Neutral Citation Number: [2017] EWCA Civ 275

Case No: C1/2017/0912

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM DIVISIONAL COURT
LORD JUSTICE BURNETT
[2017] EWHC 640 Admin

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/04/2017

Before:

LORD JUSTICE MCFARLANE
and
LORD JUSTICE BEATSON

- -

Between :

R(CONWAY)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR JUSTICE	**Respondent**

- -
- -

Mr Richard Gordon QC, Ms Annabel Lee (instructed by **Irwin Mitchell Solicitors**) for the **Appellant**
Mr James Strachan QC (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates : 11 APRIL 2017

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Approved Judgment

Lord Justice Beatson:

1. This is the judgment of the court to which we have both contributed in an application for permission to appeal against the decision of the Divisional Court on 31 March 2017: [2017] EWHC 640 (Admin). A majority of that court, Burnett LJ and Jay J, with Charles J dissenting, refused to grant the claimant, Mr Noel Douglas Conway, permission to apply for judicial review to seek a declaration under section 4(2) of the Human Rights Act 1998 that section 2(1) of the Suicide Act 1961 ("the 1961 Act") is incompatible with the European Convention on Human Rights ("ECHR"). Section 2(1) provides that a person commits a criminal offence if he or she does an act capable of encouraging or assisting the suicide or attempted suicide of another person and their act was intended to encourage or assist suicide or an attempt at suicide.

2. These proceedings arise out of tragic and distressing facts. In 2014, Mr Conway, now aged 67, was diagnosed with a form of Motor Neurone Disease. In November 2014, he was informed that he may have a life expectancy of between 6 and 18 months. He has largely lost his mobility and uses a wheelchair, and needs assistance with many everyday activities. His consultant neurologist, Dr Pall, stated that when he was diagnosed he was showing signs of respiratory failure but Dr Stockdale, his palliative care consultant, stated that in November 2016 his speech and swallow were not affected. He states that, if his breathing muscles collapse, which his respiratory nurse tells him is a possibility, he could die at any time. The evidence is that if he elects to stop using the non-invasive ventilation equipment treatment he is now using he would probably only have weeks at the most to live, but that the timing is uncertain, as is the nature of any pain or distress he may suffer.

3. Mr Conway wishes to enlist the assistance of a medical profession to bring about his death in a peaceful and dignified way at a time while he retains the capacity to make the decision. His family respect his decision and choices and wish to support him in every way they can, but his wife states she would be extremely concerned about travelling to Switzerland with Mr Conway so he can receive assistance from Dignitas.

4. The issue in Mr Conway's case is therefore the same or very similar to the issue considered by the Supreme Court in *R (Nicklinson)* v *Ministry of Justice (CNK Alliance Limited and Others Intervening)* [2014] UKSC 38, 2015 AC 657. That case was heard by nine justices of the Supreme Court who handed down their judgments on 25 June 2014, less than three years ago. Five justices held that in enacting section 4 of the Human Rights Act 1998, Parliament had given the courts power to declare legislation incompatible with the ECHR even where the decision fell within the state's margin of appreciation, that in exercising that power the courts could not compel Parliament to act to remove any incompatibility identified and so in that case it would have not been outside the court's constitutional or institutional powers to declare section 2 of the 1961 Act incompatible with ECHR Article 8, but it was inappropriate for it to do so. Whether the grounds in the present proceedings raise an arguable case justifying granting permission to apply for judicial review depends on a close analysis of what that case decided, and whether, and if so, what possibilities it left open.

5. Our summary of the positions of the nine justices in *Nicklinson's* case has benefited considerably from Burnett LJ's analysis in [7] – [17] of his judgment They took positions that fell into three broad groups. Lord Sumption, Lord Hughes, Lady Hale and Lord Kerr had settled but different views. Lord Sumption and Lord Hughes

considered that the question of relaxation of section 2(1) was for Parliament, and that Parliament could properly conclude that a blanket ban on assisted suicide was necessary for the purposes of Article 8, and it had already done so. Lady Hale and Lord Kerr, who dissented and would have made a declaration of incompatibility, considered that, unless Parliament devised a scheme which admitted of exceptions to section 2(1), the incompatibility would persist although they recognised that Parliament might take a different view and decline to change the law, as the Human Rights Act 1998 allows.

6. As Burnett LJ stated, the position of the remaining five justices fell in between these settled views. Lord Neuberger, Lord Mance and Lord Wilson concluded that the appeal should be disposed of in the same way but contemplated that circumstances may arise in the future in which an application for a declaration of incompatibility might succeed. At [116] of his judgment, Lord Neuberger gave four reasons which, he stated, when taken together "persuaded him that it would be institutionally inappropriate at this juncture, for a court to declare that section 2 is incompatible with article 8, as opposed to giving Parliament the opportunity to consider the position without a declaration. In summary, these were: **(1)** the issue is deeply controversial and sensitive; **(2)** it would not be simple to identify a remedy for an incompatibly; **(3)** Parliament had recently and repeatedly considered section 2 and a Bill was under consideration at the time: **(4)** in the decision in *R (Pretty)* v *Director of Public Prosecutions* [2002] 1 AC 800 the House of Lords had given Parliament to understand that a declaration of incompatibility would be inappropriate, a view reinforced by the conclusions of the Divisional Court and the Court of Appeal in the *Nicklinson* case itself. Lord Neuberger also stated (see [115] and [119]ff, and [125] – [127]) that in any event he would not have made a declaration of incompatibility because of the unsatisfactory state of the evidence and the arguments available to the court.

7. While Lord Mance and Lord Wilson agreed generally with Lord Neuberger's reasoning and conclusions, there are differences in the way the three justices address the question of when, if at all, circumstances may arise in which an application for a declaration of incompatibility might succeed. Lord Neuberger stated at [118] that "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 declaration of incompatibility may be made."

8. Lord Neuberger also stated at [118] that it would not be appropriate or even possible to identify in advance what amounts to a reasonable time in this context but that, bearing in mind the circumstances of the applicants in that case 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 with or in addition to whether there should be legislation along the lines of Lord Falconer's Assisted Dying Bill that was before Parliament at that time. He did not consider it 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 because that would have to be judged if and when a further

application was made, but he added that "it may transpire that, even if Parliament did not amend section 2, there should still be no declaration of incompatibility".

9. Lord Wilson stated at [197(f)] that one of Lord Neuberger's "crucial conclusions" was that, "were Parliament not satisfactorily to address that issue, there is a real prospect that a further, and successful, application for a declaration of incompatibility might be made" and (at [204]) indicated that if Parliament failed satisfactorily to address the issue, a fresh claim for a declaration of incompatibility "is to be anticipated" supported by "focussed evidence and submissions" which he stated the court in that case lacked, and while the conclusion could not be prejudged "there is a real prospect of success". Lord Mance was more cautious in the possibilities left open. He stated at [163] – [164] that where a "considerable" margin of appreciation exists at the international level, under the Human Rights Act 1998 both the legislature and the courts have a potential role in assessing whether the law is at the domestic level compatible with the rights under the ECHR and that "the legislator's choice is not necessarily the end of the matter", but that questions of institutional competence arise at the domestic level. He stated that whether section 2 is incompatible raises difficult and sensitive issues which a court was less well equipped than Parliament to address. He also stated (at [190]) that Parliament was certainly the preferable forum in which any decision should be made, after full investigation and consideration, "in a manner which will command popular acceptance".

10. Lord Clarke and Lord Reed agreed generally with Lord Sumption and Lord Hughes. Lord Clarke stated that if Parliament debated the matters and after mature consideration concluded that there should be no change in the law he would hold that no declaration of incompatibility should be made. He, however, stated (see [293]) that if Parliament chose not to debate the issues he would expect the court to intervene. Lord Reed stated that, while the Human Rights Act introduced a new element into our constitutional law and entailed some adjustment of the constitutional roles of the courts, the executive and the legislature, it did not eliminate the differences between them or alter the fact that certain issues are by their nature more suitable for determination by Government or Parliament than by the courts. He concluded that the issue before the court in that case raised highly controversial questions of social policy and, in the view of many, moral and religious questions on which there is no consensus, so that while the courts did not lack jurisdiction to determine the question the nature of the issue required Parliament to be allowed a wide margin of judgment.

The judgments in the Divisional Court

11. Burnett LJ, with whom Jay J agreed, considered (at [5]) that Parliament has considered the issue of assisted dying since the decision of the Supreme Court in *Nicklinson's* case and has decided that for the present it will not make legislative exceptions to section 2(1) of the 1961 Act. The question whether someone will be prosecuted for assisting suicide is governed by a detailed policy promulgated by the Director of Public Prosecutions which has also been subject to Parliamentary scrutiny and debate. He concluded at [5] that, while the *Nicklinson* case recognised the court has jurisdiction to issue a declaration of incompatibility in these circumstances even where Parliament has struck the balance for itself, that case also recognised that Parliament was better able to resolve these sensitive issues and, for reasons which he then gave, he concluded that "it is not arguable that a declaration of incompatibility

should be made in the light of the post-*Nicklinson* parliamentary consideration of this very difficult moral issue". We return to Burnett LJ's judgment below.

12. Charles J dissented. He concluded (see [30], [36], [38] and [40]) that it did not suffice for this claim to be "not arguable" that the ultimate decision was for Parliament because at most only four of the justices of the Supreme Court could be understood 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 section 2 of the Suicide Act 1961. Charles J considered that the temporal, qualitative and evidential considerations in the reasoning of Lords Neuberger, Mance and Wilson meant the question of institutional appropriateness and thus the arguability of judicial review depends in part on what has happened since the decision in *Nicklinson's* case: see [41]. Notwithstanding that, at [50] he also stated that an absence of a significant change in circumstances is not fatal.

13. Burnett LJ stated at [4] that "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". He also stated that "the core reason" for refusing permission "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."

14. Burnett LJ referred to Lord Neuberger's conclusion that it was "constitutionally" open to a court to consider the compatibility of section 2(1) with the ECHR, but it was not "institutionally" appropriate to do so at the time: see [11] and (at [14]) summarised to the four reasons given by Lord Neuberger at [116] to which we have referred.

15. Burnett LJ discussed the Parliamentary consideration of the question since the *Nicklinson* decision in the debates on the bills introduced by Lord Falconer of Thoroton, Rob Marris MP and Lord Hayward at [18] – [22]. He stated that Article 9 of the Bill of Rights 1689 prevented a court from scrutinising the content of a Parliamentary debate and stated that in the context of a consideration of proportionality under the Human Rights Act, it is the outcome of Parliamentary proceedings and not their content which falls to be considered: see [20]. He also stated (at [23]) that, in his 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, that the materials before the court as to how legalised assisted suicides operates in the few jurisdictions which allow it show that the topic remains one of intense controversy and that Parliament, despite full investigation and consideration has, paraphrasing Lord Mance in *Nicklinson* at [190], been unable to coalesce around a change in the law which would command popular acceptance. Burnett LJ considered that Parliament had done what Lord Mance considered appropriate and that it was clear that his approach and that of Lords Sumption, Hughes, Clarke and Reed would lead to the conclusion that a declaration of incompatibility would be institutionally inappropriate in the light of that further Parliamentary consideration: see [25].

16. Burnett LJ (at [26]) rejected Mr Gordon's submission that Lord Neuberger's reference at [118] of *Nicklinson's* case to which we have referred that since Parliament has now had the opportunity to address the issue "in the knowledge that, if it is not satisfactorily addressed, there is a real prospect that a further, and successful, application for declaration of incompatibility may be made" was an indication that it would be institutionally appropriate for a declaration to be issued after such consideration. Burnett LJ stated that Lord Neuberger expressly left open the possibility that a declaration of incompatibility would not be the necessary consequence of Parliament leaving the law unchanged. Lord Neuberger's concern was that Parliament should reconsider the matter while recognising that the outcome of that reconsideration was for Parliament. Burnett LJ concluded (at [27]) that Parliament had done precisely what the Supreme Court suggested was necessary and it therefore remained institutionally inappropriate for the court to make a declaration of incompatibility.

The grounds of appeal and the submissions of the parties

17. The first argument in support of permission to appeal in the skeleton argument of Mr Gordon QC, Mr Ruck Keene, and Ms Lee, on behalf of Mr Conway, is (see paragraph 4) that, for the purposes of permission to appeal, it is self-evident from the division of opinion in the Divisional Court that there is a realistic prospect of success. They also argue that the issues raised about Mr Conway and those in a similar position to him are of general public importance and that there is a compelling reason for the appeal to be heard.

18. They advance three substantive grounds underpinning this and upon which they also argue that the Divisional Court erred in refusing to recognise that there are arguable grounds justifying the grant of permission to apply for judicial review and refusing permission.

19. The first of the substantive grounds is that Burnett LJ (with whom Jay J agreed) misconstrued the majority judgments in *Nicklinson's* case and erred in concluding that Parliament has done precisely what the Supreme Court suggested was necessary. The second is that they erred in concluding that Mr Conway's claim for a declaration of incompatibility was "institutionally inappropriate". The third is that they were wrong to conclude that his application for permission to appeal was unarguable, and also argue that there is a compelling reason for the appeal to be heard.

20. As to the first ground, it was submitted that Burnett LJ misinterpreted Lord Neuberger's use at [27] of the term "satisfactorily addressed". It was argued that the logical consequence of the majority decision is that permission to apply for judicial review could never be granted in any future claim for a declaration that section 2(1) of the Suicide Act 1961 was incompatible with Article 8 and this interpretation wrongly characterise Lord Neuberger as agreeing with Lords Sumption, Hughes and Reed. It would in substance amount to ruling out exercising the jurisdiction that 7 justices agreed had been conferred on the court by the Human Rights Act once Parliament had addressed the issue, something which Lord Neuberger (at [112]) described as an "abdication of judicial responsibility. It was argued (skeleton §7) that Lord Neuberger made clear at [112] that the Court could make a declaration of incompatibility provided that the evidence and the arguments justified such a conclusion and (skeleton §§9-10) that the statements of Lord Mance at [163] that "the legislator's

choice is not necessarily the end of the matter" and on Lord Wilson's indication (at [204]) that the current law, if left unamended, was incompatible with Article 8 were in substance to the same effect. Taking account of the position of Lady Hale and Lord Kerr, it is, submitted Mr Gordon, at least arguable that a majority in the Supreme Court were urging Parliament to confront the issue to the extent that it could not leave the law unchanged to avoid the real possibility of a declaration of incompatibility being made.

21. Mr Gordon also submitted that Burnett LJ erred in stating at [26] that it was Mr Conway's case that Parliament was required to confront the issue to the extent that it could not leave the law unchanged. The argument was that the law is incompatible with ECHR Article 8 and a declaration of incompatibility should be made, recognising that it was open to Parliament to make a political decision not to remove the incompatibility. For this reason, he also maintained that, contrary to Burnett LJ's view, it was not necessary to consider what was said in Parliament so that the Article 9 of the Bill of Rights issues did not arise.

22. We turn to the second ground, "institutional appropriateness". It was submitted that although Burnett LJ recognised that the Supreme Court had drawn a line between the constitutional competence of the court to consider this matter – the question of jurisdiction – and institutional competence he elided the logic of the line by wrongly analysing the Supreme Court as deciding that Parliament's decision not to change the law was an institutional bar to the exercise by the court of its jurisdiction. Mr Gordon argued that now there is substantial factual and expert evidence before the Court, which was notably absent in *Nicklinson,* and the matter is no longer a "live question" before Parliament as it was at the time of the decision, it is institutionally appropriate for the Court to decide whether the law is incompatible with the Convention. The evidence now before the Court enables it to consider and determine whether the current law is incompatible with the Convention. He also argued that the reasoning of Charles J is to be preferred to that of the majority: §§11-12. As to the fourth factor mentioned by Lord Neuberger in [116], the understanding Parliament would have had as a result of the decisions in *Pretty's* case and the conclusions of the Divisional Court and the Court of Appeal in the *Nicklinson* case itself that a declaration of incompatibility would be inappropriate, it was said that the statements by Lord Neuberger at [113] and Lord Wilson at [206] in *Nicklinson* constituted a warning shot. That gave Parliament the opportunity to consider whether to amend section 2 in the light of what Lord Neuberger stated at [113] "may be said to be the provisional views of this court, as set out in our judgments in these appeals" and the observation of Lord Wilson at [206] that "by the judgment of five members of this court … the prospect of some such exception has come at least somewhat closer".

23. As to a compelling reason for the appeal to be heard, it was submitted that the issues raised are of general public importance. Moreover, the Article 8 rights engaged are fundamental to the personal and psychological autonomy and integrity of Mr Conway and others suffering from similar terminal conditions: see skeleton §§14-16.

24. Mr Strachan QC, on behalf of the Secretary of State, submitted that the essential question is whether the circumstances which led the Supreme Court to refuse to grant a declaration of incompatibility in June 2014 have changed so that a different outcome may be possible today. He argued that it was unarguable that the circumstances had changed. The reasons for not intervening in 2014 summarised by

Lord Neuberger at [116] were the same today. The issue remained deeply controversial and sensitive, and it remained difficult to identify a remedy for any incompatibly. The matter remained an active matter of debate including political debate.

25. As to the fourth factor, and Mr Gordon's "warning shot" submission, Mr Strachan submitted that whether the decision of the Supreme Court should be regarded in that way depended on the understanding of what the majority position was. He submitted that the Divisional Court was correct to conclude at [25] – [26] that 5 of the justices (Lords Mance, Sumption, Hughes, Clarke and Reed) considered that it was institutionally inappropriate to intervene in the light of the further Parliamentary consideration, or as Mr Strachan put it, while Parliament "continues to address the issue" and that Lord Neuberger's concern was that Parliament should reconsider the matter whilst recognising that the outcome of that reconsideration was for them.

26. As to Mr Conway's case on what Lord Neuberger meant by the term "satisfactorily addressed" in [118], Mr Strachan, stated that he had understood this in the same way as Burnett LJ, that the law would have to be changed. However, if what it meant was that Parliament would have to debate the issue and have it under active consideration, it remains institutionally inappropriate for a declaration of incompatibility to be made because (see [22] – [23]) the matter had been debated in Parliament on 6 March 2017 two weeks before the hearing in the Divisional Court and three weeks before its judgment. Moreover, Lord Neuberger at [118] recognised that "it may transpire that, even if Parliament did not amend section 2 [after considering whether to do so], there should still be no declaration of incompatibility". He argued that the reason it is unarguable that it is now institutionally appropriate for the court to intervene is that, as all the justices recognised, Parliament is best suited to deal with the question and, if the question is still being debated, it remains institutionally inappropriate for the court to intervene.

Decision

27. Our starting point is to reject the submissions that Burnett LJ was insufficiently alive to what Mr Gordon described as the temporal question in *Nicholson;* that is the significance of the fact that at the time of that case Parliament had an Assisted Dying Bill before it which it was actively considering. See e.g. [11] and [14] and the references in [4] to the circumstances which led the Supreme Court to refuse to grant a declaration, and to Mr Gordon's argument at [12]. He also referred to the debate and the question very shortly before the hearing in this case.

28. This application undoubtedly raises complex questions. A number of factors suggest that the decision of the majority of the Supreme Court that it was institutionally inappropriate to consider the substantive question before the court, the compatibility of section 2 of the 1961 Act with ECHR article 8, precludes further consideration now. One is that the Supreme Court considered this issue less than three years ago and debated it with what Lord Wilson described as a unique intensity.

29. A second concerns changes since *Nicklinson's* case. As stated by Burnett LJ (see [18] and [22]-[23]), since then three private members bills have been rejected by Parliament, the Government have made it clear that they have no intention of introducing legislation, and the Opposition have indicated that they would be unlikely

to press for parliamentary time. But, other than the fact that the matter is no longer before Parliament and Mr Conway's case is supported by direct expert evidence, matters have not changed.

30. As Mr Strachan submitted, the issue remains a difficult, controversial and sensitive one with moral and religious dimensions which justify a cautious approach by the courts, particularly since it is not simple to identify a cure for any incompatibility that might be found. As well as what Lord Neuberger stated at [116], we see the powerful way this was put by the Court of Appeal in *Nicklinson's* case by Lord Dyson MR and Elias LJ. At times, the arguments advanced on behalf of Mr Conway (see paragraph 11 of the skeleton argument for the hearing before us) also appeared to interpret the Supreme Court's decision in *Nicklinson* as concluding that unless Parliament changed the law, it would be institutionally appropriate for the court to intervene. That cannot be right as a matter of principle, and, in his oral submissions, Mr Gordon stepped back from it.

31. Mr Gordon did not emphasise the decision and approach of the Supreme Court of Canada in *Carter v Canada* in his submissions. We consider that he was correct not to do so. While, as Lady Hale stated in *Nicklinson's* case at [320], it is of interest, it does not materially alter the position. The decisions of Smith J in that case, which was affirmed by the Supreme Court of Canada, and those of the British Columbia Court of Appeal were before the court in *Nicklinson's* case. The decisions of Smith J and the Supreme Court of Canada are based upon the different constitutional principles in the Canadian Charter of Rights and different considerations of institutional appropriateness under it. The decision was primarily concerned with whether the rule prohibiting assisted dying was a disproportionate interference with the legitimate aim of protecting the vulnerable from being induced to commit suicide. It was (see Lord Mance's comments at [178] – [181] of *Nicklinson's* case) not focussed on the question of whether it is institutionally appropriate for this issue to be decided by the courts of Canada. It therefore does not directly bear on the question of whether it is institutionally appropriate for the compatibility of section 2 of the 1961 Act to be decided by the courts of England and Wales, and probably the courts of other legal jurisdictions in the United Kingdom.

32. Notwithstanding these factors, the undoubted need for caution, and the fragility of the prospects of a successful application for a declaration of incompatibility, it is also important to remember that what is at issue is permission to apply for judicial review. We have referred to the reliance by Charles J on the fact that there is a qualitative element introduced by Lords Neuberger, Wilson and Mance. We do not consider that the judgments of the Supreme Court, and in particular that of Lord Neuberger, can be read as having been intended to mean that it would be appropriate for a court to scrutinise Parliamentary debates. Article 9 of the Bill of Rights 1689, which prevents a court from judging the quality of debates in Parliament, was not referred to by the Supreme Court. References to "satisfactory addressing of the issue" do not and constitutionally cannot, require a qualitative assessment of the nature of the debates. In our view, the need for a "satisfactory" assessment simply meant that the issue had to be addressed adequately, i.e. it had to be dealt with.

33. Burnett LJ clearly recognised the distinction between issue (b) in *Nicklinson*, whether it is constitutionally open to United Kingdom courts to consider the compatibility of section 2 with article 8, the "jurisdiction question", and issue (c), whether it is

institutionally appropriate for the courts to do so, the courts' discretion as to the exercise of their jurisdiction; see e.g. [11] and [13]. In any event there is some overlap between the two because questions of institutional appropriateness can feed into questions of jurisdiction and in practice limit what the court can do even on a jurisdictional issue, see *R v MMC, ex p South Yorkshire Transport plc* [1993] 1 WLR 23, *per* Lord Mustill, where a jurisdictional criteria was imprecise. But, for the reasons below, we consider that he may not have sufficiently reflected the distinction in considering the consequences of his conclusion.

34. Mr Strachan QC submitted that five of the nine justices of the Supreme Court in *Nicklinson's* case concluded that it was institutionally inappropriate to intervene whilst Parliament continues to address the issue. We consider that this overlooks the present reality that Parliament has now effectively made a decision not to change the law, and that is its settled will. Burnett LJ recognised that the "the settled will of Parliament" was not to change the law and (at [27]) found that as a result of "continuing parliamentary attention, and renewed recent determination of the underlying issue", the claim is unarguable. It is, however, difficult to see how Burnett LJ's conclusion about the consequences once there has been a debate or a vote does not in practice rule out any future exercise of the jurisdiction to make a declaration of incompatibility because of "the settled will of Parliament".

35. There is no indication in [27] of any time limit, and it would have been difficult for one to be given in the light of Lord Neuberger's statement that what amounts to a reasonable time cannot be identified in advance and the judgment as to institutional appropriateness will depend on the circumstances of any new application and the evidence adduced in support of it. But, if the fact that Parliament has made a settled decision precludes the exercise of the jurisdiction in such an unqualified and unpredictable way, why is that not arguably an abdication of jurisdiction of the very sort expressly deprecated by Lord Neuberger and which is also inconsistent with the approaches of Lord Wilson, the dissenting justices and possibly Lord Mance?

36. It is possible that Burnett LJ's reliance at [23] and [27] on the factors considered by Lord Neuberger in [116] in determining that it remains institutionally inappropriate to consider the compatibility of section 2 means that it is possible he would envisage a future claim for judicial review being granted permission, if, for example, the issue has not had recent or continuing parliamentary attention, or if an international consensus on the matter develops. As to the former, it would be possible to balance the need not to abdicate a jurisdiction just because the court is unlikely to exercise it with the need to have regard to the efficient deployment of judicial and court resources by having a period within which a matter is settled, but the question is what period. Moreover, having a period appears to be precluded by Lord Neuberger's judgment. As to the latter, that would require the courts of this jurisdiction to wait for the decisions of international bodies and other countries notwithstanding the role given to them in the Human Rights Act, and such consensus is in our judgment unlikely to happen for a considerable time so that this would itself be a form of judicial abdication.

37. The reasoning of Lord Neuberger and those justices who, to varying degrees agreed with him as to the future circumstances in which an application for a declaration of incompatibility might succeed has weighed heavily with us. So has the fact that, at the time of the decision in *Nicklinson*, the issue was under active consideration by

Parliament, which held the second reading of Lord Falconer's Bill less than a month after the decision. At that time seven of the nine justices considered that was not the time to intervene. Two (Lords Sumption and Hughes) thought there should never be intervention in this issue; the others were less absolute in the ways we have summarised earlier.

38. We have identified a number of problems with the courts grappling with this issue, the factors pointing to institutional inappropriateness referred to, for example by Lord Neuberger at [116], and the possible impact of Article 9 of the Bill of Rights, referred to by Burnett LJ (see [19] and [26]). Notwithstanding these points, we consider that, in the context of considering permission for judicial review, the fact that since *Nicklinson* Parliament has made a decision not to change the law and the matter is no longer under active consideration means that Mr Conway should be entitled to argue that it is no longer institutionally inappropriate for the court to consider whether to make a declaration of incompatibility, whilst giving due weight to Parliament's recent decision.

39. In *Nicklinson's* case, one of the reasons given by members of a majority of the Supreme Court for not granting a declaration of incompatibility was the unsatisfactory state of the evidence before the court. Lord Neuberger was not properly confident that there was sufficient evidence. He stated that the court would need to be "satisfied that there was a physically and administratively feasible and robust system whereby the applicants could be assisted to kill themselves, and that the reasonable concerns expressed by the Secretary of State (particularly the concern to protect the weak and the vulnerable) were sufficiently met so as to render the absolute ban on suicide disproportionate" (at [120]). Lord Mance noted that the case had not involved a consideration of primary material, as much of the material was "second hand, adduced in other litigation or by other inquiries" (see [175]-[177]).

40. The material before the court in the present appeal, although similar in substance to that in *Nicklinson*, is a more wide-ranging selection of primary factual and expert evidence. It includes evidence from consultant clinicians with experience of treating those with terminal illnesses including psychiatrists, a psychologist, a neurologist, an oncologist, an intensive care physician, and a specialist in palliative medicine dealing with temporal prognosis, capacity, and withdrawing and withholding treatment. There is also evidence from a legal academic whose specialism is in assisted dying and the safeguards in countries with permissive legal regimes, and from the Chief Executive of Dignity in Dying, from three of Mr Conway's treating clinicians, his family and friends, others with relevant experience, and a number of others with terminal diseases or their surviving spouses or parents, including some from jurisdictions in which assisted death is permitted.

41. The inadequacy of the evidence in *Nicklinson* was a secondary reason for the majority decision not to exercise institutional competence because the justices who dealt with both questions considered that the question whether it is institutionally appropriate to consider the matter at all was a prior question which it was first necessary to determine. In our judgment, subject to that caveat, it is arguable that the evidence demonstrates that a mechanism of assisted dying can be devised for those in Mr Conway's narrowly defined group that is practical so as to address one of the unanswered questions in *Nicklinson*. That, while not a free-standing reason for granting permission, supports our primary reason, based on the change in the situation

because the matter is no longer before Parliament which has now reached a settled decision not to change the law.

42. In our judgment, permission to appeal and permission to apply for judicial review should be granted. We remit this matter to the Divisional Court to hear and determine the case.