Neutral Citation Number: [2012] EWHC 304 (QB)

Case No: HQ11X04443

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/03/2012

Before:

MR JUSTICE CHARLES

- -

Between:

TONY NICKLINSON	**Claimant**
- and -	
MINISTRY OF JUSTICE	**Defendant**
- and -	
DIRECTOR OF PUBLIC PROSECUTIONS	**1st Interested Party**
- and -	
JANE NICKLINSON	**2nd Interested Party**

Paul Bowen (instructed by **Bindmans LLP**) for the **Claimant**
David Perry QC and James Strachan (instructed by **TSol**) for the **Defendant**

Hearing dates: 23 January and 8 February 2012

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE CHARLES

Charles J :

General Introduction,

1. As Lord Bingham said in *(R)Pretty v DPP* [2002] 1 AC 800, the underlying issues in this case raise questions that have great social, ethical and religious significance and they are questions on which widely differing beliefs and views are held, often strongly.

2. The issues before me relate, and relate only, to whether the Claimant's arguments have any real prospect of success or whether there is some other compelling reason why these proceedings should be tried. There was an issue between the parties on whether these proceedings should have been brought by way of judicial review rather than by action for declarations. Sensibly, it was agreed that, at this stage, nothing turns on this because there is no effective difference between the tests to be applied on the Defendant's application to strike out the present proceedings and for permission to bring a judicial review.

General Factual Background

3. The Claimant is in his late 50s. He had a stroke in 2005 whilst on a business trip in Athens which left him paralysed below the neck and unable to speak. He was a very active and outgoing man with a busy and active family, working and social life. He communicates by blinking or limited head movement. Initially, this was only by reference to a board with letters on it but he now also has an Eye Blink Computer. He and his wife have sworn statements in these proceedings which describe in vivid and moving terms the predicaments of the Claimant, his wife and two daughters. At the beginning of his first statement in these proceedings, after referring to his stroke the Claimant says:

> "It left me paralysed below the neck and unable to speak. I need help in almost every aspect of my life. I cannot scratch if I itch, I cannot pick my nose if it is blocked and I can only eat if I am fed like a baby - only I won't grow out of it, unlike the baby. I have no privacy or dignity left. I am washed, dressed and put to bed by carers who are, after all, still strangers. You try defecating to order whilst suspended in a sling over a commode and see how you get on.
>
> I am fed up with my life and don't want to spend the next 20 years or so like this. Am I grateful that the Athens doctors saved my life? No, I am not. If I had my time again, and knew then what I know now, I would not have called the ambulance but let nature take its course. I was given no choice as to whether or not I wanted to be saved. However, I do concede that it was a fair assumption given that I had asked for the ambulance and associated medical staff.
>
> What I object to is having my right to choose taken away from me after I had been saved. It seems to me that if my right to choose life or death at the time of initial crisis is reasonably taken away it is only fair to have the right to choose back when one gets over the initial crisis and have time to reflect.
>
> I'm not depressed so do not need counselling. I have had over six years to think about my future and it does not look good. I have locked in syndrome and I can expect no cure or improvement in my condition as my muscles and joints seize up through lack of use. Indeed, I can expect to dribble my

> way into old age. If I am lucky I will acquire a life-threatening illness such as cancer so that I can refuse treatment and say no to those who would keep me alive against my will. ----------
>
> By all means protect the vulnerable. By vulnerable I mean those who cannot make decisions for themselves just don't include me. I am not vulnerable, I don't need help or protection from death or those who would help me. If the legal consequences were not so huge i.e. life imprisonment, perhaps I could get someone to help me. As things stand, I can't get help.
>
> I am asking for my right to choose when and how to die to be respected. I know that many people feel that they would have failed if someone like me takes his own life and that life is sacred at all costs. I do not agree with that view. Surely the right and decent thing to do would be to empower people so that they can make the choice for themselves. Also, why should I be denied a right, the right to die of my own choosing when able bodied people have that right and only my disability prevents me from exercising that right? "

4. I believe that this gives a picture, albeit a very incomplete one, of the circumstances in which the Claimant and his family find themselves. As the Defendant recognises and reiterates they are circumstances that evoke deepest sympathy.

The relief sought

5. The Claimant seeks three declarations, namely:

   i) A declaration that it would not be unlawful, on the grounds of necessity, for Mr Nicklinson's GP, or another doctor, to terminate or assist the termination of Mr Nicklinson's life.

   ii) Further or alternatively, a declaration that the current law of murder and/or of assisted suicide is incompatible with Mr Nicklinson's right to respect for private life under Article 8, contrary to sections 1 and 6 Human Rights Act 1998, in so far as it criminalises voluntary active euthanasia and/or assisted suicide.

   iii) Further or alternatively, a declaration that existing domestic law and practice fail adequately to regulate the practice of active euthanasia (both voluntary and involuntary), in breach of Article 2.

6. The first declaration is sought on the basis that the common law defence of necessity is available to a charge of murder in the case of voluntary active euthanasia and/or to a charge under section 2(1) Suicide Act 1961 in the case of assisted suicide provided that: (a) the Court has confirmed in advance that the defence of necessity will arise on the facts of the particular case; (b) the Court is satisfied that the person is suffering from a medical condition that causes unbearable suffering; there are no alternative means available by which his suffering may be relieved; and he has made a voluntary, clear, settled and informed decision to end his life; (c) the assistance is to be given by a medical doctor who is satisfied that his or her duty to respect autonomy and to ease the patient's suffering outweighs his or her duty to preserve life.

7. For present purposes the facts as asserted by the Claimant are not disputed and so, in assessing whether his claim is arguable, I have assumed that at trial the court would

find that the Claimant has full capacity and that the matters set out in paragraph 6 (b) and (c) above exist.

8. The existence and the combined effect of all these factors is a central point in the Claimant's arguments.

The common law doctrine of necessity

9. This is set out in Archbold at 17/128 and in *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147 as follows:

> " An act which would otherwise be a crime may in some cases be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided ---- The extent of this principle is unascertained. It does not extend to the case of shipwrecked sailors who kill a boy, one of their number, in order to eat his body. "

10. I was also referred to an extract from Sanctity of Life and the Criminal Law written by Glanville Williams in 1957 where he said:

> " Under the present law, voluntary euthanasia would, except in certain narrow circumstances, be regarded as suicide in the patient who consents and murder in the doctor who administers; ----------
>
> More specifically, the following principles may be stated:
>
> (1) If the doctor gives the patient a fatal injection with the intention of killing him, and the patient dies in consequence, the doctor is a common law murderer because it is his hand that has caused the death. Neither the consent of the patient, nor the extremity of his suffering, nor the imminence of death by natural causes, nor all these factors taken together is a defence. This, at any rate is always assumed by lawyers, though there is no case in which the argument that the concurrence of all three factors may present a defence has been actually advanced and decided. It is by no means beyond the bounds of imagination that a bold and humane judge might direct the jury, if the question were presented, that voluntary euthanasia may in extreme circumstances be justified under the general doctrine of necessity. Just as in the case of *Rex v Bourne*, the jury were directed that the unborn child may be destroyed for the purpose of preserving the yet more precious life of the mother, so, in the case of voluntary euthanasia, it is possible to imagine the jury being directed that the sanctity of life may be submerged by the overwhelming necessity of relieving unbearable suffering in the last extremity, where the patient consents to what is done and where in any event no span of useful life is left to him. Although a persuasive argument can be advanced in support of such a direction, it must be emphasised that no hint of it appears in the existing legal authorities. On the contrary the authorities precisely exclude, on a charge of murder, a defence that the deceased consented to the extinction of his life, any defence of good motive, and any defence that the deceased would shortly have died in any event. "

An introduction to the position of the parties

11. The nub of the Claimant's argument relating to the common law doctrine of necessity is that, as in 1957, there is no case in which a court has decided whether the existence and combined effect of the factors he relies on would, on an application of that doctrine, constitute a defence for a doctor to murder (voluntary active euthanasia) and a charge of assisted suicide under s. 2(1) Suicide Act 1961 (as amended by s. 59 Coroners and Justice Act 2009). The combination of factors the Claimant relies on, by reference to the description of the doctrine, are that:

    i) the inevitable and irreparable evil that cannot be avoided or ended other than by his death, is the continuation of his unbearable suffering contrary to his common law rights of self determination and dignity and his Article 8 rights (the Claimant's rights of autonomy), and

    ii) the duties of the doctor who does the act that kills him are that doctor's duties to respect the Claimant's rights of autonomy and to ease his suffering.

12. The starting point of the Defendant's assertion that the Claimant has no real prospect of success is that the law is settled and clear and provides that:

    i) the deliberate killing of another person is murder, unless it can be justified by a well recognised excuse admitted by the law,

    ii) the doctrine of necessity does not provide a defence to murder, or assisted suicide, because duress is only that species of the genus of necessity which is caused by wrongful threats, and duress is not a defence to murder (see ***R v Howe*** [1987] 1 AC 417, Lord Hailsham at 428D to 429D and 430D to 431D, and Lord Mackay at 453 B/F), and

    iii) neither consent to the infliction of death, or kindly motives, are any defence to such a charge (see ***Airedale NHS Trust v Bland*** [1993] AC 789. Lord Mustill at 892E – 893A and ***R v Brown*** [1994] 1AC 212, Lord Mustill at 261 F/G).

13. Further, and again backed by citation from high authority in particular ***Bland***, ***R(Pretty) v DPP*** [2002] 1 AC 800, ***Pretty v UK*** (App No. 2346/02) [2002] ECHR 427 and ***R(Purdy) v DPP*** [2010] 345, the Defendant submits that:

    i) any change to that settled position is a matter for Parliament,

    ii) the state of the criminal law of murder and assisted suicide does not infringe the right to respect for private life under Article 8 of the Convention, and

    iii) the Claimant has no basis for alleging a breach of Article 2.

14. Additionally, the Defendant asserts that, in any event:

    i) this is not a case in which the civil court should entertain an application for declaratory relief applying the guidance set out in ***R (Rusbridger) v A-G*** [204] 1 AC 357 at paragraph 16, and

ii) the doctrine of necessity could only provide a defence to murder or assisted suicide if the choice facing the accused was between two deaths. As to this, it was asserted that insofar as the conjoined twins case *Re A (Children)(Conjoined Twins: Surgical Separation)* [2001] Fam 147, supports the argument that necessity is an available defence: that support is so limited. The example of climbers on a rope and escape from a hold during the Zeebrugge disaster were referred to in the same way.

15. Naturally, the Claimant recognises the existence of the citations from high authority relied on by the Defendant, but he asserts that they do not mean that he should be prevented from arguing at trial for any of the declarations he seeks. I shall deal with his reasons for this below.

The first declaration sought – The defence of necessity - Development / change of the common law

16. The Claimant's arguments engage the conflict discussed in *Bland* between the sanctity of life and the individual's right of self determination (see in particular Hoffmann LJ at 826E to 828B and 830G to 831F). The discussion and reasoning in the judgments and speeches of the Court of Appeal and the House of Lords all proceed on the basis that the answer to the conflict at criminal law is that suicide is not a crime but that euthanasia (and assisted suicide) are crimes (see for example, Hoffmann LJ at 831C and Lord Goff at 865 D/H). Lord Goff says:

> " I must however stress, at this point, that the law draws a crucial distinction between cases in which a doctor decides not to provide, or to continue to provide, for his patient treatment or care which could or might prolong his life, and those in which he decides, for example by administering a lethal drug, actively to bring his patient's life to an end. As I have already indicated, the former may be lawful, either because the doctor is giving effect to his patient's wishes by withholding treatment or care, or even in certain circumstances in which (on principles which I shall describe) the patient is incapacitated from stating whether or not he gives his consent. But it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his suffering, however great that suffering may be: see *Reg v Cox* (unreported), 18 September 1992. So to act is to cross the Rubicon which runs between on the one hand the care of the living patient and on the other hand euthanasia - actively causing his death to avoid or to end his suffering. Euthanasia is not lawful at common law. It is of course well known that there are many responsible members of our society who believe that euthanasia should be made lawful; but that result could, I believe only be achieved by legislation which expresses the democratic will that so fundamental a change should be made in our law, and can, if enacted, ensure that such legalised killing can only be carried out subject to appropriate supervision and control. It is true that the drawing of this distinction may lead to a charge of hypocrisy; because it can be asked why, if the doctor, by discontinuing treatment, is entitled in consequence to let his patient die, it should not be lawful to put him out of his misery straight away, in a more humane manner, by lethal injection, rather than let him linger on in pain until he dies. But the law does not feel able to authorise euthanasia, even in circumstances such as these; for once euthanasia is recognised as lawful in these circumstances, it is difficult to see any logical basis for excluding it in others. "

17. The Claimant must and does accept that he is now inviting the court to cross the Rubicon described by Lord Goff. Correctly, he submits that *Bland* was addressing a different situation and the courts were not presented with the arguments he wishes to advance. He also submits, correctly, that the common law develops over time. Further, by his statement and argument, he points out (a) that, as is recognised in *Bland* (see 827G and 865 F/G cited above), the legal position taken in English law, set out therein, is not the only morally correct position that can be taken, and (b) the potential lack of logic in, or the potential hypocrisy of (per Lord Goff), and the harshness of the result that:

    i) if he had the physical ability to do so, he could lawfully end his suffering by ending his life,

    ii) he could lawfully refuse food and water and so end his suffering, by so ending his life, in a drawn out and painful way (subject to the palliative care that could lawfully be given to him and may lead to a quicker death), and

    iii) if his condition was such that he would die if treatment was withdrawn, he could lawfully refuse such treatment, and so end his suffering by so ending his life, but

    iv) anyone who assists him by action (rather than the discontinuance of care together with palliative care) to end his suffering by ending his life would be committing a crime.

18. So, the Claimant asserts that it is at least arguable that the common law should develop or change to provide a lawful route to ending his suffering by ending his life at a time of his choosing with the assistance by positive action of a doctor in controlled circumstances that have been sanctioned by the court.

19. He asserts that, at least arguably, the last conditions based on the involvement of the court, provide a powerful counter to the argument that, to protect the vulnerable, the common law should not develop in the way argued for by the Claimant. His position is that he (and others in a similar predicament) are not vulnerable, and if, as is the case, a court can grant declaratory relief (or give relevant permissions under the MCA 2005) to sanction, and set the circumstances in which, the life of someone who lacks capacity can be ended, then (a) it could and should do so in his case, and (b) by so doing it would set in place a process that would protect rather than harm the vulnerable. I agree that that is arguable, notwithstanding the comments of Lord Hobhouse at paragraph 119 in *Pretty* and the above citation from Lord Goff's speech in *Bland*.

20. The tragic circumstances of Mrs Pretty have a significant overlap with those of the Claimant, and they would have enabled her to run the arguments that the Claimant now wishes to advance. She did not do so and the Law Lords sitting on her case adopt and confirm the approach in English law to:

    i) the distinction between taking one's own life by one's own act and the taking of life through the intervention or with the help of a third party, and

ii) the distinction between the cessation of life-prolonging treatment and the taking of action lacking medical, therapeutic or palliative justification but intended solely to terminate the life of another.

See, for example, Lord Bingham at paragraph 9 where he points out that Mrs Pretty's case was inconsistent with those distinctions, which he describes as principles deeply embedded in English law. (See also Lord Bingham at paragraphs 26 to 29 and Lord Steyn at paragraphs 55 and 62).

21. The decision of the House of Lords in *Pretty* was made after the decision of the Court of Appeal in *Re A*, the conjoined twins case, and in *Pretty* and in the later case of *Purdy* (which has less in common with the Claimant's situation) the courts and the parties did not raise the argument that a defence of necessity was or should be available to a charge of murder or assisted suicide. Rather, they all proceeded on the basis that the common law defence that the Claimant seeks to rely on does not exist.

22. So, the Claimant accepts that what he is seeking to do is to change the existing understanding of the common law. The starting points for his argument are the nature of the common law, and so its ability to develop, adapt or change to meet new or changing circumstances, the moral arguability of the result he seeks and the point that his arguments have not been expressly raised and addressed before. In my view, all of these points support an arguable base for the result sought by the Claimant.

23. Further, he points to parts of the reasoning in *Re A* as a platform for his argument that the defence of necessity is available to a charge of murder or assisted suicide, and that it can and should be developed on a case by case basis. In this context, the following passages are of particular relevance: Ward LJ at 181A, 184E to 185B, 198F, 200H to 204B and 205A, Brooke LJ at 210D to 212F, 225 D/H and, after a discussion of necessity, 235H to 236B, 236H to 237A, 237C to 238B and 240 A/E and Walker LJ at 252F to 254C and 255E to 255H.

24. As pointed out in those passages, the conjoined twins case was a very special if not unique case on its facts, and the choices presented were that both twins would die if they were not separated, Mary could not survive if they were separated and the doctors were convinced that if they were separated Jodie would survive and have a life that was worthwhile. So, it is clear that the court was facing a choice between both twins dying and one surviving, and not a choice between the deeply rooted ethical principles engaged in this case. It is also fair to record that the arguments before me demonstrate that the core reasoning of the members of the court in that case can be analysed in different ways.

25. However, I have concluded that it is arguable that *Re A* does provide support to the Claimant's arguments that the law on the availability of necessity as a defence, or potential defence, to murder or assisted suicide is not as fixed and clear as the Defendant asserts. Further, if such support is required, it also supports the point that the common law is by its very nature capable of application to a new situation, or of development to take account of changing circumstances and new arguments (see also, for example, *Bland* and *R(L) v Bournewood Community and Mental Health Trust* [1999] 1 AC 458). *Bournewood* is cited by Walker LJ at 252 E/G in *Re A* as confirmation of the point that the concept of necessity is a part of the common law and his citation remarks on the late recognition of the role it has to play in the law of

torts – there false imprisonment. The different decision in Strasbourg in that case on the lawfulness of the detention led to amendments to the MCA to introduce the Deprivation of Liberty Safeguards.

26. Additionally I have concluded that the following submissions provide an arguable base for the declaratory relief the Claimant seeks on the availability of a defence of necessity:

    i) the statements of the law relied on by the Defendant do not provide binding authority, have not been directed to the combination of all the factors relied on by the Claimant and have concerned involuntary active euthanasia and not voluntary active euthanasia,

    ii) there is a duty owed by doctors to the Claimant based on his common law rights of self determination and dignity, and his Article 8 rights (and possibly Article 14) that is engaged in determining the defences available to a doctor to the charges of murder or assisted suicide,

    iii) the court has demonstrated in other areas that it can determine in advance whether circumstances exist (or will exist) in which it is lawful to end a person's life, and an extension of this role to cover the Claimant would promote rather than weaken the protection provided by the law to vulnerable or uncertain people who have capacity to make the relevant choices, and

    iv) the relief the Claimant seeks does not necessarily lead to, or support a conclusion that, the law should provide a defence to murder or assisted suicide in cases of involuntary active euthanasia.

27. So thus far, I have concluded that the Claimant has an arguable case.

28. However, the point that the common law and the application of its principles is capable of development and change by the courts on a case by case basis does not mean that the courts should so develop or change the law, particularly when it is settled, and involves issues of policy and ethical issues on which there are differing and strongly held views.

Can or should the court refuse to entertain these proceedings on the basis that it is only Parliament that can bring about the development and change the Claimant seeks

29. I confess that when I read these papers I was of the provisional view that only Parliament could now bring about this development or change. But, counsel for the Claimant has persuaded me that it is arguable that this is not the case.

30. I was referred to a number of statements in the speeches of Law Lords in cases I have already referred to, to the effect that the making of changes in, or in respect of, the criminality of euthanasia and assisted suicide is a matter for Parliament. For example, Lord Goff (cited earlier) and Lord Mustill in *Bland* at 896F, Lord Hobhouse in *Pretty* at paragraph 120 and Lord Hope in *Purdy* at paragraph 26. Also, at the start of this judgment I have referred to part of paragraph 2 of Lord Bingham's speech in *Pretty*, in which he describes the function of the court, and points out that it has the function

and duty of resolving issues of law and is not a legislative body and nor is it entitled to act as a moral or ethical arbiter.

31. Also, the Defendant relied on what is said by Lord Lowry in *C (A Minor) v DPP* [1996] AC 1 at 28 A/B, to found the general proposition, that was not disputed and has been recognised and applied in many cases, that the Courts should be slow to change or develop the law in disputed areas of social policy, particularly when Parliament has considered the position and made some changes, or has rejected the opportunity to make changes. As to this:

    i) in *Pretty* Lord Bingham at paragraphs 27 to 29 refers to reviews since the passing of the Suicide Act and there have been more since. There was common ground on what they were, and the last has been the work of the Commission on Assisted Dying chaired by Lord Falconer and his introduction of an amendment during the passage of the Coroners and Justice Bill, that was defeated,

    ii) by the CJA 2003, Parliament has introduced mitigating provisions relating to sentencing in cases where there has been a mercy killing, and by taking that approach rejected or did not take an alternative approach of providing a defence in such circumstances, and

    iii) Parliament has made amendments to the Suicide Act, most recently by the Coroners and Justice Act 2009.

32. The Claimant relied on the following heads of argument, which have led me to conclude that it is arguable that, notwithstanding the force of the approach based on the principles or rationales referred to in paragraphs 31 and 32 hereof (which I shall refer to as the "constitutional approach") the courts can and should entertain the claim for a declaration relating to the common law defence of necessity:

    i) the constitutional approach may be displaced (see Lord Browne-Wilkinson in *Bland* at 880D and Walker LJ in *Re A* at 255F),

    ii) where fundamental rights are in issue the constitutional approach will, or can be, displaced by the principle of legality when interpreting statutes and applying the common law (see *R v Home Secretary ex p Simms* [2000] 2 AC 115 at 131, and *HM Treasury v Ahmed* [2010] AC 534 at paragraphs 45 to 47, 61, 75 to 76, 111 to 117, 138, 193, 240 and 249),

    iii) there are examples of the courts introducing legal criteria and safeguards into the common law in respect of issues that do or can be said to trigger the constitutional approach (e.g. *Re F (Mental Patient: Sterilisation)* [1990] AC 1 in particular at paragraphs 56E to 57A, 70F to 71B, 75H and 79 G/H),

    iv) whilst it is correct that Parliament has foregone opportunities to legislate on several occasions, this is not determinative, not only because of the principle of legality, but also having regard to the points that (a) there is no explicit exclusion of the operation of a defence of necessity in all circumstances to a charge under s. 2(1) Suicide Act, and there is no such exclusion by necessary implication, (b) with one exception in 1997, the relevant debates have all been

only in the House of Lords and there have been considerable developments since 1997 (and *Pretty*) including a growing majority of the public who support the relaxation of laws of assisted dying, and the Select Committee did not reject Lord Joffe's Assisted Dying for the Terminally Ill Bill,

v) it would not be undemocratic or unconstitutional for the courts to step in and fill a gap in the common law, even if Parliament had deliberately left it empty (see *Re F (Adult: Court's Jurisdiction)* [2001] 1 Fam 38 at 56). Also, in the analogous context of the court's powers under the Human Rights Act to determine compliance with fundamental human rights in *A v Home Secretary* [2005] 2 AC 68 at paragraph 42, Lord Bingham said:

> " ------- It follows that I do not accept the full breadth of the Attorney General's submissions. I do not in particular accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true, as pointed out in para 29 above, that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. It is particularly inappropriate in a case such as the present in which Parliament has expressly legislated in section 6 of the 1998 Act to render unlawful any act of a public authority, including a court, incompatible with Convention right, has a required courts (in section 2) to take account of relevant Strasberg jurisprudence, has (in section 3) required courts, so far as possible, to give effect to Convention rights and has conferred a right of appeal on derogation issues. The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is declared to be incompatible the validity of the legislation is unaffected (section 4(6)) and the remedy lies with the appropriate minister (section 10), who is answerable in Parliament. The 1998 Act gives the courts a very specific, wholly democratic, mandate. As Professor Jowell has put it "The courts are charged by Parliament with delineating the boundaries of a rights-based democracy" ---------- "

vi) again, by analogy with the approach of the courts under the Human Rights Act (and of direct application in respect of the relief based on Article 8 and Article 2),

a) the courts must evaluate the effect of, and interpret, legislation by reference to Convention Rights (see *Wilson v First Country Trust (No 2)* [2004] 1 AC 816 at paragraph 61,

b) it is for domestic courts to form a judgment on whether a convention right has been breached (see, for example, *R (Daly) v Home Secretary* [2001] 2 AC 532 at paragraphs 23 and 27 and *R (Quila) v Home Secretary* [2011] 3 WLR 836 at paragraphs 45/46 and 61, and dissenting at 91)

c) the *Ullah* principle does not apply to issues in respect of which Strasbourg accords a margin of appreciation (see for example *Re G (Adoption: Unmarried Couple)* [2009] 1 AC 173 in particular at

paragraphs 29 to 32, 36 to 38, 50, 56, 84, 113, 115, 117, 119, 120, 122 and 126 to 130 (and 79 and 82 dissenting)),

d) the domestic authorities to whom Strasbourg affords a margin of appreciation include the courts, and whether the final word on proportionality is for Parliament or the courts is a matter to be determined by reference to the constitutional arrangements of the contracting state and so, in the UK, by the provisions of the Human Rights Act (see *Re G* at paragraphs 37 and 140), and

vii) whilst in general it may be preferable for issues of broad social and moral policy to be determined by Parliament, the fact that they are hotly contested can be a factor in favour of the court intervening particularly if, as here, the suggested solution involves the participation of the courts on a case by case basis, as has been done in cases relating to patients who lack capacity and in the Conjoined Twins case.

Should a civil court entertain the claim for a declaration

33. This is a different point in connection with the issue whether it is arguable that the court would grant the Claimant the declaratory relief he seeks. It is focused on the declaration sought on the availability and application of a defence of necessity.

34. It is well established that, save in exceptional circumstances, it is not appropriate for a civil court to grant a declaration as to whether conduct would amount to a criminal offence (*R (Rusbridger) v A-G* [2004] 1 AC 357 at paragraphs 16 and 35, and *R v DPP ex p Camelot* (1997) 10 Admin L Rep 93 at 104).

35. In my view, it is arguable that this is an exceptional case and that if the Claimant convinces the civil court that the common law should be developed or changed in the way he seeks, the civil court would go on and make the declaration.

36. I add that the parties and the court may wish to consider joining the relevant doctor and prosecuting authority, to render them bound by the declaration.

Conclusion

37. In my view, the Claimant has established an arguable case in support of the declaration he seeks relating to the availability of a defence of necessity. Accordingly, I shall not strike out that part of his claim, and so far as it is necessary for me to do so, I give permission for him to seek such relief by way of judicial review.

The second declaration sought - Article 8

38. The Defendant accepts that the Article 8 rights of the Claimant are, or at least are arguably, engaged (see *Purdy*).

39. The Claimant accepts that his arguments under this head invite the court to engage in striking a balance between the competing interests at the heart of his argument concerning the availability of the common law defence of necessity. Indeed, he acknowledges that it is under Article 8 (arguably in combination with Article 14, but

not Article 3, which he acknowledges adds nothing) that his rights of autonomy and dignity arise and are protected.

40. The Claimant also acknowledges that if he obtains all that he seeks concerning the availability of a common law defence of necessity, the declaratory relief he seeks under the Human Rights Act is unnecessary. This relief, which if granted, triggers Parliamentary consideration (as described in the citation in paragraph 32(v) above) is therefore "back up" relief.

41. Success on his arguments concerning the balance to be struck between the relevant competing interests founds the platform for the declaratory relief sought based on both lines of argument. To my mind, the overlap between common law rights of autonomy and dignity and the relevant convention rights, and indeed the part that those convention rights play in the arguments in favour of the first declaration sought concerning the availability of the defence of necessity, found the conclusion that it is not arguable that the court could or should strike a different balance between those competing interests when considering the two lines of argument.

42. So, in my view, the only potential relevance of the line of argument based on Article 8 (and arguably Article 14) is to provide an alternative head of relief. As to that, in my view, there is a real possibility that the court would conclude that it was more appropriate to grant a declaration of incompatibility under the Human Rights Act than a declaration relating to the defence of necessity at common law. For example, the civil court might conclude (a) that it should not effectively declare that defined conduct would not amount to a criminal offence, or (b) that it was more appropriate for the court to grant relief under the Human Rights Act to engage Parliament in the process of changing or developing the law, rather than for it to do so by starting a case by case approach under the common law.

43. This possibility concerning the grant of relief, combined with my view that the Claimant's case on the balance to be struck between the competing interests is arguable, founds the conclusion that the claim for the second declaration should be allowed to proceed.

44. However, the Defendant advances a further and separate argument as to why that should not be allowed. This argument is that the issue has been decided by the House of Lords and Strasbourg in *Pretty* and the court is bound by those decisions. In my view, for the reasons that follow, it is arguable that this is not the case:

    i) the relevant ruling of the House of Lords in *Pretty* is arguably obiter dicta,

    ii) a relevant factor in the view of the House of Lords and the decision of the Strasbourg court on Article 8(2) was the existence of the DPP's discretion,

    iii) in *Purdy* the House of Lords concluded that, absent a published policy by the DPP, the relevant provisions of the Suicide Act did not comply with Article 8(2), which arguably is a departure from, or a qualification of, the view and conclusion on Article 8(2) in *Pretty*,

    iv) here, unlike in *Pretty* and *Purdy* the compliance with Article 8(2) falls to be considered against the background of the law of murder as it applies to

voluntary active euthanasia and so to an effective blanket ban on assistance being given by doctors to persons who as a result of their disablement cannot commit suicide, other than by refusing food and water,

v) the points I have mentioned earlier by analogy in paragraph 32(v) and (vi) apply because Strasbourg based its decision on Article 8(2) in *Pretty* on the margin of appreciation, which makes it arguable that the court is not bound by that decision and can review and reach a different conclusion on the proportionality of a measure within the margin of appreciation (I have not mentioned all of the citations from authority to which I was referred on these arguments), and

vi) there have been a number of developments since *Pretty* which include the report of the Commission on Assisted Dying, released in January 2012, which included a conclusion that the current legal status of assisted suicide is inadequate and incoherent (see also the points made in paragraph 32(iv)(b) hereof).

Conclusion

45. So, I have also concluded that the Claimant has established an arguable case in support of the declaration he seeks in respect of Article 8. Accordingly, I shall not strike out that part of his claim, and so far as it is necessary for me to do so, I give permission for him to seek such relief by way of judicial review.

The third declaration sought - Article 2

46. The Claimant does not seek to challenge the conclusion of Lord Bingham in paragraph 5 of his speech in *Pretty* that Article 2 cannot be interpreted as conferring a right to die, or to enlist the aid of another in bringing about one's own death. He therefore accepts that Article 2 has no direct application to him.

47. He seeks to rely on the plight and risks of others who are vulnerable, evidence to the effect that covert, unregulated euthanasia occurs in England and Wales and an assertion that the current policy of the DPP, by excluding professionals from assisting suicide, encourages covert and amateur assisted suicides, to found the conclusion that the criminalisation of euthanasia is not of itself sufficient to discharge the State's positive obligations under Article 2. He does so, in the hope that a review of the law by Parliament might include changes that would have direct application and benefit to him. For that to be the case Parliament would have to introduce a change that permitted active voluntary euthanasia, rather than, for example, better protection against non-voluntary active euthanasia by better investigation and prosecution under the existing or amended criminal law.

48. I have not identified any part of the general arguments advanced by the Claimant under this head, and thus by reference to Article 2, that arguably add value or force to his arguments in support of the first two declarations he seeks. So, in my judgment, the Claimant should not be permitted to advance this line of argument in support of his other two lines of argument.

49. If this line of argument is considered in isolation, it is a general challenge to the existing law that reflects (a) the acknowledged distinction between taking one's own life and the taking of life by the intervention or with the assistance of others, and (b) the view of Lord Bingham on the extent of Article 2 (referred to in paragraph 46 hereof). That challenge is not based on the particular position of the Claimant, or any common law or convention rights of the Claimant, and could only benefit him if Parliament chose to make changes in the law to enhance the protection given to the vulnerable that made active voluntary euthanasia lawful in defined circumstances. In my judgment, from those starting points, the Claimant does not have any realistic chance of persuading a court to grant the third declaration he seeks, even if it is assumed that his underlying arguments based on the position of others are arguable. The reason for this is that the court should not engage in that debate because it is a matter for Parliament.

50. The crucial distinction between this conclusion in respect of the third declaration and my conclusions in respect of the first two declarations sought is the point that, in support of the first two, the Claimant is advancing an argument based on his asserted rights.

51. So I would not grant permission for the Claimant to seek the third declaration and I strike out that part of his claim.

Miscellaneous

52. In my view, although the Claimant would not be the defendant to any charge of murder or assisted suicide he has sufficient interest to be permitted to seek the first declaration. This is because the issue directly relates to the manner in which he seeks to exercise his rights of autonomy and dignity. It was not argued that he did not have sufficient interest to seek the second declaration.

53. I agree with the Defendant that the Claimant does not have sufficient interest to permit him to seek the third declaration on the basis advanced by reference to the impact of the law on others.

54. To my mind, the issue raised as to whether the Ministry of Justice is the correct Defendant is an arid one. The Crown is indivisible, the court can add any Department or Officer of the Crown in addition to, or in substitution for, the Ministry of Justice, and so the identity of the named Defendants is a procedural and not a substantive issue.