Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

Fleming v Ireland : Whether the constitutional right to life gives rise to a corollary constitutional right to die?

Question(s) at stake:

Whether the ban on assisted suicide contained in s.2(2) of the Criminal Law (Suicide) Act 1993 is contrary to Article 40.3.2 of the Irish Constitution which imposes an obligation on the State to protect and vindicate the "person"?

Outcome of the ruling:

Article 40.3.2° of the Irish Constitution imposes a positive obligation on the State to protect life. Thus, there is no explicit constitutional right to commit suicide or to determine the time of one's death.

Topic(s):

- The Human Body

Keywords:

- Assisted suicide
- Personal autonomy
- Human dignity
- Right to life
- Right to physical integrity
- Capacity

Tag(s):

- Right to die
- Right to life
- Terminal illness

Author(s):

- Flynn, Michelle (Max Planck Institute for Social Anthropology, Department Law and Anthropology, Germany)

Country:

Ireland

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Fleming v Ireland, the Attorney General and the Director of Public Prosecutions [2013] IESC 19

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ECLI:

No ECLI number / ECLI number unknown

Date:

29 April 2013

Jurisdiction / Court / Chamber:

Supreme Court

Remedy / Procedural stage:

Appeal to Supreme Court

Previous stages:

- High Court (10 January 2013)

Subsequent stages:

None

Branches / Areas of law:

Constitutional law, Human rights law

Facts:

The appellant was a 59 year old woman who experienced her first episode of multiple sclerosis at the age of 32 with a diagnosis being confirmed in 1989. Multiple sclerosis is a terminal illness which causes neurological deficits and for some patients the disease involves progressive neurological deterioration and eventually death. Whilst the progress of this incurable disease can be modified through certain medications in its early stage, there are no drugs to treat the advanced stages.

The appellant was in the advanced stages of multiple sclerosis. She sought to end her own life but due to the advanced stages of her terminal illness she required assistance. Section 2 of the Criminal Law (Suicide) Act 1993 provides:- “(1) Suicide shall cease to be a crime. (2) A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.”

Her cognitive functions were unaffected by this illness and her decision-making capacity was confirmed after an assessment had taken place. Her partner was willing to help her if it was lawful to do so. The appellant sought a declaration that s. 2(2) of the Criminal Law (Suicide) Act 1993 was invalid having regard to the provisions of the Constitution and a declaration that s. 2(2) was incompatible with the obligations of the Irish State under the European Convention on Human Rights. On the 10 January 2013, the High Court dismissed the claims made by the appellant. The appellant filed an appeal to the Supreme Court.

Ruling:

The Supreme Court, in dismissing the plaintiff’s appeal, held the following:

- Article 40.3.2° of the Irish Constitution imposes a positive obligation on the State to protect life. There is thus no explicit constitutional right to commit suicide or to determine the time of one's death.

- Article 40.1 of the Irish Constitution does not guarantee absolute equality for all citizens in all circumstances. Impermissible discrimination, even if apparently

neutral, might be shown if the classification of persons or of activity chosen was motivated by a discriminatory intent or revealed a prejudice. However, in this instance, the law prohibiting an individual to assist another to commit suicide applied to all individuals without distinction and was based on the fundamental equal value of each human life.

Main quotations on cultural or religious diversity:

- “Suicide was regarded as a very serious offence, with draconian penalties, for hundreds of years. It was regarded as self murder. As the person was dead, and could not be sentenced, very harsh punishment was laid down in relation to his or her burial and to forfeiture of his or her property. Over the last two hundred years the situation has been mitigated, to the point where suicide has been decriminalised in many countries, including in Ireland in 1993.” (para. 76)
- “There can be no doubt but that Article 40.3.2° of the Constitution imposes a positive obligation on the State to protect life. That the obligation on the State to protect life is an important constitutional principle cannot, equally, be doubted. The precise extent of the State's obligation in any given circumstance is, however, a matter which may require careful analysis and, at least in some cases, require a careful balancing of other constitutional considerations.” (para. 106)
- “Can it be said that the right to life as so guaranteed, whether on its own or in conjunction with the guarantee of the protection of the person, necessarily implies as a corollary, the right of every citizen to terminate his or her life and to have assistance in so doing? At the level of abstract reasoning it is of course possible to argue that, if a citizen has a right to life, that must comprehend abandoning or terminating it. It is also possible to construct a libertarian argument that the State is not entitled to interfere with the decisions made by a person in respect of his or her own life up to and including a decision to terminate it. However, it is not possible to discern

support for such a theory in the provisions of the Constitution without imposing upon it a philosophy and values not detectable from it. A right which extends to the termination of life must, as counsel for the appellant recognised in closing submissions, necessarily extend to a right to have life terminated by a third party in a case of total incapacity." (para. 113)

- "The right to life which the State is obliged to vindicate, is a right which implies that a citizen is living as a vital human component in the social, political and moral order posited by the Constitution. While it may be said that it is of the essence of certain types of rights, such as that of the right to associate, that they logically apply as a corollary a right to dissociate, that reasoning cannot be applied to all rights guaranteed by the Constitution. In particular the protection of the right to life cannot necessarily or logically entail a right, which the State must also respect and vindicate, to terminate that life or have it terminated. In the social order contemplated by the Constitution, and the values reflected in it, that would be the antithesis of the right rather than the logical consequence of it." (para. 113)
- "Thus, insofar as the Constitution, in the rights it guarantees, embodies the values of autonomy and dignity and more importantly the rights in which they find expression, it does not extend to a right of assisted suicide. Accordingly the court concludes that there is no constitutional right which the State, including the courts, must protect and vindicate, either to commit suicide, or to arrange for the termination of one's life at a time of one's choosing." (para. 114)
- "Section 2 of the Act of 1993 does not come easily within any of these categories [direct or indirect discrimination]. It is neutral on its face; it applies equally to everybody. No one who commits suicide commits a crime. Any person, without any distinction, who aids, abets, counsels or procures another person to commit suicide, commits an offence. It is not possible for anyone to complain of unequal treatment on the ground that he or she will commit a criminal act by assisting the suicide of another person. The

appellant does not claim that she is herself directly affected by s. 2(2). It is difficult to succeed in an equality challenge to a law which applies to everyone without distinction and which is based on the fundamental equal value of each human life. It is often the case that neutral laws will affect individuals in different ways: in the absence of impact on a fundamental right that does not normally give rise to any unconstitutionality." (para. 133)

- "The appellant does complain that s. 2(2) of the Act of 1993 affects her by making it difficult or impossible for her to end her own life, because she cannot perform the final suicidal act without assistance. In this she says that she is differently situated from an able-bodied person, a person who does not need assistance. Assuming for present purposes that such a complaint may give rise to a claim under Article 40.1 of the Constitution, this effect does not, of course, result from the provisions of the law, which applies equally to everybody wishing to commit suicide. Since the enactment of s. 2(1) of the Act of 1993, everyone is free to do so. What prevents the appellant from committing suicide is, on her own evidence, the fact of her disability. The appellant was able to avail of s. 2(1) for some time: when she lost that ability it was not through operation of any law before which she is required to be held equal, but the fact of her condition." (para. 134)
- "The substance of the appellant's complaint concerns, in the first instance, not the treatment of the appellant herself but the treatment of other persons. It is that the legislature treats her unequally before the law by failing to include a distinction in a facially neutral statutory provision addressed to those other persons, which, she claims, indirectly affects her. The court is invited to follow the Canadian example by interpreting Article 40.1 as requiring the courts to engage in an effects-based analysis of laws passed by the Oireachtas." (para. 135)
- "As there is no right to commit suicide, issues, such as discrimination, do not arise; nor do values such as dignity, equality, or any other principle under the Constitution, apply to the situation and application of the appellant, as

discussed above.” (para. 138)

Main legal texts quoted in the decision:

Irish Constitutional Provisions :

- Article 40.1
- Article 40.3.1°
- Article 40.3.2°

Irish Legislative Provisions:

- Criminal Law (Suicide) Act 1993, s 2
- European Convention on Human Rights Act 2003, s 5

European Convention on Human Rights: -Article 8,

- Article 14

Cases cited in the decision:

Relevant Irish Case Law:

- *McGee v The Attorney General* [1974] IR 284
- *Norris v The Attorney General* [1984] IR 36
- *In re a Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 IR 79
- *M.D. (a minor) v Ireland* [2012] IESC 10
- *Fleming v Ireland* [2013] IEHC 2

Relevant UK Case Law:

- *R (Pretty) v DPP* [2001] UKHL 61

Relevant US Case Law:

- *Washington v Glucksberg* [1997] 521 US 702

Relevant Canadian Case Law:

- *Rodriguez v British Columbia* [1993] 3 SCR 519
- *Carter v Canada (Attorney General)* [2012] BCSC 886

Relevant European Court of Human Rights:

- *Pretty v United Kingdom* (App no 2346/02) [2002] ECHR 427
- *Haas v Switzerland* (App No 31322/07) [2011] ECHR 2422

Commentary

Fleming v Ireland : Whether the constitutional right to life gives rise to a corollary constitutional right to die?

This is a landmark case which, at its core, considered the constitutional right to life and whether there was a constitutional right to die by way of assisted suicide. Whilst religious and cultural diversity issues are not explicit within the body of the judgment, this Supreme Court judgment nonetheless reveals the influence of Christian theological concepts upon the constitutional interpretation of both enumerated and unenumerated constitutional rights. The circumstances of the appellant's case presented an extremely difficult situation for the Irish Courts to adjudicate. Such was the significance of this case, the High Court sat as a Divisional Court with three judges which included Judge Kearns as the President of the High Court, Judge Hogan who is regarded as a constitutional law expert in the jurisdiction, and Judge Carney who had sat for many years as head of the Criminal Division of the High Court. Upon the conclusion of a full hearing which included testimony from various medical experts and crucially with the appellant herself giving testimony about her illness and her wish to end her life with the assistance of another, the High Court dismissed the proceedings. Upon appeal to the Supreme Court, Chief Justice Denham dismissed the appeal by way of a unanimous judgment on behalf of a seven-judge court.

The case involved the balancing of core constitutional provisions including; Article 40.1 (equality provisions), Article 40.3.2° (right to life) and Article 40.3.1° (personal rights). Of particular significance is the implicit influence of Thomistic philosophy upon the Court's interpretation of these constitutional provisions. By

way of example, Article 40.1 provides that “[a]ll citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function”. In considering the ambit of Article 40.1 of the Constitution, the Supreme Court noted that this was not a guarantee of absolute equality for all citizens in all circumstances and cited with approval the following passage in the judgment of Judge Walsh in *Quinn's Supermarket v Attorney General* [1972] IR 1 at pp. 13 and 14 “Article 40, s.1, […] is not a guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and (as the Irish text of the Constitution makes quite clear) is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or other ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community.”

Article 40.3.2° provided that “[t]he State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, … of every citizen.” In concluding that this Article imposed a positive obligation on the State to protect life, the Supreme Court cited the following passage of Chief Justice Hamilton in the case of *In re a Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 IR 79 at p. 124, wherein he stated that “As the process of dying is part, and an ultimate, inevitable consequence, of life, the right to life necessarily implies the right to have nature take its course and to die a natural death and, unless the individual concerned so wishes, not to have life artificially maintained by the provision of nourishment by abnormal artificial means, which have no curative effect and which is intended merely to prolong life. This right, as so defined, does not include the right to have life terminated or death accelerated and is confined to the natural process of dying. No person has the right to terminate or to have terminated his or her life or to accelerate or have accelerated his or her death.”

Article 40.3.1° provides that “[t]he State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen”. In assessing the ambit of this Article, Chief Justice Denham placed reliance upon the case of *McGee v Attorney General* [1974] I.R. 284 wherein Judge Henchy noted at p. 325 that “It is for the Courts to decide in a particular case whether the right relied on comes within the constitutional guarantee. To do so, it must be shown that it is a right that inheres in the citizen in question by virtue of his human personality.” This Article has been interpreted by the Irish Courts as affording a complex range of basic personal rights and in this regard the Supreme Court noted the dissenting judgment of Judge Henchy in *Norris v The Attorney General* [1984] IR 36 wherein he stated at p. 72 that such personal rights “vary in nature, purpose and range (each necessarily being a facet of the citizen's core of individuality within the constitutional order)”.

This case demanded a deeply complex analysis of core constitutional provisions arising from the question as to whether the ban on assisted suicide contained in s 2(2) of the Criminal Law (Suicide) Act 1993 was contrary to Article 40.3.2 of the Irish Constitution which imposes an obligation on the State to protect and vindicate the “person”. In dismissing the appeal, the Supreme Court held that the Irish Constitution did not provide a right to die and, in considering the ambit of the constitutional right to life, also revealed cultural attitudes towards these highly contentious issues. It is nonetheless of note that it was expressly stated that “Nothing in this judgment should be taken as necessarily implying that it would not be open to the State, in the event that the Oireachtas [the Irish legislature] were satisfied that measures with appropriate safeguards could be introduced, to legislate to deal with a case such as that of the appellant.” (para . 108). Nevertheless, the Court proceeded to note that if such legislation was introduced, it would fall to the courts to determine whether the Irish legislature had balanced legitimate concerns and ultimately whether such legislation would be constitutionally permissible. Thus, the role of the Courts in upholding the ethos of the Constitution was thereby reiterated.

Literature related to the main issue(s) at stake:

- Carere, Matt. and Kieran Doran. 2014. “The Issue of Advanced Healthcare Planning in Ireland: Euthanasia and Assisted Suicide”. Medico-Legal Journal of Ireland 20(1): 29-39.
- Davis, Lucy M. 2019. “The Right not to be Resuscitated? Do Not Attempt Resuscitation (DNAR) Orders and the Limits of the Legal Framework in Ireland”. Hibernian Law Journal 18(1): 49-67.
- Mitchell, Ben. 2014. “Constitutional Equality Law after Fleming v Ireland”. Dublin University Law Journal 37(1): 252-266.
- Scott Byrne, Colm. 2013. A Time to Change the Law on Euthanasia and Assisted Suicide in Ireland”. Trinity College Law Review16(1): 15-36.

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