Neutral Citation Number: [2013] IEHC 458

PETITION

THE HIGH COURT

[2012 No. 152 IA]

IN THE MATTER OF THE REFERENDUM ON THE PROPOSAL FOR THE AMENDMENT OF THE CONSTITUTION CONTAINED IN THE THIRTY FIRST AMENDMENT OF THE CONSTITUTION (CHILDREN) BILL 2012, HELD ON 10TH NOVEMBER, 2012

JOANNA JORDAN

INTENDED PETITIONER

JUDGMENT of Mr. Justice McDermott delivered on the 18th day of October, 2013

1. On 10th November, 2012, a Referendum was held whereby a proposal for the deletion of Article 42.5 of the Constitution and the insertion of a new Article 42A as contained in the Thirty First Amendment of the Constitution (Children) Bill 2012, was submitted for the decision of the people.

2. The Referendum Returning Officer published a provisional Referendum Certificate in Iris Oifigiúil dated 12th November, 2012, on 13th November which confirmed the final results of the Referendum. This certificate was prepared from the reports submitted by the several local Returning Officers in all of the constituencies in the State which set out the following overall result:-

> "2 (a) The total number of votes recorded at the Referendum in favour of the proposal was [615,731]
>
> (b) The total number of votes recorded at the Referendum against the proposal was [445,863]
>
> 3. A majority of the votes recorded at the Referendum was recorded in favour of the proposal."

The result indicates that 33.49% of the eligible electorate voted, 58% of those who voted, voted in favour of the proposed amendment and 42% voted against.

Amending the Constitution

3. Article 46(2) of the Constitution provides that:-

> "Every proposal for an amendment of this Constitution shall be initiated in Dáil Éireann as a Bill and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum."

Article 46.5 provides:-

> "A Bill containing a proposal for the amendment of this Constitution shall be signed by the President forthwith upon his being satisfied that the provisions of this Article have been complied with in respect thereof and that such proposal has been duly approved by the people in accordance with the provisions of s. 1 of Article 47 of this Constitution and shall be duly promulgated by the President as a law."

4. The result of any Referendum is determined in accordance with Article 47.1 of the Constitution which provides that:-

> "Every proposal for an amendment of this Constitution which is submitted by Referendum to the decision of the people shall, for the purpose of Article 46 of this Constitution, be held to have been approved by the people, if, upon having been so submitted, a majority of the votes cast at such Referendum shall have been cast in favour of its enactment into law."

Article 47.3 provides that:-

> "Every person who has the right to vote at an election for members of Dáil Éireann shall have the right to vote at a Referendum."

Article 47.4 provides that:-

> "Subject as aforesaid, the Referendum shall be regulated by law."

Referendum Act 1994

5. The law regulating the holding of a Referendum is set out in the Referendum Act 1994.

6. Voting in the Referendum is by secret ballot and s. 8 of the Act provides that:-

> "A person who has voted at a Referendum shall not in any legal proceedings be required to state how he voted."

Other provisions of the statute are calculated to preserve the secrecy of the ballot.

7. On 18th September, 2012, the Taoiseach announced in Dáil Éireann that voting on the Children Referendum would take place on 10th November, 2012. The Bill completed its passage through both Houses of the Oireachtas without amendment on 3rd October. On 8th October, the Minister for the Environment, Community and Local Government made an order pursuant to s. 10(1) of the Act nominating 10th November, 2012, as the polling day.

8. Under s. 14 of the Act, the Minister appointed a "Referendum Returning Officer" whose duty it was to conduct the Referendum and

to ascertain and declare the result thereof in accordance with the Act. Under s. 15 a person who would normally be the Returning Officer at a Dáil election in a constituency is empowered to act as "the Local Returning Officer" in that constituency for the purposes of the Referendum. It is the duty of the Local Returning Officer to do "such acts and things as may be necessary for effectually taking the poll and counting the votes in the constituency in accordance with this Act". Section 18 provides that for the purpose of taking the poll the State shall be deemed to be divided into the same constituencies as those applicable to an election to Dáil Éireann and that "the poll shall be taken separately in each such constituency". Section 37 provides that:-

> "On completion of the counting of votes in a constituency, the local Returning Officer shall furnish to the Referendum Returning Officer a report in writing (under section 34) in the form directed by the Minister stating:-
>
> (a) The number of valid votes recorded in favour of the proposal which is the subject of the Referendum,
>
> (b) The number of valid votes recorded against that proposal, and
>
> (c) The total number of valid votes recorded at the Referendum in the constituency,"

together with a statement pursuant to s. 34(3) of the Act showing the number of papers rejected as invalid and not counted under s. 34(1)(a) to (d).

9. Under s. 40, the Referendum Returning Officer, as soon as he/she has received the s. 34 reports recording the number of votes recorded in each constituency must prepare and sign the provisional certificate in the prescribed form from these reports stating:-

> "(a) In the case of a Constitutional Referendum, the number of votes recorded in favour of the proposal which is the subject of the Referendum, the number of votes recorded against the proposal and whether a majority of the votes recorded at the Referendum was or was not recorded in favour of the proposal;
>
> …
>
> (c) In every case the number of votes reported by the Local Returning Officer to have been recorded in each constituency in favour of the proposal which is the subject of the Referendum and the number of votes similarly reported to have been recorded in each constituency against the proposal."

10. Thereafter, under s. 40(2) the Referendum Returning Officer is obliged "as soon as maybe after signing the provisional Referendum Certificate" to publish a copy of the certificate in Iris Oifigiúil together with a statement that such certificate will become final and incapable of being questioned when the officer is informed by the Master of the High Court either that no Referendum petition has been duly presented in respect thereof, or that every Referendum petition so presented has become null and void. Each of these steps was lawfully completed by the Local Returning Officers and the Referendum Returning officer and no issue arises in these proceedings concerning the conduct of the poll which was in all material respects, carried out in accordance with the provisions of the Referendum Act 1994.

11. In these proceedings Ms. Jordan (hereinafter the petitioner) seeks leave to present a petition pursuant to s. 42 of the Referendum Act 1994, in respect of the provisional Referendum Certificate dated 12th November, 2012, for an order annulling the Referendum result. The proposed respondents are the Minister for Children and Youth Affairs, the Government of Ireland, Ireland and the Attorney General (the respondents). The application is based on the ruling of the Supreme Court in *McCrystal v. Minister for Children and Youth Affairs & Ors* [2012] IESC 53 delivered on 8th November, 2012, and the several judgments of the court delivered on 11th December. It was established in *McCrystal* that the information campaign sponsored by the Minister for Children and Youth Affairs in respect of the Children Referendum in advance of the poll constituted a clear disregard of the rights of citizens to a Referendum conducted in accordance with the norms of the democratic process mandated by the provisions of the Constitution.

***McCrystal* Litigation**

12. On 19th September, 2012, a Referendum Commission was established under the Referendum Act 1998, as amended, to provide neutral information to the electorate on the proposed amendment. The Referendum Commission launched a public information campaign on 16th October, 2012. It established a website, conducted an advertising campaign and also produced and distributed an information booklet on the Referendum proposal to be sent to every home in the State. The parties to the proceedings accept that the Referendum Commission was at all material times acting in accordance with its statutory mandate in an impartial and objective manner.

13. On 19th October, 2012, the Minister for Children and Youth Affairs also commenced an information campaign. The Minister caused a website to be launched, conducted an advertising campaign on television, radio and in the printed media, and produced a booklet said to be for the purpose of informing the electorate about the Referendum proposals.

14. Mr. McCrystal was concerned that the Government's information campaign constituted a clear disregard of the principles established in *McKenna v. An Taoiseach (No. 2)* [1995] 2 I.R. 10 (the *McKenna* case), which determined that the Government may not spend public monies to promote a result in a Referendum.

15. In *McKenna (No.2),* Hamilton C.J. in his judgment stated that the Referendum Act 1994, in accordance with which every proposal for constitutional amendment must be put to the people, did not allocate any role to the Government in furnishing information to the electorate or in the conduct of the Referendum. The Government in spending public funds on the promotion of a campaign in favour of a "Yes" vote was not acting in accordance with the executive power of the State. Though the Government was entitled to express its views and urge acceptance of the proposal, the issue was whether the expenditure of public funds to that end constituted an interference with the plaintiff's constitutional rights. Hamilton C.J. was satisfied that:-

> "The use by the Government of public funds to fund a campaign designed to influence the voters in favour of a 'Yes' vote is an interference with the democratic process and the constitutional process for the amendment of the Constitution and infringes the concept of equality which is fundamental to the democratic nature of the State." (p. 42)

16. O'Flaherty J. (concurring) stated that:-

> "To spend money in this way breaches the equality rights of the citizen enshrined in the Constitution as well as having the effect of putting the voting rights of one class of citizen (those in favour of the change) above those of another class of citizen (those against)…

> I should think it bordering on the self-evident that in a democracy such as is enshrined in our Constitution (which is not exclusively a parliamentary democracy; it has elements of a plebiciary democracy) it is impermissible for the Government to spend public money in the course of a referendum campaign to benefit one side rather that the other." (p. 43)

17. Blayney J. held that the Government's expenditure constituted a breach of fair procedures which must be observed in submitting a proposal to the people. He stated that if the Government's plan to spend over £400,000.00 were to be implemented:-

> "…it would give a very considerable advantage to those who support the amendment as against those who oppose it. The Government would be acting unfairly in the manner in which it was submitting the amendment to the decision of the People." (p. 50)

18. Denham J. (as she then was) in her concurring opinion, emphasised the right of a citizen to equality of political rights in a "democratic" State which had been recognised by Budd J. in *O'Donovan v. Attorney General* [1961] I.R. 114 at 137 when considering the right to vote under Article 16.2.3 and Article 40.1 of the Constitution. Denham J. was satisfied that:-

> "The spirit and concept of equality applies to the process of a referendum. There is a right to equal treatment in the political process. It is a breach of the concept and spirit of the constitutional right to equality for the Government to spend public monies in funding a campaign to advocate a specific result in a referendum." (p. 53)

Further, Denham J. emphasised that a citizen was entitled, as a personal right, to a democratic process pursuant to the provisions of Article 40.3 of the Constitution:-

> "Ireland is a democratic state. The citizen is entitled under the Constitution to a democratic process. The citizen is entitled to a democracy free from governmental intercession with the process, no matter how well intentioned. No branch of the government is entitled to use taxpayers monies from the Central Fund to intercede with the democratic process either as to the voting process or as to the campaign prior to the vote.
>
> This is an implied right pursuant to Article 40, s. 3 which harmonises with Article 5, Article 6, s. 1, Article 16, Article 40, s. 1, Article 47, s. 3 and is in keeping with the democratic nature of Bunreacht na hÉireann…
>
> Power derives from the People, and is exercised under the Constitution through their organs of government (legislative, executive, judicial). Power and decision-making in referenda is with the People.
>
> The organs of government are instruments of the People. Thus, the democratic process is fundamental and critical to the exercise of power under the Constitution." (pp. 53 – 54)

19. A test was formulated in the *McKenna* case as to how the court might exercise its jurisdiction in relation to the Government's breach of the Constitution as follows:-

> "1. The courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions provided that it acts within the restraints imposed by the Constitution on the exercise of such powers.
>
> 2. If, however, the Government acts otherwise than in accordance with the provisions of the Constitution and in clear disregard thereof, the courts are not only entitled but obliged to intervene.
>
> 3. The courts are only entitled to intervene if the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred on it by the Constitution."

(Per Hamilton C.J. at p. 32 and Blayney J. at p. 50)

20. The Supreme Court concluded that the government funding of the campaign designed to influence voters in favour of a "Yes" vote was an interference with the democratic and constitutional process for the amendment of the Constitution and infringed the concept of equality which was fundamental to the democratic nature of the State. The court granted a declaration encapsulating these findings but declined to issue an injunction.

21. Mr. McCrystal initiated his proceedings, by way of *ex parte* application to the High Court on 19th October, 2012, in respect of the expenditure of public funds by the Minister for Children and Youth Affairs and the Government in the course of the Children Referendum Campaign based squarely on the *McKenna* case. He challenged the expenditure of public money on a government information booklet, advertising on radio and television and in printed media, and the creation and maintenance of a website favouring a "Yes" vote in the Referendum. He complained that the Minister had commissioned 2.05m copies of an "information booklet", the delivery of which to all homes in the State commenced on 19th October, 2012. In the course of Mr. McCrystal's proceedings, evidence was adduced that the department allocated a budget of €3m to be spent on the Children Referendum. €1.9m was allocated to the Referendum Commission to finance the discharge of its statutory duties. The balance of €1.1m was to be used by the Department of Children and Youth Affairs: "to provide information on the Referendum and encourage members of the public to vote". Details were provided to this Court of this expenditure as follows:-

	€
"Development, design and operation of the website	11,040.00
Design and printing of information	235,759.37
Behaviour and Attitudes opinion poll	103,011.98
MKC Communications – website and booklet development	38,499.65
Broadcast, media production and advertising	164,725.29
Delivery of information booklets	225,027.01
Print media advertising (Brindley Advertising)	247,515.95
Dr Geoffrey Shannon (Advice on Adoption)	8,237.19
Press Office Costs (e.g. transcripts)	7,410.67
Sundries	1,056.88

Total expenditure	1,042,284.10"

This expenditure enabled the government to disseminate the impugned material nationwide and was a large amount compared with the sums spent by others, such as Fine Gael €150,000.00 and the Labour Party €50,000.00. The "no" campaign had very little funding available to it.

22. Affidavits were submitted to the High Court on behalf of Mr. McCrystal supporting his contention that the materials produced by the Government tended to promote a "Yes" vote. He sought a declaration that the defendants acted wrongfully and were not entitled to pursue a particular result under the guise of providing information, an injunction restraining the defendants from promoting a particular result and consequential orders in respect of the ongoing distribution of the booklets, the use of the website and the advertising campaign.

23. The High Court (Kearns P.) in an ex tempore judgment delivered on 1st November, 2012 [2012] IEHC 101, and having considered an extensive body of expert and other evidence submitted on affidavit, was not satisfied to conclude that the material constituted "a clear constitutional abuse or manifest solicitation to vote in a particular way".

24. The plaintiff appealed to the Supreme Court which commenced the hearing of the appeal on 6th November, 2012, and on 8th November granted a declaration that the various publications including the booklet, the advertising and the material on the website "in places" breached the principles set out in the *McKenna* case. An injunction was not granted because it was assumed by the court that the Minister and the Government would respect the Supreme Court's ruling and cease its unconstitutional behaviour. The Supreme Court delivered its decision promptly as the Referendum was due to be held on the following Saturday, 10th November. The court indicated that the judgments would be delivered on 11th December, 2012. The Supreme Court ruling was extensively and immediately reported in the national media and became a source of intense political debate, understandably attracting significant criticism from the "No" campaign and others. It is important to quote the relevant part of the ruling delivered on 8th November because of the claims made by both sides as to its affect or potential affect on the Referendum campaign and on votes cast on polling day two days later.

25. Denham C.J. in delivering the ruling of the court stated:-

> "3. In *McKenna v. An Taoiseach*... it was held that the Government in expending public moneys in the promotion of a particular result in a Referendum process was in breach of the Constitution.
>
> The people adopted the Constitution 75 years ago. The Constitution belongs to the people and may be amended only by the people in a Referendum. It is this democratic process which is protected by the *McKenna* principles. Public funding should not be used in a Referendum to espouse a particular point of view.
>
> 4. The *McKenna* principles may be found in the several judgments in that case. These principles, which are not in dispute, are consistent with standards recognised both nationally and internationally for a Referendum process, such as the European Commission for Democracy Through Law (Venice Commission), Code for Good Practice on Referendums, adopted by the Council for Democratic Elections at its 19th Meeting (Venice, 16 December, 2006) and the Venice Commission at its 70th Plenary Session (Venice, 16 – 17 March, 2007).
>
> 5. At issue in this case is the application of these principles to a booklet and a website, both entitled 'Children's Referendum', and advertisements, published and disseminated by the Department of Children and Youth Affairs, on foot of moneys voted by the Oireachtas, which the appellant submits breach the *McKenna* principles.
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> 6. The Court is required to give its decision promptly, in view of the pending Referendum to be held on Saturday, 10th November, 2012. The substance of that proposal is a matter for the people alone. The Court will give its ruling today and judgements will be delivered on Tuesday, 11th December, 2012.
>
> 7. The Court has concluded that it is clear that there are extensive passages in the booklet and on the website which do not conform to the *McKenna* principles. This material includes a misstatement, now admitted to be such, as to the effect of the Referendum.
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> 8. The Court is satisfied that while not all of the website or the booklet are in breach of the *McKenna* principles, because of the overall structure of the booklet and website, it would not be appropriate for the Court to redact either.
>
> 9. Accordingly, the Court would grant a declaration that the respondents have acted wrongfully in expending or arranging to expend public moneys on the website, booklet and advertisements in relation to the Referendum on the Thirty First Amendment of the Constitution (Children) Bill, 2012, in a manner which was not fair, equal or impartial. The Court does not consider it either appropriate or necessary to grant an injunction, as it is to be assumed that the respondents will cease distributing and publishing the material."

26. As the Supreme Court later noted, the appellant did not seek an order restraining the holding of the Referendum itself.

27. The judgments of the Supreme Court when delivered on 11th December, 2012, contained detailed consideration of the contents of the Government Booklet that had been distributed throughout the State, the website operated by the Minister and the advertising campaign. The various judgments set out detailed reasons for the conclusion that the Minister and Government acted in "clear disregard" of the *McKenna* principles and highlighted by a close examination of its contents why the Government's "information" campaign was found to be partial and to favour a "Yes" vote. Of course, that forensic examination of the material was not available to the electorate prior to polling day which the petitioner in this case claims to be a matter of some importance. Whilst it was and remains permissible for the Minister and the Government to spend public money on the dissemination of information, it was not permissible for them to favour a particular outcome or, under the guise of an information campaign to depart from a path of "strict neutrality".

28. It is clear from the *McKenna* and *McCrystal* decisions that if a citizen establishes to the court's satisfaction on the balance of probabilities that the Minister and/or the Government acted in clear disregard of the constitutional rights of the citizen to a democratic process incorporating the right to equality, fair procedures and freedom of expression, the citizen may apply for and secure judicial intervention in order to protect and vindicate those rights. The Supreme Court judgments recognise the vulnerability of the democratic process and the exercise of those constitutional rights which underpin its strength, integrity and effectiveness, to significant damage if the executive is permitted to spend public money in advancing a "Yes" vote in the course of a Referendum

campaign. These proceedings are concerned with the effect, if any, of that unconstitutional behaviour on the poll held on 10th November, 2012, and whether it was such as to "materially affect" the result of the Referendum "as a whole".

The Claim

29. The petitioner's claim for an order that the provisional Referendum Certificate be annulled is based on the grounds set out at para. 4 of the petition as follows:-

> "(1) It is a requirement of the Constitution of Ireland (The Constitution) that public funding must not be used in a Referendum to espouse a particular point of view.
>
> (2) Use of public funding in a Referendum to espouse a particular point of view also results in a violation of standards, which are recognised nationally and internationally, for a Referendum process.
>
> (3) Prior to the Referendum, a booklet (the Booklet) and a website (the Website) (together "the Campaign Material") both entitled "Children's Referendum" – and advertisements ("Advertising"), were published and disseminated by or on behalf of the Government and/or the State, on foot of monies voted by the Oireachtas.
>
> (4) The Booklet was widely distributed to homes in the jurisdiction. In the premises…given its widespread distribution and readership, the Booklet was such as to affect materially the result of the Referendum as a whole and/or affected the result of the Referendum and/or may have affected the result of the Referendum.
>
> (5) The Website was widely viewed during the period. Further and without prejudice to the foregoing…given its widespread readership, the Website was such as to affect materially the result of the Referendum as a whole and/or affected the Referendum and/or may have affected the Referendum.
>
> (6) There was widespread awareness of the Advertising. Further and without prejudice to the foregoing…given widespread awareness of it, the Advertising was such as to affect materially the result of the Referendum as a whole and/or affected the Referendum and/or may have affected the Referendum.
>
> (7) The Booklet, the Website, and the Advertising espouse the view that voters should vote in favour of the proposed amendment.
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> (8) Following a legal challenge, on 8th November, 2012, the Supreme Court ruled that it was clear that there were extensive passages in the Booklet and on the Website, which were not in accordance with the requirements of the Constitution. The Supreme Court also concluded that said Campaign Material included a misstatement as to the affect of the Referendum (together "the Breaches of the Constitution").
>
> (9) The Supreme Court granted a declaration in respect of the Breaches of the Constitution to the effect that the Minister for Children and Youth Affairs, the Government of Ireland, Ireland and the Attorney General:
>
> > 'acted wrongfully in expending or arranging to expend public monies on the Website, Booklet and Advertisements in relation to the Referendum on the Thirty First Amendment of the Constitution (Children) Bill 2012, in a manner which was not fair, equal or impartial.'
>
> (10) The Supreme Court declaration was made only two days prior to the holding of the Referendum.
>
> (11) Notwithstanding the Supreme Court's declaration, the defendants proceeded to hold the Referendum as scheduled on 10th day of November, 2012."

30. The petitioner contends that the nature and extent of the breaches of the Constitution in the conduct of an "information" campaign by the Minister and the Government had a "material affect" on the outcome of the Referendum poll. The Supreme Court has determined that the information booklet, the website and the advertising campaign were publicly funded and favoured the "Yes" side. The right of citizens to equality was breached in that one class of voters was favoured over another. Public funds were used to advance a point of view on the proposals which was anathema to citizens who had paid their taxes and contributed thereby to the Government spending. The right to fair procedures was breached in that the scales must be held equally between the "Yes" and "No" sides. In that regard, the petitioner focused on the particular findings in the judgments of the Supreme Court in *McCrystal* and submitted that the breaches were so egregious and serious in themselves that it was likely that they had an impact on the electorate and materially affected the outcome of the Referendum. The court was invited to consider the language, adopted in the material calculated to encourage an emotional impact and a "Yes" vote and the expenditure of a large amount of money on the campaign as evidence supporting that proposition. It was submitted that the Government booklet contained an admitted but important error, which of itself, contributed to this "material affect" and was compounded because the booklet was never withdrawn and the misstatement was not brought to the attention of the public (though the error was removed from the Government website on 7th November, 2012).

31. The petitioner also relied upon expert evidence to support the proposition that an independent poll carried out after the vote on behalf of the Referendum Commission provided significant evidence that the information campaign had a "material affect" on the Referendum poll result.

32. In addition the petitioner claimed that there was no basis to conclude that the ruling of the Supreme Court on the 8th November, 2012, had any mitigating influence on the effect otherwise caused by the Government information campaign and indeed, that the various Government members who commented upon this ruling tended to undermine its importance and potential affect. The petitioner also contended that the post Supreme Court ruling behaviour of the respondents exacerbated the affect of the unconstitutional conduct, thereby further interfering with the conduct of the Referendum and the democratic process and that it had a further material affect on the Referendum result.

The Respondents' Case

33. The respondents contended that a finding that aspects of the information campaign in *McCrystal* were at variance with the *McKenna* principles does not mean that the court must set aside the result of the Referendum. Emphasis was placed on the significant margin by which the Referendum was carried, and the number of significant polls in advance of the Referendum which indicated a large majority in favour of the type of and the actual proposal carried since 2011. It was submitted that apart from the information furnished in the impugned Government campaign there was a significant public campaign conducted in which all of the main political parties and every member of the Dáil and Seanad save one, supported the Referendum proposal and there was considerable debate in all media outlets on the issues raised by the proposal. It was also submitted that significant elements of the information campaign

were ineffective and that polling data suggested that it did not have an appreciable affect. Experts on both sides contended that the particular factors that determined the outcome of the poll were difficult if not impossible to assess in the absence of a properly designed survey, which would have been very difficult to organise. The respondents contended that the post poll survey relied upon by the petitioner did not establish that the information campaign had a material affect on the outcome.

34. The respondents relied upon the *McCrystal* Supreme Court ruling on the 8th November, 2012, as a factor which had a negative impact against the Government and was widely disseminated through the various organs of the media to the benefit of the "No" campaign.

Leave to Present a Petition

35. The first issue to be determined is whether leave should be granted to present the petition. Section 42 of the Referendum Act 1994, provides that:-

> "(1) The validity of a provisional Referendum Certificate may, and may only, be questioned by a petition to the High Court (in this Act referred to as 'a Referendum petition') in accordance with this Act.
>
> (2) A Referendum petition in relation to a provisional Referendum Certificate shall not be presented to the High Court unless that court, on application made to it in that behalf by or on behalf of the person proposing to present it not later than seven days after the publication in *Iris Oifigiúil* of the Certificate, by order grants leave to the person to do so.
>
> (3) The High Court shall not grant leave under subsection (2) to present a Referendum petition unless it is satisfied –
>
> (a) that there is *prima facie* evidence of a matter referred to in section 43 in relation to which the Referendum petition questions the provisional Referendum Certificate concerned, and
>
> (b) that the said matter is such as to affect materially the result of the Referendum as a whole.
>
> (4) An application for leave to present a Referendum petition may be made by the Director of Public Prosecutions or by any person who is registered or entitled to be registered as a presidential elector."

36. The application for leave to present a petition was made to the High Court on 19th November, 2012, but was adjourned from time to time pursuant to O. 97, r. 3(4) of the Rules of the Superior Courts to enable the proposed respondents to be put on notice of the application, and to await the delivery and consideration of the judgments of the Supreme Court on 11th December. A plenary summons was issued on the same date seeking declaratory and other reliefs including declarations that certain provisions of the Referendum Act 1994, were invalid in that they were repugnant to the provisions of the Constitution. The petitioner reserves her right to pursue those proceedings following the decision in this case, in which the annulment of the provisional Certificate is sought.

37. It was submitted on behalf of Ms. Jordan that the section provides a low threshold for the granting of leave. Reliance was placed upon the judgment of Barrington J. in *Hanafin v. Minister for the Environment* [1996] 2 I.R. 321, in which a petition was brought in respect of the result of the Divorce Referendum (a proposal contained in the Fifteenth Amendment of the Constitution Bill (No.2) 1995) following the determination in the *McKenna* case that the Government was in breach of the Constitution in the conduct of an information campaign conducted in the lead up to that Referendum poll. Leave was granted by McCracken J. in the High Court to present the petition on 7th December, 1995. No issue arose concerning the grant of leave in the *Hanafin* case. However, in his judgment in the Supreme Court, Barrington J. stated at p. 456:-

> "The application will usually be *ex parte* and no doubt affidavit evidence will be sufficient to establish *prima facie* evidence at this stage of the proceedings. When, however, it comes to the trial of the Referendum petition the petitioner will have to produce his witnesses."

38. The onus placed upon the petitioner seeking leave to present a petition under s. 42 differs from that required, for example, in seeking leave to apply for judicial review in which an applicant need only establish a stateable ground or arguable case. It also differs from that required under s. 5 of the Illegal Immigrants (Trafficking) Act 2000, and s. 50 of the Planning and Development Act 2000, both of which require an applicant to establish substantial grounds in order to obtain leave to apply for judicial review. Under s. 42, the applicant must satisfy the court that there is *prima facie* evidence of a matter referred to in s. 43 (including unconstitutional conduct by the executive) and that it "is such as to affect materially the outcome of the Referendum as a whole". The phrase "*prima facie* evidence" is often used in civil proceedings when at the conclusion of the plaintiff's evidence an application is made to dismiss the case on the basis that he/she has not made out a prima facie case. This requires the trial judge to consider whether it would be open to the decision maker, if no other evidence were adduced, or if the evidence were to be accepted, to enter a verdict for the plaintiff (see *Hetherington v. Ultra Tyre Service Ltd* [1993] 2 I.R. 535 and *O'Toole v. Heavey* [1993] 2 I.R. 544).

39. I am satisfied that in order to grant leave to present the petition in this case the court must be satisfied that there is *prima facie* evidence adduced which, if accepted and, in the absence of any other evidence, would enable the court to conclude that the unconstitutional conduct may have occurred and that the affect of the breaches of the Constitution of which complaint is made may be such as to have affected materially the result of the Referendum as a whole. The court must be satisfied that the petitioner has established on the evidence advanced in support of the ground upon which leave is sought that there is a fair *bona fide* or serious issue to be tried. It is not necessary, at this stage, that the court be satisfied of the petitioner's case on the balance of probabilities: that is the level of satisfaction appropriate to the trial of the petition. If leave is granted, as Barrington J. notes, the petitioner must produce her witnesses and the court must then determine whether it is satisfied to the appropriate level of proof that the petitioner has succeeded in establishing her contention and is entitled to the relief claimed. The threshold established under s. 42 provides a filtering system whereby vexatious or frivolous claims or those based on unarguable, unstateable, or insubstantial grounds or weak or inadequate evidence will be refused.

40. In this case, following the adjournment of the leave application, affidavits were exchanged including affidavits from various expert witnesses in respect of the alleged effect or non-effect of the *McCrystal* breaches of the Constitution on the Referendum result. It was agreed between the parties that the same evidence grounding the application for leave to present the petition would have to be considered by the court on the full hearing of the petition if leave were granted. At a preliminary hearing it was submitted that, subject to the view of the court, a telescoped hearing of the leave application together with any substantive application necessitated by any grant of leave would afford the parties full opportunity to canvas the relevant issues before the court and enable the court to deal with all such issues in an administratively efficient and fair manner. Dunne J. gave directions to that effect which I adopted when

the matter came on for hearing before this Court.

41. I was satisfied, at the request of the parties, to leave the resolution of the application for leave to present the petition until all of the evidence and submissions which the parties wished to tender in relation to the issues in the case were heard. In that regard, it is clear as a matter of fact that the Supreme Court has already determined, that the Minister and the Government acted in clear disregard of the Constitution in the lead up to the Referendum poll, so that there was clear *prima facie* evidence of the existence of an interference with or irregularity in the conduct of the Referendum under section 43. It remains for the court to consider at the leave stage whether it is satisfied that there was also *prima facie* evidence that the unconstitutional conduct established "is such as to affect materially the result of the Referendum as a whole". I will return to this issue later in the judgment when considering the evidence in the case. It is appropriate, before considering the evidence adduced to consider the onus and burden of proof applicable to the trial of a petition and the meaning of "material affect".

The *Hanafin* Case and s. 43 of the Referendum Act 1994

42. The only authority that deals directly with the principles applicable to the trial of a Referendum petition in the wake of a Referendum poll in which a Minister and the Government have been found to have unconstitutionally sponsored partisan information in the course of the campaign is to be found in *Hanafin v. Minister for the Environment* [1996] 2 I.R. 321, in which the Supreme Court considered the scope of relief available under s. 43 of the Referendum Act 1994.

43. Section 43 sets out the grounds upon which a petitioner may question the validity of a provisional Referendum Certificate as follows:-

> "43(1) A Referendum petition may question a provisional Referendum Certificate on the grounds that the result of the Referendum as a whole was affected materially by –
>
> (a) the commission of an offence referred to in Part XXII of the Act of 1992 (as applied by section 6),
>
> (b) obstruction of or interference with or other hindrance to the conduct of the Referendum,
>
> (c) failure to complete or otherwise conduct the Referendum in accordance with this Act, or
>
> (d) mistake or other irregularity in the conduct of the Referendum or in the particulars stated in the provisional Referendum Certificate."

44. The facts of the *Hanafin* case are very similar to those established in this case. In *Hanafin*, the petitioner's claim was based upon the findings of unconstitutional conduct by the executive in the *McKenna* case: in this case the petitioner bases her claim upon the findings of unconstitutional conduct by the executive based on the *McKenna* principles in the *McCrystal* case. In *Hanafin*, it was established that Dáil Éireann had voted a sum of £500,000.00 in June 1994, for an information campaign in advance of the Divorce Referendum. The poll was held on the 24th November, 1995. On the 17th November, in the *McKenna* case, the Supreme Court declared that the spending of public money by the Government in the promotion of a particular result was in breach of the Constitution. The provisional Referendum Certificate in that Referendum indicated that the proposal had been carried by 818,842 votes to 809,728, a majority of 9,114 (.56%).

45. It was held by the Supreme Court that the only way in which the result of a provisional Referendum Certificate could be challenged was by way of a petition based on the grounds set out in s. 43(1) of the 1994 Act. In construing the section, the court held that the words "conduct of the Referendum" included unlawful conduct on the part of the Government in its Referendum campaign and the consequences thereof. The court rejected a narrow construction of the section based upon the submission that it precluded the High Court from questioning the validity of a provisional Referendum Certificate on the ground that there had been constitutional wrongdoing by the executive because the section limited the courts jurisdiction to grant relief to grounds based on the manner or procedure by which the poll was conducted. Hamilton C.J. stated:-

> "If such was the intention of the Oireachtas, it would have failed in its obligation to respect, and so far as practicable, to defend and vindicate the democratic process, as outlined herein and the constitutional rights of the citizens.
>
> The Court must, however, presume that the Oireachtas did not so intend but intended that such rights should be defended and vindicated. The defence and vindication of such rights requires that the words "the conduct of the Referendum" contained in s. 43, sub-s. 1 (b) and (d) should be interpreted sufficiently widely to include unlawful and unconstitutional conduct in the Referendum campaign which materially affected the result of the Referendum. There is nothing in the other provisions of the Act which prevents this construction, which construction accords with the provisions of the Constitution.
>
> I accept as being correct the statement made by Barr J. when dealing with this issue where he stated that:-
>
> > 'It seems to me that the fundamental importance of the concept that the will of the people should be properly ascertained in accordance with law in a Referendum on constitutional change requires that the words 'the conduct of the Referendum' in s. 43, sub-s. 1 (b) and (d) should be interpreted sufficiently widely to include unlawful conduct on the part of the Government in its Referendum campaign and the consequences thereof which are alleged to have caused an obstruction, interference, hindrance to or irregularity in the conduct of the Referendum of such gravity as to vitiate its apparent result. This is an issue which the petitioner puts before the Court and on which, in my view he is entitled to a decision.'"

(See also O'Flaherty J. p. 432, Blayney J. p. 442, Denham J. p. 448 and Blayney J. pp. 453 – 454, concurring)

46. Hamilton C.J. also stated that the jurisdiction of the High Court to intervene with the Referendum result existed:

> ". . . in order to protect the rights of the citizens to exercise freely their constitutional right to vote if the constitutional rights of the citizens in regard thereto are violated by anybody or individual." (p. 425)

47. However, he emphasised that the will of the people as expressed in a Referendum providing for the amendment of the Constitution was sacrosanct and if freely given, could not be interfered with. He noted that this limitation was recognised by the Oireachtas when providing in s. 43(1) that the Certificate may only be questioned if it is established that the wrongdoing or irregularity complained of

"materially affected the result of the Referendum as a whole".

"Material Affect" and the Onus and Standard of Proof

48. In *Hanafin*, the Supreme Court's recognition of the superior and binding nature of the freely expressed will of the people under the Constitution informed its wider interpretation of "conduct of the Referendum" and the onus and standard of proof under s. 43. Hamilton C.J. defined the nature and extent of the courts jurisdiction to intervene as follows:-

> "This position is undoubtedly recognised by the Oireachtas in the Act because it provides that the validity of the provisional Referendum Certificate, which is the document containing the result of the Referendum, can only be questioned if it is established that the wrongdoing or irregularity complained of and set forth in s. 43 of the Act materially affected the result of the Referendum as a whole. In effect, this means that no matter what the nature and extent of the wrongdoing may be, the result of the Referendum cannot be impugned or interfered with if the result of the Referendum as a whole was not materially affected by such wrongdoing.
>
> Consequently, the onus lay on the petitioner to establish on the balance of probabilities:-
>
> (1) The nature and extent of the obstruction of or interference with or other hindrance or mistake or other irregularity (hereinafter referred to in the circumstances of this case as "constitutional wrongdoing"), and
>
> (2) That such "constitutional wrongdoing" materially affected the result of the Referendum as a whole.

Counsel for the petitioner has, however, submitted that:-

> (a) The Act does not explicitly require the petitioner to establish a "material affect" as a separate requirement of success in a petition;
>
> (b) Any consideration of "material affect" necessarily follows a determination that there has been unconstitutional wrongdoing such as to amount to an interference with the conduct of the Referendum and that the logic of the Act demands that the concept of material affect be understood as equivalent to showing that the interference or wrongdoing was not trivial or inconsequential and not a separate matter to be established with almost mathematical certainty by a criminal standard of proof.
>
> I cannot accept that the logic of the Act demands or requires that the concept of material affect be understood as equivalent to showing or establishing that the interference or wrongdoing was not trivial or inconsequential, or that the Act does not require the petitioner to establish that the wrongdoing complained of materially affected the result of the Referendum as a whole.
>
> Sections 42, 43 and 48, subsection (2) of the Act of 1994 refer to this requirement…
>
> From a consideration of these subsections of the Act, it is clear that the Act provided and intended that the result of the Referendum as a whole could only be questioned if it was established to the satisfaction of the court that the result was materially affected by the alleged wrongdoing. The onus of so establishing rests on the petitioner who questions the result of the Referendum.
>
> This is not only required by the Act but is in accord with the constitutional right of the citizens to vote in a constitutional Referendum and to have the result thereof accepted, respected and not interfered with unless it is established that such result was materially affected by alleged wrongdoing of such a nature and affect as to vitiate the Referendum." (pp. 426 – 427)

49. In *McCrystal*, O'Donnell J. (at para. 40) stated:-

> "It should be clear that there is a large, and constitutional distinction between restraining a breach of the Constitution by the Government (or any one else) occurring in the course of a Referendum campaign and the interference with and setting aside of, a decision made by the People whose right it is in final appeal to decide all questions of national policy."

The learned judge was addressing the defendant's contention that the terms of s. 43 required the petitioner to establish in a pre-poll application that the material enjoined contained an unequivocal exhortation to vote in one way and that the misconduct would "assuredly" have a "material affect" on the Referendum result.

50. O'Donnell J. added (at para. 40):-

> "…the Divorce Referendum which was the background to *McKenna* (No.2) itself provides a clear demonstration of the fallacy of this reasoning. The government campaign was in fact restrained by the Supreme Court in *McKenna (No.2)* but the subsequent decision of the People was not set aside although challenged in *Hanafin v. Minister for the Environment…* where the petitioner relied on the self same breaches of the Constitution which had been established in *McKenna (No.2)* and, for good measure, some further matters which emerged thereafter. If the test of material affect as applied in *Hanafin* is applicable in the *McKenna (No.2)* situation, then the plaintiff ought to have failed. Alternatively, if *McKenna (No.2)* is to be understood as an implicit application of the material affect test, then the petitioner in *Hanafin* ought to have succeeded. It is apparent that a different standard applies in any application to set aside the decision of the People once given, and for good reason."

In these proceedings the question of whether the overall result was "materially affected" is part of that different standard.

51. It is clear from the *McKenna (No.2)* and *McCrystal* cases that the onus was on the plaintiffs in each case to establish that the executive had acted in clear disregard of the *McKenna* principles on the balance of probabilities. Barrington J., in *Hanafin*, in considering the onus and standard of proof applicable to proof of a "material affect" on the Referendum result stated:-

> "I could not envisage a situation where this Court, if it were satisfied on the balance of probabilities that the Referendum had been conducted in such a way as to violate the Constitution and materially affected the result, would refuse to quash the provisional Referendum Certificate. Were it to fail to do so, it would in my opinion fall short of its duty as the

final defender of the Constitution…

At this stage (post leave) the petitioner has to attack a provisional Referendum Certificate purporting to record the decision of the people at a Referendum. The situation is not unlike that which exists when the President refers to this Court a Bill which has been passed by both Houses of the Oireachtas. The court pays the Oireachtas the courtesy of assuming that it has not violated the Constitution. It, therefore, presumes that the Bill is not repugnant to the Constitution until the contrary is clearly established…likewise, this Court will not lightly set aside what appears, *prima facie*, to be an Act of the sovereign people. Unless, therefore, what has happened is an express and obvious constitutional abuse affecting the outcome of the Referendum, the onus of proof on the petitioner will be a heavy one. This does not mean that the onus is higher than the civil onus of proof but rather that the court will be particularly vigilant in examining serious allegations." (pp. 456 – 457)

52. Blayney and Denham J.J. also accepted that the normal onus and standard of proof that applied in civil trials, namely, proof on the balance of probabilities also applied to a Referendum petition.

53. O'Flaherty J. noted that:-

> "Ever since the decision of this Court in *Banco Ambrosiana s.p.a v. Ansbacher & Co. Ltd.* [1987] I.L.R.M. 669, I regard it as settled in Irish law that in civil cases the standard of proof is on the balance of probabilities and that the necessity to prove something beyond reasonable doubt is reserved to the criminal law."

He added that:-

> "A decision of the people exercising their law making capacity (should) be respected and enjoy a presumption which is at least as strong (as the presumption of constitutionality applicable to legislation). Since the basic presumption is grounded on the respect which one organ of State owes to another and since all powers of government, legislative, executive and judicial, derive, under God, from the people (Article 6), it would seem to follow that even greater respect must be accorded to the decision of the people made in a Referendum."

54. In *Hanafin*, the respondent contended for a higher standard of proof but the petitioner accepted that the appropriate standard was the balance of probabilities as determined by the Supreme Court in *Banco Ambrosiano* in which it rejected the contention that there was an intermediate standard of proof between civil and criminal proceedings, which was applicable to allegations of fraud in civil cases. Henchy J. accepted that the consequences of a finding should be taken into account when deciding whether fraud has been established:-

> "Proof of fraud is frequently not so much a matter of establishing primary facts as of raising an inference from the facts admitted or proved. The required inference must, of course, not be drawn lightly or without due regard to all the relevant circumstances, including the consequences of a finding of fraud. But that finding should not be shirked because it is not a conclusion of absolute certainty. If the court is satisfied, on balancing the possible inferences open on the facts, that fraud is the rational and cogent conclusion to be drawn, it should so find." (at p. 702)

55. O'Flaherty J. in *O'Laoire v. Medical Council* (Unreported, Supreme Court, 25th July, 1997) again addressed this issue and stated:-

> "The common law panorama at this time gives the impression that there is but one standard of proof in civil cases though, of necessity, it is a flexible one. This flexibility will ensure that the graver the allegation the higher will be the degree of probability that is required to bring home the case against the person whose conduct is impugned."

Thus, the application of the standard of proof in civil proceedings must have regard to the issues in the case and the consequences of a particular finding of fact, with a view to ensuring that an appropriately cogent body of evidence has been established offering clear and convincing proof of the proposition advanced. In this case, the consequence of a finding in favour of the petitioner would be the annulment of what must be regarded, *prima facie*, as the will of the people as expressed in the result set out in the provisional Referendum Certificate. The court is, therefore, obliged to examine the evidence carefully. It must not draw a conclusion adverse to the Referendum result lightly or without cogent and reliable evidence that the result of the Referendum as a whole was materially affected by unconstitutional wrongdoing. The serious consequence of annulling the Referendum decision of the people is readily apparent from the fact that the people are vested with supreme authority as evidenced by the terms of the preamble, and Articles 6, 46 and 47 and other Articles of the Constitution and the judgments of the Supreme Court in *McKenna*, *Hanafin* and *McCrystal*.

An Inquisitorial Aspect?

56. The petitioner contends that these proceedings should not be regarded as a *lis inter partes* in the normal way: in particular, reliance is placed on passages in the judgments of O'Flaherty and Denham JJ., in the *Hanafin* case indicating that Referendum petition proceedings should be conducted by way of an inquisitorial procedure, though both accepted that the onus and standard of proof applicable to the petition was the civil standard. However, O'Flaherty J. (at p. 434) disagreed with the divisional High Courts approach in that it conducted the case by adopting a traditional adversarial mode of trial and the petitioner was made to attempt to prove his case. He stated:-

> "That leads me to hold with the submission which was advanced on behalf of the petitioner that it would have been better in carrying out its essential task, which was to determine whether the Referendum result was in harmony with the Constitution and the legislative provisions that regulate how the Constitution is to be amended, if the divisional court had conducted this petition in the form of an inquiry since the government's wrong was not an issue in the case, only its affect. There was a serious obligation on the government in those circumstances, to allow the court to carry out a full and free investigation as to the affect the wrongdoing might or might not have had on the Referendum result. In that way, the precepts contained in *The State (Quinn) v. Ryan* [1965] I.R. 106 and *Meskell v. C.I.E.* [1973] I.R. 122 would have been best implemented. Instead, I am afraid the case went its way with all the trappings and disadvantages (as far as this case was concerned, in any event) of an adversarial contest. The petitioner was made to attempt to prove his case…"

57. Denham J. (at p. 452) stated:-

> "In my view it is more appropriate, in these important cases held by way of the petition process, to have a full enquiry when evidence may be offered by the respondents rather than cut the proceedings short. However, that does not alter the fundamental role of the Court in this case."

58. The observations made by O'Flaherty J. referred to an application to exclude evidence in the course of the *Hanafin* petition. The remarks by Denham J. were in the context of the dismissal by the divisional court of the petitioner's case at its conclusion. I read these observations as emphasising the supervisory role and duty of the court to ensure that all evidence related to the grounds raised in a petition should be carefully addressed and considered. There is a significant public interest to ensure that the conduct of a Referendum is in accordance with the democratic process and the observance of constitutional propriety which may go beyond the interest of the petitioner and the respondents, once the jurisdiction of the court has been invoked. The Supreme Court has determined that the petition procedure under the Referendum Act 1994, provides the appropriate remedial avenue for the protection of the constitutional rights of citizens and the democratic process mandated under the Constitution for the conduct of a Referendum. The flexibility of the remedy is demonstrated by various provisions of the Referendum Act 1994. For example, s. 52 empowers the court of its own motion to direct that a particular person be brought before the court during the trial of the Referendum petition to give evidence. It also provides that the answers furnished by the witness shall not be admissible in any civil or criminal proceedings other than proceedings brought against him or her for perjury: a provision designed to encourage a reluctant witness who might otherwise fear the consequences of coming forward to give evidence. The court is also vested with a power in certain circumstances to nominate the Director of Public Prosecutions as petitioner on the withdrawal of proceedings or the death of a petitioner. These powers are clearly in aid of the court in considering whether a Referendum has been conducted in accordance with constitutional propriety. They are exercisable by the court within the petition pleadings and proceedings and the grounds upon which leave has been granted to challenge the Referendum result. They do not detract from but are entirely compatible with the onus and standard of proof which the Supreme Court held in *Hanafin* to apply to the conduct of the hearing of the petition.

59. I am, therefore, satisfied that the court is obliged and has ample powers to ensure that the petition process is not abused and that all relevant evidence for the determination of the issues raised on the grounds upon which leave is granted to present a petition is available to the court. These powers are in accordance with the courts overriding obligation to ensure that any issues emerging in the course of the trial related to these grounds are fully explored and considered.

"Result of the Referendum as a Whole"
60. The petitioner contends that it is only necessary to establish that the Referendum result was materially affected by unconstitutional conduct in some way but short of affecting the recorded result. It was submitted that a material irregularity is one which "did affect the result of the Referendum", but might also be something which fell short of changing the overall result in this case, the majority "Yes" vote. I do not accept this interpretation having regard to the provisions of Article 47.1 of the Constitution which states that the proposal put to the people shall be held to be approved "if a majority of the votes cast at such Referendum shall have been cast in favour of its enactment into law". The Referendum Act establishes how the poll must be conducted and votes cast counted to determine the result as defined by Article 47.1. The phrase used in s. 43(1) is that the conduct relied upon by the petitioner must be such that "the result of the Referendum as a whole was affected materially". Thus, even if an irregularity were to be discovered in a single constituency, this may not affect the result as a whole, i.e., the overall result of the poll. Under s. 48 of the Act the court need not order the retaking of a poll in a constituency merely because of non-compliance with any provisions of the Act where it appears to the court that the Referendum was otherwise conducted in accordance with the general principles laid down in the Act and that the non-compliance "did not affect the result of the Referendum as a whole". I am satisfied, that anything less than evidence which, on the balance of probability, demonstrates that the unconstitutional behaviour in this case affected the outcome of the Referendum and had such an impact on voters as to produce a majority in favour of the proposal, means that the petitioner must fail in her application.

Reversal of the Burden of Proof
61. The petitioner contends that the burden of proof may shift to the defendants in the course of the trial. It is contended that there is nothing in s. 43 of the Act to suggest that once a Referendum petition has questioned the provisional Referendum Certificate on relevant grounds, that the court is precluded from directing that the burden of proof in relation to misconduct and its consequences would not be shifted to the respondent. I am satisfied that this is not so. The legislature did not provide for such a reversal of the burden of proof as it had in many other statutes in civil and criminal proceedings by creating a presumption of fact which may be rebutted, usually by declaring that a particular fact may be presumed until the contrary is proved. The judgments of the Supreme Court in the *Hanafin* case do not contemplate a reversal of the burden.

62. An alternative submission was made that having regard to the fundamental rights at issue and given the seriousness of the breaches of the *McKenna* principles identified in the *McCrystal* case, it would be appropriate to place a burden of proof on the respondents to demonstrate that the Referendum result was not affected by the campaign breaches and their conduct post the ruling of the Supreme Court in *McCrystal*. The petitioner submits that the burden of proof should shift in this case because of the Supreme Court's finding that the *McKenna* principles had been breached and thereby deprived the electorate of a constitutional Referendum process. The court is also invited to reverse the onus of proof because the petitioner has difficulties in establishing that the Referendum result as a whole has been affected as a consequence of the unconstitutional conduct. It is submitted that as a matter of fair procedure, the burden of proving that this conduct did not affect the Referendum should fall on the respondents who were the wrongdoers.

63. In *Hanrahan & Ors v. Merck Sharp & Dohme* [1988] I.L.R.M. 629 the plaintiffs claimed damages for nuisance. They claimed to have suffered damage from emissions from the defendant's factory and had difficulty in establishing that fact, as a result of which they claimed that the onus of proof should be shifted to the defendant. It was held, notwithstanding the difficulties of proof faced by the plaintiffs, that these were not such as would require the shifting of the onus as might be the case in circumstances where a particular matter was within the peculiar knowledge of the defendant. It was also held that the onus of proof placed by the common law on the plaintiffs did not amount to a failure by the state to vindicate their personal rights pursuant to Article 40.3 of the Constitution, since it was not alleged that the tort of nuisance was ineffective to protect their constitutional rights. It was held that the guarantees contained in Article 40.3 were not absolute or unqualified and could not be taken to relieve the plaintiff in a nuisance action of the onus of proving the necessary ingredients of the tort. In that context Henchy J. stated:-

> "The plaintiffs have also invoked the Constitution in support of their argument as to the onus of proof. They contend that the tort relied on by them in support of their claim is but a reflection of the duty imposed on the State by Article 40.3 of the Constitution in regard to their personal rights and property rights…Insofar as I am aware, the constitutional provisions relied on have never been used in the courts to shape the form of any existing tort or to change the normal onus of proof. The implementation of those constitutional rights is primarily a matter for the state and the courts are entitled to intervene only when there has been a failure to implement them or, where the implementation relied on is plainly inadequate, to effectuate the constitutional guarantee in question. In many torts – for example, negligence, defamation, trespass to person or property – a plaintiff may give evidence of what he claims to be a breach of a constitutional right, but he may fail in the action because of what is usually a matter of onus of proof or because of some other legal or technical defence. A person may of course in the absence of a common law or statutory cause of action sue directly for a breach of a constitutional right (see *Meskell v. CIE* [1973] I.R. 121); but when he founds his action on an existing tort he

is normally confined to the limitations of that tort. It might be different if it could be shown that the tort in question is basically ineffective to protect his constitutional right. But that is not alleged here. What is said is that he may not succeed in having his constitutional rights vindicated if he is required to carry the normal onus of proof. However, the same may be said about many other causes of action. Lack of knowledge as to the true nature of the defendants' conduct or course of conduct may cause the plaintiff difficulty, but it does not change the onus of proof." (pp. 634 – 635)

Henchy J. emphasised that the rationale behind the shifting of the onus of proof to the defendant lay in the fact that it would be palpably unfair to require a plaintiff to prove something which is beyond his reach and which is peculiarly within the range of the defendant's capacity to prove. I am satisfied that whether the unconstitutional conduct "affected materially" the result of the Referendum as a whole, is not a matter which is either within the exclusive knowledge of the respondents or a matter which is peculiarly within their capacity to prove. It is also clear in this case that the remedy sought by the petitioner is not a remedy against the first two respondents whereby they bear the brunt of the relief sought, but a remedy "which seeks to override and reverse the sovereign will of the people as expressed in the provisional Referendum Certificate containing the record of votes cast at the Referendum" (per Hamilton J. in *McKenna (No.2)* at p. 429).

64. It is acknowledged in the judgments delivered in the *Hanafin* case that there are difficulties in establishing the consequences of unconstitutional wrongdoing in a Referendum. The secrecy of the ballot prevents primary evidence being elicited of the affect of the wrongdoing in this case. The secrecy of the ballot is a fundamental constitutional right essential to the existence of the democratic process: voters who have exercised their franchise are not to be obliged to reveal how they voted. The petitioner contends that because it is difficult otherwise to establish the consequences of the wrongdoing, the respondents should be obliged to demonstrate on the balance of probabilities that a substantial number of voters would not otherwise have voted "no" in the Referendum but for this wrongdoing. This would create a new presumption that the Referendum result had been materially affected on proof of unconstitutional wrongdoing by the executive. The emphasis placed by the Supreme Court in *Hanafin* on the presumption of validity attaching to the result of the poll and the superior status of a decision of the people under the Constitution suggest the contrary and that the result of a Referendum should not be lightly overturned. The voters have done nothing wrong: they have exercised their franchise. It is appropriate and proportionate, having regard to the rights of voters and the constitutional primacy of the sovereignty of the people that the burden of proof should be placed on the petitioner to demonstrate how the votes of in excess of one million citizens have been "materially affected" and why those votes should be annulled and each vote deprived of its individual power and effect. The court will proceed on the basis that the petitioner bears the onus of proof to establish a case on the balance of probabilities.

Evidence

65. The evidence related to the grounds advanced by the petitioner consists of two parts. Firstly, there is the evidence of individuals, including the petitioner, who told of their experience of the Referendum campaign and of the affect of the government information materials on them and others, and that of the Supreme Court ruling. The petitioner was able to procure the services of expert witnesses who testified in support of the proposition that the government information campaign had affected materially the Referendum result as a whole. The respondents relied on expert witnesses who gave evidence contradicting that proposition.

66. The non-expert witnesses were the petitioner, Mr. Michael Fitzgibbon, Mr. Nicholas Gargin, Mr. Daniel Ward and Ms. Deirdre Uí Ghoibín.

67. The petitioner took a "no" stance to the proposal and became aware of the government materials in the weeks leading up to 10th November, polling day. She received the Government Booklet ten days before polling at her home. She was also aware of the government advertising. She was concerned that both sources of information were partisan and slanted towards a "yes" vote. The arguments that might be raised against the proposed amendment were not included in the materials. She canvassed for a "no" vote and believed that people had a mistaken understanding of the potential impact of the Referendum proposal. She believed that it was obvious that the booklet, the website and advertising were succeeding in winning "yes" votes. The people she canvassed trusted the government material and were satisfied that it was balanced. They appeared to assume that the government would not act contrary to its obligation to be impartial. She became aware on 8th November of the *McCrystal* ruling by the Supreme Court. She believed that it came at too late a stage to be useful to the "no" campaign. However, she noticed when campaigning in O'Connell Street in Dublin, in the last two days, that people were more receptive of the "no" campaign, which she assumed was due to the Supreme Court ruling.

68. Nicholas Gargin was a part-time student of Sports Management. He voted "yes" in the Referendum and had read the Government Booklet before voting. He discovered that the Supreme Court ruling had been made during his Christmas holidays. He stated that had he found out about the ruling before polling day, he would have been angry at the government's behaviour particularly in the light of the judgments of the Supreme Court which he read. Had he known about the government wrongdoing, he would have voted "no" in the Referendum.

69. Mr. Michael Fitzgibbon campaigned for a "no" vote in North Kerry and West Limerick. He spoke to hundreds of potential voters during the course of the campaign. He believed that the "no" campaign faced a "juggernaut" in favour of the proposal, which ranged across the political spectrum and the media. His impression was that people believed government materials had been professionally prepared and were convincing. He believed they had a real influence on voters who expected a non-biased view in the Government Guide. He discerned a huge difference in the campaign after the Supreme Court ruling in that people were coming up to him saying that they would vote "no" and were very suspicious of the government and disillusioned. He acknowledged, however, that at that stage, he was campaigning in an area which he knew would vote "no" in significant numbers.

70. Mr. Daniel Ward, a farmer on Aranmore, Co. Donegal, intended to vote "no". He read the booklet and was aware of the advertising by the government. He assumed the government would be impartial and neutral in the provision of information. When he read the materials he became uncertain as to whether he should vote no, and eventually decided not to vote at all. Because he lived on Aranmore he was obliged to vote by 7.00pm on 8th November, 2012. He became aware of the Supreme Court ruling at 6.00pm. He decided not to vote presuming in the light of the Supreme Court ruling that the Referendum would be postponed.

71. Ms. Deirdre Uí Ghoibín was also a "no" campaigner. She first saw the Referendum Booklet in October, 2012 and looked at the website. She considered that there was not enough factual information available in the government materials. She believed these materials had an influence, but she could not give details of any specific discussion that she had about the booklet with any voter. She heard about the Supreme Court ruling on the radio. She did not campaign in the last two days before the poll but family and friends with whom she discussed the matter were surprised at the government's misconduct.

72. Mr. John Waters submitted three affidavits in support of the petitioner. He is an author, journalist and political commentator and has written a number of books on politics. He has been a columnist in the Irish Times for over twenty years. He was a member of the Broadcasting Commission of Ireland from 2003 to 2009 and the Broadcasting Authority from 2009 to date. He has covered all of the elections and referendum campaigns for over thirty years, and gave evidence that he was familiar with techniques of persuasion in public communications and the manner in which government used language in attempts to persuade rather than inform, a knowledge he acquired with experience. He favoured a "no" result in the Referendum. He felt that though the "no" campaign started from a low base there was an opening of the public mind to the "no" arguments in the last ten days of the campaign. He first became aware of the controversy over the government information campaign over the weekend of 20th – 21st October when he was contacted by lawyers for Mr. McCrystal and asked to review the government website and booklet for the purpose of providing a critique for the High Court. That analysis formed part of the evidence considered ultimately by the Supreme Court in the *McCrystal* judgments. He formed the view that the contents of the booklet failed to have any regard to the arguments against the proposal and failed to present the reality of the existing constitutional jurisprudence in respect of the rights of the child and the family. He was concerned that those who wished to acquaint themselves with the issues might turn to the booklet as an important source of information on the propositions for and against the proposal, which it was not. Instead, the reader was given a highly tendentious view of the affect of the proposal. The booklet was sent to every household in the state and was intended to be read in the quiet of one's home. It was calculated to override most of the other information which might have offered a general balanced position of the issues in the debate. He was concerned that the Government Booklet acquired a high level of credibility and that voters would be disposed to view it as neutral. It implicitly called for a "yes" vote which, in a sense gave it added strength. Mr. Waters also viewed the website and online advertising contracted by the Department, and found a similar approach. He described the highly emotive presentation of issues in the booklet, but especially on the website in relation to identifying the changes proposed in the Constitution and, in particular, took issue with the suggestion that all sorts of abuses and wrongs suffered by children would be remedied by the Constitution. Anecdotally, he encountered people who had been given this impression. He believed that this expenditure of money was highly effective. He thought the information campaign was the "foundation stone" of the government campaign. He could not quantify its affect, but he believed that to say it was not a central factor in the result would stretch credulity.

73. Each of the witnesses gave useful and honest accounts of their experiences during the course of the Referendum campaign and their impressions of the government materials and information. These impressions were vindicated by the ruling and judgments of the Supreme Court in the *McCrystal* case. Some of the more generalised conclusions reached by the witnesses about the affect of the materials are highly speculative and subjective. I have considered all of this evidence and it is clear that without something more tangible and objective, this evidence would be entirely insufficient to justify the granting of leave to present a petition or to establish that the overall Referendum result had been materially affected by the government information campaign. However, the petitioner also relied upon expert testimony in respect of the government information campaign.

The Government Information Campaign

74. The determination by the Supreme Court in *McCrystal* that the Minister for Children and Youth Affairs and the Government acted in clear disregard of the *McKenna* principles during the course of the information campaign was based on an overall assessment of the materials which constituted the three elements of the campaign. These were the booklet compiled and distributed by the Department of Children and Youth Affairs, the website created and maintained by the Department and an advertising campaign which it conducted on radio, television and in the printed media.

75. Preparation for the Children Referendum was the responsibility of Ms. Elizabeth Canavan, Assistant Secretary of the Department and a relatively small staff. It is clear from the discovered material and documents presented in the course of evidence that an enormous amount of preparatory work was completed prior to the publication of the wording of the proposed Referendum on 19th September, 2012. It was clear from surveys carried out in 2012 on behalf of the Department that people were associating the general proposal to amend the Constitution with issues with which it was not concerned. The information campaign was the result of a strong government view that, due to complaints about lack of information in previous Referendum campaigns, as reflected in post poll surveys by the Referendum Commission, it was necessary to put forward information to the people explaining the proposal. Ms. Canavan explained that the Department was conscious of the potential for confusion between its material and that of the Referendum Commission because of previous Referendum Commission reports to that effect. It was also acutely aware of the *McKenna* principles. Those tendering for contracts in respect of the information campaign were obliged to comply with those principles and there was a strict communication protocol which ensured that no draft could be finalised unless signed off by the Assistant Secretary following legal advice from the office of the Attorney General, which was consulted as necessary from time to time.

The Booklet

76. The booklet was delivered to all addresses, residential and non-residential, in the State. 2.026 million copies of the booklet were delivered by An Post between 19th October and 6th November, 2012. A further 18,500 copies of the booklet were sent to public offices such as county libraries at 384 locations for display. The first draft of the booklet was prepared by a civil servant and went through 18 drafts before the final draft was ready for the printer. It was reviewed within the Department for compliance with the *McKenna* principles by civil servants, in house legal advisers and the office of the Attorney General when requested.

77. The choice of the logo for the booklet was made following the submission of a number of potential logos by an outside company and was extensively discussed within the Department and finally, chosen by the Minister. Unsurprisingly, many of the Department's publications contain logos of children or photographs or silhouettes of children. There was some concern that the Department's logo should not be similar to that used by other children's organisations in their literature. Ms. Canavan told the court that there was no discussion of the use of the words "Children's' Referendum" in the booklet. Four headlines were used on the cover of the booklet which related to content within. The communication company retained did not have a lead role in the compiling of the booklet but made suggestions concerning the simplification of the language used in its contents. The booklet was also uploaded onto the website created by the Department in the days following its publication.

78. In the *McCrystal* judgment the contents of the booklet were found to have advocated a "Yes" vote. Denham C.J. pointed to a number of matters including slogans used in the booklet such as "Protecting Children" on the cover page and at pp. 1, 6 and 14. The phrase "Supporting Families" which she deemed not to be impartial also appeared on the same pages. The question posed "Why do we need a Referendum?" was found to infer a need for the Referendum. The title "Children's Referendum" in the booklet was juxtaposed with a silhouette that appeared to be three children linking hands. Mr. McCrystal had argued that these visual representations were designed to induce an emotional response and advocated a yes vote in a subliminal fashion rather than being a neutral and objective visual representation.

79. Murray J. found that the material as a whole was characterised by the four slogans contained on the cover of the booklet namely:-

> "Protecting Children

Supporting Families

Removing inequalities and adoption

Recognising children in their own right"

They were highlighted in response to the question "What is proposed in this Referendum? The question "Why do we need a Referendum?" conveyed the message that there was no question but that a Referendum to change the Constitution with a positive outcome, was needed. He highlighted the contents of p. 14 of the booklet which pointed out that the new wording was aimed at helping to "achieve the following objectives" which were identified as being:-

> "(1) Dedicated constitutional provisions for children;
>
> (2) Protecting children and supporting families;
>
> (3) Removing inequalities;
>
> (4) Adoption: a second chance for children;
>
> (5) Recognising children in their own right."

He concluded that this material advocated a yes vote without explicitly calling for one.

80. Fennelly J. having set out the history of the preparation of the various materials, and having outlined in summary the evidence given by Ms. Canavan in the *McCrystal* case, which were substantially the same as given to this Court, also concluded that the booklet was written with a view to providing support for the objectives of the Referendum proposal. He noted that the booklet was circulated shortly after the opening of the website and it largely repeated the same material, albeit in different language.

81. O'Donnell J. considered the website material to be "undoubtedly the most important" in the case. He noted that:-

> "The booklet was completed after these proceedings were threatened and it was noticeably less forthright than the website. It is to be inferred perhaps that the material in the booklet was toned down in light of the possible challenge. The advertisements had less content again and did little more than use affecting tones of children of varying degrees to repeat the message that "Its All about Them but Its up To You".

Though there was considerable overlap between the two, all parties agreed that the booklet was similar in style and presentation to the website, but more neutral in its tone.

82. Denham C.J. and O'Donnell J. gave detailed consideration to an important error contained in the booklet. O'Donnell J. (at para. 15) stated:-

> "In what is described as an "Article by Article Guide" to the proposed amendment the booklet dealt with the replacement of Article 42.5 and said:
>
> > 'It will continue to be the case that the power given by the Constitution in this area can only be used by the State in very well defined circumstances. Key requirements will continue to be underlined as follows:
> >
> > • The State can only make use of the power "*in exceptional circumstances*";
> >
> > • If failure of parental duty towards the child must exist – "*where the parents regardless of their marital status, fail in their duty towards their children*";
> >
> > • Any failure must involve harm or risk to the child's safety or welfare – "*to such extent that the safety or welfare of any of their children is likely to be prejudicially affected*";
> >
> > • The actions of the State must be in balance with the harm or risk to the child that needs to be addressed – "*by proportionate means*"; and
> >
> > • The actions the State can take must be set out in law – "*as provided by law*" (emphasis added)
>
> In fact there was a clear error in this statement. The bullet points set out components of the proposed new amendment. It was accordingly wrong to suggest that these were merely the maintenance or continuance of existing requirements. The error was pointed out by Mr. McCrystal in his affidavit of 23rd October. It was acknowledged as an error by the State on the first day of the hearing in the High Court but no steps were taken until the second day of the hearing of this Court to correct it. In the meantime booklets continued to be distributed to houses around the State."

83. Denham C.J. noted that at the time the appeal was heard before the Supreme Court on 6th November, 2012, no attempt had been made by the respondents to remedy the error contained in the booklet. The respondents continued to distribute the booklet and it was on day two of the appeal hearing on 7th November, 2012, that counsel for the respondents informed the court that the error in using the word "continue" was removed from the website between 10.30am and 11.30am. It was not brought to the attention of the public by way of an information notice stating that the correction had been made. The court considered the error to be significant, though O'Donnell J. also noted that its affect might be debated.

84. Ms. Canavan in evidence to this Court stated that she believed at the time that the material contained in the "admitted error" had been cleared and that it was not a mistake. She stated that the first time she realised it was an error was on 31st October, when it was conceded in court. It came as a surprise to her that the change had been advised to them and that they had not made it. She described it as a complete shock. When the papers on the file were reviewed, she discovered that she had actually annotated a final version of the booklet herself in the light of legal advice received and had gone through it by hand with a number of other officials and had put a line through the "admitted error", but this had not been executed. She acknowledged that quicker action should have been taken to correct the error. However, the booklet was in the course of distribution and it was impossible to take back. It simply did not occur to her that the booklet was also in PDF form on the website and though she took steps to have it taken down and corrected, the material was not removed entirely from the site until 9th November.

85. The affect of this booklet on the result of the Referendum formed a core element of the petitioner's claim. It was submitted that it was state financed in clear disregard of the Constitution and entirely one sided in advocating a yes vote, albeit not explicitly. It was received by every household in the country. It was presented as neutral and therefore to be trusted, when it was not. It was claimed, that a survey compiled on behalf of the Referendum Commission by "Behaviour and Attitudes", demonstrated that the booklet had a material affect on the Referendum result. Both sides relied upon the evidence of a number of eminent expert witnesses in respect of this issue.

86. Dr. Michael Bruter is a reader in political science specialising in electoral psychology at the London School of Economics and Political Science. He seeks to understand what goes on in people's minds when entering a polling station and what leads them to cast their vote in a particular way. Dr. Bruter was retained by the petitioner's solicitor and asked to provide an expert opinion on two matters:-

> (i) an evaluation of the nature of material provided by the Irish Government to voters in the run up to the Referendum and whether it was likely to have influenced the casting of votes in the Referendum; and
>
> (ii) whether delaying the Referendum vote following the decision of the Supreme Court in the *McCrystal* case on 8th November, 2012, would likely have resulted in a materially different result.

87. Three affidavits from Dr. Bruter were submitted in the course of these proceedings on 18th February, 17th April and 3rd May, 2013. The evidence initially tendered contained a general opinion as to how government information supplied before the Referendum might have influenced the result with specific reference to the nature and contents of the government booklet, website and advertising campaign. He examined the possible effect of this material on voters by asking firstly, how the information provided by the government during the campaign "privileged a specific answer (yes or no)" in the Referendum from a "political behaviour point of view". Secondly, having identified the relevant ways in which the yes or no answer had been advantaged, he assessed whether this was "likely to have had a material impact in the way citizens voted" considering the characteristics of this specific referendum.

88. Dr. Bruter highlighted a number of specific elements contained in the information which had already been considered in the *McCrystal* judgment but which were in his view, particularly relevant in terms of the likely psychological impact on voters. He identified what he considered to be the four essential elements which went beyond a simple lack of neutrality and clearly leant towards a yes argument. These were:-

> (i) the presentation of the proposal as one associated with multiple positive outcomes and a complete absence of negative outcomes, and making it one to which no sensible person would object;
>
> (ii) the description of the proposal that explicitly represented it as stemming from and/or legitimised by non-partisan, neutral, and prototypically competent sources and iconography and that implicitly associates its source with children themselves;
>
> (iii) the narrative of the proposal as answering a (possibly urgent) need; and
>
> (iv) the use of a rhetoric which explicitly focuses on emotions and was likely to induce a possible feeling of guilt amongst those not supporting the proposal.

89. Dr. Bruter also considered it to be important that this material was advanced by the government in respect of a Referendum proposal which had a number of important features which rendered the material more influential than it would otherwise have been:-

> (a) The Referendum was one of low "salience" *i.e.* it dealt with a question which was obscure to people or about which they knew very little. Dr. Bruter was of the view that the proposal was difficult to comprehend, fairly technical, quite abstract and impossible to summarise in a few simple words.
>
> (b) In every Referendum, a voter's choice is likely to be influenced by two important elements (i) cues; and (ii) influences. Cues are sources that collect, summarise and report information on the pros and cons of a yes or no vote. The source could be regarded as neutral (the Referendum Commission), providing information without necessarily being neutral (the media) or partisan (political parties or yes or no campaigners). External influences are elements not directly related to the question in issue but which are accepted as having a strong impact on the way people vote, for example, government popularity: political scientists are not agreed on whether "cues" or "influences" matter most. However, Dr. Bruter was of the view that the perception of whether the source of a "cue" was neutral or partisan had a "major effect on the way voters would treat the information that it provides". A partisan source for a cue would likely be heavily discounted whereas maximum credit will be afforded information from a neutral cue source: it would be regarded as a "trusted or dominant" cue by the prospective voter.
>
> (c) The lower the salience of the issues, the more likely the voter is to compensate for this by voting on the basis of more general principles received or adopted through various cues and perhaps by acting on other principles such as disapproval of the government.

90. In his preliminary report of December 2012, exhibited in an affidavit of 15th February, 2013, Dr. Bruter concluded that:-

> (i) Firstly, as the Referendum was a very low salience, voters would be highly dependent on information cues (in this case the government information), or even subject to influence by other apparently irrelevant factors.
>
> (ii) Secondly, the perceived nature of a source is a major determinant of how influential the information it provides will be. Thus, information perceived to come from a "neutral" source would be significantly more influential than information perceived to come from a "partisan" source. The government information was presented as and perceived to be neutral.
>
> (iii) Thirdly, in terms of the potentially strong impact of external influences in the context of a low salience referendum, any element which, during the campaign, was likely to give additional credit or discredit to government would have a strong effect on the result.

91. Prof. Michael Marsh, Professor of Comparative Political Behaviour at Trinity College Dublin, whose principal area of expertise was electoral behaviour including how voters make their choices in elections and referenda, gave evidence on behalf of the proposed respondents. In his first affidavit of 15th January, 2013, Prof. Marsh addressed the points raised by Dr. Bruter relying for the most

part on recognised difficulties in attempting to determine what influenced voters to exercise their franchise in a particular way. He concluded that in the absence of a properly designed study implemented at the time of the conduct of the campaign itself, it was not possible to assess definitively what factors determined the outcome of the children referendum or to determine whether any individual factors, such as the material published by the department had an effect on the level of the "yes" or "no" vote. He was emphatic that it was not possible to come to a clear view that the unconstitutional expenditure of money by the government resulted in victory for the yes side that would not otherwise have occurred. He said that it was very unlikely that the material was responsible for the fact that the proposal was carried or that it affected the number of yes votes to any significant or any degree. This conclusion was based on the following reasons:-

(i) The Referendum was a quiet campaign by the standards of other referenda on the European Union or on issues such as abortion and divorce. There was plenty of activity during the children referendum campaign from a variety of other sources. The materials published and distributed by the department constituted only a small proportion of the overall campaign activities surrounding the Referendum. He noted that the leading government spokesperson of the Referendum, the Minister for Children, participated in at least 25 discussions or interviews on the Referendum proposal on local and national radio and on television. Other members of the government also participated in media debate and discussions on the proposals, if less frequently. All the political parties adopted a yes stance on the proposal. A variety of non-governmental groups advocated a yes vote, some of which adopted a very prominent role such as the children's charity, Barnardos, the Children's Rights Alliance, the Irish Society for the Prevention of Cruelty to Children and the Campaign for Children. A number of these groups and political parties erected posters, organised public meetings and media events and made contributions to radio and television debates. He noted that there was little organised campaigning for a no vote but prominent columnists in a variety of newspapers as well as many other persons wrote letters to the press advocating a no vote. In addition, information was also provided by the independent Referendum Commission in the form of a website, a booklet delivered to all households and media appearances by its chair person.

(ii) International research demonstrates that the major sources of information used by voters in elections and referenda campaigns are the mass media and in particular television and radio.

(iii) In the minds of most voters, the government booklet or advertisement, even if published by a department, is one produced by the government, one run by the Fine Gael and Labour parties. It would be wrong to think that most voters would necessarily see such material as objective. He concluded by reference to published authorities and his own experience that government supporters would most likely have paid more attention to the booklet and most likely have voted yes in the Referendum. The general level of satisfaction with the government also had an impact on how government published information would be perceived by voters, and he noted that satisfaction with the government was low throughout the course of the Referendum.

(iv) While the issues surrounding the proposal are a factor in referendum voting, they are not the only consideration. In referenda, voters would often place their trust in the people making the arguments rather than analyse the arguments themselves. These may be experts, party figures, media commentators but voters may also decide on the basis of whom they mistrust the most. In many referenda and particularly in those in which the campaign has been weak and voters are uncertain of the issues, significant numbers of voters often vote no in what is effectively a signal of dissatisfaction to the government.

(v) Data suggested that the electorate felt poorly informed about the proposal. A comparatively low level of understanding measured before and during the children referendum campaign suggests that there was a high potential for change as people started to interest themselves more in what the amendment was about.

(vi) Data also suggested that the referendum campaign worked in favour of the no side, by converting opinion or persuading undecided voters disproportionately in favour of a no, or mobilising the no voters rather than those inclined to a yes and the campaign may have achieved all three.

92. In summary, Prof. Marsh concluded that it was unlikely that the material published by the department had a decisive impact because of its nature and source and the existence of a wider campaign, much of it pressing for a yes vote. He was strongly of the view that without a properly designed study, implemented at the time of the conduct of the campaign itself, it was not possible to assess what factors had a particular effect on the outcome.

93. Prof. Marsh also noted that the approach adopted by most researchers is to use surveys of electors and employ multivariate statistical methods to ascertain the likely affect of certain events upon voting. Those who report reading the booklet could be compared with those who do not. Statistical methods may be used to "match" the two samples because two groups could be different in any number of ways beyond their experience of the booklet. He noted that there were particular problems with this approach relating to the limited number of characteristics that can be used in the matching. A causal sequence can be very difficult to establish. There may be indirect effects which are almost impossible to capture such as whether a voter discussed the Referendum with anyone else who had read a booklet or whether that other person had been influenced by it. He was of the view that there was no reason to believe that any one factor will have the same weight in any campaign and that there is a great deal of evidence to suggest that any given factor may vary in its effect across different campaigns.

94. The petitioner also relied upon the evidence of Prof. Paul Whiteley, Professor of Governance at the University of Essex. He furnished a report in January, 2013. His expertise is in the study of elections, political participation and public opinion, including the methodology or design of surveys conducted to ascertain political opinion. He argued that the Referendum was of low salience as did Prof. Marsh and Dr. Bruter. He acknowledged that if all political parties in the state were in favour of a particular aim, people are likely to vote for it taking their cue from the party which they support. He stated that people look for assistance from a truthful or trusted source when undecided and confused about a proposal. In this instance, he stated that the information offered from a Department of State having expertise in the area would be influential, especially when invoking the opinion of other trusted sources such as Mrs. Justice McGuinness, a former Supreme Court judge. He also viewed the message carried by the information campaign as drawing upon the emotions of the reader of the booklet referring to the slogans which were discussed in the judgments of the Supreme Court. The booklet did not contain any counter arguments. He accepted that this material would not influence those who had already made their minds up or who were uninterested in the issues. The undecided voter would have attached more importance to the Department's information than information coming from an obviously partisan group or party. He also acknowledged that though he believed the information influenced the decision of voters, he could not give a precise assessment of the extent of that influence because the data was simply not available. He was, however, satisfied that biased information would help one side of the campaign and, if one had data which measured the extent to which the Irish people trusted their government at the time of the Referendum and the extent to which they absorbed the material, the extent to which it influenced the outcome would be ascertainable. He was of the view that

notwithstanding the absence of a detailed study capable of giving a precise estimate of the extent of the influence of the general campaign, this did not prevent him forming "a judgment of a rough kind about what the effects were". He was clear, however, that it was not possible to determine the percentage affect of the booklet's influence. He was satisfied its influence could not be proven either way. He was only able to conclude that the information "may very well have been quite influential". He also believed that the general trend in the Referendum reflected trends seen in other Referenda, that the "yes" campaign started out from a position of strength but saw its support leak away during the course of the campaign. This led him to believe that a further negative trend would have continued to a somewhat greater extent had the government information campaign been neutral.

95. It is an interesting feature of Prof. Whiteley's evidence that he relied upon a study which he and his colleagues carried out during the Alternate Vote System Referendum Campaign in Great Britain in 2011. It is clear from that study which was advanced as support for the proposition that voters will follow a trusted source in a Referendum that the trusted sources in that campaign were the party political leaders, and not a neutral government booklet which had been published to assist electors in making up their minds. Prof. Whiteley accepted that in the Children Referendum, the unanimous support of all the political parties in favour of the proposal must have resonated with the electorate and would have been a significant contributory factor to the yes vote. He accepted that all the experts were agreed that the supporting data was not available to enable a study to be carried out to determine exactly the extent of the influence of the government's publication.

96. The court is satisfied that this evidence was completely insufficient to establish that the votes cast in the Referendum had been materially affected by the information distributed by the government (including the booklet). Dr. Bruter's initial evidence set out a number of broad propositions which he acknowledged, required significant qualification and was the subject of reasonable criticism by Professor Marsh, some of which was based on the realities of the political campaign conducted in the lead up to the vote. Prof. Marsh and Prof. Whiteley importantly, agreed that there was insufficient data to enable the type of analysis that might make it possible to determine what influence, if any, the information had on the course of the campaign and to what precise level. Dr. Bruter also acknowledged the absence of this information but was satisfied to reach conclusions based on the limited data available. Dr. Bruter advanced additional material in support of his contentions in two further stages based on his analysis of a post Referendum survey.

The Booklet: Statistical Evidence
97. A survey entitled "Post Children's Referendum Poll" was prepared for the Referendum Commission in January, 2013 by Martha Fanning and Ian McShane of "Behaviour and Attitudes" in conjunction with Murray Consultants. It was exhibited in a subsequent affidavit of Prof. Marsh. Having been made available to the proposed respondents on Friday, 12th April, 2013, the hearing commenced on Tuesday, 16th. Both sides sought to attach significance to their respective interpretations of this survey. Further reports were prepared by Dr. Bruter and Prof. Marsh and submitted to the court as exhibits in further affidavits.

98. The "Background and Objectives" section of the poll states that following the vote on 12th November, "market research was required to measure sources of information relating to the Referendum and the perceived role and efficacy of the Referendum Commission. Fieldwork took place from 20th November to 10th December, 2012, in the form of a nationally representative survey of 2,014 aged 18+ who were eligible to vote". A number of questions were put to the respondents and the results were set out in tabulated form. The survey does not contain any lengthy analysis or commentary on these results save for a short summary at pp. 97 – 99 which gives some understanding of the data which interested the Commission and states:-

> "1. Voting Behaviour
>
> • 50% claim to have voted in the Referendum; claimed voting is lower amongst youths (under the age of) 35.
>
> • 18% spontaneously suggest their non-voting was driven by a lack of understanding of this issue, whilst 16% mention that they did not know enough to vote.
>
> • 62% claim to have voted yes; dropping to below 51% amongst under 25s.
>
> • Amongst no voters, just over one in five put it down to not understanding the Referendum.
>
> 2. Level of Understanding of Referendums
>
> • 57% felt they understood the Referendum, thirteen stating very well.
>
> • This compares positively with the Fiscal Stability Treaty Referendum and Oireachtas Inquiry Referendums.
>
> • 79% claimed to have received the Referendum Commission Guide, a significant improvement on the 61% level seen in October 2011 and the 73% in May 2012.
>
> • 26% read all or most of the Referendum Guide, rising to 72% who read at least some of the guide. This overall figure is in line with recent referendums.
>
> Summary
>
> • In terms of the complexity of the guide, there is a slightly lower incidence of people who found the Referendum Commission Guide too detailed and complicated, compared to the May 2012 referendum.
>
> • Perceived helpfulness of the guide is in line with May 2012 levels also.
>
> • 56% correctly identified the Referendum Commission as being responsible for that guide with the government guide correctly attributed by 68%.
>
> 3. Referendum Commission Communications
>
> • TV dominates perceived sources of communications on the Referendum, as is generally the case. National radio advertising and outdoor advertising both emerged strongly too.
>
> • In terms of Referendum Commission TV and recall, 75% claim to have seen the ad which was ahead of October 2011 and May 2012 levels.

> • 39% claimed to have seen the free to air TV ad (in line with the May 2012) and 46% recall the free to air radio.
>
> • 75% agree that the ad was effective in letting people know there was a referendum about to happen and 67% agreed encouraged people to vote in the Referendum; 59% agree that the ad was effective in encouraging people to find out more about the Referendum."

99. It is clear that this poll was not designed to ascertain whether or why people voted yes or no in the Referendum. Neither of its compilers gave evidence in these proceedings. The petitioner sought to base a substantial part of her case on the conclusions reached by Dr. Bruter following his analysis of this survey. At this point, the evidence of Dr. Bruter and Prof. Marsh shifted beyond the general principles discussed in the earlier affidavits to focus almost exclusively upon particular elements of the results of the poll. The arguments advanced were detailed and technical and of rather narrow focus.

Analysis of the Post Children Referendum Poll

100. The first stage of Dr. Bruter's analysis of the poll figures is set out in his affidavit of 17th April, 2013, in which he examined the "underlying data" behind the poll results. This data contained the answers given by respondents to the poll. The poll company provided "front line" results based on the questions that it believed important, generated figures for the proportions of different answers to the questions and presented them in tabular form, sometimes by reference to other characteristics such as gender or age. Dr. Bruter examined the underlying data to determine what it revealed "about the specific link between receiving the (government) booklet and a yes or no vote". He concluded:-

> "22. Turning to the more specific link between the guide and the actual yes/no vote, I have also conducted my own more close analysis of some of the Behaviour and Attitudes data. There was no weighting in the variables in the data set. One of things that the data from the survey allowed us to do was to evaluate whether those who said that they received the government booklet voted in a way that was significantly different from those who did not. Overall, receiving the booklet made people over 9.3% more likely to vote yes."

Dr. Bruter recalculated these figures controlling for social class and obtained the same result in all classes.

101. The Referendum Commission was interested to ascertain the level of recognition amongst the electorate of its booklet. Dr. Bruter stated that the poll figures indicated an improved level of correct identification for both the Referendum Commission Guide and the government guide as against the level of recognition achieved in the Financial Stability Treaty Referendum. 56% correctly identified the source of the Referendum Commission Guide with 23% attributing it to the government, and the balance of 21% to other sources: 68% attributed the government guide to the government, 9% to the Referendum Commission and 23% to others. Dr. Bruter juxtaposed this finding with the figure concerning the level of importance attached by the respondents to the receipt of information that was independent of the yes or no side: 88% felt it was important. He had regard to the figures for the level of readership of the respective guides by those who recalled receiving them: 21% of those who received the government guide read all or most of it: 45% read part of it, but "by no means all": 29% did not read it at all and 5% did not know. The same question when asked in respect of the Referendum Commission Guide provided figures of 26%, 46%, 27% and 1% respectively. When those who had received both guides were asked how much of the government guide they had read, 27% indicated that they had read all or most of it, 46% that they had read certain parts of it but by no means most of it, and 26% that they had not read it.

102. The witness laid considerable emphasis on the results obtained from answers to a number of questions in the poll, such as "how did you vote in the Referendum on Children?" The results indicated that 62% of those who received the Referendum Commission Guide (total 921) voted yes and 38% no: 64% of those who received the Referendum government guide (668) voted yes and 36% no, and 65% of those who received both guides (636) voted yes and 35% no, while 64% of those who received neither guide voted yes and 36% no. He accepted that these results could suggest that there was no difference between people who received the government guide and those who did not, but concluded that this particular result did not coincide with his raw data analysis. Dr. Bruter was satisfied that there was "a statistically significant relationship between saying you received the Government Booklet and saying that you voted yes in the Referendum".

103. Prof. Marsh did not disagree that the figure of 9.3% could be obtained from the unweighted data presented. However, he carried out a similar statistical analysis, but this time using weighted data from the underlying raw data supplied by the pollsters in their working papers. He also concluded that those who said that they received the government guide were statistically represented as voting yes more than those who did not, but the difference was approximately 5.5% as against 9.3%. For the purposes of this analysis Dr. Bruter was happy to accept that one could apply weighted data to the calculation.

104. Counsel for the petitioner submitted that Dr. Bruter's findings demonstrated that there was a 9.3% increase in the number of people who voted yes when they received the government guide than when they did not, and that given the 58:42% split in the vote, the increase in support was sufficient to carry the Referendum for the yes side. Counsel for the respondent submitted that Dr. Bruter's evidence did not go that far and that Dr. Bruter accepted that it simply demonstrated the statistically significant relationship set out above. Prof. Marsh's analysis indicates that when using weighted data, the statistical relationship is 5.5%. He was strongly of the view that this did not demonstrate a casual link between receiving the Government booklet and voting yes in the Referendum, and that more detailed data concerning other influential factors in the campaign must be available and accounted for, before such a conclusion could be reached.

105. While the figures establish some statistical correlation between receipt of the Government booklet and voting yes, the court is not satisfied that receiving the booklet meant that the recipient was thereby caused to vote yes. It is also clear that notwithstanding receipt of the Government booklet, most of the electorate did not vote at all and that a substantial proportion of those who received the booklet voted no. I am not satisfied that these figures established as a matter of probability that receiving the booklet caused an increase in the "yes" vote wholly attributable to that factor, thereby affecting the result of the Referendum as a whole.

Dr. Bruter's Second Report

106. Dr. Bruter's evidence was interrupted on 17th April, and was resumed on 3rd May, 2013, by which time a further affidavit was submitted furnishing another report of 30th April, 2013, which contained the second stage of his analysis of the poll results. This report was a further, but completely separate, refinement of the analysis presented in his previous testimony on the relationship between people who received the Government booklet and the likelihood of a yes vote. It examined the underlying data provided in the survey conducted by "Behaviour and Attitudes" for the Referendum Commission. It was divided into three parts. The first explained the application of the concept of logistic regression as a means of calculating the affect of various factors on a consequence: the second part explained the methodology used in the analysis and the third part presented results and conclusions. However, this analysis did not address the other influential factors identified as important by Prof. Marsh to the understanding of the casting of votes in the Referendum. Of course, this was largely due to the fact that the data in respect of these important factors

does not exist as acknowledged by Dr. Bruter and Prof. Whiteley.

107. Dr. Bruter explained that regression assesses the effect of a number of causes (independent variables) on a consequence (dependent variable) by attempting to ensure a levelling of conditions using control variables. Binomial logistic regression is a specific type of regression applied when the dependent variable (the factor one is trying to explain) is dichotomous (i.e. has only two possible values – voting yes or no). Bivariate regression is a method of measuring the impact of one variable on another. Multivariate regression assesses the effects of many independent variables on a dependent variable, thus permitting the identification of the variable that is really responsible for changes on the dependent variable – voting yes or no.

108. Dr. Bruter, therefore, applied binominal logistic regression in this case because the dependent variable was dichotomous, namely voting yes or no. He then tested for other independent variables including, he claimed, exposure to information or other elements of the Referendum campaign, and also receiving the Referendum Commission Booklet together with various demographic and social variables such as age, gender and social class. He stated that he also tested for exposure to information on the general campaign in two different ways: total exposure (aggregating every possible source included in the survey) and separate exposure (including each source of information or campaign element measured in the survey as a separate variable) and measured each as to whether they were more likely to make a person vote yes or no. In this way, he claimed to have controlled for potential substantive interference on the way individuals voted such as receiving the Referendum Commission booklet, exposure to television advertisements, and internet campaigning and radio advertising. He produced four regression equations and these factors were entered individually in the third and fourth equations and in aggregate form in the first and second equations. The specific questions used to create the variables used in the regression equations were set out in the appendix to the report.

109. The dependent variable was determined by Question 4a "how did you vote in the Referendum on Children?". The independent variable of interest was determined by Question 6 "do you remember receiving this (Government Guide) in your own home?". Other variables were contained in Question 13 which asked "apart from the Referendum Commission Guide, which of the following specific types of Referendum Commission advertising or Communication did you see, read or hear during this year's Childrens Referendum campaign" (emphasis added). The respondents were then provided with a list of alternative media sources through which they may have received Referendum Commission information. In addition, Dr. Bruter sought to take account of other factors such as age, gender and social class.

110. Dr. Bruter concluded that each of the regression equations indicated that receiving the Government booklet was a statistically significant predictor of voting yes. He accepted, in the course of evidence, that in fact the other sources and factors referred to by him did not include data concerning other influential factors in the campaign because it was not available: the data which he used, refers only to exposure to Referendum Commission material during the campaign. He then contended that this material was an acceptable "proxy" variable for campaign exposure because people who saw that material were more likely to be following the campaign: it was the best imitation of the campaign available. Though he acknowledged that the overall campaign would have had a "politically huge" influence on voting "yes" or "no", he did not think it would add anything to the impact of specifically saying that you received the Government Booklet. Prof. Marsh was of the view that the absence of this important data from Dr. Bruter's analysis created a difficulty about drawing impressions of causality from the association posited by Dr. Bruter. It was important to control for other events that could have influenced the voter or, indeed, whether one received the booklet.

111. Dr. Bruter later explained that he did not mean to include this material as a proxy for the rest of the information received by voters in the course of the campaign, but only as a proxy in respect of exposure to the campaign in a more limited sense in that if they paid some attention to the balance of the Referendum Commission's campaign, voters would likely take account of other elements of the campaign. It is fair to say that having regard to Dr. Bruter's previous acceptance that it would have been preferable to have full data on the effect of the main elements of the campaign for the purposes of a study such as this it may be regarded as a very insubstantial proxy.

112. Dr. Bruter calculated a co-efficient, (b), which was the increase in the odds that one would vote yes rather than no having received the Government Booklet as opposed to not receiving it. A figure was also provided for a "standard error" (SE) which represented a measure of "dispersion" of the sample. If the coefficient was to be regarded as strongly reliable, it was necessary that it be "quite a bit bigger" than the standard error. The "rule of thumb" used was that the (b) coefficient should be twice the value of the standard error (SE) if it were to be considered strong enough to be relied upon. Thus, in regression 1, the (b) coefficient was 0.20 and the standard error 0.08 for the variable of receiving the Government booklet. In regression 2, the coefficient (b) was 0.31 and the standard error 0.14. Thus, the coefficient (b) could be regarded as a strong and reliable indicator of the increase in the odds that one would vote yes rather than no having received the Government booklet. Similar exercises were carried out in respect of the other variables such as receiving the Referendum Commission Booklet, gender, age and social class and what was referred to as "total other exposure". The statistical significance of the results was also calculated as a "P" value. These and other figures enabled Dr. Bruter to conclude that his findings in respect of receiving the Government Booklet in each regression were statistically significant.

113. In his third and fourth regressions, which were similar to the first and second regressions, Dr. Bruter included each individual source "of campaigning" individually. These included figures concerning the influences of variables such as communications seen, read or heard during the campaign broken down into television advertising, television coverage, radio advertising, radio coverage, internet advertising and internet coverage. As noted earlier, it later emerged that these figures related to coverage of the Referendum Commission's materials and not the general Referendum Campaign. Dr. Bruter concluded "The results confirm that even when controlling for all the additional variables…identified, receiving the Government booklet made respondents consistently and significantly more likely to vote yes in the Children Referendum".

114. Prof. Marsh urged a degree of caution in using the results of the "Behaviour and Attitudes" poll. He stated that the pollsters were not attempting to obtain a rounded view as to why the particular outcome occurred in the Referendum. They were trying to analyse the effectiveness of the Referendum Commission's campaign. The Referendum Commission was seeking information about the reception of its booklet and other sources of information. It was not concerned and did not take account of other sources of information and their significance to the Referendum campaign such as how voting intentions were affected by political allegiances or government popularity.

115. Prof. Marsh pointed out that demographic weighting is often a feature of surveys and is unquestionably acceptable when single variables are under consideration. However, there is amongst political scientists a debate as to whether weighting is appropriate to multivariate analysis. That controversy was explored in evidence and, in effect, both experts agreed that the application of weightings should not make a difference in multivariate analysis. Prof. Marsh pointed out that there is no guidance on which form of analysis should carry more weight when weighting produces a difference. He stated that this means that there may be known biases in a survey which may be ignored or not taken into account. While weighting, even in this case would not make a great deal of difference to the figures in the tables produced by Dr. Bruter, Prof. Marsh was of the view that, in this case, it made a great deal of

difference to the inferences to be drawn from the results obtained.

116. Prof. Marsh re-ran the regression model provided by Dr. Bruter and provided for weightings in respect of gender and social class. As expected the figures were substantially the same. However, there was a significant difference in respect of those in receipt of the Government guide, which made it unsafe to say that there was a significant relationship between having recalled the Government guide and voting choice. Dr. Marsh does not contend that there are major differences in the figures obtained for weighting, but that what should be an inconsequential weighting on the re-run on regression 2 produced a (b) coefficient for receiving the Government booklet of 0.185 and a standard error figure of 0.152. That is clearly a figure that is not twice the standard error. Dr. Bruter stated that a re-run of his model with weighting should not change the results significantly and Prof. Marsh agrees: however, what was of concern to Prof. Marsh was the ease with which a slight adjustment for weighting changed the result and produced the above figure and a significantly different but related statistical significance value "P" and other figures that undermined the reliability of Dr. Bruter's model and results. Dr. Bruter disagreed with this analysis and argued that the preponderance of opinion amongst political scientists was that weighted opinion should not be used in regressions of this kind.

117. Prof. Marsh also conducted an experiment to test Dr. Bruter's model. He postulated that the inclusion of the Government booklet in the model should make a significant contribution to explaining voting "yes" and if removed from the model it should be clear that it has much less explanatory power. However, when this exercise was carried out, the predictive power of the model improved by only a trivial margin when including the receipt of the Government guide as opposed to not receiving it. Prof. Marsh, therefore, concluded that as a variable this "tells us almost nothing about the way people voted". Dr. Bruter disagreed substantially with the statistical technique used by Prof. Marsh to measure how one variable explains another and said it was not applicable to binomial linear regression, but is more usually used in other types of regression.

118. Prof. Marsh also postulated a theory that the Government guide and the Referendum Commission Guide could each have affects which are not entirely independent of one another, and that the regressions should be adapted to allow for that fact. He concluded that when that is done there are no significant effects of recall of any kind. In a table that emerged from that study he demonstrated that those who recalled receiving neither guide, just the Referendum Commission Guide, or both the Referendum Commission and the Government Guides, were more inclined to vote yes: by implication receiving only the Government guide led to a smaller probability of voting yes compared to either getting no guides at all or only the Commission's guide, or both. He concluded that recalling either guide or neither guide made no difference to the likelihood of a yes vote. Dr. Bruter contended that the methodology of the analysis was flawed: the witnesses, once again, disagreed.

119. Prof. Marsh questions the confidence to be placed in estimates of the affect of recalling the Government booklet which treats data as a simple random sample. The data in this case came from multiple samples in which areas were first chosen and then individuals. In a random sample every person has an equal chance of being included. In this case, individuals are chosen from 80 sample points. Interviewers then select respondents so as to provide a sample that fits age, gender and social classes. This "clustering" should mean that sampling variants (the degree to which identically drawn samples yield somewhat different results as a consequence of chance) will be greater than if the sample has been a "simple random sample". The software employed to assemble the data underestimates "standard errors and confidence intervals" that surround estimates from the sample. This requires a correction of one and a half times that which is provided in a typical software statistical package which assumes a simple random sample. Dr. Bruter disagreed with this proposition which was based on the authoritative work by Gelman & Hill, *Data Analysts using Regression and Multi-level/hierarchical Models* (Cambridge University Press 2006: Chap. 20). He said that the 1.5 times adjustment would depend on the quality of the sampling and could only be a rough instrument which was inappropriate to psychologically based work. He claimed that the Gelman & Hill work concerned a very specific type of data which applied to a very specific type of model namely, multi-level models which were used primarily when dealing with comparative studies between one country or jurisdiction and another in which referenda, for example, had been held. This principle was not applicable to issues which arose within a single jurisdiction. Prof. Marsh applied a 1.5 times and a 1.1 times adjustment to Dr. Bruter's figures in respect of the error. When these adjustments were made the result and figures demonstrated no basis for the existence of any affect of the recall of receipt of the Government booklet on voting. Prof Marsh concluded as a result that the affect was not significant.

120. Prof. Marsh also focused upon the fact that the variable referred to in Dr. Bruter's analysis was in respect of those who "received Government guide". He noted that only 51% of the weighted sample reported that they had received the guide compared with 79% who received the Referendum Commission guide. However, similar numbers of each guide were printed and distributed through An Post. Therefore, all households got the government's guide which indicates that the recollection of respondents was faulty. The actual question 6(b) asked "Do you recall having received the Government guide into your home?". Prof. Marsh viewed this as a measure of recall not of delivery. The meaning of "recall" in that context may involve a number of propositions. He queried whether the failure was random, whether it reflected non-delivery, whether it was selective and on what basis did some recall and others not. The figures indicated that those who recalled being in receipt of one guide were more likely to recall the other. Of those who said they received the Commission guide, 86% said they received the Government guide and of those who did not get the Commission guide only 38% said that they got the Government guide. Prof. Marsh stated that this was a strong association leaving a difference between the two figures of 48 percentage points. He, therefore, concluded that it was wrong to treat recall as a random treatment variable. There may be factors that prompt recall which, if excluded from a model, are likely to bias the estimates – the coefficients – adopted by the model signifying the effect of recall on the vote. Dr. Bruter was of the view that this was simply semantics and that recall indicated that the household had received the document.

121. I have considered all of the econometric evidence from the expert witnesses. There were numerous differences between them, but what was missing from the discussion was any real engagement with what was happening in the Referendum campaign. The cut and thrust of that debate and the strength of influence of the various participants in favour of the proposal or, indeed, against it, were not afforded any substantial part in the academic narrative provided by the witnesses. To a large extent this was dictated, as was readily acknowledged by Dr. Bruter, by the fact that there was an enormous absence of information which was highly important to an understanding of the dynamics of the campaign. The assessment by Dr. Bruter of the data concerning the affect of recall of the Government referendum booklet has been the subject of a great deal of criticism by his colleague, Prof. Marsh. It appears to be accepted that he may be correct in his conclusion that there was some statistical connection between recall of the receipt of the booklet and voting yes. The figures which he relies upon contain some variables but nothing remotely sufficient to inform the court authoritatively of the affect of the other elements of the campaign. The "proxy" variable offered is clearly insufficient to measure the reality of the affect of other factors in the course of the campaign. It is significant that political and social discourse over the last thirty years has been obliged to focus from time to time very heavily on issues concerning the welfare and rights of children. The Houses of the Oireachtas, the Courts, the Churches and virtually every organ of the media have been concerned, if not convulsed, with a whole range of issues concerning child abuse, child protection, homelessness, custody and access issues between children and parents, the detention of children, education rights of children, and many other child and family centred issues. These matters clearly informed the debate that led to the formulation of the proposal to amend the Constitution. Understandably, neither Prof. Whiteley nor Dr. Bruter had any knowledge of this background.

122. Prior to the publication of the wording, the polls indicated that there was a substantial positive view in favour of a proposal to amend the Constitution. That was reduced over time following the publication of the wording, but the majority obtained on polling day was 16%. It would require clear and cogent evidence to establish the proposition that the Government Booklet influenced the Referendum as a whole. I am not satisfied on the basis of the evidence of Dr. Bruter, and having heard the evidence of Prof. Marsh which I prefer, that his work on the "Behaviour and Attitudes" survey is sufficient to enable me to find for the petitioner on the balance of probabilities. The experts have disagreed over fundamental elements of the survey, the meaning and significance of the questions posed, interpretation of the percentage figures given and how best to assemble and interpret the data underlying the figures set out in the survey. I am not satisfied that the petitioner has established, notwithstanding the booklet's widespread distribution, that it materially affected the result of the Referendum as a whole.

The Website

123. The Minister established a website dedicated to the Referendum which went live on 19th September, 2012. Its design and operation cost €8,100.00. It was operating until closed down by the Department of Children and Youth Affairs on 9th November, 2012. The petitioner contends that the website was widely viewed during the period of its existence and that its widespread readership was such as to materially affect the result of the Referendum as a whole. It is clear from the evidence that the website was not widely viewed.

124. In the *McCrystal* ruling delivered on 8th November, 2012, it was held that there were extensive passages in the website which did not conform to the *McKenna* principles. Though not all of its contents were in breach of the principles, the court considered that it was not possible to redact the material for the website. The court was satisfied that the respondent had acted wrongfully in spending public monies on the website.

125. The nature and extent of the breach of the *McKenna* principles contained in the website was addressed in the judgments of the Supreme Court delivered on 11th December, 2012, by Denham C.J. and Fennelly and O'Donnell J.J. It is not necessary at this stage to set out in detail the various criticisms of the material, which were extensive. The issue in these proceedings is what affect, if any, the contents of the website had on the Referendum result.

126. Mr. Roger Jupp, Vice Chairman of Millward Brown Lansdowne, one of the most experienced market research companies in Ireland, noted that the website had 23,309 "unique" visitors over the full length of its life, 10% of whom were from outside the country. A "unique" visitor is a computer visitor who logs onto a website but may return to it on other occasions. 23,309 was well under 1% of the total population over 18 years of age. He noted that there was no evidence, research based or otherwise, as to what people believed the website was telling them, either in favour or against the proposal or, whether it changed their opinions from one side to the other, or whether it reinforced their opinions. The website's busiest day was on 19th September. Thereafter, the average number of daily visits was three to four hundred visitors, frequently dropping to much lower than that. The website had a minimal reach into the general population. Mr. Jupp stated that there was no evidence that the website caused a change in voting intention or had a material affect on the Referendum outcome.

127. I am not satisfied having regard to the established number of visitors to the website that there is any evidence that the website had a material affect on the overall result of the Referendum. It is clear that given the size of the majority, it could not have been decisive, and if it had any affect, it could only have been minimal.

Print, Radio and Television Advertising

128. Ms. Canavan in her evidence outlined the extent of the advertising campaign conducted by the Department of Children and Youth Affairs. On 10th September, 2012, following a public procurement competition KDNINE, a publicity firm, was retained to develop a television, radio and online advertising campaign. A brief was prepared in respect of the key messages to be delivered in the broadcast advertising which were to convey the importance of voting in the Referendum, the date of the Referendum and to promote the availability of further information on the dedicated website. Advertisements on television (RTE1, RTE2, TV3, 3E and TG4) commenced on 23rd October, and were discontinued on 8th November, 2012, after the Supreme Court ruling in the *McCrystal* case. Advertisements were also run on 24 local radio stations in the period 22nd October to 4th November. They also ran on major radio stations (Radio 1, 2FM, TodayFM, Newstalk and FM104) in the same period. A limited amount of online advertising was procured. This was placed with Mail online, rte.ie, independent.ie and irishtimes.com during the same period. From 1st November advertisements were also placed on Facebook. The total number of "click throughs" did not exceed 2,000.

129. Brindley Advertising, which holds the government print advertising contract, was commissioned to develop proposals and an advertising schedule. The key messages to be conveyed were similar to those in respect of the broadcast media. Advertisements were carried in national newspapers, regional/local papers, weekend newspaper magazines (on 3rd and 4th November), the Irish Farmers Journal, the Metro Herald and the Big Issue during a period 22nd October and 8th November. Though every effort was made to withdraw all advertising after the Supreme Court ruling in the *McCrystal* case, an advertisement was published in ten local/regional newspapers with publication dates of 9th or 10th November, because printing had been completed in advance of the Supreme Court ruling on 8th November.

130. Dr. Robert Heath, an Associate Professor lecturing in Advanced Advertising Theory at Bath University, gave evidence on behalf of the petitioner on the likely emotional influence of government advertising materials used during the course of the Referendum. He compiled a report dated 28th January, 2013, upon which he elaborated in the course of evidence. The report goes somewhat beyond the issue of advertising in that he also reviewed the effect of the cover on the Government booklet. Dr. Heath's research speciality is in the processing of emotion in advertising with a special emphasis on how this occurs at low levels of attention and influences intuitive decision making. He is the author of "*Seducing the Subconscious- the Psychology of Emotional Influence in Advertising*" (Wiley – Blackwell, 2012). He favours the view that the message in advertising has little if any influence on the favouring of a product, but that emotive non-verbal communication such as body language, tone of voice and emotional behaviour that accompanies and qualifies the communication induces a favourable response. He contends, based on work in the area by himself and others, that emotive communication or, "meta communication" in publicity material is processed automatically, instantaneously and regardless of how much attention is paid to the communication. It exerts a powerful influence on our "favourability" and in situations where decisions are hard to make, it subconsciously influences the direction of the decision through its affect on human intuition. It is claimed that because its influence is not as obvious as verbal claims or written messages, people tend not to counter-argue meta communication. He cited experimental evidence to suggest that the slightest exposure to advertising material can influence behaviour even when no recall or knowledge that the material was seen, remains. He examined government advertising materials and offered his professional opinion on the likely emotional influence of these materials on the Referendum vote.

The Booklet

131. Dr. Heath noted that the design of the cover of the booklet differed from the Referendum Commission Information Booklet. This was of critical importance to the effect the booklet had on voting intention. He highlighted the contrast between the reference by

the Referendum Commission to the "Children Referendum" and the reference in the Government booklet to the "Children's Referendum". The presence of an apostrophe carried an influential meta communication and suggested emotively that the Referendum was sponsored by and "owned" by children themselves. He noted that since the booklet was distributed to households throughout the country, it would have been seen and processed by anyone who picked it up even if the contents were never read. He cited the four slogans or bullet points on the cover which were the subject of criticism in the *McCrystal* judgments namely:-

- Protecting children.
- Bullet point supporting families.
- Bullet point removing inequalities in adoption.
- Bullet point recognising children in their own right."

132. He noted that the proposals for constitutional amendment were the only ones mentioned and that reading the bullet points would lead the reader to assume that a yes vote was about protecting children and a no vote would leave them unprotected. He claimed that the briefest glance at the cover would communicate that the subject was the Children's Referendum and that the Referendum is about "protecting children". He emphasised that this would be communicated even if all four points were not read. The message was clear that voting against the Bill would result in children not being protected.

133. He stated that the cover's influence was enhanced by the logo illustration of three very young children hand in hand. This was another meta communication which would be processed instantaneously and automatically in the following way:-

- The young children at a glance would be seen as on their own, thus not able to be protected by adults.
- They are holding hands, which children do when they fear being separated.
- The child on the left appears to be pausing or recoiling slightly; the one in the middle has half length trousers that seem either too small or worn and bare feet; the child on the right appears especially small and lonely and also has bare feet.
- The children are shown in silhouette with their faces blank. This suggests these children are not proper people with identities and views, but more akin to "non-people" who do not really count.
- My opinion is that most people would feel that these were three "lost waifs", wandering alone and defenceless to the world".

He concluded that this illustration on its own could be construed as suggesting vulnerability but when read with the words "protecting children" the reader was left in no doubt that the safety of children was in some way in danger. He stressed that even if the cover is glimpsed and not read, the emotive content will be processed instantaneously, stored as a subconscious marker which covertly suggests children are in need of protection and will intuitively influence those unsure of which way to vote to feel that a responsible citizen would be expected to vote in favour of the Referendum.

The Television Advertisement
134. Dr. Heath noted that the television advertisement sponsored by the government did not highlight any of the issues being voted upon but used a key phrase "it's all about them…but it's up to you". Following this he noted there was a word "VOTE" and that the "O" in the word was a "smiley" face. However, he noted that this particular face had features which suggested it was sad and had been crying. This appeared alongside the logo of the three children which was visible but to a lesser extent than in the booklet. What the meta communication generated in this commercial was somewhat biased towards a "yes" vote.

Printed Advertisements
135. The printed advertisement used the same words as in the television commercial and the same word "VOTE" with the smiley face in the "O". The logo with the three children was featured very prominently in the centre of the upper part of the advertisement where it would have been expected to get most attention. At the bottom right side of the page the cover of the information booklet was shown including the four slogans already quoted.

136. Dr. Heath noted that the booklet had been distributed to every household in the state and that the vast majority of voters had seen the cover. The printed advertisements, according to the government's figures, would have been seen on average 3.6 times by 85% of adults and 2.2 times by 78% of adults in the last week before polling. He believed the logo was foremost amongst the devices used in the material and that it would have become for the vast majority of people, one of the defining "emotionally competent association(s)" connected to the Referendum. An "emotionally competent association" is an element which is repeatedly exposed alongside a brand or an event and which carries powerful emotional significance. It is a term taken from a book of the same name by Damasio (2003). Dr. Heath stated that the power of such devices has been demonstrated in many case studies of advertising effectiveness. It is particularly effective in influencing those who are unsure of which way to make a decision. In that regard, he noted that there was a high level of lack of understanding or no understanding of the issues being addressed in the Referendum. He, therefore, expected that an emotionally competent association such as the three children logo had a powerful influence on voter behaviour. He emphasised that such a subconscious influence can occur even when exposure is so brief that people cannot recall ever seeing the material. Thus, evidence that people do not recall receiving a booklet or seeing a print advertisement or seeing a television commercial does not mean that they did not see it, and were not influenced by it. Nobody who saw the logo would have seen it as an attempt to influence their behaviour and thus, significantly, hardly anyone would have tried or, indeed, been able to counter argue the idea that the image conjured up in their subconscious. He, therefore, concluded that the government publicity material contained not just verbal messages, but important and highly influential meta communication that influenced voters' behaviour.

137. John Fanning is an Adjunct Faculty Member at University College Dublin Michael Smurfit Graduate Business School and currently Chair of Bord Bia Brand Forum. He worked in the advertising industry in Ireland for more than forty years at the highest level and was Managing Director of McConnell's Advertising and subsequently Chairman between the years 1980 and 2005. During his career he worked on a number of Referendum campaigns including for the Referendum Commission on the second Nice Treaty Referendum in June, 2001. He gave evidence on behalf of the respondents and was invited to offer an expert view on whether the advertising and website material sponsored by the Department in the Referendum had an impact on its outcome and, if so, to what extent. He stated that it was notoriously difficult to determine the effect of a marketing communications campaign. He relied on a widely cited authority "Testing to Destruction: A Fresh and Critical Look at the Uses of Research in Advertising" by Alan Hedges, which posed the question

whether research can do anything to prove that advertising money has been well spent. The author concluded that it could not be proven in a direct sense, although the more one knows about what goes on in terms of mass communication the better placed one is to make an intelligent judgment about whether advertising has worked. Mr. Fanning stated that in order to come to a definitive assessment of the impact of the material published by the Department, specific survey data generated before, during and after the Referendum campaign would be required. At a minimum that would require data on the degree of knowledge which potential voters had of the issues surrounding the Referendum, the degree of exposure they had to campaign literature and advertising from the Department and other sources, the degree of exposure they had to traditional media, digital media and word of mouth comment. It would also be necessary to assess resulting attitudes to the issues involved and the likelihood of voting. Though there was some limited pre-campaign polling data, he concluded that there was nowhere near enough data to enable one to evaluate the effect of the materials published by the Department when examined separately or in the context of the wider campaign. He noted that even if one had this type of information, two problems remained namely, the difficulty of untangling the effects of the Department's campaign from other "noise" going on in the wider Referendum campaign, for example, in newspapers and on television and radio in the blogosphere, and in private discussion about the Referendum which people had with friends, family and work colleagues. In addition, in seeking to assess the impact of material published by the Department, current theories on marketing communications by Dr. Heath suggest such marketing or advertising activity often operates at very low levels of involvement, thereby making recall difficult. A voter may be processing information from different sources at different levels and at different points during a Referendum campaign. He concluded that it would be impossible to separate the effect of the material published by the Department from this surrounding "noise".

138. Mr. Fanning also deduced from opinion polls carried out before the Referendum leading up to the actual vote that the percentage of the population in favour of change fell steadily from over 90% just under a year before the vote, to the 58% majority on polling day. Thus, voters were significantly more likely to vote "yes" before exposure to the government campaign than after it. This is in accordance with previous Referendum results as noted by Prof. Whiteley and Prof. Marsh. He concluded the Department material had minimal affect in influencing voters. He also suggested that the main reason for the lack of impact of this material during the campaign was its emphasis on public information rather than persuasion. It had a very conservative tone and was conventional in design, style and layout. The fact that it included some phrases and images, the effect of which was to render it a breach of the fairness required by the *McKenna* principles, did not mean it was effective in terms of persuading voters to vote, and to vote yes. The evidence of the polling data, such as it was, suggested that it did not have that persuasive affect.

139. He maintained that there was no "big idea" in the material in the sense that there was nothing in it to jolt people into a fresh recognition of a product, service or referendum subject. The government and public bodies have used creative ideas to good affect in recent years, such as graphic depictions of car accidents and injuries in road safety campaigns and the health affects of cigarettes in anti-smoking campaigns. He concluded that the materials published by the Department, including the logo of the three children and the four slogans, did not carry that type of affect. He considered the government campaign to be "low voltage".

140. Mr. Jupp agreed with Mr. Fanning that it was impossible to establish definitively what role the Department's materials had on the Referendum result because it was part of a broad swathe of information coming to potential voters from a diffuse set of sources.

141. Dr. Heath contended that there was a large proportion of people who did not understand the issues in the Referendum and would have used their intuition to make a decision on how to vote, which would have been very much directed by the emotive elements and materials. He sought to support this proposition by reference to the "Behaviour and Attitudes" survey material. However, I am satisfied that there was insufficient evidence available for him to reach the conclusion that the emotive material caused people to vote yes. Indeed, some of the material put in cross examination suggested that less than half of those who only received the Government guide voted yes, and that a higher proportion of people who only got the Referendum Commission guide voted yes. However, once again, the absence of a multivariate analysis of other influences at work in the campaign makes it difficult to determine the precise causal affect which this material had, if any. I am not satisfied that Dr. Heath's evidence establishes as a matter of probability that the Referendum result was as a whole materially affected by the meta communication described and I prefer the evidence of Dr. Jupp and Mr. Fanning to that of Dr. Heath.

Events Post the Ruling of the Supreme Court –

142. The petitioner contends that the ruling of the Supreme Court on 8th November, 2012, two days before polling day should have been followed by emergency legislation to postpone the polling day. It was submitted that there was insufficient time to enable the terms of the declaration to be widely disseminated and to disabuse the electorate of the view that the booklet was unbiased, or that it could be relied upon as a useful source of neutral information in the campaign, and that it contained an error. Further, it was contended that there was insufficient time left in the campaign to ensure that the advantages gained by the "yes" campaign because of the breach of the *McKenna* principles were negated.

143. The petitioner contends that following the ruling the respondents did not attempt to remedy the breaches of the Constitution identified by the Supreme Court or negate or dilute their affect. It is claimed that the Minister for Justice, Equality and Defence, Mr. Alan Shatter T.D., failed to issue an apology for the breaches when interviewed and requested to do so on RTE news. It is alleged that the Minister stated that the ruling only applied to the website and booklet and did not apply to the advertising campaign, and thereby further obfuscated its affect. It is said that the Minister drew attention to the High Court ruling when criticised in relation to the Supreme Court ruling.

144. The petitioner also complained that no legislation was enacted to postpone the polling day. It was claimed that, as a result, "no" campaigners were deprived of a right to participate in a constitutionally compliant Referendum process. Dr. Bruter and Professor Whiteley gave evidence about the likely benefits to the Referendum process of the postponement of the poll following the Supreme Court ruling. Dr. Bruter concluded that it was impossible to define a period of days within which a significant event, such as the ruling, will take effect in a campaign. He thought it reasonable to conclude that the affect of the ruling on the electorate would have been stronger and more stabilised if the Referendum had been delayed by a few days or three weeks. He later agreed with Professor Whiteley that a delay of two weeks between the ruling and the polling day would have been sufficient. In that regard, Professor Whiteley noted that according to a European Social Survey, Irish voters had a significant level of trust in the Supreme Court and that the ruling would have been quite influential if given time to diffuse amongst citizens. The Professor relied upon his study of the last British General Election during the course of which polls were taken in relation to significant events. One of these events was the first tri-partite leadership debate between the Liberal Democrat leader, Mr. Clegg, and the other two party leaders, the present British Prime Minister, Mr. Cameron and the then British Prime Minister, Mr. Brown. Mr. Clegg was believed to be the victor of this debate and there was a very significant surge in support for his Liberal Democrat Party which, it was said, took two weeks to have an impact on general trends. However, when the graph produced was examined, it is clear that within approximately 48 hours of the debate the poll ratings of the Liberal Democrats had surged and remained at or about that level until the date of the general election. Prof. Whiteley submitted that the longer period of two weeks was required in order to judge whether the affect of the significant event had "stabilised" in the electorate. This evidence was advanced to support the proposition that a delay in the holding of the Referendum

would have favoured the growth of the "No" vote due to an increasing understanding of the misconduct of the government by the electorate. However, it was clear from the post voting survey carried out on behalf of the Referendum Commission that a high percentage of those who voted were aware of the Supreme Court ruling.

145. Prof. Marsh considered that the negative message of the Supreme Court ruling to some extent cancelled whatever positive affect, if any, gained by the government material. Over 61% of adults were aware of the ruling and 39% were unaware according to the Behaviour and Attitudes survey. This was adjusted and recorded as 77% of voters within the survey. It was also submitted on behalf of the petitioners that this case must be contrasted with the facts of the *Hanafin* case in which a week remained of polling within which the affect of the judgments in *McKenna (No.2)* was absorbed by the electorate and various steps were taken by the defendants in that case to remedy the breaches. This also permitted the absorption by the electorate of the full extent of the breaches of the *McKenna* principles and the fact that the material was not impartial and had been wrongfully funded by the government. I am not satisfied that the time remaining for canvassing and campaigning in the Divorce Referendum following the Supreme Court ruling binds this Court in relation to its consideration of the two day period between the ruling and polling day. That period is a factor to be taken into consideration, but I am not satisfied that there is sufficient evidence to indicate that the ruling and later judgments would have had a greater affect if the polling date had been delayed.

146. There was extensive national coverage of the *McCrystal* ruling. On 8th November, RTE radio's News at One, beginning at 1.00pm., devoted almost three quarters of its coverage to the ruling and its implications, including the heated exchanges between Mr. Shatter, the interviewer Mr. O'Connell and Mr. John Waters. Mr. Waters later told the court that he believed that the Referendum would have been defeated if the poll had been postponed following the Supreme Court ruling until after delivery of the judgments when the electorate would have fully understood its meaning and affect. The programme had an audience of approximately 360,000 listeners. The ruling was also the main topic on the RTE Radio programme Liveline on the same date at 1.45pm, which included an extensive interview between the presenter, Mr. Duffy, and Mr. Mark McCrystal. Liveline at the time was Ireland's second most listened to programme with an average audience of 420,000 listeners. The ruling was the first item on the RTE Radio programme Drivetime commencing at 4.30pm, which included legal analysis. It was the first item on the Six One News on television which included a film report on the judgment by the Legal Affairs Correspondent and a filmed report on the reaction of campaigners, together with live analysis by a political correspondent. This was again followed by a live interview and debate on the ruling between the Minister for Justice, Equality and Defence, Mr. Alan Shatter T.D., and Mr. Mattie McGrath T.D. This programme had an average viewership of in excess of 400,000. The ruling was given similar prominence in RTE television news at 9.00pm, which had an even larger audience of approximately 730,000. The RTE Primetime programme on the evening of 8th November, 2012, also covered the matter extensively and had an average audience of approximately 350,000. The matter was then covered in the TV3 programme Tonight hosted by Mr. Vincent Browne, featuring an interview with Mr. *McCrystal* and a panel discussions with Ms. Patricia *McKenna*. It was also covered by the presenter Mr. Matt Cooper on TodayFM, which had an average listenership of 160,000, the lunchtime programme and the Right Hook on Newstalk which had an average audience of 130,000. On 9th November, the *McCrystal* ruling was again the leading story on Morning Ireland on RTE Radio which featured an interview between the Transport Minister, Mr. Leo Varadkar T.D., and Mr. Malachy Steenson on the issue, and the Referendum generally. This programme has an average audience of 441,000 listeners. The *McCrystal* ruling was also given saturation coverage in the print media over 8th, 9th and 10th November.

147. I am not satisfied on the evidence adduced that the Ministers cited showed disrespect for or sought to obfuscate the effect of the Supreme Court ruling. I have viewed the materials and listened to the recordings produced to the court in respect of these matters. It is clear from these materials that there was a robust engagement between at least one of the interviewers and the Minister for Justice, Equality and Defence in relation to the affect of the ruling on RTE news. Those listening to the exchanges or reading the newspaper reports of the ruling can have been in no doubt of the nature of the Supreme Court ruling. I am not satisfied that the Supreme Court ruling in the *McCrystal* case could be said not to have had an immediate impact. It was a short, focused and definitive condemnation of the expenditure of public funds by the government on a partisan information campaign as a breach of the Constitution and was reported as such. This gave rise to a robust public debate and engagement on the issues raised by the ruling.

148. The respondents also submit that the Minister for Children and Social Affairs issued a press release in which she acknowledged that the Supreme Court had found that some of the material published by her department in connection with the Children Referendum did not comply with the *McKenna* principles. I am satisfied that she demonstrated respect for the Supreme Court judgment in its criticism of the unconstitutional expenditure of public funds and undertook that the government would comply fully with the judgment of the court. On the same date, the Minister informed the Seanad of the Government's intention to act on the ruling and to cease distribution and publication of materials. On the same evening she apologised to the Irish people in clear terms stating that she was "extremely sorry that this happened. I would not have wanted this to happen, absolutely not".

149. On 8th November, the material on the website was edited by reference to the Supreme Court ruling and it was taken offline completely on the morning of 9th November. Advertisements scheduled to appear in five national daily and one local newspaper on 9th November, as well as proposed publication in another free sheet newspaper, were cancelled. Radio and television advertisements scheduled to be broadcast on 8th, 9th and 10th November were cancelled. On 8th November the department also issued a notice to public bodies, including libraries, citizen information centres and family resource centres, requesting that copies of the criticised booklet be removed from public display. I am not satisfied that there is any evidence upon which to base a claim that the action of any Minister or the Government following the Supreme Court ruling in any way contributed to the obstruction of or interference with or hindrance of the conduct of the Referendum or, amounted to conduct which was unconstitutional, and interfered in any way with the constitutional rights of citizens or the democratic process.

150. The petitioner contends that the government should have sponsored emergency legislation to ensure the postponement of the Referendum in order to guarantee an effective remedy to the petitioner for the breach of her constitutional rights. Apart from the fact that the petitioner never sought any such pre-Referendum relief, I have considerable doubt as to whether the jurisdiction of this Court extends to a review of a government's failure to introduce emergency legislation to postpone a Referendum. In *Fitzgibbon v. Ireland* (Unreported, Supreme Court, 8th June, 2001), the Supreme Court refused an application to restrain the holding of three Referenda or alternatively, the counting of votes on grounds of insufficient information and inadequate time for debate. In an *ex-tempore* judgment Keane C.J. thought it unnecessary to consider whether there might ever be "exceptional circumstances" in which the court could order the postponement of a Referendum poll and considered that such circumstances would be "so rare and so exceptional that it is difficult to conceive them in practice". The court applied the judgment of the Supreme Court in *Slattery v. An Taoiseach* [1993] 1 I.R. 286, in which a claim was made that the court should grant an injunction to restrain the holding of a Referendum on ratification of the Treaty of European Union until such time as the government had provided further factual information on the benefits, disadvantages and obligations of the Treaty and until it had clarified its implications for the constitutional protection of the right to life of the unborn. McCarthy J. stated (at p. 301):-

> "As the courts are jealous of their constitutional role and will repel any attempt by legislature or executive to interfere in the judicial domain, so must the courts be jealous of what lies wholly within the domain of the legislature, the Executive

and the People - jealous to ensure that the courts do not intervene in the constitutional (executive and legislative referendum) process I have outlined."

151. I am completely satisfied that there is no legal or evidential basis upon which to annul the provisional Referendum Certificate on grounds related to the events following the ruling of the Supreme Court on 8th November, 2012.

Conclusion

152. I am satisfied that the evidence adduced by the petitioner has established a fair *bona fide* or serious issue to be tried on the grounds set out in the petition. I, therefore, grant leave to the petitioner to present the petition. A good deal of the evidence, had it stood alone, would not have justified that conclusion. I would not have granted leave if the non-expert witnesses and Mr. Waters were the only witnesses called, or if Dr. Heath who gave evidence on advertising or the evidence called concerning the website had stood alone. I would also have had extreme doubts about granting leave on the grounds of events which occurred after the *McCrystal* ruling. However, it is important that the grounds once raised be considered together because the Supreme Court determination that the *McKenna* principles had been breached embraced a narrative that covered the entire Referendum campaign, and government information campaign and included the three significant elements of the Government booklet, website and advertising. As noted earlier in the judgment, I was satisfied following the *McCrystal* judgment under s. 42 that there was *prima facie* evidence of a matter referred to under s. 43 namely, unconstitutional conduct by the executive. Having heard the evidence in the case, I am also satisfied that the petitioner raised a serious issue to be tried that the government information campaign had the potential to materially affect the result of the Referendum as a whole. Though reference was made in the course of submissions to alleged breaches of Articles 6, 10, 13 and 14 of the European Convention on Human Rights and the "Code of Good Practice on Referendums" adopted by the European Commission for Democracy Through Law (the Venice Commission), I do not consider any such ground to be set out in the petition, nor do I consider that the petitioner has advanced any basis upon which leave to present a petition could be granted in that respect.

153. I have considered all of the evidence and submissions made in respect of the trial of the petition concerning all of the grounds advanced, and I am not satisfied on the balance of probabilities that the petitioner has succeeded in establishing those grounds for the reasons which I have set out in the judgment. The petition is dismissed.