



About this application form

This application form is a formal legal document and may affect your rights and obligations. Please follow the instructions given in the Notes for filling in the application form. Make sure you fill in all the fields applicable to your situation and provide all relevant documents.

Warning: If your application is incomplete, it will not be accepted (*see Rule 47 of the Rules of Court*). Please note in particular that Rule 47 § 2 (a) provides that:
"All of the information referred to in paragraph 1 (d) to (f) [*statement of facts, alleged violations and information about compliance with the admissibility criteria*] that is set out in the relevant part of the application form should be sufficient to enable the Court to determine the nature and scope of the application without recourse to any other document."

Barcode label

If you have already received a sheet of barcode labels from the European Court of Human Rights, please place one barcode label in the box below.

Reference number

If you already have a reference number from the Court in relation to these complaints, please indicate it in the box below.

A. The applicant (Individual)

This section refers to applicants who are individual persons only. If the applicant is an organisation, please go to Section B.

1. Surname

2. First name(s)

3. Date of birth

D	D	M	M	Y	Y	Y	Y

 e.g. 27/09/2012

4. Nationality

5. Address

6. Telephone (including international dialling code)

7. Email (if any)

8. Sex

- male
 female

B. The applicant (Organisation)

This section should only be filled in where the applicant is a company, NGO, association or other legal entity.

9. Name

10. Identification number (if any)

11. Date of registration or incorporation (if any)

D	D	M	M	Y	Y	Y	Y

 e.g. 27/09/2012

12. Activity

13. Registered address

14. Telephone (including international dialling code)

15. Email

C. Representative(s) of the applicant

If the applicant is not represented, go to Section D.

Non-lawyer/Organisation officialPlease fill in this part of the form if you are representing an applicant but *are not a lawyer*.

In the box below, explain in what capacity you are representing the applicant or state your relationship or official function where you are representing an organisation.

16. Capacity / relationship / function

17. Surname

18. First name(s)

19. Nationality

20. Address

21. Telephone (including international dialling code)

22. Fax

23. Email

LawyerPlease fill in this part of the form if you are representing the applicant *as a lawyer*.

24. Surname

25. First name(s)

26. Nationality

27. Address

28. Telephone (including international dialling code)

29. Fax

30. Email

Authority**The applicant must authorise any representative to act on his or her behalf by signing the authorisation below (see the Notes for filling in the application form).**

I hereby authorise the person indicated to represent me in the proceedings before the European Court of Human Rights, concerning my application lodged under Article 34 of the Convention.

31. Signature of applicant

32. Date

e.g. 27/09/2012

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D. State(s) against which the application is directed

33. Tick the name(s) of the State(s) against which the application is directed

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| <input type="checkbox"/> AND - Andorra | <input type="checkbox"/> LIE - Liechtenstein |
| <input type="checkbox"/> ARM - Armenia | <input type="checkbox"/> LTU - Lithuania |
| <input type="checkbox"/> AUT - Austria | <input type="checkbox"/> LUX - Luxembourg |
| <input type="checkbox"/> AZE - Azerbaijan | <input type="checkbox"/> LVA - Latvia |
| <input type="checkbox"/> BEL - Belgium | <input type="checkbox"/> MCO - Monaco |
| <input type="checkbox"/> BGR - Bulgaria | <input type="checkbox"/> MDA - Republic of Moldova |
| <input type="checkbox"/> BIH - Bosnia and Herzegovina | <input type="checkbox"/> MKD - "The former Yugoslav Republic of Macedonia" |
| <input type="checkbox"/> CHE - Switzerland | <input type="checkbox"/> MLT - Malta |
| <input type="checkbox"/> CYP - Cyprus | <input type="checkbox"/> MNE - Montenegro |
| <input type="checkbox"/> CZE - Czech Republic | <input type="checkbox"/> NLD - Netherlands |
| <input type="checkbox"/> DEU - Germany | <input type="checkbox"/> NOR - Norway |
| <input type="checkbox"/> DNK - Denmark | <input type="checkbox"/> POL - Poland |
| <input type="checkbox"/> ESP - Spain | <input type="checkbox"/> PRT - Portugal |
| <input type="checkbox"/> EST - Estonia | <input type="checkbox"/> ROU - Romania |
| <input type="checkbox"/> FIN - Finland | <input type="checkbox"/> RUS - Russian Federation |
| <input type="checkbox"/> FRA - France | <input type="checkbox"/> SMR - San Marino |
| <input type="checkbox"/> GBR - United Kingdom | <input type="checkbox"/> SRB - Serbia |
| <input type="checkbox"/> GEO - Georgia | <input type="checkbox"/> SVK - Slovak Republic |
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| <input type="checkbox"/> HRV - Croatia | <input type="checkbox"/> SWE - Sweden |
| <input type="checkbox"/> HUN - Hungary | <input type="checkbox"/> TUR - Turkey |
| <input type="checkbox"/> IRL - Ireland | <input type="checkbox"/> UKR - Ukraine |
| <input type="checkbox"/> ISL - Iceland | |

I. List of accompanying documents

You should enclose full and legible *copies* of all documents.

No documents will be returned to you. It is thus in your interests to submit copies, not originals.

You **MUST**:

- arrange the documents in order by date and by procedure;
- number the pages consecutively;
- **NOT** staple, bind or tape the documents.

45. In the box below, please list the documents in chronological order with a concise description.

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ADDITIONAL PAGES

F. Statement of alleged violation(s) of the Convention and/or Protocols and relevant arguments

The Closed Hearing Order Interferes with Article 10 Rights of the Applicant

[1] As a journalist, Applicant's freedom as a member of the press, as well as his freedom of information and freedom of expression are all at stake in the instant case. The question at issue is when can these freedoms be legitimately curtailed or abridged by a court ordering a closed hearing in a non-criminal dispute between private parties which does not engender any interests of minors, public order or public morals and any matters of state secrecy?

[2] Article 6 of the Convention assures that judicial proceedings shall be open to the public, and that **any** court order limiting such must be reasoned, legally justifiable and proportionate in its scope and effects. As the trial judge made no legal analysis of the situation before her when she rendered the blanket order, she cannot be said to have delivered a reasoned and legally justified order. The judge also prevented the press to hear the public announcement of the judgment in full at the end of the trial, which was held *in camera*. Considering the entirety of the proceedings and the fact that the judgment was not subsequently made public by the domestic court, Applicant submits that the lack of public pronouncement of the judgment amounts to a violation of Article 6 which states that "Judgments shall be pronounced publicly" (see: Pretto v. Italy, no. 7984/77, § 27). To the extent that the judge also imposed a blanket exclusion of the press and the public during the trial, she cannot be said to have excluded the press "to the extent strictly necessary" in accordance with dictates of Article 6.

[3] Unreasoned and unjustified exceptions to the publicity of judicial proceedings likely amounts to an impermissible, albeit indirect, interference with the journalist's right and duty to gather and report information related to the case. This situation causes a violation of Article 10 of the Convention. Furthermore, Article 6 of the Convention recognizes the tremendous importance of the press in a democratic society by textually mentioning that "the press [...] may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society [...]".

[4] To give an effect to the explicit reference to the press in Article 6, any exception to the principle of the publicity of judicial proceedings must be decided with a special regard to the role of the journalists to report information to the public. When a judge grants a motion for a closed hearing, he or she must necessarily take into consideration the freedom of expression and perform a balancing exercise of competing interests (*i.e.* the freedom of the press to receive and impart information *versus* the nature of the information and the reason invoked in support of a closed hearing order) which the judge failed to do in this case. Therefore, the illegitimate limitation of public hearings *de facto* causes a violation of the freedom of expression of the press.

[5] The closed hearing and lack of public pronouncement of the judgment, in this case, are not covered by any legitimate exceptions under Article 10(2), and as such does not pass the test developed by the Court to validate the legitimacy of a limitation on the freedom of expression. The Court's jurisprudence maintains that any legitimate limitation to freedom of expression of

the press must be weighed in accordance with the principles of Article 10 (for example, see *Kobenter and Standard Verlags Gmbh v. Austria*, no. 60899/00, § 30¹⁾)

[6] The Court has commented on numerous occasions the importance of the freedom of expression in a democratic society :

As the Court has already had the occasion to point out, freedom of expression holds a prominent place in a democratic society. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for the development of every man and woman (*Barthold v. Germany*, no. 8734/79, § 58²⁾, series A No 90).

[7] The violation at issue is particularly acute for democratic societies as members of the press are deemed to be “watchdogs” in a democratic society. As the Court explicitly stated in the case *Kobenter and Standard Verlags Gmbh* :

The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart [...] information and ideas on all matters of public interest. [...] Not only does it have the task of imparting such information and ideas, the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog” (*Kobenter and Standard Verlags Gmbh v. Austria*, no. 60899/00, § 29(II), 02/11/2006³⁾).

1 See also: *Sunday Times (no. 1) v. the United Kingdom*, no. 6538/74, § 65, serie A no. 30; *Thorgeirson v. Iceland*, [JM1], nos. 13778/88, § 63, 25/06/1992; or *Open Door and Dublin Well Woman v. Ireland*, n° 14234/88, § 66, serie A n° 246-A); *Lingens v. Austria*, no. 6538/74, § 35, Serie A no. 30.

2 For other examples see : *Thoma v. Luxembourg*, no. 38432/97, § 43, serie A no. 325-A; *Ressiot and others v. France*, no. 15054/07, § 98 and *Axel Springer AG v. Germany*, no. 39954/08, § 78, 07/02/2012.

3 For other examples, see : *Bladet Tromsø and Stensass v. Norway*, no. 21980/93, § 59, Reports of Judgements and Decisions 1999-III ; *Ressiot and others v. France*, nos. 15054/07 and 15066/07, § 99; *Lingens v. Austria*, no. 9815/82, § 42, serie A no. 103, *Goodwin v. United-Kingdom*, no. 17488/90, § 39, Reports of Judgements and Decisions 1996-II; *Roemen e Schmit c. Luxembourg*, no. 51772/99, § 46, Reports of Judgments and Decisions 2003-IV; *Parger and Oberschlick v. Austria*, no. 15974/90, § 34, serie A no. 313; *De Haes and Gijssels v. Belgium*, no. 19983/92, § 37, Reports of Judgements and Decisions 1997-I).

The contradiction between two Russian legislative acts on organ transplantation and the fact that the organs can be removed without consent from the family member, disappearance of five out of seven removed organs clearly demonstrates the necessity of the public to know about this case. The conflict of law is between article 8 of the Russian Law “On Transplantation of Human Organs and/or Tissues⁴” and Article 5 of the Russian law “On Burial and the Funeral Business⁵”. Moreover, Russia’s Constitutional Court, on 4 December 2003, in its decision No 459-O did not clarify the contradictions, nor did the Article 47 of the Russian law “On the Basics of Preservation of Health of Russian Citizens” enacted in 2011. This legislative contradiction causes a situation where the public is in need to have a guideline. Therefore, the closed hearing not only supports a denial of the duty of the journalists to report the information, but it also deprives the public from their right to receive such information (Kobenter and Standard Verlags Gmbh v. Austria, no. 60899/00, § 29(II), 02/11/2006⁶).

The *Sunday Times* case links the right of the public to receive information with the right of journalists to report information. It demonstrates that, in the event of a matter of general public concern, the public has to know about the situation to be able to act based on factual evidence, and for that reason, the journalists has the duty to report it (Sunday Times (no. 1) v. the United Kingdom, § 65-66).

a) The Limitation Must Be Prescribed by Law

4 Article 8 establishes a presumption of consent on the part of an individual or her close relatives to the post-mortem removal of her organs for the purpose of transplantation. Article 8 prohibits a medical institution from removing an individual’s organs if at that time it is aware that the individual or her close relatives have expressed their objection to the organ removal.

5 Article 5 states that each individual can express his or her will with regard to the treatment of his or her body after death, including organ removal. If the individual does not express their will, the right to consent or refuse consent to organ removal belongs to the spouse, a close relative (including a parent or grandparent), or a legal representative of a deceased individual.

6 See also: Thoma v. Luxembourg, no 38432/97, § 45, serie A no. 325-A; Thorgeirson v. Islande, no. 13778/88, § 63, serie A no. 23; Sunday Times no. 1, no 6538/74, § 65, serie A no. 30).

[8] In this case, a prescription by law⁷ is not a sufficient justification to simply “declare” closed hearing, as the judge must take the specific facts of the case into consideration. Journalists have the right to have access and publish information not directly affected by the alleged medical confidentiality and therefore the judge did not adequately measure, or even consider, whether minimal impact would ensue. (*Open Door and Dublin Well Woman v. Ireland* , no. 14234/88, § 66, series A no. 246-A).

[9] Also, even if medical confidentiality dictates a closed hearing in Russia, it does not justify why the rest of the information relative to the case cannot be publicized, especially if they are of interest to the public (*Handyside v. The United Kingdom*, no. 5493/72, § 49, 07/12/1976; *Bergens Tidende and others v. Norway*, no. 26132/95, § 51, Reports of Judgements and Decisions 2000-IV). Here, the trial is not based on the medical file *per se*; medical records are merely peripheral.

b) The Limitation Must Be Legitimate

[10] The members of Alina Sablina’s family, who are the rights holders regarding the principal action, have repeatedly expressed their agreement to disclose the information related to the case. The legitimacy of the closed hearing is therefore questionable. The argument of the Defendants that it was asking the court to impose a closed hearing in order to protect the privacy of the deceased is altogether irrelevant if the rights holders agree to lift this right. As stated in *Ahmet Sadik v. Greece*, the family, as the heirs of a victim, have the right to push for a resolution under article 10 if there is a legitimate moral or material interest (*Ahmet Sadik v. Greece*, no.

⁷ The Russian Court held the closed hearing based on Article 10.2 of the Code of Civil Procedure of 14 November 2002.

18877/91, § 26, Reports of Judgments and Decisions 1996-V). Furthermore, as stated above, the trial judge did not make any analysis whatsoever to ensure the restraint was proportionate in a democratic society, in accordance with requirements of article 10.

[11] The violation of article 10 remains illegitimate as the proportionate requirement of the objective of protecting the medical information of the deceased cannot be met. Prohibiting journalists from having access to court proceedings is tantamount to imposing a total restraint on their capacity to receive and publicize information – having the effect of being a prior restraint on publication. For that reason, it “call[s] for the most careful scrutiny on the part of the Court. [...] This is especially so as far as the press is concerned, for news is a perishable commodity” (Observer and Guardian v. the United Kingdom, no. 13585/88, §. 60, serie A no. 216). As the trial was held *in camera* and the judgment was not pronounced publicly, there will be no way for the Applicant to scrutinize the proceedings of this trial ever again.

c) The Limitation Must Be Necessary in a Democratic Society

[12] The “necessity” requirement of any limitation to a Convention right such as freedom of expression has not been established convincingly by the court when it ordered a blanket closed hearing. To do so, a “pressing social need” would have had to be demonstrated, which has not been done in this instance. (Hertel v. Switzerland, § 47 and Mamère v. France, § 18).

[13] It is not enough that the law explicitly allows the limitation or that the measure is considered proportionate to the case. The necessity of the measure in a democratic society must also be established convincingly before imposing any limitation such as a closed hearing. The Court has stated that it “has to be satisfied that the interference was necessary having regard to

the facts and circumstances prevailing in the specific case before it.” (The Sunday Times v. The United Kingdom, no. 6538/74, §. 65, serie A no. 30).

[14] The fact that no analysis has been made by the domestic court to demonstrate that the limitation takes into account the necessity of maintaining a free press shows its failure to act by the principles of Article 10. As stated in Worm v. Austria, “it is in the first place for the national authorities to assess whether there is a “pressing social need” for the restriction and [that], in making their assessment, they enjoy a certain margin of appreciation [,] in cases, such as the present one, concerning the press, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press.” (Worm v. Austria, no. 22714/93, § 47, Reports of Judgments and Decisions 1997-V⁸).

The Applicant’s fair trial right under Article 6(1) was violated

[15] The Court has defined that the rights derived from the application of the Article 6(1) must meet two criteria. The existence of a serious "contestation" concerning a right, and the civil character of the right at issue (Benthem v. The Netherland, no. 8848/80, series A no. 97).⁹

[16] The genuine and serious dispute concerns the freedom of speech and expression of the Applicant, which is recognized by the national Russian laws and the Convention. It also concerns the lack of any legal procedure in Russian law is "directly decisive" for the exercise of this right

8 See also *mutatis mutandis*, Goodwin v. United Kingdom, no. 17488/90, § 40, Reports of Judgements and Decisions 1996-II, and Fressoz and Roire c. France, no. 29183/95, § 45(III), Reports of Judgements and Decisions 1999-I.

9 An extensive research through the jurisprudence of the Court allows us to establish that the Court refused in many occasions to have a finite definition of “civil right”. In Benthem, the Court has constructed a broad definition of “civil right”, this definition seems to be of such nature that the simple fact that a right is protected by the Convention allow for this right to be under the scope of protection of Article 6(1) for the guarantee of judicial procedure on civil dispute.

(see above: *Bentham*, § 32), entails protection requires by Article 6(1). (*Le Compte, Van Leuven and De Meyere v. Belgium*, nos. 6878/75 and 7238/75, § 47, serie A no. 43).

[17] The absence of formal legal “standing” in Russian Civil Procedure to pursue interlocutory appeals by interested third parties amounts to a procedural bar that interferes with the Applicants’ freedoms. Since the Applicants had no legal standing under the Russian code of civil procedure, the judge did not have an obligation to listen to the Applicants’ submissions, even if their claims were well-founded in law. In the past, the Court has itself defined a “court”, under Article 6(1), as “bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case, but also the guarantees of judicial procedure.” (*De Wilde, Ooms and Versyp v. Belgium*, nos. 2832/66, 2835/66 and 2899/66, § 78, serie A no. 12). Those judicial procedures include “a reasonable right to be heard and to defend his cause” (*Ernst and Others v. Belgium*, no. 33400/96, § 60, 15/07/2003). In this case, the national court refused twice to hear the Applicants’ claims concerning the closed hearing order, apparently, since they had no deemed legal “standing” under the domestic procedural law. To this date, there is no legal redress available to the journalists to access and publish information from trial. In this case, there is no substantive law that addresses the right of the journalists; there is no law that clearly evacuates the possibility for a third party to intervene in a case where their right is at the stake. The lack of standing is not caused by a substantive bar, it is caused by a lack of procedural provisions in the domestic law that would allow for a third party to intervene in the expectation that a procedural decision, such as an order of closed hearing, shall interfere with this third party rights. However, to be legitimate, a limitation to the right provided by Article 6(1) must be dictated, in substance, by law. Even if such a law would exist, the prescription by law is not, in and of itself, a sufficient reason to

deprive somebody from his right to access a court to settle a genuine and serious dispute over a right or freedom. This substantive legal limitation should then be motivated by a legitimate goal and be proportional to the objective at stake. Finally, such limitations must be justified in a democratic society (*Ernst and Others*, cited above, § 48).

[18] This lack of procedural recognition can lead to a chilling effect for the members of the press since they may refrain from trying to access, publish and disseminate news stories of general public interest due to the lack of legal provisions by which they could act in domestic court to defend their freedoms and protect their rights and members of the press (See *Thorgeir Thorgeirson v. Iceland*, no. 13778/88, § 68, serie A no. 239).

Conclusion

[19] In conclusion, the blanket closed hearing ordered has caused a violation of the freedom of expression of the journalists which is protected under Article 10 of the Convention. The absence of legal provisions on which the journalists could defend their rights and freedoms before a domestic court deprives them of a fair trial, therefore causing a violation of article 6(1).

[20] Furthermore, information being of a perishable nature and the closed hearing constituting a prior restriction to the right to access information, the continuous proceeding *in camera* amounts to a continuous violation of the journalists' rights and freedoms with no available legal avenues of redress.

Representative of the applicant Anton Burkov

15 July 2015