

The Supreme Court and Assisted Suicide: A Commentary on *R (on the application of Nicklinson and another) v. Ministry of Justice; R (on the application of AM) v. DPP* [2014] UKSC 38

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It was a ruling which surprised no one. Despite a deliberation which spanned 6 months - during which, according to Lord Wilson, the appeals were debated “with an intensity unique in [his] experience” - the Supreme Court’s much-awaited decision in the case brought by Nicklinson, Lamb and ‘Martin’ was not altogether unexpected: that if the law on assisted suicide were to change, it is a task best undertaken by Parliament. It is a viewpoint which the judiciary has articulated on a number of previous occasions. The Court nevertheless confirmed that it has jurisdiction to declare whether s.2(1) of the Suicide Act 1961 is compatible with Article 8 of the European Convention on Human Rights (ECHR). Yet with the exception of Lady Hale and Lord Kerr, the remaining 7 judges refused to make a declaration of incompatibility on the evidence before them. They preferred to allow Parliament the opportunity to review s.2(1) unburdened by the weight of such a declaration.

But if the continuous stream of high profile cases, of which the present one is only the latest, often gave the impression that Parliament has taken a passive stance on the issue, the lead judgement given by Lord Neuberger signalled that this is an erroneous conclusion. Parliament, after criminalising assisted suicide through s.2(1), has vigorously resisted repeated efforts from private members to liberalise the law. Not only that, it has in fact expanded the reach of this law in recent times through s.59 of the Coroners and Justice Act 2009 by bringing any assistance and encouragement provided through the internet within the purview of s.2(1).

Concessions have thus far only been won through battles fought in the courtroom over the rigidity, clarity and constitutionality of the law. But these are inevitably conferred in a reactive and piecemeal fashion. Looking back, when Diane Pretty failed to secure a guarantee from the DPP that her husband, Brian Pretty, would be immune from prosecution if he assisted her to die in a manner they did not specify, Debbie Purdie’s legal team knew better than to seek the same immunity for

her husband Omar Puentes who was equally willing to assist her to die. Rather, their challenge centred around the absence of clear criteria of how the DPP would exercise the discretion granted by s.2(4) of the Suicide Act 1961 of whether or not to consent to a prosecution for s.2(1) offences. When the House of Lords ordered for the promulgation of an offence-specific policy, the DPP duly complied by issuing the *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* in February 2010 i.e. within months of the ruling. However, since Debbie Purdy had specified that the assistance she had in mind was for her husband to accompany her to the Dignitas Clinic in Zurich, the guidelines issued therein were by and large addressing the circumstances they presented. Because of this, although 'Martin' too had planned to die at the Dignitas Clinic, he had to seek clarification over whether doctors and others not within his circle of family and friends would be prosecuted if they were to extend him their assistance as his wife had refused to do what Omar Puentes was willing to do. Since the Supreme Court has strongly hinted that the DPP should review the policy to address the concerns brought by 'Martin', there is a chance that this too would lead to another piecemeal concession if the DPP confines her eventual review to the narrow set of circumstances raised by 'Martin'.

As for those who are unable to travel to Zurich like Paul Lamb and the late Tony Nicklinson, the DPP's policy is consequently of limited relevance. But inspired as they were by the acknowledgement gained by Diane Pretty from the European Court of Human Rights that her Article 8(1) right had been infringed – a point reconfirmed recently in *Haas v. Switzerland (2011)*, *Koch v. Germany (2013)* and *Gross v Switzerland (2014)* for patients in not vastly dissimilar situations, Lamb and Nicklinson's widow thereby questioned the constitutionality of s.2(1) in the light of the ECHR. Although the Supreme Court has, as we know, refused to take a firm stand on this point on this particular occasion, assisted suicide is already being debated again in Parliament. However, since Lord Falconer's Assisted Dying Bill only addresses the issue vis-à-vis terminally ill patients, the discussions are not comprehensive enough to incorporate situations affecting patients like Pretty, Purdy, Lamb and Nicklinson.

This highlights the need for a more wide-ranging Parliamentary debate. Before this is embarked on, it is worth remembering that the inroads already made through case law - not only in assisted suicide cases but also in other cases where a

third party is involved in bringing life to an end, have left the current law in an anomalous situation. While s.2(1) has stated in unequivocal terms that assisted suicide is a crime which is punishable with up to 14 years imprisonment, those who altruistically assist their loved ones to die abroad at the Dignitas Clinic would not be prosecuted, thanks in large part to the DPP's policy. Thus assistance rendered on British soil attracts significant opprobrium and legal repercussions, but those rendered abroad do not. Also, cases like *Re AK (2001)* and *Re B (2002)* indicate that the wishes of competent adults to end their lives by asking their doctors to switch off their mechanical ventilators would have to be respected. However, the wishes of similarly competent adults for doctors to help end their lives through the administration of lethal injections are prohibited. Yet at the same time, courts have condoned the administration of opioids in dosages that are known would result in the abbreviation of life. Further, courts have declared it lawful for doctors to allow patients in a persistent vegetative state (PVS) to die by removing and discontinuing all life-sustaining treatment, including clinically assisted nutrition and hydration, notwithstanding the fact that such patients' heartbeat and breathing are still functioning naturally. Thus when the issues that came to the fore in this Supreme Court case do make it to Parliament, ideally those related areas are also revisited and be subjected to equally extensive public debate. This would imbue the law relating to the bringing of human life to an end by a third party with coherence and a solid underlying rationale.