### **Article 19 – Promotion of donation**

“Parties shall take all appropriate measures to promote the donation of organs and tissues.”

Explanatory Report to the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin specifies:

“100. The removal of organs or tissues can be carried out on a deceased person who has not had, during his/her life, the capacity to consent if all the authorisations required by law have been obtained. The authorisation may equally be required to carry out a removal on a deceased person who, during his/her life, was capable of giving consent but did not make known his wishes regarding an eventual removal post-mortem.

101. Without anticipating the system to be introduced, the Article accordingly provides that if the deceased person’s wishes are at all in doubt, it must be possible to rely on national law for guidance as to the appropriate procedure. In some States the law permits that if there is no explicit or implicit objection to donation, removal can be carried out. In that case, the law provides means of expressing intention, such as drawing up a register of objections. In other countries, the law does not prejudge the wishes of those concerned and prescribes enquiries among relatives and friends to establish whether or not the deceased person was in favour of organ donation.

102. Whatever the system, if the wishes of the deceased are not sufficiently established, the team in charge of the removal of organs must beforehand endeavour to obtain testimony from relatives of the deceased. Unless national law otherwise provides, such authorisation should not depend on the preferences of the close relatives themselves for or against organ and tissue donation. Close relatives should be asked only about the deceased person’s expressed or presumed wishes. It is the expressed views of the potential donor which are paramount in deciding whether organs or tissue may be retrieved. Parties should make clear whether organ or tissue retrieval can take place if a deceased person’s wishes are not known and cannot be ascertained from relatives or friends.”

*2. Other relevant international law instruments*

WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation (endorsed by the sixty-third World Health Assembly in May 2010, in Resolution WHA63.22) specify in Guiding Principle 1:

“Cells, tissues and organs may be removed from the bodies of deceased persons for the purpose of transplantation if:

- (a) any consent required by law is obtained, and
- (b) there is no reason to believe that the deceased person objected to such removal.”

Commentary on Guiding Principle 1 provides:

“Whether consent to procure organs and tissues from deceased persons is “explicit” or “presumed” depends upon each country’s social, medical and cultural traditions, including the manner in which families are involved in decision-making about health care generally. Under both systems any valid indication of deceased persons’ opposition to posthumous removal of their cells, tissues or organs will prevent such removal.

Given the ethical importance of consent, [presumed consent] system should ensure that people are fully informed about the policy and are provided with an easy means to opt out.”



## COMPLAINTS

The applicants complain under Article 8 of the Convention that they were denied an opportunity to express their opinion on the extraction of organs from their relative's body. They further submit that Russian laws on organ transplantation are ambiguous and do not provide sufficient protection from arbitrariness, therefore enabling doctors to perform the removal without informing the relatives or seeking their consent.

The applicants further complain under Article 6 of the Convention that the civil proceedings in their case were held in camera and that the court decisions were not pronounced publicly in full. The applicants further submit that the participation of a public prosecutor in those proceedings on the defendants' side breached the principle of equality of arms.

## QUESTIONS TO THE PARTIES

1. Did the removal of Ms A.S.'s organs without her prior consent or that of the applicants constitute an interference with the applicants' right to respect for their private and/or family life, within the meaning of Article 8 of the Convention? The Government are invited to comment on this question in respect of the grandmothers and in respect of the mother separately.

If so,

(a) Was that interference "in accordance with the law"?

In particular, what was the legal basis for that interference?

Did the relevant Russian legislation, as in force at the material time, meet the requirements of clarity and foreseeability? In particular, were there disagreements among the competent authorities as to the scope and interpretation of Russian legislation on organ transplantation (see *Elberte v. Latvia*, no. 61243/08, § 113, ECHR 2015)? Also, was any system of informing the general public about that legislation, and/or regulation in that area, in place, in accordance with the Russian Constitutional Court's decision no. 459-O of 4 December 2003?

Did the relevant Russian legislation as in force at the time provide sufficient protection against arbitrariness?

(b) Did that interference pursue a legitimate aim?

(c) Was that interference "necessary", within the meaning of Article 8 § 2 of the Convention?

2. Have the applicants been subjected to inhuman and/or degrading treatment in breach of Article 3 of the Convention on account of the removal of A.S.'s organs without her prior consent or that of the applicants?

3. Did the applicants have a fair and public hearing in the determination of their civil rights and obligations, as required by Article 6 § 1 of the Convention?

In particular:

(a) Were the restrictions on the applicants' right to a public hearing and pronouncement of a judgment, as provided in Article 6 § 1, necessary and justified in the circumstances of the present case? If not, was there a breach of the relevant guarantee of Article 6 § 1?

(b) Was the principle of equality of arms respected as regards the participation of a public prosecutor in the civil proceedings (see *Batsanina v. Russia*, no. 3932/02, § 27, 26 May 2009; *Korolev v. Russia (no. 2)*, no. 5447/03, § 33, 1 April 2010; and *Menchinskaya v. Russia*, no. 42454/02, 15 January 2009)? Was there any examination of the applicants' application of 2 March 2015 to the Zamoskvoryetskiy District Court of Moscow to remove the public prosecutor from the proceedings? If so, the Government are invited to provide a copy of the relevant decision.

(c) Was the public pronouncement of the operative parts of the court decisions in the applicants' case sufficient to satisfy the relevant requirement of Article 6 § 1 (see *Malmberg and Others v. Russia*, nos. 23045/05, 21236/09, 17759/10 and 48402/10, 15 January 2015, and *Ryakib Biryukov v. Russia*, no. 14810/02, ECHR 2008)? If not, was there a breach of the relevant guarantee of Article 6 § 1?