IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-3586

UNDER	The Judicature Amendment Act 1972 and Part 7 of the High Court Rules
IN THE MATTER OF	an application for Judicial Review
BETWEEN	KELVYN ALP Applicant
AND	TELEVISION NEW ZEALAND LIMITED Respondent

Hearing: 17 June 2011

Appearances: S M Kilian for the Applicant
J E Hodder SC & H Wild for the Respondent

Judgment: 17 June 2011

ORAL JUDGMENT OF PRIESTLEY J

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Introduction

[1] I am giving this judgment orally. Having heard submissions I have reached a clear view. I am also mindful of the fact that the relief the applicant seeks has significance for recordings which the respondent TVNZ wishes to make in approximately four hours time.

Relevant background

[2] There is a large measure of common ground between the parties about the facts. There is to be a by-election in the Te Tai Tokerau electorate on Saturday 25 June 2011. This by-election has been caused by the resignation from the current Parliament of Mr Hone Harawira who was, until his resignation, the electorate's sitting Member of Parliament.

[3] Mr Harawira announced his resignation on 11 May, effective on 20 May 2011. During the preceding weeks serious disagreements had arisen between Mr Harawira and the Maori Party, of which he was a member at the time of his re-election in November 2008. In the intervening period since his resignation Mr Harawira has formed his own political party, the Mana Party.

[4] At the close of nominations for the by-election there were five candidates. One is of course Mr Harawira. The second candidate, Mr K Davis, is the selected candidate for the New Zealand Labour Party. The third candidate, Mr S Tipene, is the selected candidate for the Maori Party. The two other candidates are the applicant, whose party is OURNZ, and a Mr Herbert whose party is the Aoteoroa Legalise Cannabis Party.

[5] The respondent is a public broadcaster, operating television channels in New Zealand which are free to air. It has imposed on it a number of statutory obligations to which I shall shortly refer. One of the current affairs programmes which TVNZ offers on its TV 1 channel is *Marae Investigates*. This is described as a bilingual current affairs programme which focuses on Maori issues and events. The

programme receives direct public funding from Te Mangai Paho, which is the Maori broadcasting funding agency – a Crown entity.

[6] The urgency over this application, and indeed what has triggered the applicant's substantive claim, is a decision made by the respondent to film this evening for the *Marae Investigates* programme an interview with three of the Te Tai Tokerau by-election candidates, being Messrs Harawira, Davis, and Tipene. For reasons which I shall shortly articulate, the respondent made the decision that it would not include in that programme either the applicant or Mr Herbert. It is the respondent's intention to broadcast that programme at its normal time, 10.00 am, on Sunday, 19 June.

[7] The applicant is aggrieved by this decision and seeks redress.

[8] Of some but not determinative relevance is the fact that currently the New Zealand Labour Party and the Maori Party are political parties registered under the relevant legislation with the Electoral Commission. Registration of Mr Harawira's Mana Party, if it is to be achieved, is still in train. The applicant for his part has deposed that his organisation, OURNZ, currently has 200 members. It is accepted that OURNZ, being a newly formed party, is not yet registered with the Electoral Commission. But it is hoped registration will be achieved before the November 2011 General Election.

Relief sought

[9] The applicant's substantive claim is for judicial review under the relevant provisions of the Judicature Amendment Act 1972. The pleadings specifically refer to a decision made by the respondent through Ms Raewyn Rasch (the producer of *Marae Investigates*), recorded in an email dated 8 June 2011.[1] What the applicant seeks substantively on various grounds, which I need not list, is a declaration that the decision to exclude him from the by-election debate being mounted by *Marae Investigates* is invalid. He also seeks orders setting that decision aside.

[1] The statement of claim incorrectly pleads the 8 June email with the date 9 June.

[10] Importantly and significantly, so far as this Court's discretion is concerned, the applicant seeks, on an urgent basis, a mandatory injunction to preserve the status quo. Were the television programme to be filmed this evening and go to air on Sunday any judicial review rights which the applicant might have, were he to be successful in his substantive claim, would be hollow. Thus the applicant is seeking an interlocutory or interim mandatory injunction. The mandatory injunction sought is quite simply that he be included in the Te Tai Tokerau by-election candidates' television debate, to which I have referred.

Relevant evidence

[11] A very brief chronology is necessary. The pleaded decision which the applicant attacks is, as I have said, set out in an email sent by Ms Rasch on 9 June. Ms Rasch in her affidavit in opposition stresses that this was not a decision which was lightly reached.

[12] Shortly after the nominations for the by-election closed off the decision was made to produce the programme. Ms Rasch, although producer, consulted with other people. One of the decisions to make was how many of the five candidates should participate in the candidates' debate. Ms Rasch says on oath, "careful thought" went into making this decision. The criteria deployed were the current and historic representation of candidates and their parties in Parliament; the voting at the last General Election; the historic and current representation and standing of the five candidates in their communities; and also (importantly I suspect from the point of view of any television programme) the time available for broadcasting. The available broadcasting slot is 29 minutes.

[13] Having considered these criteria a decision was reached to include only the three candidates to whom I have referred.

[14] The first shot fired by the applicant was to question this decision and to ask for his inclusion in the debate. That request led to the email to which I have referred. Ms Rasch's email to Mr Alp on 8 June reads as follows:

> Dear Kelvyn,
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> Thank you for your detailed request. Unfortunately it does not change our position regarding our Te Tai Tokerau Candidates Debate. Please be aware we have not taken this decision lightly or arbitrarily. Our responsibility is to provide current affairs with and from a Maori perspective. The reason we have chosen the candidates we have is that they are either a sitting member of parliament or their Party is well established and in parliament. All the candidates we have chosen are from the Te Tai Tokerau electorate and have represented their communities for a considerable time at various levels of local and national government.
>
> Given the short time available within our programme for the candidates we have decided our viewers are served best by hearing from the three most substantial candidates.
>
> I'm sure we are not the only avenue of publicity for you but thank you for your interest in our programme and wish you well with your campaign.
>
> Regards
>
> Raewyn Rasch

[15] Faced with that approach the applicant involved his solicitor, who emailed a detailed letter to Ms Rasch at TVNZ on 15 June. That letter contained rebuttal arguments and legal authorities. The respondent too sought legal advice from the Wellington offices of Chapman Tripp.

[16] By letter, to the applicant's solicitors the same day, 15 June, Chapman Tripp advised that the respondent had "reconsidered its position and taken careful account of the matters referred to in [the applicant's solicitor's letter]".

[17] It is not necessary for me to set out the matters advanced by the applicant in full. However, they included:

- None of the candidates were currently Members of Parliament, other than Mr Davis. (This is, with respect, a somewhat disingenuous ground as Mr Harawira was until his resignation a Member of Parliament and was seeking re-election.);

- Only the Maori and Labour Parties were registered with the Electoral Commission;

- It was wrong to assume that only three selected candidates were unconnected with relevant communities;

- It was wrong to classify the two excluded candidates as not being "substantial"; and

- As a public broadcaster, receiving state funds, there were arguably certain duties imposed on the respondent.

[18] Chapman Tripp's letter stated that, as part of a reconsideration process, the respondent had regard to factors which include available public polling; current and historic representation in Parliament; the voting at the last General Election; and again the available time for the broadcast.

[19] The public polling reason advanced by Chapman Tripp does indeed include another ground. I am satisfied that there was, albeit within a very short time frame, something in the nature of a reconsideration by the respondent as a result of the letter TVNZ had received from the solicitors. The reference to public polling refers to a Maori Television *Native Affairs* programme, which went to air on 13 June. That programme was based on a Baseline political poll which had asked 508 people of their voting intentions, the margin of error being plus or minus 4.5%. The polling figures disclosed, as is now well in the public domain, a three horse race and a very narrow margin between the two currently leading candidates. The polling figures for Messrs Harawira and Davis respectively were 41% and 40%. Mr Tipene's polling was 15%. The recorded polling support for each of the two excluded candidates was 1%.

[20] Interestingly, and this is a matter on which Mr Kilian placed heavy weight, Ms Rasch was recently interviewed by New Zealand's largest circulating newspaper, the *New Zealand Herald*. Her interview appears in that paper's online version yesterday, being posted at the early hour of 5.30 am. In that online report Ms Rasch was asked questions, so it would seem, by a *Herald* reporter on the forthcoming *Marae Investigates* programme and Mr Alp's non-involvement in it. She is reported as having said that the respondent "had a responsibility to viewers to provide

intelligent debate"; she opined that (apparently being asked whether Mr Alp would fit the bill) she had "... looked at some of his comments – I cannot make head or tail of them"; she then went on to state that Mr Alp "was not from the electorate; was not Maori; was not on the Maori roll; and was not eligible for the Maori roll".

[21] In Mr Kilian's submission these matters ventilated in the public domain, purportedly by Ms Rasch, have significance. They contain factual errors, the first being that the applicant was not a Maori and was not eligible to be on the Maori roll. The applicant has filed an affidavit in which it would appear he can claim whakapapa, thus giving him Maori descent.

[22] It is common ground that a candidate for any electorate does not have to reside in the electorate. Nor is there any prohibition on someone enrolled on the General Roll standing in a Maori electorate and vice versa.

[23] These comments by Ms Rasch are not, so far as the documents to which I have referred are concerned, relevant to the making of the decision. Mr Kilian, however, submits that they were indeed relevant to the respondent's decision and that, because he was not Maori, the applicant has been discriminated against in terms of his race. Section 21(1)(f) of the Human Rights Act 1993 prohibits such discrimination. There are also of course parallel provisions, so far as public bodies are concerned at least, in s 19 of the New Zealand Bill of Rights Act 1990.

[24] Mr Hodder SC has raised whether in fact the pleadings correctly identify the relevant judicial review target. The appropriate decision, if there was to be a review, was the reconsidered decision contained in the 15 June Chapman Tripp letter to which I have referred. Mr Hodder may well be right but nothing, so far as my decision on the injunctive relief sought, hangs on that.

Relevant statutory provisions

[25] Counsel have relied on the provisions which attach to all public broadcasters contained in the Broadcasting Act 1989 and in particular on s 4(1)(d):

> **4 Responsibility of broadcasters for programme standards**
>
> (1) Every broadcaster is responsible for maintaining in its programmes and their presentation, standards that are consistent with –
>
> …
>
> (d) 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 within the period of current interest;
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> …

[26] I note that Mr Kilian also relies on subs (e), which refers to any approved code of broadcasting practice (being the Free-To Air Television Code of Broadcasting Practice). I doubt whether that provision reinforces to any significant extent the applicant's argument. However, for the sake of completeness I set out the pleaded provision of the Code which is Standard 7:

> Broadcasters should not encourage discrimination against, or denigration of, any section of the community on accounts of ... race, ... culture or political belief.

[27] It is important to appreciate that, unlike many broadcasters, the respondent is subject to its own specific Act of Parliament. Of particular relevance here is s 12(2)(b)(i) of the Television New Zealand Act 2003 which provides:

> **12 Functions and objectives of TVNZ**
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> ...
>
> (2) In carrying out its functions, TVNZ's principal objective is to give effect to its Charter (set out below) while maintaining its commercial performance:
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> ...
>
> (b) In fulfilment of these objectives, TVNZ will –
>
> (i) provide independent, comprehensive, impartial, and in-depth coverage and analysis of news and current affairs in New Zealand and throughout the world and of the activities of public and private institutions;
>
> …

That provision is also replicated in the respondent's charter to which Part 2 of the Act refers.

Submissions

[28] I do not intend to set out the well-known provisions relating to injunctive relief on which counsel are agreed.

[29] Similarly, I do not intend extensively to traverse fully counsel's submissions which were focused and pertinent. Expressing his submissions in terms of injunctive relief Mr Kilian submitted that, given the relevant legislation (supra [25]-[27]), there was indeed a serious question to be tried.

[30] Additionally Mr Kilian submitted the applicant's race or ethnic rights under s 19 of the New Zealand Bill of Rights Act and s 21 of the Human Rights Act had been infringed. Mr Kilian placed heavy and understandable emphasis, particularly in terms of the balance of convenience component of the injunctive relief, on the fact that if the mandatory injunction was not granted, the opportunity for the applicant to present his views as a candidate in the by-election would be taken from him. The debate on Sunday was effectively the last opportunity which the applicant would have as a candidate to promulgate his views to a wide audience.

[31] Mr Kilian in his reply strengthened somewhat his reliance on the reported comments made by Ms Rasch to the *New Zealand Herald*. In his submission, the decision made by the respondent was arbitrary and certainly, so far as the applicant was concerned, unfair.

[32] Understandably too Mr Kilian relied, as a persuasive precedent, on the High Court judgment of Ronald Young J in, *Dunne v Canwest TVworks Limited*.[2] That was a case where, with some reluctance, His Honour issued a mandatory injunction which had the effect of compelling a private television company (TV 3) to include in a leaders' television debate the leaders of two minority parties, Messrs Dunne and

[2] *Dunne v Canwest TVworks Limited* [2005] NZAR 577 (HC).

Anderton who were the then leaders of United Future and the Progressive Party respectively which parties were supporting the then Labour Government.

[33] As Mr Hodder has submitted, there are a number of grounds on which *Dunne* can be distinguished, although the points of distinction are not conclusive. Applications of this type must ultimately depend on the surrounding circumstances and the evaluative exercise leading to the exercise of a judicial discretion. Obvious distinguishing characteristics, however, are that the two applicants in the *Dunne* case were both Members of Parliament; were both leaders of a coalition party; and, interestingly, were polling, on the evidence, significant figures. The United First polling figure was only 0.2% below the polling for the ACT Party whose leader was being included in the debate. There was a clear degree of arbitrariness involved in selecting one party but not the other in that situation.

[34] There was also force in Mr Hodder's submission, as an extra distinguishing factor, that the provisions contained in Part 6 of the Broadcasting Act, which provisions impose a number of duties on broadcasters during an election period (all designed to provide balance and to inform the voting public), specifically exclude from their ambit by-elections (s 69A(1)).

[35] Mr Kilian also emphasised that it might not be so much the applicant's individual rights which were important in the general context of this proceeding (and the relevant statutory provisions). It was more the right of the voting public in the Te Tai Tokerau electorate to be informed and to have an opportunity presented to them to see and hear all the candidates.

[36] Mr Hodder's submissions advanced a number of policy points. He submitted that the respondent had the right to gather and present news in any manner it thought fit. With reference to an Ontario Supreme Court decision *Trieger v Canadian Broadcasting Corporation*[3] and the more recent House of Lords decision of

[3] *Trieger v Canadian Broadcasting Corporation* (1988) 54 DLR (4th) 143, at [8], [29].

R (Prolife Alliance) v British Broadcasting Corporation,[4] there was no human right for anyone to use a television channel.

[37] The Ontario decision, to which I have referred, casts a somewhat wider net, concerning the right with which the applicant in that case sought to interfere, namely the right of the public to hear the scheduled debate and the rights of other scheduled leaders to debate whom and what they wanted. I expressly do not approve or follow that aspect of the Ontario decision. However, I do consider the other limb of the dictum (at 151) that the media have a constitutional right to decide what they think is newsworthy without having newsworthiness dictated to them by a court has force.

[38] Mr Hodder adopted extensively relevant dicta of Lang J in *Mangu v Television New Zealand*:[5]

> [20] The starting point in considering this issue is the nature of the relief sought by Ms Mangu. On this point I accept Mr Akel's submission that, no matter how it is expressed (or, as he put it, dressed up) Ms Mangu is asking the Court to review TVNZ's fundamental constitutional right to gather and present news and current affairs in the manner it sees fit.
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> ...
>
> [23] The Court does, of course, have the power to intervene in circumstances where the interests of justice override the rights of the media to freedom of speech. An example is where there is a significant risk that an accused person will not receive a fair trial if material is broadcast or published: See eg *Burns v R* [2002] 1 NZLR 387 (HC), 402 (CA). In such cases the right of an accused person to receive a fair trial will override principles of freedom of expression and open justice. Even then, however, the Court will adopt a cautious approach.
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> ...
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> [43] The consistent reference in the above legislation to TVNZ's editorial independence is, in my view, a strong indicator that its day to day operational decisions in these spheres, divorced as they are from political influence, should not readily be susceptible to judicial review. It suggests that those matters are for it and it alone.
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> ...
>
> [48] The existence of a structured complaints and appeal process within the scheme of the Broadcasting Act 1989 is also, in my view, a further

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[4] *R (Prolife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 (HL), at [8] per Lord Nicholls, at [55] – [59] per Lord Hoffman.

[5] *Mangu v Television New Zealand* [2006] NZAR 299, (HC).

> indicator that, in relation to complaints in respect of programming standards and presentation, judicial review should not be available.
>
> *Practical considerations*
>
> [49] Finally, there is the difficulty of determining where to draw the line in individual cases if judicial review is available in respect of day to day programming and editorial decisions. During the hearing Mr Illingworth submitted that the Court should interfere with TVNZ's freedom of expression in exceptional cases and "where there is a compelling reason to do so".
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> [50] As the present case demonstrates, however, many litigants believe that they have an exceptional or compelling case. Viewed objectively, however, the reality is often different.
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> [51] I acknowledge that the Court is regularly asked to determine issues according to standards varying from "arguable" to "compelling". That is not the point. The point is that it would be unfortunate if persons aggrieved by the manner in which broadcasters have performed their functions were readily able to resort to applications for judicial review. It would be highly undesirable, in my view, for the Court to become a parallel arbiter of programming standards when a specialist body with expertise in that field already exists.
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> ...
>
> [66] If the Court is to interfere with the exercise of freedom of expression by the media, it should only do so where it is reasonably sure of the factual basis underpinning the application for restraint. In the present case I do not consider that a sufficient factual basis has been made out.

[39] Lang J at [32] also referred to the real contest, which was ironically in the Te Tai Tokerau, as being between two other candidates. The applicant in the case before Lang J was also a candidate at a General Election. Her grievance was that certain items relating to her had not appeared in a news programme.

[40] The policy considerations articulated by Lang J are ones with which I respectfully agree and adopt. In particular I note that Lang J adopted, at [49], the submission of counsel before him that, in this constitutionally fraught area, where courts are being invited to make orders which will impact on the media's rights of freedom of expression and editorial independence, judicial intervention should be saved for "exceptional and compelling cases". Mr Hodder's submission is of course that this case is neither exceptional nor a compelling one.

[41] There is no evidence, in Mr Hodder's submission, that an arbitrary decision has been made by the respondent here. Nor in the context of a by-election, but particularly given the poll information to which I have referred, can it be asserted as it was in *Dunne*, that failure to include the applicant in the television programme would have an adverse or prejudicial effect on the applicant's chance of being returned as the new Member of Parliament in the Te Tai Tokerau electorate.

[42] Pithily Mr Hodder submitted that operational decisions of a broadcaster (which in the context he was using those words included editorial decisions), did not change merely because a by-election was involved.

[43] Referring to his written submissions Mr Hodder stated that the central issue in this case was whether there was any legal authority requiring "every candidate, however unknown, to participate in every televised debate". Counsel submitted that the relief being sought by the applicant effectively would require that if granted.

Result

[44] The statutory obligations which are laid on the respondent as a public broadcaster are obligations which bind it. Those obligations must of course be considered in a current affairs programme of the type which *Marae Investigates* clearly is. I am particularly mindful of the s 12(2)(b)(i) obligation imposed on the respondent to provide both independent, comprehensive and impartial coverage of current affairs. The Te Tai Tokerau by-election has political and public ramifications far beyond the electoral boundaries. The Mana Party candidate is colourful, has a public profile, and evokes strong responses. There is, I apprehend, considerable interest as to whether or not he will be re-elected. The poll to which I have referred has also generated a degree of interest and comment amongst political commentators.

[45] Against that backdrop, the statutory obligations of the respondent assume contextual significance. Although Mr Kilian suggested that the respondent had reached its decision in some way other than being "independent" there is absolutely no evidence for that assertion and I reject it. Nor am I prepared to hold, in the

context of this case, that the respondent's decision not to include the applicant in its programme runs counter to its statutory duty to be impartial.

[46] The only limb of s 12(2)(b)(i), which is relevant in my view, is whether the decision made by the respondent to exclude two of the five candidates will somehow result in the programme not being "comprehensive". I think it would be wrong and misleading to suggest that, on a programme-by-programme basis, a producer has to take a step back and look at all the criteria listed in the subsection with which I am dealing. Obviously that should take place in a general way. But given in particular the comments made by Lang J and also the comments to which I have referred in the House of Lords and Ontario Supreme Court decisions, I do not regard it as being a strong argument that, in this by-election context, the exclusion of two candidates somehow results in the forthcoming Marae Investigates programme *not* being "comprehensive".

[47] The decision which was made by Ms Rasch and those with whom she consulted took aboard a number of considerations. None of those considerations strike me as being irrelevant or, from the applicant's point of view, unfair.

[48] Given that the real "contest" is, on polling figures, between Messrs Harawira and Davis, I do not consider that in deciding to exclude the two lower polling candidates, who I think can fairly be regarded as single issue candidates or certainly candidates not representing the larger policy considerations and platforms available to the Maori, Labour, and Mana Parties, the decision is amendable to judicial review (whether it be the decision made on 8 June or 15 June).

[49] On the issue of whether the facts before me render this case "exceptional and compelling" (supra [40]) I do not consider that threshold has been crossed. The threshold, of course, is contextual. In this delicate area where public and private rights need to be balanced against statutory obligations, I think it would be unwise to articulate a standard threshold test. That was not what Lang J was doing in [49] of *Mangu*. The expression, in my view, is a salutary reminder that care is needed and that, as is often the case, context is critical.

[50] In my judgment the application for an interim injunction falls at the first fence. There is not a serious issue to be tried. Even if I were to be wrong on that, in the exercise of my discretion, given the delicate constitutional area in which the applicant seeks interim injunctive relief, I would, as a matter of my discretion, decline the injunction in any event.

[51] For those reasons therefore the application for an interlocutory injunction is refused.

Costs

[52] Counsel have understandably not been able to turn their minds to the issue of costs. I urge them to see whether they can resolve costs on an inter partes basis without the need to resort to this Court. If costs cannot be agreed leave is given to the respondent, who is prima facie entitled to costs, to file a memorandum within 15 working days with a memorandum in reply 10 working days thereafter.

Next event

[53] Although this interlocutory judgment probably determines the substantive proceeding, for case management purposes I direct the file is to be listed in the Duty Judge List on Thursday 30 June 2011 for mention only. If a notice of discontinuance is filed before that date, the mentions hearing is to be vacated and counsel's appearances are excused.

.....…
Priestley J