

European Court of Human Rights: Death in Strasbourg—assisted suicide, the *Pretty* case, and the European Convention on Human Rights

John Keown*

Human rights—assisted suicide—Suicide Act, 1961—compatibility of act's prohibition of assisted suicide with articles 2, 3, 8, 9, and 14 of the European Convention on Human Rights

In 1993, in the *Rodriguez* case, the Supreme Court of Canada considered and rejected (albeit by a narrow majority) the argument that Canada's law against assisted suicide, which contains no exceptions, breached the Canadian Charter of Rights and Fundamental Freedoms.¹ In 1997, in the *Glucksberg* and *Quill* cases, the U.S. Supreme Court unanimously rejected the argument that blanket bans by states on assisted suicide breached the U.S. Constitution.² In 2001, the United Kingdom's House of Lords rebuffed the argument, advanced by a terminally ill woman, Dianne Pretty, that the English law prohibiting assisted suicide was incompatible with the European Convention on Human Rights.³ Pretty appealed to the European Court of Human Rights in Strasbourg. Its decision, handed down in April 2002, is the leading authority on the extent to which a prohibition on assisted suicide is compatible with the convention.⁴

1. The English courts

Pretty was diagnosed with motor neurone disease (MND, or ALS as it is known in North America) in November 1999, and her condition deteriorated rapidly thereafter. Though her intellect remained unimpaired, she became paralyzed from the neck down. She had only months to live. Frightened at the prospect of a distressing death, she wanted her husband to help her commit suicide at a time of her choosing.

* M.A., D.Phil., Ph.D.; Barrister; Rose F. Kennedy Professor of Christian Ethics, Kennedy Institute of Ethics, Georgetown University

¹ *Rodriguez v. British Columbia (Attorney-General)*, (1994) 107 D.L.R. (4th) 342.

² *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco, Attorney-General of New York v. Quill*, 521 U.S. 793 (1997).

³ *Pretty v. Director of Public Prosecutions (Secretary of State for the Home Department Intervening)*, [2001] 3 W.L.R. 1598.

⁴ *Pretty v. United Kingdom*, (2002) 35 Eur. H.R. Rep. 1. Twelve days after the European Court of Human Rights ruled against Dianne Pretty's appeal, she died according to Dr. Ryszard Bietzk at the Pasque Hospice. See *Dianepretty dies*, BBC News, May 12, 2002, available at <http://news.bbc.co.uk/1/hi/health/1983457.stm>.

Pretty's husband, however, was fearful of prosecution for assisting suicide contrary to section 2(1) of the Suicide Act, 1961.⁵ Although this act decriminalized suicide, it preserved the law's prohibition on assisting suicide. Under section 2(4) of the act, prosecutions may be brought only with the consent of the Director of Public Prosecutions (DPP). Pretty asked the DPP to give an undertaking that he would not prosecute her husband. The DPP declined to do so, and Pretty challenged his refusal by way of judicial review. She sought an order quashing his decision and ordering him to give the undertaking or, alternatively, a declaration that the Suicide Act was incompatible with the European Convention on Human Rights.⁶

The Divisional Court unanimously dismissed her claim.⁷ It held that the DPP had no power to give the undertaking sought. It also rejected her argument that the Suicide Act was incompatible with the convention. Pretty appealed to the House of Lords. Unanimously, the law lords dismissed her appeal.⁸ Their lordships agreed with the Divisional Court that the DPP had no power to grant such an undertaking. The power to dispense with and suspend laws and the execution of laws without the consent of Parliament was denied to the Crown and its servants by the Bill of Rights of 1689.⁹ The law lords also rejected Pretty's claim that the European Convention contained a right to assisted suicide. Pretty appealed to the European Court of Human Rights.

2. The European Court of Human Rights

In seeking to persuade the court of the existence of a right to assisted suicide, counsel for Pretty relied principally on articles 2 and 3 of the convention as well as articles 8, 9, and 14.

2.1. Article 2

Article 2 provides that "[E]veryone's right to life shall be protected by law. No one shall be deprived of his life intentionally," save for certain purposes connected with criminal justice.¹⁰ Pretty argued that the article protected individuals from third parties but not from themselves, and that it contained a right to choose whether or not to go on living. The court disagreed. Article 2 protected the right to life and could not, without a distortion of language, be interpreted as conferring a diametrically opposite right, namely, a right to die,

⁵ See Suicide Act, 1961, 9 & 10 Eliz. 2, c. 60 § 2 (1961) (Eng.).

⁶ See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

⁷ [2001] E.W.H.C. Admin. 788.

⁸ [2001] 3 W.L.R. 1598.

⁹ *Id.* at 1619.

¹⁰ ECHR, *supra* note 6, art. 2, 213 U.N.T.S. at 224.

or a right to choose death rather than life.¹¹ The court was confirmed in its view by Recommendation 1418 (1999) of the parliamentary assembly of the Council of Europe, which called on the committee of ministers to encourage member states to uphold the prohibition on intentionally taking the life of the terminally ill or dying.¹²

2.2. Article 3

The applicant also invoked article 3, which provides that “[N]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”¹³ She argued that the state’s prohibition on assisted suicide and the DPP’s refusal to give an undertaking not to prosecute her husband constituted inhuman and degrading treatment for which the state was responsible because it was failing to protect her from the suffering that awaited her as her illness reached its final stages.

The court replied that it was beyond dispute that the U.K. had not inflicted ill-treatment on the applicant. Nor did she complain that she was not receiving adequate medical care from the state. Her argument placed a new and extended construction on the concept of “treatment,” which, as the House of Lords held, went beyond the ordinary meaning of the word. While the court must take a dynamic and flexible approach to the interpretation of the convention, which is a living instrument, any interpretation had to comport with the fundamental objectives of the convention and its coherence as a system of human rights protection. Article 3 had to be construed in harmony with article 2, which contains a prohibition on the intentional deprivation of life and does not confer a right on an individual to require a state to permit or facilitate her death. There had been no violation of article 3.¹⁴

2.3. Article 8

Article 8(1) prohibits interference with anyone’s “right to respect for his private and family life,” though 8(2) excepts interference that is in accordance with the law and is necessary in a democratic society in the furtherance of certain specified interests, including the protection of the rights of others.¹⁵ Pretty claimed that article 8 protected the right to self-determination, and that this right embraced the right to choose when and how to die.

The court held that personal autonomy was indeed an important guiding principle in interpreting the article. The very essence of the convention was respect for human dignity and freedom.¹⁶ The court observed that, without

¹¹ 35 Eur. H.R. Rep. at 29.

¹² *Id.*

¹³ ECHR, *supra* note 6, art. 3, 213 U.N.T.S. at 224.

¹⁴ 35 Eur. H.R. Rep. at 33–34.

¹⁵ ECHR, *supra* note 6, art. 8, 213 U.N.T.S. at 230.

¹⁶ 35 Eur. H.R. Rep. at 37.

wishing to undermine the principle of the sanctity of life, considerations of “quality of life” were relevant under article 8.¹⁷ As the ban on assisted suicide prevented the applicant from exercising her choice to avoid what she considered would be an undignified and distressing end to her life, the court was “not prepared to exclude” the possibility that the ban constituted an interference with her right to respect for her private life according to article 8(1).¹⁸

Was this interference justified under article 8(2)? In its discussion of whether the blanket ban was “necessary in a democratic society” to protect the lives of others, the court observed that the notion of necessity implied that the interference corresponded to a pressing social need and that it was proportionate to the legitimate aim pursued. In determining the necessity of interference, it added, the court would take into account the fact that national authorities enjoyed a certain margin of appreciation.¹⁹

The applicant argued that the blanket ban was disproportionate as it failed to take into account that she was not vulnerable and in need of protection: indeed, she was a mentally competent woman who was free from pressure and who had made an informed and voluntary decision. The court agreed that the evidence did not establish that she was vulnerable. Nevertheless, it held that the interference with her private life was justified under article 8(2); states were entitled to use the criminal law to regulate activities that were detrimental to the lives and safety of others. And the more serious the harm involved, the more heavily public health and safety weighed against individual autonomy. The court observed:

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 conditions 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.²⁰

The court also noted that the English law against assisted suicide was flexible in that it required the consent of the DPP for prosecution and allowed courts to impose sentences below the stipulated maximum.²¹

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 38.

²⁰ *Id.* at 38–39.

²¹ *Id.* at 39.

2.4. Article 9

The Court rejected the applicant's argument that the prohibition on assisted suicide violated her right to "freedom of thought, conscience and religion" protected by article 9.²² Not all opinions constituted beliefs in the sense protected by this article, and her claim did not involve a manifestation of a belief or religion in "worship, teaching, practice and observance."²³ To the extent that her views reflected her commitment to the principle of personal autonomy, this was simply a restatement of her complaint under article 8.²⁴

2.5. Article 14

Article 14 provides that the enjoyment of the rights set out in the convention shall be secured "without discrimination on any ground. . . ." ²⁵ Pretty submitted that the law against assisted suicide discriminated against her because it treated her in the same way as those whose situations were significantly different: namely, that she was prevented from exercising a right enjoyed by others who could end their lives without assistance because they were not prevented by any disability from doing so.

The court observed that article 14 came into play only if a substantive right protected by the convention were engaged; because it had held that her right to respect for her private life under article 8 had been engaged, article 14 was thereby activated.²⁶ However, the court concluded that, just as it had found when considering article 8, sound reasons for not allowing assisted suicide for the nonvulnerable, similar cogent reasons existed under article 14 for not distinguishing between those who could, and those who could not, commit suicide unaided. The borderline between these two categories would often be very fine and to try to build it into the law would seriously undermine the law's protection of life and would greatly increase the risk of abuse.²⁷

3. Commentary

Like *Rodriguez*, *Glucksberg*, and *Quill*, *Pretty* is a rebuff to those seeking to establish a legal right to assisted suicide through the courts. Critics of the court's reasoning argue that it attached insufficient importance to individual autonomy and to the alleviation of human suffering and exaggerated the difficulties of framing and enforcing adequate safeguards against abuse.²⁸

²² ECHR, *supra* note 6, art. 9, 213 U.N.T.S. at 230.

²³ *Id.* art. 9(1).

²⁴ 35 Eur. H.R. Rep. at 40–41.

²⁵ ECHR, *supra* note 6, art. 14, 213 U.N.T.S. at 232.

²⁶ 35 Eur. H.R. Rep. at 42.

²⁷ *Id.*

²⁸ For a recent criticism of the court's decision, see Michael Freeman, *Denying Death its Dominion: Thoughts on the Dianne Pretty Case*, 10 MED. L. REV. 245 (2002).

Even critics, however, would have to concede that Pretty's case for assisted suicide was far from the strongest that might have come before the court. Pretty did not argue that her suffering could not be alleviated by palliative care. Moreover, she was claiming a right to *nonphysician*-assisted suicide. As the Divisional Court observed, it was not being asked to permit assisted suicide in carefully defined circumstances with carefully defined safeguards: "We are being asked to allow a family member to help a loved one die, in circumstances of which we know nothing, in a way of which we know nothing, and with no continuing scrutiny by any outside person."²⁹

The courts' rejection of Pretty's arguments, which were largely either contrary to or bereft of authority, was both principled and prudent.

The decision was principled because the convention protects the right to life, the right not to be intentionally deprived of life. As the court recognized, article 2 could not, without a distortion of language, be interpreted as conferring a right to be helped to kill oneself. Pretty's attempt to stand the convention on its head was rightly dismissed.

The court's decision was prudent because there would be risks to the vulnerable were a right to assisted suicide acknowledged. The court's concern that "[c]lear risks of abuse do exist" was well-founded.³⁰ Expert committees worldwide, such as the House of Lords Select Committee on Medical Ethics, whose report was noted by the court,³¹ have concluded, after lengthy consideration of the arguments and evidence, that it would not be possible to frame adequate safeguards were the law to permit voluntary euthanasia, even under medical supervision. The risks of abuse in granting a right to nonphysician-assisted suicide, the right sought by Pretty, would be all the greater. Lord Bingham, who delivered the leading judgment in the House of Lords, pointed out that even the Netherlands, which has permitted voluntary euthanasia and physician-assisted suicide since 1984, did not allow nonphysician-assisted suicide.³² The disturbing evidence of abuse from the Netherlands confirms the reality of the "slippery slope."³³ Another law lord, Lord Steyn, noted that serious concerns had been expressed about the practice of Dutch euthanasia and physician-assisted suicide, not least by the UN Human Rights Committee.³⁴ The law lords were right to conclude that if the law sought to exonerate those who assisted the suicide of the nonvulnerable, it could not, in the words of

²⁹ [2001] E.W.H.C. Admin 788, ¶ 60.

³⁰ 35 Eur. H.R. Rep. at 39.

³¹ *Id.* at 23–24.

³² [2001] 3 W.L.R. 1598, 1615–16.

³³ JOHN KEOWN, *EUTHANASIA, ETHICS AND PUBLIC POLICY: AN ARGUMENT AGAINST LEGALIZATION* (Cambridge Univ. Press 2002).

³⁴ 3 W.L.R. at 1624.

Lord Bingham, “be administered fairly and in a way which would command respect.”³⁵

Indeed, the reality of the “slippery slope” that descends to abuse was evident in the very arguments advanced by counsel for Pretty. He submitted that she had a right to assisted suicide, though not to voluntary euthanasia, because she had a right to decide when to die. But, as Lord Bingham noted, if she had a right to decide when to die, it could not logically exclude a right to voluntary euthanasia.³⁶ Indeed, his lordship could have gone further. If there is a right to decide when to die, why is it not enjoyed by those who are neither dying nor disabled?

There is, however, at least one criticism that could be raised against the reasoning of the European court: its holding that article 8(1) was breached. The court observed that “[w]ithout in any way negating the principle of [the] sanctity of life,” considerations of “quality of life” were relevant under article 8, adding that, in an era of increasing medical technology, “many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.”³⁷ It also noted that in domestic law, a person may exercise “a choice to die” by refusing life-prolonging treatment.³⁸

This reasoning fails to make a vital ethical distinction between two different sorts of choice. There is, on the one hand, the ethically uncontroversial choice to refuse life-prolonging treatment that is either futile or too burdensome. There is, on the other, the ethically contentious choice to refuse life-prolonging treatment *precisely in order to kill oneself because one no longer thinks one's life is worth living*. To endorse the latter choice, as the court implicitly appeared to do, is to endorse suicide and, thereby, to undermine the law against assisted suicide. For if you have a right to commit suicide (whether by refusing treatment or otherwise), how can the law consistently prohibit someone else from assisting you to exercise that right? So, despite the court's disclaimer that its reasoning was not “negating the principle of the sanctity of life,”³⁹ its apparent endorsement not only of choices intended to put an end to worthless *treatments* but also of choices intended to put an end to worthless *lives* seems to do precisely that.

The court should have followed the sound judgment of Lord Bingham and the impressive submission it received from the archbishop of Wales (on behalf of the Catholic Bishops' Conference of England and Wales),⁴⁰ both of which

³⁵ *Id.* at 1618.

³⁶ *Id.* at 1603.

³⁷ 35 Eur. H.R. Rep. at 37.

³⁸ *Id.* at 36.

³⁹ *Id.* at 37.

⁴⁰ *Id.* at 26.

concluded that there is no right to commit suicide and that the law against assisted suicide does not engage article 8(1). The archbishop correctly observed: “[t]he ending of a life is *not* a private matter, but is a legitimate concern of public authorities whose duty is to protect the lives of citizens within their jurisdiction.”⁴¹

The court led up to its conclusion that article 8 was engaged by asserting that individual autonomy is an important principle underlying the article and by citing the holding of the Canadian Supreme Court in the *Rodriguez* case that, although the Canadian prohibition on assisted suicide did not violate the Canadian Charter, it did interfere with Rodriguez’s right to “life, liberty and security of the person” under article 7 of the Charter. However, these observations by the European court were, with respect, loose and incautious, for three reasons. First, importing the principle of autonomy into article 8 threatens to stretch unreasonably its bounds (as it did in *Pretty*): an interference with autonomy may, but need not, involve any interference with privacy. Second, as the brief for the archbishop noted:

Article 8 does not encompass a right to self-determination *as such*. Rather, Article 8 relates to the right to private and family life in respect of the manner in which a person *conducts* his life. Where rights under Article 8 are engaged, it is to protect the physical, moral and/or psychological integrity of the individual: cf. Appl. 8978/80 *X and Y v. The Netherlands* (Series A, No. 91; 26th March 1985; (1985) 7 EHRR 152) at para. 22 of the Court’s judgment. Such rights may—indeed, sometimes do—include rights over the individual’s own body. However, the alleged right claimed by Mrs. Pretty would ineluctably and necessarily extinguish the very benefit on which it was purportedly based, namely respect for her private *life*.⁴²

Third, as Lord Bingham noted, article 7 of the Canadian Charter, which expressly protects personal “liberty” has “no close analogy” with article 8.⁴³

Moreover, one consequence of finding a breach of article 8(1) was to bring article 14 into play. And in its reply to the applicant’s argument that the prohibition on assisted suicide discriminated against those physically unable to commit suicide, the court’s earlier failure to hold that there is no right to commit suicide deprived it of the riposte, so effectively deployed by Lord Bingham, that the blanket prohibition on assisted suicide treats everyone, able-bodied or disabled, equally; the law cannot be criticized as discriminatory because it applies to everyone. As his lordship accurately observed, although suicide was

⁴¹ Intervention of the Catholic Bishops’ Conference of England and Wales pursuant to article 36 § 2 of the Convention, ¶ 33, available at <http://217.19.224.165/frameset.htm> (emphasis in original).

⁴² *Id.* (emphasis in original).

⁴³ 3 W.L.R. at 1613.

decriminalized by the Suicide Act of 1961, this was not out of recognition of a right to commit suicide. The policy of the law remained firmly opposed to suicide, as the continuing prohibition on assisting suicide made clear.⁴⁴

In sum, although the reasoning of the court is less cogent than that of Lord Bingham, *Pretty* is another persuasive rebuttal of an attempt to establish a right to assisted suicide through the courts. As Lord Bingham noted, English law prohibiting assisted suicide is consistent with “a very broad international consensus.”⁴⁵ There are, however, countries in Europe, most notably the Netherlands, that permit euthanasia or physician-assisted suicide. The decision in *Pretty* determines that European states *may* prohibit assisted suicide, not that they *must* do so.

⁴⁴ *Id.* at 1618.

⁴⁵ *Id.* at 1615.

Spain: Banning political parties as a response to Basque terrorism

Leslie Turano*

New law banning political parties—terrorism—Batasuna, Basque separatist party—government applications to declare a party illegal—freedom of association—freedom of expression—decision of special chamber of the Supreme Court

For the first time since its return to democracy in 1977, Spain passed legislation that will open the way for the Tribunal Supremo (Supreme Court) to order the dissolution of certain political parties. The new Ley Orgánica de Partidos Políticos¹ (LOPP) was conceived to address the problem posed by the existence of Batasuna,² the radical Basque separatist party widely perceived to be the political wing of the terrorist group ETA. Within weeks of the law coming into force, on June 29, 2002, the Cortes (parliament) passed a motion urging the government to bring a case against Batasuna for having violated various articles of the law. The motion was prompted by Batasuna’s refusal to condemn ETA’s attack on August 4, 2002, in Santa Pola (Alicante), in which a car bomb exploded, killing two bystanders. The new law expands the government’s

* B.A., B.A., M.Phil., Ph.D., Lecturer in Law, King’s College, University of London

¹ Ley Orgánica 6/2002 de 27 de junio de Partidos Políticos.

² Founded in 1978 as Herri Batasuna (“Popular Unity”), the party was reconstituted in 1998 under the name Euskal Herritarok (Basque Citizens) and again in 2001 as Batasuna (“Unity”). Its youth group, Segi (formerly Jarrai), was declared an illegal organization by Judge Baltasar Garzón in 2001.