25 June 2014

PRESS SUMMARY

R (on the application of Nicklinson and another) (Appellants) *v* Ministry of Justice (Respondent); R (on the application of AM) (AP) (Respondent) *v* The Director of Public Prosecutions (Appellant) [2014] UKSC 38
On appeal from [2013] EWCA Civ 961

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Reed and Lord Hughes

BACKGROUND TO THE APPEALS

These appeals arise from tragic facts and raise difficult and significant issues, namely whether the present state of the law of England and Wales relating to assisting suicide infringes the European Convention on Human Rights ("the Convention"), and whether the code published by the Director of Public Prosecutions ("the DPP") relating to prosecutions of those who are alleged to have assisted suicide is lawful.

Until 1961 suicide was a crime in England and Wales and encouraging or assisting a suicide was therefore also a crime. By section 1 of the Suicide Act 1961, suicide ceased to be a crime. However, section 2 of that Act ("Section 2") provided that encouraging or assisting a suicide remained a crime, carrying a maximum sentence of 14 years in prison, but that no prosecutions could be brought without the permission of the DPP. Section 2 was amended by Parliament in 2009, but its basic effect remains unchanged. Following a decision of the House of Lords in 2009, the DPP published "Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide" ("the 2010 guidelines") setting out his policy in relation to prosecutions under Section 2.

In the first appeal, Mr Nicklinson suffered a catastrophic stroke some nine years ago, since when he was completely paralysed, save that he could move his head and his eyes. For many years, he had wanted to end his life, but could not do so without assistance, other than by self-starvation, a protracted, painful and distressing exercise. He wanted someone to kill him by injecting him with a lethal drug, but if necessary he was prepared to kill himself by means of a machine invented by a Dr Nitschke which, after being loaded with a lethal drug, could be digitally activated by Mr Nicklinson, using a pass phrase, via an eye blink computer.

Mr Nicklinson applied to the High Court for (i) a declaration that it would be lawful for a doctor to kill him or to assist him in terminating his life, or, if that was refused, (ii) a declaration that the current state of the law in that connection was incompatible with his right to a private life under article 8 of the Convention ("Article 8"). The High Court refused Mr Nicklinson both forms of relief; he then declined all food and died of pneumonia on 22 August 2012. Mr Nicklinson's wife, Jane, was then added as a party to the proceedings and pursued an appeal. Mr Lamb was added as a claimant in the Court of Appeal. Since a car crash in 1991, Mr Lamb has been unable to move anything except his right hand. His condition is irreversible, and he wishes to end his life. He applied for the same relief

sought by Mr Nicklinson. The Court of Appeal dismissed the appeal brought by Mr Nicklinson and Mr Lamb.

In the second appeal an individual known as Martin suffered a brainstem stroke in August 2008; he is almost completely unable to move and his condition is incurable. Martin wishes to end his life by travelling to Switzerland to make use of the Dignitas service, which, lawfully under Swiss law, enables people who wish to die to do so. Martin began proceedings seeking an order that the DPP should clarify, and modify, his the 2010 Policy to enable responsible people such as carers to know that they could assist Martin in committing suicide through Dignitas, without the risk of being prosecuted. Martin's claim failed in the High Court, but his appeal was partially successful, in that the Court of Appeal held that the 2010 Policy was not sufficiently clear in relation to healthcare professionals.

Mrs Nicklinson and Mr Lamb have appealed to the Supreme Court in the first appeal and the DPP has appealed and Martin has cross-appealed in the second appeal.

JUDGMENT

The Supreme Court, by a majority of seven to two dismisses the appeal brought by Mr Nicklinson and Mr Lamb. It unanimously allows the appeal brought by the DPP, and dismisses the cross-appeal brought by Martin. Each of the nine Justices gives a judgment.

On the first appeal, the Supreme Court unanimously holds that the question whether the current law on assisted suicide is incompatible with Article 8 lies within the United Kingdom's margin of appreciation, and is therefore a question for the United Kingdom to decide. Five Justices (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr and Lord Wilson) hold that the court has the constitutional authority to make a declaration that the general prohibition on assisted suicide in Section 2 is incompatible with Article 8. Of those five, Lord Neuberger, Lord Mance and Lord Wilson decline to grant a declaration of incompatibility in these proceedings, but Lady Hale and Lord Kerr would have done so. Four Justices (Lord Clarke, Lord Sumption, Lord Reed and Lord Hughes) conclude that the question whether the current law on assisting suicide is compatible with Article 8 involves a consideration of issues which Parliament is inherently better qualified than the courts to assess, and that under present circumstances the courts should respect Parliament's assessment.

On the second appeal, the Supreme Court unanimously allows the DPP's appeal. The exercise of judgment by the DPP, the variety of relevant factors, and the need to vary the weight to be attached to them according to the circumstances of each individual case are all proper and constitutionally necessary features of the system of prosecution in the public interest. In light of the Supreme Court's conclusion on the second appeal, Martin's cross-appeal does not arise.

REASONS FOR THE JUDGMENT

The first appeal: is the present law on assisting suicide incompatible with Article 8?

The Supreme Court unanimously holds that, according to the case law of the European Court of Human Rights, the question whether to impose a general ban on assisted suicide lies within the margin of appreciation of the United Kingdom **[66, 154, 218, 267, 339].** Whether the current law is incompatible with Article 8 is, therefore, a domestic question for the United Kingdom courts to decide under the Human Rights Act 1998.

It is also the unanimous view of the court that Section 2 engages Article 8, as it prevents people who are physically unable to commit suicide without assistance from determining how and when they should die. Accordingly, it can only be a justified interference if it satisfies the requirements of Article 8(2), ie that it is "necessary in a democratic society" for one or more of the purposes specified in that article, which in the present context would be "for the prevention of disorder or crime, for the

protection of health or morals, or for the protection of the rights and freedoms of others" **[79, 159, 216, 335]**.

Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr and Lord Wilson hold that, within the constitutional settlement of the United Kingdom, the court has the constitutional authority to make a declaration of incompatibility in relation to the blanket ban on assisted suicide **[76, 191, 299, 326]**.

Lord Neuberger, Lord Mance and Lord Wilson conclude that, while the question of assisted suicide is a difficult, sensitive and controversial issue on which great significance will be attached to the judgment of the democratically informed legislature, this does not mean that the legislative judgment is necessarily determinative **[76, 191]**. However, while the sensitive and controversial nature of this issue does not justify the court ruling out the possibility that it could make a declaration of incompatibility, it would be inappropriate for a court to decide whether Section 2 is incompatible with Article 8 before giving Parliament the opportunity to consider the position in the light of this judgment **[116]**.

The main justification advanced for an absolute prohibition on assisted suicide is the perceived risk to the lives of vulnerable individuals who might feel themselves a burden to their family, friends or society and might, if assisted suicide were permitted, be persuaded or convince themselves that they should undertake it, when they would not otherwise do so **[81, 171]**. A system whereby a judge or other independent assessor is satisfied in advance that someone has a voluntary, clear, settled and informed wish to die and for his or her suicide then to be organised in an open and professional way would arguably provide greater and more satisfactory protection for the vulnerable, than a system which involves a lawyer from the DPP's office inquiring, after the event, whether the person who had killed himself or herself had such a wish **[108, 186]**. The interference with Mr Nicklinson's and Mr Lamb's Article 8 rights is grave and the arguments in favour of the current law are by no means overwhelming **[111]**.

However, even had it been appropriate to issue a declaration of incompatibility at this time, Lord Neuberger, Lord Mance and Lord Wilson would not make a declaration in these proceedings. In the courts below the main focus was on Mr Nicklinson's submissions that necessity should be recognised as a defence to murder, whereas before the Supreme Court the case advanced was that a machine like Dr Nitschke's would offer a feasible means of suicide for those who have an autonomous wish but require assistance to do so. They are not confident that the court has the necessary evidence on, or that the courts below or the Secretary of State has had a proper opportunity to address, this issue **[119-121, 153]**.

Lady Hale and Lord Kerr would have issued a declaration of incompatibility. It is clear that Article 8 confers a right on an individual to decide by what means and at what point his or her life will end, provided that he or she is capable of freely reaching a decision. They hold that, in making no exception for those whose expressed wish to die reflects an autonomous desire rather than undue pressure, the current ban on assisting suicide is incompatible with Article 8 **[300, 326]**. Lady Hale draws attention to the similarity between a procedure for identifying those who have made such an autonomous decision but require some help to carry it out and other life and death decisions currently made in the Family Division of the High Court and the Court of Protection. Lord Kerr emphasises that when courts make a declaration of incompatibility, they do precisely what Parliament, through the Human Rights Act 1998, has empowered them to do, and remit the issue to Parliament for a political decision informed by the court's view of the law **[343]**. The remission of the issue to Parliament does not involve the court making a moral choice which is properly within the province of the democratically elected legislature **[344]**. Lord Kerr would also hold that there was no rational connection between the aim of Section 2(1) and the interference with the Article 8 right **[350]**.

Lord Sumption, Lord Hughes, Lord Reed and Lord Clarke accept that the courts have jurisdiction under the Human Rights Act to determine whether the current universal ban on assisting suicide is

compatible with Article 8, but consider that the question turns on issues which Parliament is in principle better qualified to decide, and that under present circumstances the courts should respect Parliament's assessment. The question requires a judgment about the relative importance of the right to commit suicide and the right of the vulnerable, especially the old and sick, to be protected from direct or indirect pressure to do so. It is unlikely that the risk of such pressure can ever be wholly eliminated. Therefore the real question is how much risk to the vulnerable is acceptable in order to facilitate suicide by others who are free of such pressure or more resistant to it. This involves important elements of social policy and a moral value-judgment, which are inherently more suitable for decision by Parliament as the representative organ of the constitution. This is for three reasons: (1) the issue involves a choice between two fundamental but mutually inconsistent moral values, the sanctity of life and the principle of autonomy, which are sensitive to a society's most fundamental collective moral and social values and upon which there is no consensus in our society, (2) Parliament has made the relevant choice on a number of occasions in recent years, and (3) the Parliamentary process is a better way of resolving issues involving controversial and complex questions of fact arising out of moral and social dilemmas in a manner which allows all interests and opinions to be expressed and considered **[228-232]**.

The second appeal: is the 2010 Policy lawful?

The Supreme Court unanimously allows the DPP's appeal.

Section 2(4) of the Suicide Act 1961 precludes any prosecution of a person who has allegedly contravened Section 2 without the DPP's consent **[39]**. It is one thing for the court to decide that the DPP must publish a policy, and quite another for the court to dictate what should be in that policy **[141]**. The exercise of judgment by the DPP, the variety of relevant factors, and the need to vary the weight to be attached to them according to the circumstances of each individual case, are all proper and constitutionally necessary features of the system of prosecution in the public interest **[249, 271]**.

During these proceedings, counsel for the DPP indicated that under the 2010 Policy a stranger who is not profiteering from his or her action, but assisting to provide services which, if provided by a close relative, would not attract a prosecution, was most unlikely to be prosecuted. The Director will be able to consider further whether that indication should stand and whether, if so, the 2010 Policy needs amendment, without it being appropriate to order her to undertake any such review [**146, 193, 251 and 323**].

In light of the court's conclusion on the second appeal, Martin's cross-appeal does not arise.

Further observations

Lord Sumption summarises **[255(2), (3) and (4)]** the principal respects in which the law already allows for the alleviation of suffering in the terminally ill, in view of the fact that they appear to be widely misunderstood. These paragraphs are specifically endorsed by Lord Neuberger **[137]**, Lady Hale **[324]** and Lord Mance **[194]**.

References in square brackets are to paragraphs in the judgment

NOTE
This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://www.supremecourt.uk/decided-cases/index.shtml