

THE SUPREME COURT

[Appeal No. 486/12]

**Denham C.J.
Murray J.
Hardiman J.
Fennelly J.
O'Donnell J.**

Between/

Mark McCrystal

Plaintiff/Appellant

and

**The Minister for Children and Youth Affairs,
The Government of Ireland, Ireland
and the Attorney General**

Defendants/Respondents

JUDGMENT of Murray, J. delivered the 11th day of December, 2012

1. “We , the people ...

“Do hereby adopt, enact and give to ourselves this Constitution”.

This is the concluding phrase of the preamble to the Constitution, which expresses the truth that the existence of our constitutional democracy, including the constitutional framework within which it functions, owes its legitimacy exclusively to the consent of the people. That constitutional framework can only be altered with the

consent of the people obtained in a manner prescribed by the Constitution itself, namely, by consultation of the people in a democratic referendum.

2. Government by consent of the people has been considered as an essential tenet of democratic states since it was first fully embraced in the Constitution of the United States – a form of democracy which was then portrayed by its supporters as ‘the great experiment’ and by a sceptical elite, particularly in Europe, as a recipe for chaos. The tenet was echoed in its most rhetorical and famous form by Lincoln in his Gettysburg address when he referred to “government of the people, by the people, for the people”.

3. That tenet in our Constitution was the sub-stratum of the decision of this Court in *McKenna v. An Taoiseach (No. 2)* [1995] 2 I.R. 10, when it declared that the use of public funds to promote in a one-sided manner a particular outcome to a referendum was constitutionally impermissible.

4. Hamilton, C.J. in his judgment in that case stated:

“Having regard to the importance of the Constitution as the fundamental law of the State and the crucial role of the People in the adoption and enactment thereof, any amendment thereof must be in accordance with the constitutional process and no interference with that process can be permitted because, as stated by Walsh J. in Crotty ... ‘it is the people themselves who are the guardians of the Constitution’.

The Ruling of the Court

5. On 8th November, 2012 the Court ruled in this case that the above named respondents had “... *acted wrongfully in expending or arranging to expend public moneys on the website, booklet and advertisements in relation to the Referendum on the Thirty First Amendment of the Constitution (Children) Bill, 2012, in a manner which was not fair, equal or impartial.*”

6. The Court so ruled by applying the principles pronounced in the *McKenna* case. The website, booklet and advertisements referred to are those which were published and promoted by the Minister for Children and Youth Affairs in connection with that proposed amendment, since adopted. They were funded and paid for out of an allocation to the Minister by the Oireachtas of a sum of €1.1 million of public funds for the purposes of the referendum campaign. The appellant, who is the plaintiff in these proceedings, sought to restrain the respondents from continuing to use the material referred to on the grounds that they were in breach of the principles set out in the *McKenna* case. His claim was dismissed in the High Court and on appeal to this Court he obtained a ruling in his favour. Since an urgent decision of the Court was required its ruling was given on the 8th November, 2012 and it was stated that the reasons for the ruling would be given at a later date. The history and pleadings in these proceedings are amply set out in the judgment of the Chief Justice. This judgment sets out the reasons why I agreed with the ruling of the Court on that date.

The McKenna Principles

7. The *McKenna* principles derive from the judgments of the majority in the *McKenna* case. The decision in that case was taken in the context of the devolution and separation of governmental powers. Hamilton, C.J..cited the dictum of McCarthy, J. in *Slattery v. An Taoiseach* [1993] 1 I.R. 286 at 303:

"Article 6 proclaims that all powers of Government, legislative, executive and judicial, are derived under God from the People. In having a referendum the People are taking a direct role in Government either by amending the Constitution or refusing to amend it. Such an amendment can only be initiated by the legislature, where the relevant legislation may be promoted by any member of the legislature. When the relevant legislation has been passed by both Houses the constitutional process must continue."

8. In Article 6.1 the people delegated the exercise of the powers of government and paragraph 2 of that article specifies:

“These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution.”

9. The organs of State referred to are the legislative executive and judicial organs. Thus, the Government exercises executive powers conferred on it by the Constitution. Article 28.2 of the Constitution provides that:

“The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government.”

10. In his judgment in the *McKenna* case Hamilton, C.J. recalls the dictum of Walsh, J. in the *Crotty* case where it was stated:

“It is not within the competence of the Government, or indeed the Oireachtas to free themselves from the constraints of the Constitution. ... They are both creatures of the Constitution and are not empowered to act free from the restraints of the Constitution. To the judicial organ of Government alone is given the power conclusively to decide if there has been a breach of constitutional restraints.”

11. Hamilton, C.J. also pointed out that the power of the courts to supervise or interfere with the exercise of executive power by the government is limited, citing FitzGerald, C.J. in *Boland v. An Taoiseach* [1974] I.R. 338 who stated:

‘... 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.’

12. Having reviewed these and other dicta in previous judgments of this Court Hamilton, C.J. concluded:

“These dicta clearly establish that

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)

13. Hamilton, C.J. went on to consider whether there had been, in the *McKenna* case, a clear disregard by the government of its constitutional duties in expending public funds for the purpose of promoting a campaign for a “yes” vote in the proposed referendum.

14. Hamilton, C.J. explained in the course of his judgment that “*neither the Constitution nor the Referendum Act, 1994, envisaged any role for the Government in the submission of the Bill by referendum to the decision of the People.*” He went on to conclude:

“The action of the Government in expending public funds on the promotion of such a campaign was not an action in pursuance of the executive power of the State.

Even if it were, it would still be subject to examination and review by the Court in accordance with the dicta quoted in the course of this judgment.

...

The role of the People in amending the Constitution cannot be overemphasized. It is solely their prerogative to amend any provision thereof by way of variation, addition or repeal or to refuse to amend. The decision is theirs and theirs alone.”

15. The Chief Justice concluded:

“Once the Bill has been submitted for the decision of the People, the People were and are entitled to reach their decision in a free and democratic manner.

The use by the Government of public funds to fund a campaign designed to influence the voters in favour of a "Yes" vote is an interference with the democratic process and the constitutional process for the amendment of the Constitution and infringes the concept of equality which is fundamental to the democratic nature of the State.”

16. In his judgment O’Flaherty, J. pointed out that the government is entitled to spend money in providing information to the public on the implications of a constitutional amendment and indeed entitled to campaign, as are individual members of the government, for a change in the Constitution. He added that it would be *“unrealistic to expect a Government to remain neutral on a topic which it has, through its initiative, brought to the People.”*

17. He added however:

“...the Government must stop short of spending public money in favour of one side which has the consequence of being to the detriment of those opposed to the constitutional amendment.

To spend money in this way breaches the equality rights of the citizen enshrined in the Constitution as well as having the effect of putting the voting

rights of one class of citizen (those in favour of the change) above those of another class of citizen (those against). The public purse must not be expended to espouse a point of view which may be anathema to certain citizens who, of necessity, have contributed to it.”

18. He went on to add:

“I should think it bordering on the self-evident that in a democracy such as is enshrined in our Constitution (which is not exclusively a parliamentary democracy; it has elements of a plebiscitary democracy) it is impermissible for the Government to spend public money in the course of a referendum campaign to benefit one side rather than the other.”

19. Blayney, J. in his judgment noted:

“Neither the Constitution nor the Act gives any other role to the Government. And even in the matter of giving information to the electorate about the proposed amendment, the task of doing this, as appears from the terms of s.23 of the Act ... is given to the two Houses of the Oireachtas and not to the Government. It is reasonable, accordingly, to infer that neither the Constitution nor the Referendum Act, 1994, envisaged that the Government, once a Bill for the amendment of the Constitution had been passed, would have any further role to play other than to submit the Bill by referendum to the decision of the People.”

20. He concluded that the government were constitutionally bound to act fairly in discharging its executive functions without *“favouring any section of the People at the expense of any other section. This would seem to be a minimum requirement for the discharge of any constitutional obligation. The people are entitled to be treated equally.”*

21. Denham, J. agreed “...with the judgment of the Chief Justice that in expending public monies to campaign for a specific outcome to a referendum the Government are not acting within their powers under the Constitution and the law.”

22. In the course of her judgment she stated:

“The citizen is entitled under the Constitution to a democratic process. The citizen is entitled to a democracy free from governmental intercession with the process, no matter how well intentioned. No branch of the government is entitled to use taxpayers monies from the Central Fund to intercede with the democratic process either as to the voting process or as to the campaign prior to the vote.”

23. She pointed out that “Power derives from the People, and is exercised under the Constitution through their organs of government (legislative, executive, judicial). Power and decision-making in referenda is with the People.”

Conclusion on the McKenna Principles

24. Having regard to the provisions of the Constitution and the dicta in the judgments of the majority in the *McKenna* case, I think it can be properly said that a referendum, by its very nature and essence, involves the people directly in the governance of the country. This is their right and it is a right enjoyed exclusively by them. It was after all, in the words of the Preamble, the people who enacted and gave unto themselves the Constitution. All sections of the community have an equal right to participate in the constitutional and political process that is engaged when a referendum is being held. Once a referendum process has been launched with the passing of the appropriate Bill, the Constitution does not envisage or confer any special role, let alone power, on any of the organs of State in that process. The spending of public funds to advocate one side to the detriment of others would distort that democratic process.

25. To place matters in context it might be well to bear in mind that both the government and members of the Oireachtas will invariably have had a major role to play in the political process leading to the passing of a Bill containing a proposal to amend the Constitution. Every such Bill is invariably preceded by an extended public and political debate, both within the Oireachtas and outside it, on whether a particular issue or question should be the subject of an amendment to the Constitution. The government and members of the Oireachtas have a public constitutional role to play in the formulation of any proposal to amend the Constitution, including the text of any such proposal. There is the legislative process that follows the initiation of any Bill containing such a proposal. Both the government and members of the Oireachtas have the opportunity to express in both Houses the views on the merits or otherwise of any such proposal and to advocate reasons why it should or should not be adopted. Extensive debates within the Houses of the Oireachtas can serve to inform the public on the issues which arise and to persuade them as to how they should vote in the event of the Bill being adopted.

26. 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 *McKenna* principles 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.

27. Such a constitutional restriction does not mean that members of the government or of the Oireachtas are restrained from participating in a referendum campaign in their capacity as office holders, including the incidental use of facilities (such as offices and incidental services) which are available to them as office holders or elected representatives.

28. From the foregoing I would conclude that:
- (a) The right to a fair and democratic referendum process is a right vested in the People as the ultimate guardians of the Constitution. Once the constitutional process of consulting the people by way of referendum has been initiated on the passing of an appropriate Bill that right must be respected.
 - (b) Such a right means that the use of funds from the public purse to promote one side of the referendum campaign to the detriment of the others would be in breach of that constitutional right.
29. In the course of his submissions counsel for the appellant submitted that the principles pronounced in *McKenna* required that any expenditure of public funds by the government for the purposes of a referendum campaign must be expended in a manner which is ‘fair, equal and impartial’. This approach was not disputed by counsel for the respondents.
30. This is the formulation agreed and applied by the Court when it concluded that the monies expended by the government on the website, booklets and advertisements in relation to the recent campaign were “*not fair, equal or impartial*”.
31. That is the formulation to be applied for the purposes of examining whether any such expenditure complies with constitutional requirements.

The Onus of Proof

32. It is not in issue that the onus of establishing that the respondents acted in breach of their constitutional duties lies on the appellant, the plaintiff in this case. This in turn gives rise to the test to be applied by the Court in deciding whether grounds have been established which require the Court to intervene to protect a party from a breach of constitutional duty on the part of one of the organs of state in a case such as the present. The dissemination of information in a referendum process with use of

public funds is, in itself, lawful provided it does not give rise to an unfair, impartial or unequal interference with that process. The State may use various means, including statutory mechanisms, to disseminate information concerning the matters arising in relation to a proposed amendment. The Referendum Commission is one such example. No complaint has been made concerning the manner in which the Referendum Commission exercised its functions and disseminated information in the course of the referendum in question.

33. In the High Court the learned President also dealt with this case as a matter of urgency, and delivered an *ex tempore* judgment. In the course of his judgment he alluded to the “*clear disregard*” test referred to by Hamilton, C.J. in *McKenna*. However, in assessing whether the material in this case was in breach of the government’s constitutional obligations he added:

“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.”

34. I sympathise with the concerns of the learned President in the latter part of the passage quoted. It is not for this Court to be concerned with the merits, as such, of statements made by information officially disseminated in the course of a referendum campaign. Words and phrases are often imprecise tools however carefully crafted. Ambiguities may be unavoidable, and it may often be valid to say that something

could have been better phrased. In a judicial review of the dissemination of such information the Court must take an overall view of the broad thrust and effect of the material complained of. It is not simply a question of trawling through the material so as to pick up on questionable nuances or slippages in presentation. On the other hand, objective judicial scrutiny of such material in order to determine whether, taken as a whole, it offends against the principles of fairness, impartiality and equality does not necessitate the Court in becoming enmeshed in the merits as such of the material or its minutia. Moreover, the intention of the disseminator of the information is not determinative of the outcome of such scrutiny. In the present case there is no allegation that there was any *mala fides* behind the dissemination of the material. On the contrary, all the evidence is that a great deal of care was exercised with a view to avoid a breach of the *McKenna* principles, as perceived by the compilers of the material. The issue of *mala fides* may only be relevant to an issue as to whether the Court should issue a mandatory order against a government (see *TD v. Minister for Education & Others* [2001] 4 I.R. 260).

35. However, it was submitted on behalf of the appellant that the learned President erred in adopting “*blatant and egregious*” as the test to be applied in any judicial scrutiny of the material in this case.

36. In the *McKenna* case Hamilton, C.J. referred to the decision of this Court in *Boland v. An Taoiseach* (cited above), and in particular the judgment of FitzGerald, C.J. in which he expressed the view that the courts should not 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 upon it by the Constitution.*” He then went on to apply in that case a test of “*clear disregard*”. That test is clearly consistent with the approach adopted by the other members of the majority in the *McKenna* case.

37. It is axiomatic to state that the Government of the day must conduct its affairs in accordance with its obligations under the Constitution. If it clearly disregards those duties then the courts are bound to intervene where this is necessary to protect the rights of others. I do not consider that the test of “*blatant and egregious*” was the correct one to be applied.

38. Accordingly, the onus in this case is on the appellant to establish that the material in question was in “*clear disregard*” of the constitutional principles referred to in the *McKenna* case. That is the objective test to be applied

Other Countries

39. It may be appropriate to note in passing that the principles deriving from the Constitution which ensure that the referendum process should be fair are not unique to this country. Many countries apply comparative principles, whether derived from the constitution or statute law, which prohibit, regulate or control the use of public funds in referendum campaigns with a view to guaranteeing the fairness of the referendum process within their constitutional framework. These include Australia, Austria, Spain, Portugal, Finland, Sweden, the United Kingdom and certain states in the United States, to refer to some of them. In 2006 the European Commission for Democracy through Law, otherwise known as the Venice Commission, and the Council for Democratic Elections adopted a Code of Good Practice on Referendums which included the statement that “*Equality of opportunity must be guaranteed for the supporters and opponents of the proposal being voted on. This entails a neutral attitude by administrative authorities, in particular with regard to: ... public funding of campaign and its actors*”. In the explanatory memorandum accompanying the code it states: “*There must be no use of public funds by the authorities for campaigning purposes, in order to guarantee equality of opportunity and the freedom of voters to form an opinion.*”

The Material

40. In support of his claim the plaintiff relied upon affidavits of three witnesses. These were Mr. John Waters, the well known journalist, Miss Lyn Sheridan, an expert in public relations, and Doctor Colm Kenny, professor of communications at Dublin City University.

41. Affidavits were also filed on behalf of the respondents. These included Mr. Gerald Angley, First Secretary of the Department of Foreign Affairs & Trade, who had been temporarily assigned to the Department of Children & Youth Affairs; Miss Elizabeth Canavan, Assistant General Secretary of the Department of Children & Youth Affairs, and Doctor Eoin O'Malley, lecturer in Political Science at the School of Law and Government, Dublin City University. The respondents also relied on an affidavit from Dr. Richard Sinnott, Emeritus Professor of Political Science, University College Dublin, and Dr. Kevin Rafter, a lecturer in political communication and journalism at Dublin City University. All of these opponents provided interesting and thoughtfully expressed opinions on the material in issue. They were expressed from different perspectives and different in their analysis as to the nature and effect of the material, particularly in terms of whether it could be considered to advocate a yes vote in the referendum.

42. In certain circumstances evidence of this nature could be of vital importance, but in the circumstances of this case they constitute opinions based almost entirely an analysis of written material contained in the publications the subject of the proceedings. In this case the intended meaning of the textual material is patent. In the end the Court has to make up its own mind on the nature and import of the material itself applying the objective test referred to above.

43. In the circumstances of this case, I consider that the best evidence lies with the text of the material itself, namely, as contained in the website, the booklet and the

advertisements. For the most part the material which they contain was set out in plain language. It was addressed to the public at large. In the final analysis I do not think that the opinions, interesting as they are, tendered by the various witnesses on both sides of the argument materially affect or take away from the interpretation or opinion which the Court itself is required to form on the basis of the actual text and narrative contained in those materials when objectively examined by it.

44. As substantive elements of the text of the materials in issue are extensively referred to in the judgment of the Chief Justice, and in those of my colleagues Fennelly, J. and O'Donnell, J., I do not propose to engage in further extensive recitations from the material. It may be said, however, that the material as a whole is characterised by four statements or slogans:

- **Protecting children**
- **Supporting families**
- **Removing inequalities in adoption**
- **Recognising children in their own right**

45. These slogans lead the presentation of the material both in the booklet published by the respondent and on the website established and maintained by her department. For example, they are to be found on the cover of the booklet and highlighted in response to a question posed therein “*What is proposed in this referendum?*”

46. There is a considerable amount of the narrative in the texts devoted to explaining why these statements or slogans characterise the nature and purpose of the amendment. They are presented in a way that clearly conveys that if one wishes to protect children or support families, and so on, one should support the referendum proposal, and, implicitly, that to vote against it would amount to a failure to support such objectives. Again, both the booklet and the website highlight at the outset the

question “*Why do we need a referendum?*” conveying that there is no question but that a referendum to change the Constitution, with a positive outcome, is needed.

47. What seems clear to me from any objective examination of the published material is that it contains just one narrative. That is the narrative in support of a ‘yes’ vote without expressly calling for a ‘yes’ vote. The published material is replete with value judgments and references, both explicitly and implicitly, to desirable policy objectives which can only be properly achieved if the proposal to amend the Constitution is adopted.

48. As previously stated, it is not for the Court to pass judgment on the merits of any of the arguments or propositions contained in the material, but to determine whether it can be considered fair, equal and impartial.

49. No account is taken or expression given to the narrative of those who opposed the referendum such as those who claimed that a referendum was unnecessary, that it might compromise the protection of the family as enshrined in existing provisions of the Constitution, or disturbed the mutual rights of parents and children in a negative way.

50. None of this narrative is to be found in the material which has been called in question in these proceedings.

51. I agree with the analysis and the conclusions of my colleagues in relation to this material. As regards the images of children which have been used as a sort of logo throughout the material in question, I do not find it necessary to come to a separate or distinct conclusion. Images alone can undoubtedly be used to send a powerful message. Whether the attractive images of young children or the use of young children in advertisements conveys a clear message in favour of a yes vote is perhaps the one area in which the expert evidence, filed by way of affidavit, would be most useful. I would consider it necessary to address this question if the logo of the

children was an isolated issue. But the use of representations and pictures of children cannot be separated from the textual material. Since that material itself is so clearly one-sided in its narrative of the matters which should be taken into account when deciding how to vote in the referendum, I do not consider it necessary to pronounce separately on the use of such images in that context.

52. It may be said the material is couched in restrained and measured language avoiding colourful or rhetorical exhortations. And, of course, nowhere does it expressly advocate a 'yes' vote. Undoubtedly, as was argued, any reasoned explanation of the reasons for proposing an amendment to the Constitution will involve reference to the subject matter of the referendum, children's rights, and how these will be enhanced. But the criticism is not so much with the presentation of the narrative, but that it is one-sided. As O'Flaherty, J. observed in the McKenna case "*It is no answer to say, as has been said, that the advocacy ... is gentle, bland and mild and is put forward in the context of making a fair effort on the Government's part to put all matters before the people; ... nor, finally, is it any answer to say that it is either the entitlement or the "duty" of a Government so to educate the public. If the Government regards itself as having that right or duty, it must exercise it without resort to public funds.*" Alternatively it must do so by ensuring that the "information" provided with public funds is not done so as to promote one side of the referendum campaign to the detriment of another.

Conclusion

53. It is manifest in my view that the website and booklet were drafted with a view to explaining why the proposed wording of the amendment was "*designed to help with policy objectives*". For example, on page 14 of booklet it is pointed out that the new wording is aimed at helping to "*achieve the following objectives*" which are identified as being:

- (1) Dedicated Constitutional provisions for children;
- (2) Protecting children and supporting families;
- (3) Removing inequalities;
- (4) Adoption: A second chance for children;
- (5) Recognising children in their own right.

54. Objectively, presentations in the material of this nature can only be viewed as advocating support for the referendum proposal. Undoubtedly, these considerations were the basis on which it was decided that the particular proposal to amend the Constitution should be put to the people. It would seem that information explaining the underlying policy objectives was perceived as necessary if the electorate were to be fairly informed. If that were so, there was a misconception as to what was required by the *McKenna* case, namely, that fairness required impartiality and equal treatment when public funds are being used for this purpose.

55. Taking the material as a whole one is driven to the ineluctable conclusion that it advocated the case for a yes vote without explicitly calling for a yes vote. This was done, with the aid of public funds, to the disadvantage and detriment of those making the case for a 'no' vote.

56. For the foregoing reasons, I agree with the decision of the Court handed down on the 8th November, 2012 that the material in question was not fair, equal or impartial.