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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2019] EWHC 3606 (Admin)



No. CO/2594/2019

Royal Courts of Justice

Thursday, 19 December 2019

Before:

LORD JUSTICE DINGEMANS

and

MRS JUSTICE ELISABETH LAING

B E T W E E N :

The Queen on the application of
PAUL LAMB

Claimant

- and -

SECRETARY OF STATE FOR JUSTICE

Defendant

MR P. HAVERS QC, MR A. STRAW, MR A. SANDELL and MR E. KRISHNAN (instructed by Leigh Day) appeared on behalf of the Claimant.

MR J. STRACHAN QC and MR B. TANKEL (instructed by the Government Legal Department) appeared on behalf of the Defendant.

J U D G M E N T

MRS JUSTICE ELISABETH LAING:

Introduction

- 1 This is my decision on the claimant's renewed application for permission to apply for judicial review. Permission was refused on the papers by Whipple J ("the Judge") on 27 September 2019. The court is also asked, if permission is granted, to make a costs capping order.
- 2 The claimant has been represented by Mr Havers QC, Mr Straw, Mr Sandell and Mr Krishnan. The defendant has been represented by Mr Strachan QC and Mr Tankel. We thank all counsel for their helpful submissions.

The facts

- 3 It is not necessary for me to say much about the facts. The claimant was seriously injured in a road accident in 1990. He would like to die but he would need help to die. He has litigated part of this question before. In 2015 the Supreme Court decided *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657. The claimant's case was joined as *Nicklinson* at the level of the Court of Appeal. We have been shown the judgment of Elias LJ explaining the circumstances in which that happened. They are unusual circumstances.
- 4 I, therefore, accept Mr Havers' explanation of those circumstances when the claimant was joined with the claim and I also accept that he had, in that litigation, very little, if any, opportunity to influence the shape of the argument.

The claim

- 5 Anyone who helps the claimant to die would commit an offence contrary to s.2 or s.2A of the Suicide Act 1961 ("the 1961 Act"). Anyone who helps him to die would, therefore, run the risk of being prosecuted for such an offence. The claimant asks for a declaration that those provisions of the 1961 Act are incompatible with his Convention rights. He argues that they are either incompatible with his Article 8 rights or with his rights protected by Article 14, read with Article 8, in that they discriminate against him on the grounds of his disability. An abled-bodied person can end his life but, because of his disabilities, he cannot. The interference with his autonomy is not justified. Making an exception would not undermine the protection of the vulnerable which the criminal law now provides. He has made his own legislative proposals to carve out such an exception which would apply to him and to those in his situation.

The judge's reasons for refusing permission to apply for judicial review

- 6 The judge described the claim. She agreed with the points made in the defendant's summary grounds; that the claimant should have put forward the argument he now relies on in *Nicklinson*; he could have applied to amend his grounds when he joined the case at the Court of Appeal stage. She considered the claimant's explanation for starting this claim to be inadequate.
- 7 The Article 14 claim had been rejected by the House of Lords in *R (Pretty) v Director of Public Prosecutions* [2001] UKHL 61, [2012] 1 AC 800, and by the European Court of Human Rights in *Pretty v United Kingdom* [2002] 35 EHRR 1. The lack of a distinction in s.2 between the able-bodied and the disabled did not violate Article 14. It was not surprising that Article 14 had not been relied on in *Nicklinson* or in *Conway v Secretary of State for Justice* [2018] EWCA (Civ) 1431, [2018] 2 WLR 925 in the light of the decisions

in *Pretty*, but the reasoning in both cases was that the blanket prohibition on suicide is justified. The Article 8 argument was considered and rejected in *Conway*.

- 8 The courts have now considered the prohibition on assisted suicide several times from different angles. The conclusion (supported by the Supreme Court's recent refusal of permission to appeal in *Conway*) is that the current law is compatible with the Convention. If anything, the claimant's case is weaker than Mr Conway's because his legislative proposal would require more people to be allowed to be helped to commit suicide.
- 9 The judge expressed a view that the challenge in this case is not a "criminal cause or matter". That view is not disputed by the claimant and I say no more about it.

The claimant's arguments on renewal

- 10 The courts have not considered whether s.2 is discriminatory since *Pretty*. Much has changed since then. The House of Lords, it turns out, was wrong to hold in that case that the prohibition on assisted suicide did not interfere with Article 8. The Court of Appeal in *Conway* held, in para.126, that it was not bound by the conclusions in *Pretty* on justification. The claimant's case is an indirect discrimination claim and the European Court of Human Rights did not decide that Article 14 prevents indirect discrimination until *DH v Czech Republic* [2008] 47 EHRR 3.
- 11 The European Court of Human Rights has applied a different test to the justification in the case of people with disabilities, "the margin of appreciation the states enjoy in establishing different legal treatment for people with disabilities is considerably reduced ... Such treatment would require very weighty reasons to be justified" (para.89 of *JD v United Kingdom* (32949/17) 24 October 2019). That case concerned the so-called "bedroom tax". In that case the European Court of Human Rights held that the reductions in housing benefit had a disparate and prejudicial impact on the claimant, who had a disabled daughter, but that they were justified.
- 12 *Nicklinson* does not preclude this claim. It does not clearly decide that s.2 is justified. In any event, it was not concerned with discrimination. Nor does *Conway* decide the issues in this case for two reasons. First, it was not a discrimination case. Second, Mr Conway's proposed legislative scheme differed significantly from that proposed by the claimant. The claimant's scheme is strictly limited to someone who is incapable without help of killing himself. It is limited to a person who experiences unbearable suffering. It does not require a person to prove he has only six months to live and does not necessarily involve help by a doctor. The claimant is not asking the court to decide a "controversial, ethical, moral and social policy issue". He has simply asked the court to decide that the law is discriminatory and that the discrimination has not been justified.

The relevant authorities

- 13 In *Pretty*, the House of Lords considered a claim by a physically disabled claimant, who wanted to be helped to die by her husband, for judicial review of the refusal of the Director of Public Prosecutions ("the DPP") to give an undertaking that he would not consent to a prosecution for the husband if he were to help her to die. She relied on Articles 2, 3, 8, 9 and 14. Her Article 14 claim was that an able-bodied person could "exercise the right to suicide" whereas, because of her disability, she could not do so without help. As Lord Bingham recorded, Mrs Pretty relied on Article 14 and what is called "*Thlimmenos* discrimination" (*Thlimmenos v Greece* [2000] 31 EHRR 411). Her case was that s.2 discriminated against those like her who could not take their own lives because, without an objective and reasonable justification, it failed to treat differently people whose situations

are significantly different. Lord Bingham had held that none of the Convention rights on which she relied entitled her to take her own life with help. His primary reason for dismissing the Article 14 claim, therefore, was that it did not fall within the ambit of a Convention right. He went on to consider, in case that was wrong, whether the law conferred a right to commit suicide. He held that it did not. In any event, the criminal law could not be criticised as objectionably discriminatory because it applied to all (judgment para.35).

- 14 At para.36, Lord Steyn gave powerful reasons why a claim that the European Convention on Human Rights required states to make euthanasia and assisted suicide lawful should be treated sceptically. Such an interpretation would “not only be enormously controversial but profoundly unacceptable to the peoples of many member states”. He explained in para.57 why a declaration of incompatibility without more would not be “rational policy making”. Such a “fundamental change cannot be brought about by judicial creativity ... It must be a matter of democratic debate and decision-making by the legislature”.
- 15 In para.64 Lord Steyn gave a “more fundamental reason” why Article 14 did not apply than that Article 14 could not be engaged. This was that the condition of terminally ill people may vary; “the majority will be vulnerable”. Their vulnerability provided the rationale for the s.2(1) offence. This class of people was protected by s.2(1) because they needed to be protected. In any event, s.2(1) was fully justified.
- 16 All the members of the court held that if there was an interference with Mrs Pretty’s Article 8 rights, any such interference was justified (per Lord Bingham, paras.26-30, Lord Steyn, para.62, Lord Hope, para.102, Lord Hobhouse, para.112 and Lord Scott, para.124). The justification was the need to protect a vulnerable group of people even if some members of that group wanted to be helped to die.
- 17 In *Pretty v United Kingdom* [2002] 35 EHRR 1, the European Court of Human Rights was “not prepared to exclude that this constituted an interference with her right to private life” (judgment para.65). The European Court of Human Rights considered justification in paras.70-78. It decided that the ban was justified. It considered Article 14 in paras.88-89, including *Thlimmenos* discrimination. There was “objective and reasonable justification for not distinguishing in law between those who are and those who are not physically capable of committing suicide ...”.
- 18 In *Nicklinson v United Kingdom* 61 EHRR SE7, the European Court of Human Rights repeated that this issue fell within a state’s margin of appreciation. The European Court of Human Rights held at para.84 that it was inappropriate to impose an obligation on domestic courts to decide on the merits of a claim as opposed to deferring to the legislature.
- 19 In *Conway* the claimant again asked for a declaration that s.2 was incompatible with Article 8. He was terminally ill with motor neurone disease. He wanted someone to be able to help him to die when he was told that he had six months left to live. He proposed his own legislative scheme under which a person in his position could apply to a High Court judge for such help to be authorised. The Court of Appeal held that the issue was whether the blanket ban in s.2 was necessary and proportionate for the purposes of Article 8, having regard to the claimant’s legislative proposals and to the evidence before the court (para.129). The Court of Appeal upheld the decision of the divisional court that the claimant’s scheme was inadequate to protect the vulnerable and failed to give adequate weight to the sanctity of life and potentially undermine trust between doctors and patients. Those were three legitimate aims promoted by s.2(1) (para.61 of the judgment of the Court of Appeal). The Court of Appeal held that the divisional court had given appropriate respect to the views of Parliament and had not abdicated responsibility for deciding the question of proportionality.

- 20 The Court of Appeal described the history of the case law and Parliament's engagement with this issue in paras.10-48 of its judgment, including Parliament's engagement after the decision in *Nicklinson*. In para.125, the court noted that the Secretary of State had accepted that, as a matter of domestic law, it was appropriate for it to consider whether or not s.2 was a proportionate interference with Article 8. It was not bound by *Pretty*, although not because that case was about euthanasia rather than assisted suicide (it was about assisted suicide). Proportionality had to be assessed in the current circumstances (para.126). The facts in *Nicklinson* were different because the appellants were not terminally ill. The Court of Appeal were unable to discern any useful pointers from that case, other than that the majority of the Justices were decisively influenced by the fact that a relevant Bill was about to be debated in Parliament and the "overwhelming majority" thought that Parliament was better placed to decide the issues than the courts (para.134). As the Court of Appeal said at para.181, no common law right was at issue. There is no common law right to assisted suicide.
- 21 Parliament has made the position clear in the 1961 Act and by relatively recently rejecting schemes similar to Mr Conway's. What was at issue was not the application of well-established principles to new facts but the possible legalisation of conduct that was criminal at common law and is now criminal as a matter of statute. The Court of Appeal also took into account that the DPP had only prosecuted one defendant for assisting suicide in five years (para.185). Mr Conway's proposed scheme, broadly, had already been considered by Parliament (para.186). The evidence that the court had seen was necessarily selective. Unlike Parliament or the Law Commission, the court could not carry out a consultation or engage its own experts. Giving significant weight to Parliament's views was not the same as abdicating responsibility (para.193). At paras.201-206, the Court of Appeal summarised the reasoning of the Divisional Court. It could not find any fault with it.

Discussion

- 22 I accept, as did the Court of Appeal in *Conway*, that I am not bound by *Pretty*. It is true that in some respects the law has moved on since *Pretty*, but the fundamental arguments have not changed all that much. At the heart of the justification for s.2 is the argument that this provision is necessary in order to protect vulnerable people. Also at the heart of the reasoning is the principle that, in this field, it is for Parliament, not the courts to change the law. That essential reasoning is not altered because the European Court of Human Rights has now recognised that s.2 interferes with a person's Article 8 rights or because it has not recently considered an Article 14 argument in this context or because it has expanded the concept of discrimination for the purposes of Article 14.
- 23 As Mr Strachan rightly pointed out in his oral submissions, what has to be justified is the same whether it is analysed through Article 8 or through Article 14, and whether it is analysed as a matter of direct or indirect discrimination. What all the cases have considered to be justified is a similar factual situation which, legally, amounts to a grave interference with autonomy and which is suffered by people who have disabilities and are, therefore, not able to take their own lives. All the relevant cases to which I have referred concerned people in precisely that situation.
- 24 The two principles to which I have referred are forcefully repeated in the decision of the Court of Appeal in *Conway*. The Court of Appeal derived from its analysis of the judgments in *Nicklinson* support, from the overwhelming majority of the Justices for the second principle. I infer that both principles have recently been accepted, at least for the time being, by the Supreme Court, because it refused permission to appeal in that case. I

accept, having been shown the Supreme Court's reasons for refusing permission, that the Supreme Court considered that case raised arguable points of law. But what is arguable at that level and what is arguable at this level are different.

- 25 I also accept that *Conway* was not a discrimination case and that the legislative scheme proposed by the claimant is not the same as the scheme which Mr Conway proposed. But those two differences do not affect the two fundamental principles which I have identified in *Pretty* and which are echoed, as I have just said, forcefully by the Court of Appeal in *Conway*. Moreover, the Court of Appeal in *Conway* identified two further justifications for s.2 (the sanctity of life and the possible undermining of trust between doctors and their patients).
- 26 I should also say that I doubt whether a different test for justification should be applied in this case (because it overtly relies upon a discrimination ground). First, *JD* was a benefits case in the area of social and economic policy. Second, it concerned a case in which the claimant was entitled to benefit but the measure in question had a disparate impact on her because she had a disabled child. There is no similar right at issue here, see the reasoning in *Pretty* in the House of Lords.
- 27 The European Court of Human Rights has considered s.2 more than once and its consistent approach to s.2 makes me sure that it would not adopt a different test for justification now if a discrimination argument were run again in Strasbourg. I note that it did not do so in *Pretty*, which was a discrimination case. It is not enough to say that the Strasbourg cases have moved on in discrimination cases. I do not consider it likely, given its decision in *Pretty*, that the European Court of Human Rights would carve out a new special rule of this kind in relation to s.2. The European Court of Human Rights has recently considered justification in *Nicklinson* and, although I accept that was not a discrimination case, the key point is the point made by Mr Strachan which I have just described.
- 28 Third, I observe that the formulation in *JD v United Kingdom* refers to “establishing different legal treatment for people with disabilities”. Section 2 does not do this, as Mr Havers accepted. It treats able-bodied people in exactly the same way as it treats people with disabilities. It does not endorse suicide or give anyone a right to commit suicide. I do not consider that this is an arguable case of *Thlimmenos* discrimination for the reasons given by Lord Bingham in *Pretty*. Nor do I consider that formulating the claim as a claim of indirect discrimination could make an arguable difference having regard to the factual situation which has to be justified. But if I am wrong about that, I consider that the justification described by the Divisional Court and by the Court of Appeal in *Conway* does amount to very weighty reasons and that the contrary is not arguable.
- 29 It seems to me that the details of the claimant's proposed legislative scheme do not matter. The basic point about any such scheme is that the clear steer from the Court of Appeal in *Conway*, echoing Lord Steyn in *Pretty*, is that the design of any such scheme is for Parliament, not for the courts. If I am wrong about that, and the details do matter, I accept the Secretary of State's argument that the claimant's scheme, far from weakening the justification for s.2 and 2A, reinforces it. It removes the protection of those sections from the very vulnerable class of people to which the claimant belongs, some of whom may want to end their lives, some of whom will not want to end their lives and some of whom will be susceptible to various kinds of pressure, internal or external, to make such a decision.
- 30 For those brief reasons, I do not consider that this claim is arguable. I would refuse this renewed application for permission to apply for judicial review and that conclusion makes it unnecessary for me to consider an application for a costs capping order.

LORD JUSTICE DINGEMANS:

- 31 I agree with the judgment of Mrs Justice Elisabeth Laing.
- 32 I want only to add that I can see no prospect, however the legal argument is framed or presented, and it has been framed with conspicuous skill by Mr Havers QC and his legal team, of the legal answer to the claim being other than that the assessment of the justifications for any interference with rights under Article 8 of the European Convention on Human Rights or assessment of the justifications for any discrimination under Article 14, when read with Article 8 of the European Convention on Human Rights, is a matter for Parliament.
- 33 This is because there is no right to death or suicide under the European Convention on Human Rights, to which domestic effect has been given by the Human Rights Act 1998. By contrast, the European Convention on Human Rights does provide a right to life protected by Article 2 of the Convention. As is now well known, there are rights of autonomy arising from Article 8 of the Convention. The conflict between the right to life and autonomy in this immensely sensitive area is very longstanding, as in part appears from the judgment of Lord Sumption in *Nicklinson v Ministry of Justice* at paras.207-210. The justifications for any interference with the right to autonomy under Article 8, and the justifications for any discrimination under Article 8 when read with Article 14, are weighty and well known and include the protection of vulnerable persons. Parliament has considered and reconsidered those justifications and accepted them as outweighing the other rights engaged, and this claim is, therefore, not arguable.
- 34 In case it is relevant, I should also say that I agree with Whipple J, who refused permission to apply for judicial review in writing, that this is not a criminal cause or matter as defined by *Belhaj & Anor v Director of Public Prosecutions* [2018] UKSC 33 [17]. This is because the issue in this case is whether the law criminalising assisted suicide, as it has been put, is compatible with the Human Rights Act and no crime has been committed or threatened.
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CERTIFICATE

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5 New Street Square, London, EC4A 3BF

Tel: 020 7831 5627 Fax: 020 7831 7737

CACD.ACO@opus2.digital

This transcript has been approved by the Judges.