THE HIGH COURT

JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY ROISIN MORELLI FOR LEAVE FOR JUDICIAL REVIEW AND IN THE MATTER OF ARTICLE 2, 16 AND 47 OF THE CONSTITUTION AND IN THE MATTER OF THE REFERENDUM ON THE REPEAL OF THE EIGHTH AMENDMENT OF THE CONSTITUTION

[2018 No. 215 J.R.]

BETWEEN

ROISIN MORELLI

APPLICANT

AND

AN TAOISEACH, MINISTER FOR HOUSING, PLANNING AND LOCAL GOVERNMENT, MINISTER FOR FOREIGN AFFAIRS AND TRADE, MINISTER FOR HEALTH, MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Meenan delivered on the 20th day of April, 2018:

1. The applicant in these proceedings is a full time student undertaking a Masters Degree in Translational Medicine at Queens University, Belfast and has lived in Belfast all her life. The applicant is an Irish citizen, born on 12th July, 1991.

2. The applicant wishes to vote in the forthcoming constitutional referendum on the Eighth Amendment to the Irish Constitution. The polling date for the referendum has been set for 25th May, 2018.

3. Although the applicant is an Irish citizen she is not entitled to vote in the referendum. She brings these proceedings by way of judicial review claiming that the refusal to grant her a vote is contrary to:-

(i) the Constitution;

(ii) the agreement reached in the multi party negotiations, 10th April, 1998 (the Good Friday Agreement);

(iii) the European Convention on Human Rights/European Convention on Human Right Act 2003.

4. An application was made to this Court seeking leave to bring the within judicial review proceedings on 12th March, 2018. On that date, the necessary legislation to enable the fixing of a date for the referendum on the Eighth Amendment had not yet been enacted and the application was adjourned to 9th April, 2018. The Court also directed that the respondents be put on notice of the application. The matter came on for hearing on 13th April, 2018, with the respondents opposing that leave be granted.

Test to be Applied:

5. There was little disagreement between the parties as to what was the appropriate test for the court to apply when ruling on a leave application. I refer to the oft cited passage from the judgment of Finlay C.J. in *G. v. Director of Public Prosecutions* [1994] 1 IR 374, where he stated at pp. 377-378:-

> "An applicant must satisfy the court in *prima facie* manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:-
>
> (a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20(4).
>
> (b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.
>
> (c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks…"

6. This Court is concerned with whether the applicant has made "an arguable case" so that leave can be granted.

7. The "arguability test" was further considered by the Supreme Court in *Esmé v Minister for Justice and Law Reform* IESC 26. Having cited the said passage from *G. v. Director of Public Prosecutions*, Charleton J. stated:-

> "14. While in *Gordon v. Director of Public Prosecutions* [2002] 2 IR 369 this has been described as a "low threshold", per Fennelly J. at p. 372. What an arguable case might mean was also amplified by Denham J. in the G decision, with whom Blayney J. agreed. At p.382, she stated:-
>
> 'This preliminary process of leave to apply for judicial review is similar to the prior procedure of seeking conditional orders of the prerogative writs. The aim is similar - to effect a screening process of litigation against public authorities and officers. It is to prevent an abuse of the process, trivial or unstatable cases proceeding, and thus impeding public authorities unnecessarily. … It is a preliminary filtering process for which the applicant is required to establish a *prima facie* case. Ultimately on the actual application for judicial review the applicant has an altogether heavier burden of proof to discharge.'
>
> 15. In contrast, in *S. and Others v Minister for Justice and Equality* [2013] IESC 4, Clarke J referred at para. 5.1 to "a sufficiently arguable case… for the grant of leave to seek judicial review in the light of the existing jurisprudence." Any issue in law can be argued: but that is not the test. A point of law is only arguable within the meaning of the relevant decisions if it could, by the standards of a rational preliminary analysis, ultimately have a prospect of success. It is

required for an applicant for leave to commence judicial review proceedings to demonstrate that an argument can be made which indicates that the argument is not empty. There would be no filtering process were mere arguability to be the test without, at the same time, taking into account that trivial or unstatable cases are to be excluded: the standard of the legal point must be such that, in the absence of argument to the contrary, the thrust of the argument indicates that reasonable prospects of success have been demonstrated. It is still required to be shown that a prima facie legal argument has been established…"

8. To meet the "arguability test", it would appear that an applicant has to point to some provision of the Constitution, statute or legal authority that, on a reasonable interpretation, would support the case being made. Further, in a case such as this, where the statutes in question enjoy the presumption of constitutionality, this is a factor which the court should take into account when deciding whether the "arguability" threshold has been passed.

9. I will now consider the various grounds advanced by applicant and apply the appropriate test.

The Constitution:
10. The applicant seeks a declaration that the failure or refusal of the respondents to allow the applicant, an Irish citizen who happens to ordinarily reside in Northern Ireland, to vote in referenda, and in particular the referendum on repealing the Eighth Amendment to the Constitution, is in breach of her rights pursuant to Articles 2, 16.2 and 47.3 of the Constitution. Further, the applicant claims that ss. 7 and/or 8 of the Electoral Act 1992 ("the Act of 1992") are repugnant to the Constitution.

11. Article 47.3 provides:-

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

As the right to vote at a referendum is dependent upon the right to vote for members of Dáil Éireann, Article 16 has to be considered.

12. Article 16.1.2 provides:-

> "i All citizens, and
>
> ii such other persons in the State as may be determined by law, without distinction of sex who have reached the age of eighteen years who are not disqualified by law and comply with the provisions of the law relating to the election of members of Dáil Éireann, shall have the right to vote at an election for members of Dáil Éireann."

13. Article 16.2. provides:-

> "1 Dáil Éireann shall be composed of members who represent constituencies determined by law.
>
> 2 The number of members shall from time to time be fixed by law, but the total number of members of Dáil Éireann shall not be fixed at less than one member for each thirty thousand of the population, or at more than one member for each twenty thousand of the population.
>
> 3 The ratio between the number of members to be elected at any time for each constituency and the population of each constituency, as ascertained at the last preceding census, shall, so far as it is practicable, be the same throughout the country."

It should also be noted that Article 12.2.2 provides:-

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

14. Article 16.1.2 refers to "provisions of the law relating to the election of members of Dáil Éireann", the relevant provisions are ss. 7 and 8 of the Act of 1992. Section 7 provides that:-

> "(1) A person shall be entitled to be registered as a presidential elector in a constituency if he has reached the age of eighteen years and if he was, on the qualifying date-
>
> (a) a citizen of Ireland, and
>
> (b) ordinarily resident in that constituency.
>
> (2) For the purposes of-
>
> (i) the *Presidential Elections Acts*, 1937 to 1992,
>
> (ii) the *Referendum Acts*, 1942 to 1992, and
>
> (iii) this Act,
>
> "presidential elector" means a person entitled to vote at an election of a person to the office of President of Ireland."

15. Section 8 provides that:-

> "(1) A person shall be entitled to be registered as a Dáil elector in a constituency if he has reached the age of eighteen years and he was, on the qualifying date-
>
> (a) a citizen of Ireland, and

(b) ordinarily resident in that constituency."

Under these statutory provisions, it is clear that being a citizen of Ireland and "ordinarily resident" in a constituency are pre-requisites to having a vote in a referendum. Constituencies are "determined by law", as provided for by Article 16.2.

16. Mr. Ronan Lavery Q. C., on behalf of the applicant, submitted that the applicant has a constitutional right to vote by virtue of her status as a citizen of Ireland. He further submitted that she has an interest in the provisions of the Constitution and any amendment that might be made, given, what he described to be, the inevitability of reunification. It was submitted that the residency requirement in the Act of 1992 is not a constitutional requirement and that Article 47.3 is not determinative of a citizen's right to vote at a referendum.

17. Mr. Conor Power S.C., on behalf of the respondents, submitted that the wording of Article 47.3 is clear. He contended that this Article directly links a citizen's entitlement to vote at a referendum with the entitlement to vote in elections for Dáil Éireann. He submitted that the residency requirements provided for in ss. 7 and 8 of the Act of 1992 are in accordance with the provisions of Article 16, which requires a ratio between the number of members of Dáil Éireann being elected at any time for each constituency and the population of each constituency. He further relied upon s. 18(1) of the Referendum Act 1994 ("the Act of 1994), which states:-

> "For the purpose of taking the poll at a referendum, the State shall be deemed to be divided into the same constituencies as those into which it is for the time being divided for the purpose of Dáil elections and the poll shall be taken separately in each such constituency."

18. Mr. Power relied upon the judgment of the Supreme Court *In Re Article 26 and the Electoral (Amendment) Bill, 1983* [1984] IR 268. This Bill, as passed by the Dáil and Senate, contained provisions which would entitle a British citizen to be registered in a constituency as a Dáil elector if ordinarily resident in that constituency and thus become entitled to vote at a Dáil election. Pursuant to Article 26 of the Constitution, the President referred the Bill to the Supreme Court. Article 16, as it was then worded, only provided for citizens of Ireland to vote in Dáil Elections. The Supreme Court decided that the Bill was repugnant to the Constitution. Delivering the judgment of the court, O'Higgins C. J., referring to Article 16, stated at pp. 274-275:-

> "These provisions indicate a total code for the holding of elections to Dáil Éireann, setting out the matters which would appear to be necessary other than minor regulatory provisions. This code provides for the eligibility of candidates; the persons entitled to vote; the limitation of one vote for each voter; the standards for determining the number of members; the obligation to revise constituencies; proportional representation, the single transferable vote and a secret ballot as the method of election; a minimum of three members for each constituency; a limit in time within which general elections must take place after a dissolution; the maximum term of a Dáil; a provision for the timing of polling throughout the country; and an obligation to provide for the automatic election of the chairman of the Dáil.
>
> In contrast with this code of essential features of elections for Dáil Éireann, the matters which are left to be regulated by law would appear to be:-
>
> (a) the disqualification of citizens from voting;
>
> (b) the provisions with which citizens must comply in order to have the right to vote;
>
> (c) the fixing of the number of member of Dáil Éireann in the ratio laid down by the Constitution…
>
> Viewed in this way, the entire provisions of Article 16 would appear to form a constitutional code for the holding of an election to Dáil Éireann, subject only to the statues regulation of such election. Can, therefore, so comprehensive an Article be properly construed as contemplating the extension of the franchise to persons who are not citizens? If it can, then by an analogous interpretation of Article 16, s. 1, sub-s. 1, and 12, s. 4, sub-s. 1, it would be constitutionally possible to enact a law permitting a non-citizen to be elected President or to be elected a member of Dáil Éireann. It is the view of the Court that Article 16 of the Constitution, taken in its entirety, cannot be so contused..."

and

> "In the scheme of the Constitution this right of the people to designate the rulers of the State and to decide questions of national policy is carried into effect in the Articles already mentioned (Articles 12, 16 and 47) which are the provisions made for the election of the President, of the Dáil and for the determination of referenda…".

19. Subsequent to this decision, Article 16.1.2 was amended by the addition of the words "such other persons in the State as may be determined by law."

20. Clearly it is not open to the Oireachtas to extend the franchise for Dáil and Presidential elections and referenda beyond what is provided for in the Constitution. In my view, the wording of Article 47.3 is entirely clear. There is a direct link between voting for members of Dáil Éireann and voting at a referendum. Thus the provisions of Article 16 have a direct bearing on the applicant's entitlement to vote at a referendum. The statutory requirement in the Act of 1992 that a person must be ordinarily resident in a constituency to have a vote is entirely consistent with the constitutional requirement to have a stated ratio between the number of Dáil members to be elected and the population of each constituency.

21. As an answer to this, counsel for the applicant submitted that the Oireachtas could pass legislation to divide up Northern Ireland into various constituencies. In my view, such a law would be impermissible under the provisions of Article 3 of the Constitution, which states, having referred to the aspirations of uniting all of the people of the island of Ireland:-

> "Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution."

The problem raised by the requirement to have constituencies becomes even more acute when one considers Irish citizens living in the rest of the European Union, the United States, Canada, Australia and elsewhere.

22. The foregoing leads me to the conclusion that the case being made by the applicant for breach of her constitutional rights and the unconstitutionality of ss. 7 and 8 of the Act of 1992 falls well short of being arguable. If a citizen, such as the applicant, is to have a vote at a future referendum then an amendment to the provisions of Article 47.6 of the Constitution is required.

Good Friday Agreement:
23. The applicant seeks a declaration that the refusal to allow the applicant to vote at the forthcoming referendum is in breach of the Good Friday Agreement. In support of this she relies upon Article 1 of the Good Friday Agreement that is entitled "Constitutional Issues", and provides *inter alia*:-

> "(v) affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities;
>
> (vi) recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland."

24. It has to be said that although references are made to citizenship in the Good Friday Agreement, there are no provisions concerning voting entitlements. Amendments to Articles 2, 3 and 29 of the Constitution following the said Agreement to do not alter this.

25. Article 29.6 of the Constitution provides:-

> "No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."

26. I refer to the Supreme Court decision of *Doherty v. Governor of Portlaoise Prison* [2002] 2 IR 252. This case concerned the provisions of the Criminal Justice (Release of Prisoners) Act 1998, which was enacted to provide for the State's obligations in relation to prisoners under the Good Friday Agreement. In the course of giving his judgment, with which the court agreed, Murray J. (he then was) stated at p. 265:-

> "There is no provision of the Act of 1998, which enacts or purports to enact any of the provisions of the Multi-Party Agreement as part of our legislation. That agreement represents engagements and commitments solemnly entered into by the parties to the agreement. As is usual in such agreements, the obligations are *inter partes.* It does not confer rights on particular individuals which may be invoked before the courts…"

27. In a further Supreme Court decision, *O'Neill v. The Governor of Castlerea Prison* [2004] 1 IR 298, that also dealt with the provisions of the said 1998 Act, Keane C. J., having referred to the above passage from Murray J., stated at p. 311:-

> "However, even if it could be so regarded, I have no doubt that it correctly states the law. Article 29.6 of the Constitution provides that no international agreement is to be part of the domestic law of the State save as may be determined by the Oireachtas. The British-Irish Agreement itself, accordingly, did not become part of our domestic law, although the Nineteenth Amendment to the Constitution enabled the State to be bound by it, that being part of the mechanism by which the amendments contemplated to Articles 2 and 3 of the Constitution were effected by referendum. There is no basis in law whatever, in my view, for the proposition advanced on behalf of the applicants that the Belfast Agreement, which was set out in Annex 1 to the British-Irish Agreement, was incorporated at any stage in the domestic law of the State and both its language and the language of the Act of 1998 is wholly irreconcilable with that proposition. The fact that the parties to the agreement included not merely the Governments of Ireland and the United Kingdom but also a political party registered in this jurisdiction does not affect that conclusion in the slightest degree…"

28. By reason of the foregoing, I conclude that the applicant cannot make any case under the Good Friday Agreement.

European Convention on Human Rights ("the Convention")/ European Convention on Human Rights Act 2003:
29. The applicant seeks a declaration that the respondents' failure or refusal to allow the applicant to vote in referenda, and in particular the referendum to take place on 25th May, 2018, is in breach of Article 10 and/or Article 3 of the First Protocol to the Convention and thereby in breach of s. 3 of the European Convention on Human Rights Act 2003 ("the Act of 2003"). The applicant subsequently sought a declaration, pursuant to s. 5 of the Act of 2003, that the statutory provisions in question are incompatible with the State's obligations under the said Convention. This is the appropriate remedy to seek. It should be noted, however, that were such a declaration of incompatibility granted it "shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made…" (as per s. 5(2)(a)).

30. The alleged breach of Article 3 of the First Protocol to the Convention and Article 10 of the Convention will now be considered.

31. Article 3 of the First Protocol to the Convention provides under the heading "right to free elections" that:-

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

32. In his submission, Mr. Lavery relied upon *Shindler v. United Kingdom* [2014] 58 EHRR 5. This case concerned an applicant who had left the United Kingdom and moved to Italy, following his retirement in 1982, with his wife who was an Italian national. Under the Representation of the People Act 1985, British citizens residing overseas for less than fifteen years were permitted to vote in parliamentary elections. The applicant did not meet the criteria and thus was not entitled to vote at the general election of 5th May, 2010. The applicant complained that there had been an infringement of his rights under Article 3. Mr. Lavery referred to the following passage in the judgment of the court:-

> "When reviewing the proportionality of the measure, it must be borne in mind that numerous ways of organising and running electoral systems exist. There is a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into its own democratic vision. This means that the proportionality of electoral legislation (and of any limitations on voting rights) must be assessed also in

> light of the socio-political realities of a given country. Furthermore, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond to any emerging consensus as to the standards to be achieved."

33. Mr. Power did not accept the decision in *Shindler* as being an authority in support of the applicant's case. The court was referred to a number of decisions which considered the scope of Article 3 of Protocol No. 1 and, in particular, the wording in the Article which states "choice of the legislature". In *Hilbe v. Liechtenstein*, 31981/96, ECHR 1999, which concerned the applicant not being able to vote in elections or referenda in Liechtenstein, the court stated:-

> "As to the merits, the Court reiterates that the obligations imposed on the Contracting States by Article 3 of Protocol No. 1 are limited to parliamentary elections and do not apply to referendums (see *Bader v. Austria*, application no. 26633/95, Commission decision of 15 March 1996, unreported)."

34. In *Niedzwiedz v. Poland* [2008] 47 EHRR 2, which concerned a complaint by the applicant that he could not vote in the 2000 Presidential elections and the 2003 referendum on accession to the EU, the court held:-

> "In so far as the applicant complained that he could not vote in the 2000 presidential elections and the 2003 referendum on accession to the EU, the Court reiterates that the obligations imposed on the Contracting States by Article 3 of Protocol No. 1 are limited to "the choice of legislature" and do not apply to the election of a Head of State…or to referendums..."

35. Article 3 of Protocol No. 1 of the Convention was also considered by the UK Supreme Court in *Moohan and Another v. The Lord Advocate* [2014] UKSC 67. This case concerned an appeal by two men who were detained in prison on 18th September, 2014, the date of the Scottish referendum on independence. The appellants sought to establish a right to vote under, *inter alia*, Article 3 of the protocol. In giving the majority judgment, Lord Hodge stated:-

> "15. There is thus no real support for the appellants' position in the Strasbourg jurisprudence. There is no clear direction of travel in that jurisprudence to extend A3P1 [Article 3 of the protocol] to referendums. On the contrary, between 1975 and 2013 there have been at least 12 applications in which claims under A3P1 concerning a right to vote in referendums have been rejected as inadmissible. The fact that in some cases the Strasbourg Court has not set out detailed reasoning does not assist the appellants. The applications were treated as manifestly ill-founded, avoiding the need for such reasoning."

36. Finally, in the High Court decision of *Jordan v. Minister for Children and Youth Affairs* [2014] IEHC 327, concerning Article 3 of the First Protocol, McDermott J. stated.:-

> "96. …However, in *Niedzwiedz v. Poland* [2008] 47 EHRR 2, the European Court of Human Rights reiterated that the obligations imposed on contracting states were limited to "the choice of legislature" and did not apply to referenda (applying Hilbe v Liechtenstein)… It is clear therefore, that the conduct and results of Referenda are outside its scope. There is no basis to grant any relief under Article 3 pursuant to the provisions of the 2003 Act…"

37. Having regard to the forgoing authorities and the wording of Article 3 of the First Protocol to the Convention, it is clear that the applicant has no case under this provision.

38. In addition, the applicant relies upon Article 10 of the Convention which, under the heading "freedom of expression", states:-

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…"

39. It should be noted that no case has been made by the applicant that she is subject to any impediment in expressing her views and opinions on the issues that arise in the referendum on the Eighth Amendment to the Constitution. Insofar as it is submitted that voting is an "expression" under Article 10, such is misconceived. Clearly Article 3 of protocol 1 is a *lex specialis* on voting rights. This point was also considered in *Moohan*, where Lord Hodge stated:-

> "20. The European Commission on Human Rights and the Strasbourg Court have repeatedly held in decisions on admissibility that article 10 did not protect the right to vote or other rights already secured by A3P1 as the *lex specialis*. See, for example, *Liberal Party v United Kingdom* (1982) 4 EHRR 106, paras 14-16, and the other cases to which the Lord Ordinary referred at para 37 of his opinion. This is consistent with the wording of article 10 and with the approach to construction of the ECHR which considers an individual article in the context of the Convention as a whole. In any event, there is nothing in the Strasbourg jurisprudence to suggest that a claim under article 10, if admitted as in *Hirst v United Kingdom*, would confer a wider right of political participation by voting or standing for election than that protected by A3P1... The claim under article 10 therefore fails."

40. By reason of the foregoing, I am satisfied that the applicant does not have a case under Article 10 of the Convention.

Conclusions:

41. In the foregoing paragraphs I have considered each of the grounds under which the applicant seeks leave for judicial review. On each of these grounds, I am of the view that the case made by the applicant falls well short of being arguable. As stated in the course of this judgment, if the applicant is to be entitled to vote in any future referendum, assuming she does not become ordinarily resident in any constituency in the interim, then such would require an amendment to Article 47.3 of the Constitution.

42. I will therefore refuse to grant the applicant leave to seek judicial review for the reliefs sought.