



Death of patient following post-operation negligence

In today's **Chamber judgment**¹ in the case of [Lopes de Sousa Fernandes v. Portugal](#) (application no. 56080/13) the European Court of Human Rights held:

by five votes to two, that there had been a **violation of Article 2** (right to life) of the European Convention on Human Rights as to the right to life, and

unanimously, that there had been a **violation of Article 2** of the European Convention under its procedural head.

The case concerned the death of Ms Lopes de Sousa Fernandes' husband following nasal polyp surgery and the subsequent procedures opened for various instances of medical negligence.

The Court found in particular that the mere fact that the patient had undergone a surgical operation presenting a risk of infectious meningitis should have warranted a medical intervention in conformity with the medical protocol on post-operative supervision. Without wishing to speculate on the chances of survival of Ms Lopes de Sousa Fernandes' husband, the Court took the view that the lack of coordination between the ear, nose and throat department and the emergencies unit inside the hospital revealed a deficiency in the public hospital service, depriving the patient of the possibility of accessing appropriate emergency care.

The Court further found that the Portuguese legal system had not functioned effectively, since, firstly, the length of three sets of internal proceedings did not meet the requirement of promptness and, secondly, none of the proceedings conducted, nor any of the experts' assessments presented, had addressed satisfactorily the question of the possible causal link between the various illnesses suffered by the patient two days after undergoing his operation. The Court found, lastly, that the patient should have been clearly informed by the doctors prior to the operation about the risks incurred.

Principal facts

The applicant, Maria Isabel Lopes de Sousa Fernandes, is a Portuguese national who was born in 1969 and lives in Vila Nova de Gaia (Portugal).

On 26 November 1997 Ms Lopes de Sousa Fernandes' husband was admitted to the hospital of Vila Nova de Gaia (CHVNG) to undergo a nasal polypectomy (extraction of nasal polyps). The operation went well and the patient returned home the next day. Suffering from terrible headaches later that day he immediately went back to the emergencies unit at the CHVNG. The doctors on duty diagnosed psychological disorders and prescribed him tranquilisers. They recommended that he leave hospital but Ms Lopes de Sousa Fernandes objected. The next day the patient was examined by a new medical team which detected bacterial meningitis (*Pseudomonas*). He was transferred to intensive care until 5 December 1997. He was then taken into the general medicine department, where he was treated by Doctor J.V. He left the hospital on 13 December 1997, his state of health being regarded as stable. As his pain subsequently persisted, he went again three times to the

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.

emergency unit at the same hospital, where he was hospitalised twice. On 3 February 1998 Doctor J. V. authorised him to leave hospital but, his state of health having worsened, he was admitted on 17 February 1998 to the general hospital of Santo António in Oporto. He died there on 8 March 1998 from the consequences of septicaemia caused by peritonitis and hollow viscera perforation.

In response to a letter from Ms Lopes de Sousa Fernandes wishing to understand the sudden decline in her husband's health, the Inspector General for Health ordered an investigation. Reports of 2002 and 2005 concluded that her husband had been treated correctly. The Inspector General thus decided to close the case, but Ms Lopes de Sousa Fernandes contested that decision. Following fresh assessments, a report concluded that the decision by Doctor J. V. to send the patient for outpatient treatment had not been adequate and appropriate. The Inspector General thus ordered the opening of a disciplinary procedure against him.

The complaint by Ms Lopes de Sousa Fernandes to the Medical Association was unsuccessful. She then filed a new complaint for manslaughter with the Oporto criminal investigation and prosecution department. On 15 January 2009 the District Court acquitted Doctor J.V. on the ground that there was no evidence to show that he had been responsible for the death of Ms Lopes de Sousa Fernandes's husband. On 6 March 2003 Ms Lopes de Sousa Fernandes lodged a new application, seeking damages for the loss she had sustained as a result of her husband's death. The court dismissed her claims on the grounds that it had not been proven that her husband had undergone treatment that was not adapted to his clinical situation. Ms Lopes de Sousa Fernandes appealed against that decision to the Administrative Supreme Court, which dismissed her appeal in a judgment of 26 February 2013.

Complaints, procedure and composition of the Court

Relying on Article 2 (right to life), Ms Lopes de Sousa Fernandes alleged that there had been a violation of her late husband's right to life. Under Article 6 § 1 (right to a fair hearing within a reasonable time) and Article 13 (right to an effective remedy), she complained about the length of the proceedings brought by her at the domestic level and about the fact that she had not been given explanations as to the exact cause of death.

The application was lodged with the European Court of Human Rights on 23 August 2013.

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

András Sajó (Hungary), *President*,
 Vincent A. de Gaetano (Malta),
 Nona Tsotsoria (Georgia),
 Paulo Pinto de Albuquerque (Portugal),
 Krzysztof Wojtyczek (Poland),
 Iulia Antoanella Motoc (Romania),
 Gabriele Kucsko-Stadlmayer (Austria),

and also Françoise Elens-Passos, *Section Registrar*.

Decision of the Court

Article 2 (right to life)

The Court noted that an expert who had given evidence in the procedure opened by the Inspector General for Health, and the two members of the panels of ear, nose and throat and infectious disease specialists who had given evidence in the Medical Association procedure, had all indicated that meningitis was a complication that could exceptionally arise after a polypectomy. It also noted

that the members of the Medical Association's infectious diseases panel had expressed some doubt as to the promptness with which the infectious meningitis diagnosis had been established. Consequently, the Court found that the mere fact that the patient had undergone a surgical operation carrying such risks should have warranted a medical intervention in conformity with the medical protocol on post-operative supervision.

Without wishing to speculate on the chances of survival of Ms Lopes de Sousa Fernandes' husband, the Court took the view that the meningitis could have been diagnosed earlier and that the lack of coordination between the ear, nose and throat department and the emergencies unit inside the hospital revealed a deficiency in the public hospital service. In the Court's view, that was sufficient for a finding that the State had failed in its obligation to protect the patient's physical integrity. It thus concluded that there had been a violation of the right to life protected by Article 2 of the Convention.

As regards the procedure, the Court observed that the Portuguese legal system provided citizens with means which, theoretically, met the requirements of Article 2 of the Convention. As regards, however, the effectiveness of the mechanisms, the Court first noted that the length of the proceedings had not met the requirement of promptness. As regards the procedure opened by the Inspectorate General for Health, the Court noted that it had taken two years for the opening of an investigation to be ordered, a further year to appoint an inspector and four years to issue the first final report. Faced with that delay, the widow had not been able to file her criminal complaint and to bring proceedings to establish civil liability until four and five years, respectively, after her husband's death. Moreover, evidence was not taken from the medical staff until several years after the facts, thus possibly compromising the reliability of the testimony. As to the criminal proceedings, which had led to a decision of discontinuance, they had lasted for more than six years, that length of time not being justified either by the conduct of Ms Lopes de Sousa Fernandes or by the complexity of the case. Moreover, the proceedings to establish civil liability had lasted just under ten years. The Court thus emphasised that it could not accept that proceedings brought for the purposes of shedding light on accusations of medical negligence could last for such a long time. It reiterated that a prompt reaction was paramount for maintaining public confidence and upholding the rule of law, and also to enable the distribution of information to avoid the same errors being repeated and contribute to the safety of the users of the health services.

The Court noted that none of the decisions taken nor any of the experts' assessments presented had addressed satisfactorily the question of the possible causal link between the various illnesses suffered by the patient two days after undergoing his polypectomy. The Court found that this was a question which warranted an in-depth examination. Even though the patient had not died from the infectious meningitis that affected him after the operation, the Court took the view that the additional complications which had appeared were directly related to that condition. It thus considered legitimate the feeling of Ms Lopes de Sousa Fernandes that she had not obtained explanations as to the cause of death of her husband.

The Court observed, lastly, that if meningitis was a complication liable to arise after such an operation, the domestic courts should have established clearly whether the patient had been duly informed of those risks. In the present case, the doctor who had carried out the operation declared before the Administrative and Tax Court that he had done so, but there was no evidence in connection with the domestic proceedings that the pre- and post-operative medical protocol relating to a polypectomy had been duly explained to the patient before his operation. The Court noted that the States were required to take the necessary measures so that doctors considered the foreseeable consequences of a medical intervention for the physical integrity of their patients and that the latter were informed beforehand to be able to give their informed agreement. The Court took the view that the domestic authorities had not determined with sufficient clarity the circumstances of the patient's death and the possible responsibility of the doctors who had treated him. As the domestic authorities had not dealt with the complaints of Ms Lopes de Sousa Fernandes

in accordance with the requirements of Article 2 of the Convention, as regards the domestic procedure, the Court found that there had been a violation of that provision under its procedural head.

Article 41 (just satisfaction)

The Court held that Portugal was to pay Ms Lopes de Sousa Fernandes 39,000 euros in respect of non-pecuniary damage.

Separate opinion

Judges Sajó and Tsotsoria expressed a joint dissenting opinion which is annexed to the judgment

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.