Care Not Killing's Response to the Consultation on the Review of the Implementation of the Human Rights Act

Introduction

Care Not Killing (CNK) is a UK based alliance of individuals and organisations which brings together disability and human rights organisations, health care and palliative care groups, and faith based organisations with the aims of:

(a) More and better palliative care;
(b) Ensuring that existing laws against euthanasia and assisted suicide are not weakened or repealed;
(c) Influencing the balance of public opinion further against any weakening of the law.

We do this by lobbying of politicians, press and public relations work and intervening in so called 'right to die' legal cases being brought before the UK courts and the European Court of Human Rights. Among others, we have intervened in the following cases:

- Nicklinson & Lamb v Ministry of Justice and Director of Public Prosecutions and Her Majesty's Attorney General
- R (on the application of Conway) and the Secretary of State for Justice
- An NHS Trust (respondent) v Y (by his litigation friend, the official solicitor)
- Mortier v Belgium at the European Court of Human Rights

Theme 1

CNK's experience is that there have been a number of cases brought before the British courts and the European Court of Human Rights (ECtHR) which fall within the Margin of Appreciation. Such matters are most appropriately considered by national governments and parliaments and the courts should not seek to impose a view or set precedents in law in these areas.

There have a number of cases brought before the UK courts in which petitioners have sought to challenge the UK's law which prohibits assisting suicide and/or euthanasia. This is a sensitive area in which political parties generally allow their parliamentarians a free vote as it is considered to be a matter of individual conscience. In such circumstances, it is even less appropriate for courts to rule that laws and statutes are incompatible with the European Convention of Human Rights. Moreover, the ECtHR noted in the case of Haas v Switzerland that member states of the Council of Europe were far from having reached a consensus that an individual had a right to choose how or when to end his life. Moreover the Court recognised that in relation to assisted suicide, State Parties have a wide margin of appreciation.

Generally the UK courts and the European Court of Human Rights have, to date, dismissed cases which have come before them seeking to a establish a so called 'right to die'. The courts have recognised that access to assisted suicide or euthanasia cannot

reasonable be read into the plain interpretation of Article 2. However, it is concerning that in *Nicklinson*, two Justices issued a declaration of incompatibility, and three others considered that it would be institutionally appropriate for them to issue such a declaration. It seems to us that the approach of Lords Sumption, Reed, Hughes, and Clarke – according to which the courts are not institutionally competent to deal with such issues – is preferable. We are happy to note that in *Conway* the Court of Appeal held that it was a matter for Parliament. The Supreme Court denied permission to appeal but left open the question of whether it is institutionally appropriate for them to decide the compatibility issues.[1]

In the case of Debbie Purdie, the House of Lords did find that Article 8 was engaged and that the lack of a published prosecution policy interfered with that right. That judgement forced the UK prosecuting authorities to issue guidance on the circumstances in which a prosecution would be considered. In our view, the issuing of such guidance has the potential to undermine the effectiveness of the existing statute in England and Wales. For example, since the Director of Public Prosecution's policy was published, 156 cases of assisting suicide have been referred to the Crown Prosecution Service (CPS) by police. Of these 156 cases, the CPS did not proceed with 105, and 31 cases were withdrawn by the police. Just 3 cases have been successfully prosecuted. In our view, it would have been appropriate at the time (2009) for House of Lords to recognise that the subject matter of the Purdie case impacted upon matters that fell within the Margin of Appreciation and, therefore, perhaps to have sought to avoid straying into that territory.

In conclusion, we believe that it is inappropriate for the UK courts to intervene in sensitive policy issues which are routinely considered to be matters of personal conscience by political parties. On matters which fall within the Margin of Appreciation (e.g. assisted suicide and euthanasia) the UK courts should not be able to find that UK law on such conscience issues is incompatible with the rights listed in Schedule 2 of the Human Rights Act.

[1] https://www.supremecourt.uk/docs/r-on-the-application-of-conway-v-secretary-of-state-for-justice-court-order.pdf