[2018] IEHC 437

THE HIGH COURT

[2018 No. 60IA]

IN THE MATTER OF THE REFERENDUM ON THE PROPOSAL TO AMEND THE CONSTITUTION CONTAINED IN THE THIRTY SIXTH AMENDMENT OF THE CONSTITUTION BILL 2018 HELD ON THE 25TH DAY OF MAY 2018

AND IN THE MATTER OF AN INTENDED PETITION

BETWEEN

CHARLES BYRNE

APPLICANT

AND

IRELAND, THE ATTORNEY GENERAL, THE REFERENDUM RETURNING OFFICER AND THE REFERENDUM COMMISSION

RESPONDENTS

JUDGMENT of Mr. Justice Kelly, President of the High Court delivered on the 20th day of July, 2018

Introduction

1. The applicant (Mr. Byrne) seeks leave to present a petition to this court pursuant to the provisions of s.42 of the Referendum Act 1994 as amended (the Act). If granted leave, it is his intention to present a petition which will seek *inter alia* an order directing that the referendum to which this application relates should be taken again in all constituencies.

The Referendum

2. The referendum in question sought to delete Article 40.3.3 from the Constitution and to replace it with a new Article.

3. Article 40.3.3 reads:-

> *"The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.*
>
> *This subsection shall not limit freedom to travel between the State and another state.*
>
> *This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."*

If carried, the referendum proposed the deletion of that Article and its replacement by the following:-

> *"Provision may be made by law for the regulation of termination of pregnancy."*

4. The Bill which resulted in the referendum was passed by both Houses of the National Parliament on 28th March, 2018. The polling day order was made by the Minister for Housing Planning and Local Government on 28th March, 2018. It fixed 25th May, 2018 as polling day. The poll was carried out on that day and the count took place on 26th May, 2018.

5. On 26th May, 2018 the referendum returning officer declared a total poll of 2,159,655. There were 6,042 invalid ballot papers giving a total valid poll of 2,153,613. The number of votes in favour of the proposal was 1,429,981. The number of votes against the proposal was 723,632. This meant that there was a majority of votes in favour of the proposal of 706,349.

6. The provisional referendum certificate was prepared and signed on Monday, 28th May, 2018 and published in Iris Oifigiúil on Tuesday, 29th May, 2018.

These proceedings

7. On Monday, 4th June, 2018, which was a public holiday, Mr. Byrne made application to the duty judge, White J., for an order granting him leave to present a referendum petition to the court in respect of the provisional referendum certificate.

8. White J. granted leave to Mr. Byrne to issue and serve a notice of motion returnable before me on 11th June, 2018 and gave liberty to notify the Attorney General and the Referendum Commission (the Commission) of the making of that order.

9. On 11th June, 2018 I dealt with the matter inter partes, gave directions concerning the exchange of affidavits and written submissions and fixed 26th June, 2018 as the hearing date for the application. This is my judgment on foot of that three-day hearing.

The constitutional and statutory framework

10. Article 46 of the Constitution provides the mechanism for the amendment of the Constitution. The amendment may be by way of variation, addition or repeal but it must be done in the manner provided for in this Article. Article 46.2 requires every proposal for an amendment of the Constitution to be initiated in Dáil Éireann as a Bill and then, having been passed or deemed to have been passed by both Houses, to 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.

11. Article 47 provides that an amendment of the Constitution which is submitted by referendum to the decision of the people shall, for the purpose of Article 46 of the 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.

12. In the present case this was the procedure which was followed and resulted in a very substantial majority voting in favour of the proposal.

13. The legislature has by means of the Act provided a mechanism whereby a qualified elector may question the validity of a provisional referendum certificate by applying to this court by way of petition. The entitlement to present a petition is, however, a qualified one. A petition may only be presented in accordance with the provisions of Part IV of the Act.

14. Section 42 is the first section contained in Part IV. Section 42(1) makes it clear that the validity of a provisional referendum certificate may only be questioned by a petition to this court. Thus, it is not possible to question such provisional referendum certificate by judicial review or by the institution of plenary proceedings.

15. Subsection (2) of s.42 prohibits the presentation of a referendum petition unless this court grants leave to do so. An application for leave to present such a petition must be made to the court not later than seven days after the publication in Iris Oifigiúil of the provisional referendum certificate. The Act does not confer any jurisdiction on the court to extend that seven day period. It was with a view to observing that time limitation that application was made to White J. on a public holiday.

16. Section 42(3) prohibits this court from granting leave 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".*

17. Subsection (4) of s.42 provides that 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. No question arises as to Mr. Byrne's status in this regard.

18. Section 43 provides that 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."*

The Act of 1992 means the Electoral Act of that year.

Case Law

19. These statutory provisions and their practical implications have been considered on a number of occasions by the Superior Courts. In *Jordan v. Minister for Children and Youth Affairs* [2015] 4 I.R. 232 Denham C.J. pointed out the two conditions precedent which must be satisfied before this court can grant leave to present a petition and which are prescribed in section 42(3). She said of them:-

> *"(vii) Both conditions precedent must be met at the leave stage, and both are in issue at the trial stage of the petition;*
>
> *(viii) The onus of proof remains on the petitioner at all times;*
>
> *(ix) The burden of proof on a petitioner reflects the relief sought. The burden of proof is such as to respect the constitutional right of the citizen to vote in a constitutional referendum and have the result respected, unless it is proved that the matter raised affected materially the result of the referendum as a whole. At the application for leave stage the applicant must prove to the satisfaction of the High Court that there is prima facie evidence of a matter referred to in s.43 of the Act of 1994, such as to affect materially the result of the referendum as a whole. At the time of the petition the applicant must prove the application on the balance of probabilities."*

20. Later in her judgment she pointed out that:-

> *"A referendum petition is not a tool for a disappointed voter, or a group of voters, to seek to manipulate the constitutional process of a referendum in which the people determine national policy".*

21. In his judgment in that case O'Donnell J. spoke of this stage of the proceedings in the following terms:-

> *"However, the leave stage created by the legislation is an important threshold step reflecting the fact that a challenge which seeks to reverse what is prima facie the will of the people expressed in a referendum, is a very significant step not least because the grant of leave prevents the amendment from taking effect. In most if not all challenges to the result of a referendum, it would in my view be important that a separate leave application be held, and rigorously assessed".*

22. In his judgment in the same case MacMenamin J. said of the leave threshold as follows:-

> *"It cannot be the law that the threshold for leave should be a low one, such as found in ex parte applications for judicial review. The clear import of Articles 46 and 47 of the Constitution expressed through the Act of 1994 is that a petition seeking to challenge the outcome of a referendum should not be lightly undertaken. It is not only legally appropriate, but constitutionally necessary, that in a leave application, a High Court judge should satisfy himself or herself that there is prima facie evidence of a matter referred to in section 43. The judge must be satisfied that the matter raised is such as would 'affect materially the result of a referendum as a whole'. Whether or not an ex parte application is to be heard on notice is a matter which lies in the discretion of a High Court judge. However, it is not clear to me how the constitutional duty, which devolves upon a judge in interpreting sections 42 and 43 of the Act of 1994, could be discharged by the adoption of some form of low leave threshold. The test must be whether the matter raised would materially affect the result as a whole. This could not then involve establishing some minor irregularity, or infringement, or the views, no matter how well meant or whether formed in good faith; simply based on the views of some individual persons."*

23. These judicial observations make it clear that the exercise that I am conducting is one in which, although only *prima facie* evidence is required before leave can be granted, a higher threshold has to be achieved than that on an application for judicial review and that furthermore this exercise should be one of rigorous assessment.

24. An issue was discussed during the course of the hearing concerning the level of proof which Mr. Byrne has to place before the court in order to comply with the requirements of s.42(3)(b) of the Act. There is no doubt but that the level of proof of the matter prescribed in s.42(3)(a) is on a *prima facie* basis. It could be argued, as a matter of statutory construction, that a higher level of proof has to be achieved in respect of the matter prescribed under s.43(b). However, there are judicial dicta to suggest the contrary. In the event it is not necessary for me to decide this issue since both respondents conceded, in ease of Mr. Byrne, that he need only demonstrate on a *prima facie* basis that the matters of which he complains affected materially the result of the referendum as a whole.

Mr. Byrne's complaints
25. Mr. Byrne makes a series of complaints against the respondents. I will deal with those made against the Commission first. Before doing so I should, however, outline the obligations which are imposed upon the Commission.

The Commission
26. The Commission was established pursuant to the provisions of the Referendum Act 1998 (the 1998 Act).

27. The principal functions of the Commission are set out in s.3(1) of the 1998 Act as amended by s.1 of the Referendum Act 2001 which provides as follows:-

> *"(1) The Commission shall have, in addition to any functions conferred on it by any other provision of this Act, the following principal functions in relation to the referendum in respect of which it is established:*
>
> *(a) to prepare one or more statements containing a general explanation of the subject matter of the proposal and of the text thereof in the relevant Bill and any other information relating to those matters that the Commission considers appropriate;*
>
> *(b) to publish and distribute those statements in such manner and by such means including the use of television, radio and other electronic media as the Commission considers most likely to bring them to the attention of the electorate and to ensure as far as practicable that the means employed enable those with a sight or hearing disability to read or hear the statements concerned;*
>
> *(c) to promote public awareness of the referendum and encourage the electorate to vote at the poll."*

28. The Commission carried out these functions by preparing an information booklet which was distributed to all homes and by maintaining a website which contained relevant information.

29. It is to be noted that when an intended petitioner seeks to impugn the activities of the Commission an additional statutory provision has to be borne in mind. That is contained in s.12 of the 1998 Act which inserted s.43(3) into the Act and which provides as follows:-

> *"A provisional referendum certificate shall not be questioned by reason of a non-compliance by the Referendum Commission with any provision contained in the Referendum Act 1998, or mistake made by the Referendum Commission if it appears to the High Court that the Referendum Commission complied with the principles laid down in that Act and that such non-compliance or mistake did not materially affect the result of the referendum."*

30. Accordingly, if an allegation of irregularity is alleged to consist of non-compliance by the Commission with a provision of the 1998 Act or a mistake on its part, two further elements identified in subsection (3), must be taken into account.

31. In *Doherty v. The Referendum Commission* [2012] IEHC 211 Hogan J. in considering s.43(3) applied by analogy the approach of Woolf J. (as he then was) as follows:-

> *"In R. v. Environment Secretary, ex p. Greenwich LBC, The Times, 17th May, 1989, the applicant sought to impugn a British Government leaflet explaining a local government tax. While the application was dismissed on the merits, Woolf J. held that the courts had a jurisdiction to intervene if the publication in question was 'manifestly inaccurate or misleading'. One might also apply by analogy the language of s.43(3) of the Referendum Act 1994 (as substituted by s.12 of the Referendum Act 1998).'*

I agree with that approach.

32. I also agree with the observations of Hogan J. in the *Doherty* case where he considered the obligations imposed on the Commission under s.3(1)(a) of the 1998 Act. That is the subsection which requires the Commission to prepare one or more statements containing a "general explanation of the subject matter of the proposal". In that regard Hogan J. said:-

> *"It is, I think, significant that the word 'explanation' is preceded and qualified by the word 'general', so that the object of these words is that the Commission's explanation is one best designed to assist the public. It is fair to infer that the Oireachtas did not anticipate or envisage that the general explanation put forward by the Commission would reflect the level of debate such as might be seen among constitutional law scholars or in specialist text books or in legal commentary. It was designed fundamentally to assist the public."*

33. Hogan J. also had some observations concerning the information to be provided by the Commission. He said:-

> *"It follows, therefore, that the Commission's statements should not be parsed or analysed for the absolute precision and complete accuracy of discussion or analysis which would be expected in, for example, an authoritative constitutional law text book. Most members of the public would not have either the time, inclination or the training to examine or follow commentary of this kind. They would quite understandably be repelled by the thought of digesting what they would (rightly) regard as the terse and almost incomprehensible verbiage of the lawyer. This means in practice that the Commission must be given a wide freedom to communicate its message to the wider public."*

34. Whilst *Doherty's* case was not a referendum petition but rather a judicial review application brought prior to the referendum in question these observations appear to me to be of general application and I agree with them.

The complaints against the Commission
35. Mr. Byrne's complaints against the Commission are to be found in two paragraphs of the affidavit evidence which he placed before the court. The first is contained in para. 3 of his affidavit sworn on 5th June, 2018. He said:-

> *"I am concerned that the Referendum Commission's information campaign and, without prejudice to the generality of same, the information booklet failed to correctly convey to the electorate the nature and breadth of the proposal on which we were voting. In particular, the information booklet failed to state correctly and completely the legal effect in ordinary language of a Yes vote."*

In his affidavit sworn on 21st June, 2018 Mr. Byrne returned to the topic and said this:-

> *"In relation to the Referendum Commission's information campaign as referred to in my grounding affidavit, the difficulties with that campaign were compounded by the emphasis the Commission placed on itself as effectively the only definitely reliable source. In particular, its broadcast advertising asserted 'You'll be hearing a lot from both sides about what your vote means, but the only place you're guaranteed to get the clear and independent facts is at reform2018.ie. Everything your vote means is explained there.' Similarly, the Commission's information booklet is described on its cover as 'The independent guide' to the above entitled referendum, and the booklet identifies the Commission as an independent body set up under the Referendum Act 1998 whose 'role is to provide accurate and neutral information to the public in advance of a referendum on a proposal to amend the Constitution'. Such statements exacerbated the effect of the problems referred to at para.3 of my affidavit of 5th June, 2018, because they presented the Referendum Commission's information campaign as a reliable, objective and comprehensive source. Against the confusing backdrop of a debate full of strongly disputed claims and counterclaims, the Commission conveyed the message that it provided a one stop shop for everything the voter needed to know about the meaning of her or his vote, whereas in fact as noted in my affidavit of 5th June, 2018 it failed to correctly convey to the electorate the nature and breadth of the proposal."*

36. These two paragraphs are the only evidence put before the court concerning the Commission. The complaints are generalised and it was not until legal submissions were made that more specific allegations came to be identified.

37. It is to be noted that no evidence at all of the likely effect of the alleged wrongdoing of the Commission on the result of the referendum was placed before the court. There was not even a *pro forma* averment in Mr. Byrne's affidavit dealing with such. Rather, the contention was made in the course of submission that I should by inference conclude that because of the widespread publication and distribution of the Commission's booklet and the availability of its website, the allegedly inaccurate information must have been such as to materially affect the outcome of the referendum as a whole.

38. It is also to be noted that Mr. Byrne does not specifically allege on affidavit that the wrongdoing on the part of the Commission that he contends for amounts to an irregularity in the conduct of the referendum, which is the only subheading of s.43 that he relied upon in argument. I was invited to infer that the wrongdoing which he alleges against the Commission amounted to such an interference in the conduct of the referendum in the sense in which that term has been interpreted by the courts and in particular by Blayney J. in *Hanafin v. Minister for the Environment* [1996] 2 I.R. 321 where he said:-

> *"… The meaning to be given to an interference with the conduct of the referendum should not be confined to the physical aspects of the taking of the poll but should extend to any unlawful activity which would interfere with the vote expressing the freely determined opinions of the electorate."*

39. In making his complaints against the Commission, Mr. Byrne made it clear that he was not suggesting or alleging any *mala fides* on its part. He submitted that even a *bona fide* exercise of its function could, if incorrect, amount to an unlawful interference with the conduct of the referendum.

40. I turn now to a consideration of the particular complaints made against the Commission.

Complaint No. 1
41. The first complaint made by Mr. Byrne against the Commission concerns the information contained at page 6 of the pamphlet. That page purports to set out the legal effect of a Yes vote and the legal effect of a No vote. All of Mr. Byrne's fire was directed to the explanation tendered in respect of the legal effect of a Yes vote. This is what the Commission said on that topic:-

> *"If a majority votes Yes, this will allow the Oireachtas to pass laws regulating the termination of pregnancy. These laws need not limit the availability of termination to circumstances where there is a real and substantial risk to the life of the mother. Any law may be changed by the Oireachtas. If challenged, any law may be declared invalid by the courts if it conflicts with the Constitution.*
>
> *If a majority votes yes, the current law, including the law on travel and information, will remain in place unless and until it is changed by new law or is declared invalid by the courts."*

42. The complaint which is made concerning this information is not that it misstates the position but that it fails to explain to the voter that approval of the referendum proposal would bring about the loss of the right to life of the unborn. By failing to do so, it is contended that the statement was misleading because it did not mention the main effect of the referendum proposal. It is said that it ought to have said so because of the decision given by the Supreme Court in *M. v. Minister for Justice and Equality* [2018] IESC 14. In that decision the Supreme Court held that the only constitutional right of the unborn was to be found in Article 40.3.3.

43. In light of the criticism made of what is contained on p. 6 of the Commission pamphlet one might be forgiven for thinking that the Commission did not deal with the *M.* case at all. One would be incorrect if one so concluded. The reason for this is that on p.4 of the pamphlet in setting out the present legal position in Ireland in relation to termination of pregnancy the Commission pamphlet said this:-

> *"Article 40.3.3 was inserted into the Constitution as a result of a referendum in 1983. The article says that the unborn has a right to life and that the mother has an equal right to life. The Supreme Court has recently held that this is the only constitutional right of the unborn."*

The reader of the pamphlet in moving from p.4 to p.6 would, of course, encounter p.5 which sets out on one side of the page the present Article 40.3.3 and the proposed new Article 40.3.3 which states:-

> *"Provision may be made by law for the regulation of termination of pregnancy."*

Given the information provided on pp. 4 and 5 of the booklet it is hardly surprising that the Commission at p.6 concentrated on explaining the effect of the introduction into the Constitution of wording which says that provision may be made by law for the regulation of the termination of pregnancy. It is also to be borne in mind that on the right hand side of p.6 the Commission explained the legal effect of a No vote by means of an accurate and undisputed description of the state of the law as it stands and has stood since the eighth amendment to the Constitution was passed.

44. Thus it is clear that it is not correct to state that the Commission booklet either ignores the *M.* case or gives a misleading account of the position. The criticism made was that the information given on p.6 as to the legal effect of a yes vote did not in terms say that the right to life of the unborn would be removed. It is of course correct that it did not use that language but I cannot conclude that there was any obligation on it so to do. I am of opinion that any reasonable reader on reading the pamphlet and in particular pp.4, 5, and 6 could not but come to the conclusion that if the referendum proposal was approved it would result in the right to life of the unborn being removed from the Constitution.

45. I am unable to accept Mr. Byrne's criticisms of the Commission in this regard and find that he has not adduced *prima facie* evidence of an unlawful interference in the conduct of the referendum.

Complaint No. 2
46. The second complaint concerning the Commission pamphlet refers to the introduction signed by the Chairperson on page 3. Objection is taken to a single paragraph containing two sentences in that introduction. The paragraph reads:-

> *"Laws are made by the Oireachtas. You are not being asked in this referendum to vote on any particular law relating to the termination of pregnancy."*

47. Two separate criticisms are made of this statement. The first is that it was wrong for the Commission not to refer (either in this statement or in the pamphlet as a whole) to the proposed legislation which the Government indicated it had in mind to introduce should the referendum pass. The second is that the Commission should not have used the term "termination of pregnancy" either in this introductory statement or indeed throughout the remainder of the pamphlet. I will deal with each complaint in turn.

48. As to the first complaint, it cannot be suggested that the paragraph in question is other than completely correct in what it said. All that the people were being asked to vote on in the referendum was the repeal of the present text of Article 40.3.3 and its replacement by the alternative which was clearly set out on p.5 of the pamphlet. The people were not being invited to vote on a particular piece of legislation. There was no guarantee that the intended legislation would ever be passed, or passed in the form notified by the Government. It would have been quite wrong for the Commission to assume that the legislative intention of the Government was one that would ever come about. It would have confused matters for pamphlet readers if the Commission referred to an intended piece of legislation which had no guarantee of passage in the form proposed or indeed any other form. Had the Commission made reference to that, then in order to discharge its mandate, it would have had to explain that the proposed legislation might not be passed or not passed in the form in which it was proposed and that it could be amended even if passed. Instead the Commission, in my view, quite properly confined itself to stating clearly to the reader that the referendum was not a vote on any particular law relating to the termination of pregnancy. That was accurate and appropriate for the pamphlet. I hold that there is no substance to this complaint. No *prima facie* evidence of any s.43 wrongdoing in respect of this complaint has been adduced.

49. Complaint is made that the Commission used the phrase "termination of pregnancy". It is said that the Commission ought to have used the term "abortion". It is argued that "termination of pregnancy" covers events other than an abortion and therefore to use that term was misleading. But "termination of pregnancy" is the term put before the people. The Commission chose, and in my view correctly, to use the terminology to be found in the proposed new Article 40.3.3 of the Constitution. I cannot see how the Commission can be faulted for using the precise wording upon which the people were being asked to vote. Had it done otherwise I have no doubt but that it would have been the subject of criticism for deviating from that term. The only sensible course to follow was to reproduce precisely what the electorate was being asked to vote upon. I hold that there is no basis for this complaint either. Again, no *prima facie* evidence of s.43 wrongdoing has been adduced.

Conclusions on the pamphlet
50. Insofar as the pamphlet issued by the Commission is concerned I am of the view that the complaints made in respect of it are without substance or foundation. Still less can it be said that the pamphlet was "*manifestly inaccurate or misleading*", *prima facie* evidence of which would be needed for this application to succeed. It follows that Mr. Byrne has failed to produce *prima facie* evidence of wrongdoing on the part of the Commission in respect of the pamphlet. Consequently there could have been no irregularity in the conduct of the referendum brought about by the Commission's pamphlet.

Complaint No. 3
51. This complaint relates to the website which was operated by the Commission. The contents of that website were exhibited in the affidavit of Patrick Walshe sworn on behalf of the Commission. The website is more expansive than the pamphlet published by the Commission and gives more detailed information.

52. Before considering the specific complaint it is appropriate to refer back to the criticism levelled against the pamphlet and its alleged failure to deal with the decision of the Supreme Court in *M. v. Minister for Justice*. I rejected that claim but in a section of the website headed "Court Judgments" information is given concerning *Attorney General v. X* [1992]; *Roche v. Roche* [2010]; *P.P. v. HSE* [2014]; and *M. v. Minister for Justice and Equality* [2018]. Insofar as the *M* case is concerned the website states:-

> *"This case concerned the factors which the Minister for Justice and Equality must take into account when considering an application to revoke a deportation order, where it was expected that the person who might be deported would become the father of an Irish citizen child. In summary, the Supreme Court decided that the only constitutional right of the unborn is the right to life which was created by Article 40.3.3."*

53. That is a succinct and accurate statement of the position but in greater detail than what is contained in the pamphlet.

54. Amongst the "frequently asked questions" section of the website is this one:-

"What about future proposals for new laws?"

The answer is as follows:-

> *"You are not being asked to vote on any particular law on regulation of the termination of pregnancy in the Referendum. In particular, you are not being asked to vote on whether termination of pregnancy ought to be lawful up to a certain point in the pregnancy. The Referendum Commission has no role in informing the public on any legislation that may be enacted after the Referendum, whether there is a Yes or a No vote.*
>
> *However, in the event that there is a Yes vote, the Oireachtas may decide to legislate to regulate the termination of pregnancy differently from the way in which it is currently regulated under the 2013 Act.*
>
> *The Government has outlined policies which, in the event of a Yes vote, it has said it would seek to give effect to in a Bill. These are contained in a policy paper. However, you are not being asked in the Referendum whether or not you support the legislative proposal set out in this Policy Paper. If the referendum is passed, the Oireachtas may enact laws that differ from this legislative proposal. That will be a matter for the Oireachtas in the event that there is a Yes vote. The way in which laws are made by the Oireachtas has been set out elsewhere."*

55. Again this gives more detail than the entirely accurate information given in the pamphlet. It demonstrates that any reader who was sufficiently interested in obtaining further information than was available in the pamphlet could obtain it from the website.

56. I mention this by way of introduction to the complaint which is levelled at the Commission in answer to a frequently asked question as follows:-

> *"What about the European Convention on Human Rights?"*

The answer which is given is:-

> *"The European Convention on Human Rights (the Convention) is an international treaty to protect human rights and fundamental freedoms in Europe. It entered into force in 1953 and Ireland is a party to it.*
>
> *The Convention established the European Court of Human Rights. Any person who feels that their rights have been violated under the ECHR by the State can make an application to the European Court of Human Rights. If that court finds that there has been a violation of the Convention, its judgement is binding on the State. The State is obliged under the Convention to implement or give effect to the judgement of the European Court of Human Rights.*
>
> *The Convention is not a European Union Treaty and the European Court of Human Rights is not a European Union Court. The Convention does not have the same status in Irish law as EU law.*
>
> *The Convention was given effect in national law by the European Convention on Human Rights Act 2003. Where a complaint is made to an Irish court that a law, including an Act of the Oireachtas, is incompatible with the Convention, the court can issue a declaration of incompatibility relating to that law. If the court issues a declaration of incompatibility, the law remains the same and continues in force unless and until the Oireachtas removes the incompatibility.*
>
> *The Constitution cannot be declared incompatible with the Convention. However, a person who feels that the Constitution does not protect their rights under the Convention can bring a complaint against the State to the European Court of Human Rights."*

57. Mr. Byrne's complaint is directed solely at the last paragraph just quoted. His complaint is not that this paragraph is inaccurate. Instead, he contends that the Commission ought to have made reference to one particular case namely, *A.B.C. v. Ireland* [2010] ECHR 2032 where the European Court of Human Rights had found that Article 40.3.3 in its present format was compatible with the Convention. It is argued that in the absence of a reference to that case, readers of the website might infer that it is possible that the text of Article 40.3.3 as it stands is incompatible with the Convention. Such an inference would be wrong. To the extent that the case was not mentioned it is said that the answer given, although not incorrect, is misleading.

58. I am unable to accept this view. Mr. Byrne accepts that the text in respect of which he makes complaint is accurate. I do not accept that a reader of it could reasonably infer from it that it is possible that the present text of Article 40.3.3 is incompatible with the Convention. This simply does not arise. I therefore do not accept that there is *prima facie* evidence of the Commission acting wrongfully in such a way as to bring about an irregularity in the conduct of the referendum.

59. Had the Commission decided to refer to the *ABC* case it could of course have done so. But if it did so it would have been necessary for it to go into a considerable amount of detail. During the course of the hearing the *ABC* decision was carefully examined. Counsel for the Commission was correct when he described it as not being a 'simple case'. The lengthy judgment of the European Court of Human Rights is quite nuanced in places. There were three applicants who complained to the European Court of Human Rights. In respect of two of them the court held that their Article 8 rights had not been offended. That was not so in the case of the third applicant. I do not propose to lengthen this judgment with extensive references from the decision of the European Court of Human Rights. It is sufficient if I record that had the Commission decided to make reference to the case it would have to do so in considerable detail in order to give an entirely accurate picture. To do so would be to engage in the very activity which Hogan J. held the Commission ought not to do. It would have turned the website into a legal treatise which would have repelled the average reader by the "*thought of digesting what they would (rightly) regard as the terse and almost incomprehensible verbiage of the lawyer*".

This would have been completely inconsistent with the statutory obligation of the Commission to give a general explanation of the subject matter of the proposal. It would convert the website into something akin to a specialist law text. This would not accord with the statutory obligations of the Commission.

60. Accordingly, I hold that Mr. Byrne has not demonstrated *prima facie* evidence of wrongdoing on the part of the Commission to justify leave being granted.

Conclusions on the website

61. As is clear from what I have already indicated, I am not satisfied that Mr. Byrne has put before me *prima facie* evidence of any

irregularity on the part of the Commission on its website. He has certainly not demonstrated by *prima facie* evidence something that is "plainly wrong" or "manifestly inaccurate or misleading" in the publication. Accordingly, on that basis alone his application fails. I now turn to whether he has produced *prima facie* evidence that the irregularities which he alleges against the Commission's pamphlet and website affected materially the result of the Referendum as a whole.

Material affect – The Commission
62. As I pointed out earlier in this judgment there is no evidence whatsoever led by Mr. Byrne suggestive of any material affect on the outcome of the referendum. Not even a *pro forma* averment to that effect is contained in his affidavits. In all of the evidence which has been produced not a single voter swore that he or she was misled by what was contained in the Commission's publications.

63. I am asked to infer that such was the case by virtue of the independence of the Commission as a body that could be relied upon and the widespread publication of the material generated by it. I do not believe that I would be justified in drawing such an inference. Without being prescriptive as to the form or nature of the evidence that would have to be adduced to demonstrate, even on a *prima facie* basis, material affect, there would certainly have to be some. It is interesting to contrast this case with *Jordan's* case and the expert testimony that was adduced in it. It is evident from the report of that case that a good deal of expert testimony was put before the court from a variety of experts from different disciplines. There was also survey evidence. None of that has been produced even in rudimentary form in this case.

64. I must also have regard to the size of the margin in favour of the proposal. In *Jordan's* case where the proposal was passed by 58% to 42% the margin was described by O'Donnell J. as "*on any view very substantial indeed*" and in which circumstances it was "*… necessary for the petitioner to demonstrate that there was a reasonable possibility that there were either 85,000 people who voted yes and who would have voted no, or alternatively 170,000 people who did not vote but would have voted no, or of some combination of the two*". The statistical margin in this case is 32% as against the 16% in Jordan. Therefore the burden identified by O'Donnell J. is all the greater.

65. In the same case MacMenamin J. observed:-

> *"The size of a majority is not, of course, conclusive in the respondents' favour. One can conceive of a circumstance where even a substantial majority could be achieved by unlawful means. But it is nonetheless an unavoidable obstacle in the petitioner's path."*

66. I think the issue can be summarised by stating that the greater the majority in favour of the proposal the greater is the petitioner's task in demonstrating a material affect even on a *prima facie* basis. In the present case, no evidence of any sort has been placed before the court to conform to what is required under section 42(3). I would not be justified in inferring a material affect in this case.

67. In these circumstances I refuse leave to Mr. Byrne to present a petition by reference to his complaints concerning the Commission.

Complaints against the first three respondents
68. Mr. Byrne makes three complaints against the remaining respondents. They can be summarised as follows.

> First, he alleges that the Taoiseach and other Government Ministers made statements encouraging voters to cast their ballot in favour of the proposal. This he contends is impermissible.
>
> Second, Mr. Byrne alleges that in the course of exhorting the electorate to vote in favour of the proposal incorrect and misleading statements were made by Government ministers.
>
> Third, it is alleged that what are called "electoral irregularities" were committed. I will consider each of these in turn.

Complaint No. 1
69. Mr. Byrne contends that while members of the Government may generally be entitled to campaign for one side in a referendum, without using public monies to do so, they were not so entitled to campaign for a Yes vote in this referendum. The reason for that is because in this case the proposal was to remove a constitutional right which they, as members of the Government, were obliged to respect. It is said that this proposition is consistent with jurisprudence establishing the obligation of the Executive not to infringe constitutional rights. As the Executive is obliged to respect the right to life, Mr. Byrne alleges that is impossible to imagine a clearer or greater breach of that obligation than campaigning, not merely for the violation of that right in a single individual case, but for the unqualified destruction of that right in all cases. This is all the more offensive when the class affected is numerically unlimited over an unlimited period of time. Thus, it is said, the Government's campaign for a Yes vote was unconstitutional and in disregard of its obligations. Unconstitutional conduct by the Government is, he says, an interference in the conduct of the referendum and that is so even if such conduct is done in the belief that it is constitutional.

70. In support of this proposition Mr. Byrne exhibited an article written by the Taoiseach in the *Sunday Independent* newspaper and referred to an interview given on the *Newstalk* radio station on 24th May, 2018. He also referred to a statement made by the Taoiseach on a *Today FM* radio programme on 21st May, 2018. The respondents did not seek to deny that Government ministers spoke in favour of a Yes vote but asserted that there was no impropriety in their so doing.

71. Mr. Byrne contended that in *A.G. (SPUC) v. Open Door Counselling Ltd*. [1988] I.R. 593; *A.G. (SPUC)(Ireland)(Ltd) v. Open Door Counselling Ltd. & Another* [1998] I.R. 593 and *SPUC (Ireland) Ltd. v. Coogan & Others* [1989] I.R. 734 it is made clear that Article 40.3.3 applies to and imposes obligations on all organs of state, and that it precludes the Government from interfering with the right to life of the unborn.

72. In citing case law in support of this proposition counsel on behalf of Mr. Byrne first referred to *Attorney General (SPUC) (Ireland) Ltd. v. Open Door Counselling Ltd & Another* and in particular the judgment of Hamilton P. in the High Court where he said:-

> *"In the course of my judgment I referred to the statement of McCarthy J. in Norris v. Attorney General [1984] I.R. 64 at p.103 that:-*
>
> > *'The right to life of the unborn child is a sacred trust to which all the organs of Government must lend their*

support.'

Consequently, the judicial organ of Government is obliged to lend its support to the enforcement of the right to life of the unborn, to defend and vindicate that right and, if there is a threat to that right from whatever source, to protect that right from such threat, if its support is sought."

73. The argument is that whilst he was speaking of the judiciary Hamilton P. was indicating that the right to life is something that all organs of government must support. Support for that proposition is to be found later in the same judgment where he said:-

"Having regard to 'the sacred trust', referred to McCarthy J. in Norris v. Attorney General [1984] I.R. 36, all the organs of government, including the judicial organ, must lend their support."

74. This argument was further developed by reference to the judgment of Finlay C.J. in the same case where he said:-

"If, therefore, the jurisdiction of the courts is invoked by a party who has a bona fide concern and interest for the protection of the constitutionally guaranteed right to life of the unborn, the courts, as the judicial organ of government of the State, would be failing in their duty as far as practicable to vindicate and defend that right if they were to refuse relief upon the grounds that no particular pregnant woman who might be affected by the making of an order was represented before the courts."

This, counsel argued, emphasised that the duty imposed by Article 40.3.3 extends to the organs of state as a whole and is not confined to the legislature or the judiciary.

75. Reliance was also placed on the judgment of Walsh J. in *SPUC v. Coogan* [1989] I.R. 734 where at 744 he said:-

"If some department of state or some public health authority with the approval if not the encouragement of the executive power were to engage in activities which this Court in the case of A.G. (S.P.U.C.) v. Open Door Counselling Ltd. [1988] I.R. 593 restrained as being a violation of the Constitution, it would be an intolerable situation if the defence of constitutional vindication of rights were to be confined to the very officer of state who had been entrusted with the task of defending such impugned activities."

Reliance was also placed on a further statement from that judgment where the judge said:-

"The citizens' right of access to the courts in the appropriate case will include not only access in defence of their own personal and direct rights which are being threatened by the executive, or by their fellow citizens, but also the right to seek to restrain the acts of the executive or other persons from breaching the constraints imposed by the Constitution if the public interest requires that such breaches or attempted breaches should be restrained."

76. It is argued that this envisages that the Executive and every member of it are bound by this obligation and disentitled to act contrary to it. Thus, no government minister could exhort or encourage a Yes vote. It would, it is argued, be in breach of a constitutional obligation to do so.

77. Counsel for Mr. Byrne accepted that the effect of this submission was that, whilst he accepted that the Government could introduce the necessary legislation to give rise to the referendum and that Ministers might speak in favour of the proposition whilst within the confines of the National Parliament, they had no entitlement thereafter to advocate for a Yes vote. To have done so would have been to breach the obligation identified within these cases. One would thus have the rather remarkable situation where government ministers would have to observe total silence and not encourage the very referendum proposal which they piloted through parliament and wished to have accepted by the people.

78. It does seem extraordinary that although it is accepted that the Government is not precluded from putting a proposal to repeal Article 40.3.3 it is an abrogation of its obligations under that article actively to encourage its replacement. When I put it to counsel that this was a radical proposition he responded that it did not apply to all referenda, but only to referenda which withdrew rights, in this case the rights of the unborn. Thus, in some referenda depending upon the nature of the amendment sought, a government minister might or might not have the right to advocate for it. In the present referendum there would of course be no prohibition on a government minister advocating a No vote. If a future government were to seek to repeal the present Constitution and replace it with another, it would be precluded from advocating a repeal of those provisions which confer rights should such be sought to be withdrawn and not replaced. It could however exhort the repeal of other provisions.

79. I am unable to accept this approach. In law, just as in life, context is important. The SPUC and other cases relied on were not decisions referable to a referendum proposal. They did not deal with the issue at all. They were addressing entirely different issues.

80. Mr. Byrne's submission is in the teeth of what was said by Denham C.J. in *McCrystal v. Minister for Children* [2012] 2 I.R. 726 a decision dealing with a referendum where she said, having considered a substantial body of case law:-

"(i) The Government is entitled to campaign for a "Yes" vote by any methods it chooses, other than by the expenditure of public funds. Such methods include writing, speaking, broadcasting, canvassing, leafleting and advertising. Some of these methods, such as writing, speaking, broadcasting on ordinarily scheduled current affairs programmes, and canvassing, are cost free."

…

(ii) The Government is entitled to campaign for the change, and the members of the Government are entitled in their personal, party or ministerial capacity to advocate the proposed change. Government ministers may use their state transport in relation to the referendum and may avail of the radio, television and other media to put forward their point of view. However, the Government and its members must not spend monies in favour of one side."

81. That is a clear acceptance by the Supreme Court, having considered a line of authorities, that in the context of a proposal to change the Constitution there is that identified level of freedom on the part of government ministers. Thus it does not appear to me that there is anything offensive on the part of Ministers speaking in favour of a constitutional change even if that change seeks to bring about the removal of a right already acknowledged or created by the constitutional provision which it is sought to alter.

82. Indeed, Mr. Byrne's argument in this regard is one which was considered in the case of *Hanafin v. Minister for the Environment* [1996] 2 I.R. 321. It was rejected decisively in the Divisional Court by Lynch J. where he said:-

> *"It would be a very strange state of affairs indeed if the Government, which consists of a group of citizens holding ministerial office, who had introduced the Bill for the amendment of the Constitution in Dáil Éireann and therefore clearly approved of it, were to be the only group of citizens to lose their constitutional right given by Article 40, s. 6, sub-s. 1 to express freely their convictions and opinions. In Crotty v. An Taoiseach [1987] I.R. 713, Henchy J. stated at p. 788 of the report:—*
>
> > *'There is, of course, nothing in the Constitution to prevent the Government or any person or group or institution from advocating or campaigning for or otherwise working for a change in the Constitution.'"*

83. These quotations appear to me to be clear and pertain to a referendum campaign, unlike the cases relied upon by Mr. Byrne which did not touch at all upon the rights and entitlements of the Government or Ministers in the context of a referendum proposing constitutional change. To seek to apply the dicta from the various cases relied on by Mr. Byrne to the position of a government or its members in this referendum campaign would produce the truly bizarre result of total silence having to be observed by government on its own proposal. This would be absurd.

84. Accordingly, I am unable to accept that this argument has any validity or is demonstrative even on a *prima facie* basis of a form of wrongdoing which falls within the purview of section 43(1)(d) of the Act.

Complaint No. 2

85. Mr. Byrne contends that even if it was permissible for Government ministers to promote a yes result they were not entitled to misstate, misrepresent or mislead the electorate in what they had to say.

86. Such misstatements, it is said, amount to an impermissible interference with the conduct of a referendum in the manner identified by Blayney J. in *Hanafin's* case in the passage which I have reproduced at para.38 of this judgment.

87. In support of this argument my attention was drawn to the observations of Hogan J. in *Doherty's* case where he said the Constitution "*places a premium on honest and fearless debate*". That judge went on to say:-

> *"The referendum process reflects this by urging the citizenry to engage in robust political debate so that the forces of deliberation will prevail over the arbitrary and irrational so that, in this civic democracy, reasoned argument would prevail in this triumph of discourse. At the heart, therefore, of the Constitution, there are three core principles which are relevant to the issues raised by this application. The first of these is the concept of popular sovereignty (to which we have just alluded) and which is reflected in Articles 5,6,46 and 47 of the Constitution. It may thus be said, adapting freely the words of Holmes, that the theory of popular sovereignty for which Griffith argued and Pearse fought and Collins died and de Valera spoke and Hearne drafted and Henchy wrote and Walsh decided has become our constitutional cornerstone. It is that very cornerstone on which the entire referendum edifice is constructed.*
>
> *The second core principle is that of freedom of speech which is, of course, protected by Article 40.6.1 of the Constitution. As we have already observed both now and in the past, the People have been asked difficult and troubling questions via the referendum process on which there is, of course, room for legitimate political dispute and argument. The Constitution trusts in the power of argument and debate and reasoned discussion and, again, in the informed citizenry of which I spoke, who will discharge their civic responsibility to inform themselves in their own interests, that of their neighbours and that of their country.*
>
> *The third principle is that of equality. This ensures that during the referendum period, the arguments are fairly balanced so far as the public institutions of the State are concerned. As Denham C.J. stressed delivering the judgment of the Supreme Court in M.D. (A Minor) v. Ireland [2012] 1 I.R. 697, Article 40.1 reflects a commitment to equality as a core constitutional value. It is reflected in well known Supreme Court judgments such as McKenna v. An Taoiseach (No. 2) [1995] 2 I.R. 10, Coughlan v. Broadcasting Complaints Commission [2000] 3 I.R. 1 and Kelly v. Minister for the Environment [2002] 4 I.R. 191, which all stress the principle of equality during the election and referendum process. Article 40.1 thus reflects a deeply moral premise of strict equality of citizens. In the referendum context, the value of all votes and each vote and the opinion of all citizens from the most humble to the most exalted are valued equally. It is in that context that, to aid political debate, the Commission was established by the Act of 1998."*

88. Reliance was also placed on a passage from the judgment of O'Donnell J. in *Jordan's* case where he said:-

> *"The central difficulty in this case is that the court is required to identify a test which sets a balance between two values which have significant constitutional weight, and which may on occasion conflict. Very significant weight must be given to the importance of upholding the law, and in particular the constitutional law, regulating the holding of elections and referenda. Those laws exist in part to prevent a potentially beneficial collective intelligence becoming a damaging group think. They also exist to promote trust in the process and confidence in the result. On the other hand, as has just been discussed, there is a significant constitutional weight to be given to the decision of the people. The court cannot allow one to decisively outweigh the other. Where some might assert that courts should not properly engage in what can be seen as a political question, withdrawal from decision-making is not an option which is consistent with the balance set by the Irish Constitution, which after all, goes to some lengths to regulate by its own terms the electoral process. Even those theories of judicial review which lay emphasis on the separation of powers and the importance of recognising both the limits of the judicial power and the consignment by the Constitution of certain matters to the other branches, nevertheless stress the importance of positive enforcement of constitutional guarantees in respect of voting since that is a fundamental underpinning for the legitimacy of decisions of the representative branches. The court must find the point of constitutional equilibrium. The democratic process should not be too readily stopped and ballot results upset by courts, but seriously flawed processes must not be beyond effective challenge by citizens."*

89. Mr. Byrne contends that the kind of debate envisaged by the Constitution, i.e., a debate "*fairly balanced so far as the public institutions of the State are concerned*" is at a distant remove from what occurred in the debate on the 36th Amendment where he contends Government misstatements and misrepresentation of the proposal can have served only to distort the issue on which the people were called upon to vote rather than casting that issue in its true light.

90. Mr. Byrne in his affidavit of 21st June says that whilst he cannot be aware of every example of misstatements by members of the

Government he does refer to what he describes as "*very significant misstatements and some examples of where such misstatements were uttered*". He instances a *Newstalk* interview of the 24th May, 2018 where the Taoiseach is alleged to have accused those who suggested that an alternative constitutional change could be introduced to permit abortion in cases of pregnancy resulting from rape, and of unborn children with life limiting conditions, of attempting to mislead the people.

91. Mr. Byrne said the following in his affidavit:-

> *"In an article in the Sunday Independent on 20th May, 2018, the Taoiseach made a number of incorrect assertions. In particular, he wrote:-*
>
> > *'For too long our society was characterised by judgement rather than understanding. Too many lives have suffered as a consequence; some women's lives have been lost. Friday's vote is a once in a generation opportunity to change that.'*
>
> *The clear implication is that some women's lives have been lost due to the 8th Amendment. In the same article he asserted that the 8th Amendment 'has not saved lives, it has failed lives' and that 'the truth is that we cannot deal with the most difficult cases without voting Yes on Friday to remove the 8th amendment from the Constitution'. He went on to say that it is 'completely unworkable' to have rape or incest as a specific ground for abortion, omitting to mention that the laws of some countries provide for that. The Taoiseach suggested that a rape victim and anyone 'who helps her' (to obtain an abortion) could be sent to prison for fourteen years. He suggested that in situations where an unborn child has a life limiting condition 'a compassionate early delivery' should be available in Ireland, when in fact the Heads of Bill proposed by the Government provide in those circumstances that 'termination of pregnancy' shall be lawful without any gestational limit being prescribed, with 'termination of pregnancy' being defined in the Heads of Bill as 'a medical procedure which is intended to end the life of the foetus'. … It was also wrongly suggested that the British legislation was much less restrictive, even though I am informed and believe that there is no point in pregnancy at which abortion is lawful in Britain without specified reason. The article also contained smearing and mischaracterisation of arguments advanced by advocates of a No vote. The Taoiseach also said that 'if the baby can survive outside the womb, it will be delivered early and offered all possible medical care', a proposition that was untrue having regard to Heads 5 and 6 of the Heads of Bill considered in conjunction with the definition of 'termination of pregnancy'. A reading of the article suggests that voters are called upon to vote on the terms of the legislation (as incorrectly presented by the Taoiseach), rather than acknowledging that the legislation is an initial proposal and that the statutory grounds for abortion could be broadened later."*

92. His affidavit of 21st June also complained that the Taoiseach stated that the only way to change the fourteen year criminal sanction for abortion was to remove the 8th Amendment from the Constitution. This was allegedly done in an interview on *Today FM* on 21st May, 2018. Mr. Byrne says that this emphasis on a fourteen year criminal penalty "*is entirely unrealistic and that no one has been convicted under this provision*". He goes on:-

> *"The Minister for Health also wrongly claimed that the Bill did not allow for late term abortions and that it provided for early delivery. He also claimed that abortions for Downs Syndrome would not be lawful under the Bill proposed by Government and suggested that it was wrong to make an issue of this."*

93. In his earlier affidavit Mr. Byrne had alluded to these alleged misstatements in a shorter form than in his affidavit of 21st June. In that affidavit he also alleged that the Minister for Health told the public on 29th January that "*change cannot happen in this country in this area*" as long as the 8th Amendment was in place.

94. Mr. Byrne swears:-

> *"The Government also misrepresented the proposal, the subject matter of the referendum by persistently and wrongly framing it in terms that ignored the unborn. For example, the Taoiseach contended that the question to be voted on was whether or not we trust women to make their own decisions, or 'to make decisions about their own healthcare', as in the Sunday Independent article referred to above. This was untrue and was a serious misrepresentation of the true nature of the question on which the electorate were asked to vote. Government members repeatedly presented this proposal to the people in terms irreconcilable both with the factual reality of what an abortion entails and with the true legal nature of the proposal contained in the Amendment to the Constitution Bill 2018. I say and believe and am advised that the Government may not have been lawfully entitled to campaign against the expressly guaranteed constitutional right to life of the unborn at all, as such right was binding on the State. I further say and believe and am advised that, in any event, even if the Government were so entitled, it is not lawful for the government to mislead and/or to misinform the people in connection with the referendum proposal on which we are to vote."*

95. Counsel on behalf of the State contends that the complaints made by Mr. Byrne arising from these publications and broadcasts relate to what is essentially a political debate and points made in that debate. He argues that these statements ought not to be the subject of rigorous parsing and analysing and the kind of scrutiny that is exemplified in Mr. Byrne's affidavits. He contends that this is tantamount to saying that a government minister cannot participate in a referendum campaign beyond the most guarded statement to the effect that the Minister is in favour of the proposition to be put before the people. Counsel described it as folly for such a Minister to say anything more than that if Mr. Byrne's case is well founded. He argued that this is just the sort of case where the court should not intervene whether by way of injunction prior to the holding of the ballot or on an application such as this subsequent thereto. To do so would be to thrust the court into an area of what is essentially political debate. The publications complained of are, says counsel, nothing more than political advocacy which is part and parcel of any referendum campaign.

96. Counsel relies particularly on the following dicta from the judgment of O'Donnell J. in *Jordan's* case where that judge said:-

> *"The people of Ireland who participate in an election campaign or a referendum, whether they vote or not, are not mere ciphers whose free will in relation to a vote can be lightly disregarded. Their participation, or lack of it, in a referendum campaign is not to be treated as no more than leaves to be blown one way or another by the breeze generated by the skill of the pollster or advertiser or the designer of the information booklet who for example in this case decided, no doubt after much thought, to describe the referendum as "the Children's Referendum" rather than as the Referendum Commission did, "the Children Referendum". While that was one component of what was found sufficient to constitute a breach of the McKenna principles the Constitution, in my view, permits, and indeed requires, that something more be shown before the outcome of the referendum is set aside on that basis. Even if one were to assume for a moment that some voters were decisively influenced to vote for the referendum by the contents of the Government's information*

campaign, and that this was not counterbalanced by those who decided to vote against or abstain because of the finding of unconstitutionality, it still follows that every other voter was not so influenced, and their votes have a very significant constitutional value. These votes constitute the decision of the people. As Henchy J. put it at p. 8 of Dillon-Leetch v. Calleary & Others:-

> *'… the courts will not allow an electorally ineffective breach of principle to be used to set aside the correctly exercised constitutional right of the rest of the citizens forming the electorate in the constituency to elect their representatives in Dáil Éireann … To hold otherwise would be as much an inversion of constitutional priorities as to hold that an election in a particular constituency should be set aside merely because a voter or particular voters voted more than once (in breach of the prohibition in Article 16.1.4 against so doing) but not so as to have an affect on the result of the election.'"*

97. Later that judge said:-

> *"Modern mass-participation democracy is designed above all to achieve a result and one that can be trusted by the public whether any individual member participated or not. The sheer weight of numbers involves a significant quality of self-balancing and self-correction so that individual incidents become less important in the overall mix. Thus the vote, or abstention, of a foolish and uninformed person has the same weight as that of the Nobel prize winner. The vote of the person who has studied and who has agonised on the issues has the same value and impact as that of the person who votes casually or on a whim. The person who fully intends to vote but is delayed has the same impact on the outcome as the person who pays no attention and never intended to vote, or the person who defiantly abstains on the grounds of principled objection to the issue or a candidate. Some people may vote on a plain misunderstanding of the issue. In some cases, as indeed has occurred people may be confused by the formulation and led to vote in a manner contrary to their intention.*
>
> *There will always be the possibility of error in the conduct of elections involving millions of individuals. Statements will be made which are exaggerated and even false. True statements may be misunderstood. Furthermore, if we think closely enough about it, the system includes the possibility for errors and mistakes, at least at the margins. … The immune system of democracy has therefore at least some resistance to individual error. …"*

98. Counsel for the first three respondents accepts that Government Ministers do not have carte blanche in the way in which they can conduct a campaign. A stage might well be reached where the court would intervene either by means of injunctive relief prior to the ballot or on a petition subsequent thereto. Such circumstances would, he argues, be altogether exceptional. It would involve something like a calculated system of deception or an active campaign of misrepresentation.

99. I am of opinion that counsel for the State parties is correct in his submissions. The material complained of is part of the political debate on the proposal to amend the Constitution. As O'Donnell J. accepted in *Jordan's* case sometimes statements are made which may be exaggerated or even false. Indeed Mr. Byrne accepted in his affidavit of 21st June, 2018 that this referendum was conducted "against the confusing backdrop of a debate full of strongly disputed claims and counterclaims". The court should not involve itself in parsing or analysing individual speeches or articles or interviews made or given during the course of what is essentially a political campaign. To do so would interpose the court into the world of political rhetoric and argument and thus into the political arena where it has no role. The court must find the point of constitutional equilibrium. It must not intervene inappropriately into the cut and thrust of political debate. It should intervene only in circumstances where there is evidence of a calculated system of deception or campaign of misrepresentation. If Mr. Byrne were to obtain leave to present a petition in respect of this complaint he would have to produce *prima facie* evidence of just such a deliberate and sustained campaign of deception and misrepresentation. In my view he has not discharged that onus of proof.

Material affect – Government Ministers

100. Just as in the case of the Commission Mr. Byrne has produced no *prima facie* evidence that these alleged wrongdoings had any material affect on the outcome of the referendum.

101. In the context of Mr. Byrne's complaints under this heading the observations of O'Donnell J. in *Jordan's* case are apposite. He said:-

> *"Where it is alleged that significant numbers of citizens have been duped or misled in to voting in a way other than would have represented their views because of misleading statements in advertising or some other interference, then it might naturally be expected when the misleading nature of such statements is revealed, that some significant number of those people would be willing to give evidence of the fact that they feel that their vote was improperly influenced and that without that influence they would have voted otherwise."*

102. This case is significant by the fact that not a single voter has made any such allegation.

103. Again, as in the case of the complaints against the Commission, I am asked to infer that people were misled because of the standing of the politicians who made the alleged misstatements. I am unable to draw any such inference.

104. Once again the size of the margin is relevant. As was said by O'Donnell J. in *Jordan's* case:-

> *"Any court asked to invalidate the outcome of a referendum on the grounds that it might reasonably have been affected by an irregularity or illegality, should have at the forefront of its mind the numbers taking part in the vote and the margin involved."*

Bearing all of that in mind I am quite satisfied that Mr. Byrne has come nowhere near demonstrating even on a *prima facie* basis that the matters of which he complains under this heading had a material affect on the outcome of the referendum as a whole. Accordingly I refuse leave to present a petition based on these complaints.

Electoral irregularities

105. The final area of complaint identified by Mr. Byrne is what he calls "electoral irregularities". I now turn to a consideration of his complaints in that regard.

106. Mr. Byrne's complaints concerning these alleged irregularities are divided into two. First, he makes complaint of what he describes as "multiple instances" of irregularities in relation to the actual conduct of the poll. Second, he makes complaint about the

electoral register. I will consider each in turn.

Poll irregularity
107. On the second day of the hearing Mr. Byrne sought leave to introduce a series of affidavits over and above the two affidavits which he himself had sworn earlier in the proceeding and his third affidavit grounding an unsuccessful motion seeking discovery against the respondents. This was because of clear deficits in his own affidavits. These additional affidavits related to individual instances of, for example, polling cards being furnished incorrectly. They were admitted into evidence without objection from the respondents. A polling card of course does not confer a right to vote at a referendum nor is it required by a person in order to cast his or her vote. Apart from poll cards and people being removed from the register and then restored there was also an allegation concerning tallies from some boxes indicating turn out figures in excess of 100%. Indeed, it is asserted that there was a 131% turnout recorded in one box in Dublin Rathdown. He also asserted that persons on offshore islands were given the incorrect polling date. He asserted that Gardai registered individuals to vote without adequate proof of identification or citizenship. There is also exhibited transcripts from phone-in radio programmes. At least some of this affidavit evidence is mere assertion and other parts introduce material which is inadmissible notwithstanding the facility to adduce hearsay evidence in interlocutory applications. Even when I give the most generous reading to this material, I am unable to conclude that Mr. Byrne has produced even *prima facie* evidence of the matter prescribed in section 43 of the Act.

108. In addition, he has failed to produce *prima facie* evidence of material affect which, of course, given the majority in favour of the proposal, would require to be dealt with in some detail.

The electoral register
109. The final head of complaint relates to the electoral register. Mr. Byrne submits that there is a likelihood that the number of individuals registered on the Register of Electors is in excess of what it should be. This problem, he contends, has been exacerbated by the addition of a large number of persons to the supplementary register. He contends that the likelihood is therefore that there may be a large number of registered voters who are on the register twice. He has produced a report from a Mr. Drazen Komarica which sets out the methodology to be applied if voter registers were to be compared with marked registers. This methodology recites that there is a desire by Mr. Byrne to evaluate the accuracy and reliability of the purported result of the referendum so as to ensure confidence in the integrity of the referendum process. Mr. Komarica says that he is confident that he "can provide statistical proof regarding the voice and will of the electorate".

110. It is difficult to identify what exactly Mr. Komarica might be able to establish which would place Mr. Byrne's case within the purview of ss.42 and 43 of the Act.

111. The State respondents make the case that they are not charged with responsibility for the creation of the Register of Electors and that there are statutory mechanisms through which issues regarding the register and its content can be ventilated. The register is maintained by local authorities. Thus, whilst a broad interpretation has been given to the words "conduct of the referendum" in *Hanafin's* case these respondents cannot be responsible for any deficit in the register unless it is asserted that they wilfully contrived to bring that about.

112. The assertion made that the number of individuals registered on the register of electors is grossly in excess of the number entitled to be registered is just that, mere assertion. There is also a speculative element to this evidence with a sort of hope that Mr. Komarica, Micawber-like, will be able to turn up something to support the assertions. Speculation is not evidence.

113. I conclude that Mr. Byrne, in the context of this complaint, has not demonstrated any of the matter which he is required to establish on a *prima facie* basis having regard to ss. 42 and 43 of the Act.

114. In addition, he has failed to show that these complaints have had a material affect on the outcome of the referendum as a whole. That must be demonstrated on a *prima facie* basis in order to permit the court to grant leave to present a petition. This he has failed to do. The observations which I already made concerning the relevance of the size of the majority in favour of the result are relevant in respect of this complaint.

Conclusion
115. In all of the complaints which Mr. Byrne has made either against the Commission or the other respondents he has failed to discharge the onus of proof required under s.42 of the Act. There is no *prima facie* evidence of the matter prescribed under s.42.3(a) or (b). This court is precluded from granting leave unless Mr. Byrne has adduced such evidence. He has not and, accordingly, I refuse him leave to present a petition.