OUTER HOUSE, COURT OF SESSION

[2015] CSOH 123

P1036/14

OPINION OF LORD DOHERTY

In the petition of

GORDON ROSS

Petitioner;

for

Judicial Review of the failure by the Lord Advocate to adopt and publish a policy identifying the facts and circumstances which he will take into account in deciding whether or not to authorise the prosecution in Scotland of a person who helps another to commit suicide

Petitioner: O'Neill QC, Anderson; Campbell & McCartney, Solicitors
Respondent: Moynihan QC, Ross; Scottish Government Legal Directorate

8 September 2015

Introduction

[1] The petitioner is aged 65 and in poor health. In this petition he avers (Stat III) that he suffers from diabetes, heart problems, Parkinson's Disease, and peripheral neuropathy; that he is no longer able to live independently, and that since 2014 he has required to reside in a care home; that he has become dependent upon others to help with many ordinary functions such as getting in and out of bed and preparing food; and that he can no longer walk or drive. The petition continues:

> "Stat. V. The Petitioner's mental capacity is unimpaired. He has discussed with friends and relatives the possibility of committing suicide. He anticipates that a point will come at which he will find his infirmity and dependence on others intolerable. He would not wish to continue living beyond that point. He would, however, require assistance to commit suicide. He is apprehensive that anybody who assisted him to commit suicide would risk criminal prosecution. He therefore fears that he may be forced to commit suicide by his own hand sooner than he would otherwise have wished, rather than risk an undignified and distressing decline, possibly over a period of many years. The dilemma in which he finds himself is itself causing him uncertainty and anguish."

[2] In an affidavit (10 of process) the petitioner expanded on the averments in the petition. He stated that recently he had begun to have episodes of shaking and muscle spasms and which now occurred about two or three times daily. He observed that if the episodes increased and worsened he would want to end his life.

The Lord Advocate's indication of his approach to the public interest in homicide cases which involve assisted suicide

[3] By letter dated 30 July 2014 the petitioner's solicitors asked the Lord Advocate ("the respondent") whether guidance had been published on the prosecution of persons who assist individuals in Scotland to commit suicide; and, if not, whether he had any plans to publish such guidance. By letter dated 22 August 2014 the Crown Office and Procurator Fiscal Service ("COPFS") Head of Policy replied:

"…If someone assists another to take their own life, such cases would be reported to the procurator fiscal by the police as a deliberate killing of another and … it would be dealt with under the law of homicide. Under the law of homicide, consideration would be given as to whether there was sufficient evidence to establish that an offence had been committed, that the accused was the perpetrator and that the accused had the requisite *mens rea* (intention) to commit the offence.

In order to be satisfied that a crime had been committed, the Crown would have to consider that there was a direct causal link between the actings of the accused and the deceased's death. In other words, that it was a significant contributory factor to the death …

Thereafter consideration would have to be given as to whether prosecution is in the public interest. The criteria for deciding whether prosecution is in the public interest are set out in the COPFS Prosecution Code …

There is a high public interest in prosecuting all aspects of homicide where there is sufficient available evidence …"

In a submission to the Justice Committee of the Scottish Parliament (7/5 of process) (during their consideration of the Assisted Suicide (Scotland) Bill) the respondent discussed the issue of prosecution for homicide where the accused had assisted another to take his life:

"…[C]onsideration would have to be given to whether prosecution is in the public interest. The criteria for deciding whether prosecution is in the public interest are set out in the COPFS Prosecution Code. I am sure that you will appreciate that there is a high public interest in prosecuting all aspects of homicide where there is sufficient, credible and reliable evidence.

If the Crown considers there to be sufficient evidence that a person has caused the death of another it is difficult to conceive of a situation where it would not be in the public interest to raise a prosecution but each case would be considered on its own facts and circumstances."

[4] In a letter to The Herald in April 2015 (6/17 of process) the respondent repeated:

"…[W]here there is sufficient and credible and reliable evidence consideration would have to be given to whether prosecution is in the public interest. The criteria for deciding this is set out in the Scottish Prosecution Code which is publicly available … I would add the obvious point that given the seriousness of the crime of homicide – it is the most serious crime in the law of Scotland – it is difficult to conceive of a case where it would not be in the public interest to take proceedings, but each case must be considered on its own facts and circumstances …"

He added:

"In a democracy it is important that changes to the law of assisted suicide are decided by the Scottish Parliament and not by me in the issue of prosecutorial guidance. Prosecutorial guidance cannot change the law or remedy a defective law. That would be unconstitutional and an affront to the rule of law. If members of the public want the law of this country relating to assisted suicide to be changed they need to persuade a majority of MSPs to do this."

[5] In a chapter headed "Public Interest Considerations" the COPFS Prosecution Code states:

"…Assessment of the public interest often includes consideration of competing interests, including the interests of the victim, the accused and the wider community.

The factors which will require to be taken into account in assessing the public interest will vary according to the circumstances of each case.

The following factors may be relevant. Not all of them will apply in every case and the weight to be attached to any applicable factor will depend on the circumstances of each case.

The assessment of the public interest involves a careful consideration of all the factors relevant to a particular case.

(i) The nature and gravity of the offence

The nature of the offence will be a major consideration in the assessment of the public interest. In general, the more serious the offence the more likely it is that the public interest will require a prosecution. …

(ii) The impact of the offence on the victim and other witnesses

…

(iii) The age, background and personal circumstances of the accused

…

(iv) The age and personal circumstances of the victim and other witnesses

…

(v) The attitude of the victim

…

(vi) The motive for the crime

…

(vii) The age of the offence

…

(viii) Mitigating circumstances

…

(ix) The effect of prosecution on the accused

…

(x) The risk of further offending

…

(xi) The availability of a more appropriate civil remedy

…

(xi) Powers of the court

…

(xiii) Public concern

…"

The petition

[6] In this petition for judicial review the petitioner avers (Stat I) that the Prosecution Code published by the respondent:

> "is insufficiently clear and precise to enable a person, who wishes to enlist the help of another in committing suicide, to foresee the consequences for that other person in terms of liability to prosecution; that for practical purposes this precludes either seeking or giving such assistance; and that this represents an unjustified interference with the Article 8 ECHR right to private life of the person wishing to commit suicide."

The petitioner seeks (Stat II) (a) declarator that the respondent is in breach of Article 8:

> "in failing to promulgate a policy identifying the facts and circumstances which he will take into account in deciding whether or not to authorise the prosecution in Scotland of a person who helps another person to commit suicide";

(b) an order requiring the respondent to promulgate such a policy; and (c) such further order or orders as may seem to the court to be just and reasonable. The essence of the petitioner's challenge is set out in Stat XXIII:

> "The factors set out in the Prosecution Code, necessarily expressed in very general terms, wholly fail to satisfy the convention requirements of foreseeability and accessibility. It follows that the interference with the Petitioner's rights under Article 8(1) cannot properly be described as being 'in accordance with the law' as required by Article 8(2)."

Background

[7] The petition and the respondent's answers proceed on the basis (Stat X and Ans X) that suicide is not a crime in any of the jurisdictions of the United Kingdom. So far as Scotland is concerned that is the generally accepted view (see *eg Gordon, The Criminal Law of Scotland (3rd ed, edited by MGA Christie),* para 23.01; *Stair Memorial Encyclopaedia, Criminal Law Reissue (2005), "Homicide"(James Chalmers),* para 252; *Report of the Royal Commission on Capital Punishment, (1953 Cmnd 8932),* para 167; *T B Smith, A Short Commentary on the Law of Scotland,* p182; *McCall Smith and Sheldon, "Scots Criminal Law" (2nd ed),* p 171; *cf Chalmers, "Assisted Suicide: Jurisdiction and Discretion",* (2010) 14 Edin LR 295, at 298-9).

[8] At common law in England and Wales suicide was self-murder, and anyone encouraging or assisting a party to commit suicide was also guilty of that murder as a secondary party. The position was changed by the Suicide Act 1961. Section 1 took the act of suicide itself outside the scope of the criminal law in carefully framed language:

> "The rule of law whereby it is a crime for a person to commit suicide is hereby abrogated."

[9] The parties' pleadings, Notes of Argument and submissions proceed on the basis that under Scots law a person assisting the suicide of another might commit the crime of murder or the crime of culpable homicide. (There was no discussion as to whether the crime of recklessly endangering life might be committed where a person provided another with the means of committing suicide but the causal link between that provision and the death could not be established: see *McCall Smith and Sheldon, supra, (2nd edn, 1997),* pp 171-172).

[10] In England and Wales it is possible that a person assisting the suicide of another might commit murder or manslaughter, or the statutory offence introduced by section 2 of the Suicide Act 1961. Section 2

(as amended by the Criminal Law Act 1967, the Criminal Jurisdiction Act 1975 and the Coroners and Justice Act 2009) provides:

> "**2.— Criminal liability for complicity in another's suicide.**
>
> (1) A person ("D") commits an offence if—
>
> (a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and
>
> (b) D's act was intended to encourage or assist suicide or an attempt at suicide.
>
> (1A) The person referred to in subsection (1)(a) need not be a specific person (or class of persons) known to, or identified by, D.
>
> (1B) D may commit an offence under this section whether or not a suicide, or an attempt at suicide, occurs.
>
> (1C) An offence under this section is triable on indictment and a person convicted of such an offence is liable to imprisonment for a term not exceeding 14 years.
>
> …
>
> (4) ... no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions."

(Prior to its amendment in 2009 the terms of s 2(1) had been:

> "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 14 years.")

[11] It is plain that the issue of assisted suicide is highly sensitive, and that it arouses opposing and strongly held views in Scotland, in the rest of the United Kingdom, and elsewhere. However, by far the majority of member states of the Council of Europe impose

criminal liability on any form of assistance to suicide (*Koch* v *Germany* (2012) 56 EHRR 195, at para 25; *Haas* v *Switzerland* (2001) 53 EHRR 33, at para 55; *R (Nicklinson and anor)* v *Ministry of Justice* [2015] AC 657 ("*Nicklinson*"), per Lord Sumption at para 212).

[12] The possibility of relaxing the statutory prohibition on assisting suicide in England and Wales was debated in Parliament on at least six occasions in the nine years prior to the Supreme Court's decision in *Nicklinson* (see Lord Neuberger PSC at paras 51-54 for a succinct summary of Parliamentary proceedings and of the Falconer Report). That history caused Lord Sumption to conclude (at para 233):

> "As matters stand I think it is clear that Parliament has determined that for the time being the law should remain as it is."

On 4 June 2015 Lord Falconer of Thoroton introduced a Private Member's Bill - the Assisted Dying Bill - in the House of Lords (the previous Private Member's Bill of the same name which he had introduced having fallen as a consequence of the general election in May 2015). A Private Member's Bill in the same, or substantially the same, terms was presented to the House of Commons by Rob Marris MP on 24 June 2015. Both Bills make provision for physician-assisted dying. Mr Marris' Bill is expected to have its second reading debate on 11 September 2015.

[13] In the Scottish Parliament there have been two recent, but unsuccessful, attempts to change the law. Each was a Member's Bill introduced by the late Margo MacDonald MSP. The End of Life Assistance (Scotland) Bill was introduced in January 2010. The Stage 1 Report recommended the Bill's rejection. In December 2010 the Parliament rejected the Bill by 85 votes to 16. The Assisted Suicide (Scotland) Bill was introduced in November 2013. The Stage 1 Report made no recommendation to the Parliament. On 27 May 2015 a motion that the general principles of the Bill be agreed to was defeated by 82 votes to 36.

Art 8

[14] Art 8 of the ECHR provides:

"**Right to respect for private and family life**

Article 8

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."

Human Rights Act 1998, s 6

[15] Section 6 provides:

"6.— Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

…

(3) In this section *'public authority'* includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature…

…

(6) *'An act'* includes a failure to act …"

First hearing

[16] The petition came before me for a first hearing. In advance of the hearing parties had prepared Notes of Argument (11 and 12 of process). In addition the petitioner lodged a Summary Note of Argument (20 of process) and the respondent lodged an Abbreviated Note of Argument (19 of process).

Submissions on behalf of the petitioner

[17] Mr O'Neill stated that the issue was whether, and the extent to which, compliance with the petitioner's Art 8.1 rights required the respondent to promulgate a policy identifying the facts and circumstances which he would take into account in deciding whether or not to authorise the prosecution in Scotland of a person who aids, abets, counsels, procures, encourages or assists the suicide of another. He stressed that the petition did not concern questions of "mercy killing" or "physician - assisted dying". The

respondent is a public authority within the meaning of that expression in Art 8.2. He is also a public authority in terms of s 6(3) of the Human Rights Act 1998. Accordingly it is unlawful for him to act in a way which is incompatible with a Convention right (s 6(1)). The petitioner's case is that the respondent's prosecution policy is not "in accordance with the law" in terms of Art 8.2, and that he requires to promulgate a more specific policy which is in accordance with the law: and that accordingly he is acting in a way which is incompatible with the petitioner's Art 8.1 Convention rights.

[18] Mr O'Neill submitted that the case law of the European Court of Human Rights on Art 8 required States to afford an immunity from State interference with the settled decision of a person of full legal and mental capacity to kill himself unless that interference could be justified under Art 8.2 of EHCR. The principal Strasbourg authorities Mr O'Neill relies upon are *Pretty* v *UK* (2002) 35 EHRR 1; *Haas* v *Switzerland, supra*; *Koch* v *Germany, supra*; and *Gross* v *Switzerland* (2013) 58 EHRR 197. He also draws support from *R (Purdy)* v *DPP* [2010] 1 AC 345 (in particular from Lord Brown at para 82) and *Nicklinson* (in particular from Lord Sumption at para 216). Reference was also made, by way of analogy, to the decision of the Canadian Supreme Court in *Carter* v *Canada (Attorney General)* 2015 SCC 5 and to the decision at (first instance) of the High Court of South Africa in *Stransham-Ford* v *Minister of Justice* (2015) SA 50.

[19] Mr O'Neill placed particular reliance upon the following observations of Lord Hope of Craighead in *Purdy:*

> "**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, para 39; *Engel* v *The Netherlands* (No 1) (1976) 1 EHRR 647, 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) (unreported) given 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) (unreported) given 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) 22 EHRR 123, para 31; *Sorvisto* v *Finland*, 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 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."

[20] Mr O'Neill accepted that there was a legal basis in domestic law for the restriction - the law of homicide. He did not suggest that the law of homicide failed to satisfy any of the requirements of legality. However, the policy factors which the respondent would consider when he decided whether or not it was in the public interest to prosecute were part of the "law" for Convention purposes. He submitted that where a homicide involves assisted suicide the policy aspect of the law does not satisfy the requirements of accessibility and foreseeability. As a result, the law is being applied in a way which is arbitrary.

[21] In *Purdy* the appellate committee had held that the interference with Ms Purdy's Art 8 rights had not been "in accordance with the law". The same conclusion should be reached here. There, as here, the focus had been on assisted suicide. The Committee had held that the Code for Crown Prosecutors issued by the Director of Public Prosecutions ("the DPP") did not satisfy the requirements of accessibility and foreseeability for a person seeking to identify the factors which were likely to be taken into account by the DPP in exercising his discretion under s 2(4) of the Suicide Act 1961. The DPP was required to promulgate an offence-specific policy identifying the facts and circumstances which he would take into account in deciding whether to prosecute under s 2(1). The circumstances in the petitioner's case were very similar to those in *Purdy.* The Prosecution Code was in similar general terms to the Code for Crown Prosecutors. It provided little real assistance as to the factors which would tend towards or against prosecution in cases involving assisted suicide. The outcome here should be the same as the outcome in *Purdy,* for largely the same reasons as were decisive in that case.

[22] Reference was also made to (*R (Gillan) Commissioner of Police of the Metropolis* [2006] 2 AC 307, per Lord Hope at para 52; *Gillan* v *UK* (2010) EHRR 45 at paras 76 and 77; *Peruzzo* v *Germany* (2013) 57 EHRR SE17 at para 35; and to *R (T)* v *Home Secretary* [2015] AC 49, per Lord Reed at para 114).

[23] Mr O'Neill recognised that the respondent had indicated publicly that where there was a sufficiency of evidence for a prosecution for homicide he was very likely to consider it to be in the public interest to prosecute given the serious nature of the offence. He acknowledged that prosecutions were "extremely

likely to follow" in such circumstances (see eg para 3 of the Summary Note of Argument for the Petitioner). Nevertheless, he submitted that the public statements and the terms of the Prosecution Code are insufficient to satisfy the requirements of accessibility and foreseeability, or to avoid the conclusion that the law is being applied arbitrarily. It followed that the respondent is acting unlawfully.

Submissions on behalf of the Lord Advocate

[24] Mr Moynihan submitted that it was erroneous to maintain that the Strasbourg jurisprudence established that a person had a right to commit suicide; or that he had a right to have someone else assist him to commit suicide. It was clear from the jurisprudence that these were matters in relation to which member States had a wide margin of appreciation.

[25] Unlike the position in England and Wales, in Scotland there is no statutory crime of assisting or encouraging suicide. The issue raised by the petition relates to a much narrower category of cases - the prosecution of homicide where the circumstances of the homicide involve assisted suicide. Many circumstances which would involve the commission of the statutory crime in England would not involve the commission of homicide if they took place in Scotland. For example, the requisite causal connection between the *actus reus* and the death may be absent.

[26] The *Purdy* case has no bearing on prosecutions for murder (*eg R* v *Inglis* [2011] 1 WLR 1110) or manslaughter (eg *R* v *George Hugh Webb* [2011] 2 Cr App R (S) 61) in England and Wales. The Appellate Committee had been clear (see *eg* Lord Hope at para 54) that the Prosecution Code would normally provide sufficient guidance to Crown Prosecutors and to the public as to whether or not, in a given case, it will be in the public interest to prosecute. The problem in *Purdy* had been specific to the s 2 statutory offence. It had arisen because of the breadth of that offence, and because it was apparent that the DPP was not enforcing the law in many cases where the offence had been committed. The difficulty was that he had not made publicly accessible the factors which in practice he relied upon when deciding whether or not to prosecute. In those circumstances the Appellate Committee concluded that his policy lacked clarity. The law was not accessible or foreseeable, with the result that the interference with Ms Purdy's Art 8.1 rights was not "in accordance with the law" in terms of Art 8.2. No such problem arose here. The substantive law is accessible and foreseeable, as is the respondent's prosecution policy. It follows that if there is interference with the petitioner's Art 8.1 rights that interference is "in accordance with the law". The cases of *Carter* and *Stransham-Ford* have no bearing upon the issue raised in this petition.

[27] Mr Moynihan submitted that the petitioner's averments are irrelevant. There is no proper foundation in law for the remedy which he seeks. Accordingly, the respondent's first plea-in-law (that the petitioner's averments are irrelevant) should be sustained and the petition should be dismissed.

Third and fourth speeches

[28] In a brief reply to Mr Moynihan's submissions Mr O'Neill appeared to seek to question - for the first time - the necessity (including the proportionality) of the existing law and practice. He submitted that the petitioner had demonstrated an interference with his Art 8.1 rights and that therefore it was for the respondent to justify the legality and the necessity of the interference. Since the respondent tendered no justification for the interference being necessary in a democratic society the interference had not been justified in terms of Art 8.2.

[29] Mr Moynihan indicated that the issue raised in the petition was the legality of the interference, not the necessity of the interference. The respondent had responded to and addressed the matter which had been put in issue by the petitioner.

Other case-law referred to

[30] In the course of oral submissions some reference was also made to *Law Hospital NHS Trust* v *Lord Advocate* 1996 SLT 848; *MacAngus* v *HM Advocate* 2009 SLT 137; *R* v *Kennedy (No. 2)* [2008] AC 269; and *R* v *Evans* [2009] 1 WLR 1119. Some further cases were mentioned in the petitioner's Note of Argument but there was no discussion of them at the hearing.

Decision and reasons

[31] While parties are at odds as to whether it is accurate to say that there is a Convention right to commit suicide, or to be assisted to commit suicide, in my opinion it is unnecessary for present purposes to enter upon that debate (*cf eg Nicklinson,* the joint judgement of Lord Dyson and Elias LJ in the Court of Appeal at para 66; Lord Mance at paras 159-161; Lord Wilson at para 200; Lord Sumption at paras 215-216, 255; Lord Hughes at paras 263-264; Baroness Hale at paras 307-310; Lord Kerr at paras 328-335). I say that because in my opinion it is clear on the authorities that the Art 8.1 right to respect for private and family life encompasses respect for an individual's decision as to how and when to die, and in particular to seek to avoid a distressing and undignified end to life (provided that the decision is made freely): *Haas* v *Switzerland*, *supra,* para 51; *Koch* v *Germany, supra,* paras 46 and 51; *Gross* v *Switzerland, supra,* para 60; *Nicklinson*, per Lord Neuberger at para 29. It follows that Art 8.1 is engaged in the present case. I did not understand Mr Moynihan to contend otherwise.

[32] The issue raised by this petition is the legality of the interference - whether it "is in accordance with the law" in terms of Art 8.2. In my opinion it is very clear that the petition does not raise any issue as to the necessity of the existing law and practice in Scotland relating to homicide in cases of assisted suicide. There has been no failure on the part of the respondent to justify the necessity of the interference. While, of course, if the matter had been properly put in issue the onus would have been upon the respondent to make out that aspect of the Art 8.2 justification, it was for the petitioner to raise the matter in the petition if he sought to put it in issue (*cf Landcatch Marine Ltd* v *Marine Harvest Ltd* 1985 SLT 478, per Lord Davidson at p 480; *William Teacher & Sons Ltd* v *Bell Lines Ltd* 1991 SLT 876, per Lord Marnoch at pp 878-9). This is not legal formalism, nor is it a picky pleading point. It is about fair notice and the proper focussing of the challenge being made. This is a case where the terms of the petition give not the slightest indication that the necessity of the law is being questioned. On the contrary, Stat XXIII makes it perfectly clear that the legality of the interference is what is being attacked. So do the petitioner's Note of Argument (see in particular para 4.3) and his Summary Note of Argument (see in particular para 5). Had the matter been properly raised in the petition the respondent's answers, his submissions, and the material which he placed before the court would not have been confined to the legality issue.

[33] If Mr O'Neill wished to make a belated challenge to the necessity of the interference then the proper course would have been to seek leave to amend the petition. Had such a motion been made and been granted it would have been inevitable that the first hearing would have to have been adjourned to permit parties to recast their pleadings and notes of argument, and to enable consideration to be given to what further material should be placed before the court.

[34] Before examining the legality challenge I think it useful to recall two well-established propositions. First, while the court can review the legality of the respondent's policy it is not the court's role to dictate the policy's content (*Nicklinson,* per Lord Neuberger at para 141). A range of prosecution policies (some favouring more, some favouring fewer, prosecutions) may satisfy the Art 8.2 legality requirement (see *Nicklinson*, Lord Hughes at para 280, and para 44 of the joint judgment of Lord Dyson and Elias LJ in the Court of Appeal; and *R (AM)* v *The General Medical Council* [2015] EWHC 2096 (Admin), per Elias LJ at para 40). Second, the certainty required of prosecutorial policy is of a lesser, more indicative, order than the certainty required of provisions which create or identify criminal offences (see *Nicklinson*, per Lord Judge CJ in the Court of Appeal at para 179; per Toulson LJ in the Divisional Court, para 141; per Lord Sumption at paras 239-241).

[35] I agree with Mr Moynihan that the cases of *Carter* and *Stransham-Ford* provide no assistance in relation to the legality aspect of justification under Art 8.2.

[36] The petitioner relies heavily upon the decision and reasoning in *Purdy.* While I accept, of course, the general guidance given in that case as to the requirements of legality, I do not accept that the circumstances before me mirror those in *Purdy.* Nor do I accept that the outcome here must be the same. There are obvious differences between the two cases.

[37] First, s 2(1) of the Suicide Act 1961 has a wide ambit. There are likely to be many situations where encouragement or assistance of suicide in England and Wales would contravene s 2(1) but would not be homicide if they occurred in Scotland (because one or more of the requisites of the crime of murder or culpable homicide was/were lacking).

[38] Second, in *Purdy* it was clear to the Appellate Committee that the prosecution authorities were in practice applying a policy which resulted in the non-prosecution of most cases of contravention of s 2(1): but that that policy, and the factors which would in fact be taken into account in deciding whether to prosecute, were not publicly available. There was a marked inconsistency between the law and its application in practice. None of the material placed before me suggests that there is any similar divergence between the law and its application in practice in Scotland. Nor is there any indication that an unknown or unpublished policy is being applied.

[39] Third, in *Purdy* (and in the written explanation for not prosecuting which he gave in the case of Daniel James) the DPP accepted that many of the factors set out in the Code for Crown Prosecutors had little or no relevance to the decision whether a prosecution for a contravention of s 2(1) was in the public interest. That was a factor which led the Appellate Committee to conclude that, while the Code would normally provide sufficient guidance as to how decisions should or are likely to be taken, and would ensure predictability and consistency of decision-taking, it did not do so in the specific scenario postulated by Ms Purdy. Here, the respondent does not distance himself from the factors set out in the Prosecution Code. On the contrary, he has identified the factor in the Code which is likely to prevail in cases where there is a sufficiency of evidence - that the serious nature of the offence makes it likely that the public interest will require a prosecution.

[40] I turn now to examine more closely whether the requirements of accessibility, foreseeability, and of non-arbitrary interference are satisfied in the present case.

[41] For law to be adequately accessible the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case (*Sunday Times* v *United Kingdom* (1978-9) 2 EHRR 245 at para 49; see also *Purdy,* per Lord Hope at para 41). It was not suggested that the relevant substantive law here is inaccessible; and I am not persuaded that the respondent's policy fails in that respect. The Prosecution Code and the respondent's statements in relation to cases of homicide which involve assisted suicide are published documents. In *Purdy* the divergence between the proscription in s 2(1) and the DPP's practice was indicative of there being unpublished policy factors which the DPP would consider when determining whether to consent to a s 2(1) prosecution. As already observed, there is no indication of such divergence between the law and practice in the present case: and there is no basis for concluding that the respondent's decision whether to prosecute would be likely to turn upon unpublished policy factors.

[42] The requirement of foreseeability involves that the law should be

> "… formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser degree, are vague and whose interpretation and application are matters of practice." (*Sunday Times* v *United Kingdom, supra,* para 49).

Applying this guidance, and the guidance provided by Lord Hope in *Purdy* at paras 41-43, (*cf Nicklinson,* per Lord Neuberger PSC at para 141 and per Lord Hughes at para 278), I am satisfied that the foreseeability requirement is met here. The respondent has made his position clear to the petitioner and to the public at large, under reference to the Prosecution Code and his other public statements. His declared stance is that, while in each case the whole facts and circumstances would have to be considered, the public interest is likely to favour prosecution given the serious nature of the crime. The likely consequences of committing homicide in order to assist someone to commit suicide are reasonably foreseeable.

[43] In *Purdy* Lord Hope suggested that a possible example of arbitrariness might be a disproportionate application of the law. The petitioner makes no case that there is arbitrariness of that sort here. In any event, Lord Hope's observation now requires to be read with the clarification provided in *R (T)* v *Home Secretary* [2015] AC 49, per Lord Reed at paras 112-115 (with which Lord Neuberger PSC, Baroness Hale and Lord Clark agreed (at para 158)): *cf* Lord Wilson at paras 32-38. The legality test does not involve consideration of whether an interference is proportionate. Rather, the proportionality of an interference is a

matter which falls to be determined when assessing whether the interference is "necessary in a democratic society".

[44] The overriding objective of the legality principle is to guard against arbitrary executive behaviour (*Nicklinson*, per Lord Hughes at para 278). The essence of arbitrariness in this context is that:

> "The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred." (per Lord Bingham in *Gillan* at para 34: see also Lord Judge CJ in *Nicklinson* at page 77, para 179).

I see no evidence of arbitrary or inconsistent behaviour on the part of the respondent. The thrust of his policy in this area is to enforce the law. The policy is consonant with the rule of law. The public know what his policy is, and there is no suggestion that it is being applied inconsistently (*cf Nicklinson*, per Lord Neuberger PSC at para 141). Adopting the language of Lord Judge CJ (*Nicklinson*, in the Court of Appeal, para 179), decisions whether to prosecute will not be based upon the respondent's ungoverned whim but will represent conscientious decisions made by him with reference to his policy.

[45] In the result I am satisfied that the respondent's policy in relation to prosecution for homicide where the circumstances involve assisted suicide does not lack the requisite accessibility or foreseeability. Nor is it arbitrary. It satisfies all of the requirements of legality identified in *Purdy* and the other authorities discussed above. In my opinion it is not incumbent upon the respondent to do more than he has done. His policy is "in accordance with the law".

[46] Finally, I record that in his Note of Argument Mr O'Neill tentatively suggested that there might be a complaint of Art 14 indirect discrimination on grounds of ethnic or national origin as a result of the different prosecution policies followed in Scotland and in England and Wales. This was not a ground founded on in the petition, and only brief passing reference was made to it during Mr O'Neill's submissions. The argument was not developed. When I sought clarification from Mr O'Neill in relation to it he indicated it was "not a point he was pushing particularly". In the circumstances I see no need to say more about it.

Disposal

[47] I shall sustain the respondent's plea to the relevancy of the petitioner's averments and dismiss the petition. I reserve meantime all questions of expenses.