THE SUPREME COURT

Appeal No. 019/2013

Denham C.J.
Murray J.
Hardiman J.
Fennelly J.
O'Donnell J.
McKechnie J.
Clarke J.

Between/

Marie Fleming

Plaintiff/Appellant

and

Ireland, Attorney General and the Director of Public Prosecutions

Defendants/Respondents

and

Irish Human Rights Commission

Amicus Curiae

Judgment of the Court delivered on the 29th day of April, 2013, by Denham C.J.

Introduction

1. This is an appeal by Marie Fleming, the plaintiff/appellant, referred to as "the appellant", from the judgment of the divisional High Court delivered by Kearns P. on the 10th January, 2013, and the order of the same day, refusing the relief sought.

2. By plenary summons issued on the 23rd October, 2012 the appellant sought orders against Ireland, the Attorney General and the Director of Public Prosecutions, the defendants/respondents, referred to collectively as "the respondents".

3. The appellant sought the following:-

(i) An order declaring that section 2, sub-section (2) of the Criminal Law (Suicide) Act, 1993, is invalid having regard to the provisions of the Constitution.

(ii) An order declaring that section 2, sub-section (2) of the Criminal Law (Suicide) Act, 1993 is incompatible with the State's obligations under the European Convention on the Protection of Human Rights and Fundamental Freedoms.

(iii) In the alternative, an order directing the Director of Public Prosecutions, within such time as to this Court shall seem just and appropriate, to promulgate guidelines stating the factors that will be taken into account in deciding, pursuant to section 2, sub-section (4) of the Criminal Law (Suicide) Act, 1993, whether to prosecute or to consent to the prosecution of any particular person in circumstances such as those that will affect a person who assists the appellant in ending her life.

4. The case was at hearing before the High Court, a divisional court consisting of Kearns P., Carney and Hogan JJ., for six days.

5. On the 10th January, 2013, the High Court delivered a reserved judgment in the case. It dismissed the claims made by the appellant.

6. The appellant filed an appeal against so much of the judgment and order of the High Court as declined to grant the appellant:-

(i) An order declaring that section 2, sub-section (2) of the Criminal Law (Suicide) Act, 1993, is invalid having regard to the provisions of the Constitution; and

(ii) An order declaring that section 2, sub-section (2) of the Criminal Law (Suicide) Act, 1993 is incompatible with the rights of the appellant pursuant to the European Convention on Human Rights.

7. There was no appeal against the judgment and order in respect of the role of the Director of Public Prosecutions or the provision of offence specific guidelines.

8. The notice of appeal stated that the appeal would be presented on the grounds that the learned judges of the High Court had erred and misdirected themselves in law and/or fact, on twenty-eight grounds.

Background facts and medical condition

9. The background facts were found and described in the judgment of the High Court and this Court adopts those findings. The medical facts were corroborated and confirmed by medical reports furnished as agreed evidence by the appellant's advisors, including those of Professor Niall Tubridy, consultant neurologist, Dr. Paul Scully, consultant psychiatrist, Dr. Niall Pender, clinical neuropsychologist, and the appellant's general practitioner, Dr. Ann Marie O'Farrell.

10. The appellant is 59 years of age and lives with her partner, Tom Curran, and has two adult children from previous marriages. At age 32, in 1986, the appellant experienced her first episode of multiple sclerosis and a diagnosis of that illness was made in 1989.

11. Multiple sclerosis is an immune-mediated inflammatory disease causing neurological deficits which follows a relapsing-remitting pattern. Sufferers initially experience short-term neurological deficits and for some patients the disease involves progressive neurological deterioration and eventually death. Although there are some medications that can modify the progress of the disease in its early stage, there are no drugs to treat the advanced stages and there is no cure.

12. On the EDSS (Expanded Disability Status Scale), which is a scale used to describe the progress of multiple sclerosis, Professor Tubridy assessed the appellant as an 8.5, which means a person is essentially restricted to bed much of the day with some effective use of arms and some self care functions. However, the appellant feels she has deteriorated since Prof. Tubridy's assessment, and is now at 9 at best on the EDSS and possibly a 9.5 (difficulty speaking and swallowing). The next point on the EDSS is 10, representing death from the disease.

13. The appellant gave evidence that she is unable to control an electric wheelchair, has no bladder control, and requires assistance to eat and drink, and to be washed, dressed and repositioned in her wheelchair. The appellant is also frequently experiencing choking episodes whether when drinking or not, which are frightening, distressing and exhausting for her. The eventual loss of her ability to swallow will put her at risk of aspiration and she will become dependant on an medicial apparatus to receive nutrition.

14. The appellant also gave evidence that she suffers frequently from severe pain from a number of sources, which is sometimes almost unbearable. Some of the pain is neurological in cause and some is caused by the weakening of her muscles and spasms. The appellant's head, eyes, temples, neck, back, arms, hands, hips, and legs are the most frequent areas of her body suffering extreme pain. The appellant reported taking the maximum doses of analgesia that she can without becoming comatose or her quality of life decreasing further. The appellant's daily medication does not treat her condition but rather manages the symptoms of it but there are side effects which include dry mouth, heart palpitations, drowsiness and nausea.

15. However, the disease has not impaired the appellant's cognitive functions. The appellant was also assessed to establish her competency and she has been advised that there is no underlying mental illness that does or is likely to affect her decision-making capacity. A report of Dr. O'Farrell stated that the appellant's mind and her forceful clarity "is all that Marie has left".

16. While the appellant considering travelling to Switzerland to avail of the facility offered by Dignitas to end her own life five years ago, she postponed the decision

because of the wishes of her partner and the location of the clinic. The appellant now claims that she would end her life if she were able to do so and regrets not doing so before she lost the use of her arms. The appellant states that she now lives with little or no dignity and she is horrified at the thought of enduring months without being able to communicate, in pain and isolation, with full consciousness or being heavily sedated to the point of being barely conscious.

Appellant's evidence

17. The High Court described the oral evidence given by the appellant. This included that she had seven different carers and struggled every single day with the myriad problems outlined above. It left her feeling totally undignified. She had great difficulty trying to keep her head up and has constant pain in her shoulders, limbs and joints. She felt, indeed she was well aware, that her condition was getting worse, but her medication for pain relief was presently at the top dosage she could take without becoming comatose. She is presently taking 22 tablets of different medications every day. Her wish and her request to the Court were for assistance in having a peaceful dignified death in the arms of her partner and with her children in attendance. However, she did not wish to leave a legacy behind her whereby her partner or her children could be prosecuted. Her partner, while willing to help her, would only do so if it was lawful. She did not wish to die in the same way as a fellow sufferer from MS who died of hunger and thirst at the end of her treatment. She believed that with assistance she could self administer gas through a face mask. Alternatively, with medical assistance, a cannula could be put into her arm whereby a lethal injection would pass into her veins.

18. She told the High Court she had confronted any fears she ever had about dying and was at peace with the world. She had even organised her funeral arrangements so as to include a wicker coffin and an accompaniment of jazz music on the day.

19. She stated she had nothing to hide and if an independent person needed to validate any steps that were taken she would be quite happy with that. She confirmed that palliative care was not acceptable to her. Massive doses of painkillers might alleviate the symptoms of pain but, she believed, it would keep her in a comatose state which she did not want.

The Statute

20. The appellant challenges the constitutionality of s. 2(2) of the Criminal Law (Suicide) Act, 1993, and also seeks an order declaring that this provision is incompatible with the obligations of the State under the European Convention on Human Rights and Fundamental Freedoms, referred to as "the Convention".

Section 2 of the Criminal Law (Suicide) Act, 1993, referred to as "the Act of 1993", provides:-

> "(1) Suicide shall cease to be a crime.
>
> (2) A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.
>
> [...]

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

Submissions

21. Written submissions and executive written submissions were received by the Court from the appellant, the respondents, and the Irish Human Rights Commission as *amicus curiae*. In addition, the Court heard oral submissions from all three parties.

Appellant's submissions

22. In this appeal the appellant argued that the High Court erred in finding (i) that s. 2(2) of the Act of 1993 was not repugnant to the Constitution, and (ii) that it was not incompatible with the State's obligations under the Convention as incorporated into Irish law by the European Convention on Human Rights Act, 2003, referred to as "the Act of 2003".

23. On behalf of the appellant it was submitted that no part of the appellant's case amounts to a claim for the legalisation of euthanasia or for any form of declaration that it would be lawful for any person to kill another. The appellant's claim was that disabled persons who are suffering severe pain on account of a terminal and degenerative illness, and who are able to express their wishes, should not be prevented by the criminal law from receiving assistance from a person, such as her partner, in order to enable herself to take the step of ending her own life. It was submitted that it is possible for the Oireachtas to put in place safeguards, including in respect of verification of medical condition and of consent. It was contended on behalf of the appellant that a very limited exception along these lines would protect properly all of the same public interests that s. 2(2) is intended to protect, and it was submitted that s. 2(2) is disproportionate if it does not admit of any such limited exception.

24. It was submitted that the Constitution and the Convention confer autonomy upon individuals in respect of their core life choices, and that the appellant's right to bodily integrity is also engaged. On behalf of the appellant it was argued that a freedom to end one's life does exist in the case of a competent terminally ill adult who is enduring suffering that they find to be unbearable as part of such a person's rights to autonomy, bodily integrity and self-determination because such a person may choose to die, and to frustrate such a legitimate and rational choice is to frustrate an extremely important exercise of independence. It was submitted that the divisional High Court was correct in holding that "the precept of equality in Article 40.1 is here engaged". It was submitted that while s. 2(2) was facially neutral, in practice, it discriminates against disabled persons.

Respondents' submissions

25. On behalf of the respondents it was submitted that this Court should uphold the decision of the High Court as to the constitutionality of s. 2(2) of the Act of 1993, and its compatibility with the Convention.

26. It was submitted that assisted suicide has long been prohibited by the laws of this and other jurisdictions.

27. It was submitted that there is a presumption that s. 2(2) of the Act of 1993 is constitutional.

28. It was argued that the appellant failed to identify any constitutional right which is interfered with by s. 2(2). While the divisional Court of the High Court appeared to consider that the appellant's rights under Article 40.3.2° were "in principle" engaged by

s. 2(2), the respondents submitted that the notion of a constitutional right being engaged "in principle" is wholly unknown in Irish law, which requires that a constitutional right be positively identified, and interfered with, before any question of the proportionality of such interference can possibly arise.

29. It was submitted that the Irish courts have never recognised a constitutional right to be killed or to have the assistance of a third party in being killed.

30. In the absence of any general right to commit suicide, or to assistance in the commission of suicide, the appellant argued for the existence of a constitutional right which is available only to a limited class of persons. On behalf of the respondents it was submitted that that class was not defined by the appellant, but that she claims to fall within it. It was argued that the recognition of constitutional rights as available to some persons but not to others would be an unusual development. Further, if strict parameters defining the class of such persons would be prescribed by the Court (e.g. age, stage and type of illness, etc.) this would appear to be an exercise in judicial legislation rather than judicial interpretation.

31. It was submitted on behalf of the respondent that s. 2(2) is legislation on a matter of complex and important social policy, being objective and not arbitrary, and that it satisfies the test applicable pursuant to Article 40.1 of the Constitution as recently explained by this Court in *MD (a minor) v. Ireland and Ors* [2012] IESC 10. (Judgment of the Court by Denham C.J. of the 23rd February, 2012). Further, that the different impact of s. 2(2) on the appellant is justified by the necessity to safeguard the lives of others who might be vulnerable and at risk of abuse in a situation where it was legal for third parties to bring about the deaths of persons in their final days.

32. The respondents submitted that none of the appellant's rights under Articles 2, 3, 8 or 14 of the Convention are violated. Reference was made to *Pretty v. United Kingdom* (2002) 35 EHRR 1.

33. On behalf of the respondents it was submitted that should this Court find it necessary to address the issue of proportionality, the test is that set out in *Heaney v. Ireland* [1996] 1 I.R. 580, [1997] 1 I.L.R.M. 17, as applied in *Rock v. Ireland* [1997] 3 I.R. 484, [1998] 2 I.L.R.M. 35, which states that:-

> "the function of the Court is not to decide whether a perfect balance has been achieved but merely to decide whether in restricting individual constitutional rights, the legislature has acted within the range of what is permissible."

34. It was submitted by the respondents that where the impugned law is dealing with an area of important social policy, the underlying issues which are varied and complex, and the constitutional rights to be balanced against those sought by the appellant are very important (in this case potentially vulnerable persons in end-of-life situations), the Court should be particularly slow to substitute its view for that of the Oireachtas.

35. It was submitted that the High Court expressed a clear preference for the evidence submitted by the respondents, in relation to the proportionality debate and the risk of abuse, over that provided by the appellant, which it was entitled to do.

36. It was submitted that s. 2(2) of the Act of 1993 is neither unconstitutional nor a violation of any rights enjoyed by the appellant under the Convention, and that the law should be upheld.

Submissions by the Irish Human Rights Commission

37. The Irish Human Rights Commission, referred to as "the Commission", was granted liberty to appear as *amicus curiae* in the High Court, which it did. The Commission filed written submissions in the High Court and also made oral submissions.

38. Following the judgment of the High Court on the 10th January, 2013, liberty was sought on behalf of the Commission to file further submissions in advance of this appeal. Leave was granted to file submissions on the appeal, and counsel also advanced oral submissions on behalf of the Commission.

39. In written submissions it was stated that the Commission does not advocate "a right to die" or a "right to commit suicide". Rather the Commission seeks to explore the implications of the right to personal autonomy and dignity protected under Article 40.3.2°. of the Constitution and the right to equality protected under Article 40.1, as they impact on the right to life under Article 40.3.2° which, it stated, is sought to be vindicated through the blanket criminalisation of assisted suicide contained in s. 2(2) of the Act of 1993, in circumstances where suicide itself is no longer criminalised. The Commission relied on its submissions before the High Court in this Court, in which it queried whether the absolute ban on assisted suicide under Irish law is justified having regard to the extent of interference with the personal rights of a terminally ill, disabled and mentally competent person such as the appellant.

40. The Commission's written submissions to this Court focused on four specific aspects of the decision of the High Court. These were:-

(a) the lack of legal coherence arising from the blurring of the distinction between assisted suicide and euthanasia, which it said emerges from the decision of the High Court;

(b) the application of the proportionality test by the High Court;

(c) whether the classification by the High Court of those persons protected by s. 2(2) on its objective justification analysis (more specifically in respect of an Article 40.1 analysis which prohibits discrimination on grounds of disability) was correct; and

(d) the question of a remedy.

41. In answer to a question from the Court as to whether the Commission advocated that there is a constitutional right to commit suicide in certain circumstances and therefore to have someone assist a person to do so, counsel affirmed that that was the case in stringently limited circumstances and subject to strictly monitored exceptions.

42. Counsel opened, and relied on, *Carter v. Canada* [2012] BCSC 886, a decision from the province of British Columbia.

43. Counsel argued that there was a right to end one's life, and agreed with the right asserted by the appellant.

44. Counsel also addressed the issue of proportionality and the right to equality and argued that the effect of s. 2(2) of the Act of 1993 was that there was an inequality, a discrimination, which affected the appellant. It was submitted that the legislation was unequal in decriminalising suicide, by leaving, as it did, the question of assistance; that the Oireachtas had an obligation to look at the issue of the denial of the opportunity to the appellant, and that she cannot be discriminated against.

45. In answer to a question from the Court as to whether the Commission had a concluded view as to whether s. 2(2) of the Act of 1993 potentially criminalised the appellant's partner, counsel informed the Court that it had no concluded view.

Cases

46. Counsel for both parties and the amicus curiae referred the Court to cases from at home and abroad.

47. Counsel for the appellant referred to and relied on passages in *In Re a Ward of Court (withholding medical treatment) (No. 2*) [1996] 2 I.R. 79, [1995] 2 I.L.R.M. 401. However, it may be distinguished from the circumstances of this case. *In Re a Ward* was about whether antibiotics and the provision of nutrition through a medical apparatus could be withheld from a ward of court in the circumstances. As Hamilton C.J. stated at p. 120:-

> "… the issues in the present appeal … are not about euthanasia and are not about putting down the old and infirm, the mentally defective or the physically infirm but are about the question of whether, under our law and Constitution, artificial feeding and antibiotic drugs may be withheld from the ward, who is and has been for more than twenty three years in a coma and has no hope of recovery, when it is accepted that if that is done, the ward will shortly thereafter die.
>
> It is important to emphasise that the Court can never sanction steps to terminate life."

48. The Court has had regard to judgments delivered by constitutional and supreme courts in other jurisdictions.

49. In *Rodriguez v. British Columbia* [1993] 3 S.C.R. 519 the validity of the prohibition on assisted suicide contained in s.241(b) of the Canadian Criminal Code was upheld by a majority of the Supreme Court of Canada. The appellant's claim, that the prohibition, in so far as it precluded a terminally-ill person from committing "physician-assisted" suicide, infringed her fundamental rights guaranteed under ss.7, 12 and 15(1) of the Canadian Charter of Rights and Freedoms, referred to as "the Charter", was rejected by the Court.

50. Delivering the decision of the majority, Sopinka J. held that the "most substantial issue" to be determined by the court was whether the impugned provision infringed the appellant's liberty and security of the person interests under s.7 of the Charter. He held that these interests could not be divorced from the sanctity of life, the third value protected by section 7. The court rejected the argument that for the terminally ill the choice is one of time and manner of death rather than death itself since the latter is "inevitable". Sopinka J. stated at p. 586:-

> “Death is, for all mortals, inevitable. Even when death appears imminent, seeking to control the manner and timing of one’s death constitutes a conscious choice of death over life. It follows that life as a value is engaged even in the case of the terminally ill who seek to choose death over life.”

51. The court held that security of the person guaranteed under s. 7 encompasses personal autonomy, at least with respect to the right to make choices regarding one’s own body, control over one’s physical and psychological integrity and basic human dignity. It was found that s. 241(b) of the Criminal Code operated to deprive the appellant of autonomy over her person and caused her physical pain and psychological stress in a manner which impinged on the security of her person. The court was satisfied, however, that any resulting deprivation was not contrary to the principles of fundamental justice.

52. In reaching its decision, the court examined the origins of the long-standing prohibition on assisted suicide and referred to the distinction between the withdrawal of medical treatment to bring about the death of a person and the active participation of a third party to achieve this purpose. Sopinka J. held at pp.606 to 607 that:

> “The distinction between withdrawing treatment upon a patient’s request…and assisted suicide…has been criticized as resting on a legal fiction - that is, the distinction between active and passive forms of treatment. The criticism is based on the fact that the withdrawal of life supportive measures is done with the knowledge that death will ensue, just as is assisting suicide, and that death does in fact ensue as a result of the action taken […]
>
> Whether or not one agrees that the active vs. passive distinction is maintainable, however, the fact remains that under our common law, the physician has no choice but to accept the patient's instructions to discontinue treatment. […] The doctor is therefore not required to make a choice which will result in the patient's death as he would be if he chose to assist a suicide or to perform active euthanasia.
>
> The fact that doctors may deliver palliative care to terminally ill patients without fear of sanction, it is argued, attenuates to an even greater degree any legitimate distinction which can be drawn between assisted suicide and what are currently acceptable forms of medical treatment. […] However, the distinction drawn here is one based on intention-in the case of palliative care the intention is to ease pain, which has the effect of hastening death, while in the case of assisted suicide, the intention is undeniably to cause death.”

53. Later, at pp.607 to 608, Sopinka J. stated:

> "While the principles of fundamental justice are concerned with more than process, reference must be made to principles which are 'fundamental' in the sense that they would have general acceptance among reasonable people. […]
>
> Regardless of one's personal views… the fact remains that these distinctions are maintained and can be persuasively defended. To the extent that there is a consensus, it is that human life must be respected and we must be careful not to undermine the institutions that protect it."

54. Further, it was found that a blanket prohibition on assisted suicide akin to that contained in s.241 (b) of the Criminal Code was the "norm among Western democracies" and that such a prohibition has never been adjudged to be unconstitutional or contrary to fundamental human rights. Sopinka J. was satisfied that the impugned provision was "valid and desirable" and pursed the government's objectives of "preserving life and protecting the vulnerable." The court determined that, given the risks of abuse in a system that permits assisted suicide and the difficulty in creating safeguards to prevent such risks, it could not be said that the blanket prohibition on assisted suicide was arbitrary or unfair, or that it was not reflective of fundamental values at play in Canadian society.

55. Accordingly, the court held that the appellant's rights under ss.7, 12 and 15 (1) of the Charter were not violated by the prohibition contained in s. 241(b) of the Criminal Code and dismissed the appeal.

56. Another case which was before the Court and which was considered was *Washington v. Glucksberg et al* 521 U.S. 702 in which it was held that the State of Washington's prohibition against causing or aiding a suicide did not violate the due process clause in the Constitution of the United States of America. The court examined American history, legal traditions and practices and stated that for over 700 years the Anglo-American common law tradition had punished or otherwise disapproved of both suicide and assisted suicide. The court traced the law back to the 13th century, Henry de Bracton, through Sir William Blackstone's Commentary on the Laws of England, through the early American colonies, and a movement away from the common law's harsh sanctions. However, there was no acceptance of suicide in the states, it was considered to be a wrong, and assisted suicide was prohibited by the courts. The court traced the history of statutes outlawing assisting suicide in the states and current considerations of assisted suicide.

57. The court addressed the issue, described in a number of formats, as to whether there was a right to die, a liberty to choose how to die, a right to control one's final days, a right to choose a humane, dignified death.

58. Before the court was a constitutional issue as to whether the Due Process Clause of the Constitution of the U.S.A. protects a right to commit suicide, which itself includes a right to assistance in so doing. The court concluded that the nation's history, legal traditions and practices did not support such a right.

59. In the United Kingdom, the House of Lords considered a case of *R (Pretty) v. DPP [2001]* UKHL 61, in which the plaintiff, a 42-year-old woman who suffered from motor

neuron disease and was at an advanced stage of this progressive degenerative illness. Her life expectancy was low; she had only a few months left to live. Though confined to a wheelchair, the plaintiff was mentally alert and wished to take control of when and how she died. More specifically, she wished to take the necessary steps to end her life in, what she regarded was, a peaceful and dignified manner. Her physical incapacity was such, however, that the plaintiff could not end her own life without enlisting the assistance of another. She wished for her husband to assist her and he agreed, provided he would not face prosecution under s.2 (1) of the Act of 1961 which provided:-

> "A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding 14 years."

In accordance with the terms of the impugned provision, were the plaintiff's husband to assist her in the act of suicide, he would be liable to prosecution and imprisonment for the offence. However, in accordance with subsection 4 of section 2:

> "... no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions."

60. The plaintiff therefore sought an undertaking from the DPP that, should her husband provide her with assistance to commit suicide, he would be immune from prosecution under s. 2(1) of the Act of 1961. The DPP refused to provide such an undertaking, stating that it could not grant immunities that "condone, require, or purport to authorise or permit the future commission of any criminal offence, no matter how exceptional the circumstances." The plaintiff claimed that she had a right to her husband's assistance in committing suicide and that s.2 of the Act of 1961, if it prohibits his assistance and prevents the DPP undertaking not to prosecute if he does, is incompatible with the Convention. The House of Lords however, rejected that the DPP's refusal to give an undertaking or the blanket prohibition on assisted suicide engaged any of the rights relied upon by the appellant.

61. The House of Lords referred to the positive duty on the state to safeguard the life of the individual conferred by Article 2. Lord Hope observed that Article 2 is:-

> "all about protecting life, not bringing it to an end. It is not possible to read it as obliging the state to allow someone to assist another person to commit suicide."

With regard to the alleged violation of Article 3, Lord Bingham held that "[b]y no legitimate process of interpretation can that refusal be held to fall within the negative prohibition of Article 3." Further, the House of Lords determined that a positive obligation on the state to ensure that a competent, terminally ill, person who wishes but is unable to take his or her own life should be entitled to seek the assistance of another without that other being exposed to the risk of prosecution could not be derived from Article 3.

62. Similarly, the contention that Article 8 of the Convention conferred a right to self-determination which encompassed a right to choose when and how to die was also rejected by the House of Lords. Lord Bingham observed at para. 23 that Article 8 is:-

> "...expressed in terms directed to the protection of personal autonomy while individuals are living their lives, and there is

> nothing to suggest that the article has reference to the choice to live no longer."

It was held that should this determination be incorrect however, and the impugned provision did in fact deprive the plaintiff of her rights guaranteed under Article 8(1), that such an infringement would be capable of justification under Article 8(2). The blanket prohibition on assisted suicide contained in s. 2(1) of the Act of 1961 was found to strike:-

> "the right balance between the interests of the individual and the public interest which seeks to protect the weak and vulnerable"

and accordingly, was proportionate to the objective of the section.

63. Finally, the House of Lords rejected the argument that s.2 (1) of the Act of 1961 discriminated against those who can not, as a result of incapacity, take their own lives without the assistance of another. As the law creates no right to commit suicide, it was held that this argument was based on a "misconception." Further, the House of Lords held that, as the criminal provision applies to all persons equally, the provision could not be found to be objectionably discriminatory.

64. The plaintiff failed to establish that the facts of her case fell within Articles 2, 3, 8, 9 and 14 of the Convention. In light of the forgoing, the House of Lords held that s.2(1) of the Act of 1961 was not incompatible with the Convention and accordingly, dismissed the appeal.

65. The claimant appealed to the European Court of Human Rights, which also dismissed her appeal on the grounds that while the rights in Article 8 of the Convention were engaged, the prohibition came within the exceptions identified in Article 8(2), which will be referred to later in the judgment.

66. Counsel for the appellant argued that as the most recent authority in the field, with a significant review of the available evidence, and experience in other countries, that *Carter v. Canada* [2012] BCSC 886 is of high persuasive authority, and is to be preferred. Counsel on behalf of the appellant submitted that *Carter v. Canada* was the most persuasive of the relevant foreign authorities because it undertook the most in-depth assessment of recent evidence regarding the risks associated with any relaxation of the criminalisation of assisted suicide.

67. The compatibility of the prohibition on assisted suicide contained in s. 241(b) of the Canadian Criminal Code with the Charter was considered, at first instance, by the Supreme Court of British Columbia in *Carter v. Canada* [2012] BCSC 886. This challenge was brought by persons, including Ms. Carter and Ms. Taylor, who sought to benefit from or facilitate others to benefit from an exception to the prohibition on assisted suicide.

68. Lynn Smith J. held that the prohibition on assisted suicide contained in s.241 (b) of the Criminal Code to be unconstitutional because it was inconsistent with the principles of fundamental justice and was disproportionate. She found that the impugned provision unjustifiably infringed the plaintiffs' rights to life, liberty and security under s.7, and also the equality rights under s.15 of the Charter of the plaintiff, who suffered with a terminal illness.

69. In reaching her conclusion, Lynn Smith J. departed from the authority of the Canadian Supreme Court in *Rodriguez v. Canada* [1993] 3 SCR 519. In *Rodriguez* the Court determined that, notwithstanding the fact that the plaintiff's right under s.7 of the Charter was engaged by the prohibition contained in s. 241(b) of the Criminal Code, the prohibition was justified because it was not a breach of fundamental justice. Lynn Smith J. provided two reasons for her departure from *Rodriguez*. First, proportionality analysis

had been significantly developed since the decision in *Rodriguez*. Second, Lynn Smith J. was satisfied that new evidence from jurisdictions in which the ban on assisted suicide had been relaxed, which was not available to the Supreme Court in *Rodriguez*, had since become available.

70. Lynn Smith J. held that the purpose of the legislation was "pressing and substantial," namely, to protect the vulnerable from being induced to commit suicide. This purpose, she determined, was grounded in the underlying state interest in the protection of life and the maintenance of the Charter value that human life should not be taken. Lynn Smith J. was also satisfied that there was a rational connection between this purpose and the prohibition on assisted suicide contained in s. 241(b) of the Criminal Code.

71. The prohibition on assisted suicide was found, however, to have "more burdensome" and "very severe and specific deleterious" effects on persons with physical disabilities. Lynn Smith J. rejected the argument for a distinction between the withdrawal of treatment to bring about the end of a persons life and the act of physician assisted suicide. Rather, she was of the opinion that such a "bright-line ethical distinction is elusive." She concluded that, due to its unqualified nature, the impugned provision did not impair the Charter rights as little as possible. Rather, on the evidence before the Court, and summarising her findings in relation to her examination of the legislation, Lynn Smith J. stated at paragraph 16 that:-

> "Less drastic means of achieving the legislative purpose would be to keep an almost absolute prohibition in place with a stringently limited, carefully monitored system of exceptions allowing persons in Ms. Taylor's situation- grievously and irremediably ill adult persons who are competent, fully-informed, non-ambivalent and free from coercion or duress- to access physician assisted death."

72. Thus, it was held, the legislation did not meet the requirement of minimal impairment, and it was found that the absolute prohibition on assisted suicide fell "outside the bounds of constitutionality." Section 241(b) of the Criminal Code was declared invalid and struck down by the court. The operation of such declaration, however, was suspended for one year in order to afford the Parliament an opportunity to amend the impugned provision accordingly. A constitutional exemption was granted to Ms. Taylor, allowing her to avail of physician-assisted suicide during the period of suspension, subject to a number of court-imposed conditions. However, on the 4th October 2012, Ms. Taylor passed away unexpectedly due to the contraction of an infection.

73. The decision in *Carter* is a decision of the Supreme Court of British Columbia, a trial court for the province of British Columbia, which decision is currently under appeal to the British Columbia Court of Appeal. The appeal hearing commenced in that appeal court on 18th March, 2013 and concluded on 22nd March, 2013. It is probable that *Carter* will ultimately be appealed to the Supreme Court of Canada.

74. Although the judgment of Lynn Smith J. in *Carter* is enormously detailed and comprehensive, this Court is mindful of the fact that it is a decision of a trial court, currently under appeal; it is grounded on the Canadian Charter of Rights and Freedoms, not the Irish Constitution; the foundation of the judgment is a development of the principle of proportionality, and new evidence; and it is not consistent with many judgments from supreme and constitutional courts of other nations.

75. The Court considered carefully the above, and other cases. The Court found it significant that a claim to a right to assisted suicide has come before many common law and Convention bound courts, including those of the United Kingdom, the United States of America, Canada, and the European Court of Human Rights, without having succeeded in any of those Superior Courts.

However, the issue for this Court is whether there is the right sought by the appellant under the Constitution.

## Decision

76. Suicide was regarded as a very serious offence, with draconian penalties, for hundreds of years. It was regarded as self murder. As the person was dead, and could not be sentenced, very harsh punishment was laid down in relation to his or her burial and to forfeiture of his or her property. Over the last two hundred years the situation has been mitigated, to the point where suicide has been decriminalised in many countries, including in Ireland in 1993.

### Suicide ceased to be a crime

77. Suicide was a crime under the law until it ceased to be so by virtue of s. 2(1) of the Act of 1993. That section states:-

> "Suicide shall cease to be a crime".

Thus, suicide is no longer prohibited by law.

### New Statutory Offence

78. The Oireachtas has created a new specific offence, as set out in s. 2(2) of the Act of 1993, which provides:-

> "A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 14 years".

79. The Oireachtas created this new offence, having abolished the offence of suicide. While the section uses words such as "aids, abets, counsels or procures", it is a separate and new statutory offence specifically established by the Oireachtas.

Prosecution for such an offence is exclusively a matter for the Director of Public Prosecutions in the exercise of the functions delegated to her by law pursuant to Article 30.3 of the Constitution, and it is not for the courts to give general directions as to how she should exercise those functions.

80. In any consideration of an alleged offence under s. 2(2), reference may be made to the terms "aids" etc., at common law, for the purpose of construing the offence. However, such would be in the context of construing the new statutory offence created by s. 2(2) and not the previous offence of suicide.

### Locus Standi

81. In this case the Court is dealing with a hypothesis in the circumstances in which the appellant finds herself. There was a general discussion in counsel for the appellant's submissions of several methods of suicide which have been in contemplation by the appellant. All of the methods referred to would require assistance in advance by another

person, or persons, whether they remained present or not. From the facts advanced on behalf of the appellant, it is clear that it is contemplated that family members, including Mr. Curran, would be present.

82. It is the appellant's wish to ensure that there would be no criminal liability if she proceeded, with assistance, to commit suicide in one or other, or another, of the methods described in the High Court proceedings.

83. The issue of who has standing to challenge the constitutionality of a statute has been analysed in many cases over the years. Most notably in *Cahill v. Sutton* [1980] I.R. 269 at 286 Henchy J. stated:-

> "The primary rule as to standing in constitutional matters is that the person challenging the constitutionality of the statute, or some other person for whom he is deemed by the court to be entitled to speak, must be able to assert that, because of the alleged unconstitutionality, his or that other person's interests have been adversely affected, or stand in real or imminent danger of being adversely affected by the operation of the statute."

84. In this case standing is said to arise out of the indirect effect of s. 2(2) of the Act of 1993 on the appellant. The provision in the statute does not, of course, directly affect the appellant for it does not seek, on any view, to directly impose any criminal liability on her. What she asserts is that it has an indirect effect on the constitutional rights which she asserts. If she had either the general or the more specific constitutional rights which she maintained, then she argued that a person who cannot avail of those asserted rights without assistance has those rights interfered with if a criminal penalty is imposed on those who would assist. While most constitutional challenges will involve a provision which directly affects the individual who asserts an infringement of their constitutional rights, there is no reason in principle why, in an appropriate case, a person cannot seek to argue that their constitutional rights are interfered with by a measure which indirectly affects them in a way which prevents or seriously impairs their ability to exercise the asserted constitutional right in question. There may, of course, be further questions which would arise in analysing whether any interference with a relevant constitutional right was legitimate in that the considerations which may apply in balancing any competing interest may not be exactly the same as and between a case of direct interference, on the one hand, and indirect interference, on the other hand. However, such a difference in approach would arise on the substantive question of permissible interference and it would not deprive a plaintiff of standing to argue that indirect interference, if it can be shown, is a breach of a contended constitutional right.

85. The question of standing has arisen in this case out of a fear that the relevant measure under challenge would be applied in circumstances where such application is purely hypothetical. Such circumstances were addressed in *Norris v. Attorney General* [1984] I.R. 36. Thus, in an appropriate case, it is possible that someone may have standing even though there is no actual immediate threat of the measure sought to be challenged being applied to them. Persons should not be required to commit what might well be a criminal offence and subject themselves to the risk of criminal penalty in order that they be permitted to challenge a penal statute. To say that it could only be where one has been exposed (perhaps to the point of having been convicted) to the provision in question that one could challenge a statute would be unfair and unjust.

86. It was submitted that the appellant wished to have a system established whereby a lethal drug could be delivered to her by her, all of which would require assistance in the setting up of the system, so that she could take the final step. In other words, there would be complex steps involved before she could take her own life. On her premise that she has a constitutional right to commit suicide if she could, and that that implies a right of assistance, she has *locus standi* to challenge s. 2(2) of the Act of 1993.

87. In this case the State did not dispute the appellant's contention that the statute would criminalise any assistance given to her.

88. In the circumstances of this case the appellant has standing where a direct effect on her has been established on her facts. In general it would only be in very special circumstances that a plaintiff would have standing in a hypothetical situation. A plaintiff must show a real and significant effect of the statute concerned on him or her, by reference to the facts of his or her case, and by reference to the constitutional rights with which he or she asserts have been interfered. In this case the appellant's circumstances are within the parameters permissible. While her circumstances are hypothetical, in the limited sense that no one has actually assisted her, they are very real.

89. In this case members of the Court raised issues as to the scope of s. 2(2) of the Act of 1993. There may well be cases where it is necessary for a court, when considering a constitutional challenge, to reach a conclusion as to the scope and meaning of the statutory provision under challenge in order to determine its constitutionality. However, in general, the Court would be reluctant to reach a conclusion as to the scope of a penal statute outside the context of criminal proceedings.

90. While a court would ordinarily be reluctant to reach a definite conclusion on the scope of a challenged measure in the context of a hypothetical case, nonetheless if it were to transpire that coming to such a decision was necessary in order to determine whether the statute was constitutional then it might, in those limited circumstances, be necessary to reach a view. The Court would only interpret the challenged measure to the extent necessary to determine the constitutional issues arising, and would leave any other questions of interpretation over to a specific case in which they arose. A party may have standing because on one reasonable interpretation at least, the statute may affect them, but there may be cases where, even though the party has standing on that basis, the ultimate conclusion of the Court would require some degree of interpretation of the challenged measure, even if the constitutional challenge is run on a hypothetical basis.

91. In the special circumstances of this case, which include the fact that the appellant has a terminal illness and is facing imminent death, and that she asserts a right to be assisted to commit suicide, which she submits she cannot do because of s. 2(2) of the Act of 1993, the Court is satisfied that the appellant has *locus standi*.

Presumption of Constitutionality

92. The provisions of s. 2(2) of the Act of 1993, like all acts of the Oireachtas, and, in accordance with a principle applied consistently since the entry into force of the Constitution, enjoys a presumption of constitutionality. In a dictum, approved by this Court in its judgment in *Curtin v Dáil Éireann* [2006] IESC 14, [2006] 2 I.R. 556 at page 620, Hanna J said in *Pigs Marketing Board v. Donnelly (Dublin) Ltd.* [1939] I.R. 413, at p. 417:

> "When the Court has to consider the constitutionality of a law it must, in the first place, be accepted as an axiom that a law passed by the Oireachtas, the elected

> representatives of the people, is presumed to be constitutional unless and until the contrary is clearly established."

93. In the following year, this Court in delivering its opinion, *per* O'Sullivan C.J., *In re Article 26 of the Constitution and the Offences against the State (Amendment) Bill* [1940] IR 470 held at 478 that:

> "Where any particular law is not expressly prohibited and it is sought to establish that it is repugnant to the Constitution by reason of some implied prohibition or repugancy, we are of opinion, as a matter of construction, that such repugnancy must be clearly established."

94. O'Byrne J., delivering the judgment of the Court in *Buckley and others (Sinn Féin) v. Attorney General and Another* [1950] I.R. 67, at p. 80 repeated the principle but explained:

> "Such a principle, in our opinion, springs from, and is necessitated by, that respect which one great organ of the State owes to another."

95. The presumption may be regarded as having particular force in cases where the legislature is concerned with the implementation of public policy in respect of sensitive matters of social or moral policy. In *MD (a minor) v. Ireland and Ors*, [2012] IESC 10, (Judgment of the Court by Denham C.J. of the 23rd February, 2012), the Court considered a challenge to the constitutionality of s. 5 of the Criminal Law (Sexual Offences) Act, 2006, insofar as it criminalised sexual behaviour by boys but not by girls. The State justified the legislation by reference to the social policy of protecting young girls from pregnancy. Denham C.J. said, when delivering the judgment of the Court:-

> "This was a choice of the Oireachtas. Even in a time of social change, it is a policy within the power of the legislature. The issue of under age sexual activities by young persons involves complex social issues which are appropriately determined by the Oireachtas, which makes the determination as to how to maintain social order. The Oireachtas could have applied a different social policy. But s. 5, the policy which they did adopt, was within the discretion of the Oireachtas, and it was on an objective basis, and was not arbitrary."

96. The Court accepts the submission made by the first and second-named respondents that the legislation in question called for a careful assessment of competing and complex social and moral considerations. That is an assessment which legislative branches of government are uniquely well placed to undertake. The Court approaches the challenge to the constitutionality of s. 2(2) of the Act of 1993 in the light of these considerations.

Not a crime

97. While suicide has ceased to be a crime, the fact that it has so ceased does not establish a constitutional right. The repeal of the common law offence of suicide means that it is now legally open to a person to do this act which was previously prohibited.

98. Any such right as the appellant seeks to identify would require to be found in the Constitution.

Is there a Constitutional Right?

99. There is no explicit right to commit suicide, or to determine the time of one's death, in the Constitution.

100. Thus, any such right as is argued for by the appellant has to be found as part of another expressed right or in an unenumerated right.

101. It was a matter for the appellant to identify a constitutional right which she alleges has been breached by s. 2(2) of the Act of 1993. Only after the Court is satisfied that a constitutional right exists, does the principle of proportionality arise.

102. Thus, it was for the appellant to identify a right to commit suicide, a right to determine the time and method of death, and to have assistance with the exercise of that right, within the Constitution.

103. The appellant referred to several rights under the Constitution, and stress was laid on Article 40.3. Article 40.3.1° provides:-

> "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

and Article 40.3.2° states:-

> "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen."

104. Thus, the appellant laid the foundation of her case on the express right to life in Article 40.3.2. However, that right to life does not import a right to die. In *In Re a Ward (withholding medical treatment) (No. 2*) [1996] 2 I.R. 79 at 124 Hamilton C.J. stated:-

> "As the process of dying is part, and an ultimate inevitable consequence, of life, the right to life necessarily implies the right to have nature take its course and to die a natural death and, unless the individual concerned so wishes, not to have life artificially maintained by the provision of nourishment by abnormal artificial means, which have no curative effect and which is intended merely to prolong life.
>
> This right, as so defined, does not include the right to have life terminated or death accelerated and is confined to the natural process of dying. No person has the right to terminate or to have terminated his or her life or to accelerate or have accelerated his or her life."

105. That case decided that the right to life extended to a right to die a natural death or let nature take its course. While at the extremity of any principle distinctions may be fine, nevertheless a competent patient who refuses treatment is making a decision as to how to live the reminder of his or her life even when death results. That case did not decide, therefore, that there was a right to terminate life or a right to have it terminated. While the words of Hamilton C.J. stating positively that no person has a right to have his or her life terminated were strictly *obiter*, they are a persuasive authority on the analysis of a right to life under the Constitution.

106. There can be no doubt but that Article 40.3.2 imposes a positive obligation on the State to protect life. That the obligation on the State to protect life is an important constitutional principle cannot, equally, be doubted. The precise extent of the State's obligation in any given circumstance is, however, a matter which may require careful analysis and, at least in some cases, require a careful balancing of other constitutional considerations.

107. It may well be, therefore, that as part of its obligation to vindicate the right to life, the State is required to seek to discourage suicide generally and to adopt measures designed to that end. It does not, however, necessarily follow that the State has an obligation to use all of the means at its disposal to seek to prevent a person in a position such as that of the appellant from bringing her own life to an end. The problem which the facts of this case throws up is that it may be impossible to consider the position of the appellant without also having regard to the position of other persons, not necessarily in exactly the same position as the appellant, whose right to life may also have to be taken into account. The State is left, therefore, with difficult questions of policy involving complex issues both of principle and of practicality

108. Nothing in this judgment should be taken as necessarily implying that it would not be open to the State, in the event that the Oireachtas were satisfied that measures with appropriate safeguards could be introduced, to legislate to deal with a case such as that of the appellant. If such legislation was introduced it would be for the courts to determine whether the balancing by the Oireachtas of any legitimate concerns was within the boundaries of what was constitutionally permissible. Any such consideration would, necessarily, have to pay appropriate regard to the assessment made by the Oireachtas both of any competing interests and the practicability of any measures thus introduced.

Enumerated and Unenumerated Rights

109. While relying on Article 40.3 the appellant also made wider claims that s. 2(2) of the Act of 1993 infringed her constitutional rights both enumerated and unenumerated, in particular, her right to personal and bodily autonomy and self determination: specifically her right to make and carry out decisions about her own life including death; her right to privacy, her right to live (including her right to die), her right to be held equal with other citizens before the law. Mr Brian Murray, SC, for the appellant in opening the appeal, submitted every person has a right of autonomy including a right of self-determination resulting in a right to determine the timing and means of his or her own death. He submitted that the right to determine the course of one's own life extends to the right to determine the timely manner of its end.

110. The appellant has not sought to identify any unenumerated right other than such as flows from the respect for and protection of life and of the person within the terms of Article 40.3. Within that context however the appellant invokes constitutional values of autonomy, self-determination and dignity. It is undoubted that the Constitution recognises and respects these general values in the rights protected by it. It does not follow, and it is not claimed, however, that every law which impinges on the life of individuals is even *prima facie* inconsistent with the Constitution. Whether therefore values of autonomy, self-determination and dignity, as they find expression in the rights guaranteed by the Constitution, provide constitutional protection for the performance of specific acts depends on a concrete analysis of the impact of any law which is impugned in a particular case on the life of the individual, and a careful consideration of the provisions of the Constitution and the values its protects in the rights it guarantees.

111. In the absence of a specific authority the appellant's arguments depend on general principle. Most notably the appellant relied on the well-known passage in the dissenting judgment of Henchy J in *Norris v The Attorney General* [1984] IR 36. That case involved

a challenge to the provisions of s.61 and s.62 of the Offences Against the Person Act 1861 which had the effect of making criminal sexual acts carried out between consenting male adults. A principal ground of challenge was the assertion that the provisions were an impermissible invasion of a personal right of privacy. Henchy J said at pp. 71 to 72:-

> "That a right of privacy inheres in each citizen by virtue of his human personality, and that such right is constitutionally guaranteed as one of the unspecified personal rights comprehended by Article 40, s. 3, are propositions that are well attested by previous decisions of this Court. What requires to be decided – and this seems to me to be the essence of this case – is whether that right of privacy, construed in the context of the Constitution as a whole and given its true evaluation or standing in the hierarchy of constitutional priorities, excludes as constitutionally inconsistent the impugned statutory provisions.
>
> Having regard to the purposive Christian ethos of the Constitution, particularly as set out in the preamble ('to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations'), to the denomination of the State as 'sovereign, independent, democratic' in Article 5, and to the recognition, expressly or by necessary implication, of particular personal rights, such recognition being frequently hedged in by overriding requirements such as 'public order and morality' or 'the authority of the State' or 'the exigencies of the common good', there is necessarily given to the citizen, within the required social, political and moral framework, such a range of personal freedoms or immunities as are necessary to ensure his dignity and freedom as an individual in the type of society envisaged. The essence of those rights is that they inhere in the individual personality of the citizen in his capacity as a vital human component of the social, political and moral order posited by the Constitution.
>
> Amongst those basic personal rights is a complex of rights which vary in nature, purpose and range (each necessarily being a facet of the citizen's core of individuality within the constitutional order) and which may be compendiously referred to as the right of privacy. An express recognition of such a right

> is the guarantee in Article 16, s. 1, sub-s. 4, that voting in elections for Dáil Éireann shall be by secret ballot. A constitutional right to marital privacy was recognized and implemented by this Court in *McGee v. The Attorney General* [1974] I.R. 284; the right there claimed and recognized being, in effect, the right of a married woman to use contraceptives, which is something which at present is declared to be morally wrong according to the official teaching of the Church to which about 95% of the citizens belong. There are many other aspects of the right of privacy, some yet to be given judicial recognition. It is unnecessary for the purpose of this case to explore them. It is sufficient to say that they would all appear to fall within a secluded area of activity or non-activity which may be claimed as necessary for the expression of an individual personality, for purposes not always necessarily moral or commendable, but meriting recognition in circumstances which do not engender considerations such as State security, public order or morality, or other essential components of the common good."

112. This passage echoes a central portion of the same judge's judgment in *McGee v The Attorney General* [1974] IR 284 at 325:

> "As has been held in a number of cases, the unspecified personal rights guaranteed by sub-s. 1 of s. 3 of Article 40 are not confined to those specified in sub-s. 2 of that section. It is for the Courts to decide in a particular case whether the right relied on comes within the constitutional guarantee. To do so, it must be shown that it is a right that inheres in the citizen in question by virtue of his human personality. The lack of precision in this test is reduced when sub-s. 1 of s. 3 of Article 40 is read (as it must be) in the light of the Constitution as a whole and, in particular, in the light of what the Constitution, expressly or by necessary implication, deems to be fundamental to the personal standing of the individual in question in the context of the social order envisaged by the Constitution. The infinite variety in the relationships between the citizen and his fellows and between the citizen and the State makes an exhaustive enumeration of the guaranteed rights difficult, if not impossible."

113. These comments provide valuable guidance. Even so, as Henchy J recognised, the test for the identification of an unenumerated right, or the determination of the extent of an enumerated right, is a test necessarily lacking in precision, and there are irreducible areas of choice. It is all the more important therefore that the reasoning be as explicit as possible. The approach that any right inheres in a citizen by virtue of his or her

personality and should be fundamental to the personal standing of the individual in the context of the social order envisaged by the Constitution provides a useful structure and focus for analysis. Here, while the Constitution does not expressly refer to any right similar to those asserted on behalf of the appellant, it does by Article 40.3.2° commit the State to protect and vindicate the life and person of every citizen. Can it be said that the right to life as so guaranteed, whether on its own or in conjunction with the guarantee of the protection of the person, necessarily implies as a corollary, the right of every citizen to terminate his or her life and to have assistance in so doing? At the level of abstract reasoning it is of course possible to argue that if a citizen has a right to life that must comprehend abandoning or terminating it. It is also possible to construct a libertarian argument that the State is not entitled to interfere with the decisions made by a person in respect of his or her own life up to and including a decision to terminate it. However, it is not possible to discern support for such a theory in the provisions of the Constitution, without imposing upon it a philosophy and values not detectable from it. A right which extends to the termination of life must, as counsel for the appellant recognised in closing submissions, necessarily extend to a right to have life terminated by a third party in a case of total incapacity.. The concept of autonomy which extends not just to an entitlement, but to a positive right to terminate life and to have assistance in so doing, would necessarily imply a very extensive area of decision in relation to activity which is put, at least *prima facie*, beyond regulation by the State . When it is considered that recognition of such a right implies correlative duties on the State and others to defend and vindicate that right (and which must necessarily restrict those parties' freedom of action), it is apparent that the right contended for by the appellant would sweep very far indeed. It cannot properly be said that such an extensive right or rights is fundamental to the personal standing of the individual in question in the context of the social order envisaged by the Constitution. The right to life which the State is obliged to vindicate, is a right which implies that a citizen is living as a vital human component in the social, political and moral order posited by the Constitution. While it may be said that it is of the essence of certain types of rights, such as that of the right to associate, that they logically apply as a corollary a right to dissociate, that reasoning cannot be applied to all rights guaranteed by the Constitution. In particular the protection of the right to life cannot necessarily or logically entail a right, which the State must also respect and vindicate, to terminate that life or have it terminated. In the social order contemplated by the Constitution, and the values reflected in it, that would be the antithesis of the right rather than the logical consequence of it.

114. Thus, insofar as the Constitution, in the rights it guarantees, embodies the values of autonomy and dignity and more importantly the rights in which they find expression, do not extend to a right of assisted suicide. Accordingly the Court concludes that there is no constitutional right which the State, including the courts, must protect and vindicate, either to commit suicide, or to arrange for the termination of one's life at a time of one's choosing.

115. In general, the Constitution guarantees rights of general application for the benefit of every citizen and person entitled to assert such rights. The Court accordingly does not accept the submission that there exists a constitutional right for a limited class of persons, which in this case would include the appellant, deducible from their particular personal circumstances. While it is clear that the appellant is in a most tragic situation, a Court has to find and protect constitutional rights anchored in the Constitution. The appellant relies understandably on her very distressing situation as giving rise to a right in her very particular situation to have assistance in the termination of her life. That reasoning reverses, however, the process of identification of the extent of rights of general application and risks converting the question of the identification of rights and correlative duties , into an ad hoc decision on the individual case. It has not generally been the jurisprudence of the Irish Constitution that rights can be identified for a limited group of persons in particular circumstances no matter how tragic and heartrending they may be.

Equality or Discrimination: Article 40.1

116. The appellant alleged that s. 2(2) of the Act of 1993 has the effect that she is treated unequally in comparison with persons who are able to commit suicide without assistance and is thus incompatible with Article 40, section 1 of the Constitution.

117. Article 40, section 1 provides:

> "All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

118. The appellant claims that s. 2(2) of the Act of 1993 infringes her constitutional right to be held equal with other citizens before the law. It is alleged is that s. 2(2) brings about discrimination between persons wishing to end their own lives as between able-bodied persons and disabled persons inflicted with painful terminal illness.

119. The High Court, in its judgment, spoke of the commitment to equality of treatment in Article 40.1 as"a normative statement of high moral value." The Court was

> "prepared to allow that inasmuch as the 1993 Act failed to make separate provision for persons in the plaintiff's position by creating no exception to take account of the physical disability which prevents the plaintiff taking the steps which the able bodied could take, the precept of equality in Article 40.1 <u>is here engaged</u>."
>
> [emphasis added]

It proceeded to hold, for the same reasons as it had given in respect of the appellant's claim based on Article 40.3.2°, that:-

> "this differential treatment is amply justified by the range of factors bearing on the necessity to safeguard the lives of others which we have already set out at some length."

120. In effect, the High Court assumed, without deciding, that the failure of the Oireachtas to make separate provision in s. 2(2) of the Act by creating an exception to "take account of the physical disability which prevents the plaintiff taking the steps which the able bodied could take…" to commit suicide amounted to unequal treatment.

121. The appellant argued before this Court that "when applied to persons with terminal illnesses who are suffering considerable pain, or who, like the appellant, face continuing physical deterioration to the point which they may become "locked in", the provision has the effect of denying only disabled members of that class the opportunity to put into effect a choice, which in those circumstances may be entirely reasonable, to end their lives." Her counsel submitted that the High Court was in error in accepting the justification offered.

122. At the hearing of the appeal, counsel for the appellant adopted the submissions made by counsel for the Commission.

123. Counsel for the Commission submitted that inequality of treatment flowed from the decriminalisation by s. 2(1) of the act of suicide. Article 40.1 imposes a free-standing obligation and does not depend on the existence of a right. Counsel argued that s. 2(2), though neutral on its face, creates an indirect discrimination. It bears more heavily on some persons than on others. Counsel accepted that it was not possible to cite any authority on the interpretation of Article 40.1 which extends the principle of equal treatment before the law to indirect discrimination of the type alleged in the present case. Mention was made of the *obiter dictum* of Hamilton C.J in *In re a Ward, at 126*, where, responding to a submission that it was not open to any person to exercise on behalf of the ward her right to forgo medical treatment, to the effect that "[…] the ward, by virtue of her incapacity, would be deprived of the opportunity to exercise, or to have exercised on her behalf, a right enjoyed by other citizens of the State."

124. Counsel for the Commission relied essentially on the decision of Lynn Smith J. in *Carter v. Canada* [2012] BCSC 886. Section 15(1) of the Canadian Charter of Rights and Freedoms provides:

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national origin, colour, religion, sex, age, or mental or physical disability."

125. Lynn Smith J. was of the view that the prohibition of assisted suicide in s. 241 (b) of the Canadian Criminal Code had "a more burdensome effect on persons with physical disabilities than on others." She was satisfied that "the absolute prohibition against assisted suicide create[d] a distinction based on the enumerated ground of physical disability." She also found this distinction to be discriminatory. Her conclusion was based on an analysis, following Canadian jurisprudence, of the substantive effects, even indirect, of the law. To a significant extent, she followed the dissenting judgment of Lamar C.J. in *Rodriguez v British Columbia* [1993] 3 SCR 519.

126. Counsel for the first and second named respondents relied on the decision of this Court in *MD (a minor) v Ireland* [2012] IESC 10. They submit that, as in that case, the adoption by the Oireachtas of s. 2(2) of the Act of 1993 can reasonably be described as legislation on a matter of social policy, and on "an issue in society to which the legislature had to respond."

127. This Court most recently considered the application of Article 40.1 of the Constitution in its judgment in MD (a minor) v Ireland. The Court there laid emphasis on the fundamental importance of equality in the Constitution. The Court stated that:

> "Equality is among the highest and noblest aspirations included in the Constitution of every modern state."

And that:

> "The central principle of the Article rests, firstly, on the common humanity which we all share and, secondly, on the general understanding that for the State to pass a law which treats people, who are objectively in the same situation vis-à-vis the law, unequally, is an affront to fundamental ideas of justice and even to rationality."

128. As is also emphasised in that judgment, the concrete application of the principle of equality before the law is not always a simple matter. It is, as Barrington J. observed in *Brennan v Attorney General* [1983] ILRM 449 at 479, one of the most elusive concepts in the Constitution . The introduction of the guarantee of equality before the law was a significant innovation in 1937; there was no comparable provision in the Free State Constitution 1922. The concept of equality is also to be found elsewhere in the Constitution, for example in those specific provisions dealing with citizenship ( Article 9.1.3 ) voting (Article 16.1.3) and freedom of association and assembly (Article 40.6.2) . An important guide to the understanding of Article 40.1 is contained in the following passage in the judgment of Walsh J. in *Quinn's Supermarket v Attorney General* [1972] IR 1 at 13 to 14:-

> "Article 40 s.1… is not a guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and ( as the Irish text of the constitution makes quite clear) is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or other ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community."

129. If a law makes a distinction on its face between citizens, it may be necessary, depending on its context, to inquire into its justification. The justification for the application of a law to a particular category of persons may be obvious. Where a law is concerned with the regulation of a particular type of economic or other activity, it will necessarily be framed so as to apply only to people carrying on the activity in question. Even then, it may in principle be possible to show that the category of persons regulated is unfairly over or under inclusive. It may be unfairly targeted against one class of persons.

130. More generally, a law will be closely scrutinised if it classifies people by reference to such classes as race, religion, gender or nationality. These are categories, where as a matter of history, it is possible to detect the operation of conscious or unconscious prejudice. In *An Blascaod Mór Teo. v Commissioners of Public Works* [2000] 1 I.R. 6, the law exempted from statutory powers of compulsory acquisition persons who had been ordinarily resident on the Great Blasket Island on and after a prescribed date and their relatives. Barrington J, delivering the judgment of the Court at p. 19 found it difficult to see what legitimate purpose that classification served. He added: "It is based on a principle – that of pedigree – which appears to have no place (outside the law of succession) in a democratic society committed to the principle of equality." In *de Burca and Anderson v Attorney General* [1976] IR 38 two members of the Supreme Court considered that the exclusion of women from mandatory jury duty was an impermissible discrimination on the basis of gender. However, as the case of *MD (a minor) v Ireland & Ors* shows, a distinction based on gender may be so closely related to the very nature of gender difference that it is justified. Classification by reference to age or disability may be suspect or may be easily explained. Benefits granted by reference to age or disability may be easy to justify.

131. In any event, classifications of the sort discussed thus far appear on the face of the law. If there is discrimination it is direct. Discrimination may be shown if the class of persons or of activity chosen is formulated unfairly to include or exclude. If the

classification is motivated by a discriminatory intent or reveals a prejudice then a classification, though apparently neutral, may be impermissible. Few examples, if any, of this are to be found in modern legislation.

132. It is argued that there can also be indirect discrimination without an impermissible discriminatory motive when the effect of a law bears more heavily on one person than on another. One rare example, of indirect discrimination, may be the High Court decision in *Brennan & ors v Attorney General* [1983] I.L.R.M. 449. A group of farmers complained that the system of fixing rateable valuation of agricultural land, which, at that time, was still based on the Griffith Valuation of 1849 to 1852, was unconstitutional as constituting an invidious attack on their property rights by reference to Article 43 of the Constitution, but also that it constituted an arbitrary and unjust discrimination against them contrary to Article 40.1. Barrington J, in the High Court held in their favour but while the decision itself was upheld by this Court on the property rights grounds, the Article 40.1 decision was overturned, which was sufficient for its decision.

133. Section 2 does not come easily within any of these categories. It is neutral on its face; it applies equally to everybody. No one who commits suicide commits a crime. Any person, without any distinction, who aids, abets, counsels or procures another person to commit suicide, commits an offence. It is not possible for anyone to complain of unequal treatment on the ground that he or she will commit a criminal act by assisting the suicide of another person. The appellant does not claim that she is herself directly affected by s. 2(2). It is difficult to succeed in an equality challenge to a law which applies to everyone without distinction, and which is based on the fundamental equal value of each human life. It is often the case that neutral laws will affect individuals in different ways: in the absence of impact on a fundamental right that does not normally give rise to any unconstitutionality.

134. The appellant does complain that s. 2(2) affects her by making it difficult or impossible for her to end her own life, because she cannot perform the final suicidal act without assistance. In this she says that she is differently situated from an able-bodied person, a person who does not need assistance. Assuming for present purposes that such a complaint may give rise to a claim under Art. 40.1, this effect does not, of course, result from the provisions of the law, which applies equally to everybody wishing to commit suicide. Since the enactment of s. 2(1) of the Act, everyone is free to do so. What prevents the appellant from committing suicide is, on her own evidence, the fact of her disability. The appellant was able to avail of s. 2(1) for some time: when she lost that ability it was not through operation of any law before which she is required to be held equal, but the fact of her condition.

135. Consequently, the appellant's argument requires further refinement. The appellant is constrained to argue that the Oireachtas was obliged, when adopting s. 2(2) to provide an exception. The High Court described that as a failure "to make separate provision for persons in the plaintiff's position by creating no exception to take account of the physical disability which prevents the plaintiff taking the steps which the able bodied could take…" However, the exception would need to go further. It would need to introduce a distinction into an otherwise neutrally expressed provision so that the offence would not be committed by a person aiding or abetting the suicide of a person in the same circumstances as the appellant. The substance of the appellant's complaint concerns, in the first instance, not the treatment of the appellant herself but the treatment of other persons. It is that the legislature treats her unequally before the law by failing to include a distinction in a facially neutral statutory provision addressed to those other persons, which, she claims, indirectly affects her. The Court is invited to follow the Canadian example by interpreting Article 40.1 as requiring the courts to engage in an effects-based analysis of laws passed by the Oireachtas.

136. The Court does not consider that the constitutional principle of equal treatment before the law, as interpreted and applied in its judgments, extends to categorise as unequal the differential indirect effects on a person of an objectively neutral law addressed to persons other than that person. This is particularly so when the prohibition contained in section 2(2) is at least ostensibly a performance of the constitutional obligation contained in Art. 40.1 and pursues an important objective . As the Divisional Court observed, Articles 40.3 and 40.1 together "commit the State to valuing *equally* the life of *all* persons". While it may be open to the Oireachtas to consider making some distinction between persons, it cannot be said that any such distinction is required in this case by the Article 40.1 rights of the appellant.

Finding

137. The Court concludes that there is no constitutional right to commit suicide or to arrange for the determination of one's life at a time of one's choosing.

138. Thus, the appellant has no right which may be interfered with by any disability. As there is no right to commit suicide so issues, such as discrimination, do not arise; nor do values such as dignity, equality, or any other principle under the Constitution, apply to the situation and application of the appellant, as discussed above.

139. The Court rejects the submission that there exists a constitutional right for a limited class of persons, which would include the appellant. While it is clear that the appellant is in a most tragic situation, the Court has to find constitutional rights anchored in the Constitution. The appellant has relied on her very distressing situation on a fact based argument that the blanket ban affects her adversely. That is not a basis upon which a constitutional right may be identified. It has not been the jurisprudence of the Constitution that rights be identified for a limited group of persons.

Proportionality

140. As the court finds the appellant has no constitutional right to commit suicide, and so no right to assistance in the commission of suicide, the issue of the proportionality of any restriction of such a right does not arise for determination in this case. However, it should be noted that an argument was advanced, derived it appears from Canadian jurisprudence, suggesting that the court should approach the question by first determining in general whether a right existed, whereupon the onus shifted to the State to justify by evidence any limitation whatsoever on the general right asserted, by reference to the principle of proportionality. Furthermore, it was asserted that the Court was entitled, and indeed obliged, to decide whether, on the evidence adduced on the balance of probability, there was a compelling justification for the asserted limitation. It should be observed that there is no support in the jurisprudence of this Court for such an approach. Accordingly, this court expressly reserves for a case in which the issue properly and necessarily arises, and is the subject of focussed argument and express decision in the High Court, whether the approach to proportionality urged by the appellant, whether cumulatively, or any component part thereof, is required by ,or compatible with , the Constitution.

The European Convention on Human Rights

141. The appellant brought a claim also for a declaration of incompatibility under s. 5(1) of the European Convention on Human Rights Act, 2003, which the High Court rejected.

142. In the Notice of Appeal it was claimed that the High Court erred:-

> (i) In failing to determine whether Article 8 of the European Convention on Human Rights was engaged in all

> the circumstances of the appellant's case;
>
> (ii) in failing to determine whether Article 14 of the European Convention on Human Rights was engaged in all the circumstances of the appellant's case; and
>
> (iii) in failing to determine that the Act of 1993, insofar as it fails to allow for such an exception as claimed by the appellant, fails the requirements of legal certainty and justification to come within paragraph (2) of Article 8 of the said Convention.

143. The High Court pointed out, correctly, that the Convention does not have direct effect in this jurisdiction. The Act of 2003 requires the Court "insofar as is possible, subject to the rules of law relating to such interpretation and application" to interpret a statutory provision or rule of law in a manner compatible with the Convention.

144. The Court found assistance in *Pretty v. United Kingdom*, (Application No. 2346/02) which was decided by the European Court of Human Rights, referred to as the EctHR. In that case a 43-year-old woman suffering from a degenerative and incurable illness, known as motor neuron disease, alleged that the prohibition on assisted suicide contained in s.2 of the Suicide Act 1961 in the United Kingdom, and the refusal of the Director of Public Prosecutions to grant her husband immunity from prosecution if he were to assist her in committing suicide, violated her rights guaranteed under articles 2,3,8,9 and 14 of the Convention. The European Court of Human Rights, upholding the decision of the House of Lords, found that there had been no violation of the Convention by the respondent State.

145. The ECtHR affirmed that article 2 "safeguards the right to life, without which enjoyment of any of the other rights and freedoms in the Convention is rendered nugatory." The EctHR held that although article 2 places a positive obligation on Member States to protect life, it was not satisfied that a corresponding negative aspect could be interpreted from the article. Rather, the EctHR held, at para. 39:

> "[Article 2] is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life… [It] cannot, without a distortion of language, be interpreted as conferring the diametrically opposing right, namely a right to die; nor can it create a right to self- determination in the sense of conferring on an individual the entitlement to choose death rather than life."
>
> [Emphasis added.]

It was held by the EctHR that no right to die, whether at the hands of a third party or with the assistance of a public authority, could be derived from article 2 of the Convention.

146. The EctHR found that it was “beyond dispute” that the respondent State had not, itself, inflicted any ill-treatment on the applicant. Further, it was satisfied that the EctHR would be giving “a new and extended construction on the concept of treatment” which went “beyond the ordinary meaning of the word,” if it were to find that the statutory prohibition on assisted suicide, and the failure of the DPP to provide immunity from prosecution constituted inhuman and degrading treatment in violation of article 3. The EctHR held that if it were to afford such a construction to “treatment”, the positive nature of the obligation under article 3 would, in turn, require the State to sanction actions intended to terminate life. It was held that article 3 must be construed in harmony with article 2 and accordingly, such an obligation could not be derived from the Convention.

147. The applicant contended that the right to self-determination, encompassing the right to choose when and how to die, was “most explicitly recognised and guaranteed” under article 8 of the Convention. It was with this argument that the EctHR found the most favour and asserted that:

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

148. The EctHR continued to make the finding at para. 67 that:

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

149. It was then considered by the EctHR whether such interference was capable of justification under article 8(2) of the Convention. Satisfied that the interference was in accordance with the law, and sought to achieve the legitimate aim of safeguarding life by protecting the weak and vulnerable, the EctHR considered whether the interference was “necessary in a democratic society.” In doing so, the EctHR referred to the margin of appreciation afforded to Member States for conformity with the requirements of the Convention, and stated that “[t]he margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests of stake.” The EctHR found that States are entitled to regulate, through the operation of the criminal law, activities which are detrimental to the life and safety of other individuals and held that “[t]he more serious the harm involved the more heavily will weigh in the balance considerations of public health and safety against the countervailing principle of personal autonomy.” The EctHR, again, emphasised the wide margin of appreciation enjoyed by Member States and found that:

> "It is primarily for States to assess the risk and likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created. Clear risks of abuse do exist, notwithstanding arguments as to the possibility of safeguards and protective procedures." [Para. 74, emphasis added.]

150. Taking this into account, the EctHR held that the blanket ban on assisted suicide contained in s.2 of the Act of 1961 was proportionate and that:

> "It does not appear to be arbitrary to the Court for the law to reflect the importance of the right to life, by prohibiting assisted suicide while providing for a system of enforcement and adjudication which allows due regard to be given in each particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence." [Para.76]

151. In relation to the decision of the DPP not to grant the applicant's husband immunity from prosecution under the impugned provision should he assist her in the act of suicide, the EctHR was satisfied that "the seriousness of the act for which immunity was claimed" meant that the refusal could not be said to be "arbitrary or unreasonable."

152. The EctHR concluded that the interference of the applicant's rights under article 8 may be justified as "necessary in a democratic society" for the protection of the rights of others.

153. This judgment of the EctHR on the Convention and the issue of assisted suicide was of assistance to the Court, especially as the statutory formulation of s. 2(2) of the Act of 1993 is similar to the statutory law of the United Kingdom at that time.

154. The Court also gave careful consideration to *Haas v. Switzerland* (Application No. 31322/07).

155. The applicant in *Haas v. Switzerland* had been suffering from serious bipolar affective disorder for a period of 20 years and wished to obtain access to a lethal substance, sodium pentobarbital, which taken in a sufficient quantity would enable him "the only dignified, certain, rapid and pain free method of committing suicide." [Para.33] This substance, however, was only available on prescription in the respondent State.

156. Relying on Article 8 of the Convention, the applicant complained that his right to decide how and when to end his life had been breached by the obligation placed upon him to submit a medical prescription in order to obtain the substance necessary for suicide.

157. The decision of the Swiss Federal Court holding that there was no obligation on the State under article 8 of the Convention to issue, without medical prescription, sodium pentobarbital to persons who wish to end their lives or to organisations for assisted suicide was upheld by the European Court of Human Rights in *Haas v. Switzerland* (Application no. 31322/07). The Court found that the applicant's right to decide how and when to end his life had not been breached by the requirement to submit a medical prescription in order to obtain the lethal substance and accordingly, there had been no violation of article 8.

158. Referring to its earlier decision in *Pretty*, the Court held at para. 51 that:

> "an individual's right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting in consequence, is one of the aspects of the right to respect for private life within the meaning of [a]rticle 8 of the Convention."

The instant case was distinguished from *Pretty* however, as *Haas* considered whether there is an obligation on a State to ensure that a person can obtain a lethal substance in order to commit suicide, as opposed to the freedom to die. Further, the applicant in *Haas*, although suffering from serious bipolar affective disorder for a period of approximately twenty years, was not at the terminal stage of an incurable degenerative disease which prevented him from taking his own life.

159. The alleged violation of article 8 was examined from the perspective that there was a positive obligation on Member States to take the necessary measures to permit a dignified suicide. This, the Court held, "presupposes a weighing of the different interests at stake, an exercise in which the State is recognised as enjoying a certain margin of appreciation which varies in accordance with the nature of the issues and the importance of the interests at stake." In this area, it was determined that Member States enjoy a considerable margin of appreciation and the vast majority of States attach "more weight to the protection of the individual's life than to his or her right to terminate it."

160. The Court considered the positive obligation placed on Member States by article 2, namely, to prevent an individual from taking his or her own life if the decision has not been taken freely and with full understanding of what is involved. The restriction on access to the lethal substance, by the requirement to obtain a medical prescription, was found to pursue the legitimate aims of the prevention of crime and the protection of public health and safety. Further, the Court determined that the risks inherent in a system that facilitates access to assisted suicide "should not be underestimated" and that in such systems strict regulations are "all the more necessary." The Court concluded at para. 61 of its judgment that:

> "Having regard to the foregoing and to the margin of appreciation enjoyed by the national authorities in such a case, the Court considers that, even assuming that the States have a positive obligation to adopt measures to facilitate the act of suicide with dignity, the Swiss authorities have not failed to comply with this obligation in the instant case."

161. The appellant brought a claim under the Act of 2003, section 2 which provides:-

> "(1) In interpreting and applying any statutory provision or rule of law, a court shall, insofar as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the convention provisions.
>
> (2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter."

162. The Act of 2003 makes provision for the Court to grant a declaration of incompatibility. Section 5(1) provides:-

> "In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2 , on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as "a declaration of incompatibility") that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions."

163. In this claim brought by the appellant, for a declaration of incompatibility of s. 2(2) of the Act of 1993, this Court has considered carefully the jurisprudence of the ECtHR. It is apparent that this appeal is similar to the case of *Pretty v. United Kingdom* (Application No. 2346.02), where it was decided that States are entitled to regulate activities which are detrimental to the life and safety of persons. The ECtHR held that it was primarily for the States to assess the risk and likely incidence of abuse if the general prohibition on assisted suicides were relaxed, or if exceptions were to be made.

164. The complex issue of assisted suicide has been assessed, and the legislature has legislated on the issue in s. 2(2) of the Act of 1993.

165. The Court would, consequently, dismiss the appeal which has been brought on the basis of s. 5 of the Act of 2003, seeking a declaration of incompatibility.

Conclusion

166. In conclusion, for the reasons given, the Court would dismiss the appeal of the appellant in this very tragic case.