SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2016] CSIH 12
P1036/14

Lord Justice Clerk
Lady Dorrian
Lord Drummond Young

OPINION OF LORD CARLOWAY,
the LORD JUSTICE CLERK

in the reclaiming motion

by

GORDON ROSS

Petitioner and Reclaimer;

against

LORD ADVOCATE

Respondent:

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

19 February 2016

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

[2] Article 8 provides:

> **"Right to respect for private and family life**
>
> **Article 8**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others. "

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

Background

[3] The petitioner is aged 65. He suffers from diabetes, heart problems, Parkinson's disease, and peripheral neuropathy. He suffers episodes of shaking and muscle spasms many times each day. He cannot live independently. He resides in a care home. He requires assistance from others with all aspects of daily living. He is, however, mentally unimpaired. He anticipates that there will come a time when he will not wish to continue living, as he will find his infirmity and consequent dependence on others intolerable. He would require assistance to commit suicide because of his physical state. He is apprehensive that anyone who assisted him would be liable to prosecution. He considers that he may require to take action to end his life himself, sooner than he would otherwise wish to, in

order to avoid living on in an undignified and distressing condition. This dilemma causes him uncertainty and anguish.

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

[5] It was accepted by both parties that Article 8.1 was engaged by the petitioner's circumstances. The petitioner had a right to determine certain aspects of his private life, including the determination of the final moment of his life. That was not to say that the petitioner had a "right to suicide". The petitioner's right under Article 8.1 could be interfered with under Article 8.2, if the requirements of legality and legitimate aim were met. At the hearing before the Lord Ordinary, the petitioner had sought to raise, for the first time, an issue of whether the criminalisation of a person who assisted another to commit suicide was necessary in a democratic society. Prior to that, the focus in the petition, the notes of argument, and the oral submissions had been legality; ie whether the interference with the Article 8.1 right had been in accordance with the law. The petitioner did not revisit the point in the course of the appeal. In any event, it is well established that the interference did have a legitimate aim; *viz.* the protection of the vulnerable from undue influence, or other acts which could circumvent their will. It is a common thread running through the European Court jurisprudence (*Pretty* v *UK* (2002) 35 EHRR 1; *Haas* v *Switzerland* (2011) 53

EHRR 33; *Koch* v *Germany* (2013) 56 EHRR 6; *Gross* v *Switzerland* (2014) 58 EHRR 7; *Nicklinson* v *United Kingdom* (2015) 61 EHRR SE7) and that of the courts in the United Kingdom (*R (Purdy)* v *DPP* [2010] 1 AC 345; *R* (*Nicklinson)* v *Ministry of Justice* [2015] AC 657) that, not only is there a legitimate aim to the criminalisation, but also that it is a matter not for the courts but for the legislature to determine. In that regard, the legislature was afforded a wide margin of appreciation.

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

The Prosecution Code

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

[8] In addition to the Code, the respondent has made public statements, specifically related to the prosecution of those who assist another to commit suicide. In particular, in his written response to the Justice Committee regarding the Assisted Suicide (Scotland) Bill, the

Lord Advocate made it clear that, when there was a sufficiency of evidence that an individual had caused the death of another, it would be difficult to conceive of a situation in which it would not be in the public interest to prosecute, but each case would be considered on its own facts and circumstances (*Written Submission to the Justice Committee*).

Section 2 of the Suicide Act 1961

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

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

DPP guidance

[11] The DPP published offence specific guidance (*Policy for Prosecutors in respect of Cases*

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

Lord Ordinary's decision

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

[13] The Lord Ordinary considered that the interference with the petitioner's Article 8.1 right was in accordance with the law under Article 8.2. He noted two well-established principles. First, although the court could review a policy, it was not for the court to dictate the content of that policy (*Nicklinson* v *Ministry of Justice (supra)*, at para 41). A range of policies could satisfy the requirement of clarity. Secondly, the certainty and foreseeability required of a prosecution policy was of a lesser and more indicative nature than that

required of a statute which created a criminal offence (*Nicklinson* v *Ministry of Justice (supra),* at paras 239-241). The Lord Ordinary accepted the approach to legality in *R (Purdy)* v *DPP* (*supra*), but considered that the circumstances before him were different in three respects. First, section 2 of the 1961 Act had a broad ambit. It would criminalise conduct that could not be prosecuted under the law of homicide in Scotland. Secondly, although there was evidence in *Purdy* that there was a marked difference between law and practice, there was no equivalent material before him. Thirdly, although the DPP had distanced himself from the guidance in the Code for Crown Prosecutors, and had conceded that this general guidance may be of little relevance, in the present case the respondent had not sought to distance himself from the Prosecution Code. He had pointed to the seriousness of the crime as an aspect of the guidance which would carry particular weight.

[14] The Lord Ordinary found that the respondent's prosecution policy was sufficiently accessible and foreseeable. There was no evidence that it was being exercised in an arbitrary manner. There was no suggestion that the substantive law was unclear. The absence of any divergence between law and practice demonstrated that any decision to prosecute would not turn on unpublished factors. There was no basis to conclude that the policy was inaccessible or unclear. The respondent had made his position clear. Any attempt to assist suicide, which amounted to an offence under the law of homicide, would be very likely to be prosecuted, although every case required to be considered on its own facts and circumstances. Finally, there was no suggestion that the behaviour on the part of the respondent was arbitrary. He had expressed his policy and intended to follow it.

Submissions

Petitioner

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

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

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

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

[19] Legality required safeguards to ensure that the proportionality of the interference could be examined. An over-rigid regime could breach the requirement (*MM* v *UK* [2012] ECHR 1906). The absence of guidance meant that proportionality could not be assessed. States did not have a margin of appreciation on legality (*R (T)* v *Chief Constable of Greater Manchester Police* [2015] AC 49, at para 115). The guidance in *R (Purdy)* v *DPP* was based on legality and not on the particular terms of the statutory offence in section 2 of the 1961 Act.

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

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

[22] The petitioner did not want a change in the law. The respondent had previously promulgated offence specific statements of policy, even in cases of homicide (*Law Hospital*

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

Respondent

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

[24] The petitioner had confused the question of uncertainty, as to what the law provides, with the discretion left to the respondent to make difficult decisions in particular cases. The petitioner did not seek to challenge the substantive law of homicide. There was no suggestion that it was a breach of Article 8 to have a law of that nature (*Nicklinson* v *Ministry*

of Justice (*supra*), Lord Neuberger at paras 63-66). There was no challenge to the adequacy of the Prosecution Code as a generality. The issue was whether the requirement of legality required the respondent to issue offence specific guidance for that class of homicides which might be regarded as assisted suicides. The fact that Parliament had decided not to change the law was the context in which the respondent had addressed his responsibilities. In any particular case the respondent had to consider whether there was a sufficiency of evidence and whether the public interest merited prosecution. In an area of controversial social and moral policy, it was not for him to confine the exercise of his discretion to a category of individuals and thus effectively give them immunity from prosecution.

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

[26] The only issue was legality. The legality analysis required to be carried out before any proportionality or necessity considerations (*R (T)* v *Chief Constable* (*supra*); *Beghal* v *DPP* [2015] 3 WLR 344). The petitioner's submissions could not succeed if it was accepted that

the substantive law was not in breach of Article 8.1. The correct starting point was that the law, which did not qualify the law of homicide to take account of cases where the motive was to assist the suicide, was not in breach of Article 8. If the substantive law did not breach a Convention right, the respondent could prosecute to its full rigours. The respondent had a discretion to exercise, but it was one to be exercised within the boundaries of the law.

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

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

successful. In the only other case there had been insufficient evidence in law. The respondent's position was that he would consider the public interest in the prosecution of any case of assisted suicide amounting to homicide in accordance with the factors which he had identified in his Prosecution Code. The compelling factor would be likely to be the seriousness of the offence. Given the seriousness of homicide, it was very likely that a prosecution would follow.

Decision

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

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

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

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

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

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

if prosecuted in Scotland. Section 2 created a broad offence, which criminalised behaviour which would not otherwise be so. It was, and is, not applicable in Scotland.

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

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

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

evidence which undermines his public statements. It cannot be said that the respondent is exercising his discretion in a way which is arbitrary and does not meet the requirements of legality.

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