JUDICIARY OF ENGLAND AND WALES

Tony Nicklinson v Ministry of Justice

AM v Director of Public Prosecutions and others

High Court (Administrative Court)

16 August 2012

SUMMARY TO ASSIST THE MEDIA

The High Court (Lord Justice Toulson, Mr Justice Royce and Mrs Justice Macur) has today rejected challenges to the legal ban on voluntary euthanasia, and to the policy of the Director of Public Prosecutions in cases of assisted dying, brought by two men suffering from "locked in syndrome".

The Court recognised that the cases raise profoundly difficult ethical, social and legal issues, but it judged that any change to the law must be a matter for Parliament to decide.

Introduction

Lord Justice Toulson introduces the two cases (paragraphs 1 – 4):

"These are tragic cases. They present society with legal and ethical questions of the most difficult kind. They also involve constitutional questions. At the invitation of the court the Attorney General has intervened." (para 1)

"Put simply, the claimants suffer from catastrophic physical disabilities but their mental processes are unimpaired in the sense that they are fully conscious of their predicament. They suffer from "locked in syndrome". Both have determined that they wish to die with dignity and without further suffering but their condition makes them incapable of ending their own lives. Neither is terminally ill and they face the prospect of living for many years." (para 2)

"Barring unforeseen medical advances, neither Martin's nor Tony's condition is capable of physical improvement. Although they have many similarities, there are some differences in their condition. There are also differences in the orders which they seek and the ways in which their cases have been presented." (para 4)

Martin

Martin's condition and outline of his application to the court is described in paragraphs 5 – 10.

"The primary relief sought by Martin is an order that the DPP should clarify his published policy so that other people, who may on compassionate grounds be willing to assist Martin to commit suicide

through the use of Dignitas, would know, one way or the other, whether they would be more likely than not to face prosecution in England." (para 9)

"If he succeeds in his claim against the DPP, Martin also seeks declarations in relation to the GMC and SRA in order that a doctor or solicitor who played a part in helping Martin to commit suicide via Dignitas, without facing risk of prosecution under the DPP's clarified policy, should not be exposed to the risk of professional disciplinary proceedings. In the alternative (and Mr Havers made it clear that this was very much a fallback position), if Martin fails in his claim against the DPP, he seeks a declaration that section 2 of the Suicide Act is incompatible with article 8 of the European Convention." (para 10)

Tony

Tony's condition and outline of his application to the court is described in paragraphs 11 – 25.

The relief he seeks by way of judicial review is:

"A declaration that it would not be unlawful, on the grounds of necessity, for Mr Nicklinson's GP, or another doctor, to terminate or to assist the termination of Mr Nicklinson's life. …

"Further or alternatively, a declaration that the current law of murder and/or of assisted suicide is incompatible with Mr Nicklinson's right to respect for private life under article 8, contrary to s1 and 6 of the Human Rights Act 1998, in so far as it criminalises voluntary active euthanasia and/or assisted suicide." (para 18)

Issues in the case

"The central issues are these:

1. Is voluntary euthanasia a possible defence to murder?
2. Is the DPP under a legal duty to provide further clarification of his policy?
3. Alternatively, is section 2 of the Suicide Act incompatible with article 8 in obstructing Martin or Tony from exercising a right in their circumstances to receive assistance to commit suicide?
4. Are the GMC and the SRA under a legal duty to clarify their positions?
5. Is the mandatory life sentence for murder incompatible with the Convention in a case of genuine voluntary euthanasia?" (para 26)

Suicide and euthanasia at common law

The Court considers the historical position of suicide and euthanasia at common law, the provisions of the Suicide Act, the DPP's policy statement, the European Convention and Parliamentary proposals for changing the law in paragraphs 28 - 49.

Issue 1: Is voluntary euthanasia a possible defence to murder?

This is discussed is detail at paragraphs 50 – 122.

Having considered the question without reference to Article 8 of the European Convention (paragraphs 50 – 87), **Lord Justice Toulson concluded:**

"For all of those reasons it would be wrong for the court to depart from the long established position that voluntary euthanasia is murder, however understandable the motives may be, unless the court is required to do so by article 8." (para 87)

Having then considered Article 8 (paragraphs 88 – 122), **Lord Justice Touslon said:**

"I conclude that it would be wrong for this court to hold that article 8 requires voluntary euthanasia to afford a possible defence to murder. To do so would be to go far beyond anything which the Strasbourg court has said, would be inconsistent with the judgments of the House of Lords and the Strasbourg court in *Pretty*, and would be to usurp the proper role of Parliament." (para 122)

<u>Issue 2: Is the DPP under a legal duty to provide further clarification of his policy?</u>

This is discussed is detail at paragraphs 123 – 144.

"[Counsel for Martin] submitted that the DPP's policy provided the necessary degree of clarity for what he described as "class 1 helpers", that is, family members and friends who were willing to provide assistance out of compassion. Debbie Purdy's husband fell within that class, and so would Martin's wife if she were willing to help. However, the policy was defective in that it failed to give adequate clarity as to another group, which he described as "class 2 helpers", comprising individuals who were willing to act selflessly, with compassion and without suspect motives, but who had no personal connection with the individual who wished to end his or her life. "Class 2 helpers" might be professionals, carers or others. It is at once apparent that class 2 helpers are not a ubiquitous class." (para 127)

Lord Justice Toulson concluded:

"From the DPP's policy statement, I believe that it would be clear to a person who, in the course of his profession, agreed to provide assistance to another with the intention of encouraging or assisting that person to commit suicide, that such conduct would carry with it a real risk of prosecution.

"Whether the risk would amount to a probability would depend on all the circumstances, but I do not believe that it would be right to require the DPP to formulate his policy in such a way as to meet the foreseeabilty test advocated by [Martin's counsel]." (paras 139 – 140)

Lord Justice Toulson goes on to explain his three reasons for this decision in paragraphs 141 – 143.

<u>Issue 4: Are the GMC and the SRA under a legal duty to clarify their positions?</u>

Lord Justice Toulson concluded:

"Since I have rejected the claim that the DPP is obliged by law to publish further clarification of his policy on assisted dying, it follows that Martin's claims against the GMC and the SRA also fail. It is therefore unnecessary to consider the other defences advanced by those defendants." (para 145)

Issue 3: Is section 2 of the Suicide Act incompatible with Article 8?

This is considered in paragraphs 146 – 148.

Lord Justice Toulson concluded:

"As I see it, the issue of the compatibility of section 2 with article 8 has been determined at the highest level, subject to the argument about further clarification, which I have rejected. However, if it were open to this court to consider the matter afresh, I would reject the claim in any event on the ground that the law relating to assisted suicide is an area of law where member states have a wide margin of appreciation (*Haas*) and that in the UK this is a matter for determination by Parliament, as the House of Lords recognised in *Purdy*." (para 148)

Issue 5: Is the mandatory sentence of life imprisonment for murder incompatible with the Convention in cases of genuine voluntary euthanasia?

The Court declined to rule on this issue as Lord Justice Toulson said:

"There is strong evidence (considered by the Law Commission in its review of the law of murder) that the public does not regard the mandatory sentence of life imprisonment as appropriate in cases of genuine voluntary euthanasia, and there have been calls for it to be changed, but whether it is incompatible with the Convention is a matter which the court should decide only in a case in which it is necessary to do so." (para 149)

Conclusion

Lord Justice Toulson concluded:

"Tony's and Martin's circumstances are deeply moving. Their desire to have control over the ending of their lives demands the most careful and sympathetic consideration, but there are also other important issues to consider. A decision to allow their claims would have consequences far beyond the present cases. To do as Tony wants, the court would be making a major change in the law. To do as Martin wants, the court would be compelling the DPP to go beyond his established legal role. These are not things which the court should do. It is not for the court to decide whether the law about assisted dying should be changed and, if so, what safeguards should be put in place. Under our system of government these are matters for Parliament to decide, representing society as a whole, after Parliamentary scrutiny, and not for the court on the facts of an individual case or cases. For those reasons I would refuse these applications for judicial review." (para 150)

Mr Justice Royce added:

"I agree with the analysis, reasoning and conclusions of Toulson LJ. I add only this. No one could fail to be deeply moved by the terrible predicament faced by these men struck down in their prime and facing a future bereft of hope. Each case gives rise to most profound ethical, moral, religious and social issues. Some will say the Judges must step in to change the law. Some may be sorely tempted to do so. But the short answer is that to do so here would be to usurp the function of Parliament in this classically sensitive area. Any change would need the most carefully structured safeguards which only Parliament can deliver." (para 151)

Mrs Justice Macur added:

"I agree with the judgment of Toulson LJ and endorse the comments of Royce J. Superfluous as it may therefore appear I nevertheless feel compelled to comment that the dire physical and emotional predicament facing Tony and Martin and their families may intensify any tribunal's unease identified by Lord Mustill in *Bland* (at 887) in the distinction drawn between "mercy killing" and the withdrawal of life sustaining treatment or necessities of life. Judges of the Family Division sitting in the Court of Protection adjudicate upon applications for declarations in relation to the latter and have become well accustomed to the "balance sheet of best interests" which informs the decision of the Court. However, Mr Bowen QC does not succeed in persuading me that this process may reassure society that the development of common law for which he contends is merited by separate consideration of individual circumstances by individual tribunals of whatever stature and experience. The issues raised by Tony and Martin's case are conspicuously matters which must be adjudicated upon by Parliament and not Judges or the DPP as unelected officers of state." (para 152)

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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.