Date: 4 October 2022
Re: **Case note on *Mortier v. Belgium* (App No 78017/17)**

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1 Background

1. Godelieva de Troyer had suffered with chronic depression for more than twenty years, exacerbated by the breakdown of a relationship with her long-term partner. When her treating psychiatrist of over two decades expressed doubts that she met the conditions for euthanasia, she approached Dr Distelmans who is an outspoken advocate for euthanasia and leading practitioner. He met with her for the first time on 29 September 2011 before euthanizing her on 19 April 2012.

2 Procedural History

2. On 29 February 2012, Mrs De Troyer made a 'donation' to an association led by Dr Distelmans of €2,500. On 19 April 2012, she received a lethal injection. Her son, Tom Mortier ("Applicant"), learned of this from the hospital the following day.

3. He commissioned a medical expert to examine his mother's file and on the basis of the findings filed a criminal complaint in Belgium and requested the euthanasia notification form from the Federal Control and Evaluation Commission ("Commission"), responsible for ensuring compliance with the euthanasia law.

4. The Commission continued to refuse to release the euthanasia notification form even following a written request from the Applicant's lawyer. The prosecutor was delayed in taking any action due to "an unfortunate administrative error" and thereafter refused to provide any update to the Applicant.

5. An initial application was made to the European Court of Human Rights ("ECtHR") on 15 October 2014. This was found inadmissible by a single judge on 28 May 2015 for non-exhaustion of domestic remedies.

6. On 8 May 2017, in a single line letter, the prosecutor informed the Applicant's representative that criminal proceedings would not be commenced due to an insufficiency of evidence.

7. On 6 November 2017, the present application, alleging violations of Articles 2 (the right to life – which includes positive elements requiring the state to take affirmative steps to safeguard life as well as a duty to investigate suspicious deaths), 8 (the right to private and family life), and 13 (the right to an effective remedy), was filed with the ECtHR. The Court accepted the case and communicated it to the government on 3 December 2018.

2.1. Applicant's Submissions

8. The Applicant was represented by ADF International. In summary, he argued that Belgium had violated his mother's right to life and his right to family life in failing to take steps to

safeguard the right to life of the vulnerable as required under the European Convention on Human Rights ("ECHR"). Moreover, it was argued that Belgium had failed to effectively hear and resolve his complaints under the Convention.

2.2. Unilateral Declaration

9. In a letter dated 3 September 2019, the Belgian Government made a "unliteral declaration" under Rule 62A of the Rules of Court. This mechanism allows a government to admit to a violation of the Convention and, if acceptable to the Court, have the application struck out of the list on the basis of its admission.

10. With its unilateral declaration, the Belgian government admitted a violation of the procedural aspects of the right to life under Article 2: "an effective investigation as guaranteed by Article 2 of the Convention in its procedural aspect has not been conducted in this case." It indicated the domestic criminal investigation had been re-opened and proposed the payment of compensation and costs and expenses to the Applicant.

11. In a letter dated 27 November 2019, the Court informed the Applicant that it had rejected the Government's unilateral declaration and would continue its consideration of the case.

2.3. Government Disclosures

12. With its Observations dated 4 March 2020, the Government finally disclosed the euthanasia notification form in respect of the Applicant's mother which he had been seeking since 2013.

13. The form revealed a number of clear violations of the Belgian euthanasia law. While these range from the less serious to the more serious, the real relevance is that the Federal Commission and, subsequently, the prosecutor had access to this same document and yet saw no reason for concern, all the while it was kept from the Applicant.

3 Judgment

14. In its judgment of 4 October 2022, the ECtHR unanimously ruled that Belgium violated Article 2 "on account of the deficiencies in the post-mortem supervision of the euthanasia performed." By 5 votes to 2, the Court found no violation in respect of the broader legislative framework or in respect of the "conditions under which the euthanasia…was carried out."[1] By 6 votes to 1, the Court found no violation of the right to family life under Article 8.

3.1. Admissibility

15. The Court rejected the Government's argument that the case should be found inadmissible. The Court considered that "where there is a denunciation or complaint by a relative of the deceased, credibly indicating the existence of suspicious circumstances, the

[1] *Mortier v. Belgium*, no 78017/17, page 48.

competent authorities must initiate an investigation to establish the facts and, where appropriate, to identify and punish those responsible."[2]

3.2. Article 2

16. The Court recalled that Article 2 "ranks as one of the most important articles of the Convention"[3] and reiterated that "the Court has held that it is not possible to derive from Article 2 a right to die, whether at the hand of a third party or with the assistance of a public authority."[4] The Court made clear that "the present case does not concern the existence or otherwise of a right to euthanasia."[5]

17. Despite this life-affirming foundation, the Court went on to state that while it is not possible to derive a right to die from the Convention, the right to life "cannot be interpreted as prohibiting the conditional decriminalization of euthanasia per se."[6] It then said that any such regime would require adequate and sufficient "safeguards".[7] In the case of mental suffering, such considerations are even "stronger".[8]

18. Concerning the application of the framework to this case, the Court cautioned that "its power to review compliance with domestic law is limited",[9] ultimately ruling that the Court "cannot conclude that the medical situation of the Applicant's mother fell outside [the law]."

19. The Court dealt very cursorily with the two conflicts of interest alleged prior to the euthanasia. While recognizing that the monetary payment "created a conflict of interest", the Court determined without any real analysis, that in view of the amount of the donation and the circumstances of the case, that there was no real conflict.[10] In respect of the lack of independence of the doctors consulted, the Court concluded that "the fact that the doctors consulted were members of this same association is not sufficient, in the absence of other elements, to demonstrate a lack of independence."[11]

20. Ultimately, in respect of the euthanasia framework in Belgium and the decision to euthanize the Applicant's mother, the Court found no violation of Article 2.

21. Turning to the after-the-event control mechanisms, the Court reached a different conclusion. The Court considered that any *a posteriori* review must be carried out in a "particularly rigorous" manner.[12] The government had submitted that any conflict of interest is managed by the member of the Commission responsible for the euthanasia under consideration remaining silently in the room while the discussion took place. The Court considered that "the system set up by the Belgian legislature … does not meet the

[2] Para 79.
[3] Para. 116.
[4] Para. 119.
[5] Para. 127.
[6] Para. 138
[7] Para 139.
[8] Para 148.
[9] Para 157.
[10] Paras 160-161.
[11] Para. 163.
[12] Para. 171.

requirements of Article 2"[13] and that "taking into account the crucial role played by the Commission in the *a posteriori* control of euthanasia, the Court considers that the control system … did not ensure its independence…"[14]

22. Turning to the criminal investigation, the Court noted the admission by the Government that the first domestic investigation was completely ineffective. When also considering the re-opening of the criminal investigation, prompted by the ECtHR filing, the Court considered that while the investigation was "sufficiently thorough", "the criminal investigation did not meet the requirement of promptness under Article 2."[15]

23. The Court therefore found a violation of Article 2 in respect of the way the Commission reviews its cases, and in respect of the prosecution of the criminal investigation.

3.3. Article 8

24. The Court dealt primarily with this complaint under its Article 2 analysis concluding that the "Applicant's right to respect for his private and family life was not infringed merely because his mother was euthanised."[16]

25. It separately addressed the question as to whether the Applicant's lack of involvement in the process constituted a violation. The Court considered that the doctors involved had encouraged the Applicant's mother to contact him and in so doing, had discharged their duty, there being a requirement to strike a "fair balance between the various interests at stake".[17]

3.4. Damages and Costs

26. The Court awarded the Applicant's domestic costs and, in accordance with his request, made no award of damages. The ECtHR does not award costs in case of pro bono representation and so no award was made for costs before the Court.

3.5. Separate Opinions

27. Judge Elósegui (elected in respect of Spain) drafted a partly concurring and partly dissenting opinion. Judge Serghides (Cyprus) filed a partly dissenting opinion.

28. Judge Elósegui agreed with the majority that there was a violation of Article 2 in the "*post-mortem* supervision of euthanasia" and no violation of Article 8. She departed from the majority in considering that there was also a violation of Article 2 "on account of the legislative framework for pre-euthanasia procedures."[18] In addition, she placed weight on the euthanasia notification form which was missing from the medical file of the Applicant's mother and blocked from release to him by the Federal Commission. Given it was not in the file, Judge Elósegui concluded "it is questionable on what basis the prosecutor was

[13] Para. 177.
[14] Para 178.
[15] Para 181.
[16] Para 203.
[17] Para. 208.
[18] Partly Concurring and Partly Dissenting Opinion of Judge Elósegui, para 1.

able to reach such a conclusion when neither he nor anyone else in the proceedings saw the document recording the euthanasia."[19]

29. Reflecting on the facts, she observed that: "In patients with mental illness, a loss of autonomy may occur: a tendency to isolation and suicide may also be observed. One of the rules to follow in psychiatry is precisely to avoid leaving such patients alone."[20]

30. In his partly dissenting opinion, Judge Serghides would have gone further than the majority in finding a violation of Article 2 in respect of the euthanasia framework itself, as well as a violation of Article 8. He reasons that Article 2 of the Convention does not mention euthanasia but rather robustly protects the right to life. Therefore, he considers that, "the purpose of euthanasia is to end life, whereas the purpose of Article 2 is to preserve and protect it. I humbly submit, on the contrary, that any form of euthanasia…would not only lack a legal basis under the Convention, but would also be contrary to the right to life."[21]

4 Analysis

31. This case marks the first time the ECtHR has had to grapple with a challenge to the legalized practice of euthanasia. While it has dealt with the subject before, it has generally done so in the context of applicants seeking to argue for the legalization or expansion of euthanasia under the Convention. It has invariably rejected such arguments.

32. It is rare for a Western European country to be found to have violated the right to life. According to the court's case law database, Belgium has been found to violate this right on only four previous occasions. Moreover, in 2021, the Court dealt with 179 applications in respect of Belgium, only 4.4% of which resulted in any finding of a violation.

33. In this case, it was argued that an existing euthanasia regime violated the Convention either because euthanasia can never be compatible with the Convention or because euthanasia on these facts violated the Convention. In its decision, the Court found that the Belgian law did not necessarily violate the Convention but that there had been a violation in this case. In ruling in this way, the following three issues come to light:

4.1. The artificial distinction between pre- and post-euthanasia "safeguards"

34. In order to rule that the euthanasia in this case did not violate the Convention, while ruling that the events following did required the Court to make an artificial distinction between pre- and post-euthanasia "safeguards". The violation that was found is grounded in the fact that the doctor who performed this euthanasia also co-chairs the panel that approved its legality. Furthermore, not only does he co-chair the panel, but the Court confirmed that he sits in the room while his cases are reviewed and is simply expected to remain silent and refrain from voting, though there is no legal requirement to do so.

35. It is unsurprising that the Court found a violation in this regard. What is more surprising is that the Court was nonetheless able to conclude that the euthanasia in this case did not

[19] Ibid., para 17.
[20] Ibid., para 26.
[21] Partly Dissenting Opinion of Judge Serghides, para. 5.

violate the Convention. The Court asserted that it gave significant deference to the views of the medial practitioners involved, and to the domestic authorities in evaluating the implementation of national law. However, it is those same professionals who have presided over a system found to be violative of the right to life. The finding of a violation in respect of Belgium's conduct *after* the euthanasia cannot be divorced from the lawfulness of the decision to euthanize.

36. This is compounded by the deficit in reasoning provided by the Court in dealing with concrete issues that were raised by the Applicant in respect of the time before the euthanasia. For example, the Court acknowledged the link between the doctors involved (who were required to be *independent* by the law) and the conflict of interest created by the payment to the doctor in question. However, in respect of the money, with almost no explanation, the Court concluded that it didn't actually create any conflict despite recognizing that the payment took place just "fifteen days after the formal request"[22] for euthanasia. In respect of the lack of independence of the doctors, the Court considered that the fact they were "members of the same association is not sufficient…to demonstrate a lack of independence."[23] However, the requirement for independence is not a mere aspiration but a requirement of the Belgian law and one which the Applicant argued was violated not only by the common membership but by the close working relationship between the small pool of doctors involved in a significant number of Belgian euthanasia cases.

37. Furthermore, the Court failed to deal with the argument that while someone may have the right to refuse to take steps that may improve their condition, their failure to do so doesn't transform their condition from being treatable to incurable, as required under the law.

38. The arguments not dealt with, or poorly addressed, combined with the artificial division of the issues raised pre- and post-euthanasia make for a confusing read from which it is difficult to derive a coherent structure.

4.2. The argument that "safeguards" are needed, while finding they fell short

39. A second aspect of the judgment which is difficult to reconcile is the emphasis it places on the importance of "safeguards" while simultaneously finding that the primary mechanism intended to ensure compliance is systematically unsound and violates the Convention.

40. The judgment is clear that any country that goes down the path of euthanasia must incorporate robust safeguards. In previous decisions, the Court has highlighted the obvious potential for abuse.

41. The Court implicitly suggests that it is having sufficient safeguards in place that could render the practice of euthanasia compatible with the Convention. However, it then goes on to consider perhaps the primary "safeguard" that exists in Belgium – a Federal Commission charged with receiving and reviewing a notification report in respect of every

[22] Para. 163.
[23] Para. 163

euthanasia in the country. The Commission then discusses and, if concerns exist, can pass the case to the prosecutor for investigation.

42. Furthermore, the Court set out the relevant medical Ethical Guidelines. They include requirements that the doctors authorizing euthanasia physically meet, prepare a common report and that they do not perform euthanasia where a psychiatric patient exercises his or her right to refuse evidence-based treatments. After setting this out in detail, the Court does not address the apparent failure to respect these principles in this case.

43. Given the importance the Court places on "safeguards" it is difficult to understand why the Court a) did not find a substantive violation of the Convention, and b) places such faith in the protection offered by "safeguards" when a country with a long record of euthanasia publicly defends a system with such inbuilt conflicts.

44. Indeed, Judge Serghides, in his partly dissenting opinion, concludes that no such safeguards could make euthanasia safe, and draws attention to the complete absence of 'euthanasia' from the text of the Convention which speaks only of the protection of life.

4.3. Deferring the ultimate question to contracting states

45. The ECtHR has jurisdiction over 46 nations and rarely declares moral issues as rights or absolute prohibitions. This is the approach it has taken when it has been asked to deal with sensitive issues including abortion, marriage, and surrogacy. The Court has generally hesitated (often under an expansive approach to Article 8) to prohibit something legalized by a contracting state while also being reluctant to force the legalization of something a contracting state prohibits.

46. Once a contracting state has settled such a question in its domestic law, the Court has generally considered that to fall within a state's margin of appreciation, while insisting that any standards applied must comply with Convention jurisprudence. For example, in the case of surrogacy, the Court has neither required nor prohibited legalization, recognizing that it raises sensitive moral questions. However, where countries have legalized it, or been faced with related factual situations, the Court has required countries to resolve any uncertainty that arises promptly and in the best interest of children. It appears to have taken a similar path in this case which leaves much to be resolved at a domestic level.

5 Conclusion

47. The facts of this case demonstrate so many of the concerns with legalizing the intentional ending of life. Belgium has seen a year-on-year increase in the number of cases and a regular expansion of the qualifying conditions. Despite clear violations of the domestic law even apart from Convention issues, neither the Commission, nor the prosecutor, nor the medical authorities demonstrated any concrete interest in reviewing this case. As a result of this decision, it will not be possible for the authorities to claim to have executed this without changing the way the Commission operates.

48. This decision may not be the last word in the case as the judgment will not become final until 4 January 2023, unless it is first referred to the Grand Chamber.