

Failure to protect a patient's right to informed consent

In today's **Chamber judgment**¹ in the case of [Mayboroda v. Ukraine](#) (application no. 14709/07) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights as regards the failure to protect Ms Mayboroda's right to informed consent.

The case concerned the applicant's allegation that her kidney had been removed without her consent or even knowledge during emergency surgery for internal bleeding in March 2000. The intervention had been carried out in the Lviv Regional Clinical Hospital, a public hospital. She had found out a few months later via an anonymous telephone call that her left kidney "had been stolen". An official investigation had concluded that the kidney had been removed to save her life, while a civil action she had brought had resulted in her being awarded damages against the consulting doctor.

The Court found in particular that the authorities had not examined whether there had been a possibility to gain consent to the kidney removal either from Ms Mayboroda before the operation or from her relatives during the procedure and the State had failed to set up an appropriate regulatory framework to protect Ms Mayboroda's right to informed consent.

A legal summary of this case will be available in the Court's database HUDOC ([link](#))

Principal facts

The applicant, Lyudmyla Ivanivna Mayboroda, was a Ukrainian national who was born in 1952 and lived in Svalyava (Ukraine). She died in 2016 while the proceedings before the European Court were still ongoing. Her daughter Myroslava Korostelova continued the application in her stead.

In March 2000 the applicant had her left adrenal gland surgically removed in the Lviv Regional Clinical Hospital. She was suspected of having developed post-operative internal bleeding, and so urgent surgery was performed. Having obtained the applicant's oral consent a team of three doctors operated. In the course of the procedure the applicant's left kidney, previously diagnosed as healthy, was removed.

She was discharged one month and five days later. The discharge certificate did not mention the removal of her kidney.

Later that year she received an anonymous telephone call stating that her kidney "had been stolen". She contacted the press, which led to a senior university faculty member who was the father of Ms Mayboroda's consulting doctor writing a letter to her to apologise, explaining that no information had been given in order to facilitate recovery, and that it had been intended to inform her at her next appointment.

In September 2000 Ms Mayboroda complained to the national Ombudsman, which led to a prosecutor questioning a doctor involved. Separately, criminal proceedings were initiated against

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.

one of the treating doctors on suspicion of abuse of a position of authority and forgery of an official document. Those proceedings were ultimately discontinued. No other criminal investigations were opened in relation to her other complaints.

In 2002 Ms Mayboroda brought a civil case against the her consulting doctor and the operating surgeon, the hospital, and the university to which the above doctors were affiliated. In 2005 the Svalyava District Court found in her favour as regards her case against one of the doctors (I.P.), stating that he had breached his duties.

An appeal by Ms Mayboroda and a subsequent application for leave to lodge an appeal on points of law were unsuccessful.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private life), Ms Mayboroda complained of a failure to protect her right to informed consent about the removal of her kidney and of the doctors' concealing this information from her in the post-operative period.

The application was lodged with the European Court of Human Rights on 15 March 2007.

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

Georges Ravarani (Luxembourg), *President*,
Carlo Ranzoni (Liechtenstein),
Mārtiņš Mits (Latvia),
Stéphanie Mourou-Vikström (Monaco),
Lado Chanturia (Georgia),
Mattias Guyomar (France),
Mykola Gnatovskyy (Ukraine),

and also Victor Soloveytchik, *Section Registrar*.

Decision of the Court

Article 8

Failure to protect Ms Mayboroda's right to informed consent

The Court noted that the right to informed consent to medical interventions was guaranteed in Ukraine under the Law on the Fundamentals of Health Protection Legislation. A life-saving emergency intervention as an emergency without consent was not as such incompatible with the Convention or the relevant Ukrainian legislation.

In this case Ms Maybordoda's consent had however been sought, albeit without mention of the possible removal of her kidney. The medics had not sought consent concerning the kidney removal from her relatives during the operation.

The Ukrainian authorities had not examined the question of consent in depth, focussing solely on and accepting the assertion that the organ had been removed as a life-saving emergency measure.

Furthermore, it appears that the hospital – which practised oral consent – had not had adequate record-keeping protocols or a policy of consulting relatives in such situations. The Court noted, in particular, the chief of medicine's reference to Soviet-era legislation rather than the up-to-date applicable Ukrainian law.

Overall, the Court judged that the State had failed to set up an appropriate regulatory framework to protect the right to informed consent, noting also that the absence of specific regulatory

instruments which would have elaborated on key aspects of that right in a different context had previously led to the finding of a violation of Article 2 in the case of *Arskaya v. Ukraine* (no. 45076/05).

There had therefore been a violation of Article 8 of the Convention.

Failure to protect Ms Mayboroda from concealment of the information by her physicians

The Court noted that the Ukrainian courts had found her consulting doctor liable for his failure to inform Ms Mayboroda or her relatives of the removal of her kidney, and she received compensation for this. It was not for the Court to determine the liability of the other defendants in her suit, only to determine the State's responsibility under the Convention. There did not appear to have been any appearance of arbitrariness or manifest deficiencies in the approach taken by the courts.

The Court was therefore satisfied that the national courts had addressed the issue of concealment of information adequately, and so ruled this part of the application inadmissible.

Just satisfaction (Article 41)

The Court held that Ukraine was to pay Ms Korostelova 4,500 euros (EUR) in respect of non-pecuniary damage.

The judgment is available only in English.

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Press contacts

echrpess@echr.coe.int | tel.: +33 3 90 21 42 08

We would encourage journalists to send their enquiries via email.

Neil Connolly (tel.: + 33 3 90 21 48 05)

Tracey Turner-Tretz (tel.: + 33 3 88 41 35 30)

Denis Lambert (tel.: + 33 3 90 21 41 09)

Inci Ertekin (tel.: + 33 3 90 21 55 30)

Jane Swift (tel.: + 33 3 88 41 29 04)

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.