HOUSE OF LORDS SESSION 2008–09

[2009] UKHL 45

on appeal from:[2009] EWCA Civ 92

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R (on the application of Purdy) (Appellant) *v* Director of Public Prosecutions (Respondent)

Appellate Committee

Lord Phillips of Worth Matravers
Lord Hope of Craighead
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood
Lord Neuberger of Abbotsbury

Counsel

Appellants:
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Paul Bowen
(Instructed by Bindmans LLP)

Respondent:
David Perry QC
Dinah Rose QC
Jeremy Johnson
(Instructed by Teeasury Solicitors)

Interveners (Society for the Protection of Unborn Children)
Charles Foster
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Hearing date:
2 JUNE 2009

ON
THURSDAY 30 JULY 2009

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LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

1. I have had the advantage of reading in draft the opinions of each of the members of the Committee. I agree for the reasons that are common to all of them that this appeal should be allowed and that the Respondent should be required to promulgate a policy with the features described in the final paragraph of the draft opinion of my noble and learned friend, Lord Hope of Craighead. That opinion also addresses the question of whether acts in this jurisdiction that assist a person to travel to Switzerland for the purpose of there committing suicide fall within the scope of section 2(1) of the Suicide Act 1961 ("the 1961 Act"). Lord Hope approaches that question on the premise that section 2(1) created a new offence that was *sui generis* and applies to it recent jurisprudence in relation to territorial jurisdiction over criminal offences. On the basis of this and for additional reasons that reflect a purposive approach to the subsection, he gives an affirmative answer to that question.

2. It is, as Lord Hope observes, enough for the purposes of this appeal that the answer to the question should be in doubt. No argument has been placed before the House to challenge Lord Hope's conclusion. I consider it better that the question should not be resolved unless and until it falls for determination in the context of a prosecution. I say this because I do not approach the question in the same way as Lord Hope and have reached some provisional conclusions that do not reflect any of the submissions that have been placed before the House.

3. Before the 1961 Act it was unquestionably a criminal offence to aid, abet, counsel or procure ("assist") the commission of suicide where both the relevant conduct and the act of suicide occurred within England and Wales. Whether it was an offence when the conduct or the suicide occurred outside the jurisdiction is a question that I am about to consider. In my view there is a strong presumption that the offence created by section 2(1) of the 1961 Act was intended to ensure that, in those circumstances where committing suicide and the attempt to do so were decriminalised by section 1, assisting suicide remained a criminal offence. It seems unlikely that Parliament intended, in an Act whose primary purpose was to decriminalise suicide and attempted suicide, to widen the scope of the offence of assisting suicide.

4. The 12th Edition (2008) of *Smith and Hogan on Criminal Law* comments at 16.2.2.1 in relation to section 2(1) of the 1961 Act that "The words 'aids, abets, counsels or procures' are those used to define secondary participation in crime but here they are used to define the principal offence. The interpretation of the words should be the same". I agree.

5. What was the position before 1961? I will go back a further century to the position before legislation of some relevance to which I shall refer in 1861. Suicide was a felony, being regarded as self-murder (*"felonia de se").* For this reason the property of a person who committed suicide was forfeited. Attempted suicide was, as was an attempt to commit any other felony, a misdemeanour. A person who was present at the suicide of another and who assisted or encouraged the suicide, was guilty of murder as a principal in the second degree, and this applied equally where that person was the survivor of a suicide pact - *Rex v Dyson* (1823) Russ. & Ry 523; *R v Croft* [1944] KB 295.

6. A person who encouraged or assisted another to commit suicide but who was not present when the suicide was committed was, in theory, an accessory before the fact to the suicide. Such a person could not, however, be prosecuted under the common law because of the rule that an accessory before the fact to a felony could only be prosecuted once the principal offender had been prosecuted to conviction – *R v Russell* (1832) 1 Mood 356; *R v Croft.*

7. Section 1 of the Accessories and Abettors Act 1861 provided:

> "Whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted, tried, convicted and punished in all respects as if he were a principal felon".

Thereafter an accessory before the fact to suicide could be tried for murder – *R v Croft.*

8. Section 4(1) of the Homicide Act 1957 provided that

> "It shall be manslaughter, and shall not be murder, for a person acting in pursuance of a suicide pact between him and another to kill the other or be a party to the other killing himself or being killed by a third person."

Subject to this, assisting suicide, whether as a principal in the second degree or as an accessory before the fact, remained murder.

9. As a general rule English criminal law does not extend to acts committed outside the jurisdiction: *Cox v Army Council* [1963] AC 48 at p. 67; *Treacy v DPP* [1971] AC 537 at pp. 552-553. From at least the time of Henry VIII, however, murder has been recognised as an exception to this general rule. Section 9 of the Offences against the Person Act 1861 provides:

> "Where any Murder or Manslaughter shall be committed on Land out of the United Kingdom, whether within the Queen's Dominions or without, and whether the Person killed were a Subject of Her Majesty or not, every Offence committed by any Subject of Her Majesty, in respect of any such Case, whether the same shall amount to the Offence of Murder or of Manslaughter, or of being accessory to Murder or Manslaughter, may be dealt with, inquired of, tried, determined, and punished in any County or Place in England or Ireland in which such Person shall be apprehended or be in Custody, in the same Manner in all respects as if such Offence had been actually committed in that County or Place;"

10. It would appear to follow that, prior to the 1961 Act, a person who assisted another to commit suicide abroad, whether the assistance took place within this jurisdiction or outside it, was guilty of murder and could be tried for that offence in England.

11. The 1961 Act provides by section 3(3) "This Act shall extend to England and Wales only". The ambit of section 2(1) should logically, in my view, be the same as the ambit of section 1. Plainly suicide ceases to be an offence when committed in England and Wales. It follows that assisting suicide, when the act of assisting and the act of suicide take place within England and Wales, is an offence under section 2(1).

12. It is equally plain that section 1 does not apply to suicide committed outside England and Wales. If that falls to be treated as murder, so that assisting it is also murder, it would seem to follow that if a British subject accompanies a relative, who is also a British subject, to Switzerland and assists in Switzerland the relative to commit suicide with help from Dignitas, that person will under English law commit the crime of murder and will be subject to the jurisdiction of the courts of England and Wales in relation to that offence.

13. It must be a moot point whether, in respect of acts of assistance that take place in this jurisdiction in relation to suicide that takes place in Switzerland, section 2(1) applies so as to reduce the offence from murder to one under section 2(1). Logically it seems to me that it should not, but plainly considerations of legislative policy would weigh the other way.

14. Is there any escape from these conclusions, which may not have been appreciated by those who drafted the 1961 Act? A possible avenue would be a finding that, for the purposes of section 9 of the Offences against the Person Act 1861, suicide is not to be treated as murder, so that assisting suicide abroad is not to be treated as murder falling within section 9. So far as I have been able to ascertain there has never been a prosecution for assisting a suicide that has taken place outside the jurisdiction. Support for excluding suicide from the ambit of section 9 of the 1861 Act might be gained from a decision, soon after the Act came into force, in relation to the meaning of murder where that word appeared in section 15 of the same Act. Sections 11, 12, 13 and 14 of the Act provided that a number of different methods of attempting to commit murder were to be felonies. Section 15 provided:

> "Whosoever shall, by any Means other than those specified in any of the preceding Sections of this Act, attempt to commit Murder, shall be guilty of Felony."

15. In *R v Burgess* (1862) Le. & Ca. 257 one of the Crown Cases Reserved raised the question of whether section 15 applied in the case of a woman who had tried to commit suicide, with the effect that her offence was a felony, rather than a misdemeanour that fell within the jurisdiction of the Quarter Sessions. Pollock CB, giving the judgment of the court, held at p. 262:

> "We are all of opinion that the jurisdiction of the Quarter Sessions is not taken away by the 24 & 25 Vict. c. 100, and that attempting to commit suicide is not attempting to commit murder within that statute. If it were, it would follow that any one attempting to commit suicide by wounding himself must be indicted for the offence of wounding with intent to commit murder, which until very recently was punishable with death."

16. The reasoning appears to have been no more than the application of robust common sense. Whether a similar approach would enable the court to escape the provisional conclusions that I have reached and, if so, the effect that this would have on the ambit of section 2(1) of the 1961 Act are questions that I would leave unresolved. The uncertainty is a further reason for the need for a more specific published policy on the part of the Director.

LORD HOPE OF CRAIGHEAD

My Lords,

17. The position in which Ms Purdy finds herself can be stated very simply. She suffers from primary progressive multiple sclerosis for which there is no known cure. It was diagnosed in 1995, and it is progressing. By 2001 she was permanently using a self-propelling wheelchair. Since then her condition has deteriorated still further. She now needs an electric wheelchair, and she has lost the ability to carry out many basic tasks for herself. She has problems in swallowing and

has choking fits when she drinks. Further deterioration in her condition is inevitable. She expects that there will come a time when her continuing existence will become unbearable. When that happens she will wish to end her life while she is still physically able to do so. But by that stage she will be unable to do this without assistance. So she will want to travel to a country where assisted suicide is lawful, probably Switzerland. Her husband, Mr Omar Puente, is willing to help her to make this journey.

The risk of prosecution

18. Assisting a person to commit suicide is a crime in this country. Section 2(1) of the Suicide Act 1961 provides:

> "A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years."

As Lord Judge CJ said in the Court of Appeal, this provision is clear and unequivocal: [2009] EWCA Civ 92, para 2. The offence which it describes is an offence in itself. It is not ancillary to anything else. Its language suggests that it applies to any acts of the kind it describes that are performed within this jurisdiction, irrespective of where the final act of suicide is to be committed. So acts which help another person to make a journey to another country, in the knowledge that its purpose is to enable the person to end her own life there, are within its reach. Its application cannot be avoided by arranging for the final act of suicide to be performed on the high seas, for example, or in Scotland. Otherwise it would be all too easy to exclude the vulnerable or the easily led from its protection. Furthermore it does not permit of any exceptions.

19. In his article *Suicide in Switzerland: Complicity in England?* [2009] Crim L R 335 Professor Michael Hirst has suggested that it is not an offence for a person to do acts in England and Wales which aid or abet a suicide by someone else which subsequently takes place in a jurisdiction where suicide is lawful. As he points out, no prosecution has ever been brought under section 2(1) in circumstances such as those which Ms Purdy contemplates. He contends that no such prosecution could ever succeed, as her suicide would itself have to occur within the jurisdiction in order for any offence to be committed by the person who assisted her. The parties had not had an opportunity to consider this

point before the commencement of the oral hearing, so they were invited to deal with it in written submissions. The views of the Attorney General were also invited. The further submissions which have been lodged by the Director of Public Prosecutions represent the agreed position of the Law Officers.

20. As the Law Officers point out, the construction of section 2(1) of the 1961 Act which Professor Hirst advances is based on what Professor Glanville Williams described as the terminatory theory of territorial jurisdiction: *Venue and the Ambit of the Criminal Law* (1965) 81 LQR 518, 519. According to this theory jurisdiction to try the offence is established in the country in which it is completed. The alternative theory, which Professor Glanville Williams called the initiatory theory, is that jurisdiction is established in the country where the offence is commenced. He was of the opinion that, although some of the earlier cases seemed to adopt the initiatory theory, the current of authority in 1965 was set against it. Writing in 1972 however Lynden Hall said that there was no hard and fast principle which required the courts to apply the terminatory theory: *"Territorial Jurisdiction" and the Criminal Law*: [1972] Crim L R 276. As he points out, the courts had as a rule assumed jurisdiction where the "last necessary element" occurred in England. But to admit this by no means leads inescapably to the conclusion that a crime must be committed where and only where the "last necessary element" occurs.

21. In *Libman v The Queen* (1985) 21 DLR (4^{th}) 174 La Forest J examined the English case law on this subject. In *Liangsiriprasert (Somchai) v Government of the United States of America* [1991] 1 AC 225, 250 Lord Griffiths described this as a most valuable analysis. As La Forest J points out, it reveals a number of different approaches. I do not think that it is necessary, for present purposes, to do more than pick out one or two of the main highlights. On the one hand there are cases where it was held that the offence was committed where the gravamen of the offence occurred. In *R v Harden* [1963] 1 QB 8 a conviction for the offence of obtaining property by false pretences was quashed because the property was obtained in Jersey. On the other there are cases where the courts have assumed jurisdiction where acts that formed part of a continuous transaction began in another country but were still in existence when the accused came to England. In *R v Doot* [1973] AC 807, where the defendants were charged with conspiracy to import dangerous drugs into the United Kingdom, Lord Wilberforce pointed out at p 817 that there could be no breach of any rules of international law if the defendants were prosecuted in this country as under the territorial

principle the courts of this country have a clear right, if not a duty, to prosecute in accordance with our municipal law:

> "The position as it is under international law is not, however, determinative of the question whether, under our municipal law, the acts committed amount to a crime. That has to be decided on different principles. If conspiracy to import drugs were a statutory offence, the question whether foreign conspiracies were included would be decided upon the terms of the statute. Since it is (if at all) a common law offence, this question must be decided upon principle and authority."

In the search for a principle, he said, the requirement of territoriality did not, in itself, provide an answer. But a legal principle which enabled concerting law breakers to escape a conspiracy charge by crossing the Channel before making their agreement, by bringing forward arguments about the location of their agreement which had no compensating merit, was not one that he would endorse. *Clements v HM Advocate* 1991 SLT 388, where acts of being concerned in the supply of a controlled drug which took place in England were treated as justiciable in Scotland where the drugs were to be supplied, is a further illustration of this approach.

22. In *Treacy v Director of Public Prosecutions* [1971] AC 537 the appellant's appeal against his conviction on a charge of blackmail, where his letter demanding money with menaces was posted in England to a recipient in West Germany, was dismissed. Lord Diplock said at pp 561-562:

> " There is no rule of comity to prevent Parliament from prohibiting under pain of punishment persons who are present in the United Kingdom and so owe local obedience to our law, from doing physical acts in England notwithstanding that the effects of those acts take place outside the United Kingdom."

He added that it would savour of chauvinism rather than comity to treat prohibited acts which were of a kind calculated to cause harm to private individuals as excusable merely on the ground that the victim was not in the United Kingdom but in some other state. In *R v Smith (Wallace Duncan)* [1996] 2 Cr App R 1 an appeal against a conviction in this jurisdiction of obtaining by deception property which was in New York

was dismissed on the ground that substantial activities constituting the crime had taken place here and there were no reasons of international comity why it should not be tried in this country. In *R v Manning* [1999] QB 980 the Court of Appeal disagreed with that decision and held, following *R v Harden* [1963] 1 QB 8 that the last act or terminatory theory of jurisdiction was the common law of England and Wales. But in *R v Smith (Wallace Duncan) (No 4)* [2004] QB 1418 the conflict between those cases was resolved in favour of a more flexible approach which enabled the courts to assume jurisdiction to try an offence if a substantial part of it took place within the jurisdiction, provided that there was no reason of international comity why the court should not do so. On 21 June 2004 an Appeal Committee dismissed the appellant's petition for leave to appeal to the House of Lords.

23. Professor Hirst suggests that the decision in *R v Smith (Wallace Duncan) (No 4)* [2004] QB 1418 complicates the position and that, even if it is held to prevail over *R v Manning* [1999] QB 980, it may not necessarily resolve the issue in a case of assisting suicide. This is because the commission of the relevant act in England does not necessarily bring an offence within the ambit of English law. He reaches this conclusion because, in his opinion, the terminatory principle applies to acts of complicity, because secondary participation in crime is derivative in the sense that it depends on the liability of a principal offender and because there is nothing in the drafting of section 2(1) to suggest that it was intended to apply to complicity in extraterritorial suicides. I would not accept any of these arguments. As I said in para [18], the language of the subsection suggests that it applies to any acts of the kind it describes that are performed within this jurisdiction irrespective of where the final act of suicide is to be committed, and that its application cannot be avoided by arranging for the final act of suicide to be performed on the high seas, for example, or in Scotland. Otherwise it would be all too easy to exclude the vulnerable or the easily led from its protection. Professor Hirst's emphasis on the terminatory principle as the orthodox approach in English law seems to be misplaced, bearing in mind the more flexible approach that was endorsed in *R v Smith (Wallace Duncan) (No 4)* [2004] QB 1418 and the fact that the offence under section 2(1) may be committed even if the assisted person does not go on to commit suicide. Lynden Hall's suggestion in "*Territorial Jurisdiction" and the Criminal Law*: [1972] Crim L R 276 that there is no hard and fast principle which requires an English court to apply the terminatory theory has been endorsed by the decision in that case, which I would regard as having settled the law on this point.

24. Then there are the words of the statute itself. In *R v Doot* [1973] AC 809, 817 Lord Wilberforce indicated that they were likely to be decisive in a case such as this, where it has not been suggested that there are any reasons of comity to prevent their application to acts that were intended to have effect outside this country. The subsection does not create an offence of aiding, abetting or assisting another's crime because, as section 1 of the 1961 Act itself provides, the rule of law whereby it was a crime in England and Wales has been abrogated. In the context in which it appears, therefore, the offence which section 2(1) of the Act creates is not a derivative one. The acts that it refers to constitute criminal conduct in themselves, the offence not being one of complicity in the criminal wrongdoing of anyone else. Professor Hirst suggests that the absence of the words "anywhere in the world" from the subsection must be fatal to a prosecution where the offence is said to be that of assisting a person to travel from England and Wales to a jurisdiction where assisted suicide is lawful. But I can find nothing in the wording of the subsection, bearing in mind the context in which it was enacted, to suggest that it was Parliament's intention to narrow the circumstances in which the offence which it describes would apply. The anomalous results that this would give rise to are a powerful indication to the contrary. The 1961 Act extends to England and Wales only: section 3(3). It would surely be absurd if the offence which section 2(1) creates could be avoided by aiding or abetting someone who was contemplating suicide to travel from Berwick upon Tweed to Scotland so that he could commit the final act by jumping over the cliffs just over the border at Burnmouth.

25. All that having been said it is plain, to put the point at its lowest, that there is a substantial risk that the acts which Ms Purdy wishes her husband to perform to help her to travel to Switzerland will give rise to a prosecution in this country. My noble and learned friend Lord Phillips of Worth Matravers has suggested that the offence that he would be committing by assisting her to commit suicide abroad might be that of murder which, of course, carries a sentence of life imprisonment. That would be the inevitable conclusion if section 2(1) of the 1961 Act does not apply. I think that it needs to be stressed however that this case has been conducted throughout, as was *R (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department Intervening)* [2001] UKHL 61, [2002] 1 AC 800 (where the place where Mrs Pretty was intending to commit suicide was never identified), on the basis that the common law offence has been displaced by the offence that was created in 1961 by Parliament. At no point has any law officer even hinted that in a case such as this a prosecution for murder is in contemplation. It is, of course, not possible to decide this issue in these proceedings, nor is it necessary. It is the risk that the Director of Public

Prosecutions will consent to her husband's prosecution under section 2(1) of the 1961 Act that deters Ms Purdy from taking the course that she wishes to take. That is sufficient in itself to give rise to the issue which she now asks your Lordships to resolve.

The issue

26. It must be emphasised at the outset that it is no part of our function to change the law in order to decriminalise assisted suicide. If changes are to be made, as to which I express no opinion, this must be a matter for Parliament. No-one who listened to the recent debate in the House of Lords on Lord Falconer of Thoroton's amendment to the Coroners and Justice Bill, in which he sought to define in law acts which were not capable of encouraging or assisting suicide, or has read the report of the debate in Hansard (HL Debates, vol 712, 7 July 2009, cols 595-634) can be in any doubt as to the strength of feeling on either side or the difficulties that such a change in the law might give rise to. We do not venture into that arena, nor would it be right for us to do so. Our function as judges is to say what the law is and, if it is uncertain, to do what we can to clarify it.

27. On one view the law, as it stands, could not be clearer. It is an offence to assist someone to travel to Switzerland or anywhere else where assisted suicide is lawful. Anyone who does that is liable to be prosecuted. He is in the same position as anyone else who offends against section 2(1) of the 1961 Act. As with any other crime, the test that will be applied is that which the Crown Prosecution Service code lays down. He may be prosecuted if there is enough evidence to sustain a prosecution and it is in the public interest that this step should be taken. But the practice that will be followed in cases where compassionate assistance of the kind that Ms Purdy seeks from her husband is far less certain. The judges have a role to play where clarity and consistency is lacking in an area of such sensitivity.

28. Lord Pannick QC for Ms Purdy directed his argument to section 2(4) of the 1961 Act, which provides that no proceedings shall be instituted for an offence under that section except by or with the consent of the Director of Public Prosecutions, and to her right to respect for her private life under article 8(1) of the European Convention on Human Rights. He submits, first, that the prohibition in section 2(1) of the 1961 Act constitutes an interference with Ms Purdy's right to respect for her private life under article 8(1) of the European Convention on Human

Rights; and, second, that this interference is not "in accordance with the law" as required by article 8(2), in the absence of an offence-specific policy by the Director of Public Prosecutions ("the Director") which sets out the factors that will be taken into account by him and Crown Prosecutors acting on his behalf in deciding under section 2(4) of the 1961 Act whether or not it is in the public interest to bring a prosecution under that section.

29. As is well known, article 8 of the European Convention provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The words which are under scrutiny in this case are the words "respect for his private life" in article 8(1) and "in accordance with the law" in article 8(2). The Director accepts that he is a public authority within the meaning of article 8(2). He is also a public authority for the purposes of section 6(1) of the Human Rights Act 1998. It is unlawful for him to act in a way which is incompatible with a Convention right.

30. Ms Purdy does not ask that her husband be given a guarantee of immunity from prosecution. An exception of that kind, as Lord Pannick accepts, would be a matter for Parliament. What she seeks is information. It is information that she says she needs so that she can take a decision that affects her private life. A number of other people have already made the journey to countries where assisted suicide is lawful, and those who have assisted them have not been prosecuted. Your Lordships were told that by the time of the hearing there had been 115 such cases. Of those cases only eight had been referred to the Director for a decision as to whether or not the assistants should be prosecuted. In all but two of them the decision not to prosecute had been taken on the ground that there was insufficient evidence. But on 9 December 2008 the Director decided not to prosecute the parents and a family friend of Daniel James, who had sustained a serious spinal injury

in a rugby accident and had travelled with his parents to Switzerland to end his life, on the ground that a prosecution was not needed in the public interest. He took this decision personally, he gave his reasons in writing for having done so and he made those reasons available to the public. This was an exception, as the public have not been told what the reasons were in the other cases that have so far been referred to the Director which include one other case which on public interest grounds was not prosecuted. Other cases appear to have been discontinued by the police on public interest grounds. Here too no reasons for the decisions that have been taken are available.

31. Ms Purdy's request for information is to be seen in the light of that background. As has been said, she does not seek an immunity. Instead she wants to be able to make an informed decision as to whether or not to ask for her husband's assistance. She is not willing to expose him to the risk of being prosecuted if he assists her. But the Director has declined to say what factors he will take into consideration in deciding whether or not it is in the public interest to prosecute those who assist people to end their lives in countries where assisted suicide is lawful. This presents her with a dilemma. If the risk of prosecution is sufficiently low, she can wait until the very last moment before she makes the journey. If the risk is too high she will have to make the journey unaided to end her life before she would otherwise wish to do so. Moreover she is not alone in finding herself in this predicament. Statements have been produced showing that others in her situation have chosen to travel without close family members to avoid the risk of their being prosecuted. Others have given up the idea of an assisted suicide altogether and have been left to die what has been described as a distressing and undignified death. It is patently obvious that the issue is not going to go away.

32. The Court of Appeal expressed very considerable sympathy for the predicament in which Ms Purdy and Mr Puente now find themselves. But it held that it was unable to find in Ms Purdy's favour on either branch of her argument. In *R (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department Intervening)* [2002] 1 AC 800, the House held that article 8 was directed to the protection of personal autonomy while the person was alive but did not confer a right to decide when or how to die. The European Court of Human Rights disagreed. In *Pretty v United Kingdom* (2002) 35 EHRR 1, para 67, the court said:

> "The applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under article 8(1) of the Convention. It considers below whether this interference conforms with the requirements of the second paragraph of article 8."

Nevertheless the Court of Appeal held that it was bound to follow the decision of this House and was not at liberty to apply the ruling of the Strasbourg court. No other course was open to it: see *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465, paras 28, 42-45, per Lord Bingham of Cornhill; *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311, para 64, per Lord Neuberger of Abbotsbury.

33. As for the question whether the requirements of article 8(2) were satisfied, the Court of Appeal said that the absence of a crime-specific policy relating to assisted suicide did not make the effect of section 2(1) of the 1961 Act unlawful or mean that it was not in accordance with the law: para 79. The statute itself was sufficiently clear to satisfy the requirements of article 8(2) as to certainty. What Ms Purdy was seeking was in reality a guarantee that her husband would not be prosecuted. She could not achieve that objective without his being given what amounted to an immunity from prosecution or the promulgation of a case-specific policy which recognised exceptional defences to the offence which had not been enacted by Parliament. The Director was not in dereliction of his statutory duty in declining to do this.

Article 8(1): respect for private life

34. The House is, of course, free to depart from its earlier decision and to follow that of the Strasbourg court. As Lord Bingham said in *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, para 20, it is ordinarily the clear duty of our domestic courts to give practical recognition to the principles laid down by the Strasbourg court as governing the Convention rights as the effectiveness of the Convention as an international instrument depends on the loyal acceptance by member states of the principles that, as the highest authority on the interpretation of those rights, it lays down. *Practice Statement (Judicial Precedent)* which was issued on 26 July 1966 states that, while the House will still treat its former decisions as normally binding, it would

depart from a previous decision when it appeared right to do so: [1966] 1 WLR 1234. In *Lewis v Attorney General of Jamaica* [2001] 2 AC 50, 88, Lord Hoffmann drew attention to the evil which would follow if the power to overrule previous decisions of the Privy Council were exercised too readily: see also *R v Kansal (No 2)* [2001] UKHL 62, [2002] 2 AC 69, paras 20-21, per Lord Lloyd of Berwick. But it is obvious that the interests of human rights law would not be well served if the House were to regard itself as bound by a previous decision as to the meaning or effect of a Convention right which was shown to be inconsistent with a subsequent decision in Strasbourg. Otherwise the House would be at risk of endorsing decisions which are incompatible with Convention rights.

35. The difference between the House and the Strasbourg court on the application of article 8(1) to Mrs Pretty's case was on a narrow but very important point. Lord Steyn expressed the view of the majority most clearly when he said that the guarantee under article 8 prohibits interference with the way in which an individual leads his life and it does not relate to the manner in which he wishes to die: [2002] 1 AC 800, para 61. It is clear from Lord Bingham's opinion, paras 19 to 23 that he was strongly influenced by the fact that the right to liberty and security in section 7 of the Canadian Charter of Rights and Freedoms which was held by the majority in Supreme Court of Canada in *Rodriguez v Attorney General of Canada* [1994] 2 LRC 136 to confer a right to personal autonomy extending even to decisions on life and death had no close analogy in the European Convention, and by the absence of Strasbourg jurisprudence on this point, when he said in para 23 that there was nothing in article 8 to suggest that it had reference to the choice to live no longer.

36. I describe this as the view of the majority because, although I did not expressly dissent from it, the view which I expressed on this point in para 100 of my own opinion was directly to the contrary:

> "Respect for a person's 'private life', which is the only part of article 8(1) which is in play here, relates to the way a person lives. The way she chooses to pass the closing moments of her life is part of the act of living, and she has the right to ask that this too must be respected. In that respect Mrs Pretty has a right of self-determination. In that sense, her private life is engaged even where in the face of a terminal illness she chooses death rather than life."

The Strasbourg court referred to this passage in my opinion in para 64 of its judgment with approval, and the rest of its reasoning is consistent with it. In para 65 the court said:

> "The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers 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."

37. Mr Foster for the Society for the Protection of Unborn Children, intervening, pointed to the Strasbourg court's observation in para 67 that it was not prepared to exclude that the fact that Mrs Pretty was prevented by law from exercising her choice to avoid what she considered to be an undignified and distressing end to her life constituted an interference with her right to respect for private life as guaranteed by article 8. He said these words showed that it had refrained from committing itself to a decision on this point. As the Court of Appeal noted in para 49 of its judgment, the Divisional Court found the choice of language by the Strasbourg court in para 67 to be "curious" and "elliptical". He also drew attention to the importance that the Strasbourg court had attached in para 40 of its judgment to the right to life which is protected absolutely by article 2. He said that, as the Strasbourg court's position on the question whether article 8 was engaged was unclear, the House should follow its own decision in *Pretty* and that it should not be deflected from doing so by what had been said about this in Strasbourg.

38. I would reject Mr Foster's submission, for two reasons. The first is that it is plain, when its judgment is read as a whole, that the Strasbourg court did find that Mrs Pretty's rights under article 8(1) were engaged. It said so in terms in the first sentence of para 87, where it referred in a footnote to its discussion of the issue in paras 61 to 67. That sentence removes any doubt that the words used in para 67 might give rise to. The second is that, even if there was a doubt as to whether article 8(1) was engaged in Mrs Pretty's case, the same cannot be said in

the case of Ms Purdy. It seems to me that her situation is addressed directly by what the Strasbourg court said in para 65 of its judgment. Mrs Pretty, who could no longer do anything for herself, was seeking an undertaking that her husband would be immune from prosecution if he assisted her in the very act of committing suicide. Unlike Ms Purdy, she was not contemplating travelling to another country for this purpose. Nor was there any question, in Mrs Pretty's case, of her being forced by lack of information about prosecution policy to choose between ending her life earlier than she would otherwise have wished while she was still able to do this without her husband's assistance. The difference is a subtle one. But, if there was any room for doubt as to what the position was in Mrs Pretty's case, I would not find any room for doubt in the case of Ms Purdy.

39. I would therefore depart from the decision in *R (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department Intervening)* [2002] 1 AC 800 and hold that the right to respect for private life in article 8(1) is engaged in this case.

Article 8(2): in accordance with the law

40. The Convention principle of legality requires the court to address itself to three distinct questions. The first is whether there is a legal basis in domestic law for the restriction. The second is whether the law or rule in question is sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law. The third is whether, assuming that these two requirements are satisfied, it is nevertheless open to the criticism that it is being applied in a way that is arbitrary because, for example, it has been resorted to in bad faith or in a way that is not proportionate. I derive these principles, which have been mentioned many times in subsequent cases, from *Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 49 and also from *Winterwerp v The Netherlands* (1979) 2 EHRR 387, pp 402-403, para 39, *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, p 669, paras 58-59 which were concerned with the principle of legality in the context of article 5(1), *Silver v United Kingdom* (1983) 5 EHRR 347, paras 85-90; *Liberty v United Kingdom* (2008) 48 EHRR 1, para 59 and *Sorvisto v Finland*, Application No 19348/04, 13 January 2009, para 112.

41. The word "law" in this context is to be understood in its substantive sense, not its formal one: *Kafkaris v Cyprus* (2008) 25 BHRC 591, para 139. This qualification of the concept is important, as it makes it clear that law for this purpose goes beyond the mere words of the statute. As the Grand Chamber said in that case in paras 139 -140, it has been held to include both enactments of lower rank than statutes and unwritten law. Furthermore, it implies qualitative requirements, including those of accessibility and foreseeability. Accessibility means that an individual must know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it what acts and omissions will make him criminally liable: see also *Gülmez v Turkey*, Application no 16330/02, 20 May 2008, para 49. The requirement of foreseeability will be satisfied where the person concerned is able to foresee, if need be with appropriate legal advice, the consequences which a given action may entail. A law which confers a discretion is not in itself inconsistent with this requirement, provided the scope of the discretion and the manner of its exercise are indicated with sufficient clarity to give the individual protection against interference which is arbitrary: *Goodwin v United Kingdom* (1996) EHRR 123, para 31; *Sorvisto v Finland*, Application No 19348/04, 13 January 2009, para 112. So far as it goes, section 2(1) of the 1961 Act satisfies all these requirements. It is plain from its wording that a person who aid, abets, counsels or procures the suicide of another is guilty of criminal conduct. It does not provide for any exceptions. It is not difficult to see that the actions which Mr Puente will need to take in this jurisdiction in support of Ms Purdy's desire to travel to another country where assisted suicide is lawful will be likely to fall into the proscribed category.

42. The issue that Ms Purdy raises however is directed not to section 2(1) of the Act, but to section 2(4) and to the way in which the Director can be expected to exercise the discretion which he is given by that subsection whether or not to consent to her husband's prosecution if he assists her.

43. This is where the requirement that the law should be formulated with sufficient precision to enable the individual, if need be with appropriate advice, to regulate his conduct is brought into focus in this case. In *Hasan and Chaush v Bulgaria* (2000) 34 EHRR 1339, para 84, the court said:

> "For domestic law to meet these requirements [that is, of accessibility and foreseeability] it must afford a measure of legal protection against arbitrary interferences by public

> authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.
>
> The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed."

That was a case where the complaint was that there had been an unlawful and arbitrary interference with the applicants' religious liberties where decisions were taken about the organisation and leadership of their religious community for which no reasons had been given. But there is here a clear statement of principle. The question is to what extent it is applicable to this case.

The Director's discretion

44. It has long been recognised that a prosecution does not follow automatically whenever an offence is believed to have been committed. In *Smedleys Ltd v Breed* [1974] AC 839, 856, Viscount Dilhorne made these comments on the propriety of instituting a prosecution under the food and drugs legislation in that case:

> "In 1951 the question was raised whether it was not a basic principle of the rule of law that the operation of the law is automatic where an offence is known or suspected. The then Attorney-General, Sir Hartley Shawcross, said: 'It has never been the rule in this country – I hope it never will be – that criminal offences must automatically be the subject of prosecution.' He pointed out that the Attorney-General and the Director of Public Prosecutions only intervene to direct a prosecution when they consider it in the public interest to do so and he cited a statement made by Lord Simon in 1925 when he said:

> '… there is no greater nonsense talked about the Attorney-General's duty than the suggestion that in all cases the Attorney-General ought to decide to prosecute merely because he thinks there is what the lawyers call a case. It is not true and no one who has held the office of Attorney-General supposes it is.'
>
> Sir Hartley Shawcross's statement was indorsed, I think, by more than one of his successors."

45. The purpose of section 2(4) of the 1961 Act must be understood in the light of this background. It was submitted for Ms Purdy that it was clear that Parliament did not intend that all those who might be guilty of an offence under section 2(1) should be punished or even prosecuted for the offence. In *Dunbar v Plant* [1998] Ch 412, 437, Phillips LJ said that this was the logical conclusion to be drawn from the provision in section 2(4). But I would accept the view of the Court of Appeal that this observation does not fully reflect the purpose of the requirement for his consent. As it said in para 67, the better approach is to be discerned in the Law Commission's Report, *Consents to Prosecution (No 255)*, para 3.33, where it quoted from the Home Office Memorandum to the Departmental Committee on section 2 of the Official Secrets Act 1911 (The Franks Report, 1972, Cmnd 5104, vol 2, p 125, para 7), in which the point was made that the basic reason for including in a statute a restriction on the bringing of prosecutions was that otherwise there would be a risk of prosecutions being brought in inappropriate circumstances.

46. Among the five reasons that were given by the Franks Committee were to secure consistency of practice, to prevent abuse of the kind that might otherwise result in a vexatious private prosecution, to enable account to be taken of mitigating factors and to provide some central control of the use of the criminal law where it has to intrude into areas which are particularly sensitive or controversial. All these factors are in play where consideration is being given to the question whether someone who is suspected of having committed an offence against section 2(1) should be prosecuted. Consistency of practice is especially important here. The issue is without doubt both sensitive and controversial. Many people view legally assisted suicide as an appalling concept which undermines the fundamental human right to life itself. On the other hand there are those, like Ms Purdy, who firmly believe that the right to life includes the right to end one's own life when one

can still do so with dignity. Crown Prosecutors to whom the decision-taking function is delegated need to be given the clearest possible instructions as to the factors which they must have regard to when they are performing it. The police, who exercise an important discretion as to whether or not to bring a case to the attention of the Crown Prosecutors, need guidance also if they are to avoid the criticism that their decision-taking is arbitrary. Important too is the general policy of the law that the Attorney General and the Director only intervene to direct a prosecution when they consider it in the public interest to do so.

47. Steps have been taken to provide a measure of consistency. The Director, as the head of the Crown Prosecution Service, has the duty, under the supervision of the Attorney-General, to institute and conduct the prosecution of offences in England and Wales, and every Crown Prosecutor has all the powers of the Director which he must exercise under the Director's direction: Prosecution of Offences Act 1985, section 1. Section 10 of that Act provides that the Director shall issue a Code for Crown Prosecutors giving guidance on general principles to be applied by them in determining, in any case, among other things whether proceedings for an offence should be instituted and that he may from time to time make alterations to the Code. This document is available to the public. In my opinion the Code is to be regarded, for the purposes of article 8(2) of the Convention, as forming part of the law in accordance with which an interference with the right to respect for private life may be held to be justified. The question is whether it satisfies the requirements of accessibility and foreseeability where the question is whether, in an exceptional case such as that which Ms Purdy's circumstances are likely to give rise to, it is in the public interest that proceedings under section 2(1) should be instituted against those who have rendered assistance.

48. The current version of the Code was published in November 2004. It applies to all criminal offences and makes no distinction between different offences. It sets out two tests for a decision whether to prosecute. These are the "Full Code Test" and the "Threshold Test". The latter test is applied only at an early stage in the investigation, so for present purposes it is only the Full Code Test that is relevant. Para 5.1 of the Code states that the Full Code Test has two stages. The first is consideration of the evidence. If the case passes the tests that are to be applied at the evidential stage, Crown Prosecutors must then consider whether a prosecution is needed in the public interest. Para 5.7 states that a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour, or it appears more appropriate to divert the person

from prosecution. Para 5.8 tells Crown Prosecutors that they must balance factors for and against prosecution carefully and fairly and that the factors that apply will depend on the facts in each case. Para 5.9 then sets out what it describes as some common public interest factors in favour of prosecution. There are seventeen factors in this list, subparas (a) to (q). Para 5.10 sets out what it describes as some common public interest factors against prosecution. There are nine factors in this list, subparas (a) to (i). I shall not set them out. The details are given in the Court of Appeal's judgment, para 16, where paras 5.9 and 5.10 are quoted in full.

49. As the Court of Appeal observed in para 17, it is perfectly obvious that many of the factors in these lists can have no relevance in a case of assisted suicide. This point is reinforced by the Director's decision in the case of Daniel James. In para 28 of that decision he reminded himself that para 5.7 of the Code states that a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour, adding that the more serious the offence the more likely it is that a prosecution will be needed in the public interest. He then said this:

> "29. I consider that the offence of aiding and abetting the suicide of another under section 2(1) Suicide Act 1961 is unique in that the critical act – suicide – is not itself unlawful, unlike any other aiding and abetting offence. For that reason, I have decided that many of the factors identified in the Code in favour or against a prosecution do not really apply in this case (I include within this the factors identified in paras 5.9 (b), (c), (d), (e), (j), (k), (m), (n) and (p) and 5.10 (b), (c), (d), (e), (f), (g), (h) and (i) of the Code)."

50. In para 30 of the decision the Director said that, although para 5.9(a) – whether a conviction was likely to result in a significant sentence – was relevant, it was not a factor in favour of prosecution in Daniel James's case. In para 31 he said that although Daniel James's parents played some part in the co-ordination of the arrangements, they were not "ring-leaders" or "organisers" in the sense meant by para 5.9(f). Nor was the offence pre-meditated in the sense meant by para 5.9(g) or a "group" offence in the sense meant by para 5.9(h). That left paras 5.9(e), (i), (l) and (q): that the defendant was in a position of authority or trust, that the victim of the offence was vulnerable, that there was a marked difference between the actual or mental ages of the

defendant and the victim and that a prosecution would have a significant positive impact on maintaining community confidence. On the facts of that case, paras 5.9(e), (i) and (l) did not apply, and he did not think that a prosecution would be likely to have a significant positive impact on community confidence. As for the facts against prosecution, para 5.10(a) was relevant as the penalty in that case was likely to be nominal. But he did not think that much weight could be attached to the remaining factor, para 5.10(c), that the offence was the result of a mistake or a misunderstanding. The result of this careful and commendably frank analysis was that very few, if any, of the factors listed in the Code were of any real assistance.

51. The Director then reminded himself that the factors listed in the Code were not exhaustive of the public interest factors that may be relevant in any given case. Focussing on the particular facts of the case, he noted (a) that an offence under section 2(1) of the 1961 Act is serious, (b) that neither his parents nor his family friend influenced Daniel James to commit suicide – on the contrary his parents tried relentlessly to persuade him not to do so, (c) the conduct of his parents and the family friend was towards the less culpable end of the spectrum, and (d) that neither his parents nor the family friend stood to gain any advantage, financial or otherwise by his death – on the contrary, for his parents, it caused them profound distress. Taking those factors into account he decided that a prosecution was not needed in the public interest.

52. Events have moved on since the current version of the Code was published. The Director has created a Special Crimes Division staffed by a small number of specially trained officers whose function is to supervise prosecutions of exceptional sensitivity or difficulty. I would accept that this change in prosecution practice has gone one step further towards meeting the challenge of arbitrariness. Furthermore, as Ms Dinah Rose QC for the Director said, in addition to the Code Ms Purdy now has the guidance that can be obtained from the Director's decision in the case of Daniel James. She submitted that sufficient guidance was now available as to how in practice decisions were likely to be taken in cases of that kind. It was undesirable for the Director to go any further in setting out his policy. Very serious ethical issues were involved, especially as there were many examples of people who were severely disabled leading full and fulfilling lives. A finding that the Code did not provide sufficient guidance would have serious implications as this could inhibit the width of the Director's discretion.

53. But it seems to me that, for anyone seeking to identify the factors that are likely to be taken into account in the case of a person with a severe and incurable disability who is likely to need assistance in travelling to a country where assisted suicide is lawful, these developments fall short of what is needed to satisfy the Convention tests of accessibility and foreseeability. The Director's own analysis shows that, in a highly unusual and extremely sensitive case of this kind, the Code offers almost no guidance at all. The question whether a prosecution is in the public interest can only be answered by bringing into account factors that are not mentioned there. Furthermore, the further factors that were taken into account in the case of Daniel James were designed to fit the facts of that case. There could be others just as unsuitable for prosecution where, for example, it could be said that those who offered assistance stood to gain an advantage, financial or otherwise, by the death. An assistant who was not a relative or a family friend might have to be paid, for example, and a relative might derive some benefit under the deceased's will or on intestacy. The issue whether the acts of assistance were undertaken for an improper motive will, of course, be highly relevant. But the mere fact that some benefit might accrue is unlikely, on its own, to be significant.

Conclusion

54. The Code will normally provide sufficient guidance to Crown Prosecutors and to the public as to how decisions should or are likely to be taken whether or not, in a given case, it will be in the public interest to prosecute. This is a valuable safeguard for the vulnerable, as it enables the prosecutor to take into account the whole background of the case. In most cases its application will ensure predictability and consistency of decision-taking, and people will know where they stand. But that cannot be said of cases where the offence in contemplation is aiding or abetting the suicide of a person who is terminally ill or severely and incurably disabled, who wishes to be helped to travel to a country where assisted suicide is lawful and who, having the capacity to take such a decision, does so freely and with a full understanding of the consequences. There is already an obvious gulf between what section 2(1) says and the way that the subsection is being applied in practice in compassionate cases of that kind.

55. The cases that have been referred to the Director are few, but they will undoubtedly grow in number. Decisions in this area of the law are, of course, highly sensitive to the facts of each case. They are also likely to be controversial. But I would not regard these as reasons for excusing

the Director from the obligation to clarify what his position is as to the factors that he regards as relevant for and against prosecution in this very special and carefully defined class of case. How he goes about this task must be a matter for him, as also must be the ultimate decision as to whether or not to prosecute. But, as the definition which I have given may show, it ought to be possible to confine the class that requires special treatment to a very narrow band of cases with the result that the Code will continue to apply to all those cases that fall outside it.

56. I would therefore allow the appeal and require the Director to 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.

BARONESS HALE OF RICHMOND

My Lords,

57. As I begin to write this opinion, the House of Lords in its legislative capacity has just been debating an amendment to the Coroners and Justice Bill which might have made it unnecessary for the House in its judicial capacity to decide this case. Lord Falconer's amendment was designed to take one type of assistance out of the scope of the offence of assisting or encouraging suicide. This was "enabling or assisting [another adult] to travel to a country or territory in which assisted dying is lawful" but only if two conditions were satisfied. Two doctors would have to certify that the person to be helped was terminally ill and that she had the capacity to make the required declaration. She would have to make a written declaration, independently witnessed, that she knew the contents of the medical certificates and had decided to travel to a country where assisted dying was lawful for the purpose of obtaining that assistance.

58. After three hours of anxious, thoughtful and well-informed debate the House rejected the amendment by 194 votes to 141. In his closing speech, Lord Falconer commented that "Although huge passions were expressed during the debate, I never detected at any stage that anybody in the Committee wanted to prosecute the well intentioned person who went with their loved one to help them in their assisted

dying" (*Hansard (HL)*, vol 712, col 633). Many who opposed the amendment were concerned that, as Baroness O'Neill of Bengarve put it, "we have to take account not merely of compassionate assistance but of interested assistance and it is extraordinarily difficult to imagine any drafting that would do that" (col 609). Another former Lord Chancellor, Lord Mackay of Clashfern, explained that "The main reason why I feel that this amendment is not justified is that the present law, with and on the assumption that what is involved is a criminal offence, permits the circumstances to be looked at by the criminal prosecuting authority. . . . The fact that they felt that there was no obligation to raise a prosecution [in recent cases] showed that the circumstances in their view made that a proper decision" (cols 599 – 600).

59. Thus there would appear to be a general feeling that, while there are cases in which a prosecution would not be appropriate, it is necessary to retain the offence, with its current wide ambit, in order to cater for the cases in which prosecution would be appropriate. But a major objective of the criminal law is to warn people that if they behave in a way which it prohibits they are liable to prosecution and punishment. People need and are entitled to be warned in advance so that, if they are of a law-abiding persuasion, they can behave accordingly. Hence the problem faced by Ms Purdy, her husband and other people who feel as she does:

> "I want to avoid the situation where I am too unwell to terminate my life. I want to retain as much autonomy as possible. I want to make a choice about when the quality of my life is no longer adequate and to die a dignified death. The decision is of my own making. Nobody has suggested this to me or pressured me to reach this view. It is a decision that I have come to of my own free will."

60. In *Pretty v United Kingdom* (2002) 35 EHRR 1, the European Court of Human Rights considered that "the notion of personal autonomy is an important principle underlying the interpretation" of the right to respect for private and family life, home and correspondence, guaranteed by article 8 of the Convention (para 61). It went on to point out that "the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned" (para 62). The fact that death was not usually the intended consequence of such activities could not be decisive. Imposing medical treatment without consent would "interfere with a person's

physical integrity in a manner capable of engaging the rights protected under article 8(1)" (para 63). Domestic law recognised that a person may exercise a choice to die by refusing consent to life-prolonging treatment. Mrs Pretty also wished to exercise a choice to end her life. "As stated by Lord Hope, the way she chooses to pass the closing moments of her life is part of the act of living, and she has a right to ask that this too must be respected" (para 64, referring to *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800, para 100).

61. After this reasoning, it is scarcely surprising that the Court took the view, most clearly articulated in relation to the claim that the law discriminated against people who were too disabled to take their own lives, that Mrs Pretty's rights under article 8 were engaged (para 87); and that it was not prepared to exclude that the law, which prevented her from exercising her choice to avoid an undignified and distressing end to her life, constituted an interference with her right to respect for her private life (para 67); and therefore went on to consider whether such interference could be justified under article 8(2) (paras 68 to 78).

62. In those circumstances, and despite the skilful and obviously sincerely believed argument to the contrary on behalf of the intervener, the Director was in my view correct to concede that the right to respect for private life was engaged and that the potential for interference had to be justified under article 8(2). In *Pretty v United Kingdom*, it was common ground that the restriction on assisted suicide was "in accordance with the law" and in pursuit of the legitimate aim of safeguarding life and thereby protecting the rights of others. The only issue was whether it was "necessary in a democratic society" (para 69). The applicant argued that it was disproportionate to impose a "blanket ban" which applied both to those who did and to those who did not need the protection of the law. In view of the seriousness of the harm involved and the clear risks of abuse, the Court did not consider that the blanket nature of the ban was disproportionate (para 76).

63. However, the Court went on to take account of the flexibility in the law produced both by the requirement that the DPP consent to any prosecution and by the wide range of permissible sentences. Thus,

> "It does not appear to be arbitrary to the Court for the law to reflect the importance of the right to life, by prohibiting assisted suicide while providing for a system of enforcement and adjudication which allows due regard to be given in each

particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence" (para 76).

Both sides have understandably gained comfort from that passage. For the DPP, it justifies a blanket ban coupled with flexible enforcement. For Ms Purdy, it contemplates that there will be individual cases in which the deterrent effect of a prosecution would be a disproportionate interference with the autonomy of the person who wishes to end her life. Moreover, in an argument which was not raised in *Pretty*, if the justification for a blanket ban depends upon the flexibility of its operation, it cannot be "in accordance with the law" unless there is greater clarity about the factors which the DPP and his subordinates will take into account in making their decisions.

64. My Lords, I accept that argument on Ms Purdy's behalf. Ms Dinah Rose QC, on behalf of the DPP, made a valiant attempt to suggest that all the factors which the DPP was likely to take into account in these cases could be gleaned from the current Code for Crown Prosecutors. But the way in which the DPP had to explain his decision in the case of Daniel James (*Decision on Prosecution – The Death by Suicide of Daniel James,* 9 December 2008) shows that some of the listed factors have to be turned on their head and other unlisted factors introduced in order to cater for these difficult decisions. Furthermore, as it seems to me, the object of the exercise should be to focus, not upon a generalised concept of "the public interest", but upon the features which will distinguish those cases in which deterrence will be disproportionate from those cases in which it will not. The exercise will be important, not only in guiding the small number of Crown Prosecutors who decide the small number of cases which are actually referred to them by the police, but also in guiding the police and thus the general public about the factors to be taken into account in deciding whether a prosecution will or will not be in the public interest.

65. I do not underestimate the difficulty of the task. Clearly, the prime object must be to protect people who are vulnerable to all sorts of pressures, both subtle and not so subtle, to consider their own lives a worthless burden to others. These were the pressures about which the Members of this House were most concerned. But at the same time, the object must be to protect the right to exercise a genuinely autonomous choice. The factors which tell for and against such a genuine exercise of autonomy free from pressure will be the most important.

66. But I have also been concerned about whether account should be taken of the reasons why a person might wish to die. Take the example of Lord Falconer's amendment, which would have restricted the right to exercise choice to those who were terminally ill. If we are serious about protecting autonomy we have to accept that autonomous individuals have different views about what makes their lives worth living. There are many, many people who can live with terminal illness; there are many, many people who can live with a permanent disability at least as grave as that which afflicted Daniel James; but those same people might find it impossible to live with the loss of a much-loved partner or child, or with permanent disgrace, or even with financial ruin. Yet in attitudinal surveys the British public have consistently supported assisted dying for people with a painful or unbearable incurable disease from which they will die, if they request it, while rejecting it for people with other reasons for wanting to die (National Centre for Social Research, *British Social Attitudes*, The 23rd Report, 2007, chapter 2).

67. Here we are, of course, concerned about people who are unable or unwilling to end their own lives without assistance. The need for more precise guidelines governing the prosecution of those who may help them stems from the right to respect for their private lives protected by article 8. So I come back to what the European Court said about that right in *Pretty*, in the well-known passage at para 65:

> "The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of the sanctity of life protected under the Convention, the Court considers 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."

68. It is not for society to tell people what to value about their own lives. But it may be justifiable for society to insist that we value their lives even if they do not. In considering the factors for and against prosecution in the Daniel James case, the DPP did not focus upon the reasons why Daniel wished to die. Rather, he focussed upon the fact that he was "a mature, intelligent and fiercely independent young man with full capacity to make decisions about his medical treatment", who had

tried to commit suicide before, and whose parents had tried relentlessly to persuade him not to do so; also, far from gaining any advantage from his death, it had caused his parents profound distress. These are obviously among the most important factors, although no doubt there are many more. But among them, I would hope that some attention would be paid to the reasons why the person (whose Convention rights are engaged) wished to be helped to end his or her life. The House, when debating Lord Falconer's amendment, was clearly concerned that some of the people who had made use of the services of Dignitas in Switzerland were not suffering from terminal or seriously debilitating diseases. If it is the Convention which is leading us to ask the Director for greater clarity, a relevant question must be in what circumstances the law is justified in interfering with a genuinely autonomous choice.

69. For all those reasons, in addition to those given by your Lordships, I too would allow this appeal and make the order proposed by my noble and learned friend, Lord Hope of Craighead. However, I do not think it necessary to decide whether section 2(1) of the 1961 Act covers acts here which aid and abet a suicide which is to be assisted in another jurisdiction where such acts are lawful. The question has not yet been decided here and the risk that it might be decided adversely to Ms Purdy and her husband is sufficient to raise the main issue which is before us now.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

70. There are not many crimes of which it can be said that their discouragement by the State may violate the fundamental human rights of others. Yet undoubtedly that is true in certain circumstances of the conduct criminalised by section 2(1) of the Suicide Act 1961:

> "A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years."

71. Take the facts of *Pretty v United Kingdom* (2002) 35 EHRR 1, mirrored in several respects by the facts of the present case and, indeed, those of many other cases. Mrs Pretty was suffering from a deteriorating degenerative disease which would cause her ever-increasing physical and mental suffering. There would come a point at which she wished to mitigate that suffering by choosing to end her life with the assistance of her husband. As the ECtHR observed at paragraph 67 of its judgment, Mrs Pretty "is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life". Read as a whole and fairly understood, the Court's judgment makes it quite plain that the bar on assisted suicide under section 2(1) had to be regarded as interfering with Mrs Pretty's right under article 8 of ECHR to respect for her private life. More particularly it interfered with her personal autonomy and right to self-determination.

72. Of course, as the Court also made plain, such interference may well be justifiable under the terms of article 8(2). But whether this is so or not depends upon whether it is "in accordance with the law", has a legitimate article 8(2) aim and is "necessary in a democratic society" to achieve that aim (necessity in this context implying not least proportionality). No argument was advanced by Mrs Pretty that the interference was not "in accordance with the law"; this is important since it is this argument which is the central plank of Ms Purdy's case before your Lordships. Nor did Mrs Pretty dispute—any more than Ms Purdy now seeks to dispute—that a restriction on assisted suicide pursues the legitimate aim of safeguarding life and thereby protecting the rights of others. Rather, Mrs Pretty's arguments "focused on the proportionality of the interference" and "attacked in particular the blanket nature of the ban on assisted suicide as failing to take into account her situation as a mentally competent adult who knows her own mind, who is free from pressure and who has made a fully informed and voluntary decision, and therefore cannot be regarded as vulnerable and requiring protection" (para 72 of the Court's judgment).

73. In rejecting Mrs Pretty's argument that the blanket ban on assisted suicide is disproportionate, the Court (at para 76) accepted that the system "allows due regard to be given in each particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence", notably by requiring the DPP's consent for the bringing of a prosecution, and by allowing for modest penalties where appropriate, often probation or suspended sentences. Certainly, the Court held, there was nothing disproportionate in the DPP's refusal of what Mrs Pretty was seeking: an undertaking not

to prosecute her husband were he to assist in her suicide (wherever, whenever, and in whatever manner she might choose to end her life, none of which she had specified).

74. The rejected challenge to the proportionality of the blanket ban notwithstanding, it seems to me implicit in the Court's reasoning that in certain cases, not merely will it be appropriate not to prosecute, but a prosecution under section 2(1) would actually be *in*appropriate. If in practice the ban were to operate on a blanket basis, the only relaxation in its impact being by way of merciful sentences on some occasions when it is disobeyed, that would hardly give sufficient weight to the article 8 rights with which the ban, if obeyed, is acknowledged to interfere. It is impossible to read the judgment in any other way. Why otherwise would the Court identify, as part of the justification for what is ostensibly a blanket ban, the need to consider the question whether it is in the "public interest [to bring] a prosecution" and the requirement (under section 2(4) of the 1961 Act) for the DPP's consent to do so?

75. This is the context in which Lord Pannick QC makes his argument that the blanket ban is not, without more, "in accordance with the law"—an argument central to Ms Purdy's case but, as already mentioned, not advanced by Mrs Pretty (understandably, since her challenge was on an altogether wider basis, her own proposals being altogether less clear). Given, as Strasbourg clearly appears to have recognised, that in certain circumstances it will be wrong in principle to prosecute A for assisting B to commit suicide, because to do so would unjustifiably deter those in A's position from enabling those in B's position to exercise their article 8(1) right to self-determination, it is, submits Lord Pannick, incumbent on the DPP to give some indication of what these circumstances are recognised to be so as to enable A (and indeed B) to foresee with reasonable clarity the likelihood of a prosecution having regard to the particular facts of their case.

76. Obviously no advance undertaking can be sought from the DPP that he will refuse consent to a prosecution in a particular case. He could never be sufficiently sure of the precise circumstances of the case and in any event, of course, circumstances can always change. It is perhaps unsurprising that Mrs Pretty's challenge failed at every stage. Surely, however, there can be no similar objection to the Director indicating in advance what will be his general approach towards the exercise of his discretion regarding the prosecution of this most sensitive and distressing class of case. So submits Lord Pannick and, as it seems to me, that question was specifically left open by the House in Mrs

Pretty's case: *R (Pretty) v DPP* [2002] 1 AC 800. It is sufficient to cite the opinion of Lord Bingham of Cornhill at paragraph 39:

> "I would for my part question whether, as suggested on his behalf, the Director might not if so advised make a public statement on his prosecuting policy other than in the Code for Crown Prosecutors which he is obliged to issue by section 10 of the Prosecution of Offences Act 1985. Plainly such a step would call for careful consultation and extreme circumspection, and could be taken only under the superintendence of the Attorney-General (by virtue of section 3 of the 1985 Act). The Lord Advocate has on occasion made such a statement in Scotland, and I am not persuaded that the Director has no such power. It is, however, unnecessary to explore or resolve that question, since whether or not the Director has the power to make such a statement he has no duty to do so, and in any event what was asked of the Director in this case was not a statement of prosecuting policy but a proleptic grant of immunity from prosecution. That, I am quite satisfied, the Director had no power to give."

True, Lord Bingham was suggesting in that passage that the Director is under "no duty" to state his prosecuting policy (beyond that contained in the Code). I repeat, however, no argument had been advanced there based on the requirement under article 8(2) for the blanket ban on assisted suicide to be "in accordance with the law".

77. The Code itself is issued pursuant to section 10 of the Prosecution of Offences Act 1985:

> "(1) The Director shall issue a code for Crown Prosecutors giving guidance on general principles to be applied by them – (a) in determining, in any case – (i) whether proceedings for an offence should be instituted . . ."

78. The requirement, however, that it shall apply across the entire spectrum of criminal conduct, to offences of every kind and description, means that the principles it states are at a very high level of generality. Assuming that the evidential test is satisfied, paragraph 5.7 of the Code states that "[a] prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those

tending in favour" (or, and I simplify, a caution is the more appropriate disposal, unlikely though that must be in a case of assisted suicide). When considering, however, the factors stated to weigh respectively for and against prosecution in the context of the assisted suicide of a mentally competent adult who knows his or her own mind, the Code provides in my opinion singularly little assistance.

79. As others of your Lordships have mentioned, on 9 December 2008, after the decision of the Divisional Court in the present case but before that of the Court of Appeal, the Director published his reasoned decision on public interest grounds not to prosecute Daniel James's parents for having assisted in their son's suicide. The decision expressly recognised that because suicide is not itself unlawful (unlike the principal acts which ordinarily the criminal law forbids others to aid and abet) a section 2(1) offence is unique and many of the factors identified by the Code have no application. But in assessing the value of the Code in this context it seems to me instructive to note those factors that the decision suggested *were* of relevance. Listed under the heading "5.9 The more serious the offence, the more likely it is that a prosecution will be needed in the public interest. A prosecution is likely to be needed if:", appear these sub-paragraphs:

> "(a) a conviction is likely to result in a significant sentence;
>
> (e) the defendant was in a position of authority or trust;
>
> (f) the evidence shows that the defendant was a ringleader or an organiser of the offence;
>
> (g) there is evidence that the offence was premeditated;
>
> (h) there is evidence that the offence was carried out by a group;
>
> (i) the victim of the offence was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance;
>
> (l) there is a marked difference between the actual or mental ages of the defendant and the victim, or if there is any element of corruption;
>
> (o) there are grounds for believing that the offence is likely to be continued or repeated, for example, by a history of recurring conduct;
>
> (q) a prosecution would have a significant positive impact on maintaining community confidence."

Of these, the factors identified in sub-paragraphs (e), (i) and (l) were said to be the more relevant.

80. Listed under the heading "5.10 A prosecution is less likely to be needed if:" was the single factor:

> "(a) the Court is likely to impose a nominal penalty".

81. Now let me make it clear at once that I regard the decision in *James* itself, and indeed its core reasoning, as entirely admirable: sensitive, thoughtful and principled. The sole point I am presently concerned to make is that it appears to me to underline the essential unhelpfulness of the Code itself as any sort of guide to those attempting to ascertain the critical factors likely to determine how the Director will exercise his prosecutorial discretion in this class of case. Frankly it is only when the decision letter in *James* purports to assess the public interest requirements of the case by specific reference to the factors listed in the Code that it reads unconvincingly. Take, for example, the last sentence of paragraph 32 of the decision:

> "I have also considered para 5.9 (q) and believe that, in the circumstances that exist here, a prosecution would not be likely to have a significant positive impact on community confidence."

82. That seems to me substantially to understate the reality of the case: had Mr and Mrs James been prosecuted, so far from that having had "a significant positive impact on maintaining community confidence" (sub-paragraph (q)), I can think of nothing more calculated to have forfeited the confidence of the public in the Director's approach to the exercise of his discretion in section 2(1) cases. Similarly, in the light of Strasbourg's judgment in Mrs Pretty's case, it seems to be inadequate to describe the section 2(1) offence merely as "unique in that the critical act—suicide—is not itself unlawful" (paragraph 29 of the decision letter in *James*, although, as the Director now points out, it was not quite accurate; that feature of section 2(1) is true too of the offence created by section 2 of the Female Genital Mutilation Act 2003). No less important is the fact that, as I began by pointing out, the assistance criminalised by section 2(1) is assistance which those lawfully intent on suicide may require so as to enable them to fulfil their chosen end. To

deny them that assistance will thus interfere with their article 8 right to personal autonomy and self-determination.

83. The underlying premise of the Code must surely be that, whatever mitigation may be available in any given case, behaviour contrary to the criminal law is invariably to be deprecated if not always to be prosecuted. (Sometimes a defence of necessity, or duress of circumstances, will be recognised so that the behaviour in such cases will not after all be criminal.) For my part, however, and without in the least wishing to sound contentious, I seriously question whether one should always deprecate conduct criminalised by section 2(1). Of course it is wrong—often terribly wrong—to assist in the suicide of someone who is not mentally competent or not clearly fixed in their intention or who may feel under pressure to end their life for the benefit of others or whose condition may not be extreme or may perhaps be curable rather than deteriorating. Assistance in those kind of situations is clearly to be condemned. But suppose, say, a loved one, in desperate and deteriorating circumstances, who regards the future with dread and has made a fully informed, voluntary and fixed decision to die, needing another's compassionate help and support to accomplish that end (or at any rate to achieve it in the least distressing way), is assistance in *those* circumstances necessarily to be deprecated? Are there not cases in which (although no actual defence of necessity could ever arise) many might regard such conduct as if anything to be commended rather than condemned? In short, as it seems to me, there will on occasion be situations where, contrary to the assumptions underlying the Code, it would be possible to regard the conduct of the aider and abettor as altruistic rather than criminal, conduct rather to be understood out of respect for an intending suicide's rights under article 8 than discouraged so as to safeguard the right to life of others under article 2. I express no view as to whether or not the existing law should be changed. But I do suggest that something more is needed than the existing general Code to reflect the very particular nature of the section 2(1) offence.

84. That it is open to the Director to go beyond the Code in setting out his policy with regard to the prosecution of various categories of offence is not in doubt. He has indeed done this by issuing statements of the CPS's "Policy for Prosecuting Cases" respectively "of Rape" (second edition issued in March 2009), "of Domestic Violence" (3rd edition issued in March 2009) and "of Homophobic and Transphobic Hate Crime" (2nd edition November 2007). True it is, as Ms Dinah Rose QC for the Director points out, these policy statements appear to be issued rather for the benefit and reassurance of the victims of such offending than to enable prospective offenders to assess the particular

circumstances in which they may expect to be (or not to be) prosecuted: each of the three policy statements concludes with an assurance that the CPS is committed to improving the way such cases are dealt with in the criminal justice system and a stated wish for victims to have confidence in the process. But by the same token that one can readily understand why those particular categories of offending should have been singled out as needing a fuller and more specifically offence-targeted set of stated policy considerations for the benefit of victims, so surely it is evident that for the benefit of those concerned to assist others in the exercise of their article 8 rights of self-determination, a more specific policy statement than that contained in the Code is needed as to the Director's approach to section 2(1) cases.

85. I have concluded that, with the best will in the world, it is simply impossible to find in the Code itself enough to satisfy the article 8(2) requirements of accessibility and foreseeability in assessing how prosecutorial discretion is likely to be exercised in section 2(1) cases. I had thought at one stage of the argument that, deficient though the Code alone most certainly is, the Director, by publishing his decision in the *James* case, has now done enough to establish that the blanket ban on assisting suicides is being operated "in accordance with the law". In the end, however, I am persuaded that this is not so. Although generally helpful, the *James* decision itself, as stated, tends to perpetuate the unreality of attempting to consider the approach to section 2(1) under a Code that is substantially inapplicable to this type of case.

86. What to my mind is needed is a custom-built policy statement indicating the various factors for and against prosecution, many but not all of which are touched on in the *James* case, factors designed to distinguish between those situations in which, however tempted to assist, the prospective aider and abettor should refrain from doing so, and those situations in which he or she may fairly hope to be, if not commended, at the very least forgiven, rather than condemned, for giving assistance.

87. In common, therefore, with my noble and learned friend, Lord Hope of Craighead, whose opinion I have had the opportunity of reading in draft, and whose exposition of the facts and governing Convention law I gratefully adopt, I too would allow this appeal and make the order which he proposes.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

88. I have had the benefit of reading in draft the opinions of my noble and learned friends, Lord Phillips of Worth Matravers, Lord Hope of Craighead, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood. I too would allow this appeal. In the light of the importance of the issue involved, I would like to express my reasons in my own words.

89. The sad facts of this case are set out by Lord Hope and it is unnecessary to repeat them. Lord Pannick QC, who appeared for Ms Purdy, did not take the point that there can be no offence under section 2(1) of the 1961 Act, where the suicide, which is being aided, abetted, counselled or procured in this country, occurs abroad, but, as this important question arose in argument, it is right at least to consider it.

90. In my opinion, it is right to proceed on the assumption that aiding, abetting counselling or procuring ("assisting"), in this country, a suicide at least may be an offence contrary to section 2(1) of the 1961 Act, irrespective of where that suicide is committed. If it was clear that it would not be an offence, the point raised by Ms Purdy's present application would not be properly based, but, so long as there is a real risk that Mr Puente would be committing an offence contrary to section 2(1) of the 1961 Act, were he to assist Ms Purdy to travel abroad to enable her to commit suicide, she plainly has *locus* to seek the relief she now claims.

91. I was initially of the view that we should decide that Mr Puente would be committing such an offence in such circumstances. Unlike the normal case where assisting is criminalised, section 2(1) plainly does not envisage that the act assisted will be a crime: on the contrary. Accordingly, the primary criminal act (indeed the sole criminal act) on which this legislation is focussing is the assisting, not the act which is being assisted. This unusual feature of the statutory crime means that it is not safe to rely on cases or legislation where the crime of aiding and abetting is a secondary crime, and the act being aided and abetted is the primary crime.

92. Consequently, I considered that one could find no support for the contrary view in any earlier legislation, as any previous Act to which your Lordships were referred was directed to assisting an act which was itself criminal. The only subsequent legislation to which reference was made on this point was the Female Genital Mutilation Act 2003, which appears to be the only other legislation criminalising the assisting of an action which is not itself a crime. It is true that, under the 2003 Act, it is expressly spelt out that assisting in this country a genital mutilation abroad is a crime. However, it cannot possibly be right to construe a statute passed in 1961 by reference to one passed more than forty years later.

93. The natural meaning of the stark and simple language of section 2(1) of the 1961 Act, even bearing in mind the important principle of territoriality, seems to me to be that, provided the assisting occurs within the jurisdiction, the section is satisfied. This view appeared to be reinforced by the fact, that, if it were otherwise, the section could be avoided simply by ensuring that the suicide is committed, for example, in Scotland or on the high seas. Section 2(1) of the 1961 Act defines a crime, and should therefore, I accept, be construed in a narrow sense rather than a wide one, at least in case of doubt. Nonetheless, it would plainly be wrong to adopt an unrealistically restrictive and artificially technical meaning, when the meaning, so far assumed to be correct~~,~~ accords with the natural sense of the words used by the legislature and with the plain legislative purpose.

94. Lord Hope deals much more fully with this issue in paras 18 to 25 of his opinion, and I had initially been in full agreement with what he says. However, while this remains my provisional view, now that I have considered the argument to the contrary developed by Lord Phillips in his opinion, I am persuaded that it is conceivable that this argument could prevail if the issue were fully ventilated before the court (as it has not been in this case). Although it is undesirable for your Lordships to leave open such an issue, it would be even more undesirable for your Lordships to resolve an issue, which is irrelevant to the appeal in question, has not been properly argued, and is not easy.

95. I turn to the main issue. I have no hesitation in accepting that, following the reasoning of the European Court of Human Rights in *Pretty v United Kingdom* (2002) 35 EHRR 1, your Lordships should hold that article 8 of the European Convention on Human Rights is

engaged in the present case: there is nothing to add to Lord Hope's cogent analysis in paras 30 to 39.

96. Accordingly, the issue is whether the basis on which the Director of Public Prosecutions exercises his discretion under section 2(4) of the 1961 Act is accessibly formulated in sufficiently precise terms to enable a person, potentially or actually affected by it, to understand its scope and foresee its consequences – see the cases cited by Lord Hope in paras 40 to 41. Ms Purdy argues that the Director must publicly identify the criteria which he will apply when deciding whether to prosecute in cases where there is sufficient evidence to justify bringing criminal proceedings under section 2(1) of the 1961 Act, given the very wide terms in which section 2(4), from which his discretion derives, is expressed.

97. Important as the issue is, there is, at least at first sight, a slight air of unreality in the debate, now that the Director has published his sympathetic, principled and persuasive reasons for not prosecuting the parents and family friend of Daniel James, as explained by Lord Hope in paras 49 to 51 and by Lord Brown at paras 79 to 80. As a result, it can be said with some force that it must be pretty clear to Ms Purdy, and to Mr Puente, how the Director approaches the difficult and tragic cases where a loving relative assists a person, who is of sound mind and determined to end her life, to travel abroad to achieve her wish in a country where assisting suicide is not unlawful. Equally, the Director's laudable decision to publish his reasons for not prosecuting in *James* leads one to question whether he has any good reason for objecting to publishing more general guidance on the topic. However, each party to this appeal can fairly say that the Director's policy may change, and that *James* turned, inevitably, on its own particular facts. Further, I suspect that each party is, not unreasonably, and for very different reasons, concerned to establish some sort of precedent.

98. In her excellent submissions on behalf of the Director, Ms Dinah Rose QC relied on the Code for Crown Prosecutors ("the Code"), as described in the context of the Director's reasoning in *James*, by Lord Hope in paras 47 to 48 and by Lord Brown in paras 77 to 80. She also relied on the Director's published reasoning in the *James* case, and the fact that the Director has now assigned all alleged offences under section 2(1) of the 1961 Act to the Special Crimes Division, which operates from two offices, is staffed by appropriately trained officers, and supervises potential and actual

prosecutions of exceptional difficulty or sensitivity. Whatever may have been the position before the publication of the Director's reasons in *James* and the assignment of all assisted suicide cases to the Special Crimes Division, Ms Rose said that the requirements of article 8 are now satisfied: people in the tragic circumstances of Ms Purdy and Mr Puente have what is, in all the circumstances, sufficient guidance and information about the criteria and approach adopted by the Director to meet their Convention rights.

99. Ms Rose also suggested that, in reaching any conclusion, your Lordships' House should be very circumspect before effectively over-ruling the conclusion of the Director that no such further guidance was needed, especially, I might add, when it is the very Director who wrote and published the reasons for not prosecuting in *James*. I agree. After all, however much sympathy one may have for Ms Purdy (and indeed for Mr Puente), and however clear it is that article 8 is engaged, the Director is the person primarily charged with the duty to provide guidance, and the person normally in the best position to decide whether, and if so what, guidance to issue.

100. Nonetheless, the fact that it is primarily for the Director to decide whether it is appropriate or necessary to issue guidance of the type that is sought by Ms Purdy cannot, of course, mean that the courts have no role to play, and Ms Rose did not suggest otherwise. After all, the question is whether the article 8 rights of Ms Purdy, and indeed of others in her unenviable position, are being properly met in the light of the absence of any published guidance as to the Director's approach to the question of prosecutions under section 2 of the 1961 Act, and that is a question, ultimately, for the court.

101. Even allowing for the considerable deference to be accorded to the views of the Director on this important and sensitive issue, I have reached the conclusion, in common with all your Lordships, that the Director ought to formulate (to the extent, if any, that he has not yet done so) and publish a policy, which sets out what he would generally regard as the aggravating factors and mitigating factors, when deciding whether to sanction a prosecution under section 2 of the 1961 Act. Inevitably, as a matter of common sense as well as a matter of law, each case will have to be decided by reference to its own particular facts, and the contents of such a policy could not conceivably be exhaustive. However, it cannot be doubted that a sensible and clear policy document would be of great legal and practical value, as well as being, I suspect, of some moral and

emotional comfort, to Ms Purdy and others in a similar tragic situation.

102. I reach my conclusion on the ground that, in the absence of any such statement of policy, there is simply no sufficiently clear or relevant guidance available as to how the very widely expressed discretion accorded to the Director in section 2(4) of the 1961 Act will be exercised. The Code may well provide sufficient guidance for the purposes of most, even all, other crimes, but it is simply inadequate for the purpose of the crime created by section 2(1) of the 1961 Act. The very unusual features of this crime are that it involves the offender assisting an action by a third party which is not itself a crime, the third party who is being assisted is also the victim, the victim will almost always be willing, indeed will very often be the positive instigator of the crime, and the offender will often be a relatively reluctant participator, and will often be motivated solely by love and/or sympathy. In addition, the potential offender is not the person, or at least is not the only person, whose Convention rights are engaged: it is the victim whose article 8 rights are engaged, and he or she will almost always be unusually vulnerable and sensitive.

103. Consideration of the mitigating factors set out in the Code demonstrate why it does not provide helpful guidance in relation to the crime of assisting suicide: none of the mitigating factors, with the possible exception of ground (a), set out in para 80 by Lord Brown, is of any relevance, and that factor is merely the obverse of ground (a) of the aggravating factors, set out in para 79. The inadequacy of the Code for present purposes is to my mind underlined by the fact that, in his reasoning in *James*, the Director was effectively forced to treat the inapplicability of a number of the aggravating factors as amounting to mitigating factors, rather than relying on any significant mitigating factors, as Lord Brown demonstrates in paras 79 to 82. Accordingly, it seems to me that the Code is of relatively little value or assistance to those in the position of Ms Purdy.

104. My conclusion is reinforced by the Director's laudable publication of statements of guidance in relation to certain other crimes, summarised by Lord Brown at para 84: while those crimes may often be as sensitive as assisting suicide, they do not involve the unique features of that offence. If publication of such guidance is appropriate for those crimes, it is hard to see why it is not appropriate for assisting suicide as well. It is true that those statements were issued, at least in part, and maybe mainly, for the

benefit of victims, but that brings one straight back to the unusual features of this particular crime: it is the potential victim who is seeking the publication of guidelines in this case, in order to clarify whether the potential offender, her loving husband, is likely to be prosecuted if he commits the crime she so much wants him to commit "against" her.

105. The fact that the Director has published his reasons for not prosecuting in *James* seems to me to cut both ways in this case, as I have already indicated: in the end, I do not think that it helps tip the balance of the argument either way. The fact that alleged offences against section 2(1) of the 1961 Act are dealt with by the Special Crimes Division, while to be welcomed, does not seem to me to assist the Director's case on this appeal. Indeed, if anything, I consider that it tends to assist Ms Purdy, as it makes it easier for the Director to ensure that there is a consistent policy in relation to this crime, and therefore easier for him to formulate (if he has not done so) and publish a policy.

106. I agree with the more fully expressed reasons of Lord Hope, and with the form of order he proposes, as well as with the more fully expressed reasons of Lady Hale and Lord Brown. I would also like to express my agreement with Lord Hope when he says that the order which he proposes reflects the fact that our decision is simply that the article 8 rights of Ms Purdy entitle her to be provided with guidance from the Director as to how he proposes to exercise his discretion under section 2(4) of the 1961 Act. As judges, we are concerned with applying the law, not with changing the law: that is a matter to be decided by Parliament. Accordingly, I too would allow this appeal.