



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 266

Record Number 2018 280

**Birmingham P.
Peart J.
Irvine J.**

BETWEEN/

CIARAN TRACEY

APPLICANT/

INTENDED PETITIONER

- AND -

IRELAND AND THE ATTORNEY GENERAL AND THE REFERENDUM RETURNING OFFICER

RESPONDENTS

- AND -

DIARMUID MacCONVILLE

APPELLANT

JUDGMENT of the Court delivered by Ms. Justice Irvine on the 31st day of July 2018

1. This is an appeal brought by Mr. Diarmuid MacConville against the order of the High Court (Kelly P.) made and perfected on the 26th day of June 2018.
2. By his order, Kelly P. refused the application of Mr. MacConville to be substituted as "the Applicant/ Intended Petitioner in the within proceedings". He also refused Mr. MacConville's application that he state a case for the opinion of the Supreme Court under s. 55 of the Referendum Act 1994 ("the 1994 act").
3. To adjudicate upon this appeal it is necessary to briefly set out the background to the application made by Mr. MacConville in the High Court.
4. On the 5th June 2018, a Mr. Ciaran Tracey had applied to the President of the High Court for an order deeming the temporary referendum certificate for the 36th amendment to the constitution to be null and void. That application was treated as an application pursuant to Order 97 rule 3 (2) of the rules of the Superior Courts, for leave on the part of Mr Tracey to present a referendum petition to the High Court in respect of the provisional referendum certificate prepared and signed on Monday 28th May 2018 and published in Iris Oifigiúil on Tuesday 29th May 2018 concerning the outcome of the constitutional referendum held on the 25th May 2018. On hearing Mr. Tracey, directions were given concerning the hearing of his proposed application which was fixed for the 26th June 2018. Two other applications by intended petitioners seeking similar relief were also listed for hearing that day. By his order, the president directed that Mr Tracey give notice of his proposed application to the attorney general and also to the referendum returning officer and the referendum commission.
5. It is common case that the referendum in question sought to delete Article 40.3.3 from the Constitution and to replace it with a new Article.
6. Article 4.3.3. provides as follows:-

"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 sub section shall not limit freedom to travel between the State and another State.

This sub section 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."
7. If carried, the referendum proposed the deletion of that article and its replacement with the following wording:-

"Provision may be made by law for the regulation of termination of pregnancy."
8. The count in respect of the aforementioned referendum took place on the 26th May 2018. The number of votes in favour of the proposal was 1,429,981 and the number against 723,632 giving the Yes vote a majority of 706,349.
9. Prior to the hearing scheduled for the 26th June 2018, in correspondence forwarded to the High Court which concluded with a letter from Mr. Tracey dated the 19th June 2018, the President was notified that Mr. Tracey had agreed with the respondents to withdraw his application for leave to present his referendum petition. He had agreed with the respondents and the notice party, the

Referendum Commission, that he would bear his own costs.

10. Having regard to the aforementioned agreement, which had been committed to writing in the correspondence forwarded to the Court, the President, in the presence of the parties and their legal representatives, struck out the proceedings with no order as to costs.

11. Immediately following the making of the aforementioned order by the President, Mr. MacConville applied to the court seeking an order that he be substituted for Mr. Tracey in the proceedings which had at that point in time been struck out.

12. In support of his application Mr. MacConville maintained that he had a statutory right to be substituted for Mr. Tracey and contended that there was precedent to support his application.

13. Having heard Mr. MacConville as to his alleged entitlement to be substituted for Mr. Tracey, the President heard submissions from counsel for the respondents after which the High Court judge gave his ruling.

The ruling of the President of the High Court

14. The President advanced three reasons for refusing Mr. MacConville's application. First, in circumstances where Mr. Tracey's proceedings had been struck out by agreement prior to his application, there were no proceedings within which Mr MacConville might be substituted as Applicant/Intended Petitioner. Second, it was clear from the 1994 Act, and in particular s. 42(2) thereof, that the only person entitled to apply for leave to present a referendum petition was someone who had applied to do so within seven days after the publication in *Iris Oifigiúil* of the provisional referendum certificate which they wished to challenge. Whilst Mr. Tracey had commenced his proceedings within that time frame Mr. MacConville had not. Thus he was outside the time within which he might apply for leave to present a petition. Third, while s. 50 of the 1994 Act provides that, on the hearing of an application for leave to withdraw a referendum petition, a person may apply to the court to be substituted as a petitioner, it was clear that this section only applied to circumstances in which a referendum petition had been presented and leave had been granted by the High Court in that regard. In the present case, the leave application was never heard and no referendum petition was in being. That been so, there was no referendum petition to be withdrawn.

15. The President also refused to state a case to the Supreme Court pursuant to s. 55(1) of the 1994 Act in circumstances where he was satisfied that, in light of that provision, the opinion of the Supreme Court could only be sought in respect of a question of law arising at the trial of the referendum petition. The section did not apply in the circumstances of this case given that the court was not hearing a petition wherein any issue of law had emerged and in respect of which the opinion of the Supreme Court might have been sought.

Relevant statutory provisions

16. The sections of the 1994 Act material to this application are as follows:-

"42.(1) The validity of a provisional referendum certificate may, and may only, be questioned by a petition to the High Court (in this Act referred to as "a referendum petition") in accordance with this Act.

(2) A referendum petition in relation to a provisional referendum certificate shall not be presented to the High Court unless that court, on application made to it in that behalf by or on behalf of the person proposing to present it not later than seven days after the publication in *Iris Oifigiúil* of the certificate, by order grants leave to the person to do so.

(3) The High Court shall not grant leave under subsection (2) to present a referendum petition unless it is satisfied-

(a) that there is *prima facie* evidence of a matter referred to in section 43 in relation to which the referendum petition questions the provisional referendum certificate concerned, and

(b) that the said matter is such as to affect materially the result of the referendum as a whole.

(4) An application for leave to present a referendum petition may be made by the Director of Public Prosecutions or by any person who is registered or entitled to be registered as a presidential elector.

43.(2) Notwithstanding any other provision of this Act, a referendum petition shall not be dismissed on account of any informality in its contents which does not materially affect its substance.

44.(1) A referendum petition shall be presented by being lodged in the Central Office of the High Court not later than three days after the grant of leave by the High Court under section 42.

(2) (a) Subject to paragraph (b), a referendum petition (other than a petition by the Director of Public Prosecutions) shall not be accepted in the Central Office unless the petitioner lodges in the Central Office with the referendum petition security in the sum of £5,000 for any costs of the proceedings in relation to the referendum petition which may become payable by the petitioner.

(b) Where the court is satisfied that a petitioner is unable to lodge the amount specified in paragraph (a) or that the requirement would cause serious hardship, the court may require the petitioner to lodge such lesser amount as the court considers appropriate.

(c) The security required to be given by this subsection shall be given either by recognisance entered into by any number of sureties satisfactory to the court not exceeding four or by a deposit of money, or partly in one way and partly in the other.

49.(1) A referendum petition shall not be withdrawn without the leave of the court and in giving such leave the court shall be satisfied that the notice given by the petitioner pursuant to subsections (3) and (4) was reasonable and, in addition to the foregoing, where a referendum petition is presented by more than one petitioner the court, before giving such leave, shall be satisfied that all the petitioners agree to the withdrawal.

(2) Except in the case of a referendum petition presented by the Director of Public Prosecutions, when applying for leave

for the withdrawal of a referendum petition, the petitioner shall submit to the court an affidavit stating:

(a) the reasons for the proposed withdrawal, and

(b) that, to the best of the petitioner's knowledge and belief, neither an agreement nor an undertaking has been made or entered into in relation to the withdrawal of the petition in consideration of any payment or for any substantial reason not stated in the affidavit.

(3) Notice of intention to apply for leave to withdraw a referendum petition shall be given by the petitioner by the publication in at least two daily newspapers circulating throughout the State of a notice to that effect and the notice shall also state the time and place at which the application will be made and that any presidential elector may apply to the court to be substituted for the petitioner.

(4) Except in the case of a referendum petition presented by the Director of Public Prosecutions, a copy of the affidavit mentioned in subsection (2) together with notice of the time and place at which the application will be made shall be given by the petitioner to the Director of Public Prosecutions who may be represented at and, if the Director thinks fit, oppose the application.

(5) Where the referendum petition has been presented by more than one petitioner, the affidavit mentioned in subsection (2) shall, unless the court otherwise directs, be made by all the petitioners.

(6) The withdrawal of a petition pursuant to this section shall not affect the liability of any person (or of that person's estate) for the payment of costs previously incurred.

50.(1) On the hearing of an application for leave to withdraw a referendum petition, any person who, under section 42, would be eligible to apply for leave to present a referendum petition, may apply to the court to be substituted as a petitioner, and the court may, if it thinks fit, substitute the person accordingly.

(2) In case the court substitutes a petitioner under subsection (1) and is of opinion that the application for leave to withdraw the petition was the result of any agreement or undertaking the making of or entering into which is declared by section 155 of the Act of 1992 to be an offence, the court may direct that the security for costs given by the original petitioner shall remain as security for the costs that may be incurred by the substituted petitioner and that, to the extent of the sum named in the security, the original petitioner (and sureties, if any), shall be liable to pay the costs of the substituted petitioner.

(3) In case the court does not make a direction under subsection (2), security equal in amount to that which would be required in the case of a new referendum petition, and subject to the like conditions, shall be given by or on behalf of the substituted petitioner within the period of five days after the date of the order of substitution, and in case such security is not given no further proceedings shall be had on the referendum petition and the petition shall, at the expiration of the said period, become and be null and void.

(4) Subject to the foregoing provisions of this section, a substituted petitioner shall, as nearly as may be, stand in the same position and be subject to the same liabilities as the original petitioner.

55.(1) At any stage of the trial of a referendum petition the court may, if it so thinks proper, on its own motion or on the application of any party to the petition, state a case for the opinion of the Supreme Court on any question of law arising at the trial.

Discussion and decision

17. Having considered the submissions of Mr. MacConville and those advanced by Mr. Callanan S.C. on behalf of the state respondents and Mr McCullough S.C. on behalf of the Referendum Commission, the Court is satisfied that the application of Mr. MacConville made to the President on the 26th June 2018, is one that was misconceived as a matter of law.

18. The President was correct as a matter of law when he concluded that, in circumstances where Mr Tracey's proceedings had been struck out prior to Mr McConville's application, there were no proceedings subject to the court's jurisdiction within which he could be substituted as Applicant /Intended Petitioner. Mr McConville fails to appreciate that once proceedings have been struck out it is as if those proceedings never existed.

19. It is also abundantly clear that even if Mr. MacConville had made his application on the 26th June 2018 before Mr Tracy's proceedings were struck out, he could not rely upon any statutory entitlement to support that application. For reasons which will now be explained, the provision upon which Mr. MacConville wishes to rely and which is provided for in s. 50(2) of the 1994 Act does not apply in these circumstances under consideration. To demonstrate that this is so, it is necessary to examine a number of individual statutory provisions and the overall scheme of the 1994 Act.

20. As is apparent from the provisions of s. 50(1) of the 1994 Act, the court may entertain an application by a person to be substituted as a petitioner should the original petitioner seek to withdraw their petition under the provision of s. 49(1). Both sections, however, pertain to circumstances in which the High Court has already granted leave for the presentation of a petition under s. 42(2). That begs the questions as to who is to be considered a petitioner who requires the leave of the court to withdraw their petition.

21. Having considered the overall scheme of the Act it is the view of this court that ss. 49 and 50 of the Act apply only in circumstances in which the High Court has already granted leave for the presentation of a referendum petition under s. 42(2).

22. That this is so is clear from the structure of the Act which clearly differentiates between the "person" who proposes to present a referendum petition not later than seven days after the publication in Iris Oifigiúil of the provisional referendum certificate, as is provided for in s. 42(2), and the "petitioner" who, when granted leave, is thereafter entitled to present a referendum petition by lodging the same in the Central Office of the High Court within three days of the making of such order.

23. The change in language used in s. 44 to that deployed in s. 42(2) of the 1994 Act, is, as Mr. McCullough S.C. submits, of significant importance. The “person” who is entitled to seek leave to present a referendum petition in s. 42(2) is to be distinguished from the “petitioner” referred to in s. 44 who has obtained that leave.

24. On the facts of the present case Mr. Tracey was a person proposing to present a referendum petition under s. 42(2). He did not proceed with his leave application but instead choose to withdraw it, as he was entitled so to do. He never became a petitioner entitled to present a referendum petition as is provided for in s. 44 of the 1994 Act. Thus, he never reached the point at which he would have been entitled to lodge his referendum petition in the Central Office of the High Court.

25. In circumstances where Mr. Tracey never obtained leave of the court to present his proposed petition, the President of the High Court was correct to conclude that Mr. MacConville’s application to be substituted as petitioner was misconceived and was one to which neither s. 49(2) or s. 50 of the 1994 Act applied.

26. The referendum petition referred to in s. 49 must be one which was earlier lodged in the Central Office of the High Court by a petitioner who had been granted leave so to do. Mr. Tracey, however, was not such a petitioner. Further, he had not been granted leave and consequently had not presented a referendum petition.

27. It goes without saying that had Mr. Tracey obtained leave to present his referendum petition and had he lodged that petition in the Central Office of the High Court, he could not have withdrawn that petition otherwise than in accordance with the provisions of s. 49. That would have enabled Mr. MacConville to seek to be substituted as petitioner.

28. It is, perhaps, not surprising that once a referendum petition is presented, there should be, as was described by Mr. MacConville, a “dramatic procedure” before that petition can be withdrawn. The fact that the proposed withdrawal of a petition must, *inter alia*, be published in at least two daily newspapers, is understandable given that a referendum petition can only be presented after the court has determined that there is *prima facie* evidence of one of the matters referred to in s. 43 of the 1994 Act. Those matters include obstruction or interference with the conduct of the referendum, mistake or other irregularity such as to potentially materially affect the result of the referendum as a whole. That being so, one can see why the legislature has provided a mechanism whereby, should a petitioner for whatever reason decide to withdraw their petition, another person should be entitled to apply to take over the petition in order that the court might adjudicate upon the matters therein identified.

29. It follows from what has been earlier stated in the course of this judgement that Mr MacConville had no right to request the High Court on 26 June 2018 to state a case for the opinion of the Supreme Court. That application was not made, in the course of “the trial of a referendum petition” and thus did not fall within the provisions of section 55(1) of the 1994 Act.

30. Finally, Mr. MacConville’s appeal cannot be saved by the provisions of s. 43(2) of the Act because that section only operates to potentially save a referendum petition presented following the grant of leave by the High Court under s. 42.

Conclusion

31. For the reasons earlier stated in this judgment, Mr. Tracey did not require leave of the court to withdraw his application for leave to present his referendum petition in accordance with the provisions of s. 42(2) of the 1994 Act. Further, given that leave to present a referendum petition had not been granted to Mr. Tracey, Mr. MacConville could not in any event have been substituted in his place in terms of his proposed application given that the only person entitled to seek leave of the court to present a referendum petition must do so within seven days of the publication in *Iris Oifigiúil* of the provisional referendum certificate. Mr. MacConville was outside that time limit and there is no provision for the extension of that time limit. Further, it is also the case that by the time Mr. MacConville made his application for substitution there were no proceedings under the court’s jurisdiction within which he might have been substituted as applicant/intended petitioner.

32. Of greater significance is the fact that Mr. Tracey’s application to the High Court on the 26th June 2018 was not one to which ss. 49 and 50 of the 1994 act applied. Those provisions apply only to a petitioner who has been granted leave to present a referendum petition and thereafter has lodged that petition in the Central Office of the High Court. Mr. Tracey was not a petitioner in circumstances where he had not been granted leave to present a referendum petition pursuant to the provisions of s. 42(2) of the 1994 Act. Accordingly, Mr. MacConville had no statutory entitlement under s. 50(1) of the 1994 Act to apply to be substituted as a petitioner.

33. For the aforementioned reasons the court would dismiss this appeal.