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Case No: CO/2726/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/11/2019

Before:

LORD JUSTICE IRWIN
MRS JUSTICE MAY

- -

Between:

The Queen on the application of PHILIPPE GEORGE NEWBY	**Claimant**
- and -	
THE SECRETARY OF STATE FOR JUSTICE	**Defendant**

- -
- -

Paul Bowen QC, Adam Wagner and Jennifer MacLeod (instructed by **Bindmans LLP**) for the **Claimant**
James Strachan QC and Benjamin Tankel (instructed by **The Government Legal Department**) for the **Defendant**

Hearing date: 22 October 2019

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Approved Judgment

Lord Justice Irwin and Mrs Justice May DBE:

Introduction

1. This is a judgment of the court, to which we have both contributed.

2. This is a renewed application for Judicial Review. Permission was initially refused by Whipple J on 27 September 2019. The claimant ultimately seeks a declaration of incompatibility under section 4(2) of the Human Rights Act 1998 ("HRA"), stating that the current law on assisted suicide contained in section 2(1) Suicide Act 1961 ("the 1961 Act"), as amended by the Coroners' and Justice Act 2009, is incompatible with Articles 2 and 8 of the European Convention on Human Rights ("ECHR").

3. It is the Claimant's substantive case that section 2(1) of the 1961 Act breaches his rights under the ECHR as it will operate to prevent him from obtaining assistance to end his life, even where proper safeguards exist. The fact that the prohibition in section 2(1) is a blanket prohibition, admitting of no exceptions, renders the infringement of ECHR rights disproportionate. By way of illustrating this disproportionality, the Claimant has submitted a 'scheme' containing several criteria and safeguards by which, it is contended, any legitimate aims of section 2(1) can be preserved without disproportionate infringement of his rights.

4. The specific point which Mr Newby seeks to have determined as a preliminary issue is whether the court should hear evidence of what the Claimant terms "legislative facts". This term is deployed as short-hand for 'the mixed ethical, moral and social policy issues' which have a bearing on the assessment of the proportionality of interference with the Article 8 rights. That issue could only become justiciable were the court to grant permission for judicial review and direct a hearing of the preliminary issue.

Factual Background

5. The Claimant, Mr Philippe Newby, is 49 years old. In May 2014, he was diagnosed with motor neurone disease ("MND"), an incurable, progressive and life-shortening condition. His statement, provided on 6 June 2019, outlines his then-current situation, noting the relentless progression of the disease, and the limitations imposed upon his life. At the time of that statement, Mr Newby noted that he was no longer able, amongst other things, to dress or undress himself, to wash or conduct personal hygiene or care, to scratch an itch, hold a pen, type, hold, lift open, or pull an object with a hand, use a knife, or make or open food or liquid refreshments for himself. Further, he can no longer walk, move beyond two rooms in his home without assistance, leave his home or travel without assistance. He could not use a normal toilet (including normal disabled toilets), drive, or turn over in bed. Each month, the array of things that he can do diminishes.

6. Though generally stable, his emotional state varies a little. In the winter of 2018, driven by the prospect of being trapped in his body without the agency to bring his life to an end, he considered taking his own life. In January 2019 he, with his wife Charlotte, resolved to fight through the courts for the right to end his life at a time when he believed he 'had run out of road – and not before'.

7. It is impossible not to have very great sympathy for the situation in which Mr Newby finds himself. His clear and dignified statement compels admiration and respect.

8. Under these most arduous and distressing circumstances, the claimant brings his application for judicial review.

Legal Background

9. The issue of compatibility of section 2(1) of the 1961 Act with Articles 2 and 8 ECHR has now received significant judicial attention, most recently in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, *R (Conway) v Secretary of State for Justice* [2018] EWCA 143, and *R (T) v. Secretary of State for Justice* [2018] EWHC 2615 (Admin). Before turning to these cases, the relevant legal framework in which these judgments were given requires exposition.

10. Section 2(1) of the 1961 Act provides that:

> "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."

11. Article 8 ECHR provides that:

> "Article 8: Right to respect for private and family life
>
> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society … for the prevention of … crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

12. The potential for conflict between these provisions arises as a result of the breadth given to Article 8. It is now well established in the jurisprudence of the European Court of Human Rights ("ECtHR"), that the right of an individual to determine how and when to end their life falls within the ambit of Article 8. To this effect, in the decisions of *Haas v Switzerland* (2011) 53 EHRR 33, *Koch v Germany* (2012) 56 EHRR 6, *Gross v Switzerland* (2013) 58 EHRR 197, the ECtHR has found that a blanket ban on assisted suicide engages Article 8(1) ECHR. Such interference with an individual's Article 8 right, however, has been deemed both justifiable and proportionate under Article 8(2) ECHR: *Pretty v United Kingdom* (2003) 35 EHRR 1 at [74]. As the ECtHR further clarified in *Nicklinson v United Kingdom* (2015) EHRR SE7, such a decision is to be made by Member States, falling as it does within the broad margin of appreciation.

13. In the domestic setting, the issue of compatibility received the attention of the Supreme Court in *Nicklinson*, where two of the claimants suffered from "locked-in syndrome".

This condition prevented them from carrying out any act of suicide, even with assistance from others, though locked-in syndrome is not in and of itself a terminal condition. It is upon this case, and a rigorous examination of the individual judgments in this case, that the Claimant founds much of his argument.

14. The Supreme Court in *Nicklinson* ultimately declined to issue a declaration of incompatibility. Of great import to the Claimant's argument are, however, the divided views between the justices on two key questions. The first was whether a determination would be institutionally appropriate, given that assisted dying is a sensitive issue which raises a plethora of moral and ethical issues. The second was whether a declaration of incompatibility would at that time be appropriate given the then on-going debate on the issue in the House of Lords, arising from Lord Falconer of Thoroton's Assisted Dying Bill 2014.

15. The differing views in *Nicklinson* were analysed by the Divisional Court in *Conway* ([2017] EWHC 640 (Admin)), in passages quoted with approval in the Court of Appeal decision in that case at [34].

16. In *Nicklinson*, Lord Sumption, Lord Hughes, and Lord Reed found that it would be institutionally inappropriate for the Court to issue a declaration of incompatibility. Their Lordships formed the determinative majority deciding against the grant of a declaration of incompatibility, together with Lord Neuberger PSC, Lord Mance, and Lord Wilson who, for their part, considered that, although institutionally appropriate, making such a declaration was inappropriate at that time. Of the nine justices, only Lady Hale DPSC and Lord Kerr concluded that making a declaration of incompatibility was *both* institutionally appropriate *and* appropriate at that time.

17. In *Conway* the claimant was diagnosed with motor neurone disease and had, at the time of the Court of Appeal decision, a prognosis of six months' or less to live. That claimant too sought a declaration of incompatibility on the basis that the blanket prohibition of assisted suicide in section 2(1) of the 1961 Act was an impermissible interference with his Article 8 ECHR right to respect for private and family life.

18. The Court of Appeal in *Conway* considered that it was not bound by the earlier decision of *Nicklinson* (see [134]), on the basis that *Nicklinson* was concerned with individuals subject to long-term suffering, but not those who were terminally ill. The court found that the prohibition in section 2(1) of the 1961 Act was proportionate, and concluded by rejecting the claim and upholding the reasoning of the Divisional Court, expressed as follows:

> "114. In our judgment, the prohibition in section 2 achieves a fair balance between the interests of the wider community and the interests of people in the position of Mr Conway. The issues here are similar to those which arise in relation to the question of the necessity of the interference with Mr Conway's rights under Article 8(1). In particular, the margin of appreciation and the discretionary area of judgment for Parliament have similar relevance in the context of this part of the analysis. Parliament is entitled to maintain section 2 in place with full force and effect in order to promote the legitimate aims identified above in the interests of the general community, even though that has an

> impact in terms of restricting the options available to Mr Conway about the timing and manner of his death."

19. Finally, of present relevance, is the decision in *T*. The claimant in that case, suffering from multiple systems atrophy, similarly sought a declaration of incompatibility under section 4 HRA vis-à-vis section 2(1) of the 1961 Act. Following the grant of permission on the papers, an initial hearing (which took place prior to the Court of Appeal decision in *Conway*) resulted in a direction for the hearing of a preliminary issue, which the Divisional Court subsequently determined in *T*. The preliminary issue was phrased thus:

> "Is it appropriate and necessary in this case for the Court to hear first-hand evidence with cross-examination to seek to determine the mixed ethical, moral and social policy issues that underlie whether Parliament's prohibition on assisted suicide in s.2(1) Suicide Act 1961 is a justified interference with the Claimant's rights in this case"

20. After reading evidence and hearing argument on that issue the Divisional Court withheld their ruling until the conclusion of *Conway* in the Court of Appeal. Following judgment in *Conway*, the Divisional Court in *T* answered the above preliminary issue in the negative. Having concluded that there was little or no benefit to be gained from hearing oral evidence or cross-examination, crucially for present purposes, the court noted that

> "[t]here exist facts bearing on the issues in question, and there are also a range of questions not reducible to hard fact, about which opinions must be formed and considered" (at [16]).

21. The Divisional Court relied upon the following observations of the Court of Appeal made in *Conway* at [189]:

> "As we have said, the evidence in this case is considerable. Important parts of it are conflicting. There was no request for oral evidence or cross-examination. That seems to us to be right. The conflict inherent in the moral and ethical issues involved in balancing the principles of sanctity of life and the right of personal autonomy cannot be resolved in a forensic setting by cross-examination. Conflicts in the expert opinion and factual evidence as to the appropriateness of the criteria in Mr Conway's scheme and the existence and extent of risk of an incorrect decision that the substantive criteria are satisfied are unlikely to be resolved satisfactorily by cross-examination. Furthermore, the evidence available to the court is necessarily limited to that which the parties wish to adduce. Unlike Parliament, or indeed the Law Commission of England and Wales, the court cannot conduct consultations with the public or any sector of it and cannot engage experts and advisers on its own account."

22. In refusing permission on the papers in this case Whipple J observed that the court was bound by the Court of Appeal decision in *Conway* and referred to the passage from the

judgment set out above. Whipple J cited this court's decision in *T*, holding that the preliminary issue sought to be advanced in the present case on behalf of Mr Newby was not arguable in the light of these authorities.

23. More broadly, Whipple J considered the substantive claim – the compatibility of section 2(1) of the 1961 Act with Article 8 – to be similarly unarguable, following the conclusion in *Conway* that it is for Parliament, not the courts, to consider whether the law should be altered and if so, in what way.

The Claimant's Application

24. The principal submissions of Paul Bowen QC, acting for the Claimant, are as follows. He argued that the Supreme Court's decision in *Nicklinson*, declining to issue a declaration of incompatibility, depended upon the specific facts of the case and was taken in the context of an imminent Parliamentary debate on altering the law in relation to assisted dying. As such, the refusal to declare incompatibility was not a refusal on principle. As stated above, Lord Neuberger PSC, Lord Mance, and Lord Wilson appeared to decline to issue a declaration on the basis that it was not appropriate to do so at the time, given Parliament's current consideration of the matter: see for instance the judgment of Lord Neuberger PSC, at [113].

25. Parliament has now debated and rejected the Assisted Dying (No. 2) Bill, which if passed would have altered the law on assisted dying for those with less than six months to live. However, Parliament did not give express consideration to the situation of persons such as Mr Newby. The circumstance of the contemporaneous consideration of Lord Falconer's Assisted Dying Bill in Parliament, which was relied on by Lord Neuberger PSC, Lord Mance, and Lord Wilson in *Nicklinson* in refusing to grant a declaration, no longer applies. Now, Mr Bowen argues, the Supreme Court would be in a position to decide in his client's favour. *Nicklinson* was the wrong case; the present case is the right case.

26. In addition to removing judicial misgivings as to the timing of a declaration in the light of Lord Falconer's Bill and the subsequent rejection in 2015 of the Assisted Dying (No. 2) Bill, Mr Bowen submits that the present case provides the court with an opportunity properly to resolve the proportionality issue by reference to primary evidence, which was not available in *Nicklinson*. He relied on the dicta of some of the Supreme Court Justices in *Nicklinson* to the effect that necessary evidence was lacking: for instance Lord Neuberger at [120], Lord Mance at [182] and Lord Wilson at [202]. In the present case, Mr Bowen has presented the court with a substantial amount of evidence, which was not available in *Nicklinson*.

27. Mr Bowen argues that *Conway* can and should be distinguished and is therefore not binding on this court. On the facts, the position of the respective claimants is materially different. Whilst in *Conway* the claimant's prognosis left him with less than six months to live, Mr Newby's life expectancy is longer. Additionally, Mr Newby, unlike Mr Conway, is not receiving non-invasive ventilation, and therefore cannot request the legal withdrawal of this treatment. Consequently, Mr Newby has fewer legal options available to him to end his life on his terms. Further, Mr Bowen submits that whilst the current application seeks to examine and resolve the underlying 'legislative facts' that purport to justify the blanket ban on assisted suicide, no such attempt was made in *Conway*. Finally, the cases are distinct, given that it is presently argued that Section

2(1) the 1961 Act violates the Claimant's Article 2 rights, as well as his Article 8 rights. The former right was not argued in *Conway*. Article 2 is said to be engaged because the present law may drive Mr Newby to take his life earlier, since he cannot rely on assistance later.

28. Ultimately the Claimant submits that *Nicklinson* is authority for the proposition that evidence is needed. Evidence to be placed before the court, and properly examined through cross-examination is capable of informing the court of the "legislative facts", which in turn will enable a thorough assessment of proportionality. Further, as the court is not bound by *Conway*, it should proceed to consider the compatibility of Section 2(1) of the 1961 Act with Article 8 ECHR by reference to the evidence in Mr Newby's case.

The Nature of the Evidence

29. The term "legislative facts" is a presentational centrepiece of the Claimant's argument. This term, which has been plucked from the Canadian case of *Carter v AG of Canada* [2015] SCC5, refers to the "mixed ethical, moral and social policy issues" which go to the test that courts must apply in determining the compatibility of Section 2(1) of the 1961 Act under section 4 of the HRA. These "facts" are pieces of information or evidence, which Claimant asserts are necessary in order to undertake a proper analysis of whether the current legal regime interferes with Mr Newby's rights, and whether this interference can be justified on the ground of proportionality. Thus, the argument goes, in order for the court to be enabled to embark upon a meaningful assessment of whether the interference with Article 8(1) ECHR can be justified under Article 8(2) ECHR, the court must examine fully the information concerning the validity of the costs, risks, and benefits of regulating assisted suicide. By inference, the argument amounts to the proposition that ignorance of this evidence inhibits the court from making a proper assessment of whether the current law is proportionate to its legitimate aim.

30. Mr Bowen helpfully supplied us with the following categories of costs, risks, and benefits:

> "What is the degree of harm caused by the absolute ban in Section 2(1) Suicide Act to the autonomy, physical and psychological integrity of persons, like C, who suffer from incurable or terminal conditions that cannot be palliated and who are physically unable to end, and prevented by Section 2(1) from obtaining assistance in ending their lives at a time and in the manner of their choosing?
>
> Whether vulnerable people are more or less at risk of premature death in a permissive or prohibitive jurisdiction (like the UK). [Further sub-categorisation of this category has been omitted for brevity]
>
> The number of people who are affected by the current law and who are likely to be affected by any change in the law.
>
> Whether there is any causative link between the availability of palliative care and a jurisdiction being more permissive or prohibitive.

> Whether a more permissive approach is likely to have a negative impact on doctor-patient relationships and public trust in the public health system.
>
> Whether a more permissive approach is likely to have a negative impact upon the ethnical principle of the sanctity of life, with particular emphasis on the ethical distinctions between end of life practices that are currently lawful and those that are unlawful.
>
> Whether a more permissive approach is likely to have a beneficial effect of improved openness in end-of-life discussions in permissive jurisdictions and how this may contribute in a positive way to the patient's experience of dying.
>
> Whether a more permissive approach is likely to have a beneficial effect of improved regulation and transparency of all end of life decision-making.
>
> The nature and reliability of the safeguards proposed by C and whether these would meet the risks outlined in above with particular reference to the operation of the safeguards in jurisdictions where assisted suicide is lawful and empirical evidence as to whether and to what extent those risks eventuate in those jurisdictions."

31. In its ruling made at the initial hearing in *T,* which took place prior to the Court of Appeal judgment in *Conway*, the evidence was categorised and summarised by the Divisional Court ([2017] EWHC 3181 (Admin)):

> "8. As it currently stands, the evidence which is sought to be challenged by way of cross examination broadly falls into two groups. We consider each separately, because the arguments apply differently to each group or type.
>
> 9. The first type of expert evidence is from palliative care experts going to T's specific circumstances including his current condition, his future prognosis, and palliative care options open to him now and in the future. So far, the Secretary of State has adduced evidence from two such experts (named at paragraph 4.2 of the proposed directions) but Mr Strachan has made it clear that if the application succeeds, consideration will necessarily be given to whether further evidence is required.
>
> …
>
> 14. The second type of evidence which Mr Bowen seeks to challenge is that offered by Professor the Baroness Finlay of Llandaff; this is the subject of paragraph 4.1 of the Claimant's proposed directions. Baroness Finlay is a palliative care consultant who is an honorary professor at Cardiff University.

> She served on the House of Lords Select Committee on the Assisted Dying for the Terminally Ill Bill in 2004-5 (the "House of Lords Select Committee") and later co-founded the think-tank Living and Dying Well. She has a wide range of professional interests associated with end of life issues."

32. The evidence upon which the Claimant seeks to rely in this case in order to determine the "legislative facts" is extensive and follows very closely the evidence which was submitted in *T*.

The Defendant's Response

33. Mr Strachan QC for the Defendant submits in sum that the claim is unarguable, being an attempt to re-litigate issues concerning the prohibition on assisted suicide which have been repeatedly considered and rejected by the courts, most recently in *Conway*. Mr Strachan notes that on 7 November 2018 Mr Conway was refused permission to appeal to the Supreme Court.

34. The decision in *Conway* is binding. In that case the court noted that the evidence before it was conflicting. Mr Strachan points out that nothing has changed since the determination of the Court of Appeal in *Conway* that Parliament is the most appropriate forum for the resolution of these ethical and moral issues (see, in particular, [186] and [189]), if indeed such issues are capable of resolution. The court in *T* reached an identical conclusion (at [16]).

35. Mr Strachan further argues that the only significant difference between the scheme proposed in *Conway* and the scheme proposed here is that the latter includes not only persons suffering from terminal illness with a less than six months to live, but additionally anyone considered to be subject to intolerable suffering. This widening of the ambit of the proposed scheme logically requires that the reasoning in *Conway* applies with greater force. Significantly, that widening takes this proposed scheme notably farther than the proposals of Lord Falconer of Thoroton, recently rejected by Parliament.

36. The Defendant submits that, following *Conway* and *T*, this court would be bound to decline to permit oral evidence and cross-examination regarding the so-called legislative facts; further that in any event, following *Conway*, the court would refuse to grant a declaration of incompatibility in Mr Newby's case, on the basis that the issue rightly resides with Parliament.

Relationship between the court and the legislature

37. It will be recalled that the first of the two key questions addressed by the Supreme Court in *Nicklinson* concerned the ability of the courts to make a declaration of incompatibility where there were engaged grave issues of moral and ethical judgement. Only four of the nine justices felt that it would be institutionally inappropriate for a court to consider whether section 2 of the 1961 Act infringes the ECHR: hence a bare majority held that such a declaration would be institutionally appropriate. But the judgments in *Nicklinson* are lengthy and complex; they require to be read with great care and attention. The case cannot be reduced to a tallying of scores. Such an approach

deprives the carefully formulated judgments of their conditions, qualifications, and context, and thus fails to acknowledge the variety of views.

38. Undoubtedly the HRA has altered the relationship between the judiciary and Parliament. But this does not of itself impart or ascribe to the court expertise or legitimacy in the controversial questions of ethics and morals regarding the sanctity of life. These differences may mean that even in cases where the courts are empowered to act, they should be hesitant to do so. In the words of Lord Reed in *Nicklinson*, the HRA:

> "…introduces a new element into our constitutional law, and entails some adjustment of the respective constitutional roles of the courts, the executive and the legislature. It does not however eliminate the differences between them: differences, for example, in relation to their composition, their expertise, their procedures, their accountability and their legitimacy." (paragraph 3)

39. Parliament has given the court the right to declare incompatibility. Recent decisions have emphasised that the courts cannot simply abdicate responsibility by stating that it is wrong in principle to exclude issuing such declarations on the basis that Parliament is the correct forum in all difficult cases. But in this respect, as the Court of Appeal observed in *Conway* at [193]:

> "Weighing the views of Parliament heavily in the balance in a case such as the present one is not the same as a complete abdication of responsibility to consider the merits of the arguments on either side in relation to Article 8(2)"

40. In the context of repeated and recent parliamentary debate, where there is an absence of significant change in societal attitude expressed through Parliament, and where the courts lack legitimacy and expertise on moral (as opposed to legal) questions, in our judgment the courts are not the venue for arguments which have failed to convince Parliament.

41. Even if there was very widespread examination of evidence in these proceedings, the court process is in our view unlikely to provide reliable answers so as to determine this issue. Considerations of morality, upon which the issue turns, are simply not reducible to statistical analysis or any hard-edged, measurable or quantitative conclusions. As it was put by this court in *T*:

> "16…There exist facts bearing on the issues in question, and there are also a range of questions not reducible to hard fact, about which opinions must be formed and considered. The content of a study of the impact of the legislation of euthanasia (and assisted suicide) in the Netherlands is principally a question of fact. The methodology, rigour and accuracy of the conclusions of such a study is properly a question of expert opinion. The implications of such a study for the outcome of any English legislative change consequent on a declaration of incompatibility is not a "fact", but a question of judgement about the future, and

> moreover is arguably a question beyond the special expertise of some (or perhaps all) of the instructed experts."

42. The limitations of an evidence-based approach are connected to the constitutional relationship between the judiciary and the legislature, and their respective expertise and responsibilities. The number of vulnerable people who may be exposed to the risks of abuse of an assisted suicide system might be clarified by evidence and cross examination. To that extent, some of the evidential premises for a judgement as to the proportionality of the measure in its relation to a legitimate aim justifying interference with individual rights could be assessed. But this is merely a preliminary step. How is a court positioned to conclude whether such an estimated level of abuse to the vulnerable is, or is not, proportionate, as a balance to the enfranchisement of assisted suicide benefitting those facing such a tragic quandary as that before the Claimant? In our judgment, there are some questions which, plainly and simply, cannot be 'resolved' by a court as no objective, single, correct answer can be said to exist. On issues such as the sanctity of life there is no consensus to be gleaned from evidence. The private views of judges on such moral and political questions are irrelevant, and spring from no identifiable legal principle. We struggle to see why any public conclusion judges might reach on matters beyond the resolution of evidence should carry more weight than those of any other adult citizen.

43. In cases where a margin of appreciation exists, it is clear this is ceded as a whole to the relevant state and the three branches of the state. That does not determine the relative roles of the three branches of the state. Although "there is no principle by which [such an issue] is automatically appropriated by the legislative branch" (Lord Hoffman in *In re G* [2009] 1 AC 173 at [73]), this does not change the fact that by reason of Parliament's composition, expertise, procedures, democratic accountability (and hence legitimacy), Parliament is the appropriate forum to consider and determine the very difficult balance between sanctity of life and personal autonomy raised in cases of assisted suicide.

44. At the close of the hearing we invited submissions from the parties on two recent cases from Northern Ireland concerning the compatibility with Article 8 of the criminal law on abortion, and which might be thought to have a bearing on the relationship between the courts and the legislature in a comparable field involving moral and ethical questions. We are grateful to both parties for their short, written submissions on the points to be derived from those cases.

45. In [2015] NIQB 96 Horner J held that sections 58 and 59 of the Offences Against the Person Act 1861 were incompatible with Article 8 insofar as they criminalised abortion under certain specific circumstances. He made a declaration of incompatibility to that effect. Horner J's decision was then overturned by the Northern Ireland Court of Appeal ([2017] NICA 42) and the matter came before the Supreme Court. The Supreme Court ([2018] UKSC 27) by a majority, dismissed the appeal on the basis that the claimant, the Northern Ireland Human Rights Commission, had no standing to bring the claim. However, five of the Justices (Lady Hale, Lord Mance, Lord Kerr, Lord Wilson and Lady Black) considered that the (then) current law in Northern Ireland was disproportionate and incompatible in the particular circumstances which Horner J had identified. Following the Supreme Court decision, a claim for incompatibility has been successfully advanced before Keegan J, applying the principles discussed by the majority in the Supreme Court: R (Ewart) [2019] NIQB 88.

46. The Court of Appeal in *Conway* considered the implications of the Supreme Court judgment in the Northern Ireland case at [194]-[200], concluding that there was nothing in that case to cause a change of mind in relation to the issues raised by Mr Conway. The decision of the Supreme Court in the Northern Ireland case confirmed that there is no institutional bar to determining difficult questions of compatibility but emphasised that the breadth of the area of judgement accorded to Parliament will vary according to the issues raised by a particular case. The Court of Appeal in Conway highlighted a number of differences between the issues arising in the context of the abortion case in Northern Ireland and that of assisted dying (at [196]-[199]).

47. In our view, the Northern Ireland decisions on abortion serve as a useful illustration of the type of case where courts may properly assess that the balance of proportionality falls in favour of a grant of incompatibility. But, though the underlying principles are the same, those cases cannot assist with, still less be determinative of, the issues arising in connection with assisted suicide.

Conclusions

48. Despite minor distinctions to be made in the conditions of the claimants, *Conway* is an authoritative case for present purposes, and in our judgment is binding on this court in relation to this issue.

49. The court in *Conway* did not specifically consider Article 2; however, in our view the Claimant's reliance on Article 2 cannot provide him with an additional claim having reasonable prospects of success in these proceedings. In the case of *Pretty*, both the House of Lords and the European Court of Human Rights rejected claims that a law prohibiting assisted suicide breaches Article 2, essentially for the reason that suicide (whether assisted or otherwise) represents the polar opposite of the interest in the sanctity of life which Article 2 exists to protect. But even if Article 2 were properly to be invoked here, the considerations which would need to be taken into account in any balancing exercise are the same as those applicable to Article 8; indeed the Claimant's Statement of Facts and Grounds (at paragraph 32) appears to accept as much. A case formulated under Article 2 adds nothing and must fail for the same reasons as the claim under Article 8.

50. Notwithstanding the forensic analysis of the opinions in *Nicklinson*, the court is not an appropriate forum for the discussion of the sanctity of life, or for resolution of such matters which go beyond analysis of evidence or judgment governed by legal principle.

51. For these reasons, we would refuse permission.