



Neutral Citation Number: [2017] EWCA Civ 16

Case No: C1/2017/3068

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM The Divisional Court**  
**Sales LJ, Whipple J and Garnham J**  
**CB/3/37-38**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18/01/2018

**Before:**

**THE SENIOR PRESIDENT OF TRIBUNALS**  
**LORD JUSTICE UNDERHILL**

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**Between:**

|   |                          |
|---|--------------------------|
| <b>Noel Douglas Conway</b>                | <b><u>Appellant</u></b>  |
| <b>- and -</b>                            |                          |
| <b>The Secretary of State for Justice</b> | <b><u>Respondent</u></b> |

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**Ms Nathalie Lieven QC & Mr Alexander Ruck Keene (instructed by Irwin Mitchell LLP)**  
**for the Appellant**  
**Mr James Strachan QC & Mr Benjamin Tankel (instructed by Government Legal**  
**Department) for the Respondent**

Hearing date: 18 January 2018  
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**Approved Judgment**

**Sir Ernest Ryder, Senior President:**

1. This is an application for permission to appeal against the order of the Divisional Court (Sales LJ, Whipple and Garnham JJ) which on 5 October 2017 dismissed Mr. Conway's claim for judicial review. Mr. Conway sought a declaration under section 4(2) of the Human Rights Act 1998 ("HRA 1998") that section 2(1) of the Suicide Act 1961 ("SA 1961") is incompatible with his rights under article 8 of the European Convention on Human Rights ("ECHR").
2. Mr. Conway has applied for expedition of the application for permission to appeal and, if permission is granted, the substantive appeal.

**Background facts**

3. This case concerns the issue of the provision of assistance to a person with a terminal degenerative disease who wishes to commit suicide, so as to be able to exercise control over the time of his death as the disease reaches its final stage. It follows a line of cases which have addressed similar issues, in particular:

*R (Pretty) v Director of Public Prosecutions* [2001] UKHL 61; [2001] 1 AC 800 ("Pretty");

*R (Purdy) v Director of Public Prosecutions* [2009] UKHL 54; [2010] 1 AC 345 ("Purdy"); and

*R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2015] AC 657 ("Nicklinson").

4. Mr. Conway is 68. He has suffered from a form of Motor Neurone Disease ("MND") since about 2012. The average life expectancy of a person with MND is between two and five years. Mr. Conway has to use a wheelchair and requires ever increasing levels of assistance with daily life, eating and bodily functions. The muscles which allow Mr. Conway to breathe are wasting away. He finds it difficult to breathe without mechanical assistance in the form of non-invasive ventilation ("NIV"), which he requires for an increasing number of hours each day. Eventually, the brain's ability to start and control voluntary movement is lost. As Mr. Conway says: MND "is a relentless and merciless process of progressive deterioration".
5. 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 at a time of his choosing. He wishes to end his life in a way that is swift and dignified, which would involve the assistance of medical professionals. Mr. Conway says that this is because:

"At some point, my breathing will stop altogether or I will become so helpless that I will be effectively entombed in my own body. I would not like to live like this. I would find it a totally undignified state for me to live in. I find the prospect of this state for me to live quite unacceptable and I wish to end my life when I feel it is the right moment to do so, in a way that is swift and dignified."

6. The common law confers rights on individuals to insist upon preservation and protection of their physical integrity. An individual has an absolute right to refuse medical treatment. Even if medical treatment is necessary to keep a person alive, he

has the right to refuse it and to choose to die. In this case, Mr. Conway has the option to insist on the refusal of his breathing equipment which would lead to his death. The common law refusal of treatment by a patient is an example of an autonomous person's right to make a decision to die.

7. Assisted suicide is the act of deliberately assisting or encouraging another person to kill himself, with the final act resting with the person who is dying. Assisted suicide is prohibited by section 2 SA 1961. Mr. Conway's case is concerned with assisted suicide. It is important to distinguish his case from euthanasia.
8. Euthanasia is the act of deliberately ending a person's life to relieve suffering. The act of ending the person's life is done, not by the person concerned, but by an outside party (whether a doctor, relative or other person). Euthanasia is illegal in England and Wales, and the person committing the act may be charged with murder or manslaughter. Mr. Conway's case does not concern euthanasia.
9. Mr. Conway has taken a different approach to previous claimants in the key reported cases. He provided for the court an alternative scheme supported by extensive expert evidence which he submits shows that the blanket prohibition in section 2 is an unnecessary and disproportionate interference with his rights under article 8. The criteria outlined by Mr. Conway are that the prohibition on providing assistance for suicide should not apply where the individual:
  - a. Is aged 18 or above;
  - b. Has been diagnosed with a terminal illness and given a clinically assessed prognosis of six months or less to live;
  - c. Has the mental capacity to decide whether to receive assistance or to die;
  - d. Has made a voluntary, clear, settled and informed decision to receive assistance to die; and
  - e. Retains the ability to undertake the final acts required to bring about his death having been provided with such assistance.
10. The procedural safeguards proposed by him are:
  - a. The individual makes a written request for assistance to commit suicide, which is witnessed;
  - b. His treating doctor has consulted with an independent doctor who confirms that the criteria are met, having examined the patient;
  - c. Assistance to commit suicide is provided with due medical care; and
  - d. Assistance is reported to an appropriate body.
11. Mr. Conway also proposed, as a further safeguard, that permission for the provision of assistance should be authorised by a High Court judge, who should analyse the evidence and decide whether the criteria are met in that individual's case.

12. The primary issue before the Divisional Court was to determine whether the prohibition against assisting suicide set out in section 2 was justified under article 8(2) ECHR. It was accepted by the Secretary of State that the prohibition engages and interferes with article 8(1). The issues were accordingly:
  - a. Is the court bound by existing domestic authority in *Pretty* and *Nicklinson* to hold that section 2 is compatible with article 8 or to decide this case in a particular way?
  - b. What are the legitimate aims that section 2 pursues?
  - c. Is there a rational connection between the prohibition in section 2 and the legitimate aims?
  - d. Is section 2 necessary to meet the legitimate aims?
  - e. Does the measure strike a fair balance between the rights of the individual and the interests of the community?
13. The judgment of the Divisional Court is detailed, structured and careful. It sets out the factual background followed by the legal background, drawing out some significant points of difference with past cases. The court then details the Parliamentary context. The medical evidence is in part considered. Finally, the court turns to the discussion of the substantive issues.
14. The court noted that it was common ground that article 8(1) is interfered with by the prohibition in section 2. The question was therefore whether section 2 can be justified under article 8(2) as a proportionate measure to promote one or more of the objectives set out in article 8(2).
15. The court concluded that it was not bound by the House of Lords judgment in *Pretty*, as Mr. Conway's case is concerned with the application of article 8 in its domestic context and the court held that it was not bound by the judgment in *Nicklinson*, specifically there is no Bill presently before Parliament.
16. The court accepted that the protection of the weak and vulnerable was a legitimate aim pursued by section 2. Because of this, the court stated that "our decision does not ultimately depend upon resolution of this issue regarding identification of the legitimate aim or aims pursued by section 2". The court nevertheless identified two further legitimate aims which the section pursues: the protection of the sanctity of life and the promotion of trust between doctor and patient. The court found that there was a rational connection between the prohibition in section 2 and all three of the legitimate aims identified.
17. The court held that even if the legitimate aim promoted by section 2 is confined to protection of the weak and vulnerable, there is nonetheless a clear and proper case that the provision is necessary to promote that aim. The court considered that the other legitimate aims make the case on necessity even stronger.
18. Finally, the Divisional Court found that the prohibition in section 2 achieved a fair balance between the interests of the wider community and the interests of people in the position of Mr. Conway.

19. There are seven grounds of appeal. The grounds of appeal accompanying the appellant's notice set out six grounds and the skeleton argument of the appellant introduces a seventh ground. We have considered all of the grounds together and having heard argument we give permission to amend the grounds of appeal to add ground 1. The grounds of appeal are as follows:
- a. The Divisional Court misdirected itself as to the correct legal test to apply under article 8(2) ECHR ("Ground 1").
  - b. The Divisional Court adopted a legally flawed approach to the evidence ("Ground 2").
  - c. The Divisional Court misdirected itself in law as to the approach to take to identifying whether the prohibition contained in section 2(1) SA 1961 is more than "necessary" for the purposes of article 8(2) ECHR ("Ground 3").
  - d. In light of the errors identified in Grounds 1, 2, and 3 or otherwise, the Divisional Court failed to address significant evidence and material before it relating to the strength of the safeguards proposed by the appellant ("Ground 4").
  - e. The Divisional Court failed to address the consequence of the accepted presence of "biased decision-making" in treatment refusal decisions ("Ground 5").
  - f. The Divisional Court misdirected itself as to the approach to take in identifying whether the prohibition in Section 2(1) SA 1961 struck a fair balance between the rights of the appellant and the interests of the community for purposes of article 8(2) ECHR ("Ground 6").
  - g. The Divisional Court failed to address the legal and moral differences between a request for assistance with dying and a request for euthanasia (2Ground 7").

Discussion:

20. The function of this court is to consider whether any of the grounds of appeal has a real prospect of success and/or whether there are other compelling reasons for granting permission to appeal. This is not the place to set out the well argued written submissions made on Mr. Conway's behalf and in reply on behalf of the Secretary of State. We are very grateful to Ms. Lieven QC and Mr. Strachan QC and their teams for the quality of the arguments that have been presented.
21. We have come to the conclusion that permission should be granted for the reasons which follow.
22. Mr. Conway has the capacity to make a decision to end his life and to request assistance. His rights under article 8(1) ECHR are both engaged and interfered with. There must accordingly be anxious scrutiny of the proportionality of the interference. It follows that the court has to identify the justifications relied upon and then test those against the four stage test for proportionality.

23. The Divisional Court focussed its analysis on the protection of the weak and vulnerable while acknowledging that the sanctity of life and trust between doctor and patient were also in issue. Whether the protection of health and morals encompasses other elements is a moot point.
24. There is a central question relating to grounds 1 and 2 which the full court ought to consider. The Divisional Court held that “[t]he question at issue is whether Parliament had a proper basis for maintaining in place the prohibition” which “does not require it to set out and analyse in full detail the expert and other evidence placed before us”. That is arguably not the proportionality test although a close reading of the Divisional Court’s judgment demonstrates that the component parts of the test were considered in relation to the protection of the weak and vulnerable.
25. That in itself would probably be insufficient to grant permission but when taken together with the approach to the evidence that was before the court, a serious question arises as to whether there was a sufficient analysis of the evidence and how the court resolved the serious disagreements in the expert evidence so as to conduct the proportionality exercise. Given the indications of the Supreme Court in *Nicklinson* about the relevance of an alternative statutory scheme to proportionality it is arguable that each justification should have been tested against all of the relevant evidence.
26. In any event that part of the proportionality exercise which involves scrutinising whether a fair balance is achieved in light of the justification will involve value judgments which are informed by the evidence. Mr. Conway submits that the Divisional Court’s review of the evidence is selective and that accordingly the exercise is flawed. That is an arguable issue on ground 4 of the appeal.
27. Mr. Conway also submits that the Divisional Court misdirected itself in respect of the weight to be given to the role of Parliament and its conclusions over time. The issue of necessity which this addresses can only be tested in the context of the court’s review of the evidence. Whether ground 3 is sustainable depends upon the view the full court takes about the scrutiny of the evidence that was undertaken. What this amounts to is a submission that the Divisional Court could and should have come to a more sophisticated conclusion about the scheme suggested by Mr. Conway.
28. One element of the Divisional Court’s thinking betrays a caution which Mr. Conway submits is misplaced. The courts of England and Wales accept that a person may formulate a capacitous voluntary request for assistance with dying albeit that it is unlawful for another person to provide that assistance; see, for example *Re Z (Local Authority: duty)* [2004] EWHC 2817 (Fam); [2005] 1 WLR 959. The court’s hesitation about Mr. Conway’s scheme including the proposed scrutiny by the High Court is questioned from two perspectives: first the jurisdiction of the judges of the Family Division of the High Court whose work includes the consideration of issues of autonomy, vulnerability and best interests in the context of life and death decisions which is often concerned with conflicting evidence and positions; and second the Divisional Court’s consideration of inherent bias in decision making which does not necessarily square with the autonomy of a capacitous person who is not vulnerable. Ground 5 highlights these issues and we are of the view that they should be considered by the full court.

29. Ground 6 like Ground 3 is a balancing exercise that is in part dependent on the view the court takes about the other issues in the appeal including a review of the palliative care evidence, in particular that relating to the withdrawal of non invasive ventilation, and the interests of society generally in the justifications relied upon.
30. Finally, Ground 7 is an interesting philosophical debate, as to where the dividing line is as between assisted suicide and euthanasia. It would not have been a sufficient basis to give permission to appeal on its own but given the breadth of the issues encompassed within grounds 1 to 6 we do not exclude it from the permission which we give.
31. Mr. Conway submits that in any event his appeal raises issues that are sufficient as other compelling reasons to pursue the appeal. Given the conclusion to which we have come, it is not necessary to re-cast the appeal in this way but Mr. Conway is free to do so before the full court.

**Lord Justice Underhill:**

32. I agree, despite the cogent submissions in Mr Strachan's skeleton argument, that for the reasons given by the Senior President we should give permission to appeal. The essential point being made by the Appellant, which is arguably slightly obscured by the various different ways in which it is formulated in the grounds of appeal, is that the majority of the Supreme Court in *Nicklinson* contemplated that, in the case of a future challenge of this kind, any proposed scheme incorporating adequate safeguards for assisted dying would be subjected to a more intense form of assessment than was undertaken by the Divisional Court in this case. The core of the criticism is that what the Court did, in substance if not in form, was to find objective factors which weighed against the proposed scheme and to proceed on the basis that, given the existence of such factors, the weight to be accorded to them was a matter for Parliament; and that that did not constitute a proper assessment of proportionality. The point is not so much that the Court did not take the evidence into account as that it performed the wrong kind of exercise with it. I am not to be taken as saying either that that argument correctly states the nature of the required exercise or that it fairly characterises the Court's reasoning, but I am not prepared to say at this preliminary stage that it is clearly wrong; and I think that the benefit of any doubt must go to the Appellant given the great importance of the question both to him personally and more widely.

**Directions:**

Upon the basis that as presently advised neither party seeks to call oral evidence or to cross examine any witness

And upon the basis that the parties will co-operate to identify areas of agreement and disagreement as regards the expert evidence

1. We give Mr. Conway permission to add ground 1 to his appeal
2. We grant permission to appeal on all grounds

3. We direct that there be expedition in the hearing of the appeal
4. We direct that the appeal shall be heard by 3 Lord or Lady Justices of Appeal with a time estimate of one full court week to include reading time on a date to be fixed
5. We direct that the Secretary of State shall file and serve any Respondent's Notice within 14 days of today, if so advised
6. We direct that any party seeking permission to intervene shall file and serve their application within 14 days of today attaching if possible a proposed skeleton argument and any evidence upon which they seek to rely or otherwise setting out the substance of the issues that it is proposed they will address