

# Assisted suicide: a question for the courts?

Post-*Conway*, David Lawson considers the future of challenges to the law on assisted suicide

## IN BRIEF

► Review of attempts to over-turn the law against assisting people to commit suicide and euthanasia.

► Application of Art 8 of the European Convention to the criminal law.

The recent case of *R (on the application of Conway) v Secretary of State for Justice (Humanists UK and others intervening)* [2017] EWHC 2447, [2017] All ER (D) 22 (Oct) concerns a man suffering from motor neurone disease.

Mr Conway wants the option to end his life when he considers it is no longer worth living. He brought an application seeking a declaration of incompatibility in respect of s 2 of the Suicide Act 1961 (SA 1961), arguing that section is a disproportionate interference with his right to private life under Art 8 of the European Convention on Human Rights. The claimant proposed that any lawful scheme would involve safeguards such as a prognosis that the person has less than six months to live and the involvement of a High Court judge to confirm that any statutory criteria were met.

This is the most recent in a line of cases considering the relationship between Art 8 and assisted suicide or euthanasia (the difference being that the latter involves active steps to end life by a third party, usually a doctor, while the former does not). Earlier cases include *Pretty* [2001] UKHL 61 and (2002) 35 EHRR 1, *Purdy* [2009] UKHL 54 and *Nicklinson* [2014] UKSC 38. The European Court has considered similar cases from other countries. However, the court noted that at present only five of the 47 member states of the Council of Europe permit any form of assisted suicide.

## Constitutional & ethical dilemmas

Since the turn of the century there have been numerous attempts to over-turn the law against assisting people to commit suicide (s 2(1) of SA 1961) and euthanasia. The cases have taken the courts into complex constitutional and ethical questions in an attempt to resolve the application of Art 8 of the European Convention to the criminal law.

The first issue is whether this is a matter for the courts at all. Parliament has looked



at assisted suicide at least 14 times since 2000 and is more likely than the courts to represent the full spectrum of views on the underlying ethical question.

At an abstract level, the involvement of the courts can be seen either as a usurpation of democracy or as a necessary part of the rule of law, itself intrinsic to democracy. The court held this case was properly before the court and had to be determined according to law and therefore was not the exclusive role of Parliament.

The court sought to square this circle by giving considerable weight to the conclusions reached by Parliament: 'Parliament has made the assessment that [a blanket prohibition on assisted suicide is necessary]. The evidence we have reviewed shows that there is a serious objective foundation for that assessment' (paras [106]–[108]).

It has long been recognised in common law that a person can refuse medical treatment even if this will result in their death. More recently the Court of Protection has, on rare occasions, concluded that medical treatment is too burdensome, even though available and life preserving. The court accepted in *Conway* that it was rational to distinguish between the right to refuse treatment and taking active steps to end a life (para [119]).

It set out at length a submission by the British Geriatric Society that 'taking active steps to assist the patient to die changes fundamentally the role of the physician' (para [69]). The judgment refers also to evidence from disability campaigners about the impact on the attitude to the disabled of using quality of life as a yardstick for the legality of assisted suicide.

Ethically a prohibition on assisted suicide

may limit autonomy. The European Court of Human Rights has held—for example, in *Pretty*—that such a prohibition engages Art 8 of the Convention. The government replied that any interference in that right was justified in particular by the sanctity of life, the protection of trust and confidence between doctor and patient, and the need to protect vulnerable people. The court accepted that there was a rational link between these factors and s 2(1) of SA 1961 (paras [96]–[97]).

The claimant's last argument was that the prohibition—even if rationally connected to its aim—was not 'necessary', ie the aim could be achieved in other ways. The court did not see that effective safeguards were possible or that, by their nature, any safeguards would stop the wider attitudinal changes that would follow from legalisation of assisted suicide. At this point the court returned to the constitutional question and identified 'powerful constitutional reasons why Parliament's assessment of the necessity of maintaining section 2 in place should be respected by this court' (para [108]).

Lord Judge CJ, in *Nicklinson* in the Court of Appeal, had called Parliament 'the conscience of the nation'. The court in *Conway* held that 'the legitimacy of Parliament deciding to maintain such a clear line that people should not seek to intervene to hasten the death of a human is not open to serious doubt' (para [112]). The House of Lords in *Nicklinson* (albeit in the context of then forthcoming Parliamentary scrutiny) and the European Court of Human Rights in *Pretty* had accepted that the blanket ban on assisted suicide was a proportionate way to protect the weak and the vulnerable.

In *Conway*, the court concluded that it was legitimate for Parliament to lay down a clear standard for the guidance of society, to avoid distressing disputes at the end of life and to avoid incremental extension of the categories of people whose lives can be ended (para [127]).

Few legal challenges raise so many questions across such a wide range of areas. The court has identified many hurdles for those seeking to legalise assisted suicide. Before they can even access some of the legal difficulties they will surely need to remove the block caused by Parliament's view, either by some change occurring in Parliament's perspective or by showing that democratic decision-making is less relevant to the determination of this question than it is held to be in this judgment.

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