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CASE AND COMMENT

ASSISTED SUICIDE AND THE DISCRETION TO PROSECUTE

THE decision of the judicial House of Lords in *R. (Purdy)* v. *Director of Public Prosecutions* [2009] UKHL 45, [2009] 3 W.L.R. 403 was its last. Fittingly, perhaps, it was also one of its most sensational: the case where Ms Debbie Purdy, who is slowly dying from motor neurone disease, persuaded the House of Lords to tell the DPP to publish a policy-statement saying when he will and will not prosecute those who help others to travel to Switzerland for the purpose of assisted suicide.

The first issue in the case was whether the conduct in question is a crime at all. On this three views are possible. The first is that the offence of complicity in suicide created by the Suicide Act 1961 only applies to suicides in England and Wales, and helping people to commit suicide abroad is therefore legal. The second is that it applies where the *act of assisting or encouraging* takes place in England and Wales, irrespective of where the suicide occurs. The third is that this behaviour constitutes not the offence under the Suicide Act, but complicity in murder at common law, because this would have been the situation before the 1961, when suicide was treated as "self-murder", the abrogation of that rule only operates within England and Wales and murders by British citizens are triable in England, even when carried out abroad.

The House rejected the first analysis, but then failed to make up its collective mind between the second and the third. Reading between the lines, it may have trailed the possibility of liability for murder to show how urgently further legislation in this area is needed. But the loose end it left untied is important, because murder prosecutions, unlike those for complicity in suicide, do not require the DPP's consent; and if the third analysis is right, a "right to life" enthusiast could bring a private prosecution in this sort of case, even if the DPP decided not to proceed.

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Assuming the conduct in question is a crime, Ms Purdy's argument that the DPP must issue a "prosecution policy" was as follows. (1) Decisions about whether and when to commit suicide engage the decision-maker's right to "respect for his private and family life", which is protected by Article 8(1) of the European Convention. (2) This right may be interfered with only for the purposes enumerated in Article 8(2), and even then, only when the interference is "in accordance with the law". (3) The present arrangements in England and Wales, whereby assisted suicide is in theory prohibited but in practice widely tolerated by the authorities, do not qualify as an interference "in accordance with the law". (4) To cure this deficiency the DPP must therefore publish guidelines as to when assisted suicide will be prosecuted, and when not.

Ms Purdy's case had fallen at the first hurdle in the courts below, because these were bound by the earlier ruling of the House of Lords in *R. (Pretty)* v. *DPP* [2001] UKHL 62, [2002] A.C. 800 that decisions about when to die do not engage the decision-maker's rights under Article 8. However, the Strasbourg Court had later held that Article 8 is indeed engaged: *Pretty* v. *UK* (2002) 35 E.H.R.R. 1 – albeit also saying that a legal ban on assisted suicide was potentially justified as necessary "for the protection of the rights of others", a condition for permissible infringements with the right to private life that is mentioned in Article 8(2). In Ms Purdy's case the House accepted correction from the Strasbourg Court and, reversing its earlier stance in *Pretty*, held that Article 8 is indeed engaged.

Naturally, the DPP's response to the second step in Ms Purdy's argument was that the Suicide Act – a statute which explicitly forbids assisted suicide – constitutes a "law" for the purposes of Article 8, even if it is not invariably enforced. And, he added, even if a criminal statute does not constitute a "law" where the offence is subject to a discretion to prosecute that is open-ended, the discretion is not open-ended here: because in England and Wales the discretion to prosecute is regulated by the official CPS Code, a public document which sets out – admittedly at a high level of abstraction and without specific reference to this offence – the principles on which the discretion is exercised. But the House of Lords rejected this response. A statute that says "it is a criminal offence to do X", coupled with an unstated policy that it is not to be prosecuted unless certain extra factors are present too, is not, their Lordships said, a "law" for the purposes of Article 8(2). And so to put the matter right, the DPP must "promulgate an offence-specific policy identifying the facts and circumstances which he will take into account in deciding, in a case such as that which Ms Purdy's case exemplifies, whether or not to consent to a prosecution under section 2(1) of the 1961 Act".

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The main significance of this case is that it marks a step along the road towards making assisted suicide legal – a destination which many people, including the writer of this note, believe to be desirable. But the reasoning it contains has wider implications for the criminal law that are disquieting.

In the first place, the argument that succeeded in this case is equally applicable to other criminal offences in which Article 8 is also engaged; and indeed to offences that engage Articles 9, 10 and 11 as well, because these too specify that any interference with the rights that they protect must be "in accordance with the law". Complicity in suicide could be the first of many broad but rarely-prosecuted offences which the DPP must cut down to size by issuing an "offence-specific" prosecution policy.

But behind this lies a second and more basic issue. Is it really compatible with the rule of law that, when an Act of Parliament makes a certain form of behaviour a criminal offence, the DPP should in effect decriminalise it, in whole or in part, by saying when it will and will not be prosecuted? The orthodox answer, forcibly expressed by the Court of Appeal in the judgment which the House of Lords reversed, is "no": once Parliament has created an offence, only Parliament has the authority to redraw its boundaries so that it catches fewer people in its net. For any other organ of the State to attempt to do so is to infringe the first rule of the constitution, which is the supremacy of Parliament.

That the highest court should rebel against the orthodox view is, in a sense, quite understandable. In recent years Parliament, driven by the executive, has got into the habit of expanding criminal liability in all directions with little or no thought, and almost completely out of the habit of contracting it. And when authority is over-used like this, respect for it is dented. As the revolutionaries said about the authority of the French ruling classes before 1789: "*Vouz l'avez perdu en en abusant.*"

J.R. SPENCER

STOP PRESS: KAFKAESQUE PROCEDURES ARE UNFAIR

IN *R* v. *The Chancellor of Cambridge* (1723) 1 Stra. 557, it was observed that "even God himself did not pass sentence upon Adam, before he was called upon to make his defence". The importance of affording accused individuals such opportunities – and of disclosing adverse evidence in order that they may be fully exploited – is hard-wired into our criminal justice system. But there has recently been protracted litigation, culminating in the House of Lords' decision in *Home*

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