[2002] 1 All ER 1

# R (on the application of Pretty) v Director of Public Prosecutions

[2001] UKHL 61

HOUSE OF LORDS
LORD BINGHAM OF CORNHILL, LORD STEYN, LORD HOPE OF CRAIGHEAD, LORD HOBHOUSE OF WOODBOROUGH AND LORD SCOTT OF FOSCOTE

14, 15, 29 NOVEMBER 2001

Philip Havers QC and Fenella Morris (instructed by Liberty) for Mrs Pretty.
David Perry and Robin McCoubrey (instructed by the Treasury Solicitor) for the Director.
Jonathan Crow (instructed by the Treasury Solicitor) for the Secretary of State.

Their Lordships took time for consideration.
29 November 2001. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

My Lords, no one of ordinary sensitivity could be unmoved by the frightening ordeal which faces Mrs Dianne Pretty, the appellant. She suffers from motor neurone disease, a progressive degenerative illness from which she has no hope of recovery. She has only a short time to live and faces the prospect of a humiliating and distressing death. She is mentally alert and would like to be able to take steps to bring her life to a peaceful end at a time of her choosing. But her physical incapacity is now such that she can no longer, without help, take her own life. With the support of her family, she wishes to enlist the help of her husband to that end. He himself is willing to give such help, but only if he can be sure that he will not be prosecuted under s 2(1) of the Suicide Act 1961 for aiding and abetting her suicide. Asked to undertake that he would not under s 2(4) of that Act consent to the prosecution of Mr Pretty under s 2(1) if Mr Pretty were to assist his wife to commit suicide, the Director of Public Prosecutions (the Director) has refused to give such an undertaking. On Mrs Pretty's application for judicial review of that refusal, the Queen's Bench Divisional Court ([2001] EWHC Admin 788, [2001] All ER (D) 251 (Oct)) upheld the Director's decision and refused relief. Mrs Pretty claims that she has a right to her husband's assistance in committing suicide and that s 2 of the 1961 Act, if it prohibits his helping and prevents the Director undertaking not to prosecute if he does, is incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (as set out in Sch 1 to the Human Rights Act 1998). It is on the convention, brought into force in this country by the 1998 Act, that Mrs Pretty's claim to relief depends. It is accepted by her counsel on her behalf that under the common law of England she could not have hoped to succeed.

[2]

In discharging the judicial functions of the House, the Appellate Committee has the duty of resolving issues of law properly brought before it, as the issues in this case have been. The committee is not a legislative body. Nor is it entitled or fitted to act as a moral or ethical arbiter. It is important to emphasise the nature and limits of the committee's role, since the wider issues raised by this appeal are the subject of profound and fully justified concern to very many people. The

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questions whether the terminally ill, or others, should be free to seek assistance in taking their own lives, and if so in what circumstances and subject to what safeguards, are of great social, ethical and religious significance and are questions on which widely differing beliefs and views are held, often strongly. Materials laid before the committee (with its leave) express some of those views; many others have been expressed in the news media, professional journals and elsewhere. The task of the committee in this appeal is not to weigh or evaluate or reflect those beliefs and views or give effect to its own but to ascertain and apply the law of the land as it is now understood to be.

Article 2 of the convention

[3]

Article 2 of the convention provides:

> 'Right to life
>
> '1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> '2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.'

The article is to be read in conjunction with arts 1 and 2 of the Sixth Protocol, which are among the convention rights protected by the 1998 Act (see s 1(1)(c)) and which abolished the death penalty in time of peace.

[4]

On behalf of Mrs Pretty it is submitted that art 2 of the convention protects not life itself but the right to life. The purpose of the article is to protect individuals from third parties (the state and public authorities). But the article recognises that it is for the individual to choose whether or not to live and so protects the individual's right to self-determination

in relation to issues of life and death. Thus a person may refuse life-saving or life-prolonging medical treatment, and may lawfully choose to commit suicide. The article acknowledges that right of the individual. While most people want to live, some want to die, and the article protects both rights. The right to die is not the antithesis of the right to life but the corollary of it, and the state has a positive obligation to protect both.

[5]

The Secretary of State has advanced a number of unanswerable objections to this argument which were rightly upheld by the Divisional Court. The starting point must be the language of the article. The thrust of this is to reflect the sanctity which, particularly in Western eyes, attaches to life. The article protects the right to life and prevents the deliberate taking of life save in very narrowly defined circumstances. An article with that effect cannot be interpreted as conferring a right to die or to enlist the aid of another in bringing about one's own death. In his argument for Mrs Pretty, Mr Havers QC was at pains to limit his argument to assisted suicide, accepting that the right claimed could not extend to cover an intentional consensual killing (usually described in this context as 'voluntary euthanasia', but regarded in English law as murder). The right claimed would be sufficient to cover Mrs Pretty's case and counsel's unwillingness to go further is understandable. But there is in logic no justification for drawing a line at this point. If art 2 does confer a right to self-determination in relation to life and death, and if a person were so gravely disabled as to be unable to perform any

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act whatever to cause his or her own death, it would necessarily follow in logic that such a person would have a right to be killed at the hands of a third party without giving any help to the third party and the state would be in breach of the convention if it were to interfere with the exercise of that right. No such right can possibly be derived from an article having the object already defined.

[6]

It is true that some of the guaranteed convention rights have been interpreted as conferring rights not to do that which is the antithesis of what there is an express right to do. Article 11, for example, confers a right not to join an association (Young v UK (1981) 4 EHRR 38), art 9 embraces a right to freedom from any compulsion to express thoughts or change an opinion or divulge convictions (Clayton and Tomlinson The Law of Human Rights (2000) p 974 (para 14.49)) and I would for my part be inclined to infer that art 12 confers a right not to marry (but see Clayton and Tomlinson p 913 (para 13.76)). It cannot, however, be suggested (to take some obvious examples) that arts 3, 4, 5 and 6 confer an implied right to do or experience the opposite of that which the articles guarantee. Whatever the benefits which, in the view of many, attach to voluntary euthanasia, suicide, physician-assisted suicide and suicide assisted without the intervention of a physician, these are not benefits which derive protection from an article framed to protect the sanctity of life.

[7]

There is no convention authority to support Mrs Pretty's argument. To the extent that

there is any relevant authority it is adverse to her. In Osman v UK (1998) 5 BHRC 293 the applicants complained of a failure by the United Kingdom to protect the right to life of the second applicant and his deceased father. The court said (at 321):

> '115. The court notes that the first sentence of art 2(1) enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction … It is common ground that the state's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the court that art 2 of the convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.
>
> '116. For the court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in arts 5 and 8 of the convention.'

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The context of that case was very different. Neither the second applicant nor his father had had any wish to die. But the court's approach to art 2 was entirely consistent with the interpretation I have put upon it.

[8]

X v Germany (1983) 7 EHRR 152 and Keenan v UK (2001) 10 BHRC 319 were also decided in a factual context very different from the present. X, while in prison, had gone on hunger strike and had been forcibly fed by the prison authorities. His complaint was of maltreatment contrary to art 3 of the convention, considered below. The complaint was rejected and in the course of its reasoning the European Commission of Human Rights held ((1983) 7 EHRR 152 at 153–154):

> 'In the opinion of the Commission forced feeding of a person does involve degrading elements which in certain circumstances may be regarded as

> prohibited by Art. 3 of the Convention. Under the Convention the High Contracting Parties are, however, also obliged to secure to everyone the right to life as set out in Art. 2. Such an obligation should in certain circumstances call for positive action on the part of the Contracting Parties, in particular an active measure to save lives when the authorities have taken the person in question into their custody. When, as in the present case, a detained person maintains a hunger strike this may inevitably lead to a conflict between an individual's right to physical integrity and the High Contracting Party's obligation under Art. 2 of the Convention—a conflict which is not solved by the Convention itself. The Commission recalls that under German law this conflict has been solved in that it is possible to force-feed a detained person if this person, due to a hunger strike, would be subject to injuries of a permanent character, and the forced feeding is even obligatory if an obvious danger for the individual's life exists. The assessment of the above-mentioned conditions is left for the doctor in charge but an eventual decision to force-feed may only be carried out after judicial permission has been obtained … The Commission is satisfied that the authorities acted solely in the best interests of the applicant when choosing between either respect for the applicant's will not to accept nourishment of any kind and thereby incur the risk that he might be subject to lasting injuries or even die, or to take action with a view to securing his survival although such action might infringe the applicant's human dignity.'

In Keenan v UK a young prisoner had committed suicide and his mother complained of a failure by the prison authorities to protect his life. In the course of its judgment rejecting the complaint under this article the court said ((2001) 10 BHRC 319 at 348–349):

> '90. In the context of prisoners, the court has had previous occasion to emphasise that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them. It is incumbent on the state to account for any injuries suffered in custody, which obligation is particularly stringent where that individual dies … It may be noted that this need for scrutiny is acknowledged in the domestic law of England and Wales, where inquests are automatically held concerning the deaths of persons in prison and where the domestic courts have imposed a duty of care on prison authorities in respect of those detained in their custody.'

Both these cases can be distinguished, since the conduct complained of took place when the victim was in the custody of the state, which accordingly had a special



responsibility for the victim's welfare. It may readily be accepted that the obligation of the state to safeguard the life of a potential victim is enhanced when the latter is in the custody of the state. To that extent these two cases are different from the present, since Mrs Pretty is not in the custody of the state. Thus the state's positive obligation to protect the life of Mrs Pretty is weaker than in such cases. It would, however, be a very large, and in my view quite impermissible, step to proceed from acceptance of that proposition

to acceptance of the assertion that the state has a duty to recognise a right for Mrs Pretty to be assisted to take her own life.

[9]

In the convention field the authority of domestic decisions is necessarily limited and, as already noted, Mrs Pretty bases her case on the convention. But it is worthy of note that her argument is inconsistent with two principles deeply embedded in English law. The first is a distinction between the taking of one's own life by one's own act and the taking of life through the intervention or with the help of a third party. The former has been permissible since suicide ceased to be a crime in 1961. The latter has continued to be proscribed. The distinction was very clearly expressed by Hoffmann LJ in Airedale NHS Trust v Bland [1993] 1 All ER 821 at 855, [1993] AC 789 at 831:

> 'No one in this case is suggesting that Anthony Bland should be given a lethal injection. But there is concern about ceasing to supply food as against, for example, ceasing to treat an infection with antibiotics. Is there any real distinction? In order to come to terms with our intuitive feelings about whether there is a distinction, I must start by considering why most of us would be appalled if he was given a lethal injection. It is, I think, connected with our view that the sanctity of life entails its inviolability by an outsider. Subject to exceptions like self-defence, human life is inviolate even if the person in question has consented to its violation. That is why although suicide is not a crime, assisting someone to commit suicide is. It follows that, even if we think Anthony Bland would have consented, we would not be entitled to end his life by a lethal injection.'

The second distinction is between the cessation of life-saving or life-prolonging treatment on the one hand and the taking of action lacking medical, therapeutic or palliative justification but intended solely to terminate life on the other. This distinction provided the rationale of the decisions in Bland's case. It was very succinctly expressed in the Court of Appeal in Re J (a minor) (wardship: medical treatment) [1990] 3 All ER 930, [1991] Fam 33, in which Lord Donaldson of Lymington MR said:

> 'What doctors and the court have to decide is whether, in the best interests of the child patient, a particular decision as to medical treatment should be taken which as a side effect will render death more or less likely. This is not a matter of semantics. It is fundamental. At the other end of the age spectrum, the use of drugs to reduce pain will often be fully justified, notwithstanding that this will hasten the moment of death. What can never be justified is the use of drugs or surgical procedures with the primary purpose of doing so.' (See [1990] 3 All ER 930 at 938, [1991] Fam 33 at 46.)

Similar observations were made by Balcombe and Taylor LJJ ([1990] 3 All ER 930 at 941–942, 943, [1991] Fam 33 at 51, 53 respectively). While these distinctions are in no way binding on the European Court of Human Rights there is nothing to suggest that they are inconsistent with the jurisprudence which has grown up

around the convention. It is not enough for Mrs Pretty to show that the United Kingdom would not be acting inconsistently with the convention if it were to permit assisted suicide; she must go further and establish that the United Kingdom is in breach of the convention by failing to permit it or would be in breach of the convention if it did not permit it. Such a contention is in my opinion untenable, as the Divisional Court rightly held.

Article 3 of the convention

[10]

Article 3 of the convention provides:

> 'Prohibition of torture
>
> 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

This is one of the articles from which a member state may not derogate even in time of war or other public emergency threatening the life of the nation (see art 15). I shall for convenience use the expression 'proscribed treatment' to mean 'inhuman or degrading treatment' as that expression is used in the convention.

[11]

In brief summary the argument for Mrs Pretty proceeded by these steps. (1) Member states have an absolute and unqualified obligation not to inflict the proscribed treatment and also to take positive action to prevent the subjection of individuals to such treatment (see A v UK (1998) 5 BHRC 137, Z v UK [2001] 2 FCR 246 at 265 (para 73)). (2) Suffering attributable to the progression of a disease may amount to such treatment if the state can prevent or ameliorate such suffering and does not do so (see D v UK (1997) 2 BHRC 273 at 283–285 (paras 46–54)). (3) In denying Mrs Pretty the opportunity to bring her suffering to an end the United Kingdom (by the Director) will subject her to the proscribed treatment. The state can spare Mrs Pretty the suffering which she will otherwise endure since, if the Director undertakes not to give his consent to prosecution, Mr Pretty will assist his wife to commit suicide and so she will be spared much suffering. (4) Since, as the Divisional Court held, it is open to the United Kingdom under the convention to refrain from prohibiting assisted suicide, the Director can give the undertaking sought without breaking the United Kingdom's obligations under the convention. (5) If the Director may not give the undertaking, s 2 of the 1961 Act is incompatible with the convention.

[12]

For the Secretary of State it was submitted that in the present case art 3 of the convention is not engaged at all but that if any of the rights protected by that article are engaged they do not include a right to die. In support of the first of these submissions it was argued that there is in the present case no breach of the prohibition in the article. The negative prohibition in the article is absolute and unqualified but the positive obligations which

flow from it are not absolute (see Osman v UK (1998) 5 BHRC 293, Rees v UK (1986) 9 EHRR 56). While states may be obliged to protect the life and health of a person in custody (as in the case of Keenan v UK), and to ensure that individuals are not subjected to proscribed treatment at the hands of private individuals other than state agents (as in A v UK), and the state may not take direct action in relation to an individual which would inevitably involve the inflicting of proscribed treatment upon him (D v UK), none of these obligations can be invoked by Mrs Pretty in the present case. In support of the second submission it was argued that, far from suggesting that the state is under a duty to provide medical care to ease her condition and prolong her life, Mrs Pretty is arguing that the state is under a legal obligation to sanction a lawful means for terminating her life. There is nothing, either in the wording of the

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convention or the Strasbourg jurisprudence, to suggest that any such duty exists by virtue of art 3. The decision how far the state should go in discharge of its positive obligation to protect individuals from proscribed treatment is one for member states, taking account of all relevant interests and considerations; such a decision, while not immune from review, must be accorded respect. The United Kingdom has reviewed these issues in depth and resolved to maintain the present position.

[13]

Article 3 enshrines one of the fundamental values of democratic societies and its prohibition of the proscribed treatment is absolute (D v UK (1997) 2 BHRC 273 at 283 (para 47)). Article 3 is, as I think, complementary to art 2. As art 2 requires states to respect and safeguard the lives of individuals within their jurisdiction, so art 3 obliges them to respect the physical and human integrity of such individuals. There is in my opinion nothing in art 3 which bears on an individual's right to live or to choose not to live. That is not its sphere of application; indeed, as is clear from X v Germany, a state may on occasion be justified in inflicting treatment which would otherwise be in breach of art 3 in order to serve the ends of art 2. Moreover, the absolute and unqualified prohibition on a member state inflicting the proscribed treatment requires that 'treatment' should not be given an unrestricted or extravagant meaning. It cannot, in my opinion, be plausibly suggested that the Director or any other agent of the United Kingdom is inflicting the proscribed treatment on Mrs Pretty, whose suffering derives from her cruel disease.

[14]

The authority most helpful to Mrs Pretty is D v UK, which concerned the removal to St Kitts of a man in the later stages of AIDS. The convention challenge was to implementation of the removal decision having regard to the applicant's medical condition, the absence of facilities to provide adequate treatment, care or support in St Kitts and the disruption of a regime in the United Kingdom which had afforded him sophisticated treatment and medication in a compassionate environment. It was held that implementation of the decision to remove the applicant to St Kitts would amount in the circumstances to inhuman treatment by the United Kingdom in violation of art 3. In that case the state was proposing to take direct action against the applicant, the inevitable effect of which would be a severe increase in his suffering and a shortening of his life.

The proposed deportation could fairly be regarded as 'treatment'. An analogy might be found in the present case if a public official had forbidden the provision to Mrs Pretty of pain-killing or palliative drugs. But here the proscribed treatment is said to be the Director's refusal of proleptic immunity from prosecution to Mr Pretty if he commits a crime. By no legitimate process of interpretation can that refusal be held to fall within the negative prohibition of art 3.

[15]

If it be assumed that art 3 is capable of being applied at all to a case such as the present, and also that on the facts there is no arguable breach of the negative prohibition in the article, the question arises whether the United Kingdom (by the Director) is in breach of its positive obligation to take action to prevent the subjection of individuals to proscribed treatment. In this context, the obligation of the state is not absolute and unqualified. So much appears from the passage quoted at [7] above from the judgment of the European Court of Human Rights in Osman v UK. The same principle was acknowledged by the court in Rees v UK (1986) 9 EHRR 56 at 63–64 where it said:

> '37. As the Court pointed out in its abovementioned Abdulaziz, Cabales and Balkandali judgment (Abdulaziz v UK (1985) 7 EHRR 471) the notion of

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> "respect" is not clear-cut, especially as far as those positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. These observations are particularly relevant here. Several States have, through legislation or by means of legal interpretation or by administrative practice, given transsexuals the option of changing their personal status to fit their newly-gained identity. They have, however, made this option subject to conditions of varying strictness and retained a number of express reservations (for example, as to previously incurred obligations). In other States, such an option does not—or does not yet—exist. It would therefore be true to say that there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention. In striking this balance the aims mentioned in the second paragraph of Article 8 may be of a certain relevance, although this provision refers in terms only to "interferences" with the right protected by the first paragraph—in other words is concerned with the negative obligations flowing therefrom.'

That was an art 8 case, dealing with a very different subject matter from the present, but the court's observations were of more general import. It stands to reason that while states

may be absolutely forbidden to inflict the proscribed treatment on individuals within their jurisdictions, the steps appropriate or necessary to discharge a positive obligation will be more judgmental, more prone to variation from state to state, more dependent on the opinions and beliefs of the people and less susceptible to any universal injunction. For reasons more fully given at [27] and [28] below, it could not in my view be said that the United Kingdom is under a positive obligation to ensure that a competent, terminally ill, person who wishes but is unable to take his or her own life should be entitled to seek the assistance of another without that other being exposed to the risk of prosecution.

Article 8 of the convention

[16]

Article 8 of the convention provides:

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

[17]

Counsel for Mrs Pretty submitted that this article conferred a right to self-determination (see X v Netherlands (1985) 8 EHRR 235, Rodriguez v A-G of Canada [1994] 2 LRC 136, Re A (children) (conjoined twins: surgical separation) [2000] 4 All ER

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961, [2001] Fam 147). This right embraces a right to choose when and how to die so that suffering and indignity can be avoided. Section 2(1) of the 1961 Act interferes with this right of self-determination: it is therefore for the United Kingdom to show that the interference meets the convention tests of legality, necessity, responsiveness to pressing social need and proportionality (see R v A (No 2) [2001] UKHL 25, [2001] 3 All ER 1, [2001] 2 WLR 1546, Johansen v Norway (1996) 23 EHRR 33, R (P) v Secretary of State for the Home Dept, R (Q) v Secretary of State for the Home Dept [2001] EWCA Civ 1151, [2001] 1 WLR 2002). Where the interference is with an intimate part of an individual's private life, there must be particularly serious reasons to justify the interference (Smith v UK (2000) 29 EHRR 493 at 530 (para 89)). The court must in this case rule whether it could be other than disproportionate for the Director to refuse to give the undertaking sought and, in the case of the Secretary of State, whether the interference with Mrs Pretty's right to self-determination is proportionate to whatever legitimate aim the prohibition on assisted suicide pursues. Counsel placed particular reliance on certain features of Mrs Pretty's case: her mental competence, the frightening

prospect which faces her, her willingness to commit suicide if she were able, the imminence of death, the absence of harm to anyone else, the absence of far-reaching implications if her application were granted. Counsel suggested that the blanket prohibition in s 2(1), applied without taking account of particular cases, is wholly disproportionate, and the materials relied on do not justify it. Reference was made to R v UK (1983) 33 DR 270 and Sanles v Spain [2001] EHRLR 348.

[18]

The Secretary of State questioned whether Mrs Pretty's rights under art 8 were engaged at all, and gave a negative answer. He submitted that the right to private life under art 8 relates to the manner in which a person conducts his life, not the manner in which he departs from it. Any attempt to base a right to die on art 8 founders on exactly the same objection as the attempt based on art 2, namely, that the alleged right would extinguish the very benefit on which it is supposedly based. Article 8 protects the physical, moral and psychological integrity of the individual, including rights over the individual's own body, but there is nothing to suggest that it confers a right to decide when or how to die. The Secretary of State also submitted that, if it were necessary to do so, s 2(1) of the 1961 Act and the current application of it could be fully justified on the merits. He referred to the margin of judgment accorded to member states, the consideration which has been given to these questions in the United Kingdom and the broad consensus among convention countries. Attention was drawn to Laskey v UK (1997) 24 EHRR 39 in which the criminalisation of consensual acts of injury was held to be justified; it was suggested that the justification for criminalising acts of consensual killing or assisted suicide must be even stronger.

[19]

The most detailed and erudite discussion known to me of the issues in the present appeal is to be found in the judgments of the Supreme Court of Canada in the Rodriguez case. The appellant in that case suffered from a disease legally indistinguishable from that which afflicts Mrs Pretty; she was similarly disabled; she sought an order which would allow a qualified medical practitioner to set up technological means by which she might, by her own hand but with that assistance from the practitioner, end her life at a time of her choosing. While suicide in Canada was not a crime, s 241(b) of the Criminal Code was in terms effectively identical to s 2(1) of the 1961 Act. The appellant based her claims on the Canadian Charter of Rights and Freedoms which, so far as relevant, included the following sections:

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> '1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society …
>
> '7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice …

> '12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment …
>
> '15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

The trial judge rejected Ms Rodriguez' claim, because (as his judgment was summarised) 'it was the illness from which Ms Rodriguez suffers, not the state or the justice system, which has impeded her ability to act on her wishes with respect to the timing and manner of her death' ([1994] 2 LRC 136 at 144). He found no breach of s 12 and said:

> 'To interpret s 7 so as to include a constitutionally guaranteed right to take one's own life as an exercise in freedom of choice is inconsistent, in my opinion, with life, liberty and the security of the person.'

He also held that s 241 did not discriminate against the physically disabled.

[20]

The British Columbia Court of Appeal held by a majority that whilst the operation of s 241 did deprive Ms Rodriguez of her s 7 right to the security of her person, it did not contravene the principles of fundamental justice ((1993) 76 BCLR (2d) 145 at 171). McEachern CJ, dissenting, held (at 164) that there was a prima facie violation of s 7 of the Canadian Charter when the state imposed prohibitions that had the effect of prolonging the physical and psychological suffering of a person, and that any provision that imposed an indeterminate period of senseless physical and psychological suffering on someone who was shortly to die anyway could not conform with any principle of fundamental justice.

[21]

In the Supreme Court opinion was again divided. The judgment of the majority was given by Sopinka J, with La Forest, Gonthier, Iacobucci and Major JJ concurring. In the course of his judgment Sopinka J said ([1994] 2 LRC 136 at 175):

> 'As a threshold issue, I do not accept the submission that the appellant's problems are due to her physical disabilities caused by her terminal illness, and not by governmental action. There is no doubt that the prohibition in s 241(b) will contribute to the appellant's distress if she is prevented from managing her death in the circumstances which she fears will occur.'

He continued:

> 'I find more merit in the argument that security of the person, by its nature, cannot encompass a right to take action that will end one's life as security of the person is intrinsically concerned with the well-being of the

living person.'

He then continued (at 177–178):

> 'There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal

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> prohibitions which interfere with these. The effect of the prohibition in s 241(b) is to prevent the appellant from having assistance to commit suicide when she is no longer able to do so on her own … In my view, these considerations lead to the conclusion that the prohibition in s 241(b) deprives the appellant of autonomy over her person and causes her physical pain and psychological stress in a manner which impinges on the security of her person. The appellant's security interest (considered in the context of the life and liberty interest) is therefore engaged, and it is necessary to determine whether there has been any deprivation thereof that is not in accordance with the principles of fundamental justice.'

He concluded (at 189):

> 'Given the concerns about abuse that have been expressed and the great difficulty in creating appropriate safeguards to prevent these, it can not be said that the blanket prohibition on assisted suicide is arbitrary or unfair, or that it is not reflective of fundamental values at play in our society.'

With reference to s 1 of the Canadian Charter, Sopinka J said (at 192–193):

> 'As I have sought to demonstrate in my discussion of s 7, this protection is grounded on a substantial consensus among western countries, medical organisations and our own Law Reform Commission that in order to effectively protect life and those who are vulnerable in society, a prohibition without exception on the giving of assistance to commit suicide is the best approach. Attempts to fine-tune this approach by creating exceptions have been unsatisfactory and have tended to support the theory of the "slippery slope". The formulation of safeguards to prevent excesses has been unsatisfactory and has failed to allay fears that a relaxation of the clear standard set by the law will undermine the protection of life and will lead to abuses of the exception.'

He rejected the appellant's claims under ss 12 and 15 of the Canadian Charter.

[22]

Lamer CJ dissented in favour of the appellant, but on grounds of discrimination under s 15 alone. McLachlin J (with whom L'Heureux-Dubé J concurred) found a violation not

of s 15 but of s 7. She saw the case as one about the manner in which the state might limit the right of a person to make decisions about her body under s 7 of the charter (at 194). She said (at 195):

> 'In the present case, Parliament has put into force a legislative scheme which does not bar suicide but criminalises the act of assisting suicide. The effect of this is to deny to some people the choice of ending their lives solely because they are physically unable to do so. This deprives Sue Rodriguez of her security of the person (the right to make decisions concerning her own body, which affect only her own body) in a way that offends the principles of fundamental justice, thereby violating s 7 of the Charter … It is part of the persona and dignity of the human being that he or she have the autonomy to decided what is best for his or her body.'

She held (at 197):

> '… it does not accord with the principles of fundamental justice that Sue Rodriguez be disallowed what is available to others merely because it is

at 15

> possible that other people, at some other time, may suffer, not what she seeks, but an act of killing without true consent.'

Cory J also dissented, agreeing with Lamer CJ and also McLachlin J.

[23]

It is evident that all save one of the judges of the Canadian Supreme Court were willing to recognise s 7 of the Canadian Charter as conferring a right to personal autonomy extending even to decisions on life and death. Mrs Pretty understandably places reliance in particular on the judgment of McLachlin J, in which two other members of the court concurred. But a majority of the court regarded that right as outweighed on the facts by the principles of fundamental justice. The judgments were moreover directed to a provision with no close analogy in the convention. In the convention the right to liberty and security of the person appears only in art 5(1), on which no reliance is or could be placed in the present case. Article 8 contains no reference to personal liberty or security. It is directed to the protection of privacy, including the protection of physical and psychological integrity (X v Netherlands). But art 8 is expressed in terms directed to protection of personal autonomy while individuals are living their lives, and there is nothing to suggest that the article has reference to the choice to live no longer.

[24]

There is no Strasbourg jurisprudence to support the contention of Mrs Pretty. In R v UK (1983) 33 DR 270 the applicant had been convicted and sentenced to imprisonment for aiding and abetting suicide and conspiring to do so. He complained that his conviction and sentence under s 2 of the 1961 Act constituted a violation of his right to respect for his private life under art 8 and also his right to free expression under art 10. The

European Commission observed (at 271–272):

> '13. The Commission does not consider that the activity for which the applicant was convicted, namely aiding and abetting suicide, can be described as falling into the sphere of his private life in the manner elaborated above. While it might be thought to touch directly on the private lives of those who sought to commit suicide, it does not follow that the applicant's rights to privacy are involved. On the contrary, the Commission is of the opinion that the acts aiding, abetting, counselling or procuring suicide are excluded from the concept of privacy by virtue of their trespass on the public interest of protecting life, as reflected in the criminal provisions of the 1961 Act.'

This somewhat tentative expression of view is of some assistance to Mrs Pretty, but with reference to the claim under art 10 the European Commission of Human Rights continued (at 272):

> '17. The Commission considers, that, in the circumstances of the case, there has been an interference with the applicant's right to impart information. However, the Commission must take account of the State's legitimate interest in this area in taking measures to protect, against criminal behaviour, the life of its citizens particularly those who belong to especially vulnerable categories by reason of their age or infirmity. It recognises the right of the State under the Convention to guard against the inevitable criminal abuses that would occur, in the absence of legislation, against the aiding and abetting of suicide. The fact that in the present case the applicant and his associate appear to have been well intentioned does not, in the Commission's view, alter the justification for the general policy.'

at 16

That conclusion cannot be reconciled with the suggestion that the prohibition of assisted suicide is inconsistent with the convention.

[25]

Sanles v Spain arose from a factual situation similar to the present save that the victim of disabling disease had died and the case never culminated in a decision on the merits. The applicant was the sister-in-law of the deceased and was held not to be a victim and thus not to be directly affected by the alleged violations. It is of some interest that she based her claims on arts 2, 3, 5, 9 and 14 of the convention but not, it seems, on art 8.

[26]

I would for my part accept the Secretary of State's submission that Mrs Pretty's rights under art 8 are not engaged at all. If, however, that conclusion is wrong, and the prohibition of assisted suicide in s 2 of the 1961 Act infringes her convention right under art 8, it is necessary to consider whether the infringement is shown by the Secretary of State to be justifiable under the terms of art 8(2). In considering that question I would

adopt the test advocated by counsel for Mrs Pretty, which is clearly laid down in the authorities cited.

[27]

Since suicide ceased to be a crime in 1961, the question whether assisted suicide also should be decriminalised has been reviewed on more than one occasion. The Criminal Law Revision Committee in its fourteenth report Offences against the Person (Cmnd 7844 (1980)) reported some divergence of opinion among its distinguished legal membership, and recognised a distinction between assisting a person who had formed a settled intention to kill himself and the more heinous case where one person persuaded another to commit suicide, but a majority was of the clear opinion that aiding and abetting suicide should remain an offence (pp 60–61 (para 135)).

[28]

Following the decision in Bland's case a much more broadly-constituted House of Lords Select Committee on Medical Ethics received extensive evidence and reported. The committee in its report (HL Paper (1993–94) 21–I) drew a distinction between assisted suicide and physician-assisted suicide (p 11 (para 26)) but its conclusion was unambiguous (p 54 (para 262)):

> 'As far as assisted suicide is concerned, we see no reason to recommend any change in the law. We identify no circumstances in which assisted suicide should be permitted, nor do we see any reason to distinguish between the act of a doctor or of any other person in this connection.'

The government in its response (Government Response to the Report of the Select Committee on Medical Ethics (Cm 2553 (1994))) accepted this recommendation:

> 'We agree with this recommendation. As the Government stated in its evidence to the Committee, the decriminalisation of attempted suicide in 1961 was accompanied by an unequivocal restatement of the prohibition of acts calculated to end the life of another person. The Government can see no basis for permitting assisted suicide. Such a change would be open to abuse and put the lives of the weak and vulnerable at risk.'

A similar approach is to be found in the Council of Europe's Recommendation 1418 (1999) on the protection of the human rights and dignity of the terminally ill and the dying. This included the following passage (pp 2–4):

> '9. The Assembly therefore recommends that the Committee of Ministers encourage the member states of the Council of Europe to respect and protect the dignity of terminally ill or dying persons in all respects … c. by upholding the prohibition against intentionally taking the life of terminally ill or dying

at 17

> persons, while: i. recognising that the right to life, especially with regard

> to a terminally ill or dying person, is guaranteed by the member states, in accordance with Article 2 of the European Convention on Human Rights which states that “no one shall be deprived of his life intentionally”; ii. recognising that a terminally ill or dying person's wish to die never constitutes any legal claim to die at the hand of another person; iii. recognising that a terminally ill or dying person's wish to die cannot of itself constitute a legal justification to carry out actions intended to bring about death.'

It would be by no means fatal to the legal validity of s 2(1) of the 1961 Act if the response of the United Kingdom to this problem of assisted suicide were shown to be unique, but it is shown to be in accordance with a very broad international consensus. Assisted suicide and consensual killing are unlawful in all convention countries except the Netherlands, but even if the Dutch Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2001 and the Dutch Criminal Code were operative in this country it would not relieve Mr Pretty of liability under art 294 of the Dutch Criminal Code if he were to assist Mrs Pretty to take her own life as he would wish to do.

[29]

On behalf of Mrs Pretty counsel disclaims any general attack on s 2(1) of the 1961 Act and seeks to restrict his claim to the particular facts of her case: that of a mentally competent adult who knows her own mind, is free from any pressure and has made a fully informed and voluntary decision. Whatever the need, he submits, to afford legal protection to the vulnerable, there is no justification for a blanket refusal to countenance an act of humanity in the case of someone who, like Mrs Pretty, is not vulnerable at all. Beguiling as that submission is, Dr Johnson gave two answers of enduring validity to it. First, 'Laws are not made for particular cases but for men in general'. Second, 'To permit a law to be modified at discretion is to leave the community without law. It is to withdraw the direction of that public wisdom by which the deficiencies of private understanding are to be supplied' (see Boswell's Life of Johnson (3rd edn, 1970) Oxford University Press, pp 735, 496). It is for member states to assess the risk and likely incidence of abuse if the prohibition on assisted suicide were relaxed, as the commission recognised in its decision in R v UK quoted above at [24]. But the risk is one which cannot be lightly discounted. The Criminal Law Revision Committee recognised how fine was the line between counselling and procuring on the one hand and aiding and abetting on the other (p 61 (para 135)). The House of Lords select committee recognised the undesirability of anything which could appear to encourage suicide (p 49 (para 239)):

> 'We are also concerned that vulnerable people—the elderly, lonely, sick or distressed—would feel pressure, whether real or imagined, to request early death. We accept that, for the most part, requests resulting from such pressure or from remediable depressive illness would be identified as such by doctors and managed appropriately. Nevertheless we believe that the message which society sends to vulnerable and disadvantaged people should not, however obliquely, encourage them to seek death, but should assure them of our care and support in life.'

It is not hard to imagine that an elderly person, in the absence of any pressure, might opt

for a premature end to life if that were available, not from a desire to die or a willingness to stop living, but from a desire to stop being a burden to others.

at 18

[30]

If s 2(1) of the 1961 Act infringes any convention right of Mrs Pretty, and recognising the heavy burden which lies on a member state seeking to justify such an infringement, I conclude that the Secretary of State has shown ample grounds to justify the existing law and the current application of it. That is not to say that no other law or application would be consistent with the convention; it is simply to say that the present legislative and practical regime do not offend the convention.

Article 9 of the convention

[31]

It is unnecessary to recite the terms of art 9 of the convention, to which very little argument was addressed. It is an article which protects freedom of thought, conscience and religion and the manifestation of religion or belief in worship, teaching, practice or observance. One may accept that Mrs Pretty has a sincere belief in the virtue of assisted suicide. She is free to hold and express that belief. But her belief cannot found a requirement that her husband should be absolved from the consequences of conduct which, although it would be consistent with her belief, is proscribed by the criminal law. And if she were able to establish an infringement of her right, the justification shown by the state in relation to art 8 would still defeat it.

Article 14 of the convention

[32]

Article 14 of the convention provides:

> 'Prohibition of discrimination
>
> 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

Mrs Pretty claims that s 2(1) of the 1961 Act discriminates against those who, like herself, cannot because of incapacity take their own lives without assistance. She relies on the judgment of the European Court of Human Rights in Thlimmenos v Greece (2000) 9 BHRC 12 at 22 where the court said:

> '44. The court has so far considered that the right under art 14 not to be discriminated against in the enjoyment of the rights guaranteed under the convention is violated when states treat differently persons in analogous

> situations without providing an objective and reasonable justification … However, the court considers that this is not the only facet of the prohibition of discrimination in art 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the convention is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.'

[33]

The European Court of Human Rights has repeatedly held that art 14 is not autonomous but has effect only in relation to convention rights. As it was put in Van Raalte v Netherlands (1997) 24 EHRR 503 at 516–517:

> '33. As the Court has consistently held, Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a

at 19

> breach of those provisions—and to this extent it is autonomous—there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.'

See also Botta v Italy (1998) 4 BHRC 81 at 90 (para 39).

[34]

If, as I have concluded, none of the articles on which Mrs Pretty relies gives her the right which she has claimed, it follows that art 14 would not avail her even if she could establish that the operation of s 2(1) is discriminatory. A claim under this article must fail on this ground.

[35]

If, contrary to my opinion, Mrs Pretty's rights under one or other of the articles are engaged, it would be necessary to examine whether s 2(1) of the 1961 Act is discriminatory. She contends that the section is discriminatory because it prevents the disabled, but not the able-bodied, exercising their right to commit suicide. This argument is in my opinion based on a misconception. The law confers no right to commit suicide. Suicide was always, as a crime, anomalous, since it was the only crime with which no defendant could ever be charged. The main effect of the criminalisation of suicide was to penalise those who attempted to take their own lives and failed, and secondary parties. Suicide itself (and with it attempted suicide) was decriminalised because recognition of the common law offence was not thought to act as a deterrent, because it cast an unwarranted stigma on innocent members of the suicide's family and because it led to the distasteful result that patients recovering in hospital from a failed suicide attempt were

prosecuted, in effect, for their lack of success. But while the 1961 Act abrogated the rule of law whereby it was a crime for a person to commit (or attempt to commit) suicide, it conferred no right on anyone to do so. Had that been its object there would have been no justification for penalising by a potentially very long term of imprisonment one who aided, abetted, counselled or procured the exercise or attempted exercise by another of that right. The policy of the law remained firmly adverse to suicide, as s 2(1) makes clear.

[36]

The criminal law cannot in any event be criticised as objectionably discriminatory because it applies to all. Although in some instances criminal statutes recognise exceptions based on youth, the broad policy of the criminal law is to apply offence-creating provisions to all and to give weight to personal circumstances either at the stage of considering whether or not to prosecute or, in the event of conviction, when penalty is to be considered. The criminal law does not ordinarily distinguish between willing victims and others (Laskey v UK). Provisions criminalising drunkenness or misuse of drugs or theft do not exempt those addicted to alcohol or drugs, or the poor and hungry. 'Mercy killing', as it is often called, is in law killing. If the criminal law sought to proscribe the conduct of those who assisted the suicide of the vulnerable, but exonerated those who assisted the suicide of the non-vulnerable, it could not be administered fairly and in a way which would command respect.

[37]

For these reasons, which are in all essentials those of the Divisional Court, and in agreement with my noble and learned friends Lord Steyn and Lord Hope of Craighead, I would hold that Mrs Pretty cannot establish any breach of any convention right.

The claim against the Director

[38]

That conclusion makes it strictly unnecessary to review the main ground on which the Director resisted the claim made against him: that he had no power to grant the undertaking which Mrs Pretty sought.

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[39]

I would for my part question whether, as suggested on his behalf, the Director might not if so advised make a public statement on his prosecuting policy other than in the Code for Crown Prosecutors which he is obliged to issue by s 10 of the Prosecution of Offences Act 1985. Plainly such a step would call for careful consultation and extreme circumspection, and could be taken only under the superintendence of the Attorney General (by virtue of s 3 of the 1985 Act). The Lord Advocate has on occasion made such a statement in Scotland, and I am not persuaded that the Director has no such power. It is, however, unnecessary to explore or resolve that question, since whether or not the Director has the power to make such a statement he has no duty to do so, and in

any event what was asked of the Director in this case was not a statement of prosecuting policy but a proleptic grant of immunity from prosecution. That, I am quite satisfied, the Director had no power to give. The power to dispense with and suspend laws and the execution of laws without the consent of Parliament was denied to the Crown and its servants by the Bill of Rights 1688. Even if, contrary to my opinion, the Director had power to give the undertaking sought, he would have been very wrong to do so in this case. If he had no reason for doubting, equally he had no means of investigating, the assertions made on behalf of Mrs Pretty. He received no information at all concerning the means proposed for ending Mrs Pretty's life. No medical supervision was proposed. The obvious risk existed that her condition might worsen to the point where she could herself do nothing to bring about her death. It would have been a gross dereliction of the Director's duty and a gross abuse of his power had he ventured to undertake that a crime yet to be committed would not lead to prosecution. The claim against him must fail on this ground alone.

[40]

I would dismiss this appeal.

LORD STEYN.

[41]

My Lords, this is the first occasion on which the House of Lords has been asked to consider the question of assisted suicide by a terminally ill individual. She suffers from motor neurone disease and she has not long to live. The specific question before the House is whether the appellant is entitled to a declaration that the Director of Public Prosecutions (the Director) is obliged to undertake in advance that, if she is assisted by her husband in committing suicide, he will not be prosecuted under s 2(1) of the Suicide Act 1961. If Mrs Pretty is entitled to this relief, it follows that it may have to be granted to other terminally ill patients or patients suffering excruciating pain as a result of an incurable illness, who want to commit assisted suicide. Her case is squarely founded on the Human Rights Act 1998, which incorporated the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (as set out in Sch 1 to that Act) into English law. For her to succeed it is not enough to show that the convention allows member states to legalise assisted suicide. She must establish that at least that part of s 2(1) of the 1961 Act which makes aiding or abetting suicide a crime is in conflict with her convention rights. In other words, she must persuade the House that the convention compels member states of the Council of Europe to legalise assisted suicide.

I. MOTOR NEURONE DISEASE AND ASSISTED SUICIDE

[42]

Mrs Dianne Pretty is 42 years old and has been married for 25 years. She lives with her husband, daughter and granddaughter. In November 1999 she was diagnosed as having motor neurone disease, a progressive neuro-degenerative

disease of motor cells within the central nervous system. Its cause is unknown. No treatment can prevent the inevitable progression of this disease. It causes muscular weakness. Weakness of the arms and legs develop. It results in difficulty in swallowing and speaking. Eventually control of breathing deteriorates. Death usually occurs as a result of weakness of the breathing muscles in association with weakness of those muscles controlling speaking and swallowing leading to respiratory failure and pneumonia.

[43]

In March 2000 Mrs Pretty became confined to a wheelchair. In December 2000 her speech and swallowing became affected. She is paralysed from the neck downwards. She has virtually no decipherable speech. The disease is now at an advanced stage. Her life expectancy is low. She has only months to live. Yet her intellect and her capacity to make decisions is unimpaired. She is able to give instructions to her lawyers and has done so.

[44]

The suffering of Mrs Pretty is acute and she is frightened and distressed at her short but bleak future. She is in some physical pain but more importantly she is in constant dread of the day when she will no longer be able to swallow or breathe. She wishes to be spared the suffering and loss of dignity which is all that is left of life for her. She wishes to control when and how she dies. But for the disease she would be able to take her own life. The disease has, however, deprived her of the ability to commit suicide. Her solicitor explained in an affidavit that her wishes are that her husband should assist her in committing suicide. The agreed statement of facts and issues states:

> 'The disease prevents her from committing suicide unaided. Thus she wishes her husband to assist her and he has agreed, if the DPP will undertake not to prosecute him. This proviso arises because absent such undertaking the appellant's husband will be liable to prosecution and imprisonment for the offence of assisting suicide under s 2(1) of the Suicide Act 1961.'

There is, however, no information available as to how it is proposed that her husband would assist her suicide. Moreover, there is no medical evidence showing what Mrs Pretty herself can do to carry out her wish. It has, however, been emphasised on her behalf that the final act of suicide will be carried through by her.

[45]

The 1961 Act provides as follows:

> '1. The rule of law whereby it is a crime for a person to commit suicide is hereby abrogated.
>
> '2.—(1) A person who aids, abets, counsels or procures the suicide of

> another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.
>
> '(2) If on the trial of an indictment for murder or manslaughter it is proved that the accused aided, abetted, counselled or procured the suicide of the person in question, the jury may find him guilty of that offence …
>
> '(4) No proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions.'

Counsel explained that the assistance to be given by Mr Pretty to his wife would amount to aiding and abetting within the meaning of s 2(1) but that Mr Pretty's conduct would not extend to counselling and procuring suicide.

[46]

The legal officer of Liberty asked the Director of Public Prosecutions to give an undertaking not to prosecute Mr Pretty if he assists in the suicide of his

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wife. The letter described Mrs Pretty's condition and explained what she wanted to do and made a number of legal submissions. It ended by saying:

> 'We very much hope you can provide us with the undertaking we seek, in view of our client's illness and the distress she is suffering we would be grateful if you would let us have a reply within 7 days of the date of this letter.'

On 8 August 2001 the Director replied:

> 'I should like first to express my deepest sympathy to Mrs Pretty and to her family for the terrible suffering that she and they are having to bear. You have asked for an undertaking that the Director would not consent to a prosecution of Mr Pretty under section 2 of the Suicide Act, 1961, were he to assist his wife to commit suicide. You have made a number of points in relation to the European Convention on Human Rights; the Human Rights Act, 1998; and the Code for Crown Prosecutors. I have read your comments with care. Successive Directors—and Attorneys General—have explained that they will not grant immunities that condone, require, or purport to authorise or permit future commission of any criminal offence, no matter how exceptional the circumstances. I must therefore advise you that the Director cannot provide the undertaking that you seek. Whilst I believe that I have no choice but to refuse your request, I deeply regret any further suffering that this refusal may cause.'

Mrs Pretty issued an application for judicial review of the decision by the Director not to

give the undertaking.

[47]

The principal relief sought by Mrs Pretty was a declaration that the Director had acted unlawfully in refusing to give an undertaking that he would not consent to a prosecution of her husband for an offence under s 2(1) of the 1961 Act if he should assist her in committing suicide. The Secretary of State was joined as an interested party because Mrs Pretty also sought in the alternative a declaration that s 2(1) of the 1961 Act is incompatible with s 4 of the 1998 Act.

II. THE JUDICIAL REVIEW PROCEEDINGS

[48]

Permission to apply for judicial review was granted. On 18 October 2001 the Divisional Court (Tuckey and Hale LJJ and Silber J) in a detailed judgment of the court dismissed the application ([2001] EWHC Admin 788, [2001] All ER (D) 251 (Oct)). The Divisional Court held: (i) the Director has no power to grant the undertaking sought; (ii) in any event, a decision of the Director to grant or refuse to grant the undertaking would not be amenable to judicial review; (iii) s 2(1) of the 1961 Act is not incompatible with the convention.

[49]

After giving judgment, the Divisional Court certified three points of general public importance:

> '(1) Does the Director of Public Prosecutions have power under s 2(4) of the Suicide Act 1961 or otherwise to undertake not to consent to prosecute in advance of the relevant events occurring? (2) If so, was he required in this case to undertake not to prosecute the appellant's husband, Mr Pretty, if he were to assist his wife to commit suicide having regard to her rights under arts 2, 3, 8, 9, and 14 of the convention and his obligation to act compatibly with the convention? (3) If not, is s 2(1) of the 1961 Act incompatible with arts 2, 3, 8, 9, and/or 14 of the convention?'

at 23

[50]

An Appeal Committee granted leave to appeal. Given the circumstances the appeal was expedited. Subject to three points the shape of the case is very much as it was presented to the Divisional Court. There has inevitably been some deterioration of Mrs Pretty's condition. Secondly, there was a dispute at the hearing of the appeal before the House as to whether Mrs Pretty can correctly be described as vulnerable. It is not possible for the House to express any view on this point. In the context of euthanasia and assisted suicide the report of the House of Lords Select Committee on Medical Ethics (HL Paper (1993–94) 21-I) there is a relevant passage regarding the class of vulnerable people. Among its reasons for not recommending a relaxation of the existing law regarding euthanasia and

assisted suicide, the select committee observed (p 49 (para 239)):

> 'We are also concerned that vulnerable people—the elderly, lonely, sick or distressed—would feel pressure, whether real or imagined, to request early death. We accept that, for the most part, requests resulting from such pressure or from remediable depressive illness would be identified as such by doctors and managed appropriately. Nevertheless we believe that the message which society sends to vulnerable and disadvantaged people should not, however obliquely, encourage them to seek death, but should assure them of our care and support in life.'

While Mrs Pretty may or may not be vulnerable, there is in the context of euthanasia and assisted suicide undoubtedly a class of vulnerable people to be considered. This is important because the law must be stated for the generality of cases. The third point was a lack of agreement on what palliative care is available to Mrs Pretty. She apparently visits a hospice where she receives some medical and nursing care. In the final stages of the illness she will reside in the hospice and may, in the discretion of a consultant, be sedated. That is all we know. I will return to this point at the end of this judgment.

[51]

On the hearing of the appeal the House heard oral submissions on behalf of Mrs Pretty, the Director and the Home Secretary and received written submissions from a Roman Catholic Archbishop as well as the Medical Ethics Alliance, the Society for the Protection of Unborn Children and Alert. I wish to pay tribute to the quality of the arguments placed before the House.

III. THE FRAMEWORK OF THE CASE

[52]

It is necessary to explain two preliminary matters. First, terminally ill patients may sometimes be incompetent to take decisions. This is not such a case. Mrs Pretty is fully competent to take decisions about her personal autonomy and in particular about the question whether she wants to commit suicide and when and how. Secondly, there is a distinction between voluntary euthanasia and assisted suicide. Glanville Williams Textbook of Criminal Law (2nd edn, 1983) p 580 illustrates the difference. If a doctor, to speed the dying of his patient, injects poison with the patient's consent, this is voluntary euthanasia and murder. If the doctor places poison by the patient's side, and the patient takes it this will be assisted suicide and amount to the commission of the offence under s 2(1) of the 1961 Act. The arguments before the House are concerned with cases falling in the latter category. But to some extent the arguments about the two concepts are intertwined.

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IV. THE SCHEME OF THIS JUDGMENT

[53]

Reversing the order of considering the issues adopted by the Divisional Court, I will first

examine whether Mrs Pretty has a right to die with the assistance of her husband (or anybody else) enforceable against the state under the convention. In other words, I will consider whether any of the articles of the convention relied on require the state to render lawful assisted suicide by a person in Mrs Pretty's position. It will, however, be necessary to sketch the contextual scene before I consider the specific articles. Thereafter, I will briefly consider the position of the Director in regard to requests for undertakings not to prosecute made in advance of the commission of the criminal act.

## V. THE CONTEXTUAL SCENE

### Controversial questions

[54]

The subject of euthanasia and assisted suicide have been deeply controversial long before the adoption of the Universal Declaration of Human Rights in 1948 (Paris, 10 December 1948; UN TS 2 (1949); Cmd 7226), which was followed two years later by the convention. The arguments and counter-arguments have ranged widely. There is a conviction that human life is sacred and that the corollary is that euthanasia and assisted suicide are always wrong. This view is supported by the Roman Catholic Church, Islam and other religions. There is also a secular view, shared sometimes by atheists and agnostics, that human life is sacred. On the other side, there are many millions who do not hold these beliefs. For many the personal autonomy of individuals is predominant. They would argue that it is the moral right of individuals to have a say over the time and manner of their death. On the other hand, there are utilitarian arguments to the contrary effect. The terminally ill and those suffering great pain from incurable illnesses are often vulnerable. And not all families, whose interests are at stake, are wholly unselfish and loving. There is a risk that assisted suicide may be abused in the sense that such people may be persuaded that they want to die or that they ought to want to die. Another strand is that, when one knows the genuine wish of a terminally ill patient to die, they should not be forced against their will to endure a life they no longer wish to endure. Such views are countered by those who say it is a slippery slope or the thin end of the wedge. It is also argued that euthanasia and assisted suicide, under medical supervision, will undermine the trust between doctors and patients. It is said that protective safeguards are unworkable. The countervailing contentions of moral philosophers, medical experts and ordinary people are endless. The literature is vast: see for a sample of the range of views: Glanville Williams The Sanctity of Life and the Criminal Law (1958) ch 8, Ronald Dworkin Life's Dominion: An Argument About Abortion and Euthanasia (1993) ch 7, John Keown (ed) Euthanasia Examined: Ethical, Clinical and Legal Perspectives (1995), Otlowski Voluntary Euthanasia and the Common Law (1997) chs 5–8, Mary Warnock An Intelligent Person's Guide to Ethics (1998) ch 1. It is not for us, in this case, to express a view on these arguments. But it is of great importance to note that these are ancient questions on which millions in the past have taken diametrically opposite views and still do.

### The relevance of existing English law

[55]

Given the fact that Mrs Pretty's arguments are founded on the convention, the existing

position under English law, even if in large measure very similar to

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that under other European legal systems, cannot be decisive. But it demonstrates how controversial the subject of the legalisation of euthanasia and assisted suicide is in Europe. In outline the position in England is as follows. By virtue of legislation suicide is no longer an offence and a suicide pact may result in a verdict of manslaughter. Mercy killing in the form of euthanasia is murder and assisted suicide is a statutory offence punishable by 14 years' imprisonment. A competent patient cannot be compelled to undergo life-saving treatment (St George's Healthcare NHS Trust v S, R v Collins, ex p S [1998] 3 All ER 673, [1999] Fam 26). Under the double effect principle medical treatment may be administered to a terminally ill person to alleviate pain although it may hasten death (Airedale NHS Trust v Bland [1993] 1 All ER 821 at 868, [1993] AC 789 at 867 per Lord Goff of Chieveley). This principle entails a distinction between foreseeing an outcome and intending it (see also Anthony Arlidge 'The trial of Dr David Moor' [2000] Crim LR 31). The case of Bland involved a further step: the House of Lords held that under judicial control it was permissible to cease to take active steps to keep a person in a permanent vegetative state alive. It involved the notion of a distinction between doctors killing a patient and letting him die (see also NHS Trust A v H [2001] 2 FLR 501). These are at present the only inroads on the sanctity of life principle in English law. In this corner of the law England is not an island on its own. It is true that since the Alkmaar decision of the Supreme Court on 27 November 1984 (Alkmaar NJ (1984) No 106, 451) the Dutch courts, relying on the principle of 'noodtoestand' (necessity), relaxed the prohibition on euthanasia and assisted suicide. The perceived necessity was the conflict between a doctor's respect for life and his duty to assist a patient suffering unbearably. The Dutch courts reasoned that it is necessary to be guided by responsible medical opinion. It is important to note that this line of decisions is not based on the convention. See also Otlowski pp 391–450. Earlier this year the Parliament of the Netherlands enacted a statute, viz the Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2001, which formalises a relaxation of the law prohibiting euthanasia and assisted suicide previously by judicial decision. Both the case law and the 2001 statute only permit euthanasia and doctor-assisted suicide under a regime of ascertaining the wishes of the patient and with considerable medical supervision. It is to be noted, however, that the United Nations Human Rights Committee in a report dated 27 August 2001 expressed serious concerns about the operation of the system (CCPR/CO/72/NET, para 5: see also a review of other concerns in Keown, ch 16). The other member states of the Council of Europe have not legalised euthanasia or assisted suicide: compare, however, the position in Switzerland (see Lesley Vickers 'Assisted dying and the laws of three European countries' (1997) 147 NLJ 610). Furthermore, the Parliamentary Assembly of the Council of Europe (the sponsoring body for the convention) has adopted Recommendation 1418 (1999) on the protection of the human rights and dignity of the terminally ill and the dying. In para 9(c), it recommended that the Committee of Ministers should encourage the member states of the council to respect and protect the dignity of terminally ill or dying persons in all respects, by (among other things) 'upholding the prohibition against intentionally taking the life of terminally ill or dying persons', while (at p 4):

> '… ii. recognising that a terminally ill or dying person's wish to die never

> constitutes any legal claim to die at the hands of another person;
>
> 'iii. recognising that a terminally ill or dying person's wish to die cannot of itself constitute a legal justification to carry out actions intended to bring about death.'

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Paragraph 9(c)(iii) plainly covers assisted suicide. This recommendation is testimony of prevailing public opinion in member states. Given the fact that Mrs Pretty's case is based on the convention I have concentrated on European developments. It is, however, noteworthy that in the United States and Canada arguments similar to that of Mrs Pretty ultimately failed (Vacco v Quill (1997) 521 US 793, Washington v Glucksberg (1997) 521 US 702, Rodriguez v A-G of Canada [1994] 2 LRC 136).

The reach of human rights texts

[56]

The human rights movement evolved to protect fundamental rights of individuals either universally or regionally. The theme of the declaration of 1948 was universal. It involved a common conception of human rights capable of commanding wide acceptance throughout the world despite huge differences between countries in culture, in religion, and in political systems (Johnson and Symonides The Universal Declaration of Human Rights: A History of its Creation and Implementation: 1948–1998 (1998) p 39, Glendon A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights (2001) p 176). Any proposal that the Universal Declaration should require states to guarantee a right to euthanasia or assisted suicide (as opposed to permitting states by democratic institutions so to provide) would have been doomed to failure. The aspirational text of the Universal Declaration was the point of departure and inspiration of the convention which opened for signature in 1950. It is to be noted, however, that the convention embodied in some respects a narrower view of human rights than the Universal Declaration. The framers of the convention required a shorter and uncontroversial text which would secure general acceptance among European nations. Thus the convention contains, unlike the Universal Declaration, no guarantees of economic, social and cultural rights. A further illustration relates to the guarantees of equality in the two texts. The guarantee in the Universal Declaration is free-standing and comprehensive (see art 7). In the convention the provision is parasitic: it is linked with other convention rights (art 14). The language of the convention is often open-textured. In 1950 the Lord Chancellor observed:

> 'Vague and indefinite terms have been used just because they were vague and indefinite, so that all parties, hoping and expecting that these terms will be construed according to their separate points of view, could be induced to sign them.' (See Cabinet Office memorandum CAB 130/64.)

Sir Hartley Shawcross QC, the Attorney General, attributed the lack of clarity in the drafting to a compromise to accommodate the different legal systems involved (see Geoffrey Marston 'The United Kingdom's Part in the Preparation of the European Convention on Human Rights' (1993) 42 ICLQ 796 at 818, 819). The generality of the

language permits adaptation of the convention to modern conditions. It is also, however, necessary to take into account that in the field of fundamental beliefs the European Court of Human Rights does not readily adopt a creative role contrary to a European consensus, or virtual consensus. The fact is that among the 41 member states—north, south, east and west—there are deep cultural and religious differences in regard to euthanasia and assisted suicide. The legalisation of euthanasia and assisted suicide as adopted in the Netherlands would be unacceptable to predominantly Roman Catholic countries in Europe. The idea that the convention requires states to render lawful euthanasia and assisted suicide (as opposed to allowing democratically elected legislatures to adopt measures to that effect) must therefore be approached with scepticism.

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That does not involve support for the proposition that one must go back to the original intent of the convention. On the contrary, approaching the convention as a living instrument, the fact is that an interpretation requiring states to legalise euthanasia and assisted suicide would not only be enormously controversial but profoundly unacceptable to the peoples of many member states.

Policy grounds

[57]

If s 2 of the 1961 Act is held to be incompatible with the convention, a right to commit assisted suicide would not be doctor-assisted and would not be subject to safeguards introduced in the Netherlands. In a valuable essay Professor Michael Freeman trenchantly observed: 'A repeal of Section 2 of the Suicide Act 1961, without more, would not be rational policy-making. We would need a “Death with Dignity” Act to fill the lacuna.' (See 'Death, Dying and the Human Rights Act 1998' (1999) 52 CLP 218 at 237.) That must be right. In our parliamentary democracy, and I apprehend in many member states of the Council of Europe, such a fundamental change cannot be brought about by judicial creativity. If it is to be considered at all, it requires a detailed and effective regulatory proposal. In these circumstances it is difficult to see how a process of interpretation of convention rights can yield a result with all the necessary in-built protections. Essentially, it must be a matter for democratic debate and decision-making by legislatures.

VI. THE SPECIFIC ARTICLES

[58]

In combination the contextual factors which I have alluded to justify an initial disbelief that any of the articles of the convention could possibly bear the strong meaning for which counsel for Mrs Pretty must argue. Despite his incisive arguments the position is in my opinion clear. None of the articles can bear the interpretation put forward.

Right to life

[59]

Article 2 provides:

> '1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> '2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.'

Counsel for Mrs Pretty argued that art 2 and in particular its first sentence acknowledges that it is for the individual to choose whether to live or die and that it protects her right of self-determination in relation to issues of life and death. This interpretation is not sustainable. The purpose of art 2(1) is clear. It enunciates the principle of the sanctity of life and provides a guarantee that no individual 'shall be deprived of life' by means of intentional human intervention. The interpretation now put forward is the exact opposite, viz a right of Mrs Pretty to end her life by means of intentional human intervention. Nothing in the article or the jurisprudence of the European Court of Human Rights can assist Mrs Pretty's case on this article.

at 28
Prohibition of torture

[60]

Article 3 provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' The core of counsel's argument is that under art 3 the state's obligations are to take effective steps to ensure that no one shall be subjected to inhuman or degrading treatment. For my part art 3 is not engaged. The word 'treatment' must take its colour from the context in which it appears. While I would not wish to give a narrow interpretation to what may constitute degrading treatment, the concept appears singularly inapt to convey the idea that the state must guarantee to individuals a right to die with the deliberate assistance of third parties. So radical a step, infringing the sanctity of life principle, would have required far more explicit wording. But counsel argues that there is support for his argument to be found in the jurisprudence of the European Court of Human Rights on the 'positive obligations' of a state to render effective the protection of art 3. For this proposition he cites the decision of the European Court of Human Rights in D v UK (1997) 2 BHRC 273. The case concerned the intended deportation of an individual in the final stages of an incurable disease to St Kitts where there would not be adequate treatment for the disease. The European Court of Human Rights held that in the exceptional circumstances of the case the implementation of the decision to remove the individual to St Kitts would amount to inhuman treatment by the United Kingdom. Unlike D v UK the present case does not involve any positive action (comparable to the

intended deportation) nor is there any risk of a failure to treat her properly. Instead the complaint is that the state is guilty of a failure to repeal s 2(1) of the 1961 Act. The present case plainly does not involve 'inhuman or degrading treatment'.

Right to respect for private life and family

[61]

Article 8 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 interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

Counsel submitted that this article explicitly recognises the principle of the personal autonomy of every individual. He argues that this principle necessarily involves a guarantee as against the state of the right to choose when and how to die. None of the decisions cited in regard to art 8 assist this argument. It must fail on the ground that the guarantee under art 8 prohibits interference with the way in which an individual leads his life and it does not relate to the manner in which he wishes to die.

[62]

If I had been of the view that art 8 was engaged, I would have held (in agreement with the Divisional Court) that the interference with the guarantee was justified. There was a submission to the contrary based on the argument that the scope of s 2(1) is disproportionate to its aim. This contention was founded on the supposition that Mrs Pretty and others in her position are not vulnerable. It is a sufficient answer that there is a broad class of persons presently protected by s 2 who are vulnerable. It was therefore well within the range of discretion of

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Parliament to strike the balance between the interests of the community and the rights of individuals in the way reflected in s 2(1).

Freedom of thought, conscience and religion

[63]

Article 9 provides:

> '1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom,

> either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> '2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

Counsel submitted that Mrs Pretty is entitled to manifest her belief in assisted suicide by committing it. This cannot be right. This article was never intended to give individuals a right to perform any acts in pursuance of whatever beliefs they may hold, eg to attack places where experiments are conducted on animals. The article does not yield support for the specific proposition for which it is invoked. In any event, for the reasons already discussed, s 2 is a legitimate, rational and proportionate response to the wider problem of vulnerable people who would otherwise feel compelled to commit suicide.

Prohibition of discrimination

[64]

Article 14 provides:

> 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

Counsel submits that Mrs Pretty is in effect treated less favourably than those who are physically capable of ending their lives. The Divisional Court held that art 14 is not engaged. The alleged discrimination can only be established if the facts of the case fall within arts 2, 3, 8 or 9 (Botta v Italy (1998) 4 BHRC 81 at 90 (para 39)). They do not. This is a sufficient reason to reject this argument. But there is a more fundamental reason. The condition of terminally ill individuals, like Mrs Pretty, will vary. The majority will be vulnerable. It is the vulnerability of the class of persons which provides the rationale for making the aiding and abetting of suicide an offence under s 2(1) of the 1961 Act. A class of individuals is protected by s 2(1) because they are in need of protection. The statutory provision does not therefore treat individuals in a discriminatory manner. There is no unequal treatment before the law. In any event, for reasons already given, s 2(1) is fully justified.

VII. THE POSITION OF THE DIRECTOR

[65]

This issue centres on the nature of the Director's discretion to grant or refuse his consent to criminal proceedings under s 2(1) of the 1961 Act. This is a provision of primary legislation. The discretion under s 2(4) is contained in a criminal statute. It is concerned

with the deep-rooted sanctity of life principle. In this context it is plainly beyond the power conferred by s 2(4) for the Director to

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choose not to enforce s 2(1) or to disapply it. These propositions are self-evident and beyond reasonable challenge. The Director may not under s 2(4) exercise his discretion to stop all prosecutions under s 2(1). It follows that he may only exercise his discretion, for or against a prosecution, in relation to the circumstances of a specific prosecution. His discretion can therefore only be exercised in respect of past events giving rise to a suspicion that a crime under s 2(1) has been committed. And then the exercise of this discretion will take into account whether there is a realistic prospect of securing a conviction and whether a prosecution would be in the public interest. To hold that s 2(4) empowers the Director to give the undertaking sought in this case is not justified by the statutory language, and would be contrary to the manifest limited purpose of s 2(4). On this point I am in complete agreement with the careful judgment of the Divisional Court.

[66]

It is, however, necessary to consider whether, apart from the terms of the s 2(4) of the 1961 Act, the Director has any power to undertake in advance not to bring criminal proceedings in respect of a contemplated course of action. In agreement with the Divisional Court I would answer this question No. But I would qualify the thrust of the valuable judgment of the Divisional Court in one respect. The fact that there is a duty under s 10 of the Prosecution of Offences Act 1985 on the Director to issue a general code for Crown Prosecutors does not necessarily mean that he may not ever, in his absolute discretion, give guidance as to how the discretion will be exercised in regard to particular offences. It is important to bear in mind what is under consideration, viz the width of the powers of the Director. One should not be over-prescriptive on this subject. An example from Scotland was given of the Crown Agent stating that no proceedings for a contravention of s 6(1)(a) of the Road Traffic Act 1972 would be instituted on the basis of a breath alcohol reading of less than 40 mg. But I envisage that the occasions on which such statements would be appropriate and serve the public interest would be rare. Subject to this narrow qualification I would accept as sound the policy of the Director never to announce in advance, whether he will or will not bring criminal proceedings. Certainly, it is beyond his power to indicate, before the commission of a particular crime, that he will or will not prosecute if it is committed. But I regard this point as a diversion from the issues before the House. The response of the Director in this case cannot be faulted.

[67]

There was some debate about the possibility of judicial review of a decision by the Director to refuse or grant consent to a prosecution. If the Director refuses consent, the only remedy is judicial review. On the other hand, if he grants consent a defendant can raise any complaint in the criminal trial or on appeal. Since satellite litigation should be avoided in such cases, I would stand by the rule in R v DPP, ex p Kebeline, R v DPP, ex p Rechachi [1999] 4 All ER 801, [2000] 2 AC 326, that, absent dishonesty, mala fides or an exceptional circumstance, judicial review is not available in such cases.

VIII. CONCLUSION

[68]

The logic of the convention does not justify the conclusion that the House must rule that a state is obliged to legalise assisted suicide. It does not require the state to repeal a provision such as s 2(1) of the 1961 Act. On the other hand, it is open to a democratic legislature to introduce such a measure. Our Parliament, if so minded, may therefore repeal s 2(1) and put in its place a regulated system for assisted suicide (presumably doctor-assisted) with appropriate safeguards.

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IX. PALLIATIVE CARE

[69]

The report of the House of Lords Select Committee on Medical Ethics stated in 1994 that in the United Kingdom palliative care has been developed to a high standard by the hospice movement (p 49 (para 239)). The uncertainty in this case about the standard of palliative care which Mrs Pretty is receiving and will be entitled to receive in the last stages of her illness prompts me to express the hope that all is being done for her, and will be done, to make a little more tolerable what remains of her life.

X. DISPOSAL

[70]

In this sad case the Human Rights Act 1998 does not avail Mrs Pretty. For the reasons I have given, as well as the reasons given by Lord Bingham of Cornhill and Lord Hope of Craighead, the appeal must be dismissed.

LORD HOPE OF CRAIGHEAD.

[71]

My Lords, Mrs Pretty is burdened with a misfortune which has attracted widespread sympathy. She is suffering from a terminal illness which she wishes to bring to an end at a time of her own choosing by committing suicide. But she is unable to commit that act as the same illness has deprived of her of the ability to do it without help. The fact that her illness has driven her to contemplate suicide might be thought to indicate a lack of judgment on her part. But I believe that the decision which she has taken in such extreme circumstances ought not to be criticised. It has been stressed she is well able to make rational decisions as to her own future. I would accept her assurance that she has reached the decision to end her life of her own free will and that she has not been subjected to outside pressure of any kind.

[72]

Important questions of medical ethics and of morality have been raised by her request

that her husband should be allowed to help her to end her own life. They are the subject of detailed comment in the helpful written submissions which have been submitted by the interveners in this appeal. They are of great interest to society. But they are not the questions which have brought this matter before the court. The questions which your Lordships have to decide are questions of law. Mrs Pretty has invoked the Human Rights Act 1998. She is entitled to know where the law now stands on the issue of assisted suicide.

[73]

The basic framework within which Mr Havers QC developed his arguments is clear. The act of suicide itself, for long a common law crime in English law, is no longer criminal (see Blackstone Commentaries on the Laws of England (1769) vol 4, ch 14, p 189). Section 1 of the Suicide Act 1961 removed it from the criminal law. This means that a person who attempts to commit suicide but survives can no longer be prosecuted. But those who aid, abet, counsel or procure the suicide of another, or an attempt by another, to commit suicide commit an offence. Section 2(1) of the 1961 Act provides that they shall be liable on conviction to imprisonment for a term not exceeding 14 years. That is the sanction which would confront Mr Pretty if in any way he were to help, or attempt to help, his wife to end her life.

[74]

Proceedings for an offence under that section cannot be brought except by or with the consent of the Director of Public Prosecutions (the Director) (s 2(4)). So Mrs Pretty has asked him to undertake that if Mr Pretty assists her to commit suicide he will not be prosecuted. The Director says that he is unable to give the undertaking which has been sought. The argument has therefore focused on Mrs Pretty's rights under the 1998 Act and on the powers of the Director. It proceeds in this way. Firstly, it is said that the Director has power to give the

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undertaking which has been sought. Second, there is the fact that s 6(1) of the 1998 Act makes it unlawful for a public authority to act in a way which is incompatible with a convention right. So the argument asserts that the Director is obliged to give the undertaking, because to withhold it would be incompatible with Mrs Pretty's convention rights. Third, it is said that if the Director does not have power to give the undertaking, s 2(1) of the 1961 Act is incompatible with her convention rights as it imposes a blanket and indiscriminate ban on all assisted suicides.

Section 6(1) of the Human Rights Act 1998

[75]

Had it not been for the 1998 Act, Mrs Pretty's case that the Director was obliged to give the undertaking would have been unarguable. Section 2(4) of the 1961 Act leaves no room for doubt on this point. It leaves decisions as to whether or not a contravention of s 2(1) of that Act should be prosecuted to the discretion of the Director. But the Director is a public authority for the purposes of s 6(1) of the 1998 Act. It is unlawful for him to act

in a way which is incompatible with a convention right. Section 6(6) provides that 'An act' for this purpose includes a failure to act. A decision as to whether or not to prosecute has been held to be an act for the purposes of s 57(2) of the Scotland Act 1998 (Brown v Stott (Procurator Fiscal, Dunfermline) [2001] 2 All ER 97, [2001] 2 WLR 817). I see no reason why the word 'An act' in s 6(1) of the 1998 Act, which applies throughout the United Kingdom, should be construed differently. I would hold that a decision by the Director whether or not to prosecute is an act for the purposes of that subsection.

[76]

Mr Havers seeks to apply s 6(1) to the refusal of the Director to give an undertaking that he would not prosecute Mr Pretty. But in my opinion the words 'An act', construed with the benefit of s 6(6), do not require a public authority to do something which it has no power to do. A refusal by a public authority to do something which it has no power to do is not a failure to act. A public authority can only act within its powers. Section 6(1) is concerned with acts which are otherwise lawful but are made unlawful by the 1998 Act on convention grounds. The Director cannot be held to have acted unlawfully within the meaning of s 6(1) of the 1998 Act when he declined to give the undertaking unless it can be demonstrated that the undertaking was one that he had power to give.

[77]

In R v DPP, ex p Kebeline, R v DPP, ex p Rechachi [1999] 4 All ER 801, [2000] 2 AC 326 it was held that a decision by the Director to consent to a prosecution was not amenable to judicial review, in the absence of dishonesty, mala fides or an exceptional circumstance. I would approach questions about a refusal by the Director to give an undertaking not to prosecute in the same way. But a sound rule must not be applied so rigidly that it becomes a denial of justice. It is important to observe the assumptions on which the rule that was described in that case by Lord Steyn ([1999] 4 All ER 801 at 835, [2000] 2 AC 326 at 371) was based. They were that to allow challenges to be made by means of the judicial review process would open the door to delay in the conduct of criminal proceedings, and that the challenges could and should take place in the criminal trial or on appeal.

[78]

The argument in this case assumes that unless the undertaking is given Mr Pretty will not act to help Mrs Pretty to commit suicide. If the undertaking is not given there will be nothing to prosecute. We are not dealing in this case with the straightforward situation in which a person seeks an assurance after the event that he will not be prosecuted. So it is no answer for Mrs Pretty to be told that the matter should be dealt with at a criminal trial or on appeal. There will be no



criminal trial in which the issue as to whether the Director is acting compatibly with Mrs Pretty's convention rights can be tested. In my opinion it is open to her to raise the issue by judicial review in these exceptional circumstances.

The Director's powers

[79]

The question whether or not a law officer (I include in that expression the Director as well as the government law officers) should or should not consent to a prosecution is one which the judiciary must approach with caution and with due deference. Issues of policy may well be involved, and they should be left to the government law officers to answer for in Parliament. The issues of fact will be involved, and they may not be suitable for discussion in open court before trial. In practice therefore our system of public prosecution depends to a large extent on the integrity and judgment of the public prosecutor. He is likely to be in the best position to judge what is in the public interest. His judgment must be respected by the judiciary. It is against that background that I approach the question whether the Director has power to give the undertaking which has been sought.

[80]

It is important to identify precisely what it is that is being sought from the Director. He is not being asked simply for a statement about the policy which he will follow in cases of assisted suicide. If that was all that was being asked for, I would not regard it as beyond his powers to make the statement. Mr Perry has submitted that he has no such power, but I would not accept that argument. In my opinion the Director is entitled to form a policy as to the criteria which he will apply when he is exercising his discretion under s 2(4) of the 1961 Act. If he has such a policy, it seems to me to follow that he is entitled to promulgate it. I would hold that these matters lie entirely within the scope of the discretion which has been given to him by the Act.

[81]

Some guidance is to be found in the practice which is followed in Scotland in the exercise of his common law powers by the Lord Advocate. A recent example, following the decision of the Court of Session in Law Hospital NHS Trust v Lord Advocate 1996 SLT 848, is to be found in his statement of policy regarding prosecutions following the withdrawal of life sustaining treatment from patients in a permanent or persistent vegetative state (at 860, 867). Another is the statement issued in September 1983 by the Crown Agent on behalf of the Lord Advocate, following a statement to the same effect issued on 25 March 1983 by the Home Office (Home Office circular 46/1983), as to the policy which would be followed in the prosecution of drivers for drink-driving offences based on evidence produced by a breath testing machine (see Lockhart v Deighan 1985 SLT 549). The Lord Advocate has not issued a statement as to his policy regarding the prosecution of assisted suicide, which in Scotland is a common law crime. He would have power to do so if he thought that in the public interest this was appropriate.

[82]

But I do not see how the Director could be compelled to issue a statement of policy. In Scotland the question whether such statements should be issued are regarded as being entirely a matter for the Lord Advocate. It has never been suggested that he could be ordered to do this by the court. But in any event it is not as a statement of policy that the undertaking has been sought. What Mrs Pretty seeks is an undertaking, before the event

occurs, that if her husband helps her to commit suicide he will not be prosecuted. I am not aware of any case where the Lord Advocate has given an undertaking of that kind. It is not his function to permit individuals to commit acts which the law treats as criminal.

[83]

Mrs Pretty contends that the Director is obliged to give the undertaking because, if he were to decline to give it, he would be acting incompatibly with her

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convention rights. As I see it, this argument raises two distinct issues. The first is whether any of Mrs Pretty's convention rights are engaged at all in this case. Unless it can be shown that the Director's refusal is incompatible with at least one of them, the argument that s 6(1) of the 1998 Act makes it unlawful for him to refuse the undertaking disappears. The second is whether, if Mrs Pretty's convention rights are engaged, the undertaking which she has sought is one which the Director is obliged to give to her. I have already indicated that this raises difficult issues of both fact and policy. I shall deal first with Mrs Pretty's convention rights.

The convention rights

[84]

Mr Havers submitted that Mrs Pretty has a convention right to the assistance of her husband in committing suicide. He was at pains to point out that her case under the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (as set out in Sch 1 to the 1998 Act) was not that it gave her a right to die. She was asserting a right to control how and when she died as part of her right to life, without being discriminated against on account of her physical disability. She was also asserting a right of self-determination. She had made up her own mind about the course which she wished to follow to end her life. She would, but for her disability, have intended to follow that course without seeking assistance from anybody.

[85]

As I said earlier, it is not for us to form a judgment on the ethical or moral issues which these submissions have raised. That they have a part to play in the making of our laws is not in doubt (see the report of the House of Lords Select Committee on Medical Ethics (HL Paper (1993–94) 21-I)). The convention too is the product of a broad consensus of international opinion about the core values which demand respect for human life and human dignity. It is against that background that we must answer the question which she has raised, which is a question of law. It is whether the articles of the convention on which she relies confer the rights she needs to demonstrate if she is to make good her argument that the Director's refusal to give the undertaking is unlawful under s 6(1) of the 1998 Act. We must pay close attention to the words used in the convention and, where appropriate, to the jurisprudence of the European Court of Human Rights. Throughout, we must bear in mind that the rights which are in question are rights which the individual has against the state. They do not exist in the abstract. Their function is to

control the actions of the state in its relationship with the individual.

(a) Article 2

[86]

The short point here is whether the Director's refusal to give the undertaking is incompatible with the first sentence of this article. It provides that everyone's right to life 'shall be protected by law'. The remaining parts of the article deal with the circumstances in which a person may be deprived of life. They plainly have nothing to do with Mrs Pretty's dispute with the Director.

[87]

It is important to observe both what the sentence says and what it does not say. The right to which it refers is the right to life. But it does not create a right to life. The right to life is assumed to be inherent in the human condition which we all share. Nor does it create a right to self-determination. It does not say that every person has the right to choose how or when to die. Nor does it say that the individual has a right to choose death rather than life. What the first sentence does—and all it does—is to state that the right to life must be protected

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by law. This protection operates both negatively and positively. It enjoins the state to refrain from the intentional and unlawful taking of life. It also enjoins the state to safeguard lives (Osman v UK (1998) 5 BHRC 293 at 321 (para 115)). But the protection of human life is its sole object.

[88]

The Director's refusal to give the undertaking has not disturbed or interfered with Mrs Pretty's right to life. Nothing that he has done in response to her request is contrary to any law which is designed to safeguard life. On the contrary, his act in declining to give the undertaking to enable Mr Pretty to assist in his wife's suicide is compatible with the opening words of the second sentence of the article. It provides that no one shall be deprived of his life intentionally. As the Divisional Court pointed out ([2001] EWHC Admin 788 at [41], [2001] All ER (D) 251 (Oct) at [41]), for a third person to take active steps deliberately to deprive another of life, even with the consent of the person thus deprived, is forbidden by the article. The article is all about protecting life, not bringing it to an end. It is not possible to read it as obliging the state to allow someone to assist another person to commit suicide. I would hold that her claim does not engage any of her rights under this article.

(b) Article 3

[89]

The argument with regard to this article is that Mrs Pretty will inevitably suffer inhuman or degrading treatment if the disease is allowed to run its course. It is not suggested that

the Director has done anything which is directly prohibited by the article. The argument concentrates on its positive effects— what the state must do to ensure that the individual does not suffer treatment of the kind that it prohibited. The terminal stages of motor neurone disease provide the background. The inability to swallow leads to breathlessness and to the sensation of choking, as muscle power in the mouth and throat degenerates. But awareness and mental function is usually unimpaired. The patient can be expected to suffer increasing anxiety and mental anguish, as she succumbs to the symptoms of the disease. Death usually results from respiratory failure and pneumonia. Mrs Pretty says that by declining to give the undertaking the Director has taken a decision which will subject her to these tragic consequences. She says that he has subjected her to inhuman and degrading treatment within the meaning of the article.

[90]

The European Court of Human Rights has repeatedly said that art 3 prohibits torture or inhuman or degrading treatment or punishment in terms which are absolute (Chahal v UK (1996) 1 BHRC 405 at 424 (para 79), D v UK (1997) 2 BHRC 273 at 283–284 (paras 47, 49)). From this proposition two things follow. First, only serious ill treatment will be held to fall within the scope of the expression 'inhuman or degrading treatment or punishment'. The court said in A v UK (1998) 5 BHRC 137 at 141 (para 20) that ill treatment must attain a minimum level of severity if it is to fall within the scope of the article. It also said that the assessment of this minimum is relative, as it depends on all the circumstances of the case such as the nature and context of the treatment which is in issue. Second, although the absolute prohibition is not capable of modification on grounds of proportionality, issues of proportionality will arise where a positive obligation is implied. The jurisprudence of the European Court of Human Rights shows that where positive obligations arise they are not absolute. In Osman v UK (1998) 5 BHRC 293 at 321 (para 116) the court recognised that such obligations must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. This approach is consistent with that which the court takes where



other rights than those expressly stated are read into an article as implied rights (see Brown v Stott [2001] 2 All ER 97 at 129, [2001] 2 WLR 817 at 851). This makes it necessary to pay close attention to the question whether the act in question is one which is expressly prohibited or is based upon a positive obligation which is implied into the article.

[91]

As for the question whether the consequences of not giving the undertaking will attain the required minimum level of severity, the facts must be seen in their whole context. Mrs Pretty cannot be forced to accept medical treatment for her condition as it reaches the terminal stages, but it is relevant to her case to see what is on offer. In its Response to the Report of the Select Committee on Medical Ethics (Cm 2553 (1994)) the government stated (at p 2), in its comment on para 288 of the report of the select committee, that it would encourage the development of palliative care in all settings to ensure that patients received sensitive care and relief from pain and other distressing symptoms. Your Lordships were informed that nursing care and palliative treatment is

already being provided to Mrs Pretty and that it will continue to be available. The use of drugs such as opiates in the form of morphine may be helpful in the terminal stages in relieving the distress of breathlessness and the sensation of choking. It has not been possible in these proceedings to examine the facts in detail. But there is enough information available to us to cast serious doubt on the question whether the consequences of the refusal, taken as a whole in the context of the treatment which is available, attain the minimum level of inhuman or degrading treatment within the meaning of the article.

[92]

Then there is the nature of the Director's act. It is clear that he is not directly responsible for the disease or for its consequences. Nothing has been identified that he has done and should be restrained from doing in order to remove or alleviate these consequences. I would conclude that we are not dealing here with a case with an act which is expressly prohibited. The argument is that the article applies positively, as it requires the Director to do something to avoid the incompatibility. This raises the question whether the Director's refusal to give the undertaking is incompatible with art 3 because it is disproportionate.

[93]

Three matters fall to be considered where questions arise as to whether an interference with a convention right is proportionate. In De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, [1998] 3 WLR 675, Lord Clyde adopted the analysis of Gubbay CJ in Nyambirai v National Social Security Authority [1996] 1 LRC 64 drawing on jurisprudence from South Africa and Canada (see also Rodriguez v A-G of Canada [1994] 2 LRC 136 at 161 per Lamer CJ). The first is whether the objective which is sought to be achieved is sufficiently important to justify limiting the fundamental right. The second is whether the means chosen are rational, fair and not arbitrary. The third is whether the means used impair the right as minimally as is reasonably possible.

[94]

As to these issues, the following points seem to me to point conclusively in favour of the Director. First, there is the objective. The Director is entitled to regard the purpose of s 2(1) of the 1961 Act as being to protect the vulnerable from pressure to end their own lives. In its response to para 295 of the report of the select committee the government stated (at p 5) that it could see no basis for permitting assisted suicide as this would be open to abuse and would put the lives of the weak and vulnerable at risk. So the decriminalisation of attempted suicide in 1961 was accompanied by an unequivocal statement of the prohibition of acts calculated to end another person's life.

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[95]

Then there is the question whether the Director's refusal is rational, fair and not arbitrary. In my opinion he is entitled to take into account the nature of the act which he was asked

to sanction in this case. All he was told was that Mrs Pretty would be helped by her husband to commit suicide. Where, when and how this was to be done was not and probably cannot at this stage be specified. There is no suggestion that medical assistance will be available or that the act will be supervised by anybody. Sopinka J observed in Rodriguez' case (at 189) that the official position of various medical associations, including the British Medical Association, is against decriminalising assisted suicide. It is common knowledge that most members of the medical profession are opposed to any involvement in this activity. A clear distinction is preserved between the withdrawal of treatment and palliative care on the one hand and acts on the other whose sole purpose is to destroy life. Moreover, the margin between assisting suicide and euthanasia is so slender in Mrs Pretty's case as to be impossible to determine in the absence of a detailed account of the proposed act. All of this points to the conclusion that the Director is entitled to take the view that it is impracticable for him to give an undertaking in advance of the event that he will not prosecute.

[96]

Then there is the third issue, which is whether the means used to achieve the objective are proportionate. The object of s 2(1) of the 1961 Act is to avoid an abuse which would put the lives of the weak and vulnerable at risk. In this way it seeks to preserve life. I would be willing to give full weight to Mrs Pretty's assertion that she is not weak or vulnerable in this sense—that she has sufficient mental strength not to be vulnerable to pressure to commit suicide. I can appreciate her objection that vulnerability should not be imposed upon her simply because her physical condition prevents her from doing so. But this does not meet the Director's argument. It is not unreasonable for him to think that, if he were to sanction one act of assisted suicide, this might lead to requests from others less well equipped to stand up to the unscrupulous. Separating out the good from the bad would be an impossible task for him, as he lacks the resources that would be needed to conduct the exercise. He is entitled to think that the public interest is best served by holding the line against granting undertakings of this kind. In the present uncertain climate of public opinion, where there is no consensus in favour of assisted suicide and there are powerful religious and ethical arguments to the contrary, any change in the law which would make assisted suicide generally acceptable is best seen as a matter for Parliament.

[97]

I would hold therefore that the object which s 2(1) was designed to achieve struck the right balance between the interests of the individual and the public interest which seeks to protect the weak and vulnerable. Great weight must be attached to the state's interest in protecting the lives of its citizens. It was a proportionate response for Parliament to conclude that that interest could only be met by a complete prohibition on assisted suicide. I would also hold that, although the effect of the Director's decision that he had no power to give the undertaking is likely to be to expose Mrs Pretty to acute distress as she succumbs to her illness, his act cannot be said to be unfair or arbitrary or to have impaired her convention right more than is reasonably necessary. It was not disproportionate to the object of s 2(1).

(c) Articles 8 and 9

[98]

I take these two articles together, as they are both invoked in support of the same argument. This is that they confer a right to self-determination through

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the right to private life and the right to freedom of expression which prohibits a blanket ban on assisted suicide. The object of these articles is to protect the individual against arbitrary interference by the public authorities. They compel the state to abstain from acts which are incompatible with the convention rights. But, in addition to the negative undertaking, here too positive obligations may be implied into them (see X v Netherlands (1985) 8 EHRR 235 at 239–240 (para 23)).

[99]

The first question is whether these articles are engaged at all by Mrs Pretty's claim that she is entitled to her husband's assistance in committing suicide. Can her claim be said to be based on her right to respect for her private and family life, her home and her correspondence in art 8? Can it be said to be based on her right to freedom of thought, conscience and religion in art 9?

[100]

No authority has been cited in support of either proposition. The wording of the articles does not help either. Respect for a person's 'private life', which is the only part of art 8(1) that is in play here, relates to the way a person lives. The way she chooses to pass the closing moments of her life is part of the act of living, and she has a right to ask that this too must be respected. In that respect Mrs Pretty has a right of self-determination. In that sense, her private life is engaged even where in the face of a terminal illness she seeks to choose death rather than life. But it is an entirely different thing to imply into these words a positive obligation to give effect to her wish to end her own life by means of an assisted suicide. I think that to do so would be to stretch the meaning of the words too far.

[101]

A strained reading might have been appropriate if there was evidence of a consensus of international opinion in favour of assisted suicide. But there is none. As Sopinka J said in Rodriguez' case (at 176) no new consensus has emerged in society opposing the right of the state to regulate the involvement of others in exercising power over individuals ending their lives. The right to freedom of thought, conscience and religion includes the right to manifest one's religion or beliefs without interference save as provided for in art 9(2). But here again it strains the wording of the article too far to say it gives the person a right to do whatever her beliefs allow her to do. Yet that precisely is her claim under this article.

[102]

In any event, for the reasons already indicated, I would hold that the Director's refusal to give the undertaking was not disproportionate to the object of s 2(1), which is to avoid abuse and to protect the weak and the vulnerable.

(d) Article 14

[103]

This article prohibits discrimination in the enjoyment of the rights and freedoms set forth in the convention. These rights are to be secured without discrimination on any ground such as sex, race, colour and the various other grounds which are expressly mentioned in the article. The European Court of Human Rights has held that the right not to be discriminated against in the enjoyment of the rights guaranteed under the convention is violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different (Thlimmenos v Greece (2000) 9 BHRC 12 at 22 (para 44)).

[104]

Two issues arise here. The first is whether the article is engaged at all. Does it extend to the ground of discrimination on which Mrs Pretty founds her claim? The second is whether, if it does, she can point to any right or freedom which is engaged by the convention to which art 14 can be attached.

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[105]

As to the first point, it is clear that the list of grounds for discrimination set out in the article is not closed. This is made clear by the words 'such as' which precede the list. I would hold that the article is capable of extending to discrimination in the enjoyment of the convention rights on the grounds of physical or mental capacity. Section 15(1) of the Canadian Charter of Rights and Freedoms recognises that discrimination on these grounds is contrary to fundamental rights. I see no difficulty in recognising that art 14 of the convention has that effect too. Mrs Pretty can reasonably claim that her physical situation is significantly different from that of others who wish to commit suicide, as she cannot take her own life without another person's assistance. The difficulty which she faces is that, for the reasons already stated, her case does not engage any of the other articles on which she relies. It was with reference to this second point that Mr Havers said that Mrs Pretty was entitled under art 14 not to be discriminated against in the exercise of what he described as her right under s 1 of the 1961 Act to commit suicide.

[106]

The argument that art 14 prohibits discrimination in the enjoyment of a right to commit suicide would, if sound, have disturbing and far-reaching consequences. It would make it impracticable for the state to intervene to prevent people from taking their own lives, whether by removing them from places or equipment which could be used for the purpose or by rendering medical assistance to prevent death. But there is as yet no free-standing right under the convention not to be discriminated against. So I am far from

being persuaded that s 1 provides a basis for invoking art 14. In any event I would reject the argument on a more fundamental ground. Section 1 of the 1961 Act did not create a right to commit suicide. All it did was to abrogate the rule of law which had previously made it a crime to commit suicide. The fact that it provided in s 2(1) that a person who aids or abets another to commit suicide points clearly to the conclusion that decriminalisation, not the creation of a right, was what was intended. There were good reasons for wishing to decriminalise the act itself. The removal of the fear of prosecution and of the stigma was likely to make it easier to deter those who were planning or attempting suicide. Broadly speaking, it was a measure in favour of saving life, with which the provisions of s 2 are entirely in sympathy. In my opinion the argument that art 14 is engaged by a right to commit suicide which is to be found in s 1 of the 1961 Act must be rejected.

Conclusion

[107]

It has not been shown that any of the convention rights on which Mrs Pretty relies have been infringed by the Director's act when he said that he had no power to give the undertaking which she requested. So it cannot be said that his act was unlawful within the meaning of s 6(1) of the 1998 Act or that he was obliged by that Act to give the undertaking. Nor can it be said that the blanket ban which s 2(1) of the 1961 Act imposes on assisted suicide is incompatible with any of Mrs Pretty's convention rights.

[108]

For these reasons and for those given by Lord Bingham of Cornhill and Lord Steyn I agree with the Divisional Court that the conclusions which it reached in this sad case are inescapable. I would dismiss the appeal.

LORD HOBHOUSE OF WOODBOROUGH.

[109]

My Lords, this appeal concerns the sanctity of human life. The sanctity of human life is probably the most fundamental of the human social values. It is recognised in all civilised societies and their legal systems and by the

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internationally recognised statements of human rights. In English law it is given effect to by the criminalisation of murder and manslaughter. In the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (as set out in Sch 1 to the Human Rights Act 1998) it is reflected by art 2, the right to life:

> '1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is

provided by law.'

The Parliamentary Assembly of the Council of Europe on 25 June 1999 adopted a text which addressed the need to protect the dignity and quality of life of the terminally ill and the dying and called upon states to respect and protect this dignity by providing palliative care, by protecting the terminally ill or dying person's right to self-determination through the availability of truthful and comprehensive information and respect for his expressed wishes as to the forms of treatment he is willing to receive, provided that they do not violate human dignity, and—

> 'by upholding the prohibition against intentionally taking the life of terminally ill or dying persons, while: i. recognising that the right to life, especially with regard to a terminally ill or dying person, is guaranteed by the member states, in accordance with Article 2 of the European Convention on Human Rights which states that "no one shall be deprived of his life intentionally"; ii. recognising that a terminally ill or dying person's wish to die never constitutes any legal claim to die at the hand of another person; iii. recognising that a terminally ill or dying person's wish to die cannot of itself constitute a legal justification to carry out actions intended to bring about death.' (See Recommendation 1418 (1999) on the protection of the human rights and dignity of the terminally ill and the dying, p 4 (para 9(c)).)

In the Court of Appeal in Airedale NHS Trust v Bland [1993] 1 All ER 821 at 855, [1993] AC 789 at 831, Hoffmann LJ said:

> '… the sanctity of life entails its inviolability by an outsider. Subject to exceptions like self-defence, human life is inviolate even if the person in question has consented to its violation. That is why although suicide is not a crime, assisting someone to commit suicide is.'

[110]

There are two salient features of these statements of principle. One is that the consent of the deceased is no justification or defence to a charge of having acted with the intention of causing the deceased's death. A similar principle has been recognised in certain other aspects of the criminal law where the protection of the public order and the health of the society are considered to require it as, for example, in relation to the criminal offence of inflicting of grievous bodily harm. The consent of the injured person to an unlawful wounding is not a defence (R v Brown [1993] 2 All ER 75, [1994] 1 AC 212, upheld by the European Court of Human Rights in Laskey v UK (1997) 24 EHRR 39). Assisted suicide and voluntary euthanasia have the same criminality as murder notwithstanding the consent of the deceased.

[111]

The other feature is that the involvement of a second party in the relevant conduct puts the conduct into a different category from conduct which has involved the deceased alone. Joining in bringing about the intentional death of another person is in principle the

crime of murder. That the deceased wished

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to die and was, so far as he was concerned, committing suicide did not prevent the other from being convicted as a principal or accessory to the crime of murder. Thus, a party to a suicide pact, who was absent at the time the other party killed himself, could be convicted of murder as an accessory before the fact (see R v Croft [1944] 2 All ER 483, [1944] KB 295). In law, quite minor acts of encouragement can render a defendant liable to be convicted of murder as an accessory. (See for example R v Giannetto [1997] 1 Cr App R 1.) Where there was a suicide pact to which the defendant was a party and which was to include his death, this consequence was mitigated by s 4 of the Homicide Act 1957 which reduced the offence, whether as principal or accessory, from murder to manslaughter. But, where there was no suicide pact, the crime of murder continued to apply. Where there is a joint purpose that the deceased's life should be ended and the deceased and the other person co-operate in achieving that end, the principle of joint enterprise may apply so as to make the second person criminally liable for murder or manslaughter (see R v Howe [1987] 1 All ER 771, [1987] AC 417, overruling R v Richards (Isabelle) [1973] 3 All ER 1088, [1974] QB 776). Since the passing of the Suicide Act 1961, it has not been a criminal offence for a person to take his own life or attempt to do so (s 1). But the same Act preserved the criminality of the conduct of the second person. Section 2(1) created the offence of aiding, abetting, counselling or procuring the suicide, or attempted suicide, of another with a maximum sentence of 14 years' imprisonment. The result is that the relevance of suicide as opposed to voluntary euthanasia is not that it negatives the criminality of the conduct of the defendant (the second person) but that it affects the gravity of the criminal offence committed—the s 2(1) offence, manslaughter under s 4 of the 1957 Act, or murder. Assisted suicide inevitably offends against the principle of the sanctity of human life. The criminal law continues to reflect this. Assisted suicide will involve the commission of a criminal offence contrary to s 2(1) of the 1961 Act.

[112]

Mr Havers QC, who appeared on behalf of the appellant and who presented her argument with admirable objectivity and clarity, acknowledged, as he had to, that unless he could show that the appellant's human rights had been infringed contrary to the Human Rights Act 1998 he could not escape from the consequences of s 2(1) of the 1961 Act. For the reasons which they have given in their speeches, I agree with my noble and learned friends Lord Bingham of Cornhill, Lord Steyn and Lord Hope of Craighead that the appellant's human rights are not being infringed and wish to add nothing in that regard to what they have said. This conclusion suffices to necessitate the dismissal of the appeal.

[113]

But, like the Divisional Court ([2001] EWHC Admin 788, [2001] All ER (D) 251 (Oct)) and my noble and learned friend Lord Steyn and in agreement with them, I do not consider it right to leave this case without saying something about the appellant's use of the remedy of judicial review to bring this matter before the court. The respondent to the application is the Director of Public Prosecutions (the Director) and the subject matter of

her application is his negative response to a letter dated 27 July 2001 from the appellant's solicitor requesting a 'written undertaking' that he would not consent to a prosecution of Mr Pretty in the event that Mr Pretty should aid, abet, counsel or procure the suicide of the appellant in a manner consistent with her wishes. She said that she wished to choose for herself the time when and the means by which she should die and, owing to her disabling illness, was unable to fulfil this wish unaided and wished that the necessary assistance be provided by her husband. The making of this request for an undertaking was said to be justified by the 1998 Act and the fact that any

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proceedings for an offence under s 2 or the 1961 Act may only be instituted by or with the consent of the Director (s 2(4)). It thus raises again the considerations discussed in the speeches of Lord Steyn and myself in R v DPP, ex p Kebeline, R v DPP, ex p Rechachi [1999] 4 All ER 801, [2000] 2 AC 326.

[114]

The office of Director is a statutory office with functions and powers governed by statute, currently the Prosecution of Offences Act 1985 which introduced a radical restructuring of the management and conduct of criminal prosecutions in England and Wales, bringing into existence the Crown Prosecution Service and altering the role of the police. The functions of the Director are set out in s 3 of the 1985 Act. They do not include the grant of dispensations from the criminal law nor the grant of pardons; they primarily relate to the institution and conduct of criminal proceedings. It is not part of his functions or duties to advise members of the public. He has a duty to issue a Code for Crown Prosecutors giving them guidance on the general principles to be applied by them in deciding when proceedings should be instituted or discontinued and what charges should be preferred (s 10 of that Act). The undertaking which the appellant requested was not one which the Director as the holder of the statutory office had the authority or power to give and it would have been improper for him to give the undertaking whatever the merits of the appellant's solicitor's arguments. Under s 2(4) of the 1961 Act his role is confined to giving his consent to the institution of proceedings for an offence under s 2. This presupposes that an alleged offence has been committed and that he can exercise his discretion under s 2(4) in relation to all the circumstances disclosed by the evidence of what has occurred as the code issued under s 10 of the 1985 Act makes clear. The functions of the Director do not include giving undertakings in advance of the event as to how he would exercise that discretion on hypothetical facts. Even after the event, the Director has no investigatory powers and is dependent upon evidence supplied to him by others, normally the police.

[115]

The response of the Crown Prosecutor on behalf of the Director to the letter of 27 July 2001 was:

> 'Successive Directors—and Attorneys General—have explained that they will not grant immunities that condone, require, or purport to authorise or permit the future commission of any criminal offence, no matter how exceptional the circumstances. I must therefore advise you that the

Director cannot provide the undertaking that you seek.'

This was a proper reply. Indeed, any other reply would almost certainly have been improper.

[116]

In exceptional circumstances it may be proper for a member of the public to bring proceedings against the Crown for a declaration that certain proposed conduct is lawful and name the Attorney General as the formal defendant to the claim. But that is not what occurred here and, even then, the court would have a discretion which it would normally exercise to refuse to rule upon hypothetical facts. Had the case raised by the appellant been one where it was appropriate to grant a declaration as to legality or compatibility, the court would no doubt have adopted that approach. Indeed, the judgment of the Divisional Court and the speeches of your Lordships on the human rights questions will no doubt provide in practice the appropriate guidance to all those concerned in this matter as to the correct understanding of the law.

[117]

The request for the undertaking was a request for the grant of an immunity from prosecution equivalent to the grant of a dispensation from the

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operation of the criminal law or an anticipatory pardon. Even if there was a power to grant a pardon, it could not be exercised in advance. As Lord Woolf said in A-G of Trinidad and Tobago v Phillip [1995] 1 All ER 93 at 102, [1995] 1 AC 396 at 411:

> 'However, while a pardon can expunge past offences, a power to pardon cannot be used to dispense with criminal responsibility for an offence which has not yet been committed. This is a principle of general application which is of the greatest importance. The state cannot be allowed to use a power to pardon to enable the law to be set aside by permitting it to be contravened with impunity.'

Likewise any purported executive power to suspend or dispense with a law or the execution of a law, save under an express statutory authority, has been unlawful since at least 1688.

[118]

The intentions stated in the solicitor's letter were wholly unparticularised, save that the second person who was to assist was to be the appellant's husband not any independent or medically-qualified person. This has remained the position throughout these proceedings. The point was raised in a witness statement dated 19 September filed on behalf of the Director. The Divisional Court were told by Mr Havers ([2001] All ER (D) 251 (Oct) at [6]) that no further information would be forthcoming and that they had been told all that they needed to know. In the same context it was also stated that any non-availability of appropriate palliative care was not part of the appellant's case. This

lack of detail demonstrates that even if he had had the power to do so the Director could not properly have given any advance undertaking or assurance. He had not got the information, let alone the evidence, which would be needed to make any decision upon the question of consent in accordance with the s 10 code.

[119]

But this lack of information illustrates two further points. The first is that any undertaking or other advance assurance would inevitably give rise to the need for a later investigation whether the death of the appellant had in truth been by suicide and what, in the event, had been the actual participation of Mr Pretty (in all probability, the sole surviving witness). It would then have to be decided whether what had occurred had or had not been covered by the undertaking. Further proceedings for judicial review would then no doubt ensue. This is a wholly impractical and objectionable scenario. Issues of fact which should be left to be tried in a criminal court on a criminal prosecution conducted in accordance with the criminal law would be being raised in satellite litigation which would be directly contrary to the guidance given in Ex p Kebeline.

[120]

Secondly, it demonstrates the highly unsatisfactory character of the approach adopted by the appellant and her advisors. If assisted suicide is to be permitted, it is essential that the permission include suitable safeguards of an appropriate rigour and specificity. The Dutch scheme includes an elaborate medically supervised and executed procedure. The minority judgments in Rodriguez v A-G of Canada [1994] 2 LRC 136 which favoured legalising assisted suicide treated the formulation of satisfactory conditions as a necessary first step and attempted to do so (see (1993) 76 BCLR (2d) 145 at 168–169 and [1994] 2 LRC 136 at 147–148). The reasoning of the majority decision included the view that the proposed safeguards were inadequate and impractical. The conclusion is inescapable that both the nature of the questions raised by assisted suicide and the formulation of any new policies must under our system of Parliamentary democracy be a matter for the legislature not the judiciary. For the time being,

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Parliament has spoken by including s 2 in the 1961 Act. Any amendment of that section and its terms would be a matter for Parliament.

[121]

This leads on to a further matter, also covered by Ex p Kebeline. The Director is governed by the existing law. He must exercise his discretion in accordance with the law. If there are disputes as to what the law is he should, provided that they are real disputes, leave them to the criminal courts to decide. It is no part of the Director's function himself to decide arguable questions of law. Nor is it acceptable (save, perhaps, in the most exceptional circumstances which I cannot at present visualise) to seek to use an application for the judicial review of the Director's decision to prosecute as a means of challenging in advance some proposition of law upon which the prosecution will rely at the trial. The observations of my noble and learned friend Lord Steyn in Ex p Kebeline [1999] 4 All ER 801 at 835–836, [2000] 2 AC 326 at 371, from which he has

already drawn in his speech on this appeal, are pertinent and their wisdom is further demonstrated by the present case.

[122]

Some reliance was placed by the appellant, as has been noted by some of your Lordships, upon the fact that on some occasions the Director in England and the Lord Advocate in Scotland have made statements that in certain circumstances they would not authorise prosecutions. Upon examination, these have turned out to be examples of the application of the guidance given in the code or similar principles applicable in Scotland. The main example relied upon in relation to the Director (and replicated in Scotland) concerned breathalyser evidence using Home Office approved devices. The devices (or some of them) had been found to be unreliable below a certain level of breath alcohol. The effect of what the Director said, confirmed by the Home Office, was that in view of this unreliability, prosecutions would not be authorised where the evidence relied upon was unreliable, ie would fail the 'Evidential Test'. The instances referred to by the appellant thus provided no analogy for the present case nor any justification for the approach which her advisors adopted to the role of the Director.

[123]

In conclusion therefore, in agreement with what my noble and learned friend Lord Steyn has said on this topic both in this case and in Ex p Kebeline, I would stress that the procedure of seeking to bypass the ordinary operation of our system of criminal justice by raising questions of law and applying for the judicial review of 'decisions' of the Director cannot be approved and should be firmly discouraged. It undermines the proper and fair management of our criminal justice system.

LORD SCOTT OF FOSCOTE.

[124]

My Lords, I have had the advantage of reading in advance the opinions of my noble and learned friends Lord Bingham of Cornhill, Lord Steyn and Lord Hope of Craighead. I am in complete agreement with them and, for the reasons they give, would dismiss the appeal in this sad case.

Appeal dismissed.
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