



## Failure to obtain written consent before a surgical operation as required under Spanish law led to a breach of the Convention

In today's **Chamber** judgment<sup>1</sup> in the case of [Reyes Jimenez v. Spain](#) (application no. 57020/18) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 8 (right to respect for private life) of the European Convention on Human Rights.**

The case concerned a severe deterioration in the physical and neurological health of the applicant, who had been a minor at the time and who was now in a state of total dependence and disability following three surgical operations which he underwent to remove a brain tumour. Before the Court, the applicant, represented by his father, complained of failings in connection with the written informed consent requirement in respect of one of the operations.

The Court concluded that the domestic courts, from the Murcian Higher Court of Justice right up to the Spanish Supreme Court, had failed to respond adequately to the requirement under Spanish law to obtain written consent in such cases. While the Convention in no way required such informed consent to be given in writing provided it was unambiguous, the Court observed that Spanish law did indeed require written consent. It considered that the courts had not adequately explained why they considered that the failure to obtain such written consent had not infringed the applicant's rights.

### Principal facts

The applicant, Luis Reyes Jimenez, is a Spanish national who was born in 2002 and lives in Los Dolores, Cartagena (Murcia). The application was lodged on his behalf by his father, Francisco Reyes Sánchez.

When he was six years of age Mr Luis Reyes Jimenez was examined on several occasions at the *Virgen de l'Arrixaca* public university hospital in Murcia. He was given a brain scan, which showed that he had a brain tumour. On 18 January 2009 he was admitted to the emergency department of the public hospital in a very bad way. After his admission, a surgical operation was carried out on 20 January, followed by a second operation on 24 February 2009, and a third emergency operation on the same day as the second one. The patient's state of physical and neurological health deteriorated severely and irremediably. Mr Luis Reyes Jimenez is currently in a state of total dependence and disability: he suffers from general paralysis which prevents him from moving, communicating, speaking, seeing, chewing and swallowing. He is bedridden, unable to stand or sit up.

On 24 February 2010, considering that in the present case the medical staff had been guilty of professional negligence and that there had been shortcomings in obtaining the requisite informed consent concerning, in particular, the second surgical operation, the applicant's parents commenced administrative proceedings before the Department of Health and Social Policy of the Murcia Region,

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution).

seeking to engage the financial responsibility of the State for malfunctions in the public health services. They claimed an amount of 2,350,000 euros in compensation (EUR).

On 28 October 2011, in the absence of any reaction to their administrative appeal, the parents lodged an appeal to the administrative court.

By judgment of 20 March 2015 the Murcian Higher Court of Justice dismissed their claim. The parents lodged an appeal on points of law.

The applicant's parents' claims were dismissed by judgment of the Supreme Court on 9 May 2017. They then lodged an *amparo* appeal, which the Constitutional Court dismissed on the grounds that their appeal had had no constitutional relevance.

## Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), the applicant's parents submitted that they had not received full and adequate information regarding the surgical operations carried out on their son, and that they had therefore been unable to give their free and enlightened consent to those operations

The application was lodged with the European Court of Human Rights on 23 November 2018.

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

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

and also Olga Chernishova, *Deputy Section Registrar*.

## Decision of the Court

### Article 8

The Court noted that the provisions of Spanish law on patient autonomy and rights and obligations in the sphere of information, as supported by domestic practice, explicitly required doctors to provide patients with adequate relevant preliminary information so as to ensure informed consent to surgical operations. That information should also cover the inherent risks.

That situation complied fully with the Convention on Human Rights and Biomedicine (the Oviedo Convention). Moreover, the domestic legal provisions stipulated that for each of the medical acts indicated in relevant law, the consent in question had to be given in writing, with some very specific exceptions, particularly where there was an imminent, serious danger to the patient's life and where the patient or his/her family were unable to give their consent.

In this case, the applicant's parents had submitted their complaints to the domestic courts, emphasising, amongst other things, the fact that no valid type of consent had been obtained before the second operation.

The Court observed that the domestic courts had argued that the second operation had been closely linked to the first, and that the parents had been in contact with the doctors between the two operations. The Court noted in particular that the domestic courts had not given any reason why the consent to the second operation had not satisfied the condition established in Spanish law to the

effect that each surgical act required separate written consent. While both operations had had the same objective of removing the brain tumour, the second had been carried out at a later date, after part of the tumour had already been removed and when the child's state of health had no longer been the same as during the first operation. The Court noted that the domestic courts had then concluded that the consent given to the second operation – aimed at removing the remainder of the brain tumour – had been sufficient, without considering the consequences of the first operation or specifying why it had not been a separate surgical act, which would have necessitated the separate written consent required by Spanish legislation. The Court observed that the second operation had not been rushed, having been carried out almost a month after the first one. It should also be noted that the third operation on the child had proved necessary for emergency reasons, following complications which had arisen during the second operation. The parents' consent had then been obtained in writing, conversely to the lack of written consent to the second operation.

The Court had already emphasised the importance of the patient's consent and the fact that the failure to obtain consent could be tantamount to causing serious bodily harm to the person concerned. Any breach by medical staff of the patient's right to be duly informed could engage the State's liability in this sphere. In the present case the Court considered that the issues raised by the applicant's parents concerning important questions of consent and the possible liability of health professionals had not been properly addressed during the domestic proceedings, which induced the Court to conclude that they had not been sufficiently effective.

The Court held found that the domestic judgments delivered by the courts and the Murcian Higher Court of Justice, right up to the Spanish Supreme Court, had failed to provide any adequate response to the Spanish legal requirement on obtaining written consent in cases such as this. While the Convention in no way required such informed consent to be given in writing provided it was unambiguous, Spanish law did indeed require such written consent, and the courts had not sufficiently explained why they considered that the failure to obtain written consent had not infringed the applicant's rights.

The Court concluded that the domestic system had provided no appropriate answer to the question whether the applicant's parents had indeed given their informed consent to each of the surgical operations, in accordance with domestic law.

There had therefore been a violation of Article 8 of the Convention on account of the interference with the applicant's private life.

#### Just satisfaction (Article 41)

The Court held that Spain was to pay the applicant 24,000 euros (EUR) in respect of non-pecuniary damage.

*The judgment is available only in French.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.