

**The collection of tissue samples of a deceased relative
by the state in case of presumed consent**

Elberte v. Latvia (ECHR January 13th 2015, appl. no. 61243/08) – Latvian law on collection of tissue samples in case of presumed consent from a deceased partner in light of the right to privacy and the prohibition of degrading treatment (Article 8 ECHR, the right to privacy; Article 3 ECHR, prohibition of torture).

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I. General introduction

There are several reasons why the case of *Elberte v. Latvia* is of particular interest for those specialized in health law in combination with criminal law, and human rights scholars with an interest in the prohibition of torture. *Firstly*, the case can be viewed as a ‘follow-up’ on *Petrova*¹ (both decided on by the fourth section of the Court). In both cases, following a deadly car accident, the Latvian domestic *Law on Protection of the Body of a Deceased Person and the Use of Human Organs and Tissues* is discussed, with a predominant role for the discussion about removal of bodily tissue in case of ‘presumed consent’. According to the Court’s overview, there are two possible interpretations of the abovementioned Latvian law. In both cases, hospital staff used the absence of objection regarding the donation (the so-called presumed consent) to remove organs and tissue of a deceased person. The Court summarises in paragraph 18 of the *Elberte* case that “*these people were of the view that the system of presumed consent meant that “everything that is not forbidden is allowed”.*” In contrast, the mother of the deceased in *Petrova* and the wife of the deceased in *Elberte* and several members of the police and justice department argue that the Latvian law supports a system “*were removal was permissible only when it was (expressly) allowed, that is to say when consent had been given either by the donor during his or her lifetime or by the relatives*”,² *id est* with informed consent.

Secondly, the applicants in *Petrova* and *Elberte* lodged the same complaints with the Court. Both relied on the case-law of the Court to postulate a violation of the right to privacy and the prohibition of torture and inhuman and degrading treatment, because the removal of bodily tissue and/or organs of a deceased relative. However, the Court noted in *Petrova* (par. 101-102) “*that it is not necessary to examine whether, in this case, there has also been a violation of Article 3 of the Convention*” because the complaint is linked to the complaint examined under Article 8 of the Convention. In *Elberte*, the Court considered, without much further ado, in paragraph 125 that “*in the present case the question of whether or not the*

¹ ECHR June 24th 2014, appl. no. 4605/05 (*Petrova v. Latvia*).

² ECHR January 13th 2015, appl. no. 61243/08, par. 18 (*Elberte v. Latvia*).

applicant's complaint falls within the scope of Article 3 of the Convention is closely linked to the merits of the case. It should therefore be joined to the merits." In *Petrova*, the fourth section of the Court argued that the complaints under Articles 3 and 8 of the Convention are closely linked and therefore that it is not necessary to address the complaint of Article 3 of the Convention. In *Elberte*, only six months later and with exactly the same complaint, against the same country and regarding the same domestic law, the Court will discuss the merits of the complaint under Articles 3 and 8 of the Convention separately. Even more interesting is the fact that it is the first time in the Courts history that it did question which role "*profound psychological impact of a serious human rights violation on a family member*"³ should play in determining the severity of the degrading or inhuman treatment against the applicant. So, the Court will discuss if and how a human rights violation against another person can be seen as a degrading or inhuman treatment. Below the case of *Elberte* is summarized and analysed and, where possible, comparison with the case of *Petrova* is made.

II. Elberte – facts and domestic law

1. The facts (paragraph 5-33)

The applicant's husband was involved in a car accident on May 19th 2001 and died as a result of his injuries when he was transported to the hospital (in Sigulda, Latvia). Autopsy was carried out by the State Centre for Forensic Medical Examination in Riga. After the autopsy, the medical expert verified that Mr Elbert did not have a stamp in his passport which represents his *objection* to the refusal of organ and tissue donation. With a *presumed consent system* in mind, the forensic medical expert removed *dura mater* (the outer layer of the meninges) with a total area of 10 centimetres by 10 centimetres the following day. The applicant was not informed about the procedure. On May 26th, a week after the car accident and six days after the tissue removal, Mr Elbert was buried. The applicant only saw the body shortly before the funeral and saw that his legs were tied together. She thought this was a normal procedure during transportation of a body, but it was probably because of the tissue removal.

Two years later, the applicant was informed that a *criminal investigation* was opened by the Security Police into the illegal removal of organs and tissues in Latvia for shipment to a pharmaceutical company in Germany between 1994 - 2003⁴ and that her husband was one of the victims. The company modified the tissues into bio implants and sent them back to Latvia for transplantation purposes. There was an underlying agreement of the Latvian Ministry of Welfare and the German company. Under the agreement and the *Law on Protection of the Body of a Deceased Person and the Use of Human Organs and Tissues*, medical experts were allowed to remove tissue from a deceased at the State's Forensic Centres. A system of

³ ECHR January 13th 2015, appl. no. 61243/08, par. 137 (*Elberte v. Latvia*).

⁴ "*In 1999 tissue had been removed from 152 people; in 2000, from 151 people; in 2001, from 127 people; and in 2002, from 65 people*" and "*it was revealed that tissue had been removed not only from her husband's body but also from hundreds of other persons (nearly 500 persons on only 3 years, by the way of example) over a time-span of some nine-years.*" ECHR January 13th 2015, appl. no. 61243/08, par. 26, 139 (*Elberte v. Latvia*).

presumed consent was in place, according to the medical experts, but relatives could object to the removal (however, medical experts were not obliged to contact relatives). In contrast, the criminal investigators were of the opinion that the Latvian law gave a clear indication of an informed consent system. On November 20th 2005 the criminal investigation was discontinued. The differences concerning the interpretation of the Latvian law were resolved in favour of the accused medical experts. From December 2005 till June 2008, at least ten decisions were made to *reopen and discontinue* the investigation. The final decision to discontinue the investigation was made in June 2008 because the Latvian law has a five-year statutory limitation period for the criminal inquiry, which in the present case started on March 3th 2003 and was therefore expired. Till then, a substantive decision about the culpability of the medical experts was *not* made.

2. Relevant domestic law (paragraph 42-59)

The relevant domestic law is the *Law on Protection of the Body of a Deceased Person and the Use of Human Organs and Tissues*, which got mentioned a few times above. In section 2 and 3, the law provides that every living person with legal capacity is entitled to consent or object to the use of his body after death, but the person's wishes only have legal effect when they are recorded in the medical record and denoted with a special stamp in his passport. Section 4 states that the body of a deceased person may not be used against his wishes and in absence of express wishes, removal may be carried out if none of the closest relatives objects. It is this section that leads to a lot of discussion in Latvia and finally in the Courts case-law. The first part of section 4 incorporated the presumed consent system ('in absence of express wishes removal of tissue may be carried out') and the second part of the section appears to establish the requirement of an informed consent ('if none of the close relatives objects'). The question is if and when the medical staff is obligated to inform the relatives about a possible tissue and organ donation, so that they can object to the procedure. However, the *Law on Protection of the Body of a Deceased Person and the Use of Human Organs and Tissues* does not contain a provision about this topic.

III. Alleged violation of Article 8 of the Convention

1. The applicant's submission (paragraph 91-94)

The applicant argued that the removal of the tissue of her husband, without her and her husband's consent, is an interference with the right to privacy as protected by Article 8 § 1 of the Convention. In her submission, the arguments are not placed in the context of earlier case-law, but in the Court's well-established case-law, the physical identity and integrity is an important part of the private life.⁵ In *S. & Marper*, the Court already acknowledged that

⁵ See *inter alia* ECHR March 20th 2007, appl. no. 5410/03, par. 107 (*Tysiāc v. Poland*); ECHR September 12th 2012, appl. no. 10593/08, par. 151 (*Nada v. Switzerland*); ECHR December 13th 2012, appl. no. 39630/09, par. 248 (*El-Masri v. the Former Yugoslavian Republic of Macedonia (FYROM)*).

information about a person's health and the retention of cellular samples and DNA profiles are an interference with private life.⁶ The Court also held that the taking of cellular material is an interference with private life.⁷

Secondly, and more important because the removal of tissue is a clear interference with a person's private life, the applicant claimed that the interference had not been in accordance with the law and had not pursued a legitimate aim (Article 8 § 2 ECHR). She claimed that the medical experts, in accordance with section 4 of the *Law on Protection of the Body of a Deceased Person and the Use of Human Organs and Tissues*, should have enquired whether the closest relatives agreed to the donation of tissue. Furthermore, she argued that the domestic law was not foreseeable in its application and the legal provisions were unclear. This lack clarity and foreseeability was exploited by the medical experts for their own (financial) ends. The applicant also considered that the 'saving of lives of others' could not constitute a legitimate breach of the private life and is not necessary in a democratic society.

2. General principles (paragraph 103-104)

a) The right to privacy (Article 8 § 1 ECHR)

The Court is surprisingly short about the general principles regarding paragraph 1 of Article 8 of the Convention (especially when it is compared with other (Grand Chamber) judgments). It only mentions that "*the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities.*"⁸ No reference to the vagueness of the meaning and difficulty in interpretation of the 'private life' concept is included.⁹ Also, references to the aspects of the private life – such as the physical identity and integrity,¹⁰ social identity,¹¹ mental integrity¹² and cultural values¹³ – lack. The lack of reasoning and the absence of reference in this part can, in the author's view, only mean that the interference with private life is absolutely obvious for the Court in this case.

⁶ ECHR December 4th 2008, appl. nos. 30562/04 & 30566/04, par. 66, 77 (*S. & Marper v. the United Kingdom*).

⁷ ECHR June 4th 2013, appl. nos. 7841/08 & 57900/12, par. 33 (*Peruzzo & Martens v. Germany*).

⁸ ECHR January 13th 2015, appl. no. 61243/08, par. 103 (*Elberte v. Latvia*).

⁹ Compare *inter alia* ECHR March 15th 2012, appl. no. 4149/04 & 41029/04, par. 58 (*Aksu v. Turkey*); ECHR September 12th 2012, appl. no. 10593/08, par. 151 (*Nada v. Switzerland*); ECHR December 13th 2012, appl. no. 39630/09, par. 248 (*El-Masri v. the Former Yugoslavian Republic of Macedonia (FYROM)*); ECHR April 18th 2013, appl. no. 7075/10, par. 193 (*Ageyevy v. Russia*); ECHR June 6th 2013, appl. no. 18071/05, par. 208 (*Maskhadova and others v. Russia*); ECHR June 6th 2013, appl. no. 38450/05, par. 117 (*Sabanchiyeva and others v. Russia*); ECHR January 16th 2014, appl. no. 7988/09, par. 67 (*Zalov & Kakhulova v. Russia*).

¹⁰ See *inter alia* ECHR March 20th 2007, appl. no. 5410/03, par. 107 (*Tysic v. Poland*); ECHR September 12th 2012, appl. no. 10593/08, par. 151 (*Nada v. Switzerland*); ECHR December 13th 2012, appl. no. 39630/09, par. 248 (*El-Masri v. the Former Yugoslavian Republic of Macedonia (FYROM)*).

¹¹ See *inter alia* ECHR July 3rd 2012, appl. no. 52178/10, par. 81 (*Samsonnikov v. Estonia*); ECHR January 9th 2013, appl. no. 21722/11, par. 165 (*Oleksandr Volkov v. Ukraine*).

¹² See *inter alia* ECHR October 16th 2008, appl. no. 39058/05, par. 48 (*Kyriakides v. Cyprus*); ECHR July 24th 2012, appl. no. 41526/10, par. 97 (*Dordevic v. Croatia*).

¹³ See *inter alia* ECHR March 15th 2012, appl. nos. 4149/04 & 41029/04, par. 58 (*Aksu v. Turkey*); ECHR October 19th 2012, appl. nos. 43370/04, 18454/06, 8252/05, par. 143 (*Catan and others v. Moldova and Russia*).

b) Justification of the interference (Article 8 § 2 ECHR)

Because the Court uses the same considerations in a lot of his case-law about Article 8 § 2 of the Convention, they will be integrally quoted. “103. [...] *Any interference under the first paragraph of Article 8 must be justified in terms of the second paragraph, namely as being “in accordance with the law” and “necessary in a democratic society” for one or more of the legitimate aims listed therein. The notion of necessity implies that the interference correlates with a pressing social need and, in particular, that it is proportionate to one of the legitimate aims pursued by the authorities.* 104. *The Court refers to the interpretation given to the phrase “in accordance with the law” in its case-law. Of particular relevance in the present case is the requirement for the impugned measure to have some basis in domestic law, which should be compatible with the rule of law, which, in turn, means that the domestic law must be formulated with sufficient precision and must afford adequate legal protection against arbitrariness. Accordingly the domestic law must indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise.*”¹⁴

In the next passage, the standard paragraph about Article 8 § 2 of the Convention of is discussed. However, what deserves special attention beforehand is, that although the applicant argued a violation of all three criteria (‘in accordance with the law’, ‘necessary in a democratic society’ and ‘pursue a legitimate aim’) of Article 8 § 2 of the Convention, the Court only mention one of those (i.e. ‘in accordance with the law’) in the recital of the general principles in paragraph 104. It looks to me that the Court omits the other criteria, in advance of its judgment that the Latvian practice is not in accordance with the law.

For the analysis of the criterion ‘in accordance with the law’, six sub criteria that fall under the criterion can be grouped in two categories: (1) the legal basis¹⁵ and; (2) the rule of law¹⁶. The *legal basis* criterion consists of the requirements that the interference must have some basis in domestic law¹⁷ and that the legal basis is specific (especially for more serious interferences). “*It recalls that the Government relied as the legal basis for the measure on the general powers of the police to store and gather evidence. While it may be permissible to rely on the implied powers of police officers to note evidence and collect and store exhibits for steps taken in the course of an investigation, it is trite law that specific statutory or other express legal authority is required for more invasive measures, whether searching private property or*

¹⁴ The general principles are exactly the same in *Petrova*. ECHR June 24th 2014, appl. no. 4605/05, par. 85-86 (*Petrova v. Latvia*).

¹⁵ See for example ECHR May 10th 2001, appl. no. 25781/95, par. 295 (*Cyprus v. Turkey*).

¹⁶ See *inter alia* ECHR March 25th 1983, appl. nos. 5947/72 & 6205/73 & 7052/75 & 7061/75 & 7107/75 & 7113/75 & 7136/75, par. 90 (*Silver and others v. the United Kingdom*); ECHR August 2nd 1984, appl. no. 8691/79, par. 67 (*Malone v. the United Kingdom*); ECHR March 14th 2013, appl. no. 24117/08, par. 123-125 (*Bernh Larsen Holding AS and others v. Norway*); ECHR April 18th 2013, appl. no. 19522/09, par. 28 (*M.K. v. France*). J. Vande Lanotte, *Handboek EVRM – deel 1. Algemene beginsel*, Antwerpen: Intersentia 2005, 196-197; A.G. Maris, *Grondrechten tegen, jegens en voor de overheid*, Deventer: Kluwer 2008, 202.

¹⁷ See *inter alia* ECHR November 27th 1992, appl. no. 13441/87, par. 81 (*Olsson v. Sweden*); ECHR May 12th 2000, appl. no. 35394/97, par. 27 (*Khan v. the United Kingdom*); ECHR November 5th 2002, appl. no. 48539/99, par. 36 (*Allan v. the United Kingdom*).

*taking personal body samples. The Court has found that the lack of any express basis in law for the interception of telephone calls on public and private telephone systems and for using covert surveillance devices on private premises does not conform with the requirement of lawfulness.”*¹⁸

The *rule of law* criterion consists of (1) quality-of-the-law-requirements, in particular that the law is (a) *accessible*; (b) that the interference on privacy is *foreseeable* and; (c) there are *relevant safeguards* against arbitrariness, and (2) that the State does act *in accordance* with the domestic law.¹⁹ So, first of all, “*the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case.*”²⁰ Publication is not necessary, only that the law is accessible, for example, when asked for.²¹ Secondly, the citizen should have a more or less clear view of the possible interferences on his privacy on basis of the law,²² eventually after looking for expert advice. In the case of *Groperra Radio AG* – a broadcast ban for an Italian radio programme in Switzerland – the Court concluded that: “*In the instant case the relevant provisions of international telecommunications law were highly technical and complex; furthermore, they were primarily intended for specialists, who knew, from the information given in the Official Collection, how they could be obtained. It could therefore be expected of a business company wishing to engage in broadcasting across a frontier - like Groppera Radio AG - that it would seek to inform itself fully about the rules applicable in Switzerland, if necessary with the help of advisers.*”²³

Thirdly, relevant safeguards determine the quality of the law. An important factor is the limitation of government powers. When a government agent has unlimited powers according to domestic law, the law is probably flawed.²⁴ “*In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.*”²⁵ Fourth and last (and logical), the rule of law requires that the State’s agents do follow the law and do not handle in violence of the domestic law.

IV. Application of these principles to the present cases (paragraph 105-117)

¹⁸ See for example ECHR September 25th 2001, appl. no. 44787/98, par. 62 (P.G. & J.H. v. the United Kingdom).

¹⁹ ECHR April 18th 2013, appl. no. 19522/09, par. 28 (M.K. v. France).

²⁰ ECHR April 26th 1979, appl. no. 6538/74, par. 49 (Sunday Times v. the United Kingdom).

²¹ ECHR March 28th 1990, appl. no. 10890/84, par. 68 (Groppera Radio AG and others v. Switzerland).

²² See *inter alia* ECHR August 2nd 1984, appl. no. 8691/79, par. 67 (Malone v. the United Kingdom); ECHR April 18th 2013, appl. no. 19522/09, par. 28 (M.K. v. France).

²³ ECHR March 28th 1990, appl. no. 10890/84, par. 68 (Groppera Radio AG and others v. Switzerland).

²⁴ See *inter alia* ECHR January 12th 2010, appl. no. 4158/05, par. 77 (Gillan & Quinton v. the United Kingdom); ECHR June 5th 2014, appl. no. 33761/05, par. 135 (Tereshchenko v. Russia). Moreover, unlimited power makes it difficult to predict which behaviour can be based on those powers, so the conduct is not foreseeable. ECHR June 12th 2008, appl. no. 78146/01, par. 125 (Vlasov v. Russia).

²⁵ ECHR January 12th 2010, appl. no. 4158/05, par. 77 (Gillan & Quinton v. the United Kingdom)

a) The right to privacy (Article 8 § 1 ECHR)

In the summary of the general principles above, it is mentioned that the Court is rather short in the recital of the general principles and that this omission can, in the author's opinion, only mean that the interference with private life is absolutely obvious. That seems to be the case. The Court points out that the applicant was not informed about the removal of tissue and therefore could not exercise the right to object to the procedure. *"The Court considers that the above-mentioned circumstances are sufficient for it to conclude that there has been an interference with the applicant's right to respect for her private life under Article 8 of the Convention."*²⁶ This is exactly the same as in the *Petrova* case.²⁷

b) Justification of the interference (Article 8 § 2 ECHR)

There is no discussion about the existence of a legal basis for the removal of tissue in the case of *Elberte*. The basis for tissue and organ removal is the (published) *Law on Protection of the Body of a Deceased Person and the Use of Human Organs and Tissues*. However, there is a lot of discussion about the *quality of the law* and then especially if the law is formulated with sufficient precision so that it is sufficiently clear and foreseeable in its application. One of the main reasons why the Court doubts about the quality of the Latvian law in question, is that there seems to be a lot of discussion in the Latvian practice – between criminal investigators, prosecutors and judges – about the meaning of section 4 of the *Law on Protection of the Body of a Deceased Person and the Use of Human Organs and Tissues*, *id est* if it encompasses a presumed or informed consent system. *"As to whether or not the domestic law was formulated with sufficient precision, the Court observes that domestic authorities themselves held conflicting views as to the scope of obligations enshrined in national law. [...] However, their views differed in so far as the exercise of this right was concerned. The applicant considered that the experts were obliged to establish the wishes of the closest relatives. The Government argued that the mere absence of any objection was all that was required to proceed with tissue removal. It is the Court's view that these issues reflect the quality of domestic law, in particular the question of whether the domestic legislation was formulated with sufficient precision and afforded adequate legal protection against arbitrariness in the absence of the relevant administrative regulation."*²⁸ The Court concludes that *"such disagreement as to the scope of the applicable law among the very authorities responsible for its enforcement inevitably indicates a lack of sufficient clarity."*²⁹

²⁶ ECHR January 13th 2015, appl. no. 61243/08, par. 107 (*Elberte v. Latvia*).

²⁷ ECHR June 24th 2014, appl. no. 4605/05, par. 89 (*Petrova v. Latvia*).

²⁸ ECHR January 13th 2015, appl. no. 61243/08, par. 112, 108 (*Elberte v. Latvia*). See also ECHR June 24th 2014, appl. no. 4605/05, par. 94, 90 (*Petrova v. Latvia*).

²⁹ ECHR January 13th 2015, appl. no. 61243/08, par. 113 (*Elberte v. Latvia*). Compare *"such disagreement and the subsequent changes in the legislation indicate a lack of reasonable clarity as to the nature of the discretion conferred on the public authorities under domestic law at the time."* ECHR June 24th 2014, appl. no. 4605/05, par. 94 (*Petrova v. Latvia*).

“In the light of the foregoing, the Court cannot find that the applicable Latvian law was formulated with sufficient precision or afforded adequate legal protection against arbitrariness. The Court accordingly concludes that the interference with the applicant’s right to respect for her private life was not in accordance with the law within the meaning of Article 8 § 2 of the Convention. Consequently, there has been a violation of Article 8.”³⁰ All of the above cited paragraphs of the *Elberte* ruling are literally the same in *Petrova*. So, the outcome on the complaint of violation of Article 8 of the Convention in *Elberte* is not surprising.

At last and ‘off the record’, the Court does not take a stand on the presumed consent system. It is in this light a pity that the Court concluded that the Latvian practice is not in accordance with the law. The Court did not need to assess complaints about the other criteria of Article 8 § 2 of the Convention. By assessing complaints under the necessity of the interference in a democratic society, the Court could have taken a stand on it, because the necessity depends *inter alia* on the margin of appreciation the State has.³¹ To decide on the margin of appreciation, the Court uses *inter alia* a European consensus test.³² The width of the margin depends on the consensus in Member States about a certain topic – for example a presumed consent or informed consent system for donors. My guess is, however, that the Court would give States a wide margin in deciding national health care issues,³³ including the decision between presumed and informed consent in general because the national government is better placed to decide on such topics than an intergovernmental body.³⁴

V. Alleged violation of Article 3 of the Convention

1. The applicant’s submission (paragraph 127-129)

Furthermore the applicant argued that the unlawful removal of the tissue amounted to inhuman and degrading treatment because it had caused her shock and suffering. The applicant saw her husband’s body, with the legs lied together, before the funeral. Besides, the applicant claimed that throughout the criminal investigation, which was quashed and reopened several times, she had been denied finding out what exactly happened to her husband and his tissue and / or organs. Additionally, she argued that there had not been an effective investigation to possible criminal offenses committed by medical experts. The inquiry lasted five years and finally terminated due to the expiry of the statutory time-limit. The

³⁰ ECHR January 13th 2015, appl. no. 61243/08, par. 116-117 (*Elberte v. Latvia*). See also ECHR June 24th 2014, appl. no. 4605/05, par. 97-98 (*Petrova v. Latvia*).

³¹ See *inter alia* ECHR May 27th 2004, appl. no. 66746/01, par. 82 (*Connors v. the United Kingdom*); ECHR June 6th 2013, appl. no. 38450/05, par. 134 (*Sabanchiyeva and others v. Russia*); ECHR December 4th 2008, appl. nos. 30562/04 & 30566/04, par. 102 (*S. & Marper v. the United Kingdom*).

³² D.J. Harris, M. O’Boyle, E.P. Bates & C.M. Buckley, *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights*, Oxford: Oxford University Press 2009, 352-354.

³³ ECHR November 13th 2012, appl. nos. 47039/11 & 358/12, par. 119 (*Hristozov and others v. Bulgaria*); ECHR May 20th 2014, appl. no. 4241/12, par. 54 (*McDonald v. the United Kingdom*).

³⁴ I. de la Rasilla del Moral, ‘The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine’, *GLJ* 7 (2006): 6, 618.

numerous closings of the inquiry – against which the applicant lodged 13 complaints – suggest that no genuine attempt of finding the truth was made.

The discussion of the violation of Article 3 of the Convention is the most interesting part of this case. Until the paragraphs about the possible violation of Article 3 of the Convention, the cases of *Elberte* and *Petrova* are astounding similar, even in the wording used by the Court. Furthermore, the violation of the right to privacy is rather obvious and the Court does not need a lot of words and explanation to conclude that Article 8 of the Convention is violated. In contrast with the *Petrova* case, the Court follows a completely different approach to the alleged violation of Article 3 of the Convention in the present case. Both applicants submitted the same complaints but in *Petrova* “[The Court] having regard to the finding relating to Article 8 (see paragraphs 97 and 98 above), considers that it is not necessary to examine whether, in this case, there has also been a violation of Article 3 of the Convention”.³⁵ But in the present case, the Court distinguishes both complaints and it will answer for the first time if psychological impact of a serious human rights violation on a family member can be regarded as a violation of Article 3 of the Convention.³⁶ The Court has never questioned in its case-law the profound psychological impact of a serious human rights violation on the victim’s family members. So, this ruling is unique and therefore of a major importance for the topic of psychological distress or suffering as ground for a violation of the prohibition of torture or inhuman and degrading treatment.

2. General principles (paragraph 133-134)

Respect for human dignity forms part of the very essence of the Convention.³⁷ One of the main Articles to protect human dignity is Article 3 of the Convention. “As the Court has repeatedly stated, Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim’s behaviour”.³⁸ Affront of human dignity will *ipso facto* lead to a violation of Article 3 of the Convention.³⁹

a) Difference between torture, inhuman and degrading treatment

³⁵ ECHR June 24th 2014, appl. no. 4605/05, par. 102 (*Petrova v. Latvia*).

³⁶ ECHR January 13th 2015, appl. no. 61243/08, par. 137 (*Elberte v. Latvia*).

³⁷ In a lot of case-law on different Articles of the Convention, the Court recognized the protection of human dignity as the very essence of the Convention. See on Article 3: ECHR July 17th 2014, appl. nos. 32541/08 & 43441/08, par. 118 (*Svinarenko & Slyadnev v. Russia*); on Article 4: ECHR January 7th 2010, appl. no. 25965/04, par. 282 (*Rantsev v. Cyprus & Russia*); on Article 8: ECHR April 29th 2002, appl. no. 2346/02, par. 65 (*Pretty v. the United Kingdom*); on Article 9 and 11: ECHR June 10th 2010, appl. no. 302/02, par. 135 (*Jehovah’s witnesses of Moscow and others v. Russia*); on Article 14: ECHR October 2nd 2012, appl. no. 40094/05, par. 199 (*Virabyan v. Armenia*).

³⁸ ECHR January 13th 2015, appl. no. 61243/08, par. 113 (*Elberte v. Latvia*).

³⁹ ECHR July 17th 2014, appl. nos. 32541/08 & 43441/08, par. 138 (*Svinarenko & Slyadnev v. Russia*); C. Dupré, ‘Human Dignity in Europe: A Foundational Constitutional Principle’, *European Public Law*, 19 (2013): 2, 334.

For the explanation of the difference between the degrees of Article 3 of the Convention, the Court relies mainly on the Grand Chamber judgment in *Svinarenko & Slyadnev*,⁴⁰ which can be considered the standard ruling on the definition of *degrading treatment*. In that case, confinement in a metal cage in the courtroom was found degrading (although no general prohibition of confinement during judicial proceedings is issued).

In general, the ill-treatment must attain a *minimum level of severity*. However, there is no absolute minimum. The assessment of the gravity is relative. It depends on all the circumstances of the case including deprivation of liberty,⁴¹ the sex (a strip search by an agent of the other sex diminishes human dignity),⁴² age and state of health of the victim,⁴³ the will of the victim (the imposition of unnecessary medical treatment without consent is a violation of Article 3 of the Convention),⁴⁴ the duration of the treatment,⁴⁵ the necessity of the procedure⁴⁶ and relevant safeguards⁴⁷.

Ill-treatment is considered to be degrading *“when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or when it arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance. The public nature of the treatment may be a relevant or aggravating factor in assessing whether it is “degrading” within the meaning of Article 3”*.⁴⁸ So the question the Court has to answer is *“whether in view of the specific circumstances of the case that suffering had a dimension capable of bringing it within the scope of Article 3 of the Convention.”*⁴⁹ Only ‘degrading treatment’ is relevant in this case because *“according to the Court’s settled approach, treatment is considered “inhuman” if it is premeditated, applied for hours at a stretch and causes either actual bodily injury or intense physical or mental suffering”*.⁵⁰ The applicant did not suffer actual bodily injury or physical or mental suffering, but ‘only’ psychological suffering because of a human rights violation against her husband. The intensity of suffering determines the (unclear) borders between degrading and inhuman treatment and deliberate intention and a specific aim determine the (unclear) borders between inhuman treatment and torture.⁵¹

⁴⁰ ECHR July 17th 2014, appl. nos. 32541/08 & 43441/08 (*Svinarenko & Slyadnev v. Russia*).

⁴¹ ECHR October 26th 2000, appl. no. 30210/96, par. 93 (*Kudla v. Poland*).

⁴² ECHR July 24th 2001, appl. no. 44558/98, par. 114-118 (*Valasinas v. Lithuania*); ECHR March 31st 2009, appl. no. 14612/02, par. 54 (*Wiktorko v. Poland*).

⁴³ ECHR July 11th 2006, appl. no. 54810/00, par. 67 (*Jalloh v. Germany*).

⁴⁴ ECHR November 8th 2011, appl. no. 18968/07, par. 105-120 (*V.C. v. Slovakia*).

⁴⁵ ECHR February 4th 2003, appl. no. 50901/99, par. 60-63 (*Van der Ven v. the Netherlands*).

⁴⁶ ECHR July 7th 2006, appl. no. 54810/00, par. 77 (*Jalloh v. Germany*).

⁴⁷ ECHR July 7th 2006, appl. no. 54810/00, par. 79-80 (*Jalloh v. Germany*).

⁴⁸ ECHR January 13th 2015, appl. no. 61243/08, par. 115 (*Elberte v. Latvia*).

⁴⁹ ECHR January 13th 2015, appl. no. 61243/08, par. 137 (*Elberte v. Latvia*).

⁵⁰ ECHR July 3rd 2008, appl. no. 7188/03, par. 51 (*Chember v. Russia*); ECHR November 28th 2013, appl. no. 33954/05, par. 58 (*Aleksandr Novoselov v. Russia*).

⁵¹ ECHR December 18th 1996, appl. no. 21987/93, par. 63 (*Aksoy v. Turkey*); ECHR July 11th 2000, appl. no. 20869/92, par. 95-97 (*Dikme v. Turkey*).

b) The role of psychological suffering as ground for inhuman and / or degrading treatment

So, this case-law is the first time the Court has to decide on the impact of a human rights violation against another person, *in casu* the husband of the applicant, on the psychological well-being of the applicant and eventually if the human rights violation against the husband also could be used to construe a *separate* human right violations of the applicant. It is not the first time in the Courts history, that he has to decide on the role of psychological suffering in regard of degrading treatment, but in those cases the suffering was inflicted directly against the applicant.⁵² *“The Court reiterates in this connection that Article 3 cannot be limited to acts of physical ill-treatment; it also covers the infliction of psychological suffering”*.⁵³ In the case of *Begheluri and others*, the Georgian authorities *inter alia* attacked 700 Jehovah’s witnesses while they met for religious purpose. Some of the Jehovah’s witnesses were physically attacked, while others ‘only’ suffered verbal abuse. *“Accordingly, in view of the particular circumstances of that violent attack, triggered by the apparent religious hatred that caused significant emotional and psychological distress to the fourteen applicants mentioned in paragraphs 106 and 107 above, the Court considers that the treatment inflicted on them was sufficiently serious to reach the threshold of inhuman and degrading treatment within the meaning of Article 3 of the Convention.”*⁵⁴

In the present case there are two points mentioned by the Court in the general principles worth discussing. Firstly, and this is in line with the *Petrova* case, the Court argued that for a separate violation of Article 3 of the Convention the suffering should have a *character distinct* from the distress caused by the violation of Article 8 of the Convention.⁵⁵ In *Petrova*, the Court ruled that this was not the case. The submissions of the alleged violation of Articles 3 and 8 of the Convention were, in the view of the Court, the same, *id est* did not have distinct enough character. Secondly, to assess the distinctness of suffering, *“relevant elements include the closeness of the familial bond and the way the authorities responded to the relative’s enquiries”*.⁵⁶

VI. Application of these principles to the present cases (paragraph 135-143)

The Court uses a few arguments to establish the severity of psychological suffering of the applicant due to a human rights violation against her husband mainly within the aforementioned element ‘the way the authorities responded to the relative’s enquiries. Firstly, *“the Court finds that the applicant had to face a long period of uncertainty, anguish and distress as to what organs or tissue had been removed from her husband’s body, and in*

⁵² ECHR October 7th 2014, appl. no. 28490/02 (*Begheluri and others v. Georgia*); ECHR February 24th 2015, appl. no. 30587/13 (*Karahmed v. Bulgaria*).

⁵³ ECHR October 7th 2014, appl. no. 28490/02, par. 100 (*Begheluri and others v. Georgia*); ECHR February 24th 2015, appl. no. 30587/13, par. 73 (*Karahmed v. Bulgaria*).

⁵⁴ ECHR October 7th 2014, appl. no. 28490/02, par. 108 (*Begheluri and others v. Georgia*).

⁵⁵ ECHR January 13th 2015, appl. no. 61243/08, par. 137 (*Elberte v. Latvia*).

⁵⁶ ECHR January 13th 2015, appl. no. 61243/08, par. 137 (*Elberte v. Latvia*).

*what manner and for what purpose this had been done.*⁵⁷ Secondly, the tissue removal from the applicant's husband was part of a State-approved 'scheme' with a pharmaceutical company. *"This scheme had been implemented by State officials – forensics experts – who in addition to their ordinary duties of carrying out forensic examinations had carried out removals on their own initiative. These are special factors which caused additional suffering for the applicant."*⁵⁸

Thirdly, some State police and justice officials tried to investigate and try the lawfulness of the tissue removal before Latvian courts, but the investigation was discontinued several times and finally criminal prosecution had become time-barred. Furthermore, *"the domestic court would not allow such a prosecution because the law was not sufficiently clear"*.⁵⁹ So, there was no genuine attempt to establish the truth at a national level. *"These facts demonstrate the manner in which the domestic authorities dealt with the complaints brought to their attention and their disregard vis-à-vis the victims of these acts and their close relatives, including the applicant."*⁶⁰

Last, the applicants suffering was caused by the breach of the right to privacy against her husband, the closest relative, and was also due to the intrusive nature of the removal of bodily tissue without consent. *"In these specific circumstances the Government's objections that the applicant's complaint does not fall within the scope of Article 3 of the Convention and that she cannot be considered a victim in that regard are dismissed. The Court has no doubts that the suffering caused to the applicant in the present case amounted to degrading treatment contrary to Article 3 of the Convention. It, accordingly, finds a violation of that provision."*

So, not only does the Court assess the question of an alleged violation of Article 3 of the Convention due to a human rights violation against a close relative, it also finds a violation of the prohibition of degrading treatment in this case. However, in Human Rights Law, this approach is not unknown. The Human Rights Committee of the UN judged in several cases that the fear and anguish due to *incommunicado detention* of family members is not only a violation of Article 7 CCPR of the detainee but also of the family members.⁶¹

⁵⁷ ECHR January 13th 2015, appl. no. 61243/08, par. 139 (Elberte v. Latvia).

⁵⁸ ECHR January 13th 2015, appl. no. 61243/08, par. 139 (Elberte v. Latvia).

⁵⁹ ECHR January 13th 2015, appl. no. 61243/08, par. 139 (Elberte v. Latvia).

⁶⁰ ECHR January 13th 2015, appl. no. 61243/08, par. 139 (Elberte v. Latvia).

⁶¹ HRC October 24th 2007, comm. no. 1422/2005, par. 6.11 (Hassy v. Libya); HRC July 19th 2013, comm. no. 1865/2009, par. 8.4 (Sedhai v. Nepal).