

Journal of Criminal Law/2009, Volume 73/Issue 6, December/Case Notes/House of Lords: Assisting Suicide and the Discretion to Prosecute Revisited - JoCL 73 (475)

Journal of Criminal Law

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1 December 2009

House of Lords: Assisting Suicide and the Discretion to Prosecute Revisited

R (on the application of Purdy) v DPP [2009] UKHL 45

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Keywords Assisting suicide; Prosecution, discretion, guidance; Human rights

Debbie Purdy suffers from multiple sclerosis. She anticipates that her condition will worsen to a point at which her continuing existence will become unbearable. At this point she will want to end her own life. She would need help to do this as she would have to travel to a jurisdiction in which assisted suicide is lawful. She would be unable to do this without the assistance of her husband who would then be liable to prosecution under the Suicide Act 1961, s. 2(1) which provides that:

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.

The 1961 Act then goes on to provide, by s. 2(4), that no proceedings shall be instituted except by or with the consent of the Director of Public Prosecutions (DPP).

The claimant and her husband wished to know if he is likely to be prosecuted under s. 2(1). She brought a claim for judicial review and under the Human Rights Act 1998, s. 7, to challenge the failure of the DPP to provide a policy as to the circumstances in which a prosecution will be brought where the assisted suicide takes place in a jurisdiction in which it is lawful. It was claimed that this was a breach of the Human Rights Act 1998, Sched. 1, Article 8, which provides:

- (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 interest of national security, public safety, or the economic wellbeing 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.

This raised two questions: does the Suicide Act 1961, s. 2(1), engage Article 8 and, if it does, is the interference 'in accordance with the law and is necessary in a democratic society'?

The High Court, *R (on the application of Debbie Purdy) v DPP [2008] EWHC 2565 (Admin)*, dismissed the application (see 'Assisting Suicide and the Discretion to Prosecute: Hard Cases and Good Law?' (2009) 73

JCL 8), as did the Court of Appeal, *R (on the application of Debbie Purdy) v DPP* [2009] EWCA Civ 92. Ms Purdy appealed to the House of Lords.

Held, allowing the appeal, the House accepted that its decision in *R (on the application of Pretty) v DPP* [2001] UKHL 61 that the right to die does not engage Article 8 could not stand in the light of the decision of the European Court of Human Rights in *Pretty v United Kingdom* (2002) 35 EHRR 1 and that the discretion to prosecute was not 'in accordance with the law' within the terms of Article 8(2) because of the lack of guidance from the DPP on when a prosecution will be undertaken and when it will not be beyond the statutory Code for Crown Prosecutors.

Commentary

As the final decision of the House of Lords in its judicial capacity before the Judicial Committee's metamorphosis into the Supreme Court, this case would have historic significance anyway. It is tempting to imagine that it was inspired PR that led to this particular case being decided before a gathering of 12 Chief Justices from around the world.

The good news from the decision is that all five members of the Committee held the view that the DPP had a duty to publish a policy on the decision to prosecute. The bad news is that they took different routes getting there.

However, although all five speeches are substantial, the main reasoning and a speech cited by all the others is that of Lord Hope.

On one point there appears to be complete agreement: and that is that the Committee would use the *Practice Statement (Judicial Precedent)* [1966] 3 All ER 77 to depart from its decision in *Pretty* and follow the decision of the European Court of Human Rights.

Most startling is the speech of Lord Phillips in that he considers that, accepting the territoriality of the Suicide Act 1961, s. 3(3) providing that 'This Act shall extend to England and Wales only', a person assisting in England and Wales a suicide which takes place outside the jurisdiction could be guilty of murder on the authority of *R v Croft* [1944] KB 295. It is some relief that he then goes on to say:

It must be a moot point whether, in respect of acts of assistance that take place in this jurisdiction in relation to suicide that takes place in Switzerland, section 2(1) applies so as to reduce the offence from one of murder to one under section 2(1). Logically it seems to me that it should not, but plainly considerations of legislative policy would weigh the other way. ([2009] UKHL 45 at [13])

As Lord Hope states:

I think that it needs to be stressed that this case has been conducted throughout ... on the basis that the common law offence has been displaced by the offence that was created in 1961 by Parliament. ([2009] UKHL 45 at [25])

As a result, the main discussion revolved round the question of whether the law as it stood was compatible with Article 8(2). If a narrow view is taken of what is 'in accordance with the law' then the answer would be 'yes' because the provision is contained in an Act of Parliament. However, as Lord Hope states on the basis of the jurisprudence of the European Court of Human Rights:

The word 'law' in this context is to be understood in its substantive sense, not its formal one ... 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. ([2009] UKHL 45 at [41])

These factors bring the Code for Crown Prosecutors into play. Lord Hope continues:

In my opinion the Code is to be regarded, for the purposes of Article 8(2) of the Convention, as forming part of the law in accordance with which an interference with the right to respect for private life may be held to be justified. ([2009] UKHL 45 at [47])

Once these provisions are put together, Lord Hope considers that:

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. ([2009] UKHL 45 at [47])

It is unsurprising that the answer to this question is 'no'. It is, perhaps, unfortunate for the DPP that his attempt to add certainty in this area by publishing the reasons for his decision not to prosecute in the Daniel James case, available at http://www.cps.gov.uk/news/articles/death_by_suicide_of_daniel_james/, which involved a young man being accompanied to the Swiss Dignitas clinic to end his life by his parents and a friend, backfired. Their Lordships were of the view, in the words of Lord Brown but echoed by Lord Hope, Baroness Hale and Lord Neuberger, that the James case:

appears to underline the essential unhelpfulness of the Code itself as any sort of guide to those attempting to ascertain the critical factors likely to determine how the Director will exercise his prosecutorial discretion in this class of case. ([2009] UKHL 45 at [81])

Lord Hope is even more dismissive:

The Director's own analysis shows that, in a highly unusual and sensitive case of this kind, the Code offers almost no guidance at all. The question of whether a prosecution is in the public interest can only be answered by bringing into account factors that are not mentioned there. ([2009] UKHL 45 at [53])

It might be thought, as a result, that the DPP's reasons would be sufficient guidance but Lord Hope continues:

Furthermore, the further factors that were taken into account in the case of Daniel James were designed to fit the facts of that case. ([2009] UKHL 45 at [53])

As Baroness Hale puts it:

some of the listed factors have been turned on their head and other unlisted factors introduced in order to cater for these difficult decisions. ([2009] UKHL 45 at [64])

Lord Neuberger takes a similar view.

This leaves the rather more important question of where do we go from here? If the Code for Crown Prosecutors is insufficient to satisfy Article 8(2) what will? As Lord Neuberger states:

it cannot be doubted that a sensible and clear policy document would be of great legal and practical value, as well as being, I suspect, of some moral and emotional comfort, to Ms Purdy and others in a similar tragic situation. ([2009] UKHL 45 at [101])

This cannot be stressed too firmly because the general reporting of the decision made it sound as though *Pretty* had been reversed. It has not. *Pretty* was about the DPP being asked to give an undertaking not to prosecute under the Act. As Lord Hope said:

Ms Purdy does not ask that her husband be given a guarantee of immunity from prosecution. An exception of that kind ... would be a matter for Parliament. ([2009] UKHL 45 at [30])

and Baroness Hale devotes part of her speech to Lord Falconer's attempt to do just that in the Coroners and Justice Bill. As that attempt failed, the more limited role of the courts comes into play. As Baroness Hale

continued:

Thus there would appear to be a general feeling that, while there are cases in which a prosecution would not be appropriate, it is necessary to retain the offence, with its current wide ambit, in order to cater for the cases in which prosecution would be appropriate. ([2009] UKHL 45 at [59])

The questions are: what divides these two classes of cases and how can this divide be defined objectively to provide for Lord Hope's accessibility and foreseeability tests? For these, there is a need to look at the reasons for the existence of the provision in s. 2(4). Lord Hope cited the Law Commission's Report, *Consents to Prosecution*, Law Com. No. 255, October 1998, and its reference to the Franks Report, Cmnd 5104, when he stated that:

Among the five reasons that were given by the Franks Committee were to secure consistency of practice, to prevent abuse of the kind that might otherwise result in a vexatious private prosecution, to enable account to be taken of mitigating factors and to provide some central control of the use of the criminal law where it has to intrude into areas which are particularly sensitive or controversial. ([2009] UKHL 45 at [46])

Applying these test subjectively, as the Daniel James decision shows, is easy enough, but an objective test is harder. As Baroness Hale put it:

Furthermore, as it seems to me, the object of the exercise should be to focus, not upon a generalised concept of 'the public interest', but upon the features which will distinguish those cases in which deterrence will be disproportionate from those cases in which it will not. ([2009] UKHL 45 at [64])

The object being:

to protect people who are vulnerable to all sorts of pressures, both subtle and not so subtle, to consider their own lives a worthless burden to others. ([2009] UKHL 45 at [65])

Whilst:

at the same time, the object must be to protect the right to exercise a genuinely autonomous choice. The factors which tell for and against such a genuine exercise of autonomy free from pressure will be the most important. ([2009] UKHL 45 at [65])

One aspect of the Daniel James case, which was considered to be of importance, was that none of the assistants stood to gain from his death, but as Lord Hope said:

The issue whether acts of assistance were undertaken for an improper motive will, of course, be highly relevant. But the mere fact that some benefit might accrue is unlikely, on its own, to be significant. ([2009] UKHL 45 at [53])

Their Lordships refer, in varying ways, to the condition of the person contemplating suicide. Lord Brown refers to a person in desperate and deteriorating circumstances who regards the future with dread whilst Lord Hope envisages a person who is terminally ill or severely and incurably disabled. The question must be, are these factors necessary conditions for it to be in the public interest not to prosecute or merely items to be placed in the balance? A person who is not in such a position may be able to travel to commit suicide without assistance and so s. 2(1) may be irrelevant. But what of someone who gives them the plane fare?

The DPP issued an interim policy on prosecuting assisted suicide on 23 September 2009, available at http://www.cps.gov.uk/news/press_releases/144_09, and it has borne out the predictions that no policy statement will ever be much use in such cases. It is difficult not to feel sorry for Keir Starmer in the circumstances, as it is impossible to imagine any policy which is neither so general as to be almost useless, the option taken, nor so specific that many cases will fall completely outside it, the Daniel James scenario.