EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Court finds procedural defects in subsequent review of death by euthanasia of applicant's mother

In today's **Chamber** judgment[1] in the case of Mortier v. Belgium (application no. 78017/17) the European Court of Human Rights made three findings of no violation and one finding of a violation of the European Convention on Human Rights.

The case concerned the death by euthanasia of the applicant's mother, without the applicant or his sister having been informed. The applicant's mother had not wished to inform her children of her euthanasia request in spite of the repeated advice from the doctors.

The Court explained that the case was not about whether there was a right to euthanasia, but about compatibility with the Convention of the act of euthanasia performed in the case of the applicant's mother. The Court then found as follows:

- By a majority (five votes to two), that there had been **no violation of Article 2 (right to life)** of the Convention on account of the legislative framework governing the pre-euthanasia acts and procedure. The Court found that the statutory provisions on euthanasia constituted in principle a legislative framework that specifically ensured the protection of the right to life of the patients as required by Article 2 of the Convention.

- By a majority (five votes to two), that there had been **no violation of Article 2 (right to life)** on account of the conditions in which the act of euthanasia had been carried out in the case of the applicant's mother. The Court took the view that it could not be said from the evidence before it that the act in question, performed in accordance with the established statutory framework, had breached the requirements of Article 2 of the Convention.

- Unanimously, that there had been a **violation of Article 2 (right to life)** on account of the post-euthanasia review procedure in the present case. The Court found that the State had failed to fulfil its procedural positive obligation, on account of the lack of independence of the Federal Board for the Review and Assessment of Euthanasia and the length of the criminal investigation in the case.

- By a majority (six votes to one), that there had been **no violation of Article 8 (right to respect for private and family life).** The Court found that the doctors assisting the applicant's mother had done everything reasonable, in compliance with the law, their duty of confidentiality and medical secrecy, together with ethical guidelines, to ensure that she contacted her children about her euthanasia request.

A legal summary of this case will be available in the Court's database HUDOC (link).

Principal facts

The applicant, Tom Mortier, is a Belgian national who was born in 1976 and lives in Rotselaar (Belgium).

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Mr Mortier's mother had been suffering from chronic depression for about 40 years. In September 2011 she consulted Professor D. and informed him of her intention to have recourse to euthanasia. At the end of the interview, the doctor concluded that she was severely traumatised, that she had a serious personality and mood disorder and that she no longer believed in recovery or treatment. He agreed to become her doctor under the Euthanasia Act.

Between 2011 and 2012 Mr Mortier's mother continued to consult Professor D. and other doctors in connection with the euthanasia procedure. The doctors involved in this procedure suggested on several occasions that she contact her children to inform them of her request, but she refused. However, in January 2012 she sent them an email informing them of her wish to die by euthanasia. Her daughter replied that she respected her mother's wishes. According to the case file, her son did not reply. Subsequently, she continued to meet the doctors and to reiterate her wish not to call her children, explaining that she wanted to avoid any further difficulties in her life and feared that her euthanasia would be delayed. However, she wrote a farewell letter to her children on 3 April 2012 in the presence of a person of confidence.

Finally, the act of euthanasia was performed in a public hospital by Professor D. on 19 April 2012, and the applicant's mother died in the presence of a few friends.

The following day, Mr Mortier was informed by the hospital that his mother had died by euthanasia. He sent a letter to Professor D. stating that he had not had the opportunity to bid farewell to her and that he was in pathological mourning. He said that he had appointed a doctor to examine his mother's medical records. The doctor later noted, among other things, that the declaration of euthanasia was not in the file.

In June 2013, as part of its automatic review, the Federal Board for the Review and Assessment of Euthanasia – of which Professor D. was co-chair – concluded that the euthanasia of Mr Mortier's mother had been carried out in accordance with the conditions and procedure laid down in the Euthanasia Act.

In October 2013 Mr Mortier requested a copy of the document recording the euthanasia from the Board, which, in March 2014, refused to provide it on the ground that it was prohibited from disclosing it by law.

In February 2014 Mr Mortier lodged a complaint against Professor D. with the Medical Association. Owing to the confidentiality of the proceedings, he was not informed of the outcome of his complaint.

In April 2014 Mr Mortier lodged a criminal complaint against persons unknown concerning the euthanasia of his mother. It was first discontinued in 2017 for insufficient evidence. Then, in May 2019, the judicial authorities reopened a criminal investigation into the circumstances surrounding the euthanasia. The appointed expert noted, in particular, that neither the declaration of euthanasia submitted to the Board or its assessment could be found in the file. The investigation was finally closed in December 2020, as the prosecutor's office had found that the euthanasia of the applicant's mother had complied with the substantive conditions prescribed by law and had been carried out in accordance with the statutory requirements.

Complaints, procedure and composition of the Court

Relying on Article 2 (right to life) of the European Convention on Human Rights, Mr Mortier alleged that the State had failed to fulfil its obligations to protect his mother's life, since the statutory procedure for euthanasia had allegedly not been followed in her case. Relying on Article 13 (right to an effective remedy) of the Convention, he complained about the lack of an in-depth and effective investigation into the matters raised by him. The Court decided to examine the complaints under Article 2 alone.

Relying on Article 8 (right to respect for private and family life) of the Convention, he alleged that in failing to effectively protect his mother's right to life the State had also breached this provision.

The application was lodged with the European Court of Human Rights on 6 November 2017.

A number of non-governmental organisations were given leave to intervene as third parties.

Judgment was given by a Chamber of seven judges, composed as follows:

Georges **Ravarani** (Luxembourg), *President*,
Georgios A. **Serghides** (Cyprus),
María **Elósegui** (Spain),
Darian **Pavli** (Albania),
Peeter **Roosma** (Estonia),
Andreas **Zünd** (Switzerland) and,
Stefaan **Smis** (Belgium)*, ad hoc Judge*,

and also Milan **Blaško**, *Section Registrar.*

Decision of the Court

Article 2

The Court explained that the present case did not concern the question whether there was a right to euthanasia, but rather the compatibility with the Convention of the act of euthanasia performed in the case of the applicant's mother. It further stated that the applicant's complaints had been examined from the perspective of the State's positive obligations to protect the right to life, taking account of the following points.

(1) Legislative framework concerning acts prior to euthanasia

The Court observed that the decriminalisation of euthanasia in Belgium was subject to the conditions strictly regulated by the Euthanasia Act, which provided for a number of substantive and procedural safeguards. The legislative framework put in place by the Belgian legislature concerning pre-euthanasia measures ensured that an individual's decision to end his or her life had been taken freely and in full knowledge of the facts. In particular, the Court attached great importance to the existence of additional safeguards in cases, such as that of the applicant's mother, which concerned mental distress and in which death would not occur in the short term, and to the requirement of independence of the various doctors consulted, with regard both to the patient and to the doctor treating him or her. Lastly, the Euthanasia Act had been the subject of several reviews by the higher authorities, both prior to enactment (by the *Conseil d'État*) and subsequently (by the Constitutional Court), and those bodies had found, following an in-depth analysis, that it remained within the limits imposed by Article 2 of the Convention. Consequently, as regards the acts and procedure prior to euthanasia, the provisions of the Euthanasia Act constituted in principle a legislative framework capable of ensuring the protection of the right to life of the patients concerned, as required by Article 2 of the Convention. **There had therefore been no violation of Article 2 under this head.**

(2) Compliance with legal framework in present case

The Court observed that the applicant's mother had undergone euthanasia some two months after her formal request for euthanasia and after Professor D. had ascertained that her request had been made of her own free will, in a repeated and considered manner, and without external pressure, and that she was in a terminal medical situation, expressing her constant and intolerable mental distress which could no longer be alleviated and which resulted from a serious and incurable illness. That conclusion had subsequently been confirmed by the criminal investigation conducted by the judicial

authorities, which had decided that the euthanasia had indeed complied with the substantive and procedural conditions prescribed by the Euthanasia Act. Consequently, the Court considered that it did not appear from the material before it that the act of euthanasia carried out on the applicant's mother, in accordance with the established legal framework, had been in breach of the requirements of Article 2 of the Convention. **There had therefore been no violation of Article 2 under this head**.

(3) Post-euthanasia review

The Court noted that two reviews had been carried out to verify whether the euthanasia in question had been in accordance with the law.

As regards the automatic review carried out by the Federal Board, the applicant alleged that the Board could not give an independent opinion on the lawfulness of his mother's euthanasia in so far as the case involved its co-chair, Professor D., who had not withdrawn from examining the case. The Government submitted that the examination had been conducted impartially on the basis of the second part of the registration document, which could not contain any names. If the euthanasia registration document had been completed by a doctor present, he or she would never take part in the discussion and would not influence it in any way. With due respect for ethical rules and principles, the doctor would remain silent when the Board was examining a case which concerned him or her in some way or another.

The Court noted that in the present case the Board had verified, solely on the basis of the second part of the document, that is to say the anonymous part, whether the euthanasia carried out on the applicant's mother had been in accordance with the law. The Board had concluded that the euthanasia had taken place in accordance with the statutory conditions and procedure. It therefore appeared that Professor D. had not withdrawn and there was no evidence to show that the practice described by the Government, the fact of a doctor involved in the euthanasia at issue remaining silent, had been followed in the present case. It reiterated that the machinery of review put in place at national level to determine the circumstances surrounding the death of individuals in the care of health professionals had to be independent.

While the Court understood that the statutory withdrawal procedure sought to preserve the confidentiality of the personal data contained in the registration document and the anonymity of those involved, it nevertheless considered that the system put in place by the Belgian legislature for the review of euthanasia, solely on the basis of the anonymous part of the registration document, did not satisfy the requirements under Article 2 of the Convention. The procedure under section 8 of the Euthanasia Act did not prevent the doctor who performed the euthanasia from sitting on the Board and voting on whether his or her own acts were compatible with the substantive and procedural requirements of domestic law. The Court considered that the fact of leaving it to the sole discretion of the member concerned to remain silent when he or she had been involved in the euthanasia under review could not be regarded as sufficient to ensure the independence of the Board. While being aware of the autonomy enjoyed by States in this sphere, the Court found that this defect could have been avoided and confidentiality nevertheless safeguarded, for example if the Board had a larger number of members than the number sitting in each individual case. This would ensure that a member of the Board who had performed the euthanasia in question could not participate in its examination.

Consequently, and having regard to the crucial role played by the Board in the subsequent review of euthanasia, the Court considered that the machinery of review applied in the present case had not guaranteed its independence, irrespective of any actual influence Professor D. might have had on the Board's decision concerning the euthanasia in question.

As regards the investigation, the Court noted that the first criminal investigation, conducted by the public prosecutor's office following the applicant's complaint, had lasted approximately three years

and one month, whereas no investigative act appeared to have been undertaken by that office. The second criminal investigation, conducted under the direction of an investigating judge after notice of the present application had been given to the Government, had lasted approximately one year and seven months. In the Court's view, taken as a whole, and having regard to the lack of diligence during the first investigation, the criminal investigation had not met the requirement of promptness required by Article 2 of the Convention.

However, as regards the thoroughness of the investigation, the Court considered that in the course of the second criminal investigation the authorities had taken any reasonable steps available to them to obtain the information needed to establish the facts of the case. The investigating judge had accordingly appointed a medical expert, who had examined the applicant's mother's medical file and presented his findings in a detailed forensic report. The police had also heard evidence from Professor D. It was on the basis of this evidence that the court had decided that there was no case to answer. These findings were sufficient to conclude that the second investigation had been sufficiently thorough. In so far as the State was bound by an obligation of means rather than one of result, the fact that the criminal investigation had ultimately been discontinued, without anyone being committed for trial, did not in itself warrant the conclusion that the criminal proceedings concerning the euthanasia of the applicant's mother had not satisfied the requirements of effectiveness of Article 2 of the Convention.

Consequently, the Court found that the State had failed to comply with its procedural positive obligation on account of the lack of independence of the Federal Board and the length of the criminal investigation. **There had therefore been a violation of Article 2 of the Convention on those accounts**.

Article 8

The Court noted that the Euthanasia Act obliged doctors to discuss a patient's request for euthanasia with his or her relatives only where that was the patient's wish to do so. If that was not the case, doctors could not contact the patient's relatives, in accordance with their duty of confidentiality and medical secrecy.

In the present case, in accordance with the law, the doctors involved in the euthanasia procedure requested by the applicant's mother had suggested to her on several occasions that she should resume contact with her children. However, the applicant's mother had refused each time, stating that she no longer wanted to have contact with her children. However, at the request of her doctors, she had at one point sent an e-mail to her children, the applicant and his sister, informing them of her wish to undergo euthanasia. While the applicant's sister had replied to that e-mail stating that she respected her mother's wishes, the applicant did not appear to have responded.

In these circumstances, stemming from the long-standing breakdown in the relationship between the applicant and his mother, the Court considered that the doctors assisting the applicant's mother had done everything reasonable, in accordance with the law, their duty of confidentiality and medical secrecy, as well as the ethical guidelines, to ensure that she contacted her children about her request for euthanasia. The legislature could not be criticised for obliging doctors to respect the applicant's wishes on this point or for imposing on them a duty of confidentiality and medical secrecy. On this last point, the Court reiterated that respect for the confidential nature of medical information was an essential principle of the legal system of all the Contracting Parties to the Convention and that it was essential not only to protect patients' privacy but also to maintain their confidence in the medical profession and health services in general. Consequently, the Court considered that the legislation, as applied in the present case, had struck a fair balance between the various interests at stake. **There had therefore been no violation of Article 8 of the Convention**.

Just satisfaction (Article 41)

The Court held that Belgium was to pay Mr Mortier 2,211.30 euros (EUR) in respect of costs and expenses and rejected the remainder of the request for just satisfaction.

Separate opinions

Judge Elósegui expressed a joint partly concurring, partly dissenting opinion. Judge Serghides expressed a partly dissenting opinion. These opinions are annexed to the judgment.

The judgment is available only in French.

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