

THE PURDY CASE conor gearty

It is often said that 'hard cases make bad law', but the question begged by the recent House of Lords decision on assisted suicide is whether cases should be allowed to make any law at all. Debbie Purdy suffers from primary progressive multiple sclerosis, for which there is no known cure. Diagnosed in 1995, Ms Purdy's condition has gradually worsened: she now needs an electric wheelchair, has lost the ability to carry out many basic tasks for herself, and knows well that there is worse to come. Ms Purdy is clear that she will want to end her own life when things have become too unbearable but she also anticipates that by then she will be unable to do so without assistance. So she desires to travel to a country where assisted suicide is lawful (probably Switzerland) with her supportive husband in order that the end of her life can be brought about at a time of her choosing. The problem with her plan is that realising it may (or may not) result in her husband's prosecution for aiding and abetting suicide under the terms of the Suicide Act 1961. Such proceedings can only be initiated with the support of the Director of Public Prosecutions (DPP) and it was her plea that he should be required to set out clearly the policy upon which he enforces (or does not enforce) the 1961 Act that was successful before their lordships. The DPP (Keir Starmer) has now to come up with an offence-specific policy which Ms Purdy's husband and (it follows) others in an identical, analogous or indeed quite different situation to him can consult before they decide whether or not to assist a death, either of a loved one or of someone else entirely.

That there are other cases is clear. At the time of the hearing there had already been 115. Only eight of these had been referred to the DPP for a decision as to whether to prosecute – in all but two of these eight there had been an insufficiency of evidence. In the remaining two – most notably that of the parents and family friend of Daniel James who had sustained a serious spinal injury while playing rugby – it had been decided that a prosecution would not be in the public interest. The judges were surely right to assume that there will be more to come.

A large obstacle facing Debbie Purdy was the well-known decision in the Diane Pretty case seven years ago, in which a promise had been sought that Pretty's husband would not be prosecuted if he assisted in bringing her life to an end. This had proved too much to ask, of both the House of Lords and the European Court of Human Rights (to which the case had also gone). But in that decision the lords had also considered that the right to privacy in the European Convention on Human Rights (and so part of UK law via the Human Rights Act) had not included within its general guarantee of privacy any kind of right to die. The European Court seemed largely to have taken a different line on this and the House of Lords in Purdy has now followed the latter tribunal, unusually but quite explicitly declining to follow its own earlier authority.

The importance of this lay in the fact that since Ms Purdy's right to end her life was now to be seen as within her acknowledged right to privacy, it was therefore a right which could only be departed from in strictly defined circumstances, and a factor that is common to all of these exceptions is that the restriction on the right has to be 'in accordance with law'. From the perspective of human rights law, this phrase is not just about finding a law, it is also about being able (in the words of Lord Hope) 'to foresee, if need be with appropriate legal advice, the consequences which a given action

may entail'. This was the test that the DPP failed, despite having his general prosecutors' code to hand and the specific guidance he had given in the Daniel James case. More was required for this unique (or at least highly unusual) law. To meet his human rights based obligation to be clear, he needed to set out in general terms the range of criteria he would take into account when addressing this particular prosecutorial discretion – some of their lordships began the task for him in the course of their speeches in the Purdy case, albeit there was general recognition that the task was 'extraordinarily difficult' as Baroness Onora O'Neill had remarked when opposing an amendment to a legislative measure that would have altered the Suicide Act to this effect – a change which had been rejected by the lords in their legislative capacity shortly before the ruling in Purdy.

This is the unsettling dimension to the decision, for democrats at least. The Suicide Act contains no exceptions. If the legislation is now to have an extended 'reasonable excuse' clause inserted, surely this is the job of Parliament not the courts (much less the DPP)? Neither Commons nor Lords has yet gone down this route, and while it may be the case that, as certain of the judges remarked, there is public support for such a move, it is one which under our system is not made by divining the popular will and then transforming that will into law via executive discretion but rather by proper legislative process. Were there an informed public discussion, there would no doubt be a full examination of the assumption made by at least two of the judges that the only alternative to assisted suicide in some cases is to be left to die 'a distressing and undignified death' (Lord Hope). There would be proper reflection too on Lord Phillips remarkable and unexpected suggestion that Debbie Purdy's husband might be exposing himself to a charge of murder. But with due respect to the senior law lord this 'uncertainty' is not a 'further reason for the need for a more specific published policy' by the DPP; it is an argument for a proper independent review followed (if appropriate) by legislation that covers all the relevant issues, in which all affected parties can feel that they have had a chance to participate. Throwing everything onto the DPP is not only to ask too much of a single law officer, it is also to impose a legislative duty on him that is beyond his role as director of prosecutions.