

CORONERS' INQUESTS: ORDINARY CLINICAL NEGLIGENCE INSUFFICIENT

TO ENGAGE ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

In the 2015 Chamber judgment in *Lopes de Sousa Fernandes v Portugal* (App No 56080/13), the European Court of Human Rights (ECtHR) held that there was a breach of both the substantive aspect of Article 2 of the Convention (the right to life) and a breach of the procedural investigative aspect of Article 2. The Applicant had complained that her husband's death from post-operative meningitis in a state hospital, had been caused by negligence and carelessness on the part of the medical staff.

In the December 2017 Grand Chamber judgment in *Fernandes* (ECHR 395(2017)), the ECtHR held that although there had been a violation of the procedural limb of Article 2, there had been no violation of the Article 2 right to life. The Court observed that the alleged fault had not gone beyond mere error or medical negligence, or that those involved had not failed to provide emergency medical treatment to the deceased, despite being aware that the deceased's life was at risk if such treatment was not given. Further, the Court did not have any evidence before it to suggest that there had been structural or systemic failings in the healthcare services in question.

The applicability of *Fernandes* to domestic law was recently considered by the Divisional Court in the case of *R (Parkinson) v HM Senior Coroner for Kent, Dartford and Gravesham NHS Trust, and Dr Hijazi (Interested Parties)* [2018] EWHC 1501 (Admin)(15 June 2018). The case concerned the inquest into the death of Mrs Parkinson, an elderly lady suffering from dementia, who in 2011 had become acutely unwell with pneumonia, leading to her admission to a hospital emergency department. The Senior Coroner had concluded that the death did not engage the Article 2 investigative obligation, so as to require wider inquiry into by what means, and in what broader circumstances, the death had occurred.

Applying *Fernandes*, and observing that the case was not inconsistent with domestic Article 2 authorities such as *Savage*¹ and *Rabone*², the Divisional Court held that the State's Article 2 obligations do not extend to circumstances where it is alleged that a patient has been managed negligently: '*Where the state has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, matters such as an error of judgment on the part of a health professional or negligent coordination among health professionals in the treatment of a particular patient are not sufficient of themselves to call the state to account under Article 2.*' (para 87)

The Divisional Court noted that there may be exceptional cases engaging Article 2 which go beyond mere error or medical negligence, in which medical staff, in breach of their professional obligations, fail to provide emergency medical treatment, despite being fully aware that a person's life would be put at risk if that treatment is not given. However, in such cases: '*...the failure will result from a dysfunction in the hospital's services, and this will be a structural issue linked to the deficiencies in the regulatory framework...the crucial distinction is between a case where there is reason to believe that there may have been a breach which is a "systemic failure", in contrast to an "ordinary" case of medical negligence...*' (paras 88 & 89).

Dr Peter Ellis, Hailsham Chambers

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¹ *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74

² *Rabone v Pennine Care NHS Trust* [2012] UKSC 2