# CASE NOTE: THE NICKLINSON, LAMB AND AM RIGHT-TO-DIE CASE IN THE SUPREME COURT

**R (Nicklinson and Lamb) v Ministry of Justice, R (AM) v Director of Public Prosecutions [2014] UKSC 38 (25 June 2014).**

**Court:** Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Reed, Lord Hughes.

## The case

The case is about three severely disabled men who want (or wanted) to die.

Tony Nicklinson[1] and Paul Lamb together argued that the law should permit them to have help with ending their lives in England or Wales. They sought a declaration under section 4 of the Human Rights Act 1998 that the present law on assisted suicide is incompatible with their right to respect for their private lives.

Separately, Martin[2] sought clarification of the Director of Public Prosecutions' policy that governs when she will prosecute people for the offence of assisting a suicide.[3] He also wanted confirmation that a stranger, such as a carer, who provided compassionate help would not ordinarily be prosecuted. The existing policy, and the DPP's practice, is compassionate help from family or friends, for example with travel to Dignitas, is very unlikely to be prosecuted if there are no worrying features to the case. But the written policy does not make clear the position of helpers who are not family and friends, such as carers or doctors.

Both cases relied upon Article 8 of the European Convention on Human Rights, the right to respect for private life. They built on previous jurisprudence establishing that choosing to end one's life to avoid indignity and distress engages Article 8 and, accordingly, any interference with that right must be necessary, proportionate and in accordance with law that is sufficiently clear and foreseeable in its operation.[4]

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[1] Mr Nicklinson died during the proceedings. His case was, in part, continued by his widow.

[2] Martin was granted anonymity. In the case title he is referred to as AM. That, and Martin, are pseudonyms.

[3] *Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide*, February 2010, issued following the order of the House of Lords in *R (Purdy) v DPP* [2009] UKHL 45, [2010] 1 AC 345.

[4] *Pretty v United Kingdom* (2002) 35 EHRR 1; *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC 345.

Both cases had failed in the High Court.[5] By a majority, Martin had succeeded in the Court of Appeal on clarification of the DPP's policy, but Mr Nicklinson and Mr Lamb's appeals had failed.[6]

**The result**

The Supreme Court formally rejected all three claims. But this does not reflect the result, which was in fact a substantial success for all three claimants:

1. On the law criminalising assistance with suicide:[7]

   (a) The Court decided that it was empowered to declare the statute incompatible with Article 8 ECHR.[8] But, exceptionally, before making such a declaration, the Supreme Court has first given Parliament the opportunity to consider legislating, to allow those involved in this case, and others like them, to end their lives.[9]

   (b) The Supreme Court made it clear that it expects Parliament to debate legislation 'in the near future' and, if it did not properly do so, the courts may then issue a declaration of incompatibility.[10]

   (c) Several of the Justices gave guidance on how a new legislative scheme might work,[11] including suggesting that it would be unsatisfactory to limit it to those who were terminally ill,[12] and

[5] *R (Nicklinson) v Ministry of Justice, R (AM) v Director of Public Prosecutions* [2012] EWHC 2381 (Admin).

[6] *R (Nicklinson and Lamb) v Ministry of Justice, R (AM) v Director of Public Prosecutions* [2013] EWCA Civ 961.

[7] Section 2 of the Suicide Act 1961, as amended.

[8] Lord Neuberger at 75-76; Lord Mance at 150, 174, 190; Lord Wilson at 196; Lord Clarke at 293; Lady Hale at 299; Lord Kerr at 326.

[9] Lord Neuberger at 113, 115-118; Lord Mance at 150, 190; Lord Wilson at 196. Lady Hale (at 300, 321) and Lord Kerr (at 326, 361) would have gone further by making a declaration of incompatibility now.

[10] Lord Neuberger at 117-118; Lord Mance at 150, 191; Lord Wilson at 196, 197(e) and (f), 202; Lord Clarke at 293. Lady Hale and Lord Kerr would have made a declaration of incompatibility now.

[11] Lady Hale at 314-316; and, as follows, Lords Neuberger, Mance and Wilson.

[12] Lord Neuberger at 122; Lord Mance at 150; Lord Wilson at 196.

that the High Court should be empowered to determine individuals' applications to be permitted assistance to die.[13]

2. On the DPP's policy governing when she will, and when she will not, prosecute for the offence of assisting a suicide:

   (a) The Court documented and took account of an unexpected statement made by the DPP, through her counsel, during the Supreme Court hearing. The statement was a major clarification of the DPP's policy, namely that an individual member of a profession, or a professional carer, who does not have previous influence or authority over the person wishing to die, and who is brought in for the simple purpose of assisting the suicide after a person has reached his or her own settled decision to end his or her life, and who provides services that a family member would not be prosecuted for providing, would be most unlikely to be prosecuted.[14] The DPP had never previously said this.

   (b) Accordingly, the DPP's policy does not mean what she intends it to mean, and it is therefore her duty to review her written policy.[15] If she does not, the court's powers could be invoked to require appropriate action.[16]

**Who decided what?**

This is not an easy judgment to draw together. In brief: Lord Neuberger gave what is effectively a leading, albeit minority, judgment. Lords Mance and Wilson agreed with Lord Neuberger. Lady Hale and Lord Kerr would have gone further and made a declaration of incompatibility in this case.[17] Lady Hale considered that the time may be ripe to consider whether cases that might be excepted from prosecution could be identified in the DPP's policy without breaching any constitutional requirements.[18] Lords Sumption, Hughes and Reed and, to an extent, Lord Clarke, adopted an approach less favourable to the claimants.

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[13] Lord Neuberger at 123; Lord Mance at 150; Lord Wilson at 196, 197(g), 205. See also Lady Hale at 314-315 and Lord Kerr at 355.

[14] Lord Neuberger at 142-143; Lord Mance at 150, 192; Lord Wilson at 196; Lord Sumption at 251; continue

[15] Lord Neuberger at 143-144, 146, 148(e); Lord Mance at 150, 193, 195; Lord Wilson at 196, 206; Lord Sumption at 251 to 254; Lady Hale at 322, 323.

[16] Lord Neuberger at 146; Lord Mance at 150; Lord Wilson at 196; Lord Sumption at 251.

[17] Lady Hale at 300, 321; Lord Kerr at 326, 361.

[18] Lady Hale at 323.

**Comment**

The appeal was heard by a nine-judge panel, the largest the Supreme Court ever assembles, and the Court deliberated for over six months, 'with an intensity unique in my experience' (Lord Wilson at 196). It is a landmark case.

The Supreme Court has taken major steps towards liberalising the law for people who want to end their lives, while at the same time formally rejecting the claimants' cases. That rejection was gentle. Lady Hale and Lord Kerr would have granted a declaration of incompatibility (which would have eclipsed the challenge to the DPP's policy). Lords Neuberger, Mance and Wilson were not, on close analysis, far behind (while not considering that the case for incompatibility was yet clearly made out[19]). The result is a clear and unprecedented signal to Parliament that it must grasp the legislative nettle: if not, the Court has warned of more to come.

Meanwhile, those seeking help with ending their lives now have an apparent change or development of policy from the DPP. In reality, for some years, compassionate help from family or friends is not prosecuted where the case has no worrying features. The DPP's policy, as first explained in this hearing and clearly recorded in the Supreme Court's judgment, is that compassionate help from strangers, including help from professionals and carers, is no more likely to be prosecuted. This is of major significance: help from professionals and carers may be critical. And Martin, and no doubt others, have no family or friends who are available to help. It is difficult to see, following what the Court has said about this new statement of policy, how the DPP cannot now review her 2010 policy document.

One obstacle for those needing help from doctors, even merely advice, is recent GMC guidance on the subject. It was published during the life of this case, in response to a challenge originally brought by Martin against the GMC. This problematic and cautious document says that doctors should 'limit any advice or information about suicide to an explanation that it is a criminal offence to encourage or assist a person to commit or attempt suicide'.[20] This was not directly challenged before the Supreme Court. But the Court has now held that, while a doctor may not advise a patient how to kill himself,

> … a doctor may give objective advice about the clinical options (such as sedation and other palliative care) which would be available if a patient were to reach a settled decision to kill himself. The doctor is in no danger of incurring criminal liability merely because he agrees in advance to palliate the pain and discomfort involved should the need for it arise. This kind of advice is no more or less than his duty. The law does not countenance assisted suicide, but it does not require medical practitioners to keep a patient in ignorance of the truth lest the truth should encourage him to kill himself. The right to give and receive information is guaranteed

[19] See, in particular, Lord Neuberger at 119-128.

[20] General Medical Council, *When a patient seeks advice or information about assistance to die*, 31 January 2013, paragraph 4.

> by Article 10 of the Convention. If the law were not as I have summarised it, I have difficulty in seeing how it could comply.[21]

It is hard to reconcile the GMC's guidance with this. Indeed, doctors who adopt the position suggested by the guidance might in some circumstances find themselves in breach of their professional duty to act in their patients' best interests and, if they are public authorities, in breach of Article 10 ECHR.

It is in this context that Lord Sumption justifiably observes at 256 that 'many medical professionals are frightened by the law and take an unduly narrow view of what can lawfully be done to relieve the suffering of the terminally ill under the law as it presently stands. Much needless suffering may be occurring as a result.'

More generally, this is a major and progressive judgment on declarations of incompatibility under section 4 of the Human Rights Act 1998 in respect of statute law that operates within the margin of appreciation accorded to member states.

Finally, the following crisp statement of principle by Lord Mance at 164 should warm the hearts of claimant public lawyers:

> [W]hile the legislature is there to reflect the democratic will of the majority, the judiciary is there to protect minority interests, and to ensure the fair and equal treatment of all.

Adam Sandell[22]
Junior counsel to Martin (AM)
AdamSandell@matrixlaw.co.uk

Matrix

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[21] Lord Sumption at 255(3), with whom Lord Neuberger (137), Lord Mance (194), Lord Wilson (196), Lord Hughes (287) and Lady Hale (324) agreed.

[22] With thanks to Guy Vassall-Adams of Matrix, junior counsel to Mrs Nicklinson and Mr Lamb, for comments.