SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2016] CSIH 12
P1036/14

Lord Justice Clerk
Lady Dorrian
Lord Drummond Young

OPINION OF LORD CARLOWAY,
the LORD JUSTICE CLERK

in the reclaiming motion

by

GORDON ROSS

Petitioner and Reclaimer;

against

LORD ADVOCATE

Respondent:

Act: O'Neill QC, McIntosh; Campbell & McCartney, Paisley
Alt: Dean of Faculty (Wolffe QC), Ross; Scottish Government Legal Directorate

19 February 2016

[1] This is a reclaiming motion (appeal) from a decision of the Lord Ordinary on a petition for judicial review of the respondent's failure or refusal to publish specific guidance on the facts and circumstances which he would take into account in deciding whether to prosecute an individual who assists another to commit suicide. The petitioner maintains that this failure or refusal is a breach of his right to respect for his private life under Article 8 of the European Convention on Human Rights.

[2] Article 8 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 and morals, or for the protection of the rights and freedoms of others. "

The Article 8 right is a qualified one. The state may legitimately interfere with the general Article 8.1 right, if the interference is in accordance with the law and in furtherance of one of the specified aims. The petitioner avers that the respondent's interference with his Article 8.1 right is not "in accordance with the law" under Article 8.2. The Lord Ordinary disagreed. The reclaiming motion addresses the issues of whether he was correct in doing so.

Background

[3] The petitioner is aged 65. He suffers from diabetes, heart problems, Parkinson's disease, and

peripheral neuropathy. He suffers episodes of shaking and muscle spasms many times each day. He cannot live independently. He resides in a care home. He requires assistance from others with all aspects of daily living. He is, however, mentally unimpaired. He anticipates that there will come a time when he will not wish to continue living, as he will find his infirmity and consequent dependence on others intolerable. He would require assistance to commit suicide because of his physical state. He is apprehensive that anyone who assisted him would be liable to prosecution. He considers that he may require to take action to end his life himself, sooner than he would otherwise wish to, in order to avoid living on in an undignified and distressing condition. This dilemma causes him uncertainty and anguish.

[4] There are some preliminary points of importance about the scope of the petition which the petitioner was keen to stress. First, it does not address the issue of "mercy killing" or euthanasia. It is restricted to acts of suicide which require some form of assistance from a third party. Secondly, it does not overtly seek a review of the substantive criminal law, being the common law of murder and culpable homicide. Thirdly, it does not seek to challenge the settled will of Parliament. On two recent occasions, the Scottish Parliament has considered whether to legalise assisted suicide. On both occasions the draft bill was defeated by a significant majority.

[5] It was accepted by both parties that Article 8.1 was engaged by the petitioner's circumstances. The petitioner had a right to determine certain aspects of his private life, including the determination of the final moment of his life. That was not to say that the petitioner had a "right to suicide". The petitioner's right under Article 8.1 could be interfered with under Article 8.2, if the requirements of legality and legitimate aim were met. At the hearing before the Lord Ordinary, the petitioner had sought to raise, for the first time, an issue of whether the criminalisation of a person who assisted another to commit suicide was necessary in a democratic society. Prior to that, the focus in the petition, the notes of argument, and the oral submissions had been legality; ie whether the interference with the Article 8.1 right had been in accordance with the law. The petitioner did not revisit the point in the course of the appeal. In any event, it is well established that the interference did have a legitimate aim; *viz.* the protection of the vulnerable from undue influence, or other acts which could circumvent their will. It is a common thread running through the European Court jurisprudence (*Pretty* v *UK* (2002) 35 EHRR 1; *Haas* v *Switzerland* (2011) 53 EHRR 33; *Koch* v *Germany* (2013) 56 EHRR 6; *Gross* v *Switzerland* (2014) 58 EHRR 7; *Nicklinson* v *United Kingdom* (2015) 61 EHRR SE7) and that of the courts in the United Kingdom (*R (Purdy)* v *DPP* [2010] 1 AC 345; *R* (*Nicklinson)* v *Ministry of Justice* [2015] AC 657) that, not only is there a legitimate aim to the criminalisation, but also that it is a matter not for the courts but for the legislature to determine. In that regard, the legislature was afforded a wide margin of appreciation.

[6] The issue raised is simply whether the interference with the right to determine the manner of a person's death, by criminalisation of persons assisting in his suicide, is in accordance with the law. The "law" in this context encompasses not only legislation, but also secondary sources, including guidance promulgated by the respondent, such as the Prosecution Code (*infra*).

The Prosecution Code

[7] The respondent has published guidance (the Prosecution Code), which is not offence specific, on the factors which favour, or militate against, prosecution. There is a two stage test. The first is the evidential stage. This concerns itself with the legal sufficiency of the evidence. The second is the public interest stage. This addresses whether, even if there is a sufficiency, it is in the public interest to prosecute. This involves the exercise of a discretion. The Code lists thirteen factors to take into account. These include the nature and gravity of the offence, the age and circumstances of the victim, the attitude of the victim, and the motive for the crime.

[8] In addition to the Code, the respondent has made public statements, specifically related to the prosecution of those who assist another to commit suicide. In particular, in his written response to the Justice Committee regarding the Assisted Suicide (Scotland) Bill, the Lord Advocate made it clear that, when there was a sufficiency of evidence that an individual had caused the death of another, it would be difficult to conceive of a situation in which it would not be in the public interest to prosecute, but each case would be considered on its own facts and circumstances (*Written Submission to the Justice Committee*).

Section 2 of the Suicide Act 1961

[9] The petitioner relied heavily on *R (Purdy)* v *DPP* [2010] 1 AC 345. In England and Wales, a person who assists the suicide of another commits a specific statutory offence set out in section 2 of the Suicide Act 1961. This provides that a person commits an offence if he does *any* act which encourages or assists the suicide of another person where that act was intended to have that effect. The offence is a broad one. It encompasses many acts which would not be considered to be a cause of death under the Scots law of homicide. The context of section 2 of the 1961 Act is important. It follows section 1, which decriminalised suicide, and hence attempts at suicide, in that jurisdiction.

[10] The claimant in *Purdy* had sought review of the refusal of the Director of Public Prosecutions to publish clear guidance on the facts and circumstances that would be taken into account in determining whether or not to prosecute an individual under section 2 of the 1961 Act, specifically by taking a person to a country where assisted suicide was lawful. It was held that: (i) the claimant's Article 8.1 right was engaged, and (ii) the failure of the DPP to publish guidance was not an interference which was in accordance with the law in terms of Article 8.2. The Code for Crown Prosecutors was not sufficiently accessible and precise as to allow the assisting person to foresee whether or not he would be prosecuted.

DPP guidance

[11] The DPP published offence specific guidance (*Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide*, February 2010) listing 16 factors in favour, and 6 factors against, prosecution. Whilst the guidance discusses the offence under section 2 of the 1961 Act, it does not mention any overlap with homicide in English law, beyond stating that, where the conduct goes beyond assistance and involves the taking of life (or an attempt to do so), the public interest factors may have to be re-evaluated differently in light of the overall criminal conduct (Policy (*supra*) para 48). Both the DPP guidance, and the *ratio* of the decision of *Purdy,* are silent on the extent to which the law of homicide in England should be subject to the same analysis as a section 2 offence.

Lord Ordinary's decision

[12] The Lord Ordinary considered that it was clear that Article 8. 1 was engaged and that the right to respect for private life did encompass respect for an individual's right to die, particularly to avoid an undignified and distressing death. The Lord Ordinary did not consider that it was necessary to determine whether there was a right to commit suicide, or to be assisted to commit suicide, under the Convention. The only question was whether the interference was in accordance with the law. The Lord Ordinary rejected a submission that necessity was in issue. The point had not been raised in the petition or in the written notes of argument.

[13] The Lord Ordinary considered that the interference with the petitioner's Article 8.1 right was in accordance with the law under Article 8.2. He noted two well-established principles. First, although the court could review a policy, it was not for the court to dictate the content of that policy (*Nicklinson* v *Ministry of Justice (supra)*, at para 41). A range of policies could satisfy the requirement of clarity. Secondly, the certainty and foreseeability required of a prosecution policy was of a lesser and more indicative nature than that required of a statute which created a criminal offence (*Nicklinson* v *Ministry of Justice (supra),* at paras 239-241). The Lord Ordinary accepted the approach to legality in *R (Purdy)* v *DPP* (*supra*), but considered that the circumstances before him were different in three respects. First, section 2 of the 1961 Act had a broad ambit. It would criminalise conduct that could not be prosecuted under the law of homicide in Scotland. Secondly, although there was evidence in *Purdy* that there was a marked difference between law and practice, there was no equivalent material before him. Thirdly, although the DPP had distanced himself from the guidance in the Code for Crown Prosecutors, and had conceded that this general guidance may be of little relevance, in the present case the respondent had not sought to distance himself from the Prosecution Code. He had pointed to the seriousness of the crime as an aspect of the guidance which would carry particular weight.

[14] The Lord Ordinary found that the respondent's prosecution policy was sufficiently accessible and foreseeable. There was no evidence that it was being exercised in an arbitrary manner. There was no suggestion that the substantive law was unclear. The absence of any divergence between law and practice

demonstrated that any decision to prosecute would not turn on unpublished factors. There was no basis to conclude that the policy was inaccessible or unclear. The respondent had made his position clear. Any attempt to assist suicide, which amounted to an offence under the law of homicide, would be very likely to be prosecuted, although every case required to be considered on its own facts and circumstances. Finally, there was no suggestion that the behaviour on the part of the respondent was arbitrary. He had expressed his policy and intended to follow it.

Submissions

Petitioner

[15] The petitioner submitted that the point in the appeal could be put very shortly. *R (Purdy)* v *DPP* (*supra*) had been correctly decided. As the constitutional position of the respondent paralleled that of the DPP, no relevant distinction could be drawn between the two jurisdictions. On that basis, the court should ordain the respondent to produce offence specific guidance. The need for the DPP to do so in England had not been because of the nature of the offence in section 2 of the 1961 Act, but because assisting a suicide was criminal, as it was equally criminal in Scotland. The issue in *Purdy* had been that the DPP had a broad discretion on whether to prosecute. The court required him to give guidance on how he would exercise that discretion. The distinction between what would constitute assisted suicide and an intentional killing with the consent of the victim was not clear in Scots law. *MacAngus* v *HM Advocate* 2009 SCCR 238 was not entirely in point. In *MacAngus* the victim had no intention of committing suicide. What would or would not constitute a break in the causal chain was unclear.

[16] The petitioner had written to the respondent to request specific guidance on whether anyone who assisted him to commit suicide would be prosecuted. The respondent had stated that any incident involving a person who assisted another to take his own life would be reported to the procurator fiscal as a deliberate killing of another. It would be dealt with under the law of homicide. The respondent did not differentiate between assisted suicide, where a person was of sound mind but unsound body, and other cases. The respondent's current policy meant that anyone who assisted the petitioner to commit suicide would be liable to prosecution for murder or culpable homicide. The respondent therefore unlawfully interfered with the effective exercise of the petitioner's fundamental right.

[17] In both Canada and South Africa, the courts had declared that there was a right to assisted suicide which should be protected by law (*Carter* v *Canada* (*Attorney General*) 2015 SCC 5; *Stransham-Ford* v *Minister of Justice* [2015] ZAGPPHC 230). Article 8.1 encompassed the right to respect for the way in which, and when, an individual wished to end his life, provided that he was in a position freely to form his own view (*Pretty* v *UK* (*supra*); *R (Purdy)* v *DPP* (*supra*); *Haas* v *Switzerland* (*supra*); *Koch* v *Germany* (*supra*); *Gross* v *Switzerland* (*supra*). The threat of criminal prosecution constituted an interference with the right.

[18] The Article 8.1 right was not absolute. To be justified, however, any interference had to be in accordance with the law ("legality"). In *R (Purdy)* v *DPP* (*supra* at para 40), it was said that three questions required to be addressed. First, was there a legal basis in domestic law for the restriction. Secondly, was the law sufficiently accessible and precise. Thirdly, was the law being applied in an arbitrary way. A law conferring a discretion was not in itself inconsistent with the legality requirement, provided that the scope of the discretion, and the manner of its exercise, were identified. A discretion should not be expressed in terms of an unfettered power. The law must indicate its scope (*Gillan* v *UK* (2010) 50 EHRR 45). The Prosecution Code was not sufficiently specific and clear so as to avoid the risk that the power would be arbitrarily exercised.

[19] Legality required safeguards to ensure that the proportionality of the interference could be examined. An over-rigid regime could breach the requirement (*MM* v *UK* [2012] ECHR 1906). The absence of guidance meant that proportionality could not be assessed. States did not have a margin of appreciation on legality (*R (T)* v *Chief Constable of Greater Manchester Police* [2015] AC 49, at para 115). The guidance in *R*

(Purdy) v *DPP* was based on legality and not on the particular terms of the statutory offence in section 2 of the 1961 Act.

[20] The Prosecution Code was indistinguishable from the pre-*Purdy* position of the DPP. The respondent's policy made no distinction between a situation where an act was motivated by the wish to assist someone who was terminally ill and any other homicide. The respondent had to apply different criteria in the specific case of assisted suicide. In failing to do so, his policy was disproportionate. The respondent's failure to explain why the policy was in its current form was a breach of the principle of legality, which obliged him to justify why his position was constitutionally different from that of the DPP.

[21] There had been no reported cases of persons who had assisted the suicide of another being prosecuted in Scotland. Where lethal drugs were supplied to a person, the supplier was liable to prosecution for murder or culpable homicide. The prosecution in *MacAngus* v *HM Advocate* (*supra*) had not been proceeded with. The respondent had not prosecuted HC, who had taken her paralysed son to Dignitas in Switzerland, where he had received a lethal dose of drugs. There was a strong parallel between HC's situation, and the case in England of DJ, in which parents had taken their paralysed son to Switzerland. The DPP had concluded that, whilst there was a sufficiency of evidence, it would not be in the public interest to prosecute. The DPP had issued detailed reasons for that decision. The act of HC was a crime in Scotland, as the court had extra territorial jurisdiction in cases of homicide (section 11(1) of the Criminal Procedure (Scotland) Act 1995). If it was not a crime in Scotland for a person to travel with another to a country where suicide was lawful, then the respondent ought to state that. The respondent ought to specify the factors that he took into account in deciding not to prosecute HC. His failure to do so had the appearance of an arbitrary exercise of discretion.

[22] The petitioner did not want a change in the law. The respondent had previously promulgated offence specific statements of policy, even in cases of homicide (*Law Hospital NHS Trust* v *Lord Advocate* 1996 SC 301; statement of policy recorded in 1996 SCLR 516). It was within the discretion of the respondent to set out a policy to ensure that the law of homicide would be enforced in a manner which respected Convention rights. It was his duty to do so. It was irrelevant to the respondent's duty to act in a Convention compatible manner that the Scottish Parliament had considered and rejected the Assisted Suicide (Scotland) Bill. The court was not being asked to hold that the substantive law was incompatible with the Convention, but rather to assess whether the respondent was carrying out his duty to act in a Convention compatible manner.

Respondent

[23] The respondent submitted that the essential question was whether or not the reasoning of *R (Purdy)* v *DPP* (*supra*) required an order of the sort which the petitioner sought. It did not. Section 2(1) of the Suicide Act 1961 was of wide ambit. It caught acts that could not be prosecuted under the law of homicide. The law of homicide in Scotland had a much narrower ambit. The CPS Code for Cases of Assisted Suicide, now applicable in England and Wales, did not apply to cases of murder or manslaughter. Both the UK Supreme Court and the European Court had recognised that section 2 of the 1961 Act was within the margin of appreciation of member States. The criminalisation of homicide, with no distinction for cases where the motive was to assist the suicide of the victim, was *a fortiori* within that margin.

[24] The petitioner had confused the question of uncertainty, as to what the law provides, with the discretion left to the respondent to make difficult decisions in particular cases. The petitioner did not seek to challenge the substantive law of homicide. There was no suggestion that it was a breach of Article 8 to have a law of that nature (*Nicklinson* v *Ministry of Justice* (*supra*), Lord Neuberger at paras 63-66). There was no challenge to the adequacy of the Prosecution Code as a generality. The issue was whether the requirement of legality required the respondent to issue offence specific guidance for that class of homicides which might be regarded as assisted suicides. The fact that Parliament had decided not to change the law was the context in which the respondent had addressed his responsibilities. In any particular case the respondent had to consider whether there was a sufficiency of evidence and whether the public interest merited prosecution. In an area of controversial social and moral policy, it was not for him to confine the exercise of his discretion to a category of individuals and thus effectively give them immunity from prosecution.

[25] All of the public interest factors, which the petitioner suggested should be taken into account, were capable of being considered under the Prosecution Code. The respondent had not sought to distance himself

from his code, as the DPP had done prior to *Purdy*. The respondent had emphasised that, where there was a sufficiency of evidence, the nature and gravity of the offence would be important factors in determining whether there ought to be a prosecution. Where a party freely travelled to another country with an individual who took a lethal drug to end their own life, there was no crime. If there was any form of duress, which was applied to the individual who required assistance, there may be a crime. Particular cases could produce individual circumstances. The Prosecution Code listed the relevant factors that the respondent would consider in applying the public interest test. These included the attitude of the victim and the motive for the crime. The CPS Code did not consider these factors to be relevant.

[26] The only issue was legality. The legality analysis required to be carried out before any proportionality or necessity considerations (*R (T)* v *Chief Constable* (*supra*); *Beghal* v *DPP* [2015] 3 WLR 344). The petitioner's submissions could not succeed if it was accepted that the substantive law was not in breach of Article 8.1. The correct starting point was that the law, which did not qualify the law of homicide to take account of cases where the motive was to assist the suicide, was not in breach of Article 8. If the substantive law did not breach a Convention right, the respondent could prosecute to its full rigours. The respondent had a discretion to exercise, but it was one to be exercised within the boundaries of the law.

[27] Individuals could, if so advised, take legal advice to see what acts and omissions could constitute a crime. The outer ambit of the respondent's discretion was reasonably certain. It allowed him to mitigate the rigours of the law in appropriate circumstances. He had set out in the Prosecution Code the factors which he would take into account in exercising his discretion. There was no suggestion that the Code did not satisfy the principle of legality for other criminal law offences. The respondent had endorsed the Code. He had said that, if there was a sufficiency of evidence, there would be a prosecution, but for extraordinary circumstances. That was sufficient to satisfy the principle of legality.

[28] *R (Purdy)* v *DPP* (*supra*) ought to be distinguished on the basis that its reasoning, which applied to section 2 offences, did not apply to homicide in Scotland. The Prosecution Code offered adequate guidance on the factors that would bear on whether or not there would be a prosecution. The respondent did not distance himself from the terms of his Code. In *Purdy,* there had been an obvious gulf between the terms of section 2 and the way that it had been applied in practice. That was not the case in Scotland. There were 115 cases of assisted suicide in England which had not been prosecuted. In Scotland, there was a very small pool of cases to consider. In B, the accused had been prosecuted for murder, although a plea of culpable homicide was ultimately accepted. In HC, no proceedings had been taken because there was insufficient evidence of a crime. In *MacAngus* v *HM Advocate* (*supra*) a decision had been made, after that of the court, that a prosecution was unlikely to be successful. In the only other case there had been insufficient evidence in law. The respondent's position was that he would consider the public interest in the prosecution of any case of assisted suicide amounting to homicide in accordance with the factors which he had identified in his Prosecution Code. The compelling factor would be likely to be the seriousness of the offence. Given the seriousness of homicide, it was very likely that a prosecution would follow.

Decision

[29] The criminal law in relation to assisted suicide in Scotland is clear. It is not a crime "to assist" another to commit suicide. However, if a person does something which he knows will cause the death of another person, he will be guilty of homicide if his act is the immediate and direct cause of the person's death (*MacAngus* v *HM Advocate* (*supra*), LJG (Hamilton) at para [42]). Depending upon the nature of the act, the crime may be murder or culpable homicide. Exactly where the line of causation falls to be drawn is a matter of fact and circumstance for determination in each individual case. That does not, however, produce any uncertainly in the law.

[30] In relation specifically to a death caused by the ingestion of a lethal substance (which is what appears to be contemplated in the petitioner's case), the administration of such a substance (eg the injection of a first time user with heroin) may amount to homicide (*Kane* v *HM Advocate* 2009 SCCR 238; Mr Kane pled guilty to culpable homicide, see p 264). Supplying a lethal substance for immediate use may conceivably fall into this category (*MacAngus* v *HM Advocate* (*supra*)), at least where there is certainty about its purpose and use (the prosecution of Mr MacAngus for the supply of ketamine to a user was discontinued). Nevertheless, the voluntary ingestion of a drug will normally break the causal chain. When an adult with full capacity freely

and voluntarily consumes a drug with the intention of ending his life, it is this act which is the immediate and direct cause of death. It breaks the causal link between any act of supply and the death.

[31] In the same way, other acts which do not amount to an immediate and direct cause are not criminal. Such acts, including taking persons to places where they may commit, or seek assistance to commit, suicide, fall firmly on the other side of the line of criminality. They do not, in a legal sense, cause the death, even if that death was predicted as the likely outcome of the visit. Driving a person of sound mind to a location where he can jump off a cliff, or leap in front of a train, does not constitute a crime. The act does not in any real sense amount to an immediate and direct cause of the death (*MacAngus* (*supra*) LJG (Hamilton) at para [42]).

[32] There is no difficulty in understanding these concepts in legal terms, even if, as is often the case in many areas of the law, there may be grey areas worthy of debate in unusual circumstances. There is no need for the respondent to set these concepts out in offence specific guidelines. They are clearly defined matters of law upon which, if necessary, an individual can seek legal advice.

[33] As the Lord Ordinary correctly identified, *R (Purdy)* v *DPP* (*supra*) arose in circumstances which are materially different from the petitioner's case in three respects. First, the underlying substantive criminal law in Scotland is different from that in England and Wales. There is no equivalent of section 2 of the Suicide Act 1961 in Scotland. That is because suicide, and hence attempted suicide, is not a crime in Scotland, albeit that the circumstances of an attempt may involve the commission of an act otherwise criminal (eg a breach of public order). The conduct anticipated in *R (Purdy)* (*supra*) would not be criminal if prosecuted in Scotland. Section 2 created a broad offence, which criminalised behaviour which would not otherwise be so. It was, and is, not applicable in Scotland.

[34] Secondly, in *R (Purdy)* v *DPP* the DPP was consistently choosing not to prosecute those who had, on the face of it, committed an offence under section 2. There was an obvious gulf between law and practice. There is no such gulf apparent in the practice of the respondent. No instance was cited in which the respondent had considered that there was a sufficiency of evidence but had decided not to prosecute in the public interest. Only two instances of assisted suicide were identified by the respondent as having been reported to him. In both of those cases there was insufficient evidence of any crime having been committed. That is not at all surprising upon the above legal analysis.

[35] Thirdly, the respondent's Prosecution Code contains general guidance to allow the issues, which the petitioner submits are relevant, to be taken into account. The attitude of the victim, the motive for the offence and whether there are any mitigating factors are all present in the Code. However, the respondent has gone further in stating that, although all of those factors may be relevant considerations, where there is a sufficiency of evidence (that a homicide has been committed), there will be a prosecution in the absence of exceptional circumstances. There is no attempt by the Lord Advocate to distance himself from his Code.

[36] The petitioner did not contend that the criminalisation of homicide lacked a legal basis in domestic law, or that the law in that respect was not sufficiently precise and accessible so as to enable a party to foresee the consequences of his actions and to allow him to regulate his conduct accordingly. The crux of the challenge was that the law was being applied by the respondent in a way which was arbitrary. There is simply no evidence to support that. The respondent has expressed his policy in a clear manner. He will prosecute cases which amount to homicide in the absence of exceptional circumstances. There is no evidence which undermines his public statements. It cannot be said that the respondent is exercising his discretion in a way which is arbitrary and does not meet the requirements of legality.

[37] The only challenge was legality. The interference with the petitioner's rights is in accordance with the law in terms of Article 8.2, applying the test in *R (Purdy)* v *DPP* (*supra*) itself (Lord Hope at para 40). In these circumstances, the reclaiming motion must be refused.

SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2016] CSIH 12
P1036/14

Lord Justice Clerk
Lady Dorrian
Lord Drummond Young

OPINION OF LADY DORRIAN

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Respondent:

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Alt: Dean of Faculty (Wolffe QC), Ross; Scottish Government Legal Directorate

19 February 2016

[38] I am obliged to your Lordship in the chair for setting out the background circumstances of this case, and a summary of the submissions. I agree with the conclusions reached by your Lordship, but given the novelty of the case, would add a few observations of my own.

[39] As parties have agreed, suicide is not a crime in the law of Scotland. Moreover, it seems that suicide has never been a crime in Scots law.

[40] The position in England is markedly different. In English law, suicide was a crime, until it was decriminalised by the Suicide Act 1961. However, although it was no longer a crime to commit, or attempt to commit, suicide, it remained an offence to "aid, abet, counsel or procure" the suicide of another, in terms of section 2 of the 1961 Act. The Act was amended in 2010 so that the offence under section 2 is now committed where:

a. D does something capable of encouraging or assisting the suicide of another or attempted suicide of another; and

b. D's act was intended to encourage or assist suicide or an attempt thereat.

[41] The offence may be committed whether or not a suicide occurs, and the offence carries a maximum term of imprisonment of 14 years. No proceedings may be instituted except by or with the consent of the Director of Public Prosecutions.

[42] Regarding acts capable of encouraging or assisting suicide, Section 2A provides as follows:

> "(1) If D arranges for a person ('D2') to do an act that is capable of encouraging or assisting the suicide or attempted suicide of another person and D2 does that act, D is also to be treated for the purposes of this Act as having done it.
>
> (2) Where the facts are such that an act is not capable of encouraging or assisting suicide or attempted suicide, for the purposes of this Act it is to be treated as so capable if the act would have been so capable had the facts been as D believed them to be at the time of the act or had subsequent events happened in the manner D believed they would happen (or both).
>
> (3) A reference in this Act to a person ('P') doing an act that is capable of encouraging the suicide or attempted suicide of another person includes a reference to P doing so by threatening another person or otherwise putting pressure on another person to commit or attempt suicide."

[43] The result is the highly unusual one that in England it is an offence to encourage or assist in the commission of an act which in itself is not an offence. This is to be contrasted with the position in Scotland. Here, no question can arise of an individual being convicted of assisting or encouraging another to do an act which is not itself criminal. There is in Scotland no offence of "assisted suicide" despite the use of that term in argument.

[44] In Scotland, acts which might assist another person to commit suicide would only become criminal if in themselves they constituted a criminal act on the part of the individual providing the assistance. It is important to bear in mind that this case is not concerned with questions of "euthanasia" or "mercy killing", even at the behest of the victim. Strictly speaking, neither the compassionate nature of the motive, nor the desire of the victim to die are relevant considerations. A person who deliberately took the life of another may even be guilty of murder, and would at least be guilty of culpable homicide. Much would depend on the exact circumstances of the case.

[45] We are not concerned with that kind of case. We are concerned here not with someone who himself takes an active part in ending a life, rather we are concerned with those who may take steps to facilitate a person to take his own life. It is beyond doubt that in certain circumstances such acts may constitute the crime of culpable homicide. However, the requirement of a direct causal link between those acts and the death mean that many acts which would apparently be criminal according to the law of England, would not be so in Scotland. The offence under section 2(1) is a much broader offence than culpable homicide, and may be committed even in circumstances where no suicide results.

[46] The reclaimer relied heavily on the case of *R (Purdy)* v *Director of Public Prosecutions* [2010] 1 AC 345, arguing that the position in Scotland currently reflected the pre-*Purdy* position in England. The general prosecutorial code relied upon in that case had been deemed to be insufficient for the purpose of identifying the law with sufficient clarity, leading to the issuing of an offence-specific code relating to assisted suicide. The same result should follow here, notwithstanding that there was no such offence as assisted suicide.

[47] The Lord Ordinary rejected this argument, concluding that the circumstances which led to the decision in *Purdy* were in fact quite different from those currently existing in Scotland, and that the same result should not follow. He cited three main reasons for distinguishing the case of *Purdy.* I agree in general with those reasons.

[48] In the first place, the Lord Ordinary noted (para 37) that:

> "…. 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)."

[49] The very width of the scope of the offence under the 1961 Act was an important factor in the decision of the court that the existing guidance was not sufficient to enable those affected by it "to understand its scope and foresee its consequences" (Lord Neuberger, para 96). Moreover, it is clear that, notwithstanding

the generality of some of the observations, the court was particularly concerned with the position of the relative who assisted someone to travel abroad, for example to Switzerland, where they could lawfully take their own life. That such an act might be the subject of prosecution was clearly an issue of concern for Lord Phillips. It was also of concern to Lord Hope, who, in relation to the scope of section 2(1) observed (para 18):

> "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."

Lord Hope noted that no prosecution has ever been brought under section 2(1) in circumstances such as those which Mrs Purdy contemplated, but he could not agree with the proposition that no such prosecution could be brought within the terms of the statute (para 23). He considered (para 25) that there was:

> "... 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."

The state of the law was quite clear (Lord Hope, para 27):

> "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."

Lord Hope noted that in relation to such another person the prosecutorial code would apply, and the individual may be prosecuted if there were a sufficiency of evidence against him and it was in the public interest that he be prosecuted. However he went on to add:

> "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."

[50] We can see from elsewhere in his opinion (eg paras 30, 31, 41) that he was particularly exercised by cases of these kind but which as a generality would not be criminal in our law. Lord Phillips was concerned (para 12) that an individual in such a situation might be open to prosecution for the crime of murder. Yet, as the Dean of Faculty agreed during the hearing in this court, the clear situation of taking someone of sound mind and clear views to Switzerland to carry out a free and voluntary act would not even constitute the crime of culpable homicide in Scotland.

[51] The third reason given by the Lord Ordinary was that the DPP had distanced himself from the relevance of some of the factors in the general code, whereas the Lord Advocate had not done so, and indeed (para 39):

> "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."

[52] I agree too with this observation, but I would add to it a factor associated with the first reason, namely that it was essentially because of concerns over the "compassionate relative" kind of case that the DPP was advised to reconsider his guidance, since it was precisely in relation to these "exceptional" cases that the current arrangements were lacking. The wide scope of the Act and the difficulty in these cases of ascertaining the degree of risk attaching to a helper, was a critical factor in the decision that greater guidance should be given. Lord Neuberger, in agreeing that guidance should be given, emphasised (para 102):

> "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."

[53] Elsewhere the position of such a relative is again emphasised. For example, in para 45, Lord Hope noted the importance of consistency in the exercise of the DPP's discretion, and that steps towards achieving that had been taken, namely that crown prosecutors acted under the direction of the DPP, and in accordance with a published prosecutorial code. However, he went on to say (para 47):

> "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."

That the need to ensure guidance was available to individuals in such exceptional circumstances was at the heart of the decision in *Purdy* can be seen also from the following passages from the opinion of Lord Hope:

> "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…
>
> <u>Conclusion</u>
>
> 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….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."

[54] It is true that Lord Brown addressed a slightly wider class of case than those referred to by Lords Hope and Phillips, but even so, I do not understand him to consider that the code would not be sufficient in the kind of case which in Scotland would be considered homicide, as opposed to the exceptional kind of case, criminal in England, but not so in Scotland. See for example, para 76:

> "Obviously no advance undertaking can be sought from the Director of Public Prosecutions that he will refuse consent to a prosecution in a particular case. … 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."

Observations to similar effect are also contained within paras 83 and 86.

[55] The Lord Ordinary's other reason (para 38) for distinguishing the circumstances of *Purdy* was that:

> "... 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."

[56] This divergence was indicative of there being unpublished policy factors taken into account. I agree too with this observation. It clearly became apparent in the course of argument in *Purdy* that, in compassionate cases of this kind, there was a clear gulf between the terms of section 2(1) under which such acts would be capable of constituting an offence, and the exercise of the prosecutorial discretion under section 2(4) and the prosecutorial code. The court was advised that over 100 people had travelled from England and Wales to Switzerland, for the purpose of ending their lives, yet none of those who had assisted them to do so had been prosecuted. Lord Hope noted (para 54) the obvious gulf which therefore existed between the statutory provision and prosecutorial practice in relation to such cases.

[57] The Lord Ordinary observed that in argument before him there had been no suggestion that the law was inaccessible. During the hearing of the reclaiming motion there was some attempt to do so, on the basis that the distinction between what would constitute a criminal act was not entirely clear.

[58] It is not part of this court's function in this reclaiming motion to seek to identify those acts assisting suicide which might constitute a crime in the law of Scotland and those which might not, whether murder, culpable homicide, or even culpable or reckless conduct. It is clear that the question of causation is a central one, and whilst the voluntary act of the victim may not suffice to break the chain of causation in the particular circumstances of the case, the critical question is whether a direct causal link can be established. In *MacAngus* v *HMA* 2009 SCCR 238 the court summarised the position as follows:

> "[42] These Scottish authorities tend to suggest that the actions (including in some cases deliberate actions) of victims, among them victims of full age and without mental disability, do not necessarily break the chain of causation between the actings of the accused and the victim's death. What appears to be required is a judgment (essentially one of fact) as to whether, in the whole circumstances, including the interpersonal relations of the victim and the accused and the latter's conduct, that conduct can be said to be an immediate and direct cause of the death."

[59] *MacAngus,* it must be recalled, was a case argued on relevancy, where ultimately the decision of the court was merely that "depending on the facts and circumstances proved (which will include factors bearing on influence and knowledge) a causal link may be established" (para 51). In other words, it could not be said that this was a case in which the jury might not be able to find a direct causal link established, notwithstanding the voluntary ingestion of the drug.

[60] There was little discussion before us on the subject of culpable and reckless conduct, which might be relevant if the suicide failed. However, even in such cases the voluntary act of the ingester remains relevant. In *Khaliq* v *HMA* 1984 JC 23, another case on relevancy, the court, rejected an argument that the voluntary act did not break the causal chain on the basis that "The causal link is not, <u>of necessity,</u> broken by that circumstance", (emphasis added) the Lord Justice General (Emslie) pointing out (p 34) that:

> "The true question is whether the charge relevantly libels a causal connection between the alleged supply and the abuse and its consequences that is to say, whether it would be permissible for the judges of fact to conclude that the supply provided not merely the occasion for the abuse of the solvents by the recipients, but was a cause of that abuse."

[61] The requirement to establish a causal connection between the act in question and the death, or injury, is in either case clear. Whether that causality is established would be decided on the basis of all the circumstances, including, in my view, the nature, significance and intent behind the voluntary act. In cases such as *Khaliq* and *MacAngus*, the intent behind the voluntary act was not to die, rather it was to obtain some kind of "high" or perceived relief from the item ingested. It was not the settled intent of an individual of

sound mind to end his own life. This may be an important consideration in a question of causation, as is perhaps reflected in *MacAngus* in the discussion of whether an alleged victim could be classed as a "fully informed" adult (para 44).

[62] I agree with the Lord Ordinary that the way in which the law operates in this field is not inaccessible, capricious or lacking in clarity, and that it meets the test for foreseeability, namely, that the ordinary citizen would:

> "... be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given course of action may entail" (*Sunday Times* v *UK* (1979-80) 2 EHRR 245, para 49).

SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2016] CSIH 12
P1036/14

Lord Justice Clerk
Lady Dorrian
Lord Drummond Young

OPINION OF LORD DRUMMOND YOUNG

in the reclaiming motion

by

GORDON ROSS

Petitioner and Reclaimer;

against

LORD ADVOCATE

Respondent:

Act: O'Neill QC, McIntosh; Campbell & McCartney, Paisley
Alt: Dean of Faculty (Wolffe QC), Ross; Scottish Government Legal Directorate

19 February 2016

[63] The petitioner seeks a declarator that the Lord Advocate is in breach of article 8 of the European Convention on Human Rights in failing to promulgate a policy identifying the facts and circumstances which he will take into account in deciding whether or not to authorize the prosecution in Scotland of a person who helps another person to commit suicide, together with an order requiring the Lord Advocate to promulgate such a policy. The Lord Ordinary sustained a plea to the relevancy of the petitioner's averments and dismissed the petition. The petitioner has now reclaimed. I agree with your Lordship and your Ladyship that the reclaiming motion should be refused.

[64] In Scots criminal law, suicide is not a crime. Nor is assisted suicide a crime *per se*, but assisting in a suicide might, according to circumstances, involve liability for either murder or culpable homicide. It is possible that the offence of culpable and reckless conduct might also be relevant, but in the event that suicide actually occurs, I think it more likely that one of the two more serious offences would be in point. Liability for either murder or culpable homicide might be on an art and part, or accessory, basis, although that is not inevitable. The requirements of those two offences have been the subject of numerous judicial decisions and are reasonably well settled. Likewise, the requirements of art and part liability in Scots law are reasonably clear.

[65] The argument for the petitioner is based on article 8 of the European Convention on Human Rights. It is, in essence, that article 8(1) entails a right to personal autonomy and self-determination; that the requirement in article 8(2) that any interference by a public authority with article 8(1) rights must be in accordance with the law requires that the relevant law should be both accessible and foreseeable in its application; and that Scots law in its existing state fails to satisfy those requirements of accessibility and foreseeability. For this purpose, it is submitted that regard must be had not merely to the terms of the substantive law but also to the terms of any policy applied by the prosecution authority in determining whether proceedings should be instigated. In Scotland Crown Office has published a Prosecution Code which sets out the criteria that will normally be applied when a decision whether to prosecute has to be made. This document, which is expressed in general terms, unrelated to any particular offence, has been supplemented by further statements made by the Lord Advocate to committees of the Scottish Parliament as to the policy that will be followed in cases involving attempted suicide. It is the Code and further statements of prosecution policy that are the principal object of challenge. The petitioner claims that the factors set out in the Prosecution Code "wholly fail to satisfy the Convention requirements of foreseeability and accessibility". The result of that, it is said, is that the interference with the petitioner's article 8(1) rights is not "in accordance with the law" as required by article 8(2).

Existing law and practice

[66] As already stated, the Scots law of homicide is well established and the relevant rules and concepts are reasonably clear, subject to an inevitable level of uncertainty which I discuss below at paragraphs [71]-[73]. Nevertheless, in assessing the compatibility of the law with article 8 of the European Convention on Human Rights, the notion of "law" must be understood as a matter of substance rather than form: *Kafkaris* v *Cyprus* (2008) 25 BHRC 591, at paragraph 139, cited in *R (Purdy)* v *DPP*, *supra*, at paragraph 41 per Lord Hope. The result is that "law" in this sense encompasses statute law, at primary and secondary levels, and unwritten and customary law, as it would in the normal domestic signification of the word, and also statements of policy by actors at an official level, including prosecution agencies: *ibid*, at paragraph 47. The rationale for this is that the principle of legality, as enshrined in article 8, includes the critical elements of accessibility and foreseeability, and for the operation of the law to be truly foreseeable it must be possible to predict to a reasonable degree how the prosecution authority is likely to act in any particular case: this matter is discussed at length in *Beghal* v *DPP* [2015] 3 WLR 344, per Lord Hughes at paragraphs 29-31. Furthermore, it must be possible to assess whether any actions taken by a prosecutor are arbitrary or disproportionate, and that would only be possible if prosecution policy were formulated with sufficient clarity; that is an aspect of the requirement of accessibility: *Gillan and Quinton* v *United Kingdom* (2010) 50 EHRR 45, at paragraphs 76-77; *R (T)* v *Chief Constable of Greater Manchester* [2015] AC 49, per Lord Reed at paragraphs 112-116; *Beghal*, *supra*, at paragraphs 31 and 33. The result is that, as the UK Supreme Court held in *R (Purdy)* v *DPP*, *supra*, prosecution policy must be formulated in such a way that the requirements of

accessibility and foreseeability are adequately satisfied and so that it is possible to protect adequately against arbitrary or disproportionate actions by the prosecutor.

[67] The Lord Advocate, exercising his power to prosecute crime in Scotland, enjoys a certain element of discretion as to whether to institute or abandon criminal proceedings in any particular case. Crown Office has published the Prosecution Code, which sets out the criteria that will normally be applied when such a decision has to be made, together with the range of options that are available to a prosecutor when dealing with a report of a possible crime. The Code is intended to provide a general explanation of the various factors that may influence decisions in relation to prosecution or any alternative course of action. It is, inevitably, framed in relatively general terms, and it does not deal specifically with assisting in a suicide. The Lord Advocate has, however, provided further comments on assisted suicide in the form of written evidence to the Scottish Parliament's Health and Sport Committee in response to a request dated 13 January 2015 and in a further written submission to the Justice Committee, both in respect of the Assisted Suicide (Scotland) Bill that was then before the Scottish Parliament. It is these documents that must be judged against the requirements of foreseeability and accessibility contained in article 8(2).

[68] The Prosecution Code refers to a range of factors. First, it must be determined whether the conduct complained of constitutes a crime known to the law of Scotland and whether there is any legal impediment to prosecution. Secondly, the prosecutor must be satisfied that there is a sufficiency of evidence to justify proceedings; this includes an assessment of the admissibility, credibility and reliability of the available evidence. Thirdly, if sufficient evidence exists, the prosecutor must consider whether a prosecution is in the public interest. Thirteen specific factors are enumerated, with the warning that not all will apply in every case and the weight to be attached to any particular factor will depend on the circumstances of each case; all relevant factors must be considered. So far as material to homicide, the listed factors include the nature and gravity of the offence, the age, background and personal circumstances of the accused, the age, personal circumstances and attitude of the victim, the motive for the crime, mitigating circumstances, and the risk of further offending. In addition, it is indicated that in some cases prosecution may have the potential to affect the accused in a manner that is wholly disproportionate to the gravity of the offence. It is obvious that the relevance of these factors must be assessed in the circumstances of each individual case; each of the factors requires the application of judgment, and there is inevitably a limit to how far it is possible to constrain such an exercise. Indeed, if the limitations placed on the exercise of judgment are too rigid, the risk that results will be arbitrary or disproportionate is significantly increased; the assessment of proportionality and appropriateness (by which I mean the converse of arbitrariness) must inevitably be carried out on a case-by-case basis.

[69] The Lord Advocate's written evidence to the Health and Sport Committee is to the effect that, if someone assisted another to take their own life, the case would be dealt with under the law relating to homicide. As such, it would be necessary to consider the sufficiency of evidence for the relevant offence. The Lord Advocate continued:

> "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. There is a considerable amount of case law in Scotland of dealing with the issue of causation, which would require to be carefully considered in any such circumstances.
>
> Thereafter consideration 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…. There is a high public interest in prosecuting all aspects of homicide where there is sufficient available evidence".

Thereafter, it was pointed out, it would be a matter for a jury to determine whether the accused was guilty of homicide, including the element of a direct causal link between the accused's actions and the deceased's death. The statement that there is a high public interest in prosecuting homicide where sufficient evidence exists is reiterated in a further written submission made by Crown Office and the Procurator Fiscal Service to the Justice Committee of the Scottish Parliament. In this statement, after a reference to the high public interest, it is recorded that:

> "If the Crown considers there to be sufficient evidence that a person has caused the death of another it is difficult to conceive 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".

Thus the Lord Advocate's general position is that, in view of the serious nature of homicide, if sufficient evidence exists the norm should be a prosecution.

The requirement of legality in article 8(2)

[70] If interference by a public authority with the right to private life is to be justified under article 8(2), it must be "in accordance with the law", and must in addition be necessary in a democratic society in the interests of one of a range of factors, including the protection of health or morals and the protection of the rights and freedoms of others. The first of these conditions is the requirement of legality, which is plainly necessary to secure the rule of law. It is implicit in the concept of legality that the basis on which a public authority is likely to act should be foreseeable, so that a citizen can, with advice if necessary, predict to a reasonable degree the consequences of a given action. It is in addition implicit in the concept of legality that the basis on which a public authority acts or is likely to act should be accessible, or understandable, to avoid the risk of arbitrary or disproportionate actions. The assessment of arbitrariness or disproportionality, however, has been held to be an aspect not of legality but of what is necessary in a democratic society in the interests of matters such as the protection of health or morals.

[71] The concept of legality requires that the law should be stated in reasonably clear terms. It is important to recognize, however, that absolute certainty is impossible. Every legal concept and every legal rule will inevitably be surrounded by a penumbra of uncertainty. In part this is due to the inherent uncertainty of the language in which legal concepts are expressed. More specifically, and perhaps more importantly, legal rules and concepts do not exist in an abstract world of pure ideas; they exist in order to be applied to particular factual situations in the real world, and in the course of that application the concepts or rules may develop to a greater or lesser degree. It is obviously impossible to predict every possible factual situation to which a concept or rule might apply, and thus it is impossible to predict how the concept or rule might be applied in any possible case; some degree of uncertainty is inevitable. The most that can be hoped for is a degree of reasonable clarity.

[72] This feature of the law was recognized by the European Court of Human Rights in *Sunday Times* v *United Kingdom* (1979-80) 2 EHRR 245, at paragraph 49:

> "[A] norm cannot be regarded as a 'law' unless it is 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 may 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 extent, are vague and whose interpretation and application are questions of practice".

In my opinion this is an important statement of the law and a valuable reminder of the impossibility of total certainty. It must apply to all statements of the "law", in the Convention sense, including statements of practice by prosecutors.

[73] Indeed, the level of certainty that is possible in a statement of practice is in principle less than is possible in the law as laid down in decided cases and, *a fortiori*, in statute. In Scots law the Lord Advocate enjoys an element of discretion in relation to individual prosecutions, a feature that is emphasized in the Prosecution Code. The same is true of the Crown Prosecution Service in England and Wales: that is implicit in the opinions in in *R (Purdy)* v *DPP, supra*, although the particular offence in that case, assisting suicide in terms of section 2 of the Suicide Act 1961, was subject to an express discretion conferred on the prosecutor by section 2(4) of the Act. Nevertheless, is difficult to conceive of a system of prosecution that does not permit some element of discretion to the prosecutor; otherwise a great deal of court time is likely to be wasted on prosecutions that are disproportionate or, in extreme cases, trivial. Any statement of prosecution practice

must therefore itself incorporate or at least recognize this element of discretion. That is a further important factor that prevents anything like absolute certainty in a statement of prosecution practice. This factor must in my opinion weigh heavily in any assessment of the challenge that is now made to the Lord Advocate's policy in relation to cases of assisted suicide.

Application to Scots law

[74] The concepts of Scottish criminal law that are relevant to assisted suicide are murder and culpable homicide. The essence of those concepts is reasonably clear; it emerges from a large number of decided cases. The same is true of art and part liability. For the reasons just stated, absolute certainty is impossible, but it is clear in my opinion that the standard of reasonable certainty has been reached. Counsel for the petitioner disavowed any intention to challenge the substance of the criminal law as incompatible with article 8. So far as the Lord Advocate's policy is concerned, the general guidance that is given in the Prosecution Code is relevant to homicide. Several of the specific factors are also clearly relevant; these include the nature and gravity of the offence, the circumstances and attitude of the victim and the motive for the crime. In relation to assisted suicide, the Prosecution Code is supplemented by the statements by the Lord Advocate and Crown Office to the Health and Sport and Justice Committees of the Scottish Parliament. These indicate that the Lord Advocate attaches importance to the serious nature of homicide, and that if sufficient evidence exists the normal course of action will be a prosecution. The statements of policy make it clear that exceptional cases may exist where a prosecution will not be appropriate; in such cases the general discretion of the prosecution authority will be relevant. Nevertheless, it is apparent that the norm is to prosecute. It is of the nature of exceptional cases that they are hard to predict. To expect an enumeration of such cases would be wholly unreasonable. For this reason I am of the opinion that the Lord Advocate's policy clearly meets the standard of reasonable certainty that is implicit in the requirement of legality in article 8(2).

[75] That conclusion is supported in my opinion by consideration of the constitutional position of the Lord Advocate. The Lord Advocate is in charge of the system of prosecution in Scotland. As such, he exercises a function that is distinct from that of the courts. The extended definition of "law" used in the Strasbourg cases on article 8(2) is wide enough to embrace some aspects at least of the function of the public prosecutor. Nevertheless, this does not eliminate the distinction between the prosecution and the court, at least as it is understood in Scotland and the remainder of the English-speaking world. Central to this distinction is the principle of judicial independence, which must be free of interference from the prosecution. Conversely, the prosecution should generally be free to exercise its own distinct functions in an independent manner; the importance of this principle is recognized in cases such as *Montgomery* v *HM Advocate* 2001 SC (PC) 1; and *Millar* v *Dickson* 2002 SC (PC) 30. The court should in my opinion be slow to interfere with that independence. This applies in particular to the general discretion that the Lord Advocate exercises in decisions as to the prosecution of crime.

[76] Furthermore, the exercise of a discretion normally requires that consideration should be given to any factors that are relevant. The courts have generally set themselves against the fettering of discretionary powers prior to their exercise, and any attempt to be over-prescriptive in advance inevitably results in a degree of fettering of the discretion. The statements by the Lord Advocate to the two parliamentary committees are framed, no doubt deliberately, in such a way as to avoid any undue fettering of the prosecutor's discretion. It is for that reason that they state that there is "a high public interest in prosecuting all aspects of homicide where there is sufficient available evidence", or that "it is difficult to conceive a situation where it would not be in the public interest to raise a prosecution". That in my opinion provides as much certainty on the matter as can properly be expected. Counsel for the petitioner submitted that those statements by the Lord Advocate were indistinguishable from the position taken by the Director of Public Prosecutions in England and Wales prior to the decision in *R (Purdy)* v *DPP*, *supra*, a position that was held to be inadequate to satisfy the requirement of legality in article 8(2). That argument, which founded heavily on the residual element of discretion in the Lord Advocate's statements, must in my view be rejected. An element of discretion must exist, with the result that total certainty is impossible.

[77] At this point I should make passing reference to four cases where, counsel for the petitioner submitted, the policy declared by the Lord Advocate in the Prosecution Code and the statements to

Parliamentary committees had not been followed; these had been disclosed by the Scottish Government Legal Directorate in December 2015. In the first, *HM Advocate* v *PB*, a family member who had been asked by a relative suffering from a degenerative illness to kill him and had done so by administering an overdose of medication and subsequently smothering him was charged with murder, and a plea to culpable homicide was offered by the defence and accepted. The facts available were sparse, but nothing appears to be significantly contrary to the statements of the Lord Advocate; the only issue of doubt is why a plea to culpable homicide was accepted, but no information is available about that. In the second case, information had been received by the police that a family member might have assisted another in ending their own life. The Lord Advocate instructed that there was insufficient evidence for criminal proceedings, but that the case should be re-reported if further evidence came to light. Once again nothing is contrary to the policy. In the third case, *MacAngus* v *HM Advocate*, the accused had purchased controlled drugs which were ingested by the deceased and subsequently caused his death. Proceedings were raised for culpable homicide, but the Appeal Court decided that culpable homicide could not be established because the accused's act was not directed in some way against the victim. The case was reconsidered for prosecution in light of that decision, and it was decided that the evidence was unlikely to result in a conviction. Once again nothing appears contrary to the declared policy.

[78] The fourth case is the most troubling. The deceased appeared to have taken his own life, and consideration was given as to whether a member of the deceased's family had taken any action that caused the death. Both Crown counsel and the Lord Advocate considered that there was insufficient evidence to support a charge of culpable homicide and recommended that no further action should be taken. Crown Counsel nevertheless considered what should happen if the view had been taken that there was sufficient evidence. In that event, he considered that proceedings were not required in the public interest. In forming that judgment he had express regard to the Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide issued in England and Wales by the Director of Public Prosecutions through the Crown Prosecution Service. Counsel acknowledged that that guidance relates to section 2 of the Suicide Act 1961, which does not apply in Scotland, but considered that there were sufficient similarities between culpable homicide and the statutory charge to render the guidelines valuable on the question of whether prosecution was in the public interest. For reasons discussed below, I am of opinion that there is a clear distinction between the offence in section 2 and the offences of murder and culpable homicide as understood in Scots law. I accordingly consider that Crown counsel was in error in following the English guidelines. Finally, I note that the Lord Advocate agreed that there was insufficient evidence, and indicated that his role was to apply the law, which was a matter for legislators. That in my view is the correct approach.

Relevance of English law

[79] The argument for the petitioner founded heavily on English law, and in particular on the decision of the UK Supreme Court in in *R (Purdy)* v *DPP*, *supra*. In my opinion that case has no bearing on Scots law, for at least four reasons. In the first place, the case was concerned with the English statutory offence of complicity in another's suicide, as found in section 2 of the Suicide Act 1961. Prior to 1961 suicide itself had been a crime in England, although for obvious reasons it was never prosecuted. The 1961 Act abolished that crime, but created the offence of (in its original form) aiding, abetting, counselling or procuring the suicide of another person. That is an unusual offence; as Lord Neuberger indicates in *Purdy* at paragraph 102, it involves the offender's assisting an action by a third party which is not itself a crime, and the third party who is being assisted is also a victim. Section 2 of the 1961 Act is not part of Scots law, although it would obviously be open to the Scottish Parliament to enact an equivalent provision. As matters stand, however, it would cover many cases which would not amount to murder or culpable homicide in Scotland, even on an accessory basis.

[80] In the second place, the issue in *Purdy* was whether there should be a specific prosecution policy dealing with section 2. It was not at all concerned with murder or manslaughter, the equivalent of culpable homicide. Lord Hope, at paragraph 54, indicated that the Code for Crown Prosecutors issued by the Director of Public Prosecutions would normally provide sufficient guidance to prosecutors and the public as to how decisions are likely to be taken as to whether or not, in a particular case, it would be in the public interest to prosecute. He further stated that in most cases the application of the Code will ensure

predictability and consistency of decision-taking. That could not be said, however, of cases where the offence is aiding or abetting the suicide of a person who is terminally ill or severely disabled who wishes to travel to a country where assisted suicide is lawful. It was the latter type of case where guidance was required. That is plainly quite different from homicide. He added, at paragraph 55, that the cases requiring special treatment could be confined to a very narrow band, with the result that the Code would continue to apply to all other cases. That appears to include cases of homicide.

[81] In the third place, on the material disclosed to the court in *Purdy* it was apparent that an "obvious gulf" had developed between the wording of section 2(1) and the way that it was applied in practice in what were described as "compassionate" cases: Lord Hope at paragraph 54. The court therefore concluded that the practice of the Crown Prosecution Service had not been adequately disclosed. It has not been suggested that any such divergence between law and practice exists in Scotland. In the fourth place, in *Purdy* it was apparent, and indeed was conceded by the Director of Public Prosecutions, that many of the factors discussed in the Code for Crown Prosecutors plainly had no relevance of a case of assisted suicide: Lord Hope at paragraphs 48-49 and 53; in the latter paragraph Lord Hope stated that the Code "offers almost no guidance at all" in the category of cases under consideration. That is in my view quite different from the situation in Scotland. The relevant offence in Scotland is of course either murder or culpable homicide, or conceivably culpable and reckless conduct. A majority of the factors listed in the Prosecution Code as having a bearing on whether it is in the public interest to prosecute are plainly relevant to those offences, for the reasons set out at paragraphs [68] and [74] above. In addition, the Lord Advocate has expressed his policy on cases involving what may be described as assisted suicide in written evidence to the Health and Sport Committee and a written submission to the Justice Committee of the Scottish Parliament, as stated at paragraph [69] above. The latter statements, in particular, make it clear that the policy of the Lord Advocate is that prosecution should normally follow in any case where there is thought to be sufficient evidence that a person has caused the death of another. That is in my opinion clear guidance relating to the relevant offences in Scots law, murder and culpable homicide.

[82] For the foregoing reasons I am of opinion that the decision in *Purdy* is of no assistance in Scotland. It deals with an offence unknown to Scots law, and does so in a context that is quite different from the law and prosecution policy currently in force in Scotland. Equally, because the relevant offences are quite different in Scotland on one hand and England and Wales on the other, the Code for Crown Prosecutors issued by the Director of Public Prosecutions appears to me to have no bearing on Scots law. That is why I consider that Crown counsel was in error in apparently relying on the Code for guidance. Reliance should rather be placed on the Scottish Prosecution Code and the formal statements made by the Lord Advocate.

Scope of the petitioner's challenge: constitutional issues

[83] The challenge by the petitioner to the acts of the Lord Advocate is confined to criticism of his statements of prosecution policy, which it is said do not go far enough to satisfy the requirement of legality in article 8(2). No challenge was made to the substantive law that may be relevant to cases of assisted suicide. It appears to me of fundamental importance that prosecution policy should be treated as quite distinct from substantive law, even though the concept of "law" as used in article 8(2) has been given an extended meaning by Strasbourg and United Kingdom case law. That extended meaning is designed to ensure that the law on a particular topic meets proper standards of accessibility and foreseeability, but it does not nullify the more fundamental distinction between the powers of the prosecutor and the substantive criminal law.

[84] This means in particular that statements of policy by the Lord Advocate should not and do not change the substantive law. The function of the prosecutor is to secure the due application of the law, and nothing more. Any major change in the law is a matter for Parliament. Lesser changes, involving the development of existing law to meet new situations, may be effected by the court. The High Court of Justiciary has regularly shown itself willing to develop the law in appropriate cases. An example cited to us is *Lord Advocate's Reference (No 1 of 2001)* 2002 SLT 466, where the High Court held that, contrary to the previous understanding, there was no requirement in the crime of rape that there should be a forcible overcoming of will; instead, it was sufficient to establish that the victim had not in fact consented, without the requirement of showing force or an overcoming of the victim's will. Another such case is *Khaliq* v *HM*

Advocate 1984 JC 23, where the supply of solvents to children for the practice of "glue sniffing" was held to amount to the crime of wilfully administering a dangerous substance. Cases of that nature, however, represent a development of existing judge-made law. They do not represent a fundamental change in basic legal rules and concepts. Furthermore, significant judicial innovation will generally be inappropriate in a case that is governed by statute; if statute law is to be changed, that is normally a matter for Parliament.

[85] The same is true in my opinion where a Bill has been considered by Parliament but rejected. That is highly pertinent in the present case. An Assisted Suicide Bill was presented to the Scottish Parliament but was rejected by a substantial majority in a parliamentary vote on 27 May 2015. More recently, a different Bill dealing with the same subject was rejected in the Westminster Parliament by an even larger majority. Assisted suicide is a subject that, on any view, raises profound moral issues. It also raises very strong feelings, both for and against. In such a case it is in my opinion wholly inappropriate for the courts to attempt any major change in the law. Counsel for the petitioner suggested that rejection of the Bill in the Scottish Parliament was "entirely irrelevant" to the question presently before the court. I cannot agree. Rejection of that Bill, and the corresponding Westminster Bill, is a clear demonstration that the people's elected representatives are opposed to assisted suicide in the United Kingdom. In considering the issues raised in the present case, the court must in my view take that factor into account. The principle of democratic government requires no less.

[86] We were referred to the recent English decision in *R (Nicklinson)* v *Ministry of Justice* [2014] 3 WLR 200. This case does not appear to me to be directly relevant to the issues that we have to consider. It reveals widely differing views on when it may be appropriate for the courts, relying on article 8 of the European Convention on Human Rights, to alter the substantive law on the question of assisted suicide. It was a matter of agreement that the margin of appreciation that is given to national authorities under the Convention extended to determining the question of whether or not assisted suicide should be lawful. A bare majority of the UK Supreme Court held that it was open to the courts, relying on article 8, to declare the existing law, in the form of section 2 of the Suicide Act 1961, incompatible with the Convention, notwithstanding that that involved striking down an Act of Parliament. The minority, consisting of Lords Clarke, Sumption, Reed and Hughes, disagreed, holding that whether or not assisted suicide should be lawful, and in particular whether the risk to vulnerable people could be mitigated, was inherently a matter for Parliament rather than the courts: see Lord Sumption at paragraphs 223-235; Lord Hughes at paragraph 267; Lord Clarke at paragraph 293; and Lord Reed at paragraphs 294-298. In my opinion the view of the minority is manifestly correct, and I would wholeheartedly endorse the remarks of Lord Sumption at, in particular, paragraphs 230-232 and Lord Reed at paragraphs 296 and 297. At paragraph 296 Lord Reed stated that the Human Rights Act 1998, although introducing a new element into British constitutional law and entailing some adjustment of the respective constitutional roles of the courts, the executive and the legislature, does not eliminate the differences between them. He continued:

> "Accordingly, it does not alter the fact that certain issues are by their nature more suitable for determination by Government or Parliament than by the courts. In so far as issues of that character are relevant to an assessment of the compatibility of executive action or legislation with Convention rights, that is something which the courts can and do properly take into account. They do so by giving weight to the determination of those issues by the primary decision-maker. There is nothing new about this point".

Lord Reed goes on, at paragraph 297, to refer to the fact that section 2 of the Suicide Act 1961 raises highly controversial questions of social policy and moral and religious questions on which there is no consensus. On that basis he considered that Parliament required to be allowed a wide margin of judgment. I would entirely endorse that view; any other would appear to me to be an affront to the principle of democratic rule.

Conclusion

[87] These questions are not, however, directly in point in the present case, although they are of very obvious constitutional importance. For the reasons already given, I would refuse the reclaiming motion.