THE SUPREME COURT

Appeal No: 019/2013

High Court Record No: 2012 / 10589P

BETWEEN

MARIE FLEMING

APPELLANT

AND

IRELAND, THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

AND

IRISH HUMAN RIGHTS COMMISSION

AMICUS CURIAE

OUTLINE SUBMISSIONS ON BEHALF OF THE IRISH HUMAN RIGHTS COMMISSION

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A. Introduction

1. By letter dated the 24th of October, 2012, the Irish Human Rights Commission [hereinafter "the Commission"] was put on notice of these proceedings pursuant to Order 60A of the Rules of the Superior Courts. In the correspondence, it is stated:

> *"The Plaintiff is terminally ill and wishes to end her life by suicide. She is precluded from doing so by the extent of her physical disability and would therefore require assistance to end her life in accordance with her wishes. Section 2, subsection (2) of the Criminal Law (Suicide) Act 1993 provides that:*
> *"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".*

2. From the pleadings, the Commission formed the view that this case raises important human rights issues and sought liberty from the High Court to appear as *amicus curiae* in the within proceedings which said liberty was granted by order made on the 8th of November, 2012. Written submissions filed on behalf of the Commission were the subject of some short elaboration in oral submissions during the course of the hearing before the Divisional Court of the High Court in December, 2012.

3. Following delivery of judgment by the High Court on the 10th of January, 2013, counsel for the Appellant sought directions from this Honourable Court in respect of the listing of this appeal and liberty was sought on behalf of the Commission to file further submissions before this Court in advance of the appeal. These submissions are filed in accordance with the direction of the Chief Justice and, subject to permission from this Honourable Court, the *amicus curiae* will seek to elaborate briefly upon same at the hearing of the appeal herein to the extent if it appears appropriate.

B. Issues before this Court

4. The stark position highlighted on the facts of this case is that under Irish law suicide is not a crime but assisted suicide is. This equates to a right

to end one’s own life without fear of criminal sanction in the case of an able bodied person but not in the case of a person who is so physically disabled as to be unable to complete the act of suicide without assistance.

5. Colloquially, during the course of reporting of this case before the High Court, this has been characterised as the “right to die”. The Commission considers this somewhat of a mischaracterisation which is unhelpful to the identification of the real issues in the case – the competing weight to be accorded to autonomy and equality rights respectively and the weight to be accorded the protection of life. The Commission does not advocate “a right to die” or a “right to commit suicide” in this case. Rather, in these submissions (as in the submissions before the High Court), 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 of the Constitution as they impact on the right to life under Article 40.3.2 which is sought to be vindicated through the blanket criminalisation of assisted suicide contained in section 2(4) of the Criminal Law (Suicide) Act, 1993, in circumstances where suicide itself is no longer criminalised.

6. In its submissions before the High Court the Commission accepted that the right to life is a paramount human right and that strong safeguards must always apply to any perceived diminution of the right. Notwithstanding this, 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. The High Court was invited to consider if the objectives pursued by the ban could be achieved in less absolute terms suggesting that the existing ban could be replaced by legislation which would be a measured and proportionate reconciliation of the right to life, reflecting the sanctity of life but also taking into account personal rights of autonomy, privacy and equality.

7. Before this Honourable Court on appeal the Commission proposes to rely on its submissions before the High Court (without repeating them) and to focus on four specific aspects of the decision in the High Court, namely:

(i) the lack of legal coherence arising from the blurring of the distinction between assisted suicide and euthanasia which emerges from the decision in the High Court;

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

(iii) whether the classification by the High Court of those persons protected by section 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

(iv) the question of a remedy.

C. High Court Judgment

8. In its judgment the High Court records the evidence in this case to the effect that the Appellant is a fifty-nine year old lady who has been diagnosed with a terminal illness which is reaching its end stages. Her quality of life is extremely diminished. She is in significant pain and has lost much of her personal autonomy. She has been psychiatrically assessed as mentally competent. The compelling evidence, which so evidently impressed the High Court, is that her deeply felt wish to die in her own home and at a time of her choosing is a freely formed and freely held wish. It was accepted that hers is not a coerced decision and is a decision informed by a rational wish to minimise suffering and pain where her quality of life is severely diminished.

9. The High Court found that the Appellant's decision to seek assistance to end her own life in the face of her illness is *in principle* engaged by the right to personal autonomy which lies at the core of the protection of the person by Article 40.3.2 stating (at p. 52):

> *"it is rather a facet of that personal autonomy which is necessarily protected by the express words of Article 40.3.2 with regard to the protection of the person."*

10. The Court then found that:

> *"there are here powerful countervailing considerations which fully justify the Oireachtas in enacting legislation such as the*

> *1993 Act which makes the assistance of suicide a criminal offence."*

11. The Court drew a distinction between a competent adult patient making the decision not to continue medical treatment on the one hand – even if death is the natural, imminent and foreseeable consequence of that decision - and the taking of *active steps* by *another* to bring about the end of that life of the other. The Court acknowledged that one necessary feature of the Constitution's protection of the "person" in Article 40.3.2 is that the competent adult cannot be *compelled* to accept medical treatment even where the inevitable consequence is death but stated that the taking of active steps by a third party to bring about death is an entirely different matter, even if this is desired and wished for by an otherwise competent adult who sincerely and conscientiously desires this outcome.

12. In an important statement the Court went on to say:

> *"If this Court could be satisfied that it would be possible to tailor-make a solution which would address the needs of Ms. Fleming alone without any possible implications for third parties or society at large, there might be a good deal to be said in favour of her case. But this Court cannot be so satisfied. It certainly cannot devise some form of legislative solution which would be an impermissible function for the Court."*

13. Following a review of the evidence before the Court, the Court found that the State had provided an ample evidential basis to support the view that any relaxation of the ban on assisted suicide would be impossible to tailor to individual cases and would be inimical to the public interest in protecting the most vulnerable members of society.

14. At paragraph 104 of the judgment the Court stated by reference to the decision of the Canadian courts in ***Carter*** that it:

> *"cannot at all agree with Lynn Smith J.'s finding that the risks inherent in legally permitted assisted death have not materialized in jurisdictions such as Belgium and the Netherlands, even if it is true that the incidence of LAWER in those jurisdictions has "significantly declined" since liberalisation."*

15. The Court did not separately address the case made on Article 40.1 grounds to any significant extent confining its judgment on this aspect of the case to paragraphs 121-123 of the judgment. The Court did

recognize, however, that unlike its European Convention on Human Rights counterpart, Article 14 ECHR, Article 40.1 is a free-standing equality guarantee, the application of which is by no means contingent on the operation of a separate and distinct constitutional right. The Court further allowed that inasmuch as the 1993 Act failed to make separate provision for persons in the Appellant's position by creating no exception to take account of the physical disability which prevents the Appellant taking the steps which the able bodied could take, the precept of equality in Article 40.1 was engaged. The Court went on to say, however, that:

> *"for all the reasons which we have set out with regard to the Article 40.3.2, we consider 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."*

D. Asking the Wrong Question – Re-Interpreting In Re Ward of Court

16. There is an apparent blurring of the lines of distinction between assisted suicide and euthanasia, both passive (the withdrawal of life preserving treatment if indeed that is properly to be characterised as euthanasia) and active (active steps to hasten death), in the decision of the High Court. Throughout its deliberations the Court relies on research relating to euthanasia without apparently addressing the extent to which that research can permissibly be relied upon in a case where a person wishes to take a determining step in the act of suicide but needs assistance in completing all aspects of her decision to take her life.

17. Passive euthanasia has been lawful in this jurisdiction since the decision of the Court in ***In Re A Ward of Court*** as a result of the recognition by the Court of personal autonomy rights of the individual in that case with precise procedural safeguards to guard against abuse not elaborated in declaratory principles in the absence of legislation.[1] Although the judgment of the High Court in this case appears to equate assisted suicide with active euthanasia, the material fact that the death is achieved through the final direction or actions of the deceased in the case of assisted suicide does not appear to have elicited separate or particular consideration by the Court in terms of determining the

[1] [1996] 2 IR 79.

relative weight to attach to the personal autonomy rights when balanced against the right to life in each case.

18. In ***Re A Ward of Court*** the issue was quite fundamentally different to the one here, dealing as it did with issues of passive euthanasia rather than suicide where the ultimate decision and action fall to be taken by the patient. The difference is even greater when one compares active euthanasia with assisted suicide due to the role of the person themselves in effecting death. Tellingly, in his judgment in the High Court in the ***Ward*** case Lynch J. referred to the lawfulness of taking one's own life in the following terms:

> *"I would think that if the torture was cruel enough and the prospects of relief remote enough, there must come a time when in the interests of privacy, dignity or autonomy, the victim would be within his rights in ending his own life if he had the means of doing so even before the enactment of the Criminal Law (Suicide) Act, 1993."*

19. While different, however, in all cases ("passive" or "active" euthanasia and assisted suicide) difficult constitutional questions arise concerning the right to self-determination implicit in the right to bodily integrity, autonomy and privacy where they are linked with the termination of life. The decision of the High Court in this case throws into sharp focus the need for a coherent approach, based on individual rights to these different scenarios. From an equality perspective (see below), these individual rights are to be measured against the common good, with the Court's analysis being conducted through the prism of proportionality, where the reasons advanced by the State are specifically linked to the person of class or persons at issue in the case.

20. In ***In Re Ward of Court*** it was found that although the State undoubtedly has an interest in preserving life, this interest is not absolute in the sense that life must be preserved and prolonged at all costs and no matter what the circumstances. In the judgments of the Supreme Court in that case it was clear that dying was considered by the Court to be an inevitable part of life and the right to die was encompassed within the protection afforded the right to life under the Constitution. In her judgment in that case, Denham J. expressed it thus (at p. 161):

> *"in respecting a person's death, we are also respecting their life – giving to it sanctity. That concept of sanctity is an inclusive*

> *view which recognizes that in our society persons, whether members of a religion or not, all under the Constitution are protected by respect for human life. A view that life must be preserved at all costs does not sanctity life. A person, and/or her family, who have a view as to the intrinsic sanctity of the life in question are, in fact, encompassed in the constitutional mandate to protect life for the common good; what is being protected (and not denied or ignored or overruled) is the sanctity of that peron's life. To care for the dying, to love and cherish them, and to free them from suffering rather than simply to postpone death, is to have fundamental respect for the sanctity of life and its end."*

21. In de-criminalising suicide in 1993, the Legislature was already taking steps towards recognising that the right of autonomy outweighed the right to life in the case of suicide. However, it indirectly differentiated between persons with a severe physical disability and able-bodied persons who require active steps by a third party to secure not a legislative entitlement but a new freedom (insofar as the criminal prohibition is removed). In its judgment, the High Court in this case found that there was "a profound difference" between the law permitting an adult to take their own life on the one hand and sanctioning another to assist that person to that end on the other (at para 22). This statement sought to distinguish "active" from "passive" euthanasia perhaps for the purpose of reconciling the Court's decision with the apparent ratio of the ***Ward*** judgment, where the withdrawal of life sustaining treatment was authorised. The "slippery slope" concerns then identified by the Court were considered to render it impossible to craft a remedy to the Appellant's situation on the basis that a "Pandora's box" could or might be opened "which thereafter would be impossible to close".

22. By way of contrast, in ***Ward***, the Supreme Court while evincing the "fundamental objective of protecting life" as espoused in Article 40.3.2, in effect permitted autonomy and quality of life arguments to outweigh the common good in permitting the patient deny medical treatment. It is important to recall, however, that the medical treatment being denied in the ***Ward*** case was one of nourishment: that of feeding through a gastrostomy or nasogastric tube, thereby illustrating the extent to which

the distinction between passive and active euthanasia is indeed a fine one.[2]

23. In its decision in the High Court in this case, the right identified by Hamilton CJ in ***Ward*** that if mentally competent there was "no doubt" but that an individual had the right to forego or direct that treatment be withdrawn leading to their death, was differentiated from active "physician-assisted" suicide.[3] A slippery slope rationale was not therefore sufficient to prohibit the withdrawal of life preserving treatment but is, on the authority of the High Court in this case, sufficient to prohibit the provision of assistance to another person who wishes to end their own life by their own act. Logically, the rationale for the distinction between passive euthanasia (***Ward***) and assisted suicide *(**Fleming***) is difficult to reconcile in circumstances where both raise similar issues of autonomy and quality of life.

24. From the perspective of the wishes of the person and the weight to be attached to those wishes as aspects of vindicating one's right to autonomy and right to self-determination (or preserving the "private sphere") the apparent demarcation between active and passive euthanasia which emerges on the authority of the High Court in this case, when read together with ***In Re Ward of Court,*** also raises further questions, not least for persons deemed to lack mental capacity to consent to treatment, or consent to withdrawal of treatment or consent to non-treatment which are not easily reconciled. The Commission apprehends that the demarcation which is at the heart of the decision in the High Court in this case may militate against the development of a coherent and consistent response to the issue based on individual and constitutionally protected rights.

[2] Denham J. saw "no difference in principle between the artificial provision of air by a ventilator and the artificial provision of nourishment by a tube."

[3] Thus the court stated that "there is an enormous and defining difference between the decision of the competent patient to refuse treatment and physician assisted suicide". Whereas the State cannot constitutionally "compel the competent adult patient to accept medical treatment" on the basis that this would be "wholly at variance with the obligation to protect the person in Article 40.3.2" it would be a "fallacy" to suppose that physician assisted suicide "can be equated with this, precisely because it involves active participation by another in the intentional killing of that other, even if this is genuinely and freely consensual"; at para 93.

E. The Proportionality Test

25. From the reasoning of the Supreme Court in ***Re Ward of Court***, the question arises whether there is scope for this Court to conclude on this appeal that there is a freedom to seek the assistance of another in the act of suicide without risk of criminal sanction in limited and clearly defined circumstances as part of the right to bodily integrity, autonomy or the right to privacy of a person. If this is the case and such a freedom is identified, then it is submitted that it must follow that the blanket criminalisation of assisted suicide gives rise to an undue interference with the said rights if a more nuanced approach provides equally effective safeguards in ensuring due respect for the right to life. In other words, if the identified interference fails the proportionality test in the manner in which the objective is sought to be achieved, then Article 40.3 is infringed.

26. In addressing the proportionality of the prohibition on assisted suicide the High Court concluded that the prohibition on assisted suicide was rationally connected to the fundamental objective of protecting life. The Court apprehended that to unravel a thread of this law by even the most limited constitutional adjudication in the Appellant's favour might open a Pandora's Box and the Court was particularly troubled by the fact that a decision favourable to the Appellant might have the unintended effect of placing the lives of others at risk. The Court based this concern on its conclusion "even the most rigorous system of legislative checks and balances" could not ensure that "the aged, the disabled, the poor, the unwanted, the rejected, the lonely, the impulsive, the financially compromised and the emotionally vulnerable would not disguise their own personal preferences and elect to hasten death so as to avoid a sense of being a burden on family and society."

27. It is unfortunate, however, that in reaching this conclusion the Court appears to have primarily relied on evidence relating to risks associated with euthanasia (which is not at issue in this case) or systems where inadequate or different safeguards existed and even systems where prohibitions are in place but risks still exist. In reviewing the evidence offered by the State, the High Court did not focus exclusively on the evidence pertaining to assisted suicide but included in its considerations studies relating not to assisted suicide but to euthanasia and identified problems which were apprehended or identified in systems where it

seems safeguards were not in place to counter the risks identified or where the incidents reported were indeed unlawful in that jurisdiction.

28. For example, at paragraph 70 of its judgment the Court looked at the risk of coercion and cited a specific example referred to as Case 3: The Netherlands. A wife was reported as no longer wishing to care for her sick, elderly husband and gave him a choice between euthanasia and admission to a nursing home. Afraid of being left to the mercy of strangers in an unfamiliar place, he chose euthanasia. In the case cited, his doctor ends his life despite being aware that the request was coerced.

29. Clearly, where safeguards are in place under a restricted regime which permits assisted suicide in very limited and tightly controlled circumstances including a requirement for expert assessment of factors such as competence, state of mind and freedom from coercion, the Case 3 example relied upon by the High Court could not lawfully occur and the physician would be guilty of an offence notwithstanding that the prohibition on assisted suicide (or in that example, euthanasia) was not an absolute one. This example, remote as it is from the circumstances which arise in this case, was described by the Court as "deeply disturbing" and as showing "that the risks of abuse must be regarded as real and cannot simply be dismissed as speculative or distant" (para. 71).

30. As noted above, the High Court placed particular emphasis on risks associated with a relaxation in the absolute ban on assisted suicide of persons being "euthanized" without their explicit request drawing on studies in the Netherlands and Switzerland cited in the ***Carter*** case whilst stating (at para.102) that "[t]his practice is acknowledged to be unlawful." If the practice is acknowledged to be unlawful but is still occurring, this suggests that even where a prohibition is in place, risks arise. But if the same level of risk occurs notwithstanding a prohibition in law, this begs the question whether the prohibition may be disproportionate if not effective in curbing the risk. In any event, the analysis of risk should relate to the defined class of persons to whom the person belongs, rather than a broad category of "vulnerable" persons.

31. It is considered that the Court may have fallen into error in the manner in which it applied the proportionality test on the facts in this case. It is recalled that the main thrust of the evidence led by the State was to

identify a basis upon which it could be considered legitimate to interfere with autonomy rights in vindication of a right to life. Evidence of abuses or risk of abuse was led to establish a legitimate aim on the part of the State in criminalising the assistance of suicide. It is respectfully suggested, however, that neither in the manner in which the evidence was led nor in its assessment by the Court in its judgement was a real attempt made to distinguish between the context in which the risks were identified e.g. assisted suicide and/or active and/or passive euthanasia and the extent to which a comparison existed between the level of identified risk in the context of an absolute ban or a closely regulated restricted regime. It is respectfully submitted that, in other words, the real question for the Court was not addressed by the evidence and in turn, the Court failed to address the real test in its assessment of the evidence.

32. It is questionable whether the evidence presented on behalf of the State supported a conclusion that such evidence of abuse as exists post liberalisation in the case of assisted suicide was any higher than it had been pre-liberalisation. In any event, the Court did not approach the question of assessment of risk through the prism of asking what the evidence demonstrated would be the real differences, in terms of protecting the right to life, between an absolute ban as opposed to a carefully regulated and narrowly drawn restricted exemption from criminalisation.

33. It is submitted, however, that as a matter of law the ban is only proportionate if it is effective or more effective than a carefully tailored restricted regime would be or a regime that restricts the right to the least extent necessary. It is submitted that the proper test (as per ***Heaney v. Ireland***) is whether the means employed achieved the objective of preserving life in a proportionate manner through:

(i) a rational connection with the aim;

(ii) a minimal impairment of the right; and

(iii) being tailored as closely as possible to achieving the objective.

34. It is respectfully submitted that the approach of the High Court in this case does not apply those limbs of the test that require that the impairment be tailored as closely as possible to achieving the objective and in its judgment there is no thorough assessment of whether there is evidence to support a conclusion that the aim cannot be achieved through a lesser interference with rights.

35. Where abuses occur whether there is a ban or not and are no greater in the case of a ban than under a restricted regime, then it follows that a blanket ban based on the justification of preserving life is not sustainable because that same objective can be served in the same way (with no evidence of an increased level of abuse or risk of abuse) where there is no absolute ban in place. However legitimate the aim of the ban, it can only be justified when interfering with a high constitutional value of the right of autonomy/bodily integrity/privacy, if a lesser interference with the identified right is not equally effective in achieving that aim.

36. It is respectfully submitted that the correct approach to the question of proportionality would be to require the State to demonstrate that there was an evidential basis to support the conclusion that a carefully regulated restricted exemption from the criminalisation of assisted suicide would be less effective than a total ban on assisted suicide, taking into account the constitutional values at stake and bearing in mind that the legislature has already, one is to assume, concluded that the decriminalisation of suicide itself is compatible with the protection of the right to life.

37. It appears clear from para. 55 of the judgment that the Court was satisfied that the Appellant was a person who should benefit from an exemption if one could be crafted in a manner which did not give rise to risks to others. The Court stated:

> *"If this Court could be satisfied that it would be possible to tailor- make a solution which would address the needs of Ms Fleming alone without any possible implications for third parties or society at large, there might be a good deal to be said in favour of her case. But this Court cannot be so satisfied. It certainly can not devise some form of legislative solution which would be an impermissible function for the Court. Further, the Court is mindful that any legislative solution would have to be of general application and this is true a fortiori of*

any judicial decision which the Court might be called upon to make."

38. However, this approach to the concept of proportionality is problematic - both in relation to equality and personal autonomy rights. It is submitted that the threshold prescribed by the Court is set impermissibly high - the Appellant would have to present a case where the solution would be only for her benefit, have no impact on anyone else and fit within separation of powers deference. It is hard to see how this can be a correct test of whether a statute that applies in an indiscriminate, blanket fashion - is unconstitutional, and indeed the decriminalisation of suicide under section 2(1) could never meet this test on a reverse application of the Court's reasoning.

39. Further whilst a legislative solution is of "general" application, there is no impediment to the careful crafting of a limited exemption which would only apply to persons in the same narrow, defined class as the Appellant namely: persons who are terminally ill, profoundly physically disabled, but fully mentally competent.

F. Equality Argument – Questions of Classification

40. Considering the weight which was attached to the constitutional right to equality in argument before the High Court, the level of consideration given to this limb of the case in the decision of the Court may not fully reflect the weight and thrust of the argument before the High Court.

41. The Commission considers the decision of the Madam Justice Lynn Smith of the Supreme Court of British Columbia of 15 June 2012 in ***Carter v Canada***[4] to be of the first importance to the deliberations on this appeal in light of the careful consideration given to the issues in that case and the similarity between the constitutional equality guarantees in Canada with our own constitutional equality guarantee.

42. In ***Carter***, the Court concluded that the provisions regarding assisted suicide (the same as the Irish provisions) have a more burdensome effect on persons with physical disabilities than on able-bodied persons, and thereby create, in effect, a distinction based on physical disability. The

[4] [2012] BCSC 886.

Court concluded that the impact of the distinction is felt particularly acutely by persons who are grieviously and irremediably ill, physically disabled or soon to become so, are mentally competent, and who wish to have some control over their circumstances at the end of their lives. The Court ruled that this distinction is discriminatory because it perpetuates disadvantage. The Court then went on to also find that the infringement of section 15 equality rights is not demonstrably justified. The purpose of the prohibition was identified as being to prevent "vulnerable persons from being induced to commit suicide at times of weakness". It was acknowledged that this purpose was pressing and substantial and the absolute prohibition against assisted suicide was rationally connected to it. The Court went on to find however that a 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 who are grievously and irremediably ill and who are competent and fully informed, non-ambivalent and free from coercion or duress to access assisted death (in question in that case physician assisted death). Given that the prohibition failed to impair the person's equality rights as little as possible and had severe adverse impact on persons in the Plaintiff's situation, the absolute prohibition was found to fall outside the bounds of constitutionality.

43. It is submitted that the reasoning adopted in ***Carter*** in explaining its application of the equality principle to the facts in the case is clear and coherent and wholly consistent with the jurisprudence under Article 40.1 which has developed in this jurisdiction.

44. The High Court in this case was not persuaded by Lynn Smith J.'s reasoning in ***Carter***, particularly insofar as its assessment of risk was concerned for the purpose of an application of a proportionality test. From its judgment the High Court here appeared to accept that section 2(2) of the Criminal Law (Suicide) Act, 1993 *prima facie* indirectly discriminates between those who wish to end their lives and are able bodied, and those that wish to end their lives, but are physically incapable of doing so (para. 122) while ultimately finding that the discrimination is objectively justified and proportionate for the same reasons identified in relation to Article 40.3.2 rights and thus no breach of Article 40.1 occurs. It is noteworthy that while accepting the distinction drawn between the disabled and the able bodied person

when concluding that Article 40.1 is engaged, the Court did not then proceed to apply this distinction in terms of an examination of the justification.

45. The Commission recalls the judgment of this Court in ***Blascaod Mor Teo v. Commission for Public Works***,[5] where the Court found the Blascaod Mor National Park Act, 1989 to be unconstitutional. The Supreme Court ruled by reference to such cases as ***Quinns Supermarket Ltd. v. Attorney General***[6] and ***Brennan v. Attorney General***[7]***,*** and notwithstanding the findings in those cases to the effect that Article 40.1 is not a guarantee of absolute equality for all circumstances and the recognition that the legislature is entitled to classify citizens into groups for legislative purposes, that such classifications must be for a legitimate legislative purpose i.e. relevant to that purpose and fair. The Court said:

> *"in the present case the classification appears to be at once too narrow and too wide. It is hard to see what legitimate legislative purpose it fulfils. 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. This fact alone makes the classification suspect."*

46. Applying the test to the evidence in this case, it is submitted that the High Court failed to consider whether the classification (or absolute prohibition) is too wide in failing to differentiate adequately between the nature and type of assistance, the reason why assistance is required and the nature and type of decision to commit suicide for the purpose of the (legitimate) legislative objective identified by the State. It is submitted that it was necessary to rigorously and dispassionately carry out this analytical exercise, especially given the emotive subject matter of the proceedings.

47. The decision of this Court in ***MD*** is particularly instructive. The Court reiterated at paragraph 42 of its judgment that Article 40.1 recognises that perfectly equal treatment is not always achievable; rather the Article recognises that applying the same treatment to all human persons is not always desirable because it could lead to indirect

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[5] [200]] 1 IR 6.
[6] [1972] I.R. 1.
[7] [1983] I.L.R.M. 449.

inequality given the different circumstances in which people find themselves. The Court continued by reference to the factual and legal matrix under consideration in the ***MD*** case:

> *"49. The fundamental constitutional question is whether it falls to the Court or to the Oireachtas to make the judgment as to whether the risk that the female will become pregnant justifies exempting her, but not her male counterpart, from prosecution. The framing of sexual offences in such a way as to protect young people from the dangers of early sexual activity is a matter of notorious difficulty. States have, for centuries, wrestled with questions of great sensitivity concerning the appropriate age to set, whether to differentiate between males of different ages, or to differentiate on grounds of difference in age between the persons, not to mention the more recent liberation of same-sex activities from the stigma of criminality. Decisions on matters of such social sensitivity and difficulty are in essence a matter for the legislature. Courts should be deferential to the legislative view on such matters of social policy."*

48. Having considered the general approach to under age sex under the Act, which did not differentiate between male and female, the limited application of section 5 and the reasons for it, the Supreme Court found the section constitutional by concluding:

> *"54. In considering s. 5 of the Act of 2006, the State justified the legislation by a social policy of protecting young girls from pregnancy, by creating a law governing anti-social behaviour, i.e. under age sexual intercourse. 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."*

49. The similarities between the approach of the Supreme Court of British Columbia in ***Carter*** and of this Court in *MD* are apparent from a review of the two decisions. The difference between the two cases is that in ***MD*** the Court was dealing with an interference with equality rights which it held to be for a legitimate aim and considered to be crafted in

such a manner as to impair equality rights as little as possible. Applying the same reasoning in ***Carter*** on facts closely similar to those in this case, the Canadian court found that the absolute prohibition on assisted suicide fell outside the bounds of constitutionality. It is recalled that in ***MD***, there was a crafting of a limitation related to the particular circumstances of underage girls whereas, on the facts of this case the ban is total and indiscriminate.

50. The objective justification for section 2(2) of the 1993 Act, was set out in relation to the interference with the personal rights of the Appellant (para. 67 et al), and then the same justification was imported into the analysis of whether the *prima facie* discrimination could be objectively justified (para. 122). At a broad level, it can be seen that far from keeping the distinction between the able bodied and the disabled as narrow as possible, the Court considered the very broad swathe of categories of person encompassed and protected by section 2(2) - so that not just the disabled but also anyone that could be considered vulnerable was included in the group of protected persons (para. 76 gives a list of such "vulnerable persons"). If one considers the list of vulnerable persons at para. 76 it is apparent that many of the categories of person identified are not in fact physically disabled, and could, in theory, end their own lives without assistance and without fear of criminal sanction. This suggests that there is a problem with the "classification" of persons by the Court who are apparently protected by section 2(2), in that at least on an application of the equality principle as identified on the Appellant's behalf, it is far too broad. The real question must be whether there is a justification for a provision which has the effect of depriving a person who is disabled from acting to end their own life without fear of criminal law sanction while according that freedom to the non-disabled person.

51. It would seem reasonable to consider the Appellant as falling within the class of persons who are terminally ill, profoundly physically disabled, but fully mentally competent and this should be the classification adopted in equality proofing the prohibition on assisted suicide. Other than her physical disability, the Plaintiff does not appear to be otherwise "vulnerable". Taking this as the correct classification, then the legislative provision that puts her at a disadvantage when compared with able bodied persons who wish to die and who enjoy the right to autonomy to the extent that they may, by their own act, end their own life, the question remains as to whether the distinction between the Appellant as

a person who is of that narrow class of person who is terminally ill, profoundly physically disabled, but fully mentally competent is proportionate. In applying the proportionality doctrine, the High Court appeared to factor in concerns arising from the abuse of an exemption for assisted suicide by other "vulnerable" persons including able bodied persons. But the Appellant has never made the case that there should be an exemption for persons assisting able bodied persons. The case she has advanced is that persons in her particular, narrowly drawn, category, should be permitted to avail of assistance in committing suicide without fear of criminal sanction.

52. It is the Commission's respectful submission that the breadth of the classification applied by the High Court in this case when it factored in the concerns of a wide group of "vulnerable" may be flawed. The correct test, it is submitted, is to consider the purpose for the prohibition in the context of the narrow classification of persons to whom the Appellant belongs and then to examine whether the means employed to achieve the objective do so in a proportionate manner (rational connection, minimising the impairment of the right and tailored as closely as possible to achieving the objective). It is a matter for the Court as to whether the State presented evidence which demonstrates that a blanket ban provides such greater protection when compared with a narrowly drawn exemption for that class of person to whom the Appellant belongs as to justify the blanket ban. It appears to the Commission that there may be an evidential lacuna in this regard in that the State did not lead evidence to deal with the differences in terms of risk between a blanket prohibition and a narrowly crafted exemption in relation to the class of persons to whom the Appellant belongs.

53. The stark reality of the situation from an equality perspective is perhaps illustrated by comparing the position of a hypothetical person, in the same situation as the Appellant, namely, a physically disabled person, with a person who is physically able. On an application of ***In re Ward of Court***, the person in the Appellant's circumstance may refuse life preserving treatment including the withdrawal of hydration and nutrition, thus ultimately realising by her own actions her wish to die at a time of her choosing. However, a death by starvation and dehydration, is likely to be relatively protracted and accompanied by much suffering and indignity. Contrast this with the position of the able bodied person who can lawfully give effect to a decision to end their life in a manner which minimises or eliminates pain and suffering. It is unclear from the

judgment in the High Court whether the Court was willing to countenance this type of outcome but in line with the ***Ward*** case, it would appear that the State would have no right to intervene in an invasive way to compel a person to accept life sustaining measures in those circumstances.

G. The Issue of a Remedy

54. The Appellant seeks relief by the impugned provision being struck down as unconstitutional, in the absence of the possibility of severance, which relief is within the jurisdiction of this Honourable Court to order. The other relief canvassed in the High Court was whether a remedy could be tailored and the High Court indicated that if it could tailor a remedy just for the benefit of the Appellant which did not have consequences for others, then it might be prepared to do so. The Appellant did not suggest that the Court should tailor a solution for her alone but rather that through its decision, the Oireachtas would be required to do so. On the other hand, applying the same approach as the Canadian courts, the Commission considers that there is, in principle, no impediment to the Courts, in upholding the Constitution by means of a grant of declaratory relief, tailoring an individual exemption in this specific case or in any case, on a case by case basis, where vindication of constitutional rights so requires.

55. The Commission relies in this regard on the approach of the Court in ***B.G. v Murphy***[8] (in like terms with that previously followed by the Court in the ***Carmody*** case[9] and the ***S.M. (No. 2) Case***[10]) in relation to the appropriate remedy. Rather than find the provision unconstitutional by reason of the unjust conferring of a privilege on one category of person while withholding it from another (and not to suggest by a reliance on this case that the right to commit suicide is a "benefit" or "privilege"), the Court instead declared that in the event that the Plaintiff was found fit to plead and pleaded guilty in the Circuit Court that it would be unconstitutional as contrary to Article 40.1 of the Constitution were the sentencing Judge to apply a maximum sentence of more than the equivalent sentence that would have been available in the District Court on a guilty plea. This approach was adopted as a "temporary" or interim

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[8] *B.G. v. Murphy, DPP and Judges of Dublin Circuit Court*, [2011] IEHC 445.
[9] [2010] 1 IR 635.
[10] [2007] 4 IR 369.

solution to *"permit a transient cure in respect of otherwise unconstitutional legislation pending a thorough review of the offending statutory provisions*".

56. As we see in the ***Carter*** case, the Canadian Courts crafted a similar style of "temporary" solution in a case involving the criminalisation of assisted suicide which may be of interest to this Court (in the ***Carter*** Case). The remedy ordered by the Court in ***Carter***, in addition to the declaration of invalidity which was suspended for a year to allow Parliament to decide how to respond, was to constitute a "constitutional exemption" during the period of suspension of the declaration of invalidity on specified conditions whereby Ms. Taylor could obtain an assisted death.[11]

57. It is understandable that the Courts would be reluctant to fashion an individual remedy in any case involving policy considerations on the basis that the precise parameters of any change in the law in this area is a matter for the Oireachtas. However, mindful of delays in the legislative process, the complexity of the issues and the circumstances of the Appellant, this is the type of case which might warrant the Court, upon a finding of a breach of a constitutional right, tailoring an individual exemption for the Appellant in vindication of her personal autonomy and equality rights as protected under the Constitution because otherwise the circumstances of the case are such that she may be left without a remedy. It is respectfully submitted that it is entirely consistent with a separation of powers doctrine that the Courts should so intervene recalling its role as guardian of the Constitution.

H. Conclusion

58. The Commission would wish to see a coherent and consistent approach - based on fundamental rights - developed in answer to the lack of clarity

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[11] The decision is on appeal from the Supreme Court of British Columbia to the Court of Appeal for British Columbia. Notice of appeal was lodged on 13 July 2012, and the appeal is scheduled to be heard over 5 days commencing on 4 March 2013. It is common case that regardless of the decision of the Court of Appeal, it is likely to be appealed to the Supreme Court of Canada. An application to stay the constitutional exemption permitting the plaintiff to seek a physician-assisted suicide death was refused by the Court of Appeal. An application for a stay on the declarations of invalidity was however granted.

which has emerged from the blurring of the distinctions between assisted suicide and euthanasia (both active and passive) in the wake of the decision of the High Court in this case and its overlap with the decision of this Court in the ***In Re a Ward of Court*** case. Such an approach should be informed by a consideration in the first instance of the implications of the right to life, equality, privacy, autonomy and dignity as protected under Irish law in the context of the criminalisation under Irish law of assisted suicide, rather than a conflation of assisted suicide and active euthanasia without regard to the circumstances in which the requirement for same is said to arise. The elaboration of such principles would be welcome insofar as it would provide guidance as to the boundaries between assisted suicide, passive euthanasia and active euthanasia respectively and the procedural safeguards necessary to guard against abuse.

59. An issue which it seems that this Court must resolve is whether the criminalisation in absolute terms of assisted suicide is justified having regard to the extent of interference with the personal rights of the Appellant thereby occasioned and whether the classification of "vulnerable" persons identified by the High Court is overly broad when the Appellant fits within a specific sub-category of the group identified by the High Court as "vulnerable".

60. In this context it is submitted that the Court should have regard to the purpose of the provision and question whether this purpose could be achieved in other, less absolute terms by fashioning a limited exemption from criminalisation for persons who assist those, such as the Appellant, who fall within the class of persons who are terminally ill, profoundly physically disabled, but fully mentally competent.

February 6th, 2013

Siobhan Phelan BL

Frank Callanan SC