

BETWEEN

ROBERT SINNOTT

PLAINTIFF

AND

THE MINISTER FOR THE ENVIRONMENT, COMMUNITY AND LOCAL GOVERNMENT, THE ATTORNEY GENERAL AND IRELAND

DEFENDANTS

JUDGMENT of Mr. Justice O'Connor delivered on the 30th day of March, 2017

**Introduction**

1. This judgment concerns the assessment of rights in the conduct of elections and referenda not only for an individual citizen but also for this Court in its role under the Constitution to vindicate those rights which are asserted. The plaintiff, who is a visually impaired person ("**VIP**"), claims that the executive arm of government has failed and will continue to fail to vindicate his right to vote secretly unless this Court grants the reliefs now sought in an Amended Statement of Claim for which leave to deliver has been sought following quite a saga in the course of concluding these proceedings.

**FACTS****The Plaintiff**

2. The plaintiff was born with nanophthalmia in his left eye and microphthalmia in his right eye. He explained that he had at best two percent or three percent of a young person's normal vision when growing. The plaintiff has an inspiring desire to learn and to participate. This is shown not least by having graduated with an honours degree in politics and sociology from University College Dublin (UCD) in 2000 in addition to other noteworthy academic achievements resting to date with his pursuit of a PhD in Irish from Trinity College Dublin (TCD) concerning Irish in Leinster. The plaintiff also said that he was proud, happy and lucky to be an active father of two young children.

**Change in Voting Ability**

3. The elections for local authorities and for the European Parliament on 5th June, 2009 were the last elections during which the Plaintiff was able to vote without assistance and without having to disclose his choice of candidates to another individual. Following the dislocation of the lens in his right eye subsequent to 2009, it was discovered that his retina was degenerating quickly. In short, the plaintiff expects to lose all of his remaining limited sight within the next few years.

4. At the general election held on 25th February, 2011, the plaintiff voted in the Dublin South Central Constituency. He was at pains to describe the well intentioned help given by the polling clerk while the clerk did not realise the plaintiff's embarrassment when his preference of candidates was read aloud by the clerk initially and then after the ballot paper was completed by the clerk according to the plaintiff's instructions.

5. At the election for the President of Ireland and two other referenda held on 27th October, 2011, the plaintiff was again assisted by a clerk who recited his choices less loudly. The plaintiff availed of similar facilities for the referenda held on 31st May, 2012. The plaintiff was unable to vote in the referenda concerning the Seanad and a Court of Appeal on 4th October, 2013 due to the change of his polling station, access to which he regarded as difficult and unsafe due to his visual impairment.

6. In a four page letter dated 7th March, 2014 from the plaintiff's solicitors, the defendant Minister was advised about the plaintiff's earlier representations to the franchise section of the Minister's department ("**the franchise section**") concerning the absence of a mechanism for independent voting and other details available to the franchise section including the discussion about tactile templates considered by the National Council for the Blind in Ireland ("**NCBI**") before requesting an undertaking that there would be a mechanism to allow the plaintiff to vote secretly in the elections due to be held on 23rd May, 2014 for his local authority and for the European Parliament.

7. Despite the delivery of the Plenary Summons and Statement of Claim on 26th March, 2014, with a Defence delivered on 9th April, 2014 in these proceedings, the plaintiff had the unhappy experience of wondering whether his choices in the elections held in May, 2014 were actually followed by the polling clerk because the numbering of his choices as recited at a particular stage of marking the ballot paper identified a preference which he had not by then identified.

8. The plaintiff for the referendum on the Thirty-Fourth Amendment of the Constitution (Marriage Equality) Bill 2015 to allow for same sex marriage on 22nd May, 2015 worked around the necessity to disclose his choice of "yes" or "no" by asking the polling clerk to put the plaintiff's thumb on one box and his index finger on the other. When the clerk moved away, the plaintiff marked the paper selecting the "yes" or "no" box by reference to where his fingers had been pointed by the clerk. The plaintiff then moved and placed the paper in the ballot box himself. The plaintiff's delight at finding this solution was tempered by his realisation that the ballot paper could have been facing out to disclose his choices as he moved to drop it in the ballot box.

9. This prompted the plaintiff to question the apparent acceptance that he could rely on the integrity of polling clerks or some other official to present or mark ballot papers correctly. He rhetorically asked whether it would be acceptable to provide that a sighted person cast a vote by relying on a member of An Garda Síochána to carry out all or part of the secret ballot procedure.

**Progress of Proceedings**

10. Notwithstanding the efforts made, the trial of these proceedings did not commence until 12th July, 2016. At that stage the plaintiff had been given liberty on 3rd February, 2015 to amend the Statement of Claim in order to incorporate references to referenda and further elections while the Defence (delivered on 18th March, 2015) introduced a plea about trials conducted by the National Disability Authority ("**NDA**") in June, 2014 of three methods to assist VIP voters in voting independently and with minimal physical assistance from third parties.

11. Following the completion of oral evidence on 20th July, 2016, and the exchange of written legal submissions over the long vacation, the Court reconvened to hear closing oral submissions on 1st November, 2016. Without any advance notice, counsel for the

defendants interjected while counsel for the plaintiff was making a submission about referenda to advise that the defendant Minister had made on 20th October, 2016 regulations entitled Electoral Regulations 2016 [S.I. 537 of 2016] ("**the 2016 regulations**") which provide for a ballot paper template and thereby allowing VIPs to vote independently at referenda. Official notice of those regulations was published in Iris Oifigiúil on Friday, 28th October 2016. There was no reference to the prospect of the 2016 regulations in the defendants' written submissions dated 14th October, 2016. Counsel for the defendants maintained that the making of the 2016 regulations should not alter the plaintiff's stance and final oral submissions.

12. Suffice to say that I agreed that the plaintiff's legal team should have an opportunity to recast their submissions for economy of time and ultimate effectiveness of the reliefs which might be granted by this Court in light of this development.

### **Declarations Sought**

13. Towards the end of the reconvened oral submissions on Tuesday, 20th December, 2016, counsel for the plaintiff put forward the following declarations to meet the plaintiff's concerns about the defendant Minister's position:-

*"A declaration that the defendants were and are under a duty to:-*

*(i) provide by regulation made under s. 94(5)(j) of the Electoral Act 1992, as amended by the Electoral (Amendment) Act 1996 for arrangements to facilitate blind and visually impaired persons to vote by secret ballot in general, local, European elections and in referendums where it is reasonably practicable, economical and effective to do so;*

*(ii) facilitate the right of blind and visually impaired voters pursuant to declaration (i) in order to vindicate their constitutional right to vote by secret ballot".*

14. I allowed counsel for the defendants to obtain instructions over night while further oral submissions by counsel for the plaintiff were completed. This elongated story needed to evolve because it is important that the Court is directed to the real gravamen as it exists at the end of the trial.

15. The position of the defendants on 21st December, 2016 was that the declarations now sought were "*anything but a matter of housekeeping*" as depicted. Ultimately, it was agreed that a formal application to amend the Statement of Claim should be heard on 7th February, 2017 when the defendants' oral submissions on all matters would be completed irrespective of the outcome to the application to amend the Statement of Claim.

### **Motion to Amend**

16. Having regard to the substantive issues which are detailed later in this judgment, it is opportune at this stage to decide on the leave sought by the plaintiff by way of Notice of Motion issued on 31st January, 2017.

17. Order 28(1) of the Rules of the Superior Courts ("**RSC**") permits the Court "*at any stage of the proceedings*" to grant leave for the amendment of pleadings "*in such manner and on such terms as may be just*" while the amendment shall be as "*necessary for the purpose of determining the questions in controversy between the parties*". The Supreme Court in *Croke v. Waterford Crystal Limited* [2005] 2 I.R. 383 held that this "*is intended to be a liberal rule*" subject to taking into account other factors.

18. O'Sullivan J. in *Cornhill v. Minister for Agriculture* [1998] IEHC 47 stated at para. 21 that:-

*"an amendment to the pleadings should be allowed if it would have been appropriate in the original pleadings, [and] would have withstood an attack under Order 19(28) of the RSC and provided no injustice (in the sense contemplated by the authorities) is thereby done to the opposing party."*

19. As the events and submissions emerged I see no injustice or prejudice arising for the defendants in granting leave to deliver the Amended Statement of Claim exhibited to the grounding affidavit of the plaintiff sworn on 30th January, 2017. Moreover, it is indeed good housekeeping and allows the Court to focus on the issues now in controversy between the parties.

### **NCBI**

20. The NCBI is a registered charity which provides support to VIPs irrespective of age or degree of vision loss. It is funded through public donations and by the Health Service Executive.

21. Ms. Fionnuala Murphy who has qualifications in journalism and public relations joined the NCBI in 2006. She explained the work of the NCBI on the accessibility of voting for people with sight loss since that time. The following chronological summary from 2006 to 2010 indicates an increasing awareness about the issues aired by the plaintiff in these proceedings:-

July, 2006 – NCBI sent a paper entitled "*Accessible Voting For All*" ("**AVP**") to the then defendant Minister who was implementing the government's decision to use electronic voting machines. The AVP recommended a tactile voting device ("**TVD**") or more specifically a tactile ballot template as a cost effective and feasible option for VIPs to choose.

November, 2009 – Following the abandonment of electronic voting, the NCBI discussed its revised AVP with the franchise section which led to a response that its sectoral plan under the Disability Act 2005 included an objective to provide accessible voting information. The franchise section indicated a commitment to conducting its own research.

May, 2010 – NCBI furnished a report to an Oireachtas Joint Committee which recommended training for polling clerks, the retention of the right for a VIP to use a trusted companion to assist at voting and the development of TVDs.

December, 2010 – Mr. Falvey of the franchise section in an email (which was disclosed for these proceedings) noted in the context of the proposed TVD that any review of electoral practice requires "*an appropriate balance [to be] maintained between accessibility and the secrecy and integrity of the ballot and that any new arrangements introduced would be workable*".

### **The Franchise Section**

22. Mr. Falvey, who is an assistant principal, joined the franchise section in October, 2010. He gave evidence that the disability sectoral plan which was updated for 2010 to 2012 included a commitment to look at legislative, logistical and financial implications of

independent voting. In the disability sectoral plan for 2013 to 2015, the commitment extended to enhancing access to voting for people with visual or intellectual disability.

### **National Disability Authority**

23. The National Disability Authority ("NDA") has as its principal statutory function the provision of advice to the Minister for Justice and Equality. In August, 2012 it sent a discussion paper on accessible voting to the defendant Minister's department which led to an agreement to trial the use of templates at a referendum and to consider a simulated exercise for a general election. However, the referendum concerning children in November, 2012 and subsequent referenda did not allow for the use of TVDs.

### **Pakflatt Ltd**

24. Following the announcement of a public competition by the Home Office of the United Kingdom in 1999 to develop a device for a blind person to mark a ballot paper independently and in private, Mr. Patrick McGonagle (chartered engineer) and the team in Pakflatt (UK) Limited invented, developed and provided TVDs. The multi-disciplinary team of Pakflatt have developed the TVD concept to an impressive extent since the very first use of TVDs at the general election in the United Kingdom on 7th June, 2001. 25. Mr. McGonagle explained how TVDs have been used in the following types of elections:-

- (i) UK parliamentary elections – first past the post;
- (ii) European parliamentary elections in England and Wales – proportional representation with a closed list;
- (iii) European parliamentary elections in Northern Ireland with a single transferable vote;
- (iv) Local government elections in Northern Ireland with a single transferable vote which involves the ranking of candidates in order of preference among other electoral systems for which TVDs supplied by Pakflatt are used.

### **TVDs**

26. There are two distinct types of TVD:-

- (i) the hinged tab;
- (ii) the square and circular aperture.

The hinged tab TVD is suitable where the voter makes a single choice or multiple choices of equal value. Therefore, in a multiple vacancy election where there are ten candidates but only three seats available, this requires a voter to mark opposite three choices.

27. The square and circular aperture TVD is suitable in a supplementary vote where one has a first and second choice. It is indeed difficult to convey in writing how the TVDs work but suffice to say that there are four features of TVDs which assist voters who are totally blind or partially sighted to identify the correct marking positions:-

- (i) embossed numerals;
- (ii) the Braille equivalent of the numerals;
- (iii) a black number on a white background which allows for a contrast to be identified by those partially sighted;
- (iv) raised finger tabs.

28. In England, Wales and Northern Ireland hinged tabs are used for all elections while the aperture TVD can be used also in England and Wales.

29. Mr. McGonagle identified that the single transferable vote as used throughout the island of Ireland is particularly challenging for blind voters when there are more than four or five candidates. In a first past the post system, the voter only has to remember one candidate and their position on the ballot paper. Even with multiple vacancies where the choices are of equal value, the voter only needs to remember the candidates of choice and where they are located on the ballot paper. In a Single transferable vote ("STV") situation, the voter needs to remember or identify the candidates and all of their positions on the ballot paper.

### **Proposals**

30. Mr. McGonagle modestly answered questions about the success of Pakflatt by indicating that it had a distributor in Illinois in the United States where its products like its "Benjamin Franklin Voting Booth" are now used in 700 counties across 40 states. This accounts for some 50% of its total revenues. This exporting success for Northern Ireland was recognised by the conferral of an MBE in 2012 on Mr. McGonagle. I mention these facts to underscore the impression given that nothing is impossible to achieve when there are inspired, motivated and experienced members of various disciplines engaged to solve a problem.

31. The Court was told that Pakflatt had a project in hand which will facilitate and improve the use of TVDs in STV elections. Phase One of the project used a simulated procedure involving ten candidates on a ballot paper. The polling clerk sat on one side of a partition which allowed the voter to hear the order of candidates whenever the voter wanted to enter or check preferences without disclosing the voter's choice when completing the ballot paper before putting it in the ballot box. Phase Two involves the preparation of an audio file listing the names and political party (if any) of each candidate which can be accessed by headphones in the polling booth used by the VIP instead of having to rely on a polling clerk.

32. Having regard to Mr. McGonagle's evidence particularly, I conclude that the problems in producing TVDs and associated technology which might be caused by long lists of candidates for the PR STV system used for our elections could be overcome with the ingenuity and experience demonstrated by Mr. McGonagle and Mr. Falvey. In addition, I am satisfied from the evidence that the PR STV system used in the Assembly elections in Northern Ireland has not been an insuperable obstacle. In short, the costs and willingness of the defendant Minister to introduce regulations for General elections and the European Parliament like the 2016 regulations remain the factors to be identified.

### **National Disability Authority Trials**

33. In June, 2014 twenty six adults (seventeen of which had complete sight loss) participated in tests organised by the NDA. The NDA report published in January, 2015 described the phone, TVD and computer methods of voting which the group used to exercise votes in a fictitious but realistic election. Although appearing terse and without giving due acknowledgment to the in depth trials with

consequential analysis, this Court cannot decide whether the plaintiff should be offered one of the tried methods to increase his opportunity to vote independently and in secret. The most that this Court can do in this context is to assess whether the defendant Minister is obliged by law to fulfil a duty in respect of which there is proof on the balance of probabilities of past or existing dereliction.

### Priorities

34. The fourteen page chronological summary from 2006 to June 2016 (which referenced the core book of documents relied upon by the parties at trial) produced on day five of the trial, supports my conclusion that the 2009 commitment to research by the defendant Minister's department and the later assurance for referenda and legislative change did indeed slip down the list of priorities for the franchise section and more particularly for the defendant Minister.

### Other priorities

35. Mr. Falvey explained that the franchise section had the following "headline work items" for 2011:-

February 2011 – general election

June 2011 – introduction of Electoral (Amendments) Bill 2011 for the reduction of the number of TDs, mandatory by-elections within six months and reimbursement of expenses for the election of President.

July, 2011 – Establishment of the constituency commission which required service for eleven months.

November, 2011 – election for President with two referenda.

December, 2011 – Electoral (amendments) political funding bill was initiated.

36. Similar commitments arose in the years 2012 to 2015, culminating with the general election in February, 2016 and the initiation of the Electoral (Amendment) No. 2 Bill together with provision for the Citizens' Assembly in July, 2016.

37. Mr. Falvey disclosed in evidence that a proposal had been made in June, 2016 to the Department of Public Expenditure and Reform for the provision of a TVD option in referenda having sought legal advice on such a proposal in or about March, 2016. The cost of such a proposal was in the region of €42,000 which was quite insignificant compared to the multi-million euro budget for a referendum.

### International Developments

38. Professor Gerard Quinn of the Centre for Disability Law and Policy in NUI Galway prepared a detailed report at the request of the plaintiff which was admitted as evidence of the international policy and practice in the area. The report drew attention to the concerns of the European Commission expressed in 2014 about the obstacles facing citizens in exercising their electoral rights effectively. He also referenced Recommendation CM/Rec (2011)14 of the Committee of Ministers which is meant "*to be taken seriously*" by the member states of the Council of Europe in the framing of their laws and policies and for the purpose of highlighting problems affecting the secrecy of the ballot for those with a disability. Prof. Quinn identified how the United Kingdom, Poland, Austria, Malta, Spain, Germany, Australia and the United States of America had all provided for TVD voting.

39. Mr. Michael Marsh (fellow emeritus of TCD) was engaged to prepare a report for the defendants in this action. This report expressed scepticism about finding a solution to all of the plaintiff's grievances relating to independent and secret voting. Mr. Marsh had not been informed of the Minister's intention to introduce the 2016 Regulations prior to preparing the report or giving evidence on 20th July, 2016.

40. The upshot of the expert evidence is that there is not one solution to all of the plaintiff's concerns. In fact, the plaintiff accepted that further research and development needs to be undertaken. The thrust of the plaintiff's complaints is that nothing further will be done quickly or at all unless this Court intervenes in the limited way that it can in granting the reliefs now.

### The Constitution

41. Article 16 of the Constitution governs the election of Dáil Éireann and para. 4 provides that:-

*"Voting shall be by secret ballot."*

42. Article 18 of the Constitution governs the Seanad and para. 5 provides that voting shall be "*by secret postal ballot*".

43. Article 47 of the Constitution governs referenda for constitutional change and does not expressly provide for a secret ballot stating:-

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

*4. Subject as aforesaid, the referendum shall be regulated by law."*

It is indeed a well enshrined norm that a person votes by secret ballot in a referendum and the 2016 Regulations reinforced a recognition of that norm.

44. Article 28A of the Constitution concerning local government provides:-

*"1. The State recognises the role of local government in providing a form for the democratic representation of local communities, in exercising and performing at local level powers and functions conferred by law and in promoting by its initiatives the interests of such community.*

*2. There shall be such directly elected local authorities as may be determined by law and their powers and functions shall, subject to the provisions of this Constitution, be so determined and shall be exercised and performed in accordance with law.*

*3. Elections for members of such local authorities shall be held in accordance with law not later than the end of the fifth year after the year in which they were last held.*

4. Every citizen who has the right to vote at an election for members of Dáil Éireann and such other persons as may be determined by law shall have the right to vote at an election for members of such of the local authorities referred to in section 2 of this Article as shall be determined by law.

5. Casual vacancies in the membership of local authorities referred to in section 2 of this Article shall be filled in accordance with law."

45. Regulation 30(1) of the Local Elections Regulations 1965 requires that local government elections shall be by secret ballot.

#### **Section 94(5)(j) of the Electoral Act 1992**

46. On Christmas Day, 1996, the Electoral (Amendment) Act 1996 ("the 1996 Act") was enacted and it inserted the following provision into the Electoral Act 1992 ("the 1992 Act"):-

"94(5) The returning officer shall provide at each polling station –

... ..

(j) Such arrangements as the Minister may provide for by Regulations as may serve to facilitate voters with visual impairments to mark their ballot papers without assistance."

47. Until the introduction of the 2016 Regulations, the system provided by s. 103(3) of the 1992 Act only provided that where a presiding officer is satisfied that an elector's sight is so impaired that he is unable to vote without assistance:-

"The elector may request that his ballot paper shall be marked for him by a companion and, subject to subs. (4), the companion may go with the elector into one of the compartments in the polling station and there shall mark the ballot paper for the elector and shall fold it and show the back of the folded paper to the presiding officer so as to disclose the official mark and forthwith place the mark in the ballot box."

48. Section 106(5) of the 1992 Act provides that in the absence of a companion:-

"the presiding officer shall, in the presence of the elector and the personation agents and no other person, mark a ballot paper as instructed by such elector and shall then fold it and place it in the ballot box."

49. Section 103(6) of the 1992 Act enables a presiding officer to refuse a request if in his opinion such an action by the officer would interfere with the proper discharge of his duties or would unduly obstruct the voting of other Dáil electors.

#### **Case law**

50. In *McMahon v. Attorney General* [1972] I.R. 69 the plaintiff challenged the procedure in Dáil elections by which a voter's number on the register of electors was recorded on the counterfoil of his ballot paper. This meant that it was possible in a complex procedure where enquiries had to be made into spoiled ballot papers to ascertain how he voted, albeit that the chance of this ever happening was extremely remote.

51. The High Court (Pringle J.) held that the procedure for recording the voter's number on the counterfoil for possible examination violated the right to a secret ballot as enshrined by Article 16 of the Constitution. The Supreme Court by a majority of three to two, and on slightly different reasoning, dismissed the State's appeal and held that the legislation in issue was repugnant to the Constitution. Ó'Dálaigh C.J. referred to the requirement of secrecy in the absolute sense. He stated (at) p. 104:-

"Limited secrecy is not secrecy: it is something less than secrecy."

He continued (at p. 106):-

"Article 16, s. 1, sub-s. 4 of the Constitution speaks of voting by secret ballot. The fundamental question is: secret to whom? In my opinion there can be only one plain and logical answer to that question. The answer is: secret to the voter. It is the voter's secret. It is an unshared secret. It ceases to be a secret if it is disclosed. The Constitution guarantees the voter that his vote would be secret. In my opinion the Constitution therefore requires that nothing shall be done which would make it possible to violate that secrecy."

52. I accept the submission made by counsel for the plaintiff that the following statement of Ó'Dálaigh C.J. at p. 105 is particularly relevant to the developments such as TVDs:-

"The proper principle to be applied here is that stated in the decision of this Court in *Quinn's Supermarket Limited v. The Attorney General*: the right to vote of the incapacitated person has to be reconciled by the general right to vote by secret ballot. The latter right, which by its very nature is a guarantee of the free exercise of the right to vote, cannot be made the means of preventing the exercise of the right to vote simply because the incapacity of some electors renders absolute secrecy impossible. A law which contained provisions which enabled such a person to vote with the maximum degree of secrecy compatible with his incapacity would not only be desirable but would be necessary [emphasis added by this Court] to implement the right to vote conferred on such a person by the Constitution. I do not look upon the exercise, with less than full secrecy, of the incapacitated voter's franchise as being based on the principle of waiver by the voter; willy-nilly and of necessity his vote cannot be cast otherwise".

#### **Oireachtas Mandate**

53. The Oireachtas over twenty years ago recognised that the Minister should be empowered to make appropriate arrangements for visually impaired voters in order to vindicate their right to exercise their franchise by secret ballot where such systems are developed or can be developed. This followed a constitutional imperative and is consistent with the recognition of the right of those with disabilities to vote independently and in secret where reasonably possible.

#### **Draper**

54. The case of *Draper v. The Attorney General* [1984] I.R. 277 was cited in submissions also. This unsuccessful application was brought by a long time sufferer of multiple sclerosis who could not go to a polling station without severe physical discomfort. She

sought a declaration that she was entitled to a postal vote or in the alternative a declaration that insofar as the legislation did not provide for same, it was unconstitutional.

55. The appeal to the Supreme Court involved a challenge to the constitutionality of the legislation and therefore the then one judgment rule (then Article 34.4.5 of the Constitution) applied. It is important to remember at this stage that the plaintiff is not challenging the constitutionality of the 1992 Act as amended but rather he challenges the alleged failure of the defendant Minister to consider or introduce Regulations like the 2016 Regulations which concern referenda, for other elections routinely held as provided by the Constitution.

56. In *Draper*, a Joint Oireachtas Committee some twenty years previously in 1962 was alerted to "the dangers of extending too widely the facilities for postal voting which are more easily open to abuse than the provisions for voting in person" before recommending the provision of postal voting for members of the defence forces.

57. This Court is indeed attentive to the express reservation by O'Higgins C.J. in the last paragraph of the judgment in *Draper* (p. 29):-

*"The trial judge (McMahon J.) expressed the view that the right to vote "is a personal right which is entitled to the benefit of the guarantee contained in Article 40.3.1, of the Constitution." The Court reserves its opinion as to whether this view of the nature of the right is correct. Even if the right were such a personal right, the Court is not satisfied, for the reasons already given, that the State has failed to defend and vindicate this right. Accordingly, this appeal will be dismissed."*

58. By way of similar reasoning and conclusion on the debate had in these proceedings relating to an individual's right to vote in secret, this Court also finds it unnecessary in view of its ultimate determination to decide on whether the plaintiff has a right by virtue of Article 40.3.1 to vote independently and in secret as he seeks.

### **Mutual respect between arms of the State**

59. The Court notes at this stage that the respect which it owes to the executive and in particular the defendant Minister in these proceedings is a form of restraint. In the words of Hamilton C.J. in *District Court Judge McMenamin v. Ireland* [1996] 3 I.R. 100 at 136:

*"I do not propose to make a declaration giving effect to my views because, having regard to the respect which the separate organs of government, the legislature, the Government and the judiciary have traditionally shown to each other, I am satisfied that once the Government is made aware of the situation with regard to this constitutional injustice, it will take the necessary steps to have the matter remedied in accordance with law and in accordance with its constitutional obligations."*

### **When does the Court intervene?**

60. In *Doherty v. The Government of Ireland and the Attorney General* [2011] 2 I.R. 222, the plaintiff who was then a Senator hoping to be a Teachta Dála ("TD") sought a declaration that there had been unreasonable delay on the part of the Government in moving the writ for the by-election in the Donegal South West Constituency since a vacancy occurred on 6th June, 2009. All of the writs for the by-election which had been moved in Dáil Éireann from July, 2009 to September, 2010 had been defeated by the exercise of the Whip of the Government to defeat the moving of the writ. The delay in moving the writ for the vacancy was the longest in the history of the State. By the time the proceedings came on for hearing it was indicated that the Government intended to move the writ for the by-election in the first quarter of 2011.

61. Kearns J. at p. 235 under the heading "Justiciability" explained:-

*"[25] When the hyperbole associated with many of the submissions advanced on behalf of both the applicant and the respondents is dispensed with in this case, particularly those on behalf of the respondents which suggested that it would "tear asunder" the tripartite division of powers under the Constitution for the court to express any view on the matters raised, it seems to me that a fairly basic and simple question requires to be addressed. As the provisions of Article 16.7 of the Constitution delegate to the Oireachtas the power to legislate for elections to membership of Dáil Éireann, including the filling of casual vacancies, and as the Oireachtas has purportedly executed that power by enacting s. 39(2) of the Electoral Act 1992, does the court have a function in determining whether the provisions of s. 39(2) require to be interpreted as meaning that a by-election is to be held within a reasonable time, or, as the respondents submit in the alternative, the terms of the subsection leave the Dáil at large as to whether and when it shall direct the Clerk of the Dáil to issue a writ directing the returning officer to cause an election to be held of a member of the Dáil to fill the vacancy mentioned in the writ."*

[26] A useful starting point is to consider the approach taken to this issue in the High Court by Geoghegan J. in *Dudley v. An Taoiseach* [1994] 2 I.L.R.M. 321.

[27] In that case the applicant was a student residing in the Dublin South Central constituency. Some fourteen months after the sitting Dáil Deputy, John O'Connell resigned his Dáil seat, the vacancy had not been filled by a by-election. Numerous attempts in the Dáil to have the writ moved for a by-election had been successfully resisted by the Government and its supporters. The applicant argued that, as a registered elector in the constituency, his rights to vote at common law, by statute and under the constitution were being infringed.

[28] At p. 323, Geoghegan J. stated:-

*"Having regard to Article 16 of the Constitution and in particular s. 7 of that Article which envisages that casual vacancies will be filled and that the filling of them shall be regulated in accordance with law, there must, I think, be at least an arguable case that there is a constitutional obligation to hold a by-election within a reasonable time of a vacancy occurring."*

62. In marked parallel with the situation arising in these proceedings Kearns J. stated at p. 242 of the judgment:-

*"[49] As has been emphasised, this is not a case in which the constitutionality of s. 39(2) of the Electoral Act 1992 has per se been called into question. Rather, it is a case in which the applicant invites the court to hold that, by reference to*

*the aforesaid constitutional provisions, the Electoral Act 1992 and, in particular, s. 39(2) thereof, must be operated and applied by the Government in a manner which upholds and reflects the constitutional position....*

*[50] I am satisfied that this is a justiciable controversy...*

*[57] To read s. 39(2) of the Electoral Act 1992 as being subject to the requirement that the writ be moved **within a reasonable time** (emphasis added by this Court) does no violence to the express wording of the subsection. Rather it gives effect to the subsection in a manner which honours the constitutional provisions in question."*

### **Application of facts**

63. I summarise the position by pointing to the twenty year old power given to the Minister to introduce regulations like the 2016 Regulations. The actual introduction of the 2016 Regulations underscores the acceptance that TVDs could have been made available for the multiple referenda held since October, 2009 (to enable the ratification of the Treaty of Lisbon) and certainly for the referendum to allow for same sex marriage law on 22nd May, 2015 by which stage the plaintiff had amended his Statement of Claim to incorporate references to referenda.

64. The Court empathises with the plaintiff when he complains about the lack of information emanating from the franchise section or any other part of the defendant Minister's department relating to the actual steps taken or to be taken to emulate the TVD facilities available to VIPs in Northern Ireland and detailed by Mr. McGonagle of Pakflatt. I note in passing that there were exchanges between the franchise section and Pakflatt in November 2012 but they did not lead to any decision for the franchise section to plan research or tests.

65. The defendants' reliance on the 2014 tests undertaken ad hoc to the NDA with some input from the franchise section and the other commitments from 2011 to 2015 of the franchise section do not assuage but rather accentuate the concerns of the plaintiff as shared by this Court that the defendant Minister did not afford sufficient or reasonable recognition of the duty imposed on him by the Oireachtas and the Constitution to assure a secret ballot as is reasonably practicable. This Court is as concerned as Kearns J. was in *Doherty* about the year old delay in moving a writ for a by-election.

### **Submissions**

66. Senior counsel for the plaintiff stressed inter alia that:-

- (i) *"Up to the very last gasp of the submissions"* for the State on 8th February, 2017 it was maintained that the defendant Minister was not under any duty to accord the plaintiff with the arrangements even those introduced by the 2016 Regulations.
- (ii) Given that stance, the defendant Minister regarded his power under the 1996 Act as discretionary which meant that future Regulations could undermine the availability or use of TVDs in referenda. Senior counsel was careful to mention the power of either House of the Oireachtas to annul such Regulations within the prescribed 21 day period as particularly set out in s. 3(2) of the 1992 Act. However, it was submitted that that does not take away from the defendant Minister's clear obligation to appreciate and act according to his duty.
- (iii) The making of the 2016 Regulations did not have the status of the statutory provision like s. 17(5) of the 1992 Act (introduced by s. 4 of the 1996 Act) which allows for a "special voters list" of those who can cast votes by post.
- (iv) Following the judgment in *Draper* the Oireachtas granted the wish of Ms. Draper who suffered from a chronic disability to have the facility of voting other than at a polling station. In effect, s. 15(d) of the 1992 Act (as inserted by the 1996 Act) is a recognition by the Oireachtas of a disabled person's right to vote having regard to maintaining the integrity and secrecy of the ballot. This facility is not subject to the whim or discretion of the defendant Minister save insofar as the defendant Minister may make Regulations for the implementation of that statutory provision in favour of disabled voters.
- (v) The plaintiff does not want to foist his wish to vote independently and in secret on other VIPs who may continue to vote with a trusted friend or with the help of a polling clerk, provision for which exists already. The plaintiff merely asks that the defendant Minister when exercising his powers and his discretion should have regard to the underlying constitutional duty to afford the maximum degree of practical secrecy to a VIP when voting.

### **When must a statutory power be exercised by a Minister?**

67. The Supreme Court in *Sheahan v. Ireland* [1987] I.R. 550 held in allowing the appeal by the defendant that the power of a Minister to commence a statutory provision imposing liability on local authorities for failure to maintain public roads [s. 16(7) of the Civil Liability Act 1961] was an enabling provision in respect of which the discretion was vested in the Government. In that case the Supreme Court (McCarthy J. dissenting) , agreed that the specific provision could be dealt with in that way. Interestingly, Finlay C.J. reserved his view about whether the courts in a case like that which imposes a significant burden on the exchequer could be the subject of a mandamus order. In a similar approach adopted in the dissenting judgment, McCarthy J. felt that an opportunity should be given to allow the Government to adduce evidence to afford justification for not bringing the section into force.

68. In *Ó Maicín v. Ireland & Ors.* [2014] 4 I.R. 583 which concerned a native Irish speaker's wish to be tried before a bilingual jury, Clarke J. aptly in the context of the current focus in these proceedings stated at para. 232 on p. 643:-

*"The State has, of course, a duty to vindicate any established constitutional entitlements. If a constitutional entitlement can be established and if there is a means by which it can be vindicated by the exercise of a power vested, even on a discretionary basis, in the State or an organ of the State, then there will always be a strong case for the court declaring an obligation on the part of the State to exercise any discretion in a manner which would vindicate the constitutional right established. The real issue, it seems to me, is as to whether the constitutional right asserted in this case can be said to be established and to apply in the circumstances of this case in the first place. If it is so established and applicable, then clearly the court is obliged to take whatever measures may be appropriate to seek to ensure that such a right is vindicated."*

69. The Constitution, in the words of O'Dalaigh C.J. in *McMahon*, guarantees the plaintiff that his vote will be secret and that the

courts require “that nothing shall be done which would make it possible to violate that secrecy”. Therefore, the Oireachtas and the executive may be restrained by this Court from violating that secrecy.

70. More apposite to the issue in these proceedings is the pragmatic approach adopted by the legislature to confer powers on the defendant Minister to make arrangements by regulations “as may serve voters with visual impairments to mark their ballot papers without assistance”. I accept that the legislature when amending the 1992 Act was conscious of its obligations under the Constitution and recognized modern polling norms when it provided arrangements to protect the secrecy of the ballot. I also acknowledge the persuasive submissions described at para. 66 above.

71. Even if the defendant Minister had indicated an intention to introduce TVDs after an appraisal of the cost and effectiveness of TVDs for VIPs (and it is noteworthy that no such indication was given prior to the 2016 regulations or thereafter) this Court is fortified in its conclusions by the recent judgment of the United Kingdom Supreme Court in *R. (Miller) v. Secretary of State* for exiting the European Union (appellant) and Ors. [2017] UKSC 5 where at para. 35 it was stated:-

*“...ministers’ intentions are not law, and the courts cannot proceed on the assumption that they will necessarily become law. That is a matter for Parliament to decide in due course. The issues before us must be resolved in accordance with the law as it stands...”*

72. The delay in introducing the 2016 Regulations and the history of competing priorities within the franchise section which were relied upon by the defendant in these proceedings to excuse the lack of information available to the plaintiff about studies or analyses to be undertaken (as mentioned for example in the disability sectoral plans of the defendant Minister’s department) cannot be ignored by this Court. The plaintiff comes to this Court seeking declarations for the Executive to heed. The Court recognises that it cannot and should not require the Minister to adopt TVDs or any particular arrangement but it can make a declaration which may guide the defendant Minister about the effect of S 94 (5) (j) of the 1992 Act as inserted by S 3 (1) of the 1996 Act in conjunction with the duty under the Constitution to assure a secret ballot as far as is reasonably practicable.

73. Considerable discussion occurred during the hearings of this case about the wording of the declarations now sought as set out at para. 13 above. It is my view that the Court should not make declarations in the public law sphere which create further uncertainty and potential unnecessary litigation while declarations should be easily interpreted by the officer who will be most affected by the declarations.

74. In view of the concerns described earlier about delay and the lack of transparency as to what is proposed on behalf of the defendants the Court invites further submissions if the parties are unclear about the import of the following type of declarations:-

(i) the defendant Minister has a duty to outline publicly details of planned studies and regulations for the provision of arrangements to facilitate voters with visual impairments to mark their ballot papers without assistance as envisaged by s. 94(5)(i) of the 1992 Act + ;

(ii) the defendant Minister has a duty to provide the said arrangements under s. 94(5)(i) of the 1992 Act where there are no disclosed reasonably practicable economic or effective reasons not to vindicate the right to mark ballot papers without assistance.

#### **Other reliefs**

75. Counsel for the plaintiff explained that the plaintiff did not abandon his claim for damages and that there were details in the NDA report which need to be addressed in any further studies. There is no necessity for this Court to award damages because the principal grievance of the plaintiff has been addressed. It would to devalue the sincerity of the plaintiff’s motives in prosecuting these proceedings for the Court to embark on a tangent which was never actively pursued. As for the perceived lack of understanding of the NDA report, the Court repeats that it has no role in assessing the minutiae which the defendant Minister may need to consider.

#### **European Union law**

76. The conduct of European elections is governed by European Union law – Council Decision 76\787\EEC (as amended by Council Decisions 93\81\EC and 2002\772\EC) and Council Directive 93\109\EC.

77. Article 14.3 of the Treaty on European Union (“the TEU”) provides:-

*“The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot”.*

78. Article 39.2 of the Charter of Fundamental Rights of the European Union also provides:-

*“Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot”.*

79. The Explanations relating to the Charter of Fundamental Rights provide in respect of Article 39:-

*“Article 39 applies under the conditions laid down in the Treaties, in accordance with Article 52(2) of the Charter. Article 39(1) corresponds to the right guaranteed in Article 20(2) of the Treaty on the Functioning of the European Union and to Article 14(3) of the Treaty on European Union. Article 39(2) takes over the basic principles of the electoral system in a democratic state.”*

80. The procedures for European Parliament elections are set out in this State by the European Parliament Elections Act 1997, read in conjunction with the Electoral Acts 1992 and 1997. Despite the provisions for “a free and secret ballot” and the provision in Article 223(1) TFEU which provides a legal basis for the adoption of a uniform procedure for elections to the European Parliament, the European Union has not yet introduced legislation for a uniform procedure. In the absence of legislation for a common procedure, the arrangements to be put in place for VIPs are matters within the competence of the State.

81. I agree with the submission of the defendants that there is no basis for suggesting that the right to a secret ballot as it applies to European elections is any greater than it is under the Constitution and as provided by the 1992 Act (as amended).

#### **UN Convention on the Rights of Persons with Disabilities**

82. It was submitted that the UN Convention on the Rights of Persons with Disabilities (“the UN Convention”) is enforceable in respect of the right to a secret ballot in European Parliament elections. The UN Convention was approved on behalf of the then



European Community by Council Decision 2010/48/EC of 26th November, 2009 (OJ 2010L23, p. 35).

83. None of the Directives or regulations governed by the UN Convention relate to electoral procedures. There is no common electoral procedure within the European Union.

84. Any consideration of the UN Convention in Irish law therefore requires reference to be made to Article 29.6 of the Constitution, which provides that:-

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

85. The Oireachtas has not legislated to give the UN Convention the status of domestic law. Therefore, the UN Convention does not advance the plaintiff's case.

#### **European Convention on Human Rights**

86. Rights under the European Convention on Human Rights ("**ECHR**") (or a protocol to it) are relevant only insofar as the plaintiff can invoke specific provisions of the European Convention on Human Rights Act 2003 ("**the 2003 Act**") as the Convention has an effect in Irish law only through the medium of and to the limited extent provided for in the 2003 Act.

87. The plaintiff relies on s. 3(1) of the 2003 Act which provides:-

*"Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions".*

88. The voting procedures applicable are set out in statutory provisions as is required by the Constitution. The obligation on an organ of the State in s. 3(1) of the 2003 Act is expressly subject to any statutory provision. The defendants correctly submitted that the relevant statutory provisions cannot be a breach of s. 3 of the 2003 Act.

#### **European Court of Human Rights**

89. The submissions for the plaintiff candidly admitted that there was little case law from the European Court of Human Rights ("**ECtHR**") on the right to a secret ballot. Without dwelling on the jurisprudence from the ECtHR, I am satisfied that this Court will only be reviewing without offering any definitive view about the developments in this area if it engaged with the submissions for the plaintiff under this heading. Moreover, the reliefs which I have outlined for the plaintiff have persuaded me that it is not necessary to engage with the arguments about non-compliance with the ECHR.

90. Subject to hearing from counsel I will make an order along the lines set out at para 74 of this judgment.

† This declaration was not included in the order made on 28<sup>th</sup> April, 2017, as perfected on 12<sup>th</sup> May, 2017 at the request of the parties.