THE HIGH COURT

JUDICIAL REVIEW

RECORD No. 2002/18JR

BETWEEN

JOHANNA MORRIS

AND

SIAN Ní MHAOLDOMNAIGH

APPLICANTS

AND

THE MINISTER FOR THE ENVIRONMENT

AND LOCAL GOVERNMENT

RESPONDENT

Judgment of Mr. Justice Kelly delivered the 1st day of February 2002

Introduction

Both Houses of the National Parliament have passed the Twenty-fifth Amendment to the Constitution (Protection of Human Life in Pregnancy) Bill, 2001 (the Bill). As its title suggests the Bill contains a proposal to amend the Constitution. The Bill contains two sections and two schedules.

These proceedings seek a declaration that the Bill conflicts with Article 46.1 and Article 46.4 of the Constitution. As a consequential relief the court is asked to prohibit the Respondent from setting a polling day for holding a Referendum in respect of the Bill.

The Bill

In accordance with Article 46.3 of the Constitution the Bill is expressed to be "*An Act to amend the Constitution*". It recites that by virtue of Article 46 of the Constitution any provision of the Constitution may be amended in the manner provided for by that Article. It then recites that it is proposed to amend Article 46 of the Constitution and provides that it is enacted by the Oireachtas as follows. There then follows the two sections of the Bill.

Section 1. reads:

"1. - Article 46 of the Constitution is hereby amended as follows:

(a) the section the text of which is set out in Cuid I - Part I of An Chéad Sceideal - The First Schedule to this Act shall be inserted after section 5 of the Irish text,

(b) the section the text of which is set out in Cuid 2 - Part 2 of An Chéad Sceideal - The First Schedule to this Act shall be inserted after section 5 of the English text."

Section 2. reads:

"*2. - (1) The Amendment of the Constitution effected by this Act shall be called the Twenty-fifth Amendment of the Constitution.*

(2) This Act may be cited as the Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Act, 2001."

As this case was heard in English, for the sake of brevity I will set out only Part 2 to the First Schedule which contains the text of the Amendment in that language. It reads as follows:

"6 1º Notwithstanding the foregoing provisions of this Article, Article 40 of this Constitution shall be amended as follows:

The following subsections shall be added to section 3 of the English text:

"4º In particular, the life of the unborn in the womb shall be protected in accordance with the provisions of the Protection of Human Life in Pregnancy Act, 2002.

5º The provisions of section 2 of Article 46 and sections 1, 3 and 4 of Article 47 of this Constitution shall apply to any Bill passed or deemed to have been passed by both Houses of the Oireachtas containing a proposal to amend

the Protection of Human Life in Pregnancy Act, 2002, as they apply to a Bill containing a proposal or proposals for the amendment of this Constitution and any such Bill shall be signed by the President forthwith upon his being satisfied that the Bill has been duly approved by the people in accordance with the provisions of section 1 of Article 47 of this Constitution and shall be duly promulgated by the President as a law.".

2º If a law, containing only the provisions set out in An Dara Sceideal - The Second Schedule to the Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Act, 2001, is enacted by the Oireachtas, this section, other than the amendment of Article 40 of this Constitution effected thereby, shall be omitted from every official text of this Constitution published thereafter, but notwithstanding such omission this section shall continue to have the force of law.

3º If such a law is not so enacted within 180 days of this section being added to this Constitution, this section shall cease to have effect and shall be omitted from every official text of this Constitution published thereafter.

4º The provisions of Articles 26 and 27 of this Constitution shall not apply to the Bill for such a law."

The Second Schedule to the Bill is headed

> *"An Act to protect human life in pregnancy, to repeal sections 58 and 59 of the Offences Against the Person Act, 1861, and to provide for related matters."*

Amongst other things the Act set forth in the Second Schedule contains a definition of abortion, prohibits it under the criminal law of the State, prescribes a penalty for it, provides that nothing in the Act is to be construed as obliging any person to carry out or to assist in the carrying out of any medical procedure referred to in the first section of the Act and deals with the making of Government Orders. Section 7(2) provides that the Act is to come into operation on such day not earlier than two months after the date of its passing as the Taoiseach may appoint by Order.

These Proceedings

On 16th January 2002 application was made to Finnegan P., ex parte for leave to commence these proceedings. He declined to grant leave ex parte and instead directed that the application be heard on notice to the Respondent.

The Respondent was put on notice and the application for leave came before me on the 21st January 2002. On that occasion Counsel on behalf of the Respondent consented to leave being granted for Judicial Review to be sought against him. On that occasion I fixed times for the exchange of papers as between the parties and listed the case for trial on the 25th January 2002. I refused a stay on the setting of a polling day, taking the view that on the balance of convenience

such would not be warranted.

The case commenced before me on Friday last (25th January) and resumed on Tuesday 29th January.

The Relief Sought

The applicants seek:

*"(1) A declaration that the Twenty-fifth Amendment to the Constitution (Protection of Human Life in Pregnancy) Bill, 2001, conflicts with Article 46.1 and 4 of Bunreacht na hEireann, inter alia, (*sic*) it contains another proposal, viz a proposed Act of the Oireachtas.*

(2) An Order prohibiting the Respondent setting a polling day for holding a Referendum in respect of the said Bill."

Grounds Advanced

Leave was given to seek the reliefs which I have just set out on three grounds. They are as follows:

"(1) Except in cases of proposed repeals, Article 46.1 requires that the proposed "variation, addition" to the Constitution be contained in the body/text of the Constitution itself and not

have a separate existence, in the form of an entrenched Act of the Oireachtas (or statutory instrument, Ministerial circular, memorandum of agreement, Government press statement, etc.) purporting to possess constitutionally entrenched status in every respect.

(2) The Bill contains a proposal in addition to the proposed amendment viz, the proposed Act contained in the Second Schedule.

(3) The only way in which such an amendment might be made is by first amending Article 46.1 and 4 of Bunreacht na hEireann."

Jurisdiction

Before considering the substantive case on its merits it is necessary to deal with a jurisdictional objection which was raised at the outset by the Attorney General.

Paragraph 9 of the Statement of Opposition delivered on behalf of the Respondent reads as follows:

"Without prejudice to the foregoing it is not accepted that the provisions of Article 34.3 of the Constitution confer on the High Court jurisdiction to adjudicate upon the validity of the terms of a proposal contained in a Bill which is expressed to be one containing a proposal to amend the Constitution and which has been passed by both Houses of the Oireachtas."

In opening the Applicant's case Mr. Callan S.C. dealt with this aspect of the matter and spent a number of hours taking me through various authorities which he said demonstrated that there is indeed jurisdiction vested in the court to consider the Applicant's case.

He quite properly drew my attention to the decision in **Finn v The Attorney General [1983] IR 154** and in particular the short Judgment of O'Higgins C.J. speaking for all five members of the Supreme Court.

O'Higgins C.J.'s Judgment reads as follows:

"*In these proceedings the Plaintiff seeks a declaration that the proposal contained in the Eighth Amendment of the Constitution Bill, 1982 is repugnant to the Constitution of Ireland, 1937, and of no legal effect. The Judicial power to review legislation on the ground of constitutionality is confined (save in cases to which Article 26 of the Constitution applies) to enacted laws. Save in these excepted cases, there is no jurisdiction to construe or to review the constitutionality of a Bill, whatever its nature. The courts have no power to interfere with the legislative process. For this reason the Plaintiff lacks standing to maintain these proceedings and has no cause of action. As these proceedings cannot be maintained the court should not find it necessary to consider the matter as dealt with in the Judgment of Mr. Justice Barrington. This appeal should be dismissed".*

Mr. Callan contended that that Judgment has to be read in the light of subsequent decisions which,

he argued, leave open the possibility of judicial intervention in circumstances where the complaint made to the court relates not to the text of the proposed amendment but to a failure to adhere to the procedures mandated by Article 46 of the Constitution.

He relied in particular from a passage in the Judgment of Barrington J. in **Riordan v An Taoiseach (No. 1) [1999] 4 IR 321 at 335**. There Barrington J. said

> *"The procedure for the amendment to the Constitution is set out in Article 46. This too is a form of legislation. But it is different in kind from ordinary legislation. Whereas ordinary legislation requires the participation of the President and the two houses of parliament, a constitutional amendment requires the co-operation of the President, the two houses of parliament and the people. It is a procedure in which parliament proposes and the people dispose. The people either approve of the proposal, and it is carried or disapprove of the proposal in which event it is defeated. The role of the President and the courts is simply to ensure that the proposal is properly placed before the people in accordance with the procedure set out in Article 46 and that the referendum is properly conducted as provided by law. They have no function in relation to the content of the proposed referendum. That is a matter for the people. There can be no question of a Constitutional amendment properly placed before the people and approved by them being itself unconstitutional. That is why the President has no power to refer to the Supreme Court a Bill containing a proposal to amend the Constitution for an opinion on its constitutionality. A proposed amendment to the Constitution will usually be designed to*

change something in the Constitution and will therefore, until enacted, be inconsistent with the existing text of the Constitution, but, once approved by the people under Article 46 and promulgated by the President as law, it will form part of the Constitution and cannot be attacked as unconstitutional."

Mr. Callan also referred to my own decision in **Riordan v An Taoiseach (No. 2) [1999] 4 IR 343 at 348** where I said

"*The point that is taken by the Applicant is that this proposed amendment to Articles 2 and 3 of the Constitution is being brought about without due compliance with Article 46.*

At least two points are, in my view, fatal to this submission. The first is that a consideration of this point necessarily involves the court in a consideration of the merits of the proposal contained in the Bill. That is the very thing which this court cannot do.

Secondly, the appropriate procedures prescribed under Article 46 have been complied with in respect of this Bill. There is therefore no procedural lacuna or departure from the provisions of Article 46 in respect of this Bill".

My decision in that regard was affirmed by the Supreme Court and again Mr. Callan relied on a passage from the Judgment of Barrington J. in that court.

At page 359 that Judge said

"In the case of ***Finn v The Attorney General [1983] IR 154,*** *the Plaintiff sought an injunction to restrain the holding of a Referendum on the Eighth Amendment of the Constitution Bill, 1982, on the rather curious grounds that the right to life of the unborn being already protected by the Constitution, no amendment was necessary and as the proposed amendment did not amount to a "variation, addition, or repeal" of anything already contained in the Constitution, the proposed amendment was not constitutionally permissible."*

"The Supreme Court dismissed the case out of hand. O'Higgins C.J. (with whom all the other members of the court agreed) stated at page 164":-

"*The Judicial power to review legislation on the ground of constitutionality is confined, (save in cases to which Article 26 of the Constitution applies) to enacted laws. Save in these excepted cases, there is no jurisdiction to construe or to review the constitutionality of a Bill, whatever its nature. The courts have no power to interfere with the legislative process."*

The Judgment serves to emphasise the importance of the courts not getting involved with the content of draft legislation whether it be legislation pending before parliament or a proposed constitutional amendment being submitted to the people.

The Supreme Court, having adopted such a robust attitude towards ***Finn v The Attorney General***

[1983] IR 154, *did not find it necessary to discuss a problem which had been raised in the court below. This is the problem of what could be done if a Bill containing a proposed amendment to the Constitution did not comply with Article 46 in either form or content. Barrington J. referred to this matter in his Judgment in the High Court at page 161 of the report. He said:-*

> *"Mr. Geoghegan goes further and says that the courts simply have no function so far as the content of the proposal to amend the Constitution is concerned. Likewise the President's role in a Referendum appears to be concerned with the propriety of the procedure being followed rather than with the content of the proposal being placed before the people.*
>
> *The President's duty in relation to a Referendum on a proposal to amend the Constitution is described in Article 46, section 5, of the Constitution:-*
>
> > *"A Bill containing a proposal for the amendment of this Constitution shall be signed by the President forthwith upon his being satisfied that the provisions of this Article have been complied with in respect thereof and that such proposal has been duly approved by the people in accordance with the provisions of section 1 of Article 47 of this Constitution and shall be duly promulgated by the President as a law."*

It is necessary to refer also to Article 46 section 4 which provides:-

> *"A Bill containing a proposal or proposals for the amendment of this Constitution shall not contain any other proposal."*

It is extremely unlikely that the Houses of the Oireachtas would abuse their powers by attempting to incorporate some other proposal with a proposal to amend the Constitution. Apparently such a possibility was present to the minds of the framers of the Constitution and, therefore, it cannot be dismissed. Mr. Geoghegan submits that in such an eventuality the President could refer the Bill to the Supreme Court under Article 26 of the Constitution. However, the President would not appear to have the power to refer the Bill to the Supreme Court if the Bill were to be 'expressed' to be a Bill to amend the Constitution. In such an event, were the proposal which was contained in the Bill supported by a majority of the people at a referendum, the procedure prescribed by Article 46 of the Constitution would not have been followed and it would appear that the President would be justified under Article 46, section 5, of the Constitution in refusing to sign the Bill.

Mr. Mackey, however submits that the courts too have a duty to uphold the Constitution and that, upon a complaint being properly made that the Houses of the Oireachtas had acted in contravention of Article 46 section 4 of the Constitution by incorporating other proposals in a Bill to amend the Constitution, the courts would be justified in examining the Bill and taking appropriate action. Subject to this possible exception, I accept Mr. Geoghegan's submission that the High Court has no function in relation to the content of

a proposal to amend the Constitution. Certainly it is not concerned with the propriety or wisdom of any such proposal, nor has it any power to restrain the two Houses of the Oireachtas from putting any such proposal before the people."

The Applicant submits that something very similar to the situation contemplated in ***Finn v The Attorney General [1983] IR 154,*** *has happened in the present case. The Oireachtas may have passed the Nineteenth Amendment of the Constitution Bill; the people may have approved of the proposal contained therein at a referendum; the returning officer may have issued his final certificate pursuant to section 4(3) of the Referendum Act, 1994; and the President may have promulgated the Nineteenth Amendment of the Constitution as law; but the Applicant maintains, the entire proceedings were a nullity for non compliance with Article 46 of the Constitution. We have therefore, the Applicant contends, reached a situation which is even worse than that contemplated in the Judgment of Barrington J. in* ***Finn v The Attorney General,*** *and the Applicant appeals to the ultimate residual right of this court to exercise all powers necessary to defend the Constitution."*

Barrington J. then went on to consider the substance of the Applicant's claims. In the course of so doing he said at page 362:-

"*The people have a sovereign right to grant or withhold approval to an amendment to the Constitution. There is no reason therefore why they should not, provided the matter is properly placed before them, give their approval subject to a condition."*

Reliance was also placed upon the Judgment of McCarthy J. in **Slattery v An Taoiseach [1993] 1 IR 286 at 301** where he said

> "*The Plaintiff sought the intervention of the courts, the judicial organ of Government, to arrest this constitutional procedure, involving both the legislative and executive organs of government, and, further, involving the source of all powers of Government, the People. It may be that circumstances could arise in which the judicial organ of Government would properly intervene in this process; such is not the case here. In my judgment, the application made by the Plaintiffs has no foundation whatever; to grant an Order such as sought would be a wholly unwarranted and unwarrantable intervention by the judiciary in what is clearly a legislative and popular domain.*"

Mr. Callan S.C. on behalf of the Applicants contends that these dicta indicate an entitlement on the part of the court to intervene and investigate a complaint concerning not the content of a Bill which proposes an amendment to the Constitution but rather the form and procedure utilised so as to ensure compliance with the provisions of Article 46 of the Constitution.

In the event it is not necessary for me to decide this interesting question. That is so because at the outset of his submissions the Attorney General invited me to leave aside his jurisdictional objection and decide the substantive issues in the case. Whilst not conceding the jurisdiction point raised in his Notice of Opposition he nonetheless invited the court to proceed as if it had not been raised and he did not seek to pursue the matter further in argument.

In these circumstances it is my intention to proceed to deal with the substance of the Applicants' complaints on the merits leaving aside for another occasion a decision on whether the Attorney General's objection to jurisdiction is well founded or not.

The First Ground

The Applicants contend that except in the case of proposed repeals, Article 46.1 of the Constitution requires the proposed variation or addition to the Constitution to be contained in the body or text of the Constitution itself. It may not, it is said, have a separate existence in the form of an "Act of the Oireachtas or Statutory Instrument or Ministerial circular or memorandum of agreement or press statement purporting to possess constitutionally entrenched status in every respect." For his part the Respondent contends that Article 46.1 of the Constitution contains no such requirement. Rather it is said Article 46.1 of the Constitution permits its amendment should the People choose by reference to an instrument outside the Constitution.

The Applicants contend that in order to permit the Constitution to be altered so as to allow for a particular measure to stand outside the text of the Constitution and have constitutional status Article 46 would itself have to be amended first in order to enable such a proposal to be put to the people.

I do not agree with these propositions urged by the Applicants.

First, it is to be noted that Article 46.1 does not contain any express prohibition on an amendment

in the form in which it is proposed here. Neither does it contain any mandatory obligation to the effect that an amendment must be contained in its entirety in the body or text of the Constitution itself.

Secondly this form of amendment by reference to a document or documents which will not be incorporated into the text of the Constitution is one which has already been utilised on quite a number of occasions.

Whilst it is true that this is the first time on which this particular procedure to effect an amendment to the Constitution has been utilised, earlier amendments going back as far as the Third Amendment to the Constitution in 1972 have been brought about by reference to documents which were not themselves incorporated into the text of the Constitution. Some of these were challenged. The most notable in recent times was the Belfast Agreement which was at the heart of **Riordan v An Taoiseach (No. 2) [1999] 4 IR 343.** In the course of his Judgment in the Supreme Court Barrington J. said at 354

> *"The text of the new section 7 is a clever drafting device designed to resolve this problem. By means of it the People have given a conditional assent to the amendment of Articles 2 and 3 of the Constitution.*
>
> *The People have a sovereign right to grant or withhold approval to an amendment to the Constitution. There is no reason therefore why they should not, provided the matter is*

properly placed before them, give their approval subject to a condition.

It is quite wrong to suggest that the People have delegated to the Government the right to amend the Constitution. This is not so. The People have consented to an amendment to the Constitution subject to the happening of a particular future event. That future event is that the Government should have made the declaration referred to in section 7(3). Section 7(3) provides that if the Government makes that declaration "then notwithstanding Article 46 hereof, this Constitution shall be amended as follows ...". But it is the People, not the Government who are speaking in the passage quoted. The reference to "notwithstanding Article 46 hereof", is merely an indication that the People have consented to the making of the amendment on the happening of the event referred to and that they do not wish to be consulted again.

Finally it is true that the amendment effected by the Nineteenth Amendment of the Constitution Act, 1998, is, in form, an amendment to Article 29 of the Constitution and not an amendment to Article 2 and 3. But it is important to remember that the Nineteenth Amendment to the Constitution, having been approved by the People, and promulgated by the President as law now forms part of the Constitution. The amendment is now Article 29.7 of the Constitution. The proposed new text of Articles 2 and 3 are now lying - as it were in the form of an escrow - in Article 29 of the Constitution. But they are there for all to see and on the happening of the anticipated future event - that is to say the Government making the declaration contemplated by Article 29.7.3º - the draft articles 2 and 3 will, by

virtue of the internal workings of the Constitution itself, move to replace the existing articles 2 and 3."

The above quotation will have relevance to other aspects of this case but for the purposes of disposing of this point it is pertinent to point out that the Supreme Court took the view that the People, if they wished, were entitled to give their approval to a constitutional amendment *s*ubject to a condition and that condition had its roots in an agreement made at Belfast on the 10th April 1998 the text of which was not incorporated into the Constitution.

The Applicants contend that if the Constitution is to be amended by reference to a document outside the official text of the Constitution express provision would have to be made in the Constitution in advance of this. Consequently it is said it would be necessary first to amend Article 46 to allow this. Without such an amendment it is said the proposal which is the subject matter of the Bill is not in proper form because it does not comply with Article 46.1.

In my view that argument is not well founded. As I have already pointed out there is nothing in Article 46 which expressly prohibits an amendment to the Constitution by reference to a document extraneous to it no more than there is a prohibition on the making of an amendment which is conditional upon some other event taking place. The latter of these propositions has already attracted the specific approval of the Supreme Court. In the absence of an express prohibition on the former I do not think that I would be justified in implying one, thereby interfering in the legislative process in its most solemn form which will involve the expression of the will of the

People.

No more than in Riordan's case, the proposal here is a clever drafting device which does not in my view offend against Article 46.1 of the Constitution. Ultimately the People have a sovereign right to grant or withhold approval to the amendment as proposed. In my opinion insofar as this argument is concerned the proposal is properly being placed before the People and they ought now to be given the opportunity to express their approval or otherwise without interference by this court.

The People are being asked to approve an amendment to the Constitution which makes provision for a law relating to abortion as may be set out in a subsequent Act. They are being asked to give their approval to this amendment subject to a specific condition that the amendment will lapse unless the subsequent Act is enacted containing a specific text within a prescribed time. The specific text is set out in the Second Schedule to the Bill and is therefore being made known to the People prior to the referendum. If the People determine in the referendum to approve of the proposal they will be consenting to an amendment to the Constitution which will then become permanent subject to the occurrence of a condition subsequent namely the passing into law of the Act in the Second Schedule.

I take the view that since it is competent for the people to give a conditional consent to the amendment to the Constitution then pace Barrington J. in **Riordan v An Taoiseach (No. 2) at page 363** there must be a mechanism or drafting procedure whereby the matter can be properly

placed before the People. I am of opinion that the form of this Bill is such a drafting procedure and does not offend either expressly or impliedly the provisions of Article 46.1 of the Constitution.

Whilst this is sufficient to dispose of this first element of the Applicants' claim I should nonetheless address some further propositions which were put by the Applicants. As part of their argument they contended that instead of adopting this procedure reliance should have been had to Article 27 of the Constitution. Even a cursory examination of the provisions of that Article make it clear that it could have no application to the matter before the court. It applies to a Bill, other than a Bill expressed to be a Bill containing a proposal for the amendment of the Constitution which shall have been deemed by virtue of Article 23 to have been passed by both Houses of the Oireachtas. The present Bill is one which contains a proposal for the amendment of the Constitution and is not one to which the provisions of Article 23 have any application. Consequently the suggestion that this was an appropriate procedure which ought to have been followed is misplaced.

Another suggestion was that the Act which is contained in the Second Schedule to the Bill should have been passed at around the same time as a referendum was held which referendum would add the new Article 40.3.4. Such a situation would be one of great uncertainty and I can well see why for practical reasons would appear wholly unattractive.

I mention these latter two arguments which were made only to dispose of them but without accepting that they have any real relevance to the issue before the court.

It is of course correct to say that it would have been open to parliament to seek to have the entire of the Second Schedule to the Bill incorporated into the text of the Constitution. For understandable reasons that has not been its approach.

The approach taken does not, in my view, offend Article 46.1 of the Constitution.

The Second Ground

The Applicants contend that the Bill offends against the requirement of Article 46.4 of the Constitution. That Article reads:

> *"A Bill containing a proposal or proposals for the amendment of this Constitution shall not contain any other proposal".*

The objection which is taken is that the proposal being placed before the People contains the terms of an envisaged act of parliament and it is said that this therefore runs counter to Article 46.4.

Article 46.4 clearly envisages a Bill which may contain a single or multiple proposals for the amendment of the Constitution. But the Bill may not contain any other proposal. What is the meaning of the expression "*Any other proposal"*?

The Applicants in reliance on the Irish text of the Constitution which reads

> *"Ní cead togra ar bith eile a bheith ann"*

say a wide meaning must be given to the expression and that the material contained in the Second

Schedule to the Bill is a 'proposal' within the meaning of Article 46.4. They contrast the use of the term *'togra*' as the translation for 'proposal' with the word *'tairiscint*' which translates the word 'proposal' in Article 12.10.4 of the Constitution. It is to be noted however that the 'proposal' referred to in Article 12 is one to impeach the President.

By reference to the English text of the Constitution they say that the word proposal is a noun derived from the verb 'propose'. This means by reference to Collins English dictionary (Third Edition) (1991) "to put forward (a plan, motion etc) for consideration or to nominate, as for a position or to plan or intend to do something or to announce the drinking of a toast to the health of someone or to make an offer of marriage to someone."

In my view the words 'any other proposal' in Article 46.4 of the Constitution must be read in the context of the words which immediately precede them. Adopting that approach it is clear that what is envisaged is a proposal in a Bill. A Bill will not contain a proposal of marriage or the drinking of a toast to mention but two of the rather fanciful suggestions made by the Applicants. Rather a Bill will contain a legislative proposal. That I believe is what is covered by the expression 'any other proposal' in Article 46.4 of the Constitution.

This view is supported by the opinion of the all party Oireachtas Committee on the Constitution which in its first report at pages 15 - 19 on this topic said as follows

"Incidentally, while it is clear from Article 46.4 that a Bill can contain 'a proposal or

proposals' for amendment to the Constitution, it is not immediately clear what 'any other proposal' means. However, since it stands in opposition to 'a proposal or proposals' (emphasis added) it can only do so on the basis of a difference in kind. There are two kinds of proposal that may be contained in a Bill - constitutional and legislative. The term 'a proposal or proposals' explicitly refers to what is constitutional; 'any other proposal' must, therefore, refer to what is legislative. If a Bill containing a proposal or proposals to amend the constitution were also to contain a legislative proposal, the legislative proposal could not be referred to the Supreme Court for a decision on its constitutional validity under Article 26 because that Article excludes 'a Bill containing a proposal to amend the Constitution'.

My views accord with those of the all party Committee from which I have just quoted. The term "any other proposal" in Article 46.4 of the Constitution refers to a legislative proposal i.e. a proposal which, if the Bill to amend the Constitution is passed, will take effect as substantive law in the State. The text of the Second Schedule to the Bill which sets forth the terms of an envisaged Act of the Oireachtas is not a proposal which falls within the ambit of the prohibition contained in Article 46.4 of the Constitution.

The text contained in the Second Schedule to the Bill has no legislative effect as a result of its being included in the Second Schedule. The Bill does not propose that the text of the Second Schedule should have legal effect. If the referendum proposal is carried and the Bill is signed into law by the President it will only give effect to the constitutional amendment set out in the First Schedule to the

Bill. It does not in any way give constitutional or legal effect to matter contained in the Second Schedule. That will occur if and only if the national parliament passes such a measure into law. There is no guarantee that that will happen. Regardless of the size of the majority achieved in the referendum (if such occurs) there is no legal obligation on parliament to pass the legislation contained in the Second Schedule to the Bill.

The Second Schedule merely puts before the People the text of an Act which it is envisaged may, if the referendum is carried, be subsequently passed into law.

The terms of the Second Schedule to the Bill requires an entirely separate and distinct decision by the national parliament to enact a law in accordance with those terms before it can have legal effect. The Second Schedule to the Bill is not in my view a 'proposal' in the sense in which that term is to be understood where it is contained in Article 46.4.

In an effort to argue otherwise the Applicants have posed a question as to what would happen in the following circumstances. Assume that the referendum is carried. Assume also that the 180 day period provided for in 6.3º of the First Schedule has not expired but that the national parliament has not passed the Act in the Second Schedule into law. In such circumstances if an applicant were to come before the court and ask it to adjudicate upon a case involving the life of an unborn the Applicants ask the question would not the court be obliged to give some effect to what is contained in the Second Schedule to the Bill?

They answer that question by saying that the material in that Schedule would have to have some of what they describe as "bite". Whilst they accept that there could be no question of a criminal prosecution getting under way in respect of a breach of any of the provisions of the measure (since it would not be part of the law of the State) they nonetheless contend that in approaching the question of constitutional entitlements on the part of an unborn person regard would have to be had to the contents of the material contained in the Second Schedule to the Bill. In other words they argue that the contents of the Second Schedule will have a sort of shadow or ghost existence which would have to be taken into account by the court if called upon to adjudicate upon questions concerning the right to life of an unborn person during the 180 day period permitted even though the Act envisaged in the Second Schedule to the Bill has not been passed into law.

I do not agree with this proposition. Neither do I accept that the decision of the Court of Appeal in England in **Hill v Parsons (1972) Chancery 305** has any relevance to this topic.

In my opinion if a situation of the type were to arise there could be no question of a judge giving effect to anything contained in the Second Schedule to the Bill unless and until it was passed into law by both Houses of the Oireachtas and the President and a Commencement Order was made by the Taoiseach pursuant to section 7 thereof.

Reliance was placed upon the decision of Barron J. in the case of **R.C. v C.C. [1997] 1 IR 334** in support of the Applicants' argument on this aspect of the matter. In that case Barron J. granted a decree of dissolution of marriage on foot of the provisions of Article 41 section 3 sub-section 2 of

the Constitution of Ireland. That provides

> "*A court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that -*
>
> *(i) At the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,*
>
> *(ii) there is no reasonable prospect of a reconciliation between the spouses,*
>
> *(iii) such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses, any children or either of both of them and any other person prescribed by law and*
>
> *(iv) any further conditions prescribed by law and complied with".*

The Family Law (Divorce) Act, 1996, which at all material times was not in force sets out a statutory framework for a divorce jurisdiction in the State. Section 5 of that Act states that the power under it to grant a decree of dissolution of marriage is an exercise of the jurisdiction conferred by Article 41 section 3 sub-section 2 of the Constitution.

The Plaintiff and the Defendant were a married couple who had three adult children. They had separated and the Plaintiff lived with another woman by whom he had a daughter. From the time of their separation the Plaintiff and the Defendant had continuously lived apart. The Plaintiff instituted proceedings seeking a decree of dissolution of the marriage pursuant to the constitutional provisions. It was submitted for the Plaintiff that the 1996 Act, and in particular the long title and section 5 thereof indicated that it was intended to regulate a pre- existing jurisdiction conferred by the Constitution.

Barron J. in granting a decree of dissolution of the marriage held that having regard to the provisions of the 1996 Act and the Constitution the jurisdiction to grant a dissolution of marriage was derived from the Constitution and not from Statute. He also held that for the purposes of Article 41 section 3 sub-section 2 of the Constitution the High Court was a court designated by law and accordingly the jurisdiction granted by the Article could be exercised by this court. As the Article of the Constitution did not limit the power of the High Court to exercise the jurisdiction and as there was no statutory provision in force based upon any other provisions of the Constitution which removed such jurisdiction the High Court was empowered to grant the divorce.

I do not see any similarity between the position which obtained in that case and the postulate advanced by the Applicants here. In that case the Constitution created the entitlement to grant the dissolution of marriage which took effect immediately even though certain elements fell to be dealt with by subsequent legislation.

In the present case whilst certain parts of the amendment take effect immediately (and that is not contested) the principal and substantial one namely the matter which is dealt with in the Second Schedule to the Bill cannot and does not have any legal effect unless and until it is passed into law in the ordinary way by the Oireachtas.

In other words in this case the People are being asked to adopt a Constitutional Amendment the principal effect of which will not "bite", to use the Applicants' words, until such time as the Act set out in the Second Schedule is independently passed into law on a date subsequent to the referendum. The amendment proposed therefore is one which is substantially subject to a condition subsequent which may or may not be met. Until such time as it is met the material set out in the Second Schedule to the Bill is of no legal effect.

It would, in my view, be an entirely improper and unjustified approach on the part of this court to seek to give effect to the provisions of the contents of the Second Schedule to the Bill in advance of it being passed into law and brought into operation. By the same token I dismiss the contention that a person who voted for the amendment would be entitled to obtain a mandamus from this court compelling the legislature to pass the measure contained in the Second Schedule into law. I regard as equally devoid of merit the suggestion that a mandamus could be obtained compelling the Taoiseach to make an Order to bring the measure into effect even if it had been passed into law.

A further argument was made albeit somewhat outside the scope of the leave granted. For the sake of completeness I propose to deal with it very shortly. It was said, correctly on behalf of the

Applicants, that if the measure contained in the Second Schedule to the Bill is passed into law it will not be capable of amendment as is ordinary legislation. It is quite clear from the terms of what is set forth in the First Schedule to the Bill that such an Act can only be amended by the will of the People as expressed in referendum rather than by ordinary legislation. It was said that that proposition is in some way offensive and ought not to be permitted.

The answer it seems to me is to be found yet again in the Judgment of Barrington J. in **Riordan v An Taoiseach (No. 2)** where he said

> *"The People have a sovereign right to grant or withhold approval to an amendment to the Constitution. There is no reason therefore why they should not, provided the matter is properly placed before them, give their approval subject to a condition.*
>
> *It is quite wrong to suggest that the People have delegated to the Government the right to amend the Constitution. This is not so. The People have consented to an amendment to the Constitution subject to the happening of a particular future event. That future event is that the Government should have made the declaration referred to in section 7(3). Section 7(3) provides that if the Government makes that declaration 'then, notwithstanding Article 46 hereof , this Constitution shall be amended as follows...'. But it is the People, not the Government who are speaking in the passage quoted. The reference to 'notwithstanding Article 46 hereof" is merely an indication that the People have consented to the making of the amendment on the happening of the event referred to and that they do not wish to be*

consulted again. The court can only reiterate that statement adding that if it is competent for the People to give a conditional consent to the amendment of the Constitution there must be a drafting procedure whereby the matter can properly be placed before the People."

In my view if it is the will of the People that the amendment as proposed is carried then it is not for this court to comment on the merits or desirability of the measure or the way in which it is proposed to give effect to it. The court's only concern can relate to ensuring that the form and procedure prescribed by Article 46 of the Constitution is observed. In my view neither the form or procedure adopted offends Article 46.

The Third Ground

This ground is to the effect that the only way in which the amendment in suit might be made is by first amending Article 46.1 and 46.4 of the Constitution. Whilst this was identified as a separate ground at the outset of the proceedings in fact the argument pertaining to it formed part of the argument set forth under Grounds 1 and 2 and has already been dealt with in this Judgment.

Under this heading I am of opinion that the Applicants have not made out a case.

Conclusion

For the reasons set out above I am satisfied that the Applicants' claims should be dismissed. In my opinion the Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy)

Bill, 2001 does not suffer the infirmities alleged by the Applicants, and does not offend the provisions of Articles 46.1 and 46.4 of the Constitution. Consequently these proceedings are dismissed.