IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

CO/ /2017

B E T W E E N:

THE QUEEN
(on the application of)
OMID T

Claimant

v.

THE MINISTRY OF JUSTICE

Defendant

CLAIMANT'S DETAILED STATEMENT OF FACTS AND GROUNDS

Introduction

1. The Claimant seeks a declaration under s 4 of the Human Rights Act 1998 ("HRA") that the current law on assisted suicide in s. 2(1) Suicide Act 1961, as amended by the Coroners' and Justice Act 2009 ("the 1961 Act") is incompatible with his rights under Articles 2 and 8 of the European Convention on Human Rights ("ECHR") as given effect by the HRA. S2(1) provides, materially:

> **(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.**
>
> **…**
>
> **(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**

2. In particular, the Claimant contends that the current law is incompatible with his rights under:

   2.1. Article 8 of the ECHR. The blanket ban on assisted suicide in s 2(1) of the 1961 Act disproportionately interferes with the Claimant's right to respect for his private life, which encompasses a right "*to decide by what means and at what point his or her life will end"*, in circumstances where he suffers from an incurable disease which causes him unbearable suffering which cannot

otherwise be palliated; he has made a competent and informed decision to end his life; and by reason of his disability he is unable to end his life at a time of his choosing without assistance in England or Wales.

2.2. Article 2 of the ECHR. The 1961 Act creates a real risk of shortening Omid T's life by forcing him to end his life while he is still able to –by travelling abroad for an assisted suicide in Switzerland - at an earlier stage than he would otherwise have done had assisted dying been lawful in England & Wales. This violates the state's positive obligation to protect life under Article 2.

The Claimant's case distinguished from that of Noel Conway

3. The Claimant's case is to be distinguished from that currently being brought by Noel Conway which is already before the Court. Mr. Conway's case is that the law is incompatible in so far as it prevents a person with 6 months or fewer to live from receiving assistance with dying. Omid T has a condition that is life-limiting but his life expectancy can be measured in years, not months. His 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. Indeed, as Lord Neuberger stated in *Nicklinson* in relation to the private members' Bill proposed by Lord Falconer Assisted Dying Bill [HL] 6 (5th June 2014) which would have applied only to terminally ill people: who as a consequence of that illness, is reasonably expected to die within six months:

> **"there seems to me to be significantly more justification in assisting people to die if they have the prospect of living for many years a life that they regarded as valueless, miserable and often painful, than if they have only a few months left to live" (para 122).**

Urgency

4. This case is urgent for the following reasons:

4.1. First, the case of Noel Conway is due to be heard at a preliminary hearing on 21 March 2017. Bearing in mind that Omid T's case raises similar (but distinct) issues it is in the interests of justice for the court to have an opportunity to consider his case at the same time.

4.2. Second, Omid T is about to launch a Crowd Justice appeal for funds to enable him to bring this case. However he is very concerned about the impact that the resulting publicity will have on his children and wife from whom he is separated, in particular if any media outlets seek to interview or photograph them or publish details that will cause them to be identified.

5. Accordingly, although a letter before claim was sent on 13 March 2017, this claim is being brought before any substantive response is available, seeking the orders set out at para 49 below.

Factual background

6. Omid T suffers Multiple System Atrophy ("MSA"), an incurable neurodegenerative condition. Symptoms tend to appear in a person's 50's and advance rapidly over the course of 5 to 15 years, with progressive loss of motor function and eventual confinement to bed. People with MSA often develop pneumonia in the later stages of the disease and may suddenly die from cardiac or respiratory issues.

7. Omid T is 54 years old (DOB 15.10.1962) and has three children, aged 17, 15 and 13. His children live with his wife, from whom he separated in March 2015. He moved in to live with his mother on 30 March 2015 for support and assistance. On 30 March 2016 he attempted to end his life by taking an overdose and was admitted to hospital and then to a MacMillan Hospice. Social services advised that he should not move home and he was transferred from there to a nursing home in Barnet, where he has been living since early April 2016.

8. The first signs of Omid T's condition - slurred speech and screaming at nights - were noticed by his wife as long ago as 2009/2010. At first it was thought that this was due to stress, but as the disease progressed he began to experience difficulty in writing. After referral to an MND specialist, a diagnosis of MSA was made.

9. Omid T's speech and limb function are now severely affected and his difficulties impinge on all aspects of his daily life. He also has problems with urinary urgency. His condition is irreversible and deteriorating and will inevitably result in a long-drawn out and distressing death.

10. Omid T considers his current situation to be intolerable and wishes to be able to end his life at a time of his choosing, with assistance. As this is not currently lawful in the United Kingdom and Omid T is in receipt of state disability benefits he is trying to raise the money to enable him to have an assisted death in Switzerland, where assisted dying is lawful and he can engage the services of DIGNITAS. As matters stand, he is likely to take his life while he is still well enough to travel and therefore earlier than he might otherwise have done had assisted suicide been lawful in the United Kingdom. He would infinitely prefer to be able end his life in the United Kingdom at a time and place of his choosing, with the support and presence of his family.

Legal framework

11. The Claimant maintains that the current law violates his rights under Articles 8 and Article 2.

Article 8

12. The Courts have considered the issue of the compatibility of the law on assisted suicide on a number of occasions, most recently in *R (Nicklinson and Anor) v Ministry of Justice and Ors (CNK Alliance Limited and Ors Intervening)* [2014] UKSC 38 [2015] AC 657 ("*Nicklinson*").

13. That jurisprudence has primarily focussed on Article 8, the right to respect for private and family life, following the judgment of the European Court of Human Rights ("ECtHR") in *Pretty v United Kingdom* (2002) 35 EHRR 1 ("*Pretty v UK"*). In *Pretty* the ECtHR held that:

> **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 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.**

14. It has since become well-established[1] that "*an individual's right to decide by what means and at what point his or her life will end"* is an aspect of the rights protected by Article 8(1) of the Convention (*Haas*, para 51), and thus that the prohibition in s 2(1) of the 1961 Act entails an interference with those rights (see *R (Purdy) v Director of Public Prosecutions (Society for the Protection of Unborn Children intervening)* [2010] 1 AC 345, paras 38, 39, 62 and 95). This proposition has also been accepted in a number of other jurisdictions under similar constitutional instruments: *Carter v Canada (Attorney-General)* [2015] SCC 5; *Seales v AG* [2015] NZHC 1239, High Court of New Zealand; *Stransham-Ford v Minister of Justice* [2015] ZAGPPHC 230 (High Court of South Africa) (later overturned on appeal, *MOJ v Estate Late James Stransham-Ford* [2016] ZASCA 197); *Morris v Brandenberg* Second Judicial District Court, New Mexico No D-202-CV 2012-02909, 13 January 2014, *Baxter v Montana* 2009 MT 449 (Mont 2009).

15. The more contentious question is whether this interference with Article 8(1) rights of autonomy and dignity is justified under Article 8(2), which provides:

> **(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.**

16. The ECtHR in *Pretty* held that the blanket ban on assisted suicide in s 2(1) fell within the United Kingdom's 'margin of appreciation' and was therefore 'necessary in a democratic society' for the purposes of Article 8(2) and did not breach Article 8. In *Nicklinson* the question fell for consideration for the first time whether the same approach was appropriate under the HRA. Tony Nicklinson and (after his death) Paul Lamb sought a declaration that s 2(1) was incompatible with Article 8 because it did not strike a fair balance between their right to die with dignity at a time of their choosing and the need to protect the lives of others. They further contended that, notwithstanding it was within the United Kingdom's 'margin of appreciation' to impose a blanket ban on assisted suicide from the perspective of the supranational ECtHR, the

[1] See in particular *Haas v Switzerland* (2011) 53 EHRR 33 ("*Haas"*), *Koch v Germany* (2013) 56 EHRR 6, and *Gross v Switzerland* (2014) 58 EHRR 7, (2015) 60 EHRR 18.

domestic courts still had an obligation to determine the necessity and proportionality of the ban.

17. The matter reached the Supreme Court which handed down judgment on 25 June 2014. The speeches of the 9 justices were primarily concerned with a number of issues preliminary to the consideration of proportionality:

    17.1. The first of these, the "*constitutional question"*, was whether the Court had jurisdiction to determine whether s 2(1) was a disproportionate interference with Article 8 notwithstanding the ECtHR's decision in *Pretty v UK* that the measure was not disproportionate because it fell within the UK's 'margin of appreciation'. The Court unanimously found that it did have such jurisdiction; the fact that the matter was within the margin of appreciation for the ECtHR's purposes did not deprive the domestic courts of their power and responsibility to review the proportionality of the measure under the HRA.

    17.2. The second, the "*institutional question*", concerned whether, bearing in mind the socially contentious nature of assisted dying, the Court was competent to consider the proportionality of the measure question or whether only Parliament could resolve it. A majority (5-4) found that the domestic courts did have jurisdiction to undertake that exercise. It was for the Court, not Parliament, to determine whether the ban on assisted suicide struck a proportionate balance.

    17.3. The third preliminary question was whether it was appropriate to determine the proportionality question *at that time*. Of the five justices who determined that it was for the Courts to consider the question, three (Lord Neuberger, Lord Mance, and Lord Wilson) were of the view that they should not do so at that point. This was for two reasons. First, because Parliament was shortly to have an opportunity to consider the legality of assisted suicide when it debated Lord Falconer's Assisted Dying Bill, considered below. Second, because the issue could only be determined on the basis of evidence which was not at that time available to the Courts.

18. Accordingly, the majority of the Court determined that, while the Court *could* consider the proportionality of the interference with the appellants' Article 8 rights occasioned by s 2(1) of the 1961 Act, it *should not* do so at that time.

19. Only two justices, Lady Hale and Lord Kerr, considered that it was appropriate to determine the proportionality question at that time. They undertook the balancing exercise and found that the restriction of the appellants' rights was disproportionate and therefore incompatible with Article 8 (Lady Hale, paras 301-317; Lord Kerr, paras 351-361). Lord Neuberger reached the provisional view that there was a breach, see paras 111-113.

20. The appellants then applied to the ECtHR on the ground that there had been a breach of their procedural rights under Article 8 by virtue of the UK Courts' refusal to determine the proportionality of the interference with their rights. The ECtHR rejected those complaints as inadmissible (*Nicklinson and Lamb v UK* (2015) 61 EHRR SE7).

21. It is notable that, following *Nicklinson*, the Supreme Court of Canada in *Carter v Canada* found that an equivalent provision of Canadian criminal law did violate constitutional rights. Although in the cases in the other jurisdictions referred to at para 14 above the claims failed, the issue remains a live one as (other than in the case of *Fleming* in Ireland) the appeals have yet to reach the relevant apex Court.

Article 2

22. Article 2(1) of the ECHR provides that "*Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally …"*. In its negative conception (not to deprive of life) Article 2 constitutes an absolute prohibition, subject to the limited exceptions in Article 2(2) which do not apply in the present context. Article 2(1) also imposes a positive obligation on states to protect life (see e.g. *Keenan v United Kingdom* (2001) 33 EHRR 38, para 88). In this, positive, conception Article 2 creates a qualified right. A measure that has the effect of failing to protect life may engage Article 2 but there will be no breach if it is a necessary and proportionate means of achieving some other legitimate aim, such as protecting the lives of others. Accordingly a similar balancing exercise must be conducted to that under Article 8.

23. The Courts of the United Kingdom have not yet directly grappled with the question whether s 2(1) of the 1961 Act is a breach of the positive obligation under Article 2

where it operates to *shorten* lives[2], although in *Nicklinson* it was argued that this was relevant to the Article 8 balancing exercise. Lord Neuberger referred to this at para 96 of his speech:

> **96 The argument based on the value of human life is not one which can only be raised by the Secretary of State. The evidence shows that, in the light of the current state of the law, some people with a progressive degenerative disease feel themselves forced to end their lives before they would wish to do so, rather than waiting until they are incapable of committing suicide when they need assistance (which would be their preferred option). Section 2 therefore not merely impinges adversely on the personal autonomy of some people with degenerative diseases, but actually, albeit indirectly, may serve to cut short their lives.**

24. The Claimant now seeks to rely upon Article 2 directly and maintains that s 2(1) breaches the state's positive obligation to protect his life. He acknowledges that, as with Article 8, the state must strike a balance between protecting his life and the need to protect the lives of other vulnerable people whose lives may be at risk if an untrammelled right of assisted suicide, without adequate safeguards, was introduced. However, if adequate safeguards can be introduced then an absolute ban on assisted dying will breach Article 2 as well as Article 8.

25. The Courts in other jurisdictions have accepted the argument that a blanket prohibition may shorten life and thereby engages the right to life and requires justification: see *Carter v Canada* [2014] SCC 5 the Supreme Court of Canada paras 57-58 and *Seales v AG* [2015] NZHC 1239, High Court of New Zealand, para 166. In *Carter* the Supreme Court of Canada went on to find that the relevant constitutional provision (s 7 of the Canadian Charter of Fundamental Rights) had been infringed.

Grounds of challenge

26. There are therefore two questions to be determined in this claim:

    26.1. Is it appropriate to determine the proportionality question now?

    26.2. If so, is the restriction on the Claimant's rights entailed in s 2(1) necessary and proportionate?

[2] In *R (Pretty v DPP)* [2001] UKHL 61, [2002] 1 AC 800, the Court dismissed an argument that Article 2 protected a person's right to die, and the ECtHR in *Pretty v UK* upheld that decision. That is a wholly distinct proposition from that for which the Claimant contends.

27. For the reasons set out below, the Claimant submits that it is appropriate to determine the question of proportionality now, and that the restriction on the Claimant's rights in s 2(1) is disproportionate and unlawful.

Is it appropriate to determine the proportionality question now?

28. The Claimant submits that it is now appropriate to determine the proportionality question, for three reasons:

    28.1. The personal circumstances of Omid T demonstrate the imperative for this question to be determined: the infringement of his rights (whether or not proportionate) is ongoing and severe.

    28.2. Parliament has now debated and rejected the Assisted Dying (No. 2) Bill 7 that would have modified the law on assisted suicide for those with fewer than 6 months to live but they have given no consideration to the situation of persons such as the Claimant, and there is no prospect of them doing so in the near future.

    28.3. The Assisted Dying Bill [HL] 42 is a new bill which has had its first reading but has no date fixed for the second reading. This provides that the High Court (Family Division) shall be required to give its consent where it is requested by a terminally ill person, who again is reasonably expected to die within 6 months, where certain conditions are met. Even if this fares better than its predecessors, it would not assist the claimant who does not satisfy the primary condition in that he is not terminally ill with 6 months or fewer to live.

    28.4. The Claimant's case thus provides the opportunity to deploy the kind of evidence that will enable the courts properly to resolve the proportionality issue.

29. The first of these reasons requires no further elaboration. As to the second and third reasons the Claimant submits as follows:

Parliament has not considered the position of those like the Claimant

30. In *Nicklinson*, Lords Neuberger, Mance and Wilson wished to give Parliament the chance to debate the issues prior to any declaration of incompatibility. These three

justices, together with Lords Clarke and Sumption (in the minority),[3] made it clear that they would expect to see the issue of whether there should be any change to the legislation covering those in the situation of Tony Nicklinson/Paul Lamb expressly debated in Parliament in the near future along with or in addition to the question of whether there should be legislation along the lines of the Assisted Dying Bill. In particular, Lord Neuberger made clear that legislation "*covering those in the situation of [the] Applicants"* should be "*explicitly debated in the near future"* (para 118).

31. Following the judgment in *Nicklinson*, a Private Members' Bill was introduced by Rob Marris MP, the Assisted Dying (No. 2) Bill. The Bill was in identical terms to a private members Bill that had previously been proposed by Lord Falconer to which the Supreme Court referred in *Nicklinson*. Lord Falconer's Bill came to an end with the end of the 2010-2015 Parliament but Rob Marris MP won the Private Members' Bill ballot in the new Parliament and took up the original Bill. The Assisted Dying (No. 2) Bill sought to provide that those who were "*terminally ill"* – i.e. those who had a terminal illness and were reasonably expected to die within 6 months – could be assisted to die following a declaration from the High Court. The Bill received a second reading in the House of Commons on 11 September 2015 but failed following a debate by 332 votes to 112.

32. However, the Bill did not (nor did it purport to) cover the situation of those with chronic or incurable conditions who have a life expectancy of more than 6 months. Accordingly it did not cover the situation of the applicants in *Nicklinson*, as was recognised a number of times in the debate. It furthermore does not cover the situation of the Claimant. This does not meet the expectation of the Supreme Court that there would be a consideration of these issues in relation to all who were affected thereby.

33. Similarly, a recent Assisted Dying Bill [HL] 2016-2017, the first reading of which took place on 9 June 2016, only addresses the terminally ill with less than 6 months to live. It has as yet received no substantive debate.

34. It cannot be assumed that the proportionality exercise is the same in wholly different situations. As Lord Neuberger acknowledged at para 96 of his speech in *Nicklinson*, the interference with an individual's rights may be even greater when they are

[3] See paras 233 and 293 respectively

contemplating many years, rather than months, of living with a condition that causes them unbearable suffering.

35. Moreover, the short debate in Parliament in the Assisted Dying Bill (No 2) did not address the relevant evidence concerning the proportionality of the existing ban on assisted suicide, even in relation to those covered by the respective Bills (and still less by those outside its remit). This, it will be submitted by the Claimant, is insufficient for the matter to have been "*satisfactorily addressed"*.

36. It was accepted by Lord Neuberger that if Parliament did not satisfactorily address the question, "*there is a real prospect that a further, and successful, application for a declaration of incompatibility may be made"*.[4] The Claimant's case represents a proper opportunity for the issue to come back before the Courts.

Evidence is now available

37. Of those judges in Nicklinson who determined that the Court could but should not now determine the proportionality of the assisted suicide ban, a key reason was that there was insufficient evidence for them to do so.[5] In particular, Lord Mance indicated that such evidence would have to be substantial, first hand, and accompanied by cross examination (paras 174-175 and 182). Without such evidence it is not possible to conduct a clear and careful balancing of the rights of the Claimant against the state's justification for the prohibition and the proportionality of the measure cannot be properly determined. The reason that there was little evidence before the court was because the Defendant argued – and the lower Courts accepted - that the courts had no jurisdiction to hear the so the case proceeded on that basis, with the Claimant given no opportunity to deploy any evidence despite his applications to do so.

38. In the light of the Supreme Court judgment in *Nicklinson* the Claimant now can, and will, adduce evidence in support of his claim and to test any evidence put forward by the government. His condition is such that there is time for such evidence to be collated and tested in these proceedings. It is particularly relevant that the Supreme Court of Canada in *Carter v Canada* felt able to uphold the findings of the lower court

[4] Para 118. See also Lord Wilson at para 202.

[5] See the judgment of Lord Neuberger at paras 88 and 119-120, Lord Mance at para 150 and Lord Wilson at para 196.

that an equivalent ban infringed constitutional rights because such evidence had been produced and the court had made findings upon which the Supreme Court was able to rely.

Is the restriction on the Claimant's rights proportionate?

39. The Claimant submits he falls within the small category of persons referred to by Lady Hale in *Nicklinson* who should be allowed help to end their own lives (at para 314):

> **They would firstly have to have the capacity to make the decision for themselves. They would secondly have to have reached the decision freely without undue influence from any quarter. They would thirdly have had to reach it with full knowledge of their situation, the options available to them, and the consequences of their decision ... . And they would fourthly have to be unable, because of physical incapacity or frailty, to put that decision into effect without some help from others.**

40. For those people, such as Omid T, the prohibition in s 2(1) is a disproportionate restriction on their rights under both Article 8 and Article 2. For present purposes the Claimant relies upon the conclusions to that effect of Lady Hale (paras 301-317) and Lord Kerr (351-361), the only two justices to reach a final conclusion on the substantive issue in *Nicklinson* (although Lord Neuberger came close to finding that there was a breach, see paras 111-113). The existence of an interference under Article 8 is undoubted; it will therefore be a matter for the state to demonstrate, by evidence, properly tested, the justification for the blanket ban in s 2(1). The arguments based on Article 2 follow the same reasoning.

41. While the Claimant does not know what evidential justification the defendant would advance to justify the restriction on his rights, the concerns have been well rehearsed and were expressed by the government in the *Nicklinson* challenge and by Parliament in the debates concerning the Assisted Dying (No 2) Bill. In particular, therefore, Omid T would expect to address the following concerns by testing the government's evidence and putting forward evidence of his own in much the same way as was done in *Carter*, having regard to the particular, specific circumstances of the United Kingdom:

    41.1. That the weak and vulnerable will be coerced or abused and made to feel that they should avail themselves of a change in the law and could be coerced into accepting an assisted death. The Claimant in this regard would rely on evidence

that in jurisdictions where assisted dying has been legalised, this risk has not eventuated at all or not to the degree to justify the suffering that is inflicted on the Claimant.

41.2. The argument that any relaxation of the current rules would lead to a "*slippery slope*". Again, the Claimant would seek to test the validity of any such assumption, and demonstrate its falsity by reference to jurisdictions where assisted dying is legal.

41.3. That a change in the law will fundamentally change the way that society thinks about death, affecting in particular, the terminally ill, the severely disabled, and the vulnerable. This again would be challenged by the Claimant.

41.4. That there are no safeguards that will provide adequate protection against these eventualities. The government will need to demonstrate that the safeguards proposed by Lords Neuberger, Wilson and Lady Hale in their judgments in *Nicklinson*,[6] providing for a court procedure akin to that already adopted in relation to the withdrawal of life-saving treatment from incapacitated adults, would be insufficient to safeguard the government's objective. It is the Claimant's case that it will not be able to do so, as the Canadian government could not in *Carter*.

Anonymity orders for the Claimant's wife and children

42. The Claimant seeks orders, initially on an urgent *ex parte* basis, restricting any publication that might reveal the identities of his wife or children. Omid T lacks the means to bring this litigation privately. He is in receipt of welfare benefits and may contemplate an application for legal aid in due course. Experience in the Nicklinson case shows that the process of gaining legal aid in a case can take 9-12 months to resolve and can involve exhausting all appeal processes, and Omid T does not have that sort of time to devote to the procedural process and wishes to address the court sooner rather than later in the vent that he loses the wish and ability to carry on. He wishes to begin fund-raising immediately through CrowdJustice, legal fundraising, which has proved successful in raising funds in other cases. He may resort to other measures if he is not successful.

[6] See respectively, paras 108, 123, 205 and 314 et seq.

43. However, he wishes to minimise the risk of the attendant publicity leading to the identification of his wife and children. He recognises that the publication of his own name is likely to lead to those who know his wife and children making the connection between them and the Claimant. That, however, is a far cry from what might otherwise be 'open season' on the Claimant's wife and his children by the media if, as is likely to be the case, his predicament and his legal case catch the public imagination. The fact that it is impossible to provide them with complete protection from any interference with their privacy – because the identity of the Claimant will be known - is no reason not to provide them with protection for their private life if an injunction can achieve some useful purpose (for which see *PJS v News Group Newspapers Ltd (SC(E))* [2016] A.C. 1081, para 26-31). In particular, an order identifying a parent does not preclude an order preventing the disclosure of the identity of a child (*Re. Alcott* [2016] EWHC 2414 (Fam), para 31).

44. Authority to make such an order is derived from the HRA, s 8 and Article 8 (as in *PJS*). The provisions of s 39 Children and Young Persons Act 1933, s 12 Administration of Justice Act 1960, s 97 Children Act 1989 do not apply, neither the wife nor children being parties or witnesses to these proceedings.

45. The relevant principles to apply are as follows:

    45.1. An interim injunction may be granted if it is likely that a final injunction will be granted at trial, although a lower threshold is justified at an urgent interim stage: s 12(3) HRA and *Cream Holdings v Bannerjee* [2005] 1 AC 253, para 22; *PJS*, para 19, 54.

    45.2. A balance is to be struck between Article 8 (privacy) and Article 10 (free expression, although (i) neither article has preference over the other, (ii) where their values are in conflict, what is necessary is an intense focus on the comparative importance of the rights being claimed in the individual case, (iii) the justifications for interfering with or restricting each right must be taken into account and (iv) the proportionality test must be applied: see *Re S (AChild) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17; *PJS*, para 20.

45.3. Particular weight is to be given in the balancing exercise to the interests of children (*PJS*, para 36-37, 72-78). Many of the press will subscribe to the Independent Press Standards Organisation ("IPSO"), whose *Editors' Code of Practice* of January 2016 provides that "Everyone is entitled to respect for his or her private and family life" and that editors "will be expected to justify intrusions into any individual's private life without consent" (clause 3(i) and (ii)). The Code notes that there can be exceptions in the public interest, emphasising however that "editors must demonstrate an exceptional public interest to over-ride the normally paramount interests of [children under 16])". The last point echoes the thinking in article 3(1) of the United Nations Convention on the Rights of the Child (providing that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration") which has in turn informed the ECtHR's and United Kingdom courts understanding of ECHR article 8: see eg *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166, *H v Lord Advocate* 2012 SC (UKSC) 308, *H (H) v Deputy Prosecutor of the Italian Republic (Genoa)* [2013] 1 AC 338 and *Zoumbas v Secretary of State for the Home Department* [2013] 1 WLR 3690. P. 23 (*PJS*, 36).

45.4. Whether damages at trial will be an effective remedy is a crucial consideration (*PJS*, 38-43).

45.5. Privacy is to be distinguished from:

45.5.1. Confidentiality. While a claim for injunctive relief based on confidentiality may fail once the information is no longer 'secret', an injunction may still be necessary to protect privacy (PJS, 26-31, 58-64.

45.5.2. Defamation. While a defamatory statement can be remedied by way of damages a breach of privacy may not (*PJS*, 41). Once privacy is removed it cannot be restored.

46. Applying those principles to the present case:

46.1. The publication of the Claimant's name is sufficient to satisfy principles of free expression in Article 10 and of open justice under Article 6.

46.2. There is no, or no sufficient, public interest in publishing the details of the Claimant's wife and children. They are not parties or witnesses to the proceedings. While there may be some public interest in disclosing their identities because it may add sympathy and colour to the reporting of the Claimant's case it is far outweighed by the potential harm it will cause them.

46.3. Paramount weight is to be given to the privacy interests of the Claimant's three children.

46.4. The fact that some individuals will connect the Claimant's wife and/ or children to the Claimant's case because his name is published is no reason to refuse an injunction. The former may lead to some minor but unavoidable interferences in the private lives of the Claimant's wife and her children; but without an injunction they may be unnecessarily exposed to the full glare of media exposure. The difference is in the degree or intensity of the interference.

46.5. Any publication of the Claimant's wife and/ or children's names could not be remedied by damages at trial. The prospects of them pursuing the case to trial in the event an injunction is refused is minimal given their lack of resources; moreover, once the veil of their privacy has been torn away it cannot be replaced or compensated by damages.

46.6. In all the circumstances a refusal of an injunction is likely to lead to a disproportionate interference with the Claimant's wife and children's Article 8 rights that is not justified by the public interest in free expression under Article 10 or in open justice under Article 6. It is likely that a final injunction would be granted at trial.

Costs capping order

47. The Claimant seeks a costs-capping order under s 88 Criminal Justice and Courts Act 2015. It is accepted such an order cannot be made until after permission has been granted (s 88(3)). The Claimant proposes to advance the application for a costs-

capping order at the permission stage and will file further evidence in support of the application concerning his income and assets shortly. His reasons, in summary, are these:

47.1. The proceedings are public interest proceedings, in that they raise (a) an issue that is of general public importance, (b) the public interest requires the issue to be resolved, and (c) the proceedings are likely to provide an appropriate means of resolving it (s 88).

47.2. In the absence of the order, the Claimant would withdraw the application for judicial review or cease to participate in the proceedings, and it would be reasonable for the Claimant to do so. The Claimant has no means to bring this claim and will be seeking to fund raise through Crowd Justice. He does not have legal aid. Although his assets and income are so limited that he would meet the means test for legal aid it is a requirement for the grant of legal aid that "the individual does not have access to other potential sources of funding (other than a conditional fee agreement) from which it would be reasonable to fund the case" (Civil Legal Aid (Merits Criteria) Regulations 2013/104, Reg. 39(a)). This would include any source of funds raised through Crowd Justice or similar crowdfunding platform. The Claimant cannot begin to raise funds through Crowd Justice until an anonymity order protecting the Claimant's wife and children has been made. Accordingly at present he would be quite incapable of meeting any adverse costs order and would withdraw this claim if he was at any significant risk of such an order being made against him.

Relief Sought

48. Final relief:

48.1. A declaration that s 2(1) of the Suicide Act 1961 is incompatible with the Claimant's rights under Articles 2 and/ or 8.

48.2. Costs.

49. Interim relief:

49.1. A direction that the matter be listed to be heard with Mr. Conway's case on 21 March 2017;

49.2. An order under s 8 Human Rights Act 1998 directing that the following may not be included in any publication (other than the Claimant's name): (a) the name, address or school of any of the Claimant's wife or children, (b) any particulars calculated to lead to their identification (other than the Claimant's name); or (c) a picture that is or includes a picture of any of the Claimant's wife or children.

49.3. A costs-capping order that Omid T will not be liable for the Defendant's costs of this claim, including costs incurred prior to the grant of permission.

PAUL BOWEN QC

JENNIFER MACLEOD

Brick Court Chambers

SAIMO CHAHAL QC (Hon)

Bindmans LLP