NO RIGHT TO ASSISTED SUICIDE

TERMINALLY ill with motor neurone disease, Mrs. Diane Pretty wanted her husband to assist her commit suicide. She asked the DPP for an assurance that he would not prosecute her husband. The DPP refused. In proceedings for judicial review she sought an order that the DPP give the undertaking or a declaration that the prohibition on assisted suicide was incompatible with the European Convention on Human Rights.

The Divisional Court rejected her claim. The Law Lords unanimously dismissed her appeal: *R. (Pretty)* v. *DPP* [2001] UKHL 61, [2001] 3 W.L.R. 1598. Lord Bingham delivered the leading judgment, with which Lords Steyn, Hope, Hobhouse and Scott agreed. Their Lordships held that the DPP had no power to grant the undertaking. Lord Bingham observed that the DPP was not being asked for a statement of prosecuting policy but for an anticipatory grant of immunity from prosecution. The power to suspend laws and the execution of laws without the consent of parliament was denied to the crown and its servants by the Bill of Rights 1688.

Their Lordships also rejected Mrs. Pretty's claim that the European Convention contained a right to assisted suicide. Her counsel relied principally on Articles 2 and 3 but also on Articles 8, 9 and 14.

Counsel argued that Article 2, protecting the right to life, protected not life itself but the right not to be deprived of life by third parties. The corollary of life, he argued, is death and thus the corollary of the right to life is the right to die at a time and in a manner of one's own choosing. Lord Bingham replied that Article 2 was "framed to protect the sanctity of life" and could not be interpreted as conferring a right to die or enlist the aid of another in bringing about one's death. Moreover, to the extent that there was any Convention case law on the matter, it went against counsel's argument. Lord Bingham also noted that it was not enough for Mrs. Pretty to show that the UK would not breach the Convention by permitting assisted suicide; she had to go further and argue that it breached the Convention by *not* permitting it. Such an argument was, he concluded, "untenable".

His Lordship also rejected the argument that, by denying her assisted suicide, the State would be subjecting her to inhuman or degrading treatment, contrary to Article 3. He observed that Article 3 complemented Article 2. There was, in his opinion, nothing in Article 3 which bears on an individual's right to live or to choose not to live. Moreover, given that Article 3 was (like Article 2) absolute, the word "treatment" should not be given an extravagant meaning.

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Lord Bingham went on to consider whether, if Article 3 could be assumed to be applicable, there was a breach of the State's positive obligation to prevent inhuman or degrading treatment. He noted that this positive obligation was not absolute and the steps required to fulfil it were prone to variation from State to State. He concluded that that obligation did not require the United Kingdom to permit assisted suicide for the terminally ill.

Turning to Article 8, protecting the right to respect for private and family life, Lord Bingham concluded that the article was expressed in terms directed to the protection of personal autonomy while individuals are living and there was nothing to suggest that it protected the choice to live no longer. Even if Mrs. Pretty's rights under Article 8(1) were engaged, the law's prohibition of assisted suicide was justified under Article 8(2) as necessary in the furtherance of certain interests. The case for relaxing the prohibition had, he observed, been rejected by several bodies including the Lords Select Committee on Medical Ethics and the Council of Europe. The United Kingdom's prohibition on assisted suicide was in accordance with "a very broad international consensus".

Counsel for Mrs. Pretty had disclaimed any general attack on the prohibition and had sought to restrict the claim to the particular facts of her case: that of a mentally-competent adult free from any pressure who has made a fully-informed and voluntary decision. Whatever the need to protect the vulnerable, counsel had argued, Mrs. Pretty was not vulnerable. Dismissing this argument, Lord Bingham cited Dr. Johnson, who wrote that "Laws are not made for particular cases but for men in general", and that "To permit a law to be modified at discretion is to leave the community without law. It is to withdraw the direction of that public wisdom by which the deficiencies of private understanding are to be supplied." It was, said Lord Bingham, for the State to assess the risk of abuse, and the risk was, as the Lords Select Committee had shown, one which could not lightly be discounted. If the prohibition infringed any right of Mrs. Pretty the State had shown "ample grounds to justify the existing law and the current application of it". Similarly, even if Mrs. Pretty were able to show an infringement of Article 9, protecting freedom of thought, conscience and religion, the justification shown by the State in relation to Article 8 would again defeat her.

As for Article 14, prohibiting discrimination in the enjoyment of the rights and freedoms set out in the Convention, Lord Bingham rejected Mrs. Pretty's argument that the prohibition on assisted suicide discriminated against those who, like her, were incapable of committing suicide without assistance. He pointed out that this

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article had no application unless she could show a breach of another article, which she could not. Even if she could, she would still have to show that the prohibition was discriminatory because it prevented the disabled, but not the able-bodied, from exercising a right to commit suicide. Such an argument would be based on a misconception, for while the Suicide Act abrogated the offence of suicide it conferred no right to commit suicide. The criminal law could not be criticised as discriminatory because it applied to everyone.

Pretty is a beacon case in medical and human rights law and was, it is suggested, rightly decided. Although their Lordships could have laid greater emphasis on the fundamental equality-in-dignity of human beings which underlies the inviolability principle, the case represents a weighty endorsement of that principle. Further, their Lordships properly emphasised the risks of permitting assisted suicide. They recognised, in the words of Lord Bingham, that if the law were to allow assisted suicide for the "non-vulnerable" it "could not be administered fairly and in a way which would command respect".

Indeed, the risks of the slippery slope were evident in the logic of the central argument deployed by Mrs. Pretty's own counsel. If she had a "right to self-determination in relation to issues of life and death" then, as Lord Bingham noted, this would extend to voluntary euthanasia for those too disabled to commit suicide. Indeed, why would the claimed right not extend to those who were neither disabled, dying or suffering?

Moreover, their Lordships rightly refrained from endorsing certain contentious aspects of the judgment of the Divisional Court, such as its formulation of the human rights issue as a conflict between the (authentic) right to life and the (spurious) "right to decide what will and will not be done with one's own body".

The outcome of the case was as predictable as it is important. In light of the courts' reluctance to question prosecutorial discretion, of their view (expressed by Lord Goff in *Bland* [1993] A.C. 789 at 865 and echoed in this case) that the decriminalisation of active euthanasia is a matter for Parliament, not the courts, and of the rejection of a right to physician-assisted suicide by the Supreme Courts of Canada ((1994) 53 C.L.J. 234 and the United States ((1997) 56 C.L.J. 506), Mrs. Pretty's attempt to persuade the English courts to allow *non* medically-assisted suicide was somewhat ambitious.

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