Para 8.3, bullet point 2 In *Uddin* [2017] EWCA Crim 1072 the Court of Appeal considered the meaning of the phrase '*or otherwise*' which forms a part of the definition of '*vulnerable adult*' in the Domestic Violence, Crime and Victims Act 2004, s 5(6) cited in notes 8 and 9. The Court held that s 5(6) contained distinctive categories and that '*or otherwise*' created a separate third category which was different from the first and second categories. That category covered vulnerable adults who are not suffering from an illness, disability or old age. The Court recognised that all three categories required a causal link between the conditions described in each category and the significant impairment of the ability to protect oneself against violence, abuse or neglect. The Court held (at [37]) that, by reason of the causal link, the third category encompassed by 'or otherwise' could simply be defined as: 'a cause (other than physical or mental disability or illness or old age) which had the effect on the victim of significantly impairing his ability to protect himself from violence, abuse or neglect.' Furthermore, the Court stated, that whilst the first and second categories were conditions intrinsic to the victim, the third category was wide enough to include conditions which were either intrinsic or external to the victim, as the natural meaning of 'otherwise' did not necessitate that the cause be intrinsic. In principle, there was no limit to the facts and circumstances that might lead to the victim finding himself in a state of impaired ability to obtain protection. In relation to the third category, the causes of vulnerability might be physical or psychological or they might arise from the victim's circumstances, as in *Khan* [2009] EWCA Crim 2, dealt with in para 8.6. However, the third category was not limited to cases of 'utter dependency', as postulated in *Khan*. A victim of sexual or domestic abuse or modern slavery, for instance, might find himself in a vulnerable position, having suffered long-term physical and mental abuse leaving him scared, cowed and with a significantly impaired ability to protect himself.

***Para 8.23** In *R (on application of Conway) v Secretary of State for Justice* [2018] EWCA Civ 1431, Mr Conway (C), who was terminally ill with motor neurone disease (a progressive wasting disease) and had a prognosis of six months or less to live, applied for a declaration that the blanket ban on assisted suicide under the Suicide Act 1961, s 2(1) constitutes a disproportionate interference with his right to respect for his private life and was therefore incompatible with the European Convention on Human Rights, Article 8. C's case was different to that of the claimants in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, referred to in para 8.23, in that the assistance in question would be the provision to him of fatal drugs by a doctor, or other assistance to allow him to commit suicide, rather than the intervention of a third party to bring about death, or to enable travel to a jurisdiction allowing such assistance.

C put forward the outline of an alternative scheme which would only apply to terminally ill people (and would be subject to other safeguards). The scheme, he said, would safeguard relevant competing legitimate interests and would

sufficiently protect the weak and vulnerable in society and, C argued, therefore showed that the blanket prohibition in s 2(1) was an unnecessary and disproportionate interference with his rights under Article 8. The substantive criteria outlined by C were that the prohibition on providing assistance for suicide should not apply where the individual was aged 18 or above; had been diagnosed with a terminal illness and given a clinically assessed prognosis of six months or less to live; had the mental capacity to decide whether to receive assistance or to die; had made a voluntary, clear, settled and informed decision to receive assistance to die; and retained the ability to undertake the final acts required to bring about his death having been provided with such assistance. In addition, C outlined the following procedural safeguards: the individual would have to make a witnessed written request for assistance to commit suicide; his treating doctor would have to have consulted an independent doctor who confirmed that the substantive criteria were met, having examined the patient; assistance to commit suicide would have to be provided with due medical care; and the assistance would have to be reported to an appropriate body. As a further safeguard, C also proposed that permission for provision of assistance should be authorised by a High Court judge, who should analyse the evidence and decide whether the substantive criteria were met.

C's claim for a declaration of incompatibility under the Human Rights Act 1998, s 4 was dismissed by the Divisional Court. The Divisional Court considered that s 2(1) promoted three legitimate aims which were sufficiently important to justify limiting C's rights under Article 8: the protection of the weak and vulnerable; the protection of the sanctity of life as a moral principle; and the promotion of trust and confidence between doctors and patients. It held that there was a rational connection between the prohibition in s 2(1) and the protection of the weak and vulnerable, and that the prohibition served to reinforce a moral view regarding the sanctity of life and served to promote relations of full trust and confidence between doctors and their patients. It rejected C's submission that the proposed scheme would be adequate to address concerns regarding the protection of the weak and vulnerable, let alone these other legitimate aims of the blanket prohibition in s 2(1). It added that the matter had been the subject of extensive parliamentary debate and the court should respect Parliament's assessment of the necessity of s 2(1); s 2(1) struck a fair balance between the three legitimate aims and the rights of people in C's position as to the timing and manner of their death.

C appealed to the Court of Appeal, arguing that s 2(1) was unnecessary because his scheme was an adequate protection for the weak and vulnerable, and that the Divisional Court, by simply adopting the balance struck by Parliament, had effectively abdicated its responsibility to make the proportionality assessment under the Human Rights Act 1998.

The Court of Appeal distinguished the Supreme Court's decision in *R (Nicklinson) v Ministry of Justice* on the ground that it focused on the situation of people in long term suffering rather than, as under C's scheme, those suffering from a terminal illness who were within six months of death. Further, it stated, while there was only limited evidence in *Nicklinson* as to how weak and vulnerable people might be protected if assisted suicide was legalised, C's scheme was specifically designed to impose appropriate safeguards. Moreover, it added, the judgments of the Supreme Court Justices in *Nicklinson* differed to a greater or lesser extent in their detailed reasoning in many significant respects, and those in the majority were decisively influenced by the circumstance that a Bill to deal with assisted suicide was then currently before Parliament (which an overwhelming majority of the Justices thought in principle was a better forum for determining the issue of legalising assisted suicide than the courts).

Turning to the issue of whether the blanket ban on assisted suicide was justified under Article 8(2) as a necessary and proportionate interference with C's right to respect for his private life, the Court of Appeal held that the issue under Article 8(2) was not solely concerned with how the legitimate aim of protecting weak and vulnerable people was achieved; permitting assisted suicide raised important moral and ethical issues. The evidence did not clearly establish the efficacy of C's proposed scheme. An element of risk would inevitably remain in assessing whether an applicant had met the criteria under the proposed scheme. C's scheme and its potential consequences raised wide-ranging policy issues. Parliament was a far better body for determining the difficult policy issues in relation to assisted suicide in view of the conflicting, and highly contested, views within society on the ethical and moral issues and the risks and potential consequences of a change in the law and the implementation of a scheme such as that proposed by C. Giving great weight to the views of Parliament did not amount to a failure to carry out the balancing exercise required by Article 8(2).

The Court of Appeal concluded that there was no error of principle in the Divisional Court's decision. It was entitled to find that the prohibition in s 2(1) promoted three legitimate aims (to protect the weak and vulnerable, to give proper weight to the moral significance of the sanctity of life and to promote trust and confidence between patient and doctor in the care relationship), and that C's scheme would not be effective to do so. The Court of Appeal added that the Divisional Court had also been entitled to respect the views of Parliament when carrying out the assessment under Article 8(2) and to conclude that s 2(1) achieved a fair balance between the competing interests.