

Law on assisted dying post conway



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Will any assisted suicide case succeed post- *Conway* [1] ? A practitioner's guide to the law on assisted dying.

Introduction

This guide addresses the law on assisted dying, as illustrated in the recent (now leading) case of *Conway*. There are two elements to this piece, firstly a discussion of *Conway*, including a presentation of the 'legal history' and background of the case, so bringing the practitioner up to speed with the subject matter and case law. The second element will analyse the law on assisted dying in order that the practitioner can identify, analyse and advise appropriately on the issues when presented with an assisted dying matter.

Part 1: Practitioner Article – *Conway* ; a discussion

Definitions

When considering matters concerning assisted dying, it is of paramount importance to understand what assisted dying means, and what it does not mean, in order to advise and argue appropriately. In the first instance, the Suicide Act 1961 prohibits "encouraging or assisting suicide"[2]. Therefore, the law considers that assisting someone to die constitutes murder[3](absent a defence[4])[5]. To follow is an explanation of the terminology, and Noel Conway's request.

Euthanasia

"An act of euthanasia, whether literally act or rather omission, is attributed to an agent who opts for the death of another because in his case life seems

to be an evil rather than a good.”[6]It is important to note that in an act of euthanasia, the “ agent”[7]is the active party: the person who dies takes no part in bringing about his own death.

Double Effect and Terminal Sedation

The doctrine of double effect “ distinguishes between the consequences a person intends and those that are unintended but foreseen”[8]. For example, when a doctor administers a pain killing drug[9], he may ‘ foresee’[10]that this may bring about the death of his patient, but this is not his intention[11]:

“ The established rule [is] that a doctor may, when caring for a patient who is, for example, dying of cancer, lawfully administer painkilling drugs despite the fact that he knows that an incidental effect of that application will be to abbreviate the patient’s life. Such a decision may properly be made as part of the care of the living patient, in his best interests; and, on this basis, the treatment will be lawful.”[12]

The doctrine of double effect is also engaged when withdrawing life support, and is generally seen to be acceptable in the following circumstances:

- a) to ‘ produce unconsciousness before terminal extubation’[13];
- b) “ to relieve physical suffering where other options have failed’[14];
- c) for the relief of ‘ non-physical’[15]suffering, such as those, arguably, suffering from ‘ locked in’ syndrome.

Physician Assisted Suicide (PAS)

A doctor will prescribe a fatal prescription for the person wishing to commit suicide to ingest or administer.

Assisted Suicide

A person who is not a doctor assists a person to commit suicide.

Assisted Dying

This is a ‘catch all’ term, and should be avoided to obviate a lack of clarity.

The risk of prosecution

‘Assisting a person to commit suicide is a crime in this country’[16], and s 2 (1) of the Suicide Act 1961 provides:

“A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.”[17]

Distinction

It is important to note the very clear distinction between ‘voluntary euthanasia and assisted suicide’[18](for clarity presently, PAS), per Williams:

“If a doctor, to speed the dying of his patient, injects poison with the patient’s consent, this is voluntary euthanasia and murder. If the doctor places poison by the patient’s side, and the patient takes it this will be assisted suicide and amount to the commission of the offence under section 2(1) of the 1961 Act.”[19]

Noel Conway’s position

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Mr Conway specifically requested PAS, not euthanasia or suicide with the assistance of a non-medic, in the following terms: “ I would like to be able to seek assistance from a medical professional so that I may be prescribed medication which I can self-ingest to end my life successfully, if I wish to do so. If I am unable to take the medication by drinking a prescribed medication, I would also be prepared to receive medication in a different format, by activating a switch for example. I do not believe that unsupervised alternative methods of suicide are humane or acceptable and would be additionally distressing for my loved ones.”[20]

Summary

Therefore, having highlighted the distinction between the ‘ labels’ of various methods of bringing life to an end unnaturally , for the purposes of this article, the matters to be addressed will be confined to those concerning PAS alone.

The development in the law pre- *Conway*

Suicide ceased to be a crime[21]when Suicide Act 1961, s 1 provided that “ the rule of law whereby it is a crime for a person to commit suicide is hereby abrogated”[22]. Despite incremental developments in the law, judicial attitudes to assisted suicide (and euthanasia) are slow to change. This is principally because: “ the sanctity of life entails its inviolability by an outsider. Subject to exceptions like self-defence, human life is inviolate even if the person in question has consented to its violation. That is why although suicide is not a crime, assisting someone to commit suicide is.”[23]

Significant cases

Dianne Pretty

The first significant challenge[24]to the law came by way of Dianne Pretty, who was a 43 year old motor neurone disease (MND) sufferer. She was wheelchair-bound, in the advanced stages of MND[25]and attempted to obtain an undertaking from the DPP that her husband would not be prosecuted should he assist her suicide[26]. Mrs Pretty was ultimately unsuccessful, having argued that five particular convention rights were breached[27]thus:

1. ‘ article 2 protected a right to self-determination, entitling her to commit suicide with assistance;
2. failure to alleviate her suffering by refusal of the undertaking amounted to inhuman and degrading treatment proscribed by article 3;
3. her rights to privacy and freedom of conscience under articles 8 and 9 were being infringed without justification; and
4. she had suffered discrimination in breach of article 14, since an able-bodied person might exercise the right to suicide whereas her incapacities prevented her declaration of incompatibility so without assistance.’[28]

Therefore, the arguments in *Pretty* [29]’ are worthy of note as having relied heavily on lack of *individual* (Mrs Pretty’s alone as opposed to the wider public) autonomy and “ self-determination”[30]. This will be discussed further in the legal analysis section of this work:

“ Mrs. Pretty’s individual claim ... ultimately had to give way to the protection of a wider class of persons in need of protection ... [the] balance between collective and individual interests ... required Mrs. Pretty to face a painful and undignified death in order to protect a class of unidentified victims more vulnerable than herself. ” [31]

For the practitioner, *Pretty* [32] must be regarded within the context of the era as the first case to demonstrate that the judiciary were open to consider such matters. This is demonstrated by initial permission to make an application for judicial review, and subsequently, permission to appeal the dismissal of the application. In light of this judicial openness in a previously untested area of law, the lawyer can observe that these matters, even at such early stages of development were ripe for scrutiny by the judiciary. By virtue of *Pretty*, the doorway to achieving success, either partial[33] or whole in the future, was opened.

There are however, several useful markers for the practitioner that arise from *Pretty* [34] on a practical basis. Considering in the first instance the domestic courts rationale :

1. Firstly European caselaw[35] at the time, was against her, and her arguments were ‘ founded on European Convention’[36] thus, her submissions were flawed.
2. Secondly, per Recommendation 1418 (1999)[37] the member states of the council are encouraged to ‘ respect and protect the dignity of terminally ill or dying people in all respects, by (amongst other things)’[38], ‘ upholding the prohibition against intentionally taking the

life of terminally ill or dying persons”[39], therefore domestic judicial support of the converse of the recommendation would have been rogue at best and open to grave scrutiny at a European level;

3. Further, the member states that had modified their approach to assisted dying and euthanasia had been subject to disapproval by the UN Human Rights Committee[40], which did not encourage the court;
4. There were other concerns expressed in ‘Euthanasia Examined’[41];
5. In the United States[42] and Canada[43], ‘arguments similar to Mrs Pretty ultimately failed’[44].

Thus, in light of such adverse counter-arguments and with the weight of the evidence against her, Mrs Pretty’s case was not successful, due to the reasons as above. Indeed, Mrs Pretty’s legal team were subject to criticism by the domestic court due to the manner in which her case was argued.

At a European level, it was significant that “there is no Strasbourg jurisprudence to support the contention of Mrs Pretty”[45]. Yet, *Pretty* [46] “made plain”[47] that the blanket ban on “assisted suicide under s 2 (1) had to be regarded as interfering with”[48] her right to “personal autonomy and self-determination”[49]. However, the European court ultimately concluded that the interference was proportionate and justified “for the protection of the rights of others and accordingly that there has been no violation of Article 8 of the Convention”[50].

Therefore, *Pretty*’s submissions assist the practitioner to understand that European and International precedent, even at this early stage were of paramount importance to the House of Lords (and this remains the case in present day arguments[51]) and the European court. This lack of supportive

precedent on assisted suicide or euthanasia in other jurisdictions (particularly European) played a significant role in the dismissal of Mrs Pretty's appeal[52]. Further, throughout proceedings the issue of individual personal autonomy was in sharp focus. Ultimately due to this focus on the exercise of personal autonomy, the matter failed as the blanket ban was deemed necessary in order to protect others. The practitioner should take note of this theme throughout all the significant assisted dying matters, and therefore, the activity within international jurisdictions should be well considered in matters of assisted dying, as such the approach to issues concerning personal autonomy. A balancing act[53] must be achieved between the concept of sanctity of life as expressed in Article 2[54] and the right to personal autonomy as per Article 8[55].

Debbie Purdy

Conway " follows a line of cases which have addressed "[56] assisted suicide, or similar issues[57]. Arguably, the most significant and successful of which is *Purdy* [58], in " obtaining a House of Lords ruling ordering the Director of Public Prosecutions to formulate an offence-specific policy setting out the public interest factors the Crown Prosecution Service will consider when deciding whether to prosecute assisted suicide offences." [59]

Purdy [60] can be contrasted to earlier significant cases, notably *Pretty* [61], which focussed in whole upon issues of individual, personal autonomy. In contrast to *Pretty* [62] one of the strengths of *Purdy* 's arguments was that she sought " an offence-specific policy outlining the circumstances in which a prosecution under s 2 (1) of the 1961 Act would or would not be

appropriate”[63]focussing on the law and public interest as opposed to individual autonomy arguments. The bench-mark for success was the manner in which *Purdy* was argued (in contrast to *Pretty* where the legal arguments were subject to criticism). The thrust of the argument was that the need to amend the law was not confined litigant’s rights, but extended to those of others in the litigant’s position, and those collateral, yet engaged in such situations. This was principally because the crime of assisting suicide (i. e. murder) has in “ many cases, ...a unique combination of features, all of which point firmly towards a requirement for clear guidance.”[64]Notably, that assisting someone to commit suicide is participation in an act which itself is not unlawful; the ‘ victim’ is not “ merely a willing participant, but the instigator”[65]and “ the victim’s article 8 rights are interfered with *unless* the crime is committed”[66].

Thus, firstly by focussing on an argument in the public interest, as opposed to individual autonomy arguments, the court was more amenable to assist. Secondly, by seeking an undertaking of the DPP, the decision was made somewhat more palatable for the court, owing to the DPP having no constitutional role in an argument about assisted dying; the DPP do not make or change the law[67]. Therefore, the order sought by Mrs Purdy “ was not concerned with what conduct would be lawful”[68], rather a clarification of existing policy.

Additionally, the decision in *Purdy* resolved the issue to the satisfaction of all parties: “ the solution “ for the DPP, ... justifies a blanket ban coupled with flexible enforcement. For Ms Purdy, it contemplates that there will be individual cases in which the deterrent effect of a prosecution would be a

disproportionate interference with the autonomy of the person who wishes to end her own life”[69]. Comparatively, in *Pretty* the question for the court, if answered in the affirmative, would “ seriously undermine the protection of life which the 1961 Act was intended to safeguard”[70], and was not a satisfactory solution.

Tony Nicklinson

Tony Nicklinson’s case was materially different to earlier matters in that he sought euthanasia. This was due to his inability, because of a catastrophic stroke, to take any action other than use a computer operated machine to self-administer a lethal drug. Therefore, a doctor assisting, or rather euthanising Mr Nicklinson would be subject to a murder charge, and similarly if any party assisted him to commit suicide.

Nicklinson sought a declaration that any clinician assisting him to die should be permitted to raise the defence of necessity to obviate conviction for murder i. e. “ the evil represented by committing the offence is outweighed by the greater evil which would ensue if the offence were not to be committed”[71].

In the alternative[72], Nicklinson sought a declaration that “ the current state of the law on murder and assisted suicide was incompatible with his right to a private life under Article 8 of the ECHR.”[73]Ultimately, Nicklinson was unsuccessful and died shortly after the High Court judgment, which made clear that the court could not make a “ major change in the law”[74], and it was only for parliament to make such decisions. This was reiterated by the subsequent courts, The Court of Appeal ruling that a blanket ban was

“ both proportionate and compatible with Article 8”[75]. However, the Supreme Court went further to rule that it did have the constitutional authority to make such decisions, yet it was “ institutionally inappropriate”[76]to do so presently[77]. It was appropriate to give Parliament “ the opportunity to consider the position”[78], this being for four reasons, usefully repeated verbatim here:

“ First, the question whether the provisions of section 2 should be modified raises a difficult, controversial and sensitive issue, with moral and religious dimensions, which undoubtedly justifies a relatively cautious approach from the courts. Secondly, this is not a case ... where the incompatibility is simple to identify and simple to cure: whether, and if so how, to amend section 2 would require much anxious consideration from the legislature; this also suggests that the courts should, as it were, take matters relatively slowly. Thirdly, section 2 has, as mentioned above, been considered on a number of occasions in Parliament, and it is currently due to be debated in the House of Lords in the near future; so this is a case where the legislature is and has been actively considering the issue. Fourthly, less than thirteen years ago, the House of Lords in *Pretty v DPP* gave Parliament to understand that a declaration of incompatibility in relation to section 2 would be inappropriate, a view reinforced by the conclusions reached by the Divisional Court and the Court of Appeal in this case: a declaration of incompatibility on this appeal would represent an unheralded volte- face. 27

Despite a resounding failure, Nicklinson enjoyed a “ hidden majority”, as argued by Wicks[79]: the Supreme Court judgment was sympathetic. Three of the majority and two dissenting judges suggested that the law must be

changed[80], and that should Parliament not make this change, that a declaration of incompatibility in the future was a distinct possibility[81]. This ratio and obiter “warning”[82] was seen, until *Conway* [83] as a last opportunity for Parliament to alter the law, before the courts stepped in. This will be discussed further in the article.

Summary

In consideration of the previous case law, it is clear to the practitioner that the development in this area is slow. Further, the odds are stacked against the practitioner in such matters, as the judiciary are reticent to issue a declaration of incompatibility and Parliamentary appetite to change the law is not great. However, there are alternative avenues of submission. These alternative arguments are supported by European and International law, and are assisted by review of the success and failure of the earlier English case law. In Part two, these further avenues are explored fully.

Part 2 – Analysis

Introduction

Conway is now the leading case on assisted dying, yet was unsuccessful. Earlier case law indicates that the courts are amenable to the possibility of issuing a declaration of incompatibility in the future. In this part, the decision in Conway will be examined in full, in order to assist the practitioner when analysing prospects of success when present with a matter concerning assisted dying.

Conway – facts

Noel Conway was 67 at the time of the first hearing, having been diagnosed with Motor Neurone Disease, a fatal neurological condition affecting “ the nerve cells responsible for controlling voluntary muscle movement”[84]. The muscles allowing Mr Conway to breathe are wasting away, and he “ finds it difficult to breathe without mechanical assistance in the form of non-invasive ventilation (NIV)”[85]. Mr Conway is now a wheelchair user, and requires substantial assistance with his personal care.

Mr Conway expressed that at a point of his choosing, where his quality of life has diminished to such a point (within the last 6 months of life) where he cannot find any enjoyment in living, he would like to be able to[86]“ have the option of taking action to end his life”[87]. This “ action”[88]would take the form of “ seek(ing) assistance from a medical professional”[89]in order to be “ prescribed medication”[90]which Mr Conway could “ self-ingest”[91]in order to “ end his(sic) life successfully”[92].

Counsel for Mr Conway submitted that s 2 of the Suicide Act[93], was a “ blanket ban on the provision of assistance for suicide”[94]and an unjustified[95]interference with a person’s right of respect for his private life under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[96]. Therefore, Mr Conway asked the court to issue a declaration of incompatibility with regard to s 2[97], in order that he may end in his life in the manner as earlier indicated.

Mr Conway submitted that the “ blanket provision”[98]under s 2[99]was “ unnecessary and disproportionate”[100], and that the “ prohibition on providing assistance for suicide should not apply where the individual:

- a) is aged 18 or above;
- b) has been diagnosed with a terminal illness and given a clinically assessed prognosis of six months or less to live;
- c) has the mental capacity to decide whether to receive assistance or to die;
- d) has made a voluntary, clear, settled and informed decision to receive assistance to die; and
- e) retains the ability to undertake the final acts required to bring about his death having been provided with such assistance.”[101]

Mr Conway proposed “procedural safeguards”[102]in the following terms (i. e. “the prohibition should only be disapplied”[103]when these safeguards are satisfied):

- f) “the individual makes a written request for assistance to commit suicide, which is witnessed;
- g) his treating doctor has consulted with an independent doctor who confirms that the criteria are met, having examined the patient;
- h) assistance to commit suicide is provided with due medical care; and
- i) assistance is reported to an appropriate body.”[104]

Additionally, Mr Conway “proposed”[105]“as a further safeguard, that permission for the provision of assistance should be authorised by a High

Court judge, who should analyse the evidence and decide whether the criteria are met in that individual's case.”[106]

Discussion

Conway [107] has become the leading assisted dying case, and has caused controversy [108] not only due to the subject matter and facts of the case, but also due to the constitutional issues [109] which it raises. *Conway* is not solely a test of “judicial attitudes to assisting death” [110], it is also a test of the Supreme Court's appetite to challenge the doctrine of separation of powers [111], in furtherance of *Nicklinson* and the earlier case law. This test is a crucial consideration for the practitioner when asked to advise upon an assisted dying matter, and will likely be a determining factor in assessing prospects of success [112].

Insufficiency of Conway arguments

The arguments raised in *Conway* were insufficient to convince the court to allow the appeal, and subsequently issue a declaration of incompatibility. The Supreme Court's suggestion that (despite Parliament taking action following *Nicklinson* [113]) it would be prepared to make a declaration of incompatibility, indicates that a further case could be successful. Thus, it is on these points that this article will focus, in order for the practitioner to adequately advise and formulate arguments in assisted dying matters. Reflecting upon the previous discussion, the practitioner should usefully consider:

- Qualitative Issues – can an argument be properly made out that it is not for the courts to decide if the content and form of Parliamentary debate is sufficient?
- the arguments in Conway and why they were insufficient[114], and “missed the point”[115]. Is the *Conway* scheme a red herring, or was the scheme ineffectively argued?
- The main thrust of any arguments should be compatibility, with a scheme as a secondary, but important provision; usefully compare other common law jurisdictions.

Qualitative issues

Previous cases[116]have asked challenging[117]questions of the court which are now settled as those which have to be overcome in the future, in order for a case to be successful[118]. Since those questions are known, it is noted that: “ the same arguments are rehashed again and again without any apparent clearing away of old arguments or addition of really new arguments”[119]. A crucial “ old argument”[120], that must be cleared away is whether “ it is now institutionally appropriate to issue a declaration of incompatibility”. Thus, the practitioner must avoid “ rehashed”[121]arguments against known objections, and ensure that they can either answer in the negative the “ essential question”[122]: “ does the post-Nicklinson Parliamentary consideration of assisted suicide (where no change in the law was made) mean that it is still institutionally inappropriate for a court to make a declaration of incompatibility”[123], or rebut the presumption that there is a need to satisfy the question of institutional appropriateness at all.

Eric and Murkens suggest that “ the UK’s constitution forces the UKSC to develop and not to challenge the will of parliament”[124]. Yet it is the prerogative of the Supreme Court to make a declaration of incompatibility should they be satisfied that a “ provision is incompatible with a Convention right”[125]. Lord Neuberger (in particular) makes it clear that it is open to the Supreme Court to issue a declaration of incompatibility, yet it was “ institutionally inappropriate” to do so at the time of Nicklinson, due to impending Parliamentary debate[126]on the matter.

Nicklinson warrants close analysis as the majority give common, yet conflicting reasons for a declaration of incompatibility. This will be of interest for the practitioner so to consider if an argument can be properly made out that at the time of their matter, it is either institutionally appropriate to make a declaration of incompatibility, or that institutional appropriateness is immaterial. This complexity will be examined here:

Whilst it is common ground within the majority in *Nicklinson* that the time was not right for a declaration of incompatibility, there are three separate reasons why. Lord Wilson says that: “ Parliament should have the opportunity to consider whether, and if so how, to amend the subsection to permit assistance to commit suicide to be given to those in the position of Mr Nicklinson...In particular because the Assisted Dying Bill is presently before it, it would be reasonable to expect Parliament in the near future to enlarge its consideration so as to encompass the impact of the subsection on those in their position.... were Parliament not satisfactorily to address that issue, there is a real prospect that a successful, application for a declaration of incompatibility might be made”. Of note in Lord Wilson’s reasoning here is

the word “satisfactorily”, implying that any debate should meet a standard. Unhelpfully, Lord Wilson does not elaborate on what that requirement may be.

Lord Neuberger gives four reasons for which it would be “institutionally inappropriate” to issue a declaration of incompatibility of s 2(1) with art 8[127]:

1. Such a difficult moral question justifies a “relatively cautious approach by the courts”[128];
2. The present incompatibility is “not simple to identify and not simple to cure”[129], therefore whether and how to amend s 2(1) needs consideration from the legislature;
3. S 2(1) has been considered previously and was due to be considered again;
4. *Pretty* was binding: “*Pretty* .. gave Parliament to understand that a declaration of incompatibility in relation to section 2 would be inappropriate...a declaration on this appeal would represent an unheralded *volte-face*” [130] .

Lord Neuberger elaborates and indicates that “Parliament now has the opportunity to address the issue of whether section 2 should be relaxed or modified, and if so how, in the knowledge that, if it is not satisfactorily addressed, there is a real prospect that a successful application for a declaration of incompatibility may be made”[131]. Yet, confusingly, Lord Neuberger goes on to say “nor would it be possible or appropriate to identify

in advance what would constitute satisfactory addressing of the issue....”[132].

Therefore, the practitioner can conclude that the law Lords are in agreement that a “satisfactory” debate should occur before they would be willing to make a declaration of incompatibility, but they are not willing to conclude what “satisfactory” may mean.

For future cases (noting the matters settled earlier[133]and the ratio of *Conway* [134]), the fundamental issue will be to persuade the court that there is sufficient and compelling evidence[135]to issue a declaration of incompatibility[136]with s 2[137]. Here lies the crux of the matter for the practitioner, and a choice of one of two routes to take. Firstly *Nicklinson* [138]“left open”[139]a “contentious qualitative matter”[140], in that it is not clear precisely what Parliament ought to do to “address(ed) adequately”[141]“the question of relaxing or modifying section 2(1) Suicide Act”[142], prior to the court taking matters into their own hands and issuing a declaration of incompatibility[143]. However, Parliament had extensive debate[144]between *Nicklinson* [145]and *Conway* without taking steps to moderate s 2[146], which would logically indicate no legislative desire to alter the statute[147]. Yet still, the Supreme Court Order[148](refusing permission to appeal against the dismissal of Mr Conway’s appeal from the decision of the Divisional Court) indicates that the Supreme Court could “make a declaration that the law was incompatible with the Convention rights, leaving it to Parliament to decide what, if anything, to do about it”[149]. The conclusion for the practitioner must be that “Parliament addressing the law of assisted suicide is not necessarily the same as

satisfactorily declaration of incompatibility so”[150]. Thus, the first port of call when considering an assisted dying matter is to ask: “ what has Parliament done since my case and the last debate to modify the law?”.

Secondly, and alternatively, the practitioner should reflect if Parliamentary debate, and the quality of the debate is, in fact, material. Despite the court’s repeated assertion that it could issue a declaration of incompatibility it continues to refuse to do so on the basis that Parliament is the better forum than the court for these types of decision. This assertion disregards that Parliamentary debate has occurred a significant number of times in between each assisted dying matter[151]. In actual fact, a paradox occurs here; in any event, one of the “ primary benefits of declaration”[152], is, per Lord Kerr, to “ remit the issue to Parliament for a political decision, informed by the court’s view of the law”[153]. If a declaration of incompatibility were to be made, then the matter would be directly and swiftly before the executive, in effect, facilitating the court’s assertion. However, this avenue of argument should not be underestimated, as the courts “ have shown reluctance and confusion towards their novel power under section 4 of the HRA”[154]. The judicial use of section 4 has been criticised in that “ the traditional approach to s 4 is unsatisfactory and unduly deferential to the executive”[155], and limited to a “ case specific approach, rather than looking at the general terms of the legislation”[156].

There are opportunities for the practitioner to advance case law whereby the court has either looked beyond the present matter, or in the alternative, made “ a declaration.... although it is not necessary to do so in order to dispose of”[157]the case. This is a novel argument, yet a novel argument is

needed to avoid the stasis that is currently occurs in matters concerning assisted dying. Given that the courts have very clearly invited Parliament to make a change shown in the previous caselaw, and “ moreover, as the declaration of incompatibility does not affect the continuing validity, force or legal effect of the provision declared incompatible”[158], it would appear that the issues could be “ cleared away” once and for all, in a more expedient manner for those in such dire positions as Mr Conway by review of Parliament’s failure to act.

In summary, it will be useful for the practitioner to consider if they can make submissions in the interests of justice that it is not for the court to decide whether the content and form is sufficient in order for the judiciary to make a declaration of incompatibility. It is simply a binary question: “ has the law changed, or not”.

The statutory scheme

One of the flaws in *Conway’s* argument was the proposal of a statutory alternative to the blanket provision in s 2 (1)[159]as a primary argument. It is not a requirement that a “ viable alternative be available before a declaration be made”[160]. Further it seems that this alternative was proposed in response to the “(erroneous) requirement of Lord Neuberger in *Nicklinson* that a viable alternative be available before a declaration made”.

The ineffectiveness of a statutory scheme argued as a primary submission is highlighted (although indirectly) by Lady Hale in *Nicklinson*[161]. Lady Hale reasoned[162]that she would make a declaration of incompatibility “ not as a result of the general rule prohibiting assistance, but on the ground of its

failure to make allowance for exceptional cases”[163]and makes no reference to any requirement for an alternative scheme in order to do so.

The ‘trip hazard’ of the statutory scheme is illustrated through the submissions for Mr Conway. It was accepted[164]by the parties that per *Pretty* [165]and *Nicklinson* [166], “the blanket prohibition in section 2(1) involves no violation of Article 8, and that the declaration of incompatibility sought ...only concerns the domestic law under the HRA”[167]. Further, it was noted that “Mr Conway’s claim in these proceedings raises many of the same issues and controversies that were examined in detail and reported upon by the Select Committee. The range of evidence was very wide, extending well beyond that relied on before the Divisional Court”[168]. Counsel contended that there is evidence that Conway’s scheme does protect the weak and vulnerable and criticises the Divisional Court’s approach to the assessment of this evidence. Conversely, the Divisional Court “rejected the submission.... that the proposed scheme was adequate to address concerns regarding the protection of the weak and vulnerable, let alone the other legitimate aims of the blanket prohibition in section 2”. Further, the Court of Appeal concur with the Divisional Court, and say that there is no obligation on the Divisional Court to set out analysis of the scheme[169]. Therefore, in light of judicial reluctance to explain precisely how the scheme was inadequate, and the fact that the submission of a scheme was not required in any event to make a declaration of incompatibility, a good deal of distraction has occurred from what could have been a much more productive argument. The effect of this alternative scheme in Mr Conway’s argument was that it failed in the High Court[170].

The submission of such schemes as primary arguments, should be avoided. It is suggested that the practitioner can competently obviate the erroneous requirement for an alternative scheme in the future by making a number of submissions, which are not novel, yet are in accordance with the law:

1. Nicklinson was not held to be binding[171](vis Lord Neuberger's requirement);
2. In any event, there is no requirement for an alternative statutory provision or scheme to be available in order for a declaration to be made;
3. There is no burden on the applicant to adduce evidence of an alternative scheme. Conversely, " justification of an interference with a Convention right must be evidence-based"[172].

The arguments that should be maintained are that under Article 8 (2), an infringement does not:

1. accord with the law;
2. have a legitimate aim;
3. or is necessary in a democratic society (that is, having a pressing social need and be proportionate).

Four questions must be asked to satisfy the above infringements:

1. is there an important legislative aim?
2. Is there a rational connection?
3. Is the infringement more than is necessary?
4. Is a fair balance struck?

As to proportionality (above), there are three questions:

1. Is the aim sufficiently important?
2. Are the means rational, fair and not arbitrary?
3. Is there minimal impairment.

Thus, it is robust evidence of interference with a Convention Right as a primary argument, and not an alternative statutory scheme (as a primary argument) that is most likely to secure success. That said, in assessing how and what evidence should be presented, the practitioner may wish to assess that other jurisdictions make good use of alternative schemes, particularly to satiate the requirement of proportionality. An alternative scheme, likened to that of other jurisdictions, may also be put to good use in order to argue that the court could find evidence of an infringement of rights. (See below).

Evidence of interference with a Convention Right

In *Nicklinson* [173], Lords Neuberger and Mance reasoned that the Court could not reach a considered conclusion on whether to issue a declaration of incompatibility absent “ primary factual evidence about risks and benefits of changing the law, as had been available to the Canadian Constitutional Court in”[174]Carter[175]: Indeed, Lord Neuberger stated that “ there would have been too many uncertainties to justify our making a declaration”[176], and:

“ Before we could uphold the contention that section 2 infringed the article 8 rights of Applicants, we would in my view have to have been satisfied that there was a physically and administratively feasible and robust system whereby Applicants could be assisted to kill themselves, and that the reasonable concerns expressed by the Secretary of State (particularly the concern to protect the weak and vulnerable) were sufficiently met so as to

render the absolute ban on suicide disproportionate. I do not consider that we can be properly confident that we have the evidence or that the courts below or the Secretary of State have had a proper opportunity to address the issue”[177].

Lord Sumption also expressed concerns[178]that the evidence which was relied upon from Carter[179]was “ untested, incomplete and second-hand”[180]. *Conway* [181] , did not respond to *Nicklinson* in this regard: there was “ no request for oral evidence or cross-examination”[182]. In the context of the previous case law, this could be seen as a fatal flaw.

Therefore, evidence of infringement of a convention right, in order to make a strong argument for a declaration of incompatibility should be robust, and as appropriate, live. It will be useful for the practitioner to note, in this regard, that the judiciary is not averse to making comparisons between analogous provisions in both the prohibiting legislation and in relation to the rights alleged to have been infringed. For example, in *Pretty*, Tuckey LJ speaking on behalf of the Administrative Court said that the court had found the *Rodriguez* judgments especially useful, because the facts were very similar and the law was the same as that in England and Wales, albeit the constitutional position was not the same.[183]This contention is borne out by the upcoming case of *Phil Newby*[184],

[1] *R (on the application of Conway) v SSJ* [2018] UKSC, 1; NB due to the number of times that *Conway* will be referenced in the material, there will be no further corresponding footnotes, unless referencing earlier cases in the

series leading to the Supreme Court decision, or pinpointing to a specific paragraph.

[2]Suicide Act 1961, s 2

[3]ibid

[4]Coroners and Justice Act 2009 s 52 – 59. A partial defence of diminished responsibility has been successful in some cases, for example: Helen Carter, ‘‘Mercy killing’ husband, George Webb, freed from prison’ Guardian, 26 January 2011 accessed 07 July 2019; Paul Dargue, ‘ Court of Appeal: Mercy Killers and the Sentencing Rules – An Uneasy Fit?’ [2011] JCL 75 (105)

[5]Alex Mullock, ‘ Principles of Law and Medical Ethics: Assisted Dying and End of Life Law and Ethics’ [2017]

[6]Phillipa Foot, ‘ Euthanasia’ (1977) Philosophy and Public Affairs, 85, 111
Page 96

[7]ibid

[8]Glenys Williams, ‘ The Principle of Double Effect and Terminal Sedation’ (2001) Med Law Rev 9 (1) 41

[9] *R v Bodkin Adams* [1957] Crim LR 365: “ If the first purpose of medicine- the restoration of health- could no longer be achieved, there was still much for the doctor to do, and he was entitled to do all that was proper and necessary to relieve pain and suffering even if the measures he took might incidentally shorten life by hours or even longer.”

[10]ibid

[11] *R v Cox* [1992] 12 BMLR 38: the jury were directed to find that the doctor should only be convicted if they were convinced that his action could only have been taken with the *intention* of shortening life.

[12] *Airedale N. H. S. Trust v Bland*, [1993] A. C. 789, 2 WLR 316, per Lord Goff at 868.

[13]RJ Deveterre, ' Sedation Before Ventilation Withdrawal: Can it be Justified by Double Effect and Called " Allowing to Die"? (1991) 2 Journal of Clinical Ethics 122

[14]NI Cherny and RK Portenoy, ' Sedation in the Management of Refractory Symptoms' (1994) 10 Journal of Palliative Care 31

[15]B. M. Mount, ' Morphine Drips, Terminal Sedation, and Slow Euthanasia: Definitionsand Facts, not Anecdotes' (1996) 12 Journal of Palliative Care 31; see also J. A. Billings and D. Block, ' Slow Euthanasia' (1996) 12 Journal of Palliative Care 21; and Cherny and Portenoy for opposing views.

[16]R(on the application of Purdy)(appellant) v DPP (respondent) [2009] UKHL 45

[17]S 2(1) Suicide Act 1961

[18][http://www. bailii. org/uk/cases/UKHL/2001/61. html](http://www.bailii.org/uk/cases/UKHL/2001/61.html)para 52

[19]Glanville Williams (The Textbook of Criminal Law) 2nd ed (1983) p 580

[20]Conway v SSJ [2018] EWCA Civ 1431 [4]

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[21]Sally Lipscombe and Sarah Barber, ‘ Assisted Suicide’ (2014) House of Commons Library (SN/HA/4857)

[22]Suicide Act 1961, s1

[23] *Airedale N. H. S. Trust v Bland*, [1993] A. C. 789, 2 WLR 316, per Lord Hoffmann at 831

[24][http://www. bailii. org/uk/cases/UKHL/2001/61. html](http://www.bailii.org/uk/cases/UKHL/2001/61.html)para 41

[25][http://www. bailii. org/eu/cases/ECHR/2002/427. html](http://www.bailii.org/eu/cases/ECHR/2002/427.html)Pretty v United Kingdom 2346/02 [2002] ECHR 427

[26]Sally Lipscombe and Sarah Barber, ‘ Assisted Suicide’ 20 August 2014 House of Commons Library

[27]Pretty v DPP [2001] UKHL 61 [3]-[20]

[28]ibid

[29] *Pretty v DPP and Secretary of State for the Home Department* [2001] UKHL 61; *Pretty v United Kingdom* 2346/02 [2002] ECHR 427

[30]Sally Lipscombe and Sarah Barber, ‘ Assisted Suicide’ (2014) House of Commons Library (SN/HA/4857); *X and Y v Netherlands* (1985) 8 EHRR 235; *Rodriguez v Attorney*

[31][http://www. germanlawjournal. com/article. php? id=197](http://www.germanlawjournal.com/article.php?id=197)Millns, S, ‘ Death, Dignity and Discrimination: The Case of Pretty v UK’[http://www. germanlawjournal. com/article. php? id=197](http://www.germanlawjournal.com/article.php?id=197)at [27] (accessed 23 February 2015).

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[32]N25

[33]Nicklinson

[34]Pretty

[35]Osman v UK (1998) 29 EHRR; X v Germany (1984) 7 EHRR 152; Keenan v United Kingdom (2001) 33 EHRR 913

[36]<http://www.bailii.org/uk/cases/UKHL/2001/61.html> para 55

[37]Recommendation 1418 (1999) para 9c

[38]N33 para 55

[39]Recommendation 1418 (1999)

[40]UN Human Rights Committee CCPR/CO/72/NET para 5

[41]John Keown ‘Euthanasia Examined’ 1995 chapter 16

[42] *Vacco v Quill* (1997) 521 US 793; *Washington v Glucksberg* (1997) 521 US 702

[43] *Rodriguez v Attorney-General of Canada* [1994] 2 LRC 136

[44]N 33 para 55

[45] para 24

[46]

[47] para 72; para 67

[48]ibid

[49]ibid

[50]Ibid para 78

[51]ibid

[52]ibid

[53]Conway v SSJ [2018] EWCA Civ 1431 para 110

[54]Art 2 ECHR

[55]

[56]R(Conway) v SSJ [2017] EWHC 2447 [2]

[57] *R (Pretty) v Director of Public Prosecutions* [2001] UKHL 61; [2002] 1 AC 800 (“ *Pretty* ”), *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 54; [2010] 1 AC 345 (“ *Purdy* ”) and *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2015] AC 657 (“ *Nicklinson* ”).

[58]

[59]<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN04857>

[60] *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 54; [2010] 1 AC 345

[61] *Pretty v DPP and Secretary of State for the Home Department* [2001]

UKHL 61; *Pretty v United Kingdom* 2346/02 [2002] ECHR 427

[62]

[63] *ibid*

[64] *Nicklinson* UKSC 2013 para 133

[65] *ibid*

[66] *ibid*

[67] *Nicklinson* para 139

[68] *ibid*

[69] para 64

[70] *Purdy* para 89

[71] *Blackstones* para a3. 47

[72] *Nicklinson v Ministry of Justice* [2014] UKSC 38 para 5

[73]

[74] *R on the application of Nicklinson v Ministry of Justice* [2012] EWHC 2381
para 150

[75] *Nicklinson* CA [113] – [114]; *Nicklinson and Carter etc*

[76]

[77]Ibid para 111

[78]

[79]Wicks, E, ‘ The Supreme Court Judgment in *Nicklinson* : One Step Forward on Assisted Dying; Two Steps Back on Human Rights’ (2015) 23 (1) *Med LR* 144 at 144 and 145.

[80]See Nicklinson (n 13) [94]; [108]–[109] per Lord Neuberger; [186] per Lord Mance; [197(g)] & [205] per Lord Wilson; [350] & [352] per Lord Kerr; [313] per Lady Hale.

[81]Nicklinson and Carter Article;

[82]N. Ferreira in ‘ The Supreme Court in a Final Push to go Beyond Strasbourg’ (2015) PL 367 at 372.

[83]

[84]N2 (para 5)

[85]Ibid

[86]Ibid (para 6)

[87]Ibid (para 6)

[88]Ibid

[89]ibid

[90]ibid

[91]ibid

[92]ibid

[93]Suicide Act 1961, s 2

[94]N2 (para 7)

[95]Article 8(2) European Convention for the Protection of Human Rights and Fundamental Freedoms

[96]ibid

[97]N12

[98]N13

[99]ibid

[100] *Conway v SS* [2017] EWHC Civ 16 [9]-[11]

[101]Ibid

[102]ibid

[103]Conway v SS] 1431 para 52(2)

[104]ibid

[105]ibid

[106]ibid

[107] *R (on the application of Conway) v Secretary of State for Justice (Humanists UK and others intervening)* [2017] EWHC 2447 (Admin) and n1

[108]

[109]

[110] Nataly Papadopoulou, 'From Pretty to Nicklinson, changing judicial attitudes to assisted dying' *European Human Rights Law Review* 2017

[111]

[112] Clark Hobson 'Is it now institutionally appropriate for the courts to consider whether the assisted dying ban in human rights compatible? *Conway v Secretary of State for Justice*' *Medical Law Review* vol 26 no 3 518

[113]

[114] *Assisted Dying Challenges: Ethical Complexity and Arbitrary Reasoning: Conway v Secretary of State for Justice* ".... the nature of Mr Conway's argument regarding this alternative statutory scheme misses the point. It is possible for a court to find the current legislative measure to disproportionately interfere with a claimant's Article 8(1) right in principle, without having to be satisfied there is a future legislative measure that does better balance competing legitimate interests."

[115] *ibid*

[116] Nic

[117]

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[118]That

[119]Søren Holm, ‘ The Debate about Physician Assistance in Dying: 40 Years of Unrivalled Progress in Medical Ethics?’ JME 41 (1) (2015) pp 40-43

[120]ibid

[121]ibid

[122]

[123]R (Conway) v Secretary of State for Justice [2017] EWHC 640 (Admin);
[4] [27] [31]

[124]Jo Eric and Khushal Murken ‘ Judicial Review the constitutional practice of the UK Supreme Court’ Cambridge Law Journal 19-5-2138

[125]Human Rights Act 1998 s 4

[126]The Falconer Bill 2014

[127]Article 8 ECHR

[128]Nicklinson v DPP para 116

[129]

[130]Nicklinson para 116

[131]ibid para 118

[132]ibid

[133]

[134]

[135] *Conway v Secretary of State for Justice* [2017] EWHC 640, [51] Charles J: “ the underlying arguments are well established and are unlikely to change albeit that they may be affected by changes in moral values and medicine and other evidence relating to them.”;

[136]

[137] Suicide Act 1961, s 2

[138]

[139] Clark Hobson, ‘ Is It Now Institutionally Appropriate for the Courts to Consider Whether the Assisted Dying Ban is Human Rights Compatible? *Conway v Secretary of State for Justice*’ [2017]

[140] ibid

[141] *R (Conway) v Secretary of State for Justice* [2017] EWCA Civ 275, 32

[142] Clark Hobson, ‘ Is It Now Institutionally Appropriate for the Courts to Consider Whether the Assisted Dying Ban is Human Rights Compatible? *Conway v Secretary of State for Justice*’ [2017]

[143] *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2014] UKSC 38, [122 – Lord Neuberger and 197f Lord Wilson]

[144]See the Assisted Dying Bill 2014-2015 (<https://services.parliament.uk/bills/2014-15/assisteddying.html>) Assisted Dying (No. 2) Bill 2015-2016 (<https://services.parliament.uk/bills/2015-16/assisteddyingno2.html>) Assisted Dying Bill 2016-2017 (<https://services.parliament.uk/bills/2016-17/assisteddying.html>)

[145]Nicklinson

[146]

[147]Conway v SSJ [2017] EWHC 2447 (Admin) [10], per Lord Sales “ Thus in a real sense Mr Strachan’s submissions are made on behalf of Parliament itself, to defend the human rights compatibility of Parliament’s choice in 1961 to enact section 2 and then to affirm it on successive occasions over the years and to maintain it in force now.”

[148]

[149]Decision on Permission

[150]Clark Hobson as below

[151]Specifically, between Nicklinson and Conway: as outlined paras 42-48 of Conway

[152]Stevie Martin, ‘ Declaratory misgivings: assisted suicide in a post-Nicklinson context’ PL 2018 209 -223

[153]Nicklinson [2014] UKSC 38; [2015] AC 657 per Lord Kerr at 344

[154]Wilson Stark, “ Facing facts, judicial approaches to section 4 of the Human Rights Act 1998” (2017) 133 LQR 631, 654

[155]ibid

[156]ibid

[157]R (Johnson) v Secretary of State of State for the Home Department

[2016] UKSC 56

[158]Alison Young UK Constitutional Law Association and s 4(6)(a) of HRA; Carmen Draghici ‘ The blanket ban on assisted suicide: between moral paternalism and utilitarian justice’ EHRLR 2015 3 286-297

[159]Suicide Act s 2 (1)

[160]Wilson Stark, “ Facing facts, judicial approaches to section 4 of the Human Rights Act 1998” (2017) 133 LQR 631, 654

[161]

[162]Nicklinson v Ministry of Justice [2014] UKSC 38 [322]

[163]Carmen Draghici ‘ The blanket ban on assisted suicide: between moral paternalism and utilitarian justice’ European Human Rights Law Review 2015 3 286-297

[164]Conway 1431 para 56

[165]

[166]

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[167]Conway 1431 para 56

[168]Conway 1431 para 57

[169]Conway para 204

[170]Conway [2017] EWHC 2447 (Admin); [2017] HRLR 14 at [104] – [108]

[171]Conway para 60

[172]Nicklinson [2014] UKSC 38; [2015] AC 657 [351]

[173]

[174] Adam Wagner

[175]“ Nicklinson para 182

[176]

[177]Ibid para 120

[178]N174

[179]N175

[180]Nicklinson para 224

[181]

[182] para 189

[183]Glenys Williams Nicklinson and Carter: The Discrimination and Equality Provisions in Assisted Suicide (2016) 14 (1) CIL 21-47

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[184]