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A note from DIGNITAS – To live with dignity – To die with dignity

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Case of Dániel Karsai v. Hungary
European Court of Human Rights judgment – An analysis

On 13 June 2024, the European Court of Human Rights (ECtHR) rendered the judgment in the Case of Dániel Karsai v. Hungary, application no. 32312/23. This judgment further develops precedent jurisdiction concerning an individual's right to decide by what means and at what point his or her life will end, and it picks up on some related aspects such as the relationship between palliative care and voluntary assisted dying. On the one hand, this ECtHR judgment appears to be a setback in the development of freedom of choice over one's own end in suffering and life, on the other hand it provides insight into some line of arguments which is valuable for arguing in further proceedings. A short analysis.

Scope of protection of Article 8

In the court proceedings, the Hungarian government had argued that there is no right of self-determined death under the protection of Article 8 of the European Convention on Human Rights (ECHR) if no right to assisted dying was recognised under the domestic law, referring to the *Haas* and *Mortier*[1] applications, which had been filed against Switzerland and Belgium, where some forms of assisted dying are legally permissible. The ECtHR rejects this argument and considers that Dániel Karsai's interest in having access to physician-assisted dying ("PAD")[2] concerns core aspects of the right to respect for his private life enshrined in Article 8 ECHR and that it concerns respect for autonomy, physical and mental integrity and human dignity, which are the very essence of the Convention (§§ 83 - 85 and § 140). In this context, it is also positive that the Court rejected the Hungarian government's arguments that Article 8 ECHR was not applicable, as it was not so much the applicant's rights that were violated, but rather those who supported him in a possible PAD, as the Hungarian criminal prohibition sanctioned them and not the applicant. The Court states that the Convention aims to guarantee rights that can be practically and effectively enforced and are not merely theoretical or illusory[3]. This means that the protection also extends to the applicant (§ 86). In § 135, the Court says: "Given the applicant's physical condition and the fact that he is in Hungary,

[1] Case of Haas v. Switzerland, application no. 31322/07 and Case of Mortier v. Belgium, application no. 78017/17
[2] The ECtHR uses the terms "physician-assisted dying" (PAD) and "refusal or withdrawal of life-sustaining interventions" (RWI). These are also used in this article. Additional terms are listed here: http://www.dignitas.ch/index.php?option=com_content&view=article&id=31&Itemid=71&lang=en
[3] The so called Artico-jurisdiction, see case of Artico v. Italy, application no. 6694/94

this is effectively equivalent to denying him the possibility to end his life on his own terms, at home or abroad, thereby interfering with his right to respect for his private life". An outright ban which denies the possibility of making one's own decision regarding the end of one's life according to one's own wishes is therefore an encroachment on fundamental Convention rights.

With these assertions, largely dealt with in the first part of the court's considerations, the ECtHR confirms in a general form what it has developed so far, without adding anything significantly new.

Margin of appreciation

The Court believes that the topic of euthanasia is not only sensitive, but also harbours the risk of abuse and errors and a so-called "slippery slope", for example in § 152: "the Court observes that the wider social implications and the risks of abuse and error entailed in the provision of PAD weigh heavily in the balance when assessing if and how to accommodate the interests of those who wish to be assisted in dying."

In regard of the slippery slope argument, it should be noted that it is an inherently negative and empty shell argument repeatedly used by opponents of assisted dying solely to invoke unrealistic fears. Legally, the slippery slope argument simply isn't true because it is always possible to stop a certain development by law. As an aside, slopes are only slippery if they catch us unawares and we have strayed onto them inadequately equipped[4]. The ECtHR (and others) has acknowledged the right to decide on the time and manner of one's own end of life. Rather than "slipping into negative consequences", the "slippery slope" in this case results in the positive effect of an increasing number of individuals making use of a human right. And in countries where assisted dying is legalised, they make use of this human right by turning to professional support and care. In fact, when individuals have this option in a legal and safe frame, they are more likely to talk about their end-of-life-choice wishes with health care professionals, which in turn allows these to provide advice and support on all options to soothe suffering. Furthermore, this reduces the risk of suffering individuals turning to risky and/or illegal DIY-methods to end their life; attempts which mostly fail[5]. In conclusion, the alleged negative impact of a "slippery slope" is not happening. It has been a positive and welcome slippery slope in that expanded use of this human right can improve quality of life and save lives.

Although the ECtHR does not adopt the "slippery slope" argument raised by the government unquestioningly (cf. § 149: "(...) the Court does not consider that all of the arguments put forward by the Government can be decided on the sole basis of statistical or other evidence. Many of the asserted wider social implications of legalisation of PAD may inevitably be sensitive to collective moral values; they may differ from society to society and may also evolve over time."), this point is considered important by the Court and therefore – according to the Court – can only be properly assessed by the national authorities (cf. § 149: "However, these implications are unquestionably relevant and important. Furthermore, being sensitive to national conditions, they can only be properly appraised by the national authorities."). For this reason too, the Court states, it is permissible to grant the individual member States a wide margin of appreciation in regulating this issue, since there is no consensus among the member States (cf. § 139: "Where, however, there is no consensus within the

[4] Philosopher and Ethicists John Harris, in: "The Value of Life", Routledge & Kegan Paul plc, London 1985, page 127
[5] Cf: https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0274597 and http://www.dignitas.ch/images/stories/pdf/diginpublic/referat-wf-kongress-suizidversuche-e-15062012.pdf

member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider."; compare also § 144). However, in doing so the Court simply adopts the usual arguments of the (often religious-conservative) opponents of assisted dying / euthanasia without itself taking a closer look at such allegations[6]. Moreover, the Court only counts the number of the Council of Europe member States which authorise assisted suicide and/or voluntary euthanasia, but an analysis of population and area of the member States reviewed by the Court (cf § 58 ff; 42 out of 46 States) shows a differentiated picture which is that for over 42 per cent of the population and area there is access to such end-of-life-choice:

End-of-Life-Choice in Member States of the Council of Europe

according to the ECtHR judgment Dániel Karsai v. Hungary, application no. 32312/23

	State	Population (fig. mostly year 2017)	Area km²	AS	VE	JUG	BEV/AS Population	FL/AS km²
1	Austria	8'823'054	83'879	x			8'823'054	83'879
2	Belgium	11'429'336	32'545	x	x	x	11'429'336	32'545
3	Finland	5'523'231	338'144	x			5'523'231	338'144
4	Germany	82'114'224	657'121	x			82'114'224	657'121
5	Italy	59'359'000	301'336	x			59'359'000	301'336
6	Liechtenstein	37'922	160	x			37'922	160
7	Luxembourg	583'455	2'586	x	x	x	583'455	2'586
8	Netherlands	17'035'938	41'526	x	x		17'035'938	41'526
9	Portugal**	10'329'506	92'345	x	x		10'329'506	92'345
10	Spain	46'354'321	504'645	x	x		46'354'321	504'645
11	Sweden	9'910'701	449'964	x			9'910'701	449'964
12	Switzerland	8'476'005	41'285	x			8'476'005	41'285
	all other States (30)	345'157'406	3'499'171					
	Total	**605'134'099**	**6'044'707**				**259'976'693**	**2'545'536**
						in %	42.96 Population	42.11 Area

Result: almost 43% of the popluation of the Council of Europe States have access to Assisted Sucide in their country; this corresponds to around 42% of the area.

AS = Assisted Suicide
VE = Voluntary Euthanasia
JUG = AS and/or VE also for competent under-18
BEV/AS = Population with access to AS
FL/AS = Area where AS is permitted
**legalised in 2023, pending the adoption of the required regulations

Consequently, the margin of appreciation of the member States, which the Court at least does not consider to be unlimited (cf. § 144: "Having said that, the Court would reiterate the long-established principle that even when the margin of appreciation is considerable it is not unlimited and is ultimately subject to the Court's scrutiny."), is much narrower than that granted to Hungary in the present judgement.

[6] Cf. the arguments of the "amici curiae" Alliance Defending Freedom (ADF) International and Care not Killing (CNK) Alliance in § 116 of the judgement: "There were inherent risks of abuse in any system legalising PAD". The following article is equally significant in connection with the French government's planned and now postponed "projet de loi" on euthanasia: https://www.genethique.org/euthanasie-la-pente-glissante .

Prioritising Palliative Care?

A contradiction to the right to self-determination per se is that the Court almost accuses the applicant of not having examined palliative care options or not having expressed an opinion on the possibilities in Hungary in this regard: "The applicant did not put forward any specific arguments to the effect that the palliative care available to him was inadequate or that he would not be able to receive, as part of the palliative services available in Hungary, palliative sedation to relieve refractory suffering" (§ 154). The Court argues that the applicant's wish for an assisted suicide is a "personal preference" that cannot oblige the authorities to provide alternative options (cf. § 155: "…cannot in itself require the authorities to provide alternative solutions, let alone to legalise PAD").

This argument gives the impression that the Court has not at all considered the specific situation of an ALS diagnosis. With ALS, palliative treatment is usually only relevant if the individual concerned develops breathing difficulties, something which often only happens in the final stage of the illness. In fact, several times the judgement repeats what the applicant points out: how much he feels like a prisoner in his body, and the Court was also able to personally convince itself of his state of health during the hearing in November 2023. There is also no lack of medical-theoretical considerations on ALS (see §§ 12 and 45 ff.). Still though, the judgement lacks adequate conclusions on this particular clinical picture and Mr Karsai's state of health in particular.

The fact that the ECtHR presents palliative care as a preferable alternative to assisted suicide is particularly unrealistic and contradictory; it is something only argued by backward palliative care lobbyists and opponents of assisted dying. The right to decide by what means and at what point one's own life will end, as established by the ECtHR in 2011, places the decision on both aspects in the hands of the individual concerned. Anything else would lead to a paternalistic decision-making authority of third parties, e.g. the State or a group of medical professionals such as palliative care specialists, which is contrary to the meaning of human rights. Furthermore, in medically developed countries such as Switzerland, palliative care and assisted suicide are applied alongside each other[7].

In this context, it is important to note what the Austrian Constitutional Court pointed out, in its judgment G 139/2019-71 of 11 December 2020, in which it found the blanket prohibition on assistance in suicide to be unconstitutional: "…there is no difference between a patient that refuses life-prolonging or life-maintaining medical measures within his or her sovereignty over treatment or by exercising his or her right to self-determination within his or her living will, and a person willing to commit assisted suicide as part of his or her right to self-determination in order to die in dignity. In both cases, the decisive aspect is that the decision is taken on the basis of free self-determination." The Austrian Court also noted that, whilst the State needs to take measures to ensure access to palliative medical care to all, "regardless thereof the freedom of the individual to decide on their life in conditions of integrity and personal identity and, consequently, decide to end life with third-party assistance, must not be denied"[8].

True self-determination regarding the end of one's own life, as recognised by the Court in the *Haas* v. Switzerland judgement in 2011, means that a person has the full range of options at their disposal,

[7] Cf. "Attitudes of university hospital staff towards in-house assisted suicide", discussion section: "Our data also confirm the well-known reticence of many palliative care physicians concerning assisted dying. Swiss palliative care physicians have historically taken a critical stance toward suicide assistance. However, this has evolved in recent years towards a more neutral view." https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0274597#sec017

[8] https://www.vfgh.gv.at/downloads/Bulletin_2020_3_AUT-2020-3-004_G_139_2019.pdf

which they can make use of in a self-determined manner according to their needs and their self-perception of quality of life. The "offer" of only one of these options constitutes a restriction of this right to self-determination under Article 8 ECHR, and a discrimination within the meaning of Article 14 ECHR: individuals such as the applicant, who is currently not receiving life-sustaining treatment (e.g. with a breathing ventilator) is not by law provided with an option to hasten his death, whilst it does provide such an option to terminally ill patients who were dependent on life-sustaining treatment. This is a clear legal inequality that is unacceptable.

Missed opportunity

Even though the Court has stated on several occasions that "a certain trend is currently emerging towards decriminalisation of medically assisted suicide, especially with regard to patients who are suffering from incurable conditions (cf. §143)" and therefore the situation needs to be monitored ("The need for appropriate legal measures should therefore be kept under review, having regard to the developments in European societies and in the international standards on medical ethics in this sensitive domain" cf. § 167), it should be agreed with Judge Felici, who has written a "Dissenting Opinion", that the Court missed a great opportunity with this judgement; at the end of his statement he wrote: "As a final point, it is useful to repeat (see § 7 above) that the Court – in so far as it decided not to relinquish the case to the Grand Chamber – missed an extraordinary opportunity, which would have allowed a more up-to-date approach to the principles regarding end-of-life care and PAD, which, given the extreme importance of the subject, was certainly the task and responsibility of the Grand Chamber."

The reason why ultimately the Court, but above all the (here: Hungarian) national legislator, is called upon to finally bring about a change in order to enable self-determination over the end of one's own life is not to be found in the "international standards on medical ethics", but solely in the democratic will of its population in accordance with the law and the constitution. In Hungary, there is already a discrepancy between national law and the fundamental rights guaranteed in Articles 8 and 14 of the ECHR, as well as in the Hungarian constitution. This was also noticed by Judge Felici, who found a violation of both Article 8 ECHR and Article 14 in conjunction with Article 8 ECHR by the Hungarian state in his substantive examination of the facts of Mr Karsai's complaint.

Conclusion

The Karsai v. Hungary judgment confirms and further develops precedent jurisdiction on end-of-life choices, the ECtHR however misses the chance to scrutinize outdated and shallow opponents' arguments and to strengthen the freedom and right of the applicant and everyone in a similar situation to his. Without doubt, questions on the right to decide on the time and manner of one's own end in life will be re-visited in future applications.

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BACKGROUND:

DIGNITAS – To live with dignity – To die with dignity was founded in May 1998 with the aim, through international legal and political work, to make the proven Swiss model of freedom of choice, self-determination and personal responsibility in life and at life's end also accessible to individuals abroad.

DIGNITAS' advisory concept – combining palliative care, suicide attempt prevention, advance directives/decisions and assisted dying – offers a basis for good decision-making to shape life until the end.

Through litigation, DIGNITAS obtained a judgment of the European Court of Human Rights in 2011 acknowledging the right/freedom of a competent individual to decide on the manner and time of his or her own end in life and confirming this to be protected by Article 8 of the European Convention on Human Rights.

DIGNITAS has been engaged in many lawsuits in Europe and Canada and has provided in-depth submissions and received visits by expert and parliamentary committees from Great Britain, Australia, Canada, etc. when laws were discussed and planned for the protection of a patient's autonomy and human dignity.

The founder of the charitable DIGNITAS organisation is Ludwig A. Minelli, an attorney-at-law specialising in human rights. The team of DIGNITAS consists of 38 part-time employees and it is supported by several external experts in the fields of medicine, law, IT, and auditing.