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Case No: CO/4429/2019
CO/4471/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/11/2019

Before:

LORD JUSTICE DAVIS
and
MR JUSTICE WARBY

- -

Between:

The Queen (on the application of **(1) The Liberal Democrats** **(2) The Scottish National Party)**	**Claimants**
- and -	
ITV Broadcasting Limited	**Defendant**

- -
- -

Guy Vassall-Adams QC and Aidan Wills (instructed by **Kingsley Napley LLP**)
for the **First Claimant**
Philip Coppel QC and Sam Fowles (instructed by **Balfour and Manson LLP**)
for the **Second Claimant**
Kieron Beal QC (instructed by **Hogan Lovells International LLP)** for the **Defendant**

Hearing date: 18 November 2019

- -

JUDGMENT

Lord Justice Davis and Mr Justice Warby:

Introduction

1. A General Election is to be held on Thursday 12 December 2019. The defendant in these proceedings, ITV Broadcasting Limited ("ITV"), decided to schedule a televised debate on Tuesday 19 November 2019 at 8pm between Boris Johnson, Leader of the Conservative Party, and Jeremy Corbyn, Leader of the Labour Party. The Liberal Democrats ("the Liberal Democrats") and the Scottish National Party ("the SNP"), by Claim Forms issued respectively on 11 November 2019 and 13 November 2019, have challenged that decision. Put shortly, they say that to exclude the leaders of their own parties from such a debate is unfair, contrary to the Broadcasting Code ("the Code") and unlawful. They have sought, by way of judicial review, in effect to stop the debate going ahead in that format. In a nutshell, the essential points arising are whether the decision of ITV to schedule the debate in such a format was amenable at all to judicial review; and, if it was, whether such decision should be pronounced unlawful.

2. Clearly urgency was involved here. On 11 November 2019, Supperstone J directed that a rolled-up hearing (that is to say, a hearing as to whether permission to apply should be granted and, if so, with the substantive claim to be determined immediately thereafter) of the Liberal Democrats' claim was to take place on Monday 18 November 2019. Thereafter, having issued its own claim form, the SNP sought also to participate in that hearing on a similar basis; and it was granted permission by this court to do so.

3. The hearing necessarily had to conclude within the day. Very full written arguments, detailed evidence and numerous legal authorities were provided in advance of the hearing. Oral argument had, to a degree, to be compressed. The parties sensibly agreed, however, a time-table for their respective submissions (to which time-table they faithfully adhered), taking the hearing up to 4pm: on the basis that the court would then give its decision, with reasons in writing to follow at a later date.

4. At the conclusion of the arguments, and after a short retirement, this court announced its decision to refuse permission to apply for judicial review in both cases. A text of that decision, as so announced, is appended to this judgment at Annex 1. We said at the time that, as agreed by the parties in advance, we would give our reasons in writing thereafter. These are our reasons for that decision.

The factual background

5. We summarise the background relatively shortly for present purposes.

6. The issue of Brexit has dominated the political landscape in the UK for a considerable amount of time. Strong views are held and expressed. Difficulties in getting an agreed resolution through Parliament prompted, at least in considerable part, the decision of the Prime Minister, Boris Johnson, to seek a General Election. On 31 October 2019 the Early Parliament General Election Act 2019 received Royal Assent. That provided for a General Election to take place on 12 December 2019. Parliament was dissolved on 6 November 2019. Campaigning is under way, although at the time of the hearing before us no party had yet published its Manifesto.

7. As at the date of dissolution of Parliament, the Conservative Party had 298 seats and its leader, Boris Johnson, was Prime Minister. The Labour Party had 243 seats, the second highest number. Its leader, and leader of the Opposition, was Jeremy Corbyn. In terms of Parliamentary seats the third largest party was the SNP, with 35 seats. The Liberal Democrats were the fourth largest party, in terms of Parliamentary seats, with 20 seats. Other parties with seats in Westminster were the Democratic Unionist Party ("DUP") with 10 seats; Sinn Fein with 7 seats; the Independent Group for Change with 5 seats; and the Green Party with 1 seat. The Conservative, Labour, Liberal Democrat and SNP parties do not put up candidates in Northern Ireland. The DUP and Sinn Fein do not put up candidates in England, Wales or Scotland. The SNP does not put up candidates in England and Wales. Other parties, including the Brexit Party, are also due to contest some seats at the General Election.

8. Brexit will of course be one of the issues in the General Election – that is to say, whether, how and when the UK should or should not leave the European Union. In the 2016 referendum, a majority had voted in favour of "Leave", a minority in favour of "Remain". After a Parliamentary vote, notification pursuant to Article 50 of the Treaty on the Functioning of the European Union of the UK's intention to leave the European Union was given on 29 March 2017. The date of actual withdrawal has since been postponed.

9. The various parties have differing stances on the issue of Brexit. As we have said, Manifestos had not been published at the date of the hearing. But the current campaign slogan of the Conservative Party is "Get Brexit Done". The stated policy of the Labour Party is to seek to renegotiate a withdrawal deal with the European Union and, if such a deal is negotiated, to put that deal to a further referendum with an alternative option to vote in favour of remaining within the European Union. The stated policy of the Liberal Democrats is that, if they won a majority at the General Election, they would revoke the notification under Article 50 or, if they did not win a majority, would support a second referendum and campaign for "Remain". The policy of the SNP is to object to the removal of Scotland from the European Union on the basis of a UK wide referendum vote (the electorate within Scotland itself having by a majority voted in favour of "Remain" at the 2016 referendum).

10. Nevertheless, it is important to bear in mind that (as Mr Beal QC for ITV pointed out) the forthcoming General Election is not a second referendum on Brexit, as such. All parties, for example, can be expected for the purposes of the General Election to formulate policies on a number of other issues which will potentially be very important both to them and to the electorate. These may include (for example and in no particular order): the environment, the National Health Service, taxation, social welfare, law and order, defence and others besides. There can be no assumption that those who choose to vote will do so solely in accordance with their views, if they still have any, on the merits or otherwise of "Leave" or "Remain". To some, no doubt, that will be the sole consideration. To others, it may be an extremely important consideration, along, however, with their views on other issues reflected in the parties' respective policies. To others again, the other issues, or some of them, will be even more important than Brexit; and some voters, indeed, may solely be interested in the other issues. It is important to emphasize this, because some aspects of the evidence filed on behalf of the claimants is suggestive of a presumption that to all voters the Brexit issue will of

itself be determinative as to how they cast their vote. That is a viewpoint which no doubt can be held; but it cannot be assumed to be fact.

11. Clearly the public airing and public discussion of the respective parties' policies is central to the political process where a General Election is being held.

12. For this purpose, television has an important part to play. It can reach out – whether in free-to-air form or by way of subscription channel – to, potentially, many millions of people. It can do so in a variety of formats: debates, interviews, question and answer sessions, profiles and so on.

13. So far as televised debates between leaders of political parties are concerned, the evidence shows that there had been no such debates in the UK in General Election periods before 2010. In that year there were televised debates involving the leaders of the then three largest parties (Conservative, Labour, Liberal Democrat). At the 2015 General Election, there were televised debates featuring a number of parties. There was no televised debate involving all the leaders of the main parties at the General Election of 2017, as the then Prime Minister, Theresa May, declined to take part. Evidence placed before us (which also included academic studies) would suggest that such televised debates have a significant role in informing the public, in reaching parts of the population not reached by other forms of campaigning and in contributing to the shaping of voters' views. No doubt similar points can be made of party political broadcasts, televised interviews and profiles and so on. Campaigning via the internet and social media will doubtless also have a very significant part to play. Indeed, much has changed over recent years in the ways news, views and information about politics and current affairs are delivered and shared. But as to televised debates themselves it can be argued that these have their own particular "power and importance", as Mr Coppel QC, for the SNP, put it.

The decision under challenge

14. As the written evidence of Mr Michael Jermey, Director of News and Current Affairs at ITV PLC explains, ITV is part of the ITV group of commercial media companies. It is incorporated under the Companies Acts. It provides a free-to-air television service in the UK pursuant to licences granted to it by the Office of Communications ("Ofcom"). Its activities are in no way tax-payer funded: they are funded by advertising and production revenues, extending to international production and distribution.

15. As one would expect, ITV has its own skilled and experienced broadcasting and editorial team. By September 2019, as the evidence indicates, that team had been formulating broadcasting proposals in the light of a then anticipated General Election. These included proposals for televised debates but other proposals were also being discussed.

16. By late October 2019 the prospect of a General Election had arisen again. Televised debates, together with other programmes, continued to feature in ITV's deliberations. ITV was in contact with the Director of Communications of the Liberal Democrats, as well as being in contact with the Conservative and Labour parties and other parties.

17. On 1 November 2019 the Conservative Party and the Labour Party indicated that they would agree to a head-to-head televised debate on ITV between Boris Johnson and

Jeremy Corbyn. In the light of that, ITV issued a Press Release on that date, outlining its plans. Those announced plans included a head-to-head debate on Tuesday 19 November 2019 ("the First Debate") between Boris Johnson and Jeremy Corbyn, to be moderated by the experienced presenter, Julie Etchingham. The Press Release stated:

> "ITV will stage a live head-to-head debate on Tuesday 19th November between Conservative leader Boris Johnson and Labour leader Jeremy Corbyn.
>
> Julie Etchingham will moderate the debate.
>
> Later that same evening ITV will broadcast a live interview based programme in which other party leaders will be able to comment on the head-to-head debate and set out their own electoral offer.
>
> ITV plans to hold another debate later in the campaign at which the Liberal Democrats, the SNP, the Brexit Party, the Greens, Plaid Cymru as well as Labour and the Conservative Party will all have the opportunity to be represented by their leader or another senior figure.
>
> There will additionally be separate live prime-time debates in Northern Ireland and Wales. STV plan to hold a debate in Scotland.
>
> ITV's Tonight programme plans profiles and interviews with the leaders of the main political parties in Britain in the lead up to the 12 December vote. ITV's Peston programme will provide its own insight into the latest developments each week. And Good Morning Britain as well as other ITV Daytime shows will offer their focus on the campaign.
>
> More details on all ITV's comprehensive General Election coverage, in national and regional programming, including live overnight coverage of the results will be set out in the coming days."

18. This announcement attracted a swift complaint from the Liberal Democrats, which was made public. The Party President, Baroness Brinton, said that the Leader of the Liberal Democrats, Jo Swinson, should appear alongside the Prime Minister and the Leader of the Labour Party at the First Debate. It was said that her "exclusion" risks "misrepresenting the current political reality". It was said that: "Voters of this country deserve to hear from a Remainer on the debate stage, not just from the two men who want to deliver Brexit". She also said: "There is no reasonable justification for excluding Liberal Democrats from the debate. Liberal Democrats are the strongest national party of Remain".

19. In addition, it was said that to include Jo Swinson, as a female leader, was important in the context of a debate currently scheduled to include two male speakers.

20. There was a meeting on 4 November 2019 between Mr Jermey, Mr Dixon (Chief Executive of the Liberal Democrats) and Chuka Umunna of the Liberal Democrats. The respective positions were outlined. Also on that date other representatives of ITV

met representatives of the Liberal Democrats and among other things explained details of the further debate that was proposed.

21. Also on that date, Mr Jermey wrote to Baroness Brinton. He stated that ITV intended to offer viewers "comprehensive, fair and balanced general election coverage throughout the campaign". He said that what was included in a programme was a matter for independent judgment, with programming that was fair and met the obligations for due impartiality under the Code. He said: "we take our responsibility to ensure due impartiality and to give due weight to the coverage of parties during an election period very seriously". He also, among other things, explained that past electoral results and current polling were taken into account and that coverage for a "wide range of significant views and perspectives" was considered.

22. He stated: "Politicians are obviously entitled to have a view on our decision, but who is invited to take part in a programme is ultimately a matter for ITV". He also pointed out with regard to the First Debate that there would be an interview at 10pm that same night when other party leaders could then comment on the earlier debate; and that there would be a further debate ("the Second Debate"), involving seven invited party leaders or representatives, later in the campaign. He referred to the other planned programmes. He said that ITV was offering a "clearly linked package of programmes".

23. On 5 November 2019, solicitors for the Liberal Democrats wrote to the Chief Executive of ITV. They accepted that giving "due weight" to matters identified in the Code required an exercise of judgment. They identified, however, a number of factors which they said "inexorably lead" to a conclusion that Jo Swinson should be invited to take part in the First Debate. A point of particular emphasis in the letter was the Brexit issue. In this regard, it was said that if Jo Swinson did not attend the First Debate "the voice of millions of Remain voters in the 2016 referendum will not be heard" (a doubtless carefully crafted sentence, frequently repeated at the hearing before us).

24. On 7 November 2019 solicitors for the SNP also wrote to ITV concerning the First Debate. It was asserted that the current proposal was "undemocratic". It was said that, given the position of Scotland and of the SNP (particularly with regard to Brexit), "our client is unquestionably entitled to be in any main debates".

25. Also on 7 November 2019 ITV responded to the solicitors' letter of 5 November 2019. The letter was very detailed. It is not necessary to refer to it in full here. It suffices to say that it outlined the package of programmes scheduled both for 19 November 2019 and thereafter (and which, it was said, was the product of an editorial decision); averred compliance with the Code, drawing attention to a number of its provisions; and stated that the assessment was a matter of editorial judgment. In rebutting the various factors identified by the solicitors, this response among other things also indicated that while Brexit was undoubtedly a very significant issue it was by no means the only issue and that neither of the two debates would focus solely on Brexit. A corresponding response was also given, on 8 November 2019, to the letter from the SNP's solicitors.

26. Matters thereafter proceeded to pre-action correspondence. Claim forms were then issued on 11 November 2019 (on behalf of the Liberal Democrats) and 13 November 2019 (on behalf of the SNP).

27. Although both claim forms identify the relevant decision of ITV under challenge as that contained in the letter of 7 November 2019, it could be said that the relevant decision was that initially announced on 1 November 2019, with further reasons given in justification for that decision thereafter; and there are various differences in the claimants' ways of characterising the decision under challenge. However, these differences, we think, are not really material for present purposes. The fundamental challenge is to ITV's process of decision-making culminating in its maintaining the decision to confine participation in the First Debate to Boris Johnson and Jeremy Corbyn.

The Statutory and Regulatory Context

28. In order properly to understand the issues raised, it is necessary to outline the statutory and regulatory context.

29. The governing law is contained in the Broadcasting Acts 1990 and 1996 and the Communications Act 2003. For convenience, we shall refer to this group of statutes as "the broadcasting legislation".

(a) The Broadcasting Act 1990

30. Part I of the Broadcasting Act 1990 ("the 1990 Act") is concerned with Independent Television Services. It establishes a system for the regulation of such broadcasting, by means of a scheme of licensing. By s.13 it is an offence to provide a regulated television service without a licence. The 1990 Act provides for the licensing function to be carried out by a regulator, originally the Independent Television Commission ("ITC"). Obligations cast upon the regulator include a duty to do all it can to secure the provision of a nationwide system of broadcasting services known as Channel 3 (s.14). Channel 3 services must be available for reception by members of the public, without charge. They are required to provide "a range of high quality and diverse programming" (s.265). A procedure is laid down for applications for Channel 3 licences, and their award, and for the licence conditions. ITV is a licensed Channel 3 broadcaster.

31. By s.4(1) of the 1990 Act, a licence may include "such conditions as appear to [the regulator] to be appropriate having regard to any duties which are or may be imposed on them, or on the licence holder …" by the broadcasting legislation. Section 4(2), as amended, allows a licence to contain conditions requiring the licence holder:-

> "(a) to comply with any direction given by [the regulator] as to such matters as one specified in the licence, or of a description so specified, or
>
> (b) (except to the extent that [the regulator] consents to his doing or not doing them) not to do or to do such things as are specified in the licence or are of a description so specified".

32. The 1990 Act also established the Broadcasting Complaints Commission with jurisdiction to consider complaints of unfairness and breaches of privacy against

regulated broadcasters, and the Broadcasting Standards Council with powers and duties in relation to complaints relating to broadcasting standards.

33. The Broadcasting Act 1996, we might add, contains parallel provisions in relation to digital programme services.

34. By ss.40-42 of the 1990 Act, as amended, provision is made for the enforcement of licence conditions imposed, and directions given, by Ofcom. Section 40 empowers Ofcom, if satisfied that a licensee has failed to comply with any condition of the licence, to direct a licensee to broadcast a correction or statement of findings, or not to repeat a programme. If Ofcom is satisfied that the licensee has failed to comply with a licence condition or a direction given by Ofcom, it has power under s.41 to impose a financial penalty, or to shorten the licence period. By s.42 Ofcom may give notice of intent to revoke and, if the breach is not remedied, revoke the licence. The maximum penalty that can be imposed under s.41 where the licence is revoked is the greater of £500,000 or 7% of "qualifying revenue for the … last accounting period": that is, in simple terms, turnover. The maximum penalty for a breach where the licence is not revoked is 5% of turnover.

(b) The Communications Act 2003

35. The Communications Act 2003 ("the 2003 Act") created Ofcom, and transferred to it, subject to amendments, the powers and duties which the 1990 and 1996 Acts conferred on the ITC and others. The 2003 Act contained additional provisions. By s. 214(7) the licence granted for the provision of a Channel 3 service "must contain the conditions that Ofcom considers appropriate for the purpose of performing their duty under section 263." Section 263 imposes duties on Ofcom:

> "(1) … to secure that the holder of every Broadcasting Act licence at all times holds his licence on the conditions which are for the time being included in the regulatory regime for the licensed service;
>
> (2) … to do all that they can to secure that the holder of every such licence complies ... with the conditions so included in the regulatory regime for that service."

36. The 2003 Act contains a group of sections under the general heading "Programme and fairness standards for television and radio". Section 319(1) imposes a duty on Ofcom "to set … such standards for the content of programmes as appear to them best calculated to secure the standards objectives". Section 319(2) defines the "standards objectives" so as to include:

> "(c) that news included in television … services is presented with due impartiality and that the impartiality requirements of section 320 are complied with;
>
> …

> (g) that advertising that contravenes the prohibition on political advertising set out in section 321(2) is not included in television … services".

Section 319(3) requires the standards to be contained in "one or more codes".

37. Section 320 is headed "Special impartiality requirements". The relevant effect of subsections (1) and (2) is that where a matter of "political or industrial controversy" or one "relating to current public policy" is engaged, Ofcom is to ensure (among other things):

> "(b) the preservation, in the case of every television programme service, … of due impartiality, on the part of the person providing the service, as respects all of those matters;"

38. Sections 320(4)-(6) contain provisions about "due impartiality":

> "(4) For the purposes of this section—
>
> (a) the requirement specified in subsection (1)(b) is one that (subject to any rules under subsection (5)) may be satisfied by being satisfied in relation to a series of programmes taken as a whole;
>
> . . .
>
> (5) Ofcom's standards code shall contain provision setting out the rules to be observed in connection with the following matters—
>
> (a) the application of the requirement specified in subsection (1)(b);
>
> (b) the determination of what, in relation to that requirement, constitutes a series of programmes for the purposes of subsection (4)(a);
>
> . . .
>
> (6) Any provision made for the purposes of subsection (5)(a) must, in particular, take account of the need to ensure the preservation of impartiality in relation to the following matters (taking each matter separately) -
>
> (a) matters of major political or industrial controversy, and
>
> (b) major matters relating to current public policy,

> as well as of the need to ensure that the requirement specified in subsection (1)(b) is satisfied generally in relation to a series of programmes taken as a whole."

39. Section 325 of the 2003 Act then contains provisions about how the regulatory regime should secure the observance of the standards set pursuant to s. 319:

> "(1) The regulatory regime for every programme service licensed by a Broadcasting Act licence includes conditions for securing—
>
> (a) that standards set under section 319 are observed in the provision of that service; and
>
> (b) that procedures for the handling and resolution of complaints about the observance of those standards are established and maintained.
>
> (2) It shall be the duty of Ofcom themselves to establish procedures for the handling and resolution of complaints about the observance of standards set under section 319.
>
> . . ."

In the context of General Election coverage, Ofcom generally forms an Election Committee, which receives and makes determinations upon complaints of non-compliance with the Code.

40. It can overall be seen that Ofcom has wide powers, in the event of breach of the Code, of directing remedial steps, of imposing a financial penalty or even, in an extreme case, of revoking a broadcasting licence.

(c) The Ofcom Broadcasting Code

41. Ofcom has promulgated "The Ofcom Broadcasting Code", the current version of which has effect from 1 January 2019. The Code has ten main sections, covering a wide range of matters including fairness, privacy and, of direct relevance, due impartiality. Section 5 (pp 28-32) is headed "Due Impartiality and Due Accuracy and Undue Prominence of Views and Opinions." The term "due impartiality" is explained on p28:

> "'Due' is an important qualification to the concept of impartiality. Impartiality itself means not favouring one side over the other. "Due" means adequate or appropriate to the subject and nature of the programme. So "due impartiality" does not mean that an equal division of time has to be given to every view, or that every argument and every facet of every argument has to be represented. The approach to due impartiality may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach

is signalled to the audience. Context, as defined in Section 2: Harm and Offence of the Code, is important."

42. Section 5 of the Code contains the following further provisions about "due impartiality":-

"The preservation of due impartiality

…

5.5 Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service (listed above). This may be achieved within a programme or over a

Meaning of "series of programmes taken as a whole"

This means more than one programme in the same service, editorially linked, dealing with the same or related issues within an appropriate period and aimed at a like audience. A series can include, for example, a strand, or two programmes (such as a drama and a debate about the drama) or a 'cluster' or 'season' of programmes on the same subject

series of programmes taken as a whole.

5.6 The broadcast of editorially linked programmes dealing with the same subject matter (as part of a series in which the broadcaster aims to achieve due impartiality) should normally be made clear to the audience on air.

…

Matters of major political and industrial controversy and major matters relating to current public policy

…

> 5.11 In addition to the rules above, due impartiality must be preserved on matters of major political and industrial controversy and major matters relating to current public policy by the person providing a service (listed above) in each
>
> **Meaning of "matters of major political or industrial controversy and major matters relating to current public policy"**
> These will vary according to events but are generally matters of political or industrial controversy or matters of current public policy which are of national, and often international importance, or are of similar significance within a smaller broadcast area.
>
> programme or in clearly linked and timely programmes.
>
> 5.12 In dealing with matters of major political and industrial controversy and major matters relating to current public policy an appropriately wide range of significant views must be included and given due weight in each programme or in clearly linked and timely programmes. Views and facts must not be misrepresented."

43. Section 6 of the Code (pp 33-37) is headed "Elections and Referendums." Rule 6.1 makes clear that the provisions of Code 5.11 and 5.12 apply to the coverage of elections and referendums. Section 6 applies only during the election (or referendum) period. The "election period" for a Parliamentary General Election is defined as beginning with the dissolution of Parliament. Rule 6.2 says this:

> "Due weight must be given to the coverage of parties and independent candidates during the election period. In determining the appropriate level of coverage to be given to parties and independent candidates broadcasters must take into account evidence of past electoral support and/or current support. Broadcasters must also consider giving appropriate coverage to parties and independent candidates with significant views and alternatives."

44. Ofcom has also published Guidance Notes, designed to help broadcasters interpret and apply the Code. These, while obviously not having the legal force of the Code itself,

clearly are to be given weight. The guidance notes to Section 6 of the Code (22 March 2017) contain the following:-

> "1.16 There is no obligation on broadcasters to transmit leaders' or candidates' debates. The editorial format for such debates (i.e. the manner in which a broadcaster presents a programme to the audience) is a matter for the broadcaster, and as appropriate, the relevant political parties as long as the broadcaster complies with the Code. ...
>
> …
>
> 1.18 UK-based election programming (for example, UK leadership debates) can focus on those parties that have a realistic prospect of forming the UK Government following the election in question. However, in line with Rule 6.2, broadcasters must ensure that appropriate coverage is given in the same programme, or in linked programming, as appropriate, to other parties, if evidence of past electoral support means it is appropriate to do so.
>
> 1.19 It is an editorial decision for the broadcaster as to what constitutes 'appropriate coverage' in relation to Rule 6.2.
>
> 1.20 The concept of giving 'due weight', as required by Rule 6.2, is flexible. Its application depends on the electoral context."

Past Complaints

45. It should not be thought that complaints of broadly the present kind have not been made before in the context of previous General Elections in the UK. They have been. By way of example, the SNP had raised a complaint with Ofcom against ITV in 2010 in the context of the 2010 General Election. That related to the televised debate (the first of its kind) featuring the leaders of the Labour, Conservative and Liberal Democrat parties. That debate was broadcast on 15 April 2010. The SNP complained to Ofcom on 17 April 2010. It was complained that the SNP had been excluded from the television debate and negotiations surrounding the debate; that the broadcast had thereby failed to meet the requirements of due impartiality and accuracy under the Code; and that viewers in Scotland "were not given an accurate picture of a number of key public policy issues as they apply in Scotland".

46. The Election Committee of Ofcom did not uphold such complaint by its ruling given on 28 April 2010 (during the currency of that General Election campaign). Ofcom decided, in its detailed ruling, that, in the circumstances, the exclusion of the SNP from that televised debate had not involved any breach of the Code. The same conclusion was reached on a corresponding complaint to Ofcom by Plaid Cymru. It seems, moreover, that a number of viewer complaints to Ofcom with regard to a further three-way debate broadcast by Sky on 22 April 2010 also were not upheld by Ofcom.

47. Also in the course of the 2010 General Election, the SNP brought legal proceedings in the Court of Session in Scotland against the BBC. The challenge related to a proposed

series of televised debates between the leaders of the Conservative, Labour and Liberal Democrat parties, in which the SNP was not to be included. It was said that such exclusion was inherently unfair and unreasonable and did not give the "distinctive policies" of the SNP appropriate levels of coverage. Lady Smith refused to grant an interim interdict prohibiting broadcasting in Scotland of one such debate: *Scottish National Party v British Broadcasting Corporation* [2010] CSOH 56, [2010] SC 495.

48. We might also add, reverting to the current 2019 election, that the BBC has itself announced its broadcasting plans. These, as announced, will include a live head-to-head debate between Boris Johnson and Jeremy Corbyn on 6 December 2019 and also, before then, a seven-way debate between leaders or senior representatives of the seven major political parties on 29 November 2019. We were told at the hearing before us that a letter has been sent by the Liberal Democrats' solicitors to the BBC with regard to the planned televised head-to-head debate between Boris Johnson and Jeremy Corbyn. As for Sky, its announced plans include a three-way debate between Boris Johnson, Jeremy Corbyn and Jo Swinson (it having stated that it had considered a double-headed debate but rejected it "as there are now multiple proposals for double-headed debates".) We were not told at the hearing of any legal action thus far threatened by the SNP or anyone else with regard to that three-way debate planned by Sky.

The Respective Claims

(a) The claim of the Liberal Democrats

49. The relief sought by the Liberal Democrats in the claim form issued on 11 November 2019 is for an order quashing the decision set out in the letter of 7 November 2019 and a declaration that the decision not to include the leader of the Liberal Democrats in the First Debate was unlawful.

50. The claim was supported by a witness statement of Mr Michael Dixon, Chief Executive of the Liberal Democrats. The statement sets out in detail the political background. Mr Dixon attributes a "special and central" role to the leaders' televised debates. In this regard, he refers to a number of political and academic studies (including one from the University of Leeds). He also among other things says: "Right now, most voters see Brexit as the single biggest issue for the UK, their single biggest concern and the central issue for this election". He develops that theme at length in the course of his statement. He also devotes a considerable amount of space to the Liberal Democrats' standing in recent opinion polls and their performance in by-elections, European Parliament elections and local elections in the period since the 2017 General Election.

51. He addresses at length what he says is the "distinctive and clear" 'Remain' policy advocated by the Liberal Democrats. He too asserts that, if Jo Swinson is not included in the First Debate, "the voice of 'Remain' will be excluded". Mr Dixon further says that the Liberal Democrats' policy is distinctly different from that of the Brexit Party, the Green Party, the SNP and Plaid Cymru. His conclusion is that ITV have failed to achieve due impartiality in excluding Jo Swinson from the First Debate.

52. The final paragraph of his witness statement is in these terms:

> "The Liberal Democrats, on behalf of all those who want our democracy to remain fair and balanced, are legally challenging ITV to do the right, fair and balanced thing. We need to preserve the health of our democracy, for this generation and the next."

53. The witness statement of Mr Jermey, on behalf of ITV, in response is also detailed. In substance, it amplifies the points already made in ITV's previous announcement and letters. He says that when taking any decision on programming he is conscious of the need to comply with the Code. He says that the decision to broadcast the First Debate as a double-headed debate was taken as "part of a clearly linked package of decisions relating to the editorial format and structure of ITV's overall general election coverage". He also refers at length to the various formats offered by broadcasters at the previous general elections in 2010, 2015 and 2017. Mr Jermey fully sets out the background leading up to the announcement of 1 November 2019. He says of ITV's proposed structure and format of the television debates:

> "… This was a journalistic judgement based on the combined experience and knowledge of the team and taken in the same way as any other programming decision. We aimed to devise a format that would be fair and balanced, as well as compelling, informative and what we considered our viewers would be most interested to see. We considered our past experience of ITV's previous General Election coverage and other major political programming, in particular the success of the recent head-to-head format in the Conservative leadership debate, as well as historical election results (including the previous General Elections, in addition to the more recent local and European elections), current polling, the current and past composition of the House of Commons, the parties' respective positions on Brexit and the wider political context of the General Election. Having read and carefully considered the Claimant's correspondence and Claim, there is nothing in the Claimant's evidence that is a surprise to me nor inconsistent with our considerations. None of the points the Claimant has made would cause me to come to a different conclusion than that the proposal I put forward for ITV's schedule of General Election programming is the right one."

(b) The Claim of the SNP

54. The relief sought by the SNP in its claim form issued on 13 November 2019 differs in that it not only seeks a declaration and quashing order, but also seeks "an injunction prohibiting any televised debate between the leaders of registered political parties that are contesting seats in Scotland that does not include the SNP". As so framed, the injunction sought is a perpetual one. However, the skeleton argument more realistically confines the time frame to the period up to 12 December 2019. The width of the injunction still sought is nevertheless to be noted.

55. This claim was supported by a witness statement of Ian Blackford, leader of the SNP in the Westminster Parliament. In the course of it, he emphasises that the SNP was the

third largest party in the House of Commons prior to dissolution. He articulates the SNP's policy as including seeking the holding of a referendum in Scotland in 2020 on the question of Scottish independence and also makes clear that the SNP is opposed to Brexit. Mr Blackford refers in detail to past election results and other data; and says of the SNP: "It is, unquestionably, the dominant political force and party in Scotland by any measure".

56. He too stresses what he says is the importance of televised debates. He claims, by reference to published studies, that the first such debate in any election has a higher audience and a "significant impact on voters' attention to the election". He claims that to exclude parties from the debate at an early point "inevitably creates a positive advantage for parties that are included and has a negative impact on those excluded…". He says that to exclude other parties from the First Debate "presents a fundamentally unfair and skewed set of options to the viewer and the voter". Mr Blackford also strongly disputes any view that the choice at a general election is a binary choice between the Conservative party and the Labour party.

57. He addresses the timing of the debates. He observes, in this respect, that postal votes will have been issued by the time of the subsequent planned Second Debate. He also disputes that the interview planned at 10pm, following the First Debate, would be a sufficient alternative. He says that voters want to see a debate including a wider range of party leaders. His conclusion at the end of his witness statement is expressed as follows:

> "The decision of ITV to exclude the leader of the SNP from the party leaders debate on prime-time television at the formative stage of the general election campaign is anathema to the requirement that those providing television programme services treat the leaders of mainstream registered political parties with due impartiality. The First Debate will be the key debate in this campaign. Excluding the leader of the SNP will serve to disadvantage the SNP vis a vis the two parties whose leaders have been invited. They will determine the content of that debate. The skewing of the electoral process which this will produce is not remedied by a late-night 10 or so minute interview. Nor will it be remedied by a debate weeks later at the end of the campaign. All that the latter does is demonstrate that the form is viable and so empties the "editorial format" pretext for its making."

58. In his (second) witness statement in response, Mr Jermey on behalf of ITV adopts what he says in his first witness statement relating to the claim of the Liberal Democrats. He among other things seeks to correct Mr Blackford when the latter says that ITV did not take into account current polling data. Mr Jermey also rejects the suggestions made as to viewing numbers for and impact of televised debates, and their timing, saying that it is "rarely possible" to make reliable predictions of viewing patterns. He produces published independent data in order to support his rebuttal of the SNP's assertions that televised debates have more impact than televised interviews or that a first televised debate necessarily has a higher audience and a significant impact on the voters' attention to the election or necessarily is the "key" debate. He also rejects the assertion that the interview scheduled at 10pm on 19 November 2019 will necessarily attract fewer viewers than the First Debate aired at 8pm: and he points out

that both (designedly) are scheduled to follow popular entertainment programmes which ordinarily attract large audiences.

59. As to postal votes, Mr Jermey states that ITV had this factor in mind. He observes that postal votes need not be cast before the Second Debate, which has already been widely publicised, and that campaigning routinely continues vigorously up until the day of an election. Postal voting, he says, is no reason not to schedule a debate.

60. That outlines the evidence in summary only. We have borne in mind the full detail of it.

61. It will be apparent that, although there are some differences in emphasis and approach, the overarching complaints of the Liberal Democrats and the SNP are in essence the same. Although we rather got the impression at the hearing that (for perhaps obvious political and presentational reasons) the Liberal Democrats would much prefer the First Debate to be a three-headed debate, including Jo Swinson, the logic of their argument connotes that the leader of a party such as the SNP (a larger Parliamentary grouping than the Liberal Democrats, indeed) likewise should be able to attend the First Debate. It is true that the SNP cannot win the General Election (because it fields no candidates in England, Wales or Northern Ireland) and it is true that its policies are distinct from those of the Liberal Democrats; but the principle and general approach behind the present arguments are, in our view, surely the same. At all events, Mr Coppel QC, for the SNP, was rather more ready to acknowledge that this was probably so. Indeed, as Warby J pointed out in argument, these submissions (if correct) would tend to connote that other parties such as, for example, the DUP or Green Party or Plaid Cymru would also have a potential claim to attend such a debate. That, moreover, would also potentially be so for double-headed or other debates currently scheduled by the BBC or by other commercial broadcasters such as Sky. So there potentially are significant implications if the claimants' arguments are correct.

62. We should record that at the hearing Mr Beal QC, for ITV, informed us that if we ruled the decision to be unlawful then ITV would not proceed with any televised debate or subsequent interview on 19 November 2019.

The Issues

63. We turn to the issues raised. These were helpfully summarised by Mr Beal as follows:

(1) Is the decision by ITV to include in its general election programming the First Debate with its proposed double-headed format a decision amenable to judicial review on public law grounds?

(2) If it is, is an adequate alternative remedy available to the claimants in the form of a complaint to Ofcom?

(3) If no such adequate alternative remedy is available, has ITV acted in breach of its obligations under s.320 of the 2003 Act and/or of the Code?

(4) Is the decision unreasonable or invalid on public law grounds?

(5) Is the decision in violation of Article 3, Protocol 1 of the European Convention on Human Rights (a point raised only by the SNP)?

64. We will deal with these issues in turn.

The First Issue

65. The question here to be addressed is whether ITV was exercising a public function: CPR 54.2(1) (see s.31 of the Senior Courts Act 1981). It was common ground before us that ITV is not to be regarded as exercising a public function for *all* purposes. So the question which has to be asked is whether it was exercising a public function in *this* context and for *these* purposes.

(a) The applicable legal principles

66. There can be little doubt that the reach of judicial review has to an extent been expanded by the courts over the last few decades. Moreover, a series of cases have enunciated a number of propositions and principles of general application in this regard. Even so, the application of such propositions and principles to individual cases has on occasion, it has to be said, resulted in outcomes which do not always show an entirely coherent pattern. That said, the question of whether a particular decision is or is not amenable to judicial review in any given situation must depend on the particular background and circumstances in which the decision sought to be impugned is made. As counsel before us were rightly agreed, context is all.

67. We will refer to only a selection of the authorities included in the Bundles before us.

68. A convenient starting-point is the well-known case of *R v Panel on Take-overs and Mergers, ex p. Datafin Plc* [1986] 1 QB 815. That case stresses the necessity of a public element before judicial review can be available; but rejects the notion that the only focus should be on the source of the power in question. Rather, consideration of the nature of the power and the function that is being exercised may also be required. Indeed, in that case the decision of the Take-over Panel (a self-regulating body not established pursuant to any statute) was held to be amenable to judicial review. Lloyd LJ, for instance, speaking generally, said this at p.847B-D:

> "But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may, as Mr. Lever submitted, be sufficient to bring the body within the reach of judicial review. It may be said that to refer to "public law" in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other. …"

Statements to broadly like effect are contained in the subsequent Court of Appeal decision in *R (Beer) v Hampshire Farmers' Market* [2003] EWCA Civ 1935, [2004] 1 WLR 223 (see in particular paragraph 16 of the judgment of Dyson LJ).

69. On the other hand, in *R v Disciplinary Committee of the Jockey Club, ex p. Aga Khan* [1993] 1 WLR 909, the issue was whether a decision of the Jockey Club (by whose rules owners, managers and trainers had agreed to be bound and which had "dominant control" over horse racing activities in Great Britain), to the effect that a particular filly be disqualified and her trainer fined, was amenable to judicial review. The Court of Appeal held that it was not. Any remedy had to be found in private law. It was accepted that the Jockey Club regulated a significant national activity; exercised powers which affected the public; exercised such powers in the interests of the public; and, had the Jockey Club not regulated such activity, the government would probably be driven to create a public body to do so: p.923G (per Sir Thomas Bingham MR). But it was held that the Jockey Club had not, for present purposes, been "woven into any system of governmental control of horseracing". A comparable approach, albeit in rather different contexts, was taken in cases such as *R (West) v Lloyds of London* [2004] EWCA Civ 506, [2004] 3 All ER 233; and *R (Holmcroft Properties Ltd) v KPMG LLP* [2018] EWCA Civ 2093.

70. Authorities such as *Datafin*, and principle, clearly lead to a conclusion that Ofcom itself (whose regulatory powers and functions derive from statute) is potentially amenable to judicial review. But it does not follow at all that those whom, pursuant to its statutory powers and functions, Ofcom regulates are themselves also necessarily amenable to judicial review. As noted by Lord Woolf LCJ, giving the judgment of the court in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48 at paragraph 65(v):

> "What can make an act, which would otherwise be private, public, is a feature or a combination of features which impose a public character or stamp on the act. Statutory authority for what is done can at least help to mark the act as being public; so can the extent of control over the function exercised by another body which is a public authority. The more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public. However, the fact that the acts are supervised by a public regulatory body does not necessarily indicate that they are of a public nature. This is analogous to the position in judicial review, where a regulatory body may be deemed public but the activities of the body which is regulated may be categorised private."

71. An important authority for present purposes, in our view, is the Supreme Court decision in *YL v Birmingham City Council* [2007] UKHL 7, [2008] 1 AC 95. The context there was different from the present cases, involving as it did a private care home. It is also true that the case raised the issue of whether the relevant defendant was a public authority for the purposes of s.6 of the Human Rights Act 1998 rather than whether its decision in question was amenable to judicial review. But, as Lord Neuberger noted at paragraph 156 of his opinion, the character of the two issues is similar. The observations of Lord Mance at paragraph 116 of his opinion, for example, are of note:

> "In providing care and accommodation, Southern Cross acts as a private, profit earning company. It is subject to close statutory regulation in the public interest. But so are many private occupations and businesses, with operations which may impact on members of the public in matters as diverse for example as life, health, privacy or financial well-being. Regulation by the State is no real pointer towards the person regulated being a state or governmental body or a person with a function of a public nature, if anything perhaps even the contrary. The private and commercial motivation behind Southern Cross's operations does in contrast point against treating Southern Cross as a person with a function of a public nature. Some of the particular duties which it has been suggested would follow - a duty not to close the home without regard to the Convention right to a home of publicly funded residents, and perhaps even a duty to give priority to accepting such residents into the home - fit in my view uneasily with the ordinary private law freedom to carry on operations under agreed contractual terms …"

72. A useful summary of some of the propositions to be extracted from the opinions of the majority in the *YL* case can, we consider, be found in the submissions of counsel recorded in paragraph 36 of the judgment of Arden LJ in the *Holmcroft Properties* case (cited above): which was, in fact, a case where amenability to judicial review was directly in issue. These propositions are as follows:

(1) The fact that a service is for the public benefit does not mean that providing the service is a public function.

(2) The fact that a function has a public connection with a statutory duty of a public body does not necessarily mean that the function is itself public.

(3) The fact that a public authority could have performed the function does not mean that the function is a public one if done by a private body.

(4) The private profit-making motivation behind a private body's operations points against treating it as a person with a function of a public nature.

(5) Functions of a public character are essentially functions which are governmental in nature.

73. Mr Vassall-Adams QC, for the Liberal Democrats, also referred to, and placed considerable reliance on, some decisions in the New Zealand courts in which decisions by private broadcasting companies were held to be amenable to judicial review. He placed particular reliance on the decision of Ronald Young J in *Dunne v Canwest TV Works Ltd* [2005] NZAR 577. In that case a private company providing a national free-to-air broadcasting service proposed, in the context of a general election, to broadcast a debate attended by a number of leaders of political parties. The plaintiffs were leaders of two minor political parties who were not to be included in the debate. Their objection to this was upheld by the court. The decision in question of the broadcasting company was adjudged amenable to judicial review, the television company being held to perform a "public function" for the purposes of the New Zealand Bill of Rights Act 1990.

74. In so deciding, Ronald Young J attached importance to the fact that the broadcaster was a free-to-air national broadcaster and was subject to statutory control to provide balanced coverage. He also relied, among other things, on the importance and potential influence of televised leaders' debates in the democratic process and on the "fundamental right" (as he put it) of voters to be as well informed as possible before voting. He held, at paragraph 36, that "this is one of those comparatively rare cases where a private company is performing a public function with such important public consequences that it should be susceptible to judicial review".

75. Mr Vassall-Adams, while of course accepting that that decision was not binding on this court, submitted that the reasoning and approach taken in that case was right and should be adopted and applied by this court in the present cases.

76. Finally, for present purposes, we refer to the decision of the House of Lords in *R (Pro-Life Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185, and on which Mr Coppel in particular relied. That was a case bluntly described in the Court of Appeal by Laws LJ as being about "the censoring of political speech". The BBC (and other, commercial, broadcasters) had refused to transmit in Wales a party election broadcast relating to abortion, on the ground that it would be offensive to public feeling. The case proceeded on the conceded footing, for the purposes of the appeal, that the BBC was amenable to judicial review: see at paragraph 3 of the judgment of Laws LJ in the Court of Appeal. It was also accepted that the applicable standards of taste and decency were the same for the BBC and other (commercial) broadcasters: see paragraph 23 of the opinion of Lord Hoffmann.

(b) Submissions

77. In submitting that ITV was exercising a public function in taking this broadcasting decision, Mr Vassall-Adams (whose arguments in this respect Mr Coppel adopted) submitted as follows:

    (1) ITV, though a private company operating for commercial purposes, was operating a national free-to-air service directed at the public at large.

    (2) Its broadcasting activities were the subject of statutory control.

    (3) The authority to broadcast has a statutory underpinning and carries regulatory responsibilities.

    (4) ITV has chosen to have a televised leaders' debate. Such debates in the course of a General Election are significant and can influence the voting intentions of the electorate.

    (5) There is no private law remedy available to the claimants (in contrast to cases such as the *Jockey Club*, *West* and *Holmcroft Properties*).

78. He further submitted that this was not a "routine matter" of politics. He submitted that the General Election had only come about because of Brexit and that Brexit was the dominant issue: it was the "crucial and critical" factor, as he submitted. He said that, whilst it may be that ITV would not ordinarily be amenable to judicial review, this was an "exceptional" case: and that it was wrong that "the voice of Remain" should be

excluded. Mr Coppel in turn referred to what he said was the unique perspective afforded by the SNP.

79. Counsel before us were agreed that there was no obligation on ITV, under the requirements of the Code, to provide *any* televised debates or interviews for the purposes of a General Election (save with regard to Party Political Broadcasts, which are not material for present purposes). But the claimants' point was that once ITV chose to do so then obligations of impartiality arose and judicial review then in principle, as they argued, became available.

80. On behalf of ITV, Mr Beal submitted:

(1) ITV is a limited company, operating commercially for profit and having paid for its licences to broadcast.

(2) The function it exercises is broadcasting – that is not in any way a governmental or executive activity.

(3) Whilst the relevant network may be the product of statute, ITV itself is not.

(4) ITV cannot be said to be exercising the equivalent of any governmental or executive power or function; and cannot fairly be said to be "woven" or "enmeshed" into any system of governmental activity or control.

(5) That ITV is subject by its licences to the regulatory obligations contained in the Code cannot of itself mean that it exercises a public function.

81. His overarching submission was that there is no justification for "such a massive extension" to the supervisory jurisdiction of the Administrative Court as the claimants' arguments would connote.

(c) Disposal

82. We conclude that the submissions of Mr Beal are correct.

83. The first point to note is that ITV is under no *direct* statutory obligation under the terms of the 2003 Act. Although the Liberal Democrats sought so to argue in their written grounds, we understood Mr Vassall-Adams to concede as much in his skeleton and oral argument. In any event it is plain from the structure and wording of the 2003 Act that that is so. The way in which the 2003 Act works is to require Ofcom itself to set the standards for securing the defined statutory objectives (see s.319). The special impartiality requirements themselves are likewise to be the subject of rules contained in the Code. The actual obligation to comply with the Code, binding on the broadcaster, is stipulated by the express terms of the licence itself (as the sample version produced to us in court confirmed); and Ofcom has the wide-ranging powers of enforcement of those obligations conferred by sections 40, 41 and 42 of the 1990 Act.

84. Once that is appreciated then much else, as we see it, falls into place. Indeed, all the propositions that can be derived from the majority opinions in *YL*, as summarised in *Holmcroft Properties* (cited above), come into play; and they do so in favour of ITV. Moreover, it is essential also to bear in mind Lord Woolf's observation in the *Poplar*

case that a regulatory body may be deemed public – as Ofcom would be – but the activities of a body which it regulates may be categorised as private. Precisely so.

85. The position is that the activities of ITV are purely commercial: that is so, even though it broadcasts to the public at large. The source of its powers and functions derives from its Memorandum and Articles of Association, not from statute. Nor are its activities monopolistic. The function of commercial broadcasting is not intrinsically a governmental or quasi-governmental function: and it does not become so even when the broadcasting is directed at major political or industrial issues or takes place during a General Election. It is significant that a commercial broadcaster is under no obligation to broadcast any debates at all (as is conceded); nor does anyone have any public law right to appear on television. It is true that ITV has obligations, under its licences, to comply with the Code established by Ofcom pursuant to the statutory requirements of the 2003 Act. But that its activities are regulated by Ofcom, a public body, does not mean that it is itself performing a public function. There are indeed many private commercial undertakings offering services to the public at large which are regulated, but who no one could realistically suggest are exercising a public function. Ultimately, in our view, the activities in question of ITV are of such character; and therefore its broadcasting decisions in this context are not amenable to judicial review.

86. This does not mean that the jurisdiction of the courts is wholly ousted. It is not: but it operates at one remove. The clear scheme of the statutory provisions and Code is to entrust the regulation of commercial broadcasters to a specialist body (Ofcom). The courts are not designed – indeed would be ill-equipped – themselves to exercise a supervisory jurisdiction directly over the activities of commercial broadcasters. Where the courts nevertheless have a potential role is by reference to the decisions of Ofcom itself: which decisions are amenable to judicial review by the courts at the behest of a person aggrieved, in an appropriate case, on conventional public law grounds. It is true that aggrieved persons thus may have no direct private law remedy against such commercial broadcasters in this context (unlike in cases such as the *Jockey Club*). But it does not follow at all that that must mean that aggrieved persons must have a direct public law remedy against commercial broadcasters: to the contrary, that, as we have said, its contrary to the whole approach of the statutory scheme in this case.

87. We do not think this general approach (which in our view is the correct approach) can be overcome by appeals to the asserted "exceptional circumstances" of this particular case or by reliance on the Brexit and Scottish independence issues. To the contrary, if the arguments of the claimants are right then they surely must potentially be right in principle for other broadcasting decisions made hereafter by any commercial broadcaster involving matters of major political or industrial controversy or relating to major matters of current public policy. There can, whether at general elections or otherwise, be many policy issues raised of very considerable importance on which political parties can reasonably claim to have unique perspectives and policies. One can readily envisage contexts where, if a particular party is not included in a televised debate during a General Election period, it will be asserted that the "voice of opposition to [Policy X] will not have been heard" (the current refrain of the Liberal Democrats) or that the broadcasting format adopted is "undemocratic" (the current refrain of the SNP). The very examples from the New Zealand cases relied on by the Liberal Democrats and from the complaints made to Ofcom in 2010 by the SNP and

Plaid Cymru stand as illustrations, if the claimants' arguments be right, of the potential for aggrieved persons to apply directly to the courts, if commercial broadcasters are somehow to be regarded as exercising a public function in decision-making of this kind.

88. As to those New Zealand cases on which the claimants rely, while we of course accord them persuasive respect, they do not bind us. In any event, they are clearly distinguishable: in that the relevant statute there does seem to impose direct statutory obligations on broadcasters (in contrast to the present case) and moreover in that the principles relating to amenability to judicial review in New Zealand, and by reference to the New Zealand Bill of Rights Act 1990, do not appear precisely to correspond to the principles of English law in that regard.

89. As to Mr Coppel's bold assertion that the point is decided in his favour by the *Pro-Life* case, that is demonstrably not so. The matter was not the subject of argument or decision in that case but was conceded. Moreover, it was only conceded "for the purposes of the appeal" by leading counsel acting for the BBC: and, besides, the BBC by no means necessarily stands in the same position as commercial broadcasters. Whether the BBC itself is indeed to be regarded for these purposes as exercising a public function is not a matter on which we need to, or should, express any opinion. But *Pro-Life* lends no real support to the claimants' present contention with regard to ITV or other commercial broadcasters.

90. We were, however, initially a little troubled by one point. The written arguments of all parties had proceeded on the footing that Ofcom only exercises an "after the event" jurisdiction. On our query at the hearing as to why that was so, it was confirmed to us that there was, so far as counsel were aware, no provision in the 2003 Act or in the Code which in terms so stipulated. That being so, on the face of it (and of course we have not heard from Ofcom on this) Ofcom would seem to have statutory jurisdiction to intervene, in an appropriate case, *before* the broadcast in question: which would lend further confirmation that the courts are designed to have no role to play in such circumstances.

91. However, it appears that Ofcom's published current policy is not to intervene prior to any broadcast. Thus in one of its published notices, to which Mr Vassall-Adams referred us, it says:

> "Ofcom isn't a censor and we don't have the powers to approve programmes before they are broadcast on TV or radio services. … If you are concerned about a programme which has not yet been shown on a television, radio or on demand service you should contact the relevant broadcast or service provider."

Whilst one can very readily understand all the reasons why Ofcom would not wish to intervene in advance, this published stance would be such, if followed, as to preclude any intervention by Ofcom, even in an exceptional case (which the claimants say the present case is), prior to broadcast.

92. This gives some pause for thought. As will be gathered, we would not in fact ourselves regard this case (in legal terms) as an exceptional case, notwithstanding (in political terms) the Brexit context. Moreover, as we will come on to say, there remains here the

potential for alternative remedy. But take an (extreme) example posed by the court in argument. Suppose a commercial broadcaster transmits no political debates, interviews or programmes of any kind (apart from mandatory Party Political Broadcasts) in a General Election period. Suppose, also, that broadcaster then suddenly announces, without reasons, that it will accord the leader of a major party three solo prime-time interview slots on each of the three nights preceding the day of the General Election. After the event complaint to Ofcom can, it may be said, procure no effective remedy in such circumstances. Will there then be no practical remedy available?

93. However, even this consideration does not lead us to think that judicial review directly against the broadcaster can be an available remedy. We do not think that the many factors which point to commercial broadcasters not exercising a public function in decision-making on broadcasting such as this can be displaced by extreme (and, realistically, wholly improbable) examples of the kind postulated – the more so when such an outcome would only arise, as we gather, because of the after-the-event policy that Ofcom currently has chosen to adopt. We conclude that redress in such a case to an aggrieved third party remains confined to complaint to Ofcom (subject always, and importantly, to the court's powers of review of Ofcom decisions). In any event, it is worth bearing in mind the observations of Hoffmann LJ in the *Jockey Club* case at p.933D: "I do not think that one should try to patch up the remedies available against domestic bodies by pretending that they are organs of government". Moreover, in the extreme example formulated, we would in any event be minded to accept Mr Beal's submission that Ofcom might itself be able to apply to the court for a quia timet injunction, in enforcement of the conditions of the licence; or, if it did not, an aggrieved person could bring judicial review proceedings against Ofcom requiring it to do so (no doubt also then joining the broadcaster as an interested party). Furthermore, it is not to be overlooked that in cases of egregious misconduct by a broadcaster, where established, Ofcom has the ultimate sanction of revocation of the licence to broadcast: a powerful deterrent.

94. We do not propose to say more on this issue. Our overall conclusion is that with regard to the decision under challenge in this case ITV is not amenable to judicial review.

The Second Issue

95. The second issue raised is whether there is a suitable alternative remedy available to the claimants, such as to preclude a viable claim for judicial review. This ground is obviously, given the circumstances, linked to the first ground. Indeed, as will have been gathered, it is our view that it is subordinated to the first ground: in that complaint to Ofcom is *the* remedy available to the claimants, having regard to the statutory scheme.

96. Mr Vassall-Adams and Mr Coppel were very vigorous in their assertions that to permit the First Debate to go ahead in the proposed double-headed format would give rise to "irreversible" damage and that any decision of Ofcom made after 19 November 2019 would thus be academic. The damage will have been done, they said.

97. We will express our views on this relatively shortly. In our view, the objections of the claimants are very seriously overstated; and a complaint made to Ofcom after 19 November 2019 would indeed provide a practical and suitable remedy.

98. We consider that the arguments of the claimants were seriously tainted in this regard by advancing as purported incontrovertible facts or self-evident truths contentions which in actuality are highly debatable.

99. It will be borne in mind that televised debates in the UK at General Elections only first occurred in 2010. There is therefore, thus far, a slender evidence base. By 2019 no established patterns or firm conclusions can be drawn as to many aspects of such debates, even if informed and academic opinions can be expressed. Thus the suggestions that the first such debate in a campaign confers a very particular advantage or will be "the key debate in the campaign" are tendentious assertions. Who knows? One view, indeed, could be that a debate nearer the date of the election might in fact have more impact. There is no hard evidence, either, that the first debate in a General Election period invariably attracts the highest viewing figures (even if it was the case at one previous election). Overall, moreover, the contentions advanced seem to pay scant regard to the broadcaster's ability, and as contemplated by the Code, to offer an overall package or series of linked programmes during an election period.

100. Thus it also is, with respect, ultimately simply assertion that an interview, occurring one hour after the head-to-head debate, is neither intrinsically as attractive as a debate nor productive of a proper opportunity to respond. It is also simply assertion that subsequent interviews and programmes and a Second Debate will not adequately redress the balance. Certainly, as the evidence makes clear, those are not views shared by ITV itself. Opinions to this effect as put forward by the claimants can fairly and reasonably be expressed. But they remain opinions; and opinions on this can legitimately differ. It is also right to bear in mind, when considering the competing views, that the opinions under challenge represent the editorial judgments of experienced professional broadcasters.

101. As for Mr Coppel's point that postal ballots will have been issued before the planned Second Debate and some voters will have voted by that time, we do not think that shows irreversible prejudice. Such voters will at the least have had the chance to see the interview immediately following the First Debate. Moreover, as Mr Jermey points out in his second statement (where he confirms that ITV had the point in mind) the Second Debate is being widely publicised; campaigning will continue up to the day before the election; and postal voters are free to stay their hand until after the Second Debate has taken place before casting their votes. The logic of the argument advanced by the SNP in this respect might even tend to suggest that *no* televised debate should take place after postal votes have been issued; which seems untenable and is indeed contrary to what happened in 2010.

102. Moreover, if the matter were to be brought by way of immediate complaint before Ofcom after 19 November 2019 Ofcom could issue its ruling promptly and prior to the date of the election itself (as it did in 2010). Ofcom has wide powers, if it were to uphold the complaint, of requiring rectification of any identified breach of the Code and imposing other sanctions. Such powers are capable, in our judgment, of providing an appropriate remedy to the claimants. So all this operates to confirm the view that we in any event reach: which is that complaint to Ofcom was and is the sole remedy available in this case.

The Third Issue

103. The above conclusions mean that these claims must fail. But since those conclusions will mean that the First Debate will have gone ahead on 19 November 2019 in its current format, we think that we should express our views as to whether there had been an arguable breach of the Code. We do so with considerable diffidence in the light of our conclusion that such matters are properly the province of Ofcom, the specialist body entrusted with the task under the statutory scheme: we nevertheless think that we should, given that the point was argued so fully before us. However, we will, in the circumstances, express our reasons shortly. We desire to add, in this respect, that we found the approach and reasoning of Ofcom in its rulings in 2010 on the complaints of the SNP and Plaid Cymru to be informative and instructive.

104. Mr Coppel – not Mr Vassall-Adams – saw fit in oral argument to assert that ITV had acted in "outright defiance" of the Code (although when we then asked him if he was suggesting actual bad faith he disclaimed such a proposition). That was an untenable and unfair criticism which was unsupported by any evidence. It should never have been made. The letters sent at the time and the evidence of Mr Jermey show that ITV was conscientiously applying itself to the provisions of the Code and seeking to comply with it. If it breached it, such breach was not wilful.

105. Mr Coppel also submitted that, by reason of s.320(6) of the 2003 Act, in matters of (among others) major political controversy the duty was one of absolute, and not simply "due", impartiality. He said that this is shown by use of the phrase "to ensure the preservation of impartiality" in that sub-section, without use of the qualifying epithet "due".

106. This is a misconceived argument. Section 320(6) is expressly linked to s.320(5)(a). That in turn is linked to s.320(1)(b). Section 320(1)(b) relates in terms to the preservation of "due impartiality". So "due impartiality" is throughout what is required. That is the way the Code itself is drafted in these respects: and rightly so.

107. That being so, it is plain to us that the phrase "due impartiality" connotes an evaluative judgment. That is entirely consistent with the provisions of the Code (set out above) in this respect and appropriately reflected in the Guidance Notes. We reject the argument that it is a matter of hard-edged fact as to whether or not a decision shows due impartiality.

108. As the Code makes clear, by Rule 6.2, "due weight" is to be given to the coverage of parties; further, the obligation is to "consider" giving appropriate coverage to parties with significant views and perspectives. All this clearly is language designed to give a degree of flexibility to broadcasters. Moreover, paragraph 1.16 of the Guidance Notes is explicit that the editorial format of televised debates "is a matter for the broadcaster and, as appropriate, the relevant political parties as long as the broadcaster complies with the Code".

109. Yet further, the Code and Guidance Notes are explicit that due impartiality can be achieved over a period, by a series of linked programmes. That plainly, in our judgment, is what ITV was from the outset intending to do and has done. It put forward a "package" of programmes, as it was put in evidence. Thus the First Debate was designedly followed (separated by one hour) by the interview at 10pm, in which other leaders could comment on the First Debate. Other programmes and interviews were also thereafter planned: including the Second Debate at which leaders (or

representatives) of seven parties could attend. That postal votes may have been issued in the interim does not prevent the Second Debate from being part of a series. In addition, all these further programmes are and will be extensively publicised. It is plain, both as a matter of interpretation of the Code and as a matter of fact, that these were linked programmes, representing a series or package. To say, therefore (as the claimants do), that the interview and Second Debate, when set with the First Debate, are "cheese compared with chalk" is bald assertion which is not sustainable.

110. It was, in fact, a rather troubling feature of the claimants' cases throughout that they barely seemed to acknowledge, if at all, the necessary element of evaluative editorial judgment and flexibility on the part of the broadcasters as reflected in the statutory scheme and Code. Nor do they much acknowledge the express authorisation in the Code and Guidance Notes of a series of linked programmes as a method of achieving overall balance. Indeed the claimants' cases would also not readily fit with the general respect for journalistic and editorial freedom normally to be expected or with the general right to freedom of expression as reflected in Article 10 of the European Convention on Human Rights. Article 10(1) guarantees the right to impart information and ideas without interference by public authority, albeit subject to restrictions which are necessary in a democratic society. The requirement of due impartiality under the Code is such a restriction, required, among other things, to protect the rights of all those involved in elections. But the element of judgment necessarily remains: and that, as we have said, is inherent in the entire statutory scheme. Any person asserting that there is a pressing need to override a broadcaster's editorial judgment on such a matter will ordinarily need to advance clear and convincing evidence in this respect: and all the more so when such a person is demanding pre-emptive interference with a broadcasting judgment.

111. It is not for political parties to dictate the format or content of televised debates. It is for broadcasters to decide (subject to compliance with the Code), although of course those parties which are invited to participate can always decline to participate. The whole statutory scheme, at any rate, is predicated on the basis that broadcasters exercise editorial judgment and ascribe due weight to relevant factors as they think fit. That is what ITV here did, acting conscientiously and carefully. As Mr Beal submitted, and we agree, it is not for the courts – or, we apprehend, Ofcom itself – to micro-manage the editorial format and content of ITV's General Election coverage. There is no arguable case, on the evidence before this court, that ITV breached the Code.

The Fourth Issue

112. For corresponding reasons, we reject as unarguable the submission that the decision was flawed on public law grounds.

113. Although it was suggested that ITV had failed to take in to account relevant or material considerations (for example, past and recent electoral support, current polling and the issue of postal votes) that, on examination of the decision letters and the evidence of Mr Jermey, was shown to be unsustainable. Nor was there anything to show that immaterial considerations were taken into account.

114. That left the residual argument that the decision to hold the First Debate in its head-to-head format was irrational and perverse. Irrationality is a very high bar to surmount. Demonstrably the claimants fail to surmount it.

115. This ground therefore also is not realistically arguable. That the claimants regard the decision reached on the First Debate as politically and presentationally disadvantageous to them, and strongly disagree with the editorial judgment of ITV, of itself gives rise to no valid objection as a matter of public law.

The Fifth Issue

116. Mr Coppel did faintly suggest that the decision involved a breach of Article 3 of the First Protocol to the European Convention on Human Rights. That Article sets out an undertaking on behalf of Member States to hold free elections at reasonable intervals by secret ballot "under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

117. It is difficult to understand the argument, let alone accept it. For one thing, it is difficult to accept (for reasons corresponding to those given above) that ITV itself is a public authority at all for the purposes of the Human Rights Act 1998, in this context. For another, Parliament has, for the purposes of broadcasting in the context of elections, made provision by the broadcasting legislation. It is evident that a wide margin of appreciation is conferred on national legal regimes in this regard: as confirmed by cases such as *Purcell v Ireland* [1993] ECHR 77 and other authority cited to us by Mr Beal. This ground is untenable.

Conclusion

118. Viewed overall, neither of these claims has, in our judgment, realistically arguable prospects of success. We are aware that, even when a claim for judicial review is not considered arguable, the court may exceptionally still grant permission to apply. This is not, in our view, such a case. Accordingly, as announced at the hearing, we refused permission to apply in both cases.

119. These, therefore, are our reasons for our previously announced decision that the debate between Mr Johnson and Mr Corbyn scheduled for broadcast on Tuesday 19 November 2019 may lawfully go ahead. The parties are to agree a Minute of Order in consequence.

120. Since issues of this kind have the potential to resurrect themselves in the future, we grant permission for this judgment to be cited.