**THE HIGH COURT**

**[2012 No. 10508P]**

**BETWEEN**

**MARK McCRYSTAL**

**PLAINTIFF**

**AND**

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

**DEFENDANTS**

**Ex tempore Decision of Kearns P. delivered on 1st day of November, 2012**

This matter comes before the Court on foot of the plaintiff's claim that certain publications and advertisements of the first defendant relating to a proposed amendment of the Constitution by a referendum following the Thirty-first Amendment of the Constitution (Children) Bill 2012 are unconstitutional having regard to the status of a referendum under Article 46 of the Constitution and the views expressed by the Supreme Court in *McKenna v. An Taoiseach (No. 2)* [1995] 2 I.R. 10. The plaintiff maintains that the defendants have contravened the Constitution as interpreted in *McKenna (No.2)* in the sense that they have put forward material of a publicly funded nature which favours a positive outcome and a 'Yes' vote in the referendum. This advocacy is said to be contained in particular on the first defendant's website "childrensreferendum.ie ", and also in the Government's Information Booklet and in other current radio and television ads produced on behalf of the Government.

The application was opened to me on Tuesday afternoon (30th October, 2012) when, by consent, the hearing of the motion was treated as the trial of the action. I was informed on that occasion that, in all probability, one side or the other would appeal any decision I made to the Supreme Court. Having regard to the imminence of the referendum on 10th November, 2012 I am therefore delivering my decision in *ex tempore* form this morning so that the matter can be mentioned to the Chief Justice at her regular Thursday call-over of cases today with a view to facilitating any appeal which either side might decide to bring.

**BACKGROUND**

On 3rd October, 2012 the Thirty-first Amendment of the Constitution (Children) Bill 2012 was passed by both Houses of the Oireachtas. On 8th October, 2012 under the Referendum Act, 1994 the 10th November, 2012 was appointed polling day in the referendum. On 16th October, 2012 the Referendum Commission, an independent body established under the Referendum Act 1998, launched its public information campaign by establishing a website, www.referendum2012.ie, and distributing an information guide to the referendum to all homes in the State. Its chairperson has in addition appeared on national radio to further explain the referendum proposal and to answer questions from members of the public.

Quite separately from the Referendum Commission, the first named defendant launched an information campaign on the referendum, which included setting up a website, (www.childrensreferendum.ie). It commissioned 2.05 million copies of an information booklet and on 19th October commenced delivery thereof to all homes in the State. It further arranged for a series of radio and television ads which are currently being aired on these outlets.

The plaintiff makes no complaint as to the impartiality or objectivity of the campaign being run by the Referendum Commission. On the contrary both sides agree that the Referendum Commission has done an excellent job but the defendants contend that there is certain background and consequential information pertaining to the referendum which it has a duty to impart to the general public so that it can be properly and fully informed. However, the plaintiff claims that the parallel information campaign being run by the defendants is wrongful and in breach of the Constitution as it is expenditure of public monies to promote a Yes vote. The plaintiff makes no objection to the defendants arguing for a Yes vote by means which do not involve the expenditure of public monies, nor does the plaintiff object to incidental or insignificant expenditure which may be incurred by the defendants, in, for example, issuing a press release to the media.

**FIRST DEFENDANT'S WEBSITE**

The plaintiff takes issue specifically with the website, booklet and advertising on television, radio and print media undertaken by the first defendant. A further complaint about the first defendant's own Departmental website was not pursued to any appreciable degree.

The plaintiff claims that the language used on the website established by the first defendant (www.childrensreferendum.ie) implies there is a need for the referendum and uses campaigning terminology designed to promote support for the proposal. The plaintiff further claims that the FAQ section of the website is dismissive of possible objections to the proposal and could not be viewed as a fair and balanced analysis of the pros and cons of the amendment, and that the totality of the website leans heavily towards supporting the referendum, designed and intended to influence voters by favouring a particular result.

To this end, the plaintiff claims the Government website places an emotionalised emphasis on children with numerous child pictures and child handwriting; a large caption with the title 'Vote' set out in child's handwriting, with an image of a smiling face depicted in the letter 'O'; a slideshow, the penultimate message of which is "It's all about them… but its up to you"; and the logo design for the website shows an image of three children holding hands in a further emotional appeal.

The plaintiff also points out that a Facebook link whereby voters could "like" the children's referendum website, and a paragraph providing that the amendment underpins family support services appeared on the website originally but have since been removed. The plaintiff argues that the removal of this material is evidence that it was slanted in favour of achieving a Yes vote.

The defendants argue that none of the material put by them into the public arena advocates a Yes vote. The defendants strongly assert the objectivity of their publications and say that they have a right in the public interest to publish information concerning subjects of a referendum and encourage debate of the issues.

**THE FIRST DEFENDANT'S BOOKLET**
The title of the booklet distributed by the Government is "Children's Referendum", accompanied by a picture of three children holding hands. The plaintiff claims that the booklet links the referendum to Government policy and reform of child protection services and that it glosses over the very real threat to parental control of their children.

The plaintiff claims that on pages 8 to 9 of the booklet in the discussion of the new Article 42A.2.1°, attention is not expressly drawn to the fact that specific changes from the existing wording of the Constitution as it affects parents are outlined there. The emphasis is said to be on continuity rather than on those changes, so that the effect of p.9 in particular is to have a 'lulling' effect on the reader. Attention is also drawn to an error (now admitted by the defendants) at paragraph 3 of page 9, in the use of the word 'continue' in the sentence "Key requirements will continue to be as follows". This, it was claimed, was both seriously misleading and persuasive of a Yes vote.

The plaintiff argues that, stylistically at least, the reference in the booklet to an 'Article by Article guide' leads to an inference that the booklet was written by legal or other experts intent on informing the public, and not by communications-minded individuals intending to persuade.

On page 12, the plaintiff claims the booklet glosses over and does not identify in any way the 'other rights and interests' which will be counter balanced against specific recognition of the best interests of the child in the amended Constitution and the greater weight which will be given to the best interest principle if the Amendment is passed.

The plaintiff also contends that the use of 'campaigning' type language on page 14 such as "the proposed new Article puts the safety and welfare of children at the centre of decision making in relation to child protection", is value-laden and imbued with a sense of the desirability of the amendment and does not communicate any specific factual information.

**FIRST DEFENDANT'S ADVERTISEMENTS**
The plaintiff claims that the print advertisement run by the first defendant is misleading in that there is no indication that the advertisement is run by the Department of Children, which in turn leads to confusion as to whether it emanates from the Referendum Commission or the Government. In addition, the plaintiff takes issue with the radio and television advertisements aired in furtherance of the first defendant's campaign on the basis that the imagery and language therein encourage a Yes vote.

The defendants point out that these advertisements do not promote a Yes vote, but are aimed at increasing awareness and encouraging people to vote in the referendum. Furthermore, the imagery used relates to the subject matter of the referendum, rather than promoting one side or another. The defendants claim that such imagery could be used by proponents of either side of the debate.

**EXPENDITURE OF PUBLIC MONIES**
In response to a request for information from the plaintiff's solicitors, the Chief State Solicitor's Office wrote to the plaintiff's solicitors on 19th October, 2012 stating that funds voted by the Oireachtas to the Department of Children and Youth Affairs for 2012 included €3 million in respect of expenditure of the children's rights referendum.

Of this €3 million, the first defendant allocated €1.9 million to the Referendum Commission for the performance of its statutory functions. The letter states that the balance of €1.1 million is being used by the Department of Children and Youth Affairs "to provide information on the referendum and encourage members of the public to vote".

Details were provided in Court of how the €1.1 million expended by the Department was broken down as follows:

| | € |
|---|---|
| Design and operation of the website | 8,100 |
| Design and printing of booklet | 235,000 |
| Behaviour and Attitudes opinion poll | 105,000 |
| MKC Communications – website and booklet development | 37,000 |
| KD Nine media advertising services | 164,000 |
| Delivery of information booklets | 225,000 |
| Print media advertising | 273,000 |
| Translation services | 3,000 |
| Ad words | 1,500 |
| Professor Richard Sinnott | 10,000 |
| Dr Geoffrey Shannon | 8,200 |
| Contingency | 29,700 |

The plaintiff further exhibits a letter from his solicitors to the Chief State Solicitors Office dated 22nd October, 2012 seeking further particulars of 5 tenders for polling, communications and advertisement placed by the first defendant in connection with the referendum. The plaintiff outlines 3 of these invitations to tender, and argues their purpose was to shape a campaign message to reassure and persuade, engaging expert and professional services to assist the Department with its communication through media relations concerning its policies, plans and actions to 'story' the first defendant's approach.

Affidavits are submitted from John Waters, Lyn Sheridan and Professor Colum Kenny, all of which indicate their view that the materials produced by the Government are tending to promote a Yes vote, in support of the plaintiff's position. While John Waters has made public before now his views on the demerits of the referendum proposal, his views as an experienced journalist and commentator are nonetheless of value. Lyn Sheridan and Professor Kenny on the other hand are not associated with any aspect of the "No" campaign and their views carry greater weight for that reason.

**UNCONSTITUTIONAL**

The plaintiff argues that the defendant's endeavour to influence public opinion is not compatible with the decision in *McKenna v An Taoiseach (No. 2),* or the defendant's stated position that they are engaged merely in the giving of information. Whilst the Government campaign does not use the words "vote yes", it has a website, booklets, press and television advertisements, opinion polling, PR advertisers and uses images and language which directly advocate or are likely to encourage a yes vote in measures expending over €1 million of public monies. The plaintiff argues that the position of the State completely 'hollows out' the objectives of the *McKenna* judgment.

The plaintiff argues that these acts by the defendants are unconstitutionally breaching the principles of equality, fair procedures, freedom of expression and the right to a democratic process in referendums as particularised in the Preamble and Articles 5, 6, 11, 16, 28, 40, 41, 46 and 47 of the Constitution. The plaintiff therefore seeks declaratory relief that the defendants acted wrongfully, are not entitled to promote a particular result under the guise of providing information and seeks to injunct the defendant promoting a particular result with consequential orders in relation to the ongoing distribution of information booklets and the advertising campaign.

**DEFENDANTS POSITION**
The defendants' position is that there is an objective need for information in advance of a referendum and the information put into the public arena by the defendants does not offend the restrictions expressed in *McKenna v An Taoiseach (No. 2).*

The defendants submit that the website and booklet are intended to give information to the voting public on the wording and to outline the areas of law covered by the referendum and the type of change which would follow if the referendum was passed. The Referendum Commission was to some extent circumscribed by its terms of reference so that it could not give information on these background considerations. The defendants acknowledge that both its website and booklet provide information on matters which are not central to the amendment but have been directly raised in the course of the debate. The first defendant's objective in running its campaign was to increase awareness of and participation in the poll and to allow those members of the public wishing to inform themselves to do so and was not designed to capture the opinion of its audience.

Of the plaintiff's criticisms, the defendants state that the website contains several references to objective reports or studies which recommend the establishment of childrens rights. The defendants also say that the plaintiff's complaints are a subjective expression of his own opinions. Furthermore, the defendants defend the use of imagery in its campaign as very commonplace in the provision of information and images of children are deployed on either side of the debate.

The defendants claim that the plaintiff is guilty of delay. Despite the plaintiff's stated concerns he delayed in bringing the proceedings although the website has been live since 19th September, 2012. Insofar as the granting of any injunction might arise, it was incumbent on the plaintiff to act immediately which he failed to do.

**DECISION**
It is common case that since 1998, the Referendum Commission, established in response to the decision in *McKenna (No 2)*, has discharged effectively and well its statutory function of promoting public awareness of the referendum, of encouraging the electorate to vote at the poll and of publishing statements containing a general explanation of the subject matter of the proposal. It operates with complete impartiality and enjoys high levels of public confidence as a survey referred to during the hearing has demonstrated. That said, the respondents have not sought to invoke the creation and existence of the Referendum Commission as a consideration which might persuade either this Court or the Supreme Court that the present case is to be distinguished from *McKenna (No.2)*, an approach which might have permitted a wider consideration of whether the principles enunciated in *McKenna (No.2)* require recalibration in an internet age a generation further on. The Court was asked only to consider a form of 'vanilla' defence which contended that the principles outlined in *McKenna (No. 2)* were fully observed by the defendants in this case

As other judges before me have found, I have no doubt but that the bringing forward of a referendum proposal by Government is a political act or initiative in respect of which the Courts should be extremely slow to intervene. This was the view taken by my learned predecessor, Costello P. in *McKenna (No. 1)* [1995] 2 I.R. 1 in which he stated at p.6:-

> "The extent of the role the Government feels called upon to play to ensure ratification is a matter of concern for the executive arm of government, not the judicial. The Dáil decides what monies are to be voted for expenditure by the Government on information services (which would include an advertising campaign in support of an affirmative vote in a referendum). Should the Government decide that the national interest required that an advertising campaign be mounted which was confined to extolling forcibly the benefits of an affirmative vote, it would be improper for the courts to express any view on such a decision. The object of such a campaign would, of course, be to influence voters' attitudes. But to adjudicate on a claim that the use of public funds to finance such a campaign was unfair because it distorted public attitudes would involve an assessment of the effect of such a campaign on public attitudes, the strength of the opposing campaign on those propounding a "no" vote and the forces influencing the voters' ultimate decision. Such an assessment is not just one of establishing facts but calls for a careful analysis and a balancing of complex political and social factors. It is one for political analysts to make, not for judges."

The latter part of this passage has proved particularly accurate and prophetic in this case given that this Court has been asked to consider a considerable amount of material and opt between the views of political analysts and other experts in an effort to evaluate the likely effect of same on voter's intentions.

Another distinguished judge, Keane J., then a member of the High Court but later one of our most distinguished Chief Justices, took a similar line in the High Court in *McKenna (No. 2).* In *Slattery v. An Taoiseach* [1993] 1 I.R. Hederman J. also expressed the view (at p. 299) that there was no constitutional obligation on the Government to provide funds for those opposing the ratification of the particular treaty the subject matter of the referendum.

However, the Supreme Court in *McKenna (No.2)* found by a majority (Egan J. dissenting) that the Government, in expending public monies in the promotion of a particular result, was acting in breach of the Constitution. It is important to note the care the Court took to emphasise that before the courts will intervene in a political process, it must be "clearly established" that the Government has shown a "clear disregard" for constitutional rights.

The court noted and adopted the observation of Fitzgerald C.J. who in the course of his judgment in *Boland v. An Taoiseach* [1974] I.R. 338 stated at p. 362:-

> "Consequently, in my opinion, the courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred on it by the Constitution." (emphasis added)

To like effect, Finlay C.J., in the course of his judgment in *Crotty v. An Taoiseach* [1987] I.R. stated at p. 775 that:-

> "Where an individual person comes before the Courts and establishes that action on the part of the Executive has breached or threatens to breach one or other of his constitutional rights that the Courts must intervene to protect those rights but that otherwise they can not and should not."

In prohibiting a breach of constitutional principles, Hamilton C.J. in *McKenna v. An Taoiseach (No. 2)* [1995] 2 I.R. 10 at p.32, expressed the principles which governed the circumstances in which such a breach would be found to exist as follows:

> " 1. The courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions provided that it acts within the restraints imposed by the Constitution on the exercise of such powers.
>
> 2. If, however, the Government acts otherwise than in accordance with the provisions of the Constitution and in clear disregard thereof, the courts are not only entitled but obliged to intervene.
>
> 3. The courts are only entitled to intervene if the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred on it by the Constitution." (emphasis added)

That is the yardstick against which the material put out by the defendants in this case must be assessed. The breach complained of must be something blatant and egregious. It must be something which is to be seen or found in the presentation of the proposal and not be a matter which to quote counsel for the defendants, "mires" the court in assessing the merits of the substantive issues or in excessive scrutiny of each and every scrap of information disseminated by or on behalf of Government. Such an approach would place the courts in a situation where, having entered into this particular domain, they could be called upon in virtually every referendum to perform some exercise of hyper-zealous vigilance of every piece of information disseminated by Government. I cannot believe the Supreme Court in *McKenna (No.2)* intended any such consequence. It must be remembered that in *McKenna (No.2)* the Dáil had voted £500,000 for the express purpose that the same be used in a publicity campaign to encourage a Yes vote.

In fairness to the respondents in this case, and before I indicate my view on the material produced by the defendants, I am satisfied that scrupulous care has been taken to at least try to avoid falling foul of *McKenna (No. 2)* judgment in the information contained in the Government booklet and on its website. The Court has heard in great detail in the affidavit of Ms. Elizabeth Canavan, assistant general secretary of the first Defendant, of the consultation process embarked upon by the first defendant and advices sought and received from the office of the fourth defendant to ensure that the Government could impart information in compliance with the *McKenna* principles. On 4th October, 2012 a circular was issued on her behalf to all staff involved in the Referendum Unit, the Press Officer, communications groups and Ministerial advisors making explicit the Government and Departmental attentiveness to the *McKenna* judgment and the need to comply with same. However, even those 'good intentions' would not suffice if the effect of the material put forth at taxpayers' expense was to plainly advocate that the electorate should vote in a particular way.

The defendants contend that there is no basis for the Court to intervene because far from demonstrating "a clear disregard" by the Government of the powers and duties conferred on it by the Constitution in the *McKenna (No. 2)* judgment, it has carefully and scrupulously endeavoured to remain within the confines of *McKenna (No. 2)* both in its preparatory work, its consultation with expert advisors and in compliance with advices received from the Office of the fourth named defendant. Alternatively, if any of the material complained of is suggestive of a slight bias in favour of a particular outcome, the error is not so blatant or egregious as to warrant the Court's intervention. Furthermore, the granting of any injunction at a stage when 66% of the Government information booklets have been distributed would be practically pointless. The plaintiff - although he asserted he had been concerned for some time with the expenditure by the Government of monies to obtain a particular result - delayed in moving the application before the Court and that delay should count in the Court's discretion so as to refuse the relief sought.

Having considered all of the material put before me which forms the first defendant's referendum campaign, I will deal with the specific criticisms raised by the plaintiff as follows.

In relation to the website and the plaintiff's contention that an emotionalised emphasis is placed on children, in a referendum on children's rights, it cannot be objectively maintained that images of children promote one side over another. The same can be said of the caption 'Vote' in child's handwriting. It is a more likely interpretation that the smiling face in the letter 'O' of 'Vote' would be taken as an encouragement to voters to actually vote rather than some kind of subliminal message as to how voters should cast their vote.

The logo "It's all about them but it's up to you" could be used by proponents on either side of the referendum in an attempt to encourage voters to vote. The image of three children cannot be objectively viewed as an emotional appeal to vote Yes – the image is only an outline of children holding hands with no faces or expressions shown. In fact it can be said that this is a neutral image, simply pertaining to the subject matter of the referendum. In this regard, I favour the views of Dr. Eoin O'Malley, political lecturer in DCU, that it would not be true or appropriate to equate such words or images with partiality or propaganda, and that these images aid viewers.

I am satisfied that the removal of the Facebook 'like' option and the paragraph providing that the amendment underpins family support services is not significant one way or another and in no way amounts to evidence that 'liking' the website in some way equates with advocating a Yes vote.

In relation to the booklet, the defendants accept the error contained in the inclusion of the word 'continue' on page 9. I am satisfied that there was no deliberate attempt to distort the facts and that in reality, nothing turns on this. In this regard I accept the testimony of Dr. Eoin O'Malley that the booklet does not advocate a particular outcome, rather it provides information which is essential for an informed debate. In particular I am impressed by his candour and generosity of view in that he readily acknowledges how difficult it is for Government to stifle or neutralise its view of its preferred outcome, noting that in his view "it is not possible for the sponsor of legislation to remove the natural and intrinsic features of the subject of the legislation", nor is it reasonable to expect the sponsor to "actively sterilise the subject". It is his view that the predominant and overall impression created by the website and booklet is that of explanation of context and the project of amendment. Dr. Kevin Rafter, a senior lecturer in political communication and former political journalist, is equally of the view that neither the website, the booklet nor the adverts could reasonably be viewed as campaign tools which advocate a particular outcome. Finally, Professor Richard Sinnott, Emeritus Professor of Political Science in UCD, deposes that he compared material in the Yes and No campaigns and both were very different in tone and emphasis from the information contained in the Government booklet. He too refers to the difficulty of achieving explanation while avoiding advocacy but stresses that it is a democratic responsibility of the State to provide information, especially in a complex modern political environment. While he found a few 'debateable points for objection' in the Department's booklet he does not believe that either the booklet or

website show signs of being intended or having the effect of guiding or swaying voter response as a result of substance or presentation and certainly not to any extent that could be reasonably avoided in the creation of the materials in question. Some of the language is the received language of a UN Convention which is part of the context of the referendum.

Having regard to time constraints I have not been able to set out in great detail the comprehensive views which the experts on both sides have offered. While duly acknowledging the expertise of the witnesses who provided affidavits on behalf of the plaintiff, I am overall more persuaded by the experts who provided affidavits on behalf of the defendants, drawn as they are from a spectrum of political expertise and knowledge of how referendums and elections work. While this must of course be my own personal view and others might take a different view, I do not believe on the basis of the evidence that it could ever be said that there is here what might be characterised as a clear constitutional abuse or a manifest solicitation to vote in a particular way.

I regard the defendant's television, radio and print media advertisements as particularly inoffensive. These ads could not be interpreted as swaying voters in any way other than encouraging voters to vote. All three advertisements contain the words "The Children's Referendum on Saturday November 10th will give the people of Ireland the opportunity to decide about the place of Children in our Constitution" and "It's all about them… but it's up to you!". There is no objective construction of these sound bites to interpret them as advocating a Yes vote.

Having considered all of the evidence and legal arguments put before me, I am satisfied that the campaign run by the defendants contains material which is neutral, balanced and has the primary aim of informing the public about the forthcoming referendum. I do not find that the defendant's campaign can be said to plainly favour a particular outcome so that it is unconstitutional or wrongful. I therefore refuse the various reliefs as sought by the plaintiff.

If future referendum campaigns are conducted in the same way as this one, namely, by a twin track approach of disseminating information by splitting the available funding between the Government and the Referendum Commission, it seems clear that similar applications to that made herein will frequently be made to the courts. An expanded Referendum Commission, established at an earlier stage and with an adequate budget, may comprehensively discharge the function – vital in any democracy – of fully informing the electorate in advance of any poll and avoid such undesirable consequences. As a survey referred to in the case before me demonstrates, the public have a clear preference to get their information from an independent and neutral source.