QUEEN'S UNIVERSITY BELFAST

INTERNATIONAL HUMAN RIGHTS DAY

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THE RIGHT TO LIFE – HUMAN RIGHTS AT BIRTH AND DEATH

[This address will consider Article 2 ECHR, The Conjoined Twins Case and issues concerning termination of pregnancy, medical prolongation of life , "mercy killing" and assisted suicide]

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I INTRODUCTION

[1] I am both pleased and honoured to accept the invitation of Professor Colin Harvey and Tom Obokata to address this audience. Today, being International Human Rights Day, this is an auspicious occasion indeed. I welcome, and thank, all members of the audience for their attendance.

[2] This year, International Human Rights Day coincides closely with another momentous date, namely the tenth anniversary of the Human Rights Act 1998. Today, a full decade after the commencement of its main provisions, some reflection on the achievements and influence of this statute of towering importance in our legal system and constitutional order is undoubtedly appropriate.

[3] I shall also offer some analysis and reflection on some of the more challenging and controversial issues which have occupied the courts in the field of human rights at birth and death. This is unquestionably an evolving subject, with further chapters still to be written in future cases.

[4] The launch date for the Human Rights Act 1998 ("*HRA 1998*"), 2nd October 2000, now seems a distant occurrence. While most judges and practitioners were aware that something was stirring, few dared to predict the impact which this seminal statute has unquestionably had. One infamous prediction was that it would provide a field day for crackpots. Others expressed themselves in more cautious and solemn terms. In one of the early decisions, the English Court of Appeal cautioned that HRA 1998 should not be deployed to escort the court "*down blind alleys*".[1] Within a mere three months of the commencement date, an intervention by one senior English judge sparked a debate about whether Convention rights have any similarity to "*iatrogenic disease*".[2] In a letter decision, the same judge categorised HRA 1998 as one of the "*constitutional statutes*", ranking it alongside Magna Carta, the Bill of Rights 1689, the Act of Union, the European Communities Act 1972 and the major constitutional devolution statutes of 1998 (The Scotland Act and others).[3]

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[1] ***Daniels –v- Walker*** [2000] 1 WLR 1382, pp. 1386-1387.

[2] Per Sir John Laws: ***R –v- Speers*** [2001] paragraph 54.

[3] Thorburn –v- Sunderland City Council [2003] 2 WLR 247 where, in the unpromising context of what his Lordship described as the "*dry enough subject*" of weights and measures legislation, one finds a pronouncement of some profundity:

"[62] …*In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental…And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.*"

[5] The legal community was awash with predictions that some of the newly incorporated ECHR rights would have a major influence – in particular Article 5 (Liberty), Article 6 (Fair Trial), Article 8 (Private and Family Life) and Article 10 (Freedom of Expression). There were confident expectations that these particular rights would dominate subsequent jurisprudence and exert a real and concrete influence on the lives of citizens. I apprehend that few would have predicted, however, that during the decade to follow major questions relating to birth and death would occupy both the European Court and the highest United Kingdom courts. That this has occurred illustrates the profound influence which ECHR rights, suitably buttressed by the admirable machinery of HRA 1998, have had in a newly evolving legal culture. Lord Woolf has suggested that the statute has profound constitutional significance, since underpinning it is the concept that in a democratic society, both governmental action and powers granted by Parliament are limited, the rationale being that "*… the recognition of the need to adhere to the rule of law by protecting human rights is essential to the proper functioning of democracy*".[4]

[6] HRA 1998 has been variously described as revolutionary, constitutional, historic and dynamic. All of these adjectives see apt. It is one of the most important measures of law reform in the history of the legal system. Arguably its greatest impact is that it does not belong to some isolated, hermetically sealed compartment of the law: rather, it applies to **all laws** – both legislation and the common law – in a dominant, pervasive and reforming manner. Since its introduction, this statute has become the barometer for testing the validity of all pre-existing and subsequently made laws, whether legislation or rules and principles of the common law. This very concise outline serves to convey the unmistakable impact which this statute has had on our legal system during its relatively brief lifespan of ten years.

[7] In the machinery established by HRA 1998, the courts occupy a central position. The courts feature in one of the earliest provisions of the statute, **Section 2**, which requires any court or tribunal "*… determining a question which has arisen in connection with a Convention right …*" to take into account any relevant decision, declaration or opinion of the three Strasbourg organs – the European Court of Human Rights, the Commission and (frequently overlooked) the Committee of Ministers, *insofar as relevant.* From this point of departure, the overarching role – and responsibility - of the courts features repeatedly: in **Section 3** (the requirement to construe all primary and subordinate legislation in a manner compatible with the convention rights, *so far as it is possible to do so*); **Section 4** (declarations of incompatibility); **Section 5** (intervention of the Crown in certain court proceedings); and, next, **Section 6**, which is really the fulcrum of the entire statutory regime:

> "*(1)* ***It is unlawful for a public authority to act in a way which is incompatible with a Convention right …***

[4] "Human Rights. Have the public benefited?" [2003] 121 Proceedings of the British Academy 301-303.

(3) In this Section 'public authority' includes –

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament'.

[My emphasis].

[8] By **Section 7**, the mechanism for the affected citizen to establish that a public authority has acted, or proposes to act, contrary to Section 6(1) is twofold:

(a) The citizen may bring proceedings against the authority under the Act in the appropriate court or tribunal; or

(b) He or she may rely on the Convention right concerned *in any legal proceedings*.

But the citizen's right to have recourse to either of these mechanisms arises "*… only if he is (or would be) a victim of the unlawful act*".

The "*appropriate court or tribunal*" is the Judicial Review Court limb of the High Court. If proceedings are brought before this court, **Section 8** becomes operative, as this regulates the topic of **judicial remedies**:

"*In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and equitable*".

In subsections (2) and (3), Parliament has imposed certain limitations on the power of the High Court to select an award of damages as the appropriate remedy: in short, where some other remedy (e.g. a declaration or a quashing order) is considered by the court to be adequate, damages will not be awarded.

[9] At this remove, it seems appropriate to bring to mind the centrality of the role occupied by the High Court in the HRA 1998 machinery. For many centuries, it has been the function of independent judges to adjudicate on disputes between citizens and disputes between citizens and the state. Historically, although appointed by the King, for the purpose of adjudicating on disputes between citizens, judges became increasingly independent. With the passage of time, judges progressively displayed the courage and integrity

required to resist the whims of despotic monarchs and to develop the common law in a way which can now be seen compatible with the fundamental rights of citizens. Some of these rights were initially enshrined in Magna Carta. Today, some of the leading HRA 1998 commentators and practitioners proudly boast about the clearly demonstrable links between the statute (on the one hand) and the common law dating from Magna Carta (on the other). The independence of judges was underwritten by Parliament in an important piece of legislation, the Act of Settlement 1700. Pursuant to this statute, judges held tenure of appointment for as long as they were of good behaviour and could be removed from office only pursuant to a resolution of both Houses of Parliament. I digress to observe that In the whole of English history, *no High Court judge has been removed from office***.** To return to the present context**,** it is worth recalling the long title of the Act of Settlement:

> "*An Act for the further limitation of the Crown* ***and better securing the rights and liberties of the subject***".

[My emphasis]

[10] I raise this topic fundamentally for the purpose of suggesting how appropriate it is that a truly independent judiciary should adjudicate on Convention rights issues. It furthers and nurtures the operation of the rule of law in society. The separation of powers means that there is an executive which governs society; an elected Parliament which legislates for society; and an independent judiciary which adjudicates upon disputes between citizens and public authorities. The adjudication of these disputes lies at the heart of HRA 1998. The function, and responsibility, of independent judges in the framework of the rule of law is encapsulated in what Lord Bingham said in 1996, appropriately in a human rights case :

> "[The court] *has the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power. While the court must properly defer to the expertise of responsible decision makers, it must not shrink from its fundamental duty to do right to all manner of people*".[5]

These are profound words indeed. They are also echoed in the following formulation:

> ""*The right to carry a dispute with the Government before the ordinary courts, manned by judges of the highest independence, is an important element in the Anglo-American concept of the rule of law*".[6]

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5 The Queen –v- Ministry of Defence, ex parte Smith [1996] QB 517, p. 556 (per Sir Thomas Bingham MR).

6 "Administrative Law" (Wade and Forsyth, 10th Edition, p. 19).

[11] Few would deny that the independence of the judiciary is a value of supreme importance throughout the developed world. Equally undeniable is the marriage of the rule of law and judicial independence: neither partner can survive without the other. At a recent conference, one of the most senior English judges offered the following formulation of judicial independence:

> "*In a democratic country all power, however exercised in the community, must be founded on the rule of law. Therefore each and every exercise of political power must be accountable not only to the electorate at the ballot box, when elections take place, but also and at all times to the rule of law. Independent professions protect it. Independent press and media protect it.* ***Ultimately, however, it is the judges who are guardians of the rule of law. That is their prime responsibility. They have a particular responsibility to protect the constitutional rights of each citizen as well as the integrity of the constitution by which those rights exist. The judge therefore cannot be out for popularity. He – or she – cannot please everyone. He should never try to please anyone. That includes the judge himself. He should never use his office to confirm his predilections or to allow his prejudices to gain some kind of spurious judicial respectability***".[7]

As a pre-requisite to appointment, every judge must pronounce an oath (or affirmation) whereby he undertakes –

> "*… that I will do right to all manner of people without fear or favour, affection or ill will according to the laws and usages of this realm".*

This is another facet of the rule of law. While judges administer the law, they are also primarily *accountable to* the law. Thus, properly understood, judicial independence is not some kind of privilege enjoyed by judges. Those who assert the contrary are mistaken. Judicial independence is a bedrock of our system of government in a democratic society and a safeguard of the freedoms and rights of the citizen under the rule of law. This requires judges to be independent of the legislative and executive arms of government – the constitutional doctrine of the separation of powers .

[12] The unwritten British constitution is firmly based on the separation of powers i.e. the separate of judicial power from executive power. The courts are the interface between the citizen and government. While many such

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[7] The words of the Rt. Hon. Lord Judge, Lord Chief Justice of England and Wales: 16th Commonwealth Law Conference, Hong Kong, 9th April 2009 – my emphasis.

disputes are now determined by specialised tribunals, these are subject to the control of the superior courts. Thus every citizen in dispute with the government has a constitutional right to bring such dispute before a court, where it will be determined by judges of the highest independence. This is the cornerstone of the HRA 1998 regime. The protection and promotion of Convention rights would be barren indeed in the absence of mechanisms for judicial adjudication.

Article 2 ECHR

[13] Under the deceptively simple banner "Right to Life", Article 2 ECHR states:

> "*1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
>
> *2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*
>
> *(a) in defence of any person from unlawful violence;*
> *(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
> *(c) in action lawfully taken for the purpose of quelling a riot or insurrection*".

Before examining the content and scope of this right in some discrete scenarios, it is appropriate to recall that it has been repeatedly described as basic, fundamental and supreme. In the language of the European Court, Article 2 "*… enshrines one of the basic values of the democratic societies making up the Council of Europe*".[8] Comparable pronouncements are found in the texts of the UN Human Rights Committee and the Inter-American Commission on Human Rights. Long before the advent of HRA 1998, the common law had recognised a person's right to life as "*the most fundamental of all rights*".[9] In the specific context of Article 2, the European Court has emphasized the well established principle that given the object and purpose of the Convention as an instrument for the protection of individual persons, it must be interpreted and applied in a manner which renders its safeguards practical and effective.[10] In equally uncompromising language, the European Court has stated that the circumstances in which the deprivation of life may be justified [per Article 2/2] must be strictly construed, given the fundamental

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[8] ***McCann –v- United Kingdom*** [1995] 21 EHRR 97, paragraph 147.
[9] ***Bugdaycay –v- Secretary of State for the Home Environment*** [1987] AC 514, at p. 531, per Lord Bridge.
[10] ***McCann***, paragraph 146.

nature of the right in play and the consideration that no derogation from Article 2 is permissible in peace time.[11]

[14] In these unavoidably limited reflections, I propose to focus on how, in a series of domestic and European decisions, Article 2 has been judicially interpreted and applied in three particular situations:

(a) Newly born children.

(b) Unborn children.

(c) Assisted suicide.

These three groups have featured prominently in certain landmark decisions of the United Kingdom and Strasbourg courts, particularly during the past decade.

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[11] See Article 15(2), permitting derogation in respect of deaths resulting from lawful acts of war. Notably , in ***Ocalan –v- Turkey*** [2005] 41 EHRR 45, the European Court held that the arbitrary deprivation of life pursuant to capital punishment laws *or* the deprivation of life pursuant to the execution of a sentence of a court which is not independent and impartial in the Article 6 ECHR sense would contravene Article 2: see paragraph 166.

II ARTICLE 2 ECHR – THE CONJOINED TWINS CASE

[15] It might be said, with the benefit of hindsight, that the legal community had a foretaste of the kind of dramatic issues which would later arise when, in the year 2000, ***Re A (Children) (Conjoined Twins)***[12] was decided. It is worth recalling that the hearing of the appeal in this emotional, compelling and highly challenging case was spread over several days in September 2000, with judgment pronounced on the 22nd day of that month. HRA 1998 was just around the corner. Unsurprisingly, Article 2 ECHR featured prominently in the written submissions of one of the intervening parties, Pro-Life Alliance.

[16] Jodie and Mary, the conjoined twins, rapidly became household names. They were less than two months old when the Court of Appeal pronounced judgment. They were joined at the lower abdomen. While Jodie was capable of independent existence, an operation to separate the girls would inevitably result in Mary's death, while probably preserving Jodie's life . Mary attributed her existence to a common artery, whereby Jodie circulated oxygenated blood for both of them. Absent the separation operation, both would die within a matter of months, as Jodie's heart would fail. The Trust's doctors formed the view that the operation should proceed. Only one of the girls could survive, if both were not to die: would the courts sanction life for one and death for the other? The girls' parents declined to consent, giving rise to an application to the court by the Trust for a declaratory order. The application succeeded at first instance and the appeal was dismissed.

[17] In the opinion of the Court of Appeal, the fundamental question was whether it was in the best interests of one twin that an operation be performed to separate her from the other, thereby preserving and extending the other's existence, in circumstances where the first twin would inevitably die in consequence. By a majority, the Court of Appeal answered this discrete question in the negative. Ultimately, this supremely difficult dilemma was resolved by resort to the welfare principle enshrined in Section 1(1) of the Children Act 1989. To what extent, if at all, did Article 2 ECHR influence the outcome of this landmark case? In short, in this moving and difficult case, the right to life enshrined in Article 2 ECHR did not operate to protect or preserve a newly-born baby's existence. On the contrary, it was construed as justifying the medical intervention which would terminate that existence, based on the justification that such termination would occur in any event, while the intervention would save the life of another child. Thus, on one view, the right to life of one baby trumped the right to life of the other. One can be reasonably confident that neither those who framed ECHR nor those who promoted and devised HRA 1998 foresaw this kind of sad, moving and highly complex matrix. In truth, the influence of Article 2 in the resolution of the issues which exercised the court was quite limited.

[18] A recent illustration of yet another "life or death?" case is provided by ***Re OT (a child)***[13]. In that case, a baby aged ten months was suffering from a

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12 [2000] 4 All ER 961.
13 [2009] ECWA. Civ 409.

mitochondrial condition. Various medical interventions had been undertaken to no avail. The Trust's physicians formed the view that these attempts would remain unsuccessful and, moreover, were causing the baby gratuitous pain. They sought a declaration from the court that they could lawfully discontinue the treatment, in circumstances where death would inevitably ensue. The judge acceded to their application. Interestingly, the case was (apparently) so clear cut that the Court of Appeal refused permission to appeal.

III HUMAN RIGHTS BEFORE BIRTH – TERMINATION OF PREGNANCY

[19] The decision in ***Paton –v- United Kingdom***[14] did not avail baby Mary in the Conjoined Twins case. ***Paton*** is one of the very small number of cases in which either of the Strasbourg organs (i.e. the Court and the Commission) has had to pronounce on the thorny and controversial issue of terminating a pregnancy. The subject matter of Mr. Paton's challenge was his wife's decision to have an abortion when eight weeks pregnant. In accordance with Section 1(1) of the Abortion Act 1967, two medical practitioners had certified that the continuance of the pregnancy would involve injury to the physical or mental health of his wife. The two had separated and she claimed to be living in fear of the Applicant and on the verge of a breakdown. An application by the father to the Family Division of the High Court for an injunction restraining the abortion was dismissed. The abortion was duly performed within hours of the High Court's decision.

[20] The Applicant subsequently brought a petition under Article 25 ECHR, invoking Articles 2, 5, 6, 8 and 9. The decision of the European Commission is noteworthy, for two reasons. Firstly, the Commission accepted that the Applicant, being the putative father, was so closely affected by the termination of his wife's pregnancy that he was a victim within the meaning of Article 25.[15] Secondly, the Commission held that no violation of Article 2 had been established. The Commission concluded that the unborn life of the foetus could not take priority over a serious risk to the life of the pregnant mother, as this would entail an implied limitation on **the mother's** right to life over and above the express limitations specified in Article 2. To hold otherwise would be contrary to the object and purpose of the Convention. Accordingly, at its zenith, if the foetus could claim a right to life under Article 2, this right would be subject to the aforementioned limitation. Regrettably, the Commission declined to supply a definitive answer to this question, reasoning and concluding as follows:

> "*[23] The Commission considers that it is not in these circumstances called upon to decide whether Article 2 does not cover the foetus at all or whether it recognises a 'right to life' of the foetus with implied limitations. It finds that the authorisation, by the United Kingdom authorities, of the abortion complained of is compatible with Article 2(1), first sentence because, if one assumes that this provision applies at the initial stage of the pregnancy, the abortion is covered by an implied limitation, protecting the life and health of the woman at that stage, of the 'right to life' of the foetus.*"

Thus the complaint was declared inadmissible as manifestly ill-founded. In the very small number of cases where these issues have arisen, the Commission

[14] [1981] 3 EHRR 408
[15] Paragraph 2.

has essentially reasoned and concluded in these qualified and unsatisfactory terms.[16]

[21] Some of these issues crystallized starkly before the European Court of Human Rights in ***Vo –v- France***, [2004] ECHR 326 where, very sadly, an error of identity resulted in the unsolicited and unintended abortion of a Vietnamese lady who was six months pregnant. The doctor concerned was acquitted of unintentional homicide in a judgment of the Cour de Cassation. The focal point of the Applicant's petition to Strasbourg was a complaint that the absence of a criminal sanction within the French legal system to punish the unintentional destruction of an unborn child constituted a failure by the State to discharge its duty to protect by law the right to life under Article 2. The Strasbourg court rejected the Applicant's case.

[22] A majority of the judges concluded that the issue of when the right to life begins falls within the margin of appreciation of the Contracting States. The court's expressed reasons for this conclusion are of particular interest. They were twofold. The first is that this issue has not been resolved within the majority of the Contracting States. The second is the absence of any European consensus on the scientific and legal definition of the beginning of life. Thus this *supra*-national court declined to take the lead on an important and controversial issue. It justified this reluctance by reference to the absence of any clearly settled approach within the Contracting States. This stimulates an interesting and topical reflection: in the converse situation, where the Strasbourg jurisprudence does not obviously and fully supply the answer in a HRA 1998 case, are domestic courts any more adventurous than their European counterpart? A very recent decision of the United Kingdom Supreme Court suggests a negative answer.[17] While an extensive treatise of this particular topic is not appropriate here, a review of some earlier decisions of the House of Lords suggests a degree of schizophrenia in this respect.[18]

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[16] See the convenient summary of the Commission jurisprudence in ***Vo –v- France*** (*infra*), paragraphs 75- 80.

[17] **R (Smith) –v- Secretary of State for Defence** [2010] UKSC 29 where, by a majority, the Supreme Court held that on the true interpretation of Article 1 ECHR British troops operating on foreign soil are outwith the jurisdiction of the United Kingdom. One of the themes of the majority judgments is that if ECHR (and, hence, HRA 1998) has this reach, the proper forum for so declaring is the Strasbourg Court.

[18] See especially **Re P and Others** [2008] UKHL 38 and [2008] NI 310, where a majority of the House of Lords was undeterred by the fact that the Strasbourg jurisprudence did not clearly answer the Convention issues which arose: see especially per Lord Hoffmann, paragraphs [27]-[38]. The sole dissenting opinion of Lord Walker, to the effect that it was "*far from clear*" that the Strasbourg Court would hold that the relevant domestic statutory measure infringed ECHR, did not prevail: paragraph [82]. Baroness Hale declared that the appeal raised "*an issue of fundamental importance*" in the operation of HRA 1998: What should the domestic court do where a municipal statutory provision is incompatible with ECHR rights, in a sphere which the Strasbourg Court might consider to belong to the margin of appreciation of the Contracting States?

IV PROLONGING LIFE – ASSISTED SUICIDE AND MERCY KILLING

The Hillsborough Football Stadium Disaster

[23] The impact of the legal system, courts and juries on society is graphically illustrated by the fall out from what has become known as "the Hillsborough Stadium Disaster". This reflection is stimulated by the advent of the recently celebrated twentieth anniversary of these momentous and tragic events. No doubt everyone was moved by the various services of commemoration which were widely televised and publicised on 15th April 2009 – twenty years after the tragedy. These various events were designed to commemorate the appalling loss of ninety-six lives on a sporting occasion: a semi-final of the FA Cup – Liverpool –v- Nottingham Forest – one of the biggest events in the British sporting calendar. In a matter of some few minutes, a football match was transformed into carnage. During the years which followed, this was the subject of much consideration and attention within the framework of the legal system Thus:

(a) On 15th May 1999, Lord Justice Taylor, a prominent member of the English Court of Appeal, began a public inquiry into the event. This entailed consideration of, amongst other things, almost four thousand witness statements.

(b) From 1999, civil claims for compensation against the police were pursued and settled out of court, involving payments of around £14,000,000.

(c) In January 1990, Lord Justice Taylor reported. His report concluded that the main reason for the disaster was a "*failure of police control*" and it made seventy-six recommendations designed to prevent a recurrence. One of the most important of these was the introduction of "all seater" football stadia.

(d) An inquest followed. In March 1991, the inquest jury returned a verdict of accidental death. The inquest itself was far from bereft of controversy. In particular, the Coroner ruled that no deaths had occurred after 3.15pm on the date in question, thereby precluding any consideration of evidence relating to events after that time – to the consternation of the bereaved families.

(e) In November 1993, an attempted judicial review challenge was unsuccessful.

[24] The legal system and courts were involved in other ways. The DPP decided that there would be no prosecution of anyone arising out of the events. However, unusually, having obtained the permission of the court (a legal pre-requisite), the families brought a private prosecution against the Chief Superintendent of police concerned (Mr. David Duckenfield) and a police superintendent (Bernard Murray). They were prosecuted for manslaughter. However, the jury declined to convict either. In addition, the

tragedy had an airing before the European Court of Human Rights. However, this particular challenge was not brought until many years after the event and it was declared inadmissible on the ground of delay.

The Sad Case of Tony Bland

[25] Until 3rd March 1993, there had been ninety-five fatalities arising out of the tragedy. On that date, almost four years after the event, Tony Bland, a young man aged twenty-two years, became the ninety-sixth victim. His name is well known to many legal practitioners (and others) on account of the litigation which preceded the actions of doctors disconnecting the life support machine which had thitherto sustained his existence: see ***Airedale NH Trust –v- Bland***.[19] Mr. Bland had suffered a severe crush injury to his chest, giving rise to catastrophic and irreversible damage to the higher functions of his brain. He was being fed artificially and mechanically by a naso-gastric tube inserted through the nose and into the stomach. He had been in a persistent vegetative state for three-and-a-half-years. All doctors were unanimous that there was no hope whatsoever of recovery or improvement of any kind in his condition. The courts became involved because the health authority concerned decided to apply to the High Court for a declaration that it could lawfully discontinue all life sustaining treatment and medical support measures. In this way, judges found themselves involved in questions of life and death. The courts, to their credit, gave the case a high measure of priority. Within a period of less than one month, the case had been considered by (a) the President of the Family Division of the High Court (b) three of the most senior members of the Court of Appeal and (c) five Law Lords. In total, nine erudite judgments were generated during this short period.

[26] The acutely human dimension of the litigation is palpable from a reading of these judgments. A single example illustrates this observation. Lord Mustill stated:[20] [at p. 884h]:

> "*My Lords, the pitiful state of Anthony Bland and the suffering of his devoted family must attract the sympathy of all. The devotion to duty of the medical staff and the complete propriety of those who have faced up to the painful dilemma must equally attract the respect of all. This combination of sympathy and respect can but yield an urgent desire to take up the burden, to reach a conclusion on this deep moral issue of life and death and to put that conclusion into effect as speedily and humanely as possible.*"

As Lord Mustill further observed, the reality of the litigation was that "*… the authority of the state, through the medium of the court, is being invoked to*

[19] [1993] 1 All ER 821.
[20] At p. 884h.

permit one group of its citizens to terminate the life of another". As a result (his Lordship continued):

> "*The court must therefore be concerned not only to find a humane and morally justified solution to the problems of those directly involved, but also to examine rigorously both the process by which the solution is reached and the legal foundation on which it rests*".

[27] Thus there was an inextricable intertwining of questions of moral philosophy, ethics, humanity and black letter law. Was the issue to be determined a question of law or one of morality? Hoffmann LJ, in the Court of Appeal seemed undecided on this point:

> "*This is a purely legal (**or moral**) decision which does not require any medical expertise and is therefore appropriately made by the court*".[21]

The courts ruled that the Trust and the responsible physicians could lawfully discontinue all life sustaining treatment and medical support measures designed to keep Mr. Bland alive – including the termination of ventilation, nutrition and hydration by artificial means and, further, could lawfully discontinue medical treatment administered to him, except for the sole purpose of enabling him to end his life and die peacefully with the utmost dignity and the minimum of distress. This was a landmark ruling and, during the sixteen years which have elapsed subsequently, comparable rulings have been made. Article 2 ECHR barely flickers in any of these decisions.

The Case of Diane Pretty

[28] The issue of assisted suicide under HRA 1998 first exercised the House of Lords in ***R (Pretty)*** –v- DPP[22]. Diane Pretty suffered from motor neurone disease, a progressive degenerative illness, with no hope of cure or recovery. While paralysed from the neck downwards, her intellect and capacity of decision making were unimpaired. Her aspiration was to control when and how she would die. She was physically incapable of taking her own life and would require the assistance of her husband to do so. The dilemma thereby generated was whether, in this eventuality, her husband would be prosecuted for the offence of assisting suicide contrary to Section 2(1) of the Suicide Act 1961. The statute further provided, by Section 2(4), that a prosecution of this *genre* can be instituted only with the formal consent of the DPP. The latter refused to provide an undertaking that Diane Pretty's husband would not be prosecuted and this decision was duly challenged. Appropriately, the case was ultimately considered by the House of Lords, where the fact of divergent views throughout the Council of Europe states was highlighted. This theme emerged particularly in the opinion of Lord

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21 At p. 858F.

22 [2002] 1 AC 800

Steyn, who also contrasted the European Convention and the UN Declaration on Human Rights:

> "*[56] The Human Rights movement evolved to protect fundamental rights of individuals either universally or regionally. The theme of the declaration of 1948 was universal. It involved a common conception capable of commanding wide acceptance throughout the world despite huge differences between countries in culture, in religion and in political systems …*
> *Any proposal that the Universal Direction should require states to guarantee a right to euthanasia or assisted suicide (as opposed to permitting states by democratic institutions so to provide) would have been doomed to failure. The aspirational text of the Universal Declaration was the point of departure and inspiration of the Convention which opened for signature in 1950. It is to be noted, however, that the Convention embodied in some respects a narrower view of human rights than the Universal Declaration …*
> *The generality of the language permits adaptation of the Convention to modern conditions. It is also, however, necessary to take into account that in the field of fundamental beliefs the European Court of Human Rights does not readily adopt a creative role contrary to a European consensus, or virtual consensus. The fact is that among the forty-one member states … there are deep cultural and religious differences in regard to euthanasia and assisted suicide*".

Thus, said Lord Steyn, the court must treat with scepticism the suggestion that the Convention *requires* States to render lawful euthanasia and assisted suicide. Lord Steyn's observation about the generality of the Convention's language highlights what I consider to be one of its intrinsic strengths and virtues. This is linked to its description as a living instrument and ensures its enduring ability to adapt to changing conditions and new dilemmas and challenges . By virtue of these characteristics, there is a readily identifiable affinity between the Convention and the common law.

[29] In ***Pretty***, the House of Lords were both unanimous and uncompromising in holding that Article 2 ECHR did not support Mrs. Pretty's case. Lord Bingham characterised the Secretary of State's arguments as "*unanswerable*".[23] Lord Steyn dismissed Mrs. Pretty's Article 2 arguments in pithy terms:

> "*[59] … Counsel for Mrs. Pretty argued that Article 2 and in particular its first sentence acknowledges that it*

[23] Paragraph 5.

> *is for the individual to choose whether to live or die and that it protects her right of self-determination in relation to issues of life and death. This interpretation is not sustainable. The purpose of Article 2(1) is clear. It enunciates the principle of the sanctity of life and provides a guarantee that no individual 'shall be deprived of life' by means of intentional human intervention. The interpretation now put forward is the exact opposite viz. a right of Mrs. Pretty to end her life by means of intentional human intervention. Nothing in the Article or the jurisprudence of the European Court of Human Rights can assist Mrs. Pretty's case on this Article*".

In short, what she was seeking was the very antithesis of what Article 2 protects. Mrs. Pretty's invocation of other Convention rights, in particular Articles 3 and 8, was similarly unsuccessful.

[30] The European Court agreed with the House of Lords in all respects but one (*infra*).[24] In particular, the Court stated:

> "*[39] The consistent emphasis in all the cases before the court has been the obligation of the State to protect life. The court is not persuaded that the 'right to life' guaranteed in Article 2 can be interpreted as involving a negative aspect …*
>
> *[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 …*
>
> ***Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite 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].

Accordingly, Article 2 ECHR does not protect any right to die, whether with the assistance of some other person or a public authority.

<u>The Case of Deborah Purdy</u>

[31] The energy and ingenuity of human rights lawyers ensured, however, that the story did not end there. A short time later, Convention issues

[24] [2002] 35 EHRR 1.

surrounding assisted suicide resurfaced, in ***R(Purdy) –v- DPP.***[25] This time, the twin focus of the legal challenge was Section 2(1) of the Suicide Act 1961[26] and the DPP's policy on bringing prosecutions for the offence of assisting another person's suicide. Deborah Purdy suffered from primary progressive multiple sclerosis, a disease for which there is no known cure. Her condition had deteriorated progressively, to the point where she mobilised with an electric wheelchair, was unable to swallow properly, suffered choking fits when drinking and was incapable of carrying out many basic tasks of daily living. Her aspiration was to be able to end her life, duly assisted, at some point in the future of her choosing, having decided that her continuing existence was unbearable. The basic question for the courts was whether HRA 1998 provided the vehicle whereby she could fulfil this ambition.

[32] The main feature which distinguished this legal challenge from others was the Convention right upon which it was founded, Article 8, which provides:

> "*(i) Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *(ii) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of this order or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*".

The arguments presented on behalf of Ms. Purdy placed under particular scrutiny the words "*respect for his private life*", in Article 8(1) and "*in accordance with the law*", in Article 8(2). It was not in dispute that the DPP is a public authority within the ambit of Section 6(1) of HRA 1998. Thus it is unlawful for him to act in a way which is incompatible with a Convention right. The key to the outcome of this litigation lay in a superficially innocuous passage in the judgment of the European Court in ***Pretty***:

> "*[67] 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. It considers below whether this*

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[25] [2005] UKHL 45.

[26] *"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"*.

> *interference conforms with the requirements of the second paragraph of Article 8.*"

Thus the European Court disagreed with the House of Lords in ***Prett,*** : their Lordships' view was that Article 8 was directed to the protection of one's personal autonomy while alive, but did not embrace a right to decide when or how to die.The European Court disagreed , but went on to hold, however, that the relevant interference – Section 2 of the 1961 Act – was necessary in a democratic society for the protection of the rights of others.

[33] As a direct result of the decision of the European Court in ***Pretty***, Deborah Purdy, some seven years later, was able to overcome the Article 8(1) obstacle and, thus, her case entered the territory of Article 8(2), where the fundamental question became whether the two elements of the relevant interference viz. Section 2 of the Act and the corresponding DPP policy were *in accordance with the law*. Their Lordships acknowledged that the difference between the House and the Strasbourg Court on the Article 8(1) issue was "*on a narrow but very important point*".[27] The House recalled the European Court's reasoning on this issue:

> "*[65] The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity*".

The House of Lords recognised that paragraph 65 of the Strasbourg judgment was tailor made for Ms. Purdy's case. Thus the crucial question became: Was the interference in accordance with the law? The resolution of this crucial question entailed consideration of what is sometimes described, in shorthand, as, the Convention principle of legality.

[34] As noted by Lord Hope, the Convention principle of legality requires the court to address three distinct questions:

(a) Is there a legal basis in domestic law for the restriction?

(b) Is the relevant domestic law or rule sufficiently accessible to potentially affected individuals and sufficiently precise to enable them to understand its scope and foresee the consequences of their conduct, so as to regulate their lives without infringing the law?

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[27] Paragraph 35, per Lord Hope.

(c) Assuming that the first two requirements are satisfied, is the application of the relevant legal rule or law arbitrary or disproportionate?

In this context, the concept of "*law*" is to be understood in its substantive, rather than formal, sense. Thus it is not necessarily confined to the language of the relevant statute. Lord Hope expounded on the principles in play in the following terms:

> "*[41] … Accessibility means that an individual must know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it what acts and omissions will make him criminally liable …*
>
> *The requirement of foreseeability will be satisfied where the person concerned is able to foresee, if need be with appropriate legal advice, the consequences which a given action may entail. A law which confers a discretion is not in itself inconsistent with this requirement, provided the scope of the discretion and the manner of its exercise are indicated with sufficient clarity to give the individual protection against interference which is arbitrary.*"

The close affinity between these principles of European Human Rights law and the UK doctrine of the rule of law, considered in Chapter II above, is at once apparent. The House was satisfied that Section 2(1) of the 1961 Act complied with all these requirements. But the focus of Ms. Purdy's argument was Section 2(4): in what manner could the DPP be expected to exercise his statutory discretion whether to consent to prosecution?

[35] Under Section 10 of the Prosecution of Offences Act 1985, the DPP had promulgated a Code for Crown Prosecutors, embodying guidance on general principles to be applied in deciding whether a prosecution should be initiated. The House considered that this Code formed part of the relevant law, for the purposes of Article 8(2). Paragraph 5.9 of the Code listed what it described as some public interest factors in favour of prosecution, while paragraph 5.10 enumerated some common public interest factors contraindicating prosecution. The Court of Appeal had noted that many of the factors in these two lists could have no relevance in a case of assisted suicide. The DPP himself had acknowledged this, in formulating his published reasons in the case of Daniel James. Lord Hope considered that the Code fell "*… short of what is needed to satisfy the Convention tests of accessibility and foreseeability*".[28] He continued:

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[28] Paragraph 53.

> "*The Director's own analysis shows that, in a highly unusual and extremely sensitive case of this kind, the Code offers almost no guidance at all. The question whether a prosecution is in the public interest can only be answered by bringing into account factors that are not mentioned there …*
>
> *[54] The Code will normally provide sufficient guidance to Crown Prosecutors and to the public as to how decisions should or are likely to be taken whether or not, in a given case, it will be in the public interest to prosecute. This is a valuable safeguard for the vulnerable, as it enables the prosecutor to take into account the whole background of the case. In most cases its application will ensure predictability and consistency of decision-taking, and people will know where they stand. But that cannot be said of cases where the offence in contemplation is aiding or abetting the suicide of a person who is terminally ill or severely and incurably disabled, who wishes to be helped to travel to a country where assisted suicide is lawful and who, having the capacity to take such a decision, does so freely and with a full understanding of the consequences. There is already an obvious gulf between what section 2(1) says and the way that the subsection is being applied in practice in compassionate cases of that kind.*"

Thus, in this landmark case, Ms. Purdy's appeal succeeded. The relief which she secured is noteworthy. Per Lord Hope:

> "*[56] I would therefore allow the appeal and require the Director to promulgate an offence-specific policy identifying the facts and circumstances which he will take into account in deciding, in a case such as that which Ms Purdy's case exemplifies, whether or not to consent to a prosecution under section 2(1) of the 1961 Act.*"

Hence the rarely invoked prerogative remedy of mandamus was considered the appropriate vehicle to rectify the illegality. It is worth highlighting this discrete consideration, having regard to the breadth of the judicial remedies provision of HRA 1998, Section 8. In language which could scarcely be more elastic, Section 8(1) empowers the court to grant "*such relief or remedy, or make such order, within its powers as it considers just and appropriate*". Section 8 typifies the radical and far-reaching nature of this landmark reforming statute.

<u>"Mercy Killing</u>"- The Recent Case of Frances Inglis

[36] So-called "mercy killing" is a very topical subject. I wish to add a brief word on the operation of **the criminal law** in this sphere, having regard to a very recent decision of the English Court of Appeal. ***R –v- Inglis***[29]was indeed a tragic case. Thomas Inglis was a fit young man, aged twenty-one years. He suffered catastrophic head injuries and, three months later (in September 2007), his mother injected him with heroin on his hospital bed, intending to end his life. He suffered cardiac arrest, but was resuscitated. His mother, Frances Inglis, was charged with attempted murder. Just over one year later (In November 2008), she repeated her actions (in breach of her bail conditions) and Thomas died. There was no suggestion of assisted suicide. A jury convicted the mother of both attempted murder (In September 2007) and murder (in November 2008). The mandatory punishment of life imprisonment, with a "minimum term" (or "tariff") of nine years, was imposed. Her appeal against conviction was dismissed.

[37] Delivering the judgment of the Court of Appeal, the Lord Chief Justice stated:

> *"**Mercy Killing***
>
> *[37] On any view this case is a tragedy, not only for the appellant, who has lost a precious and loved son, but for the father and brothers of the deceased and the extended family. There is a wider public interest in the case because the issues to which it gives rise are immensely sensitive and difficult, and they have attracted an increasing measure of public interest and concern. Therefore we must underline that the law of murder does not distinguish between murder committed for malevolent reasons and murder motivated by familial love. Subject to well established partial defences, like provocation or diminished responsibility, mercy killing is murder. The offences of which the appellant was convicted, and for which she fell to be sentenced, were attempted murder and murder. The sentence on conviction for murder is mandatory. The judge had no alternative but to order imprisonment for life. He then had to assess the length of the minimum period to be served before the possibility of release from prison on licence could arise for consideration. In making that assessment he was obliged to have regard to the statutory provisions in schedule 21 of the 2003 Act.*

[29] [2010] EWCA. Crim 2637 – 12/11/10.

[38] We must also emphasise that the law does not recognise the concept implicit in the defence statement that Thomas Inglis was "already dead in all but a small physical degree". The fact is that he was alive, a person in being. However brief the time left for him, that life could not lawfully be extinguished. Similarly, however disabled Thomas might have been, a disabled life, even a life lived at the extremes of disability, is not one jot less precious than the life of an able-bodied person. Thomas's condition made him especially vulnerable, and for that among other reasons, whether or not he might have died within a few months anyway, his life was protected by the law, and no one, not even his mother, could lawfully step in and bring it to a premature conclusion. Until Parliament decides otherwise, the law recognises a distinction between the withdrawal of treatment supporting life, which, subject to stringent conditions, may be lawful, and the active termination of life, which is unlawful.

[39] We cannot decide the case on the basis of whichever of the contradictory strands of public opinion in this extremely sensitive area happens to coincide with our own views, assuming that is, that if we had allowed our personal feelings to impinge on our discussions, that there would be any coincidence of views. How the problems of mercy killing, euthanasia, and assisting suicide should be addressed must be decided by Parliament, which, for this purpose at any rate, should be reflective of the conscience of the nation. In this appeal we are constrained to apply the law as we find it to be. We cannot amend it, or ignore it. "

Notably, the Lord Chief Justice then referred to what he described as the English Law Commission's "*careful analysis of this profoundly sensitive issue*" in its report "Murder, Manslaughter and Infanticide":[30]

"*"All "mercy" killings are unlawful homicide.*

7.4 The law …does not recognise either a tailor-made defence of "mercy" killing or a tailor-made offence, full or partial, of "mercy" killing. Unless able to avail him or herself of either the partial defence of diminished responsibility or the partial defence of killing pursuant to a suicide act, if the defendant intentionally kills the victim in the genuine belief that it is in the victim's best interest to die, the defendant is guilty of murder. This

[30] [2006] Law Com. 304, Part 7.

is so even if the victim wished to die and consented to being killed…

7.6 The current law does not recognise the "best interests of the victim" as a justification or excuse for killing. What it does, instead, is to acknowledge to a very limited extent, that the consent of the victim can be relevant in the context of suicide pacts…

7.7 Under the current law, the compassionate motives of the "mercy" killer are in themselves never capable of providing a basis for a partial excuse. Some would say that this is unfortunate. On this view, the law affords more recognition to other less, or at least no more, understandable emotions such as anger (provocation) and fear (self-defence). Others would say that recognising a partial excuse of acting out of compassion would be dangerous. Just as a defence of necessity "can very easily become simply a mask for anarchy", so the concept of "compassion" – vague in itself – could very easily become a cover for selfish or ignoble reasons for killing, not least because people often act out of mixed motives"."

The Lord Chief Justice then observed:

"*[41] In reality, in a true case of mercy killing, provocation is unlikely to provide any defence. The more likely defence would be diminished responsibility. Either defence would reduce murder to manslaughter: it could not result in an acquittal. However, whereas the judge must leave the defence of provocation to the jury if there is evidence to sustain it, whether or not the defendant or his legal advisers have invited the jury to consider it, the defence of diminished responsibility must be raised by the defendant. If the defendant chooses not to canvass diminished responsibility, there is rarely anything the judge can do about it.*"

The Court noted that diminished responsibility had not been advanced as a partial defence by the Appellant, while recording the suggestion in medical reports that she was at all material times depressed and suffering from post-traumatic stress disorder. However, this did not constitute a defence, partial or otherwise. Thus the appeal against conviction failed.

[38] The Court then turned to consider the mother's appeal against sentence. It is a long established principle of sentencing law that ever court, in determining the appropriate punishment in a given case, must identify and

then weigh those factors which appear to aggravate the offending and those which serve to mitigate same. In the case of ***R –v- Inglis***, the Court of Appeal's exposition of the identifiable mitigating and aggravating factors is illuminating:

> *"Appeal Against Sentence*
>
> *[55] We must focus on all the critical facts and find a balance between them in which justice is appropriately tempered with mercy. Not all the crucial facts provide the appellant with mitigation. Some aggravate her offences.*
>
> *[56] Thomas was helpless. He may have been able to communicate something of the severity of his fear and panic to those who loved him, but we do not and never shall know what his response to any suggestion of euthanasia or an assisted suicide might have been, whether in September 2007 or again in November 2008. It may provide something of a comfort to the appellant and those who loved him if they have come to terms with Thomas's death by convincing themselves that if he could have communicated his wishes he would indeed have asked for his life to be ended. But, we do not know, and we are not prepared to make any such assumptions. As we have explained, this was not an assisted suicide in which the appellant did for her son what he could not physically do and desperately wanted to do for himself.*
>
> *[57] The appellant's actions were deliberate and premeditated, and her compulsive objective was indeed to kill her son. She was motivated throughout by her personal, unremitting conviction that she should release him from the living hell his very limited life had become and which it would continue to be, and also because she herself, in all probability because of her fragile personality and depressive disorders, was unable to cope personally with the catastrophic consequences of the accident. She has never felt any sense of guilt or remorse, and she was and remains convinced that, irrespective of what anyone else might think, her son's life had to be brought to an end.*
>
> *[58] There are a number of features which obviously mitigate the offence, and we have largely set them out in our narrative account of the facts. We have*

recorded that the appellant has no sense of remorse for what she has done. In this particular case the absence of remorse does not extinguish the mitigation that she has already suffered and will continue hereafter to suffer the terrible grief of the loss of Thomas, as she would put it, as a result of the accident in July 2007. The mitigation consequent on her grief should not be reduced by the absence of remorse for the killing. She was ill equipped psychologically to cope with the disaster which befell Thomas, and for that reason, the consequent stresses and strains on an already fragile personality were disproportionately grave. In our view her mental responsibility for her actions, driven as she was by a compulsive obsession, was diminished if not sufficiently for the purposes of the defence of diminished responsibility, certainly to an extent that reduced her culpability. This combination of factors led to her long obsession with the belief that as his mother she owed a duty to Thomas to end his suffering. And there is no doubt about the genuineness of her belief that her actions in preparing for and eventually killing Thomas represented an act of mercy or that the grief consequent on the loss of her son is undiminished by her responsibility for his death. These are powerful considerations, far removed from the ordinary case of murder.

[59] However the appellant's culpability is reduced, it is not extinguished. She had resolved to kill Thomas within a very short time of the accident, almost in its immediate aftermath, and well before the long-term results of the operations and treatment could be known, and indeed while the remaining members of Thomas's family were still hoping that he would survive. She was convinced that she, and she alone, knew what was best for Thomas, to such an obsessive extent that any view to the contrary, however it was expressed, was to be rejected out of hand. This was not a moment or two of isolated thinking, but a settled intention. She tried to kill Thomas and did eventually kill him without a thought to the feelings of anyone else, including his father and his brothers, and indeed the members of the medical professions who were doing their very best to care for him. What is more, she assumed that she knew what Thomas's wishes would have been, and close as the bond between mother and son no doubt was, he was an adult whose mother would not always have been able to speak for him. When the first attempt failed,

she ignored the potential consequence to others of denying her involvement in the offence, justifying the possibility that blame might pass unfairly to anyone else on the basis that she must continue to be free to achieve her objective. The process of preparing for trial for attempted murder, and the intimation that there would be a guilty plea, obscured the fact that she was making arrangements to deceive those responsible for her son's care into believing she was not his mother. And perhaps most significantly of all, her unsuccessful attempt to kill Thomas produced a deterioration in his condition without which, as far as we can see, the possibility of the withdrawal of hydration and nutrition would have been most unlikely to arise. In short, harsh as it is to have to say it, she had contributed to the very sorry condition from which, on the day of his death, Thomas was suffering, as well as the risk of the awful death from which she intended to relieve him. Because of her early fixed obsession, she never sought advice or information from medical experts on how the suffering of the patient might be reduced if the decision was made to apply to the court to allow him to die. As it is, her intention that Thomas should die was fixed long before that sad final state was reached because, as far as she was concerned, within a very short time of the accident, Thomas had to die. At that time no one else shared her view, and she decided that she must kill him herself. On the first occasion she failed to kill him, but added to his disabilities, and, on the second she was better prepared, and succeeded. "

There are no wasted words in this detailed analysis and careful reading will undoubtedly be repaid.

[39] Finally, the Lord Chief Justice acknowledged that the appeal presented "***one of the most difficult sentencing decisions faced in this court***"[31] As life imprisonment (properly understood) is the mandatory punishment for a murder conviction, the Court of Appeal could not interfere with this. However, their conclusion was that the minimum term should be reduced from nine to five years. This occurred in circumstances where the legislation obliged the court to take a so-called "*starting point*" of fifteen years, as the minimum term (or "tariff").[32] The next, and crucial, part of the sentencing exercise involved the evaluation of aggravating and mitigating features. Notably, Lord Lloyd of Berwick has described this as "*an exemplary* judgment". He suggests that this decision raises two issues of great importance:

[31] Paragraph [61].

[32] Criminal Justice Act 2003, Schedule 21.

(a) Does the current "*prescriptive statutory sentencing regime*" for murder make any real sense, given that it is bound to create this kind of acute dilemma? Murder cases are intensely factually sensitive. Should the selection of a minimum sentence not be left entirely to the discretion of the judge? Would it not be better for Parliament to simply prescribe the *maximum* sentence (as it formerly did) rather than try to micro-manage the *minimum* sentence?

(b) In the particular circumstances, what conceivable purpose did a sentence of life imprisonment serve?

Lord Lloyd suggests that the mother is plainly not going to commit any further murder, with the result that the sentence is no deterrent. He opines that when the five year minimum period expires, she will almost certainly be released on licence by the Parole Board and will, therefore, be subject to licence conditions for the remainder of her life. This, Lord Lloyd says, is "*barbaric*".

In short, Lord Lloyd, highlighting that the mandatory life sentence for murder is unknown in other countries and simply distorts the law, strongly advocates its repeal. [And see this week's public statements by the Lord Chancellor and Prime Minister] .

[40] Thus the mother's appeal against sentence succeeded. I trust that the decision in this case will stimulate reflection and informed debate amongst a broad spectrum of sectors of society, public representatives and interested professions. If nothing else, it exemplifies the enormous challenges and complexities which can confront judges in the sentencing of offenders**.** Lord Falconer of Thoroton is set to conduct an inquiry into assisted suicide. A fully informed and rational public debate will hopefully ensue. Within this debate, Convention rights – in particular Article 2, Article 3 and Article 8 – can be expected to feature prominently.