

Claim No:

IN THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N:

MARK STEYN

Claimant

and

THE OFFICE OF COMMUNICATIONS

Defendant

and

GB NEWS LIMITED

Interested Party

STATEMENT OF FACTS AND GROUNDS

Introduction and Summary

1. This is a challenge to a final decision (“the decision”) of the Defendant (“Ofcom”) of 6 March 2023 under Rule 2.2 of the Ofcom Broadcasting Code (“the Code”)¹. The decision concerned a one hour programme broadcast by the Interested Party (“GBN”) on 21 April 2022 at 20.00.
2. The Claimant (“C”) was the presenter of the programme and the investigation concerned a monologue by him at the start of his programme, known as *The Mark Steyn Show*.
3. C’s monologue was the opening segment on the show, known as *The Steyn Line*. In this C would give his views on a topic or topics of the day. In the 22 April 2022 monologue he referred to and commented on data recently published by the UK Health Security Agency (“UKHSA”) concerning those who had, and those who had not, taken the third vaccination shot of the Covid-19 vaccine. The passages in the programme considered in the decision are at pages 2-6 of the decision and during the segment tables containing the UKHSA data referred to were displayed on screen at various points. The passages considered in the decision included:

...There is only one conclusion from those numbers, which is that the third booster shot, so zealously promoted by the British state and its group-think media, has failed. And in fact, exposed you to significantly greater risk to infection, hospitalisation and death...

4. Rule 2.2 of the Code is in Section 2. Section 2 is entitled *Harm and Offence*. Rule 2.2 provides:

Factual programmes or items or portrayals of factual matters must not materially mislead the audience.

(Note to Rule 2.2: News is regulated under Section Five of the Code)

5. Ofcom’s Guidance Note (“the Guidance”) for Rule 2.2 includes the following:

Although it is a fundamental requirement of broadcasting that an audience should not be misled in the portrayal of factual matters, Ofcom only regulates the accuracy of programmes per se in News programmes.

¹ Published in Issue 469 of Ofcom’s Broadcast and On Demand Bulletin

Nevertheless, Ofcom is required to guard against harmful or offensive material, and it is possible that actual or potential harm and/or offence may be the result of misleading material in relation to the representation of factual issues. This rule is therefore designed to deal with content that **materially misleads the audience so as to cause harm or offence.**

It is not designed to deal with issues of inaccuracy in non-news programmes and complaints that relate solely to inaccuracy, rather than with harm or offence, will not be entertained.

Whether a programme or item is “materially” misleading depends on a number of factors such as the context, the editorial approach taken in the programme, the nature of the misleading material and, above all what the potential effect could be or what actual harm or offence has occurred.

This rule does not apply to News. News is regulated under Section Five.

6. The decision will be read by the court and it is therefore not proposed to summarise it in any detail. In essence, however, the decision-taker reasoned:

Misrepresentation of facts

- a. Rule 2.2 of the Code is concerned with misrepresentation of facts². C misrepresented fact by suggesting that: the two groups in the UKHSA data (vaccinated and unvaccinated populations) could be compared to analyse health outcomes; and he misrepresented fact by saying that the conclusion of a comparison was that the *third booster dose of the of the Covid-19 vaccination was the cause of* increased levels of infection, hospitalisation and death amongst those who had taken it³.

Materially misleading the audience

- b. Given the inherent biases in the two groups, it was misleading to suggest that it was possible to compare data as to infection, hospitalisation and death for each of these two groups and make an assessment of the efficacy of the booster shot. It was also, misleading to say that only the *one conclusion* advanced to by C could be drawn from the data⁴.

² Decision p.11

³ Decision pp.12 and 13

⁴ Decision p.15

- c. The inclusion in the programme of comments from three audience members (Louise and two Twitter users) was not sufficient to ensure that viewers would not be misled by C's statements⁵.
- d. C's interpretation of the data was not presented as a *possible interpretation or his personal opinion*⁶.

Potential harm to the audience

- e. A significant proportion of the population was yet to receive a third vaccination and the statements broadcast could result in viewers making important decisions about their health based on misleading information⁷.

7. C advances five grounds of challenge:

- (1) Misdirection in law – s.319(2)(f): The statutory standards objective for this decision is in sub-section 319(2)(f) of the Communications Act 2003 ("CA 2003"). It is that:

Generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion of offensive and harmful material.

As the application of Rule 2.2 in this decision shows, Ofcom interprets this as allowing rules against, and findings of breach in respect of, potential harm from viewers/listeners being influenced by misleading material to act in a way harmful to themselves or others. This is a misconstruction of the sub-section, and the error has led Ofcom to misunderstand and misapply its regulatory powers, exceeding them improperly.

- (2) Material and/or unsustainable finding of fact - Materially misleading portrayal of factual matters, causing harm: The potential harm identified in the decision, although not spelt out, is that viewers might decide not to have the third shot. The Rule and the Guidance require that the potential harm is caused by a misleading

⁵ Decision p.17

⁶ Decision p.17

⁷ Decision p.19

portrayal of factual matters in the broadcast material. See also the self-direction in the decision that Rule 2.2 is *concerned with misrepresentation of facts*. Ofcom's finding that there was such a (causal) misleading portrayal of factual matters is based on a finding that the conclusions from the data advanced by C in the programme were, and would have been understood as assertions of fact, rather than opinion⁸. This conclusion is wrong and unsupportable when the parts of the programme in issue are considered properly and in context.

- (3) Material and/or unsustainable finding of fact - The potential for harm: The postulated *harm* in this case could only occur if the third vaccine is effective⁹. This is because the suggested viewer decisions consequent on viewing the programme, ie not to have the third shot, could only be *harmful* if this is the case. Not only does the decision contain no finding to this effect, even if it is read as containing an implied finding to this effect no evidence is identified in the decision to support such a finding.
- (4) Article 10 violation: The decision amounts to a violation of C's right to freedom of expression under Article 10 of the European Convention on Human Rights ("the ECHR").
- (5) Breach of the duty of fairness: C had an interest in the outcome of the Ofcom investigation which entitled him to be protected by procedural fairness. He was not given, but should have been given, a fair opportunity to make written representations to Ofcom against the proposed finding of rule breach.

8. The general legislative/regulatory background and the relevant legal principles and submissions in respect of each ground are set out in turn below.
9. Standing: C has standing to bring this judicial review because the decision had an adverse impact on him, and on his reputation as a journalist/broadcaster. In particular the fact that the decision involved a finding of rule breach by the licensee/broadcaster does not preclude C asserting that his ECHR Article 10 rights are engaged by the adverse finding (ie that it was an *interference* with his ECHR Article 10 rights within the

⁸ Decision p.17

⁹ And viewers decide not to take it as result of seeing the programme.

meaning of ECHR 10(1)). See **Gaunt v Ofcom** (QBD) [2011] 1 WLR 663 at [36]; (CA) [2011] 1 WLR 2355 [19].

10. The pre-action correspondence: In its response to the pre-action protocol letter dated 26 May 2023, Ofcom rejects all of the above proposed grounds of challenge. Again, the correspondence will be read by the court and it is not proposed to summarise it. Ofcom has not addressed directly the interpretive issue in relation to the words *harmful material* in CA 2003 s.319(2)(f) (Ground 1). It has implicitly accepted that C's rights under ECHR Article 10 are engaged by the decision, but it has not sought in the response letter to justify the reasoning and outcome in the decision by reference to the principles established under ECHR Article 10(2) (as to which see below). In relation to Ground (2) above (Ground (5) in the response letter) Ofcom appears to advance a "fall-back" position, contrary to the clear wording of the decision, that the conclusions identified in the monologue were/may have been opinion but that Rule 2.2 can be read as applying to expressions of opinion. C will say that this is not sustainable in light of the wording of Rule 2.2 (referring to *portrayals of factual matters*).

The legislative framework and regulatory background

11. See [6]-[11] in **Gaunt** (CA) above (Lord Neuberger of Abbotsbury MR):

6. *Broadcasting standards are now governed by the Communications Act 2003, which also requires them to be implemented, supervised and enforced by Ofcom. In that connection the 2003 Act largely replaces the Broadcasting Act 1996.*

7. *Section 3(2)(e) of the 2003 Act places a duty on Ofcom to secure the application by all television and radio stations of standards that "provide adequate protection to members of the public from the inclusion of offensive and harmful material" in broadcast programmes. By section 3(4)(g) of the 2003 Act all such stations are required to have regard to "the need to secure" this "in the manner that best guarantees an appropriate level of freedom of expression".*

8. *Section 319 of the 2003 Act obliges Ofcom to set up a "standards code" for radio and television services which is "calculated to secure" the so-called "standards objectives". These objectives include, at section 319(2)(f), that "generally accepted standards are applied to the contents of television and*

radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material". Ofcom is also obliged by section 325(2) of the 2003 Act to "establish procedures for the handling and resolution of complaints about the observance of [those] standards".

9. This code, known as the Broadcasting Code, states in terms that it has been drafted in particular in the light of the right to freedom of expression as expressed in article 10 of the Convention, which encompasses a broadcaster's right to disseminate, and an audience's right to receive, creative material, information and ideas without interference, but subject to restrictions prescribed by law and necessary in a democratic society.

10. Rule 2.1 of the code provides that generally accepted standards must be applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive materials. Rule 2.3 of the code states that, in applying generally accepted standards, broadcasters must ensure that material which may cause offence is justified by the context. Such material may include, among other material, offensive language.

11. Any legislation, any code, or any decision which has the aim or effect of limiting any person's freedom of expression must be considered and assessed by reference to article 10...

Ground (1)

12. In so far as relevant CA 2003 s.319 provides:

319 OFCOM's standards code

(1) *It shall be the duty of OFCOM to set, and from time to time to review and revise, such standards for the content of programmes to be included in television and radio services as appear to them best calculated to secure the standards objectives.*

(2) *The standards objectives are—*

...

(d) that news included in television and radio services is reported with due accuracy;

...

(f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material;

...

(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented;

...

(3) The standards set by OFCOM under this section must be contained in one or more codes.

(4) In setting or revising any standards under this section, OFCOM must have regard, in particular and to such extent as appears to them to be relevant to the securing of the standards objectives, to each of the following matters—

(a) the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally, or in programmes of a particular description;

(b) the likely size and composition of the potential audience for programmes included in television and radio services generally, or in television and radio services of a particular description;

(c) the likely expectation of the audience as to the nature of a programme's content and the extent to which the nature of a programme's content can be brought to the attention of potential members of the audience;

(d) the likelihood of persons who are unaware of the nature of a programme's content being unintentionally exposed, by their own actions, to that content;

...

(8) In this section "news" means news in whatever form it is included in a service.

13. The issue C raises under Ground (1): This is whether the inclusion of the words *harmful material* in the standards objective at CA 2003 s.319(2)(f) empowers Ofcom to act against broadcast information:

- that is misleading (it causes the viewers to have a wrong idea or impression);
- and that may, as a result, influence viewers to act in a way that is damaging to themselves.

14. This not the natural and ordinary meaning of the words *harmful material*. This would be material which by the fact of its inclusion in the broadcast causes (or may cause) damage to the viewer/listener:

- a. Directly (ie through viewers seeing/hearing it); for example causing trauma or psychological disturbance or perhaps;
- b. Because it is information which is accurate but could be harmful if copied or acted upon (eg about ways of committing suicide or self-harming).

On Ofcom's interpretation the material is harmful if it is misleading and it may influence viewers to act in a way harmful to themselves or others.

15. The following principles of statutory interpretation point against this being a correct interpretation:

- a. Acts of Parliament must be construed as a whole:
 - i. This interpretation allows Ofcom to act against inaccurate information (which is misleading etc) in broadcasts such as *The Steyn Line* which are neither news nor advertising. But Parliament has only given a power to act against inaccurate and misleading information, under CA 2003 s.319, in two types of broadcasts. These are *news* (ss.319(2)(d)) and *advertising* (ss.319(2)(h)). This points strongly against a Parliamentary intention to give such a power in relation to other type of broadcast.
 - ii. Further, there is a presumption that the same words in a statute have the same meaning, and that different words have a different meaning: See *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th Ed, Section 21.3. CA 2003 section 319(2)(h) expressly distinguishes between *harmful* (and *offensive*) material, on the one hand, and *misleading material*, on the other, indicating that Parliament intended *harmful material* to be something different to *misleading material*. This is a strong presumption here because the words appear in the same run of sub-sections in s.319(2). If Parliament had intended protection against *misleading material* by the general objective at sub-section (2)(f) it would have said so.
- b. There are adverse consequences of this broad interpretation, which suggest it should not be adopted by the court.

- i. It is uncertain in a way that the constructions at [13] above are not. In order to know whether it is breaching Rule 2.2 in this way a broadcaster must consider not just the impact of the words/images *per se*, it must assess whether/the extent to which they may lead viewers to have a wrong idea/impression which may be one which may influence them towards damage to themselves or others. There are penal consequences for broadcasters if they get this wrong, so the interpretation risks uncertain (or doubtful) penalisation. See *Bennion* (above) at Section 26.4.
- ii. More particularly the application of the objective, applying this interpretation, restricts the freedom of speech of broadcasters. And this should not happen save with the clear authority of law. See *Bennion* (above) at Section 27.5.

16. Ofcom has therefore misconstrued the statutory objective, giving it a reach (and therefore a power to act against this broadcast) that it does not contain. This has led it to exceed its powers in finding a breach of Rule 2.2 in this case.

Ground 2

17. Inferences, including inferences drawn from facts, can be opinions¹⁰. In deciding whether words are or contain expressions of opinion they must be considered in their context¹¹.

18. In this case the underlying facts for the conclusions of C were straightforwardly (not misleadingly) portrayed. They were accurately described as data published by UKHSA relating to the third booster shot and the data was displayed on screen.

19. In context, the conclusions were plainly opinion in the form of inferences drawn by C from the data displayed to the viewer. This is apparent from the whole presentation but in particular:

¹⁰ See for example, in the law of defamation, *Koutsogiannis v Randon House Group* [2020] 4 WLR 25 at [16(ii)] (Nicklin J).

¹¹ See, again in the context of defamation, *Gatley on Libel* 13th Edition at 13-009. And see below re the Article 10 jurisprudence.

- a. C was identifiable and known to viewers of his programme as a journalistic commentator, not a clinician, scientist or statistician;
- b. His words were accompanied by a banner identifying the programme as a personal opinion piece on a debate of public interest¹².
- c. The presentation was polemical and identified itself from the outset as giving a different *version* to the *official version*, ie it was one of two different views. It was also identified as challenging *claims for the vaccine* made in the media¹³.
- d. C indicated to viewers that he was drawing an inference from the data when he said *there is only one conclusion from those numbers*.
- e. The assertions that the third booster shot *has failed* and *exposed you to significantly greater risk* are, and are identifiable as, evaluative judgments. There are other statements in the presentation indicating an evaluative exercise, for example that: the exercise involved weighing the merits of the shot from the data about the two groups¹⁴; the third shot was *at best useless and at worst decidedly dangerous*¹⁵; the numbers *suggest* an unnecessary tragedy¹⁶; *there's something going on here*¹⁷.
- f. The three comments, and C's response to the same, indicated that the conclusions were C's opinion, were understood as such by the viewers concerned and that there would be differences of opinion about the data.

20. The programme only falls within Rule 2.2 as interpreted and applied by Ofcom if the conclusions are misrepresentations of facts. See Decision p.11.

21. The finding that it did fall within Rule 2.2 therefore depends on the finding at decision p.17 that the conclusions were other than *a possible interpretation or his personal opinion*. But this is a material error of fact/unsupportable finding, designed to make the broadcast fit the rule. The reasoning in support of this finding is almost non-existent and (predictably) flawed. It is essentially in the following sentence on p.17, viz that C

¹² *Mark's take on the vaccine debate*. Idiomatically meaning, C giving his opinion or ideas on the debate.

¹³ Decision p.3

¹⁴ Decision p.3

¹⁵ Decision p.5

¹⁶ Decision p.5

¹⁷ Decision p.5

stated definitively that...there was only one conclusion to be drawn from such a comparison. But the fact that a person expresses their conclusion as the only correct one does not bear on whether it is an opinion or not (as opposed to whether it is a strongly held opinion). Equally predictably the decision then proceeds to contradict itself by identifying the viewer comments as alternative *viewpoints that question Mark Steyn's interpretation...*

22. It is recognised that Ofcom also identified a factual misrepresentation to the effect that it was possible to compare data as to infection, hospitalisation and death for each of these two groups and make an assessment of the efficacy of the booster shot. But this representation/assertion in isolation would not be sufficient to bring the programme within the rule as it does not carry the potential to cause the harm identified. It is neutral in these terms. A finding that the “one conclusion” identified was a misrepresentation of fact is therefore necessary to bring the programme within the rule.

Ground 3

23. The *potential for harm* is discussed at pp.18-20 in the Decision. At p.19 figures for uptake of the third booster shot are set out followed by: *A significant proportion of the population was therefore yet to receive a third vaccination and the statements broadcast in this programme could result in viewers making important decisions about their health based on misleading information. Ofcom considered that, notwithstanding the status of the pandemic, viewers needed to be able to make properly informed choices about vaccination and that broadcasting misleading claims of this nature might prevent them from doing so...*

24. It is implicit in this reasoning that the vaccine is effective, so that a viewer deciding not to take it as a result of seeing the programme may be damaging their health by failing to secure an effective protection against Covid-19 that it provides. This is a critical step in the reasoning towards a finding of breach of Rule 2.2 because, as per the Guidance, the material must materially mislead the audience so as to cause harm. But there is no explicit finding in the decision to this effect, nor is any evidence cited in the decision to support such a finding. There is only a reference to a UKHSA recommendation for a Spring booster for certain categories of people.

Ground 4

Relevant legal principles

25. ECHR Article 10 provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 10 therefore gives rights to receive as well as to impart the information and ideas in issue. See Art 10(1).

26. Engagement of the Article 10 right: The right is engaged where there is an *interference* with it by a public authority. See Article 10(1). In **Gaunt** (above) the Court of Appeal correctly proceeded on the understanding, not disputed by Ofcom, that a regulatory finding by Ofcom which identified broadcast speech by a journalist/presenter as being in breach of the Code was such an interference with their Article 10 rights. Its assessment of the case therefore moved straight to the issue of justification for the interference under Article 10(2). See **Gaunt** (CA) [19] and [36] (Lord Neuberger). As Lord Neuberger put at [36]:

*....As Lord Hope's observations in **R v Shayler** [2003] 1 AC 247, paras 59-61 show, the question of whether the finding constituted a permissible interference with Mr Gaunt's article 10 right demands rigorous scrutiny.*

27. Though the decision under challenge in this judicial review did not contain any reasoning under Article 10(2) in relation to the free speech rights of GB News or C, this does not matter. Indeed, even if it had, this such reasoning is of no avail when the issue of a violation comes before the court, if the decision-taker got the answer to the

question of justification under Article 10(2) wrong. See eg the judgment of the High Court in **Gaunt** at [22].

28. Justifying the interference under Article 10(2): The three requirements of Article 10(2) are well known.

a. The first two requirements: The measure in issue (here the adverse finding under Rule 2.2) must be *prescribed by law* and it must pursue one or more of the legitimate aims under Article 10(2). There is no dispute here that the measure is prescribed by law (ie through the regulatory regime described above, and in particular Rule 2.2). The absence of any reasoning under Article 10(2) in the decision means that it is not clear which legitimate aim/s may be relied on by Ofcom. At this stage therefore it is not conceded that the measure pursued a legitimate aim, but it is anticipated that the aim identified will be the protection of the rights of others, in the context of protection of health. In this type of case the European Court of Human Rights ("ECtHR") has emphasised the importance of a careful examination by the domestic court of whether there was a pressing social need for any interference with the expression in issue. It must balance the need to protect the rights of those concerned against the speaker's freedom to express themselves as they did. See eg **Hertel v Switzerland** (1998) 28 EHRR 534 at [47].

b. The third requirement: The measure interfering with free speech must be *necessary in a democratic society*. This requires that *relevant and sufficient reasons* must be given by the national authority for the interference; it must meet a *pressing social need*; and it must be a measure which is proportionate means of pursuing the legitimate aim. See **R v Shayler** [2003] 1 AC 247 at [58] (Lord Hope of Craighead). And see further:

59. The principle involves a question of balance between competing interests. But it is important to appreciate that there is a process of analysis that must be carried through. The starting point is that an authority which seeks to justify a restriction on a fundamental right on the ground of a pressing social need has a burden to discharge. There is a burden on the state to show that the legislative means adopted were no greater than necessary: R v Lambert [2002] 2 AC 545, 571h per Lord Steyn. As Sir Sydney Kentridge QC observed in his Tanner Lecture at Oxford, "Human Rights: A Sense of Proportion", 26 February 2001: " 'Necessary' does not mean indispensable, but it does connote

the existence of a pressing social need ... It is only on the showing of such need that the question of proportionality or 'balancing' should arise."

60. The European Court has not identified a consistent or uniform set of principles when considering the doctrine of proportionality....But there is a general international understanding as to the matters which should be considered where a question is raised as to whether an interference with a fundamental right is proportionate.

61. ...The first is whether the objective which is sought to be achieved—the pressing social need—is sufficiently important to justify limiting the fundamental right. The second is whether the means chosen to limit that right are rational, fair and not arbitrary. The third is whether the means used impair the right as minimally as is reasonably possible. As these propositions indicate, it is not enough to assert that the decision that was taken was a reasonable one. A close and penetrating examination of the factual justification for the restriction is needed if the fundamental rights enshrined in the Convention are to remain practical and effective for everyone who wishes to exercise them.

29. Principles established and applied by the ECtHR under Article 10(2): These are again well known. They include:

- a. Article 10 applies not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.¹⁸
- b. There is little scope for restrictions on freedom of political speech and speech on matters of public interest¹⁹.
- c. Where measures are capable of discouraging the press and other media from *disseminating information on matters of legitimate public concern, careful scrutiny of the proportionality of the measures is called for...*²⁰ The potential for discouraging such speech is often referred to as the “chilling effect” on free speech of the measure in issue.

¹⁸ *Handyside v. the United Kingdom* (1976) 1 EHRR 737 at [49]

¹⁹ *Bedat v Switzerland* (2016) 63 EHRR 15 at [49]

²⁰ *Bergens Tidende v Norway* (2001) 31 EHRR 16 [52].

- d. Journalistic freedom of expression allows a degree of exaggeration or even provocation²¹.
 - e. Article 10 protects the form as well as the substance of the information and ideas disseminated and it is not for the courts to substitute their own view of what techniques of reporting should be adopted by journalists²².
 - f. A careful distinction has to be drawn between statements of fact and statements of opinion, since freedom of opinion is a fundamental part of the Article 10 right. The court will take account of the context in which the statements in issue were made in deciding whether they were opinion. A value judgement without any factual basis to support it may be excessive²³.
 - g. The necessity for an interference must be *convincingly established* by the public authority under Article 10(2)²⁴.
 - h. The absence of valid and sufficient reasons for restricting the right to freedom of expression cannot be compensated for by the light nature of the sanction imposed on the speaker²⁵.
30. Submissions: Applying these principles, the decision does not contain relevant and sufficient reasons for the interference with C's freedom of expression rights which it represents.
- a. By the monologue C was participating in a debate affecting the general interest. This concerned the efficacy of the third booster shot and whether it exposed recipients to a risk of infection, hospitalisation and death. He was expressing his opinion on these matters, on the basis of factual government material shown to the viewers in the course of the programme. He was entitled to do so in a strong, polemical terms. His speech was therefore strongly protected from interference by public authority under Article 10. The interference potentially discourages speech challenging or questioning the promotion by the state of the efficacy and safety of the booster shot. It also adversely affects C's

²¹ *Prager and Oberschlick v Austria* (1995) 21 EHRR 1 [38]

²² *Jersild v Denmark* (1994) 19 EHRR 1

²³ See by way of example *Jerusalem v Austria* (2003) 37 EHRR 25 [41]-[43]

²⁴ *Barthold v Germany* (1985) 7 EHRR 383 at 403.

²⁵ *Tokes v Romania* Case No 15976/16 and 50461/17, 27 April 2021 [85] and [98]

reputation as a journalistic commentator on matters of public importance. Strong justification would be required for interfering with such speech.

- b. Any justification would have to be based upon the impact of his speech on the rights of others and, on this basis, convincingly establish the need to do so in a democratic society. The rights of others in play are unspecified but appear to be the rights of viewers of the programme to be protected against material harmful to their health, because it might influence them not to take (an effective and safe) booster shot. But viewers also had a presumptive right under Article 10 to receive the information and ideas advanced by C; and a right under Article 10 to formulate and hold their own opinions on the efficacy/safety of the booster shot offered by the government, a matter on which the decision does not suggest that there is certainty. They were entitled to do this on the basis of a range of opinions expressed in the debate, including but not only those of the state. The rights of others in play must be assessed on this basis, so that again strong justification for interfering with the expression was required. This cannot be found in the decision. The decision does not identify any actual or measurable harm to the health of any viewers as a result of the programme. There is no evidence, still less any finding, that any viewer acted in a way harmful to their health through seeing the programme, or indeed showed any inclination to do so. Ofcom appears to have proceeded to the finding on an assumption that it was plausible that the programme had such an impact on a viewer or viewers. This is insufficient reasoning to justify interference by a public authority with journalistic expression of opinion on a matter of such public importance.

Ground (5)

31. The journalistic expression in issue in the investigation was that of C as well as the licensed broadcaster. The *Gaunt* decision establishes that C's journalistic right to freedom of expression is engaged by a decision against the broadcaster under the Code in this situation, for the reasons identified above. His interest entitled him to a measure of procedural fairness before the adverse decision was published. It entitled him to make written representations to Ofcom in the investigation, in particular following the Preliminary View of rule breach being formulated (and after being

provided with the same). He was not an employee of GBN and was not (nor could Ofcom assume that he was) involved in the formulation of their written submissions to Ofcom. In fact neither he nor the producer of his show were shown by GBN the submissions that GBN made to Ofcom or the Preliminary View of Ofcom. It would not have been burdensome or impractical for Ofcom to have given him this measure of protection. The opportunity would have been of value as he could have advanced the case now advanced in this application, in particular as to the need to respect his Article 10 rights.

Relief

32. C accordingly seeks an order quashing the Decision and any further order/s the court considers appropriate.

GAVIN MILLAR KC