THE LAW QUARTERLY REVIEW

Volume 131 **January 2015**

NOTES

A BRITISH "CONVENTION RIGHT" TO ASSISTANCE IN SUICIDE?

Nine Supreme Court Justices heard *R. (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2014] 3 W.L.R. 200. Lady Hale and Lord Kerr would have declared that s.2 of the Suicide Act 1961 is incompatible with the appellants' art.8 ECHR right to respect for their private life (to the extent that s.2's prohibition of assisting suicide makes and allows no exception in relation to persons like the applicants). Lord Neuberger and Lord Wilson leaned towards such a finding but before making it, let alone issuing a declaration, would "afford Parliament the opportunity" to amend s.2 to the extent proposed by Lady Hale. Lord Mance leaned, it seems, against a finding of incompatibility, but agreed with some of what Lord Neuberger said about the vulnerability of s.2 and with almost everything he said about the need for Parliament to engage in a "dialogue" with the court about it. Lord Sumption, Lord Hughes and Lord Reed found that the enacting of s.2 in 1961, and again (if anything more strictly) in 2009, had already so addressed the whole matter that s.2 should here and now be judged (for the foreseeable future) compatible with Convention rights. Lord Clarke agreed with them, but added that Parliament should indeed soon consider—as, he said, it has not—the predicament of persons such as the appellants.

Their predicament in many respects replicated that to which the applicant in *Pretty v United Kingdom* (2002) 35 E.H.R.R. 1; [2002] 2 F.L.R. 45 foresaw she would be reduced later in her terminal illness: a condition of all but complete inability to move—and inability to kill herself. The applicants' condition in *Nicklinson* differed from hers in that their paralysing disabilities were not terminal; they faced years of a life they found profoundly unsatisfactory. What differentiated both these cases from countless others was not the acuteness of the miseries suffered but the sufferers' inability to effect suicide without assistance.

Any declaration such as the majority in their various ways envisaged making about s.2 would be highly misleading to Parliament and citizens, unless

accompanied by a straightforward explanation. Unfortunately not envisaged in any of these judgments, the explanation would need to state that "incompatible with Convention rights" does not in this case mean incompatible with the ECHR as international law interpreted by that Convention's judicial organ. For the Strasbourg court has found, in relation to a British applicant with (envisaged) sufferings, capacities and purposes very similar to these applicants', that s.2 is not merely within the UK's margin of appreciation, but actually is proportionate and justifiable. So (the needed explanation would have to conclude) there is no suggestion that s.2 puts the United Kingdom in violation of its Convention obligations; the only violation being declared is of *British rights*, identified by an Act of Parliament in 1998 in wording identical to certain provisions of the Convention thereby said to be "adopted" and to be "Convention rights", but operative as a matter of British law not Convention law.

A finding (and declaration) with such surprising meaning is questionable even before one reaches the substance of s.2's relation to art.8. *Nicklinson* puts centre-stage—in a context of primary legislation upheld by Strasbourg, against vigorous challenge, in a ruling never put in doubt in the subsequent Strasbourg cases—the idea launched in 2008 in *Re G (A Child) (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 A.C. 173 in a context of non-primary legislation, and of obvious flux in Strasbourg rulings. (*Re G* was noted by Jonathan Herring (2009) 125 L.Q.R. 1 at 1, sub nom. *Re P*, as "the most exciting of rulings".) The idea is said to concern the "margin of appreciation" conceded by Strasbourg courts to member states; within that margin, British courts interpreting Convention rights under the domestic, British law created by their "adoption" into the Human Rights Act 1998, can depart from Strasbourg's understanding. But Strasbourg in *Pretty* upheld s.2 not because it is within the margin but because it is justified (albeit not the only justifiable regulation of suicide). Without at any point noticing the wide difference between Strasbourg's complete reliance on margin of appreciation to uphold (4:3) the French law in *Fretté v France* (2004) 38 E.H.R.R. 21; [2003] 2 F.L.R. 9—the Strasbourg ruling departed from in *Re G*—and Strasbourg's scant references to, and non-reliance upon, margin of appreciation in its *Pretty* finding, the *Nicklinson* majority around Lord Neuberger treated *Pretty* as simply "deciding that it is for the member states to *decide whether their own law on assisted suicide infringes* article 8" (at [148], emphasis added). This reading down (with respect, excessive) went without any direct challenge by the minority around Lord Sumption,

Verbally at least, that is also a strange formulation, for states are the subjects of the Convention's law, not its arbiters. The effect of the formulation is to thrust out of sight Strasbourg's own ruling (in line with the law of the vast majority of member states) that s.2, just as it stands, *is not* an infringement of art.8. The strangeness is compounded when the majority, having set up two unreal questions (Has Strasbourg said s.2 is within the margin? Does a court have "constitutional competence" to decide whether s.2 infringes art.8?), sets up a third, equally unreal (as formulated): Is the issue *whether s.2 infringes art.8* "an issue which is purely one for Parliament" and therefore inappropriate for the court's consideration? Surely counsel for the respondent Secretary of State, raising institutional issues rather than defending the proposition robustly and fully upheld by the courts

below—that s.2 is compatible with art.8—did not mean to put in question the established constitutional foundations? Parliament's role is to settle by "primary legislation" what UK law should and shall be. True, ministers introducing Bills must, under s.19 of the 1998 Act, state their view about their provisions' compatibility with Convention obligations rights (with their correlative rights); Strasbourg may have made a relevant finding; a UK court may have made a relevant finding or declaration under the Human Rights Act 1998. True, Parliament should carefully consider these, and presumptively intends to comply with Convention obligations, an intention it may make explicit and interpretatively even more significant. But its decision to enact the Bill is not a *decision about* such compliance.

Even if Strasbourg in *Hirst v United Kingdom (No.2)* (2006) 42 E.H.R.R. 41; 19 B.H.R.C. 546 was justified in factoring in the (alleged) lack of Parliamentary consideration of the issue in that (highly questionable) decision, the ECHR—compatibility of legislation could surely not be enhanced at all by the introduction of preambles reciting—and truthfully—that the Houses have considered the recited articles of the Convention (and the parallel British "Convention rights"!) and have *determined* that the provisions hereby enacted are compliant with them and "are necessary in a democratic society in the interests of …. (etc., etc.)". The House of Lords in *R. (on the application of Begum) v Denbigh High School* [2006] UKHL 15; [2007] 1 A.C. 100 rejected the Court of Appeal's notion that the compliance of a public body's rules with Convention rights can depend on whether the body did or did not try to decide about the compatibility of its proposed rules with the Convention (or with the 1998 Act?). Should the Lords have acknowledged that Parliament, by contrast, does have the responsibility of making decisions *about* such compatibility and so, unless it concerns itself, visibly (by judicial observers) and to a "satisfactory" extent, with compatibility, its enactments will not be given deference such as they gave to the dress-code decisions of the High School governors?

The flaws in formulating the issues might be thought merely verbal. But Lord Sumption's failure to disown them leaves some elements of his valuable judgment obscure. For, *pace* Lord Mance's comments on it, the judgment does not question the "constitutional competence", *scil.* jurisdiction, of the courts to review s.2's compatibility with art.8 ECHR, a jurisdiction put beyond question by the terms of the 1998 Act. Nor does Lord Sumption question the court's institutional competence to review legislation for rationality. Is he then proposing to replace proportionality with rationality as the standard of review of primary legislation? Though the judgment is inexplicit, Lord Hughes was surely right to say (at [267]) that he could agree both with it and with the reasons of the Court of Appeal, which unambiguously applied to s.2 a proportionality test, but "with a light touch". Proportionality with a light touch is an approach substantially indistinguishable from the upshot of Lord Mance's discussion, much more elaborate, of the variable "intensity" (at [16]–[172]) of proportionality review conducted with an eye to institutional "competence" (here not, it seems, jurisdiction so much as aptitude) and to constitutionally shaped legitimacy (see at [166]–[170] and [115]).

In the end, proportionality, with all its ambiguities, and its essentially non-judicial, non-juristic, non-juridical goal of "striking a fair balance" between

the rights of individuals affected by a measure's adoption or non-adoption, and between those rights and other pressing social needs, is the best face that can be put on the task imposed by provisions such as art.8 ECHR: of determining what is "necessary in a democratic society in the interests of … etc. … etc …". And in carrying out this scarcely judicial task, judges indeed should, as Lord Mance says (at [189]), give "considerable weight" to the legislator's assessment of the value of the available evidence and of the choices to be made in its light. More about "evidence" below, but it should be noted now that Parliament has repeatedly decided against making exceptions to s.2, in light moreover of two full-scale select committees with extensive evidence and reports within the last 20 years.

Future adjudication of s.2's compatibility will be affected by acceptance or rejection of two premises accepted by Lords Neuberger and Wilson, and underpinning Lady Hale's and Lord Kerr's dissent: that art.8(1) entails a Convention *right* to commit suicide; and that s.2 created in England and Wales a legal *right* to commit suicide.

These come together most starkly when Lord Neuberger says that in *any* case of assisted suicide, "the victim's article 8 rights are interfered with *unless* the crime is committed" (at [133], emphasis in original). To this, and to similar affirmations by Lady Hale, Lord Wilson (at [200]) and Lord Kerr of an art.8 right to commit suicide and seek assistance in it, three helpful albeit partial replies are given in other judgments. Lord Mance (at [148]–[149]) quotes and comments on the statement made and repeated in the three post-*Pretty* Strasbourg decisions (and relied upon by the four Justices just mentioned). That statement was:

> "an individual's right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting in consequence, is one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention."

His comment is (at [159]):

> "It would be wrong … to deduce from this that … those capable of freely reaching a decision to end their lives, but physically incapable of bringing that about by themselves, have a prima facie right to obtain voluntary assistance … to achieve their wish. Article 8.1 is, on the authority of *Pretty v United Kingdom*, engaged in this area. But it does not by itself create a right. A right only exists (at least in any coherent sense) if and when it is concluded under art 8.2 that there is no justification for a ban or restriction."

More clearly focusing on the supposed, more primal right to suicide itself, Lord Sumption says (at [216]):

> "Article 8.1 was engaged because respect for Mrs. Pretty's private life entailed accepting her autonomy in making her own end-of-life choices. This is not exactly a right to commit suicide. It is an immunity from interference by the state with the settled decision of a person of full legal and mental capacity to kill himself, unless the interference can be justified under art 8.2."

And Lord Hughes's clarification of art.8 extends to both and suicide and assistance in it (at [263], emphasis added; see also at [264]):

> "There are times when, as a sphere of personal activity is identified as falling within the reach of art 8, it is tempting to say that there is therefore a fundamental right to that particular form of activity. The better view is that the fundamental right is to what art 8.1 actually speaks of - namely *respect for private and family life. Whether there is a right to do the particular thing under consideration depends on whether the State is or is not justified in prohibiting it, or placing conditions upon it*, and that in turn depends on whether the State's rules meet the requirements of art 8.2."

These welcome clarifications surmount, without mentioning, the inept drafting of art.8, which confusingly postulates first the "enjoyment" by A of a "right to respect" from/by B for A's private life, and then a perhaps wholly justified "interference"—so-called—by the state with that enjoyment (and thus with that "right to respect"). The Strasbourg court in *Pretty* circumvented the main conceptual source of confusion by departing from the article's terms and speaking of the right's being (not "interfered with" but merely) "engaged". But the problem is not fully surmounted until the "right" articulated in art.8(1) is understood as what it really is, an important human interest, or aspect of human wellbeing. State conduct impinging negatively on this human good requires justification, and this duty not unjustifiably to harm the interest/good entails—has as its jural correlative—a human right that the state not interfere unjustifiably with one's private life. So the subject-matter and content of art.8(1) are not even definable, or juridically identifiable, until one has taken into account, at least in outline, all those kinds of state action that are justifiable under art.8(2), including all those kinds of law that do or might justifiably restrict what one can do in private.

Did the Suicide Act 1961 s.1, in abrogating the crime of suicide, create (or recognise) a legal (or moral or any other kind of) *right*? In *Airedale NHS Trust v Bland* [1993] A.C. 789; [1993] 1 All E.R. 821, much discussed in *Nicklinson*, Lord Goff approved Hoffmann L.J.'s statement (in a judgment cited approvingly in *Nicklinson* by Lords Sumption and Wilson) that suicide's decriminalisation by s.1 Suicide Act 1961 "was a recognition that the principle of self-determination should in that case [suicide] prevail over the sanctity of life" (see at 827). But the ministers promoting the Suicide Bill made clear that its rationale was not the principle of self-determination or the value of autonomy, or a judgment or sense that suicide is morally sound. Rather, as the House of Lords affirmed in *R. (Pretty) v DPP* at [35], in explaining that the decriminalisation in 1961 "conferred no right on anyone to [commit (or attempt to commit) suicide]":

> "Suicide itself (and with it attempted suicide) was decriminalised because recognition of the common law offence was not thought to act as a deterrent, because it cast an unwarranted stigma on innocent members of the suicide's family and because it led to the distasteful result that patients recovering in hospital from a failed suicide attempt were prosecuted, in effect, for their lack of success … The policy of the law remained firmly adverse to suicide, as section 2(1) makes clear."

In *Nicklinson*, having given much play to autonomy as a rationale or justification for suicide, Lord Sumption firmly denies that s.1 of the 1961 Act created any sort of legal right, and restates (at [212]) those three grounds on which suicide was

decriminalised in 1961, none of them involving any right or value of autonomy or self-determination. Our law, as he concludes, acknowledges no legal or moral right to commit suicide, which remains contrary to public policy (at [213]).

But if autonomy and self-determination *are* foundational to human goods and often a matter of right, doesn't that entail that suicide's decriminalisation, whatever its motives in 1961, should now be taken as the conferring, or at least acknowledging, a legal right—a liberty right, even if not a claim-right—to assistance in giving effect to one's right? The answer No is implicit in the very structure of s.2. The robust rationality of this answer is manifested in the distinction firmly made in the United States Supreme Court in the pair of cases given proper attention by Lord Mance: *Cruzan Director Missouri Dept of Health* 497 U.S. 261 (1990), guaranteeing the right to refuse medical treatment even when the refusal is foreseen to result in death, and *Washington v Glucksberg* 521 U.S. 702 (1997), denying that there is a right to seek medical assistance directed to killing oneself. It is the distinction between *Re B (Consent to Treatment: Capacity)* [2002] EWHC 429 (Fam); [2002] 2 All E.R. 449 and, on the other hand, *R. (Pretty) v DPP*. It runs through the Mental Capacity Act 2005, which while reinforcing extensive rights of advance refusal of treatment needed to sustain life, preserves intact (by s.62) the Suicide Act and provides (in s.4(5)) that decisions about someone's best interests in relation to life-sustaining treatment must not "be motivated by a desire" to terminate his life.

And then there is the principle stated in art.2 ECHR but unmentioned in *Nicklinson*: "No one shall be deprived of his life intentionally…". Unmentioned also is the Strasbourg doctrine, massively entrenched in relation to art.3 but applied also to its twin "absolute", art.2, that such absoluteness not only eliminates margin of appreciation but entails obligations to avoid creating any "real risk" of violation by *anyone*. Again, the *Nicklinson* judgments do not mention that for three of the five Law Lords in *Bland*, the case's most acute difficulty arose from their view that it could be appropriately resolved only by permitting an *intentional* termination of life, a permission tolerable only because the termination would be entirely by omission rather than action—a distinction they reasonably felt *morally* inadequate to warrant the law's crossing the line into intentional deprivation of life.

But the law can reasonably treat as non-homicidal a decision in which the intent is only to desist from interventions and measures that patients themselves, if of capacity, might well renounce without intending to cause their own death even when perfectly foreseeing that the renunciation will result in it. Such a decision involves no intent to kill, even by omission. So too the post-*Bland* court orders authorising courses of non-treatment certain to result in death: though stringent morally oriented analysis of the inner purposing (deliberations) of applicants and judges might in some cases find an intent precisely to terminate life, the public processes and acts are otherwise. In them, what seems decisive is: (a) the duty to make decisions, about acts of healthcare assistance, in the best interests of the patient as he or she would probably have assessed them (but excluding any desire to kill); and (b) the absence of any duty to take or persist in treatments incapable of promoting medicine's restorative functions. These are not instances or logical precursors of taking steps *in order to* assist someone to carry out his intent to kill himself.

"Justification of an interference with a Convention right must be evidence-based" (at [351]). This dictum of Lord Kerr not only makes the presumption (evidence based?) questioned by Lord Hughes, that there is a specific *right* being interfered with—say, to suicide or assistance in suicide or voluntary euthanasia, or to the experience of being physically damaged, or to undergo what is prohibited by the Female Genital Mutilation Act 2002 s.1, or to be given assistance prohibited by s.2 of that Act; it also overlooks altogether the Convention's references to *morals* as a ground for justified denial that respect for private life entails rights such as those just mentioned (and there are many other private-life non-rights that might be mentioned). And "evidence-based" equivocates about what counts as a reasonable factual basis for responsible judgment in, respectively, the forensic and the legislative contexts of responsibilities. The relevant problems here are touched upon, and more, in the searching and extended paragraphs on "the role of evidence" (at [224]–[229]) and "Parliament or the Courts?" (at [230]–[235]) in Lord Sumption's judgment.

To these might be added a reference to the common-sense that would reasonably lead legislators to judge that the legislative scheme of court-supervised permissions imagined by Lady Hale, like the slightly different one imagined by Lord Kerr, could neither rationally nor actually be sustained as the sole exceptions to the prohibition of assisting suicide and of mercy-killing. Freed from the accidental constraints of litigation and forensic tactics, constraints very evident in *Nicklinson*, and briefly noted by Lord Sumption (at [235]), legislators are better placed to "strike the fair balance" needed. For that is a matter of bearing in mind the ends and the means *and the side-effects* of actual or proposed provisions, in their relation not just to art.8 and the justifications it happens to list, but equally to art.2 and the rest of the Convention and of our constitution and law, and to the whole future of their community with all its members, in their private lives and their morally significant (and therefore wellbeing-affecting and wellbeing-constituting) relations with each other—all envisaged by legislators, each drawing upon their whole experience of, and reasonable belief about, life and death in their community.

In a consolidated second appeal, about the Director of Public Prosecution's published "Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide" (2010) stating the factors affecting consent to prosecution under s.2, *Nicklinson* unanimously treats *R. (on the application of Purdy) v Director Public Prosecutions* [2009] UKHL 45; [2010] 1 A.C. 345 as a high-water mark, and nearly unanimously disapproves the *Purdy* dicta in which Lord Brown (with the agreement of Lady Hale and Lord Neuberger) said that prosecution for, say, "altruistic" assistance in suicide is "wrong in principle" (at [83] with [74]–[75]).

Unfortunately, no party or intervener argued that *Purdy* was wrongly decided: Lord Hughes alone indicates (at [277]) that *Purdy* was incompatible with constitutional principle and finds (at [280]) that ordering the DPP to issue guidance was unjustified. It should indeed have been challenged and overruled. Its (genuine) Convention-based premise was that the law must be clear enough to enable a law-abiding citizen to "foresee the consequences of his actions so that he can regulate his conduct without breaking the law" (*Purdy* at [40], per Lord Hope). Its order was in substance that the DPP must give guidance to citizens contemplating breaking the law (s.2) so that they can foresee the consequences of

their law-breaking. So, as the courts below saw, this was not only trying to square the constitutional circle, but was declaring a "Convention right" unhinged from the Convention.

To make the *Purdy* order to the DPP coherent with its stated purpose, one has to suppose that either the judges or the DPP have identified or created exceptions to s.2's prohibition. The policy, when issued, rightly did not do so. In thus leaving, say, persons professionally engaged in healthcare uncertain whether they will or will not be prosecuted, and obliged to meet a proper examination into the circumstances of the death they helped cause, the policy is upheld in *Nicklinson*. ↺

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CIVIL RECOVERY AFTER FRAUD

Relfo Ltd alleged that one of its directors had misappropriated its money and that the defendant, Mr Varsani, had received the traceable proceeds of those monies. Relfo therefore claimed the amount received by Mr Varsani on the basis of his knowing receipt of those funds or, alternatively, on the basis of his unjust enrichment. Both bases of claim were upheld, by the High Court: *Relfo Ltd v Varsani* [2012] EWHC 2168 (Ch) and by the Court of Appeal: *Relfo Ltd v Varsani* [2014] EWCA Civ 360.

Knowing receipt is a personal claim founded on equitable property rights, and tracing is the means of identifying substitute assets in which a claimant may assert the necessary equitable proprietary rights. As Arden L.J. remarked, "There is little dispute over the basic principles of tracing" (at [28]). The problems lurk in the detail; but as so often, resolution of the problems turns on the accurate statement or interpretation of some very basic axioms.

The principal problems about tracing in *Relfo* were twofold. The first was resolved relatively easily; indeed, the way had already been shown by Millett J. (as he then was) in *El Ajou v Dollar Land Holdings Plc* [1993] 3 All E.R. 717; [1993] B.C.C. 698. The route by which funds were transferred from Relfo to Mr Varsani was tortuous: unsurprisingly, those who misappropriate monies try to make it very difficult to establish what then happens to the funds, and who is their ultimate, though indirect, recipient. If tracing required that every single transaction between the misappropriated assets and the end product be strictly pleaded and proven, it would be nigh on impossible to trace in many cases. The only winners then would be the fraudsters. So in *El Ajou*, Millett J. was prepared to draw inferences about the chain of substitutions. Similarly in *Relfo*, the Court of Appeal, upholding Sales J. at first instance, thought that there was enough evidence from which the trial judge might properly infer that the funds at issue represented the product of what Relfo had lost. As Arden L.J. noted (at [56]):

↺ Assisted suicide; Declarations of incompatibility; Disabled persons; Margin of appreciation; Right to respect for private and family life

