A review of Lopes de Sousa Fernandes v. Portugal (56080/13) (GC)

Strasbourg's Approach to the Right to Life in Medical Negligence Cases

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Abstract—The Grand Chamber in *Lopes de Sousa Fernandes v. Portugal* overturned a Chamber judgment by finding that there had not been a substantive violation of Article 2 of the European Convention of Human Rights in a medical negligence case. The Chamber's judgment had the potential to significantly widen substantive liability for Article 2, which the Grand Chamber sought to reverse. The Grand Chamber also attempted to reconcile existing case law and provide authoritative guidance for future cases. This paper examines whether the Grand Chamber was correct to restrict liability and to what extent it successfully clarified the law.

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Introduction

This paper will discuss the Grand Chamber's ruling in *Lopes de Sousa Fernandes v. Portugal*.[1] The case concerns the right to life, protected under Article 2(1) of the European Convention of Human Rights ('the Convention'), in a medical negligence context with both the substantive and procedural limbs discussed in the judgment.[2] However, this paper will focus only on the substantive aspects, where the case has made important developments, with two questions being addressed. First, I will examine whether the Grand Chamber was correct to overrule the Chamber's judgment by holding that Portugal did not violate the substantive limb of Article 2. Second, the paper will evaluate whether this judgment succeeded in making the law clearer, especially in light of the Court's recent jurisprudence. It will be argued that whilst the result was correct, the Grand Chamber failed to clarify the law on substantive violations of Article 2 concerning medical negligence.

In order to answer these questions, the following structure will be employed. Section 1 will outline two key previous cases on the issue, which were influential in how the Grand Chamber decided this case. Section 2 will briefly state the facts of *Lopes de Sousa Fernandes*. Section 3 will outline decisions in the Chamber and the Grand Chamber. Section 4 will answer the first question posed: whether the Grand Chamber reached the right conclusion by not finding a substantive violation. In Section 5, the Grand Chamber's decision will be evaluated with regards to its clarity as precedent to be applied in future cases, and its consistency with previous case law. Then, in Section 6, I will

[1] *Lopes de Sousa Fernandes v. Portugal* App no 56080/13 (GC, ECHR, 19 December 2017).

[2] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 2(1).

propose an alternative approach to when Article 2 should be engaged in medical negligence cases.

1. Pre-existing case law

As stated in the introduction, this case note will focus solely on the substantive issues raised in *Lopes de Sousa Fernandes*. It is useful, at this stage, to define what is meant by a substantive and procedural violation of the Convention. This can be illustrated by looking at Article 2(1), which has two substantive requirements. First, there is a general obligation on the State to protect the right to life at law. Second, the Convention prohibits the deprivation of a person's life.[3] The procedural limb of Article 2 requires the State to investigate possible breaches of the substantive limbs of the Article. It is possible to complain simply of a violation of the procedural limb without alleging there had been a violation of the substantive requirements of Article 2.[4]

The Grand Chamber, in support of its decision, relied principally on two previous Chamber rulings. In both cases, the Chamber found a violation of the substantive limb of Article 2. However, the Grand Chamber in *Lopes de Sousa Fernandes* treated these cases as belonging to different strands of case law. In order to assess the success of the Grand Chamber's judgment, which unwisely tried to reconcile these cases so as to form a single test, a brief overview is necessary.

In *Mehmet Şentürk,* the Court found that Turkey had breached the substantive limb when a hospital denied a woman

[3] See art 2(2) ECHR for exceptions.
[4] For example, *Armani Da Silva v. United Kingdom* App no 5878/08 (GC, ECHR, 30 March 2016).

emergency surgery because she was unable to pay for her care.[5] It had been established in an investigation that the staff at the hospital were liable under national law for refusing her care. The Chamber held that Article 2 required the State to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. The Court was critical of the hospital for focusing on the deceased's inability to pay for treatment. It was irrelevant that the Turkish Government stated that emergency treatment would normally be provided without an advance payment. In coming to that conclusion, the Chamber held that Turkey's domestic law on financing of emergency healthcare was not clear enough to handle cases, such as the present one, where the patient could not pay.[6] The Chamber refused to consider the Government's policy *in abstracto*. In finding a violation the Court acknowledged that the deceased's access to healthcare was 'subordinated to a prior financial obligation', irrespective of whether this was standard Turkish practice.[7] The Chamber concluded that the deceased was 'deprived of the possibility of access to appropriate emergency care' and therefore found a violation of Article 2.[8]

In *Asiye Genç,* a child had been born but soon developed breathing difficulties.[9] The baby was denied treatment in his birth hospital due to a lack of facilities. He was subsequently transferred to other hospitals, who also were unable to treat him for the same reason. The baby died in an ambulance and the claim was brought by his parents who argued that the Turkish State

[5] *Mehmet Şentürk and Bekir Şentürk v. Turkey* App no 3423/09 (Chamber, ECHR, 9 April 2013).
[6] *ibid* [96].
[7] *ibid* [95].
[8] *ibid* [97].
[9] *Asiye Genç v. Turkey* App no 24109/07 (Chamber, ECHR, 27 January 2015).

failed to protect their son's life.[10] In finding a substantive Article 2 violation, the Chamber held that the failure to equip the hospitals and the lack of coordination between them were enough to show that the State had not taken sufficient care with regards to the provision of healthcare.[11] In effect, the Chamber was of the opinion that his treatment was 'analogous' to denial of healthcare.[12]

The two cases amount to patients being denied treatment which led to their deaths. Whilst this creates an appearance of similarity, and the Chamber in *Asiye Genç* relied partly on *Mehmet Şentürk,*[13] there is a key factual difference which the Grand Chamber in *Lopes de Sousa Fernandes* observed. In *Mehmet Şentürk,* the doctors knew the seriousness of the deceased's condition and still chose not to assist her despite being in a position to do so. By contrast, in *Asiye Genç,* the baby was not given medical attention due to structural and organisational failings of the State in managing the hospitals. Both cases involved insufficient medical attention, but for differing reasons. Accordingly, the Grand Chamber chose to treat these decisions as representing two different strands of case law.

2. The Facts of Lopes de Sousa Fernandes

The applicant was the widow of a man who died because of complications resulting from a minor surgery to remove nasal polyps.[14] During the time between his surgery and his death, he visited the hospital on several occasions with health issues such

[10] *ibid* [59].
[11] *ibid* [80].
[12] *ibid* [82].
[13] *ibid.*
[14] *Lopes de Sousa Fernandes v. Portugal* (n 2) [10].

as headaches, severe abdominal pain, and diarrhoea. On each occasion, he was dismissed from hospital as the doctors considered that his situation was normal. His symptoms persisted, and upon further examination it was found that he had rectocolitis, peritonitis, and a perforated viscus. The following day, he had trouble breathing, he underwent further surgery and subsequently died.[15] The applicant alleged that the treatment of her husband violated his right to life under Article 2(1) on the Convention.[16] She claimed that the medical staff had been negligent in their treatment and diagnosis, especially given the multiple discharges. It was argued that, in effect, he had been denied access to healthcare.

3. The Chamber and Grand Chamber Judgments

A. Chamber

The Chamber found that Portugal had breached both the substantive and procedural limbs of Article 2. In finding a substantive violation, the Chamber concluded that the hospital's failure to follow the pre-agreed medical protocol for post-operative supervision that had been put in place, and an insufficient level of communication between the hospital's departments, led to the patient's death. The Chamber cited, *mutatis mutandis* and without explanation of their applicability, the decisions in *Mehmet Şentürk* and *Asiye Genç* in coming to this conclusion.[17]

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[15] *ibid* [14]-[27].
[16] *ibid* [143].
[17] *Lopes de Sousa Fernandes v. Portugal* App no 56080/13 (Chamber, ECHR 15 December 2015) [114].

B. Grand Chamber

The Grand Chamber concluded that Portugal did not breach its substantive obligations under Article 2, although it did find a procedural violation. The Grand Chamber drew a distinction between two types of cases: 'mere medical negligence' and 'denial of access to life-saving emergency treatment'. For the former category of cases, the Court held that there will only be a breach of the substantive obligation in medical negligence cases where the Contracting State fails to implement an effective regulatory framework which ensures that both public and private hospitals take appropriate measures to protect the lives of patients.[18] Moreover, it must be shown that the failure in the regulatory framework has actually disadvantaged the patient in question. The Grand Chamber noted that medical negligence by a medical provider in and of itself would not give rise to liability under the substantive limb.[19]

The only other way a State can breach Article 2's substantive limb is in two exceptional scenarios, which were put under the broader heading of 'denial of access to life-saving emergency treatment'. The first exceptional circumstance is when an individual patient's life is knowingly put in danger because of denial of access to life-saving emergency treatment (citing *Mehmet Şentürk*).[20] The second is that a patient is being denied such treatment because of structural dysfunctions at the hospital that the authorities knew about, or should have known about, and failed to take necessary measures to resolve (citing *Asiye Genç*).[21] It is important to bear in mind that these are two different exceptional categories that have been put under the same heading of 'denial of access to life-saving emergency treatment'. The

[18] *Lopes de Sousa Fernandes v. Portugal* (n2) [186]-[189].
[19] *ibid* [187].
[20] *ibid* [191].
[21] *ibid* [192].

inclusion of this heading, in my view, is unhelpful and makes the judgment needlessly confusing. It would have been preferable simply to refer to them as the two exceptional categories.

In order to decide whether a case fell under the heading of 'mere medical negligence' or 'denial of access to life-saving emergency treatment', the Grand Chamber formulated a four part cumulative test which, if met, would mean that the latter category applied. If the tests were not met, the Court would then consider whether the facts of the case would amount to a violation under the 'mere medical negligence' category. The tests are:

> 'Firstly, the acts and omissions of the health-care providers must go beyond a mere error or medical negligence, in so far as those health-care providers, in breach of their professional obligations, deny a patient emergency medical treatment despite being fully aware that the person's life is at risk if that treatment is not given'.[22]
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> 'Secondly, the dysfunction at issue must be objectively and genuinely identifiable as systemic or structural in order to be attributable to the State authorities, and must not merely comprise individual instances where something may have been dysfunctional in the sense of going wrong or functioning badly'.[23]
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> 'Thirdly, there must be a link between the dysfunction complained of and the harm which the patient sustained.'
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> 'Finally, the dysfunction at issue must have resulted from the failure of the State to meet its obligation to provide a

[22] *ibid* [194].
[23] *ibid* [195].

> regulatory framework in the broader sense indicated above'.[24]

The Grand Chamber found that the cumulative tests were not met on the present facts.[25] The Court stressed that this was not a case of denial of treatment. The deceased had been treated, and despite it being negligently done, this prevented the case from falling into that category.[26] Moreover, it was held that the lack of coordination between the hospital's departments did not amount to structural or systemic failures, nor was there any other evidence pointing towards such a problem.[27] Ultimately, therefore, neither the first nor second parts of the test had been made out. The Court thus concluded that the case had to be examined under the first category of 'mere medical negligence'. For there to have been a violation under this category, the regulatory framework must be unsatisfactory. However, upon reviewing Portugal's regulatory framework, the Grand Chamber held that there were no shortcomings so as to breach the State's Article 2 obligations.[28] There were strong enough regulations in place to ensure that patients' lives were safeguarded and included measures laying out the duties of a doctor and what disciplinary action can be taken against them if needed.[29] Thus, it was held that the Chamber was wrong to decide there had been a substantive Article 2 violation and their decision was overturned.[30]

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[24] *ibid* [196].
[25] *ibid* [202].
[26] *ibid* [200].
[27] *ibid* [201]-[202].
[28] *ibid* [203]-[204].
[29] See [88]-[109] for the relevant domestic law.
[30] *ibid* [205].

4. Did the Grand Chamber reach the correct conclusion?

It is submitted that the Grand Chamber was correct in reversing the Chamber's decision on finding a violation of the substantive requirements under Article 2 in this case. Moreover, it will be argued that the Grand Chamber, on the broader question of when the Article should apply, was correct to limit the scope of what would constitute a substantive violation of Article 2.

The 'violation' which the Chamber had found was concluded to be no more than mere negligence. What is not clear from the Chamber's majority judgment is whether they were aware that they were significantly widening the liability that already existed from previous case law. As the joint dissenting opinion in the Chamber, provided by Judges Sajó and Tsotsoria, pointed out, the majority equated the current case to those of *Mehmet Şentürk* and *Asiye Genc,* which the dissenting judges argued was a mistake.[31] The former case concerned a denial of medical service and the latter a systematic failure of the health service in that area. The facts of *Lopes de Sousa Fernandes* were significantly different to the existing lines of jurisprudence and should be distinguished. Unlike in *Mehmet Şentürk,* the hospital did provide treatment for the deceased, even though the treatment was negligent in that the patient's symptoms were not diagnosed for some time. Moreover, the failure in the provision of healthcare in *Lopes de Sousa Fernandes* cannot be seen as systemic, especially if *Asiye Genc* is being used as the touchstone. In *Asiye Genc* there was a shortage of critical equipment over several hospitals and it was known by the authorities that there could be a high demand for their use. Here, the Grand Chamber decided that it had no such evidence which could lead it to a similar conclusion.[32] It is hard

[31] *Lopes de Sousa Fernandes v. Portugal* (n18) page 33.
[32] *Lopes de Sousa Fernandes v. Portugal* (n2) [202].

to escape the opinion that the Chamber applied existing case law incorrectly. In that sense, it was right of the Grand Chamber to overturn its decision.

The key underlying issue in the case is whether substantive Article 2 liability should be imposed in standard examples of medical negligence, such as in the present case. Liability under the Convention for regular medical negligence had been explicitly ruled out in previous case law and this restriction was upheld by the Grand Chamber. It is submitted that such a restriction should be welcomed. It must be borne in mind that a violation under the ECHR is attributed to the State, which is not directly involved with the events of the case. It would be impossible for the State to prevent medical negligence in every case due to human error by doctors. Whilst the State can impose criminal penalties and establish professional bodies to uphold standards, which fulfils the procedural limb of Article 2, it can only impose regulations to mitigate the chances of medical negligence taking place. Essentially, the State is better placed to ensure *ex post facto* enforcement of medical standards. Its ability to prevent medical negligence is more limited. It follows that since medical negligence is not something the Government caused, nor can prevent completely, the State should not be held liable under the Convention unless something more, which links the State to the case, can be shown. There would be a substantial floodgates problem if Article 2 liability were to be expanded to all medical negligence cases. Moreover, there are policy concerns, notably relating to the use of public funds, about whether damages for a violation of Article 2 should be available in every medical negligence case when, under national law, there is meant to be a possibility to sue the healthcare provider.

Additionally, as the dissenting judges in the Chamber judgement pointed out, the Chamber's judgment would have imposed on States a 'duty to provide a specific level of health-care

service for the purposes of Article 2(1)'.[33] It is submitted that they were correct to point out this problem as this is not the purpose of the Convention, which does not address social and economic rights. Instead, the Convention protects civil and political rights, such as the rights to privacy (Article 8) and free speech (Article 10). The dissenting judges, Sajó and Tsotsoria, also noted that the point that the present case would unlikely be a violation of the International Convention on Economic, Social and Cultural Rights.[34] Considering the great variance in how healthcare is managed, organised, and funded across High Contracting Parties, the Court should be very reluctant to set a one-size-fits-all policy as to what healthcare should look like in each country. This has been emphasised in previous jurisprudence. In *Sentges*, the Court dismissed a claim that a patient's Article 8 rights had been violated because he was not provided with a robotic arm to help him manage his illness.[35] The Court reasoned that the manner of allocation of limited financial resources falls within the margin of appreciation given to States. It should be noted that whilst it has been established by case law that States have to provide 'emergency healthcare', it remains to be seen how far that definition will stretch. Professor Kapelańska-Pręgowska has raised the interesting point that the Convention could require that States allocate sufficient resources to fund treatment such as chemotherapy as they could be considered urgent.[36] If so, this could have significant financial implications for States in structuring the provision of healthcare. Should the law develop in

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[33] *Lopes de Sousa Fernandes v. Portugal* (n18) page 34.

[34] *ibid.*

[35] *Sentges v. the Netherlands* App no 27677/02 (Chamber, ECHR, 8 July 2003).

[36] Julia Kapelańska-Pręgowska, 'Medical Negligence, Systemic Deficiency, or Denial of Emergency Healthcare? Reflections on the European Court of Human Rights Grand Chamber Judgment in Lopes de Sousa Fernandes v. Portugal of 19 December 2017 and Previous Case-law' (2019) European Journal of Health Law 26, 43.

this way, it would mark a new expansion of the Convention, far beyond what was originally envisaged. It is conceded that Judges Sajó and Tsotsoria's serves a powerful caution against the Court expand the scope of the law in such a fashion. Fortunately, the law has yet to make such a step and thus the dissenting judges' point still has force.

Judges Sajó and Tsotsoria went on to argue that the actual wording of the Convention in Article 2(1) makes reference to a person being 'intentionally' deprived of life .[37] Their argument is that the language of intention has made the Court slow to expand the meaning of negligence and caution should be shown before imposing Article 2 liability. This does not mean that direct intention is necessary for a violation of Article 2: the Grand Chamber's judgment states that systemic failures – which are unlikely to be intentional – can give rise to liability. What Judges Sajó and Tsotsoria were saying is that, Article 2 should not be applied too readily in the absence of intention. They were of the opinion that a negligent doctor who had intended to treat the patient correctly should not fall under Article 2. Imposing liability on the State, especially if there exists an adequate regulatory protection for patients, for acts of mere medical negligence due to the actions of individuals, seems an overreach of the Article's purpose. As the Grand Chamber points out, 'the States' substantive positive obligations relating to medical treatment are limited to a duty to regulate'.[38] Under the Chamber's approach, the State would become liable for a substantive violation of the most fundamental provision in the Convention, when the apparatus of the State had done all that it could reasonably do.

A final point on why mere medical negligence should not be considered a substantive violation is that it would diminish the significance of actual substantive Article 2 violations. Judges Sajó

[37] *Lopes de Sousa Fernandes v. Portugal* (n18) page 34.
[38] *Lopes de Sousa Fernandes v. Portugal* (n2) [186].

and Tsotsoria draw attention to the difference between life being taken on the one hand through medical negligence and on the other through the exercise of coercive power by the State.[39] It seems incorrect to say police officers intentionally taking lives when controlling a riot should have the same seriousness, in terms of how Article 2 applies, as a doctor misdiagnosing a patient. It is highly likely that the State deliberately taking someone's life would generally be perceived as a more egregious violation of the right to life than a doctor negligently treating their patient. It is wrong therefore that they should be treated the same way by the Convention. The key distinction between this extreme example and the facts of *Lopes de Sousa Fernandes* is the involvement of the State. For example, in *McCann*, the shooting of suspected terrorists could be attributed to the actions of the British Government in planning the operation.[40] There, the UK took active steps, such as using the SAS (including troops with training to kill) which led to the deaths of the terrorists. It was a case concerning direct State action that led to a violation of Article 2. In simple medical negligence cases, the State does not play any role. The negligence is committed by a medical practitioner. There is an obvious gulf between the seriousness of the State intentionally putting an individual's life at risk on the one hand and on the other a doctor who negligently misdiagnoses a patient. The justification for allowing Article 2 liability in certain medical negligence cases is that there is a nexus between the negligent event and the State, such as a failure to implement effective regulation, which makes the State responsible for the medical negligence. What the comparison to *McCann* demonstrates is that where there is a lack of a connection to the State, there should be no liability.

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[39] *Lopes de Sousa Fernandes v. Portugal* (n18) page 34.
[40] *McCann and Others v. United Kingdom* App no 18984/91 (GC, ECHR, 27 September 1995).

5. Did the Grand Chamber improve the clarity of the law?

Having argued that the Grand Chamber was correct in limiting the scope of the substantive limb of Article 2, I will now consider whether the exceptional categories described by the Court are sufficiently clear. Particular attention should be paid to the tests formulated by the Grand Chamber to decide whether a case would be classified as 'mere medical negligence' or be considered as falling within one of the two 'exceptional categories', grouped together under the 'denial of access to life-saving emergency treatment' heading. To reiterate, the 'exceptional categories' are either: when there is deprivation of medical treatment while it is known the patient's life is at risk; or where there is deprivation caused by systemic or structural failures.

For a case to fall within the two 'exceptional categories', as opposed to being a 'mere medical negligence' case, the Court lists four requirements, which were noted above.[41] The inclusion of the fourth, that the dysfunction must be the result of the failure of the State to comply with its regulatory obligation in the broad sense, in particular could cause problems.[42] Since this requirement also applies in cases of 'mere medical negligence' where Article 2 liability is imposed, it is strange that it is involved in the analysis of the exceptional cases of 'denial of access to life-saving emergency treatment'.

The first problem with its inclusion is that it casts doubt over the necessity of having the exceptional categories at all: if cases of 'mere medical negligence' can give rise to liability where the State has failed to provide an adequate regulatory regime, the

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[41] *Lopes de Sousa Fernandes v. Portugal* (n2) [194-196]. These paragraphs were extracted earlier in this article on pages 139-140.
[42] *ibid* [196].

exceptional categories which are meant to sit alongside this seem superfluous. This is because, whenever the four requirements of the test are met, liability would have already been established under the 'mere medical negligence' category.

A second and related issue with the fourth test would be that the Court is making it more difficult to establish a substantive violation of Article 2 in the exceptional cases than under 'mere medical negligence', which would seem illogical. Considering the severity of the medical negligence in these cases, it is plain that these warrant liability under Article 2 more than 'mere medical negligence' cases and thus it would be counterintuitive of the Court to make it harder to establish liability. It is possible to reach this conclusion since the cumulative test for the exceptional categories contains two additional requirements (denial of healthcare when it is known the patient's life is at risk and structural or systemic failures) as well as the requirements of a causal link and failure to comply with the regulatory obligation. By contrast, in 'mere medical negligence' cases only the latter two (causal link and lack of compliance) are required. The result is that the exceptional categories appear to be more extreme examples of the violation that would already exist for 'mere medical negligence' cases. It is possible, albeit unlikely, that the Grand Chamber intended this. They may have wanted to highlight more severe violations of Article 2, even though liability could already have been established on the lesser ground. But, considering that the result is a substantive violation of Article 2 regardless of the reasoning and that the consequences of such a violation are the same, the distinction seems to serve little purpose. The more realistic conclusion is that the implications of the inclusion of the fourth requirement were not intended by the Grand Chamber. It is notable that the Court did not give any normative reason for why this requirement was added. If, as I have suggested, the Grand Chamber intended the exceptional cases to be examples of severe medical negligence cases, they did not state that in their

judgment. It is more likely that they wanted the exceptional cases to sit alongside the mere medical negligence cases rather than to form a subset of them. This would be a more natural understanding of the phrase 'exceptional categories', i.e. as something different to the normal cases.

There is a third issue with the exceptional categories. The majority judgment of the Grand Chamber states that there are two types of 'exceptional cases.[43] However, in the following paragraph, the Court links them both together under the more general heading 'denial of access to life-saving emergency treatment',[44] and then uses a single cumulative test to determine whether a case falls within the new broad category, seemingly dismissing any differences between them. It is observed that the first criterion of the four-part test (denial of treatment knowing a person's life is at risk) corresponds to the first category of exceptional cases and the second criterion (systemic or structural dysfunction) to the second case. The first category concerns specific situations in which caregivers consciously compromise the life of an individual patient by refusing access to life-saving emergency treatment, which is drawn from cases such as *Mehmet Şentürk*. The second category concerns systematic failures which result in a patient being denied treatment, with the Court taking inspiration from cases such as *Asiye Genç*.

This raises several issues. It is unclear why the judges would create two exceptional categories in the first place if they intended for them to be joined. The Grand Chamber gives no normative reason for this merger, just a mere one paragraph after creating them.[45] Whilst they do both concern a denial of treatment, their factual backgrounds, as noted above, are different. The use of a single test, especially considering that the

[43] *ibid* [191]-[192].
[44] *ibid* [193].
[45] See *ibid* [191]-[193].

criteria are cumulative, will cause difficulties. In order to give rise to liability, a case must include features from both existing strands of jurisprudence. By joining the two historic categories together under one test, the Grand Chamber treats these cases as essentially the same. This runs counter to existing jurisprudence and earlier parts of the judgment, where they are presented as different categories. Dr Lavrysen, co-editor of the *Strasbourg Observer*, argues that the first two criteria should be alternatives rather than cumulative, corresponding to their respective exceptional cases.[46]

The reason why this merger is problematic is that it means that for a denial of treatment case to amount to a substantive Article 2 violation, a future case would have to meet a test based on two different strands of case law. In fact, it is unclear whether the previous cases, such as *Asiye Genç* and *Mehmet Şentürk,* would themselves attract liability under the newly formulated test. There would have to be a denial of treatment when the medical staff know a life was at risk as well as a systematic dysfunction. It is odd that the Grand Chamber, despite claiming to follow the previous Chamber judgments, has created a new test which would lead to different results in those same cases.

[46] Laurens Lavrysen, 'Medical negligence after Lopes de Sousa Fernandes: a blank check to the Member States with respect to the substance of the right to life?' (Strasbourg Observer, February 2018) <https://strasbourgobservers.com/2018/02/08/medical-negligence-after-lopes-de-sousa-fernandes-a-blank-check-to-the-member-states-with-respect-to-the-substance-of-the-right-to-life/#more-4090> accessed 14 February 2019.

6. An alternative approach

The better approach, it is argued, is that there should be two ways for a substantive violation of Article 2 to be found. Firstly, there should be 'mere medical negligence' in the way that the Grand Chamber understood it. In these cases, there would only be a substantive violation where the State fails to implement an effective regulatory regime. Secondly, standing alongside this should be a single exceptional scenario: where a patient is deprived of life due to a systemic or structural dysfunction in the healthcare sector which the State has failed to resolve. The difference between the two, is that in the exceptional category there might not be medical negligence. In *Asiye Genç* it must be remembered the hospital was in no position to offer healthcare since it lacked the necessary facilities. It was not a case of negligence by the hospital, but instead a failing of the State to adequately equip them so they could provide the necessary emergency treatment.

I disagree with the Grand Chamber that denial of healthcare where the patient's life was knowingly put at risk should, in and of itself, give rise to liability under Article 2. The reason for this is that the *ratio* of *Mehmet Şentürk* is that Turkey was liable because of the insufficient nature of its domestic law on paying for emergency healthcare, which did not prevent accidents like that case from happening. Instead, *Mehmet Şentürk* and similar cases should fall under the 'mere medical negligence' heading. Thus, there will be liability where there is not an effective regulatory regime. It is submitted that there should not be Article 2 liability in all cases of denial of treatment; there must be something that links the denial to the State.

I accept that this *prima facie* goes against how *Mehmet Şentürk* was understood by the Grand Chamber in *Lopes de Sousa Fernandes*, since it would not have classified it as a 'mere medical

negligence' case, but it is submitted this is entirely in accordance with how the Grand Chamber would have established liability under their exceptional category. It must be remembered that under the four-part test, the regulatory requirement had to be considered anyway. Therefore, even under the Grand Chamber's formulation, for liability to be established there had to be a failure of regulation before the Court could conclude that there was a denial of healthcare where it was known the patient's life was at risk. It is submitted that rather than a *Mehmet Şentürk* type case being unhelpfully categorised as a separate exceptional case, it should just be considered along with other 'mere medical negligence' cases. Analysing the case under this heading means that the concerns noted about the four-part test above do not arise. That is, it would still be possible to find an Article 2 violation for a *Mehmet Şentürk* type case even though the four-part test has seemingly raised the threshold. Professor Kapelańska-Pręgowska would disagree with my treatment of *Mehmet Şentürk*, as she would class the case as a 'denial of treatment case'.[47] I believe she is wrong to reach this conclusion. Respectfully, her error lies in a simple, but fundamental, oversight of the reasoning of the Chamber in *Mehmet Şentürk*. She argues that the mere denial of treatment alone was enough to engage state responsibility. However, in my opinion it is difficult to see why the State would be liable for the negligence of medical professionals in refusing treatment in a single case. The reasoning in *Mehmet Şentürk* is not overly clear, with the Chamber simply stating that the national bodies are not exonerated from liability simply because she was not meant to have to pay.[48] It is likely this has led to the difficulties with how the Grand Chamber in *Lopes de Sousa Fernandes* interpreted it. However, the Chamber goes on to emphasise that the confusing state of Turkish law on the relevant issue of payment, which does provide a connection between the negligent

[47] Kapelańska-Pręgowska (n38) 35.
[48] *Mehmet Şentürk and Bekir Şentürk v. Turkey* (n6) [95].

act and the State, which justifies the imposition of Article 2 liability. If *Mehmet Şentürk* is understood in this way, it is easy to see that classifying it as a 'denial of treatment' case, whilst seemingly attractive, is unhelpful. It is not the denial of treatment itself that justifies Article 2 liability, but only where there is failure of the State to prevent that lack of treatment. This was overlooked by the Grand Chamber and Professor Kapelańska-Pręgowska.

I further depart from the Grand Chamber over how I would distinguish between the 'mere medical negligence' and exceptional cases. Instead of the four-part test, only the second and third requirements (systemic or structural failings and causality) should be used. It has been explained above why the inclusion of the first test (knowledge that the patient's life is at risk) and fourth test (a lack of effective regulation), should not feature at all in determining whether there is structural or systemic dysfunction of the health system.[49] If the facts of a case fail to meet this test, then it would have to be examined under the 'mere medical negligence' requirements. It is submitted that this approach would provide welcome clarity and fits better with the case law than the Grand Chamber's attempt at restating the law.

Conclusion

The result is that the Grand Chamber's judgment is a mixed success. It succeeded in reversing the Chamber's unwise widening of the substantive limb of Article 2, which seemingly imposed Article 2 liability in all medical negligence claims. The Grand Chamber's consolidation of previous case law, however, is fraught with internal inconsistencies and contradictions. Whilst the Court successfully acknowledged the two existing parallel

[49] See Section 5 of this article for a discussion of the fourth test.

types of cases that could give rise to liability, they then confusingly and unwisely tried to merge them. Moreover, the criteria given to aid future courts seem more of a hindrance than a help given these issues.

This being said, in cases of 'mere medical negligence' the Grand Chamber's ruling will be of some use. It means that in those cases, the Court need only examine whether the State had put an effective framework in place. In the recent Chamber judgment of *Tülay Yıldız v. Turkey*, the Court held that the existence of such a framework absolved Turkey of any substantive liability.[50] It will be in cases where the 'exceptional categories' are engaged that the difficulties in the Grand Chamber's judgment will be revealed. Future judgments should rectify the mistakes in *Lopes de Sousa Fernandes* and set out to clarify the law on substantive violations of Article 2 concerning medical negligence, where this case failed to do so. By simply adopting a single exceptional category to go alongside the 'mere medical negligence' cases and simplifying the test that is used to identify which category a case falls into, the Court could make the law more coherent and easier to apply.

[50] *Tülay Yıldız v. Turkey* App No 61772/12 (Chamber, ECHR, 11 December 2018).