

**THE HIGH COURT**

**PETITION**

**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**

**[2012 No. 152 1A]**

**BETWEEN**

**JOANNA JORDAN**

**PETITIONER**

**AND**

**THE MINISTER FOR CHILDREN AND YOUTH AFFAIRS, THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**JUDGMENT of Mr. Justice McDermott delivered on the 22nd November, 2013**

1. The court delivered judgment in this case on 18th October, 2013 ([2013] IEHC 458), and adjourned the hearing of an application for costs to 8th November. The respondents successfully defended the petition but did not seek an order for costs against the petitioner. Counsel on behalf of the petitioner seeks an order against the successful respondents for the entire costs of the proceedings.
2. The petitioner sought an order for the annulment of the provisional Referendum certificate in respect of the poll held on 10th November, 2012, on ten grounds set out at para. 4 of the petition. Initially, the petitioner sought leave to present a petition pursuant to s. 42 of the Referendum Act 1994, 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 subsequently 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. The petitioner contended that the nature and extent of the breaches of the Constitution and the conduct of an information campaign by the Minister and the government as determined in the *McCrystal* case, had a "material affect" on the outcome of the Referendum poll "as a whole" in that the Supreme Court had determined that an information booklet, a website and advertising campaign conducted by the Minister were publicly funded and favoured a yes vote. Expert evidence was relied upon to support the petitioner's case that an independent poll carried out after the vote on behalf of the Referendum Commission provided evidence that the information campaign had the effect claimed.
3. The initial leave application was adjourned following which affidavits were exchanged, including affidavits from various experts, in respect of the alleged affect or non-affect 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. A telescoped hearing of the leave application together with the substantive application necessitated by any grant of leave afforded the parties full opportunity to canvass all of the issues before the court during the course of a single hearing: both parties conducted the proceedings in as efficient a manner as possible. Ultimately, the matter was heard over a period of fourteen days and additional evidence was adduced which had not been available at the time of the initial application for leave. The central issue in the case was whether the unconstitutional behaviour identified by the Supreme Court materially affected the result of the Referendum as a whole. This involved an interpretation of the provisions of the Referendum Act 1994, and in particular ss. 42 and 43 thereof. It also required the application of the decision of the Supreme Court in *Hanafin v. Minister for the Environment* [1996] 2 I.R. 321, in which the court considered the scope of relief available under s. 43 of the Referendum Act 1994, and, in particular, held that the words "conduct of the Referendum" in s. 43(1) were sufficiently wide to include unlawful conduct on the part of the government in its referendum campaign and the consequences thereof such as to enable the court to consider whether that behaviour caused an obstruction, interference, hindrance or irregularity in the conduct of the Referendum of such gravity as to vitiate its result. It set out a how a court considering an application under ss. 42 and 43 should conduct the proceedings. In that case, the divisional High Court awarded costs to the unsuccessful petitioner on the basis of a four day hearing without witnesses. On appeal, the Supreme Court, left that order undisturbed and awarded the entire costs of the appeal to the unsuccessful petitioner/appellant, including the costs of a preliminary issue concerning the jurisdiction of the Supreme Court to hear the appeal. The petitioner in that case succeeded on the preliminary point in the Supreme Court and in other legal submissions as to the onus and standard of proof and the interpretation of s. 43(1) referred to above.
4. Counsel on behalf of the petitioner submitted that, notwithstanding that the applicant was ultimately unsuccessful in having the provisional Referendum certificate annulled and obtaining an order for the holding of a further Referendum, she ought, nevertheless, to be awarded costs on the following grounds:-
  - (i) The High Court enjoys a broader discretion in its determination of a costs application in the context of a petition brought pursuant to the 1994 Act than is normally the case. In particular, the court is not constrained by the usual presumption that costs should follow the event.
  - (ii) The petitioner was successful in her application for leave to present her petition. In that regard, only very minimal costs were incurred as a result of the petitioner's pursuit of the unsuccessful application on the trial of the petition because, with the consent of the respondents, the hearing in respect of both applications overlapped.
  - (iii) The petitioner acted in the public interest in bringing this petition.

(iv) The matters raised by the petitioner were of great public significance.

(v) The legal issues raised by the petitioner were of special and general public importance.

(vi) The petitioner approached the conduct of the proceedings in the most expeditious and cost efficient manner possible thereby minimising the disruption to the court and the costs incurred.

(vii) The case became necessary as a result of established constitutional wrongdoing as determined by the Supreme Court in the *McCrystal* case.

(viii) The judgment of the court provided certainty concerning the validity of an amendment to the Constitution which would otherwise always have been in doubt.

#### **The Courts discretion pursuant to s. 53(1) of the Referendum Act 1994**

5. It was submitted that s. 53(1) provided for a wide and untrammelled discretion in the determination of costs arising at the conclusion of a petition application and that it would be inappropriate to presume that the starting point for the court was the same as the usual starting point in legal proceedings namely, that costs follow the event. Section 53(1) provides:-

"All costs, other than the costs of counting votes afresh under *section 47* or retaking the referendum in a constituency under *section 48*, of and incidental to a referendum petition shall be in the discretion of the court which shall have power to order the costs or any part of the costs of any party to the petition to be paid by any other such party, and, where the costs or any part of the costs of any such party are so ordered to be paid by the petitioner, the court shall, where necessary, make provision for the payment of those costs, to the extent of the amount named in the security given by the petitioner, out of or by means of such security."

6. Order 99 of the Rules of the Superior Courts provides as follows:-

"1. Subject to the provisions of the Acts and any other statutes relating to costs and except as otherwise provided by these Rules:

(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively

...

(4) The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."

It was submitted that in respect of a Referendum petition, there was no equivalent to O. 99, r. 1(4) that costs shall follow the event and that consequently, that constraint did not apply to the discretion to be exercised by the court in respect of a Referendum petition. Therefore, it was submitted that the petitioner did not bear an onus to demonstrate that "special circumstances" arose such as would normally be the case when asking the court to depart from the rule that costs follow the event.

7. In *Sinnott v. Martin* [2004] 1 I.R. 121 a similar argument was advanced on behalf of an unsuccessful petitioner in respect of an election petition. The costs in that instance were governed by r. 16 of the Third Schedule to the Electoral Act 1992, which is in almost identical terms to s. 53(1). It provides that all costs "of and incidental to a petition shall be in the discretion of the court which shall have power to order such costs or any part of such costs of any party to the petition to be paid by any other such party". It was submitted that r. 16 displaced the general provision under O. 99 and created an entirely new costs regime, vesting a wider discretion to award costs. Kelly J. held that the general discretion conferred by the statutory provision fell to be exercised in accordance with the normal rules applicable which were to be gleaned from the Rules of Court and the jurisprudence of the Superior Courts on the question of costs. The learned judge emphasised that there were many provisions in the Electoral Act 1992, which referred specifically to the costs which the petitioner might be liable to pay. This included the requirement to lodge security in the sum of £5,000 for costs which may become payable by him/her. Withdrawal of an electoral petition was not to affect the liability of any person or his estate for payment of costs previously incurred. Similar provisions exist under the Referendum Act 1994, in respect of security for costs. Section 51 also provides that if the petitioner fails to prosecute the case with reasonable speed or dies, the carriage of the case may be transferred to the Director of Public Prosecutions and the court may order the costs to be paid out of any security given by a deceased petitioner or by a petitioner who has failed to proceed with reasonable speed. The schemes of relief and the mischiefs to be addressed by the statutes are similar: both statutes seek to preserve the integrity of the electoral and Referendum process respectively and to ensure that the constitutional rights of electors are protected.

8. I am satisfied that the discretion vested in the court in respect of costs pursuant to s. 53(1) is one which falls to be exercised in accordance with the principles set out in O. 99, r. 1 and the normal principles laid down in the jurisprudence of the Superior Courts.

#### **Special Circumstances**

9. In *Dunne v. Minister for the Environment* [2008] 2 I.R. 775, the appeal was concerned with questions as to whether s. 8 of the National Monuments (Amendment) Act 2004, offended Articles 5, 10, 15 and 40 of the Constitution and breached European law. The plaintiff lost in the High Court but was awarded costs against the defendants, notwithstanding the normal rule that the losing party should pay the costs of the proceedings. The Supreme Court dismissed the appeal and the plaintiff sought to uphold the order awarding him costs in the High Court and asked the court to exercise its discretion by awarding the appellant the costs of the appeal or, in the alternative, making no order as to costs. Murray C.J. delivering the judgment of the court stated:-

"26 The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party, has an obvious equitable basis. As a counterpoint to that general rule of law, the court has a discretionary jurisdiction to vary or depart from that rule of law if, in the special circumstances of a case, the interests of justice require that it should do so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction. If there were to be a specific category of cases to which the general rule of law on costs did not apply that would be a matter for legislation since it is not for the courts to establish a cohesive code according to which costs would always be imposed on certain successful defendants for the benefit of certain unsuccessful plaintiffs.

27 Where a court considers that it should exercise a discretion to depart from the normal rule as to costs, it is not completely at large but must do so on a reasoned basis, indicating the factors which, in the circumstances of the case, warrant such a departure. It would neither be possible nor desirable to attempt to list or define what all those factors are. It is invariably a combination of factors which is involved. An issue such as this is decided on a case by case basis and decided cases indicate the nature of the factors which may be relevant but it is the factors or combination of factors in the context of the individual case which determine the issue."

10. In the *Dunne* case the plaintiff relied on the fact that he was not defending any personal interest in bringing the proceedings and was seeking to ensure that the project in question insofar as it affected a national monument was carried out in accordance with law. He contended that the case involved issues of such public importance that this factor should also be weighed in the balance in deciding to award him the costs. Though it was accepted by the court that the plaintiff brought the proceedings in the interest of promoting compliance with the law and without any private interest, it was not considered that the issues raised were of such special and general importance as to warrant a departure from the general rule. It was accepted that issues concerning national monuments had an importance in the public mind, but the further factor to be considered was whether the legal issues raised (rather than the subject matter itself) were of special and general public importance. The court was satisfied that there was nothing exceptional raised in the issues of law which were before the court to warrant a departure from the general rule and in the circumstances of the case directed that the ordinary rule should apply and that costs should follow the event. The court also noted that whether the litigation is "public interest litigation", raising issues of special and general public importance and brought by a person who does not seek any private, personal advantage, is only a relevant factor to be taken into account in reviewing the case as a whole. It does not follow that because those elements are found to exist, that an award of costs must invariably be made in favour of an unsuccessful plaintiff. However, the absence of those elements would not exclude a court from exercising its discretion to award an unsuccessful applicant his/her costs if, in all the circumstances, the court were to be satisfied of other special circumstances justifying a departure from the normal rule.

11. In this case, the petitioner commenced proceedings following and based upon the determination in the *McCrystal* case. The court was satisfied in the judgment delivered on 18th October, that the petitioner had discharged the onus of establishing a *prima facie* case namely, that there was a fair *bona fide* or serious issue to be tried in relation to the issue as to whether the unconstitutional information campaign conducted by the first named respondent materially affected the result of the Referendum as a whole. Leave was granted having heard the petitioner's witnesses including expert witnesses. The court accepts that the petitioner acted in what she regarded as the interests of the public in initiating these proceedings. She disagreed profoundly with the terms of the proposed constitutional amendment and campaigned and voted against it in what she believed to be the best interests of children and brought the petition to "stop the amendment being made into law". She acted out of concern regarding the impact of the proposed amendment on constitutional law in this jurisdiction. She clearly had no private interest in the outcome of the Referendum save to the extent that an annulment of the Referendum result and an opportunity to participate in a further Referendum on the issue would have thwarted the promulgation of a constitutional amendment which she personally opposed and afforded her a further opportunity to challenge its adoption by the people.

12. There is no doubt that the promulgation of a Referendum result and the adoption of an amendment to the Constitution concern weighty and significant matters of great public interest. The principles which have been breached namely, those set down in *McKenna v. An Taoiseach (No.2)* [1995] 2 I.R. 10 governing the conduct of information campaigns during the course of a Referendum, required that publicly funded campaigns in respect of a Referendum must be fair, equal, impartial and neutral. As stated earlier, the petitioner's case was based squarely on a breach of the *McKenna* principles found by the Supreme Court to have occurred in the *McCrystal* case. Thus, the determination had already been made by the Supreme Court that those principles had been breached.

13. Undoubtedly, the petitioner raised very serious issues regarding the affect of the unconstitutional behaviour of the executive in the furnishing of information during the course of the Referendum campaign. However, beyond the subject matter the court may also consider whether the legal issues raised in the course of the case were of special and general importance.

14. The petitioner contends that three legal issues arose, namely:-

- (1) The burden and onus of proof in the context of a leave application and petition brought pursuant to ss. 42 and 43 of the 1994 Act;
- (2) The determination of the meaning of the concept of "material affect on the result of the Referendum as a whole" under ss. 42 and 43 of the 1994 Act, and
- (3) Whether the burden to be satisfied by a petitioner at the leave stage was equivalent to that which applies at the trial of the petition.

It is submitted that the clarification produced by the judgment of this Court on these questions has resolved important legal issues in a core area of constitutional law.

15. It was also submitted that it was necessary for the petitioner to bring this application because of the findings in *McCrystal* and that in some way a question mark would have remained over the result of the Referendum had she not initiated these proceedings.

16. The respondents contended that there was no basis for an award of costs against the successful parties to the litigation. The respondents were not looking for their costs notwithstanding the fact that the petition had been dismissed. It was submitted that simply because leave was granted to bring the petition did not warrant the awarding of costs to the petitioner. It was also submitted that the principles applicable to the conduct of a Referendum petition were clear, because, in respect of the points raised by the petitioner, the Supreme Court in *Hanafin* had already established the onus and burden of proof on such an application, had indicated a relatively low threshold that applied to the leave stage and determined the nature of the "material affect on the result of the Referendum as a whole" that must be established in order to annul the provisional Referendum certificate.

17. I am satisfied that following the determination in *McCrystal*, it became a matter of public interest and importance as to whether the government information campaign found to be in breach of the constitutional principle had a material affect on the outcome of the Referendum. This did not mean that it was necessary to initiate a petition to annul the Referendum. However, the *McCrystal* findings as set out in the ruling of the Supreme Court on 8th November, 2012, gave rise to considerable public debate concerning the fairness of the Referendum process.

18. I am satisfied that the initiation of these proceedings by the petitioner arising out of the *McCrystal* findings and having regard to her standing to bring such an application under s. 42(4) of the Referendum Act 1994, was not an unreasonable course to take:

indeed, in the light of the experience of the *Hanafin* case, it was a predicable outcome of the government's conduct. There was clearly *prima facie* evidence of conduct, namely breach of the McKenna principles, that may have obstructed, interfered or hindered the conduct of the Referendum as found in the *McCrystal* case: this Court was so satisfied pursuant to s. 42(3)(a) of the Act. The court was also satisfied that there was *prima facie* evidence that this conduct may have materially affected the outcome of the Referendum as a whole. There was a serious issue to be tried and the breach of the McKenna principles had created a controversial issue of public importance that by its nature raised the question as to what effect, if any, the government information campaign had on the outcome of the Referendum.

19. I do not accept that the legal issues raised by the petitioner in the course of these proceedings involved novel points of law. The *Hanafin* decision had been clear, in the courts view, in respect of the three issues identified in the petitioner's submissions and, I regard the judgment of this Court as an application of the principles established in that case for the conduct of proceedings under ss. 42 and 43 of the Referendum Act 1994. I do not consider that the legal arguments raised constituted special circumstances justifying the awarding of costs to the petitioner. In particular, I regard the decision of the Supreme Court in *Hanafin* as entirely distinguishable from this case insofar as it was the first case concerning the conduct of a Referendum petition in the face of unconstitutional conduct by the government in the course of a Referendum campaign and clearly involved novel issues of law, including the preliminary issue of the jurisdiction of the Supreme Court and a number of other legal issues which were decided in favour of the petitioner. This case required the application of the *Hanafin* principles to the facts.

20. There is no suggestion in this case that the petitioner acted unreasonably or otherwise than in good faith in bringing this application out of public concern as to the possible effect of the government wrongdoing on the result of the Referendum. It is clear that the petitioner has raised public law issues which are of general importance and a significant constitutional issue as to the consequences of established government wrongdoing which had the potential to affect the exercise of sovereignty by the people: that, in itself, is an unusual and special circumstance that should not have arisen in the course of a Referendum. I have to balance against that the fact that the normal rule in fairness to the respondents is that costs should follow the event, and that the petitioner failed to establish her claim in law and fact. I am satisfied that the issues of fact that arose in this case were largely the result of the first named respondents information campaign and were bound to give rise to questions of public concern as to the possible affect of that campaign having regard to its nature and extent. The statute itself envisages an application by an aggrieved elector on the basis of misconduct and, as already noted, the potential affect of the misconduct on the conduct of the Referendum could have been profound.

21. I am satisfied that in the interests of justice and having regard to the special circumstances identified but also having due regard to the fact that the respondents succeeded in defending the petition, that it is appropriate to award the petitioner one third of the costs of the proceedings, including any reserved costs.