Neutral Citation Number: [2017] EWHC 640 (Admin)

Case No: CO/6421/2016

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**DIVISIONAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/03/2017

**Before**:

**LORD JUSTICE BURNETT**
**MR JUSTICE CHARLES**
**MR JUSTICE JAY**

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**Between:**

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| **THE QUEEN (on the application of NOEL DOUGLAS CONWAY)** | **Claimant** |
| **- and -** | |
| **SECRETARY OF STATE FOR JUSTICE** | **Defendant** |
| **- and -** | |
| **CROWN PROSECUTION SERVICE** | **Interested Party** |
| **- and –** | |
| **ATTORNEY GENERAL** | **Interested Party** |

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**Richard Gordon QC, Alexander Ruck Keene and Annabel Lee** (instructed by **Irwin Mitchell**) for the **Claimant**
**James Strachan QC and Benjamin Tankel** (instructed by the **Government Legal Department**) for the **Defendant**
The Interested Parties were not represented

Hearing date: 21st March 2017

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# Approved Judgment

**Lord Justice Burnett :**

1. The claimant, Noel Douglas Conway, seeks a declaration pursuant to section 4(2) of the Human Rights Act 1998 that section 2(1) of the Suicide Act 1961 ("the 1961 Act") is incompatible with his rights under articles 8(1) and 14 of the European Convention on Human Rights ("the ECHR"). The matter comes before us to consider the question of permission to apply for judicial review pursuant to an order of Blake J of 6 February 2017.

2. Mr Conway is now 67 years old. In November 2014, having previously been fit and active, he was diagnosed with Motor Neurone Disease. That is a degenerative and terminal illness. The progress of the disease varies between different sufferers. But a time will come when Mr Conway will be told that he has less than six months to live. His wish at that point, and whilst he retains the capacity to make the decision, would be to enlist the assistance of a medical professional or professionals to bring about his peaceful and dignified death. It is a wish shared by many afflicted with neurological diseases and others who must contemplate the future of a body that has failed completely whilst a mind that remains acute. Mr Conway wishes to remain in control of the final acts that would be required to enable him to ingest or otherwise administer the medication necessary to bring about his death. By the time he is ready to end his life he may well no longer be able to take the active steps to achieve it. He will certainly need assistance, at the least.

3. Section 2(1) of the 1961 Act criminalises those who provide such assistance to individuals who wish to commit suicide. The question whether someone will be prosecuted for assisting suicide is governed by a detailed policy promulgated by the Director of Public Prosecutions. There are in fact almost no such prosecutions. The policy was formulated in 2010 in response to the decision of the House of Lords in *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC 345 and was refined in 2014 following the decision of the Supreme Court in *R (Nicklinson) v the Ministry of Justice* [2014] UKSC 38, [2015] AC 657.

4. In the Nicklinson case a similar declaration of incompatibility with Article 8 ECHR was sought but refused by the Supreme Court. By a majority of seven to two the court refused to make the declaration. It was not "institutionally appropriate" to do so. The argument advanced in that case was the same in material respects as that deployed by Mr Gordon QC on behalf of the claimant in these proceedings. The inflexible nature of section 2(1) of the 1961 Act, which admits of no carefully crafted and policed exceptions to criminality for those who assist suicide, is a disproportionate interference with the article 8 rights of someone who wishes to end his life, but is unable to do so without assistance. The essential question in this application is whether the circumstances which led the Supreme Court to refuse to grant the declaration in June 2014 have changed so that a different outcome could be possible today. I note that Mr Conway seeks a declaration of incompatibility with Article 14 ECHR in addition to Article 8 ECHR. No such declaration was sought in the Nicklinson case, not least because earlier authority precluded such a course. To my mind, there can be no realistic prospect of the claimant succeeding under Article 14 ECHR if he is unable to succeed under Article 8 ECHR.

5. I have concluded that permission to apply for judicial review should be refused. The core reason for doing so is that Parliament has reconsidered the issue of assisted dying

following the decision of the Supreme Court in Nicklinson, as that court encouraged it to do. Both the House of Commons and the House of Lords have debated the matter in the context of bills proposing a relaxation of the strict application of section 2(1). The result is that Parliament has decided, at least for the moment, not to provide for legislative exceptions to section 2(1) of the 1961 Act. The policy of the DPP has also been subject to parliamentary scrutiny and debate. That controls the practical application of the statutory provision. The Strasbourg court has ruled that the question whether there should be exceptions to a blanket ban on assisting suicide falls within the margin of appreciation of the State parties to the ECHR. Whilst the Nicklinson case recognised a jurisdiction in the courts to issue a declaration of incompatibility in these circumstances, even where Parliament had struck the balance for itself, the Supreme Court also recognised that Parliament was better placed to resolve these sensitive issues. For the purposes of CPR Part 54, I do not consider that it is arguable that a declaration of incompatibility should be made, in the light of the post Nicklinson parliamentary consideration of this very difficult moral issue.

6. The Nicklinson case was heard by a panel of nine justices, each of whom gave a judgment. Both Mr Gordon and Mr Strachan QC, who appears on behalf of the Secretary of State, analysed the judgments in considerable detail in their written materials and in oral argument directing our attention to many passages in each of the judgments. The issue for us to determine is whether the parliamentary consideration of possible amendment to section 2(1) of the 1961 Act which has followed Nicklinson has necessarily shut the door to a declaration of incompatibility.

7. The nine justices divided into three broad camps. Lady Hale and Lord Kerr would have made a declaration of incompatibility because section 2(1) "fails to admit of any exceptions", as Lady Hale put it in para 301. The decision of the Strasbourg Court in *Pretty v United Kingdom* (2002) 35 EHRR 1, that the blanket ban did not breach Mrs Pretty's article 8 rights, would not preclude a domestic court from finding, in similar circumstances, that it would. I hope I do no disservice to the subtlety of the two judgments by summarising their collective view as being that unless Parliament devised a scheme which admitted of exceptions to section 2(1) the incompatibility would persist. Both Lady Hale and Lord Kerr recognised that Parliament might take a different view and decline to change the law, as the Human Rights Act 1998 allows.

8. Lord Sumption and Lord Hughes considered that the question of relaxation of section 2(1) was for Parliament: see, in particular, paras 230 to 232 in the judgment of Lord Sumption. Parliament could properly conclude that a blanket ban on assisted suicide was "necessary" for the purposes of article 8. Parliament had already determined the issue.

9. The position of the remaining five justices fell between these two settled views.

10. Lord Neuberger of Abbotsbury identified the following issues:

    i) Is section 2 of the 1961 Act within the United Kingdom's margin of appreciation under article 8?

    ii) Is it constitutionally open to the United Kingdom courts to consider compatibility?

iii) Is it institutionally appropriate to consider whether section 2 infringes article 8?

iv) Should the court grant a declaration of incompatibility?

Further issues arose in connection with a challenge to the legality of the DPP's policy.

11. In view of the decision of the Strasbourg court in the Pretty case all the justices agreed that the answer to the first question was "yes". On issue (ii), Lord Neuberger concluded that it was open to a court to consider the question of compatibility but in answer to the third question, he considered that it was not institutionally appropriate to do so at that time. In consequence, the fourth question did not strictly arise but Lord Neuberger explained that he would not have made a declaration of incompatibility in any event because of the unsatisfactory state of the evidence and argument available to the court.

12. Mr Gordon submits that the reasons why it was institutionally inappropriate to make a declaration of incompatibility are arguably no longer applicable and the evidential deficiencies identified by Lord Neuberger can be made good in these proceedings.

13. Lord Neuberger dealt with the third issue between paras 77 and 118 of his judgment. He recounted the argument in support of the proposition that the issue should be left to Parliament between paras 99 and 110. He recognised that judges should be very cautious before exercising the power under section 4 of the 1998 Act, given that Parliament had considered whether to relax the strictures of section 2 of the 1961 Act in 2009, when it was amended, and the question had been debated on other occasions (para 103). There was a bill before Parliament at the time of the Nicklinson case. His conclusions on this issue follow between para 111 and 118.

14. Lord Neuberger considered that it would be wrong in principle to rule out the possibility of a declaration where the court has jurisdiction, relying only on the contention that Parliament had considered the issue (para 112). But Parliament should be afforded the opportunity of deciding "whether to amend section 2" (para 113). In para 116 he explained that there were various reasons why it would be institutionally inappropriate to make a declaration at the time. In summary, first, the question of relaxing the blanket ban on assisted suicide was deeply controversial and sensitive. Secondly, it would not be simple to identify a remedy for an incompatibility. Much anxious consideration would be needed from the legislature. This reason reflects the reality that changes to the law involve two stages: should there be a relaxation of the law in principle and, if so, the details of the relaxation. Thirdly, Parliament had recently, and repeatedly, considered section 2 and a bill was then under consideration. Fourthly, the House of Lords had given Parliament to understand in *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800 that a declaration of incompatibility would be inappropriate, a view reinforced by the conclusion of the Divisional Court and Court of Appeal in the Nicklinson case itself. He concluded:

> "118. Parliament now has the opportunity to address the issue of whether section 2 should be relaxed or modified, and if so how, in the knowledge that, if it is not satisfactorily addressed, there is a real prospect that a further, and successful,

> application for a declaration of incompatibility may be made. It would not be appropriate or even possible to identify in advance what amounts to a reasonable time in this context. However, bearing in mind the predicament of the Applicants, and the attention the matter has been given inside and outside Parliament over the past twelve years, one would expect to see the issue whether there should be any and if so what legislation covering those in the situation of Applicants explicitly debated in the near future, either along with, or in addition to, the question whether there should be legislation along the lines of Lord Falconer's proposals. Nor would it be possible or appropriate to identify in advance what would constitute satisfactory addressing of the issue, or what would follow once Parliament had debated the issue: that is something which would have to be judged if and when a further application is made, as indicated in para 112 above. So that there is no misunderstanding, I should add that it may transpire that, even if Parliament did not amend section 2, there should still be no declaration of incompatibility: that is a matter which can only be decided if and when another application is brought for such a declaration. In that connection, Lord Wilson's list of factors in para 205 below, while of real interest, might fairly be said to be somewhat premature."

15. Lord Clarke of Stone-cum-Ebony, agreed generally with Lord Sumption and Lord Hughes (and also Lord Reed, whose judgment I will turn to shortly). He added some observations on the "differing views … as to what may happen in the future." He said this:

> 291. "Lord Neuberger, Lord Mance and Lord Wilson conclude that the appeal and cross-appeal should be disposed of in the same way but contemplate the possibility that circumstances may arise in the future in which an application for a declaration of incompatibility might succeed. In his para 197 Lord Wilson has summarised what he calls Lord Neuberger's crucial conclusions in the [Nicklinson] appeal. I agree that those are indeed his crucial conclusions. … Among the critical factors appear to me to be the fact that the detailed proposals made by Lord Neuberger and Lord Wilson were not advanced in argument and thus have not been subjected to the kind of detailed scrutiny that these difficult questions deserve. A further critical factor is that to date Parliament has not considered the position of those in a similar position to that of Mr Nicklinson and Mr Lamb.
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> 292. I agree with Lord Wilson that Lord Neuberger also included the points in his para 197(f) and (g). However, he went further, in order to explain what he meant by saying in para 118 (referred to in Lord Wilson's para 197(f)) what might happen if the issue was not 'satisfactorily addressed'. Lord

Neuberger said that, for various reasons, one would expect to see the issue whether there should be any and if so what legislation covering those in the situation of the Applicants explicitly debated in the near future. Importantly, he added this:

> "Nor would it be possible or appropriate to identify in advance what would constitute satisfactory addressing of the issue, or what would follow once Parliament had debated the issue: that is something which would have to be judged if and when a further application is made. So that there is no misunderstanding, I should add that it may transpire that, even if Parliament did not amend section 2, there should still be no declaration of incompatibility: that is a matter which can only be decided if and when another application is brought for such a declaration. In that connection, Lord Wilson's list of factors in para 205 [above], while of real interest, might fairly be said to be somewhat premature."

293. Subject to what follows, I agree with Lord Neuberger. If Parliament chooses not to debate these issues, I would expect the court to intervene. If, on the other hand, it does debate them and, after mature consideration, concludes that there should be no change in the law as it stands, as at present advised and save perhaps in exceptional circumstances, I would hold that no declaration of incompatibility should be made. In this regard I agree with the views expressed by Lord Mance at para 190, after referring earlier to the opinion of Rendquist CJ in *Washington v Glucksberg* 521 US 702 (1997) at p 735, that Parliament is certainly the preferable forum in which any decision should be made, after full investigation and consideration, in a manner which will command popular acceptance. In these circumstances I would conclude that the courts should leave the matter to Parliament to decide. I recognise that it may well be that, for the reasons given by Lord Neuberger and Lord Wilson, Parliament will conclude that some such process as they suggest might be appropriate but, as I see it, that is a matter for it (and not the courts) to determine. In particular, judges should not express their own personal views on the moral questions which arise in deciding what is the best way forward as a matter of policy. As Lord Sumption says in para 228, the imposition of the personal opinions of professional judges in matters of this kind would lack all constitutional legitimacy."

16. Lord Reed made a similar point in a different way between paras 296 and 298:

> "296. … the Human Rights Act introduces a new element into our constitutional law, and entails some adjustment of the respective constitutional roles of the courts, the executive and the legislature. It does not however eliminate the differences between them: differences, for example, in relation to their

> composition, their expertise, their procedures, their accountability and their legitimacy. Accordingly, it does not alter the fact that certain issues are by their nature more suitable for determination by Government or Parliament than by the courts. In so far as issues of that character are relevant to an assessment of the compatibility of executive action or legislation with Convention rights, that is something which the courts can and do properly take into account. They do so by giving weight to the determination of those issues by the primary decision-maker. There is nothing new about this point. It has often been articulated in the past by referring to a discretionary area of judgment.
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> 297. The question whether section 2 of the Suicide Act 1961 is incompatible with the Convention turns on whether the interference with article 8 rights is justified on the grounds which have been discussed. That issue raises highly controversial questions of social policy and, in the view of many, moral and religious questions on which there is no consensus. The nature of the issue therefore requires Parliament to be allowed a wide margin of judgment: the considered assessment of an issue of that nature, by an institution which is representative of the citizens of this country and democratically accountable to them, should normally be respected. That is not to say that the courts lack jurisdiction to determine the question: on the contrary, as I have explained. But it means that the courts should attach very considerable weight to Parliament's assessment.
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> 298. In the present case, I am far from persuaded that that assessment is unjustifiable under the Convention. That is not to say that it is inconceivable that the position could alter in the future: changes in social attitudes, or the evolution of the Convention jurisprudence, could bear on the application of the Convention in this context, as they have done in other contexts in the past. But that is not the position at present."

17. Lord Mance did not associate himself with para 118 of Lord Neuberger's judgment, although he did so in respect of the paragraphs that immediately preceded it. As is apparent from the reference made by Lord Clarke, he put the matter in his own way in para 190:

> "190. … While I would, like him, not rule out the future possibility of a further application, I would, as matters presently stand, adapt to the present context a thought which Renquist CJ expressed in a slightly different context in *Washington v Glucksberg*, p 735: that there is currently "an earnest and profound debate about the morality, legality, and practicality of …. assisted suicide" and "[o]ur holding permits this debate to continue, as it should in a democratic society". Parliament is certainly the preferable forum in which any

> decision should be made, after full investigation and consideration, in a manner which will command popular acceptance."

18. The pre-Nicklinson parliamentary consideration of the question whether the blanket ban on assisted suicide should be relaxed is fully discussed in the judgments of the Supreme Court. I have noted that a bill was before Parliament when the Nicklinson case was decided. That had been introduced into the House of Lords by Lord Falconer of Thoroton on 5 June 2014. It received its second reading after 10 hours of debate but without a vote on 18 July 2014. The bill was further debated in the House of Lords over two days in Committee in November 2014 and January 2015. Parliament was prorogued before the bill made any further progress and it fell. That it made no further progress represented the view of that house. In June 2015 Rob Marris MP introduced the Assisted Dying (No. 2) Bill into the House of Commons. It was substantially in the same form as Lord Falconer's bill. That was debated on 11 September 2015 on its second reading. More than 85 members had indicated a wish to speak in the debate which was described as "unprecedented" by the Deputy Speaker. The House divided. 118 voted in favour of the bill being given a second reading and 330 against. Hansard notes an exchange which showed that some members would not vote because they could not make up their minds. The Deputy Speaker confirmed (uncontroversially) that there was no mechanism for recording abstentions.

19. Article 9 of the Bill of Rights of 1689 ("That the freedoms of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court of place out of Parliament") prevents a court from relying upon or analysing the content of debates in Parliament with a view to judging their quality or agreeing or disagreeing with them. It is not for a court to scrutinse the content of a debate, with resulting praise, approbation or criticism. It was suggested in argument, albeit faintly, that the judgments in the Nicklinson case required Parliament to consider expressly the circumstances of those in the position of the appellants before the Supreme Court and that the bills introduced by Lord Falconer and Mr Marris did not do so. That is because they sought narrower exceptions from section 2(1) which would not encompass the circumstances of those appellants. In consequence, it is said that the debate on Mr Marris' bill, and others to which I shall turn, did not expressly consider their position.

20. There are very limited and well known circumstances in which a court may refer to proceedings in Parliament, as to which see, for example, the discussions in *Pepper v Hart* [1993] AC 593; *R (Spath Holme) v Secretary of State for the Environment Transport and the Regions* [2001] 2 AC 349 and *Wilson v First County Trust Ltd* [2004] 1 AC 816. In the context of a consideration of proportionality under the Human Rights Act, it is the outcome of Parliamentary proceedings, not their content, which falls to be considered. In any event, it is fallacious to suppose that what occurs on the floor of either House of Parliament, or in committee, represents the four corners of the consideration, thought, debate and materials upon which members form their personal judgments before voting.

21. The outcome of the vote was a rejection of Mr Marris' bill.

22. On 9 June 2016 Lord Hayward introduced another bill into the House of Lords but no date has been set for a second reading. The most recent discussions of this topic in the House of Lords occurred on 16 January 2017 in response to a question of Baroness Meacher and then a debate on 6 March 2017 where the deeply held conflicting views were once more ventilated.

23. In my view the settled will of Parliament following the Nicklinson case is that there should be no change in the law by relaxing section 2(1) of the 1961 Act. The debate this month together with the exchange following Lady Meacher's question in January demonstrate that the issue is one that is likely to remain subject to continued political attention, just as it remains a matter of intense public debate and controversy. In short, three private members' bills have failed since the Nicklinson case. The Government have made clear that they have no intention of introducing legislation. They believe that this is a matter of private conscience; the official opposition are neutral on the question whether legislation should pass but have indicated that they would be unlikely to press for parliamentary time.

24. The materials before us explain much about how legalised assisted suicide operates in the very few jurisdictions in the world which allow it. In the United States, the state of Oregon was the trailblazer and four other states allow assisted suicide in a controlled and regulated environment. Of the 47 States parties to the ECHR five allow assisted suicide. The position has also moved on in Canada, in particular as a result of the decision of the Supreme Court of Canada in *Carter v Canada* 2015 1 SCR 331. But the topic remains one of intense controversy. The question whether to allow assisted suicide at all is intensely controversial but so too is the next question which can arise, namely the nature and extent of any relaxation in the strict approach.

25. Parliament has further considered the matter and, to paraphrase Lord Mance, despite full investigation and consideration, has been unable to coalesce around a change in the law which would command popular acceptance. It has done what he considered appropriate. It is clear, in my view, that the approach of Lords Sumption, Hughes, Clarke and Reed would also lead inexorably to the conclusion that a declaration of incompatibility would be institutionally inappropriate in the light of that further parliamentary consideration.

26. Mr Gordon submits that Parliament was required to confront the issue to the extent that it could not leave the law unchanged. He emphasises that in para 118 Lord Neuberger used the term "satisfactorily addressed" a phrase echoed in the judgment of Lord Wilson in the passages referred to by Lord Clarke in the quotation above. He invites us to construe that as an indication that it would be institutionally appropriate for a declaration to be issued (subject to the nature of the evidence adduced) if Parliament left the law unchanged. I am bound to say that I do not read Lord Neuberger's judgment in that way. He expressly left open the possibility that a declaration of incompatibility would not be the necessary consequence of Parliament leaving the law unchanged. He was careful to recognise that it was a matter for Parliament *whether* to change the law. He cannot have meant to indicate that it would be appropriate for a court to scrutinise the debates in Parliament to see what factors were apparently taken into account by those who voted, what materials were referred to, and then determine whether its conduct of the matter was satisfactory or unsatisfactory. That would be unconstitutional. I would respectfully suggest that his concern was that Parliament should consider the matter again. Thus, although in the

light of the approach of the five justices to which I have referred the position is clear, it appears to me Lord Neuberger's concern was that Parliament should reconsider the matter whilst recognising that the outcome of that reconsideration was for them.

27. In summary, Parliament has done precisely what the Supreme Court suggested was necessary. Having done so, it remains institutionally inappropriate for a court to make a declaration of incompatibility, whatever our personal views of how the underlying policy issues should be resolved. Had Parliament done nothing after the Nicklinson case the claimant's case that permission should be granted would be unanswerable, however it might fare on further investigation. As a result of the continuing parliamentary attention, and renewed recent determination of the underlying issue, in my opinion the claim is unarguable and I would refuse permission. Parallel proceedings for a declaration of incompatibility were issued in the Family Division of the High Court which have been stayed pending determination of the application for permission to apply for judicial review. Mr Gordon invites us to lift the stay in those proceedings should we refuse permission. In my view that would be inappropriate. If these proceedings cannot prosper neither can those in the Family Division.

28. We were asked to consider directions, including whether to direct the hearing of a preliminary issue relating to institutional competence, were permission to be granted. As a result of the conclusion I have reached it is unnecessary to resolve such issues.

29. My conclusion does nothing to diminish the deep sympathy I feel for Mr Conway, his family and others who are confronted with the reality of living and dying with incurable degenerative conditions such as Motor Neurone Disease. Mr Conway's position in these proceedings is truly selfless because, as Mr Gordon recognises, even if the Supreme Court were to make (or uphold) a declaration of incompatibility assuming the swiftest progress of the litigation imaginable, the settled position of both Government and official opposition is that any change in the law must await a private member's bill which commands support in both houses. All current indications are that such a bill would struggle to pass. Whatever the position in the courts any change in the law seems unlikely in the foreseeable future.

**Mr Justice Charles:**

30. I have reached a different conclusion.

31. In my view the questions to be addressed are:

    i) Whether the effect of the judgments given by a nine-member Supreme Court in *Nicklinson* found the conclusion that the Claimant has not raised an arguable ground for judicial review that merits full consideration?

    ii) Whether as a matter of discretion permission should be refused?

    In my view, the answer to both questions is "no" and so permission should be granted.

32. The Secretary of State argued that if permission was granted there should be a preliminary issue, namely: Would it be institutionally appropriate for this court to consider evidence and argument on whether it should make a declaration of incompatibility? In my view, any such direction should be a matter for the case management judge in this and potentially other cases.

*Basic common ground*

33. It is for Parliament and not the courts to change the relevant law, namely s. 2 of the Suicide Act 1961 and so the blanket statutory offence of encouraging or assisting suicide. The DPP guidelines approved by Parliament apply to the prosecution of this offence and have the "after the event" effect described by Lord Neuberger in *Nicklinson* at paragraph 108.

34. If the court was to make a declaration of incompatibility pursuant to its jurisdiction to do so under the Human Rights Act 1998 this would have the result described by Lord Kerr at paragraph 343 in *Nicklinson*. As a consequence the relevant Minster would not have a statutory duty to take steps to propose changes to the present law or to promote Parliamentary debate and decision on any such changes (and her present position is that the Government would not do either). Also, Parliament may not consider the issue and, if it does, it may make no change. If no changes are made the current state of the law is that, or strongly supports the view that, the European Court of Human Rights would conclude that s. 2 of the Suicide Act 1961 was compatible with the ECHR.

35. This is not an auspicious start to proceedings that seek a declaration of incompatibility because if it was granted it may well lead nowhere. However, this problem is at the heart of the relevant reasoning and conclusions in *Nicklinson* because as, for example, Lady Hale recognises at paragraph 300, Parliament could cure the incompatibility found to exist by the court or do nothing.

*Nicklinson*

36. The common ground means that it is not enough to simply say that this claim is not arguable because the ultimate decision is one for Parliament.

37. There is a clear 7:2 majority that it was institutionally inappropriate for the court to entertain an application for a declaration of incompatibility at that time and in the circumstances of the cases before the Supreme Court.

38. However, it is only a maximum of four of the Justices who can be said to have concluded that it would never be institutionally appropriate for the court to consider and if appropriate grant a declaration of incompatibility in respect of s. 2 of the Suicide Act 1961. Two (Lords Sumption and Hughes) do reach that conclusion. Two others (Lords Clarke and Reed) arguably reach that conclusion or one that this would nearly always be the case.

39. As Parliament has debated proposed changes to s. 2 of the Suicide Act 1961 and not made them the Claimant accepted that Lord Clarke's approach would lead to a refusal of permission. I agree with the submission made on the Claimant's behalf that Lord Reed's approach is less obviously and strongly against him.

40. But even taking the reasoning of all four as being against the grant of permission they do not constitute a majority on this issue. Of the remaining five Justices, the reasoning of two (Lady Hale and Lord Kerr) is as clearly in favour of the grant of permission as that of Lords Sumption and Hughes is against it. That leaves three (Lord Neuberger, Lord Mance and Lord Wilson). The relevant reasoning of Lord Neuberger and Lord Wilson has much in common because of Lord Wilson's express agreement with Lord Neuberger. Lord Mance expresses general agreement with Lord Neuberger but parts of Lord Mance's reasoning are different or have a different emphasis. The reasoning of all three contain temporal, qualitative and evidential considerations.

41. In my view, it is at least arguable that the majority of the relevant reasoning in *Nicklinson* is that at some time and in some circumstances, it will be institutionally appropriate for the court to entertain an application for a declaration that s. 2 of the Suicide Act 1961 is incompatible, notwithstanding the common view that Parliament is the preferable forum for deciding the issues. On that basis, the issue on permission is whether in light of what has happened since the decision in *Nicklinson* it is arguable that in the circumstances of this case, and so now, it is institutionally appropriate for the court to entertain such an application.

42. In my view, that issue turns on the effect of the reasoning of Lord Neuberger, Lord Mance and Lord Wilson because if, taken together, that reasoning does not establish that the claim is arguable the reasoning of Lord Reed will not do so either. Also, if the effect of the reasoning of Lords Neuberger, Mance and Wilson does favour the Claimant he has an effective 5:4 majority on arguability.

43. The reasoning of all of Lords Neuberger, Mance and Wilson has:

    i) a temporal element, and
    ii) a qualitative element.

    These elements merge because the prospect that they all referred to of Parliament addressing the Assisted Dying Bill has occurred (see for example Lord Neuberger at paragraph 118, Lord Mance at paragraph 190 and Lord Wilson agreeing with paragraph 118 at paragraph 197).

44. The qualitative element is introduced by the references made by Lords Neuberger and Wilson to Parliament "satisfactorily addressing the issue". Lord Mance introduces a qualitative element at paragraph 190 by referring to a decision made by Parliament "after full investigation and consideration, in a manner which will command popular support".

45. Consideration of the qualitative element raises problems concerning the relationship between Parliament and the courts (see Article 9 of the Bill of Rights). But it is part of their reasoning and none of them said that a consideration by Parliament of the Assisted Dying Bill, or a decision by Parliament (by vote or convention) to continue, or which had the effect of continuing, a blanket ban, would be enough to exclude the court from considering whether s. 2 of the Suicide Act 1961 was compatible.

46. Rather, all three expressly envisaged an expansion of the issues to be considered by Parliament to the circumstances of Mr Nicklinson and Mr Lamb and so a different class of people to those within the ambit of the Assisted Dying Bill.

47. To my mind, the qualitative element of this reasoning linked to the knowledge that the Assisted Dying Bill was then before Parliament makes it arguable that the Supreme Court in *Nicklinson* decided that, without any breach of Article 9 of the Bill of Rights, the court could in the future consider what Parliament had done and conclude that taken individually or together the following would not be enough to exclude its consideration of whether s. 2 of the Suicide Act 1961 was compatible on the application of a person within the class covered by the Assisted Dying Bill (and perhaps more obviously of a person outside that class), namely:

    i) a consideration of the Assisted Dying Bill, and so its acceptance or (as happened) its rejection,

    ii) more generally, decisions by Parliament by vote or as a matter of convention (because time was not given for debate or a second reading of Lord Hayward's Bill - which was in materially similar terms to the Assisted Dying Bill) that had the effect of continuing the blanket ban on assisted suicide, and iii) answers to the questions put in the House of Lords (a) on 16 January 2017, as to the Government's position on whether it had any plans to legalise assisted dying for terminally ill capacitous adults with appropriate safeguards, and (b) on 7 March 2017, as to what assessment the Government had made of recent legislation on assisted dying in North America: and whether those laws provide an appropriate basis for legislation in England and Wales, and the short debates that followed.

48. Both Lord Neuberger and Lord Wilson arguably envisage that the time when it would be institutionally appropriate for the courts to consider making a declaration that s. 2 of the Suicide Act 1961 was incompatible could arise although Parliament has recently considered the section (see paragraphs 100, 118 and 192(e) and (f)), and so by now.

49. In any event, the stance taken by the Secretary of State in her skeleton argument and what has happened since the debate in the House of Commons on the Assisted Dying Bill (including the Government's response through Lord Keen of Elie to the question raised in the House of Lords on 16 January 2017 part of which is cited in the Secretary of State's skeleton argument and his comments on the Government's position at the end of the short debate on 6 March 2017) show that it is arguable that it will be some considerable time before Parliament reconsiders a Bill directed to changes being made to s. 2 of the Suicide Act 1961.

50. Paragraph 175 of the judgment of Lord Mance is an example of a passage that supports a conclusion that the evidential element of the reasoning of all three of Lords Neuberger, Mance and Wilson is founded on the absence of primary evidence and his reference to fresh and significantly different evidence in paragraph 174 needs to be read with this in mind. From that starting point it is arguable that an absence of a significant change in circumstances relating to the underlying arguments is not fatal to the Claimant's application for permission. Paragraph 112 of Lord Neuberger's judgment and its express agreement with paragraph 191 of Lord Mance's judgment also provide a starting point for this argument when appropriate evidence is put before and so can be tested and considered by the court.

51. In any event, the underlying arguments are well established and are unlikely to change albeit that they may be affected by changes in moral values and medicine and other evidence relating to them (e.g. as to the impact of systems of law that have and do not have a similar blanket ban on encouraging or assisting suicide). And this did not lead any of the three to find that the court should not entertain an application for a declaration that s. 2 of the Suicide Act 1961 is incompatible.

52. For these reasons, I reject the Secretary of State's stance that it is not arguable that Lords Neuberger, Mance and Wilson were contemplating or endorsing the bringing of these proceedings now and accordingly:

    i) so soon after Parliament's consideration of the Assisted Dying Bill and its further consideration of the issue, and

    ii) in circumstances in which there is a considerable overlap between and so insufficient change in the wider underlying circumstances (and so arguments and evidence) that fall to be taken into account.

*Discretion*

53. As I have mentioned earlier the prospect that the relief sought by the Claimant in the proceedings may not prompt debate in Parliament about a change in the law and so be effectively academic is inherent in the underlying problem of institutional competence addressed in *Nicklinson* and so, in my view, it does not found a conclusion that the Claimant should be refused permission to bring his claim.

*Preliminary issue on institutional competence*

54. As I am in the minority this is not a live issue but I record my views on it.

55. The time, trouble, financial and emotional expense of conducting a full hearing are factors in favour of this approach. Also, I doubt that the timetable sought by the Claimant is likely to be achieved.

56. However, it is well known that a preliminary issue can complicate and lengthen rather than simplify and shorten proceedings unless the hypotheses on which it is founded can be and are clearly defined and separated from the evidence and facts that may be found in the case. So, for example, consideration should be given to defining amongst other things the following, which have a connection to the elements of the reasoning of Lords Neuberger, Mance and Wilson, namely:

    i) the Parliamentary consideration and conclusions on the issues that the court should take into account. As to the past, this could be agreed but, as to the future, there may be issues on timing and other matters that need to be addressed particularly if the court is to be in a position to give guidance for future cases,

    ii) the evidence relied on by the parties that the court should take into account,

    iii) whether the court should proceed on any hypothesis relating to the conclusion on incompatibility (e.g. that the court would or might conclude that the section was incompatible), and more generally

iv) how the court should weigh conclusions of Parliament on relevant issues and potential conclusions by it on those and other relevant issues based on the evidence put before it and so extricate evidential issues from the preliminary issue.

57. As is apparent from the other application listed before us there may also be issues relating to what cases or issues in cases should be heard together.

**Mr Justice Jay:**

58. I agree that permission to apply for judicial review should be refused for the reasons given in the judgment of Burnett LJ, with which I agree. I agree also that the stay on the proceedings in the Family division should not be lifted.