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A complicated search for an easy way out: assisted suicide in the UK Supreme Court

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On 25 June 2014, the Supreme Court of the United Kingdom gave judgment in *R (Nicklinson & another) v Ministry of Justice* [2014] UKSC 38, a case concerning the lawfulness of assisted suicide in the UK, and the compatibility of UK law in this area with the European Convention on Human Rights.

Section 2 of the Suicide Act 1961 provides that

> '(1) A person ("D") commits an offence if—
> (a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and
> (b) D's act was intended to encourage or assist suicide or an attempt at suicide.'

There can be no prosecution under section 2 unless the Director of Public Prosecutions gives her consent.

In 2002 in *Pretty v UK* (App no 2346/02); [2002] ECHR 427, the European Court of Human Rights unanimously decided that, although personal autonomy in dying was part of the article 8 concept of a private life, section 2 of the 1961 Act was compatible with human rights, as was the DPP's refusal to make any advance statement about her intention to prosecute any individual.

But in *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, five Law Lords (including the current president and deputy president of the Supreme Court, Lord Neuberger and Lady Hale) held that the ban on assisted suicide does not comply with the article 8 Convention right to respect for private life because it was not 'in accordance with law'. Uncertainty about who the DPP would or would not prosecute in practice meant the law on assisted suicide was insufficiently precise. The DPP had to publish a policy making the approach clear. Such a policy was subsequently consulted on, and published in 2010.

In June 2014, less than three weeks before the Supreme Court's judgment, an Assisted Dying Bill had been introduced in the House of Lords by Lord Falconer. Its aim was to enable competent adults who are terminally ill to be provided at their request with specified assistance to end their own life.

Facts

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Tony Nicklinson suffered a catastrophic stroke aged 51, and as a result was completely paralysed – able to move only his head and his eyes, and able to communicate only through an eye-blink computer. He wished to end his life by receiving a lethal injection, and sought a declaration that it would be lawful for a doctor to assist in terminating his life. Following an adverse judgment in a lower court, Mr Nicklinson refused all nutrition, fluids, and medical treatment, and died in 2012. Mr Nicklinson's wife, Jane, pursued an unsuccessful appeal.

Following a car crash, Paul Lamb was able to move only his right hand. He suffered pain every day, and was permanently on morphine. He wished a doctor to end his life. He therefore made a similar application to Mr Nicklinson, and was similarly refused by the Court of Appeal.

The Court of Appeal gave Mrs Nicklinson and Mr Lamb permission to appeal to the Supreme Court.

Held

The Court held by a majority (Baroness Hale and Lord Kerr dissenting) that it was not appropriate to make a declaration that the law under section 2(1) of the Suicide Act 1961 was incompatible with the right to private and family life guaranteed by article 8 of the European Convention, at least for the moment. Before considering whether to make such a declaration it should first 'accord Parliament the opportunity of considering whether to amend section 2 so as to enable Applicants, and, quite possibly others, to be assisted in ending their lives' (per Lord Neuberger, para 113). Mrs Nicklinson's and Paul Lamb's appeals were dismissed.

Lord Neuberger said that the current UK law relating to assisted suicide complied with the Convention so far as the European Court of Human Rights was concerned (para 66). However (para 76):

> 'even under our constitutional settlement, which acknowledges parliamentary supremacy and has no written constitution, it is, in principle, open to a domestic court to consider whether section 2 infringes article 8.'

It was also in principle 'institutionally appropriate' for the Court to consider the question of compatibility (para 112):

> 'I am of the view that, provided that the evidence and the arguments justified such a conclusion, we could properly hold that that section 2 infringed article 8. A court would therefore have to consider an application to make a declaration of incompatibility on its merits, and it seems to me that it would be inappropriate for us to fetter the judiciary's role in this connection in advance. More specifically, where the court has jurisdiction on an issue falling within the margin of appreciation, I think it would be wrong in principle to rule out exercising that jurisdiction if Parliament addresses the issue: it could be said with force that such an approach would be an abdication of judicial responsibility.'

It would not however be appropriate to make a declaration of incompatibility at this time. Parliament should first be given the chance to amend the law (or not) in the light of the Supreme Court's provisional views (para 113):

> 'I consider that, even if it would otherwise be right to do so on the evidence and arguments which have been raised on the first appeal, it would not be appropriate to grant a declaration of incompatibility at this time. In my opinion, before making such a declaration, we should accord Parliament the opportunity of considering whether to amend section 2 so as to enable Applicants, and, quite possibly others, to be assisted in ending their lives, subject of course to such regulations and other protective features as Parliament thinks appropriate, in the light of what may be said to be the provisional views of this Court, as set out in our judgments in these appeals.'

Parliament should now consider the matter (para 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.'

Lords Mance and Wilson agreed with the reasoning of Lord Neuberger. Lord Wilson suggested Parliament must now deal satisfactorily with the issue (para 202):

> 'Were Parliament for whatever reason, to fail satisfactorily to address the issue whether to amend the subsection to permit assistance to be given to persons in the situation of Mr Nicklinson and Mr Lamb, the issue of a fresh claim for a declaration is to be anticipated. It would no doubt be issued, as was that of Mr Nicklinson, in the Family Division of the High Court. The Crown would be entitled pursuant to section 5(1) of the 1998 Act to notice of the claim and I expect that the Attorney General would thereupon see fit to intervene pursuant to section 5(2). In that way the court would, I hope, receive the focussed evidence and submissions which this court has lacked. While

> the conclusion of the proceedings can in no way be prejudged, there is a real prospect of their success.’

Lord Sumption, concurring in the dismissal of the appeals, said the issue was an inherently legislative one, for Parliament to decide (para 233):

> ‘the social and moral dimensions of the issue, its inherent difficulty, and the fact that there is much to be said on both sides make Parliament the proper organ for deciding it. If it were possible to say that Parliament had abdicated the task of addressing the question at all, so that none of the constitutional organs of the state had determined where the United Kingdom stood on the question, other considerations might at least arguably arise.’

Lords Clarke and Hughes agreed with Lord Sumption’s reasoning. Lord Clarke agrees Parliament should now debate assisted suicide (para 293):

> ‘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.’

Concurring judgment of Lord Reed

Lord Reed in his judgment concurred with the dismissal of the appeals, but based on different reasoning. The Court had jurisdiction to determine whether the ban on assisted suicide complied with the Convention, while recognising a wide margin of judgement for Parliament (para 297):

> ‘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.’

Considering the question in that way, Parliament’s assessment as embodied in section 2 of the 1961 Act was compatible with Convention rights (para 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 … But that is not the position at present.’

Dissent

Baroness Hale, dissenting, said that Parliament was the preferable forum in which the issue should be decided. However, the United Kingdom law was not compatible with the Convention rights, and there was no reason not to make a declaration of incompatibility (para 300):

> ‘Like everyone else, I consider that Parliament is much the preferable forum in which the issue should be decided. Indeed, under our constitutional arrangements, it is the only forum in which a solution can be found which will render our law compatible with the Convention rights. None of us consider that section 2 can be read and given effect, under section 3(1) of the Human Rights Act 1998, in such a way as to remove any incompatibility with the rights of those who seek the assistance of others in order to commit suicide. However, in common with Lord Kerr, I have reached the firm conclusion that our law is not compatible with the Convention rights. Having reached that conclusion, I see little to be gained, and much to be lost, by refraining from making a declaration of incompatibility. Parliament is then free to cure that incompatibility, either by a remedial order under section 10 of the Act or (more probably in a case of this importance and sensitivity) by Act of Parliament, or to do nothing. It may do nothing, either because it does not share our view that the present law is incompatible, or because, as a sovereign Parliament, it considers an incompatible law preferable to any alternative.’

The only justification for section 2 was protecting those who might be vulnerable. But, she asked (paras 312-3):

> ‘Is it then reasonably necessary to prohibit helping everyone who might want to end their own lives in order to protect those whom we regard as vulnerable to undue pressures to do so? I can understand the argument that it is: how does a person judge which pressures are undue and which are not? We can all understand why people placed in the situation of Mr Nicklinson, Mr Lamb, Martin or Ms B might wish an end to their suffering. But (as I ventured to point out in Purdy, at para 66) there are many other reasons why a person might consider it a sensible and reasonable thing to do. On what basis is it possible to distinguish some of those pressures from others?
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> That problem is certainly enough to justify a general ban on assisting suicide. But it is difficult to accept that it is sufficient to justify a universal ban, a ban which forces people like Mr Nicklinson, Mr Lamb and Martin to stay alive, not for the sake of protecting themselves, but for the sake of protecting other people. In Pretty, the Strasbourg court rejected the argument that Mrs Pretty was suffering inhuman and degrading treatment contrary to article 3. But no-one who has read the appellants' accounts of their lives and their feelings can doubt that they experience the law's insistence that they stay alive for the sake of others as a form of cruelty.’

Lord Kerr delivered a dissenting judgment in which he agreed with the reasoning of Baroness Hale. On the question whether the Court ought to make a declaration of incompatibility, he questioned the approach of the majority, in particular Lord Mance (para 347)

> ‘it appears to suggest that the court’s assessment of whether a particular statutory provision is incompatible should be adjusted or, indeed, disavowed, according to the court’s perception of whether it or the legislature can lay claim to ‘greater expertise’. It appears to me that this is fundamentally at odds with the court’s duty under section 4 of the Human Rights Act. … The view that Parliament might have the means to consider the issue more fully or on a broader canvas does not impel the conclusion that the courts should shy away from addressing the question whether the provision is incompatible with a Convention right, judged on the material that has been presented. On the contrary, such is the court’s duty when presented with that claim.’

Comment

The morality of assisting another to take their own life is strongly contested; and the moral disagreements about it spill over into debates about whether human rights law requires it to be permitted. While many people in Britain would be concerned about any change in the law, many others strongly sympathise with Tony and Jane Nicklinson and with Paul Lamb, because of the legal difficulties they face under the 1961 Act.

Two of the Supreme Court Justices made clear their view that section 2 of the 1961 Act is incompatible with the right to respect for private life: a universal ‘ban’ on assisting suicide is in their view a disproportionate means of protecting those who are vulnerable.

What is remarkable about the Supreme Court’s judgment however is not that this view did not prevail. It is that, with the exception of Lord Reed, the majority avoided making *any* ruling on whether the 1961 Act is rights-compatible or not. Instead, the majority seemed to use the introduction of Lord Falconer’s Assisted Dying Bill as a pretext for in effect abdicating the Court’s responsibility to rule on the matter. As a result, and extraordinarily, Mrs Nicklinson’s and Mr Lamb’s appeals were dismissed *not* on the basis that the 1961 Act was compatible with their rights, but on the basis that the Court declined for the time being to decide the question.

The majority’s ruling rests on a fundamental misunderstanding of the constitutional relationship between Parliament and the courts within the scheme of the Human Rights Act 1998. Under that Act, the question whether an Act of Parliament is compatible with Convention rights or not is a question of law; when such a question is before the courts, they should resolve it like any other question of law.

The fact that the grant of a declaration of incompatibility is discretionary under section 4 of the 1998 Act makes no difference to this analysis. Nor does it make any difference whether the Court feels, in the sense of broad ‘constitutional morality’ or ‘constitutional appropriateness’ that Parliament is a better forum to decide the social policy question whether assisted dying should be permitted, or not.

The minority – and Lord Reed, who appears to share the minority’s analysis of the respective roles of the courts and Parliament in spite of his agreement with the majority on disposal of the appeals – is surely correct on this. As Lord Reed’s judgment shows, one does not have to agree with Baroness Hale and Lord Kerr that

the 1961 Act is incompatible with Convention rights in order to share their view that the courts should not hesitate to rule on the *legal* question of incompatibility, when properly called upon to do so in an appropriate case.

It is hard to resist the suspicion that the majority felt for some reason unwilling to make a ruling that the 1961 is compatible with Convention rights, even though Lord Neuberger makes clear this would have been his view (para 119).

The upshot of this confused approach to the Human Rights Act is that, while expressing great concern for the constitutional pre-eminence of Parliament, the Court effectively gave Parliament an ultimatum: deal ‘satisfactorily’ with assisted suicide soon (the implication being that Lord Falconer’s bill was the vehicle for doing so) or else the courts might make a declaration of incompatibility after all. It’s ironic that legally misconceived respect for Parliament should have led the Court to (somewhat disrespectfully) appear to threaten Parliament in this way.

In fact a second bill on this subject—the Assisted Dying (No. 2) Bill—was introduced in the House of Commons by Rob Marris MP, and defeated on Second Reading in September 2015 by 330 votes to 118. It’s widely considered that Lord Falconer’s bill will make no further progress, either. If that is right, the Supreme Court may well soon be asked whether MPs have dealt ‘satisfactorily’ with this issue.

By adopting a surprising, unnecessarily complex and, it is submitted, paradoxically disrespectful approach to its relationship with Parliament under the Human Rights Act, the majority dodged the legal question that was rightly for the Court to answer: whether the 1961 Act is rights-compatible or not. It seems the majority found that legal question too difficult, too distasteful or too sensitive to face. By complex and confused constitutional reasoning it found an easy way out for itself. But only temporarily.