

THE HIGH COURT
JUDICIAL REVIEW

[2016 No. 78 J.R.]

BETWEEN**TOM KIVLEHAN****APPLICANT****AND****RAIDÍÓ TEILIFÍS ÉIREANN****RESPONDENT****JUDGMENT of Ms. Justice Baker delivered on the 15th day of February, 2016**

1. The broadcasting and print media play a vital role in political debate leading up to an election, and the role of the media in that context is central to the democratic process. It acts as a platform by which those running for election may inform the electorate of their policies, and also plays a direct role in covering candidates, parties and political issues in the form of news programmes, current affairs commentary, and debates between candidates and their representatives.
2. Raidió Teilifís Éireann ("RTE") is a public service broadcaster and it is mandated by statute to inform and educate the public in matters of news and current affairs, and in doing so to present and report in an objective and impartial manner and without expression of the broadcaster's own views. All broadcasters in the State are so mandated but the particular role of RTE as a public service broadcaster is identified in s. 114 of the Broadcasting Act, 2009 which expressly mandates that the station shall uphold the democratic values enshrined in the Constitution. It is the democratic right of the electorate to elect the Oireachtas, and the right of freedom of expression which imports a right to receive information and views, which forms the backdrop of these proceedings.
3. The applicant is a member of the Green Party/An Comhaontas Glas (hereinafter, "The Green Party") and a trustee and member of the executive committee of that party. He formerly served as a Green Party local government representative. He is a candidate in the February, 2016 general election. He has standing as a citizen, a member of the Green Party, and as a candidate for that party to bring these proceedings.
4. These proceedings arise out of the decision made by RTE not to invite the leader of the Green Party to participate in a live television debate intended to be broadcast this evening between the leaders of seven political parties contesting the general election.
5. The applicant seeks a declaration that criteria operated by RTE, and in particular the requirement that a party have at least three TDs in the outgoing Dail, before the leader of that party be invited to participate in the leaders debates is contrary to constitutional fairness, infringes the right of the applicant as a citizen enshrined under Article 5 and/or Article 40.1 and/or 40.3 and/or 40.6.1 of the Constitution, and in breach of its statutory obligations in ss. 39, 42 and 114 of the Broadcasting Act, 2009.
6. The application for judicial review was brought by way of a so-called "telescoped hearing" and the respondent has filed a notice of opposition and was represented at the hearing.

The live TV debates since 1982

7. The 2016, general election is due to be held on the 26th February, 2016. In anticipation of an election RTE has been considering the means by which it will deliver news and current affairs coverage of the campaign. It has in place an Election and Referendum Steering Group, a standing group which fixes policies and criteria with regard to radio and T.V. coverage. The Steering Group commenced active consideration of the nature and extent of coverage in respect of the 2016 General Election in January, 2015, and part of its consideration was the extent to which criteria and policies applied by RTE during the general election of 2011 required to be modified in the light of what is described as a changing political landscape.
8. RTE broadcasts a number of categories of television and radio programmes during the election, including news and current affairs programmes and party political broadcasts. No complaint is made by the applicant with regard to the criteria and principles which guide the respondent in its overall election coverage.
9. Since 1982, RTE has broadcast a live TV debate between the leaders of the political parties. Between 1982 and 1992, the debates were between the leaders of the outgoing governments and the leaders of the opposition, and in those ten years the leaders of Fianna Fáil and Fine Gael were the two featured leaders in the relevant debates. However the increased fragmentation of political parties and the fact that government was, or could be, made up of a coalition or group of parties had the effect that from 1992, RTE scheduled two live TV debates between party leaders, in 1997 one between the leaders of Fine Gael and Fianna Fáil, and the second between Labour and the Progressive Democrats, and in 2007, one six-way TV leader debate, and two two-way debates were broadcast. The leader of the Green Party participated in the larger format debate.
10. During the general election of 2011 the respondent scheduled two live TV debates between the leaders, the first being a five-way debate and the second a three-way debate. The leader of the Green Party participated in the debate with Fine Gael, Fianna Fáil, Labour and Sinn Féin.
11. It is proposed for the purposes of the Election in February, 2016 that two live leaders debates will be held, one with seven participating leaders, and the other with four.
12. As is apparent there is no fixed format for the leaders debate, and the format and number of parties participating in the debates has varied from one election to the other, as have the number of debates broadcast.

13. The two television debates which are to be held for the purposes as part of the coverage of the February 2016 election are one debate which will feature the leaders of the four largest political parties, Fine Gael, Fianna Fail, the Labour Party and Sinn Féin and another debate with the leaders of those four parties plus the leaders of the Anti-Austerity Alliance/People Before Profit, the Social Democrats and Renua.

14. The applicant argues that the leaders debate is of considerable influence. His evidence points to considerable viewer interest in the debates, and in 2011 the leaders debate was the fourth most watched programme on Irish TV, and attracted 964,000 viewers, or 1.4 million if one considers persons who watched some or all of the debate. It is less clear what, if any, impact performance in the debate has on electoral choice, and no Green Party candidates were elected to the outgoing Dail notwithstanding participation by the leader of the Party in the live debate in 2011. The applicant argues that the leaders debate is *sui generis* because of its audience reach, and media coverage of the political issues engaged in the campaign.

15. The applicant argues that given the high profile and importance of the leaders debate, the impression would be given to the electorate that should Eamonn Ryan, the leader of the Green Party not be permitted to participate in one of the debates, that the public could form a perception that the Green Party is not a political party of any importance or any weight as a national party.

The criteria for participation in the debate

16. In a letter of 15th January, 2016, RTE set out the criteria it applies to participation in the leaders debate as follows:-

- a. A party whose leader will be entitled to participate in the debate must have at least three sitting members of the outgoing Dáil;
- b. The party must be a registered Dáil party;
- c. The party must be standing candidates in the general election of 2016.

17. It is the first of these three criteria that is argued by the applicant as being in breach of the statutory obligations of the respondent as a public broadcaster. It is argued that the criteria are discriminatory, insufficiently objective, impartial, unfair and inclusive to satisfy the statutory obligation on RTE, or the Constitutional recognition of the democratic principles.

Arguments as to relevant factors

18. Certain factors relating to the participation of the Green Party in this election have been identified as relevant by the applicant, including that it is part of an international political movement, and has a particular interest and engagement with environmental matters, that it was a coalition partner in the previous government, and that, outside what is described as the "big four", is the only registered political party which has a candidate running for election in all constituencies.

19. It is argued by the applicant that the criteria adopted by the respondent for participating in the leaders debate fail to give due regard to what the applicant identifies as a number of considerations relevant to its participation in the 2016 election as follows:-

- a. the number of candidates a party is running in the election;
- b. its number of local government elected representatives;
- c. actual support for the party amongst the electorate, the percentage of first percentage votes won nationally by the political party in the last election, and in elections to the European Parliament, to local government and to Seanad Éireann, and the results of recent opinion polls;
- d. the history, heritage, and longevity of each political party and the contribution that each of them made up to or immediately before the general election in 2011;
- e. alliances between parties, taking account of government and opposition coalitions from common policy platforms etc. ;
- f. developments which take place during the course of the election campaign;
- g. newsworthiness of any matter with which the given political party, or parties, has a particular interest or platform to promote;
- h. the significance of having been a partner in a previous government;
- i. the growth of public concern about environmental issues and the central significance attached to matters arising in particular from recent United Nations agreements;

20. The applicant does not argue that RTE is obliged to give equal airtime to all political parties or candidates in the general election, but argues that the obligation arising from statute seen through the prism of the Constitution requires RTE to be impartial, objective, proportionate and fair in its invitation to participate in the leaders debate, and that the criteria adopted are rigid and not sufficiently flexible.

21. The applicant also points out that the leaders of three parties which have been invited to participate in the first of the two leaders debates are members of political parties which did not exist at the time of the last general election, and that the criteria, therefore, fail to reflect the political reality and to give sufficient weight to the role of the Green Party as a long established party in the State.

22. The respondent argues that the criteria adopted are rational, coherent and objective, and emerged from a considered choice, and in the light of editorial factors. It points to the obvious requirement that a public broadcaster should not appear to subjectively judge any one political view or party, but that it had an obligation to ensure that its current affairs and news coverage of the election is objective and fair and that the criteria for participation are objectively ascertainable.

23. The respondent argues that it must be afforded a margin of appreciation in the making of editorial decisions. It accepts that the purpose of the leaders debate is "to bring to the public a debate on national issues between parties holding policy positions on those issues", but that as a matter of editorial choice, the respondent must adopt a formula which results in an informative, engaging and meaningful television programme which, at the same time, achieves the overall objective of fairness, balance and impartiality.

The evidence

24. The statement of opposition is supported by an affidavit of David Nally, Head of Current Affairs in RTE Television, in which he identifies the increased fragmentation of political parties in the Irish political landscape as importing a significant challenge to it in achieving fairness and balance in current affairs and news coverage of this election.

25. The applicant had adduced evidence from Prof. Anthony Coghlan and Prof. Colum Kenny, both of whom have extensive knowledge, expertise and experience in the field of political and social policy and the role of journalism and communication in an election campaign. Each propose the view that RTE would more fairly, objectively and democratically respect the right of the citizen to hear political debate, and be informed on the issues in the election, were the broad general approach identified by RTE for its current affairs and general news coverage of the election to be adopted for the debates. Both of them, albeit with a different emphasis, and each of them with a degree of conviction which they root their experience and expertise, suggest that the exclusion of the Green Party from the live TV leaders debate fails to take account of the previous role of the party as partner in government, its specialist contributions on critical public issues, especially those concerning the environment, its position in the international environmental movement, and the fact that it is fielding a candidate in each constituency, as factors which ought to inform the editorial choices made by RTE.

The legislative context

26. The respondent is a public broadcaster and its powers and obligations are found in the Broadcasting Act, 2009. RTE is regulated in the exercise of its powers by s.39(1) of the Act, and s.39(1)(b) provides an express requirement that the broadcast treatment of current affairs by the respondent is to be presented in an "objective and impartial manner".

27. Section 42 requires the preparation of a broadcasting code to provide *inter alia* for the broadcasting treatment of current affairs, including, as set out in s.42(2)(b) that the broadcast treatment of current affairs, including matters which are either of public controversy or the subject of public debate is fair to all interests concerned and that the broadcast matter is presented in an objective and impartial manner and not be an expression of the broadcaster's own views.

28. Section 114(1)(b) of the Act provides in the relevant part the objects of RTE as *inter alia*:-

"to establish, maintain and operate a national television and sound broadcasting service which shall have the character of a public service, be a free-to-air service and be made available, in so far as it is reasonably practicable, to the whole community on the island of Ireland."

29. Section 114 (2)(b) mandates RTE in the pursuit of the objects to:-

"uphold the democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression."

This positive obligation is not imposed on other broadcasters in the State and arises from RTE's public broadcaster status.

Freedom of speech

30. The importance of the right of freedom of speech as a fundamental index of the democracy can be seen from the authorities and the positioning of the right as one of the fundamental and inalienable rights. Article 40.6.1(i) of the Constitution expressly guarantees the "right of citizens to express freely their convictions and opinions", it also has been said to arise as a result of the nature of the state. In *AG v. Paperlink Ltd.* [1984] ILRM 373 Costello J. reasoned that the right of the citizen to communicate must "inhere in the citizen by virtue of his human personality" and is "one of those personal unspecified rights of the citizen protected by Article 40.3.1". This is echoed in *Murphy v. I.R.T.C.* [1999] 1 I.R. 12, where Barrington J., delivering the judgment of the Court, explained the philosophical distinction between the personal and public rights, saying, at p. 24:-

"It appears to the Court that the right to communicate must be one of the most basic rights of man. Next to the right to nurture it is hard to imagine any right more important to man's survival. But in this context one is speaking of a right to convey one's needs and emotions by words or gestures as well as by rational discourse."

Article 40.6.1 deals with a different though related matter. It is concerned with the public activities of the citizen in a democratic society. That is why, the Court suggests, the framers of the Constitution grouped the right to freedom of expression, the right to free assembly and the right to form associations and unions in the one sub-section."

31. Budd J. in the decision of *O'Donovan v. Attorney General* [1961] I.R. 114, recognised the import of the spirit of equality in a political campaign. His *dicta* is often quoted and was quoted with approval by Denham J. in *McKenna v. An Taoiseach (No. 2)* [1995] 2 I.R. 10:-

"Article 40, s. 1 provides that all citizens shall, as human persons, be held equal before the law. . . . A 'democratic state' is one where government by the People prevails. In modern usage of the words I believe it to be correct to say a 'democratic state' denotes one in which all citizens have equal political rights. That the words should be given such a meaning in our Constitution seems to be supported by the other two Articles I have referred to as to the restriction of voting power to one vote per person and the equality of all before the law . . . There are thus contained in the Constitution other Articles the spirit of which demands equality of voting power and representation. The Articles I have just referred to admittedly have reference to equality of voting power, but are relevant in construing sub-clause 2.3 of Article 16 of this extent, that if it be established, as I believe it is, that the spirit and intendment of these other Articles is that the notion of equality in political matters is to be maintained, it would be illogical to find a different and inconsistent principle adumbrated elsewhere in the Constitution."

32. A similar and authoritative approach by the Supreme Court is found in *Coughlan v. Broadcasting Complaints Commission*, albeit given in the context of the now appealed Broadcasting Authority Act 1960, Hamilton CJ. expressed the view that the principles explained in *Mc Kenna v An Taoiseach (No. 2)* are of "general application, being based on the Constitutional rights of the citizen and the requirement of fair procedure". He quoted with approval from the judgment of Henchy J. in *The State (Lynch) v. Cooney* [1982] I.R. 337 at p. 381 that:-

"It is correct as a general statement to say that a citizen, as such, has no particular legal right to make a broadcast. Such a right will normally arise only when an agreement to broadcast is made. However, this does not mean that the Authority has carte blanche as to what kinds of broadcasts it will transmit or as to whom it will allow to broadcast. Its discretion in respect of those matters is limited by the requirements of the Broadcasting Authority Acts, 1960-1976."

The importance of the right is a factor that must weigh in the role of the Court.

The standard of review

33. The applicant identifies what counsel described as a “tension in the authorities” as to the applicable test in determining this judicial review. She argues that the court is not confined to a consideration of whether the criteria are unreasonable or irrational, but that a wider jurisdictional basis for the intervention of the court approach arises because RTE is mandated to positively respect the democratic process and has a central role in informing and educating choice within that process. She argues that if it is shown that a particular approach has the potential to interfere with the informed choices of the electorate or elements of the electorate that the court has a duty to supervise and interfere with even a reasonable decision.

34. Counsel argues that the test identified by the Supreme Court in *Keegan v. the Stardust Tribunal* [1996] I.R. 642, and *O’Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 is not sufficiently broad in scope and reach to form the basis on which the High Court should examine the approach taken by RTE. I do not propose engaging with the difficult question of whether the Supreme Court decision in *Meadows v. Minister for Justice & Ors.* [2010] 2 I.R. 701 did establish a different or higher standard of review when the Court is considering the reasonableness of administrative decisions in cases affecting constitutional or fundamental rights. I consider that counsel for the applicant is correct however that the particular role of RTE as a public service broadcaster, and its statutory mandate which is expressed in positive terms to uphold the constitutional principle of freedom of expression, does create a context or circumstance in which this judicial review is to be considered. As Denham J. identified in *Meadows v. Minister for Justice & Ors.* the nature of the decision and the decision maker is relevant to the application of the test. Fennelly J. made it clear in that case that the test laid down in the old cases starting with *Keegan v. the Stardust Tribunal* is “sufficiently flexible” to provide an appropriate level of judicial review and affording “an appropriate level of protection of fundamental rights”.

35. I accept that broad and central constitutional issues are at play in the present case, and that RTE is placed in a unique position of obligation to protect freedom of expression in the context of the democratic process. Thus I consider that principles of proportionality are engaged. I consider that the *dicta* of Murray C.J., at paras. 57-58, in *Meadows v. Minister for Justice & Ors.* correctly identifies the role of proportionality in the test of reasonableness as follows:-

In examining whether a decision properly flows from the premises on which it is based and whether it might be considered at variance with reason and common sense I see no reason why the court should not have recourse to the principle of proportionality in determining those issues. ...

The principle requires that the effects on, or prejudice to, an individual's rights by an administrative decision be proportional to the legitimate objective or purpose of that decision.”

The authorities

36. The applicant relies on the judgments of the Supreme Court in *McKenna v. An Taoiseach* and *Coghlan v. the Broadcasting Complaints Commission* [2000] 3 I.R. 1. Each of these judgments concerned a referendum.

37. In *McKenna v. An Taoiseach (No. 2)*, the Supreme Court considered the lawfulness of the use by Government of public funds to promote a particular outcome in a referendum. The Supreme Court granted a declaration that such expenditure was in breach of the constitutional right to equality. Hamilton C.J. stated that matter in broad terms as follows:-

“As the guardians of the Constitution and in taking a direct role in government either by amending the Constitution or by refusing to amend, the People, by virtue of the democratic nature of the State enshrined in the Constitution, are entitled to be permitted to reach their decision free from unauthorised interference by any of the organs of State that they, the People, have created by the enactment of the Constitution.”

38. Denham J. regarded the expenditure by the Government of public funds to promote a result in a referendum as infringing upon the constitutional right of equality, the right to freedom of expression and the right to a democratic process. She expressly referred to the “right to equal treatment in the political process”, and found the rationale in principles of equality from A. 40 :-

“This recognises the equality of citizens. It also requires the organs of government in the execution of their powers to have due regard to the right of equality. The citizen has the right to be treated equally. This includes the concept that in the democratic process, including referenda, neither side of an issue will be favoured, treated unequally, by the government.”

39. In *Coghlan v. the Broadcasting Complaints Commission* the question was whether unequal broadcasting time promoting a particular side in the referendum was an interference with the democratic process. Carney J. in the High Court pointed to the unique position of RTE, the second respondent, and took the view that “a package of uncontested or partisan broadcasts by the national broadcasting service weighed on one side of the argument was an interference with the referendum process”.

40. The Supreme Court agreed, and applied the principles enunciated in *McKenna v. An Taoiseach* as being ones of general application and based on the “constitutional rights of the citizens and the adoption of fair procedures.”

41. Counsel for the applicant argues that no distinction can be made for the purposes of the present case between a referendum and a general election. Denham J. however did identify certain key differences in her judgment in that case and at p. 30 she said the following:-

“The referendum process is a different process to that of an election. In a general election or a local election political parties are key players. They are running for power, for government. The institutions of representative democracy are driven by the party political system. Thus, party politics are at the core of an election or a general election. The party political broadcast is an important part of that process. In contrast, in a referendum the process is one of direct legislation.”

42. Denham J. pointed to the binary nature of a referendum, and it is clear that the 2016 general election does not admit of any binary categorisation of positions having regard to the very wide spectrum of political positions advanced. The evidence unequivocally points in the present case to a plurality of issues, parties, groupings and independents, and it is not possible to identify an approach to the issues which would be amenable to a mathematical formula.

43. While I consider that a referendum and a general election do, each in their different ways, impose an obligation of impartiality, objectivity and transparency and fairness on public service broadcasters, the primary difference identified in the case law between a

referendum and a general election is the role of the parties. This has the inevitable result that still less is mathematical equivalence a requirement of fairness. At p. 31 of her judgment in *Coughlan v. Broadcasting Complaints Commission*, Denham J. said with regard to referenda that:-

"Mathematical equality is not a requirement of constitutional fairness and equality."

In a general election where there is a plurality of issues still less can mathematical equality be a requirement of constitutional fairness.

44. Thus while I consider that *McKenna v. An Taoiseach* and *Coughlan v. Broadcasting Complaints Commission* are authoritative, I do not consider that they dispositive of the issue. This is primarily because it cannot be said that any individual party has a constitutional right to participate in the TV debate. The applicant does not go this far, and the position advocated by the applicant is that a broader set of criteria which would recognise, *inter alia*, the unique political and historical position of the Green Party would more appropriately achieve fairness and impartiality.

45. In the absence of a requirement of mathematical equality then, it must logically be the case that it falls to the broadcaster to exercise its editorial judgment in structuring programmes and coverage relating to the election.

46. In *Green Party v. RTE* [2003] 1 I.R. 558 Carroll J. considered that the decision of RTE to limit live coverage of its party conference was not "unreasonable". She regarded the decision as not being unreasonable, although she did consider the question in what might be called "traditional" judicial review terms.

Decision

47. I consider that the question before me is whether the decision by RTE to fix the three criteria for participation of the leader of a party in the TV debate is reasonable and proportionate in the wide sense, having regard to the constitutional rights that are engaged, and that a high degree of judicial scrutiny is engaged, if, to borrow from Hamilton C.J. in *Mc Kenna v An Taoiseach* (No. 2), that if the approach of RTE is at least capable of affecting the outcome of the election it was one with which the High Court can scrutinise.

48. If one were to test the criteria established by RTE for the live TV leaders debate in the light of the exposition of the principles of judicial review as outlined in *Meadows v. Minister for Justice*, there is not found any principle which would lead me to the view that the criteria are not proportionate. The criteria for inclusion in the debate for the current general election are different from that as adopted in previous elections, but RTE has since 1982 when the live leaders debates became a feature of election coverage, always required some level of current Dáil representation. The plurality of candidates and parties has led to the requirement in the current campaign for RTE to adopt a formula that will inevitably exclude the leaders of certain parties having regard to the number of parties engaged in the election. Fairness is achieved if the choice is proportionate to the question asked, namely how to make an engaging, informative and educational TV debate in the context of the current election while still respecting the principles of objectivity and impartiality. I consider that the threshold criterion that a party have some representation in the outgoing Dáil reflects an objective means of ascertaining the current support that a political party has, and that such a criterion is capable of being objectively ascertained, and is intrinsically fair. It applies to all political parties in the State, and does not involve the broadcaster in the subjective exercise of adjudicating on the importance of the policies or historical importance of a political party.

49. I am persuaded too by the fact that the Broadcasting Authority of Ireland has prepared guidelines for the general election coverage specifically referable to the current election. These guidelines which arise from the statutory code prepared by the Broadcasting Authority of Ireland pursuant to s. 42 of the Act of 2009, requires broadcasters in the context of achieving fairness, objectivity and impartiality coverage of the election to have regard to certain matters, including the airtime afforded, the scope of a debate, the structure of a programme, the make up of audiences, the handling by the presenter of a topic. In particular, broadcasters were asked to have regard to the fact that:-

"It is appropriate that decisions in respect of editorial coverage of the General Election rest solely with broadcasters. In this context, broadcasters must develop mechanisms in respect of their approach to coverage that are open, transparent and fair to all interested parties. These mechanisms should be considered and developed at an early stage and information on the approach being adopted should be available to all interested parties."

50. The criteria adopted by RTE have been made known to all relevant parties. They were developed for this election by an expert group which specifically had regard to the current political reality and plurality of parties. It would be wrong in those circumstances to characterise the criteria as favouring the status quo, as is argued by the applicant. The current Dáil does not reflect solely the results of the election in 2011, and some members of the outgoing Dáil were elected as a result of bye-elections. Thus the criteria do not have a wholly historic focus, but looks to current electoral representation.

51. The applicant has in correspondence both from himself and from Eamonn Ryan, the leader of the Green Party, and in the affidavit evidence furnished to the Court posited a number of different criteria to be employed by RTE in fixing threshold criteria for inclusion in the live TV leaders debate.

52. I do not consider that it is the role of the High Court to identify in detail the criteria that must be applied by any broadcaster in establishing threshold criteria of this type. The Court is inherently unable to engage with those questions as the Court has no expertise in the scheduling or producing of broadcasts. That this is so, for example, in regard to the proposal that the number of candidates fielded by a political party should be a factor in participation in the debate, as is evident from the replying affidavit of Mr. Nally where he suggests that the number of candidates of itself is not necessarily an indication of the strength of a party, its national reach, or of the degree of support that the party has or expects to have on election day. There can be strategic and tactical decisions made by a party as to the number of candidates it will field to take full advantage of the system of proportional representation, in the light of particular individual and local factors, or the presence of high profile or well-known candidates, and this is to my mind a central element in my considerations, and the requirement that a broadcaster act objectively, impartially and fairly cannot involve the broadcaster in considering the value, whether national or international, of the particular policies that a political party espouses.

53. The primary difficulty I have with the argument of the applicant is that many of the considerations contended for are considerations which would favour the Green Party over other possible participants in the TV debate. I accept that it is not the applicant's case that the leader of the Green Party should replace one of the intended participants, but rather that the refusal to invite Mr. Ryan is a failure to consider the strength historical and international importance of the policies of his party. Those factors, it seems to me, are overly subjective, they suggest engagement with the nature and quality of policies, or an engagement with either the historical or international context, all of which considerations could, it seems to me, lead to arguments of impartiality and subjectivity.

54. The affidavit evidence of David Nally expresses his view that to hold a leaders debate which included the leaders of all fifteen political parties would be “unfeasibly large and seriously undermine the merit” of such a debate, that it would be “*unwieldy and impractical*” and that viewing quality would be detrimentally impacted by such an approach. He says that he would “not be confident” that a debate with eight speakers would be as “*coherent and informative as one with seven speakers*”.

55. In that context I consider that it is important not to characterise the decision by RTE was one not to invite the leader of the Green Party to participate in the live TV debate. The decision did not arise as a result of any choice with regard to any view of the position of the Green Party in the election, as to the importance of its role in the discussion regarding environmental policies, or its historic and European political history. The choice of the criteria for inclusion in the live TV leaders debate arose from an editorial decision that the debate would not be attractive and informative to viewers if the leader of every political party were to participate. The 2016 general election is described in all of the affidavit evidence before me as being unusual in the diversity and fragmentation of political positions, and in the number of independent candidates or candidates who are members of formal or informal groupings some of which have chosen not to register as a political party. Fifteen parties are fielding candidates, only seven of whom have current Dáil representation. Some of those parties did not exist at the time of the 2011 election, some of their TDs were elected in bye-elections between 2011 and the dissolution of the Dáil in on 3rd February, 2016.

56. The complexity and range of the political platforms, the number of candidates who cannot readily be grouped as either sharing a broad political approach, or as holding a position obviously contrary to that of another group or grouping, shows the difficulty in making the editorial decision as to how to program the live TV debates. As Mr. Nally says in his affidavit some cut off point or some threshold criteria had to be imposed in order to enable the producer of the live TV debate to broadcast a programme which would be sufficiently attractive and educational to hold the attention of viewers.

57. The democratic process is fully engaged in a society where freedom to express opinions and the freedom to receive information is a primary right of the citizen. I accept the argument of counsel for RTE that the interest of the citizen, and in the case of a TV programme the interest of the viewer or likely viewer, is fully respected not merely by broadcasting programmes which are informative and educational, but also by broadcasting programmes which are attractive and which hold attention.

58. When positioning the provisions in particular of s. 114 of the Act of 2009 in the constitutional framework one must also have regard to Article 40.6.1 which recognises the role of the media as a “*organ of public opinion*”, and that education of public opinion is a matter of “*grave import to the common good*”.

59. I regard the provisions of Article 40.6.1(i) as importing a positive obligation on a public service broadcaster to produce programmes and to inform and educate. I consider that the framers of the constitution, in recognising the unique and central role of the media, recognised both its duty and any rights that flow therefrom. The right, it seems to me, must include the right of editorial or programming choice, the right of that organ of public opinion to choose the means by which it would educate public opinion. The role thus understood and described as being one of “grave import to the common good” recognises the singular nature of the press and media, and what is singular and unique is found in the editorial process. The Court is not an organ of public opinion, has no expertise as such, and must respect the constitutionally different factors at play in the media.

60. I do not consider that the High Court can have any role in that editorial choice, and the choice is one that must be made by an expert person or body who can weigh the elements of a programme by reference to all of these factors, and presumably factors of which the Court could have no knowledge.

Fettering discretion?

61. Counsel for the applicant argues that RTE has adopted a rule or fixed policy such that it has fettered its discretion in regard to participation, and has thereby failed to fully exercise its discretion with regard to whom should be invited to participate in the leaders debates. That RTE has discretion not to hold such a debate, and to determine the qualifying criteria is not in question. It is argued however that the correspondence from RTE shows a degree of inflexibility with regard to participation which is tantamount to having a policy or rule, and which does not fully engage with the various elements that ought to inform the choice of participants.

62. The requirement that a decision making body not fetter its discretion is well-established and by way of example counsel relies on the decision of the High Court in *Madigan v. RTE* [1994] 2 ILRM 472. The applicant was an independent candidate in elections for the European Parliament. RTE broadcast a number of programmes some of which included the presence in studio of certain nominated candidates from the main political parties. The applicant challenged what he argued as the failure to offer sufficient airtime to independent candidates. Kinlen J. refused declaratory relief and took the view that the approach of RTE was “*fluid*” and that it might change hourly having regard to various factors which might emerge in the course of the election. Counsel for the applicant argues that the proposition stated by Kinlen J. that, while there was no reason why the results of past elections should not be taken into account, that they “*must not be used as the sole criteria*”, and that a strict policy on the basis of prior election results would be “*unfair to some interests concerned*”.

63. It is clear that Kinlen J. considered that it could have been unfair for RTE to adopt a strict policy which confined the allocation of airtime to existing candidates. It was the fluidity and flexibility of its approach that means fairness was achieved.

64. I consider that the criteria adopted by RTE for the purposes of the current election do not amount to a policy for a number of reasons. While current Dáil representation has been *de facto* a requirement for participation in the leaders debates since 1982, the process by which the steering group decides the criteria emerges from a consideration of the current political landscape.

Conclusion

65. RTE accepts that the editorial criteria that it is has adopted for this election are not perfect, and it is not suggested that they would be suitable in another electoral context. I accept however the general proposition that some editorial choice had to be made, some threshold requirements and some editorial choice to enable the production of an attractive and engaging programme had to be made. I do not consider that the criteria are unfair or irrational. I also do not consider them to be disproportionate to the aim to be achieved, and in particular I consider that the interest of the viewer in an attractive and engaging programme, the importance of current Dáil representation as an index of political thinking and the spectrum of opinions, all have to be weighed in the balance. I cannot also omit to take account of the extent to which the role of RTE as an expert must be respected by the Court, and which is given a singular and unique recognition in the Constitution. It is not merely that the Court cannot produce a television programme, but the Court cannot be asked to fix programming criteria in which it has no expertise.

66. I consider that RTE is amenable to review in the choice of criteria, and that fundamental and core democratic ideals are in play in the present case. I consider that the criteria adopted for participation the debates are sufficiently reasonable and impartial and that they are proportionate to the needs of the political debate and the right of the public to be informed and educated in an engaging live

programme.

67. I propose refusing the relief sought.