

THE HIGH COURT

JUDICIAL REVIEW

IN THE MATTER OF LEAVE FOR JUDICIAL REVIEW

**AND IN THE MATTER OF ARTICLE 16 OF THE CONSTITUTION AND IN THE MATTER OF SECTION 63 OF THE ELECTORAL ACT 1997
AND IN THE MATTER OF THE REFERENDUM ON THE REPEAL OF EIGHTH AMENDMENT OF THE CONSTITUTION**

[2018 No. 285 J.R.]

BETWEEN

MICHAEL FISHER

APPLICANT

AND

AN TAOISEACH

THE MINISTER FOR HOUSING, PLANNING AND LOCAL GOVERNMENT

MINISTER FOR FOREIGN AFFAIRS AND TRADE

MINISTER FOR HEALTH

MINISTER FOR JUSTICE AND EQUALITY

ATTORNEY GENERAL IRELAND

RESPONDENTS

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

1. The applicant, a journalist and broadcaster, resides in County Monaghan. He is a registered voter, being on the electoral register for 2018/2019 for Monaghan County Council.

2. On 28th March, 2018 it was confirmed that the date to be included in the Referendum Bill for the holding of the referendum on the Eighth Amendment to the Constitution would be 25th May, 2018. For the reasons set out at para. 7 of his affidavit, the applicant will not be able to vote in person at his designated polling station on that date.

"7. On 2 March, 2018, I booked a Ryanair Flight 354 for my wife, Evelyn and me, from Dublin to East Midlands Airport Nottingham departing on Friday 25th May at 8:05am and returning on Wednesday 30th May. We are travelling to England for a short holiday and will also be babysitting for our daughter who is attending a wedding in Sheffield that weekend and has an infant son aged 9 months old ..."

3. Given his inability to attend at his polling station on 25th May, 2018, the applicant wrote to the local franchise officer of Monaghan County Council enquiring as to whether he could cast his vote via postal vote. In response, the applicant was informed that there is no provision in the legislation for postal votes for persons in the applicant's circumstances.

Judicial Review Proceedings:

4. On 13th April, 2018, on notice to the respondents, the applicant sought leave to seek a number of reliefs by way of judicial review. These reliefs are inter alia:

(i) A declaration that the respondents' failure or refusal to allow the applicant to be included on the postal voter register thereby enabling him to vote in the Referendum on repealing the Eighth Amendment to the Constitution to be held on 25th May, 2018 is in breach of Articles 16.2 and 47.3 the Constitution, is unlawful, *ultra vires* and/or of no force or effect.

(ii) A declaration that those provisions of s. 63 of the Electoral Act 1997 that operate to exclude the applicant from being included on the postal voter register so that he may be able to vote in the Referendum are unconstitutional and invalid.

(iii) A declaration that the respondents' failure or refusal to allow the applicant to be included on the postal voter register to enable him to vote in the Referendum is a breach of Article 10 and/or Article 3 of the First Protocol to the European Convention on Human Rights and thereby in breach of the respondents' obligations pursuant to s. 3 of the European Convention on Human Rights Act 2003.

(iv) A declaration of incompatibility pursuant to s. 5 of the European Convention on Human Rights Act 2003 that those provisions of s. 63 of the Electoral Act 1997 that operate to exclude the applicant from being included on the postal voter register so that he may be enabled to vote in the Referendum are contrary to and incompatible with the State's obligations pursuant to Article 10 and/or Article 3 of the First Protocol to the European Convention on Human Rights.

Test to be Applied:

5. The parties agreed as to what the appropriate test to be applied is. I refer to the oft cited passage of Finlay C.J. in *G. v. the Director of Public Prosecutions* [1994] 1 I.R. 374, where he stated at pp. 377-378:

"An applicant must satisfy the court in a *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. The test was considered in the Supreme Court decision of *Esmé v. the Minister for Justice, Equality and Law Reform* [2015] IESC 26. In his judgment Charleton J., having cited the said passage from *G. v. Director of Public Prosecutions*, 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 unstateable 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 unstateable 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...."

7. In order to meet the "arguability test", it seems to me that an applicant has to point to some provision of the Constitution, statute or legal authority which, on a reasonable interpretation, would support the case being made. Further, in a case such as this, where the statute in question enjoys the presumption of constitutionality, this is a factor which the court must take into account when deciding whether the arguability test has been met. I will now consider the various grounds upon which the applicant seeks leave.

Constitution:

8. Article 47.3 of the Constitution 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."

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."

In this application, the relevant law relating to the election of members of Dáil Éireann is the Electoral Act 1997 ("the Act of 1997"). Section 63(1) provides:-

"The registration authority shall enter in the postal voters list the name of every elector who, not later than the last date for making claims for correction in the draft register, applies to be so entered and satisfies the registration authority that the circumstances of the elector's occupation, service or employment are such as to render it likely that he or she will be unable to go in person on polling day to vote at the polling place for the polling district."

9. Clearly the applicant does not come within the provisions of s. 63(1) so as to entitle him to a postal vote. The reason why the applicant cannot attend at the polling station to vote is because he has a prearranged holiday to England. It is, of course, open to the applicant to cancel the holiday or to rearrange the flights so as to enable him to vote at his polling station. His grounding affidavit is silent on this. The applicant's situation is in contrast with those persons who by reason of their occupation, service or employment are likely to "be unable to go in person on polling day to vote at the polling place for the polling district."

10. Difficulties in a person's ability to cast a vote in person at a polling station were considered by the Supreme Court in *Draper v. The Attorney General* [1984] I.R. 277. In this case the plaintiff suffered from Multiple Sclerosis and was confined to a wheelchair. In giving the judgment of the court, O'Higgins C. J. described the plaintiff's situation as follows at p.286:-

"...In recent years she has been unable to leave her house. Her physical condition is such that she could not now be brought to a polling station without suffering severe physical discomfort and, perhaps, endangering her life."

The plaintiff claimed that State, through its electoral laws, had failed to recognise and provide for her the constitutional right to vote. Having set out the provisions of Article 16.1.2 O'Higgins C. J. continued at p.287:-

"While this provision confers a constitutional right to vote, that right is not, unlike other rights, conferred because of citizenship alone. It is only conferred on citizens who reach the prescribed age and who comply with the provisions of the law relating to the election of members of Dáil Éireann and who are not disqualified by law from voting..."

and at pp. 290-291:-

"In the opinion of the Court, the present law, contained in the Electoral Act, provides a reasonable regulation of elections to Dáil Éireann, having regard to the obligation of secrecy, the need to prevent abuses and other requirements of the common good. The fact that some voters are unable to comply with its provisions does not of itself oblige the State to tailor that law to suit their special needs. The State may well regard the cost and risk involved in providing special facilities for particular groups as not justified, having regard to the numbers involved, their wide dispersal throughout the country and the risks of electoral abuses.

The case made by the plaintiff in this action rests entirely on the failure of the State to provide special facilities for her and for those similarly situated. In the opinion of the Court, such failure does not amount to an interference by the State in the exercise of the right to vote under Article 16, s. 1, sub-s. 2, of the Constitution. Nor is it, in the opinion of the Court, a breach by the State of the provisions of s. 1 of Article 40. While under this Article the State could, because of the plaintiff's incapacity, have made particular provisions for the exercise by her of her voting rights, the fact that it did not do so does not mean that the provisions actually made are necessarily unreasonable, unjust or arbitrary. For the reasons already stated, the Court could not so find."

11. It seems to me that the principles set out in *Draper* apply equally to the applicant herein. Thus the absence of any statutory provision to make postal voting available to persons such as the applicant, who will be unable to vote by reason of being on holidays on the date of referendum, is not contrary to the Constitution and is not in breach of the plaintiff's constitutional rights. Therefore, I cannot conclude that the applicant has made an arguable case to allow this Court to grant leave to seek the reliefs sought by way of judicial review.

12. If persons in the applicant's situation are to be given a postal vote then this, as was done in the case of *Draper*, will have to be by way of an amendment to the relevant legislation.

European Convention on Human Rights ("the Convention")/ European Convention on Human Rights Act 2003:

13. The applicant seeks a declaration pursuant to s. 5 of the European Convention on Human Rights Act 2003 that the provisions of s.63 of the Electoral Act 1997 that operate to exclude the applicant from having a postal vote are contrary to and incompatible with the State's obligations pursuant to Article 10 and/or Article 3 of the First Protocol to the Convention. It should be noted that even if the applicant were granted such a declaration, it would "not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made..." (s. 5(2)(a)).

14. Article 3 of the First Protocol to the Convention has the heading "right to free elections" and provides:-

"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."

15. The terms of Article 3 of the First Protocol refer specifically to "the choice of the legislature". This limitation is reflected in the relevant case law, which has considered the scope and effect of the Article. 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)."

16. In *Niedzwiedz v. Poland* [2008] 47 EHRR 2, which concerned a complaint by the applicant that he could not vote in either the 2000 Presidential elections or 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..."

17. Article 3 of Protocol No. 1 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 on which the Scottish Independence Referendum was held. The appellants sought to establish a right to vote under, *inter alia*, Article 3 of the protocol. In giving the majority judgment of the court, 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."

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

19. In light of both the wording of Article 3 of the First Protocol and the foregoing authorities, the applicant clearly cannot make a case under said Article.

20. 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..."

21. The applicant makes no case that there is any impediment to his freedom to express his 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 No. 1 is a *lex specialis* on voting rights. This point was also considered by the U.K. Supreme Court in *Moohan and Another v. The Lord Advocate* 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."

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

Conclusions:

23. In the foregoing paragraphs I have considered the grounds under which the applicant seeks leave for judicial review. In respect of each of these grounds, I am of the view that the case made by the applicant falls well short of being arguable.

24. If persons, such as the applicant, are to be given postal votes in future referenda or elections it will have to be by way of an amendment to the existing legislation. Indeed in his affidavit grounding this application, the applicant exhibited a Private Member's Bill introduced in the last Dáil worded specifically to bring this about. This Bill lapsed on the dissolution of that Dáil in January 2016.

25. Therefore, I am refusing to grant the applicant leave to seek judicial review for the reliefs sought.