Judgment Title: Doherty -v- Government of Ireland & Anor

Neutral Citation: [2010] IEHC 369

High Court Record Number: 2010 959 JR

Date of Delivery: 03/11/2010

Court: High Court

Composition of Court:

Judgment by: Kearns P.

Status of Judgment: Approved

Neutral Citation Number: [2010] IEHC 369

THE HIGH COURT

JUDICIAL REVIEW

2010 959 JR

BETWEEN

PEARSE DOHERTY

APPLICANT

AND

GOVERNMENT OF IRELAND, ATTORNEY GENERAL

RESPONDENTS

AND

DÁIL ÉIREANN

NOTICE PARTY

JUDGMENT of Kearns P. delivered the 3rd day of November, 2010

By Order of the High Court (Peart J.) made on the 12th July, 2010 the applicant was given leave to apply by way of an application for judicial review for the following reliefs:-

> (i) A declaration that in view of the duration of the vacancy for membership of the Dáil in the Donegal South West constituency and the extent to which its electors and population are presently under-represented, the Government is under a duty not to oppose motions put down by others to have the writ moved for a by-election there.
>
> (ii) An order directing the Government not to oppose any such motion that may be moved.
>
> (iii) Further and other relief.

By consent of the parties, an additional relief was sought further to notice of motion dated the 18th October, 2010 as follows:-

> (2) A declaration that there has been excessive delay in filling the said vacancy since it occurred on 6th June, 2009.

The grounds set out in the Statement to ground the application for judicial review are elaborated in the following simple terms:-

> *"In the light of the Constitution's affirmation of a "democratic State" (Art. 5) and the requirement that, in any constituency, there shall be "not less than one member for 30,000 of the population" (Art. 16.2.2), there has been excessive delay in filling the said vacancy since it occurred on 6th June, 2009. On account of existing Dáil arithmetic, the only realistic prospect of getting this vacancy filled is for the Government (which effectively controls the Dáil) at least not to oppose a motion to that effect, in accordance with s. 39(2) of the Electoral Act, 1992. In somewhat different circumstances, leave for this type of relief was granted in Dudley v. An Taoiseach et al [1994] 1 I.L.R.M. 321."*

Leave having been granted by the High Court, it is to say the least surprising that no application was brought by or on behalf of the respondents to set aside the leave granted given that the main ground relied upon by the respondents herein is that the matters in issue are non-justiciable by reason of the doctrine of separation of powers.

However, a lengthy Statement of Opposition was filed on behalf of the respondents, contending, *inter alia*:-

> (1) The pleas and contentions of the applicant in relation to provisions of the Constitution, section 39(2) of the Electoral Act 1992 and the judgment of the High Court in *Dudley v. An Taoiseach* [1994] 1 I.L.R.M. 321 concern matters of law and the respondents make no admissions in respect thereof.
>
> (2) Without prejudice to the foregoing:-

(i) It is denied that Article 16.2.2 of the Constitution imposes a requirement that, in any constituency, there shall be not less than one member for 30,000 of the population as alleged. Article 16.2.2 of the Constitution provides that "*the number of members shall from time to time be fixed by law, but the total number of members of Dáil Éireann shall not be fixed at less than one member for each thirty thousand of the population, or at more than one member for each twenty thousand of the population*".

(ii) It is denied that the provisions of the Constitution upon which the applicant relies and/or section 39(2) of the Electoral Act 1992 and/or the judgment of the High Court in *Dudley v. An Taoiseach* [1994] 1 I.L.R.M. 321 provide any basis for the reliefs sought or any relief.

(iii) . . .

(iv) At the hearing of these proceedings, the respondents will rely upon *inter alia*, the provisions of the Constitution, (including Articles 5, 6, 15, 16, 28, 29, 34, 37, 46 and 47 thereof and section 39(2) of the Electoral Act 1992. In particular but without prejudice to the generality of the foregoing:-

> (a) the respondents will rely upon Article 16.7 of the Constitution which provides that "*subject to the foregoing provisions of this Article, elections for membership of Dáil Éireann, including the filling of casual vacancies, shall be regulated in accordance with law*";
>
> and
>
> (b) the respondents will rely upon section 39(2) of the Electoral Act 1992 which was enacted pursuant to and in accordance with, *inter alia*, Article 16.7 of the Constitution and provides as follows: "*where a vacancy occurs in the membership of the Dáil by a person ceasing to be a member otherwise than in consequence of a dissolution, the Chairman of the Dáil (or, where he is unable through illness absence or other cause to fulfil his duties or where there is a vacancy in the Office of Chairman, the Deputy Chairman of the Dáil) shall, as soon as he is directed by the Dáil so to do, direct the Clerk of the Dáil to issue a writ to the returning officer for the*

constituency in the representation of which the vacancy has occurred directing the returning officer to cause an election to be held of a member of the Dáil to fill the vacancy mentioned in the writ."

(v) The Constitution expressly recognises that there may be casual vacancies in the membership of Dáil Éireann but does not impose any timeframe within which such vacancies must be filled; rather, the Constitution provides that it is a matter for the Oireachtas to regulate the filling of casual vacancies by way of legislation. The power to regulate the filling of casual vacancies which the Constitution confers upon the Oireachtas encompasses, *inter alia*, the power to regulate the holding of elections to fill such vacancies and the timing of the holding of such elections.

(vi) In accordance with the provisions of the Constitution (including, in particular, Article 16.7 thereof), the Oireachtas enacted section 39 (2) of the Electoral Act 1992 to regulate the filling of casual vacancies in the membership of Dáil Éireann by persons ceasing to be members otherwise than in consequence of a dissolution of Dáil Éireann. By virtue of that legislative provision, it is a matter exclusively for Dáil Éireann to determine when to direct the Chairman of the Dáil to direct the Clerk of the Dáil to issue a writ to the returning officer for the constituency in the representation of which the vacancy has occurred directing the returning officer to cause an election to be held of a member of the Dáil to fill the vacancy mentioned in the writ.

(vii) The respondents have not failed to fulfil any obligation under the Constitution or otherwise acted in breach of the Constitution; further the respondents have not failed to fulfil any statutory obligations or otherwise acted in breach of such obligations.

(viii) The Court should not grant the reliefs claimed or any relief having regard to, *inter alia*, the provisions of the Constitution (including Articles 15 and 16 of the

Constitution and the provisions of the Constitution concerning the separation of powers between the organs of Government established by the Constitution and the mutual respect as between those organs of government) and section 39 (2) of the Electoral Act 1992. Further, the Court should not grant relief the effect of which would be to constrain the Government in the exercise of its functions under the Constitution and/or constrain members of the Government in relation to voting in the Dáil and/or imposing on such members a requirement to exercise their votes in a particular manner.

(ix) The claim of the applicant herein entails a fundamentally misconceived application to the Court to ignore and/or amend legislation enacted by the Oireachtas in accordance with the Constitution, to impose impermissible constraints and/or requirements on the Executive organ of government established by the Constitution, to breach the separation of powers which is mandated by the Constitution and to ignore and/or amend the provisions of the Constitution, including, in particular, Articles 15 and 16 thereof."

The remainder of the Statement of Opposition includes a denial that there has been excessive delay in filling the vacancy for membership of Dáil Éireann in the Donegal South West constituency since the vacancy occurred on the 6th June, 2009. The Statement of Opposition further relates that on the 29th September, 2010, the Minister of State at the Department of An Taoiseach, Mr. John Curran T.D., informed Dáil Éireann on behalf of the Government that it is the intention of the Government to move the writ for the by-election to fill the vacancy for membership of Dáil Éireann in the Donegal South West constituency in the first quarter of 2011. In those circumstances, and without prejudice to the other pleas contained in the statement of opposition, it is contended that the proceedings are now moot and unnecessary and that there is no basis for granting the reliefs sought against the respondents.

At the commencement of the hearing, counsel on behalf of the applicant advised the Court that no mandatory order was sought directing the Government either to put down or not to oppose a motion put down by others to have the writ moved for the by-election. Put another way, the applicant confined the relief sought to one of seeking a declaration, by reference to his constitutional rights, that there has been excessive delay in filling the said vacancy since it occurred on the 6th June, 2009. There was no suggestion on behalf of the respondents that the Government was not capable of being enjoined in the proceedings as the relevant organ of the State with power and responsibility to either move or not resist a motion in the Dáil to convene a by-election, although of course, the respondents strongly argued that no justiciable issue arose because of the

doctrine of separation of powers.

BACKGROUND

Senator Pearse Doherty, the applicant in this matter, is a civil engineering technician from Letterkenny in Co. Donegal and is registered as an elector for the Dáil constituency of Donegal South West. The constituency in question is a three seat constituency but since the 6th June, 2009 one of the three seats there has been vacant as a result of its occupant having been elected to the European Parliament. From time to time efforts had been made in Dáil Éireann to move a writ for the by-election, all of which had been resisted by the Government, such initiatives being voted down on the 2nd July, 2009, the 5th May, 2010 and the 29th September, 2010. When making his affidavit on the 12th July, 2010 (some two months before the Minister of State at the Department of An Taoiseach indicated to Dáil Éireann that the by-election would be moved in the first quarter of 2011), the applicant asserted that there was no realistic prospect of the Government ceasing to resist such motions for the foreseeable future. He believed that, on account of the Government 'whipping control' of many Dáil members, there was little or no prospect of the writ being moved for so long as it continued to be opposed.

In the last general election, the following had been elected to fill the three seats in that constituency: Mary Coughlan (now the Tánaiste) Dinny McGinley T.D. and Pat "The Cope" Gallagher, now an M.E.P. On his election to Brussels/Strasbourg on the 6th June, 2009 Mr. Gallagher's seat became vacant. With a population of just over 71,000, the 30,000 ceiling provided for in Article 16.2.2 and Article 16.2.3 of the Constitution has, according to the applicant, been exceeded to a very considerable extent. Endeavours had been made by Sinn Féin members of the Dáil to move the writ with the outcomes already referred to. Under Dáil standing orders, a motion to move the writ could not be tabled again for another six months from the previous occasion except when the Ceann Comhairle otherwise agreed. The applicant asserted that, as a result of discussions he had had with many individuals in the constituency, there was a great level of dissatisfaction with the current exceptional under-representation of the constituency in Dáil Éireann, a dissatisfaction which was exacerbated by the fact that one of its two T.D.'s has extremely onerous responsibilities as Tánaiste and Minister for Education, factors which inevitably must encroach on her time and availability to engage in the normal constituency work of a T.D. He deposed to his belief that in other comparable countries there is no equivalent resistance by Governments to holding by-elections when vacancies occur in their parliaments. In his affidavit sworn on the 12th July, 2010 the applicant avers that:-

> *"For instance, the general practice in relation to vacancies at the House of Commons is to move a writ within three months of the vacancy arising. There have been exceptional instances of seats remaining vacant longer than six months before a by-election, and seats are sometimes left vacant towards the end of a Parliament, to be filled by the subsequent general election. In other jurisdictions governments are obliged to hold by-elections within a prescribed time period. By way of example, by-elections in France are held for the Lower House of Parliament and in the Upper House (in the case of resignation) within three months of a vacancy occurring. In the Czech Republic, by-elections are held*

within 90 days of a vacancy occurring for the Upper House of Parliament. Canada requires by-elections to be called for the Federal Parliament within six months of a seat becoming vacant; however, there is no limit on how far in the future the actual date of the by-election may be set. It would appear that the majority of other European electoral systems use the list system to replace parliamentary vacancies when they arise. In comparison with other countries that use by-elections to fill vacancies, Ireland would seem to be the only country whereby inordinate delays arise in holding by-elections."

In a further affidavit, Sinn Fein member Mr. Caoimhghin Ó Caolain T.D., confirmed the unsuccessful attempts made by his and other parties in bringing motions for the issue of the writ for the by-election in Dáil Éireann. In relation to Mr. Curran's statement that it was the intention of the government to hold the by-election in the first quarter of 2011, Mr. Ó Caolain pointed out that a by-election held on that basis might not take place until April 2011, almost two years from the occurrence of the vacancy in Donegal South West, that being on the assumption that the government did not decide on a further delay once the first quarter of 2011 was reached. Mr. Ó Caolain referred to research he had undertaken in Dáil and political records as a result of which he ascertained that during the period 1922 to 1937 there were approximately 33 by-elections in which all the vacancies were filled within six months. There have been 88 by-elections since the enactment of the Constitution. In almost all instances the vacancies were filled within six months. One of the longest delays was the delay in holding the by-election in Dublin South which was held in June 2009, some eleven months from the vacancy. He deposed to his belief that the delay in Donegal South West was therefore considerably longer even than the very lengthy delay in a previous by-election within the present Dáil Éireann under the present Government, thereby compounding the unequal treatment of Donegal South West electors. The delay in moving the writ for the current vacancy is the longest in the history of the State. As the present Dáil first met on the 14th June, 2007, it must be dissolved by the 13th June, 2012. The vacancy occurred in June 2009, at a point where the Dáil had potentially three further years to run. Almost half of that period has now expired without the vacancy being filled and, if the government's announced plans are carried out, well over half that period will have expired without the vacancy being filled. He stated his belief that such a failure results in a denial of democratic rights. He referred to the example of Zimbabwe where some election petitions from the 2000 parliamentary elections were pending in the courts for the full term of office of parliamentarians, thus nullifying the right to a legitimate determination of a contested or vacant seat. While not suggesting that the situation in Ireland had reached the same level, he believed the principle remained the same, namely that a failure to address the vacancy within a reasonable time results in a denial of democratic rights.

In an affidavit sworn by Mr. John Curran, Minister of State at the Department of An Taoiseach, he confirmed that on the 29th September, 2010 he informed Dáil Éireann on behalf of the government that it is the intention of the government to move the writ for the by-election to fill the vacancy for membership of Dáil Éireann in the Donegal South West constituency (and the writs for two other by-elections) in the first quarter of 2011. He stated:-

> *"I referred to the severe and economical fiscal challenges facing the country and the Government and explained that until Christmas the Government would be working to ensure that a budget is brought forward which is fair to the citizens of the State and helps to further its economic recovery and also would be working to address the problems in the banking system. I explained the view of the Government that to divert attention and energy to holding by-elections while those problems are being addressed could be damaging to the economy."*

In her affidavit sworn on the 14th October, 2010 Ms. Riona Ni Fhlanghaile, Principal Officer of the Department of Environment, Heritage and Local Government, stated that the total number of members of Dáil Éireann presently fixed by law is 166 and when that figure is divided into the total population number as recorded in the 2002 census (3,917,203) the result is 23,598, a situation that complies with the requirement of the Constitution as to ratios..

In his affidavit sworn on the 10th October, 2010, Sinn Fein member Mr. Aengus O' Snodaig, TD replied to the affidavit sworn by Mr. John Curran and emphasised that the statement made by Mr. Curran to Dáil Éireann in no way equated to proffering information to the Court as to the reasons for the delay. He believed that had Mr. Curran made the same statement to the Court it would have exposed him to cross examination which would have allowed the entirely "manufactured nature of the excuses for the non- holding of the by-election" to be exposed. He stated when the first Dáil debate on the writ for the Donegal South West by-election took place in July 2009, Tánaiste Mary Coughlan made no attempt to suggest that a by-election would distract the Government from its important work of dealing with the economic crisis. When the second attempt to move the writ took place in May 2010, Mr. Curran on behalf of the Government did invoke current economic and financial difficulties as a reason for not moving the writ. Mr. O' Snodaig went on to state that the excuses offered for not holding the by-election were "wholly devoid of merit" and flew in the face of the electoral history of the previous two years. Since the economic crisis occurred in September 2008, there had been nationwide local elections to 34 City and County Councils in June 2009 as well as 5 Borough Councils and 74 Town Councils. There had been a by-election in June 2009 in Dublin South and a nationwide constitutional referendum in October 2009. Mr. O' Snodaig stated that, by applying the same reasoning offered to Dáil Éireann, the Government could well have chosen to postpone the Dublin South by-election on the basis of the economic crisis, but did not do so. He stated that there was therefore no evidence whatsoever that two nationwide electoral processes in June and October 2009 had any measurable effects in terms of "taking the eyes of the Government and [political] parties off the recovery of the economy". Mr. O'Snodaig further contended that, even accepting Mr. Curran's logic, it had to be borne in mind that the budget will take place on the 7th December, 2010 and, that being so, there was no identified reason why the by-election could not be called after that date or why it was necessary to wait until the end of the first quarter of 2011. In Mr. O'Snodaig's view, there was clearly no guarantee that the banking crisis and economic crisis would be any better by then and indeed they might well be worse. Finally, he highlighted that Mr. Curran's statements were at variance with repeated statements from Government that the economic crisis was under control and being managed competently and that "the worst is over . . . we have turned a corner" as stated by Minister for Finance Brian

Lenihan TD in December 2009.

RELEVANT PROVISIONS OF THE CONSTITUTION AND RELEVANT STATUTORY PROVISIONS

Article 5 of the Constitution states:-

"Ireland is a sovereign, independent, democratic state"

Article 16.1 of the Constitution states:-

"2° (i) All citizens, and

(ii) such other persons in the State as may be determined by law,

without distinction of sex who have reached the age of eighteen years who are not disqualified by law and comply with the provisions of the law relating to the election of members of Dáil Éireann, shall have the right to vote at an election for members of Dáil Éireann.

4° No voter may exercise more than one vote at an election for Dáil Éireann, and the voting shall be by secret ballot."

Article 16.2 of the Constitution states:-

"1° Dáil Éireann shall be composed of members who represent constituencies determined by law.

2° The number of members shall from time to time be fixed by law, but the total number of members of Dáil Éireann shall not be fixed at less than one member for each thirty thousand of the population, or at more than one member for each twenty thousand of the population.

3° The ratio between the number of members to be elected at any time for each constituency and the population of each constituency, as ascertained at the last preceding census, shall, so far as it is practicable, be the same throughout the country.

4° The Oireachtas shall revise the constituencies at least once in every twelve years, with due regard to changes in distribution of the population, but any alterations in the constituencies shall not take effect during the life of Dáil Éireann sitting when such revision is made.

5° The members shall be elected on the system of proportional representation by means of the single transferable vote.

6° No law shall be enacted whereby the number of members to be

returned for any constituency shall be less than three."

Article 16.3 to 16.7 of the Constitution states: -

3. 1° Dáil Éireann shall be summoned and dissolved as provided by section 2 of Article 13 of this Constitution.

2° A general election for members of Dáil Éireann shall take place not later than thirty days after a dissolution of Dáil Éireann.

4. 1° Polling at every general election for Dáil Éireann shall as far as practicable take place on the same day throughout the country.

2° Dáil Éireann shall meet within thirty days from that polling day.

5. The same Dáil Éireann shall not continue for a longer period than seven years from the date of its first meeting a shorter period may be fixed by law.

6. Provision shall be made by law to enable the member of Dáil Éireann who is the Chairman immediately before a dissolution of Dáil Éireann to be deemed without any actual election to be elected a member of Dáil Éireann at the ensuing general election.

7. Subject to the foregoing provisions of this Article, elections for membership of Dáil Éireann, including the filling of casual vacancies, shall be regulated in accordancewith law."

Section 39(2) of the Electoral Act, 1992 provides:-

"Where a vacancy occurs in the membership of the Dáil by a person ceasing to be a member otherwise than in consequence of a dissolution, the Chairman of the Dáil (or, where he is unable through illness, absence or other cause to fulfil his duties or where there is a vacancy in the office of Chairman, the Deputy Chairman of the Dáil) shall, as soon as he is directed by the Dáil so to do, direct the Clerk of the Dáil to issue a writ to the returning officer for the constituency in the representation of which the vacancy has occurred directing the returning officer to cause an election to be held of a member of the Dáil to fill the vacancy mentioned in the writ."

It is common case between the parties that section 39 of the Electoral Act 1992 is the legislation designed to exercise the discretion relating to the filling of casual vacancies conferred by Article 16.7 of the Constitution.

Reference might also usefully be made at this point to the statutory provisions relating to casual vacancies which arise in Seanad Éireann. Section 56(1) of the Seanad Electoral (Panel Members) Act 1947 provides:-

"Where the Minister receives from the Clerk of Seanad Éireann a

notice of a casual vacancy, the Minister shall, as soon as conveniently may be and in any case not more than one hundred and eighty days after receiving the notice, make an order (in this Act referred to as a Seanad bye-election order) directing an election to be held in accordance with this Part of this Act to fill the vacancy and stating the panel and sub-panel in respect of which the vacancy occurred and appointing for the purposes of the election the times and places mentioned in whichever of the two next following subsections of this section is applicable."

Given that the applicant also placed reliance on s. 2 of the European Convention on Human Rights Act 2003, it is important to set out the terms of that section which provide:-

"2(1) In interpreting and applying any statutory provision or rule of law, a court shall, insofar as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.

(2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter."

The obligation which the applicant contends the State owes under the Convention provision is set out in Protocol No. 1 of the European Convention of Human Rights which provides:-

"Article 3
Right to free elections
The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." (Emphasis added)

THE ISSUES RAISED

Counsel on behalf of the applicant submitted that the issues in the case could be summarised under the following five headings:-

1. Are the proceedings moot or unnecessary by reason of Minister John Curran's statement to the Dáil on the 29th September, 2010?

2. Is the matter non-justiciable by reason of seeking to constrain members of the Government in terms of how they vote in Dáil Éireann?

3. Is there an obligation to fill the vacancy within a reasonable time?

4. If there is such an obligation, is it entirely a matter for Dáil Éireann and/or the Government, and therefore non-justiciable by reason of the doctrine of separation of powers?

> 5. Is there an obligation to fill the vacancy within a reasonable time, and if that question is justiciable, has there been an excessive delay in filling the vacancy in Donegal South West having regard to constitutional and statutory principles?

It seems to me, however, that the matter which the court must first address is whether the issues raised in this case are justiciable. In doing so I appreciate that, as pointed out by counsel for the respondents, this application is not a challenge to the constitutionality of the Electoral Act 1992, or any provision of that Act.

JUSTICIABILITY

When the hyperbole associated with many of the submissions advanced on behalf of both the applicant and the respondents is dispensed with in this case, particularly those on behalf of the respondent which suggested that it would "tear asunder" the tripartite division of powers under the Constitution for the Court to express any view on the matters raised, it seems to me that a fairly basic and simple question requires to be addressed. As the provisions of Article 16.7 of the Constitution delegate to the Oireachtas the power to legislate for elections to membership of Dáil Éireann, including the filling of casual vacancies, and as the Oireachtas has purportedly executed that power by enacting s. 32 of the Electoral Act 1992, does the court have a function in determining whether the provisions of section 39(2) require to be interpreted as meaning that a by-election is to be held within a reasonable time, or, as the respondents submit in the alternative, the terms of the subsection leave the Dáil at large as to whether and when it shall direct the Clerk of the Dáil to issue a writ directing the returning officer to cause an election to be held of a member of the Dáil to fill the vacancy mentioned in the writ.

A useful starting point is to consider the approach taken to this issue in the High Court by Geoghegan J. in *Dudley v. An Taoiseach* [1994] 2 I.L.R.M. 321.

In that case the applicant was a student residing in the Dublin South Central constituency. Some fourteen months after the sitting Dáil Deputy, John O'Connell resigned his Dáil Éireann seat, the vacancy had not been filled by a by-election. Numerous attempts in the Dáil to have the writ moved for a by-election had been successfully resisted by the Government and its supporters. The applicant argued that, as a registered elector in the constituency, his rights to vote at common law, by statute and under the constitution were being infringed.

At p. 323, Geoghegan J. stated:-

> *"Having regard to Article 16 of the Constitution and in particular s. 7 of that Article which envisages that casual vacancies will be filled and that the filling of them shall be regulated in accordance with law, there must, I think, be at least an arguable case that there is a constitutional obligation to hold a by-election within a reasonable time of a vacancy occurring."*

Geoghegan J. then went on to consider the very grounds of objection which had been raised by the respondents in the instant case. In a later passage on p. 323 he stated:-

> *"But even if I am right in both of those propositions the question arises, should leave be given for judicial review having regard to the separation of powers and having regard also to the particular proposed respondents.* (In that case Dáil Éireann had also been joined as a party by the applicant)*. In order to address that question it is necessary to review the procedure prescribed by law for the holding of a by-election. That is governed now by s. 39(2) of the Electoral Act 1992."*

Having recited the subsection in full, Geoghegan J. continued:-

> *"It follows from this that a by-election cannot be held until a writ has been issued to the returning officer for the constituency. As no such writ has yet issued the returning officer is not at fault in failing to hold a by-election. The writ to the returning officer is issued by the clerk of the Dáil. But the clerk of the Dáil is not at fault either in not issuing the writ to the returning officer since under the subsection he can only do so if directed by the Dáil itself. The Dáil has not given such direction. The only machinery by which the Dáil can give such direction is by a motion laid before the Dáil by a member of the Dáil and then carried by a majority of the Dáil. In my view, declaratory relief as sought by way of judicial review is not obtainable as against Dáil Éireann because such relief should only be granted where it could be followed up either in the same proceedings or in some other proceedings by an enforceable order. No enforceable order can be made by the courts as against Dáil Éireann as such. Dáil Éireann can only give the direction if the majority of the members vote for the motion, but the courts cannot mandamus the body of members of the Dáil as such to vote in a particular way on a particular motion."*

Having expressed those views, Geoghegan J. refused leave for judicial review as against Dáil Éireann, and further refused leave to institute review proceedings against the Taoiseach as he did not see that the Taoiseach was under a personal responsibility in relation to any of the matters complained of. However, Geoghegan J applied quite different considerations to the proposed judicial review proceedings insofar as they were brought against the Government of Ireland. In this regard he stated at p. 324:-

> *"As Dáil Éireann cannot move of its own motion, I think that there must be an arguable case at least that the Government of Ireland has a constitutional obligation to set down and support the motions for the issue of a writ for the holding of a by-election after a reasonable time has elapsed from the vacancy arising and that there is also an arguable case that the Government is constitutionally obliged not to impede or oppose such a motion after a reasonable time has elapsed, except in the context of substituting its own motion. As a Minister can be judicially reviewed in the exercise of his powers and functions, there must, I*

> *think, be an arguable case that the government can be judicially reviewed in the circumstances of this particular case."*

He then proceeded to grant leave to the applicant to bring judicial review proceedings as against the Government of Ireland and the Attorney General. He also directed that Ireland be joined as a respondent.

That application, unlike the present proceedings, does not appear to have proceeded any further, but, perhaps significantly, and just as in the instant case, there was no application brought on behalf of the respondents to set aside the leave which had been granted on the grounds that the issue sought to be determined was non-justiciable.

In considering whether any particular controversy is justiciable, the courts take great care to uphold the principle of the separation of powers and to avoid situations where the court goes beyond its own proper own role in the constitutional framework laid down by the Constitution.

In *Maguire v Ardagh* (2002) 1 I.R. 385 Keane C.J. noted that the Constitution did not expressly exempt the actions of the Oireachtas or individual members thereof from judicial scrutiny save to the extent specified in Article 15.12 and Article 15.13. Keane C.J. acknowledged that the doctrine of the separation of powers precluded the courts from accepting every invitation to interfere with the conduct by the Oireachtas of its own affairs. Keane C.J. then continued to list specific activities that were non- justiciable, stating as follows at p. 537:

> *"Specifically, the courts have made it clear that they will not intervene in the manner in which the House exercises its jurisdiction under Article 15.10 to make its own rules and standing orders and to ensure freedom of debate where the actions sought to be impugned do not affect the rights of citizens who are not members of the House: see the decision of this court in Slattery v An Taoiseach [1993] 1 I.R. 286. It was also held by the former Supreme Court in Wireless Dealers Association v Minister for Industry and Commerce (Unreported, Supreme Court, 14th March, 1956) that the courts could not intervene in the legislative function itself: their powers to find legislation invalid having regard to the provisions of the Constitution arise only after the enactment of legislation by the Oireachtas, save in the case of a reference of a Bill by the President to this court under Article 26. Nor, in general, will the courts assume the role exclusively assigned to the Oireachtas in the raising of taxation and the distribution of public resources, as more recently made clear by this court in T.D. and Others v Minister for Education and Science and Others [2001] 4 I.R. 259".*

A justiciable controversy may, at its simplest, be defined as a dispute capable of litigation in the courts. In *Baker v Carr* 369 US 186 (1962), the United States Supreme Court held that the issue of justicability should be determined on a case by case basis. It has also been suggested that:-

> *"Non-justicability concerns whether a court can with constitutional propriety adjudicate on the matter before it or whether such an adjudication would be an infringement by the court of the role which the Constitution has conferred on it. Essentially the doctrine*

> *is concerned with identifying those claims which may be legitimately advanced before a court and those which must be advanced in parliament through the political process. In other words, is it a case for judicial or political relief."* (McDermott*, The Separation of Powers and the Doctrine of Non-Justiciability* 35 Irish Jurist 280 at p. 280).

Thus controversies surrounding purely political issues or the extent to which the revenue or borrowing powers of the State are exercised or the purposes for which funds are spent are entirely outside the proper role of the court. Thus, in *O'Reilly v Limerick Corporation* [1989] I.L.R.M. 181, the question as to whether the Oireachtas had adequately provided for disadvantaged groups via its taxation policies was deemed to be non- justiciable.

Similarly, in international relations and the conduct of foreign affairs, the courts have invariably taken the view that controversies which may arise are non-justiciable at the behest of individual citizens as the provisions of Articles 29.1 to Article 29.3 relate only to relations between states and confer no rights upon individuals. (See *Horgan v An Taoiseach* [2003] 2 I.R. 468).

However, even in this context, the courts have seen fit to intervene when an actual or threatened breach of an individual's constitutional rights may occur, as in *Crotty v An Taoiseach* [1987] 1 I.R. 713 where Finlay C.J. stated at p. 774:-

> *"The overall provisions concerning the exercise of executive power in external relations do not contain any express provision for intervention by the Courts. There is nothing in the provisions of Articles 28 and 29 of the Constitution, in my opinion, from which it would be possible to imply any right in the Courts in general to interfere in the field or area of external relations with the exercise of an executive power. This does not mean that the executive is or can be without control by the Courts in relation to carrying out executive powers even in the field of external relations. In any instance where the exercise of that function constituted an actual or threatened invasion of the constitutional rights of an individual, the Courts would have a right and duty to intervene."*

Equally, in what might be described as a political context, the Supreme Court by a majority decision in *McKenna v An Taoiseach (No.2)* [1995] 2 I.R. 10 took the view that the question of state funding for referendum campaigns was justiciable. Hamilton C.J. stated, at p. 32, that the case law established the three principles for judicial intervention:-

> *"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".

In *Murphy v Minister for the Environment* [2008] 3 I.R. 438, Clarke J. considered the question of delay in implementing a census. He held that it would not have been practicable to implement the report within the two or three months between publication of census and dissolution of the Dáil. However, at p. 471, he went on to say that if the Oireachtas did not take steps with "the minimum delay", it might be appropriate for the court to intervene:

> *"8.7 In the circumstances of this case I am not satisfied that it would be appropriate to conclude that the Oireachtas has failed in its constitutional obligations. I do not, therefore, propose making a declaration in those terms. However it does appear to me to be a case in which it is appropriate to adopt the position taken by the Supreme Court in District Judge MacMenamin v Ireland [1996] 3 I.R. 100, in which the court's view as to the general constitutional obligations which arise are set out and the Oireachtas is invited to take whatever detailed measures it might consider appropriate to deal with the issue which has arisen. The precise methods to be adopted in the formulation of new constituencies, is, of course, a matter for the Oireachtas. The only role of the court is to intervene if the methods adopted are in breach of the constitutional obligations of the Oireachtas. For the reasons which I have indicated, I am not satisfied that that position has been reached. However it seems to me to be clear that if, without justifiable reasoning, the Oireachtas did not take appropriate steps to ensure the minimum delay between the finalisation of the ascertainment of the population in a census and the determination and enactment of a law providing for new constituencies, then it might be appropriate for the court to take further action".*

That decision would appear to have particular resonance in terms of the facts of the instant case. In *McDonald v Bord na gCon* [1965] 1 I.R. 217 Kenny J. in the High Court concluded that a justiciable controversy is one of a type, which, as a matter of history, has been capable of litigation in the courts of this country.

While clearly, as illustrated by decisions such as *O'Malley v An Ceann Comhairle* [1997] 1 I.R. 427 (a case in which the applicant contended that certain parliamentary questions had been wrongly disallowed by An Ceann Comhairle), internal matters and the internal workings of Dáil Éireann - not involving citizens outside the House - fall outside the appropriate remit for the court's intervention, this is not such a case because the applicant is in a position to assert that his constitutional rights are being breached or rendered inoperative because of the manner in which the Government is applying and exercising the provisions of section 39(2) of the Electoral Act, 1992.

It seems to me that there is ample precedent for concluding that decisions or omissions which affect or infringe citizens' rights under the Constitution are *prima facie* justiciable. Thus in *Ahern v Minister for Industry and Commerce (No. 2)* [1991] 1 I.R. 492, a decision to put a civil servant on compulsory sick leave was held to be justiciable since it affected his right to work. Similarly, in *MacPharthalain v Commissioners of Public Works* [1992] 1 I.R. 111, the designation of certain lands as constituting an area of scenic interest was held to give rise to a justiciable controversy as it affected a landowner's right to obtain

certain types of grants.

It seems to me that a citizen's constitutional rights are trenched upon and significantly diluted when no effect is given to rights for representation clearly delineated in the Constitution. These are rights which might usefully be characterised as forming part of the "constitutional contract" between the citizen and the State.

Implicit in Article 5 of the Constitution, which states that Ireland is a sovereign, independent and democratic state, is a recognition of the requirement for democratic representation through the electoral system which the Constitution provides. Article 16.1 of the Constitution provides for a clear right for every citizen to have the right to vote at an election for members of Dáil Éireann. Article 16.2 further provides that the number of members shall from time to time be fixed by law, but in any event the total number shall not be fixed at less than one member for each 30,000 of the population, or at more than one member for each 20,000 of the population. Article 16.2.3 requires that the ratio between the number of members to be elected at any time for each constituency and the population of each constituency, as ascertained at the last preceding census, shall, so far as is practical, be the same throughout the country.

These provisions are in no sense aspirational. They do, as already, noted, set out the citizens' rights in clear and unambiguous terms. Furthermore, Article 16.7 which provides for elections for membership of Dáil Éireann to be regulated in accordance with law, specifically refers to "the filling of casual vacancies" which seems to me to imply something more than the mere regulation, without more, of elections for casual vacancies. (Emphasis added).

The applicant in the present case is a person who is entitled in my view to seek judicial review in the limited declaratory form being sought on the issue as to whether or not a lengthy delay in moving the writ for the by-election in question may be said to infringe those rights.

As has being emphasised, this is not a case in which the constitutionality of section 39(2) of the Electoral Act, 1992 has *per se* been called into question. Rather, it is a case in which the applicant invites the court to hold that, by reference to the aforesaid constitutional provisions, the Electoral Act, 1992 and, in particular, section39(2) thereof, must be operated and applied by the Government in a manner which upholds and reflects the constitutional position. Put another way, a constitutional approach necessarily means that section 39(2) of the Act of 1992 must be interpreted as being subject to a temporal requirement that a by-election motion be either moved by the Government or not resisted by it within a reasonable time of the vacancy arising.

I am satisfied that this is a justiciable controversy. It is not a controversy which relates to the internal workings of Dáil Éireann in relation to its own affairs; it is not a controversy in relation to external affairs or to any issue which might be characterised as a socio-economic issue. Rather this applicant's case relates to the effects of delay on his right to be represented by the number of members laid down by law, and the right to equality of political representation.

THE CONSTITUTIONAL APPROACH TO STATUTORY INTERPRETATION

It is well settled that the courts "*should interpret a statute in accordance with the Constitution and on the assumption that it complies with the Constitution*" (per McCracken J in *Eastern Health Board v McDonnell* [1999] 1 IR 174 at p. 183).

In *Minister for Social Community and Family Affairs v Scanlon* [2001] 1 I.R. 64 there had, as in the instant case, been no direct challenge to the constitutionality of the legislation in issue. Nevertheless Fennelly J in the course of his judgment, at p 85, stated that:

> *"The court must not interpret it so as to bring it into conflict with the Constitution if that is reasonably possible as a matter of interpretation"*

The presumption of constitutionality which applies to statutes also means that a statute must, where possible, be construed in a fashion which best protects constitutional rights (per Hamilton CJ in *Hanafin v Minister for the Environment* [1996] 2 IR 321 at pp. 423 and 424 and at pp. 441 and 442 per Blayney J).

In *East Donegal Co-operative Ltd v Attorney General* [1970] I.R. 317 Walsh J stated that even where the mode of performing official actions envisaged by an Act is not specified in the Act, they must be performed in such a way as to respect the Constitution. At p 341, Walsh J. stated the following:

> *"At the same time…the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the Courts."*

Finally, a useful example may be referred to at this point to illustrate how the courts can make a straight choice between an interpretation which is constitutional and one which is not. In *Re National Irish Bank (No.1)* [1999] 3 I.R. 145 the ambit of section 18(a) of the Companies Act 1990, which provides that answers given by a person pursuant to statutory demand made by company inspectors 'may be used in evidence against him', without specifying whether this encompassed criminal cases, was considered. Barrington J pointed out that, while there might be two possible interpretations of the section, the "*better interpretation in the light of the Constitution*" was that the section was not to be construed as permitting the admission of a statement made to a company inspector by a person who was legally compelled to answer and section 18(a) accordingly only applied to the admission of such evidence in civil proceedings.

A construction which treats section 39(2) of the Electoral Act, 1992 as devoid of any temporal requirement clearly offends the Constitutional provisions of Article 5 and Article 16. For example, if an elected representative were to die within a few days of being elected at a general election, could the Government be said to be acting in conformity with the Constitution if it kept putting off a by-election until the last few months of the five year term of a Dáil? To ask the question is, I

think, to know the answer: it most certainly would not.

To read section 39(2) of the Electoral Act, 1992 as being subject to the requirement that the writ be moved within a reasonable time does no violence to the express wording of the sub-section. Rather it gives effect to the sub-section in a manner which honours the Constitutional provisions in question.

Even looking at ordinary principles of statutory construction, it is well settled that a statute should not be given an interpretation which is illogical or absurd. Common sense must be used and the court must strive to implement rather than defeat the object of the legislation. This rule of interpretation is sometimes referred to via the maxim *ut res magis valeat quam pereat* (it is better for a thing to have effect than to be made void). The absence of a temporal requirement in section 39(2) of the Act of 1992 could produce precisely that result. So construed, an entire Dáil term of 5 years could pass without any obligation falling on the Government to exercise its control of the Dáil to move or not oppose a motion.

It must also be remembered that the Act of 1992 is part of a code of Electoral Acts which includes the Electoral (Amendment) Act, 2005 which provides as follows at section 2:

> *"Dáil Éireann shall, after the dissolution thereof that next occurs after the passing of this Act, consist of 166 members"*

Counsel for the respondents argued that this provision meant nothing more than to specify the numbers that would make up the present Dáil following the last general election but it seems equally open to the interpretation that, during its lifetime, the Dáil should, as far as practicable, continue to have that number of deputies.

I conclude therefore that, by well settled principles of constitutional and statutory construction, section 39(2) of the Electoral Act, 1992 is to be construed as incorporating a requirement that the discretion reserved thereunder be exercised within a reasonable time.

ROLE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

I have already set out the provisions of s. 2(1) of the European Convention on Human Rights Act, 2003 which impose an obligation on a court, when "interpreting" and "applying" any statutory provision, to do so, so far as is "possible", in a manner compatible with the State's obligations under the Convention provisions.

Every "organ of the State" is obliged (under s.3(1)) of the Act of 2003 to perform its "functions" in a manner compatible with the State's obligations under the Convention provisions. The President and the Oireachtas, or either House thereof, is excluded from this definition. Any other body, other than a court, through which the legislative, executive or judicial powers of the State are exercised, is subject to this requirement.

Article 3 of Protocol 1 of the Convention requires that elections be held "at reasonable intervals". The applicant relies on this provision to argue that s. 39

(2) of the Electoral Act, 1992 be "interpreted" and "applied" in accordance with the requirements of s. 2 of the Act of 2003.

Some limited authority was opened to the Court by the parties in this regard, there being an absence of cases decided by the European Court of Human Rights indicating that the "reasonable intervals" requirement applied to anything other than general elections. Counsel for the respondents suggested that, as many European countries filled casual vacancies from a 'list' system, it would be wrong to apply any such requirement to a by-election.

Reference was made to passages from Clayton & Tomlinson '*The Law of Human Rights'* (2nd Ed. Oxford, 2009) the first of which, at para. 20.35 states:

> *"The Court has observed that democracy 'is without doubt a fundamental feature of the European public order' and has held that Article 3 of the First Protocol enshrines the principle of efficient political democracy. It also protects individual rights of participation; the right to vote and the right to stand for election to the legislature. These rights are not absolute and there is room for implied limitations. States can make the rights subject to conditions and have a wide margin of appreciation. However, the conditions must not impair the very essence of the rights or deprive them of their effectiveness."*

At para. 20.37 the authors state:

> *"Reasonable Intervals"*
>
> *The Convention does not lay down any particular interval for holding elections. The question as to whether elections were held at reasonable intervals must be decided by reference to the purpose of parliamentary elections: ensuring that changes in public opinion were reflected in the opinions of the elected representatives. Too short an interval might impede political planning. On the basis of these considerations, an interval of five years between elections was 'reasonable'"* (see Timke v Germany [1996] E.H.L.R. 74).

It can hardly be disputed that, historically in this jurisdiction at least, by-elections have been seen to provide a very clear barometer of public opinion and to serve an important function in the working of a democratic representative system. Thus the same principles which underpin the authors' views about the requirement to hold general elections at reasonable intervals seem to me to apply with equal – if not greater – force where by-elections are concerned. It would strike me as absurd to apply a requirement of reasonable time to the holding of a general election and then to flout or altogether ignore the same principle at the micro level of a by-election. The issue of representation is the same; the requirement to provide an opportunity to the electorate to have their views expressed by elected representatives is also the same.

I am of the view therefore that s. 2 of the Act of 2003 does require that s. 39(2) of the Electoral Act, 1992 be "interpreted" and "applied" (the latter requirement being perhaps particularly relevant in this context) by reference to Article 3 of Protocol I to the Convention as requiring that a by-election be held within a

reasonable time of the vacancy arsing.

MOOTNESS

A fall-back position adopted by the respondents is to argue that no declaratory relief should be granted because of the commitment given to Dáil Éireann on the 29th September, 2010 that it was the intention of the Government to move the writ for the by-election to fill the vacancy in Donegal South West in the first quarter of 2011. It was argued on behalf of the respondents that the Court is not therefore confronted with a situation of which it could be said that the by-election is not going to be held within the lifetime of the current Dáil. I would observe, *en passant*, that implicit in this submission is a recognition that indefinite postponement of the by-election would amount to a gross disregard of those provisions of the Constitution which exist and are designed to provide for an effective democracy.

I am of the view however that the Court should not resile from its own constitutional obligations by reference to a particular statement of intent made on a particular occasion by a spokesman on behalf of the Government. Circumstances might quite legitimately dictate a changed statement of intent and the court has no right to conduct any sort of watchdog role over events which call for consideration within the political arena. Just as the Court has no function to assess or evaluate statements made or reasons offered when the Dáil voted as it did on three previous occasions on this issue, it has no adjudicative role on any statement of intent in relation to future events either. Its function is confined purely within the narrow confines already outlined.

FORM OF DECLARATION

The Court will declare that section 39(2) of the Electoral Act, 1992 is to be construed as requiring that the writ for a by-election be moved within a reasonable time of the vacancy arising.

Has there in fact been unreasonable delay in moving the writ for the by-election in the Donegal South West constituency? The Dáil has a 5 year term and the unprecedented delay in this instance – the longest in the history of the State – represents a significant proportion of the term of the current Dáil. The Court notes that The Constitution Review Group in its Report in 1996 proposed (at p 49) that Article 16.7 of the Constitution be amended so as to require the holding of a by-election within 90 days of the vacancy occurring. Whatever else, this recommendation may be seen as affording recognition to the requirement that by-elections take place within a reasonable time of any vacancy arising. Other instances of appropriate time intervals in different countries which provide for by-elections in their electoral systems have been referred to elsewhere in this judgment. None is of the length that has occurred here. Even allowing for the wide margin of appreciation which must be afforded to the Government when moving the writ, not least for reasons which it has offered to the Dáil (and which are not for this Court to evaluate), I am satisfied that the delay in this case is so inordinate as to amount to a breach of the applicant's constitutional rights to such a degree as to warrant the Court granting some form of relief. Far from the Court 'tearing asunder' the provisions of the Constitution by adjudicating upon this application, it is the ongoing failure to move the writ for this by-election since June 2009 which offends the terms and spirit of the Constitution and its

framework for democratic representation.

However, as this matter has not been the subject matter of detailed court analysis in the past, I do not propose to make a declaration of the wider sort contemplated or implicit - as a possibility at least - in the judgment of Geoghegan J in *Dudley v An Taoiseach* [1994] 1 I.L.R.M. 321, i.e., that the Government is obliged to set down and support the motion for the issue of a writ or at least not impede or oppose such a motion. I would hope, however, that any clarification provided by this judgment would have that effect. As Hamilton CJ stated in *District Judge McMenamin v Ireland* [1996] 3 IR 100 at 136:

> *"I do not propose to make a declaration giving effect to my views because, having regard to the respect which the separate organs of government, the legislature, the government and the judiciary have traditionally shown to each other, I am satisfied that once the Government is made aware of the situation with regard to this constitutional injustice, it will take the necessary steps to have the matter remedied in accordance with the law and in accordance with its constitutional obligation."*

The court might in another case following on from this one feel constrained to take a more serious view if any government, and not just necessarily the present one, was seen by the courts to be acting in clear disregard of an applicant's constitutional rights in continually refusing over an unreasonable period of time to move the writ for a by-election. That the Court can intervene in a more draconian way in extreme cases to protect constitutional obligations was made clear by O'Flaherty J in *O'Malley v An Ceann Comhairle* [1997] 1 I.R. 427 and by Murray CJ in *TD v Minister for Education* [2001] 4 I.R. 259 at p. 337. This is not yet such a case but in my opinion it is not far short of it.

However, for the reasons outlined above, the Court will simply make the declaration sought by the applicant to the effect that there has been unreasonable delay in moving the writ for the by-election in Donegal South West