demanded not only greater clarity from judges when imposing sentence, but also a large increase in Parole Board funding. But on principle the Court of Appeal's decision makes little sense. The Court has failed to acknowledge that the length of a prison sentence of four years or more is not determined by the judge when sentencing: that decision lies in the hands of the Parole Board, who focus on questions of risk.

The underlying problem is the continuing uncertainty about what prison sentences are for; indeed what prisons are for. The White Paper, *Justice for All* (CM 5563), published in July 2002, stresses yet again the need for a "stronger focus" on public protection. But it also acknowledges that longer sentences do not necessarily reduce crime. To pursue comparison with Shakespeare's schoolboy, the Government should take its shining morning face to school and learn the lesson that those who are to be detained "simply" for public protection deserve a system which pays much greater respect to their many human rights, of which the right to liberty is but one.

NICOLA PADFIELD

ASSISTED SUICIDE AND PERSONAL AUTONOMY

THE European Court of Human Rights recently confirmed that the exceptionless prohibition of assisted suicide under section 2(1) of the Suicide Act 1961, which had been unsuccessfully challenged by the applicant in the House of Lords because of its effects on persons physically unable to commit suicide unassisted by another (*R. (Pretty)* v. *DPP*, [2001] UKHL 61, [2001] 3 W.L.R. 1598, noted by Keown (2002) 61 C.L.J. 8), is compatible with the United Kingdom's obligations towards the applicant under the European Convention on Human Rights: *Pretty* v. *United Kingdom*, judgment of 29 April 2002. As she had before the House of Lords, Mrs. Pretty put forward arguments under Articles 2, 3, 8, 9 and 14 of the Convention. Important differences between the decisions of the European Court of Human Rights and the House of Lords emerged only in the assessment of the merits of Mrs. Pretty's case with regard to Article 8 and Article 14.

Unlike the House of Lords, the European Court of Human Rights accepted that Mrs. Pretty's right to respect for her private life under Article 8 of the Convention was affected by the prohibition of assisted suicide under UK law. The Court took the view that making choices regarding the manner and time of one's

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death is protected by Article 8 para. 1 as one of the integral aspects of respect for private life. The Strasbourg judges saw no merit in Lord Bingham's contention that Article 8 "is ... directed to protection of personal autonomy while individuals are living their lives, and there is nothing to suggest that the article has reference to the choice to live no longer" ([2001] 3 W.L.R. 1598 at para. [23]), stressing (at para. 65) that:

> it is under Article 8 that notions of the quality of life take on significance. 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.

However, this guarantee of personal autonomy is not absolute. Restrictions will be justified in terms of Article 8 para. 2 if they are "necessary in a democratic society" to achieve a legitimate legislative aim or objective (para. 68). The less fundamental the restricted activity is for a person's self-determination, the wider the margin of appreciation left to the Member States (para. 70).

The legislative aim of the unqualified and exceptionless prohibition of assistance to others in committing suicide is twofold: first, the prohibition reflects the public (*i.e.* State) interest in preserving the lives of its citizens. The prohibition discourages citizens generally from taking their own lives by preventing them from getting access to convenient means to achieve their objective. Secondly—and this was the aspect stressed by the United Kingdom Government in the case at hand—the prohibition is meant to protect vulnerable persons from acting upon a death wish which might be merely transitory in nature, induced by third parties, or related to personal conditions affecting the validity of individual judgments. Any loosening of the absolute and unqualified prohibition of assisted suicide risks weakening the effectiveness of the protection afforded under the current law to vulnerable persons, over whom undue influence might be exercised. Given the difficulties and inherent risks of a system of "advance notice" or "clearance-based" physician-assisted suicide on the one hand, and the generally limited effects on personal autonomy of the restriction as it stands on the other, an absolute ban on assisted suicide can in a democratic society be justified as a legitimate legislative choice in favour of the most effective system of protection for vulnerable persons (paras. 74–76).

But the fact that the absolute prohibition of assisted suicide is generally justifiable under Article 8 para. 2 does not mean that it is also justified towards every subject of the law. Article 14 of the

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Convention guarantees the enjoyment of the rights and freedoms set forth in the Convention without discrimination on any ground. Mrs. Pretty argued that section 2(1) of the Suicide Act 1961 was discriminatory because its effect was to prevent the disabled, but not the able-bodied, from committing suicide. Since her rights under Article 8 were engaged, the Court had to consider whether the applicant as a person physically incapable of committing suicide unaided was discriminated against by a legislative provision which for all practical purposes prevented her from committing suicide at all. Dismissing by implication Lord Bingham's assertion that "[t]he criminal law cannot in any event be criticised as objectionably discriminatory because it applies to all" ([2001] 3 W.L.R. 1598, at para. [36]), the Strasbourg Court pointed out that "[d]iscrimination may also arise where States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different" (para. 87) and suggested that this principle was applicable to the applicant's situation (para. 88). Since according to this guideline discrimination will only be conclusively established if the burden is imposed arbitrarily, the more burdensome effects of an indistinctly applicable law on a particular category of persons do not amount to unlawful discrimination under Article 14 if the harsher burden cannot be avoided in order to achieve a legislative objective which is sufficiently weighty to justify the restriction as it affects the disadvantaged group. This was the upshot of the case put in the last resort by the British Government and accepted by the European Court of Human Rights (at para. 88):

> [T]o seek to build into the law an exemption for those judged to be incapable of committing suicide would seriously undermine the protection of life which the 1961 Act was intended to safeguard and greatly increase the risk of abuse.

Whether an exemption for people in Mrs. Pretty's condition would really have this effect is questionable. As the recent and equally tragic case of *Re B (Adult: Refusal of Medical Treatment)* [2002] EWHC 428 (Fam), [2002] 2 All E.R. 449 has dramatically shown, doctors—and sometimes judges—already have to assess the capacity of individuals to make life-and-death choices in the related context of a patient's wish to refuse treatment necessary to keep her or him alive. The additional determination of whether a person is so physically handicapped that they cannot commit suicide unaided might be thought to present comparatively few extra difficulties. It could be said that a limited exception to the absolute prohibition of assisted suicide for competent persons who cannot

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take their own life unaided would not threaten the sanctity of life principle, but would merely acknowledge that it is deeply unfair to condemn someone like Mrs. Pretty to die a natural death for the sake of giving to others a kind of protection that Mrs. Pretty herself neither wants nor needs. The reason why we ought to respect her choice is the same reason that makes us respect the choice of able-bodied persons to commit suicide: not that it is *the right* choice, but that it is *her* choice.

These issues of principle will be more fully discussed in the author's forthcoming article, "The Human Rights Dimension of the Diane Pretty Case", in the March 2003 issue of this journal.

ANTJE PEDAIN

SECURITY SERVICES, LEAKS AND THE PUBLIC INTEREST

ONCE upon a time, the Crown faced almost no difficulties in securing convictions for breaches of the Official Secrets Act 1911, particularly section 2. After the somewhat embarrassing decision to proceed had been taken, it was like shooting fish in a barrel. Occasionally, the jury revolted, as they did in *Ponting* [1985] Crim. L.R. 315, producing something like a perverse verdict in the face of the judicial direction that it was no defence that the defendant believed himself to be acting in the public interest. That decision, and the ruling of the House of Lords in the *Spycatcher* litigation [1990] 1 A.C. 109 to the effect that the former security service agent Peter Wright did not commit an actionable breach of confidence by making his allegations of improper practices within the services, prompted the government of the day to promote legislation that purported to impose life-long obligations of confidence upon members and former members of the security intelligence services. "Purported" because, with the enactment of the Human Rights Act 1998, it is now open to the courts *inter alia* to declare that Parliament has acted incompatibly with one of the rights protected by that Act.

The proceedings in *R.* v. *Shayler* [2002] UKHL 11, [2002] 2 W.L.R, 754 are somewhat unusual. Mr. Shayler, a former member of the Security Service, is being prosecuted for breaches of the Official Secrets Act 1989. One possible line of defence that he wished to pursue was that the disclosures to the newspapers were made in the public and national interest. Moses J. presided over a preparatory hearing and ruled that no such defence was available under the Act, a decision affirmed by the Court of Appeal. The

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