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Assisted Suicide: Jurisdiction and Discretion

The facts of *R (Purdy) v DPP*,¹ the final decision of the House of Lords concerning the criminal law,² have received considerable public attention. Ms Purdy suffers from primary progressive multiple sclerosis, and further deterioration in her condition is inevitable. She envisages, at some future point, ending her life by travelling to a country (perhaps Switzerland) where assisted suicide is lawful. Her husband, Mr Puente, is prepared to assist her in this journey, but both he and Ms Purdy are concerned that this would render him liable to prosecution for aiding, abetting, counselling or procuring suicide under section 2(1) of the Suicide Act 1961. Ms Purdy therefore asked the Director of Public Prosecutions to “promulgate and/or disclose his policy in relation to the circumstances in which he will consent (or not consent) to a prosecution”³ for the section 2(1) offence.⁴ The DPP refused to do this, asserting that “any such policy—which would amount to a proleptic grant of immunity—would be unlawful”.⁵ Ms Purdy’s application for judicial review, and subsequent appeal, failed. In the House of Lords, however, she succeeded.

A. WOULD THERE BE ANY OFFENCE TO PROSECUTE?

The first point which the House considered—one which had not been argued in the courts below—was whether there was in fact any offence for which Mr Puente could be prosecuted were he to take the actions envisaged. Subsequent to the Court of Appeal’s decision, two different arguments appeared in the academic literature to the effect that there might be no crime committed by Mr Puente which would be prosecutable in the English courts. One of these was, in part, addressed by their Lordships; the other was not.

The point which was addressed was that made by Michael Hirst,⁶ who argued that if a suicide took place in Switzerland—beyond the jurisdiction of the English courts—then it would not be possible to prosecute any individual for being, in England, complicit in that suicide. This new argument was rejected, but only tentatively. As Lord Hope of Craighead observed, the offence under section 2(1) is

1 [2009] UKHL 45, [2009] 3 WLR 403.

2 But, as an action for judicial review, not the last criminal appeal to come before the House: that case is *R v Cooper* [2009] UKHL 42, [2009] 1 WLR 1786. See G Maher, “Rape and other things: sexual offences and people with mental disorder” (2010) 14 EdinLR 129.

3 *R (Purdy) v DPP* [2009] EWCA Civ 92, [2009] 1 Cr App R 32 at para 12.

4 Any prosecution for the offence must be by or with the consent of the DPP: Suicide Act 1961 s 2(4).

5 See *Purdy* [2009] EWCA Civ 92 at para 12.

6 M Hirst, “Suicide in Switzerland: complicity in England?” [2009] Crim LR 335.

an offence in itself, rather than being ancillary to another crime.⁷ Furthermore, he argued:⁸

Its application cannot be avoided by arranging for the final act of suicide to be performed on the high seas, for example, or in Scotland. Otherwise it would be all too easy to exclude the vulnerable or the easily led from its protection.

While attractive at first glance, this argument is unconvincing. Recourse to the high seas would be unlikely to avoid the application of the 1961 Act, because of the broad statutory provisions which allow English courts, within certain limits, to take cognisance of acts committed there as if they had taken place within ordinary English jurisdiction.⁹ Arranging for the final act to take place in Scotland would be an even less attractive option, as it would most likely render the individual concerned liable to prosecution before the High Court of Justiciary for murder.¹⁰ It is of course true that if the parties concerned could identify a jurisdiction where assisted suicide was lawful, and arranged for the final act to take place there, then Professor Hirst's argument would entail that no criminal liability attached. That seems, however, to be the very essence of his position and not a counter-argument.

The other reason for rejecting Professor Hirst's argument was that the basis of jurisdiction in English law in cases of complicity is not, as he argued, "terminatory". Instead, jurisdiction could be asserted on the basis that the English courts are entitled "to assume jurisdiction to try an offence if a substantial part of it took place within the jurisdiction, provided that there [is] no reason of international comity why the court should not do so".¹¹ Surely, however, the fact that the jurisdiction where the suicide occurred does not regard such acts as a criminal offence would be an extremely strong reason of "international comity" for declining to apply English criminal law, in the absence of Parliament having legislated for nationality-based jurisdiction?

These were not the only arguments for holding that the section 2(1) offence could be applied to circumstances such as those envisaged by Ms Purdy and Mr Puente. A full discussion, however, is beyond the scope of this note, and it is sufficient for present purposes to mention that Professor Hirst's position commands rather more weight than the speeches in *Purdy* suggest. For their Lordships' part, the key point

⁷ Para 18.

⁸ Para 18. See also para 23.

⁹ Merchant Shipping Act 1995 s 281, when read with the Magistrates' Courts Act 1980 s 3A and the Senior Courts Act 1981 s 46A. See e.g. *R v Kelly* [1982] AC 665 (applying the predecessor provisions of the Merchant Shipping Act 1894), holding that two British subjects who were passengers on a Danish ship could be prosecuted in the English courts for committing criminal damage on that ship while it was on the high seas. On the complexities of the statutory provisions, see M Hirst, *Jurisdiction and the Ambit of the Criminal Law* (2003) 291-296.

¹⁰ See generally P R Ferguson, "Killing 'without getting into trouble'? Assisted suicide and Scots criminal law" (1998) 2 EdinLR 288.

¹¹ Para 22 per Lord Hope of Craighead, citing *R v Smith (Wallace Duncan) (No 4)* [2004] QB 1418. Lord Hope's language is subtly different from that found in *Smith (Wallace Duncan)*, where the court refers – quoting Rose LJ in *R v Smith (Wallace Duncan)* [1996] 2 Cr App R 1 – to activities which should "on the basis of international comity, be dealt with by another country" (para 55, emphasis added). The shift in language would seem to support the argument made in the text.

was that the applicability of section 2(1) was arguable. If it was arguable, there was a risk of prosecution, and if there was a risk of prosecution, it was necessary to consider Ms Purdy's principal argument.

The academic argument which the House did not address was that made by J K Mason, who suggested in this journal that a solution to the dilemma posed in *Purdy* was to recognise that Mr Puente would not be assisting in suicide but simply in travel arrangements.¹² Given the approach taken by their Lordships to Professor Hirst's position, however, the problem of arguability would again seem to preclude resolving the issue in this way.

B. THE DISCRETION TO PROSECUTE

Their Lordships proceeded, therefore, to consider whether the DPP was required to promulgate the policy which Ms Purdy had requested. They concluded, first of all, that insofar as the law restricted Ms Purdy's ability to choose how she might end her life – and might, indeed, constrain her to do so at an earlier stage while she was able to do this without Mr Puente's assistance – this could amount to an interference with her right to respect for private life under article 8(1) of the European Convention on Human Rights.¹³ Any interference would therefore – by virtue of article 8(2) – have to be in accordance with the law. Reviewing the Strasbourg jurisprudence, Lord Hope concluded that this requirement:¹⁴

...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. . . . 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. . . .

This requirement is in most cases met by the *Code for Crown Prosecutors*,¹⁵ which will “normally provide sufficient guidance to Crown Prosecutors and to the public as to how [prosecutorial] decisions should or are likely to be taken”.¹⁶ However, the *Code* had demonstrably failed in this respect when the DPP had taken the decision

12 J K Mason, “Unalike as two peas? *R (on the application of Purdy) v DPP*” (2008) 13 EdinLR 298.

13 This involved a departure from the view taken in *R (Pretty) v DPP* [2002] 1 AC 800 in favour of that expressed by the European Court of Human Rights in *Pretty v United Kingdom* (2002) 35 EHRR 1 at para 67. In any event, as Lord Hope explained (at para 38), the factual differences between the cases meant that there were compelling reasons for holding that article 8(1) was engaged in Ms Purdy's case even if it had not been in Ms Pretty's.

14 Para 41.

15 Crown Prosecution Service, *The Code for Crown Prosecutors* (2004).

16 Para 54.

not to bring any prosecution in the case of Daniel James, a 23-year-old man who suffered from tetraplegia as the result of a serious spinal injury in a rugby accident and ended his life at a Swiss clinic. The DPP concluded that there was sufficient evidence to prosecute James's parents and a family friend under the 1961 Act, but that a prosecution would not be in the public interest. In reaching that decision, he said:¹⁷

I consider that the offence of aiding and abetting the suicide of another under section 2(1) Suicide Act 1961 is unique in that the critical act – suicide – is not itself unlawful, unlike any other aiding and abetting offence. For that reason, I have decided that many of the factors identified in the Code in favour or against a prosecution do not really apply in this case...

It followed from this “commendably frank analysis”¹⁸ that the *Code* was insufficient to meet the requirements of article 8(2) of the ECHR, with the result that the DPP should be required to “promulgate an offence-specific policy identifying the facts and circumstances” to be taken into account in deciding whether or not to consent to a prosecution under section 2 of the 1961 Act.

Such a policy has now been published.¹⁹ In the immediate aftermath of the House of Lords' decision, the Lord Advocate indicated reluctance to take any similar course of action in Scotland, emphasising that *Purdy* was an “English case” dealing with an “offence [which] does not apply in Scotland” and asserting that “any change in the current law related to homicide is properly a matter for the Scottish Parliament”.²⁰ Is this stance justifiable?

C. THE SCOTTISH POSITION

It is sometimes asserted that suicide simply is not a crime in Scotland,²¹ in contrast to the pre-1961 English position. In fact, the distinction between the two jurisdictions seems more a consequence of ancillary rules than a difference in substantive criminal law. The older Scottish writers do regard suicide as criminal in nature,²² but with little or no scope for such an act to be recognised as criminally *punishable*.²³ In England,

17 K Starmer, “Decision on prosecution – the death by suicide of Daniel James”, 9 Dec 2008, para 29 (available at www.cps.gov.uk/news/articles/death_by_suicide_of_daniel_james/). See also *Purdy* at para 49 per Lord Hope of Craighead.

18 Para 50 per Lord Hope of Craighead.

19 Crown Prosecution Service, *Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide* (2010), available at www.cps.gov.uk/publications/prosecution/assisted_suicide.html.

20 The Lord Advocate's statement is reproduced at (2010) 14 EdinLR 12. See also S A M McLean, C Connelly and J K Mason, “*Purdy* in Scotland: we hear, but should we listen?” 2009 JR 265.

21 See e.g. R A A McCall Smith and D Sheldon, *Scots Criminal Law*, 2nd edn (1997) 171; McLean, Connelly and Mason (n 20) at 276.

22 G Mackenzie, *The Laws and Customes of Scotland, in Matters Criminal* (1678) 1.13; Erskine, *Inst* 4.4.46 (“as truly criminal as the murder of one's neighbour”); Hume, *Commentaries* i, 300.

23 See e.g. A M Anderson, *The Criminal Law of Scotland*, 2nd edn (1904) 148: suicide “is a crime, but it is one as to which it is impossible to visit the principal with punishment”.

by contrast, the forfeiture of a suicide's goods and chattels,²⁴ in conjunction with the system of coroner's courts, gave practical application to the theory that suicide was a felony: the point was "argued backwards" from forfeiture to criminality.²⁵

It might be objected that if suicide were considered a criminal offence in Scots law, then this should have been evidenced by way of prosecutions for attempted suicide. The absence of such prosecutions, however, seems to have had more to do with the lack of any general theory of attempts in Scots law prior to 1887.²⁶ Although there is now a general rule that any attempt to commit a crime is itself criminal,²⁷ it seems that attempted suicide has not in practice been treated as a crime *per se* in Scots law, no doubt because if a prosecution were felt necessary resort might be made to the offence of breach of the peace.²⁸

In any event, this is of little relevance to the problem raised in *Purdy*, as the modern Scottish position is in practice not very different from the pre-1961 English position:²⁹ an accessory to suicide may be guilty of murder.³⁰ Were Ms Purdy and Mr Puente Scottish residents, they would therefore face an even more unpalatable risk than Mr Puente's potential prosecution for complicity in suicide: a potential prosecution for murder.

This brings out the principal oddity in the Lord Advocate's stance, which seems to be that the applicability of *Purdy* in Scotland can be doubted because the statutory offence in question does not apply north of the Border. But it surely cannot be the case that because the potential consequences for an individual are *more* severe in Scotland than under English law, the case for prosecutorial guidelines is weakened. It is true that the DPP, in his decision on the Daniel James case, laid weight on the peculiarity of the offence under section 2 of the 1961 Act. It would be wrong, however, to elevate form over substance in this respect. In effect, the position regarding the "critical act" of suicide is little different in Scotland from England, given that suicide itself cannot and does not result in prosecution.

24 Abolished by the Forfeiture Act 1870. Hume (*Commentaries* i, 300) noted that "some authorities" supported the proposition that forfeiture was available in cases of suicide under Scots law. It would, however, have required positive action on the part of the Crown by way of an action before the Court of Session, and its practical significance seems unclear. Anderson, *Criminal Law* (n 23) refers (at 148) to the corpse of a suicide having been "in former times, subjected to indignities" but makes no mention of forfeiture. See also R A Houston, *Madness and Society in Eighteenth-Century Scotland* (2000) 71-72.

25 T F T Plucknett, *A Concise History of the Common Law*, 5th edn (1956) 445. See also N St John-Stevan, *Life, Death and the Law* (1961) 234.

26 As is clear from the reasoning employed by Erskine, *Inst* 4.4.46 (discussing Mackenzie, *Matters Criminal* (n 22) 1.12.3: the reference should properly be to 1.13.3).

27 Criminal Procedure (Scotland) Act 1995 s 294, which derives ultimately from s 61 of the Criminal Procedure (Scotland) Act 1887.

28 See J Morren, *Criminal Procedure and Law of Evidence in Scotland* (1928) 141; M G A Christie, *Breach of the Peace* (1990) para 3.33. The scope of such prosecutions would now be subject to the "public element" requirement articulated in *Harris v HM Advocate* [2009] HCJAC 80, 2009 SLT 1078. Although attempted suicide was a criminal offence under English law prior to the Suicide Act 1961, prosecutions were in practice resorted to only where necessary for the accused's protection, and proceedings under mental health legislation would now be appropriate in such circumstances: D C Ormerod, *Smith & Hogan: Criminal Law*, 12th edn (2008) 554.

29 For a brief overview, see Ormerod, *Criminal Law* (n 28) 553-554.

30 See generally Ferguson (n 10).

The question must be approached as one of principle. If guidance as to the exercise of prosecutorial discretion is required by article 8(2) of the ECHR, then the relevant source of guidance is that found in the Crown Office *Prosecution Code*.³¹ Like the English *Code for Crown Prosecutors*, it sets out a list of general public interest factors to be taken into account both for and against prosecution.³² While a detailed comparison of the two Codes is outwith the scope of this note, it is fair to say that they adopt a broadly similar approach in this respect, and it is difficult to see how an application of the Scottish code in the case of Daniel James would have provided any more helpful guidance than of which the DPP was able to avail himself.

There is a more interesting general point, of course, which is the extent to which article 8(2) may require specific prosecutorial guidelines to be issued in other areas. It seems unlikely that assisted suicide is *sui generis* to the extent that the general provisions of the *Code for Crown Prosecutors* suffice for every offence but that one.³³ That point, however, is for the future. For the meantime, the only relevant difference between the position in England and Scotland is that the Director of Public Prosecutions has been obliged by a court order to produce guidelines on the prosecution of assisted suicide, and the Lord Advocate has not. Given that the order made by the House of Lords was a consequence of the application of the ECHR, it should be self-evident that this difference cannot and does not justify the absence of such guidelines in Scotland.

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The Right to Legal Advice During Detention: *HM Advocate v McLean*

It may come as a surprise to those not well versed in Scottish criminal procedure that a suspect who has been detained for police questioning has no right to legal advice during this period. In *HM Advocate v McLean*,¹ the ECHR compatibility of this position was considered by a Full Bench of seven judges.

³¹ Crown Office and Procurator Fiscal Service, *Prosecution Code* (2001) (available at www.copfs.gov.uk/Publications/2001/05/prosecutioncode).

³² At 6-8.

³³ The CPS does, however, publish more detailed guidance on many offences: see www.cps.gov.uk/legal/. In Scotland, the Crown Office is rather more circumspect, with exceptions: see e.g. the (undated) "Crown Office and Procurator Fiscal Service Policy on Causing Death by Driving", available at www.copfs.gov.uk/Publications/Driving.

¹ [2009] HCJAC 97, 2010 SLT 73.