**Right to die – assisted suicide – Article 8 ECHR – family wishes**

*Mortier v. Belgium* (application no. 78017/17), decision of the European Court of Human Rights, 4 October 2022

European Court of Human Rights

**Facts and decision of domestic authorities**

The applicant'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 suggested 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. On 19 April 2012, the act of euthanasia was performed in a public hospital by Professor D., the mother dying in the presence of a few friends.

The following day, the applicant 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 also 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, the applicant requested a copy of the document recording the euthanasia from the Board, which, in March 2014, it refused to provide on the ground that it was prohibited from disclosing it by law. In February 2014, the applicant lodged a complaint against Professor D. with the Medical Association, but owing to the confidentiality of the proceedings, he was not informed of the outcome of his complaint. In April 2014, he then lodged a criminal complaint against persons unknown concerning the euthanasia of his mother. The complaint 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 nor 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.

**Decision of the European Court of Human Rights**

Relying on Article 2 (right to life) of the European Convention on Human Rights, the applicant 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 ECHR (the right to an effective remedy in domestic law for breach of Convention rights), he complained about the lack of an in-depth and effective investigation into the matters raised by him. The European Court decided to examine the complaints under Article 2 alone. The applicant also alleged that in failing to effectively protect his mother's right to life the State had also breached the right to private and family life (Article 8). The application was lodged with the European Court of Human Rights on 6 November 2017 and a number of non-governmental organisations were given leave to intervene as third parties.

With respect to the claim under Article 2, the Court stressed that the present case did not concern the question whether there was a right to euthanasia (*Pretty v United Kingdom* (2000) 35 EHRR 1), 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 (*Osman v United Kingdom* (1997) 29 EHRR 245). 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 to the requirement of independence of the various doctors consulted, with regard both to the patient and to the doctor treating him or her.

In particular, 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. Consequently, as regards the acts and procedure prior to euthanasia, in the Court's view, 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. Accordingly, there had been no violation of Article 2 under this head.

Secondly, with respect to compliance with the legal framework in the 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. This had been carried out in a repeated and considered manner, and without external pressure, and where 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 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.

Next, with respect to the 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 had 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 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. The Court 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 it 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 Court also noted that the procedure under 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. It 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. 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 all reasonable steps available to them to obtain the information needed to establish the facts of the case. For example, the investigating judge had accordingly appointed a medical expert, who had examined the mother's medical file and presented his findings in a detailed forensic report. The police had also heard evidence from Professor D. Thus, in the Court's view, 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 because of the lack of independence of the Federal Board, and the length of the criminal investigation, but not with respect to the other claims.

With respect to the claim under 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, and in accordance with the relevant law, the doctors had suggested to her on several occasions that she should resume contact with her children, but the applicant's mother had refused each time, stating that she no longer wanted to have contact with her children. Nevertheless, 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.

The Court noted that 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, and in accordance with the law, their duty of confidentiality and medical secrecy, and 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 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, it being 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.

However, it is worth noting the judgments of the two dissenting judges, both of whom felt that there had been a breach of the substantive aspect of Article 2 in this case, and one judge feeling that assisted dying conflicted with the positive duty to protect life contained in

Article 2. Thus, Judge Elosegui argued that the Court had missed an opportunity to acknowledge that the *a posteriori* control system for euthanasia, being *a posteriori*, cannot be considered to offer sufficient safeguards against abuse regardless of the actual influence a person might have on the decision.

**Commentary**

As the Court pointed out, this was not a case where it had to consider the question whether a state had to offer assisted dying to a patient in order to comply with the Convention. This question has occupied both the European Court and the domestic courts since the seminal case of *Pretty v United Kingdom*, above. In that case, and subsequent cases in the United Kingdom, the courts have held that there is no right to assisted dying under Article 2, although there is a conditional right to assisted dying under Article 8 as the method of ending one's own life engages the right to private life and self-determination. Nevertheless, both the European and domestic courts have refused to find legislation banning assisted suicide in breach of Article 8 (and Article 14, which provides that individuals are entitled to enjoy Convention rights free from discrimination). This is due to the judicial deference offered by domestic courts towards Parliament (*Niklinson v Ministry of Justice* [2013] UKSC 38), and the margin of appreciation given by Member States by the European Court (*Pretty*).

Both courts accept that the question of assisted dying raises moral, ethical and scientific issues that make it more appropriate for the UK Parliament, and Council of Europe states generally, to decide the question within their own legislative framework. Indeed, as evidenced in the present case, there are a number of substantive and procedural safeguards that the state must consider if they are to accommodate both the 'right to die' and the state's positive duty under Article 2 to protect and preserve life. These complexities make it inappropriate for judges to rule on the compatibility of particular laws than ban assisted suicide; and from considering the wisdom of any proposals for reform (*R (Conway) v Ministry of Justice* [2018] EWCA Civ 1431; and *R (Newby v Secretary of State for Justice* [2019] EWHC 3188).

Turning to the present case, it is clear that despite there being no right to die under the Convention, a state that allows assisted dying, or the withdrawal of life treatment, is not in breach of Article 2, provided it contains safeguards to avoid unnecessary and arbitrary deaths (*Lambert v France* (2015) ECHR 545; Hans v Switzerland, decision of the European Court 20 January 2011). In *Lambert*, the European Court ruled that close relatives of a tetraplegic man did not have standing to raise complaints under Articles 2, 3 and 8 of the Convention in his name or on his behalf in respect of a decision to withdraw his artificial nutrition and hydration. It also held that in any case, by upholding the decision to withdraw treatment, the domestic authorities had not failed to comply with their positive obligation to protect life under Article The court found that both the legislative framework laid down by domestic law and the decision-making process were compatible with the requirements of Article 2. This reasoning would also apply to cases where national law allows for euthanasia.

In the present case, however, the Court was faced with two fundamental questions. First, whether the substantive and procedural safeguards were followed in this case, and whether the relevant law was consistent with those safeguards. The second question was a more novel one: should domestic law accommodate the rights of relatives to be informed in the euthanasia process, and how should that law balance such a right with the right of the patient.

The answer to these questions will of course inform any legislative framework adopted by Member States; including the United Kingdom should it pass legislation in this area.

With respect to the claims under Article 2, it is worth noting that the Court only upheld two specific claims: that the State had failed to comply with its procedural positive obligation on account of the lack of independence of the Federal Board; and with respect to the length of the criminal investigation into the death. These procedural violations occurred on the particular facts of this case, and are easily remedied by ensuring that any appearance of conflict is dealt with immediately, and that investigations are dealt with as quickly, but thoroughly, as possible. The Court's findings are not therefore an indictment on Belgium's general legal framework (leaving aside the dissenting opinions on this issue), which appeared to accommodate all the necessary safeguards to ensure compliance with the Convention and its case law.

With respect to the claim under Article 8 – that the applicant had not been sufficiently consulted before his mother's death – it is difficult to gauge the impact of the Court's ruling on the extent to which the Convention accommodates family and other participation in the assisted dying process. On the one hand, the Court states that 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. That appears to settle the conflict between the patient's wishes and the interests of the family clearly in favour of the patient and patient confidentiality. Thus, without the patient's consent the law prohibited doctors from informing others, and the Court appears satisfied with that rule. On the other hand, it noted that in accordance with the relevant law, the doctors had suggested to her on several occasions that she should resume contact with her children, but the applicant's mother had refused each time. Further, at the request of her doctors, she had sent an e-mail to her children, the applicant and his sister, informing them of her wish to undergo euthanasia. The Court then held that in these circumstances, stemming from the long-standing breakdown in the relationship between the applicant and his mother, it considered that the doctors assisting the applicant's mother had done everything reasonable to ensure that she contacted her children about her request for euthanasia. There had, *therefore*, been no violation of Article 8.

Because the Court made a ruling on all the facts, it could be suggested that it will not accept the wishes of the patient unconditionally in every case, and that doctors might have a limited duty to persuade the patient to contact and inform relatives and those close to the victim. Thus, the decision in the present case might not have solved all issues about the rights of the patient's family to take part in the procedure; indeed, they have some rights with respect to investigations post-death. Those who are seeking a change in the law in the United Kingdom, and those who might be tasked with the passing and administration of any law, will need to examine this case and its impact very carefully.

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