



Death of a patient from post-operative complications

In today's **Grand Chamber** judgment¹ in the case of [Lopes de Sousa Fernandes v. Portugal](#) (application no. 56080/13) the European Court of Human Rights held:

- **by a majority (15 votes to 2) that there had been no violation of the substantive limb of Article 2 (right to life) of the European Convention on Human Rights, and**
- **unanimously, that there had been a violation of the procedural limb of Article 2.**

The case concerned the death of Mr Fernandes, the husband of the applicant, Ms Lopes de Sousa Fernandes, following a series of medical problems that arose after a routine operation.

Ms Lopes de Sousa Fernandes alleged that her husband's death had been caused by negligence and carelessness on the part of the medical staff, and that the authorities had not elucidated the precise cause of the deterioration in her husband's health.

With regard to Mr Fernandes's death, the Court considered that the present case concerned allegations of medical negligence rather than denial of treatment. That being so, Portugal's obligations were limited to the setting-up of an adequate regulatory framework compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. Having regard to the detailed rules and standards laid down in the domestic law and practice of the Portuguese State in the area under consideration, the Court found that the relevant regulatory framework did not disclose any shortcomings with regard to the State's obligation to protect the right to life of the applicant's husband.

As to the domestic proceedings, the Court found, in particular, that the domestic system as a whole, when faced with an arguable complaint by Ms Lopes de Sousa Fernandes of medical negligence resulting in the death of her husband, had failed to provide an adequate and timely response regarding the circumstances of Mr Fernandes's death.

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 27 November 1997 Ms Lopes de Sousa Fernandes's husband (Mr Fernandes) underwent surgery to remove nasal polyps in Vila Nova de Gaia Hospital (CHVNG). He returned home the next day. On 29 November 1997 he went to the hospital's emergency department as he was suffering from violent headaches. The doctors on duty diagnosed psychological problems and prescribed tranquilisers. The following day the patient was examined by a new medical team, which discovered that he had bacterial meningitis. He was transferred to the intensive care unit, where he remained until 5 December 1997. He was then moved to a general medical ward, where he was diagnosed with two duodenal ulcers and treated by Doctor J.V. He left hospital on 13 December 1997 but his pain persisted. He went a further three times to the emergency department of the CHVNG and was hospitalised twice. Laboratory tests revealed, among other things, the presence of the *Clostridium difficile* bacterium. On 3 February 1998 he was discharged by Doctor J.V., who prescribed treatment

1. Grand Chamber judgments are final (Article 44 of the Convention).

All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

and referred him to the hospital's outpatient department for follow-up. On 17 February 1998 Mr Fernandes was admitted to Santo António General Hospital in Oporto, where he died on 8 March 1998. According to the certificate produced by the hospital, Mr Fernandes died from septicaemia.

On 13 August 1998 Ms Lopes de Sousa Fernandes wrote a joint letter to the Ministry of Health, the regional health authority for the North region and the Medical Association, complaining that she had received no response explaining the sudden deterioration in her husband's health and his subsequent death. On 20 September 2000 the Inspector General for Health ordered an investigation. A report issued in July 2006 concluded that there were no grounds for a finding of disciplinary liability for negligence against the health-care professionals concerned. The report further stated that the decision by Dr J.V. to refer the patient for outpatient treatment had not been appropriate and sufficient and that the patient should have remained in hospital under close medical supervision. The Inspector General therefore ordered the opening of disciplinary proceedings against the doctor in question, which were stayed pending the outcome of the criminal proceedings.

In the criminal proceedings Dr J.V., who was charged with homicide by negligence, was acquitted in January 2009. The District Court found that there was no evidence that he bore any responsibility for the patient's death.

On 28 December 2001 it was decided to take no further action on Ms Lopes de Sousa Fernandes's complaint to the Medical Association, on the ground that there was no evidence of misconduct or medical negligence. An appeal by the applicant to the Medical Association's National Disciplinary Council was declared inadmissible as being out of time. On 6 March 2003 Ms Lopes de Sousa Fernandes brought an unsuccessful action in the Oporto Administrative and Fiscal Court, claiming compensation on account of her husband's death. Her appeal to the Supreme Administrative Court was dismissed in February 2013.

Complaints, procedure and composition of the Court

Relying on Article 2 (right to life) of the European Convention on Human Rights, Ms Lopes de Sousa Fernandes complained about her husband's death in hospital, alleging that it had been caused by negligence and carelessness on the part of the medical staff. She also maintained that the authorities had not properly elucidated the precise cause of the sudden deterioration in her husband's health. Under Articles 6 § 1 (right to a fair hearing within a reasonable time) and 13 (right to an effective remedy), she further complained about the length and outcome of the domestic proceedings. The Grand Chamber decided to examine these allegations from the standpoint of Article 2 alone.

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

In its Chamber [judgment](#) of 15 December 2015 the Court held by five votes to two that there had been a violation of the substantive aspect of Article 2 of the Convention, and unanimously that there had been a violation of the procedural aspect of that Article. On 11 March 2016 the Government requested that the case be referred to the Grand Chamber under Article 43 of the Convention (referral to the Grand Chamber), and on 2 May 2016 the panel of the Grand Chamber accepted that request. A hearing took place on 16 November 2016.

The United Kingdom and Irish Governments were given leave to intervene as third parties in the written procedure.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Guido Raimondi (Italy), *President*,
Angelika Nußberger (Germany),
Linos-Alexandre Sicilianos (Greece),
Ganna Yudkivska (Ukraine),

Robert Spano (Iceland),
Luis López Guerra (Spain),
Mirjana Lazarova Trajkovska (“The Former Yugoslav Republic of Macedonia”),
Işıl Karakaş (Turkey),
Nebojša Vučinić (Montenegro),
Paulo Pinto de Albuquerque (Portugal),
Helen Keller (Switzerland),
Ksenija Turković (Croatia),
Yonko Grozev (Bulgaria),
Pere Pastor Vilanova (Andorra),
Alena Poláčková (Slovakia),
Pauliine Koskelo (Finland),
Georgios A. Serghides (Cyprus),

and also Roderick Liddell, *Registrar*.

Decision of the Court

[Article 2 \(right to life: substantive limb\)](#)

Ms Lopes de Sousa Fernandes did not allege, either explicitly or implicitly, that her husband’s death had been caused intentionally. She submitted that her husband had lost his life as a result of a hospital-acquired infection and of various instances of medical negligence which occurred throughout his treatment, and that the doctors in charge of treating him had failed to undertake the necessary measures to save his life.

The Court observed at the outset that the medical treatment provided to Mr Fernandes had been subjected to domestic scrutiny and that none of the judicial or disciplinary bodies which examined the applicant’s allegations had found any fault with his medical treatment. Moreover, none of the medical expert evidence had conclusively established the existence of medical negligence in the treatment of the applicant’s husband. The Court reiterated in that regard that, except in cases of manifest arbitrariness or error, it was not its function to call into question the findings of fact made by the domestic authorities, particularly when it came to scientific expert assessments, which by definition called for specific and detailed knowledge of the subject.

The Court went on to observe that Ms Lopes de Sousa Fernandes had not complained that her husband had been denied access to medical treatment in general or emergency treatment in particular, nor was there any information in the case file to suggest that this had been the case. Rather, she complained that the medical treatment provided to him had been deficient because the doctors treating him had been negligent. In the Court’s view, neither an alleged error in diagnosis leading to a delay in the administration of proper treatment, nor an alleged delay in performing a particular medical intervention, could in themselves constitute a basis for considering the present case on a par with cases concerning denial of healthcare.

The Court also considered that no sufficient evidence had been adduced in the present case to demonstrate that there had existed, at the material time, any systemic or structural dysfunction affecting the hospitals where the applicant’s husband had been treated, which the authorities knew or ought to have known about and in respect of which they had failed to undertake the necessary preventive measures, and that such a deficiency had contributed decisively to the death of the applicant’s husband. Likewise, it had not been demonstrated that the alleged fault attributable to the health-care professionals had gone beyond a mere error or medical negligence or that the persons involved in the treatment of the applicant’s husband had failed, in breach of their professional obligations, to provide emergency medical treatment to him despite being fully aware

that his life was at risk if that treatment was not given. Hence the Court considered, contrary to the Chamber's findings ([judgment](#) of 15 December 2015), that the alleged lack of coordination between the ENT department of the CHVNG and the hospital's emergency department did not, by itself, amount to a dysfunction in hospital services capable of engaging the State's responsibility under Article 2. In the present case, the Court did not have at its disposal any evidence or other elements that would enable it to make any findings or reach any conclusions establishing a situation of structural or systemic dysfunctions in the health-care services in question.

Consequently, the Court took the view that the present case concerned allegations of medical negligence and that Portugal's substantive positive obligations were limited to the setting-up of an adequate regulatory framework compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. Having regard to the detailed rules and standards laid down in the domestic law and practice of the respondent State in the area under consideration, the Court found that the relevant regulatory framework did not disclose any shortcomings with regard to the State's obligation to protect the right to life of the applicant's husband. Nor had the applicant alleged any such shortcomings. **The Court held that there had been no violation of Article 2 of the Convention (substantive limb).**

[Article 2 \(right to life: procedural limb\)](#)

In cases of medical negligence Portuguese law provided for the possibility of criminal proceedings, proceedings for civil liability in the administrative courts against public hospitals, and an application to the Ministry of Health and the Medical Association. Ms Lopes de Sousa Fernandes had made use of all these remedies. The Court noted the following points.

The proceedings before the Inspectorate General for Health (IGS) had lacked promptness. In particular, it had taken the IGS two years to order the opening of an investigation, and a further year to appoint an inspector to head the investigation; Ms Lopes de Sousa Fernandes had given evidence for the first time almost three years and six months after she had contacted the authorities; and the proceedings before the IGS had already been in progress for just over seven years and ten months when the applicant had been informed that the disciplinary proceedings initiated against Dr J.V. would be stayed pending the outcome of the criminal proceedings.

The length of the proceedings before the Medical Association – approximately four years and five months over two levels – had been unreasonable, given that they had consisted merely in examining the patient's medical records and the opinions of the specialist panels, that they had been written and that no evidence had been heard.

The criminal proceedings had been ineffective. Firstly, they had lasted for six years, eight months and nineteen days and had not been conducted promptly. Secondly, they had been concerned only with the charges against Dr J.V. and had not dealt with any of the other instances of alleged medical negligence complained of by Ms Lopes de Sousa Fernandes.

In the Court's view, the action for compensation before the administrative courts had been capable of providing Ms Lopes de Sousa Fernandes with the most appropriate redress in relation to the death of her husband. However, that had not been the case. Furthermore, the proceedings had lasted for nine years, eleven months and twenty-five days, without justification.

The Court further considered that, where there was a prima facie arguable claim of a chain of events possibly triggered by a negligent act that might have contributed to the death of a patient (in particular if an allegation of a hospital-acquired infection was concerned), the authorities could be expected to conduct a thorough examination into the matter. In the Court's view, no such examination had been conducted in the instant case, as the domestic courts, instead of carrying out an overall assessment, had approached the chain of events as a succession of medical incidents, without paying particular attention to how they may have related to each other.

Accordingly, the Court considered that the domestic system as a whole, when faced with an arguable complaint by Ms Lopes de Sousa Fernandes of medical negligence resulting in the death of her husband, had failed to provide an adequate and timely response. **The Court therefore found a violation of Article 2 of the Convention (procedural limb).**

[Article 41 \(just satisfaction\)](#)

The Court held that Portugal was to pay Ms Lopes de Sousa Fernandes 23,000 euros (EUR) in respect of non-pecuniary damage.

Separate opinions

Judges Pinto de Albuquerque (partly concurring, partly dissenting opinion) and Serghides (partly dissenting opinion) each expressed a separate opinion. These are annexed to the judgment.

The judgment is available in English and 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.