Law Report

Law on assisted suicide a matter for parliament

Court of Appeal
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Regina (Conway) v Secretary of State for Justice

Before Sir Terence Etherton, Master of the Rolls, Sir Brian Leveson, President, and Lady Justice King
[2018] EWCA Civ 1431
Judgment: June 27, 2018

It was a matter for determination by parliament, rather than the courts, whether or not a scheme permitting medical professionals to assist the suicide of a terminally ill person, with a prognosis of less than six months to live, should be lawful.

The Court of Appeal so held in dismissing the appeal of the claimant, Noel Conway, from the decision of the Divisional Court (Lord Justice Sales, Mrs Justice Whipple and Mr Justice Garnham) ([2018] 2 WLR 322) refusing him a declaration of incompatibility under section 4 of the Human Rights Act 1998, that the blanket ban on suicide in section 2(1) of the Suicide Act 1961 constituted a disproportionate interference with his right to respect for his private life under article 8(1) of the European Convention on Human Rights.

Ms Nathalie Lieven, QC, **Mr Alexander Ruck Keene** and **Ms Annabel Lee** for the claimant; **Mr James Eadie, QC**, **Mr James Strachan, QC**, and **Mr Benjamin Tankel** for the Secretary of State for Justice; **Ms Caoilfhionn Gallagher, QC**, and **Mr Graeme Hall** for Humanists UK, intervening; **Mr David Lawson** for Care Not Killing, intervening; **Ms Catherine Casserley** for Not Dead Yet (UK), intervening.

The Master of the Rolls Sir Brian Leveson and Lady Justice King said that the claimant had been diagnosed with a form of motor neurone disease. When he had a prognosis of six months or less to live, he wished to have the option of taking action to end his life peacefully and with dignity, with the assistance of a medical professional, at a time of his choosing, while remaining in control of the final act that might be required to bring about his death, such as drinking a prescribed medication or activating a switch.

The principal arguments of the claimant before the Divisional Court were as follows:

First, he argued that section 2(1) of the 1961 act was a blanket ban on the provision of assistance for suicide that constituted an interference with his article 8(1) rights in a way that was disproportionate and incompatible with article 8(2).

Second, he proposed an alternative statutory scheme which, he argued, would sufficiently protect the weak and vulnerable in society and thereby demonstrate that the blanket prohibition in section 2(1) was an unnecessary and disproportionate interference with his article 8(1) rights.

Third, he argued that, to give proper respect to their article 8(1) rights, the section 2(1) prohibition should be modified to allow himself and others within the category of individuals proposed by him under his scheme to be provided with assistance in the form he described so as to be enabled to commit suicide by their own action.

He contended, finally, on the basis that the wording of section 2(1) was clear in its meaning and effect, that no alternative interpretation could be given to it pursuant to section 3 of the 1998 act, and so the court should grant a declaration of incompatibility under section 4 of the 1998 act.

The criteria and safeguards proposed under the claimant's alternative statutory scheme were materially similar to those in bills proposed in parliament by Lord Falconer, Rob Marris, MP, and Lord Hayward.

The court had, therefore, to consider whether the blanket ban on assisted suicide in section 2 of the 1961 act was necessary and proportionate, having regard to the proposed scheme put forward by the claimant and the evidence before it.

While the protection of weak and vulnerable people was a critical issue in evaluating the suitability and efficacy of the proposed scheme, a decision to permit assisted suicide raised important moral and ethical issues on which society was divided and many people held passionate but opposing views.

In spite of the voluminous evidence adduced as to the appropriateness of the substantive criteria in the scheme, there was a dispute as to the possibility of predicting death within six months with any reliable degree of accuracy, and it was clear that an element of risk would inevitably remain in assessing whether an applicant had met the scheme's criteria. The evidence being limited to what the parties had chosen to place before it highlighted the limitation on the court's ability to assess with confidence the precise extent of that risk.

There could be no doubt that parliament was a far better body for determining the difficult policy issue in relation to assisted suicide in view of the conflicting, and highly contested, views within society on the ethical and moral issues and the risks and potential consequences of a change in the law and the implementation of a scheme such as that proposed by the claimant.

The contentious nature of the proposal was reflected in the fact that assisted suicide was unlawful in the great majority of Convention countries. It was particularly of note that the claimant's proposed scheme was broadly equivalent to the Falconer Bill, which never became law, and the Marris Bill, which was rejected by the House of Commons.

Furthermore, the court was restricted to considering the suitability of the precise scheme proposed by the claimant, who had chosen to limit it to those suffering terminal illness within six months of death. The court was not in a position to say whether, if there were adequate protections that showed that a blanket ban on assisted suicide was not necessary and proportionate, the line should be drawn elsewhere, such as those who were within 12 months of death.

Important parts of the evidence before the court were conflicting. Unlike parliament, or the Law Commission of England and Wales, the court could not conduct consultations with the public or any sector of it and could not engage experts and advisers on its own account.

There had been no error of principle in the reasoning of the Divisional Court. It had accorded appropriate respect for the views of parliament when carrying out the assessment under article 8(2) and concluded that the prohibition in section 2 of the 1961 act achieved a fair balance between the interests of the wider community and th interests of people in the position of the claimant. Its conclusions could not be faulted.

Solicitors: **Irwin Mitchell LLP**; **Treasury Solicitor**; **Hodge Jones Allen LLP**; **Barlow Robbins LLP**, Guildford; **Fry Law**, Sheffield.