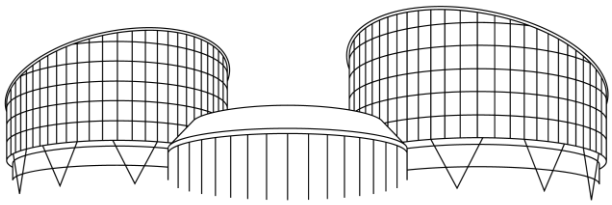

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF GROSS v. SWITZERLAND

(Application no. 67810/10)

JUDGMENT

STRASBOURG

14 May 2013

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Gross v. Switzerland,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Guido Raimondi, *President,*
Danutė Jočienė,
Peer Lorenzen,
András Sajó,
Işıl Karakaş,
Nebojša Vučinić,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 9 April 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 67810/10) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swiss national, Ms Alda Gross ("the applicant"), on 10 November 2010.

2. The applicant was represented by Mr F. Th. Petermann, a lawyer practising in St. Gallen. The Swiss Government ("the Government") were represented by their Agent, Mr F. Schürmann, Head of the Human Rights and Council of Europe Section of the Federal Ministry of Justice.

3. The applicant alleged, in particular, that her right to decide how and when to end her life had been breached.

4. On 5 January 2012 the application was communicated to the Government. It was also decided to grant the case priority (Rule 41 of the Rules of Court).

5. The parties replied in writing to each other's observations. In addition, third-party comments were received from: the Alliance Defending Freedom (formerly known as the Alliance Defense Fund), an association based in the United States of America dedicated to protecting the right to life on a worldwide basis, represented by Mr P. Coleman; the European Centre for Law and Justice, an association based in France specialising in questions of bioethics and the defence of religious freedom, represented by Mr G. Puppinck; Americans United for Life, an association based in the United States of America dedicated to protecting the right to life from conception until natural death, represented by Mr W. L. Saunders; and Dignitas, an association based in Switzerland aimed at ensuring that its members may receive end-of-life care and die in line with human dignity,

represented by Mr L. A. Minelli. All of the third party interveners had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1931 and lives in Greifensee in Switzerland.

7. For many years, the applicant has expressed the wish to end her life. She explained that she is becoming more and more frail as time passes and is unwilling to continue suffering the decline of her physical and mental faculties.

8. In 2005, following a failed suicide attempt, the applicant received inpatient treatment for six months in a psychiatric hospital. This treatment did not, however, alter her wish to die. As the applicant was afraid of the possible consequences of another failed suicide attempt, she decided that she wished to end her life by taking a lethal dose of sodium pentobarbital. She contacted an assisted-death association, EXIT, for support, which replied that it would be difficult to find a medical practitioner who would be ready to provide her with a medical prescription for the lethal drug.

9. On 20 October 2008 a psychiatrist, Dr T., having examined the applicant on 13 and 19 August 2008, submitted an expert opinion on the applicant's capacity to form her own judgment (*Urteilsfähigkeit*). He noted that the applicant had never been seriously ill and did not have to undergo major surgery. However, in recent years, the applicant had noted a decline in her physical and, to a certain degree, her mental faculties. Her memory, her capacity to concentrate and her attention span were not what they used to be. She had difficulty undertaking long walks and her range of activities and her circle of friends had diminished. Accordingly, it had been her strong desire for several years to be allowed to end her life, which she felt was becoming more and more monotonous. She could hardly bear her physical decline. Furthermore, she increasingly suffered from eczema and back aches and every change in her environment terrified her. Her quality of life was constantly decreasing, and she also suffered from the fact that she could not talk openly about her wish to die with her friends.

10. On the basis of his psychiatric examination, Dr T. observed that there was no doubt that the applicant was able to form her own judgment. He further noted that her wish to die was reasoned and well-considered, had persisted for several years and was not based on any psychiatric illness. From a psychiatric/medical point of view, Dr T. did not have any objection

to the applicant being prescribed a lethal dose of sodium pentobarbital. However, he refrained from issuing the necessary prescription himself on the grounds that he did not want to confuse the roles of medical expert and treating physician.

11. By letters of 5 November 2008, 1 December 2008 and 4 May 2009 the applicant's representative submitted the applicant's request to be given a prescription for sodium pentobarbital to three further medical practitioners, who all declined to issue the requested prescription. In a letter dated 3 December 2008 medical practitioner Dr B. explained that she felt prevented by the code of professional medical conduct (*aus standesrechtlichen Gründen*) from issuing the requested prescription, given that the applicant was not suffering from any illness. In a letter dated 11 May 2009 medical practitioner Dr S. stated that she considered the applicant's wish to die to be understandable. She stated that she would be ready to examine the applicant and to consider her request to issue the required prescription, provided that the applicant's counsel could guarantee that she would not risk any consequences from the point of view of the code of professional medical conduct. When the applicant's counsel replied that he could not give such a guarantee, Dr S. declined the request on the grounds that she did not wish to be drawn into lengthy judicial proceedings.

12. On 16 December 2008 the applicant submitted a request to the Health Board of the Canton of Zurich to be provided with 15 grams of sodium pentobarbital in order for her to commit suicide. She submitted that she could not reasonably be expected to continue her search for a physician who was ready to issue the required medical prescription.

13. On 29 April 2009 the Health Board rejected the applicant's request on the grounds that neither Article 8 of the European Convention on Human Rights nor the Swiss Constitution obliged the State to provide a person who wished to end his or her life with the means of suicide of their choice.

14. On 29 May 2009 the applicant lodged an appeal with the Administrative Court of the Canton of Zurich. On 22 October 2009, the Administrative Court rejected the appeal. The Administrative Court noted, at the outset, that assisting someone to commit suicide was only subject to criminal liability under Article 115 of the Swiss Criminal Code if it was carried out for selfish motives. Accordingly, a physician who provided a patient suffering from a terminal illness with the means to commit suicide was not subject to criminal liability (the Administrative Court referred to the case-law of the Swiss Federal Supreme Court, judgment of 3 November 2006, BGE 133 I 58, summarised in *Haas v. Switzerland*, no. 31322/07, §§ 15-16, ECHR 2011). The prerequisite of a medical prescription for obtaining a lethal dose of sodium pentobarbital was in accordance with Article 8 of the Convention and with the Swiss Constitution. It ensured that a medical practitioner had examined all pertinent aspects of the matter and thus served the general interest in public

health and safety and – in connection with assisted suicide – the prevention of crime and combating the risk of abuse. The medical prescription served the aim of preventing premature decisions and guaranteed that the intended action was medically justified. It further ensured that the decision was based on a deliberate exercise of the free will of the person concerned.

15. The Administrative Court observed that Dr T., in his expert opinion, had stated that he did not have any objection from a psychiatric/medical point of view to the applicant being prescribed a lethal dose of sodium pentobarbital. However, Dr T. had merely examined whether the applicant was able to form her own free will and whether her wish to die was well thought out and persistent. He had not, however, considered whether the applicant was suffering from any illness which would justify the assumption that the end of her life was near. Neither had he examined whether the applicant's wish to die might be the manifestation of a disease which could be medically treated. The wish to die taken on its own, even if it was well-considered, was not sufficient to justify the issuing of a medical prescription. Accordingly, the content of the case file did not demonstrate that the necessary prerequisites for issuing a medical prescription had been fulfilled in the instant case. There was therefore a need for further medical examination.

16. Under these circumstances, there was no sufficient reason to dispense the applicant from the necessity of a thorough medical examination and of a medical prescription.

17. The applicant lodged an appeal against the Administrative Court's judgment. She repeated her request to be provided with 15 grams of sodium pentobarbital, alternatively through a pharmacy. She further asked the Federal Supreme Court to establish that the provision of a lethal dose of this substance to a person who was able to form her own judgment and was not suffering from a mental or physical illness did not constitute a violation of a medical practitioner's professional duties.

18. Relying, explicitly or in substance, on Articles 2, 3 and 8 of the Convention, she alleged that the impugned decisions had rendered her right to decide by which means and at what point her life would end illusory. She averred that the State was under an obligation to provide the necessary means allowing her to exercise this right in a concrete and effective way.

19. On 12 April 2010 the Federal Supreme Court rejected the applicant's appeal. Relying on its own case-law and on the Court's judgment in the case of *Pretty v. the United Kingdom* (no. 2346/02, ECHR 2002-III), the Federal Supreme Court considered, in particular, that there was no (positive) obligation enjoining the State to guarantee an individual's access to a particularly dangerous substance in order to allow him or her to die in a painless way and without the risk of failure. The Federal Supreme Court observed that proceedings in the *Haas* case were pending before the European Court of Human Rights. Accordingly, it was up to that Court to

examine whether the Federal Supreme Court had correctly interpreted Article 8 of the Convention in this context. Pending these proceedings, the Federal Supreme Court did not see any reason to revise its reasoning in the *Haas* judgment.

20. The Federal Supreme Court furthermore held that the requirement of a medical prescription pursued the legitimate aims of protecting the individual concerned from making a hasty decision and of preventing abuse. The restriction on access to sodium pentobarbital served the protection of public health and safety. In view of the ethical questions relating to medically assisted suicide, it was primarily up to the democratically elected legislature to decide if and under which circumstances the purchase, transport and storage of sodium pentobarbital should be allowed. The Federal Supreme Court observed in this context that a reform of the law on assisted suicide was currently the subject of political debate.

21. The Federal Supreme Court further observed that the applicant undisputedly did not fulfil the prerequisites 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 ("SAMS", see paragraphs 32-33 below), as she was not suffering from a terminal illness, but had expressed her wish to die because of her advanced age and increasing frailty. Even though the Federal Supreme Court had considered in its previously cited decision that the issuing of a medical prescription for sodium pentobarbital to a person suffering from an incurable, persistent and serious psychological illness did not necessarily amount to a violation of a doctor's professional duties, this exception had to be handled with "utmost restraint" and did not enjoin the medical profession or the State to provide the applicant with the requested dose of sodium pentobarbital to put an end to her life. The Federal Supreme Court further noted that the issuing of the requested substance required a thorough medical examination and, with respect to the persistence of the wish to die, long-term medical supervision by a specialist practitioner who was ready to issue the necessary prescription. This requirement could n

ot be circumvented by the applicant's request for an exemption from the necessity of obtaining a medical prescription.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Domestic law

22. The relevant provisions of the Swiss Criminal Code are worded as follows:

Article 114 – Homicide at the victim's request

> "Any person who for commendable motives, and in particular out of compassion, causes the death of a person at that person's own genuine and insistent request shall be liable to a custodial sentence not exceeding three years or to a monetary penalty."

Article 115 – Inciting and assisting suicide

"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."

23. The Federal Law on Drugs ("the Drugs Act") of 3 October 1951 regulates the use and supervision of drugs. The Federal Law on Medicinal Products and Medical Devices ("the Therapeutic Products Act") of 15 December 2000 applies to drugs covered by the Drugs Act where they are used as therapeutic products (section 2, subsection (1)(B) of the Therapeutic Products Act). The Drugs Act remains applicable, however, if the Therapeutic Products Act does not regulate a specific matter or if its regulation is less extensive (section 2, subsection (1) *bis* of the Drugs Act).

24. Under section 1 of the Drugs Act and the Order of 12 December 1996 on Drugs and Psychotropic Substances issued by the Swiss Institute for Therapeutic Products, sodium pentobarbital is considered to be a drug within the meaning of the Drugs Act. In addition, it appears from the Federal Court's judgment of 3 November 2006 that sodium pentobarbital is categorised as a category B medicinal product within the meaning of the Therapeutic Products Act.

25. Section 9 of the Drugs Act lists the members of the medical professions who may obtain drugs without authorisation. Section 9(1) is worded as follows:

"Doctors, dentists, veterinary surgeons and those managing a public or hospital pharmacy who practise as self-employed professionals by virtue of a decision of the cantonal authorities adopted pursuant to the Federal Law of 19 December 1877 on the practice of the professions of doctor, pharmacist and veterinary surgeon in the Swiss Confederation may obtain, hold, use and issue drugs without authorisation, within the limits justified by their practice, in conformity with the requirements of their profession. This shall be without prejudice to cantonal provisions regulating direct dispensing by doctors and veterinary surgeons..."

26. Pursuant to section 10(1) of the same Act, only doctors and veterinary surgeons are authorised to prescribe drugs. Doctors and veterinary surgeons may write such prescriptions only in so far as this is medically acceptable and only for patients whom they have examined personally (section 11(1) of the same Act, and regulation 43(1) of the Order on Drugs of 29 May 1996).

27. Sections 24 and 26 of the Therapeutic Products Act are worded as follows:

Section 24 – Dispensing of medicinal products subject to prescription

(1) The following persons shall be entitled to dispense prescription-only medicinal products:

(a) pharmacists, on presentation of a doctor's prescription and, in justified exceptional cases, without a doctor's prescription;

(b) all other medical professionals in accordance with the provisions on dispensing physicians;

(c) all duly trained professionals, under the supervision of a person specified in subsections (1) (a) and (b).

...”

Section 26 – Principle of prescription and dispensing

“(1) The recognised rules of pharmaceutical and medical sciences must be respected when prescribing and dispensing medicinal products.

(2) A medicinal product may only be prescribed if the state of health of the consumer or patient is known.”

28. Chapter 8 of the same Act contains criminal-law provisions targeting persons who intentionally endanger the health of another person in relation to an activity covered by the Act. Section 86 of the Act provides:

Section 86 – Offences

“"(1) Unless an offence carrying a more severe penalty under the Criminal Code or the Narcotics Act of 3 October 1951 has been committed, any person who wilfully endangers human health by:

(a) neglecting his duty to exercise diligence in dealing with therapeutic products;

(b) manufacturing, placing on the market, prescribing, importing or exporting, or trading in a foreign country, medicinal products without authorisation or licence or while infringing other provisions of this Act;

(c) dispensing medicinal products without authorisation;

...

shall be liable to a term of imprisonment or to a fine not exceeding 200,000 francs.

(2) If the person concerned acts in his professional capacity, he or she shall be liable to a term of imprisonment not exceeding five years and to a fine not exceeding 500,000 francs.

(3) If the person concerned acts through negligence, he or she shall be liable to a term of imprisonment not exceeding six months or a fine of up to 100,000 francs.“

B. Legislative actions

29. On 28 October 2009, the Swiss Federal Council submitted two alternative legal projects aimed at regulating organised assisted suicide. It proposed two options that would change Swiss criminal law: the determination in the Criminal Code of clear duties of care for employees of assisted suicide organisations, or a complete ban on organised assisted suicide *per se* (see the press release issued by the Federal Department of Justice and Police on 28 October 2009). The consultation of the cantons, political parties and other interested parties (*Vernehmlassung*) demonstrated that no consensus on the issue could be reached. While a majority of the

consulted parties considered that the federal law should define specific duties of care within the context of assisted suicide, they could not agree on the concrete implementation. On 29 June 2011 the Federal Council decided to refrain from including specific regulations on organised assisted suicide in criminal law, while expressing its intent on fostering suicide prevention and palliative care in order to reduce the number of suicides (see the press release issued by the Swiss Federal Council on 29 June 2011).

C. The case-law of the Federal Supreme Court

30. On 3 November 2006 the Federal Supreme Court was called upon to examine a request to be granted a lethal dose of sodium pentobarbital lodged by a plaintiff who had been suffering from a serious bipolar affective disorder and considered that as a result, he could no longer live in a dignified manner. Since that substance was only available on prescription, he approached several psychiatrists to obtain it, but was unsuccessful. In its judgment (published in the Official Collection of Decisions of the Federal Supreme Court, BGE 133 I 58, summarised in *Haas*, cited above, §§ 15-16), the Federal Supreme Court considered that sodium pentobarbital could not be issued without a medical prescription. It noted, in particular, that section 24(1)(a) of the Therapeutic Products Act had to be interpreted narrowly and did not allow for an exemption in the event that no doctor could be found who was ready to issue a prescription. The Federal Supreme Court further considered that the following prerequisites had to be met before a doctor could issue a medical prescription for sodium pentobarbital: a thorough and considered examination; a medical indication; and, with regard to the genuineness of the wish to die and capacity for discernment in this connection, monitoring over a certain period by a medical specialist. Following that judgment, in May 2007 the plaintiff wrote to 170 psychiatrists setting out his case and asking each of them whether they would agree to produce a psychiatric report on him with a view to issuing a prescription for sodium pentobarbital. None of the doctors responded positively to his request.

31. On 16 July 2010 the Federal Supreme Court examined the validity of an agreement concluded by the General Public Prosecutor of the canton of Zurich and the assisted-death organisation EXIT aimed at lying down specific rules to be observed in assisted-death cases. The Federal Supreme Court considered that the agreement was invalid as it lacked a legal basis and was not in accordance with the domestic law (BGE 136 II 415).

D. Medical ethics guidelines

32. In its judgment given on 3 November 2006, the Federal Supreme Court referred to the medical ethics guidelines on the care of patients at the

end of life which were adopted on 25 November 2005 by the Swiss Academy of Medical Sciences (SAMS), an association of the five medical faculties and the two veterinary faculties in Switzerland. According to the case-law of the Federal Supreme Court (judgment of 26 August 2010, BGE 136 IV 97), the guidelines issued by SAMS do not have the formal quality of law. As they prescribe a number of precautionary measures, they can be classed as a code of conduct — the value of which is generally accepted by the practitioners bound by it. Furthermore, these guidelines may serve to define the duty of diligence in criminal proceedings or in proceedings concerning civil liability.

33. The scope of application of these guidelines is defined as follows:

1. Scope of application

"(1) These guidelines concern the care of patients at the end of life. These are patients whose doctor has arrived at the conclusion, on the basis of clinical signs, that a process has started which, as experience indicates, will lead to death within a matter of days or a few weeks."

Section 4 of these guidelines reads as follows:

4. The limits of medical intervention

"Respect for the patient's wishes reaches its limit if the patient asks for measures to be taken that are ineffective or to no purpose, or that are not compatible with the personal moral conscience of the doctor, the rules of medical practice or applicable law."

4.1. Assisted suicide

"According to Article 115 of the Penal Code, helping someone to commit suicide is not a punishable offence when it is done for altruistic reasons. This applies to everyone.

With patients at the end of life, the task of the doctor is to alleviate symptoms and to support the patient. It is not his task to directly offer assistance in suicide, rather he is obliged to alleviate any suffering underlying the patient's wish to commit suicide. However, in the final phase of life, when the situation becomes intolerable for the patient, he or she may ask for help in committing suicide and may persist in this wish.

In this borderline situation a very difficult conflict of interests can arise for the doctor. On the one hand assisted suicide is not part of a doctor's task, because this contradicts the aims of medicine. On the other hand, consideration of the patient's wishes is fundamental for the doctor-patient relationship. This dilemma requires a personal decision of conscience on the part of the doctor. A decision to provide assistance to commit suicide must be respected as [a decision of that sort]. In any case, the doctor has the right to refuse help in committing suicide. If he decides to assist a person to commit suicide, it is his responsibility to check the following preconditions:

- The patient's disease justifies the assumption that he is approaching the end of life.

- Alternative possibilities for providing assistance have been discussed and, if desired, have been implemented.

- The patient is capable of making the decision, his wish has been well thought out, without external pressure, and he persists in this wish. This has been checked by a third party, who is not necessarily a doctor.

The final action in the process leading to death must always be taken by the patient himself."

4.2. Killing on request

"Even if requested seriously and insistently, the killing of a patient must be refused by the doctor. According to Article 114 of the Penal Code, killing on request is a criminal offence."

III. COMPARATIVE LAW

34. The research conducted by the Court in the context of the *Haas* case (cited above, §§ 29-31) indicates that certain member States of the Council of Europe have specific regulations covering access to substances liable to facilitate suicide.

35. In Belgium, for example, the Law of 28 May 2002 defines euthanasia as an act carried out by a third party which intentionally ends an individual's life at that individual's request (section 2 of the Law). A pharmacist who issues a "lethal substance" does not commit an offence where this is done on the basis of a prescription in which the doctor has explicitly stated that he or she is acting in accordance with the law. The implementing regulations establish the criteria of prudence and the conditions which must be met for the prescription and issuing of such substances; the necessary measures must also be taken to ensure the availability of the lethal substances.

36. In Luxembourg, the Law of 16 March 2009 decriminalised euthanasia and assisted suicide. Under that Law, access to a substance enabling suicide is only lawful for a doctor if he or she is playing an integral part in the process of euthanasia or assisted suicide.

IV. INTERNATIONAL LAW

37. Sodium pentobarbital is listed in Schedule III of the Convention on Psychotropic Substances of 21 February 1971, to which the Swiss Confederation acceded on 22 April 1994. Article 9 of that Convention reads as follows:

Article 9: Prescriptions

"1. The Parties shall require that substances in Schedules II, III and IV be supplied or dispensed for use by individuals pursuant to medical prescription only, except when individuals may lawfully obtain, use, dispense or administer such substances in the duly authorized exercise of therapeutic or scientific functions.

2. The Parties shall take measures to ensure that prescriptions for substances in Schedules II, III and IV are issued in accordance with sound medical practice and

subject to such regulation, particularly as to the number of times they may be refilled and the duration of their validity, as will protect the public health and welfare.

3. Notwithstanding paragraph 1, a Party may, if in its opinion local circumstances so require and under such conditions, including record-keeping, as it may prescribe, authorize licensed pharmacists or other licensed retail distributors designated by the authorities responsible for public health in its country or part thereof to supply, at their discretion and without prescription, for use for medical purposes by individuals in exceptional cases, small quantities, within limits to be defined by the Parties, of substances in Schedules III and IV."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

38. The applicant complained that the Swiss authorities, by depriving her of the possibility of obtaining a lethal dose of sodium pentobarbital, had violated her right to decide by what means and at what point her life would end. She relied on Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

39. The Government contested that argument and invited the Court to declare the present complaint inadmissible as being manifestly ill-founded.

A. Admissibility

40. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

41. The applicant submitted that the fact that the required dose of sodium pentobarbital was only available on medical prescription, combined with the fact that medical practitioners refused to issue such a prescription to a person, who, like herself, was not suffering from any terminal illness,

had rendered her right to decide by what means and at what point her life would end theoretical and illusory. She considered that ingesting sodium pentobarbital was the only dignified, certain and pain-free method of committing suicide. She further pointed out that she had, through her counsel, unsuccessfully sought authorisation to obtain a lethal dose of cyanide or a firearm in order to end her life.

42. The applicant further considered that the State was under a general obligation to provide the means by which its citizens might make use of their Convention Rights. She pointed out that she was not in a position to fulfil the Federal Supreme Court's requirement of "long-term supervision by a medical practitioner", as Swiss psychiatrists, under pressure from their professional governing body, refused to take part in treatments which had the ultimate aim of the patient's death or which, at the least, accepted the possibility of this outcome.

43. The Federal Supreme Court had, furthermore, refused to consider the applicant's argument that both domestic law and the international Convention on Psychotropic Substances allowed for an exemption from the requirement of a medical prescription.

44. The Supreme Court, had, furthermore, failed to establish a concrete risk of abuse. No concrete abuse case had ever been alleged in the course of the public debate on assisted suicide. If the required substance was given to the applicant via an assisted-suicide association, any possible risk to the health of others could be ruled out. On the other hand, having regard to the statistics on failed suicide attempts in Switzerland, the applicant herself ran a much higher risk of her own health being damaged by a failed suicide attempt.

45. The Supreme Court's judgment had been self-contradictory, in that it had relied on the fact that the applicant did not fulfil the requirements of the medical ethics guidelines on the care of patients at the end of life. By relying on these guidelines, the Supreme Court had presupposed that the applicant's suicide had to be justified from a medical point of view. This point of view was incompatible with the assumption that any person who was able to form his or her judgment had the right to decide on the time and manner of their own death. Accordingly, there was no need for any medical justification. The applicant further pointed out that the medical ethics guidelines did not have the formal quality of law and had not been adopted through the democratic process. Furthermore, they had not been applicable in the instant case, because they presupposed that the end of a patient's life was near.

2. The Government's submissions

46. Relying on the Court's case-law (the Government referred to the case of *Pretty*, cited above, §§ 68 *et seq.*), the Government submitted that the States were entitled to regulate activities which were detrimental to the

life and safety of other individuals and that it was primarily up to the State to assess the risk and the likely consequences of possible abuse in the context of assisted suicide. The Court had further found that clear risks of abuse existed, notwithstanding the arguments as to the possibility of safeguards and protective procedures; and that even a blanket ban on assisted suicide was not disproportionate. The Government further relied on the principles developed by the Court in the *Haas* judgment (cited above).

47. With regard to the question whether there had been an interference with the applicant's Article 8 rights or whether there was a positive obligation incumbent on the State, the Government did not see a reason to depart from the approach adopted in this respect by the Court in the *Haas* case. They considered, in any event, that any interference with the applicant's rights under Article 8 had been justified under paragraph 2 of that same Article.

48. The authorities' refusal to provide the applicant with a lethal dose of sodium pentobarbital had been in accordance with the law. The restrictions imposed on access to that drug served the aims of protecting life, health and public safety and of preventing crime.

49. According to the Government, the applicant had made only very limited efforts to obtain a prescription for sodium pentobarbital from a medical practitioner. The expert opinion prepared by Dr T. had been based on only two interviews of approximately one-and-a-half hours each and thus had not complied with the prerequisites developed in the case-law, which required a thorough examination of the applicant's situation, based on medical supervision of a certain duration. Subsequently, the applicant had contacted three medical practitioners. In the absence of any further steps being taken, the applicant had failed to demonstrate that it had been impossible to find a practitioner who would have been ready to issue the requested prescription.

50. In any event, the authorities had stayed within their margin of appreciation. The Government reiterated that, under the Court's case-law, the Convention had to be seen as a whole and that Article 2 of the Convention obliged the national authorities to prevent an individual from taking his or her own life if the decision had not been taken freely and with full understanding of what it involved. It could be established by statistics that the vast majority of suicide attempts were undertaken under the influence of a mental illness and that four out of five people did not repeat their attempt. Accordingly, the State was under an obligation to effectively protect people who were suffering from an acute episode of depression from access to a substance which would facilitate their suicide.

51. The Government further observed that there existed numerous means by which to end to one's life. It had not been established that the ingestion of sodium pentobarbital was the only effective and supposedly painless method to do so. In any event, the restriction imposed on access to this

substance was not capable of preventing a healthy person from ending his or her life if they wished to do so and had not put into question the individual's right to decide when and by which means their life would end.

52. The Government further considered that the risks of abuse were obvious, keeping in mind that a small dose of the substance could cause certain death. It was thus necessary to limit access to this substance. As far as people like the applicant, who was not suffering from a serious illness, were concerned, the Government considered that it would be too difficult to assess the motivation for a prescription request in order to rule out the possibility of the State facilitating the suicide of an individual who was suffering from nothing more than an acute episode of depression.

53. The Government finally pointed out that the regulations on assisted suicide were more liberal in Switzerland than in a number of other Member States, thus causing a number of people to travel to Switzerland in order to end their life there, a phenomenon which had been termed "suicide tourism". Under these circumstances, Switzerland could not be blamed for seeking to put in place safeguards against the risk of the floodgates being opened, particularly given that the consequences would be fatal for those concerned.

3. The third parties' submissions

54. Referring to the Court's case-law (see *Pretty* and *Haas*, both cited above), 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.

55. The European Centre for Law and Justice considered that the Court, in its *Haas* judgment, had placed the right to personal autonomy under Article 8 of the Convention above the right to life enshrined in Article 2 and had thus reversed the hierarchical structure of the rights enshrined in the Convention. This approach had destroyed the balance between the two Convention rights and thus jeopardised the coherence of the Convention and the foreseeability of the obligations incumbent on the States. In the *Haas* judgment, the Court had failed to consider that Article 2 of the Convention contained an absolute ban on the State intentionally taking human life. Consequently, there could be no right under the Convention to assisted

suicide. This was in line with the legal situation of the vast majority of the Member States and with Council of Europe recommendations.

56. According to Americans United for Life, there was no positive obligation under Article 8 to help someone to have the kind of death they wished. They further considered that if the Court were to hold that such an obligation existed, it would inadvertently place vulnerable people at risk of coercion, neglect, or prejudice. Further relevant public policy reasons for refusing such a right were preserving human life, protecting the integrity of the medical profession, and regulating dangerous substances. They further submitted that, for these same reasons, none of the highest courts of the United States of America had ever interpreted guarantees of privacy or liberty to be broad enough to provide a right to assistance in committing suicide.

57. According to Dignitas, full respect for the right to self-determination, especially at the end of life, made it necessary for there to be a relatively simple, yet nonetheless controlled access to sodium pentobarbital as a means of suicide. There was a serious risk of failed suicide attempts, leading to the temporary or permanent impairment of the health and well-being of either the individual who wished to commit suicide or that of third parties. The prevention of suicide was best served by open counselling which treated suicide as acceptable human behaviour if it was justified. Furthermore, a large majority of the Swiss population supported assisted dying in the form of organised assistance to commit suicide.

4. Assessment by the Court

58. The Court reiterates that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept, which encompasses, *inter alia*, the right to personal autonomy and personal development (see *Pretty*, cited above, § 61, and *A, B and C v. Ireland* [GC], no. 25579/05, § 212, ECHR 2010). Without in any way negating the principle of the sanctity of life protected under the Convention, the Court has considered that, in an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity (see *Pretty*, cited above, § 65, and *Koch*, cited above, § 51). In the *Pretty* case, the Court was "not prepared to exclude" that preventing the applicant by law from exercising her choice to avoid what she considered would be an undignified and distressing end to her life constituted an interference with her right to respect for her private life as guaranteed under Article 8 § 1 of the Convention (see *Pretty*, cited above, § 67).

59. In the *Haas* case, the Court further developed this case-law by acknowledging that an individual's right to decide the way in which and at

which point his or her life should end, provided that he or she was in a position to freely form his or her own judgment and to act accordingly, was one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention (see *Haas*, cited above, § 51; see also *Koch v. Germany*, no. 497/09, § 52, 19 July 2012).

60. Having regard to the above, the Court considers 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.

61. The Court further reiterates that the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. Any interference under the first paragraph of Article 8 must be justified in terms of the second paragraph, namely as being "in accordance with the law" and "necessary in a democratic society" for one or more of the legitimate aims listed therein. According to the Court's settled case-law, the notion of necessity implies that the interference corresponds to a pressing social need and in particular that it is proportionate to one of the legitimate aims pursued by the authorities (see, for example, *A, B and C*, cited above, § 229)

62. In addition, there may also be positive obligations inherent in an effective "respect" for private life. These obligations may even involve the adoption of measures designed to secure respect for private life in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific measures (see, among other authorities, *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91, and *Tysiąc v. Poland*, no. 5410/03, § 110, ECHR 2007-I).

63. In the *Haas* case, the Court considered that it was appropriate to examine the applicant's request to obtain access to sodium pentobarbital without a medical prescription from the perspective of a positive obligation on the State to take the necessary measures to permit a dignified suicide (see *Haas*, cited above, § 53). In contrast, the Court considers that the instant case primarily raises the question whether the State had failed to provide sufficient guidelines defining if and, in the case of the affirmative, under which circumstances medical practitioners were authorised to issue a medical prescription to a person in the applicant's condition.

64. Turning to the circumstances of the instant case, the Court observes at the outset that in Switzerland, pursuant to Article 115 of the Criminal Code, inciting and assisting suicide are punishable only where the perpetrator of such acts is driven to commit them by "selfish motives". Under the case-law of the Swiss Federal Supreme Court, a doctor is entitled to prescribe sodium pentobarbital in order to allow his patient to commit

suicide, provided that specific conditions laid down in the Federal Supreme Court's case-law are fulfilled (compare paragraph 30, above).

65. The Court observes that the Federal Supreme Court, in its case-law on the subject, has referred to the medical ethics guidelines on the care of patients at the end of their life, which were issued by a non-governmental organisation and do not have the formal quality of law. Furthermore, the Court observes that these guidelines, according to the scope of application defined in their section 1, only apply to patients whose doctor has arrived at the conclusion that a process has started which, as experience has indicated, will lead to death within a matter of days or a few weeks (compare paragraph 33 above). As the applicant is not suffering from a terminal illness, her case clearly does not fall within the scope of application of these guidelines. The Court further observes that the Government have not submitted any other material containing principles or standards which could serve as guidelines as to whether and under which circumstances a doctor is entitled to issue a prescription for sodium pentobarbital to a patient who, like the applicant, is not suffering from a terminal illness. The Court considers that this lack of clear legal guidelines is likely to have a chilling effect on doctors who would otherwise be inclined to provide someone such as the applicant with the requested medical prescription. This is confirmed by the letters from Drs B. and S. (see paragraph 11, above), who both declined the applicant's request on the grounds that they felt prevented by the medical practitioners' code of conduct or feared lengthy judicial proceedings and, possibly, negative professional consequences.

66. The Court considers that the uncertainty as to the outcome of her request in a situation concerning a particularly important aspect of her life must have caused the applicant a considerable degree of anguish. The Court concludes that the applicant must have found herself in a state of anguish and uncertainty regarding the extent of her right to end her life which would not have occurred if there had been clear, State-approved guidelines defining the circumstances under which medical practitioners are authorised to issue the requested prescription in cases where an individual has come to a serious decision, in the exercise of his or her free will, to end his or her life, but where death is not imminent as a result of a specific medical condition. The Court acknowledges that there may be difficulties in finding the necessary political consensus on such controversial questions with a profound ethical and moral impact. However, these difficulties are inherent in any democratic process and cannot absolve the authorities from fulfilling their task therein.

67. The foregoing considerations are sufficient to enable the Court to conclude 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.

68. As regards the substance of the applicant's request to be granted authorisation to acquire a lethal dose of sodium pentobarbital, the Court reiterates that the object and purpose underlying the Convention, as set out in Article 1, is that the rights and freedoms contained therein should be secured by the Contracting State within its jurisdiction. It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, with the Court exercising a supervisory role subject to the principle of subsidiarity (compare, among other authorities, *Z. and Others v. the United Kingdom*, no. 29392/95, § 103, ECHR 2001-V, and *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 147, ECHR 2009).

69. Having regard to the above considerations, and, in particular, the principle of subsidiarity, the Court considers that it is primarily up to the domestic authorities to issue comprehensive and clear guidelines on whether and under which circumstances an individual in the applicant's situation – that is, someone not suffering from a terminal illness – should be granted the ability to acquire a lethal dose of medication allowing them to end their life. Accordingly, the Court decides 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.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

70. The applicant further complained under Articles 6 § 1, 8 and 13 of the Convention about the domestic courts' decisions and that they had failed to take into account the pertinent arguments she had submitted before them. She further complained that the impugned decisions had violated her rights under Articles 2 and 3 of the Convention.

71. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

72. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

73. The applicant did not submit a claim for damages. Accordingly, the Court considers that there is no call to award her any sum on that account.

B. Costs and expenses

74. By letter to the Court dated 13 September 2012, the applicant claimed the sum of 49,557.80 francs (CHF) for the costs of the proceedings before the domestic authorities and before the Court. The applicant's lawyer presented his excuses for having misunderstood letters sent by the Registry of the Court on 23 May and 9 August 2012 (see below).

75. The Government considered that the sum claimed by the applicant was excessive and was not supported by the necessary documentation. They observed that the applicant had been charged the overall sum of CHF 5,060 for the proceedings before the domestic authorities and invited the Court to award the applicant this sum. Alternatively, they invited the Court to award the applicant CHF 10,000 under this head.

76. The Court observes that its Registry, by letter of 23 May 2012, asked the applicant to submit any claims for just satisfaction by 3 July 2012. By letter of 9 August 2012, the applicant was again asked to submit such claims by 30 August 2012. It follows that the applicant lodged her claim for costs and expenses after expiry of the relevant time-limit and without giving sufficient reasons for the delay. Accordingly, the Court does not make any award under this head and sees fit to reject the applicant's claim for costs and expenses in full.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint under Article 8 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* by four votes to three that there has been a violation of Article 8 of the Convention;

3. *Dismisses* unanimously the applicant's claim for just satisfaction.

Done in English, and notified in writing on 14 May 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Guido Raimondi
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge D. Jočienė, joined by judges G. Raimondi and I. Karakaş, is annexed to this judgment.

G.R.A.
S.H.N.

JOINT DISSENTING OPINION OF JUDGES RAIMONDI, JOČIENĖ AND KARAKAŞ

1. We voted against finding a violation of Article 8 in this case because, to our regret, we were not able to follow the majority in their findings. We observe that under section 24(a) of the Therapeutic Products Act, read in conjunction with the Drugs Act, sodium pentobarbital is available only upon medical prescription. We further observe that under the pertinent case-law of the Federal Supreme Court (see paragraph 30 of the judgment), section 24(a) of the Therapeutic Products Act does not allow for an exemption from this rule in the event that no medical practitioner is willing to issue the required prescription. We are of the opinion that the Federal Supreme Court's case-law, which refers to the above-mentioned medical guidelines, *sufficiently and clearly defines the circumstances* under which a medical practitioner is allowed to issue a prescription for sodium pentobarbital.

2. We are also of the opinion that, even accepting that the right to assisted suicide is recognised in Switzerland, our applicant is not among the people who have obtained such a right, in the circumstances of the case. We note that the domestic law is very clear on this point – the lethal substance can be prescribed by medical practitioners issuing a medical prescription (see paragraphs 19-21, 26, 30 and 32-33 of the judgment). 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 (see paragraphs 32-33 of the judgment) which have, in our opinion, been correctly applied and clearly interpreted in the jurisprudence of the Federal Supreme Court (see paragraphs 19-21 of the judgment).

3. With regard to the balancing of the competing interests in this case, in our opinion the instant case falls to be distinguished from the *Haas* case (cited in paragraph 63 of the judgment). In that case, the applicant wished to end his life because he was suffering from a serious psychiatric disorder. Conversely, in the present case the applicant, as mentioned above, is not suffering from any serious illness, but rather does not wish to continue living while relying on physical and mental faculties that are impaired through old age. In our opinion the regulations put in place by the Swiss authorities, namely the requirement to obtain a medical prescription, pursue, *inter alia*, the legitimate aims of protecting everybody from making hasty decisions, preventing abuse, and, most notably, ensuring that a patient

lacking the ability to understand the consequences of his or her actions does not obtain a lethal dose of sodium pentobarbital (compare *Haas*, § 56).

4. As the Court remarked in the *Haas* case (see *Haas*, § 57), such regulations are all the more necessary in respect of a country such as Switzerland, where legislation and practice allow for access to assisted suicide. Where a country adopts a liberal approach in this matter, appropriate implementing measures for such an approach and preventive measures are necessary. The introduction of such measures is also intended to prevent organisations which provide assistance with suicide from acting unlawfully and in secret, with significant risks of abuse.

5. In particular, the Court has considered that the risks of abuse inherent in a system that facilitates access to assisted suicide should not be underestimated. It considers that the requirement for a medical prescription, issued on the basis of a full psychiatric assessment, is a legitimate means enabling this obligation to be met. Moreover, the Court has found that this solution corresponds to the spirit of the International Convention on Psychotropic Substances (see *Haas*, § 58, and paragraph 37 of the judgment).

6. With regard to the margin of appreciation enjoyed by the State, for the purposes of the balancing process, we reiterate that a number of factors must be taken into account when determining the breadth of that margin in relation to any case under Article 8 of the Convention. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted (see, for example, *Dudgeon v. the United Kingdom*, 22 October 1981, § 52, Series A no. 45; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI; and *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-IV).

7. Where, however, there is no consensus between the States Parties to the Convention, 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. By reason of their direct and continuous contact with the vital forces of their countries, the State authorities are, in principle, in a better position than an international court to give an opinion, not only on the "exact content of the requirements of morals" in their country, but also on the necessity of a restriction intended to meet such requirements (see, among other authorities, *A, B and C*, cited in paragraph 58 of the judgment, and *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24).

8. The comparative research shows that the majority of States Parties do not allow any form of assisted suicide (see paragraph 34-35 of the judgment, and *Haas*, § 55). Only four States examined allow medical practitioners to prescribe a lethal drug in order to enable a patient to end his or her life. It follows that the States Parties to the Convention are a long

way from reaching a consensus in this respect, thus indicating that the State should enjoy a considerable margin of appreciation in this area (also compare *Haas*, § 55, and *Koch*, cited in the judgment at paragraph 59).

9. With regard to the applicant's argument that the legal situation such as exists in Switzerland rendered theoretical and illusory her right to decide when and by which means her life would end, we observe that this right, like any other aspect of the right to respect for one's private life contained in Article 8, may be subject to restrictions in the public interest. In our opinion, the clearly formulated and statutory restrictions and the jurisprudence of the Federal Supreme Court on a specific drug's prescription have clearly eliminated our applicant from the application of such provisions in her case, as she did not fulfil the established legal requirements; she was not able to be issued with a medical prescription for sodium pentobarbital as she was not suffering from a terminal illness (see paragraph 2 of the present opinion). Therefore we conclude that the right in question, which was not granted to the applicant under the domestic law, cannot be regarded as illusory.

10. Having regard to the above considerations, we consider that the State remained well within its margin of appreciation when refusing to grant the applicant authorisation to acquire a lethal dose of sodium pentobarbital without a medical prescription, assuming that it is acceptable for such a prescription to be given to other people in clearly defined circumstances under the domestic law and practice. In our view the Court should not oblige the State to adopt some laws or provisions for broader regulation of certain questions that the State has by itself determined in a clear and comprehensive manner.

11. We therefore believe that there has, accordingly, been no violation of Article 8 of the Convention.