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

Legal summary

October 2022

Mortier v. Belgium - 78017/17

Judgment 4.10.2022 [Section III]

Article 2

Positive obligations

Substantive aspect

Death by euthanasia of applicant's mother, who had suffered from depression for about 40 years, as authorised by legal framework: *no violation*

Procedural aspect

Lack of independence of board subsequently reviewing all acts of euthanasia, allowing doctor who carried out specific act to vote on its legality, and excessive length of criminal investigation: *violation*

Article 8

Positive obligations

Article 8-1

Respect for private life

Doctors' failure to involve son in procedure leading to mother's death by euthanasia, in the absence of her wish to do so, in accordance with law: *no violation*

Facts – The applicant's mother had been diagnosed as suffering from chronic depression for about forty years. On 19 April 2012 she underwent euthanasia, which was carried out by Professor D. The Federal Monitoring and Assessment Board (the Board), which was responsible for verifying compliance with the procedure and the conditions laid down in the Euthanasia Act (the Act), found no breach of the law. A criminal complaint lodged by the applicant was dropped for lack of evidence. After notice of the present application had been given to the Government, the criminal investigation was reopened. In 2020 it ended with a discontinuance order on the ground that the euthanasia carried out in the case of the applicant's mother had complied with the statutory requirements.

Law – Article 2:

This was the first case in which the Court had been called upon to examine the compliance with the Convention of an act of euthanasia. It therefore considered it necessary to clarify the nature and scope of a State's obligations under Article 2 in this context before examining whether those obligations had been fulfilled in the present case. The Court therefore had to begin by determining whether such an act could, in

certain circumstances, be carried out without contravening Article 2. The question which arose was whether the euthanasia carried out under the Act, by which it was authorised, at the request of the applicant's mother, had been in accordance with Article 2.

1. *Application of principles of end-of-life case-law to an act of euthanasia* –

(a) Interpretation of Article 2 – The Court was required to take account, in examining a possible violation of Article 2, of Article 8 of the Convention and of the right to respect for private life, and of the notion of personal autonomy which it encompassed. The right of an individual to decide how and when his or her life should end was one aspect of the right to respect for private life. The decriminalisation of euthanasia was intended to give individuals a free choice to avoid what in their view might be an undignified and distressing end to life.

While it was not possible to derive a right to die from Article 2, the right to life enshrined in that provision could not be interpreted as *per se* prohibiting the conditional decriminalisation of euthanasia.

In order to be compatible with Article 2, the decriminalisation of euthanasia had to be accompanied by the provision of suitable and sufficient safeguards to prevent abuse and thus ensure respect for the right to life. In this connection, the United Nations Human Rights Committee had held that euthanasia did not in itself constitute an interference with the right to life if it was accompanied by robust legal and institutional safeguards to ensure that medical professionals were complying with the free, informed, explicit and unambiguous decision of their patient, with a view to protecting patients from pressure and abuse.

The Court's assessment of the effects of such a measure in relation to the Convention could be made only after an examination of the particular circumstances of the case at hand.

(b) The context of the Court's examination – In the context of a case concerning an act of euthanasia alleged to violate Article 2, the applicant's complaints fell to be examined under the positive obligations of the State to protect the right to life within the meaning of the first sentence of paragraph 1 of that provision. The Court took into account the following factors:

(i) whether there had been, in domestic law and practice, a legislative framework for pre-euthanasia procedures which met the requirements of Article 2;

(ii) whether the legislative framework had been complied with in the present case;

(ii) whether the subsequent review had afforded all the guarantees required by Article 2.

(c) The applicable margin of appreciation – Matters of end-of-life care, and in particular euthanasia, raised complex legal, social, moral and ethical issues. The legal opinions and responses among the States Parties to the Convention varied greatly, and there was no consensus as to the right of an individual to decide how and when his or her life should end.

Accordingly, in this area, which concerned the end of life and the way in which a balance must be struck between the protection of the patient's right to life and that of the right to respect for his or her private life and personal autonomy, the States must be afforded a margin of appreciation. It was not, however, unlimited, and the Court reserved its power to review the State's fulfilment of its obligations under Article 2.

2. *Substantive aspects* –

(a) The legislative framework for pre-euthanasia procedures – The legislature had chosen not to provide for any independent prior review of specific acts of euthanasia. Accordingly, the Court was required to look more closely at the existence of substantive and procedural safeguards. In the Court's view, the legislative framework governing pre-euthanasia procedures had to ensure that the patient's decision to request such an end to life was taken freely and with full knowledge.

The request for euthanasia had been made in the present case because of mental, not physical, suffering, in the context of which the death of the applicant's mother had clearly not been expected to occur in the short term, within the meaning of the law. In such circumstances, the law had to provide for enhanced safeguards in the decision-making process.

The decriminalisation of euthanasia was subject to conditions strictly regulated by law, which provided for a number of substantive and procedural safeguards.

Thus, a doctor could only carry out euthanasia if the adult or emancipated minor was conscious at the time of his or her request, if it was made of his or her own free will, in a considered and constant manner, and provided that it was not the result of external pressure. Furthermore, euthanasia was permitted only if the patient was in a hopeless medical situation and experienced sustained and intolerable physical or mental suffering which could not be alleviated and was the result of a serious and incurable accidental or pathological illness.

In addition, the law provided for additional safeguards where death would not otherwise occur in the short term, such as where the requesting patient alleged mental suffering. At least one month had to elapse between the patient's written request and the act of euthanasia, thus ensuring that the request was the result of a considered and constant wish. The main doctor was also required to consult a second doctor, who again had to be satisfied that the suffering was constant and intolerable and could not be alleviated and that the request had been made of the patient's own free will, in a considered and constant manner. The second doctor had to be independent, in relation to both the patient and the principal doctor, and had to be competent as regards the pathology concerned.

Accordingly, the legislative framework governing pre-euthanasia procedures ensured that an individual's decision to end his or her life was taken freely and knowingly. In particular, additional safeguards were provided for in cases, such as that of the applicant's mother, which concerned mental suffering and where death would not otherwise occur in the short term. The various doctors consulted had to be independent in relation to both the patient and the main doctor.

Lastly, the law had been subject to a number of reviews by the higher authorities, both prior to enactment, by the *Conseil d'État*, and subsequently by the Constitutional Court, which had found, following a thorough analysis, that it remained within the limits imposed by Article 2.

Having regard to all the above considerations and to the margin of appreciation enjoyed by the State, as regards the acts and procedure prior to euthanasia, the provisions of the Act had constituted in principle a legislative framework capable of ensuring the protection of a patient's right to life as required by Article 2.

Conclusion: no violation (five votes to two).

(b) Compliance with the legal framework in the present case – With regard to the medical situation of the applicant's mother, in accordance with the law, Professor D. had consulted two other psychiatrists. They had examined whether the applicant's mother

was lucid, whether the request had been made of her own free will and in a considered and constant manner, whether she had been pressured by third parties and whether she was experiencing unbearable and hopeless suffering, before concluding that she could be assisted in ending her life. In the absence of any specific evidence calling into question the competence of the doctors consulted or the accuracy of their medical conclusions, the medical situation of the applicant's mother fell within the scope of the law.

As regards the donation of EUR 2,500 made by the applicant's mother to the association LEIF (LevensEinde InformatieForum, working for a dignified end to life for all) a few weeks before she died, this had occurred several months after the informal request for euthanasia and fifteen days after the formal request. Moreover, having regard to the amount of the donation, it could not be considered, in the circumstances of the case, to indicate a conflict of interest. Nor was there anything in the case file to suggest that the applicant's mother had made such a donation in order to obtain the doctors' consent to euthanasia.

As regards the alleged lack of independence of the two doctors consulted *vis-à-vis* Professor D., given their membership of the same association, the positive obligations arising under Article 2 implied that there should not only have been a lack of hierarchical or institutional connection, but also formal and practical independence both between the various doctors consulted and *vis-à-vis* the patient. In the present case, a large number of doctors, including those who assumed responsibility for euthanasia requests, had received training provided by the LEIF association. In that context, the fact that the doctors consulted were members of the same association did not suffice, in the absence of other evidence, to prove a lack of independence.

The act of euthanasia had ultimately been carried out on the applicant's mother 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 and in a constant and considered manner, without external pressure, that she was in a hopeless medical situation and that she was experiencing constant and intolerable mental suffering which could no longer be alleviated and stemmed from a serious and incurable illness. That conclusion had subsequently been confirmed following the criminal investigation conducted by the judicial authorities, which had decided that the euthanasia in question had indeed complied with the substantive and procedural conditions prescribed by law.

Consequently, the act of euthanasia, which had been carried out on the applicant's mother in accordance with the established legal framework, had not contravened the requirements of Article 2.

Conclusion: no violation (five votes to two).

3. *Procedural aspects* – The general principles had previously been set out in *Nicolae Virgiliu Tănase v. Romania* [GC]. In the Court's view they were also to be applied in cases where an act of euthanasia was the subject of a criminal complaint by a relative of the deceased, plausibly indicating the existence of suspicious circumstances.

(a) The Board's review – The Act had introduced a mechanism of automatic subsequent review by the Board for every act of euthanasia performed. The review had to be particularly rigorous in order to comply with the obligations laid down in Article 2.

As regards the composition of the Board, the law provided for the presence of medical practitioners, law professors and professionals used to dealing with patients suffering from incurable diseases, thus undoubtedly guaranteeing the multidisciplinary knowledge and practice of its members. Moreover, the fact that the members of the Board were nominated by a legislative assembly was a guarantee of its independence.

In the present case, however, the Board had ascertained, solely on the basis of the anonymous part of the registration document, whether the euthanasia had been carried out in accordance with the law and it had answered in the affirmative. Professor D. had not therefore withdrawn and there was no indication that he had opted to remain silent.

While the recusal procedure provided for by law was intended to preserve the confidentiality of the personal data contained in the registration document and the anonymity of the persons involved, the system put in place by the legislature for the review of euthanasia solely on the basis of the anonymous part of the document did not satisfy the requirements of Article 2, as the procedure did not prevent the doctor who performed the euthanasia from sitting on the Board or from voting on whether his or her own acts were compatible with the substantive and procedural requirements of domestic law. The fact of leaving it to the sole discretion of the member concerned to decide to remain silent, where he or she was 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 area, such a defect could have been avoided and confidentiality safeguarded, for example, if the Board had been composed of a larger number of members than the number of those who sat to consider each case. This would have ensured that a member of the Board who had performed the specific act of euthanasia could not sit when the Board was reviewing it.

Consequently, and having regard to the crucial role played by the Board in the post-euthanasia review, the machinery of review established in the present case had not guaranteed its independence, irrespective of any real influence Professor D. might have had on the Board's decision.

(b) The criminal investigation – Where death was the result of an act of euthanasia carried out under the legislation, which permitted it subject to strict conditions, a criminal investigation was not usually required. It became mandatory where there was a criminal complaint by a relative of the deceased indicating the existence of suspicious circumstances. Thus, having regard to the criminal complaint lodged by the applicant, who had plausibly alleged that the law on euthanasia had not been complied with in the present case, the Belgian authorities had been under an obligation to conduct a criminal investigation.

The first criminal investigation had lasted approximately three years and one month whereas no investigative act appeared to have been undertaken by the Crown Prosecutor in that time. 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 been sufficiently thorough, but it had lasted approximately one year and seven months.

Taken as a whole, and having regard to the inaction during the first investigation, the criminal investigation had not met the requirement of promptness under Article 2.

In view of the foregoing, the State had failed to fulfil its procedural positive obligation on account of the lack of independence of the review Board and of the length of the criminal investigation in the present case.

Conclusion: violation (unanimously).

Article 8:

The present case raised the question whether the respondent State had failed to fulfil its positive obligation to secure to the applicant, whose mother had died by euthanasia, the right to respect for his private and family life.

Firstly, the applicant had complained of a violation of Article 8, arguing that his mother's euthanasia was contrary to Article 2. In this connection, with regard to the legislative framework concerning the procedure prior to euthanasia and the conditions in which the act was carried out in the present case, the Court had already concluded that there had been no violation of Article 2. Consequently, the applicant's right to respect for his private and family life had not been breached solely on account of the fact that his mother had undergone euthanasia.

Next, as regards the applicant's lack of involvement in the euthanasia process, the Court was called upon to rule on a conflict between various competing interests, namely the applicant's wish to accompany his mother in the last moments of her life and his mother's right to respect for her wishes and her personal autonomy. In this context, the Court had to weigh up the interests at stake.

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

In the present case, in accordance with the law, the doctors had suggested several times to the applicant's mother that she should resume contact with her two children. However, the applicant had repeatedly objected, stating that she no longer wanted to have contact with them and that she was afraid of her son. Nevertheless, at the request of her doctors, the applicant had sent an e-mail to her children informing them of her wish to undergo euthanasia. The applicant had apparently not reacted.

In these circumstances, which related to a long-standing break-down in the relationship between the applicant and his mother, the doctors had taken all reasonable steps, in accordance with the law, their duty of confidentiality and medical secrecy, as well as 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 the latter point, respect for the confidential nature of health information was an essential principle of the legal systems of all the Contracting Parties to the Convention, not only for protecting the privacy of patients but also for preserving their confidence in the medical profession and health services in general.

In view of the above, the legislation, as applied in the present case, had struck a fair balance between the different interests at stake.

Conclusion: no violation (six votes to one).

Article 41: no award (in the absence of any claim of just satisfaction).

(See also *Pretty v. the United Kingdom*, 2346/02, 29 April 2002, Legal summary; *Haas v. Switzerland*, 31322/07, 20 January 2011, Legal summary; *Lambert and Others v. France* [GC], 46043/14, 5 June 2015, Legal summary; *Nicolae Virgiliu Tănase v. Romania* [GC], 41720/13, 25 June 2019, Legal summary; *Lings c. Denmark*, 15136/20, 12 April 2022, Legal summary)

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