



Gross v Switzerland:
The ECHR and Assisted Suicide

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Introduction

For several decades the European Court of Human Rights (ECHR) has taken an evolutive approach to the meaning of the European Convention on Human Rights, and the notion that the Convention is “a living instrument”¹ now appears to be uncontested. Nevertheless, the Court’s evolutive approach in the case of *Gross v Switzerland*² is remarkable.

Going into the case, the clear jurisprudence of the Court had been that there is no right to assisted suicide or euthanasia under the Convention, nor are there any positive obligations on the State in regard to these issues, save the positive duty on the States to protect life under Article 2. Moreover, the Court had unanimously ruled on the issue of assisted suicide in the very similar case of *Haas v Switzerland* in 2011,³ holding that restricting access to lethal drugs was not in violation of the Convention. Even with the evolutive approach in mind, finding a violation of the Convention seemed farfetched. But the Court found one.

Facts

In 2010 Alda Gross, a Swiss citizen, took a complaint to the ECHR against the Swiss government after she was refused the poison she desired to commit suicide. Although Switzerland is one of only four European countries to allow doctor-prescribed death in certain circumstances, individuals can obtain sodium pentobarbital, a drug that can be used to commit suicide, only after a medical examination and prescription by a doctor.

As she was not suffering from a fatal illness, Gross failed to find a doctor prepared to prescribe the lethal substance to her, so she appealed to the national courts in 2009. The Swiss courts held that the restrictive conditions placed on the drug are in place to prevent abuse and cannot be overridden in the absence of a medical prescription. The national courts also noted that Gross does not suffer from a fatal disease, but has simply expressed her wish to die because of her advanced age and her growing fragility. A position reiterated by the Government before the ECHR.⁴

¹ *Tyrer v. United Kingdom*, Application no. 5856/72, 25 April 1978 at § 21.

² *Gross v Switzerland*, Application no. 67810/10, 14 May 2013.

³ *Haas v. Switzerland* (2011) 53 E.H.R.R. 33.

⁴ *Gross* at § 21.



Decision of the Court

Despite the previous case-law of the Court⁵ and the obvious risks involved in liberalising the distribution of a lethal poison, the Court nevertheless held that, “the applicant’s wish to be provided with a dose of sodium pentobarbital allowing her to end her life falls within the scope of her right to respect for her private life under Article 8 of the Convention.”⁶

Having found that the right to a lethal poison comes within the scope of the Convention, the Court then assessed whether there had been a breach of this “right”.

Rather than tackling the issues head on – having done this in *Haas* and with a unanimous decision against the applicant – the Court instead focussed on the guidelines issued by the Swiss authorities. It concluded that, “Swiss law, while providing the possibility of obtaining a lethal dose of sodium pentobarbital on medical prescription, does not provide sufficient guidelines ensuring clarity as to the extent of this right. There has accordingly been a violation of Article 8 of the Convention in this respect.”⁷

The ruling was a four votes to three decision and in the dissenting opinion, three judges stated that the Swiss guidelines, “sufficiently and clearly defines the circumstances under which a medical practitioner is allowed to issue a prescription for sodium pentobarbital.”⁸

Furthermore, the dissenting judges noted that, “The applicant was not able to obtain such a prescription at domestic level as she had not been suffering from a terminal illness, which is a clearly defined precondition for obtaining the lethal substance. She had just expressed her wish to die because of her advanced age and increasing frailty. Therefore, in our opinion, the applicant in the instant case did not fulfil the conditions laid down in the medical ethics guidelines on the care of patients at the end of life adopted by the Swiss Academy of Medical Sciences.”⁹

Therefore, four judges found that the right to poison *is* protected under the Convention and unclear guidelines surrounding this “right” are in violation of the Convention. In contrast, three judges found that the guidelines were clear, that the applicant did not qualify and that the position of the Swiss authorities was plainly justifiable under the Convention.

⁵ For example, *Pretty v. the United Kingdom*, Application no. 2346/02, ECHR 2002-III; *Haas v. Switzerland* (2011) 53 E.H.R.R. 33.

⁶ *Gross* at § 60.

⁷ *Gross* at § 67.

⁸ Joint Dissenting Opinion of Judges Raimondi, Jočienė And Karakaş, at § 1.

⁹ Dissenting Opinion at § 2.



Implications of the Decision

This is now the second time in quick succession that the ECHR has found a violation of Article 8 in an assisted suicide case, without actually declaring that assisted suicide is a human right.

In the recent case of *Koch v Germany*,¹⁰ the Fifth Section of the Court held unanimously that there had been a violation of Article 8 of the Convention based on procedural grounds. The Court held that the refusal of the German administrative and judicial bodies to examine the merits of the applicant's motion to purchase lethal drugs interfered with the applicant's right to respect for private life. The Grand Chamber of the Court refused to accept the appeal in the case of *Koch*.

Pointing to the principle of subsidiarity, the Court concluded that it has decided "to limit itself to the conclusion that the absence of clear and comprehensive legal guidelines violated the applicant's right to respect for her private life under Article 8 of the Convention, without in any way taking up a stance on the substantive content of such guidelines."¹¹

However, by finding a violation of the Convention under Article 8, the Court has in actuality completely overridden the principle of subsidiarity.

As the Court rightly pointed out in *Haas*: "The vast majority of Member States ... appear to place more weight on the protection of an individual's life than on the right to end one's life."¹² Indeed, of the 47 Member States of the Council of Europe, only four have openly legalized assisted suicide: the Netherlands, Belgium, Luxembourg and Switzerland. Around the globe, instances of legalized assisted suicide or euthanasia are even rarer.¹³ Thus, given the lack of European consensus, Contracting States clearly enjoy a wide margin of appreciation to legislate against assisted suicide or euthanasia as they see fit.¹⁴

By finding Switzerland in violation of the Convention, the court has overridden this margin of appreciation and the principle of subsidiarity. Therefore, it is essential that the case of *Gross* is appealed to the Grand Chamber and is accepted by the Court.

¹⁰ *Koch v Germany* (Application no. 497/09) 19 July 2012.

¹¹ *Gross* at § 69.

¹² *Haas* at § 55. See also *Rasmussen v. Denmark* (1985) 7 E.H.R.R. 371 at § 40.

¹³ Of the 193 nations currently recognized by the U.N., approximately 3% have openly legalized currently euthanasia and/or assisted suicide.

¹⁴ See *Rasmussen v. Denmark* (1985) 7 E.H.R.R. 371 at § 40.



ADF Comments

Alliance Defending Freedom intervened in the case as a third party. The Court summarized ADF's submission as follows:

"Referring to the Court's case-law ... the Alliance Defending Freedom submitted that the Convention did not convey any right to assisted suicide. While the Court had recognised that some individuals may wish to commit suicide in a manner of their choosing, this declaration of personal autonomy and self-determination could never outweigh the countervailing need to uphold public health and safety and to protect the rights and freedoms of others. This was particularly so given the seriousness of the harm involved and the high risk of abuse inherent in a system which facilitated assisted suicide. It followed that Article 8 of the Convention did not create a positive obligation on the State to facilitate assisted suicide. Even if such an obligation existed, national authorities would not fail to comply with that obligation by placing restrictions on access to lethal substances."¹⁵

The following quotes can be attributable to Paul Coleman, Legal Counsel for Alliance Defending Freedom:

"The government has an obligation to protect life, not facilitate death. Claims to personal autonomy must not override national laws which are designed to protect the weak and vulnerable. Prior to the case of *Gross v Switzerland*, this position had been supported by the European Court's case law and is enshrined in the European Convention on Human Rights."

"It is already disturbing that individuals in Switzerland can gain access to lethal substances through medical doctors who are supposed to help preserve life. If drugs designed to end life become available without a prescription, as Ms. Gross has argued for in this case, it will put the lives of thousands of people at extraordinary risk."

Conclusion

Aside from showing no respect for the right to life under the European Convention on Human Rights, the majority decision of the Second Section of the Court shows no respect for the principle of subsidiarity or its own previous case-law. It is imperative that the decision is overturned by the Grand Chamber of the Court.

¹⁵ *Gross* at § 54.