Case No: CO/7774/2010; CO/7850/2011

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/10/2012

Before:
LORD JUSTICE TOULSON
MR JUSTICE ROYCE
and
MRS JUSTICE MACUR

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Between:

THE QUEEN ON THE APPLICATION OF TONY NICKLINSON	**Claimant**
- and -	
MINISTRY OF JUSTICE	**Defendant**
DIRECTOR OF PUBLIC PROSECUTIONS	
JANE NICKLINSON	**Interested Parties**

And Between:

THE QUEEN ON THE APPLICATION OF AM	
- and -	**Claimant**
(1) DIRECTOR OF PUBLIC PROSECUTIONS	
(2) THE SOLICITORS REGULATION AUTHORITY	**Defendants**
(3) THE GENERAL MEDICAL COUNCIL	
AN NHS PRIMARY CARE TRUST	**Interested Party**
THE ATTORNEY GENERAL	
CNK ALLIANCE LTD (CARE NOT KILLING)	**Interveners**

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Paul Bowen QC (instructed by **Bindmans LLP**) for **Tony Nicklinson**

David Perry QC and James Strachan (instructed by **Treasury Solicitor**) for the **Ministry of Justice**
Philip Havers QC and Adam Sandell (Instructed by **Leigh Day & Co**) for **AM**
John McGuinness QC (Instructed by **CPS Appeals Unit**) for the **Director of Public Prosecutions**
Timothy Dutton QC and Miss M Butler (instructed by **Bevan Brittan**) for the **Solicitors Regulation Authority**
Robert Englehart QC and Andrew Scott (Instructed by **GMC Legal**) for the **General Medical Council**
Jonathan Swift QC and Joanne Clement (Instructed by **Treasury Solicitor**) for the **Attorney General**
Charles Foster and Benjamin Bradley (Instructed by **Barlow Robbins LLP**) for the **CNK Alliance Ltd**

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RULING ON ANCILLARY APPLICATIONS

Lord Justice Toulson:

Ruling on ancillary applications

1. This is the ruling of the court.

AM

Permission to appeal

2. We give Martin permission to appeal against the DPP, although we do not consider that the appeal has any real prospect of success. Our reason for giving permission is the first of the "two other compelling reasons" advanced in the application for permission to appeal. More particularly, we consider that our approach to the role of the DPP and to the decision in *Purdy* in relation to s2 of the Suicide Act raises questions of sufficient significance to merit consideration by the Court of Appeal.

3. We do not give Martin permission to appeal against the GMC or the SRA ("the regulators"). We do not consider a) that his proposed appeal in relation to them has a real prospect of success or b) that it raises issues of comparable constitutional significance to those raised in relation to the DPP; nor do we think that the public interest requires that the Court of Appeal should consider an appeal against the regulators on a hypothetical (and in our view improbable) basis.

4. It is argued on Martin's behalf that refusal of leave to appeal against the regulators is liable to cause additional costs and delay. We consider it far more likely that granting leave to appeal would lead to unnecessary expenditure in court time and costs, involving argument over issues between the claimant and the regulators which it was not necessary for this court to decide.

5. A successful appeal against the DPP would require him to re-draw his policy, probably after further public consultation. If in the light of such amended policy as the DPP might introduce the regulators were to take a position which was arguably unlawful, that would be the time at which a legal challenge would no longer be hypothetical.

Costs

6. Contrary to Martin's contention that he has "in large part won his case", the reality is that he has lost on the issue which was at the heart of the case. The costs of the application for an interim declaration were dealt with on that application and it is not appropriate for the court to reopen them. To describe the defendants as all adopting "ever changing positions" is an exaggeration, and the claimant would have come to court in any event to argue the central issue on which he lost. We reject the application that the defendants should pay Martin's costs notwithstanding that his claim was dismissed.

7. However, we consider that in all the circumstances it would be fair to make no order as to costs other than an assessment of Martin's publicly funded costs. Of the

defendants, only the GMC seeks an order for costs in its favour. We prefer the approach of the SRA and (tacitly) the DPP. Accordingly there will be no order for costs as between the parties.

Nicklinson

Permission to appeal

8. We do not give permission to appeal or allow the associated applications for Mrs Nicklinson to be made a party to the proceedings and for a protective costs order.

9. We do not consider that the proposed appeal has any real prospect of success. It is of course an important question whether the law of murder should be changed in the way that Tony fought for, but it does not follow that permission to appeal should therefore be granted. We consider it to be plainly a matter for Parliament. We accept the submission that the boundary between the role of the court and the role of Parliament in deciding such a question is itself a matter of constitutional significance, but again it does not follow that permission to appeal should be granted in circumstances where we can see no real prospect of any court being in doubt about it in the area with which we are concerned.

10. If Tony had not died, there would have been an additional important factor to consider, namely whether permission to appeal ought nevertheless to have been given as a matter of compassion and because of the importance of the case for him personally. However, we are not persuaded that we should give permission to pursue an appeal which would no longer be of any benefit to him and which we consider would have no real prospect of success.

11. So far as Mrs Nicklinson is concerned, we are deeply conscious of her suffering since the time of Tony's stroke and her frustration and distress over the state of the law, but we are not persuaded that we should give permission to amend the claim so as to include a claim by her for damages and permission to appeal so as to enable her to pursue it. It would be another route for pursuing an appeal which we do not consider would have any real prospect of success.

12. Since we do not consider that there is a sufficient case for an appeal, the question of a leap frog certificate does not arise.

Costs

13. The parties have proposed a form of order for costs in favour of the M o J subject to limitations. We do not think that it would be fair for Tony's estate to bear the defendant's costs of the proceedings, bearing in mind that we are making no order for costs in Martin's case. We will therefore make an order in the terms proposed, but amended so as to provide that the M o J's entitlement to costs shall not exceed the amount of its liability for costs under the order of Charles J. The net effect will be that the estate will be under no liability for the defendant's costs. We suspect that in practical terms the result under the form of order proposed by the parties would probably have been the same.