JUDICIARY OF
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PRESS SUMMARY

R (on the application of Conway) (Appellants) v The Secretary of State for Justice (Respondent) and Humanists UK, Not Dead Yet (UK) and Care Not Killing (Interveners)

On appeal from *R (Conway) v Secretary of State for Justice* [2017] EWHC 2447 (Admin)

References in square brackets are to paragraphs in the judgment

LORD/LADY JUSTICES: Sir Terence Etherton Master of the Rolls, Sir Brian Leveson President of the Queen's Bench Division, Lady Justice King.

BACKGROUND TO THE APPEAL

The appeal raises the issue as to whether the present state of the law relating to assisting suicide infringes the European Convention on Human Rights ("the Convention").

Mr Conway is a 68-year-old man who was diagnosed with a form of motor neurone disease ("MND") in November 2014. By the time of the hearing before the Court of Appeal his condition had deteriorated to the extent that he required non-invasive ventilation ("NIV") for approximately 23 hours each day. Mr Conway has to use a wheelchair and requires ever increasing levels of assistance with daily life, eating and bodily functions.

When Mr Conway has a prognosis of six months or less to live, he wishes to have the option of taking action to end his life peacefully and with dignity, accomplished with the assistance of the medical profession, at a time of his choosing, whilst remaining in control of such final act as may be required to bring about his death.

The Court of Appeal expresses their deep sympathy with Mr Conway's circumstances and profound respect for the dignified and resolute way in which he has been coping with what is a terrible disease **[3].** Mr Conway attended the hearing by video link in order to listen to part of the submissions made by Counsel on his behalf.

Section 2(1) of the Suicide Act 1961 prohibits the assistance which Mr Conway desires. By section 1 of the 1961 Act, Parliament abolished the rule of law under which it was a crime for a person to commit suicide. Parliament decided, however, to maintain the criminal prohibition on acts capable of providing encouragement or assistance to a person to enable them to commit suicide. No prosecution can be brought without the permission of the Director of Public Prosecutions. His revised policy in relation to prosecutions under Section 2 is published in the "Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide ("the 2010 guidelines").

Mr Conway applied to the High Court for a declaration of incompatibility under section 4 of the Human Rights Act 1998 ("HRA") on the basis that section 2(1) of the 1961 Act is a disproportionate interference with his right to respect for his private life under Article 8 of the European Convention on Human rights ("Article 8 ECHR"). On 5 October 2017, the Divisional Court dismissed Mr Conway's application.

Mr Conway has appealed to the Court of Appeal.

The Secretary of State filed a Respondent's Notice cross appealing on two grounds.

JUDGMENT

By a judgment of the Court, the Court of Appeal dismisses the appeal brought by Mr Conway.

BACKDROP TO THE JUDGMENT

Since its enactment, the criminal offence in section 2(1) as well as its compatibility with Convention rights has been the subject of much debate in Parliament and the courts. The Court of Appeal therefore sets out in detail in the judgment both the Parliamentary engagement with section 2 and questions of assisted suicide and the relevant (domestic and European) court decisions **[10-48]**.

Prior to the present case, *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657 (*"Nicklinson")* was the most recent challenge to section 2(1). On 5 June 2014, shortly before the judgment of the Supreme Court, Lord Falconer had introduced his Assisted Suicide Bill in the House of Lords.

The Supreme Court unanimously held that Section 2(1) engages Article 8 and the question whether to impose a general ban on assisted suicide lies within the margin of appreciation of the United Kingdom. Whether section2(1) is incompatible with Article 8 is a domestic question for the United Kingdom courts to decide under the HRA. By a majority of seven to two, the Supreme Court dismissed the appeal against the refusal to grant Mr Nicklinson (and others) a declaration of incompatibility.

The virtually unanimous view of the Justices was that, in principle, Parliament was a better forum for determining the issue of legalising assisted suicide than the courts **[191]**.

Nicklinson is not binding on the Court of Appeal in Mr Conway's case as *Nicklinson* focused on the situation of people in long term suffering rather than, as under Mr Conway's proposed scheme of assisted suicide, those suffering from a terminal illness who are within six months of death **[134]**.

Following *Nicklinson*, Parliament has considered the question of assisted suicide through three Bills (the Falconer Bill, the Marris Bill and the Hayward Bill). The issue was most recently the subject of a brief debate on 6 March 2017. Each Bill would have legalised assisted dying in certain specified circumstances broadly along the lines proposed by Mr Conway. The only Bill to go to a vote in the House of Commons was the Marris Bill, which was rejected by 330 votes to 118.

A major feature of the disagreement between the parties on appeal is whether the Divisional Court gave too much deference to Parliament's decision incorporated in the 1961 Act and in the failure of successive attempts since then to change the law on assisted suicide.

REASONS FOR THE JUDGMENT

The appeal focused on three issues **[67-70]**:

i) The correct way in which the court should approach Parliament's decision not to amend section 2(1);
ii) How the safeguards put forward on behalf of Mr Conway should be addressed; and
iii) The weight to be placed on personal autonomy.

The Secretary of State cross-appealed on the basis that the Divisional Court had erred in concluding that the case of *R (Pretty) v Director of Public Prosecutions* [2001] UKHL 61, [2002] 1 AC 800 ("*Pretty*") is not binding authority and sought a finding that it is institutionally inappropriate for the courts, rather than Parliament, to consider the compatibility of section 2(1) with Article 8 **[12-16]**.

The Court of Appeal rejects the Secretary of States submission that the court need go no further than the decision of the House of Lords in *Pretty* which, they say, is binding and which held that that section 2 of the 1961 Act meets the conditions in Article 8(2) and is therefore compatible with Article 8. This is firstly because no Justice of the Supreme Court suggested that the decision in *Pretty* had a binding precedential effect on a domestic application of Article 8(2) and the Supreme Court plainly considered the matter to be at large. Secondly, the balancing act falls to be considered on the facts as they are now **[124-128]**.

The Court of Appeal therefore holds that it must consider whether the blanket ban on assisted suicide is necessary and proportionate having regard to the proposed scheme put forward by Mr Conway **[129]**.

The Court of Appeal does not accept the starting point suggested on behalf of Mr Conway that the Court is as well placed as Parliament to determine the necessity and proportionality of the blanket ban on assisted suicide in order to protect the weak and vulnerable. Nor does it accept that the issue under Article 8(2) in the present case is focused solely on the legitimate aim of the protection of those weak and vulnerable people. The Court holds that whilst the protection of the weak and vulnerable is a critical issue in evaluating the suitability and efficacy of Mr Conway's proposed scheme (which involves the involvement of the Family Division of the High Court to scrutinise every case of assisted suicide), the decision raises a number of important moral and ethical issues on which society is divided and many people hold passionate, but opposing, views **[135]**, including the competing values as between the concept of sanctity of life and the right to personal autonomy.

Voluminous evidence was filed as to the appropriateness and efficacy of Mr Conway's proposed scheme, important parts of which were conflicting **[142-171]**, including in relation to the risk of coercion and the undermining of the doctor /patient relationship. The Court of Appeal holds that it was right that there was no request for oral evidence or cross-examination as the conflict inherent in the moral and ethical issues involved in balancing principles of the sanctity of life and the right to personal autonomy cannot be resolved in a forensic setting by cross-examination. The court further observed that the evidence before the court is necessarily limited to that which the parties wish to adduce, and the court, unlike Parliament or the Law Commission of England and Wales, cannot conduct consultations with the public or engage experts or advisors of its own accord **[189]**.

The court does not consider that the Divisional Court was under an obligation to set out in meticulous detail all the evidence before them. In the light of the matters to which the Divisional Court did refer and to which the Court of Appeal specifically refers, it could not be said that the Divisional Court did not have material upon which to conclude that the scheme put forward on Mr Conway's behalf was inadequate to protect the weak and vulnerable and failed to give adequate weight to the moral significance of the sanctity of life and on the scheme's potential to undermine relations of trust and confidence between doctors and patients **[204]**.

The Court does not accept the submission that, bearing in mind the extent to which compromise to the sanctity of life has been made in *Re B, Bland* and other cases and that it is not a criminal offence to attempt to commit suicide, the Divisional Court had failed to grapple with the need for compromise between the principles of the sanctity of life and autonomy. The law has imposed a limit on personal autonomy to reflect wider moral, ethical and practical issues which include but are not limited to the protection of the weak and vulnerable. The court highlights the fact that consent is not always a defence to wounding or the infliction of actual or grievous bodily harm **[139]**.

The Court holds that in withdrawal of treatment cases where the court is dealing with common law rights, that is to say the right to refuse medical treatment (even where such treatment is necessary) and where Parliament is not proposing to intervene, the court has no option but to tackle the moral, ethical and social considerations in order to reach a decision; in particular, the court is most often determining what is in the best interests of a person who is legally unable to determine the matter for himself or herself. There is no common law right to assisted suicide. Parliament has expressed a clear position in section 2(1) and has subsequently and relatively recently rejected legislation along the lines of Mr Conway's scheme. What is in issue is not the application of well-established principles, but the possible legalisation of conduct which was criminal at common law and is now criminal as a matter of statute **[180-181]**.

The Court is of the view that Parliament is a far better body for determining the difficult policy issue in relation to assisted suicide and the matters submitted on behalf of Mr Conway in relation to safeguards, possible codes of practice and autonomy are not a sufficient answer **[182-184]**.

The Court of Appeal considered the Supreme Court judgments in the recent case about the anti-abortion laws in Northern Ireland. (*In the matter of an application by the Northern Ireland Human Rights Commission for judicial review (Northern Ireland)* [2018] UKSC 27) ("the Northern Ireland Case").Whilst dismissing the appeal, a majority of the Supreme Court decided that, had they had jurisdiction, they would have held the current prohibition on abortion in Northern Ireland is incompatible with Article 8, insofar as it forbids abortion in cases of rape, incest and fatal foetal abnormality **[195]**. The Court of Appeal considers that the present case is different from the issue that was before the Supreme Court for a number of reasons including that the issue of assisted dying is more difficult and controversial in terms of its moral and religious dimensions and that the UK's approach to assisted dying largely reflects the approach over almost the whole of Europe, whereas the abortion laws in Northern Ireland are almost alone in their strictness. Further, there was no assurance as to when or even if, the Northern Ireland Assembly would address the issue, whereas Parliament has actively considered the issue of assisted dying and has given no indication that it would not do so again **[196-200]**.

The Court when considering whether the blanket ban on assisted suicide is necessary and proportionate has in mind the DPP's policy and, whilst the court recognises that a retrospective examination of events in the context of that policy will always be more traumatic and difficult, the possibility of prosecution is not a high risk **[185]**.

The Court of Appeal rejects the submission on behalf of Mr Conway that the Divisional Court gave excessive deference to Parliament in carrying out its assessment of justification and proportionality under Article 8(2). Nor does it accept the submission on behalf of the Humanists UK that weighing the views of Parliament heavily in the balance in a case such as the present one is an abdication of the responsibility to consider the merits of the arguments on either side in relation to Article 8(2) **[205]**.

The Divisional Court concluded that the prohibition in section 2 of the 1961 Act achieves a fair balance between the interests of the wider community and the people in the position of Mr Conway. The Court does not consider that the approach or conclusions of the Divisional Court can be faulted and the appeal and respondent's notice are therefore both dismissed.

NOTE:

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the court is the only authoritative document. Judgments are in the public domain and are available at [2018] EWCA (Civ)