Headnotes

to the Order of the First Senate of 26 July 2016

1 BvL 8/15

1. The state's duty of protection following from Article 2(2) first sentence of the Basic Law requires that, under certain narrow conditions and as a last resort, where there is imminent risk of considerable impairments to their health, persons under custodianship who lack mental capacity be provided medical treatment even if that treatment is against their natural will.

2. a) Judicial review proceedings pursuant to Article 100(1) of the Basic Law may also concern provisions that, according to the plausible view of the referring court, lack elements that would be required by a specific constitutional duty of protection.

b) If there is a weighty and objective need to clarify a question of constitutional law raised by a referral, the referral may remain admissible even if the initial proceedings have become moot because of the death of one of the main parties.

FEDERAL CONSTITUTIONAL COURT

- 1 BvL 8/15 -

IN THE NAME OF THE PEOPLE

**In the proceedings
for constitutional review of**

whether § 1906(3) of the Civil Code in the version of the Act on Consent by a Custodian to Coercive Medical Treatment of 18 February 2013 (BGBl I, p. 266) is compatible with Article 3(1) of the Basic Law to the extent that, as a precondition to the custodian's consent to in-patient coercive medical treatment, it requires the treatment to be conducted in a setting of confinement pursuant to § 1906(1) of the Civil Code, even in cases where affected persons do not intend to remove themselves from the site of treatment, or are physically unable to do so

– Order of Suspension and Referral of the Federal Court of Justice of 1 July 2015 - XII ZB 89/15 -

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Kirchhof,

Gaier,

Eichberger,

Schluckebier,

Masing,

Paulus,

Baer,

Britz

held on 26 July 2016:

1. **It is incompatible with the state's duty of protection following from Article 2(2) first sentence of the Basic Law that, where there is imminent risk of considerable impairments to their health, persons under custodianship who lack the mental capacity for insight into the necessity of needed medical treatment or for acting upon this insight cannot, under any circumstances, receive medical treatment against their natural will if they are receiving in-patient treatment but cannot be confined in an institution because they do not intend to remove themselves from the site of treatment or are physically unable to do so.**

2. **The legislator is obliged to enact provisions covering this type of case without undue delay.**

3. **Until such provisions are enacted, § 1906(3) of the Civil Code, in the version of Article 1 no. 3 of the Act on Consent by a Custodian to Coercive Medical Treatment of 18 February 2013 (BGBl I, p. 266), also applies to persons under custodianship who are treated as in-patients and are unable to remove themselves from the site of coercive medical treatment.**

REASONS:

A.

The Federal Court of Justice referred to the Federal Constitutional Court the question whether § 1906(3) of the Civil Code […] is compatible with the Basic Law to the extent that, as a precondition to in-patient coercive medical treatment, it requires the treatment to be conducted in a setting of confinement pursuant to § 1906(1) of the Civil Code, even in cases where affected persons do not intend to remove themselves from the site of treatment, or are physically unable to do so, i.e. where ordering confinement is impermissible according to established case-law.

I.

1. a) The objective of the […] Custodianship Act […] is to improve the legal status of adults with mental illness or disability taking into account their individual needs and abilities.

If adults, due to mental illness or physical, mental or psychological disability, are unable, entirely or in part, to attend to their affairs, the custodianship court appoints a custodian for them on their application or *ex officio* (cf. § 1896(1) of the Civil Code). The Civil Code governs the appointment of a custodian (§§ 1896 *et seq*. of the Civil Code), the extent of custodianship (§§ 1901 *et seq*. of the Civil Code), and makes certain measures subject to the approval of the custodianship court (§§ 1904 *et seq*. of the Civil Code). 3

To the extent that custodianship pursuant to § 1896 of the Civil Code is ordered for tasks relating to health matters, the custodian must arrange for the necessary measures to be taken and, where required, consent to necessary medical treatment (§ 1901 of the Civil Code). The custodian must attend to the affairs of the person under custodianship in their best interests. These best interests include the possibility to live their lives according to their own wishes and ideas, within the limits of their abilities (§ 1901(2) of the Civil Code). […] As far as it is possible to ascertain – e.g. on the basis of an advance healthcare directive pursuant to § 1901a of the Civil Code – the free will of the person under custodianship in respect of whether and how they would want specific treatment measures to be carried out, this will is also binding on the custodian. 4

[…] 5

Medical treatment against the natural will of persons under custodianship who, due to mental illness or mental or psychological disability, lack the mental capacity for insight into its necessity or for acting upon such insight is only permissible on the basis of § 1906 of the Civil Code, and thus only in cases in which persons under custodianship are confined in an institution pursuant to § 1906(1) of the Civil Code. In the past, it was controversial whether coercive medical treatment was also permissible, on the basis of §§ 1896 and 1901 of the Civil Code, in cases in which persons under custodianship are not confined in an institution and where the custodian consented […]. By order of 11 October 2000 […], the Federal Court of Justice held that this was impermissible […]. 6

[…] 7

b) […] 8-9

2. […] 10-12

3. […] 13-14

4. […] 15

5. […] 16-17

II.

1. The person concerned in the initial proceedings, who was 63 years old, suffered from schizoaffective psychosis. For this reason, she had been under custodianship for, *inter alia*, tasks relating to care and health matters, including consent to medical measures and treatment, as well as for determining her place of residence, including decisions on confinement or similar measures, since the end of April 2014. 18

In early September 2014, the person concerned was briefly admitted to a care facility. While there, she refused to take the medication prescribed to treat an autoimmune disease, refused to eat and expressed the intent to commit suicide. From mid-September 2014, she was confined in a dementia unit at a hospital, a measure 19

approved by a judge. On the basis of several orders of the custodianship court, she was subject to coercive medical measures for medicating her autoimmune disease, hypothyroidism and mental illness. The medication – as well as food – was administered via stomach tube, the insertion of which also constituted a coercive medical measure. In addition, further examinations (punch biopsy) were carried out with regard to suspected cancer. They confirmed the suspicion of breast cancer, which had not yet broken through the skin.

At that time, she was severely weakened physically and could no longer walk or move herself around in a wheelchair. However, mentally, she was able to express her natural will. In response to a judge's questions, she repeatedly stated that she did not wish to be treated for cancer. She wanted neither surgery nor chemotherapy. 20

2. In a letter dated 20 January 2015, her professional custodian applied for authorisation to extend the patient's confinement, and to carry out coercive medical measures, to treat the breast cancer in particular […], but also to continue the treatment of the other conditions with medication. 21

3. The Local Court rejected the application for confinement and coercive treatment. While the person concerned was suffering from a mental illness preventing her from consenting to the necessary medical treatment, confinement was not necessary given that the requested treatment and medical interventions could also be carried out in an open institution. 22

4. The Regional Court rejected the custodian's complaint but admitted the complaint on points of law. 23

[…] 24-27

5. On behalf of the person concerned, the custodian filed a complaint on points of law before the Federal Court of Justice. 28

III.

1. The Federal Court of Justice suspended the proceedings pursuant to Art. 100(1) first sentence of the Basic Law and referred to the Federal Constitutional Court the question whether § 1906(3) of the Civil Code in its version of 18 February 2013 is compatible with Art. 3(1) of the Basic Law to the extent that, as a precondition to the custodian's consent to in-patient coercive medical treatment, this treatment must be conducted in a setting of confinement pursuant to § 1906(1) of the Civil Code, even in respect of cases where the persons concerned do not intend to remove themselves from the site of treatment, or are physically unable to do so. 29

[…] 30-37

2. […] 38

IV.

Statements in the referral proceedings were submitted by the Federal Association of Notaries (*Bundesnotarkammer*), the Federal Association of Persons with Physical and Multiple Disabilities (*Bundesverband für körper- und mehrfachbehinderte Menschen e.V.*), the Federal Association of Families of People with Mental Illness (*Bundesverband der Angehörigen psychisch Kranker e.V.*), the Federal Association of Professional Custodians (*Bundesverband der Berufsbetreuer/innen e.V.*), the Association of German Notaries (*Deutscher Notarverein e.V.*), the Initiative for Persons with Mental Illness – Association for Reforming the Care of Persons with Mental Illness (*Aktion psychisch Kranke Vereinigung zur Reform der Versorgung psychisch Kranker e.V.*), the German Association for Psychiatry, Psychotherapy and Psychosomatics (*Deutsche Gesellschaft für Psychiatrie und Psychotherapie, Psychosomatik und Nervenheilkunde e.V.*), the Federal Workers' Welfare Association (*AWO Bundesverband e.V.*), the Federal Bar Association (*Bundesrechtsanwaltskammer*), the German Caritas Association, the Federal Working Group of Users and Survivors of Psychiatry (*Bundesarbeitsgemeinschaft Psychiatrie-Erfahrener e.V.*) and the Federal Association of Users and Survivors of Psychiatry (*Bundesverband Psychiatrie-Erfahrener e.V.*). 39

[…] 40-51

B.

I.

The referral is admissible. 52

1. […] 53-58

2. […] 59

3. The referral was not rendered inadmissible by the fact that the affected person in the initial proceedings died in the course of the referral proceedings. 60

a) 61

[…] 62-63

b) Despite the death of the affected person in the initial proceedings, a weighty objective need persists for clarifying the question of constitutional law referred by the Federal Court of Justice. 64

[…] 65

II.

It constitutes a violation of the state's duty of protection, which follows from Art. 2(2) first sentence of the Basic Law, that persons under custodianship who cannot reach 66

a decision informed by their free will are – regardless of the risks involved in the treatment and of the extent of the risk to their life or physical integrity – entirely excluded from necessary medical treatment if that treatment is against their natural will, yet they cannot be confined in an institution because the requirements for such confinement are not met (see 1 below). There is no need to decide here whether this is also incompatible with the right to equality (see 2 below).

1. It follows from Art. 2(2) first sentence of the Basic Law that the state is obliged to provide protection to vulnerable persons who are under custodianship for health matters and who lack the mental capacity for insight into the necessity of medical treatment where there is imminent risk of considerable impairment to their health, or for acting upon such insight; where necessary, the state must provide this protection, in the form of medical care, even against the vulnerable person's natural will (see a below). Such coercive medical treatment is also compatible with Germany's obligations under international law (see b below). The fact that, under the law as it currently stands, vulnerable persons who are in-patients in an open institution and are unable to move about without assistance cannot, even when urgently necessary, be treated against their natural will constitutes a violation of the duty of protection following from Art. 2(2) first sentence of the Basic Law (see c below). […] 67

a) […] 68

aa) The fundamental right to life and physical integrity not only guarantees the individual a defensive right against state interference with these legal interests, but also constitutes an objective decision on constitutional values that establishes duties of protection on the part of the state. Accordingly, the state is obliged to protect and defend the individual's right to life (cf. BVerfGE 39, 1 <42>; 46, 160 <164>; 90, 145 <195>; 115, 320 <346>). Art. 2(2) first sentence of the Basic Law also encompasses protection against impairments to physical integrity and health (cf. BVerfGE 56, 54 <78>; 121, 317 <356>). 69

[…] The Federal Constitutional Court can only find a violation of such a duty of protection if safeguards have either not been put in place at all, or if the provisions enacted and measures taken are evidently unsuitable, entirely inadequate, or fall significantly short of achieving the required aim of protection (cf. BVerfGE 56, 54 <80>; 77, 170 <215>; 92, 26 <46>; 125, 39 <78 and 79>). 70

bb) Accordingly, in respect of persons under custodianship who, due to mental illness or mental or psychological disability, lack the mental capacity for insight into the necessity of medical treatment, or for acting upon such insight, the general duty of protection consolidates, under certain narrow conditions, into a specific duty of protection. It follows from Art. 2(2) first sentence of the Basic Law that the legislator is obliged to provide a system of assistance and protection for persons under custodianship who lack the mental capacity for insight into the necessity of medical treatment to prevent or fight serious illnesses, or cannot act upon such insight. In serious cases, it must be possible, as a last resort, to carry out medical examination and 71

treatment measures, even if this entails having to override the opposing natural will of persons under custodianship.

[…] 72

(1) Under narrow conditions, Art. 2(2) first sentence of the Basic Law gives rise to a constitutional duty to protect certain persons under custodianship, even by way of coercive treatment measures where necessary; this duty follows from the specific need for assistance of these persons. If, due to illness, they lack the capacity for insight into the medical necessity of an examination or curative treatment or to act upon such insight, they are unprotected and vulnerable given that they are exposed to risks to their life and physical integrity without being able to ensure their protection themselves (cf. BVerfGE 58, 208 <225>; 128, 282 <304 *et seq*.). The state and society may not simply abandon helpless persons. 73

(2) Nonetheless, every coercive treatment measure interferes with the fundamental right to the free development of one's personality because under the Basic Law everyone is in principle free to decide on interferences with their physical integrity and to deal with their health as they see fit. This freedom is a manifestation of one's personal autonomy, and as such is protected by the general right of personality under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law (for the same outcome, referring to Art. 2(2) first sentence of the Basic Law, cf. BVerfGE 128, 282 <302>; 129, 269 <280>; 133, 112 <131 para. 49>). An individual is not required to follow a standard of objective reasonableness when deciding whether and to what extent to seek diagnosis and treatment. The state's duty to "protect individuals from themselves" does not establish the 'sovereignty of reason' (*Vernunfthoheit*) of state organs over fundamental rights holders in such a way that their will is set aside merely because it differs from average preferences or appears to be unreasonable from an outside perspective (cf. BVerfGE 128, 282 <308>). The fundamental freedoms [enshrined in the Basic Law] encompass the right to exercise the liberties and freedoms in a way that is, in the eyes of third parties, contrary to the seemingly best interests of the fundamental rights holder. Therefore, it is generally for individuals to decide whether they wish to undergo therapeutic measures or other treatment, even if these serve to preserve or improve their health. This constitutionally protected freedom also encompasses the 'freedom to be ill', and thus the right to refuse curative treatment, even if it is urgently indicated according to current medical findings (cf. BVerfGE 128, 282 <304>; with further references). 74

To the extent that the affected persons are able to decide on medical treatment to preserve or improve their own health on the basis of their free will, there is no need for protection and assistance; in this case, the state's duty of protection following from Art. 2(2) first sentence of the Basic Law must stand back. Coercive medical treatment against a person's free will is then ruled out. 75

If the affected persons are unable to reach a decision informed by their free will on how to deal with an illness because, due to illness, they lack the mental capacity for 76

insight into the necessity of medical treatment, or for acting upon such insight (on this requirement cf. BVerfGE 128, 282 <304 and 305> as well as § 1906(3) first sentence no. 1 of the Civil Code), a potentially existing natural will relating to their illness is still, under constitutional law, an expression of the right to self-determination that is protected by the right to the free development of one's personality; even under these conditions, coercive medical treatment is an interference with this right. However, the natural will opposed to necessary medical treatment does not alter the fact that the affected persons need special help and protection.

(3) If a medical measure cannot be justified through the consent of the affected person given of their own free will, and coercive medical treatment is imposed against their natural will, this also conflicts with that person's fundamental right to physical integrity (cf. also BVerfGE 128, 282 <300 and 301>). This applies to both diagnostic and therapeutic measures. 77

(4) If there is a risk of serious impairment to the health of persons under custodianship who lack the mental capacity for insight into their illness, and if, in a balancing of the prospects of curing them against the burdens imposed on them through medical treatment, the former prevail, the state's duty of protection prevails over the conflicting freedoms. In that case, it is incumbent on the state to open up the possibility of medical treatment even against the natural will of the persons under custodianship. Strict substantive and procedural requirements regarding such coercive treatment must ensure that the affected freedoms are taken into consideration to the greatest possible extent. 78

(a) Where the state's duty of protection following from Art. 2(2) first sentence of the Basic Law requires that medical treatment be administered against the natural will of persons under custodianship, this conflicts with their right to self-determination and their fundamental right to physical integrity. In this case, the duty of protection does not lapse merely because the risk of a fundamental rights violation does not stem from third parties, but because measures based on that duty of protection conflict with opposing fundamental rights of the affected persons. […] 79

(b) In cases in which serious health impairment, including a danger to one's life, can be averted through treatment measures that do not amount to an excessively intrusive interference and that have good prospects of success, the legislator must provide for the possibility of coercive medical treatment of persons who, due to illness, lack mental capacity and therefore, of their natural will, oppose such treatment. […] 80

In fulfilling this duty of protection, the legislator has latitude in setting out the details of specific protective measures. In particular, the legislator has latitude to set out the substantive requirements for curative treatment and the procedural rules safeguarding the self-determination and physical integrity of the affected persons. However, where a duty of protection is already established, the legislator's latitude only relates to the question of how – but not whether – medical treatment of persons under custodianship for health matters should be regulated. 81

(c) Given that in the cases described above the specific duty of protection ultimately prevails over the right to self-determination and physical integrity of the affected persons, the legislator is, in the interest of the greatest possible respect for the fundamental freedoms that must stand back in such cases, obliged to provide for stringent and sufficiently specific substantive requirements supplemented by procedural ones in respect of coercive medical treatment (regarding the justification of coercive medical treatment as an interference, cf. already BVerfGE 128, 282 <308 *et seq*.>). In this regard, the legislator must take into account that this is not a matter of ensuring medical protection according to standards of objective reasonableness; rather, the free will of persons under custodianship must be respected. This also applies where the free will can only be determined on the basis of indications – especially by drawing on earlier statements or on how and to what extent the natural will is expressed. Only where this is not possible can the opposed natural will formed due to illness be overridden as a last resort. 82

(d) […] 83

(e) […] 84-85

The Basic Law calls for the autonomous self-determination of the individual to be respected. This requires the legislator to put in place the necessary provisions to ensure that, before specific examinations of their state of health, curative treatment or medical interventions are performed, it is established whether persons under custodianship for health matters have sufficient mental capacity for insight and agency with regard to these measures to reach a decision informed by a free and thus decisive will. In this respect, an advance healthcare directive or prior statements on desired treatment in a situation such as the one in question can be decisive, as already provided for by law (cf. § 1901a(1) and (2) of the Civil Code). Where the natural will of persons under custodianship who lack the mental capacity for insight opposes such measures, it is necessary to first try and convince them of the necessity and reasonableness of the intended treatment (cf. already § 1906(3) no. 2 of the Civil Code), before coercive treatment may be carried out as a last resort. 86

b) International law obligations do not stand in the way of the state's duty to protect persons under custodianship who are vulnerable and unable to form a free will, and if necessary, to subject them to coercive medical treatment under the conditions set out above (see a bb, para. 71 *et seq*. above). 87

aa) In its order of 23 March 2011, the Federal Constitutional Court held that the UN Convention on the Rights of Persons with Disabilities (CRPD), which has the force of law in Germany […] and serves as an interpretive guideline for determining the content and scope of fundamental rights (cf. BVerfGE 111, 307 <317 and 318>), does not suggest a different conclusion (cf. BVerfGE 128, 282 <306 and 307>). The Court did not infer from the provisions of the Convention that aim to safeguard and strengthen the autonomy of persons with disabilities, in particular from Art. 12 CRPD, a general prohibition of measures carried out against the natural will of persons with dis- 88

abilities, where such measures are grounded in their limited capacity for self-determination due to illness. […].

[…] 89-91

bb) The state's duty following from Art. 2(2) first sentence of the Basic Law to protect vulnerable persons under custodianship who lack the capacity to reach a decision informed by their free will and, where necessary, to subject them to coercive medical treatment under the conditions set out above (see a bb, para. 71 *et seq*. above), is also in conformity with the European Convention on Human Rights and the case-law of the European Court of Human Rights. 92

According to the case-law of the European Court of Human Rights, Art. 8 of the European Convention on Human Rights provides for a right to conduct one's life in a manner of one's own choosing. That also includes the opportunity to pursue activities that are physically harmful or dangerous. Medical treatment against the will of mentally competent adult patients would interfere with their physical integrity, and therefore with the rights protected under Art. 8 of the Convention, even if refusal of the treatment might lead to a fatal outcome (cf. ECtHR (GC), *Lambert v. France*, Judgment of 5 June 2015, no. 46043/14, § 120 *et seq*.; ECtHR, *Pretty v. the United Kingdom*, Judgment of 29 April 2002, no. 2346/02, §§ 62 and 63). In this respect, however, the states have a margin of appreciation (ECtHR (GC), *Lambert v. France*, Judgment of 5 June 2015, no. 46043/14, § 148). 93

However, the state and society are only required to accept decisions which by objective standards are unreasonable and may possibly lead to death where that decision is based on the free will of a mentally competent adult. Where a person does not make such a decision freely and with full understanding of what is involved, the European Court of Human Rights assumes that the state has a duty, derived from Art. 2 of the Convention, to prevent such persons from endangering their own lives (cf. ECtHR (GC), *Lambert v. France*, Judgment of 5 June 2015, no. 46043/14, § 140; ECtHR, *Haas v. Switzerland*, Judgment of 20 January 2011, no. 31322/07, § 54; ECtHR, *Arskaya v. Ukraine*, Judgment of 5 December 2013, no. 45076/05, §§ 69 and 70). Where a patient refuses medically indicated treatment and thereby endangers their life, the European Court of Human Rights holds that the state must sufficiently provide for a duty upon attending physicians to establish the decision-making capacity of the person concerned where there are indications that free will may be lacking (cf. ECtHR, *Arskaya v. Ukraine*, Judgment of 5 December 2013, no. 45076/05, §§ 62, 69, 70, 88). 94

Thus, it cannot be found that there is a contradiction between the European Convention on Human Rights, in particular Arts. 2 and 8 of the Convention, as interpreted by the European Court of Human Rights, and necessary coercive medical treatment, under the conditions set out above (see a bb, para. 71 *et seq*. above), of vulnerable persons under custodianship as mandated by Art. 2(2) first sentence of the Basic Law. 95

c) According to these considerations, it constitutes a violation of the state's duty of protection following from Art. 2(2) first sentence of the Basic Law that, under applicable custodianship law, persons under custodianship who lack mental capacity, who are at risk of considerable health impairments due to illness and who can be treated with good prospects of success by a measure that entails only relatively minor burdens cannot under any circumstances be treated against their natural will, if they are in-patients, but are unable to remove themselves from the site of necessary treatment and can therefore not be confined in an institution. 96

Custodianship law in the Civil Code only provides for coercive medical treatment in respect of persons under custodianship who are confined in an institution pursuant to § 1906(1) of the Civil Code (§ 1906(3) first sentence no. 3 of the Civil Code). […] 97

Persons under custodianship who are treated as in-patients and who […] are *de facto* unable to remove themselves from the site of treatment cannot be confined in an institution pursuant to § 1906(1) no. 2 of the Civil Code, and therefore cannot be subjected to coercive treatment pursuant to § 1906(3) of the Civil Code. Thus, even if these persons under custodianship unquestionably fit all the substantive conditions that would give rise to a constitutional duty of protection on the part of the state, and all procedural requirements were satisfied, they would still not receive the required protection following from Art. 2(2) first sentence of the Basic Law. In this respect, the legal situation for persons under custodianship does not satisfy the constitutional requirements. 98

[…] 99

d) […] 100

2. […] 101

C.

[…] 102-103

Kirchhof Gaier Eichberger

Schluckebier Masing Paulus

Baer Britz

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 26. Juli 2016 - 1 BvL 8/15

Zitiervorschlag BVerfG, Beschluss des Ersten Senats vom 26. Juli 2016 - 1 BvL 8/15 - Rn. (1 - 102-103), http://www.bverfg.de/e/ls20160726_1bvl000815en.html

ECLI ECLI:DE:BVerfG:2016:ls20160726.1bvl000815