Lambert and Others v. France.

JOINT PARTLY DISSENTING OPINION OF
JUDGES HAJIYEV, ŠIKUTA, TSOTSORIA,
DE GAETANO AND GRIҬCO

1.  We regret that we have to dissociate ourselves from the majority’s view expressed in points 2, 4 and 5 of the operative provisions of the judgment in this case. After considerable reflection, we believe that once all is said and written in this judgment, after all the subtle legal distinctions are made and all the fine hairs split, what is being proposed is nothing more and nothing less than that a severely disabled person *who is unable to communicate his wishes about his present condition* may, on the basis of a number of questionable assumptions, be deprived of two basic life-sustaining necessities, namely food and water, and moreover that the Convention is impotent in the face of this reality. We find that conclusion not only frightening but – and we very much regret having to say this – tantamount to a retrograde step in the degree of protection which the Convention and the Court have hitherto afforded to vulnerable people.

2.  In reaching the conclusion in paragraph 112 of the present judgment, the majority proceed to review the existing cases in which the Convention institutions have accepted that a third party may, in exceptional circumstances, act in the name and on behalf of a vulnerable person, even if the latter has not expressly stated his or her wish to submit an application. The majority deduce from that case-law two main criteria to be applied in such cases: the risk that the direct victim will be deprived of effective protection of his or her rights, and the absence of a conflict of interests between the victim and the applicant (see paragraph 102 of the present judgment). While we agree with these two criteria as such, we completely disagree with the way in which the majority apply them in the particular circumstances of the present case.

With regard to the first criterion, it is true that the applicants can, and did, rely on Article 2 on their own behalf. However, now that the Court has recognised the *locus standi* of a non-governmental organisation to represent a deceased person (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, ECHR 2014), we do not see any valid reason not to follow the same approach in respect of the applicants in the instant case. In fact, as close relatives of Vincent Lambert, they have, *a fortiori*, even stronger justification for acting on his behalf before the Court.

As regards the second criterion, the majority consider that, since the impugned domestic decisions were based on the certainty that Vincent Lambert would not have wished to be kept alive under the conditions in which he now finds himself, it is not “established that there is a convergence of interests between the applicants’ assertions and what Vincent Lambert would have wished” (see paragraph 104 of the present judgment). This statement would be correct only if – and in so far as – the applicants alleged a violation of Vincent Lambert’s right to personal autonomy under Article 8 of the Convention, which, according to our Court’s case-law, comprises the individual’s right to decide in which way and at which time his or her life should end (see *Haas v. Switzerland*, no. 31322/07, § 51, ECHR 2011). However, although the applicants do rely on Article 8, they do so in a completely different context; it is Vincent Lambert’s physical integrity, and not his personal autonomy, that they seek to defend before the Court. Their main complaints raised on behalf of Vincent Lambert are based on Articles 2 and 3 of the Convention. Unlike Article 8, which protects an extremely wide panoply of human actions based on personal choices and going in various directions, Articles 2 and 3 of the Convention are clearly unidirectional in that they do not involve any negative aspect. Article 2 protects the right to life but not the right to die (see *Pretty v. the United Kingdom*, no. 2346/02, §§ 39-40, ECHR 2002-III). Likewise, Article 3 guarantees a positive right not to be subjected to ill-treatment, but no “right” whatsoever to waive this right and to be, for example, beaten, tortured or starved to death. To put it simply, both Article 2 and Article 3 are “one-way avenues”. The right not to be starved to death being the only right that Vincent Lambert himself could have validly claimed under Articles 2 and 3, we fail to see how it is logically possible to find any lack of “convergence of interests” between him and the applicants in the present case, or even entertain the slightest doubt on this point.

In these circumstances, we are convinced that the applicants did have standing to act in the name and on behalf of Vincent Lambert, and that their respective complaints should have been declared compatible *ratione personae* with the provisions of the Convention.

3.  We would like to make it clear from the outset that had this been a case where the person in question – Vincent Lambert in this case – had clearly expressed his wish not to be allowed to continue to live because of his severe physical disability and the pain associated therewith, or, in view of that situation, had clearly refused food and water, we would have found no objection to hydration and feeding being stopped or withheld if domestic legislation provided for that (and save always the right of members of the medical profession to refuse to be party to that procedure on the ground of conscientious objection). One may not agree with such a law, but in such a situation two Convention rights are, as it were, pitted against each other: the right to life (with the corresponding duty of the State to protect life) on the one hand – Article 2 – and the right to personal autonomy which is subsumed under Article 8. In such a contest one can agree that “respect for human dignity and human freedom” (exmphasised in *Pretty*, cited above, § 65) may prevail. But that is not Vincent Lambert’s situation.

4.  Vincent Lambert is, according to the available evidence, in a persistent vegetative state, with minimal, if any, consciousness. He is not, however, brain dead – there is a failure of function at one level of the brain but not at all levels. In fact, he can breathe on his own (without the aid of a life-support machine) and can digest food (the gastro-intestinal tract is intact and functioning), but has difficulty in swallowing, in moving solid food down the oesophagus. More critically, there is no evidence, cogent or otherwise, that he is in pain (as distinguished from the evident discomfort of being constantly in bed or in a wheelchair). We are particularly struck by a submission made by the applicants before this Court in their observations of 16 October 2014 on the admissibility and merits (see paragraphs 51 and 52), and which has not really been contested by the Government, to the following effect:

“The Court must realise that, like any person in a state of severely diminished consciousness, Mr Lambert can be got out of bed, dressed, put in a wheelchair and taken out of his room. Many patients in a condition comparable to his reside in a specialised nursing home and are able to spend weekends and some holidays with their families ... and it is precisely the enteral method used to feed them that makes this form of autonomy possible.

In September 2012 Doctor Kariger agreed to let Vincent Lambert’s parents take him on holiday to the south of France. That was six months before the first decision to stop feeding him was taken ... and there had been no change in his condition in the interim.”

From the evidence submitted before this Court, enteral feeding involves minimal physical invasion, causes the patient no pain, and, with minimal training, such feeding can continue to be administered by the family or relatives of Mr Lambert (and the applicants have offered to do so) – although the food mixture to be administered is still something that has to be prepared in a clinic or hospital. In this sense enteral feeding and hydration (irrespective for the moment of whether this is termed “treatment” or “care” or just “feeding”) is entirely *proportionate* to the situation in which Vincent Lambert finds himself. In this context we are none the wiser, even after hearing oral submissions in this case, as to why the transfer of Vincent Lambert to a specialised clinic – the Bethel[[1]](#footnote-1) nursing home – where he can be cared for (thereby relieving the Reims University Hospital of that duty) has been blocked by the authorities.

In other words, Vincent Lambert *is alive* and being cared for. He is also being fed – and food and water are two basic life-sustaining necessities, and are intimately linked to human dignity. This intimate link has been repeatedly stated in numerous international documents[[2]](#footnote-2) What, we therefore ask, can justify a State in allowing a doctor – Dr Kariger or, since he has resigned and left Reims University Hospital[[3]](#footnote-3), some other doctor – in this case not so much to “pull the plug” (Vincent Lambert is not on any life-support machine) *as to withdraw or discontinue feeding and hydration so as to, in effect, starve Vincent Lambert to death*? What is the overriding reason, in the circumstances of the present case, justifying the State in not intervening *to protect life*? Is it financial considerations? None has been advanced in this case. Is it because the person is in considerable pain? There is no evidence to that effect. Is it because the person is of no further use or importance to society, indeed is no longer a person and has only “biological life”?

5.  As has already been pointed out, there is no clear or certain indication of what Vincent Lambert’s wishes really are (or even were) regarding the continuance or otherwise of his feeding and hydration in the situation in which he now finds himself. Although he was a member of the nursing profession before the accident which reduced him to his present state, he never formulated any “advance directives” nor appointed “a person of trust” for the purposes of the various provisions of the Public Health Code. The *Conseil d’État*, in its decision of 24 June 2014, made much of the evidently casual conversations that Vincent Lambert had had with his wife (and apparently on one occasion also with his brother, Joseph Lambert) and came to the conclusion that “Dr Kariger [could not] be regarded as having incorrectly interpreted the wishes expressed by the patient before the accident”[[4]](#footnote-4). In matters of such gravity nothing short of absolute certainty should have sufficed. “Interpreting” *ex post facto* what people may or may not have said years before (and when in perfect health) in casual conversations clearly exposes the system to grave abuse. Even if, for the sake of argument, Vincent Lambert had indeed expressed the view that he would have refused to be kept in a state of great dependency, such a statement does not in our view offer a sufficient degree of certainty regarding his desire to be deprived of food and water. As the applicants note in paragraphs 153 and 154 of their observations – something which again has not been denied or contradicted by the respondent Government:

“If Mr Vincent Lambert had really wanted his life to end, if he had really ‘given up’ psychologically, if he had really and truly wanted to die, [he] would already be dead by now. He would not have survived for thirty-one days without food (between the first time his nutrition was stopped on 10 April 2013 and the first order of the Châlons-en-Champagne Administrative Court, of 11 May 2013, ordering the resumption of his nutrition) if something inside him, an inner force, had not made him fight to stay alive. No one knows what this force of life is. Perhaps, unconsciously, it is the fact that he is a father, and the desire to see his daughter? Perhaps it is something else. What is undeniable is that by his actions Mr Vincent Lambert has shown a will to live that it would be wrong to ignore.

Conversely, any person who works with patients in a state of impaired consciousness will tell you that a person in his condition who gives up on life dies within ten days. In the instant case, Mr Lambert survived for thirty-one days with no food and only 500 ml of liquid per day.”

However, all this emphasis on the presumed wishes or intentions of Vincent Lambert detracts from another important issue, namely the fact that under the French law applicable in the instant case, where a patient is unconscious and has made no advance directives, his wishes and the views or wishes of his family only *complement* the analysis of what the doctor in charge of the patient perceives to be a medical reality. In other words, the patient’s wishes are, in such a situation, *in no way determinative* *of the final outcome*. The three criteria set out in Article L. 1110-5 of the Public Health Code – futility, disproportion and sustaining life artificially – are the only relevant criteria. As the *Conseil d’État* has stated, account must be taken of any wishes expressed by the patient and particular importance must be attached to those wishes (see paragraphs 47-48 of the present judgment), but those wishes are never decisive. In other words, once the doctor in charge has, as in the instant case, decided that the third criterion applies, the die is cast and the collective procedure is essentially a mere formality.

6.  By no stretch of the imagination can Vincent Lambert be deemed to be in an “end-of-life” situation. Regrettably, he will be in that situation soon, after feeding and hydration are withdrawn or withheld. Persons in an even worse plight than Vincent Lambert are *not in an imminently terminal* *condition* (provided there is no other concurrent pathology). Their nutrition – regardless of whether it is considered as treatment or as care – is serving a life-sustaining purpose. It therefore remains an *ordinary* means of sustaining life and should, in principle, be continued.

7.  Questions relative to the supplying of nutrition and hydration are often qualified by the term “artificial”, and this, as has happened in this case, leads to unnecessary confusion. Every form of feeding – whether it is placing a feeding bottle in a baby’s mouth, or using cutlery in the refectory to put food in one’s mouth – is, to some extent, artificial, as the ingestion of the food is being mediated. But when it comes to a patient in Vincent Lambert’s condition, the real question that must be asked (in the context of the concepts of proportionality and reasonableness that underpin the notion of the State’s positive obligations under Article 2) is this: is the hydration and nutrition of benefit to the person without causing any undue burden of pain or suffering or excessive expenditure of resources? If the answer is yes, then there is a positive obligation to preserve life. If the burdens surpass the benefits, then the State’s obligation may, in appropriate cases, cease. In this context we would add, moreover, that a State’s margin of appreciation, referred to in paragraph 148 of the present judgment, is not unlimited, and, broad as it may be, must always be viewed in the light of the values underpinning the Convention, chief among which is the value of life. The Court has often stated that the Convention must be read as a whole (a principle referred to in paragraph 142) and interpreted (and we would say also applied) in such a way as to promote internal consistency and harmony between its various provisions and the various values enshrined therein (see, albeit in different contexts, *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X, and *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 54, ECHR 2012). In assessing this margin of appreciation in the circumstances of the instant case, and the method chosen by the French authorities to “balance” any competing interests, the Court should therefore have given more weight to the value of life. It should also be recalled that we are not in a situation here where one can legitimately say that there may be some doubt as to whether or not there is life or “human life” (such as in cases dealing with fertility and human embryos – the “when does human life begin” question). Nor is it a case where there is any doubt as to whether or not Vincent Lambert is alive. To our mind, a person in Vincent Lambert’s condition is a person with fundamental human dignity and must therefore, in accordance with the principles underpinning Article 2, receive ordinary and proportionate care or treatment which includes the administering of water and food.

8.  We agree with the applicants that the law in question lacks clarity[[5]](#footnote-5): on what is ordinary and extraordinary treatment, on what amounts to unreasonable obstinacy, and, more critically, on what amounts to prolonging (or sustaining) life *artificially*. It is true that it is primarily for the domestic courts to interpret and apply the law, but it is also clear to us that the *Conseil d’État*, in its judgment of 24 June 2014, adopted uncritically the interpretation given by Mr Leonetti and, moreover, disposed in a perfunctory way of the issue of the compatibility of domestic law with Articles 2 and 8 of the Convention (see paragraph 47 of the present judgment), attaching importance only to the fact that the “procedure had been observed”. It is true that this Court should not act as a fourth-instance court and that the principle of subsidiarity must be respected, but not to the point of refraining from affirming the value of life and the inherent dignity even of persons who are in a vegetative state, severely paralysed and who cannot communicate their wishes to others.

9.  We agree that, conceptually, there is a legitimate distinction between euthanasia and assisted suicide on the one hand, and therapeutic abstention on the other. However, because of the manner in which domestic law has been interpreted and the way it has been applied to the facts of the case under examination, we strongly disagree with what is stated in paragraph 141 of the present judgment. The case before this Court is one of euthanasia, even if under a different name. In principle it is never advisable to use strong adjectives or adverbs in judicial documents, but in the instant case it certainly is utterly contradictory for the respondent Government to insist that French law prohibits euthanasia and that therefore euthanasia does not enter into the equation in this case. We cannot hold otherwise when it is clear that the criteria of the Leonetti Act, as interpreted by the highest administrative court, when applied to a person who is unconscious and undergoing “treatment” which is not really therapeutic but simply a matter of nursing care, actually results in precipitating death *which would not otherwise occur in the foreseeable future*.

10.  The public rapporteur before the *Conseil d’État* is reported (in paragraphs 31 and 122 of the present judgment) as having said (citing the Minister of Health while the Leonetti Bill was being piloted in the Senate) that “[w]hile the act of withdrawing treatment ... results in death, the intention behind the act [is not to kill; it is] to allow death to resume its natural course and to relieve suffering. This is particularly important for care staff, whose role is not to take life”. Much has been made of this statement both by the *Conseil d’État* and by this Court. We beg to differ. Apart from the fact that, as we have already said, there is no evidence in the instant case that Mr Lambert is suffering in any way, that statement would be correct if, and only if, a proper distinction were made between ordinary care (or treatment) and extraordinary care (or treatment). Feeding a person, even enterally, is an act of ordinary care, and by withholding or withdrawing food and water death inevitably follows (which would not otherwise have occurred in the foreseeable future). One may not will the death of the subject in question, but by willing the act or omission which one knows will in all likelihood lead to that death, one actually intends to kill that subject nonetheless. This is, after all, the whole notion of positive *indirect* intent as one of the two limbs of the notion of *dolus* in criminal law.

11.  In 2010, to mark its 50th anniversary, the Court accepted the title of *The Conscience of Europe* when publishing a book with that very title. Assuming, for the sake of argument, that an institution, as opposed to the individuals who make up that institution, can have a conscience, such a conscience must not only be well informed but must also be underpinned by high moral or ethical values. These values should always be the guiding light, irrespective of all the legal chaff that may be tossed about in the course of analysing a case. It is not sufficient to acknowledge, as is done in paragraph 181 of the present judgment, that a case “concerns extremely complex medical, legal and ethical matters”; it is of the very essence of a conscience, based on *recta ratio*, that ethical matters should be allowed to shape and guide the legal reasoning to its proper final destination. That is what conscience is all about. We regret that the Court has, with this judgment, forfeited the above-mentioned title.

1. .  See the observations of the third-party intervener association Amréso-Bethel. [↑](#footnote-ref-1)
2. .  It suffices to refer to General Comment No. 12 and General Comment No. 15 adopted by the United Nations Committee on Economic, Social and Cultural Rights at its twentieth and twenty-ninth sessions respectively. [↑](#footnote-ref-2)
3. .  See the applicants’ observations, paragraph 164. [↑](#footnote-ref-3)
4. .  See paragraph 30 of that decision, cited in paragraph 50 of the present judgment. [↑](#footnote-ref-4)
5. .  There is also a hint of this in paragraph 56. [↑](#footnote-ref-5)