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## **Koch v. Germany**

### **Assisted Suicide and Article 8 ECHR**

#### **Introduction**

In the recent case of *Koch v. Germany*, the Former Fifth Section of the European Court of Human Rights (here and after “the Court”) held unanimously that there had been a violation of Article 8 of the Convention (respect for private and family life). Although the Court fell short of declaring that the right of privacy includes a right to assisted suicide, it held that Germany breached Article 8 because domestic courts refused to examine the merits of a motion to purchase lethal drugs. Thus the Court found that a procedural aspect of Article 8 had not been respected by the German judiciary.

#### **Facts**

The applicant and his late wife were married for 25 years. The applicant’s wife had been suffering from total sensorimotor quadriplegia after an accident in 2002. She was almost completely paralyzed and needed artificial ventilation and constant care and assistance, but she still had a life expectancy of at least 15 more years. She wished to end what was, in her view, an undignified life by committing suicide with the applicant’s help. In November she requested that the Federal Institute for Drugs and Medical Devices grant her an authorization to obtain 15 grams of pentobarbital of sodium – a lethal dose of medication that would enable her to commit suicide at her home. The Federal Institute refused to grant authorization, because the relevant law enabled one to obtain the drug for life-supporting purposes only and not for the purpose of committing a suicide.

The decision was appealed, but pending appeal, the applicant and his wife traveled to Zurich, Switzerland, where the applicant's wife committed suicide assisted by the Dignitas organization. Subsequently the decision of the Federal institute was upheld on appeal. Further motions were introduced for judicial administrative review, but they were dismissed by German administrative courts. The Courts found that Article 8 of the Convention does not include a right to have the spouses' marriage terminated by the suicide of one of them. The German Constitutional Court declared a complaint lodged by the applicant as inadmissible mostly on the ground that the applicant lacked standing.

### **Decision of the Court**

The Court first concluded that the applicant has standing on his own, because his wife's suffering and the eventual circumstances of her death affected him in his capacity as a compassionate husband and carer. Based on this rationale, the Court distinguished the current case from cases brought before the Court by the deceased person's heir or relative on behalf of the deceased. Indeed the Court held that the applicant's complaint about a violation of his wife's rights is inadmissible citing settled jurisprudence on standing (in particular the case of *Sanles Sanles v. Spain*).

The Court created a novel three prong test to find whether the applicant can claim a violation of his own rights, namely:

- a) The existence of close family ties (the Court found that the applicant shared a very close relationship with his late wife).
- b) Whether the applicant has sufficient personal or legal interest in the outcome of the proceedings (the Court found that the applicant had accompanied his wife throughout her suffering).
- c) Whether the applicant has previously expressed an interest in the case (here the Court found that the first administrative appeal was lodged jointly with his deceased wife).

Based on this test, the Court concluded that under these "exceptional circumstances" the applicant has standing on his own.

The Court went then on to consider the merits of the claim. Here the Court started its analysis with a striking and potentially very dangerous assertion – "that Article 8 of the Convention may encompass a right to judicial review even in a case in which the substantive right in question had yet to be established." (§ 53) The assertion is dangerous in two ways: (1) it

invites judicial activism (“the substantive right in question had yet to be established”), and (2) can create very uneven application of the newly invented procedural guarantees (“Article 8 may encompass a right to judicial review”).

Based on this novel approach, the Court held that the refusal of the German administrative and judicial bodies to examine the merits of the applicant’s motion interfered with the applicant’s right to respect for private life. This conclusion is all the more frightening because the settled jurisprudence of the Court to date has been that of accepting procedural guarantees relating to Article 8 only in cases where the existence of a substantive right was not in doubt. Indeed this is the only approach that makes any logical sense.

The Court found that the German administrative courts refused to examine the merits of the applicant’s motion on the ground that he either lacked standing or could not rely on his own rights under Article 8 or domestic law. But the Court did admit that even this was not entirely precise – the Cologne Administrative Court did, in an *obiter dictum*, express the opinion that the refusal to grant approval for the purchase of a lethal drug was in compliance with Article 8. Therefore it is difficult to understand what would satisfy the Court’s claim of having a motion examined on its merits. The mere fact that German courts rendered a decision of inadmissibility does not mean that they did not deal with the substance of the applicant’s claim. However, the substantive law on assisted suicide in Germany is crystal clear – it is illegal.

### **Implications of the Decision**

It is difficult to predict what the precise implications of the case will be. Would it suffice for the German courts to accept applicant’s standing based on the newly found “exceptional circumstances” three prong test and then deny the purchase of the lethal drug, because it is illegal? That is hardly in line with the Court’s approach of protecting rights that are “practical and effective” and not “theoretical and illusory”.

It is clear that the Court is not ready yet to declare a substantive right to assisted suicide (the Court cited with some level of acknowledgment the seminal cases on euthanasia *Pretty v United Kingdom* and *Haas v. Switzerland*). The Court makes a comparative analysis of law regulating assisted suicide in the Council of Europe’s member states. The comparative research shows that 36 countries strictly prohibit any form of assisted suicide and only four member states allow medical practitioners to prescribe lethal drugs (Switzerland, Belgium, the

Netherlands and Luxembourg). Therefore the Court did emphasize that because member states are far from reaching a consensus in this respect, they enjoy a considerable margin of appreciation in this context.

Two remarks in conclusion. First, it seems that the Court, although not prepared to declare substantive rights to abortion or assisted suicide, is ready to question member states' ability to legislate in these matters on "procedural" grounds. A very similar approach by the Court was taken in the *Tysiac v. Poland* abortion case. Second, the whole comparative method used by the Court to declare wide or narrow margins of appreciation is totally unsound and potentially dangerous. Why should the mere fact that a majority of countries legislating in one direction force the remaining minority to conform to the trend – in the absence of a clear substantive right based in the text of the Convention. "Progress" should be declared by the representatives of the people in a democracy and not invented from thin cloth by the European judicial elite.

### **Conclusion**

The Court in *Koch v. Germany* invented a new three prong test on standing and found procedural "penumbras" emanating from non-existent Article 8 substantive rights. We should do our utmost to get the case appealed to the Grand Chamber.