Judicial Conservatism: A Constraint on the HRA? An Analysis through the *NI Abortion Case* and *Nicklinson*

Jack Bailey

Jack Bailey is a third-year undergraduate in Law at Fitzwilliam College, Cambridge, interested in the intersection of law and politics. In autumn 2022 he will begin a training contract with Freshfields Bruckhaus Deringer. He has just stepped down from his role as Pro Bono Coordinator on the Cambridge University Law Society, with the Pro Bono Department having been nominated for the 'Access to Justice Foundation Award' at the LawWorks and Attorney General Student Pro Bono Awards 2021.

The purpose of the Human Rights Act 1998 (HRA) was to 'bring rights home', allowing people to protect their fundamental human rights under the European Convention on Human Rights (ECHR) in domestic courts.[1] For present purposes, the relevant rights are the right to autonomy and dignity, and their control over their body and future (based on Articles 2, 3, and 8). However, the idea that people are able to protect these rights is anathema to the tenor of the salient and contentious judgments in the *NI Abortion Case*[2] and Nicklinson—[3]cases which restrict these rights—as well as subsequent case law. Such a conclusion can only be reached by a fundamental misconstruction of what the cases stand for. Instead, excessive and overzealous judicial conservatism has failed to demonstrate and realise the potential of the HRA. The damage done to the rights in question by this conservative approach conflicts with the very mandate provided in the HRA. For this potential to be realised, a more 'radical' (yet legally and constitutionally sound) approach is necessary, and the apparent fear of issuing an s 4 Declaration of Incompatibility (DOI)—a declaration by the Court that the relevant legislation is incompatible with ECHR rights—must be dispensed with. Such action is not inappropriate, nor radical, but merely performance of the proper constitutional role of the court.

1 I would like to thank Dr Stevie Martin for her helpful advice in writing this article and reading over my drafts. The considerations and viewpoints she raised were greatly helpful.

2 *Re an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27.

3 *R v Nicklinson* [2014] UKSC 38.

The *Northern Ireland Abortion Case*

Ducking the issue?

The *NI Abortion Case* cannot be posited as a reinforcement of either the autonomy and dignity of citizens, nor the protection of their control over their body and future. The court refuses, by a majority, to even substantively engage with these issues in any consequential way. Instead, Lords Mance, Reed, and Lloyd-Jones and Lady Black duck the issue by judging that the Northern Ireland Human Rights Commission (NIHRC) did not have standing under HRA s 7 to bring s 4 proceedings, thus allowing them to dispense with any meaningful discussion surrounding Articles 2, 3, 8, and 14. The reasoning used to arrive at this conclusion is self-contradictory and illogical because, as Lords Kerr and Wilson and Lady Hale highlight, the English Equality Commission (the NIHRC's equivalent) is able to bring proceedings of the same nature. Such is the reticence to engage with fundamental human rights, the majority would rather raise antecedent issues of unfair devolution arrangements and the differing treatment of the UK's four nations.

The Court dodges a politically contentious, yet still fundamentally legal, question for fear of it being 'institutionally inappropriate' (as Lord Sumption describes it in *Nicklinson*). One cannot assert, therefore, that the case demonstrates the protective potential of the HRA, as the Court only hypothetically engages with the rights in question on the terms of the HRA. In fact, the opposite result

is achieved—the rights under the HRA lose their efficacy as they are rendered unenforceable by a frankly cowardly interpretation of human rights standing. More damning still, the majority decision in this case regarding standing has been superseded by the European Union (Withdrawal) Act 2018 (EUWA), which explicitly established that the NIHRC has standing to bring such cases, proving the minority right. Following this judgment, it seems even more apparent that ducking the issue on the grounds of standing was a conscious choice.

Engaging (superficially) the substantive rights

Nonetheless, the judges do engage in some discussion around the Article 3 and 8 rights engaged by the NI abortion laws, though this discussion is all obiter dicta.[4] This discussion largely fails to properly protect these rights, and instead offers a confined scope of application that pales in comparison to the comparative application of those rights within other nations of the UK. While the majority (5:2) judge that the law is incompatible, on the basis that it is disproportionate in aiming to protect morals and excessively fetters the autonomy and self-determination of individuals, this is still true in a very qualified sense, with division amongst the majority. Only four of the judges rule that there is a violation of Article 8 regarding abortion in cases of rape, incest, and fatal foetal abnormalities (FFAs). Only Lady Black rules that there is a violation in regard to FFAs but not rape or incest. This does very little to protect a Northern Irish woman's right to autonomy, dignity, and control over her body and future. As far as Lady Black is concerned, her human rights only allow her to seek abortion where she is carrying a child with an FFA, and she should be made to carry the child to birth if it is the product of rape or incest. Lords Reed and Lloyd-Jones in the minority share this position but extend it to FFAs also. Lady Black's proposition is frankly astonishing, especially when compared to the rights she would have if she lived in a different region of the same country!

The position of the five judges regarding FFAs was cited in *Ewart*[5] and subsequently approved in the High Court, which would have issued a s 4 DOI in relation to Article 8 had it not been rendered nugatory by a previous change in legislation. This validated the view of the five judges. However, it still cannot be said that the *NI Abortion Case* shows the potential of the HRA to protect the rights in question. Instead, it is *Ewart* that did so, though in a highly confined and qualified sense.

Even the position of the four majority judges in the *NI Abortion Case* is insufficient. The NIHRC itself only sought validation on these terms, but it is not out of the remit for the Court in such a case to issue a general s 4 DOI on anti-abortion laws in relation to relevant rights. As Lady Hale and Lord Kerr highlight in *Nicklinson*, and Horner J highlights in the NIHC decision of this case (citing Lord Bingham in *A v Secretary of State for the Home Department (Belmarsh)*),[6] the idea that this is institutionally inappropriate is anathema to the powers granted by Parliament to the judiciary in s 4 of the HRA itself. The issuing of a DOI does not in itself force a change in the law. It instead forces Parliament to consider the issue, at which point it is an issue of Parliamentary sovereignty as to whether Parliament chooses to amend the law. The notion that citizens living in the same country, but in different nations, should enjoy substantially different rights offends the supposedly universal nature of those rights.

As far as dignity is concerned, only Lords Kerr and Wilson were prepared to say that forcing a woman to travel from NI to England, Wales, or Scotland to obtain an abortion was a violation of Article 3. They also held, more broadly, that forcing a person to carry to term a foetus that has an FFA, or was conceived through rape or incest, constitutes inhuman or degrading treatment. While Lady Hale expresses sympathy with this view, she does not reach the same conclusion in relation to Article 3. She uses this factor to demonstrate the law's disproportionality in regards to Article 8. However, this should not be a reason why it cannot also constitute an Article 3 violation too. This case fails to respect the dignity of the women concerned by failing to properly enforce their human rights and provide parity with the rights enjoyed by the women of England, Wales, and Scotland.

Though the NI law has been changed since the case to a position that is more acceptable, the position following the *NI Abortion Case* did not sufficiently provide for this in respect to either their right to autonomy (Article 8), dignity (Article 3), or choice as to their body and future (Article 8).

Nicklinson (as developed in *Conway* and *Newby*)

Nicklinson, taken with *Conway* and *Newby*, also cannot properly be said to demonstrate the potential of the HRA in protecting the rights in question, given that all of these cases flatly refuse the applications made.

Ducking the issue (again)?

The European Court of Human Rights (ECtHR) in *Pretty* says that the Suicide Act 1961 (SA) s 2 ban on assisted suicide (AS) engages Article 8. Nicklinson, however, sought to argue that the SA violated his Article 8 right to avoid an undignified and distressing death and his right to choose the manner and timing of his death. Once again, the Court ducks the issue in question and thus does not provide any demonstration that the HRA is a useful mechanism to protect a person's rights. Seven of the nine judges ruled that it would be 'institutionally inappropriate' to make a consideration as to the compatibility of the SA with Article 8, though there is a 4:3 split in reasoning.

The most conservative approach is taken by Lords Clarke, Sumption, Reed, and Hughes, who refuse to engage in any meaningful discussion of whether the SA was incompatible with Article 8. They refuse on the basis that, while the court has jurisdiction to do so, such an analysis turns on issues that Parliament was better suited to decide, meaning it would be 'institutionally inappropriate' to make a decision. Once again, the reasoning of Lady Hale and Lord Kerr in the present case, and Lord Bingham in *Belmarsh*, is prescient. HRA s 4 explicitly invites courts to decide on these issues. It is paradoxical and oxymoronic for the court to say that they cannot use the power that Parliament has given them to declare Parliament's legislation incompatible, on the grounds of it being 'institutionally inappropriate'. This is a total abdication of responsibility and is a misguided, cowardly retreat from a contentious issue which has still not been decided on by Parliament over six years later. By not even engaging with the issue of compatibility, the judges neuter the HRA's ability to protect these rights. It is more inappropriate for them to abstain from this consideration than it is for them to engage in it. The justification given is insufficient and debases the HRA significantly.

A less conservative approach is taken by Lords Neuberger, Mance, and Wilson. They instead judge that it is not institutionally inappropriate, per se, to make a decision on incompatibility.

4 A comment in obiter dicta is a non-binding part of the judgment.
5 *Re Ewart* [2019] NIQB 88.
6 *A v Secretary of State for the Home Department* [2004] UKHL 56.

However, they decide that it was in this case because Parliament was currently discussing the issue, essentially giving Parliament one last chance to try and *sort* the issue. This is also an insufficient analysis, as it relies on another case making it to the Supreme Court. As we can see, with *Conway* and *Newby*, this has not yet happened. *Conway*'s permission to appeal was refused, thus rejecting the opportunity to make an authoritative ruling on the matter. Once again, there is a misplaced and illogical deference to Parliament, which ignores the powers bestowed *by* Parliament.

The better approach by far is that of Lady Hale and Lord Kerr, who do not deem it to be institutionally inappropriate to make a consideration on the compatibility of the SA with Article 8. They are the only justices who claim this. This is the only way that the HRA can be used to protect these rights. The court must actually engage in a compatibility analysis for the HRA to even have a *chance* of protecting rights. As Lady Hale says in Paragraph 300:

> I see little to be gained, and much to be lost, by refraining from making a declaration of incompatibility. Parliament is then free to cure that incompatibility, either by a remedial order under section 10 of the Act or (more probably in a case of this importance and sensitivity) by Act of Parliament, or to do nothing. It may do nothing, either because it does not share our view that the present law is incompatible, or because, as a sovereign Parliament, it considers an incompatible law preferable to any alternative.[7]

This is exactly the point. A declaration of incompatibility is just that—a declaration. It has no binding force and does not compel Parliament to do anything if it does not want to. It has no effect on the law other than to highlight its incompatibility with the relevant Convention Rights. Therefore, pontifications on institutional propriety serve no purpose other than to dilute the rights afforded under the Convention.

Engaging the rights

Lady Hale and Lord Kerr judge the SA to be incompatible with Article 8, and state that they would have issued a s 4 DOI. They consider that the blanket ban imposed is disproportionate under *Huang*. While accepting that protecting the rights of the vulnerable is a legitimate aim, they consider that the blanket ban was more than what was necessary to achieve that objective and did not strike a fair balance. They also reject Lord Sumption's obiter proposition that protecting morals may be another objective (manifested in the sanctity of life), on the basis that morals are not universally shared in this context and are too complex, with respect being needed for autonomy and dignity too. Hence, on the construction of Lady Hale and Lord Kerr, the HRA could well serve to protect these rights. However, the majority, and therefore binding, view in *Nicklinson* fails to achieve this.

Post-*Nicklinson*: *Conway* (Article 8) and *Newby* (Article 2)

After *Nicklinson*, *Conway* reflects Lady Hale and Lord Kerr's observation on the lack of strength in the objective of protecting the vulnerable regarding Article 8 infringement. More objectives are imported to the ban such as protecting morals and protecting the doctor–patient relationship. These too are weak. The protection of morals is easily dismissible on the same grounds as Lady Hale and Lord Kerr provide in tackling Lord Sumption on this in *Nicklinson*, as well as the fact that it simply does not reflect a uniform public consensus, nor reflect the approach taken to other end-of-life contexts such as the capacitous refusal of treatment. Lord Kerr in *Nicklinson* also questions whether the sanctity of life can really be preserved where terrible suffering is being forced on the claimant.

It is not wholly clear that the doctor–patient relationship is a strong objective either. Doctors can already withdraw treatment, even where the patient is incapacitated (see *Bland* and *Re Y*), and often administer palliative sedation knowing that double effect is certain. This puts the law in a rather perverse situation where, under *Bland*, a person in a persistent vegetative state (PVS) who may well wish to continue living, but cannot express that, can be subjected to what is essentially involuntary euthanasia. By contrast, where a person gives their fully informed, unvitiated consent, they are unable to access assisted dying. As for palliative sedation, *Re B* is authoritative on the fact that where a capacitous person, on the basis of informed consent, wishes to end their life-sustaining treatment, that wish is to be respected, even where death is inevitable. Therefore, the distinction between that and AS seems superficial. Is it really, then, such a Rubicon to cross? Furthermore, polling among the Royal College of Physicians and British Medical Association shows a majority opinion which is at least neutral towards AS. Even the profession does not see a threat to the patient–doctor relationship. The homogeneity that the Court in *Conway* implies simply does not exist. Permissive jurisdictions have shown that the discussions involved in arranging AS are actually conducive to building good relationships, and empower patients in the decision-making process.

Therefore, it is not entirely clear that the additional objectives posited in *Conway* are valid and legitimate objectives rationally connected with such aims, or fairly balanced where cases such as *Conway*, *Nicklinson*, *Pretty*, and *Newby* are concerned. More egregious still is the fact that *Conway* disposes of the analysis in the Canadian case, *Carter*, on the basis of false distinctions. Supporting this is the fact that in *Pretty*, the ECtHR says that *Carter* s 7 concerned autonomy, which is parallel to Article 8. Yet again, *Conway* fails to allow the HRA to be used to protect the right to autonomy and dignity and control over the body.

Newby argues that the SA and subsequent jurisprudence was a breach of the positive obligation to protect life under Article 2, on the basis that there was not an effective legal system that protects life. The SA did not deter threats and was in itself a threat. The argument relies on the evidence that the blanket ban on AS resulted in the premature suicide of people before they become incapacitated to avoid the implications of the SA. This is a point illuminated by: *Carter*; the first-hand account in *Omid T*; and perhaps put best by Lord Neuberger in Paragraphs 96 of his judgment, saying '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'.

The High Court is dismissive of this argument, dealing with it in one paragraph, which is questionable at best. No material consideration is given to the argument, and the conservative *Nicklinson*-type approach is taken to avoid discussion of the sanctity of life etc. While they do say that Article 2 engagements in this context would deal with the same considerations as Article 8, they consider these Article 8 issues heavily reliant on Conway, which itself was heavily reliant on Lord Sumption's reasoning in *Nicklinson*. Therefore, this Article 2 argument is yet to be properly examined in a court and judged. However, the current line of jurisprudence suggests that an

7 *Nicklinson* [300] Lady Hale.

unfavourable approach would be taken to this argument. Therefore, *Newby*, as with every other case, fails to demonstrate the HRA's potential to protect the rights of the individual to autonomy and dignity, and control over their body and future.

Conclusion

The overly conservative approach of the courts in relation to assisted dying and abortion results in a failure to properly uphold the rights of claimants under the ECHR. Therefore, one cannot assert that the current state of the law protects a person's right to autonomy and dignity, and their control over their body and future. Nothing binding in the *Northern Ireland Abortion Case*, *Nicklinson*, or any of the subsequent litigation supports the assertion. The only saving graces of these cases, that may possibly be relied on to try and support this proposition, are the minority judgments.

Time and time again, claimants have sought to rely on the HRA to protect their rights to autonomy and dignity under Articles 8 and 3, and their control over their body and future under Articles 2 and 8. However, time and time again, courts have failed to give effect to this. Instead, cowardly and overly conservative judicial approaches have given way to an over-reliance on a de facto decriminalisation based on Crown Prosecution Service discretion that is by no means a watertight guarantee of immunity, and still forces families to endure police investigation.

Courts should embrace the powers they have been conferred by Parliament in the HRA and make s 4 DOIs where that would be appropriate, as it is in the cases considered above. The considerations of the cases above clearly show that where courts duck this on grounds of 'institutional inappropriateness', rights are not vindicated, and people are left to suffer. Engagement with these issues would not be an improper judicial power grab but merely a fulfilment of the role and responsibilities given by Parliament in the HRA to declare legislation incompatible where it is. By not fulfilling this role, the checks and balances inherent in our constitution are jeopardised. For as long as the judiciary adopts this unnecessarily conservative jurisdictional approach, the cases that come before them will never demonstrate the true potential of the HRA to protect a person's right to autonomy and dignity, and control over their body and future.