Case Nos: C1/2012/2712,
C1/2012/2918
& C1/2012/2931

Neutral Citation Number: [2013] EWCA Civ 961
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
TOULSON LJ, ROYCE AND MACUR JJ
CO/7774/2010
HQ11X04443

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2013

Before:

THE LORD CHIEF JUSTICE
THE MASTER OF THE ROLLS
and
LORD JUSTICE ELIAS

- -

Between:

(1) THE QUEEN ON THE APPLICATION OF MRS JANE NICKLINSON (IN HER OWN RIGHT AND AS ADMINISTRATRIX OF THE ESTATE OF MR TONY NICKLINSON DECEASED) **(2) MR PAUL LAMB**	**Appellants**
- v -	
MINISTRY OF JUSTICE	**Respondent**
- and -	
DIRECTOR OF PUBLIC PROSECUTIONS	**1st Interested Party**
- and -	
HER MAJESTY'S ATTORNEY GENERAL	**2nd Interested Party**
- and -	
CNK ALLIANCE LIMITED (CARE NOT KILLING) **BRITISH HUMANIST ASSOCIATION**	**Intervenors in both Appeals**
- Linked with -	
(3) THE QUEEN ON THE APPLICATION OF AM	**Appellant**
- v -	

DIRECTOR OF PUBLIC PROSECUTIONS **Respondent**

- and -

A PRIMARY CARE TRUST **Interested Party**

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Mr Paul Bowen QC and **Mr Guy Vassall-Adams** (instructed by **Bindmans**) for the **First** and **Second Appellants**

Mr David Perry QC and **Mr James Strachan QC** (instructed by **Treasury Solicitor**) for the **Respondent Ministry of Justice**

Mr Philip Havers QC and **Mr Adam Sandell** (instructed by **Leigh Day & Co**) for the **Appellant AM**

Mr Charles Foster and **Mr Benjamin Bradley** (instructed by **Barlow Robbins LLP, Guildford**) for **CNK Alliance Limited**

Ms Rebecca Trowler QC and **Ms Caoilfhionn Gallagher** (instructed by **Irwin Mitchell LLP**) for **The British Humanist Association**

Mr John McGuiness QC (instructed by the **CPS Appeals Unit)** for the **Respondent Director of Public Prosecutions**

Hearing dates: 13, 14 and 15 May 2013

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Judgment

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The Master of the Rolls and Lord Justice Elias :

1. These appeals concern individuals who suffer from permanent and catastrophic physical disabilities. They are of sound mind and acutely conscious of their predicament. They do not want to suffer a painful and undignified process of dying.

They wish to die at a time of their choosing. However, they are not physically capable of ending their own lives unaided. AM (known as "Martin", but that is not his real name) can end his own life but only with the assistance of a third party. Paul Lamb is so disabled that he cannot even commit suicide with assistance; he requires a third party to terminate his life. (That was also the position of Tony Nicklinson, although he died soon after the judgment below was delivered.) Each has a settled and considered wish that his death should be hastened by the requisite assistance. Each contends that as a matter of both common law and European Convention of Human Rights law ("the Convention"), those who provide him with assistance to bring about his death ought not to be subject to any criminal consequences. The current understanding of the law is that those providing such assistance will be committing the offence of assisted suicide contrary to section 2(1) of the Suicide Act 1961 ("the 1961 Act") if they merely assist a person to take his own life, and murder if they actually terminate life themselves.

2. In the case of Martin, he seeks in the alternative to establish that even if the person assisting him to commit suicide may be subject to criminal prosecution, it is incumbent on the Director of Public Prosecutions (DPP), who alone can decide whether or not to initiate such a prosecution, to set out in greater detail than he has hitherto how that discretion may be exercised. Martin submits that Convention law requires that he, and anyone assisting him, should be able to assess with some confidence the risk of their being prosecuted.

3. It is obvious even from this brief sketch of the facts that these appeals raise complex and highly controversial moral and ethical issues concerning the sanctity of life and the limits of autonomous self-determination. The principal contours of this wide-ranging debate were succinctly mapped out by Lord Steyn in his judgment in *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800 (para 54):

> "The subject of euthanasia and assisted suicide have been deeply controversial long before the adoption of the Universal Declaration of Human Rights in 1948, which was followed two years later by the European Convention on Human Rights and Freedoms (1950). The arguments and counter arguments have ranged widely. There is a conviction that human life is sacred and that the corollary is that euthanasia and assisted suicide are always wrong. This view is supported by the Roman Catholic Church, Islam and other religions. There is also a secular view, shared sometimes by atheists and agnostics, that human life is sacred. On the other side, there are many millions who do not hold these beliefs. For many the personal autonomy of individuals is predominant. They would argue that it is the moral right of individuals to have a say over the time and manner of their death. On the other hand, there are utilitarian arguments to the contrary effect. The terminally ill and those suffering great pain from incurable illnesses are often vulnerable. And not all families, whose interests are at stake, are wholly unselfish and loving. There is a risk that assisted suicide may be abused in the sense that such people may be persuaded that they want to die or that they ought to want to

> die. Another strand is that, when one knows the genuine wish of a terminally ill patient to die, they should not be forced against their will to endure a life they no longer wish to endure. Such views are countered by those who say it is a slippery slope or the thin end of the wedge. It is also argued that euthanasia and assisted suicide, under medical supervision, will undermine the trust between doctors and patients. It is said that protective safeguards are unworkable. The countervailing contentions of moral philosophers, medical experts and ordinary people are endless. The literature is vast: see for a sample of the range of views: *Glanville Williams, The Sanctity of Life and the Criminal Law,* 1958*,* chap 8. *Ronald Dworkin, Life's Dominion: An Argument About Abortion and Euthanasia,* 1993*,* chap 7; *Euthanasia Examined: Ethical clinical and legal perspectives, Essays edited by John Keown,* 1995; *Otlowski, Voluntary Euthanasia and the Common Law,* 1997, chap 5-8; *Mary Warnock, An Intelligent Person's Guide to Ethics,* 1998, chap 1. It is not for us, in this case, to express a view on these arguments. But it is of great importance to note that these are ancient questions on which millions in the past have taken diametrically opposite views and still do."

4. These appeals also raise important constitutional questions about the role which the courts should play, if any, in resolving these difficult ethical problems. The appellants submit that fundamental rights - both common law and Convention - are in play and that as guardians of those rights, the judges cannot simply refuse to resolve the conflicting arguments that arise on the grounds that they raise difficult ethical and moral issues better suited to resolution by Parliament. They have to engage with the issues, however unsavoury they may find the task, and they must vindicate fundamental rights unless satisfied that any interference with those rights is justified and proportionate; it would be an abnegation of judicial responsibility to do otherwise. Indeed, the heart of the appeal advanced before this court by Mr Bowen QC, counsel for the Nicklinsons and Mr Lamb, is that the Divisional Court, which dismissed the applications below, wrongly failed in its duty to engage with this question.

The appellants.

5. The circumstances under which each of these appellants live day by day make distressing reading and evoke the greatest sympathy. They explain why they have each taken a settled wish to end their lives.

Martin.

6. Martin lives with his wife and his wife's daughter. He is 48 years of age. In August 2008 he suffered a brainstem stroke, the effects of which are permanent. It 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. The computer shows him letters and words which he selects by looking at them for a few seconds. The computer then displays

them on another part of the screen and speaks them out loud. The process is painfully slow.

7. Martin is totally dependent 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, who is a nurse, and by full-time carers provided by his local NHS Primary Care Trust. He is fed by people putting food into his mouth or through a PEG, a tube that enters his stomach through his abdominal wall. He is able to swallow. His medication goes through the PEG. 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.

8. Martin loves his family, 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 is not going to recover, and does not want to continue living like this. He wants to die.

9. Because of his physical disabilities, he is unable to take his own life. He is not able to take a lethal overdose of drugs or take his life in any other way in the UK. As at the date of the hearing before the Divisional Court, there were only two ways in which Martin could have ended his life. One was for him to stop eating and drinking – to dehydrate and starve himself to death. He attempted to do this a few months after judgment was handed down by the Divisional Court. His attempt failed in the most distressing circumstances. The alternative was for him to travel to Switzerland to make use of the Dignitas service in Zurich. This is the route that he now wishes to follow. But he cannot do this without assistance. To pursue the Dignitas option, Martin needs to find out about the organisation's services, join it, obtain medical records and reports from doctors and send them to Dignitas, make complex travel arrangements and send Dignitas money. Above all, he needs someone to accompany him to Dignitas. Without help Martin cannot even begin exploring with Dignitas whether its services may be available to him.

10. Martin and his wife are very close to each other. His wife respects Martin's autonomy. She would want to be with him when he dies. But, understandably, she does not wish to play any part in bringing about her husband's death. She is therefore not willing to assist him to die by using the services of Dignitas. For understandable personal reasons, Martin is not willing to ask his father or brother to help him go to Dignitas and he has no friends to whom he can turn for assistance. Accordingly, as Martin puts it in his witness statement, he has no option but to request assistance from a stranger, such as an organisation like Friends At The End or alternatively to seek help from one of his carers.

Tony Nicklinson.

11. In June 2005 Tony Nicklinson suffered a stroke causing 'locked-in' syndrome, leaving him almost completely paralysed and totally dependent upon others for all his care needs, 24 hours a day. He could communicate by blinking to indicate a letter which was held up for him by his wife. Once stabilised his condition was not life-threatening and he had a reasonable expectation of living many more years. That was a prospect which he gradually but firmly decided was not one he wished to face. He

described his life to the court below as "dull, miserable, demeaning, undignified and intolerable" and described the humiliation he felt at the loss of all bodily functions. He made a competent and rational decision to end his own life in 2007. However, by virtue of his almost total physical disability, he was unable to act upon that wish, other than by refusing all food and liquids and thereby dying of dehydration. He wanted a doctor to end his life but could not request that assistance whilst the doctor was likely to face a charge of murder.

12. Sadly, following the judgment below in which he was unsuccessful, Tony Nicklinson took the view that he was condemned to a life of increasing misery. He refused nutrition, fluids and medical treatment and died of pneumonia less than a week later, on 22 August 2012.

Paul Lamb.

13. Unusually, Paul Lamb was added as a party to this appeal after the hearing below. The reason was that following the death of Mr Nicklinson, it was appreciated that one of the arguments which he had advanced before the Divisional Court, namely that there should be developed a common law defence of necessity available to anyone bringing about his death, could no longer be advanced. It had no practical significance. Paul Lamb was added in order to keep that argument in play in the appeal. He seeks essentially the same relief as Tony Nicklinson sought below.

14. Paul Lamb's condition is as follows. He is a 57 year old man who is divorced from his wife and has two grown up children. In 1990 he was involved in a car accident as a result of which he sustained multiple injuries leaving him paralysed. He is completely immobile with the exception only of his right hand which he can move to a limited extent. He requires constant care and has carers with him, funded by the local Primary Care Trust, 24 hours a day. He spends the whole of every day in his wheelchair. He experiences a significant amount of pain every day and has done ever since the accident, with the consequence that he is constantly on morphine. He feels that he is trapped in his body, and that he cannot enjoy or endure a life that is so monotonous and painful and lacking in autonomy. His condition is, at least in the present state of medical knowledge, irreversible. He wishes that a doctor should end his life.

Mrs Nicklinson.

15. Mrs Nicklinson is now a party to the proceedings as administratrix of the estate of her husband. In addition she has, since the hearing below, also been added as a party in her own right on the basis of the decision of the ECtHR in *Koch v Germany* (2013) 56 E.H.R.R. 6. The court held that a spouse or partner of the party wishing to die may claim that his or her own rights under Article 8 of the Convention are directly infringed as a result of denying a remedy to the party wishing to die, at least where there is an exceptionally close relationship between the spouse or partner and that party, and the spouse or partner has been actively involved in the realisation of the party's wish to end his or her life. Mrs Nicklinson has not been separately represented and it is accepted that her presence as a party has no impact on the legal arguments.

The relevant law.

16. These appeals involve submissions to the effect that the right to die at the time of one's choosing engages fundamental common law rights as well as the right to private life protected by Article 8 of the Convention. In order properly to understand the submissions, it is necessary briefly to summarise the current state of the law on assisted dying, and to consider the potential scope of Article 8 in this field.

Assisted dying at common law.

17. The position at common law was that both euthanasia and suicide constituted the offence of murder. Suicide was self-murder, and anyone encouraging or assisting a party to commit suicide was also guilty of that murder as a secondary party. This would include a party to a suicide pact. As recently as 1944 the survivor of a suicide pact was convicted of murder and sentenced to death when he survived and the other party died: *R v Croft* [1944] 1 KB 295. Section 4 of the Homicide Act 1957 modified this draconian stance. It provided that in such circumstances, provided the defendant had a settled intention of dying in pursuance of the pact, he would be guilty of manslaughter rather than murder.

18. The position was changed by the 1961 Act. Section 1 took the act of suicide itself outside the scope of the criminal law in carefully framed language:

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

19. As Lord Bingham pointed out in R (*On the Application of Pretty) v Director of Public Prosecutions* [2001] UKHL 61, [2002] 1 AC 800, this decriminalisation of suicide falls short of establishing a right to commit suicide (para.35):

> "Suicide itself (and with it attempted suicide) was decriminalised because recognition of the common law offence was not thought to act as a deterrent, because it cast an unwarranted stigma on innocent members of the suicide's family and because it led to the distasteful result that patients recovering in hospital from a failed suicide attempt were prosecuted, in effect, for their lack of success. But while the 1961 Act abrogated the rule of law whereby it was a crime for a person to commit (or attempt to commit) suicide, it conferred no right on anyone to do so."

Lord Hope expressed similar sentiments: see para 106.

20. As Lord Bingham observed, had Parliament intended to create a right to commit suicide, it would logically have had to permit others who encourage or assist someone to take that step also to be free from criminal sanctions. However, Parliament did not adopt that position. On the contrary, section 2(1) of the 1961 Act renders such conduct unlawful by creating a specific offence triable on indictment and subject to a maximum sentence of 14 years' imprisonment.

21. Section 2(1) was amended in 2009 by the Coroners and Justice Act 2009 but as is clear from paragraph 327 of the Explanatory Notes, this was only to clarify the law, not to change it. The modified section brings the language into line with section 44(1) of the Serious Crimes Act 2007 which established the statutory offence of intentionally encouraging or assisting an offence in place of the old common law crime of incitement. The current wording of section 2(1) is as follows:

"2 – Criminal liability for complicity in another's suicide

(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."

22. The concept of encouraging and assisting is a wide one: it includes arranging for others to do acts which are capable of encouraging or assisting (s.2A(1)), and acts whose purpose is to encourage or assist even though, unbeknown to the defendant, they are not capable of achieving their objective (s.2A(2)). The offence may also be committed even where there is in fact no suicide, nor even an attempt to commit it (s.1(B)).

23. However, there is an important control over the manner in which the provision is enforced. The decision whether or not to prosecute is left solely in the hands of the DPP. Section 2(4) expressly provides that no proceedings may be instituted except by or with his consent. It is for the DPP to determine whether it is in the public interest to prosecute.

24. As a result of the decision of the House of Lords in *R (Purdy) v DPP* [2009] UKHL 45; [2010] 1 AC 345, the DPP was required to set out in some detail in a Policy statement the factors which he will take into account when considering whether or not he will exercise his discretion in favour of prosecuting. Martin's case focuses on that Policy which he contends fails in certain respects to satisfy binding requirements of Article 8 of the Convention. We consider those arguments in detail later.

25. Euthanasia involves not merely assisting another to commit suicide, but actually bringing about the death of that other. That is the nature of the assistance which Paul Lamb seeks. At common law euthanasia is the offence of murder, unlawfully taking the life of another, and the 1961 Act has no bearing on that offence. The courts have not hitherto been willing to accept that it is any defence to euthanasia that the deceased consented to, or even actively sought, his or her own death, or that the defendant acted out of compassion or familial love: see *Airedale NHS Trust v Bland* [1993] AC 789 per Lord Mustill at 892E-893A; and *R v Inglis* [2010] EWCA Crim 2637; [2011] 1 WLR 1110 per Lord Judge CJ, para 37. Nor is there a general defence of necessity: see *R v Dudley and Stephens* (1884) 14 QBD 273, affirmed by the House of Lords in *R v Howe* [1987] 1 AC 418 per Lord Hailsham at 429B-D and Lord Mackay at 453B-F. No doubt these considerations would bear upon the likely sentence but they provide no defence. A "mercy killing", as it is sometimes termed, even at the request of the deceased, remains unlawful homicide. None of this is contentious.

26. It is not, however, unlawful for a doctor to prescribe medical treatment which will necessarily hasten death where the purpose is to relieve pain and suffering. This is known as the double effect principle. As Lord Mustill pointed out in *Bland* (p.892), this has nowhere been the subject of a specific decision but seems to have been generally assumed to be the law by criminal practitioners. Nor is it unlawful to

withdraw medical assistance from a patient even though the inevitable result is to bring about that person's death: that was the principle enunciated by the House of Lords in the *Bland* case itself. The law has drawn a clear and consistent line between withdrawing medical support, with the consequence that the patient will die of his own medical condition, and actually bringing about the patient's death by a positive act. It reflects the position succinctly described by the poet Arthur Clough in his satirical poem on the Ten Commandments, "The Latest Decalogue":

> "Thou shalt not kill; but needst not strive
>
> Officiously to keep alive."

27. In *Bland* both Lord Browne-Wilkinson (p.885) and Lord Mustill (p.887) expressed unease that the law should distinguish between acts and omissions in this way when ethically there was, in their view, difficulty in identifying any rational point of distinction between the two courses of conduct. But they both recognised, as Lord Mustill put it, that whatever the merits of the distinction, "the law is there and we must take it as it stands."

28. Lord Goff also recognised that the distinction could attract a charge of hypocrisy but nonetheless thought that to allow a doctor to kill a patient, however humanitarian the concerns, would be:

> "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." (page 865).

29. He also provided a justification for the distinction, essentially a pragmatic "slippery slope" argument, namely that it would be too difficult to draw clear lines between cases where euthanasia should be permitted and where it should be denied:

> "It is true that the drawing of this distinction may lead to a charge of hypocrisy; because it can be asked why, if the doctor, by discontinuing treatment, is entitled in consequence to let his patient die, it should not be lawful to put him out of his misery straight away, in a more humane manner, by a lethal injection, rather than let him linger on in pain until he dies. 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."

30. Lord Justice Hoffmann, as he then was, when giving judgment in the Court of Appeal in the *Bland* case (in a passage cited with approval by Lord Bingham in *Pretty* (para 9)) had provided a rather different justification based on the need at all times to respect the sanctity of life:

> "No one in this case is suggesting that Anthony Bland should be given a lethal injection. But there is concern about ceasing to supply food as against, for example, ceasing to treat an infection with antibiotics. Is there any real distinction? In order to come to terms with our intuitive feelings about whether there is a distinction, I must start by considering why most of us would be appalled if he was given a lethal injection. It is, I think, connected with our view that the sanctity of life entails its inviolability by an outsider. Subject to exceptions like self-defence, human life is inviolate even if the person in question has consented to its violation."

One of the submissions made on behalf of Tony Nicklinson and Paul Lamb is that this distinction between acts and omissions is unprincipled and unsatisfactory and should no longer reflect the common law.

Article 8.

31. Article 8 of the Convention, which has become part of domestic law by virtue of section 1 of the Human Rights Act 1997, is central to all these appeals. It provides:

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

32. It is therefore a qualified right and can be the subject of interference in the circumstances described in Article 8(2).

33. It is common ground that the right to private life conferred by Article 8(1) is engaged in this case. The House of Lords confirmed in *Purdy* that this was the effect of the decision of the Strasbourg court in *Pretty v United Kingdom* (2002) 35 EHRR 1. The Strasbourg court had disagreed with the ruling of the House of Lords in *Pretty* in which their Lordships had held that Article 8(1) was not engaged because it did not relate to the manner in which a person wishes to die. The court in *Purdy* was directly faced with the question whether the Strasbourg court had in fact reached a clear and definitive conclusion on this point, given the somewhat elliptical terms of its judgment. Their Lordships held unanimously that the Strasbourg ruling was clear and that accordingly that they should depart from the earlier House of Lords' decision in *Pretty* (see especially Lord Hope, paras 37-39; Lady Hale paras 60-61). Subsequent Strasbourg courts have confirmed that the right encompasses the right to determine how and when to die: (so as to avoid a distressing and undignified end to life, provided the individual is of sound mind and is able to make a freely informed judgment) see *Haas v Switzerland* (2011) 53

E.H.R.R. 33 para. 51; *Koch v Germany* (2013) 56 E.H.R.R. 6 para 52; and *Gross v Switzerland* (application No 67810/10), 14 May 2013.

34. Accordingly, the critical question is whether the interference with the Article 8(1) right resulting from the legal prohibitions on providing assistance to those wishing to die meets the criteria laid down in Article 8(2), the onus being on the respondent to show that it does. This issue is of the first importance to these appellants. If the impediment is created by statute, as is the case with assisted suicide, and the court finds that it is a disproportionate interference, the court must if possible read down the statute so as to give effect to Convention rights as required by section 3 of the Human Rights Act; if that is not possible it will have to grant a declaration of incompatibility as required by section 4. Where the interference is a common law rule (or the lack of one) the court must amend the common law so as to achieve the necessary vindication of the right.

35. In *R (Quila) v Home Secretary* [2011] UKSC 45; [2012] 1 AC 621 para 45, Lord Wilson identified the following questions which need to be posed when determining whether an interference is proportionate or not (following the earlier analysis of Lord Bingham in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167):

> "(a) is the legislative objective sufficiently important to justify limiting a fundamental right?; (b) are the measures which have been designed to meet it rationally connected to it?; (c) are they no more than are necessary to accomplish it?; and (d) do they strike a fair balance between the rights of the individual and the interests of the community?"

36. The appellants accept that the laws prohibiting assisted suicide and euthanasia are aimed at a legitimate objective and are rationally connected to it, namely safeguarding the lives of those who are weak and vulnerable and may, without protection, feel pressured into agreeing to die. Their submission is that the prohibitions are disproportionate because they extend too far; it is not necessary for the law to protect those who, like the appellants, are not vulnerable and are not subject to improper pressure to hasten their death.

The issues.

37. With that by way of introduction, we summarise the issues which arise in these appeals.

38. The first issue arises solely in relation to Paul Lamb. It is submitted that the time has now come when the common law should provide a defence to murder where that takes the form of euthanasia, at least in the circumstances which Mr Lamb now faces and Mr Nicklinson faced. The terms of the declaration sought before the Divisional Court by Tony Nicklinson identify the critical features of his case. He wanted a declaration that necessity should be a defence to euthanasia and to a charge 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.

39. As the Divisional Court pointed out, it was illogical to ask for a declaration that there ought to be a common law defence of necessity for euthanasia, since the common law can in principle be developed so as to provide one. But as Mr Bowen accepts, the same defence would have to be available for those who assist a suicide since it would be absurd for the defence to be available for the greater offence but not the lesser. That runs into the difficulty of establishing a defence in the face of the unambiguous blanket ban on assisting suicide imposed by section 2(1) of the 1961 Act.

40. The second issue concerns the scope of the protection afforded by the Article 8 right. As we have said, given that Article 8(1) rights are engaged, the issue is whether the legal prohibitions on those providing assistance constitute a disproportionate interference with the Article 8 right. All the appellants submit that there is clear Strasbourg authority to the effect that they do, at least in certain limited and particular situations. It is not suggested that the legal prohibitions should be effectively dis-applied in all circumstances but merely in particular cases where the Article 8 right is strong and the interference is disproportionate. Indeed, the appellants accept that an unfettered right to end the life of another even with his or her consent would conflict with the right to life in Article 2. As the Strasbourg Court noted in the *Haas* case, para 54, that article requires states to protect vulnerable persons even from taking action which might endanger their own lives.

41. Thereafter Mr Bowen and Mr Havers QC part company as to the implications of their assertion that a blanket prohibition on assisting dying, whether statutory or common law, will sometimes be disproportionate. Mr Bowen submits that the Divisional Court wrongly concluded that it was for Parliament and not the courts to determine that question. Consequently the court failed in its duty to carry out the detailed balancing of relevant factors which is essential when applying Article 8(2). He does not suggest that this court could properly carry out that exercise but seeks an order that the matter be remitted to the Divisional Court to enable it to do so. If, having applied the proper proportionality test, the court were to find that Article 8 rights were disproportionately affected, it would at that point have to remove, or seek to remove, any impediment by amending the common law or, in the case of the 1961 Act, using the powers under the Human Rights Act.

42. Mr Havers also asserts that Article 8(1) rights will be infringed if section 2(1) of the 1961 Act forbids assisting suicide in all circumstances. However, he does not seek the same relief as Mr Bowen. He accepts that section 2(1), albeit ostensibly laying down a blanket ban, is itself compatible with Convention law and is not a disproportionate interference with the Article 8 right, but only on the assumption that the DPP will exercise his discretion not to initiate a prosecution against someone assisting a person to commit suicide in any case where to do so would involve a disproportionate interference with Article 8 rights. On this analysis, the protection for Article 8 rights is afforded not by the terms of the substantive law but through the

exercise of the discretion to prosecute. Mr Havers further submits that in Martin's case at least, it is not necessary to remit this case for a proportionality exercise to be undertaken by the Divisional Court. It is plain in the light of Martin's desperate and undignified condition and his settled wish to die, that to prosecute any doctor or other professional who now assists Martin to bring about his own death would necessarily infringe Martin's Article 8 rights. It would be a wholly disproportionate interference frustrating his choice of how and when he should die.

43. The third issue is advanced solely by Martin and focuses upon another aspect of the DPP's Policy. This argument turns on the requirement in Article 8(2) that any interference with the Article 8 right must be "in accordance with the law". The law for these purposes means not simply the primary statute but also other subordinate rules which affect the way in which the law may operate in practice. The phrase 'in accordance with law' incorporates requirements relating to the clarity of the law in question, and in particular imposes an obligation upon the state to make the law accessible and foreseeable.

44. These requirements were first developed by the Strasbourg court in the case of *Sunday Times v UK* (1979) 2 EHRR 245, para 49 and they have been applied in numerous cases since. Mr Havers relies upon this principle to challenge the DPP's Policy on the grounds that it does not satisfy these criteria. He submits that as currently drafted, it is impossible to predict with any degree of confidence whether a professional doctor or carer who assists him to commit suicide will be prosecuted or not. Unlike Martin's broader submission that a prosecution would in fact infringe his Article 8 rights, this argument, even if successful, does not require the DPP to amend or amplify his Policy in favour of Martin. The DPP would not be obliged to indicate that a prosecution would be unlikely in such cases. He could meet the criteria of accessibility and foreseeability by giving a sufficiently clear indication that any doctor assisting Martin would be likely to be prosecuted. Mr Havers concedes that whilst this would not be the outcome he seeks, it would be consistent with the Convention requirement of foreseeability. This complaint is not, therefore, about the content of the Policy but rather its clarity.

45. This ground of appeal, even if successful, provides no comfort to Paul Lamb. Anyone assisting him to die can be prosecuted for murder and, unlike the position with respect to assisted suicide, the specific consent of the DPP is not required. In any event, he submits that unless there is a guarantee that there will be no prosecution – and he concedes that the DPP could not lawfully give such a guarantee - no doctor or carer would be likely to be willing to assist him. The only effective guarantee can be through the court concluding that assisting Paul Lamb to die would not be murder because the defence of necessity could be invoked.

46. We turn to consider the arguments addressed with respect to these issues.

Should the common law be developed?

47. Mr Bowen submits that the time has now come for the common law to be developed to recognise a defence to murder where a doctor or other person gives effect to the settled wish of a competent person to end his or her own life. As the court below noted, it is nothing if not a bold submission since no country in the common law

world has gone this far. In our judgment, the argument faces a number of insurmountable hurdles.

48. Before considering the merits of the argument, we make two preliminary observations. The first is that it is very difficult to see how this argument can add anything to the Article 8 submission. The substance of the argument is that fundamental common law rights of autonomy and dignity should in certain circumstances require the State to allow a person unable to end his own life to secure another person to do it for him. It is asserted that these fundamental rights should trump conflicting considerations. This in essence mirrors the Article 8 argument where precisely the same analysis has to be undertaken. However, it suffers from the disadvantage that whereas Convention rights incorporated into domestic law by the Human Rights Act can in some cases be asserted even in the face of Parliamentary legislation, by reading down the statute in accordance with section 3, common law rights cannot. In the event of conflict with legislation, statute must prevail and the common law must give way.

49. Second, Mr Bowen accepts that we are not in a position to determine whether there has been a disproportionate interference with Article 8 rights. That involves, he submits, consideration of a vast array of detailed evidence, including sociological, philosophical and medical material, which would have to be conducted by the Divisional Court. The Divisional Court took the view that it would be inappropriate for the courts to develop the common law in the way suggested to them principally on the grounds that any change of the law in such a complex and controversial field should be left to Parliament. We could in principle say that they were wrong. But if we were to take that step, we would ourselves have to identify the circumstances in which the defence would arise and stipulate any conditions under which it could be exercised. Yet on the premise of Mr Bowen's Article 8 submissions, we do not have the material to reach a sensible and definitive view on these questions. We could not simply refer the matter back to the Divisional Court with a direction to consider again whether the common law should be changed. This apparent contradiction in the analysis of the common law and Article 8 arguments does not bode well for Mr Bowen's common law submission.

50. Mr Bowen's starting point is the assertion that the common law has recognised a fundamental right to autonomy, at least for someone of sound mind, and a right to be treated with dignity. We were referred to several decisions where the courts have referred to autonomy and dignity as "rights". For example, in the Court of Appeal in *Bland* Hoffmann LJ referred to the right of someone to choose how to spend his life as involving "individual autonomy or the right to self determination" and he added that it was closely related to "respect for the dignity of the individual human being." (p.826E-G). In the House of Lords Lord Goff referred to it as a "principle of self-determination" (p.864). We do not under-estimate the importance of these concepts in the structure of the law when we say that we have some doubts whether autonomy and dignity can properly be described as independent common law rights rather than values or principles which inform more specific common law rights, such as the right to bodily integrity and privacy. But we will concede the premise that they can in principle be so described for the purposes of analysing this submission.

51. The argument then proceeds as follows: those rights are so fundamental that in appropriate circumstances, which would include the undignified condition in which

Tony Nicklinson found himself and Paul Lamb now finds himself, their claims are so strong that they will perforce override any considerations to the contrary. Mr Bowen cites from a judgment of Justice Nelson in his speech in *Baxter v Montana* P3d 2009 WL 5155363 (Mont. 2009), in the Supreme Court of Montana, when he concluded that the Montana Constitution protected a person's right to be assisted to die with dignity:

> "Dignity defines what it means to be human. It defines the depth of individual autonomy throughout life and, most certainly, at death. Usurping a mentally competent, incurably ill individual's ability to make end-of-life decisions and forcing that person against his will to suffer a prolonged and excruciating deterioration is, at its core, a blatant and untenable violation of the person's fundamental right of human dignity."

52. Professor Ronald Dworkin, the distinguished legal philosopher reached a similar conclusion which he expressed in trenchant terms:

> "Making someone die in a way that others approve but he believes a horrifying contradiction of his life is a devastating, odious form of tyranny."

53. These are powerful observations which will no doubt resonate with the strongly held views of many reasonable people. They express strong opinions as to how the authors think the law should be framed. But they do not assist in determining whether our courts can now properly develop this defence at common law, particularly in circumstances where as recently as 2009 Parliament confirmed that it should remain unlawful even to assist suicide, let alone to permit euthanasia.

54. In our view, this submission that the common law should recognise a defence of necessity to apply to certain cases of euthanasia is wholly unsustainable for a variety of reasons. First, Mr Bowen accepts that there are circumstances when rights of autonomy and dignity may have to yield to other rights or interests. That is manifestly correct and the question is whether they should do so here. In that context it is important to bear in mind that the argument based on these rights is not simply advancing a claim why the individual should be permitted to take his or her own life; it is seeking to require positive action by the state to protect third parties who are willing to give effect to those rights. As Mr Perry QC, counsel for the Secretary of State, has emphasised, the sanctity of life is if anything an even more fundamental principle of the common law, reflected in the unqualified right to life found in Article 2 of the Convention. In *Pretty* Lord Hobhouse commented that it was "probably the most fundamental of all human values" (para.109). There is no self-evident reason why it should give way to the values of autonomy or dignity and there are cogent reasons why sensible people might properly think that it should not. So the mere fact that there may be rights to autonomy and to be treated with dignity does no more than raise the question whether they should be given priority in circumstances like this; it does not of itself carry the day.

55. Second, as Lords Bingham and Hope pointed out in *Pretty*, it is wrong to say that there is a right to commit suicide; section 1 of the 1961 Act can more accurately be described as conferring an immunity from the criminal process for those who actually commit suicide. *A fortiori*, if there is no right to kill yourself, there can be no right, fundamental or otherwise, to require the State to allow others to assist you to die or to kill you. That

analysis cannot be altered by the simple expedient of recasting what is at best a liberty or freedom to commit suicide as the exercise of a positive right to autonomy and dignity.

56. The third reason is that it is simply not appropriate for the court to fashion a defence of necessity in such a complex and controversial field; this is a matter for Parliament. This was the ground on which the Divisional Court rejected this submission. Toulson LJ, as he then was, giving the lead judgment in the court, referred extensively to a number of authorities where the judges have consistently and unambiguously refused to walk where Parliament has been unwilling to tread. There are various observations by the judges in their Lordships' House in *Bland* to this effect. Lord Goff noted that whilst many responsible members of society were in favour of euthanasia in appropriate circumstances:

> "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" (p.865).

57. Lord Browne-Wilkinson and Lord Mustill, although unhappy with the distinction drawn in *Bland* between withdrawing support knowing that life will end and actively terminating life, nonetheless confirmed that in their view too the difficult issues raised by questions of assisted suicide and euthanasia could not satisfactorily be dealt with by the courts. Lord Browne-Wilkinson expressed his reasons as follows (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."

58. Lord Mustill observed that:

> "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 a sound procedural framework within which the rules can be applied to individual cases".

59. More recently Lord Judge CJ has come to the same conclusion in *Inglis* (para 39):

> "However, problems of mercy killing, euthanasia, and assisted suicide 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."

60. Toulson LJ in the Divisional Court identified three strands in this reasoning which he termed "competence, constitutionality and control of the consequences" (para 75). These are inter-related reasons but we agree that the principal objections expressed by these judges to developing the common law in this field, in the passages we have quoted and elsewhere, can usefully be analysed under those heads. Parliament as the conscience of the nation is the appropriate constitutional forum, not judges who might be influenced by their own particular moral perspectives; the judicial process which has to focus on the particular facts and circumstances before the court is not one which is suited to enabling the judges to deal competently with the range of conflicting considerations and procedural requirements which a proper regulation of the field may require; and there is a danger that any particular judicial decision, influenced perhaps by particular sympathy for an individual claimant, may have unforeseen consequences, creating an unfortunate precedent binding in other contexts.

61. Mr Bowen submits that in adopting this approach, the Divisional Court failed to give due weight to the fact that the courts have recognised that there is no rational basis for denying a defence to those who, out of sympathy, bring about the death of someone who has a settled wish to die but who is unable to commit suicide. He relies on the views expressed by Lords Browne-Wilkinson and Mustill in *Bland*, referred to above, to the effect that it is irrational for the law to distinguish between a doctor withdrawing support knowing that it will lead to certain death and actively taking steps to bring it about. However, these judges recognised that this is a distinction deeply rooted in English law and, more to the point, thought that whatever its justification, any change should be made by Parliament. Moreover, as we have seen, not everyone considers that the distinction is irrational and unjustified.

62. Mr Bowen also relies heavily on the case of *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147 where the Court of Appeal held that doctors could operate on twins joined at birth notwithstanding that it would necessarily lead to the immediate death of one of them who was surviving off the metabolism of the other. Mr Bowen says that this is a case where, to use the language of Lord Goff in *Bland*, the judges crossed the Rubicon and allowed the deliberate taking of life. But the justification in that case was that the operation would in all probability save the life of the other twin who would otherwise have died within months.

63. Furthermore, the court emphasised that this was an exceptional case and that their judgments should have no wider significance. In any event, there is a world of difference between taking a life to save one and taking a life because the deceased wishes it to end. This case is too slender a thread on which to hang such a far-reaching development of the common law.

64. Fourth, as we have already said, any defence provided to those who assist someone to die would have to apply not merely to euthanasia but also to assisted suicide. That immediately raises the question: how can the courts develop a defence to assisted suicide

when Parliament has stated in unequivocal terms that it is a serious criminal offence carrying a maximum sentence of 14 years' imprisonment. Mr Bowen sought to rely on the principle of legality, as it is sometimes called, which began to gain traction in the period leading up to the introduction of the Human Rights Act. The principle was expressed in the following terms by Lord Hoffmann in *R v Secretary of State for the Home Department ex p. Simms* [2002] 2 AC 115,131:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

65. This principle of statutory interpretation has been adopted in a number of cases to read down general words where precise and well established fundamental rights have been in issue. These have included the right of unimpeded access to the courts: *R v Lord Chancellor ex-parte Witham* [1998] QB 575; the right not to be punished by retrospective legislation: *Waddington v Miah* [1974] 1 WLR 683; the right not to have penalties increased: *R v Secretary of State for the Home Department ex-parte Pierson* [1998] AC 539 (HL); and the right to communicate confidentially with a legal advisor under the principle of legal professional privilege: *R (On the Application of Daly) v SSHD* [2001] 2 AC 532. It is to be noted that they are all detailed and specific rights.

66. In our judgment, this principle of statutory construction could not conceivably have any application here, for two quite distinct reasons. First, as we have noted, there is no right - let alone a fundamental right - to commit suicide, and the right to assist someone to do so cannot place the party providing assistance in a stronger position than the party committing suicide. Second, section 2(2) of the Suicide Act is not ambiguous, nor is it cast in general terms. There is no scope for giving it a limited interpretation. There is no conceivable risk that Parliament may not have understood the full implications of a blanket ban, or that the problems of those unable to commit suicide have passed unnoticed in the democratic process. On the contrary, Parliament fully understood what a blanket ban meant and why they were imposing it. They have on numerous occasions considered specific proposals for change but have so far chosen not to accede to them. The principle of legality can gain no hold here. This difficulty alone is in our view decisive of this submission. If a defence of necessity cannot be fashioned for assisted suicide, it certainly cannot for euthanasia.

The legal prohibitions and Article 8

67. The Divisional Court held that for two distinct but interlinked reasons Article 8(1) rights were not infringed by the absolute legal prohibition on assisted dying. The first was the binding decision of the House of Lords in *Pretty*, whose analysis was approved by the Strasbourg court in that case. Second, this was an area where the Strasbourg court allows a margin of appreciation to Member States and, for essentially the same reasons which the court gave when rejecting the possibility that it should develop the common law in this area, the court held that it should be for Parliament and not the courts to determine in what circumstances assisting someone to die should ever be lawful.

68. The appellants' principal attack is against the conclusion that the authorities support the proposition that a blanket prohibition on assisted suicide or euthanasia is necessarily a proportionate interference with Article 8 rights in all circumstances. They submit that the contrary is the case and that properly analysed, the Strasbourg decision in the *Pretty* case, particularly when read in the context of the subsequent House of Lords' decision in *Purdy* and certain observations of the Strasbourg court in *Haas* and *Koch*, clearly demonstrate that there may be exceptional cases where the ban is disproportionate. Accordingly, Mr Bowen submits that the Divisional Court should have determined whether the law forbidding euthanasia in all circumstances was proportionate in its application to Mr Nicklinson's circumstances. As we have said, Mr Havers does not contend that section 2(1) of the 1961 Act is itself disproportionate, but he says that the DPP was obliged to make it plain that he would not prosecute anyone who assisted Martin to commit suicide because that would infringe Martin's Article 8(1) rights.

69. Mr Bowen also contends that even if a blanket prohibition is permissible under Strasbourg law nonetheless the case falls squarely within the margin of appreciation so it is for the state to decide what constitutes a disproportionate interference with the Article 8 right. It is not obligatory for the UK to adopt a blanket ban; other possibilities would be consistent with Convention law. Since the Article 8 right is engaged, it is always necessary for the court itself to carry out the proportionality exercise even where the circumstances fall within the margin of appreciation. The Divisional Court was obliged to carry out that exercise and was wrong to leave the field to Parliament. Even if that is a legitimate stand for the court to take when considering whether or not to develop the common law, it is not appropriate where fundamental Convention rights are in issue because it is the court's job to protect them. The Divisional Court here was failing in that duty.

Is a blanket prohibition compatible with Article 8?

70. There is a string of relevant cases which it is necessary to analyse in some detail.

71. The first case is the decision of *Pretty* in the House of Lords, in many respects similar to these appeals. The claimant, Mrs Pretty, was suffering from a progressive and degenerative terminal illness and was faced with the prospect of a distressing and humiliating death. Physical disabilities prevented her from taking her life unaided. Her husband was willing to assist her to commit suicide when necessary but she was not willing that he should do so unless she was given an assurance that he would not be prosecuted under section 2 of the Suicide Act. Accordingly, she requested the DPP

to undertake that he would not consent to such a prosecution, but the DPP refused to give that assurance.

72. She brought a claim based upon various provisions of the Convention both before the domestic and the Strasbourg Court claiming infringements of Articles 2, 3, 8, 9 and 14. They all failed. So far as concerned Article 8, the House of Lords held that Article 8(1) was not in fact engaged but *Purdy* has confirmed that in the light of the *Pretty* case in Strasbourg, this conclusion is no longer good law.

73. However, their Lordships also considered the position in the alternative if Article 8 was applicable. The question was whether the ban on assisted suicide constituted a proportionate interference under Article 8(2). The House of Lords were unanimous that it did. Mrs Pretty argued that whilst section 2 was a proportionate response to protect vulnerable individuals, it was disproportionate to the extent that it unnecessarily went too far in also fettering the ability of those who were not vulnerable from being able to obtain assistance to end their lives.

74. Lord Bingham noted that the question whether assisted suicide should be decriminalised had been reviewed on a number of occasions, including by the Criminal Law Revision Committee in 1980, by the House of Lords Select Committee on Medical Ethics following the decision of the House of Lords in the *Bland* case, and had been the subject of a recommendation by the Council of Europe 1418 in 1999 on the protection of the human rights and dignity of the terminally ill and dying. They all reached the conclusion that the law should not be changed. The recommendation stated in terms that the law should recognise that:

> "a terminally ill or dying person's wish to die never constitutes any legal claim to die at the hand of another person"

and it added that it could not constitute legal justification for someone else to bring about that person's death. Lord Bingham, with whose judgment Lords Steyn, Hope and Scott expressly agreed, then summarised Mrs Pretty's arguments and his conclusions with respect to them were as follows (paras 29-30):

> 29. On behalf of Mrs Pretty counsel disclaims any general attack on section 2(1) of the 1961 Act and seeks to restrict his claim to the particular facts of her case: that of a mentally competent adult who knows her own mind, is free from any pressure and has made a fully-informed and voluntary decision. Whatever the need, he submits, to afford legal protection to the vulnerable, there is no justification for a blanket refusal to countenance an act of humanity in the case of someone who, like Mrs Pretty, is not vulnerable at all. Beguiling as that submission is, Dr Johnson gave two answers of enduring validity to it. First, "Laws are not made for particular cases but for men in general." Second, "To permit a law to be modified at discretion is to leave the community without law. It is to withdraw the direction of that public wisdom by which the deficiencies of private understanding are to be supplied" (Boswell, *Life of Johnson,* Oxford Standard Authors, 3rd ed, 1970, at pp 735, 496). It is for member states to assess the risk and likely incidence of abuse if the prohibition on assisted suicide were

relaxed, as the commission recognised in its decision in *R v United Kingdom* quoted above in paragraph 24. But the risk is one which cannot be lightly discounted. The Criminal Law Revision Committee recognised how fine was the line between counselling and procuring on the one hand and aiding and abetting on the other (report, p 61, para 135). The House of Lords Select Committee recognised the undesirability of anything which could appear to encourage suicide (report, p 49, para 239):

> "We are also concerned that vulnerable people - the elderly, lonely, sick or distressed - would feel pressure, whether real or imagined, to request early death. We accept that, for the most part, requests resulting from such pressure or from remediable depressive illness would be identified as such by doctors and managed appropriately. Nevertheless we believe that the message which society sends to vulnerable and disadvantaged people should not, however obliquely, encourage them to seek death, but should assure them of our care and support in life."

It is not hard to imagine that an elderly person, in the absence of any pressure, might opt for a premature end to life if that were available, not from a desire to die or a willingness to stop living, but from a desire to stop being a burden to others.

30. If section 2(1) infringes any convention right of Mrs Pretty, and recognising the heavy burden which lies on a member state seeking to justify such an infringement, I conclude that the Secretary of State has shown ample grounds to justify the existing law and the current application of it. That is not to say that no other law or application would be consistent with the convention; it is simply to say that the present legislative and practical regime do not offend the convention."

75. Lord Steyn observed that a blanket ban was proportionate because the majority of persons protected by section 2 are vulnerable and it is to protect them that the section is framed as it is (para 62).

76. This is an unambiguous finding by the House of Lords that a blanket prohibition on assisted suicide was "amply justified" and a proportionate interference with Article 8 rights.

77. That question was considered when the *Pretty* case went to Strasbourg. Indeed, once the court had held that Article 8 was engaged, it was the critical issue in the case. The court first summarised Mrs Pretty's argument which reflected the submissions advanced before the House of Lords (para 72):

> "The applicant attacked in particular the blanket nature of the ban on assisted suicide as failing to take into account her situation as a mentally-competent adult who knows her own mind, was free from pressure, and who has made a fully-informed and voluntary decision, and therefore cannot be regarded as vulnerable and requiring protection. This

> inflexibility means, in her submission, that she will be compelled to endure the consequence of her incurable and distressing illness at a very high personal cost."

78. The court rejected a submission by the Government that the applicant was herself vulnerable, but recognised the risk of abuse if the general prohibition was made subject to exceptions (para 74):

> "Nonetheless, the Court finds, in agreement with the House of Lords and the majority of the Canadian Supreme Court in *Rodriguez*, that States are entitled to regulate through the operation of the general criminal law activities which are detrimental to the life and safety of other individuals (see also *Laskey, Jaggard and Brown*, cited above, pp. 132-33, § 43). The more serious the harm involved the more heavily will weigh in the balance considerations of public health and safety against the countervailing principle of personal autonomy. The law in issue in this case, section 2 of the 1961 Act, was designed to safeguard life by protecting the weak and vulnerable and especially those who are not in a condition to take informed decisions against acts intended to end life or to assist in ending life. 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."

The reference to the "vulnerability of the class" as a justification for the prohibition echoes the approach by Lord Steyn in the House of Lords.

79. The court then expressed its conclusion in paragraph 76, which is critical to these appeals:

> "The Court does not consider therefore that the blanket nature of the ban on assisted suicide is disproportionate. The Government have 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. The Select Committee report indicated that between 1981 and 1992 in twenty-two cases in which "mercy killing" was an issue, there was only one conviction for murder, with a sentence of life imprisonment, while lesser offences were substituted in the others and most resulted in probation or suspended sentences (paragraph 128 of the report cited at paragraph 21 above). 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."

80. It then considered specifically whether there was anything disproportionate in the action of the DPP in refusing to give an advanced undertaking that no prosecution would be taken. It said this (para 77):

> "… 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. In any event, the seriousness of the act for which immunity was claimed was such that the decision of the DPP to refuse the undertaking sought in the present case cannot be said to be arbitrary or unreasonable."

81. The court held that on the facts there had been no violation of Article 8.

82. It is also necessary to take account of the court's conclusion in relation to the alleged violation of Article 14 which is directed at equal treatment. The submission from the applicant essentially repeated what she had said in relation to Article 8 but reworked the argument to fit it into the language of equality. She alleged that the blanket ban unfairly discriminated between those who were physically able to commit suicide and those who could not because they required the necessary assistance. Insofar as the justification was the need to protect the vulnerable, Mrs Pretty submitted that this did not justify applying the provision in relation to those who were not vulnerable and who did not need the law's protection. In essence, as the court recognised, Mrs Purdy was arguing in accordance with the case of *Thlimmenos v Greece* (2001) 31 EHRR 15, para 44 that so far as the ban itself was concerned, different cases should be treated differently, and that accordingly the law should be moulded to take account of persons who, like the applicant, were not physically capable of committing suicide yet were not vulnerable or in need of protection.

83. The court rejected this submission in the following terms (para 89):

> "Even if the principle derived from *Thlimmenos* was applied to the applicant's situation however, there is, in the Court's view, objective and reasonable justification for not distinguishing in law between those who are and those who are not physically capable of committing suicide. Under Article 8 of the Convention, the Court has found that there are sound reasons for not introducing into the law exceptions to cater for those who are deemed not to be vulnerable (see paragraph 74 above). Similar cogent reasons exist under Article 14 for not seeking to distinguish between those who are able and those who are unable to commit suicide unaided. The borderline between the two categories will often be a very fine one and to seek to build into the law an exemption for those judged to be incapable of committing suicide would seriously undermine the protection

> of life which the 1961 Act was intended to safeguard and greatly increase the risk of abuse."

84. The appellants focus on paragraph 76 in support of a submission that notwithstanding that the court has unarguably stated in the first sentence that the blanket ban is in principle compatible with Article 8, the court is also envisaging in the remainder of that paragraph that there may be circumstances where it would in fact be disproportionate to invoke the criminal law. Martin accepts that the first sentence makes it plain that he can have no complaint about the existence of the absolute prohibition on assisted suicide in section 2 of the 1961 Act. But he asserts that the remainder of the paragraph supports his submission that it is incumbent upon the DPP, as the officer responsible for enforcing the law, to ensure that in exercising his discretion whether to prosecute or not he will take account of the Article 8(1) rights of the party wishing to die. If a prosecution would be a disproportionate interference with Article 8 rights, it must not be initiated. Paul Lamb relies on the paragraph for the wider submission that the logic of the court's stance, notwithstanding the apparently clear endorsement of a blanket prohibition in the first sentence, is that the underlying law itself must be modified where necessary properly to protect Article 8 rights; those rights cannot adequately be protected through the exercise of the discretion to prosecute alone.

85. In our judgment, a careful reading of the decision makes it plain that the court was not in paragraph 76 seeking to suggest that a blanket ban was disproportionate or that a prosecution may sometimes infringe Article 8 rights. This conclusion is supported by the following considerations. First, it was never suggested that the exercise of the discretion to prosecute could itself, quite independently of the underlying criminal offences, constitute a breach of Article 8. Second, it is inconsistent with the unambiguous statement in the first sentence of paragraph 76 that the court did not consider that the blanket nature of the ban on assisted suicide was disproportionate. Moreover, the reference to "therefore" in that sentence makes it absolutely plain that the court was reaching a definite conclusion in the light of its earlier reasoning. Third, it does not sit happily with the observation in paragraph 74 that it is for the State to assess the risks of creating exceptions to the blanket prohibition. Finally, it is inconsistent with the finding in relation to Article 14 where the court unambiguously held that the article did not require the State to distinguish between those who could and those who could not commit suicide unaided.

86. Moreover, in paragraph 77 the court held that it was not disproportionate for the DPP to refuse to give a guarantee either to individuals or to any class that they would not be prosecuted. This again does not sit comfortably with the notion that there may be a category or class of case where prosecutions would be contrary to rights conferred by Article 8(1) and would thereby have to be spelt out in advance by the DPP.

87. In our judgment, the observations in paragraph 76 concerning the flexibility in relation to enforcement and sentence, were not addressing the position of the party contemplating suicide who has the Article 8(1) right, but were focusing on the position of a party providing assistance. The court was noting that the law was flexible enough to ensure that his or her particular circumstances could be taken into account when deciding whether to prosecute and what sentence the criminal conduct should attract. These observations in our view simply do not bear on the Article 8 right at all.

88. Accordingly, simply reading this decision on its own, we have no doubt that the clear conclusion is that a blanket ban is fully compatible with Article 8(2). That is not to say that only a blanket prohibition is compatible; as the court noted in *Pretty*, and subsequently reiterated in *Koch* and *Haas,* states have a wide margin of appreciation in determining the role of the criminal law in this sphere. That factor also militates against a construction of paragraph 76 which would write exceptions into the general prohibition.

89. The appellants submit that the Strasbourg decision in *Pretty* should not be considered independently of later authorities which, they say, strongly support their submission that the only proper interpretation of paragraph 76 is that there will be exceptional cases where a blanket ban is disproportionate. The most important case on which they rely is *Purdy* in the Supreme Court. They submit that a majority of the court, Lady Hale, Lord Brown and Lord Neuberger, must have construed paragraph 76 of the Strasbourg judgment in that way and contrary to the way we have described above. They also rely on observations in *Haas* and *Koch* which they say reflect the same assumption.

90. Mrs Purdy suffered from multiple sclerosis. She could envisage a time when she would want to end her life because it would become unbearable to her, but she would then need her husband's assistance to travel to a country where assisted suicide was lawful. She did not, as in *Pretty*, seek any guarantee from the DPP that he would not prosecute her husband if he were to provide assistance. Rather she sought to require him to set out factors which he would take into account in deciding whether or not he would prosecute. The DPP declined to do so, taking the view that he should exercise his discretion in accordance with the general code which he issues in relation to taking prosecutions in criminal cases generally. The House of Lords held that he should. We consider their Lordships' judgments in more detail when we consider the third issue in this appeal. Here we focus on those elements in the judgment which allegedly have relevance to the proper interpretation of the Strasbourg case in *Pretty*.

91. The case was opened by Lord Pannick QC, counsel for Mrs Purdy, in the following way (page 349E):

> "The discretion conferred on the Director of Public Prosecutions by section 2(4) is integral to the application of the criminal offence created by section 2(1) … and the flexibility introduced by the consent provisions of section 2(4) was recognised by the European Court of Human Rights in *Pretty v United Kingdom* (2002) 35 EHRR 1 as an important factor relevant to establishing that the prohibition in section 2(1) was not a disproportionate interference with Article 8: see at para 76. Section 2(4), therefore, constitutes parliamentary acknowledgment that there is a category of individuals who, notwithstanding that they have committed the offence under section 2(1), should nevertheless suffer no criminal penalty as a result and whom it is not in the public interest to prosecute. The legislation, however, leaves this class of individuals undefined."

92. It is here being asserted that paragraph 76 should be read in the broad way in which the appellants contend. The DPP's discretion to prosecute must be exercised so as to safeguard Article 8 rights where necessary. It is also at least arguable that at one point Ms Rose QC, on behalf of the DPP, seems to have made the same assumption. Her argument, in part, is reported as follows (page 357H):

> "The prohibition on aiding, abetting, counselling or procuring a suicide in section 2(1) taking into account the Director's discretion, is proportionate and "in accordance with the law", as the European Court found in *Pretty v United Kingdom* at paras 68-78. In reaching that conclusion, the court at para 76, drew attention to and specifically relied on the flexibility afforded to prosecutors to consider the circumstances of individual cases as important to the proportionality of the restriction. It would be remarkable in these circumstances if the existence of the consent requirement without the promulgation of a specific further Policy limiting its application were to be found to be in breach of Article 8.2; such a conclusion would be inconsistent with the approach of the court in *Pretty v United Kingdom*."

93. There was no discussion in any of the judgments in *Purdy* as to how paragraph 76 should be construed and the issue was not directly before the court. Lord Phillips and Lord Hope made no observation with respect to paragraph 76 and did not suggest that the DPP would ever be under any obligation not to prosecute in order to respect Article 8(1) rights. However, it is conceded by the respondent that Lady Hale and Lord Brown did consider that he might be under that obligation. The critical part of Lady Hale's judgment is at paragraph 63-64 where she said this:

> "However, the Court went on to take account of the flexibility in the law produced both by the requirement that the DPP consent to any prosecution and by the wide range of permissible sentences. Thus, at para 76:
>
> > "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".
>
> Both sides have understandably gained comfort from that passage. For the DPP, it justifies a blanket ban coupled with flexible enforcement. *For Ms Purdy, it contemplates that there will be individual cases in which the deterrent effect of a prosecution would be a disproportionate interference with the autonomy of the person who wishes to end her life*. Moreover, in an argument which was not raised in *Pretty*, if the

> justification for a blanket ban depends upon the flexibility of its operation, it cannot be "in accordance with the law" unless there is greater clarity about the factors which the DPP and his subordinates will take into account in making their decisions.
>
> *My Lords, I accept that argument on Ms Purdy's behalf ….* "
> (emphasis added.)

94. We accept that Lady Hale is saying in the italicised passages that there may be individual cases where Article 8 rights may have to be secured by the DPP refraining from prosecuting the party providing assistance.

95. Lord Brown expressed similar views at paragraph 70 at the commencement of his judgment:

> "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 …"

96. Then a little later, at paragraph 74, he made the position even clearer:

> "The rejected challenge to the proportionality of the blanket ban notwithstanding, it seems to me 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. If in practice the ban were to operate on a blanket basis, the only relaxation in its impact being by way of merciful sentences on some occasions when it is disobeyed, that would hardly give sufficient weight to the Article 8 rights with which the ban, if obeyed, is acknowledged to interfere. It is impossible to read the judgment in any other way. Why otherwise would the Court identify, as part of the justification for what is ostensibly a blanket ban, the need to consider the question whether it is in the "public interest [to bring] a prosecution" and the requirement (under section 2(4) of the 1961 Act) for the DPP's consent to do so?"

97. Surprisingly, however, when he commented on what an amended Policy would require at paragraph 86, he did not include an obligation on the DPP to identify cases where prosecutions would not be initiated because this would conflict with Article 8 rights. It is also pertinent to note that this was not an obligation imposed by the order made by the court.

98. The appellants also place reliance on Lord Neuberger's speech simply because he stated at the end of his judgment (para 106) that he agreed with the reasons of Lord

Hope, Lady Hale and Lord Brown. They submit that this shows that a majority of the court has held that a blanket prohibition is disproportionate because exceptionally it will breach Article 8 rights to punish the assisting party, and accordingly the court had to determine whether the appellants' cases fell into the exceptional category.

99. We do not accept that *Purdy* is binding authority on this point; nor does it cause us to reconsider our analysis of the Strasbourg decision in *Pretty*. Paragraph 76 was not debated in *Purdy*, nor was there any argument about the scope of the Strasbourg ruling. Moreover, the order made demonstrates that the ratio of the decision was that it was necessary for the DPP to identify the factors bearing on the exercise of his discretion. In those circumstances it is in our view not possible to say that it was any part of the ratio of *Purdy* that a disproportionate ban might on occasions be unlawful, or that the ban had to be mitigated by the DPP adopting a Policy not to prosecute certain individuals or classes of individuals. In our judgment, Lady Hale and Lord Brown's speeches were based on the assumption that *Pretty* had that effect, which assumption was no doubt influenced by the way in which the case had been argued by counsel; they reached no reasoned conclusion on the point which was not directly before them.

100. Mr Havers seeks some support for his argument in certain observations of the Strasbourg court in *Haas*. The applicant in that case suffered from a bipolar affective disorder. He had twice failed to commit suicide. He wished to do so by obtaining a particular substance, sodium pentobarbital, which in sufficient quantities would enable him to die in a safe and dignified manner. The drug could only be obtained by prescription and he was unable to secure it. He unsuccessfully sought the assistance of various health authorities to obtain the drug without a prescription. He contended that he had an Article 8 right to end his life in a dignified way and that this had been infringed. The court rejected his claim. It accepted that Article 8 was engaged but concluded that controlling access to the drug was a proportionate interference designed to protect vulnerable people from obtaining the drug too readily. Mr Havers relies on a passage in the judgment at paragraph 53 of the decision, when the court said this:

> "The court considers that the applicant's request to have access to sodium pentobarbital without a medical prescription must be examined from the angle of a positive obligation on the State to take the necessary steps to allow a dignified suicide."

101. As we understand it, Mr Havers submits that the reference to "necessary steps" might include permitting the assistance by a third party. We do not accept that these observations can be read in that way. The court expressly stated in paragraph 52 that unlike *Pretty*, this case was not about the potential immunity from the legal process of those assisting someone to die; indeed, Switzerland is one of the few countries where assisted suicide is permitted. These observations do not, in our view, lend any assistance to the appellant's claims.

102. Mr Bowen relied heavily on the *Koch* decision in which the facts were very similar to *Haas*. The applicant was the husband of someone who suffered from total sensorimotor quadriplegia following an accident which had rendered her virtually

completely paralysed. She wished to end her life. She asked the authorities to provide her with a lethal dose of medicine so that she could commit suicide at home, but the request was refused. In fact she subsequently travelled to Switzerland and then committed suicide, assisted by Dignitas. Under German law drugs could only be prescribed for life sustaining purposes and not to end life. The husband complained before the German courts of breach of Article 8. The case went right through the German courts system and it was held that he had no standing to bring the claim. As we have seen, the European court held that because of the husband's strong personal involvement in his wife's situation he had standing under Convention principles to assert that there had been a breach of his own Article 8 rights. The court went on to hold that the German courts had wrongly failed to consider the merits of his Article 8 claim.

103. Mr Bowen says that this ruling supports Paul Lamb's case. The premise of the decision is that a failure by the State to provide drugs enabling a person to commit a safe and dignified suicide may in principle involve a breach of Article 8. We agree that it is, but in our view that has no bearing on the question in issue in this case. The case was not about the ability of a party to take her own life but the different question whether she could do so in the manner she desired. Moreover, there is nothing in the judgment which suggests how the German court was required to resolve that question.

104. We do not think that it can be said that the court in *Koch* was in any way intending to row back on its ruling in *Pretty* where it had recognised the very wide margin of appreciation which States have in this field.

105. In our view, therefore, the blanket ban is a proportionate interference with Article 8 rights and neither *Purdy* in the House of Lords nor subsequent Strasbourg cases cast any doubt on that conclusion. Given the authoritative ruling in *Pretty*, the Divisional Court was right to say that they were bound by that decision; and so are we.

106. We would add that had we acceded to the appellants' submissions and held that the Strasbourg ruling in *Pretty* should be construed as establishing that there will be cases where to criminalise those assisting dying will involve a disproportionate interference with Article 8 rights, we would have agreed with Mr Bowen that the legal prohibitions would themselves have to be disapplied to give proper effect to those rights. We would reject Mr Havers' submission that Article 8 rights can properly be vindicated by the expedient of not prosecuting for the breach. Those assisting would still be acting in a criminal manner, albeit not so as to attract any practical consequences. It is a curious kind of right which is secured only by the exercise of a discretion by the prosecutor not to enforce a breach. We recognise that Mr Havers felt constrained to argue in this way in order for his submission to be consistent with the first sentence of paragraph 76 of the Strasbourg judgment in *Pretty*. But the incongruity of holding that the law itself is proportionate but enforcing the law is not strongly reinforces our conclusion that the Strasbourg court was not intending to suggest that a blanket prohibition would contravene Convention law.

The margin of appreciation.

107. Mr Bowen submits that even if the blanket prohibition is not inconsistent with the Convention as construed in Strasbourg, nonetheless this did not liberate the Divisional Court from its obligation to carry out a balancing exercise. He relies upon the

following passage from the judgment of the Strasbourg Court in *Koch*: where the court emphasised that it was particularly important to examine the merits of the claim where the case fell within the wide margin of appreciation (paras 69-71):

> "With regard to the substantive aspect of the complaint under Article 8, the Court reiterates that the object and purpose underlying the Convention, as set out in Article 1, is that the rights and freedoms should be secured by the Contracting State within its jurisdiction. It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, with the Court exercising a supervisory role subject to the principle of subsidiarity (compare, among other authorities, *Z. and Others v. the United Kingdom,* no. 29392/95, § 103, ECHR 2001-V and *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 147, ECHR 2009).
>
> The Court considers that this principle is even more pertinent if the complaint concerns a question where the State enjoys a significant margin of appreciation."

108. This case does not assist Mr Bowen because the proportionality issue has already been considered on its merits by a court. The Divisional Court would be bound by the decision of the House of Lords in *Pretty* where the court - and not Parliament - found section 2 of the 1961 Act (and *a fortiori* the lack of any necessity defence for euthanasia) to be a proportionate interference with the Article 8 right. It would therefore be a wholly pointless exercise to remit this case. *Koch* was different because the German courts had not made a ruling on the relationship between Article 8 and the German law regulating the accessibility of drugs capable of terminating life. It was incumbent on them to do so as part of the necessary procedural protection for Article 8 rights. That obligation has already been satisfied in the UK.

109. It is true that Toulson LJ went on to say, at least on one reading of his decision, that even had the court not been bound by authority it would not have felt it appropriate to consider whether the existing law was a proportionate interference since, for the reasons it gave when refusing to develop the common law, the courts were not the appropriate institution to carry out that task and it would be usurping the role of Parliament.

110. If that is an accurate reading of his decision then we would respectfully disagree with the analysis. The Human Rights Act creates domestic rights enforceable in domestic courts, and the court is obliged to vindicate those rights. Even where the margin of appreciation applies, it has to satisfy itself that any interference is proportionate as a matter of domestic law. Having said that, where the margin of appreciation applies, in our opinion the court should give considerable leeway to Parliament recognising what is sometimes termed a wide margin of judgment. As Lord Bingham noted in *Kay v Lambeth Borough Council* [2006] UKHL 10; [2006] 2 AC 465, para.44, when determining how Convention rights should be construed, the court must apply the principles in the context of national law and practice. Where the law is not incompatible with the Strasbourg jurisprudence, because it falls within the margin of appreciation, the guiding constitutional principle underlying domestic law is that the

courts should give effect to legislation passed by Parliament. It is not an overriding principle, however, and the courts must, as guardians of human rights, reserve the power to hold in an appropriate case that domestic law infringes Convention rights even where Strasbourg would not find that to be the case. An example, and so far the only example, is the decision of the House of Lords in *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173. Mr Bowen relies on that case but it was wholly exceptional. It concerned legislation passed by the Northern Ireland Assembly which prevented unmarried couples from adopting children. There was some doubt whether the Strasbourg court would have found that this fell within the margin of appreciation, but a majority of their Lordships (Lord Hoffmann, Lord Hope, Lady Hale and Lord Mance; Lord Walker dissenting) held that even if it would, nonetheless the court should find that the law infringed Article 8 rights. That case is far removed from the present. It concerned what their Lordships considered was an irrational rule which, moreover, was inconsistent with another principle of the legislation in question, namely an obligation to promote the best interests of children.

111. We have no doubt that in a case like this, it would be improper for the court to find a blanket prohibition to be disproportionate where this is not dictated by Strasbourg jurisprudence. The guiding principle remains that adumbrated by Lord Bingham in *Ullah v Special Adjucator* [2004] 2 AC 323 that:

> "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

112. In our judgment, it would be inappropriate for the courts to fashion domestic Article 8(1) rights exceeding the protection afforded by the requirements of Strasbourg in direct opposition to the will of Parliament as reflected in section 2 of the 1961 Act. The courts have to concede a very wide margin of judgment to Parliament in a controversial area raising difficult moral and ethical issues such as assisted suicide, and the current law cannot conceivably be said to stray beyond it.

113. So whilst we accept the submission that the courts cannot refuse to carry out the proportionality exercise even where the case falls within the margin of appreciation, they must adopt a very light touch particularly when dealing with primary legislation. Applying the principles in that way, we have no doubt that as a matter of domestic law the current blanket prohibitions are compatible with Article 8.

114. It follows that in our judgment all these appeals fail on this Article 8 issue. The blanket prohibitions on euthanasia and assisted suicide do not constitute a disproportionate interference with the Article 8 rights of these appellants. In relation to Martin, this means that he has no right to require the DPP to desist from prosecuting a carer or doctor who helps him to die; and the DPP cannot be required as part of his section 2 prosecution Policy to identify a category of cases where a prosecution will not be initiated because to do so would infringe Article 8 rights. However, that still leaves Martin's submission that the Policy is an unjustified interference with his Article 8 rights since the interference constituted by the Policy is too uncertain to be "in accordance with the law" as required by Article 8(2). We turn to consider that final ground of appeal.

Does the Policy of the DPP satisfy Convention principles of foreseeability?

115. The starting point for this argument is that there is now a body of Strasbourg authority which firmly establishes that any law interfering with Convention rights must reach a certain level of clarity before it constitutes a legitimate interference. What degree of clarity does Article 8(2) require? The basic principle is that it must satisfy a certain measure of foreseeability. The origin of the requirement is to be found in *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at para 49:

> "… 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 unattainable. 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. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

116. A more recent statement of the principle appears in *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 1339 at para 84:

> "For domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.
>
> The level of precision required of domestic legislation—which cannot in any case provide for every eventuality—depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed."

117. The law must be "sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to resort to the impugned measures": *Gulmez v Turkey* (Application No 16330/02), judgment 20 May 2008 at para 49.

118. These principles were relied upon by the appellant in the case of *Purdy*. Ms Purdy was concerned that her husband might be prosecuted if he were to take her to Dignitas once her degenerative neurological condition had deteriorated to the point that her continued existence became unbearable. She asked the DPP to disclose what factors he would take into consideration when determining whether or not to prosecute under section 2(4) of the 1961 Act but he declined to do so. She sought judicial review of

his refusal to promulgate his Policy and was successful before the House of Lords having failed in the lower courts.

119. The House considered, contrary to the DPP's submissions, that the generic Prosecution Code which identifies factors which may bear upon the discretion to prosecute in a wide range of cases did not satisfy the Article 8(2) requirements of accessibility and foreseeability for a person seeking to identify the factors that were likely to be taken into account by the DPP in exercising section 2(4) discretion. For example, at paragraph 27 Lord Hope observed that the Prosecution Code would suggest that someone assisting a potential suicide victim to go to Switzerland would be prosecuted provided there was evidence to sustain the prosecution and the public interest justified it, but he then added:

> "But the practice that will be followed in cases where compassionate assistance of the kind that Ms Purdy seeks from her husband is far less certain. The judges have a role to play where clarity and consistency is lacking in an area of such sensitivity."

120. And at paragraph 41, in a section of his opinion which was dealing with the Article 8(2) requirement that an interference with the Article 8(1) right be "in accordance with the law", he noted the broad concept given to the word "law" in Convention jurisprudence and commented on the foreseeability test in the following terms:

> "The word "law" in this context is to be understood in its substantive sense, not its formal one: *Kafkaris v Cyprus* (2008) 25 BHRC 591, para 139. This qualification of the concept is important, as it makes it clear that law for this purpose goes beyond the mere words of the statute. As the Grand Chamber said in that case in paras 139 -140, it has been held to include both enactments of lower rank than statutes and unwritten law. Furthermore, it implies qualitative requirements, including those of accessibility and foreseeability. Accessibility means that an individual must know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it what acts and omissions will make him criminally liable: see also *Gülmez v Turkey*, Application no 16330/02, 20 May 2008, BAILII: [2008] ECHR 402, para 49. 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. 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: *Goodwin v United Kingdom* (1996) 22 EHRR 123, para 31."

121. At paragraph 55, he said that the DPP was obliged "to clarify what his position is as to the factors that he regards as relevant for and against prosecution in this very special and carefully defined class of case". At paragraph 56, he required the DPP to

"promulgate an offence-specific Policy identifying the facts and circumstances which he will take into account in deciding, in a case such as that which Ms Purdy's case exemplifies, whether or not to consent to prosecution under section 2(1) of the 1961 Act". Paragraph 56 was reflected in the mandatory order that was made.

122. The members of the Appellate Committee were unanimous in concluding that the law was not sufficiently foreseeable and that greater guidance was required. Lady Hale said that the object of the exercise should be to "focus, not upon a generalised concept of the public interest but upon the features which will distinguish cases in which deterrence will be disproportionate from those cases in which it will not" (para 64). Lord Brown also considered that the general Code failed to meet the requirement of foreseeability and that a "custom-built Policy statement" was required (para 86).

123. In our judgment this analysis is consistent with the view that by conferring the specific discretion on the DPP to decide whether or not to prosecute, Parliament has recognised that there will be circumstances where the public interest will point away from prosecution – to use Lady Hale's phrase, it will be disproportionate. The principles for determining how that public interest is protected directly affect potential criminal liability and they are part of the "law" in the wider sense in which that term is used in the context of Article 8 jurisprudence. Accordingly, since Article 8 is engaged, those principles have to satisfy the requirements of accessibility and foreseeability.

124. Following the decision in *Purdy,* on 23 September 2009 the DPP published an interim Policy. This remained in force for approximately six months. It contained a list of public interest factors favouring prosecution for assisting suicide and a list of factors tending against prosecution. Eight of the sixteen factors identified as favouring prosecution and seven of the thirteen factors identified as against prosecution were expressed as in most cases carrying more weight than the others.

125. The interim Policy was the subject of a wide consultation. Taking account of the responses to the consultation, the DPP published the Policy in February 2010.

126. A number of points need to be made about the *Purdy* decision before considering the details of the Policy material to this appeal. First, the House of Lords made it clear that it was not changing the law: see, for example, paragraph 26 of Lord Hope's opinion. If changes were to be made, that must be a matter for Parliament. Secondly, the House did not intend that the clarification that the DPP was required to give would suspend or disapply section 2(1). That would be constitutionally improper. This was the point made by Lord Bingham in *Pretty* at paragraph 39: the DPP has no power to make a "proleptic grant of immunity from prosecution". The power to dispense with and suspend laws or 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). Their Lordships in *Purdy* chose their language carefully. They did not explicitly encourage the DPP to cross the line of constitutional propriety. Thirdly, however, in the context of section 2 of the 1961 Act, there is a clear tension between (i) meeting the Article 8(2) requirement of clarity and foreseeability and (ii) maintaining constitutional propriety. The greater the clarity of the Policy and the more precisely it defines the circumstances in which a prosecution will and will not be instituted against a person for the offence of assisting suicide, the greater the danger that the DPP will have crossed the line of constitutional propriety. The DPP was only

too aware of this difficulty. But it was the inevitable consequence of the decision in *Purdy*. In his evidence to the Falconer Commission of Assisted Dying the DPP said:

> "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."

The Policy

127. As one would expect, the Policy is a carefully considered and detailed document. At paragraph 5, it emphasises that *Purdy* did not change the law on encouraging or assisting suicide: only Parliament could do that. At paragraph 6, it states that the Policy "does not in any way 'decriminalise' the offence of encouraging or assisting suicide. Nothing in this Policy can be taken to amount to an assurance that a person will be immune from prosecution". Paragraph 13 states that prosecutors must apply the Full Code Test as set out in the Code for Crown Prosecutors ("the Prosecution Code") in cases of encouraging or assisting suicide. The Full Code Test has two stages: (i) the evidential stage and (ii) the public interest stage. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be. But where there is sufficient evidence to justify a prosecution, prosecutors must go on to consider whether a prosecution is required in the public interest.

128. Paragraph 38 states that in cases of encouraging or assisting suicide, prosecutors must apply the public interest factors set out in the Prosecution Code and the factors set out in the Policy in making their decisions. The Policy continues:

> "39. Assessing the public interest is not simply a matter of adding up the number of factors on each side and seeing which side has the greater number. Each case must be considered on its own facts and on its own merits. Prosecutors must decide the importance of each public interest factor in the circumstances of each case and go on to make an overall assessment. It is quite possible that one factor alone may outweigh a number of other factors which tend in the opposite direction. Although there may be public interest factors tending against prosecution in a particular case, prosecutors should consider whether nonetheless a prosecution should go ahead and for those

factors to be put to the court for consideration when sentence is passed.

40. The absence of a factor does not necessarily mean that it should be taken as a factor tending in the opposite direction. For example, just because the victim was not "under 18 years of age" does not transform the "factor tending in favour of prosecution" into a "factor tending against prosecution".

41. It may sometimes be the case that the only source of information about the circumstances of the suicide and the state of mind of the victim is the suspect. Prosecutors and investigators should make sure that they pursue all reasonable lines of further enquiry in order to obtain, wherever possible, independent verification of the suspect's account.

42. Once all reasonable enquiries are completed, if the reviewing prosecutor is doubtful about the suspect's account of the circumstances of the suicide or the state of mind of the victim which may be relevant to any factor set out below, he or she should conclude that there is insufficient information to support that factor.

Public interest factors tending in favour of prosecution

43. A prosecution is more likely to be required if:

1. the victim was under 18 years of age;

2. the victim did not have the capacity (as defined by the Mental Capacity Act 2005) to reach an informed decision to commit suicide;

3. the victim had not reached a voluntary, clear, settled and informed decision to commit suicide;

4. the victim had not clearly and unequivocally communicated his or her decision to commit suicide to the suspect;

5. the victim did not seek the encouragement or assistance of the suspect personally or on his or her own initiative;

6. the suspect was not wholly motivated by compassion; for example, the suspect was motivated by the prospect that he or she or a person closely

connected to him or her stood to gain in some way from the death of the victim;

7. the suspect pressured the victim to commit suicide;

8. the suspect did not take reasonable steps to ensure that any other person had not pressured the victim to commit suicide;

9. the suspect had a history of violence or abuse against the victim;

10. the victim was physically able to undertake the act that constituted the assistance him or herself;

11. the suspect was unknown to the victim and encouraged or assisted the victim to commit or attempt to commit suicide by providing specific information via, for example, a website or publication;

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;

15. the suspect was aware that the victim intended to commit suicide in a public place where it was reasonable to think that members of the public may be present;

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.

44. On the question of whether a person stood to gain, (paragraph 43(6) see above), the police and the reviewing prosecutor should adopt a common sense approach. It is possible that the suspect may gain some benefit - financial

or otherwise - from the resultant suicide of the victim after his or her act of encouragement or assistance. The critical element is the motive behind the suspect's act. If it is shown that compassion was the only driving force behind his or her actions, the fact that the suspect may have gained some benefit will not usually be treated as a factor tending in favour of prosecution. However, each case must be considered on its own merits and on its own facts.

Public interest factors tending against prosecution

45. A prosecution is less likely to be required if:

    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.

46. The evidence to support these factors must be sufficiently close in time to the encouragement or assistance to allow the prosecutor reasonably to infer that the factors remained operative at that time. This is particularly important at the start of the specific chain of events that immediately led to the suicide or the attempt.

47. These lists of public interest factors are not exhaustive and each case must be considered on its own facts and on its own merits.

> 48. If the course of conduct goes beyond encouraging or assisting suicide, for example, because the suspect goes on to take or attempt to take the life of the victim, the public interest factors tending in favour of or against prosecution may have to be evaluated differently in the light of the overall criminal conduct."

Is the Policy in accordance with the law?

129. In developing his submission that the Policy is not "in accordance with the law" Mr Havers compares two classes of case. In a class 1 case, the person (described in the Policy as the "victim") wishes to end her life and (i) has a friend or family member who is willing to arrange for the use of the services of Dignitas; (ii) the helper, who has emotional ties to the victim, acts in good faith out of compassion; and (iii) there are no particular grounds for concern about the motives of the helper or about the vulnerability of the person being helped. Mr Havers submits that it is clear enough from a careful reading of the Policy that class 1 helpers will not be prosecuted. Indeed, this is borne out by what happens in practice. Between 2008 and 2010, approximately 25 British citizens (all class 1 helpers) travelled each year to assist a victim to make use of the services of Dignitas. So far as is known, none of them has been prosecuted. In a class 1 case, none of the public interest factors tending in favour of prosecution is likely to be engaged and most of the public interest factors tending against prosecution are engaged. The position was summarised crisply in the Falconer Commission Report at p 285 in these terms:

> "The guidelines …. amount to the DPP saying that he will not prosecute in cases where the assistance is provided compassionately to a person who is capable of making a considered and autonomous decision.

130. Mr Havers submits, therefore, that the requirement of foreseeability is adequately met in class 1 cases. Class 2 cases are, however, different. Class 2 helpers have no close or emotional connection with the victim. Martin is a paradigm class 2 case. Some class 2 helpers may reasonably expect remuneration to provide their services as carers. Some may be professionally qualified, for example a doctor who provides a report in connection with the victim's application to Dignitas. Mr Havers submits that there are several factors in the Policy which tend to favour prosecution of healthcare professionals, for example, where the helper is acting as a healthcare professional and the victim is in his or her care (para 43(14)); the helper is paid by the victim or those close to the victim for their encouragement or assistance (para 43(13)); the helper is (by providing assistance in the course of paid work) motivated in part by the prospect of financial or other gain (para 43(6)); and the helper gives encouragement or assistance to more than one victim who were not known to each other (para 43(12)).

131. On the other hand, there are also several factors in the Policy tending against prosecution which may well not be engaged in respect of some class 2 helpers, where, for example, (i) the helper is wholly motivated by compassion (para 43(2)); (ii) the helper has sought to dissuade the victim from taking the course of action which resulted in suicide (para 43(4)); and (iii) the actions of the helper may be characterised as reluctant encouragement or assistance in the face of a determined wish on the part of the victim to commit suicide (para 43(5)).

132. Mr Havers submits that the Policy gives no indication of how these various factors are weighted by the DPP in a class 2 case. Take Martin's case. Are compassion and respect for his autonomy the most important public interest considerations? Or is the most important consideration the need to prevent professionals with caring responsibilities from assisting with suicide in these or any circumstances? The Policy does not say. Instead, it expressly leaves the outcome unforeseeable: see para 39.

133. It is clear from the report of the Commission on Assisted Dying at p 94-99 that the operation of para 43(14) is causing difficulty and confusion amongst healthcare professionals. The problem of uncertainty was also mentioned in the Falconer Commission report at p 286:

> "Second, there remains considerable uncertainty about what conduct will attract criminal prosecution. Unlike most other crimes, whether a person is liable to be prosecuted depends, primarily, on the application of non-discretionary requirements in a statute, or requirements established clearly and with precision by the common law. For the offence of assisted suicide there is now the application of the guidelines, which are by their nature only indicative — they cannot cover every factual situation — and then the exercise of a discretion. Some of those who gave evidence argued that a system with upfront safeguards and prospective approval of individual cases would be preferable, as this would remove the uncertainty currently embedded in the system.
>
> Third, the factors for and against prosecution make a special case of health and social care professionals, making it clear they are more likely to be prosecuted for providing assistance with suicide than other members of the public. This has many consequences, including particular insecurities for doctors and other health or social care professionals whose legal position in relation to various forms of minor 'assistance' (such as providing medical records) remains unclear and may come into conflict with their duties of care and patient confidentiality."

134. At para 133 of his judgment, Toulson LJ summarised the DPP's approach in these terms:

> "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."

135. Toulson LJ said that this was a "constitutionally proper" approach for the DPP to take, being consistent with the terms of the order in *Purdy*. As for the requirement for clarity, he said at para 139 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".

136. He then said:

> "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. "

137. It is important to keep in mind the narrow basis on which Mr Havers mounts his first challenge to the Policy. He does not say that the Policy is irrational. He accepts that all of the factors identified in the Policy are factors which the DPP is entitled to take into account in deciding whether to consent to a prosecution. Nor does he advance a free-standing discrimination argument on the basis that the Policy unlawfully discriminates between class 1 and class 2 cases, although he says that there is no reason why greater clarity is not provided in relation to class 2 cases such as is provided in relation to class 1 cases. His submission is that the Policy does not provide sufficient foreseeability in class 2 cases. He accepts that, if the Policy were to be amended to make it clear that professional carers who assist victims who have reached a voluntary, clear, settled and informed decision to commit suicide, *are* likely to be prosecuted, then it would be "in accordance with the law", but such an amendment would not assist persons in the position of Martin to achieve their goal.

138. Despite the wording of the order made in *Purdy,* we consider that it is not sufficient for the Policy merely to list the factors that the DPP will take into account in deciding whether to consent to a prosecution under section 2(1). A list of factors which

contains no clue as to how the discretion to grant or withhold consent will be exercised is not sufficient to meet the requirements of Article 8(2). Lord Hope clearly recognised this at para 41 of his opinion in *Purdy.* He said that the requirement of foreseeability will be satisfied where the person concerned "is able to foresee....the *consequences* which a given action may entail" (emphasis added). This formulation was derived from the *Sunday Times* case at para 49. If a list of relevant factors does not enable the person concerned to foresee, to a degree that is reasonable and adequate in the circumstances, the *consequences* of his action, then the Article 8(2) requirement is not satisfied. It is clear, therefore, that the order made by the House of Lords in *Purdy* required the DPP to identify the facts and circumstances which he would take into account in such a way that a person who is considering providing assistance to a victim to commit suicide is able to foresee, to a degree that is reasonable and adequate in the circumstances, the consequences of providing such assistance.

139. The circumstances in the present context include the fact that assisting a person to commit suicide is a criminal offence which carries a maximum sentence of 14 years' imprisonment. The graver the potential consequences, the more important it is that the consequences are foreseeable.

140. In our judgment, the Policy is in certain respects not sufficiently clear to satisfy the requirements of Article 8(2) in relation to healthcare professionals. It is not surprising that they are reluctant to assist victims to commit suicide. Para 43(14) is particularly problematic. How does it apply in the case of a medical doctor or nurse who is caring for a patient and out of compassion is willing to assist the patient to commit suicide, but is not, as it were, in the business of assisting individuals to commit suicide and perhaps has never done so before? How much weight is given by the DPP to para 43(14) alone? And if the professional accepts some payment for undertaking the task, will that be likely to involve a finding that he or she is not wholly motivated by compassion, thereby triggering both paragraph 43(6) and paragraph 43(13)? These questions are of crucial importance to healthcare professionals who may be contemplating providing assistance. It is of no less importance to victims who wish to commit suicide, but have no relative or close friend who is willing and able to help them to do so. Suppose that (i) none of the factors set out in para 43 is present (apart from the para 43(14) factor) and (ii) all of the factors set out in para 44 are present. What is the likelihood of a prosecution in such a situation? The Policy does not say. To adopt the language of the *Sunday Times* case, even in such a situation, the Policy does not enable the healthcare professional to foresee to a reasonable degree the consequences of providing assistance. In our view, the Policy should give some indication of the weight that the DPP accords to the fact that the helper was acting in his or her capacity as a healthcare professional and the victim was in his or her care. In short, we accept the submission of Mr Havers that the Policy does not provide medical doctors and other professionals with the kind of steer in class 2 cases that it provides to relatives and close friends acting out of compassion in class 1 cases.

141. The Lord Chief Justice does not accept that the guidance creates the uncertainty which we have identified. He believes that it is tolerably plain that if a social worker acts out of compassion, he or she will not be prosecuted even if paid for providing the service since the purpose of paragraph 43(13) is to deal with "profiteering". However, the helper could not be the social worker or carer who has had the responsibility for

caring for the victim since he or she is in a position of trust. This might be the proper construction of the guidelines, but we cannot, with respect, feel confident that it is. Clearly Martin's lawyers and social workers are not confident that it is; and nor were the members of the Falconer Commission. If the DPP intends to convey the message as the Lord Chief Justice understands it, we see no reason why it should not be spelt out unambiguously.

142. Toulson LJ concluded at para 139 that the Policy is in accordance with the law because it would be clear to the medical doctor or other professional that assisting a person to commit suicide would carry with it a "real risk of prosecution". But Ms Purdy's husband must have known that there was a real risk that he would be prosecuted if he assisted his wife to commit suicide and yet that was not considered by the House of Lords to be enough to satisfy the requirements of Article 8(2). More is therefore required, although we accept that immunity from prosecution cannot be guaranteed; and it may be that, without such a guarantee, some (maybe many) doctors and other professionals would not be willing to assist.

143. We are not persuaded by the three reasons given by Toulson LJ for holding that the DPP should not be required to provide further clarification of the Policy. As regards the first reason, we agree that the jurisprudence allows a degree of flexibility as to the way in which the "in accordance with law" requirement may be satisfied. But there are limits to what degree of flexibility is acceptable. Whilst the necessary degree of precision may vary, excessive flexibility is inimical to the principle that the consequences of a given course of conduct must be foreseeable to a degree that is adequate or reasonable. For the reasons that we have given, the Policy is not in accordance with the law in relation to class 2 cases.

144. As regards the second reason, we accept that it would be impractical, if not impossible, for the DPP to lay down guidelines which would embrace every class 2 case, so as to enable every doctor or other professional to be able to tell as a matter of probability whether he or she would be prosecuted in a particular case. But it is not impossible or impractical to amend the Policy so as to make its application in relation to class 2 cases more foreseeable than it currently is. As Mr Havers points out, it is not for the court to prescribe how the Policy should achieve this. That is a matter for the DPP. But the Policy allows a reasonable degree of foreseeability in relation to class 1 cases. We do not see why the DPP cannot do more in relation to class 2 cases. As we have seen, he introduced an element of weighting in his interim Policy. Mr Havers has suggested an example (were it to accord with the DPP's Policy) which would suffice to make the consequences of the Policy adequately clear:

> "At the heart of the consideration of competing factors are three considerations: the public interest in protecting individuals' autonomy, the public interest in the protection of vulnerable individuals from abuse, and individuals' right to respect for the way in which they choose to pass the closing moments of their lives. When factors pull in different directions, these three considerations should be used to determine the relative importance of each factor. The first and third will normally outweigh the second where individuals with capacity have reached autonomous decisions, where they receive only help that they have themselves requested, and where there are no

particular concerns about the exploitation or abuse of a vulnerable person."

145. As for the third reason, we do not accept that the Policy cannot be amended along these lines without crossing the constitutional boundary which it would be improper for the DPP to cross. He has made the position in class 1 cases sufficiently clear for Article 8(2) purposes without crossing that boundary. It is common ground that, despite the relative clarity of the position in class 1 cases, the Policy does not involve changing the law or suspending its application in relation to them. We do not see why the position in relation to class 2 cases is, in principle, any different. In amending the Policy, the DPP would no doubt continue to be mindful of the constitutional boundary. We recognise the difficulties that this entails. As we have already said, these difficulties flow inevitably from the conclusion in *Purdy* that the generic Prosecution Code does not satisfy the requirements of Article 8(2). But for the reasons that we have given, we consider that greater clarity could and should be introduced.

146. Our attention was drawn to the recent decision of the ECtHR in *Gross v Switzerland* which was reported during the course of the hearing. The facts are similar to *Haas* and *Koch*. The applicant wished to end her life by taking a lethal dose of sodium pentobarbital. None of the medical practitioners whom she approached would issue her with the prescription that she needed. They were all concerned that, if they issued a prescription, they might face criminal charges or charges of professional misconduct. She complained that in these circumstances there had been a breach of her Article 8 right to decide when and how she should die. At para 63, the court said that the case primarily raised the question "whether the State had failed to provide sufficient guidelines defining if and, in the case of the affirmative, under which circumstances medical practitioners were authorised to issue a medical prescription to a person in the applicant's condition".

147. It then proceeded to examine certain medical guidelines relating to the care of patients at the end of their lives, but said that these did not have the "formal quality of law" and did not apply to the circumstances of the applicant in any event. It continued at para 65:

> "The Court further observes that the Government have not submitted any other material containing principles or standards which could serve as guidelines as to whether and under which circumstances a doctor is entitled to issue a prescription for sodium pentobarbital to a patient who, like the applicant, is not suffering from a terminal illness. The Court considers that this lack of clear legal guidelines is likely to have a chilling effect on doctors who would otherwise be inclined to provide someone such as the applicant with the requested medical prescription….
>
> 66. The Court considers that the uncertainty as to the outcome of her request in a situation concerning a particularly important aspect of her life must have caused the applicant a considerable degree of anguish. The Court considers that

> the applicant must have found herself in a state of anguish and uncertainty regarding the extent of her right to end her life which would not have occurred if there had been clear, State-approved guidelines defining the circumstances under which medical practitioners are authorised to issue the requested prescription in cases where an individual has come to a serious decision, in the exercise of his or her free will, to end his or her life, but where death is not imminent as a result of a specific medical condition…..
>
> 67. The foregoing considerations are sufficient to enable the Court to conclude that Swiss law, while providing the possibility of obtaining a lethal dose of sodium pentobarbital on medical prescription, does not provide sufficient guidelines ensuring clarity as to the extent of this right. There is accordingly a violation of Article 8 of the Convention in this respect."

148. Although the court did not explicitly mention the "in accordance with the law" requirement of Article 8(2), it is clear that this is the aspect of Article 8 to which it must have been referring. There is a resemblance between the lack of clarity in the Policy in relation to class 2 cases and the lack of clarity in the relevant Swiss law discussed in *Gross.* The conclusion of the ECtHR in *Gross* strongly reinforces the conclusion that we have reached for the reasons given above that the Policy is in not in accordance with the law and on that account in breach of Article 8. Accordingly, we uphold this ground of challenge advanced by Mr Havers.

Overall conclusion.

149. We would therefore dismiss the appeals of Mrs Nicklinson and Paul Lamb. We would uphold Martin's complaint that the Policy of the DPP fails to provide sufficient clarity as to the DPP's prosecution Policy with respect to those persons who fall into what we have termed the class 2 category.

150. We would now invite the parties to agree the terms of a declaration to give effect to our decision in relation to the Policy.

Lord Judge, Lord Chief Justice of England and Wales:

151. For the reasons given in the joint judgment of the Master of the Rolls and Elias LJ I agree that the appeals of Mrs Nicklinson and Mr Lamb should be dismissed.

152. By way of emphasis, and as the foundation for my conclusion that, contrary to their view, the appeal of Martin should also be dismissed, I shall add two footnotes.

153. The application of the criminal law to suicide is the product of statute. It is not judge-made law. As a result of primary legislation suicide and attempted suicide were decriminalised over half a century ago, but simultaneously, assisting another to commit or attempt to commit suicide remained and was expressly identified as a criminal offence. As recently as the Coroners and Justice Act 2009 Parliament re-enacted this statutory prohibition.

154. Much of the argument before us carried with it expressly, or by implication, and certainly by undertone, the suggestion that a way should somehow be found to alleviate some of the more harrowing consequences of these statutory provisions as they impact on the lives of these appellants and the late Mr Nicklinson. The short answer must be, and always has been, that the law relating to assisting suicide cannot be changed by judicial decision. The repeated mantra that, if the law is to be changed, it must be changed by Parliament, does not demonstrate judicial abnegation of our responsibilities, but rather highlights fundamental constitutional principles.

155. The circumstances in which life may be deliberately ended before it has completed its natural course, and if so in what circumstances, and by whom, raises profoundly sensitive questions about the nature of our society, and its values and standards, on which passionate but contradictory opinions are held. Addressing these life and death issues in relation to life before birth, the circumstances in which a pregnancy may be terminated were decided by Parliament. The abolition of the death penalty following the conviction for murder was, similarly, decided by Parliament. For these purposes Parliament represents the conscience of the nation. Judges, however eminent, do not: our responsibility is to discover the relevant legal principles, and apply the law as we find it. We cannot suspend or dispense with primary legislation. In our constitutional arrangements such powers do not exist. They are not vested in any one or any body. Parliament itself cannot suspend or dispense with primary legislation. It may enact new provisions amending the law. When it does so, the change follows as a result of fresh legislative enactment which, far from suspending or dispensing with the law, confirms that a suspending or dispensing power is a stranger to our constitution.

156. The issues with which these appeals are concerned have been addressed in Parliament on a regular basis over many years without producing the result sought by those who advocate change. The legislation which criminalises assisting suicide is recent and unequivocal. Even if (which it is not) it were constitutionally permissible for judges to intervene on the basis that Parliament had failed to address a desperately urgent social need, it cannot be said that Parliament has ignored these issues. Therefore whatever the personal views of any individual judge on these delicate and sensitive subjects, and I suspect that the personal views of individual judges would be as contradictory as those held by any other group of people, the constitutional imperative is that, however subtle and impressive the arguments to the contrary may be, we cannot effect the changes or disapply the present statutory provisions, not because we are abdicating our responsibility, but precisely because we are fulfilling our proper constitutional role. In the context of Martin's appeal I must record at this early stage my concern that the requirement of the consent of the Director of Public Prosecutions (DPP) to any prosecution for assisting suicide in accordance with s.2(4) of the Suicide Act 1961 (the 1961 Act) should not inadvertently be developed in such a way as to undermine this constitutional imperative.

157. The second feature which requires emphasis in the context of the decision of the European Court of Human Rights in *Pretty v The United Kingdom (*2002) 35 EHRR 1 is that, however the decision of the court is understood, it does not provide authority for the proposition that a blanket prohibition against assisting suicide, even if supported by criminal sanctions, constitutes an infringement of Convention rights. Some countries which are parties to the Convention have decriminalised suicide in different circumstances: others (the majority) have not.

158. Mrs Pretty's action against the DPP arose from her physical inability to commit suicide without assistance, which her husband was willing to provide. Anxious about the possible consequences if he did so, she sought an indication from the DPP of the consent decision which he would make in relation to any possible prosecution of her husband under s.2(4) of the Suicide Act 1961. He refused to give it. As that was the issue, it is unsurprising that it was given close attention in the judgment, and in the subsequent decision in the House of Lords in *R (Purdy) v DPP* [2010] 1 AC 345. What, however, is clear is that even in the context of the rights protected by Article 8 of the Convention, the lawfulness of the continued criminalisation of assisting suicide in an individual Member State is not dependent on or justified only by a consent requirement similar to that created in this jurisdiction by s.2(4) of the 1961 Act. In different countries there are different systems for enforcing any blanket bans on assisting suicide.

159. As the court explained in *Haas* (2011) 53 EHRR 33, "the investigations carried out … enable it to conclude that the Council of Europe Member States are far from having reached a consensus as to the rights of an individual to chose how and when to end his life". Thus in Switzerland, 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 any right to end it. Indeed the court acknowledges the risk of abuse inherent in any system which facilitates assisted suicide and concludes "that the States have a wide margin of appreciation".

160. In *Koch* (2013) 56 EHRR 6 the court described "comparative research" which showed "that the majority of Member States do not allow any form of assistance to suicide … it follows that the state parties to the Convention are far from reaching a consensus in this respect, which points to a considerable margin of appreciation enjoyed by the State in this context". *Koch* confirmed that of forty two Council of Europe Member States, thirty six criminalised any form of assistance to suicide. In only four Member States, Switzerland and the Benelux countries, were medical practitioners permitted, subject to specific safeguards, to prescribe lethal drugs, and in two, Sweden and Estonia, assisting suicide was not a criminal offence, although in Estonia medical practitioners were not entitled to prescribe a drug in order to facilitate suicide.

161. Much attention was focussed on the relatively recent decision in *Gross v Switzerland* (app no. 67810/10) in a judgment delivered on 14 May 2013. The Chamber divided by four votes to three. Ms Gross, like Mr Haas, was a citizen of Switzerland. She was not terminally ill. She wished to end her own life. Her complaint was that she was deprived of the possibility of obtaining a lethal dose of sodium pentobarbital, because the doctors from whom she sought the drug were prevented from doing so "by the medical practitioners' code of conduct or feared lengthy judicial proceedings and, possibly, negative professional consequences". *Gross* did not address questions of assisting suicide, or its criminalisation. The single question was whether it was permissible to limit the circumstances in which an intending suicide, wishing to act lawfully to end her life in accordance with the law of Switzerland, should be provided with the means to do so. The majority concluded that the absence of "clear and

comprehensive legal guidelines" constituted a violation of a right to respect for Ms Gross' private life, but they did so "without in any way taking up a stance on the substantive context of such guidelines". The joint dissenting opinion underlined that "comparative research" continued to show that the majority of Member States prohibited any form of assisting suicide. Only four states allowed medical practitioners to prescribe a legal drug to enable a patient to end his or her life. The minority judgment ended by observing that "the court should not oblige the state to adopt some laws or provisions for broader regulation of certain questions that the state has by itself determined in a clear and comprehensive manner". The emphasis, by reference to *Haas* and *Koch*, was that each individual state should enjoy "a considerable margin of appreciation".

162. The decisions of the European Court of Human Rights underline that the provisions which govern whether or not assisted suicide should or should not be decriminalised depend on the arrangements in the individual state. In this jurisdiction that responsibility remains with Parliament, and the prohibition against assisting suicide is indeed a blanket prohibition.

163. The requirement that the DPP should consent to a prosecution for an offence falling within the ambit of s.2(4) of the 1961 Act does not constitute and did not create an extra parliamentary regime which, directly or indirectly, may be used to undermine the criminalisation of assisting suicide. It is sometimes suggested that the statutory requirement for consent is imposed to address sensitive and difficult cases, like the present, but it is difficult to discern any particular feature of the list of myriad cases in which the consent of the Attorney General or Director of Public Prosecutions is required that such a broad test can be of universal application. In the long list of such cases set out in the *Consents to Prosecute – Legal Guidance* issued on 1st July 2013, the first entry on the Schedule of Offences requiring consent arises from the Agricultural Credits Act 1928 and the last is created by the Wireless Telegraphy Act 2006. In some situations the appropriate consent may also be given by a specified government minister (see e.g. the Transport and Works Act 1992 Part 2, or the Water Act 1989). Offences requiring the consent of the Director of Revenue and Customs are also numerous. There are two matters which require the *personal* consent of the DPP, the first group arising under the Bribery Act 2010 and the second, cases to which the former principle against "double jeopardy" arise for decision.

164. The DPP is required by s.10 of the Prosecution of Offences Act 1985 to issue a code giving guidance to Crown Prosecutors on the general principles to be applied to the institution of all criminal proceedings. He is also vested with authority to issue broad guidance on any issues relevant to the prosecutorial process. Ultimately he is responsible for all prosecutorial decisions. In recent years the courts have increasingly underlined that in limited circumstances judicial review of a decision to prosecute, or not to prosecute, is available. Although there is no doubting that in an appropriate case the jurisdiction is available, successful proceedings for judicial review of decisions to prosecute are likely to be very rare, not least because of the availability of the alternative remedy of an abuse of process submission before the trial court. That remedy is not available to an individual aggrieved by a decision that a prosecution should not follow, but any proceedings for judicial review to set the decision aside are confronted with the difficulty that the relevant responsibility is vested exclusively in the DPP. In short, prosecutorial decisions are not "immune"

from review, but the decision itself will only be disturbed in "highly exceptional cases". (See *R (on the application of Corner House Research) v DSFO* [2009] 1 AC 756; *R v DPP ex parte Kebilene* [2000] 2 AC 326; and *R (on the application of Gujra) v Crown Prosecution Service* [2012] 1 WLR 254. However, until the decision in *R (Purdy)* the single source of obligation on the DPP to issue guidance relating to the exercise of the prosecutorial judgment was statutory, the consequence of the 1985 Act.

165. In *R (Purdy)* the House of Lords asserted a supervisory jurisdiction over the DPP, when, in advance of the commission of any offence, he was directed to issue or amplify the guidance he had chosen to give in relation to public interest considerations arising in cases of assisting suicide. The problem facing Mrs Purdy was similar to that which faced Mrs Pretty. The desperate consequences of progressive degeneration meant that if she left it too late she would be unable to end her own life without assistance, but, if she acted on her own and committed suicide when she did not need assistance, she would end her life before she wished to do so. Unlike Mrs Pretty who sought an undertaking from the DPP that her husband would not be prosecuted if he assisted her for this purpose, Mrs Purdy advanced her case on the basis that she was simply seeking information about the factors which the DPP would take into account if and when her husband assisted her to commit suicide and the question then arose whether or not consent would be given to prosecute him. After analysing the decision of the ECHR in *Pretty* in the context of Article 8 of the Convention, the House of Lords ordered the DPP "to promulgate an offence-specific Policy identifying the facts and circumstances which he would take into account in deciding, in a case such as Mrs Purdy's exemplifies, whether he ought to consent to a prosecution under s.2(1) of the 1961 Act". The DPP was not directed to tell Mrs Purdy what his decision would or would be likely to be if, at some future date her husband provided the necessary assistance to enable her to commit suicide. The direction was limited to the provision of Policy guidance in the specific circumstances which obtain.

166. This decision in *Purdy* is binding on us. It is worth pausing to reflect on its possible consequences. As a matter of jurisdiction it appears to mean that there is no logical reason why in judicial review proceedings the DPP may not be required to promulgate the Policy which he would apply to any of the many offences for which a statutory pre-condition to prosecution is his consent, or indeed to identify the public interest considerations which would apply to the prosecution of any offence. If so, the principle would extend to the statutory requirements which apply to the consent of the Attorney General or indeed ministerial consent to a prosecution.

167. In our system for the administration of criminal justice a clear demarcation has always been maintained between the processes leading to the decision to prosecute, for which the DPP alone is responsible, and the processes of the court, to which the DPP is subject. Although adjudication on the processes which have resulted in the decision to prosecute are sometimes required either in judicial review proceedings or in abuse of process submissions in the Crown Court the responsibilities are distinct and separate, and should not be blurred. Moreover if the DPP is required to promulgate Policy relating to his prosecutorial decisions the opportunity for satellite litigation in the form of abuse of process arguments, or judicial review proceedings relating to the *decision* to prosecute, is correspondingly increased, with consequent delays to the

crucial issue in any criminal proceedings, that is, the verdict whether or not the allegation has been proved.

168. The DPP has, in recent years, increasingly taken to offering guidance about the considerations relevant to the assessment of the public interest element of the prosecutorial decision. It is rightly asserted that such guidance represents Policy, rather than decisions about fact-specific circumstances, which must be addressed after they have arisen. Nevertheless it is noteworthy that after the decision in *Purdy,* the House of Commons Justice Committee conducted an examination of the law relating to joint enterprise during 2011 and 2012. Its report was published in January 2012. The primary recommendation was that immediate steps should be taken to bring forward legislation which would clarify what everyone who has been involved in this area of the law, particularly in the context of homicide offences, acknowledges is over complex and problematic. In view of evidence from the Ministry of Justice that there was no prospect of legislation relating to complicity being introduced during the course of the present Parliament, the Committee recommended that the DPP should issue guidance about how the doctrine of joint enterprise should apply when charging decisions were made.

169. Understandably, this recommendation was taken up by the DPP, and new guidance on Joint Enterprise Charging Decisions was published in December 2012. It consists of nearly twenty pages of closely argued analysis. It begins with the disclaimer that in so far as it attempts to set out the law on secondary liability, this does not "have the force of law". Although the disclaimer is entirely accurate, the effect is that in an area where the requirement for legislation is notorious, the process of necessary law reform has been subsumed in prosecutorial guidance. In short, prosecutorial guidance is in danger of expanding into a method of law reform (if only by way of non-enforcement of the criminal law) which is outside the proper ambit of the DPP's responsibilities. It is in my view inevitable that these processes will, at the very lowest, encourage a deep misunderstanding of the responsibilities and functions of the DPP, suggesting that he is entitled to exercise what Lord Bingham in *Pretty* described as a "a proleptic grant of immunity from prosecution" prohibited by the Bill of Rights, immunity that is, because on Policy grounds the criminal law may be applied so as to withdraw from its ambit those who currently fall within it.

170. In the appeal of Martin, Mr Philip Havers QC is far too subtle an advocate to suggest or imply that he is seeking immunity from prosecution for anyone who might assist Martin to commit suicide. That, of course, was the way in which Lord Pannick QC advanced the case for Mrs Purdy. However no advocate would think it forensically wise to suggest or imply that the applicant was seeking any sort of immunity from prosecution. That submission was rejected in *Pretty*, and for the reasons given in that judgment, it would inevitably be rejected in this court. What Mr Havers submits, is needed, is greater certainty whether the individual who provided the necessary assistance would or would not be prosecuted. He suggests that the present guidelines are not sufficiently certain for this purpose. His client is seeking no more than an amplification and clarification of post *Purdy* guidelines in the personal context in which he finds himself, that is, his own settled determination to commit suicide, and the need to offer any potential assistant some reasonably secure basis for understanding that if the necessary assistance is provided, he or she is unlikely to be prosecuted.

171. The DPP was bound, as we are, by the decision of the House of Lords in *Purdy*. Nevertheless just because of the sensitivity of the issues a full public consultation was organised before the required Policy was promulgated. An interim Policy was therefore issued in September 2009. The response was very substantial, producing something approaching 5000 submissions, many of them of very high quality were identified.

172. No less than sixteen public factor interests in favour of prosecution were noted, of which the first eight were said to carry more weight than the others, and no less than thirteen public interest factors against prosecution were similarly identified, of which the first seven were said to carry more weight. It is perhaps noteworthy that one factor advanced for consideration against prosecution was that the individual whose suicide was assisted (described in the Guidance as the "victim") suffered from a terminal illness or severe and incurable physical disability or a severe degenerative physical condition. Another factor to the same effect was that the necessary assistance was provided by a spouse, partner or close relative or friend within the context of a long-term and supportive relationship. This approach, however, and of relevance to Martin's case, weighed too heavily in relation to victims who were disabled, and therefore required assistance to achieve their intended suicide, but who did not have any spouse, relative or friend willing and able to provide the necessary assistance. That concern was addressed in the subsequent guidelines.

173. After providing a lengthy, detailed analysis of the responses, and informed by them, on 25 February 2010 the DPP issued the Policy now criticised for failing to provide sufficient certainty for Martin's purposes. By way of introduction the Policy underlined that it did not "decriminalise" the offence of encouraging or assisting suicide, and underlined that nothing in it "can be taken to amount to an assurance that a person will be immune from prosecution if he or she does an act that encourages or assists the suicide or the attempted suicide of another person". As already indicated, that observation is not open to criticism. After describing the evidential stage (which does not arise for consideration in these appeals), but turning to the public interest stage it was emphasised that, just because encouraging or assisting suicide is a crime, a prosecution will normally follow unless "the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour". In short, the prosecutorial decision involves balancing a number of factors, some of which may conflict, inevitably making certainty elusive.

174. Be all that as it may, the public interest tending in favour of prosecution are identified in paragraph 43:

> "A prosecution is more likely to be required if:
>
> 1. the victim was under 18 years of age;
>
> 2. the victim did not have the capacity (as defined by the Mental Capacity Act 2005) to reach an informed decision to commit suicide;
>
> 3. the victim had not reached a voluntary, clear, settled and informed decision to commit suicide;

4. the victim had not clearly and unequivocally communicated his or her decision to commit suicide to the suspect;

5. the victim did not seek the encouragement or assistance of the suspect personally or on his or her own initiative;

6. the suspect was not wholly motivated by compassion; for example, the suspect was motivated by the prospect that he or she or a person closely connected to him or her stood to gain in some way from the death of the victim;

7. the suspect pressured the victim to commit suicide;

8. the suspect did not take reasonable steps to ensure that any other person had not pressured the victim to commit suicide;

9. the suspect had a history of violence or abuse against the victim;

10. the victim was physically able to undertake the act that constituted the assistance him or herself;

11. the suspect was unknown to the victim and encouraged or assisted the victim to commit or attempt to commit suicide by providing specific information via, for example, a website or publication;

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;

15. the suspect was aware that the victim intended to commit suicide in a public place where it was reasonable to think that members of the public may be present;

16. the suspect was acting on 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."

175. 43(6) is amplified in paragraph 44. Importantly for present considerations, this reads:

> "On the question of whether a person stood to gain (paragraph 43(6) see above), the police and the reviewing prosecutor should adopt a common sense approach. It is possible that the suspect may gain some benefit – financial or otherwise – from the resultant suicide of the victim after his or her act of encouragement or assistance. The critical element is the motive behind the suspect's act. If it is shown that compassion was the only driving force behind his or her actions, the fact that the suspect may have gained some benefit will not usually be treated as a factor tending in favour of prosecution. However, each case must be considered on its own merits and on its own facts."

That consideration seems to me to apply equally to para. 43(13).

176. The public interest factors tending against prosecution are set out in paragraph 45:

> "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."

177. Paragraphs 46 and 47 read:

> "46. The evidence to support these factors must be sufficiently close in time to the encouragement or assistance to allow the prosecutor reasonably to infer that the factors remained operative at that time. This is particularly important at the start of the specific chain of events that immediately led to the suicide or the attempt.
>
> 47. These lists of public interest factors are not exhaustive and each case must be considered on its own facts and on its own merits."

178. In my judgment this provides a comprehensive analysis of the factors which the DPP would take into account in making a decision whether to prosecute an individual who committed the offence of assisting suicide. Significantly in the present case, it is clear that the removal of reference to members of the family and close relatives involves a deliberate decision by the DPP that he was seeking to avoid distinctions among those who help the "victim" to commit suicide based on what I shall describe as familial relationships, and those who do not.

179. With great respect, we cannot keep ordering and re-ordering the DPP to issue fresh guidelines to cover each new situation. Prosecutorial Policy decisions must remain fact specific and certainty about the Policy which can be no more than indicative of the eventual decision if a crime is committed is not to be equated with the certainty required of provisions which create or identify criminal offences. (See, for example, *R v Mirza* [2005] 1 Cr. App. R 21 and *R v Rimmington*; *R v Goldstein* [2006] 1 AC 459). What, however, is certain is that the individual who assists Mr Martin to commit suicide will be committing a crime. Normally such an individual will be prosecuted. It is however also certain that in deciding whether he or she should be prosecuted the consent of the DPP will be regulated by the Policy he has promulgated. The Policy is far from arbitrary, but to the extent that it does have to balance a series of potentially conflicting factors, it cannot provide certainty. The decision, however, will not be dependent on the ungoverned whim of the DPP, but will represent a conscientious decision made by reference to the Policy by the holder of the office vested with the relevant statutory "consent" responsibility. Moreover if it were to be exercised in some vague unprincipled way, for some inexplicable reason remote from the Policy, it will then be open to examination by a court, whether by way of judicial review or abuse of process, and, if appropriate, a remedy provided.

180. In this appeal the issue is whether on the basis of this Policy an individual member of the public who offered assistance to Martin by helping him with all the necessary arrangements to enable him to travel abroad to utilise the services of Dignatas when he has no other member of friends or family who are willing to do so would be likely to be prosecuted. Such an individual might require the reimbursement of his/her expenditure, and indeed reasonable recompense for his services. He or she may be a health professional or someone with professional skills relevant for the purpose. If so, it may be necessary for him to be paid a reasonable fee.

181. Mr Havers accepted that the Policy provided an appropriate degree of certainty for those he described as "class 1 helpers", members of the family or friends who would be willing to provide assistance for Martin out of love and compassion. His complaint was that insufficient certainty was provided to those he described as "class 2 helpers", that is individuals with no personal connection with Mr Martin, but who would act out of a sense of compassion and understanding for the position in which he has now found himself.

182. It is virtually inevitable in a situation like this that some of the very many factors identified in the Policy as tending to favour prosecution may arise, but others, favourable to a non-prosecution decision would also arise. In my judgment a one by one tick box approach to these factors would not only be inappropriate, but unwise. The decision does not depend on whether a larger or lower number of factors fall within the prosecution or non-prosecution compartments. The decision has to be made on the overall facts, balancing all these factors. I respectfully disagree that the

Policy is insufficient for those described as "class 2 helpers" to make a reasonably informed decision about the likelihood of a prosecution if they offered the necessary assistance to enable Martin to travel abroad to Dignitas.

183. As I have already underlined, what is apparent in the context of Martin's appeal is that, in the Policy guidance now under consideration, following the wide public consultation, a family relationship is given no specific weight, either way. The crucial question is the extent to which the individual described as the "suspect" is motivated by compassion for the "victim". In short, it is not a necessary ingredient of the decision to withhold consent to a prosecution that the "suspect" should be a member of the family, or some blood relative, or indeed a close friend. A non family member is not, for that reason alone, at any disadvantage. This appears to me to have direct application to the situation in which Martin finds himself. His wife respects his decision that he wishes to end his life. She understands it. She accepts it. She is not, however, willing, for conscientious reasons of her own, to offer the necessary physical support to enable him to travel to Dignitas for this purpose, although it appears very likely that she is willing to travel with him, and offer emotional support in his final hours. Given that the reason Martin needs help from an outsider is that his wife, he, and she, and I understand they together, must turn to an outsider who will offer assistance by providing services which, if provided by the wife, would be most unlikely to attract a prosecution. Therefore what it comes to is that Martin has no alternative source of assistance, and the responsibility which might otherwise be accepted by his wife must, if he is to end his own life, be undertaken by someone else, who is not a relative or a friend.

184. This leads to the problem of payment. The Policy is carefully calibrated. In the Policy payment is contrasted with compassion, but a "commonsense approach" to payment is required. An outsider reasonably seeking some recompense for the time and effort involved in taking the "victim" abroad may indeed gain some modest financial benefit for providing assistance. That is not profiteering. He is not someone who will benefit under a will, or stand to make acquisitive gain on the victim's death. Similarly, if the "suspect" sought extortionate sums for the services, or if he was running or employed in a business with a profit making motive, a different approach might well be appropriate. In short, the Policy indicates understandable concern about the motivation of anyone who stands to make a financial gain from assisting the suicide, but what is anticipated in Martin's case can hardly be described as profiteering.

185. There was much debate about the circumstances in which a professional carer assisting in the death might come to be prosecuted. Our attention was focussed on paragraph 14 of factors in favour of a prosecution. Given that paragraph 14 refers to a "person in authority, such as a prison officer", I do not read it as extending to a professional carer who, with no earlier responsibility for the care of the victim, comes in from outside to help. True it is, that for a very short time the victim would be in his or her care, for the very purposes of assisting in the suicide, but it seems clear to me that paragraph 14 addresses the risks which can arise when someone in a position of authority or trust, and on whom the victim would therefore depend to a greater or lesser extent, assisting in the suicide in circumstances in which, just because of the position of authority and trust, the person in authority might be able to exercise undue influence over the victim. As I read this paragraph it does not extend to an individual

who happens to be a member of a profession, or indeed a professional carer, brought in from outside, without previous influence or authority over the victim, or his family, for the simple purposes of assisting the suicide after the victim has reached his or her own settled decision to end life, when, although emotionally supportive of him, his wife cannot provide the necessary physical assistance.

186. Save for the purposes of the forensic argument, I do not believe that the distinction between "class 1" and "class 2" helpers is helpful. Naturally, it would come as no surprise at all for the DPP to decide that a prosecution would be inappropriate in a situation where a loving spouse or partner, as a final act of devotion and compassion assisted the suicide of an individual who had made a clear, final and settled termination to end his or her own life. The Policy does not limit, and we know from the responses to the consultation process, deliberately does not restrict the decision to withhold consent to family members or close friends acting out of love and devotion. The Policy certainly does not lead to what would otherwise be an extraordinary anomaly, that those who are brought in to help from outside the family circle, but without the natural love and devotion which obtains within the family circle, are more likely to be prosecuted than a family member when they do no more than replace a loving member of the family, acting out of compassion, who supports the "victim" to achieve his desired suicide. The stranger brought into this situation, who is not profiteering, but rather assisting to provide services which, if provided by the wife, would not attract a prosecution, seems to me most unlikely to be prosecuted. In my respectful judgment this Policy is sufficiently clear to enable Martin, or anyone who assists him, to make an informed decision about the likelihood of prosecution.

187. My view is reinforced by the decision of the DPP in relation to the death of Raymond Cutkelvin that his assistant should not be prosecuted, even when he was a doctor who had been struck off. This was a case which had all the hallmarks of the "class 2 helper" identified by Mr Havers, with the particular factor which might well have been strongly in favour of a prosecution, that the motivation of the suspect was informed at least in part by a crusading zeal that the present law should be reformed, and at least in some respects, where necessary, disregarded. I shall simply confine myself to observing that if a prosecution was not appropriate on the facts of that case, in the context of the way in which it is anticipated that events will unfold in the present case, and assuming that they do, any decision to prosecute in this case would be open to serious question.

188. For these reasons, which for the purposes of a dissenting judgment have taken longer to express than I would have wished, in agreement with the Divisional Court, my conclusion would have been that Martin's appeal, too, should be dismissed.