Federal Administrative Court
Supreme Court
(https://www.bverwg.de/en)

Judgment of 2 March 2017 - BVerwG 3 C 19.15

ECLI:DE:BVerwG:2017:020317U3C19.15.0

Licence for acquiring a lethal dose of sodium pentobarbital to commit suicide

Headnotes

1. As a general principle, the licence for acquisition of a narcotic drug in order to commit suicide cannot be granted.

2. The general right of personality under article 2 (1) in conjunction with article 1 (1) GG also covers the right of a person suffering from a severe and incurable disease to decide in which way and at what time to end his or her life, provided he or she can form a free will and act accordingly.

3. In view of this basic right, section 5 (1) no. 6 BtMG is to be interpreted to mean that the acquisition of a narcotic drug in order to commit suicide may as an exception comply with the legislative purpose if the acquirer willing to commit suicide is in extreme distress due to a severe and incurable disease.

4. Extreme distress exists if - firstly - the severe and incurable disease is connected with grave physical suffering, in particular severe pain, which results in unbearable psychological strain for the affected person and cannot be reduced sufficiently, and if - secondly - the affected person is able to take decisions and has made the free and earnest choice to end his or her life and if he or she - thirdly - does not have any other reasonable option to carry out the wish to die.

Sources of law

Narcotic Drugs Act	BtMG, *Betäubungsmittelgesetz*	sections 3 (1), 4 (1) no. 3 (a), 5 (1) no. 6, section 13 (1)
Basic Law	GG, *Grundgesetz*	articles 1 (1), 2 (1) and (2)
European Convention on Human Rights (ECHR)		article 8

Summary of the facts

By way of an action for retrial of the case (*Restitutionsklage*), the claimant seeks a declaration that the Federal Institute for Drugs and Medical Devices (BfArM, *Bundesinstitut für Arzneimittel und Medizinprodukte*, hereinafter Federal Institute) would have been obligated to authorise his now deceased wife to acquire 15g of sodium pentobarbital to commit suicide.

The claimant's wife (hereinafter Ms K.) suffered from high-grade, almost complete sensorimotor paraplegia after an accident in April 2002. She was paralysed from the neck down, needed artificial ventilation, and depended on permanent medical assistance and care. Frequent spasms caused strong pain. According to the medical opinion, there were no prospects that her condition may have improved. Due to this situation of suffering, which she experienced as unbearable and humiliating, Ms K. had the wish to end her life. In a letter of 12 November 2004, she requested that the Federal Institute authorises her to acquire 15g of sodium pentobarbital for an assisted suicide. She ex-

plained that she had discussed her wish to die with the claimant, their daughter, the treating physicians, a psychologist, the nursing staff and a minister of religion; that they all respected her decision; that the only possibility for a risk-free and pain-free suicide for her was using the requested drug; that pentobarbital was a marketable and prescribable narcotic drug under the Narcotic Drugs Act (BtMG, *Betäubungsmittelgesetz*); that, however, physicians are prohibited under applicable medical law and rules of professional conduct from prescribing a lethal dose; that it furthermore was uncertain how assistance in a freely and responsibly chosen suicide would be assessed under aspects of criminal law; that the suicide intended by her using sodium pentobarbital was possible in Switzerland; that, however, this journey was not a reasonable alternative due to the strain involved.

In a notice dated 16 December 2004, the Federal Institute rejected the application, stating that the requested licence had to be refused pursuant to section 5 (1) no. 6 BtMG, as the acquisition of a narcotic drug in order to commit suicide does not comply with the legislative purpose of the Act, which is to secure the required medical care of the population, and that medical care within the meaning of this provision only covers life-sustaining or life-supporting purposes. In its objection notice dated 3 March 2005, the Federal Institute rejected Ms K.'s objection (*Widerspruch*) as unfounded, and the claimant's objection as inadmissible. A few days before the objection notice was issued, Ms K. had travelled to Switzerland, accompanied by the claimant and their daughter, and had committed suicide with the assistance of an association for euthanasia.

The action for declaration that the notice of 16 December 2004 in the form of the objection notice of 3 March 2005 was unlawful and that the defendant would have been obligated to grant the requested licence was rejected as inadmissible by the Administrative Court (*Verwaltungsgericht*) in the judgment of 21 February 2006 - 7 K 2040/05 - (...). The Administrative Court found that the claimant did not have standing; that he could not claim to have been violated in his rights under article 6 (1) Basic Law (GG, *Grundgesetz*), and that it furthermore did not seem possible that his right to respect for private and family life under article 8 of the European Convention on Human Rights (ECHR) may have been infringed; and that only his wife's rights may have been affected by the refusal of the licence. The application for granting leave to appeal on points of fact and law against this judgment was rejected by the Higher Administrative Court (*Oberverwaltungsgericht*) in the decision of 22 June 2007 - 13 A 1504/06 - (...). The Higher Administrative Court held that the Administrative Court had correctly decided that the claimant did not have standing. In its decision of 4 November 2008 - 1 BvR 1832/07 - (...), the Federal Constitutional Court (BVerfG, *Bundesverfassungsgericht*) refused to admit the constitutional complaint lodged against the rejection.

The European Court of Human Rights (ECtHR) which the claimant seised after this decision, held in its judgment of 19 July 2012 - Application no. 497/09, Koch/Germany - (...) that the claimant's right to respect for private and family life under article 8 (1) ECHR was infringed by the refusal of the national courts to examine the merits of the case. The judgment became final and binding on 17 December 2012.

On 15 January 2013, the claimant requested a resumption of proceedings before the Administrative Court, and further pursued his request for a declaratory judgment. In its judgment of 13 May 2014 - 7 K 254/13 -, the Administrative Court set aside its judgment of 21 February 2006 and dismissed the claim. It found that the action for retrial of the case was (...) admissible; that the review of the claim showed that the action requesting a declaration that the refusal of the expired administrative act was unlawful (*Fortsetzungsfeststellungsklage*) was admissible but unfounded; and that the Federal Institute had rightly refused Ms K.'s application to be granted a licence to acquire a lethal dose of the narcotic drug sodium pentobarbital. In its judgment of 19 August 2015 - 13 A 1299/14 -, the Higher Administrative Court dismissed the claimant's appeal on points of fact and law.

The claimant's appeal on points of law met with partial success.

Reasons (abridged)

10 The admissible appeal on points of law is partly well-founded. The claimant has a right to a declaration that the Federal Institute's notice of 16 December 2004 in the form of the objection notice of 3 March 2005 was unlawful. Insofar, the contested judgment is based on a violation of section 5 (1) no. 6 BtMG and article 2 (1) in conjunction with article 1 (1) GG (section 137 (1) no. 1 Code of Administrative Court Procedure (VwGO, *Verwaltungsgerichtsordnung*)). In as far as the appeal on points of law goes beyond this, it is unsuccessful. The claimant has no right to a declaration that the Federal Institute would have been obligated to issue the licence.

11 1. The Higher Administrative Court correctly assumed that the requirements for a reopening of the proceedings are met. The action for retrial of the case is admissible and well-founded pursuant to section 153 (1) VwGO in conjunction with section 580 no. 8 Code of Civil Procedure (ZPO, *Zivilprozessordnung*). Therefore, the judgment of the Administrative Court of 21 February 2006 - 7 K 2040/05 - was to be set aside (see section 590 (1) ZPO; (...)).

12 2. The action requesting a declaration that the refusal of the expired administrative act was unlawful constitutes the proper legal remedy (section 113 (1) fourth sentence VwGO *mutatis mutandis*), and all other requirements concerning admissibility are also met. The claimant has standing (section 42 (2) VwGO) and possesses the required special interest in a declaratory judgment (section 113 (1) fourth sentence VwGO), based on the decision by the European Court of Human Rights of 19 July 2012. According to this decision, the claimant can assert that his own rights (article 8 (1) ECHR) were infringed by the refusal on the part of the Federal Institute to grant his deceased wife the requested licence. He also has a justified interest in a judicial examination of the lawfulness of the refusing decision by the administrative authority (see ECtHR, judgment of 19 July 2012 - Application no. 497/09, Koch/Germany - (...) para. 45 et seqq.).

13 3. In the case of an action requesting a declaration that the refusal of an expired administrative act was unlawful, the material date for the examination is the time when the event that caused expiry took place (Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*), decision of 7 May 1996 - 4 B 55.96 - (...); judgment of 21 December 2010 - 7 C 23.09 - (...) para. 53). Accordingly, the material date for the determination of the factual and legal situation in this case is the date of Ms K.'s death on 12 February 2005. In as far as the claimant requests a declaration that the refusing notices by the Federal Institute were unlawful, the material date for the determination of the factual and legal situation is the time when the notices were issued (see BVerwG, judgment of 4 December 2014 - 4 C 33.13 [ECLI:DE:BVerwG:2014:041214U4C33.13.0] - BVerwGE 151, 36 para. 18, 21). This means that the Narcotic Drugs Act in the version promulgated on 1 March 1994 (Federal Law Gazette (BGBl., *Bundesgesetzblatt*) I p. 358) and the Eighteenth Ordinance Amending Narcotic Drugs Law (*Achtzehnte Verordnung zur Änderung betäubungsmittelrechtlicher Vorschriften*) of 22 December 2003 (BGBl. 2004 I p. 28) are decisive here. However, this does not prevent the Court from taking into account subsequent changes and developments in the law if and in as far as they allow conclusions regarding the legal situation at the particular time.

14 4. On this basis, the refusing notices issued by the Federal Institute of 16 December 2004 and 3 March 2005 were unlawful. The underlying assumption, that the ground for refusal provided for in section 5 (1) no. 6 BtMG made the granting of a licence impossible without exception, is erred in law.

15 a) In order to be able to acquire a lethal dose of sodium pentobarbital to commit suicide, Ms K. required a licence pursuant to section 3 (1) BtMG.

16 Pursuant to section 3 (1) no. 1 last alternative BtMG, anyone wishing to acquire narcotic drugs requires a licence from the Federal Institute for Drugs and Medical Devices. Narcotic drugs within the meaning of this provision are the substances and preparations listed in Annexes I through III (section 1 (1) BtMG). Pentobarbital is listed in the group of marketable and prescribable narcotic drugs in Annex III. This means that the acquisition of sodium pentobarbital requires a licence, except if one of the exemptions provided for in section 4 BtMG applies. The latter is not the case here. Pursuant to section 4 (1) no. 3 (a) BtMG, a licence pursuant to section 3 BtMG is not required if a narcotic drug listed in Annex III is acquired on the basis of a prescription from a physician. However, Ms K. could not obtain the requested dose of sodium pentobarbital with a prescription from a physician. Even though, pursuant to section 2 (1) (b) of the Ordinance on the Prescription, Dispensing and Proof of the Disposition of Narcotic Drugs (BtMVV, *Betäubungsmittel-Verschreibungsverordnung*) of 20 January 1998 (BGBl. I p. 74, 80) in the version of the Fifteenth Ordinance Amending Narcotic Drugs Law (*Fünfzehnte Betäubungsmittelrechts-Änderungsverordnung*) of 19 June 2001 (BGBl. I p. 1180) which is decisive here, pentobarbital can be prescribed by a physician, a requirement for such prescription, pursuant to section 13 (1) first sentence BtMG, is that the use of the narcotic drug on or in the human body is justified. This is

the case if, based on acknowledged medical scientific standards, an indication exists regarding the use of the narcotic drug, i.e. if the drug is intended to be used as part of a medical treatment for therapeutic purposes (see Federal Court of Justice (BGH, *Bundesgerichtshof*), judgments of 8 May 1979 - 1 StR 118/79 - Rulings of the Federal Court of Justice in Criminal Matters (BGHSt, *Entscheidungen des Bundesgerichtshofs in Strafsachen*) 29, 6 <10> [regarding the predecessor provision of section 11 (1) no. 9a BetMG 1972] and of 28 January 2014 - 1 StR 494/13 - BGHSt 59, 150 para. 39; decision of 17 May 1991 - 3 StR 8/91 - BGHSt 37, 383; (...)). Whether this means that a prescription for the purposes of suicide is ruled out entirely, or whether a prescription of the drug by a physician may, subject to the requirements regarding the permissibility of the acquisition which shall be discussed below, be admissible under section 13 (1) BtMG (...), does not need to be discussed here. The Higher Administrative Court found that Ms K. actually had no possibility of obtaining the requested narcotic drug via a prescription from a physician, as a majority of the medical profession has agreed that the prescription of a lethal dose does not comply with the standards of medical science and the Hippocratic Oath. Accordingly, the Federal Institute agreed that a licence requirement under section 3 BtMG exists.

17 b) Like the Federal Institute, the Higher Administrative Court assumed that a licence under section 3 BtMG, which is requested in order to acquire a narcotic drug to commit suicide, has to be denied without exception pursuant to section 5 (1) no. 6 BtMG. This is incompatible with federal law. Even though the provisions of the Narcotic Drugs Act rule out a licence for acquisition in order to commit suicide as a matter of principle (aa), this prohibition severely interferes with the general right of personality under article 2 (1) in conjunction with article 1 (1) GG of persons with severe and incurable diseases to autonomously decide in which way and at what time their lives should end (bb). In view of the above, section 5 (1) no. 6 BtMG must be interpreted in accordance with the basic rights, with the result that this provision, as an exception, does not rule out the granting of a licence if the person willing to commit suicide is in a situation of extreme distress due to his or her disease (cc).

18 aa) According to the provisions of narcotic drugs law, the acquisition of a lethal dose of sodium pentobarbital in order to commit suicide is not permissible as a general principle. This results from the spirit and purpose of the Narcotic Drugs Act and the regulatory system of section 5 (1) no. 6 and section 13 (1) BtMG.

19 (1) Pursuant to section 5 (1) no. 6 BtMG, a licence under section 3 BtMG is to be refused if the nature and purpose of the requested trade for which application has been made do not comply with the purpose of this Act, to ensure the required medical care of the population, but at the same time to preclude, as far as possible, the abuse of narcotic drugs or the improper production of exempt preparations as well as the development or maintenance of an addiction to narcotic drugs. The focus here is merely on the non-compliance with the purpose of the Act to ensure the required medical care of the population. The objective of preventing narcotic drug addiction is obviously not affected if the licence for acquisition is requested for a suicide. Furthermore, such

a licence does not contradict the legislative purpose to rule out narcotic drug abuse. Taking recourse to the legislative materials, the Higher Administrative Court correctly stated that this term expresses the legislative objective of preventing the health-endangering and harmful consumption of narcotic drugs for enjoyment or as a stimulant, and, in particular, of combating drug addiction (see explanatory memorandum of the draft act of the Federal Government on the Narcotic Drugs Act 1981, Bundestag printed paper (BT-Drs., *Bundestagsdrucksache*) 8/3551 p. 23 et seqq., 29).

20 (2) The term "ensuring the required medical care of the population" is based on the fact that narcotic drugs have not only harmful effects, but may be beneficial to human health in certain cases. This is why the Act refrains from prohibiting trade in narcotic drugs, in as far as narcotic drugs are required for medical purposes. This is taken into account in Annex III to the BtMG which lists the marketable and prescribable narcotic drugs. As shown above, the requirement of prescribability is regulated in section 13 (1) BtMG. The therapeutic objective of the use of the narcotic drug, required under this provision, exists if it serves to cure or alleviate diseases or pathological symptoms. For systematic reasons, the same must apply in the context of the term "medical care" as used in section 5 (1) no. 6 BtMG. The required medical care using narcotic drugs is mainly ensured by patients being able to acquire a narcotic drug from Annex III required for therapeutic purposes with a physician's prescription at a pharmacy, or by the physician administering the narcotic drug as part of the treatment or putting it at the disposal for immediate use (section 13 (1), (2) first sentence BtMG). In these cases, the physician's prescription replaces the licence under section 3 (1) BtMG, as can be seen from section 4 (1) no. 3 (a) BtMG (...). As far as requirements of medical care with other narcotic drugs are concerned, section 13 (1) third sentence BtMG provides that a licence pursuant to section 3 BtMG is necessary. The granting of a licence is linked to the term "required medical care" pursuant to section 5 (1) no. 6 BtMG in order to ensure that the use of the narcotic drug is justified under medical aspects, as in the cases of section 13 (1) BtMG. Accordingly, the Senate's jurisprudence regarding section 3 (2) BtMG required a use of the narcotic drug which is aimed at curing or alleviating pathological conditions (see BVerwG, judgments of 19 May 2005 - 3 C 17.04 - BVerwGE 123, 352 <354 et seq., 356 et seq.> and of 6 April 2016 - 3 C 10.14 [ECLI:DE:BVerwG:2016:060416U3C10.14.0] - BVerwGE 154, 352 para. 13).

21 This means that section 5 (1) no. 6 BtMG, as a matter of principle, rules out the granting of a licence for acquisition for the purpose of committing suicide. Such a licence would not comply with the Narcotic Drugs Act's objective which is to protect human health and life (see BT-Drs. 8/3551 p. 23). This assessment does not change in view of the supply of narcotic drugs to ensure palliative care for dying patients. The administration of a narcotic drug as part of palliative care serves to alleviate pain and other negative sensations such as difficulty in breathing, nausea, fear etc., and thus serves therapeutic purposes. If an alternative therapy is not available (section 13 (1) second sentence BtMG), the use of the narcotic drug is justified in accordance with section 13 (1) first sentence BtMG. This applies even if the medication has

the unintended but inevitable side effect of accelerating death (see BGH, judgment of 7 February 2001 - 5 StR 474/00 - BGHSt 46, 279 <284 et seq.>). This cannot be compared to the use of a narcotic drug for the purpose of committing suicide. Palliative treatment of terminally ill persons can be described as "assisting the dying" (see explanatory memorandum of the draft act on the criminalisation of assisted suicide services <section 217 German Criminal Code (StGB, *Strafgesetzbuch*)>, BT-Drs. 18/5373 p. 11, 17 et seq.; (...)). This conveys the idea that the palliative treatment accompanies a process of dying that has already begun. In contrast to this, the narcotic drug in a suicide is deliberately used to directly bring about death. However, the administration of a narcotic drug for reasons of palliative care may also be of considerable relevance for the implementation of a desire to die. A person willing to die will often only request the abortion of life-sustaining or life-prolonging measures if he or she is certain that palliative medication will be provided after the treatment has been aborted.

22 bb) A prohibition without exceptions of the acquisition of sodium pentobarbital in order to commit suicide interferes with the constitutionally protected right of severely and incurably ill persons to autonomously decide how and when their lives should end.

23 (1) The right to the free development of one's personality and the obligation to respect and protect human dignity pursuant to article 2 (1) in conjunction with article 1 (1) GG ensure that every individual has an independent area of private life, in which his or her individuality can be developed and preserved (BVerfG, judgment of 13 February 2007 - 1 BvR 421/05 - BVerfGE 117, 202 <225 et seq.>). This includes that a person has a right to self-determination, and can autonomously organise his or her fate (BVerfG, decision of 11 October 1978 - 1 BvR 16/72 - BVerfGE 49, 286 <298>). Dealing with disease also is an expression of personal autonomy. The constitutionally protected freedom therefore includes the right to refuse medical treatments or other therapeutic measures with the objective of cure (see BVerfG, judgment of 26 July 2016 - 1 BvL 8/15 - (...)). This also applies to the right to refuse life-prolonging measures (see BGH, judgment of 25 June 2010 - 2 StR 454/09 - BGHSt 55, 191 para. 23). This is confirmed by ordinary legislation in the provisions on the living will (sections 1901a et seqq. German Civil Code (BGB, *Bürgerliches Gesetzbuch*)). Without the consent of a patient who is able to grant consent, or against the expressed or presumed will of a patient who is not able to grant consent, life-sustaining or life-prolonging measures must not be initiated or continued (BGH, judgment of 25 June 2010, see above para. 14 et seqq.; decisions of 6 July 2016 - XII ZB 61/16 - (...) para. 34 et seqq. and of 17 September 2014 - XII ZB 202/13 - Rulings of the Federal Court of Justice in Civil Matters (BGHZ, *Entscheidungen des Bundesgerichtshofs in Zivilsachen*) 202, 226 para. 14 et seq.).

24 (2) Using this as a basis, the general right of personality under article 2 (1) in conjunction with article 1 (1) GG also covers the right of a person suffering from a severe and incurable disease to decide how and when to end his or her life, provided he or she can form a free will and act accordingly ((...); similar, explanatory memorandum of the draft act on the criminalisation of assisted suicide services <section 217 StGB>, BT-Drs. 18/5373 p. 10, 13, (...)). Here, the scope of protection

of the basic rights is not restricted to cases where the process of dying has already begun or is immediately imminent as a consequence of the terminal stage of a fatal disease. The respect for each individual's personal way of dealing with disease and his or her own death, which is required under aspects of constitutional law, includes the free and autonomous decision by severely ill individuals to wish to end their lives before reaching the dying phase, or independently from a fatal course of the disease.

25 (3) The recognition of the constitutionally guaranteed protection of the right to autonomous dying of severely and terminally ill individuals by suicide also complies with the case-law of the European Court of Human Rights. Accordingly, the right to respect for private life under article 8 (1) ECHR includes the right to self-determination (ECtHR, judgment of 29 April 2002 - Application no. 2346/02, Pretty/United Kingdom - (...) para. 61). From this, the Court derived the conclusion that an individual's decision to avoid what this person considers to be an undignified and distressing end to his or her life, is covered by the scope of application of article 8 ECHR (ECtHR, judgment of 29 April 2002, see above para. 67). Based on this, the Court held that article 8 (1) ECHR includes the individual's right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting in consequence (ECtHR, judgments of 20 January 2011 - Application no. 31322/07, Haas/Switzerland - (...) para. 50 et seq., of 19 July 2012 - Application no. 497/09, Koch/Germany - (...) para. 51 et seq. and of 14 May 2013 - Application no. 67810/10, Gross/Switzerland - para. 58 et seq.).

26 (4) Section 5 (1) no. 6 BtMG limits the trade in narcotic drugs by prohibiting the granting of a licence under the conditions specified there. The refusal of the requested licence for acquisition which was based on this provision prevented Ms K. from committing suicide in the intended manner. This means that section 5 (1) no. 6 BtMG had the effect of limiting her right to autonomously decide by what means and at what point her life will end. It is not necessary to decide whether this constitutes an interference in the classical sense of the term. This would require a direct and targeted impairment of the constitutionally guaranteed freedom. This is to be doubted, as the Narcotic Drugs Act is not directly aimed at limiting the right, guaranteed under article 2 (1) in conjunction with article 1 (1) GG, to autonomously decide on the end of one's life. However, the scope of protection of a basic right may also be affected if an impairment is indirect, provided that the objectives and effects of such impairment are similar to an interference (see BVerfG, judgment of 17 March 2004 - 1 BvR 1266/00 - BVerfGE 110, 177 <191> and decision of 11 July 2006 - 1 BvL 4/00 - BVerfGE 116, 202 <222>). This is the case here. The restriction without exception of access to the narcotic drugs listed in Annex III for use for therapeutic purposes in the narrow sense of the term has the result that a substance such as sodium pentobarbital is not available for a suicide. This access prohibition also affects severely and terminally ill persons who, due to their situation of suffering which they perceive to be unbearable, have decided freely and earnestly to end their lives, and wish to use a narcotic drug, the effects of which allow them to commit a pain-free and safe suicide. The lack of access to such narcotic drugs may

have the consequence that they cannot implement their wish to die, or can only do so under unacceptable conditions. This constitutes an indirect impairment of their basic right under article 2 (1) in conjunction with article 1 (1) GG.

27 Even if the prohibition to acquire narcotic drugs in order to commit suicide were not assessed to constitute an interference with this basic right of severely and terminally ill persons, it would be necessary to interpret section 5 (1) no. 6 BtMG in view of the protection obligation for their autonomy when dealing with their disease, which results from article 2 (1) in conjunction with article 1 (1) GG (...). The fact that the described right to self-determination has a defensive dimension as well as a protective dimension follows from its basis, *inter alia*, in article 1 (1) GG. Pursuant to article 1 (1) second sentence GG, it is the duty of all state authority to respect and protect human dignity. Even though, due to the legislature's margin of appreciation, evaluation and scope for action in balancing this duty of protection with the duty of protection for life under article 2 (2) first sentence GG, an individual cannot demand that the state create framework conditions and structures that allow or facilitate suicide (...), but a consolidation that leads to a specific duty to protect self-determination may have to be considered if a severely and incurably ill person is in a situation of extreme distress due to this disease, and does not have any way out of this situation. The state community may not simply abandon helpless persons to their own devices (BVerfG, decision of 26 July 2016 - 1 BvL 8/15 - (...) para. 73 - on the duty of protection that results from article 2 (2) first sentence GG). This applies not only if his or her life is at risk, but also if such risk relates to his or her right to self-determination. An individual depends, in particular at the end of his or her life and in the event of a severe disease, on his or her autonomy being respected and protected.

28 cc) In view of the described constitutional protection of the right to self-determination, section 5 (1) no. 6 BtMG is to be interpreted to mean that the acquisition of a narcotic drug in order to commit suicide may as an exception comply with the legislative purpose, which is to secure the required medical care of the population, if the acquirer willing to commit suicide is in a situation of extreme distress due to a severe and incurable disease.

29 (1) The basic right to the free development of one's personality under article 2 (1) in conjunction with article 1 (1) GG is not granted without limitations. It is limited, *inter alia*, by the constitutional order. This includes the state's duty of protection for life. The basic right to life and physical integrity under article 2 (2) first sentence GG does not only guarantee a subjective defensive right of the citizen against the state to avert state interferences with these rights. At the same time, it constitutes an objective value decision of the constitution that establishes duties of protection on the part of the state. When establishing and implementing normatively the corresponding concepts of protection, the legislature is entitled to a margin of appreciation, evaluation and scope for action (BVerfG, decision of 26 July 2016 - 1 BvL 8/15 - (...) para. 70 with further references). Accordingly, it is unobjectionable under constitutional law if a so-called active euthanasia, i.e. the killing

by a third person on the request of a person who wishes to die, is made subject to punishment (section 216 StGB; BGH, judgment of 20 May 2003 - 5 StR 66/03 - (...)).

30 (2) Furthermore, there are no objections regarding the fact that the acquisition of a narcotic drug in order to commit suicide is not permissible under section 5 (1) no. 6 BtMG as a general principle. As correctly held in the previous instances, this prohibition serves to protect persons in a vulnerable position and condition from decisions which they may take hastily, in a state when they lack cognitive capabilities or without acting autonomously, as well as to prevent abuse. By preventing such risks, the legislature is pursuing legitimate objectives which justify the prohibition of access to a narcotic drug ((...); ECtHR, judgment of 20 January 2011 - Application no. 31322/07, Haas/Switzerland - (...) para. 56 et seqq.; in the context of section 217 StGB: explanatory memorandum of the draft act on the criminalisation of assisted suicide services, BT-Drs. 18/5373 p. 11, 13; BVerfG, chamber decision of 21 December 2015 - 2 BvR 2347/15 - (...) para. 18 et seqq.).

31 (3) In view of article 2 (1) in conjunction with article 1 (1) GG, these objectives can, however, no longer justify the prohibition to acquire narcotic drugs in order to commit suicide if the acquirer is in a situation of extreme distress due to a severe and incurable disease. This is the case if - firstly - the severe and incurable disease is connected with grave physical suffering, in particular severe pain, which results in unbearable psychological strain for the affected person and cannot be reduced sufficiently (...), if - secondly - the affected person is able to take decisions and has made the free and earnest choice to end his or her life, and if he or she - thirdly - does not have any other reasonable option to carry out the wish to die.

32 If the affected person is at the mercy of this disease in such a manner, his or her right to self-determination has particular weight, to which the state's duty of protection for life under article 2 (2) first sentence GG is subordinate. The state community must respect the affected person's autonomously taken decision to wish to end his or her life; it must not make the implementation of this decision impossible. If the consumption of a lethal dose of a narcotic drug is the only reasonable option of carrying out the wish to die, the affected person, without access to the narcotic drug, would have to continue to endure the situation of suffering that he or she experiences to be unbearable, without any prospect of improvement or, at least, of imminent death. In the absence of a possibility of ending his or her life, he or she would have to continue to live, contrary to his or her free will. A duty to continue to live against one's own will interferes with the core of autonomous self-determination (...). The state must not impose such duty - not even indirectly - upon severely and incurably ill persons who are, however, capable of acting autonomously. Due to the significance of the legal interests concerned here for the affected person's dignity and due to his or her helplessness, the state's duty of protection under article 2 (1) in conjunction with article 1 (1) GG, under the described prerequisites, condenses to the duty to allow such persons to acquire the narcotic drug in order to commit suicide.

33 The fact that the state's duty of protection for life is under certain conditions subordinate to the affected person's constitutionally protected right to self-determination has moreover in the meantime also been recognised for the situation of an abortion of treatment, even in cases where the affected person is not in a situation of extreme distress. An affected person can request that life-sustaining and life-prolonging measures be aborted, even if the abortion of such treatment aims at ending this person's life in spite of an existing life perspective (BGH, decision of 17 September 2014 - XII ZB 202/13 - BGHZ 202, 226 para. 22).

34 (4) A closer examination is required of the other possibility of realising the wish to die in a reasonable manner. A possibility such as this can usually be assumed to exist if the affected person can end his or her life by aborting life-sustaining or life-prolonging treatments whilst being provided palliative care, for instance by switching off the ventilator or by terminating artificial nutrition. As shown above, medical measures must not be continued against the patient's will (see BGH, decision of 17 September 2014 - XII ZB 202/13 - BGHZ 202, 226 para. 22). However, the abortion of treatment only constitutes another reasonable possibility of realising the wish to die if such abortion is anticipated to result in death in the foreseeable future, i.e. does not merely lead to a further deterioration of health for an indefinite period of time, possibly combined with a loss of the ability to take decisions. Also, it must be ensured that the affected person has sufficient palliative care after the treatment is aborted. This includes in particular relief from pain, difficulty in breathing and nausea (...).

35 A physician-assisted suicide was not an alternative at the time that is relevant here, nor is it currently. Whether, and possibly under what conditions, the provision of a narcotic drug by a physician to the patient for the purpose of committing suicide may be permissible, has not been finally decided up to now. This applies with regard to the potential criminalisation (...) as well as with regard to the aspect of medical professional rules ((...); explanatory memorandum to the <non-enacted> Draft of an Act on Rules for Physician-assisted Termination of Life, BT-Drs. 18/5374 p. 8). This means that assisting in a suicide is associated with significant legal risks for the physician. In a situation such as this, the legal system cannot compel the affected person to search for a physician who is prepared to take these risks.

36 The state community can furthermore not refer the affected person to the possibility of committing the intended suicide with the required narcotic drug abroad. Article 1 (3) GG obligates the state to ensure the required protection of the basic rights under its own legal system.

37 (5) Section 3 (1) in conjunction with section 5 (1) no. 6 BtMG can be interpreted in this manner to comply with the basic rights. It is not necessary to refer the matter to the Federal Constitutional Court under article 100 (1) GG. The interpretation of a provision in conformity with the constitution ends where it would contradict the wording and the clearly discernible intention of the legislature (BVerfG, decisions of 19 January 1999 - 1 BvR 2161/94 - BVerfGE 99, 341 <358> and of 19 September 2007 - 2 BvF 3/02 - BVerfGE 119, 247 <274>). This is not the case here. The term "required medical care" in section 5 (1) no. 6

BtMG means the use of narcotic drugs for therapeutic purposes. In a situation of extreme distress as described here, the use of a narcotic drug in order to commit suicide may in exceptional cases be considered to serve therapeutic purposes; it is the only possibility of ending a situation of suffering caused by a disease which is unbearable for the affected person. As the assumption of a situation of extreme distress requires that relief is not possible in any other way and that there is no other reasonable option to realise the wish to die, the provision of the narcotic drug is also to be considered to be necessary. Accordingly, the limit set by the wording of section 5 (1) no. 6 BtMG is not being exceeded.

38 Also, there are no indications that an interpretation in conformity with the constitution would be contrary to the legislature's intention. Even though the legislative materials on the Narcotic Drugs Act allow the conclusion that a licence for acquisition in order to commit suicide does not come into consideration as a matter of principle, these materials do not provide any indication that an exemption from this prohibition is intended to be ruled out entirely, even under the specified strict requirements (see BT-Drs. 8/3551 p. 23 et seqq.). Section 13 (1a) BtMG, which was incorporated through the Second Act Amending Medicinal Drugs Law and other Provisions (*Zweites Gesetz zur Änderung arzneimittelrechtlicher und anderer Vorschriften*) of 19 October 2012 (BGBl. I p. 2192), does not provide any guidance with regard to the question as to whether the prohibition of a licence for authorisation for the purpose of committing suicide is intended to apply without any exceptions. The same applies with regard to the associated legislative materials (see recommendation for a decision and report by the Committee on Health on the draft act of the Federal Government - printed paper 17/9341 -, BT-Drs. 17/10156 p. 83, 91 et seq.). Finally, the criminal provision in section 217 StGB, which came into force on 10 December 2015, does not allow the conclusion that an interpretation of section 3 (1) in conjunction with section 5 (1) no. 6 BtMG in conformity with the constitution would contradict the legislature's intention. Pursuant to section 217 (1) StGB as amended by the Act on the Criminalisation of Assisted Suicide Services (*Gesetz zur Strafbarkeit der geschäftsmäßigen Förderung der Selbsttötung*) of 3 December 2015 (BGBl. I p. 2177), anyone who, with the intention of assisting another person to commit suicide, provides, procures or arranges the opportunity for that person to do so as a professionalised service is liable to punishment. With this criminal-law provision, the potential suicide is intended to be prevented from an act which may abstractly endanger an individual's life and autonomy by making use of an assisted suicide service (BVerfG, chamber decision of 21 December 2015 - 2 BvR 2347/15 - (...) para. 14; BT-Drs. 18/5373 p. 11 et seq., 14). The related materials state that it is problematic that organisations and persons increasingly appear in Germany who consistently and publicly propagate so-called assisted suicide as an alternative to a natural dying process that takes place with medical and humane care, and who offer assistance services in committing suicide (BT-Drs. 18/5373 p. 9). This development is to be countered for reasons of the protection of the integrity and autonomy of potential suicides. The prohibition of assisted suicide services is intended to counter the risk of a conflict of interests which would arise if the person assisting in a suicide had own interests

in the performance of the suicide (BT-Drs. 18/5373 p. 11). Also, the aim was to counter the risk that "such offers that suggest normality" may induce persons to commit suicide who would otherwise not do so (BT-Drs. 18/5373 p. 13). Accordingly, the introduction of section 217 StGB does not provide any indications that it is in accordance with the legislature's intention to prohibit without exception a licence for acquisition under narcotic drugs law in order to commit suicide, without taking into consideration the specified situation of extreme distress of severely and incurably ill persons. The granting by the authority of such a licence, which is only permitted in special individual cases and only under very strict conditions, cannot be compared with assisted suicide services by a private individual who assists in a suicide within the meaning of section 217 StGB. The Federal Institute does not pursue any own interests, but its decision is based on the fact that, under the described conditions, the affected person must not be refused this licence for legal reasons. In view of the narrow limits of such licence, one can furthermore not speak of an "appearance of normality" caused by this. The interpretation of section 3 (1) in conjunction with section 5 (1) no. 6 BtMG in conformity with the constitution furthermore does not create a state "offer of assisted suicide", but merely takes into account the protection of the right to self-determination of severely and incurably ill persons, which is required under the provisions of the Basic Law. The legislature expressly acknowledged this right when passing section 217 StGB (BT-Drs. 18/5373 p. 10, 13). Accordingly, the legislature assumes that, apart from the permitted abortion of treatment and the so-called indirect euthanasia or the change of therapeutic objectives, there is no criminalisation under section 217 StGB if "assistance in suicide is provided in an individual case, after diligent examination and under strict orientation to the autonomous decision of a person determined to commit suicide" (BT Drs. 18/5373 p. 18).

39 (6) The defendant's objection that the Federal Institute is not equipped to reliably assess and determine whether or not such an exceptional situation exists, is not sustainable.

40 The lack of specific procedural rules on the determination of the exceptional situation does not stand against the obligation on the part of the Federal Institute to act in compliance with the basic rights (see BVerfG, decision of 11 October 1978 - 1 BvR 16/72 - BVerfGE 49, 286 <301>). However, in view of the high-ranking legal interests affected by this decision, and in order to prevent abuse, such a decision requires a particularly diligent examination of the facts. This applies with regard to the determination of the free and genuine will to commit suicide, as well as with regard to the fulfilment of the other conditions of a situation of extreme distress. However, the general procedural law provides a sufficient basis for this. Pursuant to section 24 (1) of the Administrative Procedure Act (VwVfG, *Verwaltungsverfahrensgesetz*), the Federal Institute can and must take the required measures in order to be able to assess on a safe basis of information whether the conditions of an exceptional situation are met. In this context, it can use the means of evidence pursuant to section 26 (1) VwVfG which it, subject to its discretion in accordance with legal obligation, considers to be necessary in order to determine the facts. If and in as far as the authority

does not have the necessary expertise to determine and assess the relevant facts, it can use the services of informed third parties and, if necessary, experts (...).

41 The Senate does not fail to realise that the Federal Institute is required to make difficult assessments, and that its decision affects a highly sensitive area. However, the same applies with regard to the determination of whether a patient who requests the abortion of life-sustaining measures is capable of consenting, as well as to the determination of the presumed will of a patient who is unable to grant consent in connection with the decision on whether to perform life-prolonging measures pursuant to sections 1901a et seqq. BGB. If a binding living will does not exist, the custodian and the physician in attendance as well as the custodianship court are obligated to determine the patient's will. This is also not an easy decision to take (see BGH, decision of 17 September 2014 - XII ZB 202/13 - BGHZ 202, 226; explanatory memorandum of the Draft of a Third Act Amending Custodianship Law, BT-Drs. 16/8442 p. 12).

42 c) Based on the above, the refusing notice by the Federal Institute of 16 December 2004 in the form of the objection notice of 3 March 2005 was unlawful. The Federal Institute would have been obligated to examine whether Ms K. was in a situation of extreme distress that would have commanded the granting of the requested licence. This was within the realms of possibility in this case. Due to her high-grade, almost complete paraplegia, Ms K. suffered from extremely severe physical impairments that were irreversible, required constant medical assistance and care, and were associated with severe pain. In her application, she explained in detail that and why she experienced her condition as an unbearable situation of suffering. Based on her explanations, it was effectively not in doubt that she had autonomously and earnestly decided to wish to end her life. Under these circumstances, the Federal Institute was not permitted to refuse the requested licence without examining whether Ms K. had another reasonable possibility of realising her wish to die. The Federal Institute could not assume this to be the case merely because Ms K. needed artificial ventilation. Even though this led to the possibility that an abortion of the treatment, with medical palliative care, may have been an option, it was not clear whether the switching off of the ventilator would in her case have led to death in the foreseeable future. In particular, there still was legal uncertainty at the material time of assessment regarding the question under which conditions an abortion of medical treatment that is carried out through a positive act is to be considered as exempt from criminalisation. The legal situation was only clarified by a supreme court decision in 2010 (BGH, judgment of 25 June 2010 - 2 StR 454/09 - BGHSt 55, 191). Therefore, it could not be ruled out that Ms K. was actually unable to obtain "euthanasia" via an abortion of her treatment, as the medical staff may not have been prepared to do this in view of the legal uncertainties.

43 5. In as far as the claim goes beyond this, it is not successful. The determination that the Federal Institute would have been obligated to grant the licence cannot be made without the necessary examination and finding of facts. This is no longer possible after Ms K.'s death. In particular, the question as to whether reasonable alternatives would

have been available can no longer be answered without her participation. Accordingly, there was no reason to refer the matter back to the Court of Appeal for a further inquiry into the facts.