Jenkinson's motive onto Ratcliffe. Second, the court found that Ratcliffe was motivated *in part* by hostility toward Brianna because she was transgender.

Inclusion of the word 'normally' within Para 3 does not preclude the possibility that other cases may reach the necessary level of seriousness required for the higher starting point. This equally also works in reverse: a case that would 'normally' attract a particular starting point may not reach the required level of seriousness because of its own particular facts. The brutality of the murder in this case, along with the extent of the injuries sustained, are likely of themselves to justify the higher starting point. Had the judge not reached the conclusion that the higher starting point applies, she could have treated Jenkinson's sadistic motives and Ratcliffe's transphobic comments as aggravating factors, which could then have resulted in the same minimum term, albeit derived from a lower starting point.

Having identified the appropriate starting point, the court proceeded to consider the aggravating and mitigating factors. In doing so, the court is under a duty to avoid double counting any factors that were considered in setting the starting point (Sch.21, Para 7 Sentencing Act 2020). Consideration of the aggravating and mitigating factors may result in a minimum term of any length, regardless of the starting point used (Sch. 21, Para 8), and the Court of Appeal has in the past imposed minimum terms which bear little correlation with the relevant starting point. For example, in *R v Inglis* [2010] EWCA Crim 2637, where the Court of Appeal imposed a five-year minimum term compared with a 15-year starting point to give sufficient weighting to the mitigating factors present. The context of each aggravating and mitigating factor will vary. It is not a case of listing the aggravating and mitigating factors and deciding which is longer. A short list of mitigating factors may outweigh a long list of aggravating factors, as was the case here with Ratcliffe whose maturity level was significantly lower than would ordinarily be the case in a person of his age.

Conclusion

The judgment provides little insight into how the court assessed and weighed the various aggravating and mitigating factors. However, the imposition of a 20-year minimum term for Ratcliffe, which was two years less than that for Jenkinson, was said to reflect the fact that Ratcliffe's aggravating factors were not 'quite as high' as in Jenkinson's case, while at the same time Ratcliffe benefitted from slightly more compelling mitigation in the form of his reduced maturity. However, it appears that reduced maturity does not mean that the offender is treated as if they are younger. At most, Ratcliffe's reduced maturity led to a two-year reduction in sentence. Had Ratcliffe been 14 years old at the time of the murder, the appropriate starting point would have been 15 years (Sch. 21 Para 5A (2) Sentencing Act 2020), five years less than that which was applied.

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Right to die – assisted suicide – private life – freedom from discrimination – margin of appreciation

Karsai v Hungary, Application No. 32312/23, decision of the European Court of Human Rights, 13 June 2014

Introduction

In *Karsai v Hungary*, Application No. 32312/23, the European Court of Human Rights has recently delivered a judgment with respect to the compatibility of Hungarian law with the European Convention on Human Rights in this area. The Court had the opportunity to rule that the state has a duty to allow assisted dying and thus offer individuals the right to a dignified death, but followed previous case law (*Pretty v United Kingdom* (2002) 32 EHRR 1), allowing the state a margin of appreciation, and dismissed the applicant's claim

The facts and decision

The applicant is affected with a type of motor neurone disease - amyotrophic lateral sclerosis (ALS) and claims a right to a self-determined death. He is in an advanced stage of ALS, a progressive neurodegenerative disease with no known cure, which consists in the gradual loss of motor neurone function, and hence of the voluntary control of muscles. It was accepted by the Court that at the end-stage of ALS, most muscles responsible for volitional motion are paralysed, and that speech, unaided breathing and swallowing becomes very difficult and ultimately impossible. It was also accepted that sensory and cognitive abilities may stay largely intact, and that patients may maintain their intellectual functions and consciousness throughout the progression of the disease. The applicant first experienced the symptoms of ALS in July 2021, and is no longer able to walk and take care of himself without assistance. He maintained before the Court that within a year from now, he will be completely paralysed and will not be able to communicate; that he will be "imprisoned in his own body without any prospect of release apart from death"; and that his existence will consist almost exclusively of pain and suffering. Thus, he would like to end or at least to shorten that phase of his disease through some form of assisted dying before he reaches a state that he considers unbearable. However, under Hungarian law, it is a criminal offence to help somebody to end his/her own life, including when that person is of sound mind but has an incurable degenerative disease and does not wish to live any longer (s.162 of Act C of 2012 on the Criminal Code).

In his application, he maintains that, even if he were to die of assisted suicide or euthanasia outside Hungary, the relevant provision of the Criminal Code would apply and anyone assisting him in ending his life could face criminal charges in Hungary. He argues that the lack of any prospect of ending his life on his own terms is having a detrimental effect on his mental state and his ability to cope with the challenges of the disease. He also complains that there is a blanket and extraterritorial ban on assisted suicide, and that the lack of any possibility for him to decide how to die is disproportionate. Thus, he argues that Hungary is under an obligation to provide a possibility for him to end his life on his own terms with dignity. Relying on Articles 3, 8 and 9, and the same provisions in conjunction with Article 14 of the Convention, he argues that the choice to die is open to those who by nature of their disease can terminate or shorten their life by declining life-prolonging treatment, but not to those who – like himself – do not require such treatment. In his opinion, that makes him a victim of discrimination under Article 14. Using Article 8 ECHR, K submitted that his case differed from *Pretty* because it also concerned the extraterritorial effect of the Hungarian ban on assisting suicide; that prosecution of the offence of assistance in suicide was mandatory; and that the legal and social context in Europe had changed since the Court had adopted that judgment. Thus, there had been growing trend towards legalisation of physician-assisted dying (*Haas v Switzerland* (Application No. 31322/07) and *Mortier v Belgium* (Application No. 78017/17).

The Court accepted that Article 2 ECHR (the right to life) did not prevent national authorities from allowing or providing physician-assisted dying, so long as appropriate and sufficient safeguards were in place to prevent abuse, but that it was for the national authorities to assess whether assisted dying could be provided within their jurisdiction in compliance with the ECHR. K's request involved intertwining duties, in other words, both "negative and positive obligations" including provision of access to medical intervention, such as access to life-ending drugs. This raised sensitive moral, ethical and policy issues in respect of which the national authorities were better placed to assess priorities, use of resources and social needs, although it acknowledged that there was a growing trend towards decriminalisation of medically assisted suicide, especially with regard to patients with incurable diseases. Although there had been important legal developments in favour of granting some form of access to assisted dying in certain European countries, the majority of member States continued to prohibit and prosecute assisted suicide, including by physicians. Further, the Council of Europe's Oviedo Convention provided no basis for concluding that the member States were advised, let alone required, to provide access to such assistance. Thus, Hungary should be granted considerable discretion in deciding whether to allow it in Hungary, the question was whether Hungary was overstepping that discretion and whether a fair balance had been struck between his desire to end his life through assistance, and the legitimate aims behind the legislation in question.

The Court noted that the wider social implications and the risks of abuse and error entailed in the provision of such assistance weighed heavily in how to accommodate the interests of those who wished to be helped to die. The Court had been referred to the challenges in ensuring that a patient's decision to use assistance was genuine, free from any external influence and not underpinned by concerns, which should be effectively addressed by other means, including the possibility that the patient might change his or her mind as the disease progressed. Effective communication with a patient required special skills, time and significant commitment on the part of medical and other professionals, as did the provision of adequate palliative care, and this fell within the national authorities' discretion. The Court also considered that high-quality palliative care, including access to effective pain management, was essential to ensuring a dignified end of life, and that the available options in palliative care, including the use of palliative sedation, were generally able to provide relief to patients in the applicant's situation and allow them to die peacefully. K had not contested the adequacy of the palliative care available to him, nor had he argued that he would be unable to refuse breathing assistance when the time came. Although he maintained that that course of action would only become available to him after he had been "locked inside his body" for a prolonged period of time and exposed to unbearable "existential suffering" while fully conscious, it felt that a personal preference to forego otherwise appropriate and available procedures could not in itself require the provision of alternative solutions, let alone to legalise assisted dying.

The Court did not accept that 'existential suffering' could lend itself to an objective assessment and noted that it was not for it to determine the acceptable level of risk involved in assisted dying in such circumstances. Although such a heightened state of vulnerability warranted a fundamentally humane approach to the management of the situation, including palliative care guided by compassion and high medical standards, K had not alleged that such care would be unavailable to him. The criminal prohibition on assisted suicide was intended to deter life-endangering acts and to protect interests arising from considerations of a moral and ethical nature, and there was nothing unusual or excessive in the fact that the State's prohibition applied also to suicides carried out abroad. Thus, issues relating to the coherency of the national-law system and the collective moral and ethical considerations underpinning the prohibition of assisted suicide provided reasonable grounds for the Hungarian authorities' reluctance to introduce the type of exception sought by the applicant. Further, mitigating factors could be taken into account and where justified, the sentence imposed could be lower than the statutory minimum. Therefore, there had been no violation of Article 8 of the Convention. However, in the Court's view, the Convention had to be interpreted and applied in the light of the present day. The need for appropriate legal measures should therefore be kept under review, regarding the developments in European societies and in the international standards on medical ethics in this sensitive domain.

K claimed a breach of Article 14 in conjunction with Article 8 because some patients could refuse life—saving treatment and thus choose to die, whereas that was not available to hum. However, the Court noted that the right to refuse or request discontinuation of medical treatment in end-of life situations was inherently connected to the right to free and informed consent to medical intervention, widely recognised and endorsed by the medical profession, whereas assisted dying was not. The Court therefore considered that the alleged difference in treatment of the two groups was objectively and reasonably justified and that there had been no violation of Article 14 taken in conjunction with Article 8 of the Convention.

The Court also declared his claims under Articles 3 (freedom from inhuman and degrading treatment) and 9 (freedom of thought and conscience), inadmissible as manifestly ill founded; following the judgment made by the Grand Chamber in *Pretty*. Judge Wojtyczek expressed a partly concurring, partly dissenting opinion, arguing that Article 2 of the ECHR, protecting the right to life, precluded any argument under the ECHR for the right to assisted dying. Judge Felici, on the other hand, dissented by relying on an interpretation of Article 8 that looks at the individual circumstances of the case, rather than rejecting the idea of imposing a positive obligation to respect self-determination through the doctrine of the margin of appreciation. He also felt that there was a breach of Article 14, as both sets of patients are, in effect, receiving end of life treatment. In his view, the ability to choose to end one's life should be based an assessment of the illness and suffering of the patient, not the type of treatment that the illness requires

Analysis

As expected, the Court adopted a cautious approach, maintaining the states' discretion in formulating their own laws in this area. The Court was particularly influenced by the fact that so few states in the Council of Europe allow euthanasia and assisted suicide, and that there is little consensus on this issue. Nevertheless, the Court stressed that several developments have taken place since *Pretty*, and that Hungary should keep the matter under review. A similar warning was issued to the UK government in respect of its treatment of transsexuals, until the Court established a breach of Articles 8 and 14 in *Goodwin v United Kingdom* ((2002) 38 EHRR 18). That leaves open the possibility that the Court may change its approach in the future, and insist on some form of assisted dying in appropriate cases. The Court also refused to accept that Article 9 is engaged in these claims, upholding the finding in *Pretty*. Had it done so, it would then have had to considerer whether that article would enhance the claim beyond the claim under Article 8 (and 14), or whether it would offer a similarly wide margin of appreciation to the state in securing the right to life and the prevention of abuse in terminating life.

A central feature of the applicant's case was that Hungarian law has an extraterritorial effect, making it unlawful to assist suicide in another state that allows assisted dying. If the Court had found Hungarian law to be arbitrary, it may have found a breach of the applicant's Convention rights, but the Court saw nothing unusual in this aspect of the domestic law. This was despite the argument that the law was embedded in statute that admitted on no exceptions; unlike UK law, which allows for prosecutorial discretion within the DPPs policy guidelines.

What is of equal interest in this case is the varying opinions voiced by the two dissenting judges. On the one hand, Judge Wojtyczek, agreeing with the dissenting opinion of Judge Serghides in *Mortier*, above, noted that Article 2 of the Convention provided an exhaustive list of exceptions to the state's duty to protect life, euthanasia and medically assisted suicide not being mentioned. Thus, Article 2 called for a strict interpretation and excluded the insertion of additional exceptions, particularly the decriminalisation of euthanasia and medically assisted suicide. For the Judge, Article 2 reflects the underlying assumption that human life is priceless and has an objective and intrinsic value, which do not depend on subjective feelings about the meaningfulness or meaninglessness of life. The Judge also doubted whether physician-assisted death could be carried out in compliance with Article 2. Although personal autonomy was a very precious freedom, given the clear letter of Article 2, it cannot encompass decisions about one's own life and death: the very notion of private life – which presupposes life-, does not extend to the choice of death by means of medically assisted suicide or euthanasia. What is not clear is whether the Judge would also find the withdrawal of life-saving treatment, at the request of the patient or not, to be incompatible with Article 2, and thus not within the scope of Article 8.

On the other hand, Judge Felici, advocated a different, more rights-based approach to the question, in line with the 'living instrument' approach to the Convention and its protection of ECHR rights. In the Judge's view, the core of the applicant's case was not a general right to assisted dying as an expression of self-determination, but rather the specific and circumstanced right of a terminally-ill patient who wishes to die to access a remedy responding to his desire to end his life. Previous case law in this area dealt with different claims and did not have the special features of the present case. Under the Convention, first, it is clear that respect for private life encompasses the right to resist one's physical suffering, even if this involves the termination of life. Second, if the Convention imposes on a state a duty against medical negligence, it is difficult to see that there would be no violation if a state fails to provide an effective remedy to address intolerable suffering such as complained of in the present case. Third, it was indisputable that the magnitude of a global trend in favour of recognising at least some form of assisted dying could not be questioned.

Thus, in the light of those points, there were no insurmountable legal obstacles in imposing a duty on the state, having regard to all the circumstances of this case. Further, it does not appear that the state can be granted any margin of appreciation in this situation; and in the absence of that margin, no assessment of proportionality and mitigation (that sentences would be low) is required. This argument appears to use the right of dignity and self-determination under Article 8 as an absolute right, similar to the one under Article 3, protecting individuals from inhuman and degrading treatment; although the

Judge does not mention Article 3, or the Court's rejection of that claim. Overall, the Judge felt that in this case the majority had used case law to ensure coherence with the Convention, rather than deciding the case on its merits. The argument of the majority, that a different law may be open to abuse, is, in the Judge's view, no legal argument, as the state is under a duty to ensure that there is no abuse. He was also critical of the Court not referring the case to the Grand Chamber, depriving the highest judicial body to make a ruling in this area.

Both dissenting views illustrate the wide parameters of the arguments in this controversial area, and, with respect, appear to be formulated on the basis of personal and philosophical beliefs rather than pure legal reasoning.

Conclusions

The issue of assisted suicide continues to attract a variety of moral and ethical opinion, as well as arguments in favour of judicial deference at the national, and an extended margin of appreciation at the international level. Despite the arguments on human right and dignity, it appears that a number of factors are combining to justify the Courts' approach in this area. One is that the case raises particularly delicate moral, social, ethical and other issues. Second, unlike the many other human rights issues, national approaches to assisted dying do not show a common European standard or consensus to justify challenge in the European Court of Human Rights. Third, it is clear that the European Court agrees with the domestic courts' reluctance to question the law and its rationale where Parliament has already debated the issues and then failed to legislate.

These factors point to the likelihood of the Court's case law being maintained: that it is not in breach of the ECHR for a state to pass and enforce a law of assisted dying, but that there is no obligation under the Convention to force them to pass such laws. Provided the state makes provision for any pain and suffering of the victims, by offering suitable palliative care and pain relief, states will be allowed to maintain the distinction between allowing patients to refuse life-saving treatment, and those who simply wish to end their lived early with the direct assistance of others. That provides little redress and comfort to individuals such as the applicant in the present case, who are denied an effective remedy based on where they reside, and the will of the national authorities in enforcing their criminal laws against those who are willing to assist them.