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Case No: CO/7774/2010; CO/7850/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/08/2012

Before:
LORD JUSTICE TOULSON
MR JUSTICE ROYCE
and
MRS JUSTICE MACUR

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Between:

THE QUEEN ON THE APPLICATION OF TONY NICKLINSON	**Claimant**
- and -	
MINISTRY OF JUSTICE	**Defendant**
DIRECTOR OF PUBLIC PROSECUTIONS	**Interested Parties**
JANE NICKLINSON	

And Between:

THE QUEEN ON THE APPLICATION OF AM	**Claimant**
- and -	
(1) DIRECTOR OF PUBLIC PROSECUTIONS	**Defendants**
(2) THE SOLICITORS REGULATION AUTHORITY	
(3) THE GENERAL MEDICAL COUNCIL	
AN NHS PRIMARY CARE TRUST	**Interested Party**
THE ATTORNEY GENERAL	**Interveners**
CNK ALLIANCE LTD (CARE NOT KILLING)	

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Paul Bowen QC (instructed by **Bindmans LLP**) for **Tony Nicklinson**
David Perry QC and James Strachan (instructed by **Treasury Solicitor**) for the **Ministry of Justice**
Philip Havers QC and Adam Sandell (Instructed by **Leigh Day & Co**) for **AM**
John McGuinness QC (Instructed by **CPS Appeals Unit**) for the **Director of Public Prosecutions**
Timothy Dutton QC and Miss M Butler (instructed by **Bevan Brittan**) for the **Solicitors Regulation Authority**

Robert Englehart QC and Andrew Scott (Instructed by **GMC Legal**) for the **General Medical Council**
Jonathan Swift QC and Joanne Clement (Instructed by **Treasury Solicitor**) for the **Attorney General**
Charles Foster and Benjamin Bradley (Instructed by **Barlow Robbins LLP**) for the **CNK Alliance Ltd**

Hearing dates: 19-22 June 2012

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Approved Judgment

Lord Justice Toulson:

Introduction

1. These are tragic cases. They present society with legal and ethical questions of the most difficult kind. They also involve constitutional questions. At the invitation of the court the Attorney General has intervened.

2. Put simply, the claimants suffer from catastrophic physical disabilities but their mental processes are unimpaired in the sense that they are fully conscious of their predicament. They suffer from "locked in syndrome". Both have determined that they wish to die with dignity and without further suffering but their condition makes them incapable of ending their own lives. Neither is terminally ill and they face the prospect of living for many years.

3. I will refer to the claimants as Martin and Tony. Martin (which is not his real name) understandably wishes to preserve his privacy and the court has made an anonymity order. Tony's case has attracted a lot of public interest because he has taken part in public debate with the help of his wife, Mrs Nicklinson, and their daughters. As Mrs Nicklinson has said to the media, whatever the outcome of his case, there will be no winners. Either way, there is no happy ending in sight.

4. Barring unforeseen medical advances, neither Martin's nor Tony's condition is capable of physical improvement. Although they have many similarities, there are some differences in their condition. There are also differences in the orders which they seek and the ways in which their cases have been presented.

Martin

5. Martin would be capable of physically assisted suicide, but this would involve someone else committing an offence under the Suicide Act 1961, section 2. It would be possible for him to end his life at a Dignitas clinic in Zurich without an offence being committed under Swiss law; and if Martin's wife were willing to help him to do so, it is unlikely that she would face prosecution in England under the policy published by the Director of Public Prosecution (DPP) about prosecution for assisted suicide after the decision of the House of Lords in *R (Purdy) v DPP* [2009] UKHL 45, [2010] 1 AC 345. But Martin's wife, who is herself a nurse and devoted to his care, is understandably not willing to support Martin for that purpose, with which she does not agree, although she would wish to be with him to provide comfort and make her final farewell, if he were to succeed in his purpose by the help of others.

6. Martin's main claim is against the DPP, but the Solicitors Regulation Authority (SRA) and the General Medical Council (GMC) have been included in the proceedings. Because of the importance of the issues, I would give Martin permission to apply for judicial review.

7. In his claim Martin's condition is described in this way:

> "6. Martin is 47 years old. He lives with his wife and his wife's daughter. In August 2008 he suffered a brain stem stroke. This has left him virtually unable to

> move. He cannot speak. He can communicate only through small movements of his head and eyes and, very slowly, by using a special computer that can detect where on a screen he is looking.
>
> 7. He is totally dependant on others for every aspect of his life. He lives in an adapted room in his family home. He spends almost all of his time in bed, although he can be taken out of the house. His care is provided by his wife…and by full-time carers provided by his local NHS Primary Care Trust.
>
> 8. Martin is fed by people putting food into his mouth. He is able to swallow. His medication goes through a tube through his abdominal wall into his stomach. He wears a convene (a sheath over his penis, attached to a tube, into which he urinates). He defecates into special underwear. Adjoining the room in which he lives, he has a specially adapted bathroom in which he can be washed.
>
> 9. He is, it is understood, not likely to die of natural causes in the near future.
>
> 10. Martin has a strong, settled and reasoned wish to end his life. He loves his family, and enjoys spending time with them, and he likes to read. But he finds his life and his condition following his stroke to be undignified, distressing and intolerable. He does not wish to go on living like this. And, because he finds his current life unbearable, he wishes to end his life as soon as possible."

8. There are, it seems, two ways by which he might achieve that aim. One would be by using the services of Dignitas in Zurich, if he is able to afford them. It is said in his claim that Dignitas is not cheap and that Martin's resources are limited. The other means would be by self-starvation. There is medical evidence that this would involve considerable pain and distress, although it would be possible for medical staff to provide some alleviation in order to reduce his suffering without crossing the line of intentionally assisting his suicide attempt.

9. The primary relief sought by Martin is an order that the DPP should clarify his published policy so that other people, who may on compassionate grounds be willing to assist Martin to commit suicide through the use of Dignitas, would know, one way or the other, whether they would be more likely than not to face prosecution in England. The potential helper or helpers might be a member of the public who had no previous knowledge of Martin, a health professional or a solicitor who might act as an intermediary in making the necessary arrangements. The clarification which Martin now asks for is limited to the Dignitas scenario, because by the end of the hearing Philip Havers QC, on his behalf, accepted that no clarification is required regarding the self-starvation scenario, in view of things said during the course of the hearing.

10. If he succeeds in his claim against the DPP, Martin also seeks declarations in relation to the GMC and SRA in order that a doctor or solicitor who played a part in helping Martin to commit suicide via Dignitas, without facing risk of prosecution under the DPP's clarified policy, should not be exposed to the risk of professional disciplinary proceedings. In the alternative (and Mr Havers made it clear that this was very much a fallback position), if Martin fails in his claim against the DPP, he seeks a declaration that section 2 of the Suicide Act is incompatible with article 8 of the European Convention.

Tony

11. Tony is now aged 58. He suffered a catastrophic stroke in June 2005. He is paralysed below the neck and unable to speak. He cannot move anything but his head and eyes. He communicates by blinking to indicate a letter held up by his wife on a Perspex board. He also now has an eye blink computer which makes word processing faster for him. He has described it as a "ray of sunshine on an otherwise bleak horizon", but the process of communication is still desperately slow. He estimates that it takes him 3 hours to write what a person without disabilities could do in 20 minutes. He is virtually housebound. Although the family has a wheelchair adapted car, he rarely goes out as he has lost interest in doing so. His meals are soft food, mashed up and taken orally, and fluids inserted directly into the stomach through the abdominal wall by a percutaneous endoscopic gastrostomy or PEG tube. Swallowing is a difficult and laborious business. He often coughs and has to have the saliva wiped from his face.

12. Tony's day presently consists of writing his memoirs and watching TV. In the morning two carers come to get him out of bed. They shower him, get him dressed and put him for a short time on a cycling machine. He is then given breakfast and placed in a wheelchair. He spends the morning writing and the afternoon watching TV. At 4pm two carers come to transfer him from the wheelchair to an armchair. At 10.30pm a carer helps Mrs Nicklinson to undress him, wash him and make him ready for bed, where he remains until 8.30am the following day. He has a night time carer to move him, which happens usually 3 or 4 times per night. Recently he took part in the making of a TV documentary which was broadcast on the eve of the hearing. The members of the court watched it.

13. In a statement he has summarised his condition in this way:

> "My life can be summed up as dull, miserable, demeaning, undignified and intolerable. …it is misery created by the accumulation of lots of things which are minor in themselves but, taken together, ruin what's left of my life. Things like…constant dribbling; having to be hoisted everywhere; loss of independence, …particularly toileting and washing, in fact all bodily functions (by far the hardest thing to get used to); having to forgo favourite foods; … having to wait until 10.30 to go to the toilet…in extreme circumstances I have gone in the chair, and have sat there until the carers arrived at the normal time."

14. Shortly before the hearing Tony sent an email to his solicitors which he asked should be read out to the court. He said:

> "All this current activity, making documentary and writing articles, has reminded me of how much I want my life to end. I know you said this hearing is all about legal argument, but is it possible for you to remind the judges of a few things? I have wanted my life to end since 2007 so it is not a passing whim. I know consent makes no difference but the doctor has it anyway. Legal arguments are fine but they should not forget that a life is affected by the decision they come to. A decision going against me condemns me to a life of increasing misery. I have no doubt the judges have heard it all before, but I simply wanted to get it off my chest."

15. As things are, the only way in which Tony could end his life other than by self-starvation would be by voluntary euthanasia. With his wife's help he could probably travel to Switzerland, but that would not help him because euthanasia is outside the scope of Dignitas' activities. No country in the world permits the practice of voluntary euthanasia in the case of non-residents.

16. According to a statement by Dr Philip Nitschke, who is a doctor in North Australia, it would be technologically possible for Tony to take the final step of initiating suicide with the aid of a machine which Dr Nitschke has invented. The machine would be pre-loaded with lethal drugs and could be digitally activated by Tony using an appropriate pass phrase, but it would be an elaborate procedure requiring the machine to be set up, tested and connected to Tony's PEG tube.

17. In these circumstances Tony wants to be able to choose to end his life by voluntary euthanasia. This does not mean that he necessarily wants to end his life immediately. At the moment he thinks that he would probably wish to end it in a year or two, but he wants to establish the right to die with dignity at a time of his choosing.

18. On 12 March 2012 Charles J gave Tony permission to apply for the following relief by way of judicial review:

> "1. A declaration that it would not be unlawful, on the grounds of necessity, for Mr Nicklinson's GP, or another doctor, to terminate or to assist the termination of Mr Nicklinson's life. By way of preliminary issue, the claimant seeks a declaration that the common law defence of necessity is available to a charge of murder in a case of voluntary active euthanasia and/or to a charge under s2(1) of the 1961 Act in the case of assisted suicide provided
>
> (a) the Court has confirmed in advance that the defence of necessity will arise on the facts of the particular case;
>
> (b) the Court is satisfied that the person is suffering from a medical condition that causes unbearable suffering; that there are no alternative means available by which his suffering may be relieved;

and that he has made a voluntary, clear, settled and informed decision to end his life;

(c) the assistance is to be given by a medical doctor who is satisfied that his or her duty to respect autonomy and to ease the patient's suffering outweighs his or her duty to preserve life;

2. Further or alternatively, a declaration that the current law of murder and/or of assisted suicide is incompatible with Mr Nicklinson's right to respect for private life under article 8, contrary to s1 and 6 of the Human Rights Act 1998, in so far as it criminalises voluntary active euthanasia and/or assisted suicide."

19. As to the second ground of relief, at the hearing counsel representing Tony, Paul Bowen QC, accepted that it would not be right for the court to make a declaration that the current law of murder is incompatible with the Convention in so far as it criminalises voluntary active euthanasia, since murder is not a statutory offence, although there are certain statutory defences. The question whether voluntary active euthanasia may give rise to a defence of necessity to a charge of murder is governed by the common law. The Human Rights Act 1998 does not make provision for the courts to declare that the common law is incompatible with a Convention right. There is good reason for this. The common law is declared by the courts, which have the power to develop it. Section 6(1) makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. The courts are a public authority and therefore are responsible for ensuring that the law, as they declare it, is compatible with the Convention. Section 6(2) provides an exception where a court is bound by primary legislation to reach a result which is incompatible with a Convention right. In such circumstances the doctrine of Parliamentary sovereignty requires the court to give effect to the legislation, but section 4 makes provision for the court to declare that the legislation is incompatible with a Convention right.

20. If the court were satisfied that article 8 requires that voluntary active euthanasia should in relevant circumstances be a defence to murder, its proper course in accordance with section 6(1) would be to recognise that there is such a defence under the doctrine of necessity. The court should not rule that there is no such defence at common law, but that the common law is incompatible with the Convention, for that would amount to a statement that the court had failed to comply with the Convention in determining the scope of the common law. Put another way, it would amount to a declaration that the court had itself failed to comply with its statutory obligation under section 6(1).

21. There is no constitutional impediment to Tony seeking a declaration that section 2 of the Suicide Act is incompatible with article 8, but on the facts of his case it is a somewhat academic question, given that he is not in a condition to be able to commit assisted suicide. The evidence of Dr Nitschke makes it not entirely academic, but the main part of Mr Bowen's argument was directed to establishing that article 8 requires voluntary active euthanasia to be permitted by law in Tony's circumstances.

22. As a further alternative, Mr Bowen asked the court to declare that the legislation under which murder carries a mandatory sentence of life imprisonment is incompatible with the European Convention in a case of genuinely compassionate voluntary active euthanasia.

23. The evidence on Tony's behalf consisted of statements from himself, members of his family and various experts' reports. These were all admitted by consent.

24. The skeleton arguments on behalf of Tony and Martin both contained a number of references to a report dated January 2012 by The Commission on Assisted Dying. This was a committee with a distinguished membership, chaired by Lord Falconer. The Commission obtained evidence from a wide variety of sources and its report contains much interesting information. We were asked to read the report and have done so. However, it is important to stress that it was not an officially appointed commission. Its report contains an interesting analysis of arguments and views, but it would not be right for the court to treat it as having some form of official or quasi-official status. It also refers to various statements made to the Commission by Tony, of which we have taken note.

25. Shortly before the hearing, judgment was given by Smith J in the Supreme Court of British Columbia in the case of *Carter v Canada* [2012] BCSC 886. After a 22 day trial, in which the judge heard a large amount of expert opinion, she delivered a judgment declaring that the provisions of the Criminal Code of Canada which prohibit physician-assisted dying are incompatible with the Canadian Charter of Rights and Freedoms. Mr Bowen applied for leave to introduce the evidence in that case as evidence in the present proceedings. The evidence was not available to him at the time of the application and he recognised that, if it were admitted, there would have to be a further hearing in order to enable the witnesses to be called and cross-examined. Other parties would also need to be given the opportunity to consider whether they wished to introduce contradictory expert evidence. Mr Bowen did not seek to delay the court from hearing the arguments which the parties had come prepared to present, but asked that we should consider the application to introduce further evidence when considering judgment.

Issues

26. The central issues are these:

    1. Is voluntary euthanasia a possible defence to murder?

    2. Is the DPP under a legal duty to provide further clarification of his policy?

    3. Alternatively, is section 2 of the Suicide Act incompatible with article 8 in obstructing Martin or Tony from exercising a right in their circumstances to receive assistance to commit suicide?

    4. Are the GMC and the SRA under a legal duty to clarify their positions?

5. Is the mandatory life sentence for murder incompatible with the Convention in a case of genuine voluntary euthanasia?

27. Before commenting on the arguments and relevant authorities, I should first refer to the historical position of suicide and euthanasia at common law, the provisions of the Suicide Act, the DPP's policy statement, the European Convention and Parliamentary proposals for changing the law.

Suicide and euthanasia at common law

28. At common law suicide was self-murder or "felo de se". Murder was a felony. There were three categories of person who could be convicted of a felony: principals in the first degree, principals in the second degree and accessories before the fact. A principal in the first degree was a person who carried out the conduct element of the offence (in murder, the killing) with the necessary mental element. (There might be more than one principal in the first degree.) A principal in the second degree was someone who was present and aided or abetted the actual perpetrator of the felony at the time when the felony was committed. An accessory before the fact was a person who gave deliberate encouragement or assistance in advance. The Criminal Law Act 1977 abolished the distinction between felonies and other types of offence. Under the new classification, offences which used to be felonies are now indictable offences, i.e. triable by a jury. Those who were principals in the second degree or accessories before the fact (in short, those who assisted or encouraged the commission of an offence) are now known as secondary parties or accessories. The changes in title have not affected the substantive law, but I have referred to the old terminology in order to explain what used to be the common law regarding suicide.

29. Someone who committed suicide was a self-murderer in the eye of the law, but obviously could not be prosecuted. However, if he committed suicide by agreement with another, for example under a suicide pact, and the other person survived, the survivor was guilty of murder. This was confirmed by the Court of Criminal Appeal in *Croft* [1944] 1 KB 295.

30. In that case the trial judge directed the jury that the survivor of a suicide pact was guilty of the murder of the deceased, even if he was not present when the death occurred. The appellant was convicted and sentenced to death. His appeal was dismissed.

31. The law was amended by section 4 of the Homicide Act 1957, which provided that the survivor of a suicide pact should be guilty of manslaughter rather than murder, provided that the defendant had himself the settled intention of dying in pursuance of the pact. In all other circumstances, it remained the law until the Suicide Act 1961 that a person who assisted or encouraged another to commit suicide was guilty of murder. A person who carried out an act of euthanasia would have been a principal in the first degree. A person who attempted to commit suicide, but failed, was guilty of attempting to murder himself.

Suicide Act 1961

32. Section 1 provides:

> "The rule of law whereby it is a crime for a person to commit suicide is hereby abrogated."

33. If the Act had stopped there, it would have followed that those who assisted or encouraged a person to commit suicide would also no longer be guilty of an offence. That was not Parliament's intention. In order to prevent that consequence, by section 2 it created a new offence of complicity in another's suicide. Section 2 was amended by section 59 of the Coroners and Justice Act 2009, but the purpose was to clarify, rather than change, the law on assisted suicide. The Lord Chancellor explained the rationale on the second reading of the Bill in the House of Commons:

> "Both the Law Commission and an independent review identified confusion about the scope of the law on assisted suicide…[Section 59] does not substantively change the law, but it does simplify and modernise the language of section 2 of the Suicide Act 1961 to increase public understanding and to reassure people that the provision applies as much to actions on the internet as to actions off-line." (487 HC Official Report (6th Series) Col 35)

34. Section 2 in its amended form provides:

> "(1) A person ("D") commits an offence if –
>
> (a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and
>
> (b) D's act was intended to encourage or assist suicide or an attempt at suicide.
>
> (1A) The person referred to in subsection (1)(a) need not be a specific person (or class of person) known to, or identified by, D.
>
> (1B) D may commit an offence under this section whether or not a suicide, or an attempt at suicide, occurs.
>
> (1C) An offence under this section is triable on indictment and a person convicted of such an offence is liable to imprisonment for a term not exceeding 14 years.
>
> (2) If on the trial of an indictment for murder or manslaughter of a person it is proved that the deceased person committed suicide, and the accused committed an offence under subsection (1) in relation to that suicide, the jury may find the accused guilty of the offence under subsection (1).
>
> …

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

35. Section 2A(1) provides:

> "If D arranges for a person ("D2") to do an act that is capable of encouraging or assisting the suicide or attempted suicide of another person and D2 does that act, D is also to be treated for the purposes of this Act as having done it."

DPP's policy about prosecution for assisted suicide

36. In *R (Purdy) v DPP* [2009] UKHL 45, [2010] 1 AC 345, the House of Lords made a mandatory order requiring the DPP "to promulgate [his] policy identifying facts and circumstances which he will take into account in deciding whether to consent to prosecution under section 2(1) of the Suicide Act 1961."

37. Before issuing a final policy statement, the DPP, Keir Starmer QC, issued an interim policy dated 23 September 2009, and conducted an extensive public consultation exercise. Mr Starmer gave evidence to the Falconer Commission, during which he was asked questions about how he approached the formulation of his policy guidelines and their operation. A transcript of his evidence is included in our material. Mr Starmer said that the consultation exercise took several months and that there were nearly 5000 responses from a variety of sources, expressing a wide range of opinions. There was strong support for most of the factors in favour of, or against, prosecution identified in his interim policy, but there were some significant exceptions. The most significant exception related to whether or not the status of the victim ought to be a relevant factor.

38. In the interim policy, one of the factors against prosecution was that the victim had "a terminal illness; or a severe and incurable physical disability; or a severe degenerative physical condition; from which there was no possibility of recovery". Mr Starmer said that many organisations representing disabled people or individuals with disabilities responded with concern about that factor. He summarised their concern in this way:

> "If you have that factor in as a factor suggesting you won't prosecute, what that means is in Case A where all the facts are the same as Case B and the only difference is that the person who committed suicide had some terminal illness, severe or incurable disease, that will be the factor that tilts it. From our perspective, that suggests to us that we are less well protected because you wouldn't prosecute if I fell within category A but you would prosecute somebody else."

39. After consideration of all the consultation responses, the DPP omitted that factor from his final policy statement, issued in February 2010.

40. The policy statement lists 16 factors tending in favour of prosecution and 6 factors tending against prosecution.

41. The factors identified as tending in favour of prosecution include:

> 12. The suspect gave encouragement or assistance to more than one victim who were not known to each other.
>
> 13. The suspect was paid by the victim or those close to the victim for his or her encouragement or assistance.
>
> 14. The suspect was acting in his or her capacity as a medical doctor, nurse, other healthcare professional, a professional carer (whether for payment or not), or as a person in authority, such as a prison officer, and the victim was in his or her care.
>
> 16. The suspect was acting in his or her capacity as a person involved in the management or as an employee (whether for payment or not) of an organisation or group, a purpose of which is to provide a physical environment (whether for payment or not) in which to allow another to commit suicide.

42. The factors identified as tending against prosecution are:

> 1. The victim had reached a voluntary, clear, settled and informed decision to commit suicide.
>
> 2. The suspect was wholly motivated by compassion.
>
> 3. The actions of the suspect, although sufficient to come within the definition of the offence, were of only minor encouragement or assistance.
>
> 4. The suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide.
>
> 5. The actions of the suspect may be characterised as reluctant encouragement or assistance in the face of a determined wish on the part of the victim to commit suicide.
>
> 6. The suspect reported the victim's suicide to the police and fully assisted them in their enquiries into the circumstances of the suicide or the attempt and his or her part in providing encouragement or assistance."

European Convention

43. Article 2 provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in

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

44. Article 8 provides:

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

Parliamentary proposals for changing the law

45. There have been numerous parliamentary attempts to change the law. Lord Joffe introduced Bills in the House of Lords unsuccessfully in 2003, 2004 and 2005. The Bills were similar in aim. They sought to legalise not only medical assistance with suicide but also, in cases where self-administration of lethal medication was not possible, voluntary euthanasia.

46. Lord Joffe's 2004 Assisted Dying for the Terminally Ill Bill was considered by a Select Committee under the chairmanship of Lord Mackay of Clashfern, which reported on 4 April 2005. It summarised the evidence which it had received (comprising oral evidence from 48 individuals or group representatives, written evidence from 88 individuals or groups and 14,000 letters). In *Dishonest To God* (2010, Continuum International Publishing Group), page 46, Baroness Warnock has described the Select Committee's report as giving "an exceptionally detailed insight into the legal, moral and religious arguments deployed on both sides of the debate". The report recommended that consideration of the Bill should be adjourned until after the 2005 general election. It also suggested that a clear distinction should be drawn in any future Bill between assisted suicide and voluntary euthanasia in order to provide

Parliament with an opportunity to consider carefully these two courses of action, and the different considerations which apply to them, and to reach a view on whether, if such a Bill were to proceed, it should be limited to the one or the other or both.

47. After the general election Lord Joffe introduced a new Bill of the same name on 9 November 2005. The debate on the second reading of the Bill took place on 12 May 2006. The House voted to adjourn it for 6 months. It is the convention of the House of Lords not to vote against the principle of a Bill on its second reading, but the decision to adjourn the Bill was in substance a decision that it should not proceed.

48. During the passage of the Coroners and Justice Act 2009 Lord Falconer moved an amendment in the House of Lords which would have created an exception to section 2 of the Suicide Act in the case of acts done for the purpose of enabling or assisting a person to travel to a country in which assisted dying is lawful, subject to certain conditions. The amendment was defeated. The decision of the House of Lords in *Purdy* was delivered 3 weeks later.

49. On 27 March 2012 there was debate in the House of Commons on the subject of assisted dying. In the course of the debate moving accounts were given by MPs about cases of constituents or family members and widely differing views were expressed on the desirability of legislative change. The House passed a motion welcoming the DPP's policy and encouraging further development of specialist palliative care and hospice provision. It rejected an amendment calling on the Government to carry out a consultation about whether to put the DPP's guidance on a statutory basis.

Is voluntary euthanasia a possible defence to murder?

50. I will begin by considering the question without reference to article 8 of the European Convention. Mr Bowen submitted that whether or not Tony has what I will refer to as the right to die (using that expression as shorthand for a right not to be prevented by the state from undergoing voluntary euthanasia) under that article, the time has come when the common law should give respect to his autonomy and dignity by recognising that voluntary euthanasia can provide a defence to murder by way of the defence of necessity.

51. Mr Bowen recognised that this is a bold submission. He was not able to cite any decision of a court in any common law country to that effect. There are many statements to the contrary of high persuasive authority, although technically they were obiter because they were not a necessary part of the courts' reasoning.

52. The Law Commission considered the topic in Part 7 of its report on Murder, Manslaughter and Infanticide (2006) Law Com 304. The question whether mercy killing should afford a justificatory defence was outside the Commission's terms of reference, but the Commission did consider whether to recommend, as part of a re-drawing of the boundaries of homicide, that mercy killing should amount to a less serious homicide offence than murder. It decided not to make such a recommendation but it did recommend that there should be a full consultation on the issue. It said at paragraph 7.2:

> "However, we have decided that a recommendation for a specific partial defence of "mercy" killing should await a

further and more detailed consultation exercise specifically concentrating on the issue. We quite simply did not have the time that we would have needed to conduct a full consultation on such an important issue."

53. However, because of the importance of the subject, the Commission examined the present state of the law. It referred to previous recommendations for reform by the Criminal Law Revision Committee in 1976 and by a Select Committee of the House of Lords in 1989 (the Nathan Committee), and it referred also to more recent research carried out on behalf of the Commission by Professor Barry Mitchell into public opinion on the subject.

54. The Commission summarised the present state of the law as follows:

"**All "mercy" killings are unlawful homicides**

7.4 The law of England and Wales does not recognise either a tailor-made offence of 'mercy' killing or a tailor-made defence, full or partial, of 'mercy' killing. Unless able to avail him or herself of either the partial defence of diminished responsibility or the partial defence of killing pursuant to a suicide pact, if the defendant ("D") intentionally kills the victim ("V") in the genuine belief that it is in V's best interests to die, D is guilty of murder. This is so even if V wished to die and consented to being killed.

7.5 D is entitled to be convicted of manslaughter rather than murder if D proves that:

(1) he or she was suffering from diminished responsibility at the time of killing V;

(2) he or she was a party to an agreement with V which had as its object the death of both of them, irrespective of whether each was to take their own life, and it was D's intention, when entering into the agreement, to die pursuant to the agreement.

7.6 The current law does not recognise the 'best interests of the victim' as a justification or excuse for killing. What it does, instead, is to acknowledge, to a very limited extent, that the consent of V can be relevant in the context of suicide pacts. However, the consent of V does not operate to *justify* the actions of the survivor of the suicide pact. Rather, combined with the fact that the survivor intended to kill him or herself as part of a pact, V's consent partially excuses the actions of the survivor.

> 7.7 Under the current law, the compassionate motives of the 'mercy' killer are in themselves never capable of providing a basis for a partial excuse. Some would say that this is unfortunate. On this view, the law affords more recognition to other less, or at least no more, understandable emotions such as anger (provocation) and fear (self-defence). Others would say that recognising a partial excuse of acting out of compassion would be dangerous. Just as a defence of necessity "can very easily become simply a mask for anarchy", so the concept of 'compassion' - vague in itself - could very easily become a cover for selfish or ignoble reasons for killing, not least because people often act out of mixed motives."

55. In *Inglis* [2010] EWCA Crim 2637, [2011] 1 WLR 1110, Lord Judge CJ giving the judgment of the Court of Appeal Criminal Division quoted large parts of paragraphs 7.4 to 7.7 of the Law Commission's report and said that the court could not improve on the Commission's "careful analysis of this profoundly sensitive issue" (paragraph 40). Lord Judge also said (paragraph 37):

> "…we must underline that the law of murder does not distinguish between murder committed for malevolent reasons and murder motivated by familial love. Subject to well established partial defences, like provocation or diminished responsibility, mercy killing is murder."

56. As to possible changes in the law, Lord Judge said (at paragraph 39):

> "However problems of mercy killing, euthanasia, and assisting suicide should be addressed must be decided by Parliament, which, for this purpose at any rate, should be reflective of the conscience of the nation. In this appeal we are constrained to apply the law as we find it to be. We cannot amend it or ignore it."

57. There are statements to similar effect in earlier authorities. In *Airedale NHS Trust v Bland* [1993] AC 789 the House of Lords considered whether a health authority could lawfully discontinue life-sustaining treatment designed to keep a patient alive in a persistent vegetative state. The members of the Judicial Committee made it plain that euthanasia was not lawful at common law. Lord Mustill said at page 892:

> "7. Murder.
>
> It has been established for centuries that consent to the deliberate infliction of death is no defence to a charge of murder. Cases where the victim has urged the defendant to kill him and the defendant has complied are likely to be rare, but the proposition is established beyond doubt by the law on duelling, where even if the deceased was the challenger his

> consent to the risk of being deliberately killed by his opponent does not alter the case.
>
> 8. "Mercy Killing".
>
> Prosecutions of doctors who are suspected of having killed their patients are extremely rare, and direct authority is in very short supply. Nevertheless, that "mercy killing" by active means is murder was taken for granted in the directions to the jury in *R v Adams* (unreported), 8 April 1957, *R v Arthur* (unreported), 5 November 1981 and *R v Cox* (unreported), 18 September 1992, and was the subject of direct decision by an appellate court in *Barber v Superior Court of the State of California*, 195 Cal. Rptr. 484 and has never so far as I know been doubted. The fact that the doctor's motives are kindly will for some, although not for all, transform the moral quality of his act, but this makes no difference in law. …
>
> 9. Consent to "mercy killing".
>
> So far as I am aware no satisfactory reason has ever been advanced for suggesting that it makes the least difference in law, as distinct from morals, if the patient consents to or indeed urges the ending of his life by active means. The reason must be that, as in the other cases of consent to being killed, the interest of the state in preserving life overrides the otherwise all-powerful interests of patient autonomy."

58. Lord Goff, at page 865, and Lord Browne-Wilkinson, at page 882, made statements to similar effect.

59. The textbooks are equally unequivocal. Smith and Hogan's Criminal Law, 13th Edition (2011), page 589, states:

> "English law admits of no defence of mercy killing or euthanasia."

60. In *Bland* the judges were acutely aware of the profoundly difficult ethical questions which the case presented. They reached their decision on the legal basis that Anthony Bland's condition was such that the doctors no longer had a legal duty to continue invasive care and treatment, and accordingly the omission to continue such treatment would not be an unlawful omission. They emphasised two things: first, that the law drew a crucial distinction between an omission to maintain treatment and the administration of a lethal drug, however unsatisfactory such a distinction might seem to some people from an ethical viewpoint; and secondly, that it must be a matter for Parliament to decide whether the law should be changed, taking into account the complex humanitarian, ethical and practical considerations. Lord Goff said at page 865:

> "I must however, stress…that the law draws a crucial distinction between cases in which a doctor decides not to

> provide, or to continue to provide, for his patient treatment or care which could or might prolong his life, and those in which he decides, for example by administering a lethal drug, actively to bring the patient's life to an end. As I have already indicated, the former may be lawful, either because the doctor is giving effect to his patient's wishes by withholding the treatment or care, or even in certain circumstances in which…the patient is incapacitated from stating whether or not he gives his consent. But it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his suffering, however great that suffering may be: see *R v Cox* (unreported), 18 September 1992. So to act is to cross the Rubicon which runs between on the one hand the care of the living patient and the other hand euthanasia – actively causing his death to avoid or to end his suffering. Euthanasia is not lawful at common law. It is of course well known that there are many responsible members of our society who believe that euthanasia should be made lawful; but that result could, I believe, only be achieved by legislation which expresses the democratic will that so fundamental a change should be made in our law, and can, if enacted, ensure that such legalised killing can only be carried out subject to appropriate supervision and control. It is true that the drawing of this distinction may lead to a charge of hypocrisy…But the law does not feel able to authorise euthanasia, even in circumstances such as these; for once euthanasia is recognised as lawful in these circumstances, it is difficult to see any logical basis for excluding it in others. "

61. Lord Browne-Wilkinson said at pages 879-880:

> "On the moral issues raised by this case, society is not all of one mind…the position therefore, in my view, is that if the judges seek to develop new law to regulate the new circumstances, the law so laid down will of necessity reflect judges' views on the underlying ethical questions, questions on which there is a legitimate division of opinion…Where a case raises wholly new moral and social issues, in my judgment it is not for the judges to seek to develop new, all embracing, principles of law in a way which reflects the individual judges' moral stance when society as a whole is substantially divided on the relevant moral issues. Moreover, it is not legitimate for a judge in reaching a view as to what is for the benefit of the one individual whose life is in issue to take into account the wider practical issues as to allocation of limited financial resources or the impact on third parties of altering the time at which death occurs.

> For these reasons, it seems to me imperative that the moral, social and legal issues raised by this case should be considered by Parliament. The judges' function in this area of the law should be to apply the principles which society, through the democratic process, adopts, not to impose their standards on society."

62. Lord Mustill said at pages 887 and 891:

> "I will…abstain from debate about whether the proposed conduct will amount to euthanasia. The word is not a term of art, and what matters is not whether the declarations [that the hospital might lawfully discontinue treatment] authorise euthanasia, but whether they authorise what would otherwise be murder. ….The conclusion that the declarations can be upheld depends crucially on a distinction drawn by the criminal law between acts and omissions, and carries with it inescapably a distinction between, on the one hand what is often called "mercy killing" where active steps are taken in a medical context to terminate the life of a suffering patient, and a situation such as the present where the proposed conduct has the aim for equally humane reasons of terminating the life of Anthony Bland by withholding from him the basic necessities of life. The acute unease which I feel about adopting this way through the legal and ethical maze is I believe due in an important part to the sensation that however much the terminologies may differ the ethical status of the two courses of action is for all relevant purposes indistinguishable. … Still, the law is there and we must take it as it stands.
>
> …
>
> The whole matter cries out for exploration in depth by Parliament and then for the establishment by legislation not only of a new set of ethically and intellectually consistent rules, distinct from the general criminal law, but also of a sound procedural framework within which the rules can be applied to individual cases. …Meanwhile, the present case cannot wait. We must ascertain the current state of the law and see whether it can be reconciled with the conduct which the doctors propose."

63. Mr Bowen submitted that the Rubicon referred to by Lord Goff was crossed in the case of *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, and that the case shows that the court is able to fashion means of permitting doctors to act in a way which accords with the demands of humanity. The case concerned two baby girls, Jodie and Mary, who were born joined at the lower abdomen. Jodie was stronger than Mary. If Mary had been born a singleton, she would not have been viable and would have died shortly after birth. She remained alive because a common artery enabled Jodie to circulate sufficient oxygenated blood for Mary to survive for the time being. If the twins were surgically separated, the evidence was that Jodie

would have a good prospect of a healthy and normal life, but Mary would die within minutes. If no operation were performed, both twins would die within months because Jodie's heart would not be able to sustain both Mary and herself in the longer term.

64. The court granted an application by the hospital for a declaration that it could lawfully carry out separation surgery. The judges had no difficulty in concluding that it was better that one twin should have a normal life than that neither should survive the first few months of life. But there was a formidable question whether the operation, carried out in the knowledge that it was sure to result in Mary's immediate death, would amount to murder. The court considered three possible defences: lack of causation, lack of intent and necessity, overshadowed by a concept of quasi-self-defence. It concluded that the operation would be lawful, but the three members of the court expressed their reasoning in different ways. Ward LJ concluded that where a doctor was faced with conflicting duties towards two patients whose lives were at risk, it was lawful for him to adopt the course which would be the lesser of two evils. He did not use the language of necessity, but his reasoning may be said to fall within the doctrine. Brooke LJ conducted a lengthy and comprehensive analysis of the doctrine of necessity, at pages 219-238, and he concluded that the principle applied on the unusual facts of the case. He said at page 240:

> "According to Sir James Stephen there are three necessary requirements for the application of the doctrine of necessity: (i) the act is needed to avoid inevitable and irreparable evil; (ii) no more should be done than is reasonably necessary for the purpose to be achieved; (iii) the evil inflicted must not be disproportionate to the evil avoided. Given that the principles of modern family law point irresistibly to the conclusion that interests of Jodie must be preferred to the conflicting interests of Mary, I consider that all three of these requirements are satisfied in this case.
>
> Finally, the doctrine of the sanctity of life respects the integrity of the human body. The proposed operation would give these children's bodies the integrity which nature denied them."

65. Robert Walker LJ concluded, at pages 258-259, that whereas it would be unlawful to kill Mary intentionally, that is, to undertake an operation with the primary purpose of killing her, Mary's death would not be the purpose of the operation. Although Mary's death would be foreseen as an inevitable consequence of an operation which was intended, and necessary, to save Jodie's life, Mary's death would not be the intention of the surgery. She would die "because tragically her body, on its own, is not and never has been viable". His judgment therefore combined all three strands of necessity, lack of intent and lack of causation.

66. The analysis that Mary's death would be regarded in the eyes of the law as caused by the fact that her body was not viable on its own comes from case law which has given rise to the so-called doctrine of double effect.

67. The origin of the doctrine may be traced to the summing up of Devlin J in the case of *Adams*. Dr Adams was charged with the murder of an elderly patient by overdosing

her with morphia and heroin. His defence was that he had prescribed the drugs for the alleviation of pain. The trial was in 1957 and the case was unreported, but Lord Devlin wrote an account of it in 1985 in his book *Easing the Passing*. In his summing up, as he recounted it, he said:

> "If the first purpose of medicine, the restoration of health, can no longer be achieved, there is still much for a doctor to do, and he is entitled to do all that is proper and necessary to relieve pain and suffering, even if the measures he takes may incidentally shorten life. This is not because there is a special defence for medical men but because no act is murder which does not cause death. We are not dealing here with the philosophical or technical cause, but with the commonsense cause. The cause of death is the illness or the injury, and the proper medical treatment that is administered and that has an incidental effect on determining the exact moment of death is not the cause of death in any sensible use of the term. But…no doctor, nor any man, no more in the case of the dying than of the healthy, has the right deliberately to cut the thread of life."

68. He also directed the jury that if the defendant did "some act capable, if the necessary intent was present, of being murderous," the prosecution had also to prove the intent to murder.

69. The summing up therefore left it open to the jury to acquit Dr Adams, if they considered it possible that his purpose was the alleviation of pain, either on the basis that the death should be regarded as the consequence of the patient's infirmity rather than the drugs which were intended to alleviate its consequences, or on the basis that there was a lack of intent. Both strands can be seen in Robert Walker LJ's analysis in *Re A*.

70. A particular feature of *Re A* was the duty to protect Jodie's life and the recognition that it was imperilled, albeit unintentionally, by the parasitic life of Mary. Ward LJ said at page 203:

> "Mary uses Jodie's heart and lungs to receive and use Jodie's oxygenated blood. This will cause Jodie's heart to fail and cause Jodie's death as surely as a slow drip of poison. How can it be just that Jodie should be required to tolerate that state of affairs? One does not need to label Mary with the American terminology which would paint her to be "an unjust aggressor", which I feel is wholly inappropriate language for the sad and helpless position in which Mary finds herself. I have no difficulty in agreeing that this unique happening cannot be said to be unlawful. But…I can see no difference in essence between…resort to legitimate self-defence and the doctors coming to Jodie's defence and removing the threat of fatal harm to her presented by Mary's draining her life blood. The availability of such a plea of quasi-self-defence, modified to meet the quite exceptional circumstances nature has inflicted on the twins, makes intervention by the doctors lawful."

71. Similarly Robert Walker LJ said at page 255:

> "There is on the facts of this case some element of protecting Jodie against the unnatural invasion of her body through the physical burden imposed by her conjoined twin. That element must not be overstated. It would be absurd to suggest that Mary, a pitiful and innocent baby, is an unjust aggressor…Nevertheless, the doctors' duty to protect and save Jodie's life if they can is of fundamental importance to the resolution of this appeal."

72. Those highly unusual features, which were critical in the case of *Re A*, are absent from the present case. If in this case a doctor were to administer a lethal drug to Tony, there could be no defence to a charge of murder based on lack of causation, lack of intent or quasi-self-defence. However, Mr Bowen relies on the case for the broader argument that the court was willing to apply the doctrine of necessity in a new situation and, in doing so, was prepared to consider which was the lesser of two evils. He submitted that on a humane application of Sir James Stephen's test, which Brooke LJ followed, the defence of necessity should be potentially available to a doctor who agreed to terminate Tony's life at Tony's request.

73. In *The Criminal Law: The General Part* (2nd Ed 1961) page 728, Glanville Williams observed that "The peculiarity of necessity as a doctrine of law is the difficulty or impossibility of formulating it with any approach to precision". He added:

> "It is in reality a dispensing power exercised by the judges where they are brought to feel that obedience to the law would have endangered some higher value. Sir William Scott said in *The Gratitudine* (1801) 165 ER at 459:
>
> > "The law of cases of necessity is not likely to be well furnished with precise rules; necessity creates the law; it supersedes rules; and whatever is reasonable and just in such cases, is likewise legal. It is not to be considered a matter of surprise, therefore, if much instituted rule is not to be found on such subjects." "

74. In a system governed by the rule of law, any such dispensing power requires great caution. It should not be used as a means of introducing major and controversial policy change. *Re A* was a case of highly exceptional facts, where an immediate decision was required. Tony's condition is tragic but sadly not unfamiliar.

75. The reasons given in *Bland* and in *Inglis* for saying that it is for Parliament to decide whether to change the law on euthanasia are compelling and should be followed by this court. The reasons have to do with competence, constitutionality and control of the consequences.

76. As to competence, the subject is profoundly difficult and complex, raising a myriad of moral, medical and practical considerations. The issues were considered in depth and from many viewpoints by the Select Committee under the chairmanship of Lord Mackay. The committee considered that essentially there was a conflict between

different valuable principles, which were accorded different priorities by different protagonists. After considering the report, a majority of the House of Lords voted against changing the law. The Falconer Commission has recently recommended that Parliament should reconsider the subject.

77. In its reflections on the evidence which it received, the Falconer Commission commented, at page 283:

> "As chapter 2 of this report demonstrated, the evidence the Commission received presented a huge range of extremely powerful and nuanced arguments representing the many ethical dimensions encompassed by the assisted dying debate. These ethical principles included the value of individual autonomy, the "intrinsic" or "self-determined" value of human life, the importance of a compassionate response to suffering, the need to protect vulnerable people, the importance of fighting societal discrimination towards disabled people and doctors' (in some people's view) conflicting responsibilities to relieve suffering and preserve life. As the evidence presented in chapter 2 demonstrated, we found on inspection of the evidence that every single ethical principle that was put forward has its equally vociferous opposite."

78. A court hearing an individual case, concentrating rightly and inevitably on the dire circumstances of the claimant, is not in a position to decide such broader questions, but its decision would create a precedent which would affect many other cases.

79. As to constitutionality, it is one thing for the courts to adapt and develop the principles of the common law incrementally in order to keep up with the requirements of justice in a changing society, but major changes involving matters of controversial social policy are for Parliament. There is ample authority for that proposition. Lord Reid said in *Shaw v DPP* [1962] AC 220, 275:

> "Where Parliament fears to tread it is not for the courts to rush in."

80. In *Myers v DPP* [1965] AC 1001, 1021, a case about the law of hearsay, Lord Reid said:

> "I have never taken a narrow view of the functions of this House as an appellate tribunal. The common law must be developed to meet changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in this House in old cases. But there are limits to what we can or should do. If we are to extend the law it must be by the development and application of fundamental principles. …And if we do in effect change the law, we ought in my opinion only to do that in cases where our decision will produce some finality or certainty."

81. In *Abbott v The Queen* [1977] AC 755, 767, a case about duress, Lord Salmon said:

> "Judges have no power to create new criminal offences; nor in their Lordships' opinion, for reasons already stated, have they the power to invent a new defence to murder which is entirely contrary to fundamental legal doctrine accepted for hundreds of years without question. If a policy change of such a fundamental nature were to be made it could, in their Lordships' view, be made only by Parliament. Whilst their Lordships strongly uphold the right and indeed the duty of judges to adapt and develop the principles of the common law in an orderly fashion they are equally opposed to any usurpation by the courts of the functions of Parliament."

82. In *C (A Minor) v DPP* [1996] 1 AC 1, 28 Lord Lowry said:

> "It is hard, when discussing the propriety of judicial law-making, to reason conclusively from one situation to another…I believe, however, that one can find in the authorities some aids to navigation across an uncertainly charted sea. (1) If the solution is doubtful, the judges should beware of imposing their own remedy. (2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while the leaving the difficulty untouched. (3) Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems. (4) Fundamental legal doctrines should not be lightly set aside. (5) Judges should not make a change unless they can achieve finality and certainty."

83. Lord Lowry considered, but distinguished, the case of *R v R* [1992] 1 AC 599, in which the House of Lords upheld a conviction for marital rape, rejecting as outmoded the doctrine of so called implied consent, although earlier attempts to abolish it by legislation had failed. He observed, at page 38, that the decision in *R* was based on a very widely accepted modern view of marital rape and it derived support from a group of up-to-date decisions. Further, the principle rejected in *R* stood on a dubious legal foundation.

84. A decision by the court to alter the common law so as to create a defence to murder in the case of active voluntary euthanasia would be to introduce a major change in an area where there are strongly held conflicting views, where Parliament has rejected attempts to introduce such a change, and where the result would be to create uncertainty rather than certainty. To do so would be to usurp the role of Parliament.

85. As to control of the consequences, it is hard to imagine that Parliament would legalise any form of euthanasia without a surrounding framework regarding end of life care and without procedural safeguards. The Falconer Commission observed at pages 287-288:

> "It was not the purpose or objective of the Commission to decide whether the law should be changed to make assisted dying legally possible…It is for Parliament to decide on behalf of the people whether it would be in the interests of society as a

> whole to implement a safeguarded system that would provide this option, and there is a clear need for more inclusive public debate to inform this process. In particular, the evidence the Commission has received has made it clear that the issue of assisted dying cannot be viewed in isolation from the need for adequate health and social care, or from the considerable concerns from many people that vulnerable people could be put at risk of abuse or indirect social pressure to end their lives, if such an option was to become available. Therefore if an assisted dying framework is to be implemented in the future it must have these concerns at its heart and its purpose must be viewed as providing people with access to high quality end of life care, and protecting vulnerable people from any kind of social pressure at the same time as providing people with greater choice and control over how and when they die."

86. It would be impossible for a court to introduce, still less monitor, any such regime.

87. For all of those reasons it would be wrong for the court to depart from the long established position that voluntary euthanasia is murder, however understandable the motives may be, unless the court is required to do so by article 8. I would refuse the application to introduce the evidence received by Smith J in *Carter v Canada*, because it would not be right for the court to depart from the law as it presently is on the basis of its views about such evidence.

Article 8

88. The foundation of Mr Bowen's argument is that article 8 protects two values which are the birthright of every person – a right to personal autonomy, or self-determination, and a right to dignity. In *Omega Spielhallen-und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2005] 1 CMLR 5 the Court of Justice, at paragraph 34, recognised that the Community legal order strives to ensure respect for human dignity as a general principle of law and it referred with approval the opinion of the Advocate General on this topic at AG82-AG91. In her opinion the Advocate General observed that the concept of human dignity is a generic concept, for which there is not a traditional legal definition, but that respect for human dignity is an integral part of the general legal tenets of Community law. This is a particularly important factor of the present case, Mr Bowen submitted, because Tony's stroke has condemned him to living in conditions in which he is deprived of all usual dignity and the law has deprived him of the right to say that enough is enough. For Tony, autonomy and dignity, humanity and justice require that he should be permitted to end his life; and it is submitted that article 8 gives him the right to do so.

89. The counter arguments are also based on considerations of morality and compassion, as well as practical considerations, but they relate in the main to the consequences upon other members of society if Tony's claim succeeds. With that introduction to the article 8 debate, I turn to the leading cases. They are cases about assisted suicide, not euthanasia, but Mr Bowen submitted that the developing Strasbourg jurisprudence nevertheless supports his argument.

R (Pretty) v DPP [2001] UKHL 61, [2002] 1 AC 800

90. Mrs Pretty suffered from motor neurone disease. She wanted to be able to enlist her husband's help to commit suicide. He was willing to do so, but only if he could be sure that he would not be prosecuted under section 2. The DPP refused to give such an undertaking. She applied for judicial review of his refusal to do so, or alternatively for a declaration that section 2 was incompatible with article 8.

91. Lord Bingham said, at paragraph 2, that the Appellate Committee was not a legislative body, nor was it entitled or fitted to act as a moral or ethical arbiter. The questions whether the terminally ill, or others, should be free to seek assistance in taking their own lives were of great social, ethical and religious significance, but it was not the task of the Committee to weigh or evaluate them. Its task was to apply the law of the land as it understood it to be.

92. He referred, at paragraph 9, to two principles which he described as "deeply embedded in English law". The first was the distinction between the taking of one's own life by one's own act and the taking of life through the intervention or with the help of a third party. The former was permissible; the latter was not. The second distinction was between the cessation of life-saving or life-prolonging treatment on the one hand and the taking of action lacking medical, therapeutic or palliative justification but intended solely to terminate life on the other. Lord Bingham continued:

> "While these distinctions are in no way binding on the European Court of Human Rights there is nothing to suggest that they are inconsistent with the jurisprudence which has grown up around the Convention. It is not enough for Mrs Pretty to show that the United Kingdom would not be acting inconsistently with the Convention if it were to permit assisted suicide; she must go further and establish that the United Kingdom is in breach of the Convention by failing to permit it or would be in breach of the Convention if it did not permit it. Such a contention is in my opinion untenable."

93. Lord Bingham held, at paragraphs 26 to 30, that article 8 was not engaged by section 2; but that, if article 8 was engaged, section 2 was not incompatible with it.

94. Lord Bingham also upheld the DPP's refusal to give the undertaking which had been requested of him. He said, at paragraph 39, that the DPP had no power to make what would have been "a proleptic grant of immunity from prosecution". He continued:

> "The power to dispense with and suspend laws and the execution of laws without the consent of Parliament was denied to the Crown and its servants by the Bill of Rights 1689 (1 Will & Mary, sess 2, c 2)."

95. The other members of the Appellate Committee agreed with Lord Bingham's reasoning.

***Pretty v United Kingdom* (2002) 35 EHRR 1**

96. The Strasbourg court rejected Mrs Pretty's complaint that there had been a violation of article 8. The court disagreed with the House of Lords' opinion that article 8 was not engaged, but agreed that it was not breached.

97. As to the engagement of article 8, the court said:

> "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 medial decrepitude which conflict with strongly held ideas of self and personal identity.
>
> …
>
> 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."

98. On the question of compliance, the court said:

> "70. According to the Court's established case law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued; in determining whether an interference is "necessary in a democratic society", the Court will take into account that a margin of appreciation is left to the national authorities, whose decision remains subject to review by the Court for conformity with the requirements of the Convention. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake.
>
> …

> 74. …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. Doubtless the condition of terminally ill individuals will vary. But many will be vulnerable and it is the 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. Clear risks of abuse do exist, notwithstanding arguments as to the possibility of safeguards and protective procedures.
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> …
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> 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.
>
> 77. Nor in the circumstances is there anything disproportionate in the refusal of the DPP to give an advance undertaking that no prosecution would be brought against the applicant's husband. Strong arguments based on the rule of law could be raised against any claim by the executive to exempt individuals or classes of individuals from the operation of the law."

99. The comments in paragraph 77 were a clear reference to Lord Bingham's comments on the impropriety of the DPP acting in a way which would amount to a dispensation with the law, without the consent of Parliament.

100. There was much argument in the present case, as there was in *Purdy* to which I will come, about the final sentence of paragraph 76. I would observe at this stage that paragraphs 76 and 77 contained three points:

> 1. A blanket ban on assisted suicide was not disproportionate in the view of the court.
>
> 2. Nor was it "arbitrary" to reflect the importance of life by prohibiting assisted suicide, while providing a system of enforcement which allowed due regard to be given *in each particular case*, to the public interest, the requirements of deterrence and such like.
>
> 3. Strong objection could be raised against any claim by the executive to exempt in advance any *individual or classes of individuals* from the operation of the law. (Emphasis added)

***R (Purdy) v DPP* [2009] UKHL 45, [2010] 1 AC 345**

101. Mrs Purdy suffered from multiple sclerosis. She expected that a time would come when she would regard her life as unbearable and would want to end it while still physically able to do so. By that stage she would need her husband's assistance to travel to a country where assisted suicide was lawful. He was willing to help her, but she was concerned about his risk of prosecution under section 2. She asked the DPP to set out the factors which he would take into account in deciding whether to bring a prosecution, but he declined to be drawn. She sought judicial review of his refusal on the ground that, without such clarification, the law relating to assisted suicide did not satisfy the article 8(2) requirements of accessibility and foreseeability. The House of Lords agreed and made the order which led to the DPP making his policy statement.

102. In his argument on behalf of Mrs Purdy, Lord Pannick QC addressed the constitutional concerns voiced by Lord Bingham and the Strasbourg court about the impropriety of the executive dispensing with the law, or exempting classes of individuals from its operation. He submitted (page 305):

> "The Director has no power to adopt a policy that he will not prosecute, but he does have power to adopt and publish a policy setting out the most significant factors that would guide his decision."

103. From that starting point, Lord Pannick submitted that without an offence-specific policy as to the factors to be taken into account when the DPP decided whether to consent to a prosecution for assisting suicide, the prohibition in section 2 was not "in accordance with the law". The Court of Appeal had been wrong, Lord Pannick said (at page 355), to understand Mrs Purdy to be wanting the DPP to promulgate a policy which would effectively discount the risk of her husband being prosecuted. She was asking for no more than the publication of an offence-specific policy setting out the factors that he would take into account.

104. The judgments contain a narrower and a broader strand of reasoning of a significantly different nature. The narrower line of reasoning reflected the argument advanced by Lord Pannick. The scope of the law of assisted suicide was for Parliament to decide, not for the court or the DPP, but in order for the law to comply with the Convention requirements of accessibility and foreseeability it was necessary for the DPP to clarify

the factors which he would take into account in giving his consent for a prosecution. How he chose to do so was a matter for the DPP.

105. The broader line of reasoning involved recognising that there would be some cases in which the existence of a risk of prosecution would violate the would-be suicide's right of autonomy under article 8, and that it was necessary for the DPP to formulate a policy aimed at preventing such violation, by restricting those cases in which he would give his consent to ones which would not involve a breach of article 8.

106. Lord Hope adopted the narrower line. (Without setting out lengthy extracts from his judgment, I would refer to paragraphs 26-27, 40-43 and 53-56.) Lord Neuberger also followed the narrower line of reasoning, as I read his judgment (paras 96, 101 and 106), although he also said that he agreed with the more fully expressed reasons of Lady Hale and Lord Brown. Lord Phillips agreed that Mrs Purdy's appeal should be allowed for the reasons which were common to the other members of the Committee (paragraph 1).

107. The broader line of reasoning appears in parts of the speeches of Lady Hale and Lord Brown.

108. Lady Hale, at paragraph 63, interpreted the final sentence of paragraph 76 of the Strasbourg's court's judgment in *Pretty* as indicating that the Strasbourg court contemplated that there would be cases in which the deterrent effect of a risk of prosecution would be a violation of a would be suicide's rights under article 8. On that premise, and on the associated premise that the justification for a blanket ban depended on the flexibility of its operation, it followed that the prohibition could not be in accordance with the law unless there was greater clarity about the factors which the DPP would take into account. In providing the necessary clarification, the object of the exercise should be to focus upon the features which would distinguish those cases where deterrence would be disproportionate, i.e. would violate a person's article 8 rights, from those in which it would not (paragraph 64).

109. On Lady Hale's approach, the problem with the law was not simply one of accessibility, but was more fundamental, namely that section 2 was potentially incompatible with article 8 because of its blanket nature, and that in order to make it compliant with article 8 it was necessary for the DPP to produce guidelines which would limit its scope.

110. Lord Brown began his opinion by saying, at paragraph 70:

> "My Lords, there are not many crimes of which it can be said that their discouragement by the state may violate the fundamental human rights of others. Yet undoubtedly that is true in certain circumstances of the conduct criminalised by section 2(1) of the Suicide Act 1961."

111. He expressed the view, at paragraph 74, that although the Strasbourg court in *Pretty* had said that it did not consider that the blanket nature of the ban on assisted suicide was disproportionate, it was implicit in the court's reasoning

> "…that in certain cases, not merely will it be appropriate not to prosecute, but a prosecution under section 2(1) would actually be *in*appropriate." (Original emphasis)

112. Lord Brown expanded on the point at paragraph 75, saying that:

> "…Strasbourg clearly appears to have recognised that in certain circumstances it will be wrong in principle to prosecute A for assisting B to commit suicide, because to do so would unjustifiably deter those in A's position from enabling those in B's position to exercise their article 8(1) right to self determination…"

113. Lord Brown concluded at paragraph 86:

> "What to my mind is needed is a custom-built policy statement indicating the various factors for and against prosecution, …, factors designed to distinguish between those situations in which, however tempted to assist, the prospective aider and abettor should refrain from doing so, and those situations in which he or she may fairly hope to be, if not commended, at the very least be forgiven, rather than condemned, for giving assistance."

114. The question arises whether Lady Hale's and Lord Brown's interpretation of the Strasbourg court's judgment in *Pretty* formed a necessary part of the reasoning in *Purdy*, upon which the mandatory order issued by the court was made, so that this court is bound by that reasoning. Mr Bowen submitted that it did. Mr Havers, who also relied on the observations of Lady Hale and Lord Brown in support of Martin's case, acknowledged that he could not go that far. I do not accept Mr Bowen's submission. The narrower line of reasoning had the support of all the members of the Appellate Committee and was all that was necessary to make the order which the court issued.

115. That conclusion does not preclude Mr Bowen from submitting that the broader reasoning is persuasive. Mr Bowen submitted that Lady Hale and Lord Brown were right, and that Tony's case is one in which he should be entitled to decide when his life should be ended. On that premise Mr Bowen argued that since nature has deprived Tony of the ability to carry out his decision, the only way that his right can be exercised is through an act of voluntary euthanasia.

***Haas v Switzerland* (2011) 53 EHRR 33**

116. The applicant lived in Switzerland, where assisted suicide is permitted. He had a long history of mental illness and wished to commit suicide. No doctor was willing to help him to do so. He complained about the refusal of the Swiss authorities to permit him to obtain lethal drugs, without a prescription, in a sufficient quantity to enable him to end his life in a dignified manner. He contended that the authorities thereby violated his right under article 8 to decide when and how to end his life. The court held that there was no violation.

117. The court accepted (paragraph 51) that the right of an individual to decide how and when to end his life, provided that he is in a position to make up his own mind in that respect, is one aspect of the right to respect for private life within the meaning of article 8. The question whether there has been a violation depends on article 8(2). As to that, the court said at paragraph 55:

> "The Convention and the Protocols thereto must be interpreted in the light of the present-day conditions…In Switzerland, under art 115 of the Criminal Code, incitement to commit or assistance with suicide are only punishable where the perpetrator of such acts commits them for selfish motives. By comparison, the Benelux countries in particular have decriminalised the act of assisting suicide, but only in well-defined circumstances. Certain other countries only allow "passive" acts of assistance. The vast majority of Member States, however, appear to place more weight on the protection of an individual's life than on the right to end one's life. The Court concludes that the states have a wide margin of appreciation in that respect."

The effect of the Strasbourg authorities

118. There is no Strasbourg authority which supports the proposition that a blanket ban on voluntary euthanasia is incompatible with article 8. Currently the Benelux countries are the only Council of Europe Member States which permit voluntary euthanasia, and in *Haas* the court concluded that the states have a wide margin of appreciation in this area.

119. Where a matter is within the margin of appreciation left to individual states, it is also up to the state to determine which organ of the state should decide what legal regime to adopt. Mr Bowen argued that the court should not leave the matter to Parliament. He cited *Re G (Adoption): (Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173, as a case where the court held that secondary legislation was incompatible with the Convention, although the Strasbourg court had accepted that a similar provision adopted by another state was within its margin of appreciation. That was a case far removed from the present, in which the order in question discriminated against a minority. The court's decision did not create uncertainty, nor was it liable to have wider consequences beyond the court's ability to evaluate.

120. In *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465, Lord Bingham said at paragraph 44:

> "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 the 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."

121. The only general principles which the Strasbourg court has expounded are that the right of an individual to decide how and when to end his life is an aspect of the right of respect for private life within article 8 and that states have a wide margin of appreciation in this area. For reasons which I have already given, I am satisfied that the law maker in this area (euthanasia) should be Parliament, just as Lord Hope and others said in *Purdy* that Parliament should be the law maker in the area of assisted suicide. Furthermore, since it has been held by both the House of Lords and the Strasbourg court that a blanket ban on assisted suicide is not incompatible with article 8, the same must apply with added force to the ban on voluntary euthanasia.

122. I conclude that it would be wrong for this court to hold that article 8 requires voluntary euthanasia to afford a possible defence to murder. To do so would be to go far beyond anything which the Strasbourg court has said, would be inconsistent with the judgments of the House of Lords and the Strasbourg court in *Pretty*, and would be to usurp the proper role of Parliament.

Is the DPP under a legal duty to provide further clarification of his policy?

123. The requirement of accessibility is part of Convention jurisprudence about what is a "law". In *Sunday Times v UK* (1979) 2 EHRR 245, at paragraph 49, the Strasbourg court said that:

> "…a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unobtainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances."

124. In *Purdy* Lord Hope said, at paragraph 41, that in this context the word "law" is to be understood "in its substantive sense, not its formal one". The law for this purpose goes beyond the mere words of the statute. He added:

> "The requirement of foreseeability will be satisfied where the person is able to foresee, if need be with the appropriate legal advice, the consequences which a given action may entail. A law which confers a discretion is not in itself inconsistent with this requirement, provided the scope of the discretion and the manner of its exercise are indicated with sufficient clarity to give the individual protection against interference which is arbitrary."

125. Applying the principle to Martin's circumstances, Mr Havers submitted that the DPP's policy will be defective unless it enables Martin, and those who might be willing to assist him to commit suicide, to know as a matter of probability whether a particular course of conduct will result in their prosecution. It is not enough, he submitted, that they would know from the policy that they would face a real risk of prosecution. He would therefore rephrase Lord Hope's statement that the requirement of foreseeability "will be satisfied where the person concerned is able to foresee, if need be with appropriate legal advice, the consequences which a given action may entail" so as to read "will not be satisfied unless the person concerned is able to foresee, if need be with appropriate legal advice, the consequences which a given action will probably entail."

126. This submission was an advance on the way in which the matter was put in Martin's skeleton argument (at paragraph 85). There it was submitted that the principle to be distilled from the case law was that "the person concerned must be able to determine adequately, with legal advice if necessary, whether or not prosecution under section 2(1) of the 1961 Act is a real risk arising from a given course of conduct". I mention that not in a spirit of criticism, but because it highlights a point of some significance.

127. Mr Havers submitted that the DPP's policy provided the necessary degree of clarity for what he described as "class 1 helpers", that is, family members and friends who were willing to provide assistance out of compassion. Debbie Purdy's husband fell within that class, and so would Martin's wife if she were willing to help. However, the policy was defective in that it failed to give adequate clarity as to another group, which he described as "class 2 helpers", comprising individuals who were willing to act selflessly, with compassion and without suspect motives, but who had no personal connection with the individual who wished to end his or her life. "Class 2 helpers" might be professionals, carers or others. It is at once apparent that class 2 helpers are not a ubiquitous class.

128. Mr Havers observed that in relation to class 2 helpers some of the factors identified in the policy might tend to favour prosecution, but others might tend against prosecution. The fact that the suspect was acting as a health care professional, or was providing assistance in the course of paid work or gave encouragement or assistance to more than one victim who were not known to each other, would all be factors favouring prosecution. On the other hand, the same suspect might be motivated wholly by compassion, have sought to dissuade the victim from taking the course of action which resulted in his or her suicide and eventually acted in a way which might be characterised as reluctant encouragement or assistance in the face of a determined wish on the part of the victim to commit suicide. Those factors would all tend against prosecution. The policy gave no indication how the DPP would carry out a balancing exercise in a case where some factors tended in favour of prosecution and others tended against prosecution.

129. For those reasons Mr Havers submitted that further clarification was required. Without it, the position of those who might be willing to help Martin, including particularly health care professionals and solicitors (who might be able to help him go about the process of engaging people to assist him with his suicide), was too uncertain to satisfy the requirements of the Convention.

130. In considering these criticisms, it is right to understand the thinking which underlay the DPP's approach to the task which he had been set. In his evidence to the Falconer Commission, Mr Starmer said:

> "The approach we took was this: the law makes it an offence to assist suicide. It then obviously gives the prosecutor discretion. We thought that if the law remains unamended and in that form, it was important to distinguish between as it were one off acts of support or compassion and those that were engaged in the delivery of professional services or a business that would routinely…bring them into conflict with the law, because of the broad prohibition on assisted suicide. I mean, I appreciate not everyone would agree with that distinction but if you do have a broad based offence, it's one thing to say, "this is as it were, a one-off compassionate act" compared with "this is the provision of a service or a business" which inevitably involves a breach of the law and I think …if we didn't put that factor in, Parliament might say we are really undermining the prohibition on assisted suicide."

131. Mr Starmer also demurred at the suggestion that his policy should be seen as in some way schematic. He said:

> "We want to be transparent about the factors, hence the policy, and apply it on a case by case basis. We want to avoid being too schematic because it's not for me or the CPS to determine what the law should be. The law is clear and we're simply being given discretion in individual cases…What I think would be wrong, what I want to resist is saying: "schematically this is what we're trying to achieve", because that is not for me."

132. He was asked whether setting out factors for and factors against prosecution was any different from setting out rules. His reply is instructive:

> "I think it is, because ultimately it's a discretion; this is simply saying what are the sort of factors we're likely to take into account. That is different from saying: "schematically these are the cases we are going to prosecute and these are the cases we're not going to prosecute". I appreciate that the two are not at opposite ends of the continuum by any stretch of the imagination. But they are conceptually different and I have avoided any attempt I hope to be schematic about this and insisted that every case has to be decided on its own facts. These are factors to indicate to people what is likely to be taken into account one way or the other, with the overriding proviso that no one factor outweighs others. We don't simply weigh them all up and we will decide each case on a case-by-case basis. We're trying to avoid…the schematic approach does risk, unless it's very carefully constructed, undermining Parliament's intention that this should be an offence."

133. It is clear from his answers that the DPP was not seeking to identify types of case in which he would adopt a policy of non-prosecution based on a consideration of the rights of the victim. That would have been to introduce a de facto form of justifiable homicide. He took the view that any such exercise should be for Parliament; and that while Parliament maintained a blanket ban on assisted suicide, he should not adopt a policy which might appear to undermine the law. On the other hand, he recognised that there would be cases in which the public interest did not require prosecution, not because the homicide was justifiable or to encourage its repetition in other cases, but because it was a one off act of compassion. As Mr Starmer recognised, there is a conceptual difference between adopting the latter approach and carving out from the law a class of cases in which he would not enforce the law as a matter of general policy. The factors identified in the policy statement were intended to reflect this distinction.

134. That was in my view a constitutionally proper approach for him to adopt. It was consistent with the terms of the order in *Purdy*, which were that he should identify facts and circumstances which he would take into account in deciding whether to consent to prosecution.

135. Concern has been expressed that the effect, although not the intention, of the DPP's policy has been to dispense with the law in a category of cases. The Falconer Commission expressed its concern at pages 285-286:

> "These guidelines are exceptional as they prescribe the circumstances in which the public interest test will be used, not with a view to deal with the exceptional or unexpected case, but in order to deal with the most common manifestation of the conduct that is criminalised by section 2(1) of the Suicide Act 1961. There is no doubt that the DPP has a public interest discretion not to bring a prosecution even if he is satisfied that the evidential test is satisfied. But that public interest test is normally used to deal with the exceptional individual case. By contrast, the guidelines provide a reason not to prosecute that applies equally to all. Or, to put it another way, they take a whole identifiable category of case out the ambit of the criminal justice process.
>
> Currently, the decision about whether the law should be changed, in a contested area (contested in the sense that there are strong views for and against law change) is not being made by the law-makers (Parliament), but by the DPP. He has done his best in consulting the public and reflecting what he believes to be society's wishes in relation to prosecutions. However, the effect of being forced to issue guidelines by the judgment of the House of Lords in the *Purdy* case means the DPP has to decide on the extent of the law, and to whom it applies. The change is therefore piecemeal; it comes after no coherent public debate, and is driven by a response to individual cases rather than by a wider strategic consideration of the aims of the policy that society wishes to adopt.

> …
>
> Some of the evidence that was put to the Commission argued that the DPP policy has brought sufficient resolution to the issue of assisted suicide…
>
> However, a much larger body of evidence put to the Commission highlighted the many problems with this approach of legal prohibition of assisted suicide combined with a lenient policy on prosecution, as outlined in the DPP policy. First, the question of when cases of assisted suicide should be prosecuted is now being determined by the exercise of a discretion by a well-meaning official, the DPP, applying general guidelines rather than the letter of the law, subject to a discretion not to prosecute in exceptional cases. Thus the question of whether a category of persons will be prosecuted depends on the view of one official and that view could change when the DPP changes. The essence of the rule of law is that our society is "ruled by laws not men". The situation reached with the guidelines is that this basic tenet of the rule of law is broken. "

136. This is strong criticism. John McGuinness QC on behalf of the DPP submitted that it was not correct to say that he had taken "a whole identifiable category of case out of the ambit of the criminal justice process". What the DPP has done is to identify factors which lead towards or against prosecution, while making it clear that the final decision always involves an exercise of judgment based on all the relevant considerations. Legally the submission is correct, but it may not accord entirely with public perception as the Falconer Commission's comments would tend to indicate. In the debate in the House of Commons on 27 March 2012 the Solicitor-General said (542 Official Report HC, No 287, Col 1380):

> "There is a growing confusion – perhaps it was there already – between the guidelines which are the DPP's policy statement on when it is and is not thought appropriate to prosecute and the factors that he will consider, and the substantive law that is set out in section 2 of the Suicide Act. The two are quite different."

137. Mr McGuinness submitted that to require the DPP to go further than he already has in identifying the factors which he will take into account would be to require him to cross a line which constitutionally he should not be required to cross.

138. The DPP has in my judgment done what was required of him by the decision in *Purdy* and it would be wrong to require him to do more.

139. From the DPP's policy statement, I believe that it would be clear to a person who, in the course of his profession, agreed to provide assistance to another with the intention of encouraging or assisting that person to commit suicide, that such conduct would carry with it a real risk of prosecution.

140. Whether the risk would amount to a probability would depend on all the circumstances, but I do not believe that it would be right to require the DPP to formulate his policy in such a way as to meet the foreseeability test advocated by Mr Havers. I consider that it would be wrong for three reasons.

141. First, it would go beyond the Convention jurisprudence about the meaning of "law" in the context of the rule of law. Even when considering the meaning of "law" in the strict sense of that which may be enforced by the courts, the jurisprudence allows a degree of flexibility in the way that it is formulated (*Sunday Times v UK*). This must apply even more in relation to "law" in the extended sense of meaning the law as it is liable in practice to be enforced (*Purdy* paragraph 112), because flexibility is inherent in a discretion. It is enough that the citizen should know the consequences which may well result from a particular course of action.

142. Secondly, it would be impractical, if not impossible, for the DPP to lay down guidelines which could satisfactorily embrace every person in Mr Havers' class 2, so as to enable that person to be able to tell as a matter of probability whether he or she would be prosecuted in a particular case. As Mr Havers rightly observed, the factors for and against prosecution may point in opposite directions. I do not see how the DPP could be expected to lay down a scheme by which a person would be able to tell in advance in any given case whether a particular factor or combination of factors on one side would be outweighed by a particular factor or a combination of factors on the other side. The DPP is not like an examiner, giving or subtracting marks in order to decide whether a candidate has achieved a pass mark. The DPP has expressed his opposition to any such schematic approach for the good reason that each case ultimately involves a personal judgment.

143. Thirdly, it would require the DPP to cross a constitutional boundary which he should not cross. For the DPP to lay down a scheme by which it could be determined in advance as a matter of probability whether an individual would or would not be prosecuted would be to do that which he had no power to do, i.e. to adopt a policy of non-prosecution in identified classes of case, rather than setting out factors which would guide the exercise of his discretion.

144. The DPP has published details of two cases in which he concluded that there was sufficient evidence to prosecute a doctor for an offence under section 2, but he decided on the particular facts that it would not be in the public interest to do so. In one case the assistance provided was minimal, consisting of the giving of some advice, and there was no evidence that the advice contributed significantly to the outcome. In the other case, involving a doctor aged 79 who had been struck off the register, the DPP concluded that "on the very particular facts of this case, the likely penalty would be a conditional discharge". These examples show that the DPP does not take a mechanistic approach to cases which involve healthcare professionals, but considers the full facts. Other individuals within Mr Havers' class 2 would cover a broad range and the facts might vary infinitely.

GMC and SRA

145. Since I have rejected the claim that the DPP is obliged by law to publish further clarification of his policy on assisted dying, it follows that Martin's claims against the

GMC and the SRA also fail. It is therefore unnecessary to consider the other defences advanced by those defendants.

Is section 2 of the Suicide Act incompatible with article 8?

146. In *Pretty* the Strasbourg court agreed with the House of Lords that the blanket ban on assisted suicide was not incompatible with article 8, but its reasoning included reference to the existence of a prosecutorial discretion about which the House of Lords held in *Purdy* that further clarification was required. Mr Havers' principal argument was that the clarification given by the DPP was inadequate in Martin's circumstances, but his alternative argument was that without further clarification there is an incompatibility between the section and article 8. Mr Bowen argued that section 2 was incompatible with article 8 unless it was subject to a common law defence of necessity. Section 2 would potentially affect Tony if he wished to use Dr Nitschke's invention to initiate an act of suicide.

147. The necessity argument mirrors the argument advanced by Mr Bowen in relation to murder, which I have rejected. To allow it would be contrary to the intention of Parliament as evidenced by the rejection of Lord Joffe's Bills and the enactment of section 2 in its present form in 2009, which was after the decisions of the House of Lords and the Strasbourg court in *Pretty*.

148. As I see it, the issue of the compatibility of section 2 with article 8 has been determined at the highest level, subject to the argument about further clarification, which I have rejected. However, if it were open to this court to consider the matter afresh, I would reject the claim in any event on the ground that the law relating to assisted suicide is an area of law where member states have a wide margin of appreciation (*Haas*) and that in the UK this is a matter for determination by Parliament, as the House of Lords recognised in *Purdy*.

Is the mandatory sentence of life imprisonment for murder incompatible with the Convention in cases of genuine voluntary euthanasia?

149. There is strong evidence (considered by the Law Commission in its review of the law of murder) that the public does not regard the mandatory sentence of life imprisonment as appropriate in cases of genuine voluntary euthanasia, and there have been calls for it to be changed, but whether it is incompatible with the Convention is a matter which the court should decide only in a case in which it is necessary to do so. The question might arise if a person were convicted of murder and sentenced to life imprisonment in a case of genuine voluntary euthanasia carried out from a compassionate motive, but it is not necessary to decide the question in this case because it cannot realistically affect Tony's position whether a doctor, or other person, who carried out an act of voluntary euthanasia would be exposed to such a grave penalty or lesser punishment. On any view, the risk of conviction for homicide is likely to be a strong deterrent for any person, especially a professional person.

Conclusion

150. Tony's and Martin's circumstances are deeply moving. Their desire to have control over the ending of their lives demands the most careful and sympathetic consideration, but there are also other important issues to consider. A decision to

allow their claims would have consequences far beyond the present cases. To do as Tony wants, the court would be making a major change in the law. To do as Martin wants, the court would be compelling the DPP to go beyond his established legal role. These are not things which the court should do. It is not for the court to decide whether the law about assisted dying should be changed and, if so, what safeguards should be put in place. Under our system of government these are matters for Parliament to decide, representing society as a whole, after Parliamentary scrutiny, and not for the court on the facts of an individual case or cases. For those reasons I would refuse these applications for judicial review.

Mr Justice Royce:

151. I agree with the analysis, reasoning and conclusions of Toulson LJ. I add only this. No one could fail to be deeply moved by the terrible predicament faced by these men struck down in their prime and facing a future bereft of hope. Each case gives rise to most profound ethical, moral, religious and social issues. Some will say the Judges must step in to change the law. Some may be sorely tempted to do so. But the short answer is that to do so here would be to usurp the function of Parliament in this classically sensitive area. Any change would need the most carefully structured safeguards which only Parliament can deliver.

Mrs Justice Macur:

152. I agree with the judgment of Toulson LJ and endorse the comments of Royce J. Superfluous as it may therefore appear I nevertheless feel compelled to comment that the dire physical and emotional predicament facing Tony and Martin and their families may intensify any tribunal's unease identified by Lord Mustill in *Bland* (at 887) in the distinction drawn between "mercy killing" and the withdrawal of life sustaining treatment or necessities of life. Judges of the Family Division sitting in the Court of Protection adjudicate upon applications for declarations in relation to the latter and have become well accustomed to the "balance sheet of best interests" which informs the decision of the Court. However, Mr Bowen QC does not succeed in persuading me that this process may reassure society that the development of common law for which he contends is merited by separate consideration of individual circumstances by individual tribunals of whatever stature and experience. The issues raised by Tony and Martin's case are conspicuously matters which must be adjudicated upon by Parliament and not Judges or the DPP as unelected officers of state.