The Suicide Act 1961 (UK), ECHR & *Carter*

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PURPOSE AND STRUCTURE OF PRESENTATION

- **Purpose**: to demonstrate **why** and **how** *Carter* supports the making of declarations of incompatibility between s 2(1) of the Suicide Act 1961 and Articles 2 and 8 of the ECHR as sought by Noel Conway and Omid T
- **Structure**:
  - 1. Introduction to the AS 'scheme' in England and Wales
  - 2. Overview of the reasoning of the UKSC in *Nicklinson*
  - 3. Demonstrate **why** *Carter* is authoritative
  - 4. Demonstrate **how** *Carter* is authoritative
  - 5. Summary of **why** the declarations sought by Noel Conway and Omid T should be made

CURRENT POSITION IN E & W

- The following is summary of the position in England & Wales
- Section 2, *Suicide Act 1961:*

(1) A person ("D") commits an offence if—

(a) **D does an act capable of encouraging or assisting the suicide or attempted suicide** of another person, and

(b) **D's act was intended to encourage or assist** suicide or an attempt at suicide.

(1A) The person referred to in subsection (1)(a) need not be a specific person (or class of persons) known to, or identified by, D.

(1B) D may commit an offence under this section whether or not a suicide, or an attempt at suicide, occurs.

(1C) An offence under this section is triable on indictment and a person convicted of such an offence is liable to imprisonment for a term not exceeding 14 years.

...

(4) **No proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions**.

RATES OF PROSECUTION

- From 1 April 2009 up to 7 July 2017, there have been **136 cases referred** to the CPS by the police **that have been recorded as assisted suicide**.
- Of these 136 cases, **85 were not proceeded with** by the CPS. **28 cases were withdrawn** by the police.
- There are **currently eight ongoing cases**. **One case** of **assisted attempted suicide** was **successfully prosecuted** in October 2013, **one case** of assisted suicide was charged and **acquitted after trial in May 2015** and **seven cases were referred onwards for prosecution for homicide or other serious crime**.
- SO →
  - In over 8 years there have been 136 cases referred to the CPS which have been recorded as assisted suicide
  - 113 (83%) not proceeded with (either by CPS or withdrawn by the police)
  - 8 (6%) ongoing
  - 1 (0.7%) successfully prosecuted
  - 7 (5%) referred onwards for prosecution for other serious crime (e.g. homicide such as *Grazeley* 22/5/15).

SECTION 2 AND ECHR

- Dianne Pretty – early 2000s. Had motor neurone disease. Sought a declaration pursuant to s 4 of the *Human Rights Act 1998* that the blanket ban on assisted suicide in s 2(1) was incompatible with Article 2 (the right to life) and Article 8 (right to private life)
- The domestic courts rejected both aspects of Ms Pretty's claim finding that the blanket ban did not interfere with either the right to life or the right to private life
- Ms Pretty was partially successful before the ECtHR which found:
  - 1. that the right to private life **was** engaged by the blanket ban:

    [67] The applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8 § 1 of the Convention.

    (Notably, the ECtHR also considered that: 'The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity' (at [65])
  - 2. that the right to life **was not** engaged by the blanket ban

SECTION 2 AND THE ECHR (CONT'D)

- Post-*Pretty*:
  - **Debbie Purdy**: successfully argued that s 2(1)'s **interference with her Article 8 right to private life would be arbitrary and, thus, not 'accordance with the law', unless there was sufficient clarity about the factors which the DPP and his subordinates will take into account** in making their decisions (per Hale at [63]).
  - **Tony Nicklinson:** Tony Nicklinson, who had locked-in syndrome, challenged the compatibility of s 2(1) with Article 8 of the ECHR arguing that the blanket nature of the ban was overbroad and, thus, disproportionate to the objective of protecting vulnerable people. Unfortunately, Mr Nicklinson's substantive claim was largely lost amongst a constitutional dispute as to whether or not the courts had jurisdiction to issue a declaration of incompatibility given the highly sensitive nature of the topic. **While a majority** of the Supreme Court considered that the court **did have jurisdiction**, only two judges (Lady Hale and Lord Kerr) proceeded to examine the substantive issues (deciding that the ban was disproportionate and, thus, violated Article 8).

NICKLINSON

- Lady Hale and Lord Kerr held that the blanket ban **was** incompatible with Article 8 because the ban 'goes much further than is necessary to fulfil its stated aim of protecting the vulnerable' (Per Lady Hale at [317]).
- Significantly, as Lord Kerr observed all that must be demonstrated is that the inclusion of people who *are not* vulnerable in the group of people caught by the ban was 'unavoidable to protect the vulnerable group' (at [354]). And the State was, according to Lady Hale and Lord Kerr, unable to meet that threshold.
- According to Lady Hale and Lord Kerr, the blanket ban in s 2 is, then, not reasonably necessary to protect the vulnerable; in order to be compatible with Article 8, s 2(1) ought to permit of exceptions which allow people who are not vulnerable to access assistance in suiciding.

CURRENT SITUATION

- Post-*Nicklinson* there have been several attempts to amend s 2 to permit of exceptions to the blanket ban on assisted suicide. All such attempts have failed to pass Parliament, with the latest attempt stagnating in the House of Lords.
- **Two new challenges:**
  - **Noel Conway:** Mr Conway, who has motor neurone disease, is seeking a declaration that s 2 is incompatible with the right to private life (Article 8) and the right to freedom from discrimination (Article 14). Leaving aside the discrimination claim, Mr Conway's case has been described by the domestic courts as 'the same or very similar to the issue considered by the Supreme Court in *R (Nicklinson) v Ministry of Justice (CNK Alliance Limited and Others Intervening)* [2014] UKSC 38' (per *Conway* CoA at [4]). A Divisional High Court heard Mr Conway's application prior to breaking for summer break; judgment remains outstanding.
  - **Omid T's case**: Omit T, who has been diagnosed with the incurable and life-limiting but not terminal condition, MSA has instituted proceedings challenging the compatibility of the blanket ban with the right to life (Article 2) and the right to private life (Article 8). Omid's case has been 'postponed' until judgment in Mr Conway's case is delivered as, plainly, there is overlap in the issues at the centre of each set of proceedings. But there are, obviously, very significant differences in the proceedings. First and foremost, Omid T's condition, while incurable, is not terminal; while Mr Conway's case is that the ban is incompatible with the ECHR in so far as it prevents a person with 6 months or fewer to live from receiving assistance with dying. In contrast, Omid's case is that the prohibition on assisted suicide is incompatible however long he may yet live given the unbearable and worsening suffering that will accompany the years to come.

CARTER: WHY IS IT AUTHORITATIVE? SIMILARITY IN THE RIGHTS AT ISSUE

- Why is *Carter* authoritative?
  - Firstly, there is considerable overlap between the rights in issue:
- In *Carter* the rights in issue were those enshrined in s 7 of the Charter which provides:
  - Everyone has the **right to life, liberty and security of the person** and the right not to be deprived thereof **except in accordance with the principles of fundamental justice**.
- Also relevant is s 1, which states:
  - The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it **subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society**.

CARTER: WHY IS IT AUTHORITATIVE? SIMILARITY IN THE RIGHTS AT ISSUE

- As for the UK proceedings, Article 8 provides:

  1. Everyone has the right to **respect for his private and family life**, his home and his correspondence.

  2. There shall be no interference by a public authority with the exercise of this right **except such as is in accordance with the law and is necessary in a democratic society in the interests of** national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the **protection of the rights and freedoms of others**.

- While Article 2 reads:

  1. Everyone's **right to life shall be protected** by law. **No one shall be deprived of his life intentionally** save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
  2. ...

CARTER: WHY IS IT AUTHORITATIVE? SIMILARITY IN THE RIGHTS AT ISSUE

- Significant parallels in the principles underpinning the rights enshrined in s 7 and Article 8. The Supreme Court in *Carter* described the protections afforded by s 7 in the following terms:

  > The right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly ... The rights to **liberty and security** of the person, which **deal with concerns about autonomy and quality of life**, are also engaged. An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy...

- Similarly, the ECtHR has held that autonomy is 'an important principle' underpinning the right to privacy enshrined in Article 8 (*Pretty* at [61]). The ECtHR in *Pretty* went on to observe:

  > [65] The **very essence of the Convention is respect for human dignity and human freedom**. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is **under Article 8** that notions of the **quality of life** take on significance...

- In fact, the ECtHR observed in *Pretty* that while s 7 (as considered by the Supreme Court in *Rodriguez*) is 'framed in different terms' to Article 8, '**comparable concerns arose regarding the principle of personal autonomy in the sense of the right to make choices about one's own body**' (at [66]).

CARTER: WHY IS IT AUTHORITATIVE? SIMILAR PROPORTIONALITY ASSESSMENTS

ECHR

- The fact that the blanket ban interferes with the right to private life (in particular, the right to choose the manner and timing of one's death) has been accepted by the domestic courts and the ECtHR since Dianne Pretty's case came before the latter. The issue, then, is whether or not that interference is justified which, in turn, requires proof that:
  - the **legislative objective is sufficiently important** to justify limiting a fundamental right;
  - the measures designed to meet that objective are **rationally connected** to it;
  - those measures are **no more than are necessary** to achieve it; and
  - the measures **strike a fair balance between the rights of the individual and the interests of the community.**
- At each stage, **the onus is borne by the State** (the applicant having first demonstrated that a right is interfered with).

CARTER: WHY IS IT AUTHORITATIVE? SIMILAR PROPORTIONALITY ASSESSMENTS

Canada – FIRSTLY: The principles of fundamental justice

- The **onus is on the applicant** to demonstrate that they have been deprived of a s 7 right *and* that the deprivation is not in accordance with the principles of fundamental justice. According to those principles, the relevant provision must not be:
  - arbitrary (i.e. there is no rational connection between the object of the law and the limit it imposes on the s 7 right);
  - overbroad (i.e. the law goes too far by denying the rights of some individual in a way that bears no connection to the object); or,
  - grossly disproportionate (i.e. the negative effects on the individual are completely out of sync with the object of the provision).
- **At no point at this stage of the inquiry do broader social interests come into play**.
- If the applicant demonstrates that there has been a deprivation of a s 7 right which is not in accordance with the principles of fundamental justice, the **onus shifts to the State to demonstrate, pursuant to s 1 of the Charter, that the deprivation is justified.**
- It is at this stage that broader social interests *may* be relevant.

CARTER: WHY IS IT AUTHORITATIVE?
SIMILAR PROPORTIONALITY ASSESSMENTS

Charter	ECHR
1. the law has a **pressing and substantial object**	1. the legislative **objective** **sufficiently important** to justify limiting a fundamental right;
2. the means adopted are **rationally connected** to the objective;	2. measures which have been designed to meet it **rationally connected** to it;
3. it is **minimally impairing** of the right in question; and,	3. **no more than are necessary** to accomplish it
4. there is **proportionality b/w the deleterious and the salutary effects** of the law.	4. strike a **fair balance** between the **rights of the individual** and the **interests of the community**

CARTER: HOW IS IT AUTHORITATIVE?

- ***Carter* is 'authoritative', so what?** The two primary findings of the trial judge in *Carter* are of central importance to Noel Conway's and Omid T's challenges, namely that the blanket ban on assisted suicide violated:
    1. the right to liberty and security of the person because it denies people suffering from grievous and irremediable conditions the right to make decisions concerning their bodily integrity and medical care and thus trenches on their liberty. And by leaving them to endure intolerable suffering, it impinges on their security of the person; and,
    2. the right to life because if forced some people to take their lives sooner than they otherwise would if they could obtain assistance in suiciding at a later time.
- And in both instances, the interference with the s 7 rights was not in accordance with the fundamental justice principles as the ban was overbroad *and* there were less harmful means of achieving the legislative goal (i.e. it was not minimally impairing as required by s 1).

CARTER: HOW IS IT AUTHORITATIVE?

- **What does this mean for Noel Conway and Omid T?**
  - The ECtHR has found that s 2 interferes with the right to private life (Article 8) BUT that interference is justified because it pursues a legitimate aim (protecting vulnerable people) and is proportionate to achieving that aim
  - BUT as the courts in *Carter* observed, a blanket ban will inevitably catch people who are *not* vulnerable. This is entirely consistent with the findings of Lady Hale and Lord Kerr, the two Supreme Court justices in the matter of *Nicklinson* who considered s 2(1)'s compatibility:
    - The ban 'goes much further than is necessary to fulfil its stated aim of protecting the vulnerable' (per Lady Hale at [317]).

CARTER: HOW IS IT AUTHORITATIVE?

- **Consistently with the trial judge and the Supreme Court in *Carter***, Lady Hale and Lord Kerr noted that end of life decision making occurs on a daily basis, including in the courts:

  > ...the High Court has for more than 25 years sanctioned the bringing to an end of life. Why should it not do so in relation to the type of case with which we are concerned here? ...

- The blanket ban in s 2 is, then, not reasonably necessary to protect the vulnerable; in order to be compatible with Article 8, s 2(1) ought to permit of exceptions which permit of people who are not vulnerable accessing assistance in suiciding.

CARTER: HOW IS IT AUTHORITATIVE?

- **A further, and important, similarity in the reasoning** of the courts in *Carter* and that of Lady Hale and Lord Kerr is the recognition that the empirical evidence available from the permissive jurisdictions does not support the contention of the States that allowing assistance in suiciding would expose vulnerable people to the risk of being pressured into taking their lives. As several presentations have covered in far greater detail, data from a number of permissive jurisdictions reaffirms those findings.

CARTER: HOW IS IT AUTHORITATIVE?

The **latest data from Oregon** reveals:

- As of January 23, 2017, 133 people had died in 2016 from ingesting the prescribed medications, including 19 prescription recipients from prior years. Characteristics of DWDA patients were similar to previous years: most patients were aged 65 years or older (80.5%) and had cancer (78.9%). During 2016, no referrals were made to the Oregon Medical Board for failure to comply with DWDA requirements ... The median age at death was 73 years. As in previous years, decedents were commonly white (96.2%) and well-educated (50.0% had a least a baccalaureate degree).

The **latest data from California** is strikingly similar:

- Of the 111 individuals who died pursuant to EOLA during 2016, 12.6 percent were under 60 years of age, 75.6 percent were 60-89 years of age, and 11.7 percent were 90 years of age and older. The median age was 73 years. At the time of death, the decedents were 89.5 percent white, 54.1 percent were female; 83.8 percent were receiving hospice and/or palliative care, and 72.1 percent had at least some level of college education

- In both jurisdictions, the majority of patients had been diagnosed with cancer, with neuromuscular diseases coming in second, followed by heart disease, lung respiratory diseases and dementia.

CARTER: HOW IS IT AUTHORITATIVE?

- As the courts in *Carter* and Lord Kerr observed, those statistics do not indicate that permissive schemes are a risk to the vulnerable.
- **So what does this mean for Noel Conway and Omid T?**
- Assuming they do not make different evidential findings, the courts hearing Noel Conway's and Omid T's challenge **ought to issue a declaration that s 2(1) of the Suicide Act 1961 is incompatible with Article 8 (right to private life) on the basis that a blanket ban is not reasonably necessary to protect vulnerable people.**

WHAT, IF ANYTHING, DOES *CARTER* MEAN FOR OMID T'S ARTICLE 2 CLAIM

- In rejecting Ms Pretty's claim that Article 2 protected the right to live, ***and the right to decide not to live*** **(ie. a right to die)**, the ECtHR opined:

  '[The right to life] cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entirely to choose death rather than life' (at [39]).

- Notwithstanding the unequivocal manner with which the ECtHR disposed of the Article 2 claim, I would suggest that Omid T's Article 2 challenge has more likelihood for success on the following bases:

  1. first, courts in at least three jurisdictions with common law backgrounds (namely, the Canadian courts in *Carter*, the South African High Court in *Stransham-Ford* and the New Zealand High Court in *Seales*) have accepted that similarly worded blanket bans have the effect of forcing people to take their lives sooner. Provided the domestic courts make similar findings, there is a strong argument that the blanket ban engages the right to life (in particular, the positive obligation to protect life);
  2. while the 'sanctity of life' considerations may be valid countervailing factors, the question the courts must ask themselves is *what life* are they protecting? Lord Kerr directly addressed this issue in *Nicklinson* in which he asked:

     'is the sanctity of life protected or enhanced by insisting that those who freely wish to but are physically incapable of bringing their lives to an end, should be required to ensure untold misery until a so-called death overtakes them? ...To insist that these unfortunate individuals should continue to endure the misery that is their life is not to champion sanctity of life; it is to coerce them to endure unspeakable suffering' (at [358]).

  3. The ECtHR has resiled somewhat from its statement in *Pretty* that Article 2 does not admit of quality-based considerations. In *Lambert v France*, the Grand Chamber observed that when considering the question of sanctity of life in withdrawal of treatment cases, Article 8 considerations (including questions of quality) may be relevant. This is entirely consistent with the observations of Lord Kerr in *Nicklinson*.

SUMMARY

- *Nicklinson*: minority agreed with Tony that the ban was disproportionate; it caught people who were not vulnerable and that objective could be met with a less restrictive ban.
- Post-*Nicklinson:* three unsuccessful attempts to introduce a less restrictive ban with a fourth amending Bill presently stagnating in the House of Lords.
- Two new challenges to the compatibility of s 2 making their way through the lower courts.
- Objective of this presentation was to demonstrate how and why the judgments of the Canadian courts in *Carter* support the making of the declarations sought by Noel Conway and Omid T.
- *Carter* + Lady Hale and Lord Kerr in *Nicklinson* + GG in *Lamber v France* →), the domestic courts should, barring a completely different interpretation of the relevant evidence to that proffered by the courts in *Carter*, issue the declarations sought by both Noel Conway and Omid T.