Nicklinson and Lamb v United Kingdom

– Strasbourg Fails to Assist on Assisted Dying in the UK

The Supreme Court judgment in *Nicklinson*¹ went further than ever before in signifying judicial unease at the existing absolute legal prohibition of assisted suicide. Two judges were prepared to issue a declaration of incompatibility against this law, while others, sharing many of the same reservations about the current law, preferred to leave the resolution of the issue to Parliament. It was ultimately a disappointing judgment, both for the applicants who were once more denied access to an assisted death, and also arguably for the development of human rights law under the Human Rights Act 1998. Nonetheless, it contained a hint of optimism for the future resolution of the assisted dying debate. Now, the optimism has faded. Parliament has rejected the Assisted Dying Bill (which would have removed the blanket ban on assisted suicide without providing any solution to the *Nicklinson* applicants) and the European Court of Human Rights has rejected as inadmissible two complaints seeking to challenge the flawed Supreme Court judgment.² The applicants to the Strasbourg Court were Mrs Nicklinson, the widow of Tony Nicklinson, who brought claims under Article 8 both on her own behalf and on behalf of her late husband, and Paul Lamb, who brought claims under a range of Articles in relation to the denial of his wish to seek judicial authority for a volunteer to end his life by the provision of lethal drugs. This brief case note will investigate both applications in turn before some general comments on the admissibility (and other) hurdle(s) at Strasbourg for claims such as this, and the current state of the assisted dying debate in the UK.

1. Nicklinson: The Procedural Aspect of Article 8

¹ *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2014] UKSC 38. See E. Wicks, 'The Supreme Court Judgment in *Nicklinson*: One Step Forward on Assisted Dying; Two Steps Back on Human Rights' (2015) 23 Medical Law Review 144-156.

² *Nicklinson and Lamb v United Kingdom* (Apps 2478/15 and 1787/15), Decision of 23 June 2015.

Mrs Nicklinson's two applications argued that the domestic courts had violated Article 8's right to respect for private and family life by refusing to determine whether the offence of assisted suicide, contained in Section 2 of the Suicide Act 1961 (as amended), is compatible with Article 8. It was an argument focusing upon the procedural guarantees contained within Article 8. These have been developed extensively in the Strasbourg Court's case law, perhaps most notably in relation to abortion where the Court has emphasised that the Convention 'is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.'³ This has led the Court to find in a series of cases that Poland (and, in one case, Ireland⁴) is in violation of Article 8's right to respect for private life for failing to structure its legal framework in a way that ensures that legal access to therapeutic abortions is real and effective, rather than merely theoretical.⁵ The Court's judgments in these cases has not been concerned with the existence of a right to abortion under the Convention but rather with whether effective mechanisms existed in Poland to determine whether the domestic conditions to obtain a legal abortion had been met. Whether the applicants would have satisfied those conditions is irrelevant. The existence of an independent review procedure was regarded as essential to provide pregnant women with greater certainty as to their legal situation. As such, the development has been less about a right to abortion than it is about a right to procedural fairness. The procedural aspect of Article 8 has also been central to some assisted dying cases. For example, in *Gross v Switzerland*, the Court concluded that Swiss law, while providing the possibility of obtaining a lethal dose of sodium pentobarbital on medical prescription, did not provide sufficient guidelines ensuring clarity as to the extent of this right and there was therefore a violation of Article 8.⁶ In particular, there was a lack of guidelines as to whether and under which circumstances a doctor is entitled to issue a prescription for this potentially lethal drug to a patient such as the applicant who is not suffering from a terminal illness. As in the abortion cases, the

³ *Tysic v Poland* (App. 5410/03), 20 March 2007, (2007) 45 EHRR 947, ECHR 2007-IV, para. 113.

⁴ *A, B & C v Ireland* (App. 25579/05) 16 December 2010 [GC], ECHR 2010.

⁵ *Tysic v Poland* (n 1 above); *R.R. v. Poland* (App. 27617/04) 26 May 2011, ECHR 2011 (extracts); *P. and S. v. Poland* (App. 57375/08) 30 October 2012.

⁶ *Gross v. Switzerland* (App. 67810/10) 14 May 2013. See also *Haas v. Switzerland* (App. 31322/07) 20 January 2011, ECHR 2011.

Court's focus is on ensuring that rights granted in domestic law are practical and effective rather than on the substance of the domestic law. Indeed, in both the abortion and assisted dying cases, it is only once the state has conceded the legality in some circumstances of the medical procedure that the Strasbourg Court has been willing to intervene to ensure procedurally fair and legally certain access to the procedure. Thus Nicklinson's application was always facing an uphill struggle due to the absolute legal prohibition of assisted suicide in English law. While it might be argued that DPP's prosecutorial guidance in relation to assisted suicide⁷ represents a relaxation in the law's approach to the issue, in reality it is little more than an acknowledgment of the inconsistent enforcement in the criminal justice system of this absolute offence. The 'softening' approach seems entirely unmotivated by autonomy concerns and indeed the Supreme Court dismissed further revision and specification of the DPP policy as the way forward on assisted dying⁸ in its judgment in *Nicklinson*. Thus, whatever legal certainty issues may be raised by this prosecutorial guidance, it does not detract (and indeed could be argued to be designed to sustain) the absolute nature of the offence of assisted suicide. In focusing on the procedural aspect of Article 8, Nicklinson's applications would not benefit from a formal or legal concession of the existence of a right to assisted dying in the UK (as had been evident in respect of Switzerland for assisted dying and Poland and Ireland for abortion). Instead, the procedural requirements argument would have to stand alone against the weight of the legal prohibition. This hurdle proved to be too great and the applications were found to be inadmissible on the basis that they were 'manifestly ill-founded'.

The Strasbourg Court's reasoning for this was based on three grounds. First, it was held that the procedural guarantees inherent in Article 8 cannot be interpreted so as to extend beyond the guarantees in Article 13's right to an effective remedy. As the Court's Article 13 case law has previously determined that this provision does not require that there be a remedy enabling primary

⁷ CPS, *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* (available at http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html).

⁸ *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2014] UKSC 38.

legislation to be challenged before domestic courts on the ground of its incompatibility with Convention rights,⁹ the Court felt that it could not extend Article 8 to require such a remedy. Thus, the fact that Nicklinson's challenge was to an Act of Parliament, rather than, as in *Koch v Germany*,¹⁰ to an individual measure of implementation of the law, meant that the case could be distinguished. The Court did concede that matters were complicated by the fact that the UK has chosen, through the Human Rights Act 1998, to permit challenges to primary legislation on the grounds of their compatibility with the Convention rights. However, this led to the Court's second ground for finding the application to be manifestly ill-founded: it is not for the Strasbourg Court to intervene in internal constitutional arrangements. The Court emphasised that contracting states are free 'to determine which of the three branches of government should be responsible for taking policy and legislative decisions which fall within their margin of appreciation and it is not for this Court to involve itself in their internal constitutional arrangements.'¹¹ It will be recalled that the Supreme Court's judgment in *Nicklinson* had involved much hand-wringing over this very issue. The majority in the Supreme Court took the view that while the UK as a whole remained free to determine the compatibility of primary legislation with the Convention rights in circumstances where the issue has been situated within the margin of appreciation by Strasbourg, it was primarily for the legislative branch of government to make such a decision rather than the judicial branch. The judges on the Supreme Court held this view in varying degrees of certainty and indeed I have argued that a majority remained willing for the judiciary to make the final determination¹² (final in the sense of exercising the strongest powers held by the courts under the HRA which fall some way short of representing the actual final decision on the issue) but in the instant case there was a majority in favour of giving the legislature another opportunity to consider the issue. In other words, the Supreme Court's judgment on the respective roles of the different branches of government in respect of assisted dying (but also to some extent in

⁹ *James and others v United Kingdom*, (App. 8793/79), 21 February 1986, Series A No 98, (1986) 8 EHRR 123, §85, confirmed in *Kudła v Poland*, (App. 30210/96), 26 October 2000 [GC], (2002) 35 EHRR 198, ECHR 2002-XI, §151 and *A and others v. The United Kingdom* (App. 3455/05) 19 February 2009 [GC].

¹⁰ *Koch v. Germany* (App. 497/09) 19 July 2012.

¹¹ *Nicklinson & Lamb*, n. 2, para. 85.

¹² Wicks, n.1.

respect of any question of primary legislation's compatibility with the Convention) was complex, confused and far from unanimous. The Strasbourg Court is understandably eager to stay out of such contentious constitutional debates. It recognises that if domestic courts were to be required to give a judgment on the merits of a complaint such as this one, 'this could have the effect of forcing upon them an institutional role not envisaged by the domestic constitutional order.'¹³ The Strasbourg Court declines to take such a step and indeed this seems a sensible approach at first glance. The Convention does not require the domestic judicial enforcement of the rights, and certainly not over the objection of the elected branches of government. Indeed, the fact that the HRA came into force in 2000 and was not required when the UK ratified the Convention in the early 1950s is proof of this. However, the fact remains that the UK does now have a mechanism for the domestic courts to determine compatibility with the Convention rights and evasion of its responsibility under the HRA could arguably raise lack of effective remedy issues under Article 13. (After all, if the legalisation of assisted dying or abortion requires that those rights be practical and effect and not merely illusory, would not the incorporation of the Convention rights into domestic law in the HRA similarly require real and not theoretical enforcement of the rights?) Of course, the HRA is a complicated and subtle means of incorporating the Convention rights. It meticulously ensures that it is Parliament with the final say on Convention compatibility and goes to great efforts to protect the freedom of Parliament to infringe the Convention rights if it so chooses.

This, then, brings us onto the Strasbourg Court's final basis for concluding that the *Nicklinson* applications are manifestly ill-founded. It takes the view that the Supreme Court judgment in this case did in fact deal with the substance of the claim. The Court concludes that a majority of seven judges found that Mrs Nicklinson had failed to show that developments since *Pretty* meant that the ban on assisted suicide could no longer be considered a proportionate interference with Article 8

¹³ *Nicklinson & Lamb*, n. 2, para. 85.

rights.¹⁴ This approach ensures that the Article 13 and constitutional arrangements points are ultimately unimportant because the Strasbourg Court takes the view that the application is factually inaccurate in that, contrary to Mrs Nicklinson's claim, the Supreme Court did determine the compatibility of the assisted suicide offence with Article 8. The conclusion is certainly arguable. While a majority did seem inclined to reach a conclusion on the compatibility of the offence with Article 8 (while a minority focused instead on constitutional propriety issues), it was, if anything, a finding of incompatibility. This is not, presumably, what the Strasbourg Court had in mind when holding that the issue had already been decided.

2. Lamb: Voluntary Active Euthanasia

Lamb's application was rather broader in focus. It claimed violations of Article 6's right to a fair trial, Article 13's right to an effective remedy and Article 14's prohibition of discrimination as well as Article 8's right to respect for private life. It was argued that these rights had all been infringed due to the UK's failure to confer the opportunity upon the applicant of seeking court authority to die by means of voluntary active euthanasia (VAE). The argument was fundamentally flawed, however, by the fact that it had not been explicitly raised before the Supreme Court. This meant that the Strasbourg Court wasted little time in finding the application to be inadmissible due to a failure to exhaust domestic remedies. This admissibility requirement is a core element of the Strasbourg system, ensuring that the regional oversight is subsidiary to domestic enforcement of human rights. The national authorities must always be given the opportunity to address and remedy any alleged Convention right infringement before it is submitted to the regional Court. In respect of Lamb's application, although he had pursued arguments surrounding assisted dying through the domestic courts all the way up to the Supreme Court, the precise basis of the arguments had varied at different levels. Thus, before the Supreme Court, arguments about the use of a necessity defence to

¹⁴ Ibid.

the homicide laws to permit voluntary active euthanasia had been dropped and replaced with a focus upon assisted suicide. Presumably this was a strategic manoeuvre by Lamb's legal team to ensure reliance was placed upon the potentially strongest argument before the highest court in the land. However, it was a strategy which doomed to failure a subsequent attempt to argue that the UK was in violation of the Convention for not permitting VAE. The Strasbourg Court dismissed any argument that the Supreme Court's conclusions on assisted suicide could be read so as to include VAE, holding that the 'two matters are distinct' and that 'it cannot be assumed that the Supreme Court would have disposed of the argument that the second applicant now advances in the same way as it disposed of the claim in respect of the prohibition of assisted suicide.'¹⁵ While it is certainly true that VAE raises different issues from assisted suicide, it is impossible to imagine that the Supreme Court's reluctance to decide the issue of an exception to assisted suicide leaves room for the possibility of a declaration of incompatibility in relation to the offence of murder. The majority's hesitation about usurping the constitutional role of Parliament in relation to such a morally and ethically sensitive topic would undoubtedly have led to the same refusal to issue a declaration of incompatibility at the present time. Indeed, the encroachment of the absolute prohibition on killing another person (by an act rather than an omission) necessitated by VAE would be a much harder line to cross than in respect of the prohibition of assisted suicide (where the final step is taken by the person wishing to die and there is already prosecutorial tolerance of such assistance). However technically correct the Strasbourg Court's application of the exhaustion of domestic remedies admissibility requirement may be, its explanation of the different way in which the Supreme Court might have decided the issue of VAE if only it was given the chance verges on fantasy. The majority of the judges sitting in *Nicklinson* were not willing to issue a declaration of incompatibility on this topic despite hinting that the current law on assisted suicide was disproportionate. If they could not overcome their concerns about constitutional niceties for assisted suicide, they would certainly not have done so for the much greater encroachment upon sanctity of life represented by VAE. The

¹⁵ Ibid, para. 94.

Strasbourg Court's hands were tied, however, by an application which steadfastly ignored the issues argued before the Supreme Court in favour of resurrecting arguments from earlier stages in the litigation and seeking to put a Convention gloss upon them. The issues, not to mention the applicants, deserved better.

3. The Role of Strasbourg

The increasingly vocal debate on assisted dying within the UK has not been given a proper hearing by the Strasbourg Court. This admissibility decision avoids the merits of the arguments on both sides of the debate and arguably does so by hiding behind some technicalities. However, the Convention system is built around a robust admissibility barrier. Approximately 95% of applications to the Court are found to be inadmissible,¹⁶ and a large percentage of those are inadmissible due to being classified as 'manifestly ill-founded'. This ground for inadmissibility is unusual in that it requires an examination of the merits of the application, albeit at a potentially superficial level. It is construed by the Court far more broadly than the words 'manifestly ill-founded' would imply and there is some valid criticism of the lack of clarity surrounding this admissibility/merits hybrid.¹⁷ While the admissibility requirements serve a vital function in managing the workload of the Court, they are being increasingly tightened and also now form part of a broader battleground between (some) contracting states and the Court in relation to the appropriate roles of both in enforcing the Convention rights. With the prospect of achieving a full merits investigation of an application so low, and the subsidiarity nature of the Court's role increasingly emphasised,¹⁸ Strasbourg's ability to influence the future direction of the assisted dying debate is limited.

¹⁶ *Practical Guide on Admissibility Criteria* (Council of Europe, 2014), p. 11 (available at http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf)

¹⁷ See J. Gerards, 'Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning' (2014) 14 Human Rights Law Review 148.

¹⁸ Protocol No. 15 (not yet in force) amends the Convention preamble to add an explicit reference to the principle of subsidiarity and the doctrine of the margin of appreciation.

As if the admissibility hurdle was not enough, applications on ethically and morally sensitive issues such as assisted dying also face the ever-present obstacle of the margin of appreciation. This means that a large amount of discretion will be left to national authorities to determine the legality of controversial procedures such as assisted dying, termination of pregnancy or assisted reproductive treatment. Once a state has conceded their legality, the Court will impose some quite onerous procedural requirements (as discussed above) but until it does so, the Court prefers to stay out of the controversy. Thus, the UK Parliament is not likely to be told by Strasbourg that it must provide exceptions to the absolute ban on assisted suicide. We should not forget, however, that it has already been sent this message by the Supreme Court.

4. The Current State of the Assisted Dying Debate in the UK

At the time of the Supreme Court judgment in *Nicklinson*, Lord Falconer's Assisted Dying Bill was before Parliament. While it had significant shortcomings, not least in that it would provide no assistance to the applicants in the case, it provided a clear opportunity for Parliament to consider the issue of assisted dying. The reluctance of Lords Neuberger, Wilson and Mance to issue a declaration of incompatibility at the present time seemed to be partly based on, or at the very least supported by, the fact that Parliament was currently required to debate this very issue. That moment has passed. While the House of Lords gave some detailed consideration to Lord Falconer's Bill, the general election of May 2015 led to its failure. In the current Parliament, Rob Marris MP introduced a similar Bill into the House of Commons as a private member's bill but the House wasted less than four hours in voting it down.

Marris introduced the Bill by explaining that the Supreme Court had 'recognised that there is a problem that needs to be addressed by Parliament.'¹⁹ He was immediately challenged on this by

¹⁹ HC Debates, 11 September 2015, col. 656-725,.

Fiona Bruce²⁰ but correctly affirmed that ‘five judges expressed grave concerns about a possible breach of article 8 of the convention’. The significance of the Supreme Court’s message to Parliament was later recognised by Keir Starmer (former DPP and now an MP) who noted that in *Nicklinson* ‘the majority held that there was an incompatibility between our current position and fundamental human rights, but because of the margin of appreciation [sic] they should not themselves make a declaration to that effect but leave it to Parliament to further consider the issue, and today is that opportunity.’²¹ The message did not stick, however, and in a brief and somewhat self-congratulatory debate peppered with personal stories of dying relatives, the bandying of conflicting statistics and declarations of religious principle, the House overlooked the disproportionate infringement of Article 8 by the current law. Towards the conclusion of the debate, Andy Slaughter argued for the Bill to proceed to committee stage in order that the details be considered and the safeguards further clarified. He said, ‘We abdicate our responsibility if, after 18 years, we do not fully discuss these matters in detail and look at the safeguards and the possibilities in the Bill.’²² But the House divided 330-118 against the Bill and thus its brief passage through Parliament ends, and with it any immediate prospect of the change in the law requested by a majority of the Supreme Court. It seems likely that it is to this judicial venue that the saga will return in due course. However, the Human Rights Act 1998 and its mechanism of declarations of incompatibility looks ever more vulnerable²³ and, even if such a declaration were forthcoming on this issue before the HRA’s demise, the current House of Commons seems unashamedly at odds with what appears to be public and judicial opinion on this matter. Westminster has joined Strasbourg in failing to assist those begging for assistance in dying and, while the debate will continue, legal reform looks far from imminent.

²⁰ ‘If I am correct, in the *Nicklinson* case only two of the judges recognised that there was an issue. Seven of the judges—the majority—indicated that the law on this is in accordance with the margin of appreciation under the European convention on human rights, and that has recently been confirmed by the Strasbourg Court.’ (ibid.)

²¹ Ibid, col. 673.

²² Ibid, col. 722.

²³ The Conservative Government is expected to release its plans to repeal the HRA in the autumn of 2015.