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SUICIDE ASSISTANCE FOR MENTALLY DISORDERED INDIVIDUALS IN SWITZERLAND AND THE STATE'S POSITIVE OBLIGATION TO FACILITATE DIGNIFIED SUICIDE

Haas c Suisse, Cour européenne des droits de l'homme, 1re section (20 janvier 2011) (Unreported)[1]

I. INTRODUCTION

In principle, any individual in Switzerland may assist the suicide of another, provided that the assistance is not selfishly motivated.[2] Moreover, the lawfulness of suicide assistance is not contingent on any particular status of the individual who dies (for example, whether he is terminally ill,) although he must have capacity in order for the final act to be considered suicide.[3] However, no great variation among assistors and the assisted is observable in Switzerland: in almost all cases, assisted suicide takes place with the involvement of a physician and a "right to die" organisation,[4] and the individual who dies suffers from a recognised medical condition.[5]

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[1] *Haas c Suisse* CEDH, n° 31322/07, 1re sect (20 janvier 2011) (Unreported). Available in French from http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=53352&sessionId=66753721&skin=hudoc-en&attachment=true

[2] The lawfulness suicide assistance results *a contrario* from Swiss Penal Code, art 115: "Any person who for selfish motives incites or assists another to commit or attempt to commit suicide shall, if that other person thereafter commits or attempts to commit suicide, be liable to a custodial sentence not exceeding five years or to a monetary penalty."

[3] G Bosshard, 'Switzerland' in J Griffiths, H Weyers and M Adams (eds), *Euthanasia and law in Europe* (Hart 2008) 471

[4] Data from 2001-2 found a right to die organisation to be involved in 92% of doctor assisted suicides in Switzerland: A van der Heide, L Deliens, K Faisst, T Nilstun, M Norup, E Paci, G van der Wal and PJ van der Maas, 'End-of-life decision-making in six European countries: descriptive study' (2003) 362 Lancet 345, 347

[5] G Bosshard, E Ulrich and W Bar, '748 cases of suicide assisted by a Swiss right-to-die organisation' (2003) 133 Swiss Med Wkly 310, Table 4; S Fischer, CA Huber, L Imhof, R Mahrer Imhof, M Furter, SJ Ziegler and G Bosshard, 'Suicide assisted by two Swiss right-to-die organisations' (2008) 34 J Med Ethics 810, Table 1

However, additional regulation applies to physician assisted suicide (PAS). Federal narcotics law permits physicians only to administer, dispense or prescribe fast acting barbiturates (the preferred lethal medication for assisted suicide) within the limits of accepted professional and scientific practice.[6] This requirement is reiterated in Cantonal health law.[7] In 1999, the Zurich Administrative Court held that PAS would only accord with accepted practice for conditions "indisputably leading to death".[8] Similarly, guidance issued in 2004 by the Swiss Academy of Medical Sciences (SAMS) sets as one precondition for PAS that "[t]he patient's disease justifies the assumption that he is approaching the end of life".[9]

Notwithstanding the case law and guidance, empirical evidence for the periods 1990-2000 and 2001-4 has revealed that Swiss physicians have prescribed lethal medication to individuals with "non-fatal conditions", including a small number of mentally disordered individuals.[10] However, whether it was commensurate with accepted practice to provide lethal medication to such individuals during these periods is uncertain. In the *Zurich Case*, it was held that it would be "extremely questionable" whether a mental disorder could be a condition "indisputably leading to death".[11] The psychiatrist who issued the prescription for lethal medication (on consultation of the individual's medical records alone) had his licence to prescribe controlled substances revoked. In 2004, the Aargau Administrative Court found a psychiatrist to have been negligent in assessing the diagnosis, prognosis and decisional capacity of several mentally

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[6] Loi fédérale sur les stupéfiants et les substances psychotropes du 3 octobre 1951, arts 9(1), 10, 11
[7] Bosshard (n 3) 473
[8] *Zurich Case* Verwaltungsgericht des Kantons Zürich, Entscheid der 3 Kammer VB Nr 9900145 (1999)
[9] Swiss Academy of Medical Sciences, 'Care of patients in the end of life' (2004), 6 http://www.samw.ch/dms/en/Ethics/Guidelines/Currently-valid-guidelines/e_RL_Lebensende.pdf accessed 25 August 2011
[10] Bosshard et al (n 5) Table 4; Fischer et al (n 5) Table 1
[11] *Zurich Case* (n 8); Bosshard (n 3) 473, 475

disordered individuals who had received suicide assistance, consequently incurring the same sanction.[12] In 2007 the Basel Criminal Court convicted a psychiatrist of negligent homicide for wrongly prescribing lethal medication to a mentally disordered individual who lacked capacity at the time of suicide in 2001.[13] The uncertain permissibility of the prescription of lethal medication to mentally disordered individuals is likely to have brought increased scrutiny during mandatory police investigations, consequently revealing the improper medical conduct present in these three cases. The *Haas* litigation resolved the question of whether it was impermissible *in principle* under Swiss Law to prescribe lethal medication to mentally disordered individuals, and provides an insight into the scope of the State's obligations to facilitate dignified suicide under the European Convention on Human Rights (ECHR).

II. THE HAAS LITIGATION

A. Swiss Legal Process

The applicant in *Haas* had suffered from severe bipolar disorder for some 20 years, during which time he had twice attempted suicide, and spent several periods in psychiatric institutions. In 2004 he became a member of *Dignitas*, subsequently soliciting its assistance to commit suicide. However, unable to find a psychiatrist willing to prescribe a lethal dose of sodium pentobarbital, the applicant's plans were frustrated.

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[12] *Aargau Case* Verwaltungsgericht des Kantons Aargau, Entscheid BE 200300354-K3 (2005); Bosshard (n 3) 476

[13] *Basel Case* Strafgericht Basel-Stadt (6 Juli 2007); Bosshard (n 3) 476

In 2005, the applicant sought authorisation from the Federal Office of Justice, the Federal Office of Public Health (FOPH) and the Zurich Health Authority (ZHA) to procure, via *Dignitas*, sodium pentobarbital in a pharmacy without prescription.[14] Each of the public bodies refused the request.[15] Specifically, the FOPH stated that sodium pentobarbital was only available in pharmacies on prescription. Moreover, it asserted that article 8 did not impose a positive obligation on States to create the conditions under which suicide might be committed without risk of failure or pain. The ZHA refused to grant the authorisation on identical grounds. On appeal, the Zurich Administrative Tribunal (ZAT) upheld the ZHA decision. The Federal Department of Home Affairs (FDHA) declared inadmissible the applicant's appeal against the FOPH decision, holding the applicant's circumstances not to constitute a state of emergency under which medication might be obtained without prescription.

The applicant appealed to the Federal Supreme Court (FSC) against the decisions of the ZAT and the FDHA, submitting, *inter alia*, that article 8 guaranteed the right to decide the moment and the manner of death, and thus any interference with the right had to be justified by article 8(2). The requirement that individuals obtain sodium pentobarbital by prescription, which the applicant claimed impossible to meet as a result of the threat of sanctions on physicians who prescribed lethal medication to mentally disordered individuals, constituted an interference with the right to private life. The applicant alleged that this interference, while in accordance with the law and in pursuit of a legitimate aim, was disproportionate in scope.[16]

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[14] As a safety measure, it is common for right-to-die organisations to store the lethal medication until it is used: Bosshard (n 3) 475

[15] *Haas c Suisse* (n 1) [8-12]

[16] *Haas c Suisse* (n 1) [13]

The FSC rejected the appeal. It held that the applicable national law precluded the supply of sodium pentobarbital without prescription, and that the applicant's situation was not one of exception permitting derogation from the law.[17] Moreover, it held the decisions of the public bodies in accordance with the law not to be in violation of article 8.[18] While the right to self-determination under article 8(1) included the right of individuals to decide the manner and moment of death, this right was to be distinguished from a right to assistance in suicide, whether by the State or a third party.[19] The State's primary obligation was to safeguard life, and while this obligation generally would not trump the autonomy of an individual with capacity, no positive obligation on the State to grant individuals access to their preferred means of suicide could be derived from article 8. On the contrary, the right to life guaranteed by article 2 required the State to implement a procedure designed to ensure that the decision to commit suicide reflected the true wishes of the individual concerned.[20]

The FSC accepted that a serious, incurable and longstanding mental disorder could cause suffering that might, with the passage of time, lead an individual to come no longer to consider his life worth living. In such cases, the prescription of sodium pentobarbital to a mentally disordered individual was not necessarily contraindicated nor to be excluded as a violation of the physician's duty of care. However, it would be necessary to distinguish between two classes of cases: first, cases where the wish to die emanated from a treatable mental disorder, and second, cases where the wish to die was the reasoned and settled decision of an individual with

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[17] ibid [15]
[18] ibid [16]
[19] *Haas* Schweizerisches Bundesgericht, Entscheid 2A48/2006, 2006 (3 November 2006) [6.1] Translated excerpts from the Supreme Court judgment are reproduced under paragraph 16 of the ECtHR judgment. For ease of reference, the paragraph numbers from the Supreme Court judgment are used.
[20] ibid [6.2.1]

capacity. Only to individuals in the second class of cases would it be permissible to prescribe sodium pentobarbital.[21] The determination of whether a mentally disordered individual fell within the first or the second class necessitated expert medical opinion, in particular an extensive psychiatric evaluation, which would only be guaranteed by continuing to require that sodium pentobarbital be issued on prescription.[22] To this extent, the legal regime relating to the prescription of narcotics was both proportionate and necessary in a democratic society.[23]

B. Subsequent Solicitation of Psychiatrists

Following the FSC judgment, the applicant wrote to 170 psychiatrists practising in the Basel area requesting that they accept him as a patient, solely to conduct the prescribed psychiatric evaluation.[24] No psychiatrist replied favourably to the letter. Reasons for refusal included a lack of time and/or expertise, ethical objections, and the fact that the applicant's disorder was treatable.[25]

C. The European Court of Human Rights

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[21] ibid [6.3.5.1]
[22] ibid [6.3.5.2]
[23] ibid [6.3.6]
[24] *Haas c Suisse* (n 1) [17]
[25] ibid [18]

Some eight months after the FSC judgment, the applicant applied to the European Court of Human Rights (ECtHR/the Court). He alleged that the impossibility of meeting the conditions for obtaining sodium pentobarbital (a prescription issued pursuant to an extensive psychiatric evaluation) interfered with his article 8 right to decide the moment and the manner of death. He advanced that in such "exceptional" circumstances, the access to lethal medication ought to be guaranteed by the State.[26]

The ECtHR first cited its decision in *Pretty v United Kingdom*: "As the Court has had previous occasion to remark, the concept of 'private life' is a broad term not susceptible to exhaustive definition".[27] It then reiterated its finding in *Pretty* that the "choice to avoid what [the applicant considered to] be an undignified and distressing end to her life" fell within the scope of article 8.[28] In the light of *Pretty*, the Court held that the right of an individual to decide the manner and moment of death, provided that he were able to form his own opinion and had the ability to act accordingly, was one of the aspects of the right to private life guaranteed by article 8.[29]

However, the Court then proceeded to distinguish *Haas* from *Pretty*. Whereas *Pretty* related to the existence of a "right to die", and the potential immunity from prosecution of assistors, the question before the Court was whether the State should derogate from the relevant legislation in order to allow the applicant to die without pain or risk of failure. Moreover, unlike in *Pretty*, the applicant in the present case was not in the terminal stages of an incurable degenerative

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[26] ibid [32]
[27] ibid [50]; *Pretty v United Kingdom* (2002) 35 EHRR 1 [61]
[28] *Haas c Suisse* (n 1) [50]; *Pretty* (n 27) [67]
[29] *Haas c Suisse* (n 1) [51] « la Cour estime que le droit d'un individu de décider de quelle manière et à quel moment sa vie doit prendre fin, à condition qu'il soit en mesure de forger librement sa propre volonté à ce propos et d'agir en conséquence, est l'un des aspects du droit au respect de sa vie privée au sens de l'article 8 de la Convention ».

illness that would render suicide impossible, and thus could not truly be considered as disabled.[30]

Consequently, it was appropriate to consider the applicant's request for authorisation to procure sodium pentobarbital without prescription from the perspective of a positive obligation on the State to take those measures necessary to permit dignified suicide. This would entail a balancing exercise of the relevant interests. In such an exercise, the State possessed a certain margin of appreciation, which would vary in accordance with the nature of the issues and the importance of the interests at stake.[31]

Applying that to the case before them, the Court held that the ECHR was to be read as a whole. Therefore, when considering an alleged violation of article 8, it was necessary to consider article 2, which required States to safeguard vulnerable individuals (including from themselves), particularly if they lacked the capacity to make an informed decision.[32] In consideration of the lack of consensus among the Member States of the Council of Europe in respect of the right of the individual to choose the moment and the manner of death, the Court concluded that the State benefited from a considerable margin of appreciation.[33]

Thus while the Court recognised the applicant's wish to commit suicide in a manner that was certain, dignified and without excessive pain and suffering, it held that the Swiss legal regime

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[30] ibid [52]
[31] ibid [53] « il convient d'examiner la demande du requérant à avoir accès au pentobarbital sodique sans ordonnance médical sous l'angle d'une obligation positive de l'Etat de prendre des mesures nécessaires permettant un suicide digne »
[32] Ibid [54]
[33] Ibid [55]

had the legitimate aim of protecting individuals from premature decisions, as well as safeguarding against abuse – in particular, situations where an individual lacking capacity obtained lethal medication.[34] Such measures were obligatory in jurisdictions that had a permissive stance toward assisted suicide, considering the inherent risks of abuse.[35] Article 2 required the State to implement a procedure designed to ensure that a decision to commit suicide reflected the true wishes of the individual concerned; the issue of a prescription following an extensive psychiatric evaluation was one way in which the requirement might be satisfied.[36]

The Court also recognised that psychiatrists might be unwilling to prescribe lethal medication, and that this reticence might be amplified where there was a risk of criminal prosecution. However, similar to the Swiss government,[37] the Court was unconvinced that the applicant faced the impossibility of finding a physician willing to accept him as a patient.[38] Therefore, contrary to the applicant,[39] who claimed a violation of the principle that guaranteed "practical and effective" ECHR rights,[40] the Court did not consider the right to choose the moment and the manner of death to exist only in theoretical or illusory form.[41]

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[34] ibid [56]
[35] ibid [57-58]
[36] ibid [58]
[37] ibid [44]
[38] ibid [59-60]
[39] ibid [33]
[40] *Artico v Italy* (1981) 3 EHRR 1 [33]
[41] Ibid [60]

For these reasons, and taking into account the margin of appreciation, the Court concluded that even assuming the existence of a positive obligation to adopt measures facilitating dignified suicide, no violation of this obligation had been committed by the Swiss authorities.[42]

III. IMPLICATIONS OF *HAAS* FOR PHYSICIAN ASSISTED SUICIDE IN SWITZERLAND

The FSC decision in *Haas* establishes that it is not impermissible *in principle* for Swiss physicians to provide suicide assistance, inter alia, to mentally disordered individuals, signalling a departure from prior case law,[43] and the SAMS guidance, which, while not legally binding, previously had been stated to enjoy "almost the respect due legislation".[44] In order to render such assistance permissible, the FSC abandoned the precondition of terminal illness in favour of a criterion whereby an individual's condition – in this instance, mental disorder – causes suffering that leads him to consider his life no longer worth living.

The adoption of the broader suffering criterion aligns the Swiss case law with the practice of physicians and the right to die organisations, which have provided suicide assistance to individuals with non fatal conditions and individuals with mental disorders[45] – ostensibly without sanction. Reluctance prior to *Haas* to prosecute physicians who provided suicide

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[42] Ibid [60]
[42] Ibid [61]
[43] *Zurich Case* (n 8); *Aargau Case* (n 12)
[44] Bosshard (n 3) 465
[45] e.g. 21.1% and 2.7% respectively among deaths assisted by Exit in the Zurich Canton for 1990-2000: Bosshard et al (n 5) Table 4; 24.9% and 2.9% respectively among deaths assisted by Exit and Dignitas investigated by the Institute of Legal Medicine Zurich for 2001-2004: Fischer et al (n 5) Table 1

assistance to mentally disordered individuals may be explained by the fact that article 115 of the Swiss Penal Code imposes no requirement that suicide assistance accord with accepted practice. Prosecutions would therefore only occur for egregious violations of the physician's duty of care in circumstances that precluded conviction under article 115.[46] The *Haas* judgment may provide physicians prescribing lethal medication to individuals who are not terminally ill with greater certainty in respect of the permissibility of their conduct.

However, greater legal certainty for physicians may come at a cost to individuals seeking suicide assistance. While the position for individuals with non fatal conditions is unclear, the procedure established for suicide assistance of mentally disordered individuals is significantly more stringent than that which applies to individuals who are terminally ill. This may be because the existence and extent of suffering that has a somatic origin (and which has a predictable trajectory with death at its end) is more readily perceptible, and thus more susceptible to an evaluation of its reasonableness in producing a wish to die. If the rationale for the wish to die is relatively uncontroversial, this lends itself to a finding that the individual is acting autonomously, that is, with capacity, and absent undue influence.

Since *Haas*, individuals with mental disorder seeking PAS are required to undergo an extensive psychiatric evaluation with a specialist, during which time treatment effectively may be obligatory.[47] This may be because suffering that has a non somatic origin is more difficult to perceive, undermining evaluation of its reasonableness as a basis for suicide. Faced with this difficulty, physicians are in addition required to investigate the source of the wish to die (or

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[46] *Zurich Case* (n 8); *Aargau Case* (n 12); Similar reluctance may feature in instances of physician euthanasia: Bosshard (n 3) 468

[47] In order to canvass alternatives to suicide: *Haas c Suisse* (n 1) [60]

perhaps more accurately, the suffering), that is, whether it emanates from a treatable mental disorder, or whether it is (or produces) the reasoned and settled decision of an individual with capacity. Therefore, in seeking to establish whether the decision is "autonomous and all-encompassing",[48] the physician is not only verifying whether the individual has capacity, and is free from undue influence, but also whether he is acting authentically. Authenticity, in this sense, would appear intimately linked to whether a condition is incurable.

Nevertheless, the procedure developed in *Haas* is problematic insofar as mentally disordered individuals are subject to measures not imposed on individuals with somatic conditions. Individuals with somatic illness are not required to demonstrate that the wish to die is authentic – no distinction is made between the individual and the condition. Moreover, unlike individuals with somatic conditions,[49] mentally disordered individuals may not decline alternatives, *viz*, treatment.[50] However, if the underlying assumption with regard to mentally disordered individuals holds for those with somatic conditions (that a wish to die is only authentic when the source of the suffering is incurable), it would be illegitimate to allow any refusal of treatment with a greater than *de minimis* chance of extending life. Alternatively, the underlying assumption may be false – and the link between incurability and authenticity artificial.[51] Refusal in individuals with somatic conditions demonstrates that it is possible to have a treatable illness *and* make a purportedly authentic decision to die. It is speculated, therefore, that the additional control of authenticity to which mentally disordered individuals are subject

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[48] *Haas* (n 19) [6.3.5.1] « une décision autonome et globale »

[49] SAMS (n 9) 6

[50] The position is similar elsewhere. In *Chabot* the Dutch Supreme Court held: "there can in principle be no question of lack of prospect of improvement if there is a realistic alternative to relieve the suffering which the patient has in complete freedom rejected": J Griffiths, A Bood and H Weyers, *Euthanasia and law in the Netherlands* (Amsterdam University Press 1998) 82

[51] cf DJ Tan, PT Hope, DA Stewart and PR Fitzpatrick, 'Competence to make treatment decisions in anorexia nervosa: thinking processes and values' (2006) 13 Philos Psychiatr Psychol 267

prior to the provision of suicide assistance is little more than psychiatric paternalism. Ultimately, it is likely that the *Haas* procedure has increased the difficulty for individuals with mental disorder to receive suicide assistance in Switzerland.

IV. After *Haas c Suisse*: A Right to Suicide, A Right to Dignified Suicide?

"Being allowed to do something is not always equivalent to having a right to do it".[52] Thus it has been argued that the decriminalisation of suicide conferred no right to suicide under English Law.[53] In *Haas c Suisse* the ECtHR held individuals to have the right under article 8 to decide the manner and moment of death (provided they are able to form their own opinion and have the ability to act accordingly). By operation of section 2(1)(a) of the Human Rights Act 1998, which requires English Courts to take relevant ECtHR judgments into account, this must recognise, *inter alia*, a right to suicide.[54] However, since the right extends only to those individuals who are able to commit suicide unaided – albeit at their risks and perils – its recognition is of little practical effect.

However, the hesitant recognition in *Haas c Suisse* of a positive obligation on the State to adopt measures facilitating "dignified" suicide (suicide without risk of pain or failure) may be of significance to individuals desiring suicide assistance in jurisdictions where it is unlawful to provide any such assistance.[55] Jurisdictions with permissive legal regimes (such as Switzerland)

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[52] J Coggon, 'Could the right to die with dignity represent a new right to die in English law?' (2006) 14 Med Law Rev 219, 219

[53] Suicide Act 1961 (c 60); e.g. J Coggon, 'Ignoring the moral and intellectual shape of the law after Bland: the unintended side-effect of a sorry compromise' [2007] 27 Legal Studies 110, 113; *Pretty* (n 27) [86]

[54] *Haas c Suisse* (n 1) [51]

[55] Ibid [52]

that set conditions on lawful assistance (such as the procedure set by the FSC in *Haas*) will more easily be able to justify restrictions on assistance under article 8(2) ECHR than jurisdictions that have blanket bans on suicide assistance (such as England and Wales). This is because permissive regimes may more easily demonstrate that restrictions imposed are "proportionate to the legitimate aim pursued",[56] *viz*, that they strike an appropriate balance between the positive obligations to "safeguard life by protecting the weak and vulnerable" (article 2),[57] and to facilitate dignified suicide (article 8).

It is difficult to envisage the State being able to justify a blanket prohibition on suicide assistance (or a procedure tantamount to prohibition) under article 8(2) ECHR when this is certain to result in an "undignified and distressing end to [...] life".[58] To persist with the prohibition would appear to run counter to the principles elaborated by the Court, insofar as the ECHR guarantees rights that are practical and effective,[59] and thus would require the State not to impose a blanket restriction on individuals seeking dignified suicide. However, the margin of appreciation accorded to States in this domain is considerable. Indeed, it is possible that the United Kingdom would meet its positive obligation to facilitate dignified suicide by virtue of the prosecutorial policy in operation in England and Wales, which, although indirectly excluding access to lethal medication within the jurisdiction, renders prosecution unlikely for those individuals who assist others to travel abroad to receive (dignified) suicide assistance.[60]

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[56] *Pretty* (n 27) [86]
[57] *Pretty* (n 27) [74]
[58] *Pretty* (n 27) [67]
[59] *Artico* (n 40) [33]
[60] Director of Public Prosecutions, 'Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide' (2010) http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.pdf accessed 25 August 2011

Whether this is an acceptable way for a State to discharge its ECHR obligations is quite another matter.