



INTERNATIONAL HUMAN RIGHTS
LouvainX online course - prof. Olivier De Schutter

READING MATERIAL

related to: section 4, sub-section 1: The duty to protect and waiver of rights

European Court of Human Rights (4th sect.), *Pretty v. United Kingdom* (Appl. no. 2346/02), judgment of 29 April 2002:

[The applicant is a 43-year-old woman suffering from motor neurone disease (MND), a progressive neuro-degenerative disease of motor cells within the central nervous system which is associated with progressive muscle weakness affecting the voluntary muscles of the body. No treatment is available. As a result of the progression of the disease, death usually occurs as a result of weakness of the breathing muscles, in association with weakness of the muscles controlling speaking and swallowing, leading to respiratory failure and pneumonia. The life expectancy of Ms Pretty, at the advanced stage of the disease, is very poor. However her intellect and capacity to make decisions are unimpaired. As she is frightened and distressed at the suffering and indignity that she will endure if the disease runs its course, she very strongly wishes to be able to control how and when she dies and thereby be spared that suffering and indignity. However, she is prevented by her disease from ending her life without assistance. It is, however, a crime to assist another to commit suicide (section 2(1) of the Suicide Act 1961). Contacted by her solicitor, the Director of Public Prosecutions (DPP) refused to give an undertaking not to prosecute the applicant's husband should he assist her to commit suicide in accordance with her wishes. Before the Court, the applicant alleges that this results in a violation of a number of rights under the Convention, including Article 2, which guarantees the right to life, Article 3, which prohibits the infliction of inhuman and degrading treatments and punishments, and Article 8, which protects the right to respect for private life.]

[The right to life (Art. 2 of the Convention)]

38. The text of Article 2 expressly regulates the deliberate or intended use of lethal force by State agents. It has been interpreted however as covering not only intentional killing but also the situations where it is permitted to 'use force' which may result, as an unintended outcome, in the deprivation of life (*McCann and others v. United Kingdom* [judgment of 27 September 1995, Series A No. 324], §148). The Court has further held that the first sentence of Article 2 §1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the *L.C.B. v. United Kingdom* judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998–III, p. 1403, §36). This obligation extends beyond a primary duty to secure the

right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions; it may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (*Osman v. United Kingdom* judgment of 28 October 1998, *Reports* 1998–VIII, §115; *Kiliç v. Turkey*, No. 22492/93, (Sect. 1) ECHR 2000–III, §§62 and 76). More recently, in the case of *Keenan v. United Kingdom*, Article 2 was found to apply to the situation of a mentally ill prisoner who disclosed signs of being a suicide risk (at §91).

39. The consistent emphasis in all the cases before the Court has been the obligation of the State to protect life. The Court is not persuaded that ‘the right to life’ guaranteed in Article 2 can be interpreted as involving a negative aspect. While, for example, in the context of Article 11 of the Convention, the freedom of association was found to involve not only a right to join an association but a corresponding right not to be forced to join an association, the Court observes that the notion of a freedom implies some measure of choice as to its exercise (see the *Young, James and Webster v. United Kingdom* judgment of 13 August 1981, Series A No. 44, §52, and *Sigurður A. Sigurjónsson v. Iceland* judgment of 30 June 1993, Series A No. 264, pp. 15–16, §35). Article 2 of the Convention is phrased in different terms. It is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life. To the extent that these aspects are recognised as so fundamental to the human condition that they require protection from State interference, they may be reflected in the rights guaranteed by other Articles of the Convention, or in other international human rights instruments. Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.

40. The Court accordingly finds that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention. It is confirmed in this view by the recent Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe ...

41. The applicant has argued that a failure to acknowledge a right to die under the Convention would place those countries which do permit assisted suicide in breach of the Convention. It is not for the Court in this case to attempt to assess whether or not the state of law in any other country fails to protect the right to life. As it recognised in the case of *Keenan*, the measures which may reasonably be taken to protect a prisoner from self-harm will be subject to the restraints imposed by other provisions of the Convention, such as Articles 5 and 8 of the Convention, as well as more general principles of personal autonomy (see §91). Similarly, the extent to which a State permits, or seeks to regulate, the possibility for the infliction of harm on individuals at liberty, by their own or another’s hand, may raise conflicting considerations of personal freedom and the public interest that can only be resolved on examination of the concrete circumstances of the case (see, *mutatis mutandis*, *Laskey, Jaggard and Brown v. United Kingdom* judgment of 19 February 1997, *Reports* 1997–I). However, even if circumstances prevailing in a particular country which permitted assisted suicide were found not to infringe Article 2 of the

Convention, that would not assist the applicant in this case, where the very different proposition – that the United Kingdom would be in breach of its obligations under Article 2 if it did not allow assisted suicide – has not been established.

42. The Court finds that there has been no violation of Article 2 of the Convention.

[The right to respect for private life (Art. 8 of the Convention)]

61. As the Court has had previous occasion to remark, the concept of ‘private life’ is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (*X. and Y. v. Netherlands* judgment of 26 March 1985, Series A No. 91, p. 11, §22). It can sometimes embrace aspects of an individual’s physical and social identity (*Mikulić v. Croatia*, No. 53176/99 [Sect. 1], judgment of 7 February 2002, §53). Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see e.g. the *B. v. France* judgment of 25 March 1992, Series A No. 232–C, §63; the *Burghartz v. Switzerland* judgment of 22 February 1994, Series A No. 280–B, §24; the *Dudgeon v. United Kingdom* judgment of 22 October 1991, Series A No. 45, §41, and the *Laskey, Jaggard and Brown v. United Kingdom* judgment of 19 February 1997, *Reports* 1997–1, §36). Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, *Burghartz v. Switzerland*, Commission’s report, *op. cit.*, §47; *Friedl v. Austria*, Series A No. 305–B, Commission’s report, §45). Though no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.

62. The Government have argued that the right to private life cannot encapsulate a right to die with assistance, such being a negation of the protection that the Convention was intended to provide. The Court would observe that the ability to conduct one’s life in a manner of one’s own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned. The extent to which a State can use compulsory powers or the criminal law to protect people from the consequences of their chosen lifestyle has long been a topic of moral and jurisprudential discussion, the fact that the interference is often viewed as trespassing on the private and personal sphere adding to the vigour of the debate. However, even where the conduct poses a danger to health, or arguably, where it is of a life-threatening nature, the case law of the Convention institutions has regarded the State’s imposition of compulsory or criminal measures as impinging on the private life of the applicant within the scope of Article 8 §1 and requiring justification in terms of the second paragraph (see, for example, concerning involvement in consensual sado-masochistic activities which amounted to assault and wounding, the above-cited *Laskey, Jaggard and Brown* judgment and concerning refusal of medical treatment, No. 10435/83, Commission decision of 10 December 1984, DR 40, p. 251).

63. While it might be pointed out that death was not the intended consequence of the applicants’ conduct in the above situations, the Court does not consider that this can be a decisive factor. In the sphere of medical treatment, the refusal to accept a particular treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person’s physical integrity in a manner capable of engaging the

rights protected under Article 8 §1 of the Convention. As recognised in domestic case law, a person may claim to exercise a choice to die by declining to consent to treatment which might have the effect of prolonging his life ...

64. In the present case, though medical treatment is not an issue, the applicant is suffering from the devastating effects of a degenerative disease which will cause her condition to deteriorate further and increase her physical and mental suffering. She wishes to mitigate that suffering by exercising a choice to end her life with the assistance of her husband. As stated by Lord Hope, the way she chooses to pass the closing moments of her life is part of the act of living, and she has a right to ask that this too must be respected ...

65. The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, 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 ...

67. The applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8 §1 of the Convention. It considers below whether this interference conforms with the requirements of the second paragraph of Article 8.

2. Compliance with Article 8 §2 of the Convention

68. An interference with the exercise of an Article 8 right will not be compatible with Article 8 §2 unless it is ‘in accordance with the law’, has an aim or aims that is or are legitimate under that paragraph and is ‘necessary in a democratic society’ for the aforesaid aim or aims (see the *Dudgeon v. United Kingdom* judgment of 22 October 1981, Series A No. 45, p. 19, §43).

69. The only issue arising from the arguments of the parties is the necessity of any interference, it being common ground that the restriction on assisted suicide in this case was imposed by law and in pursuit of the legitimate aim of safeguarding life and thereby protecting the rights of others.

70 According to the Court’s established case law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued; in determining whether an interference is ‘necessary in a democratic society’, the Court will take into account that a margin of appreciation is left to the national authorities, whose decision remains subject to review by the Court for conformity with the requirements of the Convention. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake.

71. The Court recalls that the margin of appreciation has been found to be narrow as regards interferences in the intimate area of an individual’s sexual life (see *Dudgeon v. United Kingdom*, *op. cit.*, p. 21, §52; *A.D.T. v. United Kingdom* No. 35765/97 (Sect. 3) ECHR 2000–IX, §37). Though the applicant has argued that there must

therefore be particularly compelling reasons for the interference in her case, the Court does not find that the matter under consideration in this case can be regarded as of the same nature, or as attracting the same reasoning.

72. The parties' arguments have focussed on the proportionality of the interference as disclosed in the applicant's case. 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, who is 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 consequences of her incurable and distressing illness, at a very high personal cost.

73. The Court would note that although the Government argued that the applicant, as a person who is both contemplating suicide and severely disabled, must be regarded as vulnerable, this assertion is not supported by the evidence before the domestic courts or by the judgments of the House of Lords which, while emphasising that the law in the United Kingdom was there to protect the vulnerable, did not find that the applicant was in that category.

74. Nonetheless, the Court finds, in agreement with the House of Lords and the majority of the Canadian Supreme Court in the *Rodriguez* case, 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 the above-mentioned *Laskey, Jaggard and Brown* case, §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.

75. The applicant's counsel attempted to persuade the Court that a finding in this case would not create a general precedent or any risk to others. It is true that it is not this Court's role under Article 34 of the Convention to issue opinions in the abstract but to apply the Convention to the concrete facts of the individual case. However, judgments issued in individual cases establish precedents albeit to a greater or lesser extent and a decision in this case could not, either in theory or practice, be framed in such a way as to prevent application in later cases.

76. 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 22 cases in which 'mercy killing' was an issue, there was only one conviction for murder, with a sentence for life imprisonment, while lesser offences were substituted in the others and most resulted in probation or

suspended sentences ... 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.

77. Nor in the circumstances is there anything disproportionate in the refusal of the DPP to give an advance undertaking that no prosecution would be brought against the applicant's husband. 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.

78. The Court concludes that the interference in this case may be justified as "necessary in a democratic society" for the protection of the rights of others and, accordingly, that there has been no violation of Article 8 of the Convention.