THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 13

[2016 No. 108]

The President
Finlay Geoghegan J.
Peart J.

BETWEEN

BRIAN MOHAN

PLAINTIFF

AND

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of the President delivered on 9th February 2018

Introduction

1. In a judgment delivered on 2nd February 2016, Keane J. dismissed the plaintiff's claim that s. 17 (4B) of the Electoral Act 1997 as inserted by s. 42 (c) of the Electoral (Amendment) (Political Funding) Act 2012 was invalid having regard to the provisions of the Constitution. The court held that the plaintiff did not have the necessary standing to bring the action, applying the law as stated by the Supreme Court in the leading case *Cahill v. Sutton* [1980] IR 269, and also holding that there were no countervailing considerations that would overcome the primary rule. The High Court was satisfied that the principles of exception in the case law that the plaintiff sought to rely on were not available to him in this case. Those cases were *Crotty v. An Taoiseach* [1987] IR 713, *McGimpsey v. Ireland* [1988] IR 56 and *McKenna v. An Taoiseach (No. 2)* [1995] 2 IR 10. In light of this finding, the High Court did not proceed to decide the question of constitutionality but dismissed the claim *in limine*. The issue in this appeal is whether the decision made by Keane J. that the plaintiff lacked standing is correct.

2. Part III of the Electoral Act 1997 provides for State funding to eligible political parties on certain conditions. Section 17 (4B) imposes a reduction unless at least 30% of the party's candidates at the previous general election were women and at least 30% were men to qualify for such funding. That is set out as follows.

3. Section 17 (4B) provides:

> "(a) Payments calculated in accordance with this Part shall be reduced by 50 per cent, unless at least 30 per cent of the candidates whose candidatures were authenticated by the qualified party at the preceding general election were women and at least 30 per cent were men.
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> (b) Paragraph (a) –
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> (i) comes into operation on the polling day at the general election held next after section 42 of the Electoral (Amendment) (Political Funding) Act 2012 comes into operation and
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> (ii) ceases to have effect on the polling day at the general election held next after the expiration of 7 years from the polling day specified in subparagraph (i).
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> (c) Payments calculated in accordance with this Part shall be reduced by 50 per cent, unless at least 40 per cent of the candidates whose candidatures were authenticated by the qualified party at the preceding general election were women and at least 40 per cent were men.
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> (d) Paragraph (c) comes into operation on the day after the day on which paragraph (a) ceases to have effect."

4. The plaintiff is a member of the Fianna Fáil party and at the relevant time he was chair of the Dublin Central Comhairle Dail Ceanntair (CDC). In early September 2015 in advance of the forthcoming General Election, Mr. Mohan was nominated for selection as a candidate at the constituency candidate selection convention scheduled for 7th October 2015. On18th September 2015, he received a letter from the general secretary of the party in which the following was stated:

> "[h]aving considered the matter very carefully and consulted with the CDC Officer Board, the National Constituencies Committee [' NCC'] has directed that one candidate only be selected at the convention and that the candidate selected must be a woman."

5. There were, in fact, three candidates nominated, two women and the plaintiff. The convention was held as scheduled and one woman was chosen as the party candidate.

6. Mr. Mohan did not challenge the validity of the decision made by the party management, but chose instead to seek to have the relevant legislation struck down on the ground of constitutional invalidity. That is the claim that he brought to the High Court. He

pleaded that s. 17 (4B) offended Articles 6, 16 and 40 in various ways. In its defence, the State made the preliminary objection that the plaintiff lacked the necessary standing to enable him to bring the claim and that the action should therefore be dismissed *in limine*. The defence maintained that the plaintiff was not affected sufficiently or at all by the provision and that he was in effect seeking to make a third party case on behalf of Fianna Fail.

The High Court

7. The Court heard evidence from the plaintiff and from Dr. Fiona Buckley, a lecturer in the Department of Government at UCC, who was called by the State. She specialises in the study of gender politics, including women's political representation in Ireland.

8. Three propositions of fact formed an important part of the plaintiff's case, as the Court held. The first was the contention that the statutory provision in question was truly coercive in its effect because the Fianna Fáil party could not continue to function with a 50% reduction in its s. 17 funding. Keane J. concluded on this point that the plaintiff had failed to establish that such a reduction would make it impossible or even significantly difficult for the party to continue to function.

9. Mr. Mohan also failed to satisfy the Court that his exclusion from the selection process was a requirement imposed on the party by section 17 (4B) rather than a decision made entirely at the discretion of the party. In the course of her evidence, Dr. Buckley had been able to point to a report by an internal Fianna Fáil commission that outlined a range of different options available to the party to meet the candidate gender quota.

10. The third point was that the Fianna Fail party supported the gender quota in question. Not only had its parliamentary representatives not opposed the legislation, but they had actually suggested extending its reach to local government elections. The court held that Mr. Mohan's protestations that the party membership at its Ard Fheis in 2012 had voted against gender quotas did not trump the positions of the Parliamentary Party, the party leader or the National Constituency Council, in the absence of any evidence to that effect.

11. The plaintiff does not challenge these findings in his Notice of Appeal or submissions.

12. The submissions made to the High Court on standing are outlined in the written submissions on this appeal and they may be summarised as follows. He had standing because he had sufficient interest in the matter and had been personally aggrieved, injured or prejudiced by the provision in question, which meant that he satisfied the requirements laid down in *Cahill v. Sutton* [1980] IR 269. He also relied on the exceptions recognised by Henchy J. in that case referring firstly to a measure that operated against a group that included the challenger. Secondly, he contended that there were "weighty countervailing considerations justifying a departure from the rule". Other authorities relied on were *McGimpsey, Crotty* and *McKenna* which are fully cited and further referred to below.

13. The High Court submissions concluded with two paragraphs as follows:

> "The Defendants in their Defence assert that the Plaintiff has no entitlement to be selected as a Fianna Fáil candidate. If that is meant to convey that the Plaintiff has no personal legal entitlement to be selected as a Fianna Fáil candidate, that is legally true and trite.
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> However, the Plaintiff is a member of that party in good standing and is entitled to be nominated for selection as a candidate at a constituency convention of the party members in that constituency. He was duly nominated for selection but was ruled ineligible by virtue of a direction that only a woman might be selected. That direction was made in order to assist Fianna Fáil nationally to comply with the 30% quota imposed by Section 17 (4B) of the 1997 Act as amended, and to avoid the potential loss of 50% of the Exchequer funding for the party envisaged by the section."

14. In his judgment, Keane J. accepted the State's argument that the plaintiff's case should be dismissed for lack of standing. First he identified the primary rule, beginning at para. 84 of his judgment:

> "As is clear from the decision of the Supreme Court (per Henchy J) in *Cahill v Sutton* [1980] IR 269 at 286:
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> 'The primary rule as to standing in constitutional matters is that the person challenging the constitutionality of the statute, or some other person for whom he is deemed by the Court to be entitled to speak, must be able to assert that, because of the alleged unconstitutionality, his or that other person's interests have been adversely affected, or stand in real or imminent danger of being adversely affected by the operation of the statute'.
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> 85. The plaintiff in this case cannot assert, on the limited evidence presented, that his rights (whether to stand as a candidate, to equal treatment, or to freedom of expression, assembly or association) have been adversely affected by the operation of s. 17 (4B) because he has failed to establish any, or any sufficient, causal nexus between the direction of the party excluding his nomination from consideration at the relevant candidate selection convention and the operation of that provision.
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> 86. O'Higgins CJ addressed the issue in the following terms in the same case (at p. 276):
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> 'This Court's jurisdiction, and that of the High Court, to decide questions concerning the validity of laws passed by the Oireachtas is essential to the preservation and proper functioning of the Constitution itself. Without the exercise of such a jurisdiction, the checks and balances of the Constitution would cease to operate and those rights and liberties which are both the heritage and the mark of free men would be endangered. However, the jurisdiction should be exercised for the purpose for which it was conferred – in protection of the Constitution and of the rights and liberties thereby conferred. Where the person who questions the validity of a law can point to no right of his which has been broken, endangered or threatened by reason of the alleged invalidity, then, if nothing more can be advanced, the Courts should not entertain a question so raised.'
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> 87. In the present case, the plaintiff points to a number of his rights (already enumerated) which he asserts have been broken, but has failed to establish on the scant evidence he has placed before the Court that the reason for that alleged breach, which is to say the reason for the NCC's directive of the 17th September 2015 in relation to the party's Dublin Central selection convention, was the coercive effect on the party of s. 17 (4B) of the 1997 Act as opposed to the exercise of the party's own discretion in its choice of policy and in its selection of the appropriate means of pursuing that policy."

15. Citing the rationale for the rule which he said was compelling, the judge said:

> "To concede standing to the plaintiff in the present action, insofar as he seeks to make a case in relation to the party's funding requirements, financial resilience, internal constitutional arrangements and internal and external policy positions, would be to run the grave risk of leaving the party with a well-founded grievance that any case it might wish to make in that regard had been wrongly or inadequately presented." [At para.90]

16. Keane J. went on to make another citation from the judgment of Henchy J. in *Cahill* which he said was particularly relevant in the instant case:

> "In particular, the working interrelation that must be presumed to exist between Parliament and the Judiciary in the democratic scheme of things postulated by the Constitution would not be served if no threshold qualification were ever required for an attack in the Courts on the manner in which the legislature had exercised its law making powers. Without such a qualification, the Courts might be thought to encourage those who have opposed a particular Bill on its way through Parliament to ignore or devalue its elevation into an Act of Parliament by continuing their opposition to it by means of an action to have it invalidated on constitutional grounds. It would be contrary to the spirit of the Constitution if the Courts were to allow those who were opposed to a proposed legislative measure, inside or outside Parliament, to have an unrestricted and unqualified right to move from the political arena to the High Court once a Bill had become an Act. It would not accord with the smooth working of the organs of State established by the Constitution if the enactments of the National Parliament were liable to be thwarted or delayed in their operation by litigation which could be brought on the whim of every or any citizen, whether or not he had a personal interest in the outcome." [At p. 284]

17. Keane J. concluded accordingly that the plaintiff had not been able to meet this standard. He next considered whether Mr. Mohan might be able to bring himself within any of the recognised exceptional categories of circumstances acknowledged by the case law. The plaintiff also failed this test. In regard to the examples given by Henchy J. in his judgment in *Cahill*, the judge found that Fianna Fáil as a party was more obviously indirectly affected by the claimed prejudice than was Mr. Mohan. And it was not the case that the measure was directed against a group interest shared between him and the political party.

18. As for the three cited cases on which the plaintiff relied, again Mr. Mohan was unable to bring himself within any principle or category that could be derived from their circumstances or the reasoning in the judgments: see *McGimpsey v. Ireland* [1988] I.R. 56*, Crotty v. An Taoiseach* [1987] I.R. 713 and *McKenna v. An Taoiseach* (No. 2) [1995] 2 I.R. 10. In regard those cases, the judge observed:

> "103. It seems to me to have been a common feature of the three cases just discussed that the plaintiff in each was an individual or citizen in a position broadly equivalent to -and certainly no worse than - that of thousands of other citizens, if not all other citizens, in raising the constitutional issue concerned, and that no other party had emerged or was likely to emerge with standing to raise that issue under the primary rule in Cahill v Sutton. The position in the present case is quite different. It is implicit, if not explicit, in both the plaintiff's assertions of fact and his arguments of law that the party (together with every other qualified party) is more fundamentally and directly affected by the impugned provision than he is.
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> 104. In those circumstances, and mindful of the need to avoid the various potential problems that the general application of the primary rule is designed to prevent, I have come to the conclusion that there are no weighty countervailing considerations that would warrant the disapplication of that rule in this case."

19. The High Court judgment accordingly concluded:

> "For the reasons set out above, I have come to the conclusion that the plaintiff has failed to demonstrate that any of his interests have been adversely affected, or stand in real or imminent danger of being adversely affected, by the operation of s. 17 (4B) of the 1997 Act and that, in consequence, the plaintiff has failed to establish his standing to bring the present action by operation of the primary rule. Further, I have decided that there is no, or no sufficiently weighty, countervailing consideration that would justify a departure from the primary rule in this case." [At page.107]

The Appeal

20. The plaintiff's notice of appeal asserts that he has standing because (i) he has sufficient interest in the subject matter of the proceedings; (ii) he has been personally aggrieved, injured or prejudiced and (iii) he has raised important constitutional issues. He maintains that the High Court erroneously held that he lacked standing either under the primary rule or the recognised exceptions in the case law.

21. The High Court erred in its application of *Cahill v. Sutton* [1980] IR 269; also in holding that there were no sufficient countervailing considerations to overcome the primary rule, which was incorrect having regard to relevant jurisprudence in *McGimpsey v. Ireland* [1988] IR 56; *Crotty v. An Taoiseach* [1987] IR 713; and *McKenna v An Taoiseach* (No.2) [1995] 2 IR 10.

22. The respondent's notice listed the counterargument:

> i. The High Court correctly concluded that the Appellant had failed to establish a standing to bring the action by the operation of the primary rule in *Cahill v Sutton*.
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> ii. The High Court correctly concluded that there were no, or no sufficiently weighty, countervailing considerations that would justify a departure from the primary rule.
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> iii. Accordingly, the High Court correctly dismissed the Appellant's claim on the basis of lack of *local standi*.
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> iv. The judge did not err in failing to find the provision unconstitutional but he felt that in view of his finding as to standing it would be wrong to express a view on the constitutional question.
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> v. The respondent does not accept that the section is invalid under the Constitution.
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> vi. The Appellant has not shown that his interests have been adversely affected or are in danger of being affected by the provision. It did not oblige the Fianna Fail party or any committee to issue a direction excluding him from nomination or consideration; such direction was a matter for the party in the exercise of its discretion as to choice of policy and in its selection of appropriate means of pursuing policy.

vii. The Appellant's case is fundamentally flawed, in that it seeks to assert *ius tertii*. The Appellant is essentially seeking to put forward arguments on behalf of the Fianna Fail party but he does not represent or have any authority to represent that party.

viii. The primary rule of standing as above stated is not satisfied in this case. There are no exceptional countervailing considerations and none of the cases cited supports this case. If a challenge were to be brought in respect of the validity of the provision, that should be done by a qualifying political party within the meaning of the Electoral Act 1997 and not by any other individual or entity. It is not enough to say that a case raises important constitutional issues.

Submissions and Arguments

23. The appellant's written submissions and oral argument owe more to logic than to law. They do not engage in analysis of the leading cases with a view to demonstrating errors in the approach adopted by the trial judge. They seek instead by way of assertion, inference and interpretation of the statutory provision in question and its purposes and impact on parties and members to demonstrate the connection between this law and individual party members such as the plaintiff. In this way, they make the case that the law interferes with the choices available to individuals and propose that this represents sufficient interest and effect to comply with the rules on standing. It is essential to this analysis that an enactment restricting the choices available to a party also affects each member of the party. To quote the written submissions: "[t]he issue is whether the party is now affected by the law and whether, perforce, each and every member is thereby affected."

24. The plaintiff makes some attempt to revisit matters of fact decided by the trial judge but the notice of appeal does not actually challenge such findings. The judge heard oral evidence on these matters from the plaintiff and Dr. Buckley and his findings seem to me to be immune to criticism, even apart from the deference that this Court owes to the Court of first instance in respect of facts. The evidence does not establish that the law in question caused Mr. Mohan to be struck off the list of candidates considered or declared ineligible or otherwise excluded. Nevertheless, his submissions refer to explanations that he was given that cited the law as being a reason for what happened.

25. In regard to the trial judge's conclusion that Fianna Fáil and not the plaintiff was best placed to deal with the impact of a reduction of 50% in State funding, it is submitted on Mr. Mohan's behalf that this "misses completely the Appellant's case that he, like every other member of a registered political party, is directly affected by the existence of the impugned provision is law and that he is aggrieved by its continuance as law because it constrains his capacity to argue against gender quotas or their implementation by reason of financial penalties fixed for non-compliance, and that he has sufficient interest in standing to seek its invalidation is unconstitutional". The arguments could not be said to be characterised by restraint but the nature of the case probably accounts for a certain amount of *sturm und drang* and I would not wish to be over-critical. However, I think that the judge's conclusion on the evidence he heard is irresistible. It also cannot be the case that a member of a party is *directly* affected, although I understand that point that each member is affected, whatever consequence for standing that may involve.

26. The submissions also revisit the proposition that the Fianna Fáil Ard Fheis in 2012 refused support for gender quotas – twice. They are scornful of the view of the trial judge that the party's position on the enactment of the provision "was somehow relevant to, and/or dispositive of the legal issue as to whether the Appellant had standing to contest the constitutionality of the impugned provision".

27. The plaintiff's argument appears to be essentially as follows. This provision imposes a sanction on a political party that does not comply with a candidates gender quota. That represents a restriction of choice on the gender of candidates at General Elections because of the financial detriment or sanction or penalty. That situation affects the rights and freedoms of the party as a whole and also of the individual members. This latter impact on people like Mr. Mohan was that they was "faced with the situation that persuading their fellow members not to comply with or to abandon gender quotas required persuading their fellow members to accept serious financial penalties for the party".

28. It makes no difference on the appellant's argument whether some members or a majority or the governing group of a party supported the measure when it was introduced and enacted: "The issue was whether the Appellant was and is now affected by the continuing legal effect of the law. Insofar as a majority of the members of Fianna Fail can no longer freely choose their own party's gender quotas without regard to the State's financial penalties, each and every one of them is and remains affected by that law". It follows as the argument goes that a member of the party "must have standing to challenge the constitutionality of the impugned provision".

29. The plaintiff also submits that he has raised a matter of major constitutional importance which justifies and validates his entitlement to bring his proceedings.

30. I do not think there is any doubt that the sanction in the amendment is a significant one. And it was clearly intended to have an effect on candidate selection. In that regard, it is submitted that Mr. Mohan "had, and has, on that basis alone, standing qua member to challenge its constitutionality insofar as it infringes his constitutionally guaranteed rights and freedoms". That proposition, unfortunately, commits the logical error of begging the question, that is, it assumes the very matter that is to be proved.

31. The appellant argues that he does not have to establish an inevitable, causal link between his exclusion and the impugned provision. It was sufficient for him to establish a real likelihood that it was one of the factors. I do not doubt that it was explained to Mr. Mohan that the decision was a response to or even was necessitated by the new provision but I do not think that can be the determinant. The fact that a person gave an explanation or even misunderstood the provision does not give rise to standing; the question is whether on a proper interpretation of the provision the consequence followed. And that question was decisively answered in the circumstances of the plaintiff's case by the trial judge as a matter of fact, having regard to the evidence of the plaintiff and of Dr. Buckley.

32. The judgment of the High Court was not based in any way on a criticism of Mr. Mohan or that the judge was doubtful of his *bona fides*. The judge did, however, find that the claim was in essence one that was based on the rights of the party rather than any individual rights possessed by the plaintiff, in a word, *jus tertii*.

33. In an earlier comment, I said that I thought that the central, fundamental submission made on behalf of Mr. Mohan is that his party is affected by the Act and it follows that as a member of the party he also is affected by it. He submits that his interest stands separate from the party and independent and is sufficient to entitle him to challenge the legislation. At paragraph 65 of his written

submissions, he claims that the High Court judgment "utterly failed to recognise and ignored that the Plaintiff:

> (a) had a direct interest, and that he was directly affected by, the impugned legislation;
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> (b) that his constitutional freedoms and rights of political association and practicable personal electability were and are really and substantially affected by the impugned provision, and,
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> (c) had raised a point of public/constitutional importance; and
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> (d) *qua* citizen/member of a political party, is entitled to object to a law curtailing or prejudicing free political association by penalising parties for failure to abide with the electoral policies intended to encourage or secure particular electoral outcomes by the threat of discriminatory allocation of Exchequer funding."

34. The respondent points at once to the absence of case law analysis in the arguments made by the plaintiff and his reliance on first principles. The State argues that the trial judge engaged in a careful and detailed analysis of the relevant legal principles which he applied appropriately to the facts as he had found them or as were agreed. The first point is that the primary rule in *Cahill v Sutton* did not apply. The plaintiff cannot invoke the rights of another party in order to challenge legislation. The situation here is that the plaintiff is opposed to the measure that was introduced by the amendment and he is now pursuing that in litigation.

35. The State argues that Mr. Mohan has not himself been directly adversely affected by s. 17 (4B). It is the political party, in this case Fianna Fáil, that is directly affected and is on any view the more appropriate challenger if the constitutional validity is in issue. It is not a situation therefore where there is an absence of a person or body to make the case.

36. It is submitted at para. 50 of the written submissions as follows:

> "The fundamental problem that the Plaintiff faces is that, in the present case, the Fianna Fáil party has not challenged the contested provision nor voiced any objection to it. This is unsurprising given that that party in fact supported this provision. In fact, as the Judgment finds, current Fianna Fail policy appears to go further than section 17 (4B) and to extend its application to local elections. But it is not an answer to this point to suggest that Fianna Fail may not wish to challenge section 17 (4B). In the first place, as a matter of first principle, the fact that a party with standing does not seek [to] challenge and enactment does not confer standing on a party without it. Secondly, the evidence here established that Fianna Failed supports the policy of section 17 (4B). In those circumstances, it would be wholly incongruous to permit the Appellant to rely on his membership of the party as a basis for challenging the provision."

37. The State submits that the argument made on behalf of Mr. Mohan seeks to circumvent the rules as to standing.

38. The plaintiff's interests were not affected by the section, but rather by the decision of the party in September 2015 that only one candidate should be selected for the constituency and that the candidate should be a woman. That was a matter for the party to decide in accordance with its own judgment and its internal rules and procedures. The judge found that it was not the section that mandated that result. The evidence of Dr. Buckley was that parties have a wide variety of methods of complying with the section. The fact is that the plaintiff did nothing to challenge the party's decision which is the reason why he was excluded.

39. Mr. Mohan's claim is, according to the State's argument, a derivative one through the party so that any claim to standing is based on that unsound foundation. The fundamental point is that the interests of the party and those of Mr. Mohan are distinct and he is not entitled to stand in the shoes of the association.

40. None of the exceptions to the primary rule as to standings applies here, which was a finding made by the court that is entirely correct and in accordance with the jurisprudence. The State maintains that the appellant has failed to demonstrate any flaw in the reasoning of the trial judge. It is not enough for Mr. Mohan to assert that the matters he has raised are important, he has to establish a basis of claim that fits with the clear, cohesive argument laid out in *Cahill v. Sutton* and subsequent cases. The State submits that he has entirely failed to do so.

Discussion

41. The issue in the appeal is whether the High Court was correct to hold that the plaintiff lacked standing.

42. The plaintiff does not challenge the findings of fact as recorded above. The trial judge commented that the three specific issues of fact that he addressed were all matters which the Fianna Fáil party was better able to address than was Mr. Mohan. It is clear that various modes of implementation of the measure were available to the party other than the one that they selected and which is the basis of the plaintiff's assertion that he was rendered ineligible as a candidate. Obviously, he was not declared ineligible and that is no doubt a shorthand reference rather than being intended as an accurate definition. The point is, however, that it is not established that this legislation was responsible for the decision made by Fianna Fáil as to the selection of a candidate for the Dublin Central constituency. The Act did not prevent the plaintiff standing as a candidate or going for selection as a candidate for his party. The party decided it would implement the Act in this way; any complaint is with the party and not the legislation. Keane J was accordingly correct in concluding that the directive to the Dublin Central Convention did not give the plaintiff standing to challenge the legislation.

43. The plaintiff also argues that there is a sanction on a party that does not comply with the legislation, which means that it is no longer wholly free to choose the gender of its candidates are general elections. That indeed is the whole point of the measure, as it seems to me. It is intended to encourage and reward parties for increasing the number of women candidates. It is suggested that a consequence is that members of a party are inhibited from advocating a different approach to candidate selection because persuading fellow members comes with a price in the form of deprivation of 50% of the available State funds. This proposition appears in various forms in the written submissions and it featured in the argument of counsel on the appeal. The plaintiff makes the argument that his right of association within a political party is interfered with because he is inhibited in his capacity to persuade his fellow party members to bypass or ignore the Act by selecting candidates as they please, on the basis that they will be inclined to resist, knowing that agreeing with him will bring sanctions in the form of reduction of income from the State. However, there is nothing to prevent him or discourage him from seeking to persuade his colleagues to back repealing the Act or amending it. Accordingly, even if we allow that this argument might have validity it appears that it is without foundation when he is free to advocate changing the policy of supporting the legislation, which carries no sanction whatsoever and yet achieves the result that the plaintiff desires.

44. A central submission made on behalf of Mr. Mohan is that this law affects political parties and he as a member of the political party is also affected, which means that he has sufficient standing to challenge the law. That does mean, as the respondent points out, that this is an assertion that every member of a political party is entitled similarly to make. It is clear, however, that the Act is directed at political parties, as parties commanding a minimum percentage of the total votes cast in the previous general election, and their candidate selection processes. The respondent points out that Fianna Fáil has not challenged this law, indeed it supports it as the evidence established. The State argues that the fact that a party that has standing does not seek to invalidate a law cannot be a reason for conferring standing on a person who does not have it.

45. The plaintiff endeavoured in the High Court to make the case that his failure to be considered for nomination at the convention could be ascribed to the operation of this measure. However, the trial judge held against that case on the basis of the evidence. The second point that Mr. Mohan made was that his party could not survive if it were to be deprived of 50% of State funding. Again, the judge rejected that. Besides the failure in point of proof, it is obvious that this case is an example of a claim on behalf of a third party. And the fact that his own party actually supported the measure surely undermines any claim that is sought to be made on behalf of the members. They are free to change their minds; the party is free to change its policy. It could decide to campaign for the repeal of the law or its replacement with some other provision. The members including Mr. Mohan can argue that out in the party rooms and conferences and come to agreement. That would be considered normal politics. But that has little to do with whether Mr. Mohan can speak on behalf of the party to challenge legislation which the party itself supports.

46. There is a sense in which the plaintiff is correct to say that this law affects him and other members of his party and other parties when it comes to selecting candidates. But that is no more than saying that he is subject to the law of the land as in every public and general Act of the Oireachtas. Every male or indeed female member of a party – assuming it reaches the minimum qualifying percentage of votes – is in the same position as Mr. Mohan. He or she is subject to the law. This provision contains a carrot and stick. It is apparent from the evidence in the High Court that there is debate about the value of quotas and the political wisdom of imposing them. That is a legitimate political issue. It does not mean that every member of a political party necessarily has standing by the very fact of being entitled to take part in conventions that are subject to the conditions on which State funding is provided.

47. In my judgment, membership of a political party is not of itself sufficient to give standing to a person to challenge this measure. I think that the analysis of the rules as to standing that the High Court made is unimpeachable. Keane J. first looked at the locus classicus in *Cahill v. Sutton* to find the primary rule. He examined the rationale as explained in the judgments of Henchy J. and O'Higgins CJ and sought to apply it to the instant circumstances. Then he referred to the exceptions as recognised in that case. He proceeded to look at subsequent judgments to see if there was anything there that would assist the plaintiff. I am unable to find fault with this approach; indeed, I have to say that I consider it is a model of judicial analysis of case law.

48. It seems to me that this is an example of the kind referred to by Henchy J. in his judgment in *Cahill v. Sutton*, which is cited above by Keane J, in which a party who disagrees with the law seeks to overturn it by litigation rather than by the process of legislation.

49. This measure is directed to political parties. It affects members of parties but not directly. Mr. Mohan's constitutional challenge is a derivative claim that only exists by and through the party of which he is a member. His argument conflates the interests of the party and of the individual. The party is affected in its funding by the State if it chooses not to comply with the terms and conditions on which the money is paid. That is the party's decision. How is a member affected? Mr. Mohan may say that his choice of candidate gender is restricted but it is difficult to square that with the evidence in the High Court about the multiple modes of compliance that are available. But let me suppose that his options are limited as he alleges. That comes about by reason of the party's decision whether to comply with the conditions or not. The members react to decisions by the party, which opts for or against compliance. A party might comply because it believed in the policy, which as it happens is the position with Fianna Fáil. It could of course change its position by deciding otherwise. Another party might choose to go along with the conditions but *supra protest* and decide to challenge the Act. It would claim standing as being directly affected by the provision. Clearly, party members have a function in the decision to comply or not, according to the rules of their association or organisation.

50. It seems to me that the trial judge was correct in this case and I would dismiss the appeal.