

Criminal law review prosecutorial law general essay

Law



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45; [2010] 1 A. C. 345 (HL)

***Crim. L. R. 543 Abstract**

There are several objections to the recent decision in Purdy. Further consideration should be given in future to preferring prosecutorial "systems" of enforcement to prosecutorial "policies", where the potential scope of an offence is so wide as to be a matter of public concern. In R. (on the application of Purdy) v DPP¹ the House of Lords was confronted with a tragic application on behalf of a desperately ill person. Mrs Purdy suffers from primary progressive multiple sclerosis. She needs an electric wheelchair and her paralysis is likely to spread. She anticipates that a time will come when she will feel that life is unbearable and would want to commit suicide, but she may by that stage be physically incapacitated from doing so. She would then want to be assisted to die in a country where this can be overseen by doctors, probably Switzerland (where assisted suicide is legal, provided that it is not done for "selfish" reasons).² She would, however, need help even to get to Switzerland, and her fear is that her husband may be prosecuted for assisting her suicide if he were to help her to make that journey. Fear of that, and of that alone, would prevent her from making the journey.³ At the time of the litigation,⁴ s. 2(1) of the Suicide Act 1961 provided that: "A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on indictment to

imprisonment for a term not exceeding fourteen years."*Crim. L. R. 544

Despite, or perhaps even because of, the brevity of this sentence, its content was thought to be clear. 5 It proscribed even modest acts of assistance and it left no room for any common law defence of necessity which might otherwise have been available to Mrs Purdy's husband, should he be prosecuted. 6 But Mrs Purdy did not challenge the scope of the substantive law, and she also accepted that the DPP cannot provide relief by promising in advance not to prosecute her husband. 7 She argued instead that the inhibiting effect of the offence of assisted suicide engages art. 8(1) of the European Convention on Human Rights, and that in order for that interference to be "in accordance with the law" it should be supplemented by a clear and accessible prosecutorial policy relating to its enforcement. Article 8(2) of the European Convention provides: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with law and is necessary in a democratic society in the interests of ... the protection of health and morals, or for the protection of the rights and freedoms of others." This argument, though it had been unsuccessful in the lower courts, persuaded all five of their Lordships. Consequently they granted a mandatory order that the DPP should promulgate and publish a policy relating to the factors that he will consider relevant when deciding whether it would be in the public interest to prosecute anyone for assisted suicide in cases which are comparable to that of Mrs Purdy. The DPP published an interim policy⁸ on September 23, 2009, less than two months after the decision in Purdy, and he announced a 12-week consultation period on its contents. A final (revised) version was

published on February 25, 2010. 9 Much could be written about the Purdy decision, including the preliminary issue whether a competent and autonomous person's wish to be assisted to die engages the right to respect for her private life in art. 8(1). The decision that art. 8 is engaged required their Lordships to prefer the (ambivalent) decision of the European Court of Human Rights in *Pretty v United Kingdom*¹⁰ on this point to their own (ambivalent) decision to the contrary earlier in the same case. 11 But the engagement of art. 8 had in fact been conceded by the DPP¹² and we shall say nothing further about this part of the decision. Our attention will instead be addressed to the decision that compliance with art. 8(2) might require the prosecutor to promulgate an offence-specific policy, the essence of which is inevitably to suggest that certain *Crim. L. R. 545 cases of assisted suicide are most unlikely to be prosecuted for public interest reasons. 13 We shall argue that offence-specific policies of the type that was mandated in Purdy are inherently objectionable, and no less so in this difficult and tragic case. However it is strongly arguable that by virtue of the same art. 8(2), the DPP should have been required to set up a special system for dealing with affected cases, so that the "chilling effect" of the offence does not have disproportionate effect. 14 This article divides into four sections. First, we shall elaborate upon the decision in Purdy, and secondly we will outline the main points of the DPP's Final Policy. Thirdly, we shall criticise the decision in Purdy on the grounds that it does not address the constitutional objections to suggesting that certain conduct will systematically not be prosecuted; and we shall note that promulgating an offence-specific policy was not even implicitly required by the decision of the European Court in *Pretty v United*

Kingdom. Finally we will develop the key argument that compliance with art. 8(2) should instead require the DPP to maintain an efficient and fair prosecutorial system for dealing with assisted suicide cases. The distinction between prosecutorial policies and prosecutorial systems of enforcement is relatively unfamiliar in the literature¹⁵ and was not grasped in Purdy, but it may usefully be employed in other contexts too, especially where again the substantive law is wider than would seem to be absolutely necessary. ¹⁶

1. Purdy: analysis of the decision

In this section, we seek to emphasise two particular points. First, that the DPP does not seem to have challenged Mrs Purdy's underlying construction of art. 8(2) of the European Convention. Instead he seems to have fought the case on the basis that the information that Mrs Purdy sought was already to be found in the Code for Crown Prosecutors, which sets out how the "public interest" test operates in the general run of cases. This may limit the weight of the precedent in Purdy; indeed it may be limited substantially to its own facts. Secondly, the DPP was not given a free hand to produce any policy on prosecuting assisted suicide that he pleased. Rather, he was specifically mandated to formulate a policy which would seek to "protect the right to make an autonomous choice".

***Crim. L. R. 546 Purdy: an uncontested and limited precedent**

As we have noted already their Lordships had held in Pretty that respect for the private life of the dying person does not require or even permit the DPP to decide not to prosecute anyone in advance of any offence being

committed. ¹⁷ So Mrs Purdy resorted to the next available argument; that <https://assignbuster.com/criminal-law-review-prosecutorial-law-general-essay/>

the absence of any guidance on how the public interest element in cases such as hers would be assessed meant that any ex post prosecutorial discretion would not be "in accordance with the law". In turn, the DPP should have to declare his policy (or to devise one, if he had not already done so, and then declare it) regarding the enforcement of assisted suicide in cases where the victim was understood to be an autonomous individual who was under no apparent external pressure to commit suicide. 18 This argument had not been anticipated in *Pretty*, but acquired its force from a line of Strasbourg cases suggesting that where a discretionary power exists (that affects the enjoyment of an art. 8 right) then in order for that power to "accord with the law", "... the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise." 19 Their Lordships accepted the argument, apparently untroubled by the fact that none of the authorities cited involved the exercise of prosecutorial discretion²⁰ in relation to a substantive offence the scope of which is itself clear. So the underlying assumption in *Purdy* is that it is discretionary enforcement of the criminal law, and not the criminal law itself, which constitutes the "state interference". Only then does it become pertinent that the criteria for that decision are not accessible and that its exercise may not readily be predictable. It is thus important to observe that the DPP did not seem to contest this construction of the applicability of art. 8 to prosecutorial discretion. Rather he relied on the point that any such guidance as Mrs Purdy could expect to receive could already be found by interpretation of the Fifth Code for Crown Prosecutors (2004). 21 Further, he had already applied the Code to a similar case where he had

decided not to prosecute the family members of 23-year-old Daniel James. Mr James was a young man who had become tetraplegic following a serious spinal injury occasioned in a rugby match, whose family assisted his travel to commit suicide in a clinic in Switzerland. Mr James was accepted to be**Crim. L. R.* 547 "... a mature, intelligent and fiercely independent young man with full capacity to make decisions about his medical treatment whose determination to commit suicide was not in any way influenced by the conduct or wishes of his parents." 22The DPP had also published²³ his reasons in this case. But, departing from the Court of Appeal, their Lordships found that the factors listed in the " general" Code bore too little relevance to prosecutions for assisted suicide. The DPP noted that the James case was not one of the more serious cases of assisted suicide on account of the settled willingness of the victim to die²⁴; but the relevance of this does not derive from the " general" Code and in any event the DPP acknowledged that assisted suicide itself remained a serious offence. The other point of mitigation relied upon by the DPP was that:" 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." 25However--and here lies the rub--there is nothing in the " general" Code to suggest that lack of greed, or the finding of any combination of grief, distress and regret from the defendant following an offence, may constitute " public interest" reasons not to prosecute. As stated by Lord Hope:" The question whether a prosecution is in the public interest can only be answered by bringing into account factors that are not mentioned there. Furthermore, the further

factors that were taken into account in the case of Daniel James were designed to fit the facts of that case." 26 So Mrs Purdy succeeded because neither the general Code nor the publication of the reasons for not prosecuting in the James case made it sufficiently clear how the DPP exercised his discretion in assisted suicide cases. It might be countered that, among the 115 or more English people known to have been assisted to die in Switzerland, only eight cases were referred to the DPP, and none of them resulted in prosecution, including the rather telling case of Daniel James. 27 But clarity about the decision-making process is more than a question of outcomes. Rather, the underlying principles needed to be promulgated in order for Mrs Purdy to receive reliable legal advice about the likelihood of prosecution. Lord Hope seemed to appreciate that it might be difficult for the families to attach much weight to past practice alone and said that " this issue will not go away" 28 as things presently stand.*Crim. L. R. 548

Although the DPP lost on account of the insufficiency of the general Code, it is at least clear that future applications of Purdy may be limited. Their Lordships did accept that in most cases, the content of any general Code for Crown Prosecutors is likely to offer sufficient guidance as to likely prosecutorial decision-making. 29 Case law too may assist. So, it is surely wrong to suppose that the DPP will be required to produce many separate offence-specific policies in other areas where human rights are engaged. For example, it should be clear enough already that teachers who chastise their pupils for religious reasons should expect prosecution even if their rights under art. 9(1) are thereby engaged. This is because their potential liability can be justified for the purpose of protecting the rights of children, 30 and

because the " general" Code for Crown Prosecutors specifies that the fact that " the person was in a position of authority or trust" 31 points towards a decision to prosecute. The ready applicability of the general Code to most offences and indeed to most issues in the criminal law perhaps explains the tactical decision of the DPP to rely on it in Purdy. Unfortunately this proved to be exactly the wrong case in which to adopt that tactic.