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The right to life and the 'right' to end life

Lambert and others v. France (ECtHR 25th June 2015, appl. no. 46043/14) – the procedure of end of life decisions in cases of unreasonable obstinacy (Article 2 ECHR, the right to life).

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I. General introduction

Life and death are two sides of the same coin. Therefore it is not surprising that the Court decided on several occasions on the right to life and end-of-life decisions, in forms of a right to die[1] and the withdrawal of treatment[2]. In the first category of decisions applicants claimed, on grounds of Article 2 and 8 of the Convention, that the right to life and the right to respect for private life encompasses a right to die (in a manner of one's own choosing). The Court decided explicitly that the right to life does not include an opposite right to die: "*Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.*"[3]

However, Article 8 of the Convention includes a right to choose one's own death in a dignified manner,[4] but it does not mean that a State has to facilitate (every possible manner of) suicide. In the case of *Haas*, the Court decided that "*the applicant's right to choose the time and manner of his death was not merely theoretical or illusory*".[5] The Court is very reluctant to formulate firm positions on euthanasia and assisted suicide.[6] There is only one case, *Koch*,[7] where a State violated a Convention right (Article 8) in cases regarding end of

[1] ECtHR 29th April 2002, appl. no. 2346/02 (Pretty v. the United Kingdom); ECtHR 20th January 2011, appl. no. 31322/07 (Haas v. Switzerland).

[2] ECtHR 11th July 2006, appl. no. 19807/06 (Burke v. the United Kingdom) (dec.); ECtHR 9th March 2004, appl. no. 61827/00 (Glass v. the United Kingdom).

[3] ECtHR 29th April 2002, appl. no. 2346/02, par. 39 (Pretty v. the United Kingdom).

[4] ECtHR 20th January 2011, appl. no. 31322/07, par. 58 (Haas v. Switzerland).

[5] ECtHR 20th January 2011, appl. no. 31322/07, par. 60 (Haas v. Switzerland).

[6] This is especially the case while there is no consensus in the Member States regarding euthanasia and assisted suicide. See for example (ECtHR 19th July 2012, appl. no. 497/09, par. 26 (Koch v. Germany): "*Comparative research in respect of forty-two Council of Europe Member States shows that in thirty-six countries (Albania, Andorra, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Georgia, Greece, Hungary, Ireland, Latvia, Lithuania, the Former Yugoslav Republic of Macedonia, Malta, Moldova, Monaco, Montenegro, Norway, Poland, Portugal, Romania, Russia, San Marino, Spain, Serbia, Slovakia, Slovenia, Turkey, Ukraine and the United Kingdom) any form of assistance to suicide is strictly prohibited and criminalised by law. In Sweden and Estonia, assistance to suicide is not a criminal offence; however, Estonian medical practitioners are not entitled to prescribe a drug in order to facilitate suicide. Conversely, only four member States (Switzerland, Belgium, the Netherlands and Luxembourg) allow medical practitioners to prescribe lethal drugs, subject to specific safeguards.*"

[7] ECtHR 19th July 2012, appl. no. 497/09 (Koch v. Germany).

life.[8] However, the case of *Koch* is an outlier, because the violation of Article 8 of the Convention consists of the refusal of the administrative courts to examine the merits of the applicant's motion.[9] In other words, when the merits would have been reviewed by a national court and that court had taken a reasoned position why assisted suicide should not be facilitated in the manner of the applicant's wishes, the Court would, in my opinion, have dismissed the complaint about violation of Article 8 of the Convention (such as in the cases *Pretty*[10] and *Haas*[11]).

There are only a few cases that fall in to the second category, the withdrawal of treatment. The withdrawal of treatment, passive euthanasia, is viewed as an act of omission. In such cases, medical staff do not undertake actions to prolong life (and possibly improve health). This is an important distinction because the act of omission is reviewed as a failure to meet a positive obligation (rather than a violation of a negative obligation). Two complaints of a violation of a Convention right due to the withdrawal of treatment, *Ada Rossi and others*[12] and *Burke*,[13] were found respectively incompatible *ratione personae* and inadmissible as being manifestly ill-founded. The only substantive decision is the case of *Glass*.[14] In that case hospital staff administered diamorphine to a child against the multiple ushered explicit wishes of the legal guardian (the mother). The staff also added a 'do not resuscitate'-order in the medical file, which was also contrary to the wishes of the legal guardian. The complaint about violation of Article 2 of the Convention was found inadmissible because it was manifestly ill-founded,[15] but Article 8 of the Convention had been violated because the hospital staff acted against explicit wishes of the legal guardian. Because a violation of Article 8 of the Convention was already established, the Court did "*not consider it necessary to examine separately the applicants' complaint regarding the inclusion of the DNR notice in the first applicant's case notes without the consent and knowledge of the second applicant.*"[16] So, in only two cases where a right to die or a withdrawal of treatment was at issue, a violation of Article 8 (and not 2) of the Convention was accepted. In both cases, *Glass* and *Koch*, other considerations – *id est* treatment against explicit wishes and refusal of national courts to examine the merits of an appeal – accounted to the violation. So, a clear right to die, in a passive or active form, cannot be inferred from the Court's case-law.

A few months ago, on the 25th of June 2015, the Court published it judgment in the case of *Lambert and others*. The case of *Lambert and others* falls in the second category, it is about the withdrawal of treatment, *id est* artificial nutrition and hydration, by a 39 year old Frenchman (Vincent Lambert) who has been in a vegetative state for over six years. The

[8] ECtHR (GC) 25th June 2015, appl. no. 46043/14, par. 139 (Lambert and others v. France).
[9] ECtHR 19th July 2012, appl. no. 497/09, par. 54 (Koch v. Germany).
[10] ECtHR 29th April 2002, appl. no. 2346/02 (Pretty v. the United Kingdom).
[11] ECtHR 20th January 2011, appl. no. 31322/07, par. 58 (Haas v. Switzerland).
[12] ECtHR 16th December 2008, appl. nos. 55185/08, 55483/08, 55516/08, 55519/08, 56010/08, 56278/08, 58420/08, 58424/08 (Ada Rossi and others v. Italy).
[13] ECtHR 11th July 2006, appl. no. 19807/06 (Burke v. the United Kingdom) (dec.).
[14] ECtHR 9th March 2004, appl. no. 61827/00 (Glass v. the United Kingdom).
[15] ECtHR 18th March 2003, 61827/00 (Glass v. the United Kingdom) (dec.).
[16] ECtHR 9th March 2004, appl. no. 61827/00, par. 83 (Glass v. the United Kingdom).

parents, a sister and a half-brother applied to the Court because the attending doctor, in consultation with Vincent's wife and a few other family members, argued that continuation of the treatment would not lead to improvement of Vincent's health. So, the central issue of the case is whether the attending doctor can decide to stop treatment of a patient and, if so, under which conditions (especially when family members among themselves disagree about continuation and withdrawal of treatment). So, it is the latest case regarding the right to life and end-of-life decisions.

The case is also of interest because of admissibility questions. It is not the direct victim of the doctor's decision, Vincent Lambert, who filed a complaint, but several family members. In reaction, other family members intervened in the procedure as a third party[17]. So, next to the attention-grabbing substantive decision on the right to life and withdrawal of treatment, there are difficult questions about the representation of Vincent before the Court. Article 34 of the Convention determines that "*the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.*" The victim in this case is (first and foremost) Vincent, because the decision to withdraw treatment will lead to his death, but he is unable to express his wishes due to his vegetative state. So the Court has to answer if the two family fractions (in short, his parents versus his wife) can apply to the Court.

II. Facts and domestic law

1. The facts (paragraph 10-51)

First, it is important to clarify the family ties of all the persons that take part in this case. The case revolves around Vincent Lambert (born 1976), who sustained severe head injuries in a traffic accident which led him tetraplegic and in a vegetative state since 2008. He can breathe independently, but cannot eat or drink. The applicants are Pierre and Viviane Lambert, the parents of Vincent, and David Philippon and Anne Tuarze, respectively Vincent's half-brother and sister. They complain against the decision to withdraw treatment taken by Vincent's doctor, Dr Kariger. In other words, the four aforementioned family members insist on the continuation of treatment of Vincent. Vincent's wife, Rachel Lambert, and his nephew and niece, François Lambert and Marie-Geneviève Lambert, intervened as third party because they support the decision to withdraw treatment taken by Dr Kariger (which will lead to the death of Vincent).

Secondly, the Court summarizes the procedures and decisions taken by Dr Kariger. In 2012, Vincent's carers observed signs of what they believed to be resistance against daily care. The hospital staff, with Dr Kariger at the head, initiated the 'collective procedure' (Act of 22

[17] See <http://strasbourgobservers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/>, for a guide on third party intervention by Paul Harvey (lawyer in the Registry of the Court). Website last called upon on 12th August 2015.

April 2005 on patients' rights and end-of-life issues) in early 2013. As required by the act, and that is why it is called a collective procedure, Vincent's wife Rachel was involved in the procedure. The investigation and discussions resulted in a decision by Dr Kariger (as head of the hospital staff and Vincent's attending doctor) to withdraw nutrition and reduce his hydration. The decision was put into effect on 10 April 2013. Almost a month later, on 9 May 2013, the applicants applied to the urgent-applications judge to ask for an order to compel the hospital and their staff to resume feeding, hydrating and treating Vincent normally. Two days later, on 11 May 2013, the judge granted their request. The main reason was that Vincent had not drawn up end-of-life directives and also had not assigned a person of trust to decide for him. According to the judge, the collective procedure should be reopened because the judge noted that, while a family member had been involved in the procedure, other family members were not.

Four months later, in September 2013, Dr Kariger started a new collective procedure. He consulted six other doctors, including three who worked at another hospital chosen by Vincent Lambert's parents, his wife and the medical team respectively. He also held two family meetings which were attended by Vincent's wife and parents and his eight siblings. Seven family members expressed their wished to discontinue treatment, while the other four (the applicants in this case) were in favour of maintaining it. The last step in the procedure, Dr Kariger held a meeting on 9 December 2013 with all the doctors and members of the care team working on the unit were Vincent was hospitalized. Dr Kariger and five of the six consulted doctors (including the ones appointed by the parties) were in favour of withdrawing treatment. On 11 January 2014, Dr Kariger announced his decision to stop Vincent's treatment on 13 January. "*His decision, comprising a reasoned thirteen-page report, a seven-page summary of which was read out to the family, observed in particular that Vincent Lambert's condition was characterised by irreversible brain damage and that the treatment appeared to be futile and disproportionate and to have no other effect than to sustain life artificially. According to the report, the doctor had no doubt that Vincent Lambert had not wished, before his accident, to live under such conditions. Dr Kariger concluded that prolonging the patient's life by continuing to treat him with artificial nutrition and hydration amounted to unreasonable obstinacy*" (par. 22).

After the new decision made by Dr Kariger, the four applicants applied to the urgent-applications judge for a second time. They requested an order prohibiting the hospital and doctor concerned to withdraw treatment and requested an immediate transfer of Vincent to another facility (in Oberhausbergen). The judge again suspended the implementation of Dr Kariger's decision, this time based on three reasons. First, Dr Kariger wrote in his report that he 'had no doubt that Vincent Lambert had not wished to live under such conditions'. But this could not be taken into account according to the judge, because Vincent's 'wish' was not constituted in the formal manifestation. Secondly, Vincent's apparent rejection of treatment, which was observed by the hospital staff in 2012, added "*no unequivocal conclusion as to his desire*. […] *The Administrative Court held that Dr Kariger had incorrectly assessed Vincent Lambert's wishes*" (par. 27). Thirdly, the judge ruled that the treatment could not be

characterised as futile or disproportionate when the treatment did not cause any stress of suffering. The judge "*therefore held that Dr Kariger's decision had constituted a serious and manifestly unlawful breach of Vincent Lambert's right to life. It issued an order suspending the implementation of the decision while rejecting the request for the patient to be transferred to the specialised extended care facility in Oberhausbergen*" (par 28).

Two family members, who also intervened as a third party in the case by the Court (his wife and half-brother), and the hospital lodged applications on 31 January 2014 to appeal against the judgment of the urgent-applications judge. The *Conseil d'État* task was to judge if the statutory conditions governing any decision to withdraw treatment in case of unreasonable obstinacy had been met by Dr Kariger. Therefore they appointed three independent doctors, to examine the patient and his medical file to give their expert opinion about Vincent's health and if further treatment is unreasonable obstinate. The *Conseil d'État* gave the experts the following four questions to answer: "*(i) to describe Mr. Lambert's current clinical condition and how it has changed since the review carried out in July 2011 by the Coma Science Group of Liège University Hospital; (ii) to express an opinion as to whether the patient's brain damage is irreversible and as to the clinical prognosis; (iii) to determine whether the patient is capable of communicating, by whatever means, with those around him; (iv) to assess whether there are any signs to suggest at the present time that Mr Lambert reacts to the care being dispensed to him and, if so, whether those reactions can be interpreted as a rejection of that care, as suffering, as a desire for the life-sustaining treatment to be withdrawn or, on the contrary, as a desire for the treatment to be continued*" (par. 35).

As to the first question, the experts found that "*Vincent's clinical condition corresponded to a vegetative state, without any signs pointing to a minimally conscious state. They noted that his state of consciousness had deteriorated since the assessment carried out in Liège in 2011*" (par. 40). The answer on the next question depends on the length of time since the injury and the nature of the damage. "*In the present case they noted that five and a half years had passed since the initial head injury and that the imaging tests showed severe cerebral atrophy testifying to permanent neuron loss, near-total destruction of strategic regions such as both parts of the thalamus and the upper part of the brain stem, and serious damage to the communication pathways in the brain. They concluded that the brain damage was irreversible*" (par. 41). Thirdly, according to the tests, and especially because speech and language treatment in the past had not succeeded, Vincent was not capable anymore to communicate (verbal or in signs). Lastly, "*the experts observed that Vincent Lambert reacted to the care provided and to painful stimuli, but concluded that these were non-conscious responses. In their view, it was not possible to interpret them as conscious awareness of suffering or as the expression of any intent or wish with regard to the withdrawal or continuation of treatment*" (par. 43).

Firstly, the *Conseil d'État* reviewed if Dr Kariger followed the law while conducting the collective procedure. The doctor is required to consult at least one independent medical expert. Dr Kariger consulted, in his second collective procedure, three doctors. Furthermore, three doctors, chosen by the two family fractions and the hospital staff, completed the expert

team. "*Accordingly, contrary to what was argued before the Châlons-en-Champagne Administrative Court* (the urgent-application procedure)*, the procedure preceding the adoption of the decision of 11 January 2014 was not tainted with any irregularity*" (par. 50). Secondly, the *Conseil d'État* compared the findings of Dr Kariger and the expert team of the collective procedure correspond with the findings of the expert team appointed by the *Conseil d'État*. "*These findings, which the experts reached unanimously following a collective assessment in the course of which the patient was examined on nine separate occasions, thorough cerebral tests were performed, meetings were held with the medical team and care staff involved and the entire file was examined, confirm the conclusions drawn by Dr Kariger as to the irreversible nature of the damage and Mr Lambert's clinical prognosis*" (par. 50). Thirdly, the *Conseil d'État* argued, in contrast with the urgent-application judge, that the law does not demand that the patient's wishes can only be taken in to account when constituted in the formal manifestation. Fourthly, the doctor in charge is required to ask for the families view on the end-of-life considerations, which Dr Kariger did with both family fractions. "*Accordingly, the decision taken by Dr Kariger on 11 January 2014 to withdraw the artificial nutrition and hydration of Mr Vincent Lambert cannot be held to be unlawful. Accordingly, the Conseil d'État set aside the urgent-applications judge's ruling and dismissed the applicants' claims*" (par. 51).

2. Relevant domestic law (paragraph 52-58)

Article L. 1110-1 of the Public Health Code (hereinafter "the Code") describes that all available means must be used to secure for each individual the fundamental right to protection of health. The Act of 22 April 2005 on patients' rights and end-of-life issues, known as the Leonetti Act,[18] amended a number of Articles of the Code. However, the Act does not authorise either euthanasia or assisted suicide. It allows doctors, in accordance with a prescribed procedure, to discontinue treatment only if continuing it would demonstrate unreasonable obstinacy.

Article L. 1110-5 states that: "*Every individual, regard being had to his or her state of health and the urgency of the treatment required, shall be entitled to receive the most appropriate care and to be given the safest treatment known to medical science at the time to be effective*." This provision can be put aside in cases where the continuation of treatment can be seen as unreasonable obstinate (second paragraph of Article L. 1110-5). The Code does not give a definition of 'unreasonable obstinacy' but only the following description: "*Where they appear to be futile or disproportionate or to have no other effect than to sustain life artificially, they may be discontinued or withheld.*" In Article L. 1111-4, the Code states that, when an individual is unable to express his end-of-life wishes, no decision to discontinue treatment can be made without the collective procedure. In this procedure the appointed person of trust, the family or a person close to the patient has to be consulted.

[18] A. Baumann, G. Audibert, F. Claudot & L. Puybasset, 'Ethics review: End of life legislation – the French model', Crit Care. 2009; 13(1): 204, doi: 10.1186/cc7148.

Article R. 4127-37 describes the collective procedure as follows: "I. *The doctor may set the collective procedure in motion on his or her own initiative. He or she shall be required to do so in the light of any advance directives given by the patient and submitted by one of the persons in possession of them mentioned in Article R. 1111-19, or at the request of the person of trust, the family or, failing this, another person close to the patient. The persons in possession of the patient's advance directives, the person of trust, the family or, where appropriate, another person close to the patient shall be informed as soon as the decision has been taken to implement the collective procedure.* […] *III. The decision to limit or withdraw treatment shall be taken by the doctor in charge of the patient, after consultation with the care team where this exists, and on the basis of the reasoned opinion of at least one doctor acting as a consultant. There must be no hierarchical link between the doctor in charge of the patient and the consultant. The reasoned opinion of a second consultant shall be sought by these doctors if either of them considers it necessary. The decision to limit or withdraw treatment shall take into account any wishes previously expressed by the patient, in particular in the form of advance directives, if any, the views of the person of trust the patient may have designated and those of the family or, failing this, of another person close to the patient.* […] *Reasons shall be given for any decision to limit or withdraw treatment. The opinions received, the nature and tenor of the consultations held within the care team and the reasons for the decision shall be recorded in the patient's file. The person of trust, if one has been designated, the family or, failing this, another person close to the patient, shall be informed of the nature of and the reasons for the decision to limit or withdraw treatment.*"

III. Standing in behalf of the victim (paragraph 80-124)

In order to rely on Article 34 of the Convention, an applicant must be able to claim to be a victim of a violation of the Convention. The individual concerned must be able to show that he or she was 'directly affected' by the measure. The Court made an exception in cases where the alleged violation(s) of Convention rights are closely linked to a death or disappearance in circumstances allegedly engaging the responsibility of the State.[19] In such cases the Court has recognised the standing of the victim's next-of-kin. However, the Court has held that special considerations may arise in the case of victims of alleged breaches of Articles 2, 3 and 8 of the Convention at the hands of the national authorities. Especially when the victim due to his age,[20] sex[21] or disability[22] is unable to lodge a complaint by the Court.[23]

[19] ECtHR 25th August 1987 appl. no. 10300/83, par. 33 (Nölkenbockhoff v. Germany); ECtHR 18th June 2013, appl. no. 48609/06 (Nechova and others v. Bulgaria); ECtHR (GC) 17th July 2014, appl. no. 47848/08, par. 98 (Centre for legal resources on behalf of Valentin Campeanu v. Romania).
[20] ECHR 20th May 1996, appl. no. 23715/94 (S.P., D.P. and A.T. v. the United Kingdom).
[21] ECtHR 22nd July 2003, appl. no. 24209/94 (Y.F. v. Turkey).
[22] ECtHR (GC) 27th June 2000, appl. no. 22277/93 (Ilhan v. Turkey).
[23] ECtHR (GC) 17th July 2014, appl. no. 47848/08, par. 103 (Centre for legal resources on behalf of Valentin Campeanu v. Romania).

"*The Court considers at the outset that the case-law concerning applications lodged on behalf of deceased persons is not applicable in the present case, since Vincent Lambert is not dead but is in a state described by the medical expert report as vegetative (see paragraph 40 above). The Court must therefore ascertain whether circumstances apply of the kind in which it has previously held that an application could be lodged in the name and on behalf of a vulnerable person without the latter having issued either a valid authority to act or instructions to the person purporting to act for him or her*" (par. 97). According to the Court, the fact that two family members fractions applied to the Court with diametrically opposed points of view makes it even more difficult. The Court (following the cases mentioned in footnotes 18 – 21) applies two criteria to determine if a third party can lodge a complaint on behalf of a victim without valid authority to act: (1) "*the risk that the direct victim will be deprived of effective protection of his or her rights and*; (2) *the absence of a conflict of interests between the victim and the applicant*" (par. 102).

"*Applying these criteria to the present case, the Court does not discern any risk, firstly, that Vincent Lambert will be deprived of effective protection of his rights since, in accordance with its consistent case-law (see paragraphs 90 above and 115 below), it is open to the applicants, as Vincent Lambert's close relatives, to invoke before the Court on their own behalf the right to life protected by Article 2*" (par. 103). The second criterion demands that there is a convergence of interest between the victim and the applicant. The only indications of what Vincent's wishes are, are included in the *Conseil d'État* judgment which refers to Dr Kariger's report and the testimony of his wife and half-brother. The *Conseil d'État*, in according with that report and those testimonies, concluded that Vincent's wishes were not incorrectly interpreted. "*Accordingly, the Court does not consider it established that there is a convergence of interests between the applicants' assertions and what Vincent Lambert would have wished. The Court concludes that the applicants do not have standing to raise the complaints under Articles 2, 3 and 8 of the Convention in the name and on behalf of Vincent Lambert. It follows that these complaints are incompatible ratione personae with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected pursuant to Article 35 § 4*" (par. 104-106).

As reaction on the complaint lodged by the applicants, Rachel Lambert intervened as a third party on behalf of Vincent('s wish to end his life). Article 36 of the Convention contains the third party intervention: "*1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings. 2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.*" The Court is short about Rachel's intervention: "*The Court notes that no provision of the Convention permits a third-party intervener to represent another person before the Court. Furthermore, according to Rule 44 § 3 (a) of the Rules of Court, a third-party intervener is any person concerned "who is not the applicant*" (par. 110).

So, the complaints made by the applicants are incompatible *ratione personae* because the applicants complain about human rights violations of a third party without valid authority. Furthermore, third party interveners cannot represent another person before the Court.

"*Nevertheless, the Court emphasises that, notwithstanding the findings it has just made regarding admissibility, it will examine below all the substantive issues arising in the present case under Article 2 of the Convention, given that they were raised by the applicants on their own behalf*" (par. 112). In its well-established case law, the Court finds complaints by next-of-kin admissible, when they complain about a violation of the right to life whereby the State allegedly is responsible for the death. In this regard, the Court has differentiated between applications where the direct victim has died after the application was lodged with the Court and those where he or she had already died beforehand.[24]

Next-of-kin may pursue an application after the applicant died, provided that the substitute applicant has sufficient interest in the case. An example is the case of *Dalban*, were the widow of the applicant pursued the complaint about the violation of Article 10 of the Convention because the deceased applicant published a journal article about fraud in a State-owned company and got convicted for making a false statement.[25] So, the widow had a 'personal' interest in the pursuit of this case because the reputation of her husband was at stake. However, it is not necessary that the interest is personal. In *Karner*, the Court accepted the continuation of a case about equality by the law for homosexuals. "*The Court considers that the subject matter of the present application – the difference in treatment of homosexuals as regards succession to tenancies under Austrian law – involves an important question of general interest not only for Austria but also for other States Parties to the Convention.*"[26]

"*However, the situation varies where the direct victim dies <u>before</u> the application is lodged with the Court. In such cases the Court has, with reference to an autonomous interpretation of the concept of "victim", been prepared to recognise the standing of a relative either when the complaints raised an issue of general interest pertaining to "respect for human rights" (Article 37 § 1 in fine of the Convention) and the applicants as heirs had a legitimate interest in pursuing the application, or on the basis of the direct effect on the applicant's own rights.*"[27] This is the reasoning followed in Lambert. Without any doubt, the withdrawal of the artificial nutrition and hydration will lead to the death of Vincent. Next-of-kin can lodge an application because the death of Vincent has a direct effect on the applicant's own rights. "*Accordingly, even if the violation is a potential or future one, the Court considers that the applicants, in their capacity as Vincent Lambert's close relatives, may rely on Article 2*" (par. 115).

[24] ECtHR (GC) 17th July 2014, appl. no. 47848/08, par. 97 (Centre for legal resources on behalf of Valentin Campeanu v. Romania).
[25] ECtHR (GC) 28th September 1999, appl. no. 28114/95 (Dalban v. Romania).
[26] ECtHR 24th March 2003, appl. no. 40016/98, par. 27 (Karner v Austria).
[27] ECtHR (GC) 17th July 2014, appl. no. 47848/08, par. 98 (Centre for legal resources on behalf of Valentin Campeanu v. Romania).

IV. Alleged violation of Article 2 of the Convention

1. The applicants' submissions (paragraph 113, 126-127, 147, 161)

The applicants submitted that the withdrawal of Vincent Lambert's artificial nutrition and hydration would be in breach of the State's positive obligation to protect life under Article 2 of the Convention. The applicants argued that the State violated this Article because (1) the Act of 22 April on right to life and end-of-life decision lacked clarity and precision and; (2) that the collective procedure, as deployed by Dr Kariger, is in violation with the French law.

The complaints against the Act of 22 April focuses on the lack of clarity in the scope of application. The law applies to cases where treatment has 'no other effect than to sustain life artificially'. Furthermore, the law speaks of 'treatment', and the applicants argue that artificial nutrition and hydration should be considered care and not treatment. Lastly, the law only applies in case of the sick or people at the end of life, but the applicants claim that their son is 'only' disabled so continuation of care cannot be seen as unreasonable obstinate.

In regard to the collective procedure, the applications dispute that the procedure was collective. Dr Kariger only sought opinions of other experts and family members on a consultative basis and he alone took the decision to end Vincent's life. The decision-making process should have been, in their view, genuinely collective or at the very least have provided for mediation in the event of disagreement.

To sum up, "*the applicants alleged that the Act of 22 April 2005 lacked clarity and precision, and complained of the process culminating in the doctor's decision of 11 January 2014. In their view, these shortcomings were the result of the national authorities' failure to fulfil their duty of protection under Article 2 of the Convention*" (par. 149).

2. General principles (paragraph 117-124, 136-148)

In paragraph 124, the Court categorized the case as a complaint that the State did not meet the positive obligations under Article 2 of the Convention: "*The Court notes that both the applicants and the Government make a distinction between the intentional taking of life and "therapeutic abstention" (see paragraphs 119-20 above), and stresses the importance of that distinction. In the context of the French legislation, which prohibits the intentional taking of life and permits life-sustaining treatment to be withdrawn or withheld only in certain specific circumstances, the Court considers that the present case does not involve the State's negative obligations under Article 2, and will examine the applicants' complaints solely from the standpoint of the State's positive obligations.*"

The Court has never ruled on the same complaint – the withdrawal of treatment as violation of a positive obligation to protect a life – but several cases can be used as comparison

(par. 136-139). The Court mentions *Sanles Sanles*,[28] *Pretty*,[29] *Glass*,[30] *Koch*,[31] *Haas*,[32] *Burke*[33] and *Ada Rossi*[34]. These cases can be summarized in two categories: a right to end life in a manner of one's own choosing and the withdrawal of necessary treatment resulting in death. Most cases were found inadmissible *ratione personae*, manifestly ill-founded or the Court did not find a violation of Articles 2 and 8 of the Convention. Only in two cases, *Glass* and *Koch*, the Court found Article 8 of the Convention violated. But strictly speaking, those violations were not based on the withdrawal of treatment or the right to die. In *Koch*, the German courts refused to examine the applicants appeal to acquire a lethal dose of medication. In *Glass*, the hospital staff acted against the explicit wishes of the applicant.

That there is absolutely no consensus between Member States makes a decision about the right to die even more problematic. When the 'consensus-test' is negative, Member States have a large margin of appreciation (par. 144, 147).[35] "*Accordingly, the Court considers that in this sphere concerning the end of life, as in that concerning the beginning of life, States must be afforded a margin of appreciation, not just as to whether or not to permit the withdrawal of artificial life-sustaining treatment and the detailed arrangements governing such withdrawal, but also as regards the means of striking a balance between the protection of patients' right to life and the protection of their right to respect for their private life and their personal autonomy*" (par. 148).

In general, Article 2 of the Convention requires States to take appropriate steps to safeguard lives of people within its jurisdiction; in the public-health sphere, these positive obligations require States to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of lives (see also case note 5, *Genc v. Turkey*). In this case, which is not that of euthanasia but rather the withdrawal of life-sustaining treatment, the Court cannot solely focus on Article 2 of the Convention, but the Convention should be read as a whole. "*In a case such as the present one reference should be made, in examining a possible violation of Article 2, to Article 8 of the Convention and to the right to respect for private life and the notion of personal autonomy which it encompasses*" (par. 142).

In this regard, the Court reiterates the rulings of *Haas* and *Pretty* where the Court considered "*that an individual's right to decide in which way and at which time his or her life should end was one of the aspects of the right to respect for private life*"[36] and "*in the sphere of medical treatment, the refusal to accept a particular treatment might, inevitably, lead to a*

[28] ECtHR 26th October 2000, appl. no. 48335/99 (Sanles Sanles v. Spain) (dec.).
[29] ECtHR 29th April 2002, appl. no. 2346/02 (Pretty v. the United Kingdom).
[30] ECtHR 9th March 2004, appl. no. 61827/00 (Glass v. the United Kingdom).
[31] ECtHR 19th July 2012, appl. no. 497/09 (Koch v. Germany).
[32] ECtHR 20th January 2011, appl. no. 31322/07 (Haas v. Switzerland).
[33] ECtHR 11th July 2006, appl. no. 19807/06 (Burke v. the United Kingdom) (dec.).
[34] ECtHR 16th December 2008, appl. nos. 55185/08, 55483/08, 55516/08, 55519/08, 56010/08, 56278/08, 58420/08, 58424/08 (Ada Rossi and others v. Italy).
[35] D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, Oxford: Oxford University Press 2009, p. 352-354.
[36] ECtHR 20th January 2011, appl. no. 31322/07, par. 51 (Haas v. Switzerland).

fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8 § 1 of the Convention"[37].

"*The Court will take these considerations into account in examining whether the State complied with its positive obligations flowing from Article 2. It further observes that, in addressing the question of the administering or withdrawal of medical treatment, it took into account the following factors: (1) the existence in domestic law and practice of a regulatory framework compatible with the requirements of Article 2 (Glass, cited above); (2) whether account had been taken of the applicant's previously expressed wishes and those of the persons close to him, as well as the opinions of other medical personnel (Burke, cited above) and; (3) the possibility to approach the courts in the event of doubts as to the best decision to take in the patient's interests (ibid.)*" (par. 143).

V. Application of these principles to the present cases (paragraph 149-182)

The applicants complained that the Act of 22 April 2005 lacked clarity and precision, *id est* that the law was not clear about the definitions of 'treatment' and 'unreasonable obstinacy'. They argue that the administration of artificial nutrition and hydration cannot be seen as treatment but must be seen as 'care', and 'unreasonable obstinacy' is only at hand when treatment is without any kind of prospect of improvement, which is not the case with their son. Furthermore, the applicants complained that the decision-making process should have been genuinely collective or at the very least have provided for mediation in the event of disagreement. So, the applicants' complaints are covered by the first two factors that the Court set forth in the general principles, the existence of a legal framework compatible with the requirements of the Convention and whether account had been taken of the applicants' previously expressed wishes and those of the persons close to him.

The legislative framework

"*The Court has regard to the legislative framework established by the Public Health Code (hereinafter "the Code") as amended by the Act of 22 April 2005. It observes that, prior to the rulings given in the present case, the French courts had never been called upon to interpret the provisions of the Act of 22 April 2005, although it had been in force for nine years. In the present case the Conseil d'État had the task of clarifying the scope of application of the Act and defining the concepts of "treatment" and "unreasonable obstinacy"* (par. 151).

The Court recalls that the *Conseil d'État* interpreted the concept of treatment in its ruling of 14 February 2014. This judgment, as mentioned in the paragraph above, was the first to be adopted since the Act of 22 April 2005 is in force. According to the parliamentary proceedings, the *Conseil d'État* argued that the legislature had intended to include all acts

[37] ECtHR 29th April 2002, appl. no. 2346/02, par. 63 (Pretty v. the United Kingdom).

"*aimed at maintaining the patient's vital functions artificially, and that artificial nutrition and hydration fell into that category of acts*" (par. 154). The Court chooses to compare the French judgment with international guidelines. In the Council of Europe's 'Guide on the decision-making process regarding medical treatment in end-of-life situations' treatment covers "*not only interventions whose aim is to improve a patient's state of health by acting on the causes of the illness, but also interventions which have a bearing only on the symptoms and not on the aetiology of the illness, or which are responses to an organ dysfunction*" (par. 154). There is no consensus in Europe on the question if artificial nutrition and hydration is a form of treatment that may be limited or withdrawn in certain circumstances or as a form of care meeting the individual's basic needs and which cannot be withdrawn except with express wishes of the patient.

The Code states in Article L. 1110-5 that treatment will amount to unreasonable obstinacy if it is: (1) futile; (2) disproportionate or; (3) has no other effect than to sustain life artificially. This last criterion was used by Dr Kariger. The *Conseil d'État* took several factors into account to decide if treatment is unreasonable obstinate, these were: "*the medical factors (which had to cover a sufficiently long period, be assessed collectively and relate in particular to the patient's current condition, the change in that condition, his or her degree of suffering and the clinical prognosis) and the non-medical factors, namely the patient's wishes, however expressed, to which the doctor had to "attach particular importance", and the views of the person of trust, the family or those close to the patient*" (par. 158). Furthermore the *Conseil d'État* established two important safeguards. Firstly, the fact that a person is in a vegetative state or in an irreversible state of unconsciousness leads not *ipso facto* to a situation where continuation of treatment would appear unjustified on grounds of unreasonable obstinacy. Secondly, when the patient's wishes are unknown, doctors cannot assume that they consist in a refusal to be kept alive.

On the basis of these analyses of the concepts of treatment and unreasonable obstinacy as used in the Code and the judgment of the *Conseil d'État*, the Court cannot subscribe the applicants' arguments that the Act lacked clarity and precision. This is even more so because interpretation is inherent in the work of the judiciary.[38] The Court "*considers that the provisions of the Act of 22 April 2005, as interpreted by the Conseil d'État, constitute a legal framework which is sufficiently clear, for the purposes of Article 2 of the Convention, to regulate with precision the decisions taken by doctors in situations such as that in the present case. The Court therefore concludes that the State put in place a regulatory framework apt to ensure the protection of patients' lives*" (par. 160).

The decision-making process

The applicants also complained about the decision-making process. The process is called 'collective' in the Code, but the doctor carries the sole responsibility to decide. In the

[38] ECtHR (GC) 20th October 2011, appl. no. 13279/05, par. 85 (Nejdet Sahin & Perihan Sahin v. Turkey).

applicants' view the procedure should be genuinely collective or at least have provided for mediation in the event of disagreement.

The Court made a comprehensive comparative analysis (par. 75) about end-of-life decisions through withdrawal of treatment where the patient has not drawn up any directives. In general, Member States have one of the following four procedures: (1) the decision is made by a doctor; (2) the decision is made jointly by a doctor and the family; (3) the decision is made by the legal representative or; (4) the decision is made by the courts. All in all, and this is the same with regard to the legal framework, there is no consensus between Member States on the issue of withdrawal of treatment and end-of-life. The Court leaves Member States a larger margin of appreciation when there is no consensus.[39] So, "*the Court notes at the outset that neither Article 2 nor its case-law can be interpreted as imposing any requirements as to the procedure to be followed with a view to securing a possible agreement*" (par. 162). So, the question is if the French authorities and doctor followed the rules, and not if the rules are compatible with the Convention because of the large margin of appreciation.

"*The Court observes that, although the procedure under French law is described as "collective" and includes several consultation phases (with the care team, at least one other doctor, the person of trust, the family or those close to the patient), it is the doctor in charge of the patient who alone takes the decision. The patient's wishes must be taken into account and the decision itself must be accompanied by reasons and is added to the patient's medical file*" (par. 163). The second collective procedure lasted from September 2013 to January 2014 and at every stage of its implementation exceeded the requirements laid down by law. Dr Kariger consulted more doctors than necessary and even consulted doctors appointed by family members. He also held several meetings with the hospital staff and family members which is not a requirement laid down by the law. Furthermore, his decision was thoroughly motivated and provided detailed reasons. Lastly, his decision corresponds with five of the six consulted doctors, therefore it cannot be said that his decision is unforeseeable. The Court follows the *Conseil d'État* when it held that the implementation of the collective procedure adopted by Dr Kariger was not tainted by any irregularity.

"*The Court notes the absence of consensus on this subject (see paragraph 165 above) and considers that the organisation of the decision-making process, including the designation of the person who takes the final decision to withdraw treatment and the detailed arrangements for the taking of the decision, fall within the State's margin of appreciation. It notes that the procedure in the present case was lengthy and meticulous, exceeding the requirements laid down by the law, and considers that, although the applicants disagree with the outcome, that procedure satisfied the requirements flowing from Article 2 of the Convention*" (par. 168).

[39] D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, Oxford: Oxford University Press 2009, p. 352-354.

Judicial remedies

Lastly, the Court examined the remedies that were available to the applicants in the present case, the factor which is set forth in the general principles, even so when the applicants did not lodge a complaint about a violation of this factor. Judicial remedies are necessary so that the process implemented and the decision made by the doctor can be reviewed.

Firstly, the applicants applied to the urgent-application judge. Secondly, the applicants lodged a complaint by the *Conseil d'État*. Were the urgent-application procedure was fast and with a single judge, the procedure by the *Conseil d'État* (in full court which is highly unusual) was extremely thorough with an in-depth examination and a new expert investigation of Vincent's health by three specialists appointed by the *Conseil d'État*.

The Court concluded, "*as to the judicial remedies that were available to the applicants, the Court has reached the conclusion that the present case was the subject of an in-depth examination in the course of which all points of view could be expressed and all aspects were carefully considered, in the light of both a detailed expert medical report and general observations from the highest-ranking medical and ethical bodies*" (par. 181).

Conclusion

"*Consequently, the Court concludes that the domestic authorities complied with their positive obligations flowing from Article 2 of the Convention, in view of the margin of appreciation left to them in the present case. It follows that there would be no violation of Article 2 of the Convention in the event of implementation of the Conseil d'État judgment of 24 June 2014*" (par. 181-182).

VI. Concluding remarks

The main conclusion after *Lambert and others* is that the Court is still reluctant to decide that the Convention rights include an unlimited right to die. A comprehensive comparative analysis on the right to die shows that there is no consensus between the Member States of the Council of Europe. The Court therefore leaves the Member States a large margin of appreciation to decide on euthanasia, assisted suicide and the like, fitting with their judicial, social and political beliefs and systems. When applicants lodge a complaint about the violation of Article 2 or 8 of the Convention because a State did not allow euthanasia or assisted suicide in a manner of one's own choosing or on the issue of withdrawal of treatment, the Court can only assess if the State has a clear and precise judicial framework, so that decisions are foreseeable, that there are judicial remedies available and that the State's practice is in accordance with the law. For the moment, in cases like *Lambert and others* it will lead to the conclusion that States, when acting in accordance with a sufficiently clear and precise law, do not violate the Convention rights to life and respect to privacy. The Court's minimum level of 'protection' is

that "*the applicant's right to choose the time and manner of his death* [should not be] *merely theoretical or illusory*".[40]

The discussion about the right to die in one's own manner will still be heavily discussed in the literature. The discussion between judges of the Court is also still going. In a partly dissenting opinion, judges Hajivev, Sikuta, Tsotsoria, De Gaetano and Gritco write that "*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.*"

Their central issue focuses on the wishes of the patient. If a person clearly expressed his wishes about what should be done when he is severely disabled, they find no objection with euthanasia and assisted suicide when the law provides such measures. This is however not the case with Vincent. He did not express his wishes, in a manner that is verifiable. Furthermore, he is not brain-dead. He can breathe and his internal organs are all functioning correctly. The only problem is that he cannot swallow. From the evidence submitted to the Court, the dissenters conclude that Vincent is not in pain and that internal feeding involves minimal physical invasion. Moreover, after minimal training, such feeding can be administered by the family and the applicants have offered to do so. "*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. […] What, we therefore ask, can justify a State in allowing a doctor – Dr Kariger or, since he has resigned and left Reims University Hospital, some other doctor – in this case not so much to "pull the plug" (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"?*" So, they conclude that when a person did not express his wishes and is not brain-dead and in pain, "*this person with fundamental human dignity must therefore, in accordance with the principles underpinning Article 2, receive ordinary and proportionate care or treatment which includes the administration of water and food.*"

[40] ECtHR 20th January 2011, appl. no. 31322/07, par. 60 (Haas v. Switzerland).