

Assisted Dying in England and Wales: Conway's Challenge - Déjà Vu or Jamais Vu?

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Abstract

Assisted dying remains illegal in England and Wales in spite of several attempts having been made by campaigners to challenge the law. These were either through judicial review in the courts or the introduction Private Members' Bills in Parliament. Recently, terminally ill Noel Conway joins the cause by seeking a declaration of incompatibility between the blanket ban on assisted dying as enshrined in section 2(1) Suicide Act 1961, with his right to respect for private life as protected by Article 8(1) of the European Convention on Human Rights. He also proposed a statutory scheme that he claimed would serve as sufficient protection for the weak and vulnerable, and which would in turn render the blanket ban an unnecessary and disproportionate interference with his Article 8(1) rights. However, given that these assertions have been made by previous campaigners, Conway's decision to field these arguments has a strange sense of familiarity around them. Hence when his application failed to garner the sympathy of the High Court and the Court of Appeal in their recent judgments, this was hardly surprising since these two main routes which campaigners have pursued in the 21st century, have never met with success. By either overlooking or paying insufficient heed to their fates in previous campaigns, Conway's challenge seemed destined for failure from the outset.

A. Introduction

“[I]n an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of physical or mental decrepitude which conflict with strongly held ideas of self and personal identity...”¹

This statement, which was expressed by the European Court of Human Rights (ECtHR) in 2002 in the high-profile case of Dianne Pretty, highlights the plight of those who would like to self-determine their end of life but are impeded by their national laws. In England and Wales, where physician-assisted death is still illegal, several such sufferers have challenged and/or sought clarification of the existing law through the judicial review process. Joining Dianne

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¹ *Pretty v. United Kingdom* (2002) 35 EHRR 1, para. 65.

Pretty in the 21st century are now well-known names like Debbie Purdy² and Tony Nicklinson³. In December 2016, terminally ill Noel Conway added his name to this list when he too sought judicial review before the English Courts in a bid to have the law on assisted dying, as enshrined in section 2(1) of the Suicide Act 1961, liberalized.

Noel Conway had been diagnosed with Motor Neurone Disease (MND) in 2012 and the probable life expectancy of MND patients is usually two to five years.⁴ He has been largely confined to his wheelchair and is fully dependent on carers for all his daily activities. In addition to his neurological condition, Conway was suffering from respiratory failure, and is using long-term artificial non-invasive ventilator treatment. If Conway were to stop using his ventilator, at best he would have several weeks to live. The nature and timing of his pain and suffering were unpredictable: “a relentless and merciless process of progressive deterioration.”⁵ Conway wished the assistance of a medical professional in the UK to bring about his death in a peaceful and dignified manner at a time when he still maintains his mental capacity and the ability to remain in control of the final act involved to bring about his death. His family, concerned about using assisted dying services abroad, supports his decision. He therefore applied for a judicial review contending that section 2(1) of the Suicide Act 1961, which imposes a blanket ban on assisted death, is incompatible with his right to private life under Article 8(1) of the European Convention on Human Rights (ECHR). The court should therefore, he argued, use its power under section 4 of the Human Rights Act 1998 to grant a declaration of incompatibility.

² *R (Purdy) v. DPP* [2009] UKHL 45.

³ *R (on the application of Nicklinson and another) v. Ministry of Justice* [2014] UKSC 38.

⁴ *R (Conway) v. Secretary of State for Justice* [2017] EWCA Civ 16, para. 4.

⁵ *Ibid.*

He proposed an alternative statutory scheme that would, he claimed, adequately protect weak and vulnerable members of society.⁶ Through this, the blanket ban imposed by section 2(1) would be rendered unnecessary and constitutes a disproportionate interference with his Article 8(1) rights. The prohibition should therefore be revised to allow himself and others who meet the eligibility criteria outlined under the scheme to receive assistance in such a way as to help them to commit suicide by their own action. In other words, a statutory exception should be recognised for section 2(1) in highly specific and specified circumstances.

Given that the statutory scheme was modelled on the Falconer, Marris and Hayward Bills which were debated in Parliament just before his application for judicial review was attempted; and similar pleas for a declaration of incompatibility had also already been made in several previous high-profile cases, Conway's attempt to field these two lines of arguments has a strange sense of familiarity around them. Hence when his application failed to garner the sympathy of the High Court⁷ and the Court of Appeal⁸ in their recent judgments, this was hardly surprising since these two main routes which campaigners have pursued in the 21st century, have never met with success. Yet his case is undoubtedly unique. Since those Bills introduced in Parliament had focused largely on the plight of terminally ill patients,⁹ and the aforementioned individuals campaigning for legal change through the judicial route were not imminently terminally ill, Conway's case was distinctive in that the facts rendered it possible for the two lines of arguments to be explicated together. In so doing, however, it appeared that his legal team had either disregarded or paid little heed to the fates of these two campaign

⁶ *R (Conway) v. Secretary of State for Justice* [2017] EWHC 2447 (Admin) para. 14.

⁷ *R (Conway) v. Secretary of State for Justice* [2017] EWHC 2447 (Admin).

⁸ *R (Conway) v. Secretary of State for Justice* [2018] EWCA Civ 1431.

⁹ P. Cooper, 'In the Shadowlands' *Criminal Law and Justice Weekly* (27 January 2018).

routes in previous attempts. This article will firstly take a closer look at the declaration of incompatibility, before turning our attention to the alternative statutory scheme proposed. The work contends that with the revival of these two ill-fated approaches rather than the deployment of novel arguments, Conway's case was destined for failure from the outset.

B. A Declaration of Incompatibility

Under section 2(1) Suicide Act 1961, it is an offence for one person to intentionally encourage or assist the suicide or attempted suicide of another. This may result in up to 14 years imprisonment on conviction.¹⁰ Further, by virtue of section 59 of the Coroners and Justice Act 2009, section 2(1) offence now also includes encouragement or assistance provided via the internet.¹¹ The law admits of no exception. A blanket prohibition on assisted death is therefore imposed and this has remained in place despite growing acceptance from the general public¹² of medically assisted dying.¹³ This is due to the fact that this law was designed to safeguard life by protecting weak and vulnerable members of society, particularly those who are not in a position to come to an informed decision against acts intended to bring life to an end.¹⁴ But the burden of living with chronic and debilitating conditions which negatively impact on quality of life have prompted sufferers and campaigners like Dianne Pretty¹⁵, Debbie Purdy¹⁶ and Tony Nicklinson¹⁷ to challenge the law in the last two decades. Although the blanket ban currently

¹⁰ S.2(1C) Suicide Act 1961.

¹¹ Ministry of Justice Circular 2010/03, 'Encouraging or Assisting Suicide: Implementation of Section 59 of the Coroners and Justice Act 2009' (2010), available at: <http://webarchive.nationalarchives.gov.uk/20110201140204/http://www.justice.gov.uk/publications/docs/circular-03-2010-assisting-encouraging-suicide.pdf>.

¹² N. Richard, 'Assisted Suicide as a Remedy for Suffering? The End-of-Life Preferences of British "Suicide Tourists"' (2017) 36(4) *Medical Anthropology* 348.

¹³ For a European Perspective, see G. Bosshard, *et. al.*, 'A Role for Doctors in Assisted Dying? An Analysis of Legal Regulations and Medical Professional Positions in Six European Countries' (2008) 34 *Journal of Medical Ethics* 28.

¹⁴ *R (Conway) v. Secretary of State for Justice* [2018] EWCA Civ 1431, para. 203.

¹⁵ She suffered from motor neurone disease, a progressive neurodegenerative terminal disease with no known cure.

¹⁶ She suffered from multiple sclerosis for which there was no cure and she was wheelchair-bound because of her condition.

¹⁷ He suffered a stroke which had left him with a diagnosis of 'locked-in' syndrome.

remains uncompromised, their efforts have progressed the debate on assisted dying in England and Wales. One of their most notable legacy is the acknowledgment made by the judiciary that the section 2(1) ban engages Article 8(1) of the ECHR.¹⁸ In other words, an individual's choice of when and how he ends his life is undeniably an aspect of his right to respect for private life.

Pretty and Nicklinson also broached a related theme, namely the possibility that section 2(1) might actually be incompatible with Article 8(1) and sought a declaration to this effect under section 4 of the Human Rights Act 1998. On this, they both suffered a major setback. In *Pretty*, the House of Lords (the predecessor of the Supreme Court) held that any interference with Article 8(1) right was both proportionate and justified under Article 8(2),¹⁹ particularly for the safety and wellbeing of the weak and vulnerable. A declaration of incompatibility was therefore not issued.²⁰ This line of reasoning and course of action were endorsed by the ECtHR. The Court added that “states are entitled to regulate through the operation of the general criminal law, activities which are detrimental to the life and safety of other individuals. The more serious the harm involved, the more heavily it will weigh in the balance considerations of public health and safety against the countervailing principle of personal autonomy”.²¹

In *Nicklinson*, the Supreme Court accepted that it had the authority to make declarations of incompatibility to ECHR. However, given that the Falconer Bill was being debated at that time, the court believed that it would be “institutionally inappropriate at this juncture”²² to

¹⁸ *Pretty v. United Kingdom* (2002) 35 EHRR 1 para. 65; *R (on the application of Nicklinson and another) v. Ministry of Justice* [2014] UKSC 38 paras. 27-38.

¹⁹ This states that public authority may interfere with Article 8(1) right if this is “necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, 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”.

²⁰ *R (Pretty) v. DPP* [2001] UKHL 61.

²¹ *Nicklinson and Lamb v. United Kingdom* [2015] ECHR 709 para. 74.

²² *R (on the application of Nicklinson and another) (Appellants) v. Ministry of Justice* [2014] UKSC 38, para.116.

advance declarations of incompatibility in relation to assisted dying before allowing Parliament the opportunity to consider this position.²³ The factors contributory to this view were: (i) the question whether s.2(1) should be modified raises a complex issue with multifactorial dimensions which requires a careful judicial approach; (ii) both *Pretty* and *Nicklinson* demonstrate that incompatibility is *not* simple to identify and easily remediable, so amending s.2(1) requires careful Parliamentary consideration; (iii) s.2(1) was then currently debated in the House of Lords and the legislature was actively considering the issues; (iv) *Pretty* gave Parliament the understanding that a declaration of incompatibility in relation to section 2 of the 1961 Act would be inappropriate, and thus a declaration of incompatibility in the present case would represent a significant turnaround. The Supreme Court thereby declined to issue a declaration of incompatibility for *Nicklinson*, thus maintaining the *status quo*.²⁴

When the ECtHR was subsequently asked to determine whether this refusal on the part of the Supreme Court amounted to a violation of Article 8(1) rights, the Court began by clarifying and emphasizing that the decision of having a blanket ban and whether it should be relaxed fell within a member state's margin of appreciation.²⁵ It then proceeded to hold that domestic courts should not be forced by those seeking a change to the law on assisted suicide to assume an institutional role by requiring them to make a judgment on the merits of such a complaint.²⁶ In addition, the ECtHR agreed with the Supreme Court that Parliament continues to be the most appropriate forum for deciding the matters of assisted dying; given the wide-

²³ In June 2018, the Supreme Court ruled that the Civil Partnerships Act 2004 is incompatible with Articles 8 and 14 ECHR and proceeded to issue a declaration of incompatibility under Human Rights Act 1998 - see *R (on the application of Steinfeld and Keidan) v. Secretary of State for International Development* [2018] UKSC 32.

²⁴ I. Brassington, 'The 2012 Report of the Commission on Assisted Dying: Providing Assistance in the Debate That Will Not Die?' (2012) 7(1) *Clinical Ethics* 28.

²⁵ C. Draghici, 'The Blanket Ban on Assisted Suicide: Between Moral Paternalism and Utilitarian Justice' (2015) 3 *European Human Rights Law Review* 285.

²⁶ E. Wicks, '*Nicklinson and Lamb v. United Kingdom*: Strasbourg Fails to Assist on Assisted Dying in the UK' (2016) 24(4) *Medical Law Review* 633-640.

ranging ethical and social issues which amendment of section 2 would entail.²⁷ The ECtHR therefore ruled that the application made before it to be manifestly ill-founded and declared it to be inadmissible.²⁸ Thus up to that point, the ECtHR has not found the blanket ban to be a violation of Article 8.

Returning to the case under consideration, it is important to highlight that Conway takes no issue with the legitimate aims of section 2(1). The inextricable link between the protection of the weak and vulnerable with the offences relating to assisted suicide was never in doubt. Indeed, the ban on assisted dying without exception served a broader aim: the imperative to place sanctity of life before any autonomy and human rights considerations.²⁹ However, it was precisely these reasons, as well as the need to preserve the trust and confidence between doctors and patients, that had led the judiciary to conclude that the fundamental link between the blanket ban on assisted suicide and these legitimate aims necessitates section 2(1).³⁰ The High Court, as subsequently endorsed by the Court of Appeal, saw no incompatibility between section 2(1) and Conway's Article 8 rights.³¹

C. Alternative Statutory Scheme

In addition to seeking a declaration of incompatibility, Conway also proposed an alternative statutory scheme, the robustness of which, he claimed, would serve as sufficient protection for

²⁷ *Nicklinson and Lamb v. United Kingdom* [2015] ECHR 709 para. 84.

²⁸ *Ibid.* at 85.

²⁹ E. Wicks, 'The Supreme Court Judgement in *Nicklinson*: One Step Forward on Assisted Dying; Two Steps Back on Human Rights' (2014) 23(1) *Medical Law Review* 144 at 145.

³⁰ E. C. Goligher, *et. al.*, 'Physician-Assisted Suicide and Euthanasia in the Intensive Care Unit: A Dialogue on Core Ethical Issues' (2017) 45(2) *Critical Care Medicine* 149-155. See also *R(Conway) v. Secretary of State for Justice* [2018] EWCA Civ 1431 para. 203.

³¹ *R(Conway) v. Secretary of State for Justice* [2018] EWCA Civ 1431 para. 205.

the weak and vulnerable.³² This would in turn, he argued, render the blanket ban an unnecessary and disproportionate interference with his Article 8(1) rights.³³ In line with this, section 2(1) should be relaxed for those who meet the eligibility criteria outlined by the scheme so that they may legitimately receive appropriate assistance that would enable them to commit suicide by their own action.

This was by no means the first statutory scheme ever proposed. In the period since Dianne Pretty brought her case to court, several attempts have been made in Parliament to legalise assisted dying in England and Wales. These were introduced as Private Members Bills by Lord Joffe, Lord Falconer and Lord Hayward in the House of Lords, and Mr Rob Marris in the House of Commons. These came in two phases. The first was when Lord Joffe introduced the Assisted Dying for the Terminally Ill Bill between 2003-2006 at the conclusion of the *Pretty* case.³⁴ The second phase took place with the introduction of the Assisted Dying Bill between 2013-2016 at the conclusion of the *Nicklinson* case. This was initially brought by Lord Falconer in 2013 whose efforts were informed by the recommendations of the Commission on Assisted Dying³⁵ which he chaired. His lack of success³⁶ subsequently saw the mantle assumed by Mr Marris in 2015 and Lord Hayward in 2016. Founded on the principles of personal autonomy, these Bills were inspired by and modelled on, the Oregon Death with Dignity Act.³⁷ Although their aim was to make it lawful for the person to receive medical assistance to die at their own

³² *R(Conway) v. Secretary of State for Justice* [2017] EWHC 2447 (Admin), para. 14.

³³ *Ibid.*

³⁴ For discussion, see e.g. R. Tallis & J. Saunders, 'The Assisted Dying for the Terminally Ill Bill, 2004' (2004) 4(6) *Clinical Medicine* 534; K. George, 'Autonomy and Vulnerability at Death Bed' (2006) 10 *University of Western Sydney Law Review* 139; I. Brassington, 'Five Words for Assisted Dying' (2008) 27 *Law and Philosophy* 415.

³⁵ *The Commission on Assisted Dying* (London: Demos, 2011).

³⁶ 'Assisted Dying Bill [HL] 2013-14' (UK Parliament May 16, 2013) <<https://services.parliament.uk/bills/2013-14/assisteddying.html>> accessed October 14, 2018.

³⁷ D. Gordon, *et.al.*, 'Assisted Dying- Should the UK Change its Stance?' (2015) 55(2) *Medicine, Science and the Law* 71 at 72.

request, the final act must be self-administered. However, none of the Bills managed to make it into the statute books.

The scheme proposed by Conway was largely modelled on the Assisted Dying Bill. According to it,³⁸ only adults (i.e. those who have attained the age of 18) are eligible for assisted death under the proposed legislative framework. They must be mentally competent and make their decisions on a voluntary, clear, settled and informed basis. The patient must have been diagnosed with a terminal illness and has received a clinically assessed prognosis of 6 months or less to live. The individual must also be able to carry out the final acts required to bring about his death having been provided with relevant assistance. Apart from ensuring that the person meets the eligibility criteria, the following procedural safeguards must also be observed. The treating doctor must ensure that the person is referred to an independent medical practitioner. The latter must confirm that the patient has met the eligibility criteria by independently examining the patient. The patient is required to make a written request for medical assistance to die and this must be witnessed. The assistance to commit suicide itself must be provided with due medical care; and reported to an appropriate body. As a further safeguard, the provision of assistance should be authorized by a High Court judge after the evidence is analyzed and after he is satisfied that the eligibility criteria are met.

However, just as in the case of his claim for a declaration of incompatibility, the same fate befell his efforts to convince the judiciary that his statutory scheme can adequately protect the weak and vulnerable. One of the foremost concerns relates to the difficulty of making an

³⁸ *R(Conway) v. Secretary of State for Justice* [2017] EWHC 2447 (Admin), para. 14.

accurate clinical assessment of when someone has only 6 months or less to live. Various parties made representations of the prevalence of error in such prognostications, so much so that it was clear to the judiciary that these cannot be made with any degree of certainty.³⁹ Connected to this, is the fear that the provision of medical assistance to commit suicide would lead to an erosion of the doctor-patient relationship.⁴⁰ Further, as the onus is placed on the medical profession to provide the assistance, many doctors have also made representations of their opposition to their professional brethren take part in what they consider antithetical to what their role should be.⁴¹

In addition, by allowing such an arrangement in society, some who are terminally ill or those who are elderly who feel that their continued care would be an inconvenience to others, would feel that they have a duty to die.⁴² Even the proposed safeguard of High Court involvement and monitoring was not considered a fool-proof system to protect the weak and vulnerable.⁴³ It was pointed out that those with serious debilitating terminal illnesses may be predisposed towards emotional states like despair and low self-esteem. This may make them perceive themselves as a burden to others, which could then trigger a wish for death. This may be compounded by isolation and loneliness, particularly if they are of advanced age. Since they may feel this way even if they retain mental competence and are not under any form of external pressure or undue influence, it was not felt that such judicial oversight is adequate for the protection of the weak and vulnerable.⁴⁴

³⁹ *R (Conway) v. Secretary of State for Justice* [2018] EWCA Civ 1431, paras. 142-149.

⁴⁰ *Ibid.*, paras. 150-151.

⁴¹ *Ibid.*, paras. 156-157.

⁴² *Ibid.*, paras. 160-163.

⁴³ *Ibid.*, para. 174.

⁴⁴ *R (Conway) v. Secretary of State for Justice* [2017] EWHC 2447 (Admin), para. 100.

As these main reservations were highly similar to those which have been expressed when the Assisted Dying Bill was debated⁴⁵ and defeated, the fact that Conway's legal team did not manage to convince the court that the scheme proposed is sufficiently robust to justify the relaxation of section 2(1) is highly predictable. It therefore comes as no surprise that the blanket ban was once again upheld as proportionate and necessary to protect weak and vulnerable members of society.

D. Conclusion

Since the start of the 21st century, 4 high-profile cases have been brought to the attention of the English courts relating to assisted death: *Pretty*, *Purdy*, *Nicklinson* and *Conway*. Each of these cases reached the highest court in the land apart from *Conway*.⁴⁶ *Pretty* and *Nicklinson* also proceeded to the ECtHR but failed to sway the Court that the UK's legal stance on assisted dying had directly impinged on the exercise of their Convention rights. What has been won however, was the recognition by the Court that the *status quo* on section 2(1) engages article 8(1). Since *Pretty*, it has now been accepted that the right to respect for private life also includes the right to choose the manner and timing of one's death.⁴⁷ However, as Article 8 is a *qualified* right, a member state can interfere with one's right to determine how and when they die as long as that interference pursues a legitimate aim that is both necessary and proportionate. On this, Parliament has again recently made it clear that assisted death should remain a crime of the highest order for the benefit of the weak and vulnerable.⁴⁸

⁴⁵ See e.g. Hansard 18 July 2014 (Columns 775-782); 7 November 2014 (columns 1853-1864); 16 January 2015 (columns 1004-1025); 11 September 2015 Columns 656-724; 6 March 2017 Volume 779.

⁴⁶ The Supreme Court declined to grant him permission to appeal to the Court on 27 November 2018 <<https://www.supremecourt.uk/docs/r-on-the-application-of-conway-v-secretary-of-state-for-justice-court-order.pdf>> accessed December 5, 2018.

⁴⁷ *Pretty v United Kingdom* (2002) 35 EHRR 1.

⁴⁸ H. Biggs, 'From Dispassionate Law to Compassionate Outcomes in Health-Care Law, or Not' (2017) *International Journal of Law in Context* 172.

As discussed, Conway too failed in his attempt to convince the courts that section 2(1) is incompatible with Article 8(1). Granted that his case is distinctive enough⁴⁹ to justify the resurrection of this plea, the fact that courts have repeatedly refused to issue a declaration in the past makes it questionable whether it was a sensible course for his legal team to pursue at this point in time. This is especially so since all they were able to offer the courts by means of an alternative statutory scheme was a framework heavily modelled on the Assisted Dying Bill. Thus, the arguments which have led to the Bill's defeat were the same ones which were expressed by the courts to justify the continued interference with his choice in the manner and timing of his death. Conway's failure to achieve what he has set out to do therefore seemed attributable to the deployment of recycled arguments without giving proper consideration to their frailty and fates.

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⁴⁹ Particularly since he, unlike Tony Nicklinson, is terminally ill; and the matter itself was not under consideration by Parliament and Parliament had now come to a decision not to liberalize the law – see S. Foster, 'The Right to Die and Private Autonomy Versus the Sanctity of Life' (2017) *Coventry Law Journal* 71.

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