

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE**

**CIV-2020-404-001850
[2020] NZHC 2650**

UNDER the Judicial Review Procedure Act 2016 and
Part 30 of the High Court Rules 2016

BETWEEN NEW CONSERVATIVE
First Applicant

L J BAKER
Second Applicant

AND TELEVISION NEW ZEALAND LIMITED
Respondent

Hearing: 7 October 2020

Appearances: T Mijatov and M McCarthy for the Applicants
B Davies and M Ferrier for the Respondent

Judgment: 7 October 2020

Reasons: 8 October 2020

JUDGMENT OF WOOLFORD J

*This judgment was delivered by me on Thursday, 8 October 2020 at 4:00 pm
pursuant to r 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Solicitors: Franks Ogilvie (S Franks and B Morten), Wellington
MinterEllisonRuddWatts, Wellington

Counsel: T Mijatov, Wellington

[1] The first applicant, New Conservative, is a registered political party. It is contesting the 2020 general election and has 72 candidates standing in all general and Māori electorate seats. The leader of New Conservative is the second applicant, Mr Leighton Baker. The respondent is Television New Zealand Ltd (TVNZ), a Crown entity and broadcaster.

[2] TVNZ is to hold a multi-party debate at 7.00 pm on Thursday, 8 October 2020. New Conservative has not been invited to participate. The applicants say that is wrong and now apply for an order requiring TVNZ to invite Mr Baker to participate in the debate as leader of New Conservative.

[3] The application is opposed by TVNZ.

[4] I heard argument from the parties on Wednesday, 7 October 2020. After hearing argument, I dismissed the application for an order requiring TVNZ to invite Mr Baker to participate in the debate and indicated that my reasons would follow. These are my reasons. Given the circumstances, however, it has not been possible to canvass in detail all arguments advanced during the hearing.

Factual background

[5] The general election is to be held on Saturday, 17 October 2020. TVNZ is to hold a multi-party debate at 7.00 pm on Thursday, 8 October 2020 (the debate).

[6] TVNZ developed criteria prior to the 2011 general election, which it has continued to apply, as a means of providing an objective and reasonable basis upon which to select party leaders to participate in multi-party debates prior to general elections. TVNZ's General Counsel, Mr Brent McAnulty, explains that a number of factors influenced TVNZ at the time:

- (a) the *Dunne v CanWest TVWorks Ltd* decision of 2005, in which it was made clear that limiting criteria to just one poll and no other considerations was regarded as arbitrary;¹

¹ *Dunne v CanWest TVWorks Ltd* [2005] NZAR 577 (HC).

- (b) the public interest in hearing from leaders of registered political parties which have a realistic prospect of gaining one or more seats in Parliament at the election;
- (c) the different ways that such parties come to Parliament in New Zealand (as new parties, through party changes by sitting MPs and as incumbent parties); and
- (d) the desire as a news organisation to be as fair and balanced as possible within the context of a commercial enterprise with certain resource constraints.

[7] The criteria which TVNZ initially applied to this year's multi-party debate were, therefore, the same as the last election (the initial criteria);

- (a) Leaders of parties currently represented in Parliament (criterion one); and/or
- (b) Leaders of registered parties not represented in Parliament that score three per cent in at least one of the two 1 News Colmar Brunton polls preceding the debate (criterion two); and/or
- (c) Members of Parliament elected to Parliament in 2017 who are leaders of registered parties (criterion three).

[8] On the basis of these criteria, the following parties would have been eligible to participate in the debate — Labour, National, NZ First, Greens and ACT under criterion one, and Advance NZ under criterion three. (Its leader, Jami-Lee Ross, being an MP). Labour and National have chosen not to participate in the debate.

[9] Following some criticism from excluded political parties, on or about 8 September 2020, TVNZ revised criterion two to be more inclusive such that consideration was to be given to polls up to six months prior to the debate rather than just the two polls immediately preceding the debate. More significantly, it also revised criterion three to read as follows:

Leaders of registered parties where the leader has been a MP or party has been represented, in either/both of the past two parliaments.

This has led to the inclusion of the leader of the Māori Party in the debate.

[10] TVNZ explained the major change in criterion three as follows:

TVNZ accepts the Māori Party's concern that the current criteria does not adequately consider parties who are only contending Māori electorate seats. We also accept success in Māori electorate seats impacts the make-up of Parliament, and viewers need to be aware of parties and politicians who may have a viable path to Parliament by winning these seats.

To address this imbalance, while still ensuring fairness to other parties, TVNZ's multi-party criteria will be broadened to acknowledge viable contenders for electorate seats. Given TVNZ does not poll in Māori electorates, or a number of other electorates, previous parliamentary representation will be used to demonstrate a strong possibility of future seat success.

[11] New Conservative does not meet the initial criteria or the revised criteria. It polled fifth equal with NZ First in the most recent 1 News Colmar Brunton poll on 28 September 2020, behind Labour, National, ACT and Greens, with 1.4 per cent. It polled sixth in the previous poll on 22 September 2020 with 1.6 per cent (NZ First was on 2.4 per cent). It is excluded from the debate. The Māori Party and Advance NZ are, however, included in the debate with lower poll ratings — 0.8 per cent and 0.6 per cent respectively. They are included because they both meet the revised criterion three.

The proceeding

[12] The applicants have filed a statement of claim under the Judicial Review Procedure Act 2016 (the Act) in which they seek judicial review of the TVNZ decision not to invite Mr Baker to participate in the debate. A declaration is sought that TVNZ's decision is unlawful. They also seek an order requiring TVNZ to invite Mr Baker to participate in the debate.

[13] Significantly, because of the imminence of the debate, the applicants also make an interlocutory application for interim relief (without notice) in which the same mandatory order is sought requiring TVNZ to invite Mr Baker to participate in the debate.

Reviewability

[14] The applicants allege that TVNZ's decision not to invite Mr Baker to participate in the debate is reviewable as an exercise of a statutory power under the Act. TVNZ is a Crown entity and broadcaster bound by s 4(1)(d) of the Broadcasting Act 1989. Section 4(1)(d) requires all broadcasters to maintain in its programmes and their presentation, standards that are consistent with "the principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes".

[15] In facilitating debates through its programmes and their presentation, the applicants allege TVNZ is performing a public function with public consequences, namely, informing voters about the views of parties in the general election and referenda in order that voters may make informed decisions on voting in the election and referenda on 17 October 2020.

[16] On the other hand, TVNZ maintains that it is not a public body and, in developing and applying the criteria for the debate, is not exercising any public function, power or duty and therefore is not amenable to review. However, it accepts for the purposes of the interlocutory application for interim relief, that it is exercising a public function, power or duty and is amenable to review. In other words, it seeks to preserve its position, but is willing to engage with the substance of the application because of the urgency of the matter.

Interim relief

[17] Section 15 of the Act provides that, before the final determination of an application for judicial review, the Court may make an interim order prohibiting a respondent from taking any further action that is consequential on the exercise of a statutory power. The Court may make an order where it is necessary to do so in order to preserve the position of the applicant.

[18] Although s 15 does not appear to contemplate the granting of mandatory interim orders, r 30.4 of the High Court Rules 2016 provides that the High Court may

make an interim order on whatever terms and conditions the Court thinks fit. While this is an application for interim relief, the decision of this Court on this application for interim relief will effectively determine the proceedings. In such circumstances, the plaintiff is required to demonstrate a prima facie case rather than merely demonstrating a serious question to be tried.²

[19] The first issue is therefore whether there is a prima facie case that TVNZ's application of the criteria is unreasonable or in some other way flawed through failure to take into account a relevant consideration or by fettering its own discretion. Importantly, the onus is on the applicants to persuade the Court that there is such a prima facie argument, rather than on the media to justify its criteria.³ If this threshold is met, the next issue is where the balance of convenience and overall justice lie. The balance of convenience is a descriptor for weighing the respective harm to the parties by making or declining the order sought.⁴

[20] To grant interim relief I must also be satisfied that the order sought is reasonably necessary to preserve the position of the applicant. If it is, then the Court has a wide discretion to consider all the circumstances, including the apparent strength or weakness of the claim for review and/or the repercussions, both public and private, of granting interim relief.⁵

Grounds of review

[21] The applicants plead three grounds of review:

- (a) TVNZ acted unreasonably in declining to invite Mr Baker to participate in the debate;
- (b) TVNZ failed to take into account relevant considerations; and
- (c) TVNZ unlawfully fettered its discretion.

² *Ross v MediaWorks Holdings Ltd* [2020] NZHC 2574 at [31].

³ At [48].

⁴ At [32].

⁵ *Minister of Fisheries v Antons Trawling Co Ltd* [2007] NZSC 101 at [8].

Is there a prima facie case against TVNZ?

Did TVNZ act unreasonably?

[22] First, the applicants allege that TVNZ's decision not to invite Mr Baker to participate in the debate is based on an inconsistent articulation and application of the criteria for inclusion in the debate.

[23] I accept that Ms Claire Silvester, the Q&A Executive Producer at TVNZ, emailed Mr Simon Gutschlag, the national campaign manager for New Conservative, on 25 September 2020 with the criteria for inclusion in the debate, which she had noted were "The same as for the last election" when the criteria had been altered earlier that month as a result of criticism from the Māori Party. That was an error on her part. That "inconsistent articulation" does not, however, make the revised criteria unreasonable. Nor does the fact that the criteria have been revised following public debate lead to "inconsistent application" of them. New Conservative knew of the revised criteria on 8 September 2020 when it and four other minor parties emailed TVNZ to acknowledge that the revised criteria were an improvement, but they were "still unjust, unfair, and an affront to voters".

[24] Although there is no single standard of unreasonableness in administrative law, which can vary according to the subject matter, the articulation and application of criteria in the present case cannot be seen as unreasonable. In *Morgan v Television New Zealand Ltd*, Venning J held that the 2017 criteria were not unreasonable:⁶

[59] As Mr Cooke also accepted, broadcasters including TVNZ, must be able to make decisions on who to include in the leaders' debates. His argument was that the decisions must be justified given the potential impact they have on the actual process and that a television network could only justify the exclusion of leaders of parties who genuinely do not have a realistic prospect in the election. But that selection should be based on reasonable and objective criteria. For the reasons given above, I consider the criteria chosen by TVNZ to be transparent and workable. Mr Cooke submitted that TVNZ is effectively deciding who the viable candidates for election are. But as Ms Shortall submitted it is not TVNZ that suggests Mr Morgan or TOP will not reach the threshold to gain a seat in Parliament rather it is the current poll results.

⁶ *Morgan v Television New Zealand Ltd* [2017] NZHC 2178, [2017] NZAR 1485.

[25] Secondly, the applicants say that the Māori Party and Advance NZ have been included in the debate, but there have been no public polling results indicating that the Māori Party or Advance NZ would win an electorate seat in 2020 or receive more than three per cent of the party vote. On the other hand, there have been public polling results which indicate that New Conservative will receive materially more party votes than will be received by either the Māori Party or Advance NZ.

[26] However, while New Conservative may have received more support in the latest 1 News Colmar Brunton poll than either the Māori Party or Advance NZ, those parties were invited to participate in the debate through their qualification by another criterion (criterion three), which New Conservative does not meet. The fact is all three parties do not meet the three per cent threshold for qualification under criterion two.

[27] Thirdly, the applicants say New Conservative polled 1.4 per cent support in the last 1 News Colmar Brunton poll, which had an approximately 1.4 per cent margin of error — a total of 2.8 per cent. The applicants point to TVNZ's policy or practise of rounding up results of 2.5 per cent or higher to three per cent and, accordingly, New Conservative says it conceivably meets the criteria for inclusion in the debate.

[28] With respect, I do not consider it proper to add a margin of error to a poll result to reach a higher figure. The poll result should be taken at face value. In any event, the margin of error of 1.4 per cent used by New Conservative is said to apply to a poll result of around five per cent. The margin of error on 1.4 per cent is much less.

[29] TVNZ seemingly has a policy or practise of rounding up results of 2.5 per cent or higher to three per cent, which reflects its desire to be more inclusive, but New Conservative does not come close to 2.5 per cent. Ultimately, as noted by Venning J in *Morgan*:⁷

[60] The strongest point for the applicant is that TVNZ's criteria [are] limited to existing parties and the 3% threshold without having regard to the likelihood of a party breaking through the 5% threshold. The difficulty for the applicant is that he has not been able to suggest an alternative workable criteria to identify those issues. Essentially TOP's argument is that the level should be at 1% or 2%, rather than 3% in the polls, but as noted, there are good reasons for not reducing the level below the 3%, particularly given the number

⁷ *Morgan v Television New Zealand*, above n 6.

of minority parties and given the element of discretion applied by TVNZ in rounding up the poll results from 2.5% in the event that was achieved.

Did TVNZ fail to take into account relevant considerations?

[30] First, the applicants allege that TVNZ did not take into account the impact of Māori electorate seats in Parliament. New Conservative is running candidates in all Māori electorates, which was a relevant consideration that TVNZ was required to take into account.

[31] However, it is clear that TVNZ did have regard to this very point when revising its criteria for inclusion in the debate. It addressed the Māori Party's concern that the initial criteria did not adequately consider parties who were only contesting Māori electorate seats. The same concern does not apply to New Conservative given it is fielding candidates in all electorates. It has national coverage and is not disadvantaged by the nationwide polling undertaken by Colmar Brunton, as is the Māori Party.

[32] Secondly, the applicants allege that TVNZ did not take into account the future likelihood of parties being in Parliament after the election. Instead, the criteria are focused on historic performances of the parties and their leaders in previous elections.

[33] However, New Conservative has not identified an electorate seat which it says it may have a chance of winning. When asked how New Conservative had a credible pathway to parliamentary representation, counsel pointed to the fact that they had a candidate standing in all general and Māori electorate seats, were polling in fifth place, and the profile garnered through participation in the debate and the two public referenda. As to the chance of securing a list seat, the highest the party has polled in recent times is 1.6 per cent, when there is a threshold of five per cent for securing representation in Parliament. Its support has been as low as 0.4 per cent in May 2020. The fact that New Conservative has candidates in all Māori electorates does not change this assessment.

[34] Thirdly, the applicants also allege that TVNZ did not have regard to the impact of the referenda on the decisions that voters were making in deciding their general election votes. The applicants allege that the parties' position on the referenda are a

relevant consideration that TVNZ was required to take into account as they are a unique feature of the 2020 general election compared with the debates ahead of past general elections.

[35] The applicants say that as a result of failing to have regard to the referenda, the debate will proceed with participation by parties who support one or both of the referenda and without participation by a party (namely, New Conservative) which opposes both referenda.

[36] However, I am not persuaded that the fact that two public referenda are to be held at the same time as the general election has any relevance to the inclusion of Mr Baker in the debate.

[37] The statement of claim alleges that the referenda will impact on the decisions that voters will make in deciding their general election votes; the parties that put forward strong positions for or against the referenda; and whether voters took into consideration those strong positions when considering their general election votes.

[38] The applicants have not put forward any empirical evidence about any such impact. The allegation that there will be some impact is completely unproven. The applicants were also not able to explain how any such impact might be demonstrated. The fact that New Conservative advocates a no vote to both referenda cannot, in my view, be a relevant consideration that TVNZ must take into account when determining who to invite to participate in the debate.

Did TVNZ unlawfully fetter its discretion?

[39] Notwithstanding the formulation of criteria for inclusion in the debate, the applicants allege TVNZ was required to remain willing to exercise its genuine discretion. TVNZ informed New Conservative on 25 September 2020 that “I know you are keen to be involved, but the final decision is based on the polls, being one of the criteria.” Further, TVNZ informed the applicants on 2 October 2020 that “We have eliminated discretion as much as we can”. Accordingly, the applicants allege that TVNZ failed to exercise or consider exercising its genuine discretion.

[40] I do not consider that those comments amount to an unlawful fettering of discretion. The reality of the situation is that TVNZ has adopted criteria to guide its decision-making, but has recognised it could not be inflexible and so revised the criteria this year. I apprehend it would do so again if circumstances warranted it.

[41] In comments made at the time it revised the criteria, TVNZ acknowledged that voters needed to be aware of parties and politicians who might have a viable path to Parliament by winning any of the Māori electorate seats.

[42] There is no evidence that New Conservative has engaged TVNZ in serious debate during the course of which TVNZ has displayed unreasonable rigidity. The comment by a TVNZ employee about polls is a reflection that that is the pathway through which New Conservative could be invited to participate in the debate. New Conservative has not suggested any other route. It has not put forward any alternative criteria. Its leader may, however, still be invited to participate in the debate if New Conservative polls three (or 2.5) per cent in the latest 1 News Colmar Brunton poll due to be released today.

Decision

[43] I accordingly was of the view that the applicants had not established a prima facie case for the making of an interim order requiring TVNZ to invite Mr Baker to participate in the debate as leader of New Conservative. In those circumstances, I do not need to consider the balance of convenience.

[44] The application for interim orders was therefore dismissed. The substantive application is adjourned to the **Judicial Review list at 9.00 am on Thursday, 21 October 2020.**