THE COURT OF APPEAL

[2018 No. 316]

Birmingham P.
Irvine J.
Hogan J.

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

AND IN THE MATTER OF AN INTENDED PETITION

BETWEEN

JOANNA JORDAN

APPELLANT

AND

IRELAND, THE ATTORNEY GENERAL AND

THE REFERENDUM RETURNING OFFICER

RESPONDENTS

JUDGMENT of the Court delivered by Birmingham P. on 27th day of August 2018

1. This is an appeal from a decision of the High Court (Kelly P.) of 20th July 2018: see Jordan v. Ireland [2018] IEHC 438. In that judgment. Kelly P. refused to grant leave to the applicant, Ms. Jordan, to present a petition pursuant to the provisions of s. 42 of the Referendum Act 1994 ("the 1994 Act"), seeking to have declared null and void a Provisional Referendum Certificate signed on 28th May 2018 and which was published in Iris Oifigiúil on 29th May 2018. Ms. Jordan has now appealed to this Court against that decision.

2. By way of background, it should be explained that the 36th Amendment of Constitution Bill 2018 was passed by both Houses of the Oireachtas on 28th March 2018. The principal object of this Bill was to propose that the existing provisions of Article 40.3.3 of the Constitution protecting the right to life of the unborn should be deleted and replaced with a new provision giving the Oireachtas a general power to legislate for the termination of pregnancy. A Polling Day Order was then made by the Minister for Housing, Planning and Local Government which fixed 25th May 2018 as the polling date. The referendum took place that day and the count was carried out on the following day.

3. On 26th May 2018, the Referendum Returning Officer declared a total poll of 2,159,655 votes. There were 6,042 invalid ballot papers, giving a total valid poll of 2,153,613. The number of votes in favour of the proposal was 1,429,981 and the number of votes against was 723,632. There was, accordingly, a majority of votes in favour of the proposal of 706,349. The Provisional Referendum Certificate was prepared and signed on Monday 28th May 2018 and was published in Iris Oifigiúil on Tuesday 29th May 2018.

4. As we have just indicated, the issue on which the People were called upon to vote was whether the existing Article 40.3.3 should be deleted and replaced with a new version of that sub-Article. Article 40.3.3 currently reads as follows:

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

5. The referendum proposal, if passed, would see the deletion of the present Article 40.3.3 and its replacement by the following provision:

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

6. In the High Court, Ms. Jordan's application was heard in conjunction with and consecutive to an application for leave to issue a petition brought by a Mr. Charles Byrne: see *Byrne v. Ireland* [2018] IEHC 437. In the High Court, Ms. Jordan raised two issues: the first concerned the involvement of the Minister for Health in the 'Yes' campaign and the very prominent role played by him in the course of that campaign, and the second raised issues concerning the Register of Electors.

7. It is to be noted that the issue in relation to the role of the Minister for Health has not been raised as a ground of appeal, nor did it feature in the written or oral submissions. However, for completeness, it should be explained that in the High Court, Ms. Jordan contended that there was:

> ". . a fundamental conflict between the campaign role and the Minister's duties and responsibilities of office. In office, he is responsible for the initiation, direction and control of health policies, services and facilities . . . the roles of office holder and campaigner became conflated when the Minister participated in the national 'Doctors for Yes' event held on Saturday

> 12th May 2018 when, in the course of that event, he discussed with journalists present the recent cervical cancer issues . . . was a clear example of the Minister for Health, he quite clearly could be mistaken for the chief proponent of 'Yes' campaign and the other way round, the opposite also applying, that for a voter, a confusion was being created as to who was speaking."

8. Ms. Jordan contended that the Minister's actions throughout the period of the campaign amounted to unlawful interference with the conduct of the referendum so as to affect materially the result of that referendum.

The Judgment of the High Court

9. In the High Court, Kelly P. concluded that the Minister for Health (Mr. S. Harris TD) was entitled to campaign for a Yes vote. In that context, he referred to remarks made by Denham C.J. in *McCrystal v. Minister for Children and Youth Affairs* [2012] IESC 53 [2012] 2 I.R. 726. Kelly P. observed, by reference to earlier authorities, that Mr. Harris was entitled to use State transport in the course of the referendum; that he was entitled to be paid a salary as a Minister even though he was campaigning for a Yes vote and he was entitled to answer questions put to him concerning other topical issues, such as the cervical cancer screening difficulty which arose during the campaign. Again, as Minister, he was entitled to indicate departmental policy on issues falling within his brief, whether in relation to the provisions of free contraceptives, or, in the event of the referendum passing, whether abortions would be provided at State expense.

10. Kelly P. was of the view that there was no conflict or illegality in the Minister for Health continuing to discharge his ministerial function in all its aspects and advocating for a Yes vote. He was not satisfied that Ms. Jordan had demonstrated *prima facie* evidence of any of the matters specified in s. 43 of the 1994 Act, and, in particular, had not demonstrated any irregularity in the conduct of the referendum as that term was interpreted by the Supreme Court in *Hanafin v. Minister for Environment* [1996] 2 I.R. 321. He went on to say that even if he was wrong in that view, there was no evidence, even of a *prima facie* nature, that such activity materially affected the result of the referendum as a whole as is required by s.42 (3) (b) of the 1994 Act.

11. It was for these reasons that Kelly P. refused to grant the applicant the leave which she sought. I propose to consider presently the various grounds advanced by the applicant, both in the High Court and in this Court. It is, however, first necessary to consider the applicable test governing the grant of leave in a case of this kind.

The Test Governing the Grant of Leave

12. As this Court has frequently had occasion to remark in, admittedly, a variety of contexts quite different to this one, the Constitution created a democratic state based upon the rule of law: see Article 5. As the provisions of Article 15, Article 16 and Article 28 of the Constitution further make clear, the State is principally a parliamentary democracy in respect of which the Government is democratically accountable to Dáil Éireann (Article 28.4) and where a freely elected Oireachtas enacts legislative measures. But the State is also, at least in some respects, a plebiscitary democracy because, as Article 6 makes clear, it is the People's right "in final appeal" to decide all questions of national policy. In the context of a constitutional amendment, this popular sovereignty is ordained by Article 47.1 which provides that the amendment in question shall be "held to have been approved by the people" if the majority of the votes cast at the referendum "shall have been cast in favour of its enactment into law."

13. In a case such as the present one, the Court's task is, accordingly, to harken to the authentic voice of the People as expressed in the referendum and, absent cogent evidence of obstruction, non-compliance, mistake or irregularity such as might materially affect the result for the purposes of s. 43 of the 1994 Act, to give effect to it. In the first instance, as MacMenamin J. pointed out in Jordan v. Minister for Health and Children [2015] 4 I.R. 232, 367, this means that the result contained in the Provisional Referendum Certificate has, at least, a presumptive validity. As the previous case law has made clear, this means that any petitioner seeking to challenge the outcome of a referendum carries a heavy onus of demonstrating that the outcome was materially affected by such obstruction, non-compliance, mistake or irregularity.

14. This issue was itself examined in greater detail in an earlier referendum petition brought by the same applicant: Jordan v. Minister for Children and Youth Affairs [2015] IESC 33, [2015] 4 I.R. 252. Following an exhaustive and rigorous analysis of the earlier Supreme Court decision in *Hanafin* and the effect of s. 43 of the 1994 Act, O'Donnell J. said ([2015] 4 I.R. 252 at 318):

> "…I would hold that the 'material effect on the outcome of a referendum' involves establishing that it is reasonably possible that the irregularity or interference identified affected the result. Because of the inherent flexibility of this test, it may be useful to add that the object of this test is to identify the point at which it can be said that a reasonable person would be in doubt about, and no longer trust, the provisional outcome of the election or referendum."

15. In his concurring judgment, MacMenamin J. spoke to the same effect ([2015] 4 I.R. 252 at 375-376):

> "…the proof required in s. 42(1)(b) [of the 1994 Act] regarding the leave application is that the High Court should be satisfied that the said matter is such as to 'affect materially the result of the referendum as a whole'. It is argued that this suggests that the evidence must demonstrate a 'potential' that the result of the referendum was affected. But this is not what the sub-section says. What is required is that the matter disclosed is such as to 'affect materially' the result of the referendum 'as a whole'. While it is evident that this language is derived from the consideration that referendum counts take place on a constituency by constituency basis, it is, nonetheless, a significant threshold, closer to the requirement disclosed in the planning statutes, requiring 'substantial grounds'. I do not accept, therefore, that there is a significant contrast in language between the terms of s. 42(1)(b) and s.43(1), requiring that at the trial it be shown 'the result of the referendum as a whole was affected materially by the impugned matter'. It is said that s.43 requires 'actuality'. I agree with the latter submission, which is consistent with the provisions of Articles 46 and 47 of the Constitution, and the respect due to the will of the People."

16. It is against this background and with reference to these standards that this Court is now requested to grant the applicant leave to present the referendum petition. The applicant's arguments before this Court concern, essentially, first, the role of the Government in the conduct of the referendum campaign and, second, alleged or supposed irregularities in the Electoral Register.

17. Before considering these questions, two further preliminary observations are called for. First, there is the size of the majority as reflected in the Provisional Referendum Certificate, with a margin of victory of almost two to one. While we do not say that a referendum result providing for a margin of this magnitude could never be judicially overturned, it is clear that the task of any petitioner wishing to establish that the outcome was materially affected by any supposed irregularity etc. is all the greater where, as here, the margin in favour of any acceptance of the proposal is a resounding one. If, as O'Donnell J. observed ([2015] 4 I.R. 232, 325) in Jordan, the referendum can "only be re-run when the outcome is in doubt", then, quite obviously, it is more difficult to establish material effect on that outcome where the majority is a large one.

18. Second, unlike previous referendum petitions such as Hanafin and Jordan, no constitutional irregularity has already been established in respect of this referendum. In Hanafin, the petition had been presented in circumstances where the Supreme Court had already ruled during the course of the referendum campaign in relation to what became the 15th Amendment of the Constitution Act 1996 (divorce) in McKenna v. An Taoiseach (No.2) [1995] 2 I.R. 10 that the Government had violated the Constitution by committing public funds in support of the Yes campaign. The same was true in Jordan, as the Supreme Court ruled within a month or so of the referendum on what was to become the 31st Amendment of the Constitution Act 2015 (children's rights), and in McCrystal, the Government information leaflet which had been sent to voters during the course of the referendum campaign was not neutral, thus amounting to the use of public monies to support one side of the campaign.

19. In the present case – unlike the background to Hanafin and Jordan - no such irregularity has already been established so far as this referendum is concerned. While we do not say that this in itself would necessarily be fatal to a petitioner's case, it obviously makes the task of establishing a material irregularity which is likely to have a material effect on the outcome all the more difficult.

20. We propose now to consider the specific arguments advanced by the applicant in the course of this appeal.

The Role of the Government and Government Ministers in the Conduct of a Referendum Campaign

21. The applicant's argument under this heading was that the Government and individual Ministers had acted unconstitutionally in the course of the campaign by campaigning actively on the 'Yes' side. Some of these arguments were not included in the notice of appeal, but given that these issues were extensively canvassed without firm objection in oral argument before this Court, we intend to rule on them.

22. While the question of the role played by the Minister for Health (Mr. S. Harris T.D.) in the referendum campaign has not, as such, featured on this appeal as an issue, we should, for the sake of completeness, say that we completely agree with the conclusions of Kelly P. on the matter. In our view, the Minister for Health was just as entitled as every other citizen to take a position and to campaign actively in support of the view that he had formed. That view is, I believe, consistent with the long-standing jurisprudence of the courts. As far back as *Crotty v. An Taoiseach* [1987] I.R. 713, 788 Henchy J. had stated:

> "There is, of course, nothing in the Constitution to prevent the Government, or any person or group or institution from advocating or campaigning for or otherwise working for a change in the Constitution."

23. As Kelly P. pointed out in the course of his judgment in the High Court, this issue had also been addressed by the Supreme Court in *McCrystal.* In her judgment in that case, Denham C.J. had said ([2012] 2 I.R. 726 at 753-754):

> "37(i) The Government is entitled to campaign for a Yes vote by any method it chooses, other than by the expenditure of public funds. Such methods include writing, speaking, broadcasting, canvassing, leafleting and advertising. Some of these methods, such as writing, speaking, broadcasting on ordinarily-scheduled current affairs programmes and canvassing are cost-free. Others, such as the creation of a dedicated website, leafleting and advertising involve expenditure. Partisan advertising, that is advertising in one way or another urging a particular result, may be carried out by any person or by any organised group or political party, including parties comprising the Government of the day, but it must be done at their own expense. Any 'information' disseminated by the Government at public expense must be equal, fair, impartial and neutral. (ii) The Government is entitled to campaign for the change, and the members of the Government are entitled in their personal, party or ministerial capacity to advocate the proposed change. Government Ministers may use their State transport in relation to the referendum and may avail of the radio, television and other media to put forward their point of view. However, the Government and its members must not spend public monies in favour of one side."

24. In the same case, Murray J. had commented ([2012] 2 I.R. 726 at 774):

> "In a subsequent political campaign, neither is the Government nor members of the Oireachtas restricted in their capacity, nor should they be, to advocate one view or another concerning the merits of the proposed amendment to the Constitution. The inhibition that derives from the principles in *McKenna v. An Taoiseach (No. 2)* [1995] 2 I.R. 10, relates to the use of funds from the public purse to advocate one side of the argument to the detriment of others once the matter goes before the People for their decision."

25. While the issue of the role played by the Minister for Health, which had formed part of the application in the High Court, has not featured prominently during the course of this appeal, an issue which actually formed no part of Ms. Jordan's proceedings in the High Court has. On the hearing of this appeal, Ms. Jordan has sought to argue that while, in general, members of a government may be entitled to campaign for one side in a referendum, provided public money is not used, they were not entitled to campaign for a yes vote in the recent referendum. The reason for this, she says, is because the proposal was to remove a constitutional right which they, as members of the Government, were obliged to respect. The arguments now sought to be advanced in this respect in this appeal were, admittedly, arguments that were presented in the parallel application brought on behalf of Mr. Charles Byrne.

26. In our view, as this issue was not canvassed in the High Court in these proceedings (although it was, in Mr. Byrne's case) it is not one which, in strictness, Ms. Jordan can now seek to rely upon. In the interests of completeness, however, we propose nevertheless to consider it.

27. In the course of his judgment in the High Court in Byrne, Kelly P. commented that this argument was one which had been considered in *Hanafin v. Minister for the Environment* [1996] 2 I.R. 321, and that it was rejected decisively in the Divisional Court by Lynch J. who had said ([1996] 2 I.R. 321 at 364):

> "It would be a very strange state of affairs indeed if the Government, which consists of a group of citizens holding ministerial office, who had introduced the Bill for the amendment of the Constitution in Dail Éireann and therefore clearly approved of it, were to be the only group of citizens to lose their constitutional rights given by Article 40, section 6, subsection (1) to express freely their convictions and opinions."

28. Kelly P. commented that to accept the arguments of Mr. Byrne would mean that the position of the Government and its members in a referendum campaign would give rise to the truly bizarre result of total silence having to be observed by Government on its own proposal. That, he said, would be absurd. For our part, we respectfully agree.

29. Nor can we agree with the suggestion that there is a subclass of proposed constitutional amendments in respect of which Government Ministers are prohibited from campaigning. As the Government is obliged to uphold the Constitution (including the fundamental rights provisions of Articles 40 to 44), it was submitted that the Government and Government Ministers are precluded

from campaigning to remove an existing constitutional right in the course of any ensuing referendum campaign.

30. If such was the case, it would produce some very anomalous results indeed. It would have meant, for example, that while Ministers were free to campaign in 1983 to insert the Eighth Amendment of the Constitution Bill 1983, they were not free at any stage following its enactment to campaign in favour of its repeal. It would also mean that Ministers who in 2018 were opposed to any change to Article 40.3.3 would have been free to canvass for a No vote, but their colleagues who supported a change would have been prohibited from canvassing for a Yes vote.

31. Many other examples could be given to illustrate the anomalous and unsatisfactory state of affairs which this submission, if it were to be accepted, could produce. Counsel for the petitioner, Mr. Sumner (who, it must be said, argued a weak case with conspicuous clarity and skill) admitted, for example, that in view of the freedom of debate provisions contained in Article 15.10 and Article 15.12, Government Ministers could argue for and vote for the proposed measure as it made its way through both Houses of the Oireachtas. It would certainly be striking if, for example, the Constitution permitted the Taoiseach (and other Ministers) freedom to speak in favour of the measure in the Oireachtas, yet precluded him or her from speaking on the ensuing referendum campaign immediately following the passage of the Bill through both Houses.

32. Another refinement of this argument was, it was said, that the Government (or, as the case might be, individual Ministers) could not argue during the course of a referendum campaign in favour of the total abolition of an existing constitutional right, but that it was permitted to do so in the event that the proposal simply curtailed or varied an existing constitutional right. Viewing the matter from a historical perspective, this meant, counsel submitted, that, for example, while the Government was free to argue in favour of the 12th and 13th Amendments of the Constitution Acts 1992 (which provisions amended Article 40.3.3 by safeguarding the right to travel and to seek information concerning abortion services) and the 16th Amendment of the Constitution Act 1996 (amending the personal liberty provisions of Article 40.4 in relation to bail) because these proposals had simply varied a pre-existing constitutional right provided for in Article 40.3.3, the Government could not have legitimately have done so in the present case because the proposed amendment would have entirely repealed a pre-existing constitutional right. We consider, however, that this suggested distinction would be unworkable and anomalous and would give rise to unprofitable debates as to the extent to which any referendum proposal was one destined to simply vary – as distinct from repeal – a pre-existing constitutional right.

33. More fundamentally, however, the supposed restriction would be materially at variance with the underlying principle contained in Article 46.1 to the effect that "any provision" of the Constitution may be amended, "whether by way of variation, addition or repeal" (our emphasis). While it is true that all branches of government – executive, legislative and judicial – are bound to uphold the Constitution, it is not a breach of that duty to seek to have the Constitution amended. It is clear from the terms of Article 46.1 that the drafters envisaged that any provision of the Constitution could be changed by referendum, although the argument now advanced by the applicant would effectively invite the courts to parse the wording of the proposed amendment to see whether it involved a variation or addition on the one hand as distinct from a repeal on the other. But the very wording of Article 46.1 itself confirms that no distinction of this kind is permissible.

34. No one – whether in 1937 or in 2018 – could either then have been or is now so foolishly partisan as to suggest that the Constitution could not be improved. More to the point, the whole point of the democratic State based on the rule of law envisaged by Article 5 of the Constitution is that it should (and, of course, does) provide for a fair mechanism whereby legislative change – even to an important provision of a fundamental law – can be brought about by legitimate and democratic means. In our constitutional system this is what is provided for by Article 46 and Article 47.

35. We repeat, therefore, that it is not a breach of the executive's duty to uphold the Constitution by campaigning for constitutional change, since a mechanism for constitutional change is itself provided for in the Constitution itself. In line with the provisions of Article 46.1, it matters not that the proposal for constitutional change involves a suggested repeal of an existing constitutional right or whether it is proposed that that right be simply varied or amended. Leaving aside issues of the expenditure of public monies raised in cases such as McKenna and McCrystal (but which do not arise in the present case), it is accordingly clear that Government Ministers are perfectly free to campaign as they see fit in the course of a referendum campaign.

The Issues in Relation to the Electoral Register

36. There remains for consideration the issues relating to the Electoral Register. In the course of the written submissions to the High Court, this was described as 'Issues with the Register of Electors' and we propose to adopt this formula.

37. In her first affidavit, Ms. Jordan asserts the following:

> 5 "I canvassed for a No vote for 17 weeks before the vote on 25th May in Dublin city centre. Initially, the majority of people were in favour of a Yes vote. By the beginning of May, there was a shift to "no" which continued until 24th May.
>
> 6. A foreign journalist informed me on Thursday night, 24th May, that the polls were showing a 2.6 % differential. Within 24 hours, the result showed an increase of 20%. Such a swing is not possible.
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> 7. Evidence is coming in of large numbers of potential no" voters who are unable to vote due to deregistering. These consisted of groups such as convents of nuns and residents of nursing homes.
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> 8. There is also evidence of people not entitled to vote getting polling cards.
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> 9. Thousands of young Irish people who were paid to return to vote were not questioned about, their time of residency abroad, at the polling stations.
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> 10. The tally of the number of votes cast by box was not always given when requested by 'no" people' at the close of voting on 25th. It begs the question then were the number of ballots counted from 9am on 26th May the same as the number of ballots in the boxes at 10pm on 25th May? If not, it could account for the 20% overnight swing'."

38. In his judgment in the High Court, Kelly P., with considerable restraint, commented that much of what was contained in this affidavit amounted to generalised assertion, speculation or inadmissible hearsay, the rather relaxed regime which exists in respect of the admission of hearsay evidence on interlocutory applications notwithstanding. We agree. Indeed, we would go further and say that these assertions are so entirely devoid of substance that we can only conclude that they were made with reckless and irresponsible abandon.

39. The impression formed by one canvasser for a partisan view – and it must be recalled that all canvassers were canvassing for one

or other partisan view in the course of the referendum - that there was a shift in public opinion is of no evidential value whatever. The comment that the applicant was told by an unnamed journalist on the eve of polling day that polls were showing a 2.6% differential is likewise of absolutely no evidential value whatsoever. The journalist's comments about large numbers of voters, potential no voters, being deregistered, if made, are again of no value. If it is indeed the case that, for example, convents of nuns and residents of nursing homes were deregistered in large numbers, as is suggested, it is truly remarkable that now, almost three months after the referendum that no such evidence has emerged. The point about deregistration ignores the fact that citizens have the entitlement – indeed, one might even say, the responsibility - to check the draft electoral register. Every year, significant sums of public money are spent on an advertising campaign urging people to do just that.

40. Ms. Jordan further asserted that thousands of young Irish citizens were paid to return home from abroad in order to vote in the referendum. There is no indication at all where this suggestion comes from. From whence were they paid to return? Who, is it suggested, paid them to do so? These averments disclose a complete absence of detail.

41. Ms. Jordan further averred that the tally of votes cast by box was not always given when requested by no campaigners at the close of voting on May 25th. There is no indication whether a failure to furnish information was on a large scale and no indication whether those seeking the information were persons authorised to make such requests of Presiding Officers. The comment that "it begs the question, then, were the number of ballots counted from 9am on 26th May the same as the number of ballots in the boxes at 10pm on 25th May and that if not, it could amount for the 20% overnight swing" is, we feel bound to observe, a complete non-sequitur. Moreover, the suggestion of that ballot boxes were "packed" without any evidence whatsoever to support this suggestion is quite irresponsible and we further feel bound to observe that such conduct on the part of a litigant such as Ms. Jordan can properly be described as unacceptable.

42. The issue of the Electoral Register was addressed again in a second supplemental affidavit sworn by Ms. Jordan on 20th June 2018. There, she commented:

> 7. "I say and believe that since I made initial application to the Court, I have since requested anyone with relevant information as to possible irregularities in voting to contact me. I have received to date more than 80 reports of persons with serious complaints in this regard, including many persons receiving two Polling Cards and two persons having received three. I have also received what I would consider reliable reports of unannounced deregistration, questionable voting and of refusal to provide postal votes. I also say that I have received reports of issues with the maintenance, security and transport of ballot boxes and of persons being unable to get ballot box tallies at the close of voting. I say that a number of those who have informed me of these matters have indicated that they are willing to depose as to these facts.
>
> 8. I say that the context for the various issues with registration and voting, which I describe hereto above, illustrates the well-reported systemic large-scale problem with the Electoral Register. I say and believe that this raises legitimate concerns for the validity of the referendum process and result. I also say and believe that the process is open to manipulation and/or abuses.
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> 9. I say that a recent OECD report ranked Ireland 137th in the world for voter registration processes and that the Electoral Integrity Project (EIP), an independent academic study, scored Ireland 32 out of 100 for the perception of electoral integrity.
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> 10. I say that a Newstalk and media report for 25th January 2016 stated that, by making comparison with the 2011 Census, it could be estimated that the register was overstated by 15%, that is by at least 200,000 people, but perhaps that over-registration could be as many as 600,000 persons. I say that the author of this article has indicated his willingness to give oral evidence to the Court in respect of this matter, including also the situation following the 2016 Census and the issues generally with the register. I say further that the serious issues with the register had been in the public domain for several years, but that despite acceptance by Government of the need for remedial action, including the need for an Electoral Commission, nothing has been done.
>
> 11. I say and believe and am advised by my legal representatives that which I depose herein and heretofore is prima facie evidence of interference with the conduct of the referendum such has (sic) had a material effect on its result which questions the Provisional Referendum Certificate."

43. Commenting on this aspect of Mr Jordan's evidence, Kelly P. observed:

> "Once again, it must be noted that this affidavit likewise contains much by way of assertion, speculation and admissible material. In particular, is the remarkable and speculative proposition stated in paragraph 10 that by comparison with the 2011 Census, it could be estimated that the Register was overstated by 15%, that is by at least 200,000 persons, but perhaps that over-registration could be as many as 600,000 persons . . .

These affidavits go nowhere near establishing what section 42 of the Act requires."

44. Prior to the hearing in the High Court, Mrs. Jordan swore a third supplemental affidavit setting out a series of pieces of information given to her by named persons. As Kelly P. pointed out, these concerned for the most part people receiving in excess of one polling card or other persons indicating a discrepancy between the total vote count and a tally or failure to permit a person to record a ballot box identity and various other matters of the sort. He commented the assertions contained in these affidavits failed to demonstrate what is required on this application.

45. In the course of her third supplemental affidavit, Ms. Jordan reported what she was told by some 41 third parties. The information provided in many cases could fairly be described as sparse. Some 25 of these reports related to the inappropriate issuing of polling cards. In some cases, the issuing of two or even three cards to the same person, and in others, the issuing of cards to people who had gone away or for some other reason should not have received a card. In only one case is it suggested that an individual who had received a card and ought not to have done so actually intended to vote. If an individual who is not entitled to vote receives a card and proceeds to cast a vote, in doing so, that individual commits the offence of personation: see s. 134(1) of the Electoral Act 1992 as applied to referendums by s. 6 of the 1994 Act. The information provided by Ms. Jordan suggests, however, that there is no major correlation between over-issuing of cards and the casting of improper votes.

46. In any exercise of mass democracy, such as is involved in elections and referendums, it may be expected that there will be occasional errors, irregularities and omissions so far as the Electoral Register is concerned. As O'Donnell J. observed in Jordan, many of these random errors will, to some degree at least, self-cancel by affecting indiscriminately potential 'Yes' and 'No' voters alike. Yet,

taking the applicant's case at its very height and making every possible allowance in her favour, one can point, at most, to perhaps a few instances of where polling cards were wrongly issued and – possibly – to a small number of cases where the recipients of these cards then proceeded wrongly to vote. That, however, is by any measure almost as far away from indicating that there had been a material effect on the outcome of the referendum as it is possible to imagine.

47. So far as the contention that there are more names on the Electoral Register than there ought to be is concerned, there is no suggestion – still less evidence - that this impacted on the outcome of the referendum or even on the margin. There is no suggestion that the over-representation on the electorate is confined to particular areas or in respect of particular social classes or other demographics. The Newstalk report on which the applicant places reliance contends that 200,000 more voting cards were issued in the referendum on the 35th Amendment of the Constitution Act 2015 (marriage equality) than there were citizens. The point is made that if the registration of citizens was not 100%, then the divergence between registration and citizen numbers on the Census is greater. If a registration rate of 90% is assumed, then the divergence rises to 488,000, and if a divergence rate of 85% was to be assumed, the divergence figure would rise to 600,000.

48. Even if, however, it could be established that 600,000 extra voters were cast and all cast their votes the one way in favour of the proposal to repeal Article 40.3.3, that would still not have affected the outcome. In fact, even if one was prepared to accept that there were appreciably more names on the register that there are citizens, there is no evidence, or even anything to suggest, that this advantaged one side over the other in the referendum. There is no evidence, for example, that over-representation occurs disproportionately, occurring in particular demographics which, as a minimum, is the sort of information that would be required before one could form the view that over-registration had any effect whatever on the outcome, still less had affected materially the outcome of the referendum as a whole in the manner required by ss. 42 and 43 of the 1994 Act.

49. When counsel for the applicant was asked by members of the Court in the course of oral argument where the evidence that the inflation of the Electoral Register had any impact whatever on the result and had served to advantage the Yes side rather than the No side actually was, his response was that the expectation had been that the result would be close, but instead, there had been a decisive Yes win. This in its own way is simply a measure of the desperate straits to which the applicant's complaints regarding the Electoral Register have been reduced.

50. The State respondents further made the point that even if all the complaints were substantiated, the margin by which the referendum was carried means that it can be said with absolute certainty that these issues did not materially affect the result. That is self-evidently the case. Like Kelly P., we are of the view that Ms. Jordan has not produced *prima facie* evidence of any material which would justify a Court granting leave to present a petition. No evidence on a prima facie basis has been put forward of the matters referred to in s. 43 of the Referendum Act. Neither has she presented *prima facie* evidence that what she complains of is such as to affect materially the result of the referendum as a whole as is required by section 42(3) (b).

An Application to Introduce New Material

51. During the course of the proceedings before this Court, Ms. Jordan swore a still further affidavit and sought to have its contents admitted in evidence. In arguing for its admission, counsel on behalf of the appellant contended that what had occurred before Kelly P. was essentially interlocutory in nature and that, accordingly, no special leave was required in order for the material to be admitted. Alternatively, he said that if what had occurred in fact amounted to a final determination, then the Court should apply the principles applicable to the admission of new evidence and in its discretion admit the proposed material. The Court considered the matter and ruled on the issue. The Court was and is in no doubt that the proceedings before Kelly P. cannot be characterised as interlocutory and that his judgment and order, subject to a right of appeal, finally disposed of the matter. In the circumstances, the Court is and was in no doubt that the material could only be admitted with the special leave of the Court (see The Minister for Agriculture, Food and Forestry v. Alt Leipziger Versicherung Aktiengesellshaft). The Court was also firmly of the view that the application did not come anywhere close to meeting the criteria for admitting new evidence.

52. The affidavit dealt with a number of topics. It dealt with the question of the over-subscribed Register of Electors and it concluded that section by making the point that what it had to say in that regard was based on State documentation and that, accordingly, the respondents were or ought to have been aware already of those matters. While that might be so, it is also the case that it was material that was potentially available to the appellant in the High Court. The Court is of the view that the material, even if admitted, would not alter the situation. The contention that there are more names than there ought to be on the Register was clearly in the case and the proposed new material really adds nothing to the issue.

53. The next section of the affidavit dealt with what is described as specific examples of deficiencies in the Register and other related matters. The Court saw this as simply a repeat of what had already been said in the third supplemental affidavit.

54. The third aspect of the affidavit claims that interventions by various members of the Government, in particular, the Taoiseach and Minister for Health, were misleading and untruthful. It is in the nature of the political debate and in the nature of debate that takes place in the context of a controversial referendum that both sides will seek to put their case forward as persuasively as possible. Invariably, the accuracy of what one side has to say, and sometimes the truthfulness of what one side has to say, will be challenged by the other. However, it is not the role of the courts to act as a fact-checker during or in the aftermath of election or referendum campaigns. There is the further point that what the participants on both sides of the debate had to say, including An Taoiseach and the Minister for Health, was known before the application to the High Court for leave. The Court was in no doubt and remains in no doubt that the affidavit was not of the nature of document in respect of which special leave should be granted.

Some Further Observations

55. Before concluding, we would, however, like to add some further observations. There does not appear to have been any recorded instance of the presentation of any referendum petition prior to the application in Hanafin in 1995/1996. Yet, in recent years, they have almost become the norm. The first such challenge in Hanafin was presented in a situation where it was not in dispute that the Government had used public funds in support of the Yes campaign; something which the Supreme Court said in McKenna was not permissible. The challenge was in the context of an extremely close result; a Yes lead of some 9,114 votes out of a total valid poll of some 1.63m voters: see [1996] 2 I.R. 321, 345 per Murphy J. Since then, however, challenges have been presented even though the result has been very decisive and where it must be clear to all concerned that the scale of the margin presented a difficulty for the would-be challenger.

56. In Jordan, the application for leave to present a petition came against a background that the Supreme Court had held in its earlier judgment in *McCrystal* that the Government had engaged in constitutionally impermissible conduct by producing partisan material in the guise of objective information. By any standards, serious issues also arose in the Jordan application which required resolution.

57. Since then, however, a number of applications have been presented in the case of referendum results which were very clear cut.

That was so in the case of the 35th Amendment of the Constitution Act 2015 (marriage equality) and it now has happened once more in the case of the present referendum. The stage has been reached when challenges to referendum results seem to have become almost routine.

58. For our part, we deprecate any suggestion that the commencement of proceedings seeking leave to challenge a referendum result should become the norm or should be regarded as routine. As a minimum, the act of seeking leave will delay the implementation of the will of the People. Absent cogent grounds for such a challenge – such as in Hanafin or in the first Jordan case - the commencement of such proceedings amounts to the frustration of the will of the People as envisaged by Article 46 and Article 47 and a frustration of the democratic order envisaged by Article 5.

59. We have already drawn attention to the fact that in Jordan, O'Donnell J. commented that the object of the exercise was to identify the point at which it could be said that a reasonable observer would be in doubt and could no longer trust the outcome of an election or referendum. Naturally, in any democracy there will be many who will be disappointed with the outcome of any particular referendum, not least in the context of a traditionally contentious subject such as the termination of pregnancy. But equally, in a democracy, all must accept the result, at least absent cogent evidence of material irregularity.

60. In the present case, there can be no rational, reasonable observer who could have any reason to doubt or to distrust the result. In these circumstances, such a reasonable observer could only regard any decision to seek leave to issue a petition with some disquiet. Seeking leave by means of the commencement of a referendum petition simply in the hope of achieving delay, if that indeed was the objective of the application, amounts not only to impermissible conduct in a democracy and in other circumstances might well amount to an abuse of process.

Conclusions
61. In summary, therefore, we would conclude as follows.

62. First, it is not a breach of the Executive's duty to uphold the Constitution by campaigning for constitutional change since a mechanism for constitutional change is itself provided for in the Constitution. In line with the provisions of Article 46.1, it matters not that the proposal for constitutional change involves a suggested repeal of an existing constitutional right or whether it is proposed that that right be simply varied or amended. Leaving aside issues of the expenditure of public monies raised in cases such as McKenna and McCrystal (but which do not arise in the present case), it is accordingly clear that Government Ministers are perfectly free to campaign as they see fit in the course of a referendum campaign.

63. Second, the applicant has advanced no sustainable argument or evidence to demonstrate that the effect of any supposed irregularities in relation to the Electoral Register could possibly have affected the result. Even taking the applicant's case at its absolute height and making every possible allowance in her favour, all that can be shown is that, at most, a handful of votes were affected. Nor can the argument regarding the supposed inflation of the Register be accepted because even if that were so, no evidence has been presented to show that this had the potential of affecting the outcome of the referendum.

64. We consider that Kelly P. was entirely correct in refusing leave to present the petition. For our part, we would go even further and hold that the presentation of the petition in these circumstances - based as it was on such flimsy and slender grounds - amounted to a frustration of the democratic process in relation to referendums as envisaged by Articles 5, 46 and 47 of the Constitution and, as such, might well in other circumstances amount to an abuse of process.

65. It follows, therefore, that this appeal should be dismissed