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Direct email: s.chahal@bindmans.com  
PA: a.abdoun@bindmans.com

**GDL**  
**1 Kemble Street**  
**London WC1**

Dear Sirs/Mesdames

### Mr Philippe Newby - Letter before Claim

1. We have recently been instructed by the Claimant, Mr Newby, in this proposed claim for judicial review. His details are provided below.
2. This Letter Before Claim sets out why Mr. Newby proposes to seek 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 ("1961 Act") is incompatible with his rights under, materially, Article 8 of the European Convention on Human Rights ("ECHR") as given effect by the HRA. Further, he seeks a Declaration that the lack of a law/policy enabling him to end his life with assistance obliges him to travel abroad to have an assisted death in Europe earlier than he would otherwise wish to die, in breach of his rights under Articles 8 and 2 ECHR.
3. Mr. Newby seeks, in summary, to adopt the same arguments and evidence as to the incompatibility of s 2(1) as were made and relied upon by our client Omid T, before he sadly died and his claim was discontinued earlier this year. In particular, he seeks the early resolution of a preliminary issue along the same lines as that decided against Omid T by the Divisional Court as to the deployment of primary evidence, including by way of cross-examination, and to pursue this as soon as possible on a 'leapfrog' appeal to the Supreme Court. Given your position on Omid T's claim, and on the preliminary issue, is well-established we are notifying you as a courtesy of the fact. We intend to issue a claim

SENIOR CONSULTANTS  
Sir Geoffrey Bindman QC\*  
Katherine Gieve  
Stephen Grosz QC\*  
Lynn Knowles  
Michael Schwarz

PARTNERS  
Tamsin Allen  
Liz Barratt  
Jules Carey  
Saimo Chahal QC\*  
Jon Crocker  
Kate Gooold  
John Halford  
Siobhan Kelly  
Elizabeth McGlone  
Alia Murphy  
Jamie Potter  
Martin Rackstraw  
Paul Ridge  
Amrit Rana  
Amy Rowe  
Alison Stanley  
Katie Wheatley

ASSOCIATES  
Salima Budhani  
Emma Cohen  
Peter Daly  
Yagmur Ekici  
Ashley-Jayne Fleming  
Roberta Haslam  
Charlotte HaworthHird  
Sarah Hindle  
Laura Hobey-Hamsher  
Catherine Jackson  
Jude Lanchin  
Karen May  
Olivia Piercy  
Jessica Skinnis  
Sheetul Sowdagur  
Anna Thwaites

SOLICITORS  
Karan Ahluwalia  
Lana Adamou  
Clara Barry Born  
Rachel Bennett  
Jessie Brennan  
Darren Conway  
Molly Cox  
Samuel Cronin  
Alice Davis  
Abigail Evans  
Mira Hammad  
Christian Hansen  
Rachel Harger  
Ella Jefferson  
Robert Maddox  
Hannah Marshall  
Joseph Morgan  
Jamie Niven-Phillips  
Oliver Oldman  
Patrick Ormerod  
Farhana Patel  
Caroline Robinson  
Rosie Roddy  
Basmah Sahib  
Charanjit Toor  
Emma Varley  
William Whitaker  
Daniel Zona

LAWYER  
Melissa Arnold

CONSULTANTS  
Liz Dronfield  
Jill Marshall  
Tony Taylor

\*Honorary

*Specialist  
Fraud Panel*

*Contracted with  
the Legal Aid  
Agency*

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Law Society Accredited

### Bindmans LLP

236 Gray's Inn Road London WC1X 8HB  
DX 37904 King's Cross Telephone 020 7833 4433 Fax 020 7837 9792  
www.bindmans.com [info@bindmans.com](mailto:info@bindmans.com)

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on Mr. Newby's behalf in 14 days. If you wish to respond within this time then please do so.

**A. Details of the action being challenged**

4. The Claimant seeks to challenge the legality of the current law on assisted dying, contained in s 2(1) of the 1961 Suicide Act ("1961 Act") which provides, materially:

*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.*

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

1. Article 8 of the ECHR. The blanket ban on assisted suicide in 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 will cause him unbearable suffering which cannot otherwise be palliated; he has made a competent and informed decision to end his life at a time when he has decided his suffering is so great that he no longer wishes to live; and by reason of his disability he is and will be unable to end his life at a time of his choosing without assistance in England or Wales.
2. Article 2 of the ECHR. The 1961 Act brings a real risk of shortening Mr. Newby's life by forcing him to end his life while he is still able to - whether at his own hand or 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.

**B. The Claimant - background information**

6. Mr Newby is 48 years of age, of French and English dual heritage and suffers from Motor Neurone Disease (MND), an incurable, progressive and life shortening condition which will eventually lead to his death after a worsening of his condition, with a deterioration of all aspects of his body such that he will require 24 hour care with all of his bodily functions in due course.

7. Mr Newby has lived a full and fulfilling life. Most recently and up until 2014, Mr Newby was working, having set up Green Ventures to broker environmental initiatives and to accelerate collaboration between the public, private and environmental sectors. Green Ventures also delivered the planning and permitting for solar farms, wind farms & flood defences.
8. The first signs and symptoms of MND began to appear in 2013 and he underwent many investigations until a diagnosis was made by a Consultant Neurologist at Addenbrooke's Hospital in May 2014.
9. The disease is progressing unremittingly and his current symptoms are characterised by:
  - Paralysis of both hands with almost total muscle atrophy to the elbows.
  - Severe atrophy of upper arms to the shoulders.
  - Near paralysis and / or severe muscle weakness of the feet and lower legs.
  - Severe muscle atrophy of upper legs to the thighs.
  - Generalised muscle weakness & sometimes chronic fatigue.
  - Continual muscle fasciculation of all major remaining muscle groups.
  - Muscle spasms & cramps of face, neck, limbs and torso.
10. The limiting nature of this crippling disease means that he can no longer:
  - Dress or undress.
  - Wash or conduct personal hygiene or care.
  - Hold a pen, write or sign his name.
  - Hold, lift, open, pull, any object with a hand.
  - Use a knife.
  - Make or open food or liquid refreshments.
11. In 2018, as his mobility decreased he wrote 2 books. "Innocent Lives" is published and available on Kindle. "28 Days in Kerala" is to be published this year.
12. MND is not known for being a specifically painful disease as its progression is limited to the motor and not sensory nerves. Palliative care does not provide any answer to the key issue at stake in his case. Managing pain is not his primary concern. Nonetheless he is considering all palliative care options available in the meantime. Mr. Newby's primary concern is as to the psychological suffering he will endure as his body gradually ceases to function over the course of what may be many years.
13. MND progresses differently amongst patients and it is unlikely that he would be in the same physical condition as other patients, including Noel Conway. The disease is progressing slowly for Mr Newby. If the deterioration continues at the same pace, he will be looking at years of emotional & physical discomfort. This is an inhumane and intolerable situation for Mr Newby.

14. Mr. Newby wishes to be able to choose an assisted death, at home, when he considers that the emotional and physical discomfort of existence is outweighed by any value or enjoyment that he would still receive from living. That point has not yet been reached, but it is foreseeable. With the comfort of knowing he had that option available to him Mr. Newby would be better able to enjoy the time he has left.
15. He does not wish to have to travel to Switzerland for an assisted suicide or to take his own life. Both of these options will require him to end his life sooner than he would otherwise wish. He will not do anything to put his friends or family at risk of prosecution, so these options will either compel him to spend his last days in Switzerland, away from his home, friends and family; or to end his life alone at his own hand by means that are uncertain, perhaps painful and inevitably distressing.

**C. Legal background**

16. The current law violates the Claimant's Article 8 and Article 2 rights, as explained below.

**Article 8**

17. As you will know, the Courts have considered the issue of the compatibility of the law on assisted suicide on a number of occasions, most recently in *R (Conway) v Secretary of State for Justice*, *R (Omid T) v Secretary of State for Justice* and *R (Nicklinson and Anor) v Ministry of Justice and Ors (CNK Alliance Limited and Ors Intervening)* [2014] UKSC 38 [2015] AC 657 ("*Nicklinson*").
18. 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.*

19. It has since become well-established<sup>1</sup> 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); *Morris v Brandenburg* Second Judicial District Court, New Mexico No D-202-CV 2012-02909, 13 January 2014, *Baxter v Montana* 2009 MT 449 (Mont 2009).
20. 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.*
21. 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 Human Rights Act. Tony Nicklinson and (after his death) his wife Jane, together with 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 domestic courts still had an obligation to determine the necessity and proportionality of the ban.
22. 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:

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<sup>1</sup> 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.

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.
  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.
  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 the Assisted Dying (No. 2) Bill, considered below. Second, because the issue could only be determined on the basis of the evidence which at that time was available to the Courts. We will return to this issue, shortly.
23. 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.
  24. 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.
  25. The appellants then applied to the ECtHR which found the appellants’ complaints to be inadmissible (*Nicklinson and Lamb v UK* (2015) 61 EHRR SE7).

26. It is notable that, after the Supreme Court judgment in *Nicklinson*, the Supreme Court of Canada in *Carter v Canada* held that an equivalent provision of Canadian criminal law did violate constitutional rights. Although in the cases in the other jurisdictions referred to at para 19, above, the claims all failed, the issue remains a live one. The cases of *Seales v AG* and *Morris v Brandenburg* were ultimately unsuccessful. In *Stransham-Ford*, however, although the applicant's successful claim was overturned in the South Africa Court of Appeal (2016 ZASCA 197), that Court expressly left open the possibility of the matter being reconsidered in another case.
27. More recently, on 27 November 2018 in *R (Noel Conway) v Secretary of State for Justice* the Supreme Court, in refusing permission to appeal:
- 7. Under the United Kingdom's constitutional arrangements, only Parliament could change this law. But the Supreme Court could, if it thought right, make a declaration that the law was incompatible with the Convention rights, leaving it to Parliament to decide what, if anything, to do about it. The questions for the court would therefore be twofold: (1) Is the hard and fast rule banning all assistance to commit suicide a justified interference with the Convention rights of those who wish for such assistance? (2) If it is not, should this court make a declaration to that effect? In particular, is it appropriate to make such a declaration in this case? These are questions upon which the considered opinions of conscientious judges may legitimately differ. Indeed, they differ amongst the members of this panel.*
- 8. Ultimately, the question for the panel is whether the prospects of Mr Conway's succeeding in his claim before this court are sufficient to justify our giving him permission to pursue it, with all that that would entail for him, for his family, for those on all sides of this multi-faceted debate, for the general public and for this court. Not without some reluctance, it has been concluded that in this case those prospects are not sufficient to justify giving permission to appeal.*
28. The Supreme Court accepted that there is an 'arguable point of law' that remains to be determined as to whether s 2(1) Suicide Act is incompatible with Article 8. The prospects of Mr. Conway succeeding were, however, insufficient to justify granting leave. The Court has, however, left open the possibility of reconsidering the issue in the right case. The question, then, is whether there is anything about Mr. Newby's case that distinguishes it sufficiently from that of Mr. Conway so that, if the matter were to return to the Supreme Court, they would re-open the issue. We return to this, below.

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## Article 2

29. 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.
30. 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*<sup>2</sup>, 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.*
31. 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.
32. 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]

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<sup>2</sup> 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.



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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.

**D. The Claimant's case distinguished from that of Noel Conway**

33. Mr. Newby accepts that for the Courts to consider a further claim for a declaration of incompatibility in relation to s 2(1) it will be necessary to distinguish the claim from that of Mr. Conway, whose claim was unsuccessful. There are (at least) four reasons why Mr. Newby's case is to be distinguished from Mr. Conway's.
34. First, as with Omid T, whose claim was discontinued earlier this year following his death and the lack of an alternative claimant to take over his case, Mr. Newby is seeking a hearing before the Court to resolve the underlying 'legislative facts' that underpin the justification for the absolute ban on suicide, where necessary with appropriate cross-examination. Mr. Conway did not ask the Court to resolve these underlying issues on evidence and made no application for cross-examination. For reasons we will develop in due course (but which will mirror those put forward in the Omid T case), it is a consequence of the Supreme Court's judgment in *Nicklinson* that any reconsideration of the issue of the compatibility of s 2(1) can only take place in the light of "detailed examination of first-hand evidence, accompanied by cross-examination", including "wide-ranging examination of expert and statistical material concerning suicide and the psychological factors and risks bearing on its occurrence" so as to assess "the validity of any risks involved in relaxing the absolute prohibition on assisting suicide, or (which is surely another side of the same coin) the nature or reliability of any safeguards which might accompany and make possible such a relaxation" (per Lord Mance at para 175, 182). Mr. Newby will seek the resolution of a similarly worded preliminary Issue to that sought by Omid T which was resolved by the Divisional Court in *R (T) v SSJ* [2018] EWHC 2615 (Admin), in these terms:

*"Is it appropriate and necessary for the Court to hear first-hand evidence with cross-examination as to the legislative facts (the mixed ethical, moral and social policy issues) that underlie Parliament's prohibition on assisted suicide in s. 2(1) Suicide Act 1961 in order to determine whether the prohibition in s 2(1) is a necessary and proportionate interference with the Claimant's rights under Article 8 and/ or 2?"*

35. The Divisional Court held that the answer was 'no'; Omid T died before he could appeal that ruling. In the light of that judgment Mr. Newby will invite the Administrative Court to resolve the Preliminary Issue against him but will (like Omid T) seek permission to bring a 'leap-frog' appeal to the Supreme Court on this issue as

a matter of urgency. It will be Mr. Newby's case that the Courts cannot resolve the necessity and proportionality of s 2(1) without a forensic examination of all the evidence and relevant findings as to those 'legislative facts' made by a first-instance judge.

36. Second, Mr. Conway's case was limited to an argument that the law is incompatible with Article 8 in so far as it prevents a person with fewer than 6 months left to live from receiving assistance with dying. Mr. Newby has a similar condition, MND, that is life-limiting but his life expectancy can be measured in years, not months. His case - like that of Mr. Nicklinson before him - 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 a proposal regarding the terminally ill with less than 12 months to live,

*“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).*

37. Third, Mr Newby's situation is different from Mr. Conway's in another material respect, namely he is not receiving non-invasive ventilation (NIV) and cannot request that this be withdrawn and so die quickly, which would be lawful under common law. This was a relevant factor in the decision of the Courts to refuse Mr. Conway's application for a declaration of incompatibility; he had available to him a lawful means of ending his own life that would involve a relatively minimal degree of suffering. By contrast, the only lawful options currently available to Mr. Newby would be to travel abroad for an assisted suicide in Switzerland, to take his own life or to refuse hydration and nutrition and starve to death.
38. Fourth, Mr. Newby also argues that the current law is incompatible with his rights under Article 2, considered above.

#### E. The Claim

39. There are therefore three questions to be determined in this claim:
1. Is it appropriate to determine the proportionality question now?
  2. Is it necessary and appropriate for that issue to be determined on the basis of primary evidence with cross-examination?
  3. Is the restriction on the Claimant's rights entailed in s 2(1) a necessary and proportionate interference with his rights under Article 8 and/ or 2?

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Is it appropriate to determine the proportionality question now?

40. The Claimant submits that it is now appropriate to determine the proportionality question in his case. The personal circumstances of Mr Newby demonstrate the imperative for this question to be determined: the infringement of his rights (whether or not proportionate) is ongoing and severe.
41. There are two key reasons for the Courts to now carefully consider the proportionality of the restrictions: first, Parliament has now debated and rejected the Assisted Dying (No. 2) Bill 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; and, second, the Claimant's case provides the opportunity to deploy the kind of evidence that will enable the courts properly to resolve the proportionality issue.

*Parliamentary consideration of the issues*

42. 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),<sup>3</sup> 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).
43. Following the judgment in *Nicklinson*, a Private Members' Bill introduced by Rob Marris MP, the Assisted Dying (No. 2) Bill, received a second reading in the House of Commons on 11 September 2015. That 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 failed at the second reading stage when 332 members of the House of Commons voted against it (112 voted in favour of it). There is no prospect currently of Parliament reconsidering these issues
44. Moreover, 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

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<sup>3</sup> See paras 233 and 293 respectively

issues in relation to all who were affected thereby. It is not the case that a debate by Parliament would by itself necessarily be sufficient, as there had been a number of debates in the Houses of Parliament before the *Nicklinson* case that were not sufficient.<sup>4</sup>

45. 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 contemplating many years, rather than months, of living with a condition that causes them unbearable suffering.
46. Moreover, the short debate in Parliament did not address evidentially the question as to whether the prohibition was proportionate, even in relation to those covered by the Bill (and still less by those outside its remit). This, it will be submitted by the Claimant, is insufficient for the matter to be considered "*satisfactorily addressed*".
47. 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*".<sup>5</sup> The Claimant's case represents a proper opportunity for the issue to come back before the Courts.
48. In any event the Divisional Court and Court of Appeal in Conway have already accepted that the compatibility of s 2(1) falls to be decided 'on the facts as they exist at the moment, and in the light of all that has taken place', and were not precluded from resolving that issue on the merits in Mr. Conway's case, rejecting the Secretary of State's argument to the contrary (see CA, paras 126-129). Indeed, Omid T was granted permission to bring his claim on the grounds and evidence that is now presented in support of Mr. Newby's claim.

*Evidence is now available*

49. Of those judges in *Nicklinson* who determined that the Court *could* but *should not* determine the proportionality of the assisted suicide ban, a key reason was that there was insufficient evidence for them to do so.<sup>6</sup> 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.

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<sup>4</sup> See Lord Neuberger's judgment at para 51 et seq.

<sup>5</sup> See also Lord Wilson at para 202.

<sup>6</sup> See the judgment of Lord Neuberger at paras 88 and 119-120, Lord Mance at para 150 and Lord Wilson at para 196.

50. The Claimant proposes to adduce such evidence and to test any evidence put forward by the government. That evidence has already been to be collated and there is time for it to be tested in these proceedings, if necessary by cross-examination. It is particularly relevant that the Supreme Court of Canada in *Carter v Canada* felt able to uphold the findings of the lower court 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 it necessary and appropriate for that issue to be determined on the basis of primary evidence with cross-examination?

51. We have already addressed this at paras 34-35, above.

Is the restriction on the Claimant's rights proportionate?

52. 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 para314):

*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.*

53. For those people, such as Mr Newby, 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 of Lady Hale and Lord Kerr, the only two justices to determine the substantive issue in *Nicklinson*. It will be a matter for the state to demonstrate by evidence, properly tested, whether there remains any justification for the blanket ban in s 2(1).
54. While the Claimant does not know what evidential justification the defendant would advance to justify the restriction on his rights, the underlying issues have been well rehearsed and were expressed by the government in the *Nicklinson*, *Conway* and *Omid T* challenges and by Parliament in the debates concerning the Assisted Dying (No 2) Bill and are rehearsed, in summary form, at paras 151-179 of the Court of Appeal's judgment in *Conway*. In particular, therefore, Mr Newby would expect to address the following concerns by testing the government's evidence and putting forward evidence in relation to the following issues in much the same way as was done in *Carter*, having regard to the particular, specific circumstances of the United Kingdom:

1. The weak and vulnerable will be coerced or abused, whether directly or indirectly, into 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.
2. Any relaxation of the current rules would lead to a “*slippery slope*” towards involuntary euthanasia. 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.
3. A change in the law will undermine society’s support of those in need, particularly by the provision of palliative care for those who are terminally and the provision of continuing care and other support for those who are severely disabled. Again, this assumption will be challenged by reference to evidence from other, permissive jurisdictions.
4. The relationship of trust between doctors and patients will be undermined, and patients will ‘doctor-shop’, if the prohibition on physician-assisted suicide is relaxed. The Claimant will demonstrate that there is no evidence of this in permissive jurisdictions.
5. There is a preponderance of medical evidence opposed to a relaxation in the law. The Claimant notes, in particular, that the Royal College of Physicians has recently changed its position from one of opposition to one of neutrality.
6. There are no practical 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*,<sup>7</sup> 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*.

**F. Actions sought/ ADR/ timing/ proposed reply date**

55. We recognise that in the present case there is no action that the Defendant may take that will meet the Claimant’s concerns. The only remedy that he seeks is a declaration of incompatibility which can only be taken by a Court. A change in the law can only be effected by an Act of Parliament, not by any act of the Defendant.

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<sup>7</sup> See respectively, paras 108, 123, 205 and 314 et seq.

As neither a declaration of incompatibility nor an Act of Parliament can be agreed between the parties this case is not a suitable case for any form of ADR.

56. We anticipate that your response will be as in the Omid T case. Hence this letter is served as a courtesy and to comply with the pre-action protocol in the knowledge that your client resists and opposes these claims and these arguments have been well rehearsed only a few months ago. Let us know within 14 days if you wish to add anything more.

Yours faithfully

*Bindmans LLP*

**Bindmans LLP**