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The claimant, Debbie Purdy, suffers from multiple sclerosis. She anticipates that her condition will worsen to a point at which her continuing existence will become unbearable. At this point she will want to end her own life. As she would need help to do this, she would have to travel to a jurisdiction in which assisted suicide is lawful. She would be unable to do this without the assistance of her husband who would then be liable to prosecution under the Suicide Act 1961, s. 2(1) which provides:

A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding 14 years.

The Act then goes on to provide that no proceedings shall be instituted except by or with the consent of the DPP (s. 2(4)).

The claimant and her husband wish to know if he is likely to be prosecuted under s. 2(1). She brought a claim for judicial review and under the Human Rights Act 1998, s. 7 to challenge the failure of the DPP to provide a policy as to the circumstances in which a prosecution will be brought where the assisted suicide takes place in a jurisdiction in which it is lawful. It was claimed that this was a breach of the Human Rights Act 1998, Sched. 1, Article 8, which 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 interest of national security, public safety, or the economic wellbeing of the country, for the protection of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

This raised two questions: does s. 2(1) of the Suicide Act 1961 engage Article 8 and, if it does, is the interference 'in accordance with the law'?

Held, dismissing the application, the Divisional Court was bound by the decision of the House of Lords in R (on the application of Pretty) v DPP [2001] UKHL 61 that the right to die does not engage Article 8 and that
the DPP has no duty to set out any policy on the exercise of discretion to prosecute beyond the statutory Code for Crown Prosecutors.

**Commentary**

If this had been the limit of the judgment, and there is no reason why it should not have been, the case would be unremarkable. However, the Divisional Court went on to consider the decision of the European Court of Human Rights (ECtHR) in *Pretty v United Kingdom* (2002) 35 EHRR 1. As a result, two questions had to be asked: (1) what was the decision of the ECtHR; and (2) did it change domestic law?

As the court in *Purdy* points out, the first question is made more complicated than it need be by some curious wording in the ECtHR judgment in *Pretty* that:

> 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. ((2002) 35 EHRR 1 at para. 67)

Yet being 'not prepared to exclude' something comes well short of a finding that the Article was engaged. However, as the second sentence only becomes relevant if the Article is engaged, it was treated as if the ECtHR had found it to be so. This obviously is at odds with the House of Lords and so is potentially problematic.

In considering the question in the second paragraph of Article 8, the ECtHR concluded that:

> 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. ((2002) 35 EHRR 1 at para. 76)

This echoed Lord Bingham in the House of Lords when he said that:

> since whether or not the Director has the power to make such a statement he has no duty to do so, and in any event what was asked of the Director in this case was not a statement of prosecuting policy but a proleptic grant of immunity from prosecution. That, I am quite satisfied, the Director had no power to give. ([2001] UKHL 61 at [39])

These two findings effectively sank the argument that *Purdy* was distinguishable from *Pretty* as both apply to the facts of the former as much as those of the latter and the two decisions had come to the same conclusion overall on Article 8--that there was no breach--albeit by different routes. This rendered the second question, the effect of an ECtHR ruling on domestic law, academic, but the court considered it anyway.

Was this, strictly speaking, necessary? The House of Lords decision is binding by the normal rules of precedent whereas the Human Rights Act 1998, s. 2 merely provides that a court must 'take into account' any judgment of the ECtHR. However, it could be questioned as to what 'take into account' means in this context. There is an example of a House of Lords decision being reversed by the Court of Appeal on the authority of a ECtHR judgment in the case of *D v East Berkshire Community NHS Trust* [2003] EWCA Civ 1151 and this was upheld by the House of Lords (*JD v East Berkshire Community NHS Trust* [2005] UKHL 23). However, the nature of this decision was different; the original House of Lords authority dated from before the Human Rights Act and the effect of the Act was to change the law. Obviously the same argument could not be mounted in relation to *Pretty* and *Purdy*, so what was the position?

The court in *Purdy* relied on Lord Bingham's answer to this question in *Kay v Lambeth LBC* [2006] UKHL 10 in which he said that:

> it is for national authorities, including national courts particularly, to decide in the first instance how the
principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. It is by the decisions of national courts that the domestic standard must be initially set, and to those decisions the ordinary rules of precedent should apply. ([2006] UKHL 10 at [44])

Obviously by the 'ordinary rules of precedent' decisions of the House of Lords are binding. This is by no means an inevitable conclusion and in many ways an unfortunate one. It could be argued that the domestic courts in general and the House of Lords in particular have given the Human Rights Act such a limited interpretation that much of its potential value has been lost. The decisions of the Court of Appeal and the House of Lords in *R v East London and the City Mental Health NHS Trust, ex p. von Brandenberg* [2001] EWCA Civ 239, [2003] UKHL 58 respectively come to mind. In this case a patient detained under the Mental Health Act 1983 was ordered by the Mental Health Review Tribunal (MHRT) to be discharged in seven days' time. However, before the seven days expired, the authorities, who had opposed his application to the MHRT, re-sectioned him. This was held to be lawful despite Article 5(4) providing that:

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Similar decisions in respect of Article 6, the right to a fair trial, can be seen in cases such as *Manchester City Council v Cochrane* [1998] EWCA Civ 1967 and *R v Bournewood Community and Mental Health Trust* [1998] 3 All ER 289.

A judiciary willing to uphold the spirit of the Human Rights Act rather than just the letter would not have come to any of these decisions and, it is argued, UK law would have been the better for it. However, as Lord Bingham also said in *JD*:

But the question does arise whether the law of tort should evolve, analogically and incrementally, so as to fashion appropriate remedies to contemporary problems or whether it should remain essentially static, making only such changes as are forced upon it, leaving difficult and, in human terms, very important problems to be swept up by the Convention. I prefer evolution. ([2005] UKHL 23 at [50])

The problem is that evolution is a very slow process.

The judges are not alone in this. The question could have been avoided if Parliament, in reality the Government, had had the courage to provide instead that judgments of the ECtHR were binding on domestic courts. Difficult problems could then have been avoided. An example is the *Bournewood* case cited above and *HL v United Kingdom* (2005) 40 EHRR 32, in which the House of Lords held that a detention in hospital was lawful even though the Mental Health Act 1983 provisions were not used, but the ECtHR held, in 2004, that the detention was a breach of the Convention, in part because it was not in accordance with a procedure prescribed by law. Because the House of Lords decision is binding and the ECtHR's decision is not, individuals are still detained in breach of their Convention rights and will continue to be until April 2009 when the new Sched. A1 to the Mental Capacity Act 2005, inserted by the Mental Health Act 2007, finally comes into force.

The *Purdy* case has provoked a great deal of media interest, both as regards its human interest element and as a further stage in the battle between those for and against a law on assisted dying. The decision was inevitable as a result of *Pretty* and, although the arguments used were ingenious, there appeared no chance of them succeeding and so it has proved. Lord Bingham had effectively foreshadowed the application. For law students the case could be equally valuable as they struggle with the distinction between the binding decisions of the European Court of Justice and the non-binding decisions of the European Court of Human Rights. Unfortunately, the media habit of conflating them into 'the European Court' means we start with a disadvantage.