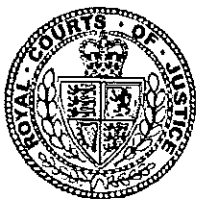

Neutral Citation Number: [2009] EWCA Civ 92

Case No: C1/2008/2626

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
DIVISIONAL COURT
LORD JUSTICE SCOTT BAKER AND MR JUSTICE AIKENS
CO/3449/2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19th February 2009

Before:

LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RT HON. LORD JUSTICE WARD
and
THE RT HON. LORD JUSTICE LLOYD

Between:

The Queen (on the application of Debbie Purdy)	**Appellant**
- and -	
Director of Public Prosecutions	**Respondent**
and	
Omar Puente	**Interested Party**
and	
Society for the Protection of Unborn Children	**Intervener**

Lord Pannick QC and Mr Paul Bowen (instructed by Bindmans LLP) for the appellant
Miss Dinah Rose QC and Mr Jeremy Johnson (instructed by The Treasury Solicitor) for the respondent
Mr Charles Foster and Mr Ben Bradley (instructed by Penningtons) for the intervener

Hearing date: 3rd February 2009

Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Judge CJ:

This is the judgment of the Court to which we have all contributed.

Introduction

1. This is a case about assisted suicide. Assisted suicide is a crime. That is clear and unchallenged in this case. The reason is simple. Section 1 of the Suicide Act 1961 ("the Act") abrogated the rule of law that suicide is a crime. However section 2(1) of the Act continues to impose criminal liability for complicity in another's suicide by providing that:

> "(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. In short, the law which governs this case was made by Parliament. It is clear and unequivocal. We cannot subject it to judicial interpretation and produce a meaning which the statute does not bear. The statute does not admit of exceptions. We cannot suspend or dispense with the law. That would contradict an elementary constitutional principle, the Bill of Rights itself. Parliament alone has the authority to amend this law and identify the circumstances, if any, in which the conduct of the individual who assists or attempts to assist another to commit suicide should be de-criminalized.

3. This case revolves around section 2(4) of the Act which provides

> "(4) ... no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions."

The real question which arises is this: can the Director of Public Prosecutions ("the DPP") be required to promulgate an offence-specific policy identifying the facts and circumstances he will take into account when deciding whether, on the assumption that there is sufficient evidence to prosecute a defendant under section 2(1), it will not be deemed in the public interest to do so? The question arises because the appellant, Ms Purdy, who suffers a debilitating illness, has declared her wish to travel abroad to take her own life. For the purposes of the forensic argument her claim is based on her wish to know whether or not her husband, Mr Puente, will be prosecuted if, in these circumstances, he aids and abets her suicide: in reality she wants to know that he will not.

Ms Purdy's predicament

4. The essential facts are distressingly stark. Ms Debbie Purdy is forty-five. She was diagnosed in 1995 to be suffering with progressive multiple sclerosis ("MS"). It is a chronic disease of the central nervous system. The person with MS can suffer almost any neurological symptom or sign, including changes in sensation, muscle weakness, muscle spasms, or difficulty in moving; difficulties with co-ordination and balance; problems in speech or swallowing; visual problems; fatigue; acute or chronic pain and bladder and bowel difficulties. Cognitive impairment of varying degrees and

emotional symptoms of depression or unstable mood are also common. There is no known cure for MS.

5. Ms Purdy graphically describes the effects of her illness:

> "3. By 2001, I was permanently using a wheelchair and finding everyday tasks like showering or cooking more difficult, and often impossible, without help.
>
> 4. More recently in 2006 my arms became weaker and self-propelling my wheelchair became more difficult. Brushing my teeth was becoming impossible. I bought an electric toothbrush, but even that is difficult. I take painkillers everyday and that manages the pain in my swollen feet. I find it difficult to hold my body still and flop around. I have regular physiotherapy to try and use the right muscles and reduce painful spasms. I experience dry mouth from time to time. I experience choking fits. I am beginning to lose the ability to do many things for myself.
>
> 5. Throughout 2007 my condition has deteriorated further. For example I cannot cut things up. I drop things a lot. I am more prone to choking fits when I drink. I now need to use an electric wheelchair ..."

6. The increasing deterioration of her health now presents her with this terrible predicament:

> "7. My wish is to be able to ask for and receive assistance to end my life, should living it become unbearable for me. I wish to be able to make the decision to end my life while I am physically able to do so. I consider that this will probably mean either traveling to Zurich, Switzerland to avail myself of the services of Dignitas (as I do not wish to mess up any attempts, thereby making matters worse for myself), or to go to Belgium and avail myself of the Belgian Act on Euthanasia of 28th May 2002 as Belgium is relatively easy for me to travel to.
>
> 8. My husband has said he would assist me and if necessary face a prison sentence, but I am not prepared to put him in this position for a number of reasons. I love him and do not want him to risk ending up in prison ... I also do not want him to suffer more than necessary.
>
> 9. I want to avoid the situation where I am too unwell to terminate my life. I want to retain as much autonomy as possible. I want to make a choice about when the quality of my life is no longer adequate and to die a dignified death. This decision is of my own making. Nobody has suggested this to me or pressured me to reach this view. It is a decision I have come to of my own free will."

In short, Ms Purdy's condition has continued to deteriorate. The progress of her illness cannot be halted. She knows that eventually she will wish to bring her suffering to an end by committing suicide. However, she wishes to live for as long as possible, and to end her life only when it becomes utterly unbearable. But the harsh reality is if she lives that long she will be unable to end her own life without assistance. By then, it will be beyond her capability to do so.

7. The appeal has proceeded on the basis that Mr Puente is willing to care lovingly for her, for however long it may take, until she has decided for herself that her life has become impossible. Then, as a final act of devotion he would be willing to assist her to achieve her objective by taking her abroad, somewhere where individuals suffering from "hopeless or incurable illness, unbearable pain or unendurable disabilities" may end their lives with dignity.

8. This couple knows that no matter how desperate or determined to take her own life Ms Purdy may be, no matter how clear and balanced her state of mind, and no matter how motivated by raw compassion and devoted love Mr Puente would be, the law which prohibits assisted suicide does not permit of exceptions.

9. They are confronted with an impossible dilemma. We suspect that although Mr Puente would be willing to pay whatever penalty the law may require, for Ms Purdy it would be a price too high. She is desperate to avoid the risk that he may be prosecuted, so much so, that she would prefer to end her life while she is still able to do so without his assistance. If Ms Purdy could achieve something practicable within the current legal structures to ensure that her husband would not be prosecuted after her death, then she will not need to bring her life to an end before she would otherwise be ready.

10. While recognising the call for compassion and understanding in this particular case, it is worth remembering that the provisions of section 2(1) of the Act are not confined to cases in which it might not be unreasonable to hope for a merciful outcome. Reflecting on section 2(1), in an appeal against sentence, Lord Lane CJ observed:

> "It is clear … that Parliament had in mind the potential scope for disaster and malpractice in circumstances where elderly, infirm and easily suggestible people are sometimes minded to wish themselves dead. It is a crime, whether you pigeon-hole it under attempted murder or assisting a suicide. In terms of gravity it can vary from the borders of cold-blooded murder down to the shadowy area of mercy killing or common humanity …" (*R v Hough* (1984) CAR (S) 406.)

Cases of assisted suicide, like all other criminal offences, vary hugely in their criminality. The context, usually, or at any rate frequently, is that the suicide will have been successful. It is the assistant who has survived. The mitigating features may indeed vary hugely, and in some, regrettably, there are none or virtually none. Not all cases are as sensitive as this one, and not all cases of assisted suicide represent the final act or acts of love or the culmination of a lifelong loving relationship.

11. A similar problem to that faced by Ms Purdy confronted Mrs Dianne Pretty. She suffered from motor neurone disease, a progressive degenerative illness from which

she had no hope of recovery. She faced the imminent prospect of a distressing and humiliating death. She was, however, mentally alert and wished to control the time and manner of her dying but her physical disabilities prevented her from taking her life unaided. She too wished her husband to help her and he was willing to do so provided that in the event of his giving such assistance he would not be prosecuted under section 2(1) of the Suicide Act 1961. In her case she requested the DPP to undertake that he would not consent to such a prosecution under section 2(4). On his refusal to give that undertaking she, in reliance on rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR) sought relief. She claimed that if section 2 of the Act prevented her assisted suicide or the DPP giving the undertaking, that was incompatible with the Convention. She contended that her rights protected under Articles 2, 3, 8, 9 and 14 were infringed. Her claim was dismissed and the dismissal was upheld by the House of Lords in 2001 – see *Regina (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening)* [2001] UKHL 61, [2002] 1 AC 800. It will be necessary to consider that case in detail later. Having lost here, she looked to the European Court of Human Rights but the court unanimously held – see *Pretty v United Kingdom* (2002) 35 E.H.R.R. 1 - that there had been no violation of her human rights, and of particular relevance to our appeal, no violation of Article 8. In the result the courts have determined that the DPP cannot be compelled to grant the requested undertaking for immunity from prosecution.

12. Ms Purdy, with the support of Dignity in Dying (previously called the Voluntary Euthanasia Society) has tried another tack. On 18th December 2007 her solicitors wrote to the DPP suggesting that he had a policy not to prosecute and requesting him to publish any policy he may have in place, alternatively (if none such existed) to promulgate a policy setting out the criteria for the exercise of his discretion in deciding whether to prosecute under section 2(4), in particular in cases where a relative or friend assists the person to travel abroad to a country where assisting a suicide is not a criminal offence. Assisted suicide is lawful in Switzerland, Belgium, the Netherlands, Luxembourg and Oregon U.S.A. In his reply of 14th January 2008 the DPP stated that

> "There is no such policy; and indeed, as you will be aware from the judgment of the House of Lords in the Dianne Pretty case, any such policy – which would amount to a proleptic grant of immunity – would be unlawful. As Lord Bingham said:
>
> > '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 letter stated that the only policy which the DPP applies is that set out in the Code for Crown Prosecutors applicable to the prosecution of all alleged offences, that none of his public policy statements "sets out circumstances in which a prosecution should never be brought for a given offence" and that he had no plans to issue further guidance in relation to policy for this offence. On 10th April 2008 Ms Purdy issued her claim for judicial review challenging the DPP's refusal to disclose his policy, or alternatively his failure to promulgate such a policy. It is the latter claim which is central to this appeal. She seeks a mandatory order requiring the DPP to promulgate

and/or disclose his policy in relation to the circumstances in which he will consent (or not consent) to a prosecution under section 2(4) of the Suicide Act 1961; alternatively appropriate declaratory relief to the same effect.

The role of the Director of Public Prosecutions

13. The Director is the head of the Crown Prosecution Service which consists of himself, the Chief Crown Prosecutors and other staff appointed by the Director: see section 1(1) of the Prosecution of Offences Act 1985. Subsections (6) and (7) are material. They provide:

> "1(6) ...every Crown Prosecutor shall have all the powers of the Director as to the institution and conduct of proceedings but shall exercise those powers under the direction of the Director.
>
> (7) Where any enactment (whenever passed)—
>
> (a) prevents any step from being taken without the consent of the Director or without his consent or the consent of another; or
>
> (b) requires any step to be taken by or in relation to the Director;
>
> any consent given by or, as the case may be, taken by or in relation to, a Crown Prosecutor shall be treated, for the purposes of that enactment, as given by or, as the case may be, taken by or in relation to the Director."

14. Section 10 of that Act provides for guidelines for Crown Prosecutors as follows:

> "10(1) The Director shall issue a Code for Crown Prosecutors giving guidance on general principles to be applied by them—
>
> (a) in determining, in any case—
>
> (i) whether proceedings for an offence should be instituted or, where proceedings have been instituted, whether they should be discontinued; or
>
> (ii) what charges should be preferred; ...
>
> (2) The Director may from time to time make alterations in the Code."

15. Given the particular circumstances of this appeal, and the issues which arise in it, we must set out the provisions of the Code in some detail. The Code provides for a "Full Code Test" in two stages. The first stage is a consideration of the evidence and requires that Crown Prosecutors be satisfied that there is enough evidence to provide "a realistic prospect of conviction". If the case does pass the evidential stage, Crown Prosecutors must proceed to the second stage and decide if a prosecution is needed in the public interest. The Code points out that in 1951, Lord Shawcross, the Attorney

General, made the classic statement on public interest, which has been supported by Attorneys General ever since:

> "It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution."

This principle has never been doubted, and indeed was endorsed in *Smedley's Ltd v Breed* [1974] A.C. 839.

16. The following guidance is then given:

> "**5.7** The public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed. A prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweighed those tending in favour, or it appears more appropriate in all the circumstances of the case to divert the person from prosecution.
> ...
>
> **5.8** Crown prosecutors must balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the suspect. Some factors may increase the need to prosecute but others may suggest that another course of action would be better.
>
> **The following lists of some common public interest factors, both for and against prosecution, are not exhaustive. The factors that apply will depend on the facts in each case.**
>
> **Some common public interest factors in favour of prosecution**
>
> **5.9** The more serious the offence, the more likely it is that a prosecution will be needed in the public interest. A prosecution is likely to be needed if:
>
> **a** *a conviction is likely to result in a significant sentence*;
>
> **b** a conviction is likely to result in a confiscation or any other order;
>
> **c** a weapon was used or violence was threatened during the commission of the offence;

d the offence was committed against a person serving the public (for example, a police or prison officer, or a nurse);

e *the defendant was in a position of authority or trust;*

f *the evidence shows that the defendant was a ringleader or an organiser of the offence;*

g *there is evidence that the offence was premeditated;*

h *there is evidence that the offence was carried out by a group;*

i *the victim of the offence was vulnerable,* has been put in considerable fear, or suffered personal attack, damage or disturbance;

j the offence was committed in the presence of, or in close proximity to, a child;

k *the offence was motivated by any form of discrimination against the victim's* ethnic or national origin, *disability*, sex, religious beliefs, political views or sexual orientation, or the suspect demonstrated hostility towards the victim based on any of those characteristics;

l *there is a marked difference between the actual or mental ages of the defendant and the victim*, or if there is any element of corruption;

m the defendant's previous convictions or cautions are relevant to the present offence;

n the defendant is alleged to have committed the offence while under an order of the court;

o there are grounds for believing that the offence is likely to be continued or repeated, for example, by a history of recurring conduct;

p the offence, although not serious in itself, is widespread in the area where it was committed; or

q *a prosecution would have a significant positive impact on maintaining community confidence.*

Some common public interest factors against prosecution

5.10 A prosecution is less likely to be needed if:

a *the court is likely to impose a nominal penalty;*

> **b** the defendant has already been made the subject of a sentence and any further conviction would be unlikely to result in the imposition of an additional sentence or order. ...
>
> **c** the offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence);
>
> **d** the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgement;
>
> **e** there has been a long delay between the offence taking place and the date of the trial, unless:
> • the offence is serious;
> • the delay has been caused in part by the defendant;
> • the offence has only recently come to light; or
> • the complexity of the offence has meant that there has been a long investigation;
>
> **f** a prosecution is likely to have a bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence;
>
> **g** the defendant is elderly or is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is real possibility that it may be repeated. ...
>
> **h** the defendant has put right the loss or harm that was caused (but defendants must not avoid prosecution or diversion solely because they pay compensation); or
>
> **i** details may be made public that could harm sources of information, international relations or national security."

17. We have cited that list of factors to show the breadth of the criteria that play a part depending on the particular crime concerned. It is perfectly obvious that many of those factors can have no relevance in a case of assisted suicide. Indeed it must be obvious that there will be very few cases in which the decision whether to prosecute or not will involve every single one of the factors identified in the Code. We have, however, highlighted those which may be material.

18. The DPP has chosen from time to time to publish more detailed guidance with regard to particular types of offence. We have been referred to his policy statements for prosecuting cases of Domestic Violence, Bad Driving and his policy for Football Related Offences 2005/06.

19. It is obvious that assisted suicide and euthanasia which is often linked with it give rise to issues which are highly sensitive and deeply controversial. It is no part of this Court's function to enter into that debate. As we have emphasised, the proper forum for that discussion is Parliament but despite Lord Joffe's attempts to legalise "assisted dying" his bills introduced in the House of Lords have made little headway. Some evidence has been placed before us to show the scale of the problem. Ms Purdy assisted by Dignity in Dying has collated evidence to suggest that since October 2002 ninety UK citizens had travelled abroad for the purpose of legally obtaining an assisted suicide, yet no-one was prosecuted. The DPP has no "centralised records" which would help establish the numbers of alleged offences contrary to section 2(1) of the Act. He draws attention to the fact that those cases may well have been investigated by the police but never referred to the CPS or the Director. He draws attention to twelve cases where there were prosecutions, though none of them was a case where the defendant had assisted in a suicide abroad. Helpfully he produced for the Divisional Court eight cases where the matter was referred at least to the Crown Prosecution Service who, it will be remembered (see [9] above) can exercise the Director's powers and so consent or refuse to consent to the prosecution. In eight of those cases it was decided that the evidence was not convincing enough to justify the prosecution. In only one case did the Crown Prosecutor find that there was sufficient evidence but that it would not be in the public interest to prosecute. There is only one case which has been dealt with by the DPP himself and that is the sad case of Daniel James, who died after the hearing in the Divisional Court which is the subject of the present appeal. Although it is, like all such decisions, fact-specific, we believe that it is illustrative not only of the care with which the issue in these cases would be approached, but also an extremely helpful example of the kind of broad circumstances in which, notwithstanding that the evidential test has been passed, the ultimate decision would be that a prosecution should not be mounted.

The case of Daniel James

20. This young man, a very talented rugby player, was injured whilst training in March 2007. He suffered a dislocation of the C6 and C7 vertebrae and spinal cord compression which left him tetraplegic, paralysed from the waist down with no independent hand or finger movement albeit he retained normal mobility and strength in his shoulders, biceps and triceps. There was no prospect of any significant improvement. The impact of his injuries on Daniel was profound. He became suicidal and was determined to end his own life. Notwithstanding their ardent hope held until the last moment that he would change his mind, Daniel's parents accepted his wish to travel to Switzerland and although it was against their own wishes, they began to assist him in making arrangements to end his life with Dignitas. A friend booked the flights (even booking a return flight for Daniel in the hope that he would change his mind). On 12th September 2008 Daniel attended the clinic with his parents where a doctor helped him take his own life. His parents were with him when he died. The DPP has published his reasons for deciding not to prosecute Daniel's parents or his friend.

21. The DPP concluded that there was enough evidence to provide a realistic prospect of a conviction against Daniel's parents and the friend. So he turned to the public interest stage of the Full Code Test. He decided that many of the factors identified in the Code in favour of a prosecution did not apply in that case including the factors

identified in paras 5.9 b, c, d, e, j, k, m, n and p and 5.10 b, c, d, e, f, g, h and i. He concluded that factor 5.9 a was relevant but he discounted it because he considered it very unlikely that a court would impose a custodial penalty upon any of the potential defendants. In his view, "In all probability the sentence would be either an absolute discharge or, possibly, a small fine." There was no suggestion that the parents were "ringleaders" or "organisers" nor was the offence pre-meditated and it was not a "group" offence in the sense meant by paragraph 5.9 h. It was, of course, not likely to be repeated. Taking 5.9 e and l together, he decided that although the parents were in a position of trust (para 5.9 e) and markedly older than Daniel (5.9 l) it was clear that Daniel was a mature, intelligent and fiercely independent young man with full capacity to make decisions about his medical treatment and whose determination to commit suicide was not in any way influenced by the conduct or wishes of his parents – on the contrary he proceeded in the teeth of their imploring him not to do so. The same point could be made about paragraph 5.9 i for although he was vulnerable in many senses he was not vulnerable to manipulation by his parents or the family friend. He also considered under paragraph 5.9 q that in the circumstances a prosecution would not be likely to have significant positive impact on community confidence. His overall conclusion was, therefore, that very few of the factors identified in paragraph 5.9 of the Code point in favour of a prosecution.

22. Turning to the factors identified in the Code against prosecution, the fact that under paragraph 5.10 a the penalty was likely to be nominal was the only relevant factor (though 5.10 c impacted on the friend who may not have appreciated the wrongfulness of his booking the travel tickets).

23. His conclusion was:

> "35. I remind myself that the factors identified in the Code in favour or against a prosecution are not exhaustive of the public interest factors that may be relevant in any given case. It is also important to keep in mind that Parliament has chosen to retain section 2(1) Suicide Act 1961 and a decision not to prosecute should not be taken merely because there are powerful mitigating circumstances. However, I consider that a factor that is otherwise relevant does not cease to be relevant merely because it overlaps with, or might be relevant to, mitigation. I have therefore focused intensely on the particular facts of his case.
>
> a. An offence under section 2(1) Suicide Act 1961 is serious. That points in favour of a prosecution.
>
> b. Neither Mark and Julie James nor the family friend influenced Daniel James to commit suicide. On the contrary, his parents tried relentlessly to persuade him not to commit suicide. Daniel was a mature, intelligent and fiercely independent young man with full capacity to make decisions about his medical treatment. There is clear evidence that he had attempted to commit suicide on three occasions and that he would have made further attempts if and whenever an

> opportunity to do so arose. On the facts of this case, these are factors against prosecution.
>
> c. Although the evidential test under the Code is met, a wide range of conduct of varying degrees of culpability is caught by section 2(1) Suicide Act 1961 and, although not truly minor acts, on the facts of this case the conduct of Mark James, Julie James and the family friend was more remote than the acts under consideration in *Wallis* and *Hough* and towards the less culpable end of the spectrum. That is a factor against prosecution.
>
> d. Neither Daniel's parents nor the family friend stood to gain any advantage, financial or otherwise, by his death. On the contrary, for his parents, Daniel's suicide has caused them profound distress. That is a factor against prosecution.
>
> 36. Taking those factors into account and bearing in mind the observation of Lord Lane CJ in [and he here quotes the passage cited earlier in this judgment from *Hough*] ... I have decided that the factors against prosecution clearly outweigh those in favour. In the circumstances I have concluded that a prosecution is not needed in the public interest."

24. We shall not comment further on this decision, save to record that there can be no doubt about the correctness of the conclusion that, if these potential defendants had been prosecuted to conviction, the eventual outcome would indeed have been a nominal sentence. Using the language of section 12 of the Powers of Criminal Courts (Sentencing) Act 2000, which addresses the power of the court to order an absolute or a conditional discharge, having regard to the circumstances of this case, "including the nature of the offence and the character of the offender" it would have been "inexpedient to inflict punishment" on these offenders.

The proceedings in the Divisional Court

25. The Court identified these issues. The first was whether Ms Purdy's rights under Article 8(1) of the ECHR were engaged. That question was further broken down into inquiring, first, whether the right to choose the manner of one's own death fell within the scope of Article 8(1) which involved an analysis of Mrs Pretty's case in the House of Lords and in Strasbourg to see whether the decision of the European Court of Human Rights was inconsistent with that of the House of Lords; second, if there is such an inconsistency, whether the Court can follow the European decision or whether it must faithfully follow the House of Lords; third, if Ms Purdy has an Article 8(1) right, did the ban on assisted suicide in section 2(1) of the Act constitute an interference with that right?

26. If Article 8(1) was engaged, the second issue was whether the prohibition on assisted suicide met the requirements of Article 8(2) of the Convention which requires that any interference must be "in accordance with the law", Mrs Purdy's case being that that obligation could only be fulfilled if the DPP issued a public statement of policy

identifying the criteria he would take into account in exercising his discretion to consent to prosecution under section 2(4) of the Act.

27. Article 8 of the Convention is well enough known but it is convenient to set it out here again:

> **"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."

In the careful judgment of the Court, Scott Baker L.J. and Aikens J. (as he then was) concluded, that the House of Lords in *Pretty* had concluded that Mrs Pretty's rights under Article 8 were not engaged at all because the right to private life related to the manner in which a person conducts his life, not the manner in which he departs from it. There was nothing in the present case to make it distinguishable in that regard.

28. They reflected on the passages in the judgment of the European Court, (at para 67) that

> " ... The Court is not prepared to exclude that this [her choice to avoid what she considers will be an undignified and distressing end to her life] constitutes an interference with her right to respect for private life as guaranteed under Article 8(1) of the Convention."

They concluded that this wording was "slightly curious" and "a good deal less firm than holding categorically that it would be an interference". They felt that "It may be that the expression covers beneath it differing opinions about the ambit of Article 8(1)." They further concluded that: "[39] ... On the face of it there is some doubt whether the court definitively concluded that art 8(1) was engaged or whether the court decided to proceed on the assumption that it was, but determined the case by its conclusion that there was compliance with art 8(2)." The Court rejected the submission that the facts of the case were sufficiently extreme to fall within the exceptional circumstances in which the court is entitled to apply the European Court's decision rather than that of the House of Lords. The Court reflected furthermore, that: "[46] ... the somewhat elliptical wording of the European Court at para 67 of *Pretty* leaves us in considerable doubt about the extent to which the Court might have disagreed with the House of Lords about the ambit of the rights created by Article 8(1)". The Court regarded itself as bound by the decision by the House of Lords in *Pretty* and followed it accordingly. The Court could find nothing in subsequent cases in the House of Lords which indicated that their Lordships had themselves departed

from what they had held in *Pretty* and in the result concluded that Article 8(1) was not engaged on the facts of the present case.

29. The Court went on to consider whether any interference with Ms Purdy's Article 8(1) rights were in accordance with the law which it was submitted needed such clarity as to the scope and manner of the exercise of the DPP's discretion whether or not to prosecute that his decision could reasonably be predicted by Ms Purdy. Both counsel had accepted that the basic question on that part of the case was whether the general Code that had been promulgated by the DPP under section 10 of the Prosecution of Offences Act 1985 was sufficiently clear and precise to provide the minimum degree of protection against arbitrariness. The Court concluded that the combination of the Code of Practice promulgated by the DPP under section 10 of the Prosecution of Offences Act and the administrative law principles and remedies developed by the common law satisfied the required Convention standards of clarity and foreseeability.

30. The Divisional Court nonetheless gave permission for this appeal.

The issues for this Court

31. Lord Pannick Q.C., counsel for Ms Purdy, identifies three issues:

1. Is Article 8(1) engaged?

2. Is a Court of Appeal bound to follow the decision of the House of Lords or the decision of the European Court in *Pretty* on the applicability of Article 8(1)?

3. In the absence of a published policy by the DPP as to the criteria by reference to which he will decide whether to consent to a prosecution against an individual who assists in suicide, in particular where the assistance is in making arrangements to travel abroad for the purposes of an assisted suicide which is lawful in the country where it occurs, is section 2 of the Suicide Act 1961 in accordance with law?

The first issue: is Article 8(1) engaged?

32. Since Ms Purdy really seeks clarification of her husband's position should he assist her to die, one may wonder why attention is concentrated on her Article 8(1) rights, rather than his. The answer seems to be that it is accepted that an opinion of the Commission precludes the argument. In *R v United Kingdom* 33 DR 270 the applicant had been convicted and sentenced to imprisonment for aiding and abetting suicide and he complained that his conviction and sentence under section 2(1) of the Act constituted a violation of his right to respect for private life under Article 8. The Commission observed:

> "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. ... 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 [of] 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."

33. As it will be Mr Puente who would render himself liable to prosecution for assisting her suicide, one asks how is Ms Purdy's right to a private life engaged? Lord Pannick answers by submitting that she is asserting that her right to autonomy and self-determination permits her to decide how and when to end her own life so that suffering and indignity can be avoided. The fear of her husband's prosecution is an impediment to the exercise of that right for it affects her freedom of choice. This is, therefore, an interference with her right which needs to be justified under Article 8(2). This "libertarian principle" of self-determination (so described by Lord Goff of Chieveley in *In Re: F (Mental Patient: Sterilisation)* [1990] 2 A.C. 1, 73D and referred to again with approval in *Airedale NHS Trust v Bland* [1993] A.C. 789, 864) was expressed by Cardozo J. in *Schloendorff v Society of New York Hospital* (1914) 105 NE 92, 93 in these terms:

> "Every human being of adult years and sound mind has a right to determine what shall be done with his own body ..."

The decision of the House of Lords in Pretty v DPP

34. The arguments on behalf of Mrs Pretty were based on her personal autonomy and the right to self-determination which encompassed the right to make decisions about her own body, protecting the individual's physical integrity and encompassing the right to make decisions about one's own body. The same arguments were, in effect, advanced on behalf of Ms Purdy. In response the Secretary of State submitted that the right to private life under Article 8 related 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 Article 8 foundered on exactly the same objection as the attempt based on Article 2 – the right to life – because the alleged right would extinguish the very benefit on which it was supposedly based. The House of Lords accepted these submissions. We must analyse the reasoning.

35. Lord Bingham of Cornhill considered that the most detailed and erudite discussion of the issues was to be found in the judgments of the Supreme Court of Canada in *Rodriguez v Attorney General of Canada* [1994] 2 ORC 136, a case on its facts very similar to this. He acknowledged that it was evident that all save one of the judges of the Canadian Supreme Court were willing to recognise section 7 of the Canadian Charter as conferring a right to personal autonomy extending even to decisions on life and death, but he considered that the judgments were directed to a provision with no close analogy in the European Convention. It should be noted that at [24] Lord Bingham commented that "There is no Strasbourg jurisprudence to support the contention of Mrs Pretty." In his opinion:

> "[23] ... 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 and Y v The Netherlands* 8 EHRR 235. But article 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."

36. Lord Steyn rejected the argument based on the principle of the personal autonomy of the individual saying:

> "[61] ... Counsel submitted that this article [8] 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 article 8 assist this argument. It must fail on the ground that the guarantee under article 8 prohibits interference with the way in which an individual leads his life and it does not relate to the manner in which he wishes to die."

37. The approach of Lord Hope of Craighead was rather different. . He said:

> "[100] ... Respect for a person's "private life", which is the only part of article 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."

He rejected Mrs Pretty's argument because it was:

> " ... 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."

38. Lord Hobhouse of Woodborough (like Lord Bingham) drew attention to the text adopted by the Parliamentary assembly of the Council of Europe on 25th June 1999 which, while addressing the right of a terminally ill individual to self-determination, and the importance of protecting his or her dignity and quality of life, underlined the prohibition against taking life, "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 ... (and) cannot of itself constitute a legal justification to carry out actions intended to bring about death". He agreed with the remaining speeches in the House of Lords and Lord Scott of Foscote agreed with Lord Bingham, Lord Steyn and Lord Hope.

39. Their Lordships did, however, go on to consider whether, assuming the engagement of Article 8(1), the infringement was justifiable. They found that it was. Lord Bingham pointed out:

> "[29] ... 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."

Lord Steyn's views were succinctly expressed:

> "[62] ... It is a sufficient answer [to the submission that the scope of section 2(1) was disproportionate to its aim] that there is a broad class of persons presently protected by section 2 who are vulnerable. It was therefore well within the range of discretion of Parliament to strike the balance between the interests of the community and the rights of individuals in the way reflected in section 2(1)."

On this aspect Lord Hope said:

> "[102] ... I would hold that the Director's refusal to give the undertaking was not disproportionate to the object of section 2(1), which is to avoid abuse and to protect the weak and the vulnerable."

40. It is, therefore, clear beyond argument – and Lord Pannick has not sought to argue otherwise – that the ratio of their Lordships' opinions is that Mrs Pretty's case did not engage Article 8(1) and even if it did, section 2(1) of the 1961 Act was nevertheless properly justified. This conclusion is binding on us unless, first, it is inconsistent with the subsequent decision of the European Court of Human Rights and second, even if it is, this would represent one of the exceptional cases in which we would no longer be bound to follow the decision of the House of Lords.

The judgment of the European Court of Human Rights in Pretty

41. The Court recorded the submissions as follows:

> "*1. The applicant*
>
> 58. The applicant argued that, while the right to self-determination ran like a thread through the Convention as a whole, it was Article 8 in which that right was most explicitly recognised and guaranteed. It was clear that the right to self-determination encompassed the right to make decisions about one's body and what happened to it. She submitted that this included the right to choose when and how to die and that nothing could be more intimately connected to the manner in which a person conducted her life than the manner and timing of her death. ...
>
> *2. The Government*
>
> 1. The Government argued that the rights under Article 8 were not engaged as the right to private life did not include a right to die. It covered the manner in which a person conducted her life, not the manner in which she departed from it. Otherwise,

> the alleged right would extinguish the very benefit on which it was based."

Unsurprisingly, since the same counsel were retained, the arguments addressed to the Court were therefore exactly the same as the arguments addressed to the House of Lords.

42. We must set out the Court's assessment of these provisions in full. The emphasis is added by us:

> "61. As the Court has had previous occasion to remark, the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. *Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.*
>
> 62. The Government has argued that the right to private life cannot encapsulate a right to die with assistance, such being a negation of the protection that the Convention was intended to provide. The Court would observe that the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned. The extent to which a State can use compulsory powers or the criminal law to protect people from the consequences of their chosen lifestyle has long been a topic of moral and jurisprudential discussion, the fact that the interference is often viewed as trespassing on the private and personal sphere adding to the vigour of the debate. However, *even* where the conduct poses a danger to health or, arguably, *where it is of a life-threatening nature*, the case-law of the Convention institutions has regarded the State's imposition of compulsory or criminal measures as impinging on the private life of the applicant within the meaning of Article 8(1) and requiring justification in terms of the second paragraph. [The footnote cites the example of a refusal of medical treatment.]
>
> 63. *While it might be pointed out that death was not the intended consequence of the applicant's conduct in the above situations, the Court does not consider that this can be a decisive factor.* In the sphere of medical treatment, the refusal

to accept a particular treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8(1) of the Convention. *As recognised in domestic case-law, a person may claim to exercise a choice to die by declining to consent to treatment which might have the effect of prolonging his life.* [The footnote here refers to Lord Goff's speech in *Airedale NHS Trust v Bland* [1993] A.C. 789, 864: "First it is established that that the principle of self-determination requires that respect must be given to the wishes of the patient, so that if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must respect his wishes, even though they do not consider it to be in his best interests to do so ...to this extent, the principle of the sanctity of human life must yield to the principle of self-determination."].

64. In the present case, although medical treatment is not an issue, the applicant is suffering from the devastating effects of a degenerative disease which will cause her condition to deteriorate further and increase her physical and mental suffering. She wishes to mitigate that suffering by exercising a choice to end her life with the assistance of her husband. *As stated by Lord Hope, the way she chooses to pass the closing moments of her life is part of the act of living, and she has a right to ask that this too must be respected.*

65. *The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.*

66. In *Rodriguez v. the Attorney General of Canada*, which concerned a not dissimilar situation to the present, the majority opinion of the Supreme Court considered that the prohibition on the appellant in that case from receiving assistance in suicide contributed to her distress and prevented her from managing her death. This deprived her of autonomy and required justification under principles of fundamental justice. Although the Canadian court was considering a provision of the Canadian Charter framed in different terms from those of

> Article 8 of the Convention, *comparable concerns arose* regarding the principle of personal autonomy in the sense of the right to make choices about one's own body.
>
> 67. *The applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life.* The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8(1) of the Convention. It considers below whether *this interference* conforms with the requirements of the second paragraph of Article 8."

43. So the court went on to consider compliance with Article 8(2). In order to see how our own case differs from *Pretty* it is relevant to observe how the issue before the Court was defined.

> "68. An interference with the exercise of an Article 8 right will not be compatible with Article 8(2) unless it is "in accordance with the law", has an aim or aims that is or are legitimate under that paragraph and is "necessary in a democratic society" for the aforesaid aim or aims.
>
> 69. The only issue arising from the arguments of the parties is the necessity of any interference, it being common ground that the restriction on assisted suicide in this case was imposed by law and in pursuit of the legitimate aim of safeguarding life and thereby protecting the rights of others."

44. The Court's conclusion was:

> "74. Nonetheless, the Court finds, in agreement with the House of Lords and the majority of the Canadian Supreme Court in the *Rodriguez* case, that States are entitled to regulate through the operation of the general criminal law activities which are detrimental to the life and safety of other individuals. The more serious the harm involved the more heavily will weigh in the balance considerations of public health and safety *against the countervailing principle of personal autonomy.* The law in issue in this case, section 2 of the 1961 Act, was designed to safeguard life by protecting the weak and vulnerable and especially those who are not in a condition to take informed decisions against acts intended to end life or to assist in ending life. ... It is vulnerability of the class which provides the rationale for the law in question. It is primarily for States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created. ...
>
> 76. The Court does not consider therefore that the blanket nature of the ban on assisted suicide is disproportionate. The

> Government has stated that flexibility is provided for in individual cases by the fact that consent is needed from the DPP to bring a prosecution and by the fact that a maximum sentence is provided, allowing lesser penalties to be imposed as appropriate. ... It does not appear to be arbitrary to the Court for the law to reflect the importance of the right to life, by prohibiting assisted suicide while providing for a system of enforcement and adjudication which allows due regard to be given in each particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence.
>
> ...
>
> 78. The Court concludes that the interference in this case may be justified as "necessary in a democratic society" for the protection of the rights of others and, accordingly, that there has been no violation of Article 8 of the Convention."

45. The Court then considered the alleged violation of Article 14 of the Convention which guarantees the enjoyment of the rights and freedoms set forth in the Convention without discrimination. In that regard the Court's assessment was this:

> "87. *The Court has found above that the applicant's rights under Article 8 of the Convention were engaged.* It must therefore consider the applicant's complaints that she has been discriminated against in the enjoyment of the rights guaranteed under that provision in that domestic law permits able-bodied persons to commit suicide yet prevents an incapacitated person from receiving assistance in committing suicide. ...
>
> 89. ... there is, in the Court's view, objective and reasonable justification for not distinguishing in law between those who are and those who are not physically capable of committing suicide. Under Article 8 of the Convention, the Court has found that there are sound reasons for not introducing into the law exceptions to cater for those who are deemed not to be vulnerable. Similar cogent reasons exist under Article 14 for not seeking to distinguish between those who are able and those who are unable to commit suicide unaided. The borderline between the two categories will often be a very fine one and to seek to build into the law an exemption for those judged to be incapable of committing suicide would seriously undermine the protection of life which the 1961 Act was intended to safeguard and greatly increase the risk of abuse."

46. The Court declared that Mrs Pretty's application was admissible, but unanimously held that there had been no violation of Article 8 or Article 14 of the Convention.

Is the decision of the House of Lords inconsistent with that of the European Court of Human Rights?

47. Applying the analysis at the highest that we can in support of Lord Pannick's submission that the answer to the question is an unequivocal "yes", it can be argued that what emerges from the Strasbourg judgment, read as a whole, is that in [61] the court is clearly stating the principle of personal autonomy and acknowledging its importance as informing the broad breadth of Article 8 which is essentially concerned with the physical integrity of a person. Respect for human dignity is "the very essence of the Convention": [65], and so "notions of the quality of life take on significance under Article 8". The Government's contention accepted by the House of Lords, was referred to at [62] but far from appearing to accept the argument, the court observes that the ability to conduct one's life in a manner of one's own choosing may include decisions which may be of a life-threatening nature [62]. Refusal to accept medical treatment even if it leads to a fatal outcome – which cannot be seen other than as an election how to die and to die earlier than one would were one to accept the treatment – is an interference with a person's physical integrity which lies at the heart of Article 8: [63]. The reference in [64] to Lord Hope's opinion that choosing to pass the closing moments of life is part of the act of living cannot be read otherwise than as an endorsement and approval of that observation. The Court goes on to say, and here they are surely expressing their own views, "and she has a *right* to ask that this too must be respected", with our emphasis added. Paragraph [66] must also be treated as an endorsement of the judgment of the Canadian Supreme Court since "comparable concerns arose regarding the principle of personal autonomy in the sense of the right to make choices about one's own body." That was not Lord Bingham's view.

48. The Court's conclusion in [67] is that it will consider whether "this interference" conforms with Article 8(2). They have surely found that there was that interference. In response to the contention advanced by the respondents that, in choosing to say in [67], "the Court is not prepared to exclude that this constitutes an interference with her right" the Court was merely reaching a tentative conclusion redolent with doubt, the words that follow, "It considers below whether *this interference* conforms with [Article 8(2)]" defeat that contention. That therefore is a conclusion that there has been an interference with her Article 8(1) right. Paragraph 87 makes that clear because the Court records that it *has found* that the applicant's rights under Article 8 were engaged, and those words seem conclusive of the argument.

49. On the basis of this analysis, everything in the judgment suggests that Article 8(1) is engaged. The only possible doubt arises from the choice of language in paragraph 67. This the Divisional Court found to be "curious" and "elliptical" and the court speculated whether it betrayed some difference of emphasis between the seven members of the court. Be that as it may, the House of Lords found that Mrs Pretty's Article 8(1) rights were not engaged. The European Court of Human Rights found that they were. The decisions are clearly inconsistent.

The second issue: are we bound to follow the decision of the House of Lords or are we at liberty to apply the ruling of the Strasbourg Court?

50. This very problem was addressed and decided by an enlarged committee of the House of Lords in *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 A.C. 465. We must again quote at length. Lord Bingham of Cornhill said this:

"28. The mandatory duty imposed on domestic courts by section 2 of the 1998 Act is to take into account any judgment of the Strasbourg Court and any opinion of the Commission. Thus they are not strictly required to follow Strasbourg rulings, as they are bound by section 3(1) of the European Communities Act 1972 and as they are bound by the rulings of superior courts in the domestic curial hierarchy. But by section 6 of the 1998 Act it is unlawful for domestic courts, as public authorities, to act in a way which is incompatible with a Convention right such as a right arising under article 8. There are isolated occasions (of which *R v Spear* [2003] 1 AC 734, paras 12 and 92, is an example) when a domestic court may challenge the application by the Strasbourg Court of the principles it has expounded to the detailed facts of a particular class of case peculiarly within the knowledge of national authorities. The 1998 Act gives it scope to do so. But it is ordinarily the clear duty of our domestic courts, save where and so far as constrained by primary domestic legislation, to give practical recognition to the principles laid down by the Strasbourg Court as governing the Convention rights specified in section 1(1) of the 1998 Act. That Court is the highest judicial authority on the interpretation of those rights, and the effectiveness of the Convention as an international instrument depends on the loyal acceptance by member states of the principles it lays down. ...

42. While adherence to precedent has been derided by some, at any rate since the time of Bentham, as a recipe for the perpetuation of error, it has been a cornerstone of our legal system. Even when, in 1966, the House modified, in relation to its own practice, the rule laid down in *London Street Tramways Company Limited v London County Council* [1898] AC 375, it described the use of precedent as:

> "an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules" *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

The House made plain that this modification was not intended to affect the use of precedent elsewhere than in the House, and the infrequency with which the House has exercised its freedom to depart from its own decisions testifies to the importance its attaches to the principle. The strictures of Lord Hailsham of St Marylebone LC in *Broome v Cassell & Co Limited* [1972] AC 1027, 1053-1055, are too well known to call for repetition. They remain highly pertinent.

43. The present appeals illustrate the potential pitfalls of a rule based on a finding of clear inconsistency. The appellants, the First Secretary of State and the Court of Appeal in the *Leeds* case find a clear inconsistency between *Qazi* and *Connors*. The respondents and the Court of Appeal in the *Lambeth* case find no inconsistency. Some members of the House take one view, some the other. The prospect arises of different county court and High Court judges, and even different divisions of the Court of Appeal, taking differing views of the same issue. As Lord Hailsham observed ([1972] AC 1027, 1054), "in legal matters, some degree of certainty is at least as valuable a part of justice as perfection." That degree of certainty is best achieved by adhering, even in the Convention context, to our rules of precedent. It will of course be the duty of judges to review Convention arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998 Act. But they should follow the binding precedent, as again the Court of Appeal did here.

44. There is a more fundamental reason for adhering to our domestic rule. The effective implementation of the Convention depends on constructive collaboration between the Strasbourg court and the national courts of member states. *The Strasbourg court authoritatively expounds the interpretation of the rights embodied in the Convention and its protocols,* as it must if the Convention is to be uniformly understood by all member states. *But in its decisions on particular cases the Strasbourg court accords a margin of appreciation,* often generous, to the decisions of national authorities and attaches much importance to the peculiar facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. It is by the decisions of national courts *that the domestic standard must be initially set, and to those decisions the ordinary rules of precedent should apply.*

45. To this rule I would make one partial exception. In its judgment on the *Leeds* appeal, paragraph 33, the Court of Appeal said:

> "In *D v East Berkshire Community NHS Trust* [2004] QB 558 this court held that the decision of the House of Lords in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 could not survive the introduction of the Human Rights Act 1998. This was,

> however, because the effect of the Human Rights Act 1998 had undermined the policy consideration that had largely dictated the House of Lords decision. Departing from the House of Lords decision in those circumstances has attracted some academic criticism. It remains to see whether this will be echoed by the House itself."
>
> When that case reached the House, no criticism of the Court of Appeal's bold course was expressed, the House agreed that the policy considerations which had founded its decision in *X v Bedfordshire* had been very largely eroded and it was accepted that that decision was no longer good law: [2005] 2 AC 373 paras 21, 30-36, 82, 119, 124-125. The contrary was not suggested. But there were other considerations which made *X v Bedfordshire* a very exceptional case. Judgment was given in 1995, well before the 1998 Act. No reference was made to the European Convention in any of the opinions. And, importantly, the very children whose claim in negligence the House had rejected as unarguable succeeded at Strasbourg in establishing a breach of article 3 of the Convention and recovering what was, by Strasbourg standards, very substantial reparation: *Z v United Kingdom* (2001) 34 EHRR 97. On these extreme facts the Court of Appeal was entitled to hold, as it did in paragraph 83 of its judgment in *D,* that the decision of the House in *X v Bedfordshire,* in relation to children, could not survive the 1998 Act. But such a course is not permissible save where the facts are of that extreme character."

51. This approach was forcefully reiterated in *Regina (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2008] 3 W.L.R. 1023 where Lord Neuberger of Abbotsbury said:

> "64. Where the Court of Appeal considers that an earlier decision of this House, which would otherwise be binding on it, may be, or even is clearly, inconsistent with a subsequent decision of the ECtHR, then (absent wholly exceptional circumstances) the court should faithfully follow the decision of the House, and leave it to your Lordships to decide whether to modify or reverse its earlier decision. To hold otherwise would be to go against what Lord Bingham decided. As a matter of principle, it should be for this House, not for the Court of Appeal, to determine whether one of its earlier decisions has been overtaken by a decision of the ECtHR. ... As to what would constitute exceptional circumstances, I cannot do better than to refer back to the exceptional features which Lord Bingham identified as justifying the Court of Appeal's approach in *East Berkshire* [2004] QB 558: see *Kay* [2006] 2 AC 465, para 45."

52. Lord Pannick submits on behalf of the appellant, first, that departure from the general rule is justified because of the fact, recognised to be important in *Kay* that the same individual, the same facts, issues and arguments were involved both in the Lords and in Strasbourg. Secondly, he submits that the principle of autonomy established in Strasbourg has been accepted as correct in several subsequent cases in the House of Lords.

53. As to the first point, we see the force of Lord Pannick's submission that the identity of the parties, facts, issues and arguments is a point of importance. If this point had been thought to be conclusive and sufficient on its own, their Lordships would have said so. But they did not stop there. The Court of Appeal in *D v East Berkshire Community NHS Trust* was forgiven its *lèse majesté* because it was regarded as "a very exceptional case". To come within the permitted exception the facts must be "of that extreme character". There no human rights arguments had been addressed at all because the Act was not then in force: not so here. Moreover, the policy considerations which underlay the earlier decision had been eroded. That does not apply here. No public policy issues arise. There it was accepted that the decision was no longer good law. Here argument still rages as to whether there is a clear inconsistency between the two views and we have to acknowledge that, whatever our views on the matter may be, two judges of the Divisional Court both now members of this Court, were not persuaded that the matter was at all clear cut.

54. We have come to the conclusion that their Lordships intended to give the Court of Appeal very limited freedom, only in the most exceptional circumstances, to override what would otherwise be the binding precedent of the decision of the House. They clearly required more than the bare fact of the same parties being involved in order to bring the case within the very narrow confines of the *very exceptional case*, one of an *extreme character*, or of *wholly exceptional* circumstances, with the emphasis added by us to phrases from their Lordships' speeches. We are not seeking to be released from these strictures. The structure of judicial precedent, designed over the years, has served us well. The decisions of the European Court do not bind us. The decisions of the House of Lords do. By-passing or finding an alternative route around the decisions of the House of Lords, on the basis of the jurisprudence of the European Court would, in the ultimate analysis, be productive of considerable uncertainty. Therefore if the strictures are too tight, it is their Lordships who, if they think it appropriate, must release the knot. As it is, and in any event, we cannot bring this case within the required degree of exceptionality.

55. As for the second submission, Lord Pannick relies on several later decisions beginning with *R (Razgar) v Home Secretary* [2004] UKHL 27, [2004] 2 A.C. 368, an asylum case, where Lord Bingham said:

> "9. ... It is plain that "private life" is a broad term, and the court has wisely eschewed any attempt to define it comprehensively. ... In *Pretty v United Kingdom* (2002) 35 EHRR 1, 35-36, para 61, the Court held the expression to cover "the physical and psychological integrity of a person" and went on to observe that:

> "Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world."
>
> Elusive though the concept is, I think one must understand "private life" in article 8 as extending to those features which are integral to a person's identity or ability to function socially as a person."

His Lordship was there dealing with Article 8 in broad terms. We cannot discern from what Lord Bingham said that he was endorsing the proposition that the principle of personal autonomy extended to decisions as to the manner of ending one's life.

56. Next is the case of *Ghaidan v Godin Mendoza* [2004] UKHL 30, [2004] 2 A.C. 557, a Rent Act case, where Baroness Hale remarked:

> "132. ... The essence of the Convention, as has often been said, is respect for human dignity and human freedom: see *Pretty v United Kingdom* (2002) 35 EHRR 1, 37, para 65."

That observation, no doubt, represents an acknowledgement of the fact that the European Court found that Mrs Pretty's Article 8(1) rights were engaged, but it sheds no light on the question which we have to decide.

57. Finally there is *Regina (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 A.C. 719, the hunting with hounds case. Our attention is drawn to a number of passages in the speeches. Lord Bingham's dealt with *Pretty* as follows:

> "11. The HR claimants helpfully presented their article 8 case under four headings. The first was "private life and autonomy". The authorities principally relied on were *Pretty* ... From the court's judgment in *Pretty* the claimants drew recognition (para 61) that "private life" is a broad term, not susceptible to exhaustive definition, but covering the physical and psychological integrity of a person, sometimes embracing aspects of an individual's physical and social identity, protecting a right to personal development and the right to establish relations with others in the outside world, and extending to matters within (paras 61, 62) the personal and private sphere. The court held the notion of personal autonomy to be an important principle. The court was not prepared to exclude the possibility (para 67) that denial of a right to procure her own death was an interference with the applicant's right to respect for private life. ...
>
> 15. Despite the careful argument of Mr Gordon QC for the HR claimants, I am not persuaded that their claims can be brought within the scope of article 8 under any of the four heads relied on:

> (1) Fox-hunting is a very public activity, carried out in daylight with considerable colour and noise, often attracting the attention of on-lookers attracted by the spectacle. No analogy can be drawn with the very personal and private concerns at issue in ... *Pretty*."

58. In paragraph 11 Lord Bingham was reciting the submissions of counsel and counsel's analysis of *Pretty*. The argument was rejected at paragraph 15. We cannot read into this observation any ringing endorsement of the proposition that the right to procure her own death did interfere with Mrs Pretty's right to respect for private life. Their Lordships were looking at the breadth of the reach of Article 8 and not specifically concerned with the very narrow point which arises in this case. That was made clear by Lord Hope who said:

> "54. I agree that the claims of the HR claimants cannot be brought within the scope of article 8 of the Convention. We are not concerned in this case with personal autonomy in the sense referred to in *Pretty v United Kingdom* (2002) 35 EHRR 1, paras 61 and 66. This case is not about the choices that a person makes about his or her own body or physical identity."

59. Lord Rodger of Earlsferry made this reference:

> "94. In *Pretty v United Kingdom* (2002) 35 EHRR 1, 35, para 61, the European Court pointed out that "private life" in article 8(1) is "a broad term". The Court also said that the notion of "personal autonomy" is an important principle underlying the interpretation of the various guarantees, including the right to "personal development", in that aspect of article 8(1)."

He was however dealing with the ambit of Article 8 in terms, as he said in paragraph 101: "... that article 8(1) protects those features of a person's life which are integral to his identity." He too, in our judgment, was not addressing the point before this Court.

60. Lord Brown of Eaton-under-Heywood suggested that he could not improve upon the careful analysis of the jurisprudence on Article 8 made by Lord Bingham. Then he added:

> "139. ... for my part [I] would hope to see the jurisprudence governing the scope of article 8 further developed by the Strasbourg Court. Why should it not encompass a broad philosophy of live and let live (or, in Mrs Pretty's case, let die: *Pretty* ...)? Why should people not be free to engage in whatever pursuits they wish — pursuits, that is, central to their well-being, as hunting was recognised in the court below to be in the lives of some of these appellants ("a core part") — unless there is good and sufficient reason (as, indeed, was found in Mrs Pretty's own case) to forbid it? Article 8's protection is recognised to extend to a right to identity and to personal development and, as *Pretty* first articulated, the notion of personal autonomy. ...

> 141. Naturally I have considered whether this House ought itself properly to construe and apply article 8(1) sufficiently widely to encompass at least some of these appellants. But I conclude not. It is one thing to say that member states have a margin of appreciation, perhaps a wide margin of appreciation, when it comes to striking any balance that falls to be struck under article 8(2) (or, for that matter, in respect of any other qualified right); quite another to say a comparable margin exists for considering whether the qualified right (here article 8(1)) is engaged in the first place. The reach of article 8 must be for the Strasbourg court itself to develop."

There it is true we see Lord Brown appearing to accept the Strasbourg decision in Mrs Pretty's case in relation to the engagement of her Article 8 rights.

61. Looked at overall, we cannot but conclude that their Lordships were not concerned in *Countryside Alliance* with the narrow effect of the *Pretty* decision but rather with general principle. It would need a more focused concentration on the right to choose when and how to die to persuade us that their Lordships in that decision were somehow acknowledging that their conclusion in the *Pretty* appeal was erroneous, or that it was now open to this Court to declare that it should no longer be followed.

62. *Pretty* undoubtedly expanded and elaborated upon the notion of "private life" and the circumstances in which it may be engaged. On this point, the guidance was accepted by the House of Lords. It also has to be acknowledged that there is no hint of dissent from anything said by the European Court and no attempt by their Lordships to distance themselves from the heart of the decision that Mrs Pretty's Article 8(1) rights to decide the manner of her departing this life were engaged. As it is a decision on the reach of article 8(1), we should accept that it is highly unlikely that the House of Lords will not bow to a decision of Strasbourg on the question of the engagement of Article 8(1) if the matter should fall to be considered by them. However we have to ask ourselves whether these observations about the judgment in *Pretty* in relation to the engagement of Article 8(1) are enough to justify our boldly arrogating to ourselves the entitlement to decide that a House of Lords' authority should no longer be followed. We are persuaded by Miss Rose Q.C. that there is nothing in these three decisions sufficient to indicate that lower courts should now be free no longer consider themselves bound by the judgment of the House of Lords. Thus, enticing though Lord Pannick's submissions are, we are not persuaded that we are entitled to follow the course he invites us to tread. It follows that we must find that Ms Purdy's Article 8(1) rights are not engaged.

The Article 8(2) issue: what is the impact of the absence of a published policy by the DPP in relation to the prosecution of an individual who participates in an assisted suicide?

63. Notwithstanding this conclusion we shall address Lord Pannick's contention that the DPP acted, and continues to act, in breach of section 6(1) of the Human Rights Act 1998 by failing to "promulgate a policy as to the circumstances in which a prosecution will be brought for aiding and abetting a suicide".

64. Expressly in agreement with the House of Lords, the European Court of Human Rights upheld the provisions of section 2(1) of the Suicide Act [74 and 76]. The

Court believed that appropriate protection against arbitrary interference with Mrs Pretty's Article 8 rights was provided by the consent requirement in section 2(4) of the 1961 Act and the operation of a case-specific system of enforcement and adjudication [76]. Lord Pannick nevertheless submits that in the absence of a case-specific policy directed to participation in an assisted suicide the purported justification for any contravention of Ms Purdy's Article 8(1) rights were not and could not be held to be "in accordance with law". The essential argument on behalf of the DPP is that sufficient guidance has been given to Crown Prosecutors in the Code for Crown Prosecutors, and that this Code is readily available to any member of the public with an interest in it. His decision in the case of Daniel James, and the reasons for it, are illustrative of the application of his policy in cases where the issue of assisted suicide has to be addressed.

65. Lord Pannick's starting point is section 2(4) of the 1961 Act which provides:

> "No proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions."

The requirement is said to be "integral" to the operation of section 2(1). Thus far, we agree. Without the consent of the DPP there will be no prosecution. He then focused our attention to the observations of Phillips L.J. (as he then was) in *Dunbar v Plant* [1998] Ch 412, at 437, that:

> "When the Act is considered ... it gives a clear indication that the circumstances in which the offence is committed may be such that the public interest does not require the imposition of any penal sanction. This, in my judgment, is the logical conclusion to be drawn from the "consent" provision."

66. Lord Pannick suggested that this observation provides an exhaustive analysis of the purpose of section 2(4) and that it is binding on us. As the purpose of the consent requirement is to avoid any prosecution where the public interest would not be served by any penal sanction, the DPP should publish guidance in relation to assisted suicide in sufficiently specific terms for those contemplating the commission of the crime reasonably to be able to know whether they would avoid the ordinary consequences of committing it. On analysis the issue in *Dunbar v Plant* was whether the forfeiture rule applied to the survivor of a suicide pact who claimed a share in the assets of the deceased, and was whether the rule applied to her criminal conduct in aiding and abetting the deceased's suicide. That was the context in which Phillips L.J. made this observation, and it led him to conclude that as the public interest required no penal sanction "strong grounds are likely to exist for relieving the person who has committed the offence from all effect of the forfeiture rule". That, in effect, was a specific decision in which the broad issue of principle currently under consideration did not arise and was not addressed.

67. We have been shown a schedule which identifies the numerous offences in which the consent of the Director of Public Prosecutions or Attorney General is required before a prosecution can be mounted. The list extends from the Agricultural Land (Removal of Surface Soil) Act 1853 to the Weights and Measures Act 1985. The lengthy list itself does not suggest that the only purpose of the Director's consent relates to the

possible imposition of penalties. The better approach is to be discerned in the Law Commission's Report, *Consents to Prosecution (No. 255)*, where attention was drawn to the Home Office memorandum to the Franks Commission in 1972 that "the basic reason for including in a statute a restriction on the bringing of prosecutions is that otherwise there would be a risk of prosecutions being brought in inappropriate circumstances". Five reasons "for considering the inclusion of a consent requirement" were then given. The first four were:

> "(a) secure consistency of practice in bringing prosecutions, e.g., where it is not possible to define the offence very precisely so that the law goes wider than the mischief aimed at or is open to a variety of interpretations;
>
> (b) to prevent abuse or the bringing of the law into disrepute, e.g., with the kind of offence which might otherwise result in vexatious private prosecution ...;
>
> (c) to enable account to be taken of mitigating factors, which may vary so widely from case to case that they are not susceptible to statutory definition;
>
> (d) to provide some central control over the use of criminal law when it has to intrude into areas which are particularly sensitive or controversial ..."

68. As Lord Lane CJ's observation in *R v Hough* indicated, cases of assisted suicide vary hugely, in particular in relation to the culpability and motivation of those who participate in them. Many of these cases, like the present, will be sensitive as well as controversial. It would be profoundly alarming if, in cases like *Daniel James*, it would remain open to an individual with a profound and principled hostility to assisted suicide to start a private prosecution when the DPP has decided that public interest does not require it. The consent requirement is therefore part of the system for the enforcement of section 2(1) which impressed the European Court of Human Rights in *Pretty* that "due regard" would be given in every case "to the public interest in bringing a prosecution". Without the requirement of consent, the policy promulgated by the DPP, whether in its present form, or even if specific to assisted suicide, would, in the end, fail to give Mr Puente the protection that his wife is currently seeking. In this particularly sensitive and controversial area there must be central control over criminal prosecutions, and the fact of such control will ensure consistency of approach. Accordingly we are unable to accept that the observations of Phillips L.J. provide an exhaustive definition of the reasons underpinning the need for the consent of the DPP in accordance with section 2(4) of the Act.

69. There were a number of different strands to Lord Pannick's argument. He contended that the general guidance issued by the DPP is inadequate to meet the particularly sensitive considerations which arise in this type of case. He suggested that the DPP has the power to adopt a specific policy in relation to any specific offence or groups of offences, and indeed, as we have demonstrated, he has, and he has exercised it from time to time. No-one has suggested that the issue of the specific policy statements is unlawful or beyond the proper exercise of responsibilities of the DPP. The contention here is that a crime-specific policy statement which amplifies but does

not contradict the Code is necessary to achieve the precision without which the DPP is failing in his duty. Lord Pannick recognises that the DPP cannot be required to produce an offence-specific policy document relating to assisted suicide in which he would set out his likely decision in any individual case, or that the policy document should indicate that he will not prosecute when particular circumstances obtain. Nevertheless he contends that the DPP has a duty to publish a policy in which he sets out in far greater detail than the Code itself how cases of this kind would be approached once the evidential test has been satisfied.

70. To support this contention Lord Pannick submitted that the current terms of the Code were insufficiently precise to enable Ms Purdy and Mr Puente to make their own decisions (*Sunday Times v United Kingdom* (1979) 2 EHRR 245; *Silver v United Kingdom* (1983) 5 EHRR 347; *Hassan Chaush v Bulgaria* (2002) 34 EHRR 1339) and in consequence, there was a real danger that the law would be applied in an arbitrary fashion (*Herczegfalvy v Austria* (1992) 15 EHRR 347). Lord Pannick highlighted the requirement for foreseeability contained in para 49 of judgment of the *Sunday Times v United Kingdom* decision.

> "... a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable to the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to agree that is reasonable in the circumstances, the consequences which a given action may entail."

71. To this contention Miss Rose suggested an alternative approach. She highlighted the further passage in para 49 that:

> "... those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, while certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

She suggested that the practical operation of these principles can be seen in two further decisions of the European Court of Human Rights, *Goodwin v United Kingdom* (1996) 22 EHRR 123 at para 33 and *Steel v United Kingdom* (1999) 28 EHRR 603 at para 55. She contended that the "accordance with the law" requirement under Article 8(2) did not require rigidity and that the public interest could not realistically be formulated in prescriptive terms.

72. In our judgment the problem with Lord Pannick's submission is that Ms Purdy and Mr Puente know perfectly well that, as the law stands at present, if he were to assist her suicide, he would be contravening the criminal law and exposing himself to the risk of prosecution. The statute is clear, not vague. His submission therefore involves the assertion that, although the offence created by section 2(1) of the 1961 Act is (as he accepts) sufficiently clear to satisfy ECHR requirements as to certainty, the added provision that no prosecution may be brought without the consent of the DPP makes it

less certain and indeed so much less certain, that it no longer satisfies the requirement of certainty and is therefore not "in accordance with law" for the purposes of Article 8.

73. The issue before us therefore is confined to the possible consequences which would follow the commission by Mr Puente of a criminal offence in the future. It is inevitable that after he has committed it the DPP will have to make an informed decision whether to consent to a prosecution based on the circumstances as they appear at that time. In this deeply sensitive case, we are conscious of the realities. Lord Pannick would not and did not suggest that his client was seeking immunity for Mr Puente if he assisted his wife's suicide. He would not and did not suggest that a policy statement should be prepared by the DPP which would, in effect, if complied with, lead to the conclusion that Mr Puente should not be prosecuted. But what in reality Ms Purdy is seeking, and we understand why she is seeking it, is the nearest thing possible to a guarantee that if the circumstances we have summarized come to pass, and her husband assists her suicide when she is no longer able to end her own life by her own unassisted actions, he would not be prosecuted. Without giving what in reality would amount either to immunity from prosecution or the promulgation of a policy which would effectively discount the risk of a prosecution in this particular case (which it is accepted cannot be provided) Ms Purdy cannot achieve her true objective.

74. The legislative responsibilities of the DPP are defined by section 10 of the 1985 Act (see para 14 above). He is required to provide general guidance. He has done so (see para 16 above). What he has refused to do is to provide specific guidance in relation to assisted suicide.

75. The approach by the DPP to this problem is, in any event, amply supported by the decision of the House of Lords in *Pretty*. In the context of an argument that the DPP might issue a crime-specific policy statement to apply to assisted suicide, Lord Bingham observed: "...whether or not the Director has the power to make such a statement he has no duty to do so ...". Lord Steyn made the same point.

> "The fact that there is a duty under section 10 of the Prosecution of Offences Act 1985 on the DPP 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. ... I envisage that the occasions on which such statements would be appropriate and serve the public interest would be rare." (Our emphasis).

Lord Hope made the same point, observing that if the DPP had a specific policy in relation to cases of assisted suicide,

> "... 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." (Our emphasis).

76. The problem was examined by the European Court of Human Rights in *Pretty*. Examining the responsibilities of the DPP in relation to consent, and the availability

of a range of penalties to address individual cases, the Court concluded that it was not "arbitrary" for assisted suicide to be prohibited when this was balanced against what was described as

> "a system of enforcement and adjudication which allows due regard to be given in each particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence".

The Court went on to record, at para 77, that there was nothing:

> "disproportionate in the refusal of the DPP to give an advance undertaking that no prosecution would be brought against the applicant's husband ... the seriousness of the act for which immunity was claimed was such that the decision of the DPP to refuse the undertaking sought in the present case cannot be said to be arbitrary or unreasonable."

77. We acknowledge the difference between the issue now raised in argument, which is whether the consent arrangements currently in force lack sufficient certainty, and the issues then directly addressed by the Court in *Pretty*, and we also note the concessions made on her behalf. In our judgment, however, the concessions were realistic, and it is unsurprising that none of the speeches in the House of Lords, and nothing in the judgment in the European Court suggests otherwise.

78. In the course of argument, it was suggested by Ward L.J. that the combination of the general guidance, and with the example of the decision in the case of Daniel James available for analysis, there was ample material to enable Ms Purdy's legal advisers to address the likelihood of a prosecution if her husband assisted her suicide. And in truth, that is all that can be done. Ms Purdy must take legal advice, and no doubt she will, and she must then make her own decision. But she cannot do so on the basis that the DPP should either act as her legal adviser, or through the means of a crime-specific policy, offer the kind of case-specific indications which would provide her with the absolute security of mind she is seeking.

79. In our judgment the DPP is not in dereliction of his statutory duty. The absence of a crime-specific policy relating to assisted suicide does not make the operation and effect of section 2(1) of the 1961 Act unlawful nor mean that it is not in accordance with law for the purposes of Article 8(2). Like this Court the DPP cannot dispense with or suspend the operation of section 2(1) of the 1961 Act, and he cannot promulgate a case-specific policy in the kind of certain terms sought by Ms Purdy which would, in effect, recognise exceptional defences to this offence which Parliament has not chosen to enact.

80. We must add one footnote. Although the discretion of the DPP in relation to the promulgation of policy is effectively absolute, and our system does not permit a court to interfere with his decision that an individual case should be prosecuted, the Court is not powerless. If the prosecution amounts to an abuse of process, the court will dismiss it. However even if a defendant were to be convicted, but the circumstances were such that in the judgment of the *court*, no penal sanction would be appropriate, the court, exercising its own sentencing responsibilities would order that the offender

should be discharged, and might well question publicly the decision to prosecute. In other words, the court is part of the protective system which discourages and would prevent or extinguish the effect of any arbitrary or unprincipled exercise by the DPP of his responsibilities. Experience shows that although for these purposes the court is vested with the necessary authority, the occasions when it is necessary for it to be exercised are remote virtually to the point of extinction.

Conclusions

81. This appeal must be dismissed. Notwithstanding our sympathy for the dreadful predicament in which Ms Purdy and Mr Puente find themselves, this appeal must be dismissed.