

# **Ofcom Broadcast and On Demand Bulletin**

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## Introduction

Under the Communications Act 2003 (“the Act”), Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives<sup>1</sup>. Ofcom also has a duty to secure that every provider of a notifiable On Demand Programme Services (“ODPS”) complies with certain standards requirements as set out in the Act<sup>2</sup>. Ofcom must include these standards in a code, codes or rules. These are listed below.

The Broadcast and On Demand Bulletin reports on the outcome of investigations into alleged breaches of those Ofcom codes and rules below, as well as licence conditions with which broadcasters regulated by Ofcom are required to comply. We also report on the outcome of ODPS sanctions referrals made by the ASA on the basis of their rules and guidance for advertising content on ODPS. These Codes, rules and guidance documents include:

- a) [Ofcom’s Broadcasting Code](#) (“the Code”) for content broadcast on television and radio services.
- b) the [Code on the Scheduling of Television Advertising](#) (“COSTA”) which contains rules on how much advertising and teleshopping may be scheduled in television programmes, how many breaks are allowed and when they may be taken.
- c) certain sections of the [BCAP Code: the UK Code of Broadcast Advertising](#), which relate to those areas of the BCAP Code for which Ofcom retains regulatory responsibility for on television and radio services. These include:
  - the prohibition on ‘political’ advertising;
  - sponsorship and product placement on television (see Rules 9.13, 9.16 and 9.17 of the Code) and all commercial communications in radio programming (see Rules 10.6 to 10.8 of the Code);
  - ‘participation TV’ advertising. This includes long-form advertising predicated on premium rate telephone services – most notably chat (including ‘adult’ chat), ‘psychic’ readings and dedicated quiz TV (Call TV quiz services). Ofcom is also responsible for regulating gambling, dating and ‘message board’ material where these are broadcast as advertising<sup>3</sup>.
- d) other licence conditions which broadcasters must comply with, such as requirements to pay fees and submit information which enables Ofcom to carry out its statutory duties. Further information can be found on Ofcom’s website for [television](#) and [radio](#) licences.
- e) Ofcom’s [Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services](#) for editorial content on ODPS. Ofcom considers sanctions in relation to advertising content on ODPS on referral by the Advertising Standards Authority (“ASA”), the co-regulator of ODPS for advertising or may do so as a concurrent regulator.

[Other codes and requirements](#) may also apply to broadcasters, depending on their circumstances. These include the Code on Television Access Services (which sets out how much subtitling, signing and audio description relevant licensees must

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<sup>1</sup> The relevant legislation is set out in detail in Annex 1 of the Code.

<sup>2</sup> The relevant legislation can be found at Part 4A of the Act.

<sup>3</sup> BCAP and ASA continue to regulate conventional teleshopping content and spot advertising for these types of services where it is permitted. Ofcom remains responsible for statutory sanctions in all advertising cases.

provide), the Code on Electronic Programme Guides, the Code on Listed Events, and the Cross Promotion Code.

**It is Ofcom's policy to describe fully the content in television, radio and on demand content. Some of the language and descriptions used in Ofcom's Broadcast and On Demand Bulletin may therefore cause offence.**

## Note to Broadcasters

### Election and referendum programming

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On 5 May 2016, various elections will be taking place across the UK. In addition, the UK's referendum for remaining in or leaving the EU will be taking place on 23 June 2016.

Ofcom reminds all broadcasters that great care needs to be taken when broadcasting election-related programming or referendum-related programming. In particular, broadcasters should ensure that they comply with Section Five (Due Impartiality)<sup>1</sup> and Section Six (Elections and Referendums)<sup>2</sup> of the Code, as well as the prohibition of political advertising contained in section 321 of the Communications Act 2003 and reflected as Section 7 of the BCAP Code.

In relation to the elections being contested on 5 May 2016, the rules in Section Six of the Code will apply when the "election period" commences, which will be as follows for the different categories of elections:

- London Assembly and Mayor of London: 21 March 2016.
- Scottish Parliament: 24 March 2016.
- National Assembly for Wales: 6 April 2016.
- Northern Ireland Assembly: 30 March 2016.
- English local (and mayoral) government: 30 March 2016.
- Police and Crime Commissioners: 30 March 2016.

In relation to the EU referendum, the rules in Section Six of the Code will apply when the "referendum period" commences, which will be on 15 April 2016.

Ofcom will consider any breach arising from election-related programming or referendum-related programming to be potentially serious, and will consider taking regulatory action, as appropriate, in such cases, including considering the imposition of a statutory sanction. If a complaint is made which raises a substantive issue concerning due impartiality during the election period or referendum period, and in Ofcom's opinion the complaint, if upheld, might require redress before the election, it will be considered by Ofcom's Election Committee<sup>3</sup>. In such circumstances, it will be necessary for Ofcom to act expeditiously in order to determine the outcome of any such complaints in a proportionate and transparent manner before the election.

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<sup>1</sup> See: <http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/section5.pdf> Ofcom's published Guidance to Section Five of the Code can be found at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section5.pdf>

<sup>2</sup> See: <http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/section6.pdf> Ofcom's published Guidance to Section Six of the Code can be found at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section6.pdf>

<sup>3</sup> See Ofcom Election Committee's Terms of Reference <http://www.ofcom.org.uk/about/how-ofcom-is-run/committees/election-committee/terms-of-reference/>

Given this, Ofcom may expedite any investigation carried out in relation to potential breaches of the impartiality provisions of the Code during the election period or referendum period and broadcasters should be prepared to engage with Ofcom on short timescales.

Broadcasters should note that, following a public Consultation, Ofcom will soon be publishing an updated version of the Ofcom list of larger<sup>4</sup> parties ahead of the elections taking place on 5 May 2016. Broadcasters should consult the list of larger parties to ensure that any election-related programming complies with Section Six of the Code.

For further information about the various elections being contested on 5 May 2016 or the EU Referendum, broadcasters should visit the Electoral Commission website at [www.electoralcommission.org.uk](http://www.electoralcommission.org.uk)

Broadcasters are also reminded that if they would find it helpful to have informal guidance on Sections Five and Six of the Code, they can contact Ofcom directly ([adam.baxter@ofcom.org.uk](mailto:adam.baxter@ofcom.org.uk)).

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<sup>4</sup> We have previously referred to this list as the Ofcom list of 'major parties'. However, as we explained in our recent consultation reviewing Ofcom's list of larger parties for elections taking place on 5 May 2016, we recognise that this terminology did not best express the nature of the list and Ofcom's role. We explained that we had decided to use the term 'larger parties' to reflect more accurately the nature of the parties included on the list and consequently that we would now refer to the list as the "Ofcom list of larger parties". When we publish our updated version of the Ofcom list of larger parties, we will issue amended versions of Section Six of the Code and the published Guidance to Section Six of the Code, to reflect this new terminology.

## Broadcast Standards cases

### In Breach

#### News item

*Aaj Tak, 4 December 2015, 13:00*

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#### Introduction

Aaj Tak is a 24 hour rolling news channel which broadcasts a mixture of news, sports and entertainment news in Hindi. It broadcasts primarily to a south Asian audience both in the UK and internationally. The licence for Aaj Tak is held by TV Today Network Limited (“TVTN” or “the Licensee”).

A complainant alerted Ofcom to an item on ISIL<sup>1</sup>, which is a proscribed terrorist organisation within the UK. The complainant objected to graphic images of beheadings and torture of prisoners being broadcast at a time of day when children could have been watching.

Ofcom translated the content and gave the Licensee an opportunity to comment on the accuracy or otherwise of the translation. TVTN did not raise any issues as to the accuracy of the translation, and we therefore relied on this translation for the purposes of the investigation.

We noted that at approximately 13:00 a studio presenter introduced a report on ISIL that comprised three separate segments lasting approximately 16 minutes in total, which were interspersed with a mixture of commercial breaks and breaking news. The segments featured various video clips and images some of which were described as having been “*released... on to social media*”.

The first segment, which lasted for approximately nine minutes, focused on Russia’s intervention in the Syrian conflict, and in particular highlighted Russian President Vladimir Putin’s anger with ISIL, and its leader Abu Bakr Baghdadi<sup>2</sup> in particular. The studio presenter stood in front of a satirical image of Abu Bakr Baghdadi with hand outstretched standing in front of Vladimir Putin who is seated in a high chair. Vladimir Putin is shown ‘caning’ Abu Bakr Baghdadi. A voiceover stated:

*“Baghdadi, you are really in for it now. You have placed your head in the mouth of a...you will not be spared”.*

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<sup>1</sup> The UK Government’s list of proscribed terrorist organisations dated 30 October 2015 states the following in relation to ISIL: “Islamic State of Iraq and the Levant (ISIL) also known as Dawlat al-Iraq al-Islamiyya, Islamic State of Iraq (ISI), Islamic State of Iraq and Syria (ISIS) and Dawlat al Islamiya fi Iraq wa al Sham (DAISh) and the Islamic State in Iraq and Sham - *Proscribed June 2014*. ISIL is a brutal Sunni Islamist terrorist group active in Iraq and Syria. The group adheres to a global jihadist ideology, following an extreme interpretation of Islam, which is anti-Western and promotes sectarian violence. ISIL aims to establish an Islamic State governed by Sharia law in the region and impose their rule on people using violence and extortion”. See [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/472956/Proscription-update-20151030.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/472956/Proscription-update-20151030.pdf)

<sup>2</sup> Abu Bakr Baghdadi is the self-declared Caliph and leader of ISIL.



The studio presenter then listed an array of Russian aircraft and weaponry being deployed against ISIL whilst footage of missiles being fired and bombs being dropped was broadcast.

The second segment, which lasted approximately three minutes, began at approximately 13:42 with the studio presenter stating:

*“It looks like Baghdadi has not learnt anything from his previous mistakes and continues to make mistakes. This time his henchman have beheaded a Russian spy, and as they have done in the past they have released the video of the beheading on to social media, and to ensure that the message reaches Putin directly, this terrorist does not speak in English or Arabic but in Russian. Naturally Putin’s rage at this act will be terrifying”.*

A report was then broadcast which included various still images of what was referred to as the ISIL “henchman” wielding a knife and standing behind a Russian prisoner (“a Russian spy”) kneeling on the ground and wearing an orange jump suit. There was then broadcast still images of the ISIL fighter pointing the knife and addressing the camera. At this point the programme commentary stated:

*“Wearing military uniform this terrorist is standing with a knife behind this person. According to ISIS this person is a Russian spy, and for this crime the ISIS fighter is about to punish him [knife at throat]. Have another look [at this prisoner] wearing an orange jump suit and on his knees. The terrorist is standing behind his prey with knife in hand. Exceeding all limits of bestiality he beheads this person”.*

While this commentary was being broadcast, a video clip was broadcast showing the ISIL fighter standing behind the Russian prisoner and pulling back the prisoner’s head, and pressing the knife to his neck. Then a video clip was shown twice of the ISIL fighter sawing at the neck of the Russian prisoner with the knife, but with the detail of the knife and the neck blurred. This was followed by a further video clip featuring the prisoner lying on the ground on his front and focusing in close up on his head and neck. The head was shown pulled up to an unnatural angle, but with the wound to the neck being blurred. This was followed by a further clip showing the prisoner’s body lying face-down on the ground with his head lying next to the body. The image of the severed head was blurred in this shot. Soon afterwards this segment finished with a reprisal of the brief image of the ISIL fighter standing behind the Russian prisoner and pulling back the prisoner’s head, and pressing the knife to the prisoner’s neck.

The third segment, which lasted approximately four minutes, began at approximately 13:52. The segment opened with a report of a prisoner who had been accused of spying, and being sentenced to death, by ISIL. The programme commentary stated:

*“Here you can see that in the middle of the desert, a man who has been accused of spying has been hung from a cross. From his condition it is clear that before crucifying him, this man has been mercilessly tortured. He too is wearing an orange jump suit and his head is hanging down, and it is clear that he is half dead. These terrorists bring new methods of torture and killing. Here they take a man into the middle of the desert and crucify him. Then they fire bullets into his arms [sound of shots fired] so that he can die a slow agonising death”.*

While this commentary was being broadcast, a still image was shown of a man dressed in an orange jump suit tied to a frame with his arms outstretched and his

head looking down. This was described by the programme commentary as ISIL “*crucifying*” the man. In the image a man, apparently armed, was shown standing in the foreground facing the crucified man.

The programme commentary then introduced a series of ISIL-related video clips as follows:

*“All these videos have been prepared by these terrorists to sow terror in the minds of people and teach others a lesson:*

We noted several brief video clips and still images were broadcast, which included:

- a clip of five men in orange jump suits standing in a cage which was shown being lowered into a body of water. The footage showed this process until the men’s heads were just disappearing into the water. The clip then jumped to what was apparently the same cage totally immersed in the water with just the top bars showing and air bubbles appearing on the surface of the water;
- a clip of three men in orange jump suits being led to a car by three men in military uniform. The clip then jumped to a long shot of what was apparently the same car, which was then shown exploding; and
- a still image of seven men in orange jump suits kneeling in a line connected by a wire which was tied around each of their necks.

The studio presenter then said:

*“ISIS first releases a beheading video and then a little while later releases another video in which they show caged prisoners being burnt alive, and now they are being even crueller”.*

The programme commentary then stated:

*“So, previously they have been beheading prisoners and sending them to their death, then used children to shoot prisoners, and then placed a prisoner in a cage and burnt him alive and then showed a prisoner digging his own grave, but now they broken all records for bestiality and cruelty. In Iraq and Syria from 21 August 2014 the terrible routine slaughter of individuals has continued apace. In both these countries for the last ten months this mass slaughter has continued. Nobody can count the numbers of those who have died and nobody has any idea when Baghdadis unleashed terrorists and henchmen will be reined in. Today in the scorching heat of the desert finding mass graves has become a daily occurrence, and the question how long will this deadly toll of killings and brutal videos continue? After all how long will the world have to endure the evil of these ISIS terrorists?”*

While this commentary was being broadcast, a range of images and brief video clips were shown, including those already broadcast and described above, but also including the following:

- still images of what were described as “*children shoot[ing] prisoners*”;
- a still image of a man dressed in an orange jump suit what was described as “*digging his own grave*”;

- a blurred still image of an individual being burned alive in a cage<sup>3</sup>; and
- still images of lines of individuals lying face down on the ground apparently being shot by armed men pointing weapons at them.

Ofcom considered the above content raised issues warranting investigation under the following rules of the Code:

Rule 1.3: “Children must also be protected by appropriate scheduling from material that is unsuitable for them”.

Rule 2.3: “In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context...”.

Ofcom therefore asked the TVTN how the programme complied with these rules.

### **Response**

TVTN stated that it had made “every effort to ensure that disturbing images [were] appropriately blurred” but said it would “exercise greater caution while reporting on similar matters in the future”. The Licensee stated the purpose of this content was not to breach the Code but “to bring to our viewers’ attention (including the attention of children who may be influenced in some way to join terrorist activities) of the barbaric nature of offences committed by...ISIS and the manner in which terrorism has no religion and all it does is spread hate and fear”. Therefore, in TVTN’s the content was “well within...Rule 2.3 of the Code”.

In commenting on Ofcom’s Preliminary View in this case (that there were breaches of Rules 1.3 and 2.3), the Licensee however did not continue to seek to defend the broadcast of this material. Instead TVTN stated that it was “never our intention to hurt the sentiments of our viewers”, and that the report was “intended to highlight only the inhuman face of ISIS terrorists”.

### **Decision**

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including that “persons under the age of eighteen are protected” and “generally accepted standards are applied so as to provide adequate protection for members of the public from the inclusion of offensive and harmful material”. These duties are reflected in Sections One and Two of the Code.

In reaching this Decision, Ofcom has taken account of the audience’s and broadcaster’s right to freedom of expression set out in Article 10 of the European Convention on Human Rights (“ECHR”).

The Code contains no absolute prohibition on distressing or graphic content as there may be occasions where the broadcast of such material is justified. Ofcom believes that, taking account of the right to freedom of expression, it is important that news and current affairs programmes are able to report freely on events which the

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<sup>3</sup> Ofcom understands the individual concerned was the captured Jordanian pilot Moaz al Kasabeth (see <http://www.bbc.co.uk/news/world-middle-east-31121160>).

broadcasters consider to be in the public interest. However, in doing so they must comply with the Code. Therefore, when including offensive or distressing content in the news before the watershed they must ensure that as necessary or appropriate such material must be appropriately scheduled or justified by the context.

### Rule 1.3

Rule 1.3 requires that children must be protected by appropriate scheduling from material that is unsuitable for them. Appropriate scheduling is judged by a number of factors including: the nature of the content; the likely number and age range of the audience; the start and finish time of the programme; and, likely audience expectations and the availability of children to view taking into account school time, weekend and holidays.

When applying Rule 1.3 to protect children from unsuitable material, Ofcom must have regard to the need for the rule to be applied in a manner that best guarantees an appropriate level of freedom of expression. For example, in reaching decisions about whether material unsuitable for children is “appropriately scheduled”, we must take into account the proportionality of potentially restricting the broadcast of such material to transmission post-watershed. With television news and current affairs programmes likely to feature subjects and material that may well be challenging or upsetting, we must weigh up whether it would be a disproportionate restriction of freedom of expression to limit the broadcast of such content to post-watershed slots. Therefore, it is important that broadcast journalists can report the news of what has occurred as freely as possible.

It is of course open to carers and parents to restrict the watching of programming that they consider unsuitable for children in their care, particularly with regard to programming broadcast before the 9pm watershed that may contain material which is potentially distressing for them. In Ofcom’s view, in this case, appropriate warnings would have been of particular importance so that the audience would have been alerted to the potentially distressing images, and parents and carers given the opportunity to restrict children’s viewing where necessary.

We first considered whether the programme contained material unsuitable for children.

We noted that the Licensee broadcast three linked segments that focused on the activities of the terrorist organisation, ISIL. In particular, the second and third of these segments featured a number of video clips and still images that were reported as having been “*released... on to social media*”. In our view, the various clips and images, as detailed in the Introduction showed details, at times referred to in the programme commentary, of numerous acts of violence carried out by ISIL towards individuals that they had captured.

We noted the Licensee’s comment that “every effort was made to ensure that disturbing images are appropriately blurred”. However, although some details of the content had been blurred, we considered that it would have still be apparent to viewers what was going on. For example, we considered that the repeated broadcast of the video clip of the ISIL fighter sawing at the neck of his Russian prisoner with a knife (in the second segment) would have been readily discernible to viewers, and therefore clearly capable of causing distress to children. This is because, it would have been apparent to viewers and particularly children that they were viewing the last moments of the victim’s life. We considered that the level of potential distress would have been increased by the fact that at this point in the programme a blurred

video clip was broadcast, albeit briefly, which showed the Russian prisoner's body lying face-down on the ground with his head lying next to the body. Although, the image of the head was blurred we considered it would have been possible for viewers, including any children in the audience, to have identified what was being shown.

A contributory factor in causing distress to children was that at different times in the programme, the programme commentary was describing what was being shown in the various video clips and images. For example, during the video clip showing the ISIL fighter sawing at the neck of his Russian prisoner with a knife (in the second segment), the programme commentary stated:

*"Have another look [at this prisoner] wearing an orange jump suit and on his knees. The terrorist standing behind his prey with knife in hand. Exceeding all limits of bestiality [sawing motion on prisoner's neck] he beheads this person".*

We considered the level of descriptive detail provided would have helped any children watching to identify what was being shown in the blurred video clip, and, as a consequence, would have been upsetting for such viewers.

Another example, included in the third segment, was the image of another apparent ISIL prisoner being shown tied to a frame with his arms outstretched. The programme commentary described in detail what happened to this captive:

*"Here you can see that in the middle of the desert, a man who has been accused of spying has been hung from a cross. From his condition it is clear that before crucifying him, this man has been mercilessly tortured. He too is wearing an orange jump suit and his head is hanging down, and it is clear that he is half dead. These terrorists bring new methods of torture and killing. Here they take a man into the middle of the desert and crucify him. Then they fire bullets into his arms [sound of shots fired] so that he can die a slow agonising death".*

We considered the combination of the image and the description of a man having been tortured, crucified and shot would have had the potential to be upsetting to children.

In addition, we considered that the inappropriate nature of the video clips and images shown in the programme was exacerbated by a number of them being repeated several times during the programme.

In Ofcom's view the various images and descriptions of extreme violence were potentially very distressing for children, and therefore unsuitable for such viewers.

We next considered whether the news report was appropriately scheduled.

Ofcom noted that the news report was broadcast at 13:00 on a Friday during school term time. In addition, Aaj Tak is a rolling news Hindi channel which is not primarily aimed at children, and we accept that the likely number of children would have been limited. Nevertheless, given the potentially distressing nature of this content, we were concerned that it was broadcast at a time of day when children could have been present and able to view this content.

Ofcom also noted that there was no pre-broadcast warning of the graphic content. In this regard, Ofcom's published Guidance<sup>4</sup> on Section One of the Code states:

"It is accepted that it is in the public interest that, in certain circumstances, news programmes may show material which is stronger than may be expected pre-watershed in other programmes as long as clear information is given in advance so that adults may regulate the viewing of children".

We considered that due to the lack of any warning alerting them to this content, viewers (and particularly parents and carers) had no advance warning of the violent and graphic nature of the material broadcast. Therefore, in our view the distress to children would have been compounded by the lack of any prior warning. We acknowledge one of the Licensee's stated intentions for broadcasting this content was to draw to "the attention of children who may be influenced in some way to join terrorist activities" the "barbaric nature of offences committed by...ISIS and the manner in which terrorism has no religion and all it does is spread hate and fear". Nevertheless taking all the above factors into account, we considered the content was not appropriately scheduled, and Rule 1.3 was breached.

### Rule 2.3

Rule 2.3 requires that in applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context..."

Under Rule 2.3, broadcasters must ensure that potentially offensive material is justified by its context. Context is assessed by reference to a range of factors including: the editorial content of the programme; the service on which the material was broadcast; the degree of offence; the effect of the material on viewers who might come across it unawares; warnings; and, likely audience expectations.

We first considered whether the programme had the potential to cause offence. As detailed above, the programme featured various video clips and images and accompanying commentary detailing various acts of extreme violence committed by ISIL against individuals in their captivity. We considered that the level of detail provided with would have had the potential to be extremely offensive to viewers. For example, the images, albeit blurred (in the second segment) showing an ISIL fighter attempting to decapitate a Russian prisoner would have been particularly offensive and upsetting. So too would have been the video clip of five men in orange jump suits standing in a cage which was shown being lowered into a body of water. Although the footage, in this example, jumped from showing the men's heads just as they disappeared into the water to what was apparently the same cage totally immersed in the water, we noted that in the latter shot, the top bars of the cage were showing and air bubbles were appearing on the surface. In our view, viewers would have been likely to have construed these bubbles as the last breaths of the five incarcerated men before drowning. We also considered that the cumulative effect of the various clips and images featuring various acts of violence and torture, would have been likely to have heightened the level of offence in this case. Ofcom therefore considered that the material was capable of causing considerable offence to viewers in general.

We therefore went on to consider whether the broadcast of such images was justified by the context.

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<sup>4</sup> See <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section1.pdf>

Ofcom acknowledges that Aaj Tak is a rolling news channel which typically broadcasts news and current affairs programmes with greater appeal to adults. Ofcom underlines that in line with freedom of expression, it is important for news and current affairs programmes to be able to report freely on events that they consider in the public interest. In addition, Aaj Tak's viewers (who would be predominantly adult) would have an expectation that news and current affairs content will cover themes of a potentially disturbing or distressing nature. In this regard, we recognise that news broadcasters have a legitimate expectation to broadcast sensitive and controversial material. This may at times involve images and footage that are of a distressing and shocking nature. However, broadcasters do not have unlimited latitude in what they may broadcast, and must comply with the Code.

We considered that events in the Middle East and the rise of ISIL would be legitimate areas for a broadcaster to cover, and that such coverage could entail broadcast of material that would be both challenging and distressing to viewers. In this regard, it has been widely reported that ISIL has undertaken many brutally violent acts, including beheadings and has made available video clips of these acts on social media platforms. It is therefore unsurprising that broadcasters would want to comment on and refer to such content in their output. However, noting the graphic detail of much of the audio-visual content being produced by ISIL, broadcasters must take extreme care in what images they broadcast, especially pre-watershed.

Ofcom was of the view that to show this material on this channel at this time, in the manner it was broadcast, was not consistent with likely expectation of UK audiences. We considered there was some content that may have been appropriate to broadcast pre-watershed, as long as viewers were alerted to the nature of this content. However, we noted that no such warning was provided. We therefore considered the lack of any warning resulted in viewers having no advance information about the extreme nature of the potentially distressing images that were broadcast.

We were particularly concerned about the video clip featuring the ISIL fighter trying to decapitate a Russian prisoner. As mentioned above in relation to Rule 1.3, we noted the Licensee's comment that "every effort was made to ensure that disturbing images are appropriately blurred". However, although, some details of the content had been blurred, we considered that it would still have been apparent to viewers that, for example, the ISIL fighter was sawing at the neck of his Russian prisoner with a knife. In addition, this was followed by video clips which, albeit briefly and blurred, showed the Russian prisoner's head being pulled up to an unnatural angle, but with the wound to the neck being blurred, and the prisoner's body lying face-down on the ground with his head lying next to the body. In our view, the content of these various blurred clips featuring the Russian prisoner, although blurred, were so offensive that, even with a pre-broadcast warning, they would have been unsuitable for broadcast pre-watershed.

In reaching its Decision Ofcom took into account the Licensee's stated intention for broadcasting this content was to portray the "barbaric nature of offences committed by...ISIS and the manner in which terrorism has no religion and all it does is spread hate and fear". Ofcom also noted that the Licensee "will make sure to exercise greater caution while reporting on similar matters in the matter". However, for all the above reasons it was not justified by the context, and was in breach of Rule 2.3.

### **Breaches of Rules 1.3 and 2.3**

## In Breach

### Editorial content relating to the 2015 Nigerian Presidential election

*BEN TV, 7 and 11 February 2015, 20:00<sup>1</sup>*

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#### Introduction

BEN TV is an entertainment and news channel that broadcasts to Western Europe and parts of Asia and Northern Africa. The licence for this service is held by Greener Technology Limited (“GTL” or “the Licensee”).

A complainant drew Ofcom’s attention to what they considered to be political advertisements placed on BEN TV on 7 and 11 February 2015<sup>2</sup> that related to the 2015 Nigerian Presidential election<sup>3</sup> taking place on 28 March 2015. Ofcom therefore obtained recordings of this output.

On assessing this content, we noted that on 7 February 2015 at 20:00 BEN TV broadcast an edition of the news programme *Weekend File*, which had a duration of about 90 minutes. In addition, on 11 February 2015 at 20:00, BEN TV broadcast an edition of the news programme, *NTA News Extra*, which had a similar duration.

Certain items in this content falling into two categories caused Ofcom concern: those broadcast during advertising breaks, and those that were broadcast during news programmes. For the reasons explained further below, none of these items were advertisements but editorial content. All the content referred to below was in English except where otherwise indicated.

#### 1) Editorial content broadcast during advertising breaks

A number of items appearing in advertising breaks expressed electoral support for the then President, Goodluck Jonathan and/or the PDP (in the Presidential election taking place on 28 March 2015 and a gubernatorial election taking place on 11 April 2015), or opposition to the Presidential candidacy of General Muhammadu Buhari.

- In the advertising breaks in and around *Weekend File*, 7 February 2015 at 20:00

a) An item about one minute long commenced with a caption stating: “*Nigerians you have to see this!*”

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<sup>1</sup> This case was delayed by a separate assessment by Ofcom of whether GTL was in control of this service. We concluded that it did.

<sup>2</sup> On investigation, the content broadcast on 7 and 11 February 2015 did not contain any political advertisements. However, Ofcom did investigate political advertisements broadcast on BEN TV- see page 35.

<sup>3</sup> This election was principally contested between the then incumbent, President Goodluck Jonathan of the People’s Democratic Party (“PDP”), and the main challenger, General Muhammadu Buhari of the All Progressives Congress (“APC”). General Buhari was the eventual winner. On 28 March 2015 there were elections to the Nigerian National Assembly. In addition, on 11 April 2015 there were also gubernatorial elections to the various federal states in Nigeria.



There was then a series of photographs over which there was the following commentary:

*“Gloria Iyama, just 11. She and her sister, Patience, two daughters from the proud, hard-working woman of Nigeria, a single mother, Gladys Iyama, taken and...”.*

A caption stated:

*“First woman killed by firing squad in Nigeria”.*

The commentary continued as follows:

*“...unfairly tried by General Buhari, heartlessly put to death. Two girls orphaned by a man who knows no mercy. General Buhari took the mother, took her voice. Make your voice heard. On March 28<sup>th</sup>, vote no to dictatorship, no to the man who shows no mercy. Vote for justice and compassion. Vote Goodluck Ebele Jonathan”.*

- b) An item about one minute long featured footage of Goodluck Jonathan campaigning and carrying out various political activities including meeting with world leaders, while the following lyrics were sung in English and Pidgin<sup>4</sup>:

*“Jonathan you are the man o!  
You are the one.  
Jonathan you are the man o!  
You are the one.  
Goodluck Jonathan you are the man o!  
You are the one.  
Jonathan you are the man o!  
You are the one.  
Fast! Fast! Fast!  
Fast! Fast! Fast!  
Fast! Fast! Fast!  
This is a call for everyone!  
This is a call to one and all.  
It is a call to a better life to all.  
It is a call to a better life to all.  
Better life for mama, papa.  
Better life for brother, sister.  
Better life for the child o!  
Make should all answer the call.  
Jonathan you are the man o!  
You are the one.  
Jonathan you are the man o!  
You are the one.  
Goodluck Jonathan you are the man o!  
You are the one”.*

The item ended with the following caption stating: *“Vote GOODLUCK EBELE JONATHAN”* accompanied by a photograph of Goodluck Jonathan and a PDP logo.

- c) An item about 30 seconds long featured footage of various workers from different industries referring to their industries as follows:

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<sup>4</sup> Ofcom obtained an independent translation of the Pidgin lyrics into English.

*“Under Goodluck Jonathan, electricity output has doubled”.*

*“Under Goodluck Ebele Jonathan, over 20,000 kilometres of new roads have been built”.*

*“Under Goodluck, we have laid the foundation for a better future”.*

*“Under Goodluck Jonathan, the railways have been upgraded, and now two million more Nigerians are travelling by the rail”.*

*“Under Goodluck, Nigeria is going forwards”.*

There were then the following captions:

*“ECONOMY FORWARDS”.*

*“POWER FORWARDS”.*

*“INFRASTRUCTURE FORWARDS”.*

*“EDUCATION FORWARDS”.*

*“HEALTH FORWARDS”.*

*“JOBS FORWARDS”.*

*“LET’S KEEP GOING FORWARDS. Vote Goodluck”.*

- d) An item about one minute long included footage depicting scenes from contemporary Nigeria with the following commentary:

*“After years of slumber, Nigeria is on the move again. Our agric. sector is flourishing again. Transport systems are being upgraded, and young people are reaching heights they previously could only dream about. Now that we have retained our place as Africa’s largest economy, surely we are headed in the right direction? For this man, whose leadership these milestones he has achieved, it is only the beginning. The beginning of bigger, life-changing things to come. Vote to finish what we have started Nigeria. Vote Goodluck Ebele Jonathan in 2015 and live to see the Nigeria we always dreamed about”.*

- e) An item about one minute long consisted of footage of an individual singing the following lyrics whilst surrounded by a group of other individuals who sang selected lyrics during the item:

*“From the north to the south.  
From the east to the west.  
There’s a sound all around.  
A mighty voice to be heard.  
Everybody’s crying out.  
[Other voices: “Good, Goodluck”].  
Can you hear the mighty shout?  
[Other voices: “Good, Goodluck”].  
It’s a call from the fatherland.  
From the man who is right, Goodluck Jonathan”.*

The item ended with various photographs of Goodluck Jonathan.

- f) An item about one minute long included various pieces of footage of Goodluck Jonathan campaigning and carrying out various political activities, while various lyrics were sung:

*“Goodluck Jonathan...Vote Goodluck. Vote PDP 2015. This message was brought to you by the Media and Publicity Directorate of the PDP Campaign”.*

- g) An item about one minute long was broadcast, which focused on reported violence by supporters of General Muhammadu Buhari in the 2011<sup>5</sup> Presidential Election. During this item various pieces of footage illustrated the points made in the item:

- it was stated in commentary that General Buhari had *“incited”* the crowd at a campaign rally in 2011 by encouraging them to vote in the 2011 Presidential Election and allegedly said: *“Anybody who stops you, kill them”*;
- the commentary went on to state that: *“the damage was massive and the pains were unbearable...the outcries and lamentations of the victims, especially Christians, who were persecuted and shattered as a result of violence that was unleashed on them by Buhari supporters...Even Muslims who were thought to be sympathisers were not spared, as they also suffered heavy casualties due to the violence of Buhari’s angry supporters;*
- it was alleged that supporters of General Buhari had caused the deaths of ten individuals in 2011 and the commentary said: *“Yet, General Buhari has not made a statement to condemn or reach out to the families of these heroes of our democracy. General Buhari is such a bad loser”*; and
- it was stated that Goodluck Jonathan and General Buhari had signed a peace accord ahead of the 2015 Presidential Election, but that supporters of General Buhari had subsequently committed acts of violence.

At the end of the item the commentary stated: *“We cannot forget the ugly episodes of the 2011 post-election violence. But, even as we put it behind us, we need to draw the attention of Nigerians to the fact that General Buhari’s supporters are still threatening to kill, maim and destroy should they lose the elections. This desperation is condemnable. Nigerians will not be blackmailed or herded to vote for General Buhari who still has the blood...on his hands...This message is brought to you by the Initiative for Peaceful Elections. Vote wisely”.*

- [In the advertising breaks in and around NTA News Extra, 11 February 2015 at 20:00](#)

- h) There was a repeat of item (a) above.

- i) An item about one minute long commenced with a caption stating:

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<sup>5</sup> General Buhari had also (together with Goodluck Jonathan) contested the 2011 Nigerian Presidential election.

*“After Nigerians rejected him in the 2003, 2007 and 2011 Presidential elections, the General [i.e. General Buhari] broke down and wept. He vowed NEVER to contest AGAIN”.*

Footage of General Buhari followed:

*“This campaign is a sad and last one for me, since after it I will not present myself again for election to the office of President”.*

There was then the following caption: *“But old failed ambitions never die”.*

A montage of several photographs of Goodluck Jonathan were shown, and the item ended with the following caption:

*“THE SAME NIGERIANS ARE WAITING FOR HIM”.*

- j) An item about 40 seconds long featured Umar Mohammed Nasko, the PDP Gubernatorial candidate for Niger State. This item began with a photograph identified with the caption: *“Umar Mohammed Nasko”.*

Umar Mohammed Nasko was shown speaking to camera and saying:

*“We’re living in a world that is fast changing. We’re living in a world that is changing in terms of information and communication technology. And at a time like this only a vibrant mind that is informed and that is energetic can take Niger State to the next level. I believe I am the right person for that job. I pledge to live up to the aspirations and expectations of the youth, whilst still the trust and confidence of the elder generation. I am Umar Mohammed Nasko. I am running for the office of Governor of Niger State”.*

There was then the following by caption:

*“Niger State PDP. UMAR NASKO GUBERNATORIAL CAMPAIGN ORGANIZATION”.*

Throughout this item the PDP logo was shown.

- k) An item about 50 seconds long commenced with the following caption:

*“DAMS FOR SOCIAL-ECONOMIC TRANSFORMATION”.*

There were then various still images of Nigerian hydroelectric dams listing their output in terms of water discharge and electrical capacity, followed by the captions:

*“OVER 200 Dams. 34 Billion Cubic Meters of Water for Multipurpose Use”.*

*“WATER SUPPLY & SANITATION”.*

*“HYDROELECTRICITY”.*

*“FLOOD CONTROL”.*

*“FOOD SECURITY”.*

*“JOB CREATION”.*

“BOOSTING COMMERCIAL ACTIVITIES”.

“TOURISM DEVELOPMENT”.

The item ended with the following caption: “*Transforming lives...Vote Continuity 2015*”, which was accompanied by a photograph of Goodluck Jonathan and the PDP logo.

- l) An item about one minute long consisted of the following commentary while still images were shown illustrating some of the themes referred to in the commentary:

*“Goodluck Ebele Jonathan is the most disability-friendly President that Nigeria has ever had. In sports, he was the first President to appreciate paralympians after their golden exploits at the 2012 Paralympics, with a dinner, national honours, and monetary awards. He economically empowered people with disabilities with a waiver of mass employment into the Federal Civil Service, ensured their full integration into: the Micro Small and Medium Industries Development Fund; National Information Technology Development Agency; where programmes for them are included. Politically, he enabled their full participation in the last National Confab. He has assured the passage of the Disabilities Rights Bill, recently sent to him. Goodluck Jonathan has proved that disability is not inability. To the 24 million people with disabilities in Nigeria [inaudible] to vote Goodluck...to ensure a better life for us all”.*

- m) There was a repeat of item (e) above.

Ofcom was initially concerned that items (1)(a) to (m) above were potentially in breach of the ban on political advertising contained within the Communications Act 2003 (“the Act”). We therefore sought the Licensee’s comments on the terms under which the items had been included in its schedule. The Licensee informed us that these items had not been transmitted in return for payment or other valuable consideration. Ofcom therefore concluded that these items should not be regulated as advertising but as programme material and they were therefore subject to the Code.

As these items dealt with the Nigerian Presidential election and a related gubernatorial election taking place in March and April 2015, while the campaign<sup>6</sup> for those elections were on-going, Rule 6.1 of the Code was applicable. Rule 6.1 states that:

“The rules in Section Five, in particular the rules relating to matters of major political or industrial controversy and major matters relating to current public policy, apply to the coverage of elections and referendums.”

Ofcom considered the 2015 Nigerian Presidential Election and other related elections to be matters of major political or industrial controversy and major matters relating to current public policy.

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<sup>6</sup> Under section 30(1) of the Nigerian Electoral Act 2010 (as amended) (“the 2010 Act”) the Notice of election for the various Nigerian elections was published on 1 October 2014. In addition, under section 46 of the 2010 Act, the publication of the Notice of Poll took place on 28 January 2015 (see <http://www.inecnigeria.org/?inecevents=time-table-and-schedule-of-activities-for-general-elections-2015-2>). Originally the various elections were due to take place on 14 February 2015, but on 8 February 2015 the Independent National Electoral Commission of Nigeria announced the postponement of the various elections to 28 March and 11 April 2015.

Ofcom therefore considered this material raised issues warranting investigation under Rule 6.1 and under the following rules:

Rule 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 programme or in clearly linked and timely programmes”.

Rule 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”.

We also considered the content raised issues warranting investigation under Rule 9.2, which states:

“Broadcasters must ensure that editorial content is distinct from advertising”.

We asked the Licensee to provide comments on how the above content complied with these rules.

## 2) News content

The news programme *Weekend File* broadcast on 7 February 2015 and the news programme *NTA News Extra* broadcast 11 February 2015 contained six items that focused on policy initiatives by the administration of Goodluck Jonathan or otherwise reported on various campaigning activities relating to the re-election campaign of Goodluck Jonathan.

- *Weekend File*, 7 February 2015 at 20:00

a) In this news item, the programme reported on Goodluck Jonathan’s measures to improve agriculture, with the newsreader saying the following:

*“The Federal Government’s policy on online procurement of farm inputs has been applauded as the best tools promoting agriculture and food security in the country. A cross-section of farmers in Adamawa State said this at the...distribution of improved seeds for dry season farming in the southern zone of the state”.*

A reporter than said:

*“Worried by the sharp practices associated with the old method of assessing farm imports and implements by farmers in the country, President Goodluck Jonathan last year resolved to adapt new measures to ease the difficulties and enhance guaranteed and effective deliveries to farmers with a view to boosting both production and profitability of farming practice. Various measures include the introduction of farmers’ registration centres and redemption centres where all registered farmers can have access to all their farming requirements...the Adamawa Commissioner for Agriculture Patricia Yakubu...described the exercise as successful and fruitful”.*

Usman Bapullo Ribadu, Chairman Agro-allied Dealers Association, Adamawa State said he hoped *“the Federal Government and State Government...continue with this kind of programme”*.

- *NTA News Extra, 11 February 2015 at 20:00*

In this news programme, there were the following five news items:

- b) The programme reported on various pieces of legislation relating to railways and roads in Nigeria being approved by Goodluck Jonathan’s administration. The newsreader introduced the item by saying:

*“The Federal Executive Council have approved eight draft Bills for the transport sector as part of efforts of the present administration to continue to strengthen the various sectors of the economy”*.

This news item then included statements from the following members of Goodluck Jonathan’s administration and/or the PDP about these pieces of legislation: Idris Umar, Minister of Transport; Mike Onolememen, Minister of Work; Olusegun Aganga, Minister of Industry, Trade and Investment; Reuben Abati, Presidential Spokesman; Laurentia Mallam, Minister of Environment; Akinwumi Adesina, Minister for Agriculture; and Idris Wada, the PDP Governor of Kogi State.

Idris Umar, Minister of Transport:

*“The idea again is to enable the private sector to have full participation not just in rail operation but even in ownership of railway tracks”*.

Mike Onolememen, Minister of Work:

*“It has taken us about 20 years, but we are glad that it is happening. It is the right thing to do, so as it is with these two Bills approved by the Federal Council today, it means that road institutions in Nigeria now align with international best practice...with better road development, better road management, better road rehabilitation and better road material”*.

Olusegun Aganga, Minister of Industry said:

*“As the priority economic Bills of the Federal Government. And what it does essentially is to open the whole sector of the economy, the road sector of the economy, the transport sector of the economy to the private sector”*.

- c) The programme reported on an announcement by Goodluck Jonathan’s administration about tackling vandalism in Nigeria. The newsreader said:

*“The Federal Government has pledged commitment to ensure adequate power supply for tackling the acts of vandalism in the country. At a special Ministerial briefing in Abuja, Minister of Power, Professor Chinedu Nebo, said that in collaboration with security agencies, the Ministry will ensure the remote monitoring of facilities to prevent vandalism of power infrastructure. He said vandalism is affecting not only electricity supply but other aspects of the economy”*.

This news item included a statement by Professor Chinedu Nebo, Minister of Power:

*“Gas infrastructure vandalism and crude oil theft are the causes of significant economic loss to the Nigerian nation, as well as the cost, major cost, of insufficient power supply. But again, one measure is we must do other things than just gas to power. And this government is working hard: renewable energy coal, wind power etcetera, etcetera”*

The newsreader then said:

*“The Minister, who commended President Jonathan’s commitment for efficient power supply, appealed to Nigerians to join in the fight against vandalism”.*

- d) The programme reported on the commencement of a campaign to persuade young people to support the re-election of Goodluck Jonathan, with the newsreader saying the following:

*“Thousands of youths commenced a nationwide campaign to drum support for President Goodluck Jonathan’s second term bid. To this end a secretariat has been inaugurated in Bayelsa State to serve as a centre for unity and consultation to realise their goals”.*

A reporter said:

*“These youths are from different states across the country, that are unified by one ambition, and that is to return President Goodluck Jonathan to a second term in office”.*

This news item also included the following further statements:

George Turnah, National President, Jonathan Youth Vanguard:

*“This secretariat, which brings together every youth of Bayelsa State that identifies or shares with the general campaign”.*

Reporter:

*“This event also attracted the attention of several youths from the opposition party, All Progressives Congress, who defected to the People’s Democratic Party...The group demonstrated their love for the President by coming out en masse at the rally”.*

George Turnah:

*“We are grateful to all the youths that are here. The crowd we have here will of course translate to votes”.*

Nelson Abali, Jonathan Youth Vanguard:

*“We’ll mobilise all youths in Bayelsa and around the country at large to show him [Goodluck Jonathan] love by voting for him massively”.*

- e) The programme reported on The National Leadership of Commercial Tricycle and Motorcycle Owners and Riders Association declaring its support for the re-election of President Jonathan. In his report the correspondent said:

*“The President of the National Commercial Tricycle and Motorcycle Owners and Riders Association says the decision to throw their weight behind President Jonathan*



*was made after a series of meetings at local, state, zonal and national levels. They have agreed, he says, to support the President's re-election so that he can continue with his numerous transformative programmes... Responding, former Minister of State for Defence, [Musiliu Obanikoro] says the President is a unifier and decent, law-abiding Nigerian, whose re-election deserves to be supported".*

This news item also included a statement by Musiliu Obanikoro, former Minister of State for Defence in support of Goodluck Jonathan.

- f) The programme reported on a campaign event by the PDP gubernatorial candidate for Rivers State, as follows:

*"Rivers State, where the people of the state have been assured of the construction of new roads in the rural areas of the state. The Rivers State PDP governor candidate, Nyesom Wike made the promise in the PDP rally..."*

A reporter said:

*"Nyesom Wike promised the people that if elected he will galvanise the industrial sector of the state... The governorship candidate promised to fight corruption in the state civil service. Different speakers mounted the podium to compliment Nyesom Wike's promises to the Rivers people".*

This news item also included statements by: Nyesom Wike, PDP gubernatorial candidate for Rivers State Prince Uche Secondus, Deputy National Chairman of the PDP; and Celestine Omehia, former governor of Rivers State. These statements all expressed support in some form for the PDP.

As with the items under (1) above, Ofcom considered items at (2)(a) to (f) above raised issues warranting investigation under Rules 5.11, 5.12 and 6.1.

We also considered the content under 2(a) to (f) above raised issues warranting investigation under Rule 5.1. This states:

"News, in whatever form, must be reported with due accuracy and presented with due impartiality".

We therefore asked the Licensee to provide comments on how the above content complied with these rules.

## **Response**

The Licensee said that the broadcast content Ofcom asked GTL to comment on was a live relay of the Nigerian Television channel NTAI. It added that, although NTAI has an Ofcom broadcast licence, NTAI "could not independently broadcast" and therefore GTL "has an agreement" that NTAI "is relayed live by BEN Television". The Licensee said however that after being contacted by Ofcom about the current case it had suspended all live relays of NTAI on BEN TV.

The Licensee said that: "We never thought [NTAI] could show unbalanced programmes or News [because] NTAI...has BBC status in Nigeria".

GTL said that this content had "no input by or from BEN Television" and that BEN TV had been broadcasting NTAI content "for many years" without any complaints being

lodged with Ofcom. In addition, in the news content, the Licensee said that the reporters and interviewees “were merely making remarks to show how far Nigeria has come as a nation bearing in mind it had its 50<sup>th</sup> celebrations not long ago. The comments were highlighting what the government had done which could be on any nation by the sitting government”. It added that: “Many nations do this during news programmes and considering we bridge the gap between the African continent and Europe the diaspora’s need to be informed to what is happening back home”. GTL also argued as “both candidates were featured we see no breach of” Ofcom’s rules as having occurred.

The Licensee commented that it relies “on selling airtime to survive...as we do not get any funding or percentage from licensing fees which is paid [by] all [the] millions watching televisions as [the] TV licence [and a] high percentage from the fees comes from BME and Ethnic viewers”. In conclusion, GTL said that it is has a “little team” who are “very mindful” of the Code and who try ensure that BEN TV’s output is “balance[ed]...even where it may be very challenging to our resources and production”.

## **Decision**

Under the Act, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including that: news included in television and radio services is presented with due impartiality; and that the special impartiality requirements set out in section 320 of the Act are complied with. These standards are contained in Section Five of the Code. Broadcasters are required to ensure that the impartiality requirements of the Act are complied with, including that due impartiality is preserved on matters of political or industrial controversy and matters relating to current public policy (see above for the specific provisions).

Ofcom also has a statutory duty under the Act to ensure that “the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with”. Articles 20 and 23 of the EU Audiovisual Media Services Directive (“the AVMS Directive”) set out strict limits on the amount and scheduling of television advertising. The AVMS Directive also requires that advertising is distinguishable from other parts of the programme service. This is to prevent viewers being confused or misled about the status and purpose of the material they are watching and to protect them from surreptitious advertising. It also prevents editorial content from being used to circumvent the restrictions on advertising minutage. The AVMS Directive requirements are reflected in, among other Code rules, Rule 9.2, which requires that editorial content is kept distinct from advertising.

When applying the requirement to preserve due impartiality, Ofcom must take into account Article 10 of the European Convention on Human Rights. This provides for the broadcaster’s and audience’s right to freedom of expression, which encompasses the right to hold opinions and to receive and impart information and ideas without interference by public authority. The broadcaster’s right to freedom of expression is not absolute. In carrying out its duties, Ofcom must balance the right to freedom of expression on one hand against the requirement in the Code to preserve “due impartiality” on matters relating to political or industrial controversy or matters relating to current public policy.

Ofcom recognises that Section Five of the Code, which sets out how due impartiality must be preserved, acts to limit, to some extent, freedom of expression. This is because its application necessarily requires broadcasters to ensure that neither side of a debate relating to matters of political or industrial controversy and matters relating to current public policy is unduly favoured. Therefore, while any Ofcom licensee should have the freedom to discuss any controversial subject or include particular points of view in its programming, in doing so broadcasters must always comply with the Code. Further, in reaching decisions concerning due impartiality, Ofcom underlines that the broadcasting of statements relating to candidates contesting non-UK elections is not, in itself, a breach of the rules on due impartiality. However, depending on the specific circumstances of any particular case, it may be necessary to reflect alternative viewpoints and/or provide context in an appropriate way to ensure that Section Five is complied with.

In addition, in judging whether due impartiality has been preserved in any particular case, the Code makes clear that the term “due” means adequate or appropriate to the subject matter. “Due impartiality” does not mean an equal division of time has to be given to every view, or that every argument and every facet of the argument has to be represented. Due impartiality may be preserved in a number of ways and it is an editorial decision for the broadcaster as to how it ensures due impartiality is maintained.

Ofcom considered the two sets of content broadcast by BEN TV in this case.

#### 1) Editorial content broadcast during advertising breaks

Ofcom assessed first the various items set out in (1)(a) to (m) in the Introduction against Rule 6.1 (with reference to Rules 5.11 and 5.12) and Rule 9.2 of the Code.

##### Rule 6.1 (with reference to Rules 5.11 and 5.12)

Rule 6.1 states that:

“The rules in Section Five, in particular the rules relating to matters of major political or industrial controversy and major matters relating to current public policy, apply to the coverage of elections and referendums”.

Rule 5.11 states that:

“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...in each programme or in clearly linked and timely programmes”.

Rule 5.12 states that:

“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”.

Ofcom first considered whether the requirements of Section Five and Section Six of the Code were applicable to this broadcast material: that is, whether the various pieces of content (1)(a) to (m) listed in the Introduction concerned major matters of

political or industrial controversy or a matter relating to current public policy, and whether the rules relating to elections applied in this case.

The 2015 Nigerian Presidential election and related elections had been announced<sup>7</sup> prior to the broadcasts on 7 and 11 February 2015, and polling day was on 28 March 2015<sup>8</sup>. Therefore, we considered that these items were broadcast during the election campaign for those particular elections.

The effect of Rule 6.1 is to ensure broadcasters must preserve due impartiality in their coverage of elections and referendums. This is to help ensure that elections are conducted fairly, and that no unfair advantage is given to particular candidates through promotion in the broadcast media, irrespective of whether the candidate can be shown to have actually benefited in practice. Rule 6.1 applies to elections both inside and outside the UK, and requires broadcasters' coverage of elections to comply with the rules in Section Five, and in particular the rules relating to matters of major political or industrial controversy and major matters relating to current public policy.

Just because editorial content refers to political organisations or political figures does not necessarily mean that the rules in Sections Five and Six are applicable. Ofcom takes into account the manner in which political issues are dealt with, and how they are presented within programming. We noted in this case that all the items we investigated clearly stated support for candidates (and in particular the Presidential candidate Goodluck Jonathan) of one political party, the PDP, contesting the March 2015 Nigerian elections. Some of the items also voiced clear criticism of Goodluck Jonathan's main challenger in the 2015 Presidential election, General Muhammadu Buhari of the APC. In summary, we considered that all these items could be interpreted as calls to action for viewers to support Goodluck Jonathan, or in one case<sup>9</sup> for Umar Mohammed Nasko, the PDP gubernatorial candidate in Niger State. The fact that the various items were presented as standalone pieces of editorial content promoting or supporting a single political viewpoint would have helped to increase their likely effect on viewers. In Ofcom's view, the items clearly touched on matters of major political controversy in Nigeria, namely the on-going election campaign in that country.

Given the above, as the items were broadcast on 7 and 11 February 2015, during the election campaign for the Nigerian Presidential election and related elections, Rule 6.1 of the Code was clearly applicable. By virtue of Rule 6.1, the 2015 Nigerian Presidential election and related elections were matters of major political or industrial controversy and major matters relating to current public policy. Rules 5.11 and 5.12 therefore also applied in this case.

Having established that the requirements of Sections Five and Six of the Code applied, we went on to analyse whether due impartiality was preserved. Ofcom considered that these items all contained to varying degrees different expressions of support for the PDP and its election candidates through statements on particular matters of political controversy and matters relating to current public policy. All of the items expressed strong support for the PDP, the PDP Presidential candidate,

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<sup>7</sup> Ibid.

<sup>8</sup> Polling day was 11 April 2015 in the case of the gubernatorial election in Niger state (see item (1)(j) in the Introduction).

<sup>9</sup> See item (1)(j) in the Introduction.

Goodluck Jonathan, and in one case Umar Mohammed Nasko, the PDP gubernatorial candidate in Niger state. The items did not contain any alternative views which could be reasonably and adequately classed as critical or counter to those of the PDP, Goodluck Jonathan, or Umar Mohammed Nasko. These alternative views might for example have been in favour of General Muhammadu Buhari and/or the APC. Furthermore, although the Licensee claimed in its representations that “both candidates were featured”, we noted there was no evidence of items containing viewpoints in opposition to the PDP, Goodluck Jonathan and on behalf of the APC and/or General Buhari.

In any event, we doubted that items such as (1)(a) to (m) above could be balanced by other items containing opposing points of view. These were independent and self-standing items placed in the schedule expressing support for particular candidates in an important election or opposition to other candidates. As a result it was in Ofcom’s view difficult to see how the repeated broadcast of items such as this could be taken in aggregate to be a body of programming planned over time by the Licensee to be duly impartial, unlike more conventional, scheduled programming.

Secondly, we noted that many of these items contained both direct calls to action (to vote for particular candidates, such as Goodluck Jonathan, and a particular political party i.e. the PDP) or indirect calls to action (implicitly suggesting viewers should not vote for a particular candidate i.e. General Buhari). These items were clearly not merely reporting on, or discussing, a particular political point of view. Consequently, it was our view that many of the items were self-standing pieces which to varying degrees were intended to, and did, promote the political interests of the PDP and its Presidential candidate. By their very nature, therefore, such items presented no opportunity for duly impartial consideration of a matter of political controversy.

Given the above, Ofcom concluded that these items breached Rule 6.1 (with reference to Rules 5.11 and 5.12).

### Rule 9.2

This rule states:

“Broadcasters must ensure that editorial content is distinct from advertising”.

We noted that many of these editorial items broadcast in advertising breaks were self-standing messages, virtually all of which were of short duration and containing calls to action, which appeared to have been produced by, or on behalf of, the PDP. There were no conventional programme elements present (for example a presenter, a studio or programme titles). They strongly resembled advertisements and were, in Ofcom’s view, much more likely to be reasonably perceived by viewers as advertisements than as programmes. For these reasons this editorial content was not distinct from advertising.

In this case therefore Rule 9.2 was breached.

### 2) News content

Ofcom considered the various items (2)(a) to (f) set out in the Introduction under Rule 6.1 (with reference to Rules 5.11 and 5.12), as set out above, and also under Rule 5.1, which states:

“News, in whatever form, must be reported with due accuracy and presented with due impartiality”.

Importantly, it is not part of Ofcom’s remit to question or investigate the validity of the views expressed in a case like the current one, but to require the broadcaster to comply with the relevant standards in the Code. This would particularly be the case during election campaigns.

The obligation in Rule 5.1 to present news with due impartiality applies potentially to any matter covered in a news programme, and not just matters of political or industrial controversy and matters relating to current public policy. Due impartiality may be preserved in a number of ways and it is an editorial decision for the broadcaster as to how it ensures a news story is presented with due impartiality. We take into account all relevant facts in the case, including: the substance of the story in question; the nature of the coverage; whether there are varying viewpoints on a news story, and if so, how a particular viewpoint or viewpoints on a news item could be or are reflected within news programming; and, the context of the particular broadcast material in issue, including factors such as the type of programme and channel, and the likely expectation of the audience as to content. A key part of Ofcom’s analysis is an assessment of whether a particular view or response needed to be reflected, or context provided, to ensure due impartiality, and – if so – whether it was appropriately reflected or provided. This is a matter of judgement, to be decided taking account of all the relevant circumstances.

In this case, BEN TV broadcast two news programmes which included six news items focusing on the political situation in Nigeria.

*News items about the policies and actions of the PDP administration of Goodluck Jonathan*

We first considered three of the news items – (2)(a) to (c) in the Introduction – which dealt with the policies and actions of the PDP administration of Goodluck Jonathan. (Item (a) was included in the edition of *Weekend File* broadcast on 7 February 2015, and items (b) and (c) were included in the edition of *NTA News Extra* broadcast on 11 February 2015):

a) This item reported on Goodluck Jonathan’s steps to improve agriculture saying that these measures had been *“applauded as the best tools promoting agriculture and food security”* in Nigeria. The news item included various positive statements concerning Goodluck Goodluck Jonathan’s agricultural policies. For example, It was stated that:

*“President Goodluck Jonathan last year resolved to adapt new measures to ease the difficulties and enhance guaranteed and effective deliveries to famers with a view to boosting both production and profitability of farming practice”.*

It was then stated that the PDP national Government’s various measures to boost agriculture had been described as *“successful and fruitful”* by the Adamawa Commissioner for Agriculture Patricia Yakubu. In addition, Usman Bapullo Ribadu, Chairman of the Agro-allied Dealers Association, Adamawa State said he hoped *“the Federal Government and State Government...continue with this kind of programme”.*

b) This news item reported on various transport-related pieces of legislation being approved by Goodluck Jonathan’s administration, which were described in the item as a way *“to strengthen the various sectors of the economy”.*

The item featured statements by various ministers in Goodluck Jonathan's administration talking in positive terms about specific pieces of legislation. For example, Mike Onolememen, Minister of Work, said the legislation meant that: *"road institutions in Nigeria now align with international best practice...with better road development, better road management, better road rehabilitation and better road material"*.

c) A second news item in the same news programme reported in positive terms on the announcement by Goodluck Jonathan's administration about tackling vandalism in Nigeria, so as to stop vandalism affecting the *"electricity supply [and] other aspects of the economy"*. The report included a statement by Professor Chinedu Nebo, Minister of Power who said:

*"Gas infrastructure vandalism and crude oil theft are the causes of significant economic loss to the Nigerian nation, as well as the cost, major cost, of insufficient power supply. But again, one measure is we must do other things than just gas to power. And this government is working hard: renewable energy coal, wind power etcetera, etcetera"*.

It was also stated that Chinedu Nebo *"commended President Jonathan's commitment for efficient power supply"*.

News items (a) to (c) above discussed in positive terms the policies and actions of the administration of Goodluck Jonathan during an election campaign in which Goodluck Jonathan was seeking re-election. Accordingly, in our view, these items were dealing with matters which needed to be presented with due impartiality in news programmes of this nature. The Licensee therefore needed to ensure that: the viewpoint of those in opposition to the administration of Goodluck Jonathan (such as General Muhammadu Buhari and the APC) were appropriately reflected; the positive statements concerning the the policies and actions of the administration of Goodluck Jonathan were challenged; and/or appropriate context was given. However, Ofcom noted that no such alternative viewpoints or context were provided in these three news items.

Given the above, we therefore decided that the Licensee did not present news items (a) to (c) – which dealt with matters of major political controversy and major matters relating to current public policy (i.e. the policies and actions of the PDP administration of Goodluck Jonathan in the context of the 2015 Nigerian Presidential election) – with due impartiality.

#### *News items about the election campaigns of PDP candidates*

We next assessed the other three news items – (2)(d) to (f) in the Introduction – which dealt with the election campaigns of Goodluck Jonathan, the PDP candidate in the 2015 Presidential election in Nigeria, and in one case, Nyesom Wike the PDP candidate in the 2015 gubernatorial election in Nigeria's Rivers State. All were included in the edition of *NTA News Extra*, broadcast on 11 February 2015.

d) This news item reported in positive terms on a campaign to persuade young Nigerians to support the re-election of Goodluck Jonathan. For example it was stated that the members of the youth movement:

*"[were] unified by one ambition, and that is to return President Goodluck Jonathan to a second term in office"; and  
"demonstrated their love for the President by coming out en masse at the rally";*

It also stated that *“several youths from the opposition”* APC had *“defected”* to the PDP and that support shown amongst the youth campaign *“will of course translate to votes”* for Goodluck Jonathan and the PDP. In addition, Nelson Abali of the Jonathan Youth Vanguard said:

*“We’ll mobilise all youths in Bayelsa and around the country at large to show him love by voting for him massively”.*

e) This news item reported on The National Leadership of Commercial Tricycle and Motorcycle Owners and Riders Association in Nigeria stating its support for the re-election of Goodluck Jonathan. The report stated that the reason for this body deciding to support Goodluck Jonathan was that he *“can continue with his numerous transformative programmes”*. It was also stated by a former Minister of Defence that *“the President is a unifier and decent, law-abiding Nigerian, whose re-election deserves to be supported”*.

f) This news item reported on a campaign event by the PDP gubernatorial candidate for Rivers State, Nyesom Wike. In particular, it was stated that Nyesom Wike had made several policy pledges at the event such as that he would:

implement *“the construction of new roads in the rural areas of the [Rivers] state”*;

*“galvanise the industrial sector of the [Rivers] state”*; and

*“fight corruption in the state civil service”*.

This news item also included statements supporting Nyesom Wike’s candidacy by Prince Uche Secondus, Deputy National Chairman of the PDP, and Celestine Omehia, former governor of Rivers State.

Items (d) to (f) above discussed in positive terms the election campaigns of Goodluck Jonathan, the PDP candidate in the 2015 Presidential election in Nigeria, and Nyesom Wike the PDP candidate in the 2015 gubernatorial election in Nigeria’s Rivers State. Accordingly, in our view, these items dealt with matters which needed to be presented with due impartiality in news programmes of this nature. The Licensee therefore was obliged to ensure that: the viewpoint of those in opposition to the PDP candidates in the Nigerian Presidential election (such as General Muhammadu Buhari and/or the APC) or the gubernatorial election in Nigeria’s Rivers State (such as the APC candidate Dakuku Peterside) were appropriately reflected; the positive statements concerning the policy platforms of the PDP were appropriately challenged; and/or appropriate context was given. However, Ofcom noted again that no such alternative viewpoints or context was provided in these three news items.

Given the above, we therefore decided that the Licensee did not present news items (d) to (f) – which dealt with matters of major political controversy and major matters relating to current public policy (i.e. the policies and actions of the PDP in the context of the 2015 Nigerian Presidential election and related elections) – with due impartiality.

In reaching our Decision about the news items, we noted the Licensee’s points that for example that the reporters and interviewees in the news items *“were merely making remarks to show how far Nigeria has come as a nation bearing in mind it had its 50<sup>th</sup> celebrations not long ago”* and the *“comments were highlighting what the*



government had done which could be on any nation by the sitting government". News programmes will often report on the actions of governments or a country's political situation and policy achievements in the context of particular anniversaries. Ofcom underlines this must be done in a duly impartial manner, especially, as in this case, when in the context of an on-going election campaign. We considered that these six news items gave one-sided positive coverage to the viewpoint of a governing party, with alternative viewpoints of opposition parties being totally ignored.

We also took into account the Licensee's comment that BEN TV "bridge[s] the gap between the African continent and Europe the diaspora's need to be informed to what is happening back home". Ofcom recognises that broadcasters serving particular communities will want to provide content that presents issues of topical interest to their target audience. This, however, cannot justify the broadcast of partial and one-sided news reports.

Finally, GTL also suggested that as "both candidates were featured we see no breach of" Ofcom's rules as having taken place. We disagreed. In the news items we investigated we could not identify any content which could be described as reflecting viewpoints in opposition to Goodluck Jonathan and his policies, or the PDP more widely. Nor did we note any content which could be described as reflecting the viewpoint of General Muhammadu Buhari or the APC, or indeed any other Nigerian political parties.

Given all the above, we considered that the news items in this case were clearly in breach of Rule 5.1 and Rule 6.1 (with reference to Rules 5.11 and 5.12).

#### Other representations

In reaching our Decision, we took account of the Licensee's other representations. Firstly, we noted that GTL had an agreement to broadcast a live relay of the Nigerian Television channel NTAI, and that as a result of this case, it had now suspended the live relays of NTAI on BEN TV. We noted the Licensee's statement that it never thought [NTAI] could show unbalanced programmes or News [because] NTAI...has BBC status in Nigeria". We interpreted this statement to mean that GTL had based its approach to the compliance of the various items listed in (1) and (2) in the Introduction on NTAI's status as a broadcaster within Nigeria, namely that NTAI's position and reputation in Nigeria are analogous to those of the BBC in the UK. We were very concerned that the Licensee appeared to have relied on the reputation of the NTAI as a basis for complying much of the broadcast material in this case, and did not appear to have taken any steps to assess independently whether the content complied with the Code.

Second, the Licensee argued that the content in this case had been broadcast with "no input by or from BEN Television", and that BEN TV had been broadcasting NTAI content "for many years" without any complaints being lodged with Ofcom. We also did not consider these to be relevant considerations. As the entity with editorial responsibility for BEN TV, it was GTL's responsibility to comply with the Code irrespective of the fact that the Licensee had not produced the news content in question. Similarly, the fact that this case was the first time that Ofcom had been alerted to BEN TV's relay of the NTAI service did not mitigate the failure to preserve due impartiality in the news programmes in this case.

The Licensee also said that it relies "on selling airtime to survive...as we do not get any funding or percentage from licensing fees which is paid [by] all [the] millions

watching televisions as [the] TV licence<sup>10</sup> [and a] high percentage from the fees comes from BME and Ethnic viewers”. We did not consider this to be a relevant consideration. The fact that GTL does not receive any funding from the BBC (or other) licence fee did not affect the requirement on the Licensee to comply with the Code.

Finally, we noted GTL’s statement that it is has a “little team” who are “very mindful” of the Code and who try ensure that BEN TV’s output is “balance[ed]...even where it may be very challenging to our resources and production”. We acknowledge the logistical and resource challenges faced by small broadcasters. However it is a fundamental obligation on all Ofcom licensees to ensure they have arrangements in place to ensure they comply with the Code.

### Conclusion

The right to broadcast comes with responsibilities. It is important that broadcasters maintain due impartiality and do not use their licensed service as a platform to broadcast inherently partial items on matters of major political controversy and major matters relating to current public policy.

Ofcom was concerned that the Licensee’s response in this case indicated a lack of understanding about its responsibilities under the Code. In September 2015, Ofcom therefore held a meeting with GTL to discuss its compliance processes in this area. We also expect the Licensee to improve its compliance in this area.

**Breaches of Rule 6.1 (with reference to Rules 5.11 and 5.12) as regards all the broadcast material; breaches of Rule 9.2 concerning the material broadcast during advertising breaks; and breaches of Rule 5.1 with reference to the items broadcast during news programmes**

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<sup>10</sup> We interpreted this to be a reference to the Licence Fee which funds BBC public services on radio and television.

## In Breach

### Political advertisements relating to the 2015 Nigerian Presidential election

*BEN TV, 17 and 26 March 2015, various times<sup>1</sup>*

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#### Introduction

BEN TV is an entertainment and news channel that broadcasts to Western Europe and parts of Asia and Northern Africa. The licence for this service is held by Greener Technology Limited (“GTL” or “the Licensee”).

A complainant drew Ofcom’s attention to what they considered to be advertisements placed on BEN TV on 7 and 11 February 2015 that related to the 2015 Nigerian Presidential election taking place on 28 March 2015<sup>2</sup>. This election was principally contested between the then incumbent, President Goodluck Jonathan of the People’s Democratic Party (“PDP”), and the main challenger, General Muhammadu Buhari of the All Progressives Congress (“APC”).

As a result of this complaint, Ofcom monitored output by BEN TV broadcast on 17 and 26 March 2015. We noted the following two advertisements were broadcast during advertising breaks in BEN TV’s broadcast output:

a) An advertisement of approximately 13 seconds duration consisted of the following statements appearing as on-screen captions:

*“IF BUHARI  
HAD RESPECT  
FOR NIGERIA  
after his DICTATORSHIP  
He wouldn’t be  
CONTESTING  
in our DEMOCRACY!”*

According to the Licensee this advertisement was broadcast three times.

b) An advertisement of approximately one minute in duration depicted a fictional narrative featuring a Nigerian Town Crier making an announcement to a group of villagers in traditional Nigerian dress. The advertisement consisted of various statements made by the Town Crier and the villagers, speaking either collectively or individually:

Town Crier: *“Attention. The king has requested I inform you that on election day wherever you see the sign of the umbrella<sup>3</sup>, which is protection, that’s where you thumb print<sup>4</sup>. Did I speak well or not?”*

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<sup>1</sup> This case was delayed by a separate assessment by Ofcom of whether GTL was in control of this service. We concluded that it did.

<sup>2</sup> On investigation, the content broadcast on 7 and 11 February 2015 did not contain any political advertisements. However, Ofcom did record breaches of the Code in relation to editorial content broadcast on those dates – see page 16.

<sup>3</sup> The PDP logo consists of an umbrella.

- Villagers: *"You spoke well!"*
- Villager 1: *"Town Crier, we did hear, how about electricity?"*
- Town Crier: *"They will provide us uninterrupted electricity".*
- Villager 2: *"How about water supply?"*
- Town Crier: *"They will provide us water".*
- Villager 3: *"How about the farmers?"*
- Town Crier: *"Most important to them are the farmers".*
- Villager 4: *"Please do you know what is important to me? Mosquitoes".*
- Town Crier: *"Mosquitoes will not harm you again".*
- Villager 5: *"How about our streets and hospital that was promised?"*
- Town Crier: *"They will provide hospitals. No more sickness".*
- Villager 6: *"After all this has been achieved, what next for us? Enjoyment!"*
- Town Crier: (singing) *"We are enjoying. Let's go to PDP".*
- Villagers: (singing) *"We are enjoying. Let's go to PDP".*

At the end of the item there was the following commentary: *"This message was brought to you by the Goodluck Lagos Grassroots Project".*

Throughout this item a PDP logo was visible on screen together with the caption *"Goodluck Lagos"* and a photograph of Goodluck Jonathan.

According to GTL, this advertisement was broadcast six times.

Ofcom has a statutory duty, under section 319(2)(g) of the Communications Act 2003 ("the Act"), to secure the standards objective "that advertising that contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services."

Political advertising is prohibited on radio and television under the terms of sections 321(2) and 321(3) of the Act and Rule 7.2 of the BCAP Code<sup>5</sup>.

For most matters, the BCAP Code is enforced by the Advertising Standards Authority ("ASA"). However, Ofcom remains responsible, under the terms of a Memorandum of

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<sup>4</sup> As part of the electoral registration process, Nigerian voters have to provide a copy of their thumb print.

<sup>5</sup> The UK Code of Broadcast Advertising, available at: <http://bcap.org.uk/The-Codes/BCAP-Code.aspx>.

Understanding between Ofcom and the ASA, for enforcing the rules on “political” advertising.

In this instance, Ofcom considered that the material raised issues warranting investigation under the following rules from Section 7 (Political and controversial matters) of the BCAP Code:

7.2 “Advertising that contravenes the prohibition on political advertising set out below must not be included in television or radio services:

7.2.1 An advertisement contravenes the prohibition on political advertising if it is:

- (a) an advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature;
- (b) an advertisement which is directed towards a political end...

7.2.2 For the purposes of this section objects of a political nature and political ends include each of the following:

- (a) influencing the outcome of elections or referendums, whether in the United Kingdom or elsewhere;
- (b) bringing about changes of the law in the whole or a part of the United Kingdom or elsewhere, or otherwise influencing the legislative process in any country or territory;
- (c) influencing the policies or decisions of local, regional or national governments, whether in the United Kingdom or elsewhere;
- (d) influencing the policies or decisions of persons on whom public functions are conferred by or under the law of the United Kingdom or of a country or territory outside the United Kingdom;
- (e) influencing the policies or decisions of persons on whom functions are conferred by or under international agreements;
- (f) influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy;
- (g) promoting the interests of a party or other group of persons organised, in the United Kingdom or elsewhere, for political ends”.

By virtue of Rule 7.2.3, the prohibition does not apply to, and is not to be construed as prohibiting the inclusion in a programme service of: (a) an advertisement of a public service nature inserted by, or on behalf of, a government department; or (b) a party political or referendum campaign broadcast the inclusion of which is required by a condition imposed under certain provisions of the Act. Ofcom did not consider that this exception to the prohibition was relevant in this case because the advertisements were neither of a public service nature inserted by, or on behalf of, a government department, nor a party political or referendum campaign broadcast within the scope of the Act.

Ofcom therefore asked the Licensee for its comments, and for the comments of the advertisers, on how the advertisements had complied with the above rule.

## Response

The Licensee said that the advertisements were “put together from Nigeria” by the Goodluck Lagos Grassroots Project and supplied to it by an individual who had “confirmed” to GTL that the advertisements had “passed approval in Nigeria”.

GTL said that, because the Nigerian Broadcasting Codes reflected the laws of that country, it had believed the advertisements would be “in line with” the UK’s broadcasting rules. The Licensee also stated that it had “sincerely” considered that it was able to broadcast the advertisements because they were “not directly...party broadcast[s]”.

In conclusion, GTL made clear that once it had been notified by Ofcom that the material in this case might be political advertising, it had ceased broadcasting the content.

## Decision

Under the Act, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is “that advertising that contravenes the prohibition on political advertising set out in section 321(2) of the Act is not included in television or radio services”.

Section 321(2) and Section 321(3) – which provides an inclusive, non-exhaustive list of examples of what “political nature” and “political ends” include under Section 321(2) – are replicated at paragraphs 7.2.1 and 7.2.2 of BCAP Code Rule 7.2, from which material relevant in this instance is quoted in the Introduction, above.

Ofcom first considered the content of the advertisements, both of which related to candidates contesting the 2015 Nigerian Presidential election. We noted that advertisement (a) questioned whether it was appropriate for General Muhammadu Buhari to contest the Presidential election after “*his DICTATORSHIP*”<sup>6</sup>. As such, we considered this content plainly sought to influence the outcome of the 2015 Nigerian Presidential election in which General Buhari was a candidate.

In relation to advertisement (b), we noted that the advertisement consisted of a fictional narrative where a Town Crier was shown addressing a group of villagers on behalf of “*The king*” with the message to the villagers that “*on election day*” wherever they “*see the sign of the umbrella*”<sup>7</sup>, which is protection” they should leave their “*thumb print*”<sup>8</sup>. This was then followed by the Town Crier confirming to the villagers that, if they did as he suggested and voted for the PDP, various positive results would follow, such as the provision of “*uninterrupted electricity*”, “*water*”, and “*No more sickness*” before leading the villagers to sing “*Let’s go to PDP*”. Because the advertisement included numerous implicit and explicit references to the PDP’s

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<sup>6</sup> We considered that this was a reference to the period 1983 to 1985 when General Buhari had previously ruled Nigeria as head of state of a military government.

<sup>7</sup> Because the PDP logo consists of an umbrella, we considered that the phrase “the sign of the umbrella” was a reference to the PDP.

<sup>8</sup> See footnote 3.

policies and the “*protection*” offered by the PDP to these ordinary people, we again considered that the advertisement was clearly intended to influence the outcome of the 2015 Nigerian Presidential election in which Goodluck Jonathan was the PDP candidate.

Although referring to a political party or politician in an advertisement may not itself breach Rule 7.2 of the BCAP Code (e.g. if it consists of a passing reference to a political party in a broadcast advertisement for a newspaper), Ofcom considered Rule 7.2 was breached in the following ways:

The adverts were inserted by or on behalf of a body whose objects are wholly or mainly of a political nature

Ofcom noted that the advertisements were placed by the Goodluck Lagos Grassroots Project (“GLGP”), campaigning organisation that was seeking to advance Goodluck Jonathan’s candidacy in the Nigerian Presidential election amongst voters in Lagos state<sup>9</sup>. We therefore considered that GLGP was “a body whose objects are wholly or mainly of a political nature” (where “political nature” includes any of (a) to (g), in paragraph 7.2.2 of BCAP Code Rule 7.2 – see Introduction above).

Since the advertisements were placed by GLGP, it was in breach of Rule 7.2 of the BCAP Code, which prohibits, among other things, “an advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature.”

The adverts were directed towards a political end

Ofcom considered the two advertisements served primarily to advance the candidacy of Goodluck Jonathan in the 2015 Nigerian Presidential election. For example, advertisement (a) was clearly critical of the candidacy of Goodluck Jonathan’s main challenger in the Presidential election, General Buhari. In addition, we considered that advertisement (b) served primarily to solicit viewers’ support for Goodluck Jonathan in the election. We therefore considered that the advertisements were “directed towards a political end”, where “political end” includes “influencing the outcome of [an] election...elsewhere [i.e. outside the UK]” and “promoting the interests of a party or other group of persons organised...elsewhere [i.e. outside the UK], for political ends” (i.e. sub-paragraphs (a) and (g) in paragraph 7.2.2 of BCAP Code Rule 7.2 – see Introduction above).

Ofcom’s Decision is therefore that the advertisements were in breach of Rule 7.2 of the BCAP Code, which prohibits, among other things, “an advertisement which is directed towards a political end”.

In reaching our Decision we took into account the Licensee’s representation that it had ceased broadcasting this content. However, we also noted GTL’s explanation for its decision to broadcast these advertisements, namely: the fact that the individual who had supplied the advertisements to BEN TV “confirmed” that the advertisements had “passed approval in Nigeria”; the Licensee’s belief that the Nigeria broadcasting codes were reflective...[of] statutes as in the UK”; and therefore GTL’s linked belief

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<sup>9</sup> For example, on its website the GLGP said that it: “urges every person in [Lagos] state to use their democratic right to vote for the most democratic, most humble and most economically competent candidate. The President [i.e. Goodluck Jonathan]” – accessed by Ofcom at <http://www.theglgp.com/> during the investigation.

that the advertisements were “put together...in line with the” UK’s broadcasting rules. GTL also said that it “sincerely” considered it was able to broadcast the advertisements because they were “not directly...party broadcast[s]”.

Ofcom was concerned that the Licensee’s response in this case indicated a lack of understanding about its responsibilities under the BCAP Code. Breaches of this nature are particularly significant – a specific statutory prohibition on political advertising exists because of the effect that such advertising is considered to have on the democratic process both in the UK and elsewhere. In September 2015, Ofcom therefore held a meeting with GTL to discuss its compliance processes in this area. We are also putting the Licensee on notice that, in the event of a similar incident, we may consider further regulatory action.

## **Breaches of BCAP Rule 7.2**



## In Breach

### Anatomy of the Day

NTV Mir Lithuania, 2 September 2015, 23:40

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#### Introduction

NTV Mir Lithuania is a television channel broadcasting to the Russian-speaking community in Lithuania. *Anatomy of the Day* is a late night analytical news<sup>1</sup> programme broadcast four times a week. The licence for NTV Mir Lithuania is held by Baltic Media Alliance Limited (“BMAL” or “the Licensee”).

A complainant alerted Ofcom to a news item during the programme which dealt with “a new law put in place by the [Lithuanian] Ministry of Education for all educational institutions” which, according to the news item “has made Lithuanian the only permitted native language” in Lithuania and had led to a strike by Polish students and teachers the previous day (1 September 2015). This “new law”, according to the news item, would now mean that “teaching in all languages at higher levels, except in Lithuanian” would be “forbidden”. The complainant considered that the news item was not duly impartial with regard to its treatment of the Lithuanian Government’s current education policy.

Ofcom obtained an independent translation of the full programme from the original Russian to English. We gave the Licensee an opportunity to comment on the accuracy or otherwise of the translation. BMAL raised no objection to the accuracy of the translation, and we therefore relied on this translation for the purposes of the investigation.

Ofcom noted that *Anatomy of the Day* was 35 minutes in duration and featured two studio presenters either standing in front of a large screen, with accompanying images of the reports in the background, or at a desk in front of the screens.

The programme included ten separate reports based on timely and/or topical issues of the day. One of these was a two and a half minute news item about the teaching of Lithuanian in schools in Lithuania.

This news item contained the following statements:

Presenter:

*“The Lithuanian authorities, which have long been haunted by the Russian language, have come up with a very savage way of fighting it. School children come under fire and this time, not only the Russian speaking ones. Generally speaking, all ethnic minorities have been affected. They have forbidden teaching in all languages in the higher forms, except in Lithuanian”.*

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<sup>1</sup> The Licensee stated *Anatomy of the Day* is not a news programme. It described the programme as an “infotalkshow” and an authored programme “chosen, documented, scripted/commented under direct management of the programme’s sole author Vadim Takmenev”. For the reasons set out in the Decision, Ofcom is of the view that this programme could be reasonably described as “news, in whatever form” as defined in Rule 5.1 and therefore Rule 5.1 applied in this case.

Presenter:

*“When it comes to examination in the student’s native language, everybody – Russians, Poles, Belarusians – will have to take a Lithuanian language examination. Worst off are those that will leave school next year as there’s not much time left to learn Lithuanian as a mother tongue. If you don’t pass, then you can kiss goodbye to your chance of enrolling at university”.*

Reporter:

*“Ernest and Edgar are ethnic Poles, but were born and raised in Lithuania. Before, students from ethnic minority schools took native language state examinations in their own languages – Poles in Polish, Russians in Russian. But the new Law of the Ministry of Education for all educational institutions has made Lithuanian the only permitted native language”.*

Reporter:

*“Parents and teachers called the new law discriminatory and humiliating. After all, the authorities adopted it, but still there are no special programmes and textbooks and as a result, non-Lithuanian school graduates will simply fail their native language exams and they will not be able to attend a good university... Representatives of national minorities account for over 15 per cent of Lithuania’s population. This is almost half a million people. And the government deprives them of the right to education as claimed at the rally”.*

Reporter:

*“Now, according to sociologists, every second resident of Lithuania under the age of 25 has left the country or is going to do so. After the new reform the number of young emigrants threatens to increase significantly. At the very least, the majority of pupils from ethnic minority schools are going to leave Lithuania almost the day after the exam in their non-native ‘native’ language”.*

For reasons set out in the Decision, Ofcom considered that *Anatomy of the Day* was a news programme and therefore the news item relating to Lithuania’s education policy warranted further investigation under Rule 5.1:

Rule 5.1: “News, in whatever form, must be reported with due accuracy and presented with due impartiality”.

Ofcom therefore asked the Licensee how the programme complied with this rule.

## **Response**

According to BMAL, the programme as a whole and the individual reports within it did not “represent news” and Rule 5.1 was not applicable. Specifically, it described the programme as “an authored analytical infotalkshow broadcast four times a week late at night”. The Licensee added that the programme did not contain any “obvious criticism to the law or Lithuanian authorities”. BMAL added that reports in the programme were “based on real events” and the interpretation of these events “was not misleading to viewers”.

BMAL provided background information on the “new law” referred to in the news item:

- the news item was referring to amendments to the Lithuanian “Law on Education”<sup>2</sup>, which were originally adopted on 17 March 2011;
- these amendments required that the criteria for the “Maturity Examinations” taken by Lithuanian school-leavers would be standardised for ethnic Lithuanian and non-ethnic Lithuanian school leavers from September 2015<sup>3</sup>; and
- the imminent changes to the Maturity Examinations had prompted activists from non-ethnic Lithuanian minorities to protest on 1 September 2015, which is traditionally the beginning of new school year in Lithuania. The Licensee said that it was these protests which were being reported on in the news item in question. BMAL added that “in a strict sense” the news item was not dealing with a “new law” as stated in the news item, but “new requirements that take effect in 2015”.

The Licensee then addressed the individual statements made within the programme, as set out above. For example, BMAL described each of the following statements as “an impartial statement of fact”:

*“The Lithuanian authorities, which have long been haunted by the Russian language, have come up with a very savage way of fighting it. School children came under fire and this time, not only the Russian speaking ones. Generally speaking, all ethnic minorities have been affected. They have forbidden teaching in all languages in the higher forms, except in Lithuanian”<sup>4</sup>.*

*“.. After all, the authorities adopted it, but still there are no special programmes and textbooks and as a result, non-Lithuanian school graduates will simply fail their native language exams and will not be able to attend a good university”.*

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<sup>2</sup> See: [http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc\\_l?p\\_id=281043](http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_l?p_id=281043) Ofcom understands the following in relating to the Law on Education in Lithuania:

- The law was originally introduced in Lithuania in 1991 and since this date various amendments have been added. Article 30 of the Law concerns: “The Right to Study in the State Language and in the Mother Tongue”.
- A feature of this law is that a Maturity Examination is taken upon completion of secondary education in Lithuania and awards the student with a school leaving certificate, which is necessary for obtaining a university place in Lithuania.
- Ofcom understands that up until 1 September 2015, it was possible for non-native Lithuanian school students to sit some parts of the Maturity Examination in their mother tongue.
- The “new law” referred to in the news item in this case which concerned an Amendment to the Law added in 2011 which required that there would be one Lithuanian Language Maturity Examination for both native and non-native Lithuanian speakers and this would have to be implemented by the beginning of the school year in September 2015. Ofcom understands that this would mean all Lithuanian school students irrespective of ethnicity would have to sit their Maturity Examinations in Lithuanian from 1 September 2015.

<sup>3</sup> Ibid.

<sup>4</sup> The Licensee stated this was “an impartial statement of a fact” as the unification of the education system and procedures (in compliance with the one-language doctrine of Lithuania) was the “officially declared aim of the Law on Education.”

The Licensee described the following statement as “factual” and “almost a verbatim excerpt from the Amendments to the Law on Education” and “no particular author’s opinion” was expressed:

*“Ernest and Edgar are ethnic Poles, but were born and raised in Lithuania. Before, students from ethnic minority schools took native language state examinations in their own languages – Poles in Polish, Russians in Russian. But the new law put in place by the Ministry of Education for all educational institutions has made Lithuanian the only permitted native language”.*

BMAL stated that the conclusion drawn from the statement below was “obvious”:

*“Worst off are those that will leave school next year as there’s not much time left to learn Lithuanian as a mother tongue. If you don’t pass, then you can kiss goodbye to your chance of enrolling at university”.*

Finally, the Licensee stated the following statement was the “author’s opinion” but it was “neither critical nor categorical but rather allowing a great deal of probability/admissibility”. It added the use of the term “threatens to” in the following statement illustrated this point.

*“Now, according to sociologists, every second resident of Lithuania under the age of 25 has left the country or is going to do so. After the new reform the number of young immigrants threatens to increase significantly. At the very least, the majority of pupils from ethnic minority schools are going to leave Lithuania almost the day after the exam in their non-native ‘native’ language”.*

The Licensee stated that in determining the application of the due impartiality rules, Ofcom must have regard to the contextual factors of the broadcast. It therefore cited the contextual factors that demonstrated how in its opinion due impartiality had been preserved in this case:

- The editorial content of the programme, programmes or series: BMAL explained that the general content of the service was built around various investigations and crimes both in the form of documentary and feature material. *Anatomy of the Day* was “a typical programme of NTV Mir Lithuania service as to format, themes and [their] degree of sensitivity”.
- The service on which the material was broadcast: The Licensee said that NTV Mir Lithuania was a television service broadcast in Russian for non-native (non-Lithuanian) residents of Lithuania. It added that it was “common knowledge that non-Lithuanian-speaking residents of Lithuania have opinions that differ from the official public view on a great deal of domestic and foreign issues”. Consequently, BMAL stated that “NTV Mir Lithuania performs an important role in informing these ethnic minorities”.
- The time of broadcast: BMAL said that programme was broadcast at 23:40 and its audience was primarily economically and politically “inactive elderly people of non-Lithuanian ethnicity”.
- The degree of harm and offence likely to be caused: In the Licensee’s view the content of the programme “would do no harm or offence to our regular audience across the territory of broadcast”.

The Licensee also stressed that alongside the contextual factors, the importance of freedom of expression should also be taken into account. Therefore, taking note of specific circumstances in which the programme was broadcast, BMAL was of the opinion that there were “important and sufficient contextual factors to understand the programme’s impartiality as ‘due’”.

The Licensee also argued that the programme was an “authored” programme<sup>5</sup>, and made the following points in this regard:

- all material featured in the programme was “chosen, documented, scripted/commented under direct management of the programme’s sole author Vadim Takmenev<sup>6</sup>”;
- the “author’s opinions (or other’s opinions reproduced by the author) were not “categorical” and they allowed “a degree of assumption and probability”;
- the “presence of alternative opinions is not a binding pre-condition for... ‘authored’ programmes”;
- the likely size and composition of the potential audience and likely expectation of the audience was a relevant point as, according to BMAL, it “needs to be taken into account that the programme was an ‘authored’ series allowing an advancement of particular interpretation of events, with various individuals interviewed within the programme”; and
- the news item would not have exceeded the audience’s expectations of the channel, “given that: inter alia, the report was articulating a point of view shared by most people in the ethnic non-Lithuanian communities; and...the audience of NTV Mir Lithuania is drawn from the ethnic non-Lithuanian communities within Lithuania”.

Finally, the Licensee added that it received daily audience measurement data so it “statistically predicted the size and composition of the potential audience of NTV Mir Lithuania in the programme slot”. Based on these predictions and “our excellent knowledge of the audience profile for NTV Mir Lithuania”, the Licensee argued that the content and degree of impartiality in the programme fully conformed to the profile and expectations of the audience. It therefore argued that the programme “would not have prompted the audience to expect another degree of impartiality...” and therefore the degree of impartiality in the news item was “due”.

BMAL also commented on Ofcom’s Preliminary View in this case, which was that this programme breached Rule 5.1. The Licensee objected to Ofcom’s reference in the Preliminary View to a statement made by the Ministry of Education and Science of the Republic of Lithuania, which had been provided by the complainant. (Ofcom referred to this statement in the Preliminary View to illustrate that there was an

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<sup>5</sup> BMAL referred to the Ofcom Guidance to Section Five of the Code which it said states that audiences “are comfortable with adjusting their expectation of due impartiality when they know they are watching or listening to such programmes”. See <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section5.pdf>, paragraph 1.48.

<sup>6</sup> The Licensee has described Vadim Takmenev as “an author working for [the] Russian TV Channel NTV, which produced the programme, and through its European representative (BMAL’s supplier) sold it to BMAL.”

alternative viewpoint on the policy of teaching exclusively in Lithuanian to that presented in the report).

BMAL stated that Ofcom's reference was "unfair". This was because "to incorporate in the justification for a Preliminary View any third party testimony not directly contained in the broadcast under discussion – but made *post factum* after the investigation of the broadcast began, and the actual source of this testimony is dubious". The Licensee said that the opinion of the Lithuanian Ministry of Education and Science "provided in the Preliminary View *can be* alternative to the opinions mentioned in the programme only on the assumption that the assertions it makes are true". Therefore, BMAL argued that a reference to the Ministry's opinion "as having any sort of weight to the argumentation regarding BMAL violations is not appropriate" and "in the interest of objective argumentation" the Licensee argued this should be removed.

BMAL added, however, that in response to Ofcom's investigation it had contacted the reporter of the news story about education in Lithuania, Andrey Khramtsov. The Licensee said it had reminded the reporter about the rules in Section Five of the Code and also put him "on notice that if BMAL identifies non-compliance to the Code in his future stories, news broadcasts containing his work will not be scheduled for NTV Mir Lithuania."

## **Decision**

### Background

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including that news included in television and radio services is presented with due impartiality. This objective is reflected in Section Five of the Code.

Broadcasters are required to comply with the rules in Section Five to ensure that the impartiality requirements of the Act are complied with, including that due impartiality is preserved on matters of political or industrial controversy and matters relating to current public policy.

When applying the requirement to preserve due impartiality, Ofcom must take into account Article 10 of the European Convention on Human Rights. This provides for the broadcaster's and audience's right to freedom of expression, which encompasses the right to hold opinions and to receive and impart information and ideas without interference by public authority. The broadcaster's right to freedom of expression is not absolute. In carrying out its duties, Ofcom must balance the right to freedom of expression on one hand against the requirement in the Code to preserve "due impartiality" on matters relating to political or industrial controversy or matters relating to current public policy.

Ofcom recognises that Section Five of the Code, which sets out how due impartiality must be preserved, acts to limit, to some extent, freedom of expression. This is because its application necessarily requires broadcasters to ensure that neither side of a debate relating to matters of political or industrial controversy and matters relating to current public policy is unduly favoured. Therefore, while any Ofcom licensee should have the freedom to discuss any controversial subject or include particular points of view in its programming, in doing so broadcasters must always comply with the Code.

The Code does not prohibit broadcasters from discussing or reporting on any controversial subject, or including any particular point of view in a news programme. To do so would be an unacceptable restriction on a broadcaster's freedom of expression. Therefore, the broadcasting of critical comments concerning the policies and actions of any government is not, in itself, a breach of due impartiality rules. The Code does not prohibit broadcasters from, for example, criticising particular nation-states, governments or one side in a particular conflict or dispute. However, it may be necessary to reflect alternative viewpoints in an appropriate way and/or provide context to ensure due impartiality is preserved.

Rule 5.1 of the Code states that:

“News, in whatever form, must be reported with due accuracy and presented with due impartiality”.

### Nature of the programme

Ofcom noted the Licensee's view that *Anatomy of the Day* was not a news programme and therefore Rule 5.1 was not applicable. Rather, BMAL described the programme as “an authored analytical infotalkshow broadcast four times a week late at night”. Therefore, we first considered whether the programme constituted “news, in whatever form” and therefore whether Rule 5.1 applied. In this context, Ofcom's published Guidance to Section Five states: “news in whatever form would include news bulletins, news flashes and daily news magazine programmes”<sup>7</sup>.

In determining whether a programme is “news in whatever form”, Ofcom will take into account all relevant factors, such as the format of the programme, the subject matter and the manner in which it is presented to the audience.

Ofcom considers that the term “news in whatever form” allows considerable latitude in terms of the range and type of programming that might be covered by Rule 5.1. Ofcom is of the view that a news programme would normally contain some or all of the following:

- the programme would typically be ‘anchored’ by a presenter or presenters in a studio who might also summarise other information or events and provide links to a number of different individual news items. The latter would, typically be presented by journalists either in the studio or outside the studio;
- the content of the various news items would typically relate to information or events of a contemporary or recent nature to the time and date of broadcast;
- the programme may or may not include some analysis or discussion around the various news items;
- the presenter or presenters may interview reporters or other contributors either in the studio or via telephone or video links; and
- the studio may feature screens with graphics or images which might add context or other information to the content of the news programme.

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<sup>7</sup> See <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section5.pdf>, paragraph 1.8.

It is Ofcom's opinion that the programme *Anatomy of the Day* clearly contained all of the characteristics of a news programme, as described above. For example, the reports concerning the main day's events were followed by summaries of the day's business and entertainment news such as the opening of the Venice Film Festival. The two presenters in this case sat at desks or stood in front of large screens featuring the various news stories and interacted with the reporters and contributors. We considered that the ten separate news items in this programme were wide ranging, dealing with political, economic and cultural matters as follows:

- President Putin's visit to China;
- the strike by teachers and students in non-native language schools;
- an exclusive interview with the new president of the Russian Football Union;
- the economic news of the day;
- a demand by Germany and France for a review of EU rules on asylum for immigrants;
- the latest images of a giant sinkhole in Solikamsk in Dacha;
- a celebration of Russian actor Valentin Gaft on his 80<sup>th</sup> birthday;
- the Venice Film Festival which opened that evening; and
- the proposal by Deputies of the State Duma to exempt single pensioners from the payment of state repair taxes.

In our view all of these items might reasonably be described as having been timely and in some way linked to events taking place over the 24 to 36 hours preceding the broadcast. For example, the first news story and the "*main topic of the day*" was President Putin's visit to China which had started on the day of broadcast. We therefore considered it was likely that viewers would have perceived this programme to be a news programme – albeit in a news magazine format – broadcast four nights a week. Therefore Ofcom was of the view that this was a news programme and Rule 5.1 applied.

### The application of Rule 5.1

Rule 5.1 contains the requirement on broadcasters to present the news with "due impartiality". In judging whether due impartiality has been preserved in any particular case, the Code makes clear that the term "due" means adequate or appropriate to the subject matter. "Due impartiality" does not mean an equal division of time has to be given to every view, or that every argument and every facet of the argument has to be represented. Due impartiality may be preserved in a number of ways and it is an editorial decision for the broadcaster as to how it ensures due impartiality is maintained.

The obligation in Rule 5.1 to present news with due impartiality applies potentially to any matter covered in a news programme, and not just matters of political or industrial controversy and matters relating to current public policy. Due impartiality may be preserved in a number of ways and it is an editorial decision for the broadcaster as to how it ensures a news story is presented with due impartiality. A



key part of Ofcom's analysis is an assessment of whether a particular view or response needed to be reflected, or context provided, to ensure due impartiality, and – if so – whether it was appropriately reflected or provided. This is a matter of judgement, to be decided taking account of all the relevant circumstances.

Accordingly, as Ofcom considered that this programme was a news programme it was a requirement upon the Licensee to ensure the due impartiality of the material broadcast. In accordance with a broadcaster's right to freedom of expression, Ofcom acknowledges that the broadcaster has the right to interpret news events as it sees fit, as long as it complies with the Code. However, the Code guidance makes clear that broadcasters should take care before making any unequivocal interpretations or statements about contentious issues, which may be dependent on nuance and open to different interpretations.

The news item in this case dealt with a strike and protest in Lithuania by non-native speaking teachers, students and their families. We noted the news item dealt briefly with the background to this change in education policy, the reaction of the non-native students affected and the alleged impact this would have on higher grade students progressing to higher education in Lithuania. In reporting this matter BMAL included various statements (made by the programme's journalists or interviewees) that commented directly or indirectly on these educational developments in Lithuania. Given NTV Mir Lithuania's likely target audience is the largely Russian speaking non-native residents of Lithuania, it is not surprising that the Licensee would wish to focus in the programme on the impact of any changes in Lithuanian education policy on non-native residents of Lithuania. However, in doing so BMAL had to present this news item with due impartiality.

We noted that the Licensee argued that the statements made in the programme and identified by Ofcom in the Introduction were variously: "impartially represented facts"; a "verbatim excerpt"; not an expression of a "particular author's opinion"; could be concluded as being "obvious"; and the "author's opinion" which was "neither critical nor categorical but rather allowing a great deal of probability/admissibility". In response to these points, we considered that these various statements related to the education policies of the Lithuanian Government and were highly critical of these policies, and were policies on which the Lithuanian Government was likely to have an alternative view.

By way of example, we noted the following statements made in the news item:

*"The Lithuanian authorities, which have long been haunted by the Russian language, have come up with a very savage way of fighting it. School children came under fire and this time, not only the Russian speaking ones. Generally speaking, all ethnic minorities have been affected. They have forbidden teaching in all languages in the higher forms, except in Lithuanian".*

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*"Worst off are those that will leave school next year as there's not much time left to learn Lithuanian as a mother tongue. If you don't pass, then you can kiss goodbye to your chance of enrolling at university".*

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*"Ernest and Edgar are ethnic Poles, but were born and raised in Lithuania. Before, students from ethnic minority schools took native language state*

*examinations in their own languages – Poles in Polish, Russians in Russian. But the new law put in place by the Ministry of Education for all educational institutions has made Lithuanian the only permitted native language”.*

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*“Parents and teachers called the new law discriminatory and raw...After all, the authorities adopted it, but still there are no special programmes and textbooks and as a result, non-Lithuanian school graduates will simply fail their native language exams and will not be able to attend a good university”.*

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*“Now, according to sociologists, every second resident of Lithuania under the age of 25 has left the country or is going to do so. After the new reform the number of young immigrants threatens to increase significantly. At the very least, the majority of pupils from ethnic minority schools are going to leave Lithuania almost the day after the exam in their non-native 'native' language”.*

Ofcom was of the view that the statements contained various comments that were clearly critical of, or in opposition to, the Lithuanian Government and its education policy. We therefore considered that news about these matters required the viewpoint of the Lithuanian Government to be reflected or sufficient context provided, and reflected or provided appropriately to ensure due impartiality was maintained.

#### The preservation of due impartiality

Ofcom therefore went onto assess whether the news report preserved due impartiality. In doing so Ofcom took into account that the service NTV Mir Lithuania reports news from a Russian viewpoint.

As already noted the Licensee argued that many of the statements made in the report were for example: “an impartial statement of fact”; not an expression of a “particular author’s opinion”; or “neither critical nor categorical but rather allowing a great deal of probability/admissibility”. Ofcom disagreed. We considered that these various statements set out above related to the Lithuanian Government’s education policies and actions resulting from those policies, and were highly critical of these policies and actions. Accordingly, in Ofcom’s view this was a matter which needed to be presented with due impartiality. The Licensee therefore needed to ensure the viewpoint of the Lithuanian Government was appropriately reflected or that relevant context was also provided.

However, we could not identify any such viewpoints being reflected in this item, or appropriate context being given. The only viewpoints provided were ones critical of the Lithuanian Government and its education policies (for example, the Lithuanian Government’s policy requiring all Lithuanian school leavers to take their school-leaving Maturity Examinations in Lithuanian was described as “savage”, “discriminatory” and “raw”).

Further, the news item included various statements which described, what was in the speakers’ views, the negative ramifications of the changes to the school-leaving Maturity Examinations. These statements implied, for example, that certain non-native Lithuanian school leavers: could “kiss goodbye to [their] chance of enrolling at university”; would “simply fail their native language exams and will not be able to attend a good university”; and “are going to leave Lithuania almost the day after the

*exam in their non-native 'native' language*". We considered that these were matters on which the Lithuanian Government were likely to have a view. By failing to provide such viewpoints or appropriate context, the criticisms of the Lithuanian Government's education policies remained unchallenged and therefore BMAL failed to ensure this news was presented with due impartiality.

Ofcom is of the view that in any news report which deals with a controversial matter, such as the adverse impact of a particular public policy or criticism of specific official actions, viewpoints from different sides of the debate will undoubtedly exist. In this case, the report focused on what was described as a "*new law*" introduced by the Lithuanian Government, which, according to the news report, would have a significant, adverse and long term impact on non-native students in Lithuania. It therefore would have been appropriate to reflect an alternative viewpoint on this policy to ensure due impartiality was preserved.

Ofcom noted the viewpoint of the Lithuanian Government with regard to changes it had implemented to its education policy concerning the teaching and taking of the Maturity Examination in Lithuanian. The complainant provided Ofcom with a statement from the Lithuanian Ministry of Education and Science which set out the Lithuanian Government's position on this issue. This was, in summary, as follows:

- the amendments to the education law implementing one Lithuanian Language Maturity Examination for both native and non-native Lithuanian speakers had been introduced in 2011 and native and non-native speaking students at school leaving age in Lithuania have taken the same Maturity Examination since 2013;
- non-native speaking students in Lithuania are already completing the Maturity Examination in Lithuanian and the results for the Maturity Examination in 2015 would suggest that non-native language students in Lithuania, who have already completed the examination in Lithuanian, fared comparably to ethnic Lithuanian students in terms of the success rate in the Examination;
- the period to 2019-20 would be a transitional period during which a more relaxed assessment would apply to non-native speaking students to take account of the fact that these students will not have been learning Lithuanian for as long as native speakers; and
- non-native language schools (Polish, Russian and Belarusian languages) continue to teach in their native languages and in these schools Lithuanian is taught in the native language up to the Maturity Examination level.

We noted the Licensee's comment on the Preliminary View that it was "unfair" for Ofcom to refer to this statement because it was "third party testimony" and it was "not directly contained in the broadcast under discussion – but made *post factum* after the investigation of the broadcast began, and the actual source of this testimony is dubious". We disagreed. In this case the information provided to Ofcom by the complainant was from an official Lithuanian Government department. Ofcom was not required to assess its accuracy to take it into account in reaching a decision in this case. The statement provided evidence only of the existence of an alternative viewpoint to that expressed in the news report – and which was not in any way reflected in that report.

For the reasons set out above and after taking careful account of the context we concluded that the Licensee did not present the news item with due impartiality.

## Other matters

In reaching our Decision, Ofcom also took account of the other points raised by BMAL.

Firstly, the Licensee cited various contextual factors<sup>8</sup> as being relevant in this case. However, we did not consider these to be relevant, or of marginal importance, to whether or not the news was presented with due impartiality in this case. For example, the fact that *Anatomy of the Day* broadcast at 23:40 was “a typical programme” on NTV Mir Lithuania did not alter our view that the Licensee did not adequately reflect alternative viewpoints or provide other appropriate context. Another argument by BMAL was that NTV Mir Lithuania is broadcast in Russian for non-native (non-Lithuanian) residents of Lithuania and “it is common knowledge that non-Lithuanian-speaking residents of Lithuania have opinions that differ from the official public view on a great deal of domestic and foreign issues”. NTV Mir Lithuania “performs an important role in informing these ethnic minorities”. Therefore the Licensee stated that it strived “to broadcast programmes, topics, and opinions that would be embraced by the target audience”. It also “considered that the content of the Programme would do no harm or offence to our regular audience across the territory of the broadcast” and argued that the content and degree of impartiality in the programme fully conformed to the profile and expectations of the audience.

Ofcom noted that as a Russian speaking service serving non-native speakers in Lithuania, the Licensee would produce news reports from a Russian, or non-native viewpoint. However, as discussed previously, it is for the Licensee to achieve this in a manner which is compliant with the Code. While the audience who chooses to watch this service, and particularly this news programme, may also share the same viewpoint as the Licensee, this does not mean that the news on a particular issue can be presented without due impartiality. Nor does it weaken the obligation on that service to reflect alternative viewpoints or to provide context as appropriate.

The other contextual factor raised by BMAL was the importance of freedom of expression, which includes the audience’s right to receive information and ideas. In reaching our Decision in this case we had careful regard to the broadcaster’s right to freedom of expression and the audience’s right to receive information and ideas. But, as mentioned above, when considering the application of Section Five, there are limits to the right to freedom of expression. The application of the due impartiality rules (derived directly from statute) necessarily requires broadcasters to ensure that news in whatever form is reported with due impartiality.

Second, Ofcom noted the Licensee’s view that *Anatomy of the Day* was an “authored analytical” talkshow and all “materials and stories that feature in the programme chosen, documented, scripted/commented under the direct management of the program[me]’s sole author Vadim Takmenev”. Accordingly, it was the Licensee’s view that, for example, the “presence of alternative opinions is not a binding precondition of authored programmes”. We disagreed with these arguments for several reasons. Rule 5.9 of the Code states that:

“Presenters and reporters (with the exception of news presenters and reporters in news programmes), presenters of "personal view" or "authored" programmes or items, and chairs of discussion programmes may express their own views on matters of political or industrial controversy or matters relating to current public

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<sup>8</sup> In this regard, BMAL noted the definition of due impartiality in Section Five specifically states that: “Context, as defined in Section Two: Harm and Offence of the Code, is important”.

policy. However, alternative viewpoints must be adequately represented either in the programme, or in a series of programmes taken as a whole. Additionally, presenters must not use the advantage of regular appearances to promote their views in a way that compromises the requirement for due impartiality. Presenter phone-ins must encourage and must not exclude alternative views”.

Therefore the provision in Rule 5.9 allowing presenters of “personal view” or “authored” programmes to express their own views on matters of political or industrial controversy or matters relating to current public policy does not apply to news presenters and reporters in news programmes. Further, BMAL referred to the Ofcom Guidance to Section Five of the Code which it said states that audiences “are comfortable with adjusting their expectation of due impartiality when they know they are watching or listening to such programmes”. In response to this point, Ofcom notes that paragraph 1.48 of the Guidance<sup>9</sup> to Section Five states “In clearly signalled ‘personal view’ programmes, many in the audience are comfortable with adjusting their expectations of due impartiality”. In this case, however, Ofcom considered that it was not made clear (i.e. “clearly signalled”) to the audience that this was a “personal view” programme. Further, the “author” of the programme was named by the Licensee as Vadim Takmenev. However, Mr Takmenev did not appear either as a presenter or contributor and the translation of the programme made no reference to him. Indeed, as set out by the Licensee Mr Takmenev’s role was strictly editorial and “all material and stories” were “chosen, scripted/commented under direct management” of Mr Takmenev.

In any event and contrary to the Licensee’s assessment, even if *Anatomy of the Day* could be interpreted as an authored programme, Rule 5.9 of the Code makes clear that such programmes always require alternative viewpoints to be “adequately represented”<sup>10</sup> to maintain due impartiality.

Therefore for the reasons set out above, Ofcom considered that the news item relating to the Lithuanian Government’s education policy was not reported with due impartiality and therefore Rule 5.1 of the Code was breached.

### Conclusion

Ofcom noted that this breach of Rule 5.1 followed two previous breaches<sup>11</sup> of the rules in Section Five of the Code recorded against the Licensee in relation to programmes on NTV Mir Lithuania. The Licensee has also attended a meeting with Ofcom to discuss its licensing status and compliance arrangements. Further, Ofcom is currently investigating BMAL’s compliance with Licence Condition 17(2) (compliance arrangements). Ofcom is concerned that in its representations in the present case, BMAL appears to continue to misunderstand fundamental aspects

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<sup>9</sup> See <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section5.pdf>

<sup>10</sup> Similarly, paragraph 1.48 of the Guidance to Section Five, which was cited by the Licensee makes clear that “in order to maintain due impartiality, alternative viewpoints should be adequately represented” in authored programmes.

<sup>11</sup> See:

- Professia Reporter, Breach of Rule 5.5, issue 282 of Ofcom’s Broadcast Bulletin, published 29 June 2015 ([http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb282/Issue\\_282.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb282/Issue_282.pdf)).
- Today, Breaches of Rule 5.1, issue 284 of Ofcom’s Broadcast Bulletin, published on 27 July 2015 ([http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb284/Issue\\_284.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb284/Issue_284.pdf)).

concerning the application of the due impartiality rules in the Code. We will therefore take this latest breach into account in our separate investigation under Licence Condition 17(2).

**Breach of Rule 5.1**

## In Breach

### The Caribbean Culture Show

ALL FM 96.9, 11 October 2015, 13:00

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#### Introduction

ALL FM 96.9 is a community radio station broadcasting to listeners in the central, east and south Manchester area. *The Caribbean Culture Show* is a weekly chat show broadcasting Caribbean music. The licence for ALL FM 96.9 is held by ALL FM Limited (or “the Licensee”).

A complainant alerted Ofcom to the inclusion of what the complainant considered to be “extremely offensive comments” about a “mentally ill person”.

Ofcom noted that at the beginning of this hour-long programme the presenter recounted the story of a journey he had undertaken two days previously, when he had had a heated encounter with a policeman who had refused to allow him access down a road due to an “incident”.

The presenter then went on to explain to listeners how he had taken a detour to avoid a further group of four policemen. He said that he encountered a crowd in the street, with the crowd having gathered due to a man threatening to jump from a nearby building. At this point of the programme, the presenter said:

*“So I said [to a bystander] ‘what’s happenin[g]?’ [Presenter starts laughing]. He [the bystander] says ‘there’s something, there’s a lad on the building. [Presenter continued to laugh as he spoke] He’s threatening, threatening to jump off. He’s on the building and there’s nobody [struggling to stifle his laugh] around him and he’s threatening to jump off’. I’m going ‘You are not serious. You cannot be serious’. This is just the beginning of the story. This is a Friday I thought. He is on top of the building and I can’t see nobody behind him, or front of him or on the side of him. Nobody with a [inaudible] and yet he’s put the city on lock down for threatening to jump off”.*

The presenter added:

*“I have no sympathy for a reformed suicider [sic]. I do not, I do not ... if you feel so bad about whatever it is in this country there are so many systems and so many ways you can do it as oppose to do what you do, and lock, and inconvenience everyone else around you, and have no fear, and have absolutely nothing. Threatening! On top of a building! Threatening to jump off! Excuse me! You know what I wanted to – no, I’m not gonna say. I didn’t even utter it, I’m not going to. He’s put me out. I could have been arrested. The worst of it [is if] I had gone through those four policemen I would have been seriously battered and all of that because someone, whatever the circumstances may or may not be, who doesn’t look like me is on a building. The privilege of walking up there and stopping the world from turnin[g]. I wanted to let him know and I’m lettin[g] you all know. That is just the beginning! That is just the beginning, I swear to God, that’s just the beginning...How inconsiderate, I don’t care how mad you are... I may make light of it, but not because I particularly love to do any harm. I wake up every morning and I wake up with love, nothing but love...and I swear, trust me, if*

*ever I see that little— , I'm trying to find [laughs] the word that doesn't make me [laughing, inaudible]... He will wish he was never, ever, ever been born”.*

Soon afterwards the presenter also said:

*“I so, so, so want to play the tunes but this story I've got to tell you because, you see, until you realise the privileges that this country [has] afforded everyone, anyone, you will not realise just how privilege[d] you or anybody else is. Only the rich, the very very rich know that and I tell you, that without any exception, without exception, that that person who stood on that building, who inconvenienced everybody with regard or any regard to the rest of the world. It's such a privilege to be able to do that you know”.*

At the end of the programme, the presenter concluded the show by introducing and talking to an ALL FM Youth Support Worker:

Presenter: [To the Youth Support Worker] *“Tell them what you think, or about life itself, you have you've got two minutes”.*

Youth Support Worker: *“Oh wow ok. It was an inconvenience for everyone I can get that, but you know there's a bigger picture here. You know there, I mean it's been in the news quite a lot about mental health and the lack of support for people and you know this is a country that which is... without getting too political...It's just getting worse for people and like I say the lack of support, it's difficult for people, and we have to look at [that] and I think it's hard for me because [hesitates] and I think life is beautiful...Life is beautiful and it bothers me that some people want to check out but I don't blame them for it. It's trying to understand what...”*

Presenter: *“I appreciate what you're saying. It's very eloquent... but the subject that you brought [up] I really apologise. Let me first, thank you for bringing it to my attention...because yes mental health is a very serious situation and we don't know and I'm no expert on that and for those people who have, may or may not, intentionally or unintentionally inconvenienced, I sincerely apologise...totally apologise because I wasn't trying to make any light of that situation. I was just looking at my day...and I thank you for bringing it to my attention. I really apologise. I humble myself to you sir. I really apo[logise], I'm so sorry. I really didn't mean it in that way...I was havin[g] a bad couple of days right. And the people who were making it bad are the people who have been doing it for the last two generations or more. I refuse to apologise [to them] and that's why I really had to get you here. Thank you very much. Your audience is there sir and coming up next...That's my last word and I leave the last word to the gentleman who's so kindly come in and brought such a serious matter to my attention. Thank you very much everyone”.*

Ofcom considered the material warranted investigation under Rule 2.3 of the Code which states:



“In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context”.

We therefore sought comments from the Licensee as to how material complied with the Code<sup>1</sup>.

## Response

ALL FM Limited acknowledged that “what the presenter said during the show in question was unacceptable both in terms of regulation and taste”.

The Licensee said that on being alerted to this content it had immediately “suspended the presenter until [it] could discuss the issues arising from this broadcast with him”. However, the presenter “showed no willingness to meet” or accept “that the content broadcast was contentious”. As a result, ALL FM Limited said that the “show was removed from the [ALL FM 96.9] schedule on 11 November”.

The Licensee said that its training for on-air volunteers included “a radio law section” and “the examination of case studies” from the Ofcom Broadcast and On Demand Bulletin. It expressed its hope that “an incident such as this one was preventable because of the quality” of the training provided by ALL FM Limited.

In conclusion, the Licensee said that “while ultimately there is little any station could do when a presenter decides to disregard” the training provided and the station’s policies, it would work to ensure that the chances of “anything like this [happening] in future [was] made even smaller”. It added that once Ofcom had concluded its investigation in this case all volunteers would be: “alerted” to the outcome of Ofcom’s investigation; “asked whether they understand the parameters implicit in the relevant parts of the Ofcom Code”; and “alerted to the limits on ‘editorialising’ as a presenter”.

## Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including that generally accepted standards are applied so as to provide adequate protection for members of the public from the inclusion of offensive and harmful material. This duty is reflected in Section Two of the Code.

In reaching a Decision in the case, Ofcom acknowledged the importance attached to freedom of expression in the broadcasting environment, as set out in Article 10 of the European Convention on Human Rights.

Therefore, the Code contains no prohibition on broadcasters dealing with the subject matter of suicide – to do so would be an inappropriate restriction on a broadcaster’s and the audience’s freedom of expression. It is crucial that broadcasters are free to make programmes and allow discussions on air about issues like suicide, and be able to include in these broadcasts views or remarks which may cause offence or may not be widely held. Broadcasters however must be mindful of how such views or comments are presented to ensure any offence is justified by the particular context.

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<sup>1</sup> Ofcom also gave the presenter the opportunity to comment. He did not make any written representations.

Under Rule 2.3, broadcasters must ensure that potentially offensive material is justified by the context. Context is assessed by reference to a range of factors such as the editorial content, the degree of offence, and likely audience expectations.

Ofcom first considered whether the material was potentially offensive.

During this programme the presenter detailed how a journey he had carried out had been delayed due to road closures by the police as a result of a man “*threatening to jump off*” a nearby building. We noted that the potential suicide attempt was initially ridiculed by the presenter who attempted to explain to listeners while laughing, and becoming more contemptuous and aggressive in manner and tone as the story progressed. For example, the presenter made the following statements:

*“He is on top of the building...and yet he’s put the city on lock down for threatening to jump off”.*

\*\*\*\*

*“I have no sympathy for a reformed suicider [sic]. I do not, I do not ... if you feel so bad about whatever it is in this country there are so many systems and so many ways you can do it as oppose to do what you do, and lock, and inconvenience everyone else around you... Threatening! On top of a building! Threatening to jump off! Excuse me!...He’s put me out”.*

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*“The privilege of walking up there and stopping the world from turnin[g]...How inconsiderate, I don’t care how mad you are...and I swear, trust me, if ever I see that little –, I’m trying to find [laughs] the word that doesn’t make me [laughing, inaudible]... He will wish he was never, ever, ever been born”.*

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The presenter referred to the “*person who stood on that building, who inconvenienced everybody with regard or any regard to the rest of the world*”.

We considered that the presenter’s statements that he had “*no sympathy*” with the individual who had threatened to commit suicide, would have had the potential to be highly offensive to listeners, as would the presenter’s description of the individual concerned as, for example, being “*inconsiderate*” and as having “*inconvenienced everybody*”.

We went on to consider whether the material was justified by the context.

Ofcom recognises that while suicide itself is a sensitive issue, this does not mean that it cannot be a subject of discussion in programmes. Whether the treatment of the subject matter complies with the Code depends on the context. We noted that the audience of *The Caribbean Culture Show* are normally encouraged to contact the presenter, while the programme is on air, to speak about local community issues and to make song requests. However, in our view, listeners were unlikely to expect the presenter to discuss in highly insensitive terms, how he had been personally affected by an individual considering suicide. We considered that the likely level of offence would have been heightened by the fact that the presenter punctuated his comments with laughter. In addition, the aggressive manner in which the presenter delivered some of comments would have also increased the likely level of offence in this case.

Ofcom noted that towards the end of the show, the Youth Support Worker attempted to counter to some extent some of the offence that could have been caused by the presenter's initial statements, by saying for example:

*"[I]t's been in the news quite a lot about mental health and the lack of support for people and...It's just getting worse for people and like I say the lack of support, it's difficult for people".*

We also noted that immediately following the Youth Support Worker's comments the presenter apologised and clarified his previous references to the individual he had encountered who had been contemplating suicide. For example, he said:

*"[M]ental health is a very serious situation and we don't know and I'm no expert on that and for those people who have, may or may not, intentionally or unintentionally inconvenienced, I sincerely apologise...totally apologise because I wasn't trying to make any light of that situation".*

However, we considered that the presenter's apology and clarifying statements would have only partially softened the likely level of offence caused by the presenter's original comments. This was because when the presenter originally referred to the individual who was contemplating suicide, he did so, at length, and in a highly dismissive and insensitive manner punctuated with laughter, and while expressing aggression towards the individual concerned. In summary, we considered the presenter had delivered an insensitive tirade about an individual in obvious distress due to mental illness. In our view, this was inappropriate given the sensitive nature of the subject matter.

In reaching our Decision, we noted the Licensee's statement that "what the presenter said during the show in question was unacceptable in terms of regulation and taste". We also noted that the presenter had been removed from ALL FM 96.9's schedule and the steps that ALL FM Limited was intending to take to improve compliance.

However, for all the reasons outlined above, we considered the broadcast was not justified by the context, and Rule 2.3 was therefore breached.

### **Breach of Rule 2.3**

## In Breach

### Yasmin

*DM News Plus, 17 November 2015, 18:00*

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#### Introduction

DM News Plus is a satellite television service primarily aimed at the Asian community in the UK. The licence for DM News Plus is held by DM Global Media Limited (“DM Global” or “the Licensee”).

*Yasmin* is a film of approximately 80 minutes duration about the experiences of a young Muslim woman living in the Yorkshire town of Keighley, following the terrorist attacks of 11 September 2001. It has a 15 certificate from the British Board of Film Classification.

A complainant alerted Ofcom to offensive language in this content.

On assessment, we noted that during this content the following language was used:

- 12 instances of “*fuck*” or “*fucking*”;
- two instances of “*bitch*”;
- two instances of “*bastard*”;
- three instances of “*piss off*”; and
- one instance each of “*bollocks*” and “*bullshit*”.

Ofcom considered the material raised issues warranting investigation under the following rules of the Code:

Rule 1.14: “The most offensive language must not be broadcast before the watershed...”.

Rule 1.16: “Offensive language must not be broadcast before the watershed...unless it is justified by the context. In any event, frequent use of such language must be avoided before the watershed”.

We therefore asked DM Global how the material complied with these rules.

#### Response

The Licensee apologised for the “human error” in its “payout department in broadcasting the wrong version of” the film *Yasmin*. It added that it had two versions of the film, one of which had been edited to remove all “explicit language”.

DM Global said the film *Yasmin* “sends a message to the community on relevant issues” when broadcast without “explicit language”. It added that DM News Plus is a “community channel” and it would not seek to “broadcast content using explicit language as [the channel] is dedicated to the ethnic community”. The Licensee also

pointed out that it had “never had any complaints of this nature” and it had not broadcast this content “for financial gain”.

In conclusion, DM Global said as a result of this incident, it had taken “robust action to supervise the payout for compliance so that this would not happen again”.

## **Decision**

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that “persons under the age of eighteen are protected”. This objective is reflected in Section One of the Code.

### Rule 1.14

Rule 1.14 states that the most offensive language must not be broadcast on television before the watershed. Ofcom’s research on offensive language<sup>1</sup> notes that the word “fuck” or its variations are considered by audiences to be amongst the most offensive language. The broadcast of 12 uses of “fuck” and “fucking” was clear examples of the most offensive language being used in a programme broadcast before the watershed. This material therefore breached Rule 1.14.

### Rule 1.16

Rule 1.16 states that offensive language must not be broadcast before the watershed, unless it is justified by the context; and that, in any event, frequent use of such language must be avoided before the watershed.

In addition to the 12 uses of the most offensive language included in the programme, there were nine instances of offensive language (“bastard”, “bitch”, “bollocks”, “piss” and “shit”) during a film of approximately 80 minutes duration. We considered that this amounted to the frequent use of offensive language before the watershed. We also noted that Ofcom’s research on offensive language indicated that none of these words was regarded as generally acceptable on television before the watershed<sup>2</sup>.

We went on to consider whether the multiple and frequent uses of offensive language in this case were justified by the context. We noted DM Global’s statement that DM News Plus is a “community channel” and it would not seek to “broadcast content using explicit language as [the channel] is dedicated to the ethnic community”. Ofcom therefore considered that the frequent use of offensive language before the watershed was not justified by the context because it would have exceeded audience expectations. This material therefore breached Rule 1.16.

Ofcom noted that in this case DM Global apologised for this incident, which had been the result of “human error” and had not been “for financial gain”. We also noted that it had taken steps to improve compliance in this area. Nonetheless we concluded that the programme breached Rules 1.14 and 1.16 of the Code.

## **Breaches of Rules 1.14 and 1.16**

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<sup>1</sup> Audience attitudes towards offensive language on television and radio, August 2010 (<http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf>).

<sup>2</sup> Ibid.

## Broadcast Licence Conditions cases

### In Breach

#### Broadcasting licensees' late and non-payment of licence fees

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Ofcom is partly funded by the broadcast licence fees it charges television and radio licensees. Ofcom has a statutory duty to ensure that the fees paid by licensees meet the cost of Ofcom's regulation of broadcasting. The approach Ofcom takes to determining licensees' fees is set out in the Statement of Charging Principles<sup>1</sup>. Detail on the fees and charges payable by licensees is set out in Ofcom's Tariff Tables<sup>2</sup>.

The payment of a licence fee is a requirement of a broadcasting licence<sup>3</sup>. Failure by a licensee to pay its licence fee when required represents a significant and fundamental breach of a broadcast licence, as it means that Ofcom may be unable properly to carry out its regulatory duties.

#### In Breach

The following licensees failed to pay their annual licence fees by the required payment date. These licensees have therefore breached their broadcast licences.

The outstanding payments have now been received by Ofcom. Ofcom will not be taking any further regulatory action in these cases.

Licensee	Licence Number	Service Name
Afro Caribbean Millennium Centre	CR000037BA	New Style Radio
The Arsenal Football Club Public Limited Company	ADSRSL000002BA	Arsenal Football Club
Bloomberg LLP	RLCS000105BA	Bloomberg News Radio
Brick FM Limited	CR000135BA	Brick FM
Celtic Music Radio Limited	DP000149BA	Celtic Music Radio
Mr WJ Cartwright	LRSL000042BA	Radio Nightingale
Mr Ian Robinson	LRSL000104BA	University Radio Bath

The following licensee failed to pay its annual licence fee by the required payment date. This licensee has therefore been found **in breach** of Conditions 3(1) and (2) in Part 2 of the Schedule of the relevant licence.

In the specific circumstances of the following case, the non-payment of the fee was considered by Ofcom to amount to a serious licence breach. **Ofcom is therefore putting this licensee on notice that the breach is being considered for the imposition of a statutory sanction, which may include a financial penalty.**

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<sup>1</sup>[http://stakeholders.ofcom.org.uk/binaries/consultations/socp/statement/charging\\_principles.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/socp/statement/charging_principles.pdf)

<sup>2</sup> [http://www.ofcom.org.uk/content/about/annual-reports-plans/tariff-tables/Tariff\\_Tables\\_2015\\_16.pdf](http://www.ofcom.org.uk/content/about/annual-reports-plans/tariff-tables/Tariff_Tables_2015_16.pdf)

<sup>3</sup> As set out in Licence Condition 3 for radio licensees and Licence Condition 4 for television licensees.

<b>Licensee</b>	<b>Licence Number</b>	<b>Service Name</b>
Radio Cardiff Limited	CR000094BA	Radio Cardiff

**Breaches of Licence Conditions 3(1) and (2) in Part 2 of the Schedule of the relevant licences.**

## In Breach

### Provision of recordings and information

*Business News, BEN TV, 7 February 2015, 20:54*

*NTA News, BEN TV, 24 March 2015, 20:00*

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#### Introduction

BEN TV is an entertainment and news channel that broadcasts to Western Europe and parts of Asia and Northern Africa. The licence for this service is held by Greener Technology Limited (“GTL” or “the Licensee”).

#### *Business News, BEN TV, 7 February 2015, 20:54*

Ofcom asked the Licensee whether commercial branding in the studio during a business news report was subject to any commercial arrangement.

The Licensee explained that the feed for this programming came live from Nigeria via another service, NTAI, but that BEN TV received no commercial benefit. Following receipt of this information, this case and the case below were delayed by a separate assessment by Ofcom of whether GTL continued to be in control of the service. We concluded that it did.

Ofcom clarified that BEN TV is responsible for any content transmitted on its service and was therefore required to provide Ofcom with information on whether the branding was the result of any commercial arrangement, including liaising with NTAI to obtain the information.

The Licensee did not provide the information requested within the deadlines set by Ofcom.

Ofcom considered that this warranted investigation under Condition 12(1) of Greener Technology’s licence, which states that the Licensee:

“...shall furnish to Ofcom in such manner and at such times as Ofcom may reasonably require such documents, accounts, returns, estimates, reports, notices or other information as Ofcom may require for the purpose of exercising the functions assigned to it by or under the 1990 Act, the 1996 Act, or the Communications Act”.

#### *NTA News, BEN TV, 24 March 2015, 20:00*

Ofcom requested a recording of output broadcast on BEN TV on 24 March 2015 to assess a viewer complaint alleging political bias. The Licensee explained that there would be a delay because it had to source the material from Nigeria. The Licensee did not provide the requested recording by the deadlines specified by Ofcom.

Ofcom considered that this warranted investigation under Condition 11(2) of GTL’s licence, which states that the Licensee must:

- (a) “make and retain or arrange for the retention of a recording in sound and vision of every programme included in the Licensed Service for a period of 60 days from the date of its inclusion therein; and



(b) at the request of Ofcom forthwith produce to Ofcom any...recording for examination or reproduction...”.

Ofcom therefore asked the Licensee for its comments on its compliance with Licence Conditions 11(2)(a) and (b) and 12(1).

### **Response**

The Licensee did not provide any comments.

### **Decision**

Under the Communications Act 2003, Ofcom has a duty to ensure that in each broadcaster’s licence there are conditions requiring the licensee to provide information to Ofcom when such information is necessary to enable Ofcom to exercise its functions. For Television Licensable Content Service (TLCS) licences, this is reflected in Licence Condition 12(1).

Ofcom also has a duty to ensure that in each broadcaster’s licence there are conditions requiring that the licensee retain recordings of each programme broadcast, in a specified form and for a specific period after broadcast, and to comply forthwith with any request to produce such recordings issued by Ofcom. For TLCS licences, this is reflected in Licence Conditions 11(2)(a) and (b).

#### *Business News, BEN TV, 7 February 2015, 20:54*

Ofcom requires licensees to have measures in place to ensure information it requests is provided in a timely manner. In this case, the Licensee did not provide the information requested within the deadlines set by Ofcom. Ofcom’s view was therefore that there was a breach of Licence Condition 12(1).

#### *NTA News, BEN TV, 24 March 2015, 20:00*

The Licensee did not provide the recording within the deadlines set by Ofcom. Ofcom’s view was therefore that GTL had breached Conditions 11(2)(a) and (b) of its TLCS licence.

The failures by GTL to meet the requirements of Conditions 11(2)(a) and (b) and 12(1) are significant breaches of its licence, because they resulted in Ofcom being unable to fulfil its statutory duty properly to assess and regulate broadcast content in this case. Further, we noted that this is the second occasion when the Licensee has breached Conditions 11(2)(a) and (b) of its licence<sup>1</sup>.

We will monitor the Licensee’s arrangements to retain and provide recordings and information to Ofcom in due course. We are therefore putting GTL on notice that, should similar compliance issues arise, Ofcom will consider taking further regulatory action.

### **Breaches of TLCS Licence Conditions 11(2)(a) and (b) and 12(1)**

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<sup>1</sup> See: [http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb280/Issue\\_280\\_of\\_Ofcom's\\_Broadcast\\_Bulletin.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb280/Issue_280_of_Ofcom's_Broadcast_Bulletin.pdf)

## Resolved

### Broadcast of a service on a local radio multiplex

*Celador Radio Ltd (31 October to 30 November 2015)*

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#### Introduction

Celador Radio Ltd (“Celador” or “the Licensee”) holds a local FM commercial radio licence for Bournemouth, which broadcasts as Fire Radio (the “Licence”).

Fire Radio’s licence was renewed by Ofcom on 26 June 2010 for 12 years. The Licence, at that time held by Fire Media Ltd, was renewed in accordance with section 104A of the 1990 Broadcasting Act (as amended) (the “Act”).

In accordance with section 104A(12) of the Act, Part 2 of Fire Radio’s Licence contains a condition (Licence Condition 2A) which requires that:

“The Licensee shall do all it can to ensure that the local digital sound programme service Fire Radio is broadcast by means of the Bournemouth local radio multiplex service throughout the renewal period”.

On 2 November 2015 Ofcom received confirmation from Now Digital Ltd (“Now Digital”), the Bournemouth multiplex licensee, that the Fire Radio service was removed from the Bournemouth multiplex with effect from 31 October 2015.<sup>1</sup> This followed correspondence between Ofcom and Celador in which Celador had indicated its intention to cease transmission of Fire Radio on the Bournemouth multiplex when its existing contract with Now Digital expired on 31 October 2015.

Ofcom considered the matter raised issues warranting investigation under Licence Condition 2A of Celador’s Licence. We therefore sought Celador’s formal comments on how it had complied with this condition.

#### Response

Celador confirmed that, on the grounds of ensuring the ongoing financial viability of Fire Radio, it had taken the decision not to renew the station’s carriage contract with Now Digital, meaning that the Fire Radio digital service was removed from the Bournemouth multiplex on 31 October 2015.

Celador also explained that, since its initial decision to withdraw Fire Radio from the Bournemouth multiplex, it considered that Fire Radio’s financial performance had improved to such an extent that the station was now capable of sustaining the cost of DAB carriage and had commenced negotiations with Now Digital to return a simulcast of Fire Radio to the Bournemouth DAB multiplex<sup>2</sup>.

Celador argued that it did not consider that it had breached Licence Condition 2A during the period when Fire Radio was not available on the Bournemouth multiplex.

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<sup>1</sup> Prior to removing the service from its multiplex, Now Digital Ltd had submitted a multiplex variation request to Ofcom proposing to remove the Fire Radio service from 31 October 2015. This variation request was approved by Ofcom on 29 October 2015.

<sup>2</sup> As explained below, transmission of the Fire Radio service on the Bournemouth multiplex recommenced from 1 December 2015.

This was because it believed that it had done all it could to ensure that Fire Radio was provided on the Bournemouth multiplex, as required by the licence condition.

The Licensee noted that Ofcom had not published (or otherwise provided) any guidance on its interpretation of Licence Condition 2A other than to say it regarded the obligation as being “a high one”. It therefore said that it assumed, for the purposes of its representations, that Ofcom interprets the Licence Condition 2A obligation as being akin to a “best endeavours” obligation, such that Licence Condition 2A obliges Celador to take all the steps in its power which are capable of ensuring that Fire Radio is broadcast on DAB, being steps which a prudent, determined and reasonable licensee, acting in its own interests and desiring to achieve that result, would take.

Celador said that it acknowledged that fulfilling Licence Condition 2A was not difficult in operational or practical terms, in the sense that all it needed to do was to pay a monthly fee to the multiplex operator. However, it argued that the level of fees charged by the multiplex operator was such that paying the fees “would be likely to prevent Fire Radio from ever making a profit”. Celador submitted evidence in support of this in the form of a profit and loss statement for the year ending September 2015 and its projected profit and loss for the year ending September 2016, which it said represented its understanding of the financial position of Fire Radio as at 31 October 2015. It added that, in these circumstances, “we considered that we had done all we could to ensure that transmission on the Bournemouth multiplex was maintained, could not reasonably or fairly be required to do more, and took the decision not to renew our DAB transmission contract with Now Digital”.

Celador argued that it tried to negotiate a reduction in fees with the multiplex operator, but had been unsuccessful. Given local market conditions and the nature of Fire Radio’s Format and target demographic<sup>3</sup>, it did not consider further significant audience and revenue growth beyond that which had already been achieved was likely, and said it had undertaken all the cost-saving cost reductions it was able to without compromising the quality of the output provided by Fire Radio and the other stations Celador Radio owns.

The Licensee concluded that, if Ofcom were to interpret Licence Condition 2A as an absolute obligation that would require Celador to disregard its own commercial interests then, in its view, this would put the continued existence of Fire Radio in jeopardy. The Licensee considered that, as well as being irrational, this would be contrary to Parliament’s policy objectives for local radio, and to Ofcom’s statutory duties to do all that it can to secure a range and diversity of local radio services, and to maintain plurality in the providers of radio services.

### Ofcom’s Preliminary View

Having considered the Licensee’s representations, we wrote to Celador setting out our Preliminary View that Celador’s decision to remove Fire Radio from the multiplex appeared to be motivated by its commercial interests rather than any more fundamental practical impediment outside of Celador’s control to maintaining the broadcast. In these circumstances, we were therefore not persuaded that Celador

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<sup>3</sup> Fire Radio’s analogue Format, which forms part of its licence, requires it to be: “A music-led service primarily targeting 15-34 year-olds, with appropriate speech content to appeal to young local listeners. The music will be ‘rhythmic contemporary’ featuring dance, soul and related contemporary genres”.

had done “all it can” to ensure that the Fire Radio digital service was broadcast on the Bournemouth multiplex throughout the renewal period in accordance with the requirements of Licence Condition 2A.

Our Preliminary View was therefore that, in failing to ensure that the Fire Radio digital service was broadcast on the Bournemouth multiplex during the period from 31 October 2015 to 30 November 2015, Celador breached Condition 2A of the Licence.

However, Ofcom also took into account that, since the commencement of this investigation, Celador had been able to successfully conclude carriage negotiations with the multiplex operator, and that the Fire Radio service re-commenced broadcasting on the Bournemouth multiplex from 1 December 2015.<sup>4</sup>

In view of this, and the relatively short time for which Fire Radio was not available to listeners in the Bournemouth area on DAB, in our Preliminary View we considered the matter to be resolved.

#### Representations made by Celador on Ofcom’s Preliminary View

In its response to our Preliminary View, Celador noted that while in previous correspondence Ofcom had stated that it regarded the obligation to broadcast a digital service as being “a high one”, in the Preliminary View the obligation was increased to being “a very high one”. It also questioned Ofcom’s statement in the Preliminary View that licensees whose licences have been renewed on the basis of providing a digital service are expected to broadcast that service “in all but exceptional circumstances that are outside the licensee’s control.” Celador said that had it been Parliament’s intention that the Licence Condition 2A should effectively be an absolute obligation that would only cease to apply in exceptional circumstances, then this would have been set out expressly in the 1990 Act.

Celador challenged Ofcom’s view that the financial viability of Fire Radio would not have been fundamentally threatened by way of the continued transmission on the DAB multiplex, noting that it only became aware of “the unexpected and significant increases in Fire Radio’s total [listening] hours and sales” after having already taken the decision to remove Fire Radio from the Bournemouth multiplex, on the basis of the information available at the time. This was, therefore, not relevant to the “state of play” when the decision was actually made by Celador.

The Licensee questioned Ofcom’s consistent use of the phrase “commercial reasons/interests” in the Preliminary View, suggesting that Ofcom considered this as being a “somehow distasteful and/or an invalid motivation” for Fire Radio ceasing to provide its digital service.

It reiterated that there were a number of other factors, as set out in its initial response to Ofcom, in addition to the size of the multiplex fees, which had influenced its decision to cease carriage of Fire Radio on the Bournemouth multiplex, as follows:

- The annual cost of DAB transmission of Fire Radio at the poorest, permitted quality mono signal is over three times the cost of its FM stereo transmission at its highest quality.

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<sup>4</sup> On 23 November 2015, Ofcom received a multiplex variation request from Now Digital to restore Fire Radio to the Bournemouth multiplex from 1 December 2015. The request was approved by Ofcom, and Celador is now once again broadcasting the Fire Radio service on the multiplex.

- Coverage of the Bournemouth multiplex extends to areas over 30 miles from Bournemouth, to places that the analogue Bournemouth licence is not required to serve.
- The broadcast of Fire Radio on DAB would duplicate a service already available to listeners on the FM band in Bournemouth. According to audience figures from RAJAR<sup>5</sup> (Q3 2015), only 3,100 of Fire Radio's 54,000 weekly listeners were consuming the station via DAB.
- Digital switchover is unlikely to happen until, at the very earliest, 2020.

Celador also pointed to Ofcom's current small-scale DAB multiplex trial as evidence that the regulator recognised that the existing DAB multiplexes were unsuitable for both community radio stations and smaller commercial radio stations such as Fire Radio.

Finally, the Licensee was also concerned that the background to this case had not been referred to in the Preliminary View. It noted that Ofcom had previously agreed to shorten and then fully re-advertise the commercial radio licences held by the company for Portsmouth and Weston-Super-Mare,<sup>6</sup> yet had not agreed to do so in the case of the Bournemouth licence. When completing the purchase of Fire Radio in the summer of 2014, Celador said that it had no reason to believe that Ofcom would be unwilling to shorten and fully re-advertise Fire Radio's Bournemouth licence.

## Decision

Section 104A of the Broadcasting Act 1990 (as amended) enables the holders of analogue commercial radio licences to renew their licence provided that certain specific criteria are met, and in particular subject to the condition that the licensee also provides a digital programme service on a relevant local DAB multiplex throughout the renewal term. The purpose of this provision is to incentivise commercial radio stations to broadcast on the DAB radio platform.

In this case, it was therefore a fundamental condition of licence renewal that the Licence was varied to include Condition 2A which requires that the licence-holder "do all it can to ensure that the local digital sound programme service Fire Radio is broadcast by means of the Bournemouth local radio multiplex service throughout the renewal period".

We noted that Celador had suggested that, in the absence of guidance from Ofcom on the interpretation of Licence Condition 2A, it understood the obligation was akin to a contractual "best endeavours" condition. To clarify, we do not consider that Licence Condition 2A is akin to a contractual "best endeavours" obligation. Rather, in our view, the obligation "to do all [the licensee] can" to broadcast on the multiplex is a high one, reflecting a fundamental principle of the statutory framework for renewal of analogue licences and the commitments that were made to Ofcom when considering whether to renew or to re-advertise the Licence. Licensees are required to do "all they can" to ensure that the service is broadcast on the relevant local multiplex – this means that they should take steps to ensure that the service is broadcast on the

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<sup>5</sup> Radio Joint Audience Research.

<sup>6</sup> Both these licences had been previously renewed on the basis of providing of a digital service on a relevant DAB multiplex.

relevant local multiplex in all but exceptional circumstances that are outside of the licensee's control. There is no reference to this obligation being limited to "reasonable endeavours" or "best endeavours" on the part of the Licensee.

We noted that Celador had argued that it was reasonable for it to take the decision to remove the Fire Radio digital service from the Bournemouth multiplex on the basis that the fees charged by the multiplex operator threatened the profitability of the Fire Radio service.

We were not persuaded that the evidence submitted by Celador was sufficient to demonstrate that the financial viability of the Fire Radio service would have been fundamentally threatened by way of the continued transmission on the DAB multiplex.

We also noted the other factors, in addition to the size of the multiplex fees, which Celador had indicated influenced its decision to cease carriage of Fire Radio on the Bournemouth multiplex, namely:

- that the annual cost of DAB transmission of Fire Radio at the poorest, permitted quality mono signal is over three times the cost of its FM stereo transmission at its highest quality;
- that the coverage on DAB extends to areas over 30 miles from Bournemouth that the analogue licence is not required to serve;
- that it considered that the broadcast of Fire Radio on DAB would duplicate a service already available to listeners on the FM band in Bournemouth and that, according to audience figures from RAJAR (Q3 2015), only 3,100 of Fire Radio's 54,000 weekly listeners were consuming the station via DAB; and
- that digital switchover is unlikely to happen until, at the very earliest, 2020.

However, even if such factors influenced Celador's decision that maintaining the broadcast would not be in its commercial interests, they do not demonstrate that it would not have been possible for Celador to maintain the broadcast. Further, as noted above, the requirement to maintain a digital service broadcast on the local multiplex arises from the relevant statutory scheme, which has the objective of promoting the take-up of digital radio. This objective would not be furthered if Celador were to cease the broadcast on the basis that its audience figures for the digital service are currently low and digital switchover is unlikely to happen until 2020.

We also note Celador's reference to reported comments made by Ofcom in relation to its current trial of small scale DAB technology. We do not consider that the small scale DAB trial being conducted by Ofcom is relevant to the present case. The trial is not evidence that the level of local multiplex fees being charged were not affordable to Celador in this case.

We considered that Celador's decision to remove Fire Radio from the multiplex appeared to be motivated by its commercial interests rather than any more fundamental practical impediment outside of Celador's control to maintaining the broadcast. In these circumstances, we were therefore not persuaded that Celador had done "all it can" to ensure that the Fire Radio digital service is broadcast on the Bournemouth multiplex throughout the renewal period in accordance with the requirements of Licence Condition 2A.

On the background to this case, we accepted that different decisions were taken by Ofcom concerning Celador's request to shorten the Portsmouth and Weston licences. However, at no stage did Ofcom provide any assurances to Celador that we would accept any future request to shorten and re-advertise any other local radio licences, and we did not consider that it would have been reasonable for Celador to assume that the same approach would be taken in the case of the Fire Radio licence.

We concluded that, by failing to ensure that the Fire Radio digital service was broadcast on the Bournemouth multiplex during the period from 31 October 2015 to 30 November 2015, Celador breached Condition 2A of the Licence.

We considered that this decision was consistent with our statutory duties in relation to local radio services.

However, Ofcom also took into account that, since the commencement of this investigation, Celador had been able to successfully conclude carriage negotiations with the multiplex operator, and that the Fire Radio service re-commenced broadcasting on the Bournemouth multiplex from 1 December 2015.<sup>7</sup>

In view of this, and the relatively short time for which Fire Radio was not available to listeners in the Bournemouth area on DAB, we consider the matter to be resolved.

## **Resolved**

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<sup>7</sup> On 23 November 2015, Ofcom received a multiplex variation request from Now Digital to restore Fire Radio to the Bournemouth multiplex from 1 December 2015. The request was approved by Ofcom, and Celador is now once again broadcasting the Fire Radio service on the multiplex.

## Broadcast Fairness and Privacy cases

### Upheld in Part

#### Complaint by Ms A

*40 Kids by 20 Women, Channel 5, 31 March 2015*

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#### Summary

Ofcom has upheld in part Ms A's complaint of unwarranted infringement of privacy.

The programme followed four men who had fathered over 70 children between them. During the programme, the men discussed their promiscuity with women, and their attitudes towards women and the children they had fathered. One of the men, Keith, was shown engaged in a conversation with the complainant at a bus stop. Ms A was not named in the programme and her face was obscured, however her voice was not disguised. A three-second clip of this exchange with Ms A was also shown at the beginning of the programme.

Ofcom found that, in the particular circumstances of this case:

- Ms A had a legitimate expectation of privacy, albeit limited to some extent, in connection with the obtaining of footage of her but that, on balance, the broadcaster's right to freedom of expression and the public interest in obtaining the material of Ms A outweighed her limited legitimate expectation of privacy.
- Ms A's legitimate expectation of privacy was significantly more engaged in the programme as broadcast and, on balance, her right to privacy outweighed the broadcaster's and Keith's right to freedom of expression and the audience's right to receive information and ideas without interference. Ofcom found therefore that Ms A's privacy was unwarrantably infringed in the programme as broadcast.

#### Programme summary

On 31 March 2015, Channel 5 broadcast *40 Kids by 20 Women*, a programme that followed four men from different backgrounds who had fathered over 70 children between them. The fathers were shown in interview discussing the consequences of their promiscuity, interacting with their families and going about their day-to-day lives. The programme, which was narrated, explored the men's attitudes to a number of matters including women and their responsibilities towards their children.

The narrator explained that one of the fathers, Keith, was known locally as "*the Sunderland Shagger*" and had fathered at least 15 children by a number of women. Keith was shown travelling to Birmingham and explaining that he was visiting the city to "*pull girls*". The narrator said that Keith had a "*tried and tested formula for pulling girls*". Keith explained that his technique was to approach women at bus stops and ask them for the time with the hope of starting a conversation with them and obtaining their telephone number. Keith and his friend were then shown wandering around Birmingham. Keith was shown standing at a bus stop looking at women passing by, commenting on their looks to his friend: "*some of them are like really fat, proper beach whales some of them. You see when I've had too much to drink you're just going with anybody, don't you? And then you wake up and you go, oh no, what have I done?*" Keith was shown approaching some of the women and asking them for the time. Later in the programme, Keith was shown again standing near the bus stop



approaching women, commenting on their looks: “*Oh she looks alright*”, “*No she’s got glasses. Doesn’t matter – pass*”, “*Oh another fatty*”. At this point, the narrator said “*Keith’s bus stop vigil finally pays off*” and Keith was shown approaching a woman standing at the bus stop.

The following exchange took place between the woman and Keith:

Keith: “*Excuse me, have you got the right time, please?*”

Woman: *I think it’s six o’clock.*

Keith: *Can I ask you a question? What’s the best place around here for like drinking and stuff like that? See, I’ve never been around here, I’m from Newcastle, you can tell by my accent.*

Woman: *Yeah. I’m not really sure around here to be honest with you. I’d probably just start there [pointing down the road].*

Keith: *Are you single by any chance?*

Woman: *Yeah.*

Keith: *Can I have your number?*

Woman: *Okay*”.

The narrator said that this was a success for Keith in that he had “*managed to get the girl’s number and he couldn’t be happier about it*”. Keith was then shown walking away, laughing to his friend whilst saying “*that’s how easy it is to pull around here, man. Class*”. The narrator then said “*it appears Keith’s baby making career is far from slowing down*”. The woman was not shown again in the programme.

The woman spoken to by Keith was the complainant. She was not named in the programme and her face was obscured, however her voice was not disguised. A three second clip of Keith’s exchange with the complainant was also shown at the beginning of the programme.

## **Summary of the complaint and the broadcaster’s response**

### The complaint

- a) Ms A complained that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme because she was filmed in public without her knowledge or consent.
- b) Ms A complained that her privacy was unwarrantably infringed in the programme as broadcast because footage of her was included in the programme without her consent.

In particular, Ms A said that when she was approached by the programme makers and asked if she would permit them to use the footage, she had said no several times. However, the footage was still used. Ms A said that her voice was heard unobscured and that although her face was blurred, she was still recognisable from her hair and clothes. She said that she had been recognised by people she knew. Ms A said that she felt that not enough was done by the

programme makers to protect her identity, the result being that she now felt humiliated.

### Channel 5's response

Channel 5 stated that no correspondence had been entered into between the programme makers and Ms A.

Before addressing the specific elements of the complaint, Channel 5 set out the case law which it considered relevant.

The broadcaster said that the first question was whether or not the applicant had a reasonable expectation of privacy. In particular, Channel 5, referring to *Murray v Big Pictures (UK) Ltd*<sup>1</sup>, stated that this is an objective question.

Channel 5 then submitted that “[t]he cases make clear that not every action or inaction involving a person will necessarily be private”. However, Channel 5 submitted that where the action or inaction occurs as part of a person’s private life, whether or not that action or inaction is private will be an objective question of degree, considering all the circumstances of the case. Channel 5 said that the second question is only asked where the first question is answered in the affirmative.

In particular, Channel 5 said that questions of public interest in connection with Article 10 of the European Convention on Human Rights (“ECHR”) never arise unless and until it has been established that the individual has a reasonable expectation of privacy. Channel 5 said that it may be necessary to consider the public interest as part of the process of establishing whether or not, objectively speaking, a matter attracts a reasonable expectation of privacy. The broadcaster said that “[t]he fact that an action or activity or object is *in itself* contrary to the public good or the public interest may be a critical consideration in deciding that the action, activity or object does not attract a reasonable expectation of privacy” [emphasis in original].

The broadcaster submitted that there is no general rule about when matters are or are not private and that each case turns necessarily on its own facts.

Channel 5 said that the mere taking of a photograph or the filming of a subject would not amount, in itself, to a breach of Article 8. In support of this position, Channel 5 referred to *Wood v Commissioner of Police for the Metropolis*<sup>2</sup> and to *Browne v Associated Newspapers Limited*<sup>3</sup>.

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<sup>1</sup> [2008] EWCA Civ 446, para 35.

<sup>2</sup> [2009] EWCA Civ 414, para 31: “...ordinarily the taking of photographs in a public street involves no element of interference with anyone’s private life and therefore will not engage Article 8(1), although the later publication of such photographs may be a different matter. Here, I should again cite *Campbell v MGN Ltd*... Lord Hoffmann said this at paragraphs 73 – 74:

*‘In the present case the pictures were taken without Miss Campbell’s consent. That in my opinion is not enough to amount to a wrongful invasion of privacy. The famous and the not so famous who go out in public must accept that they may be photographed without their consent ...’*

... Lord Hope of Craighead said this at paragraph 122:

Channel 5 then cited *Campbell v MGN Ltd*<sup>4</sup>, which it said made clear that it is not to the point whether or not the subject of a disclosure takes offence, rather what is important is whether, objectively speaking, it would be reasonable for an ordinary person, to consider the particular disclosure to the general public to be offensive.

In responding specifically to the complaint, Channel 5 said that it was difficult to see how an ordinary person would consider that what happened to Ms A in the present case could possibly amount to an activity which ought to be kept private or an activity which, if disclosed, would cause offence. The broadcaster said that the activity occurred in a public street and that it was not a deception or trick played by the programme makers, but rather they simply filmed one of the contributors doing what he did in the ordinary course of his life.

Channel 5 said that anyone present at the scene where the exchange between Ms A and Keith occurred could have seen the exchange and overheard it. It said that Ms A did not reveal any information personal to her in the exchange and nothing detrimental about Ms A was conveyed by the broadcast of the footage.

Channel 5 submitted that, importantly, at the time of the exchange that was broadcast, Ms A did not show any signs of vulnerability or embarrassment. It acknowledged that Ms A may have been caught off-guard by the question asked by Keith but the question was not one likely to cause a reasonable person embarrassment and nor was it one which a reasonable person would consider offensive.

Channel 5 submitted that Article 8 affords protection to a person's private and family life, his home and his correspondence. However, Channel 5 said that Article 8 does not afford protection to a person's public activities i.e. activities which either occur in public spaces and are not inherently private or activities which occur in a way which makes it impossible to regard them as inherently private. In support of this, the broadcaster cited *Kinlock (AP) v Her Majesty's Advocate*<sup>5</sup>.

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*'The taking of photographs in a public street must...be taken to be one of the ordinary incidents of living in a free community. The real issue is whether publicising the content of the photographs would be offensive...'*

*Finally, Baroness Hale of Richmond at paragraph 154:*

*'We have not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential. The activity photographed must be private. If this had been, and had been presented as, a picture of Naomi Campbell going about her business in a public street, there could have been no complaint...'*

<sup>3</sup> [2007] EWCA Civ 295; [2008] QB 103: "Nevertheless we accept ... that the mere fact that the information was imparted in the course of a relationship of confidence does not satisfy Lord Nicholls's test of 'expectation of privacy'... That is clear, for example from Lord Nicholls's formulation of the test, namely whether in respect of the disclosed facts the claimant has a reasonable expectation of privacy – our emphasis. As we see it, the test must be applied to each item of information communicated...".

<sup>4</sup> [2004] UKHL 22; [2004] 2 AC 457.

<sup>5</sup> [2002] UKSC 62, para 21: "There is nothing in the present case to suggest that the appellant could reasonably have had any expectation of privacy. He engaged in these activities in places where he was open to public view by neighbours, by persons in the street or by

The broadcaster stated that “equally, and perhaps importantly, nothing in the European Convention on Human Rights or any other relevant law establishes a right ‘not to be on television’”. It said that complainants often appear to perceive that the law of privacy establishes such a right, when clearly it does not.

Channel 5 also said that the case law recognises that courts must give latitude to the view of the publisher/broadcaster about what is appropriate to be published or broadcast. Referring again to *Campbell*, Channel 5 noted that Lord Hoffman stated that a publisher was not limited to the publication of bare facts but could include circumstantial details, including photographs, because media outlets, consistent with their Article 10 rights should have latitude about how stories are told or presented to the public. In particular, the broadcaster said that Lord Hoffman observed that “*judges are not newspaper editors*”. The broadcaster submitted that the same latitude should be afforded to broadcasters.

Channel 5 then provided background information on the programme. Channel 5 submitted that the programme was a documentary looking at men who father many children with more than one female partner. It submitted that the programme was an observational documentary which followed the ordinary lives led by the contributors.

The broadcaster explained that one of the contributors, Keith, (who the broadcaster said “fancied himself as a kind of Casanova”) told the programme makers that one of his techniques for “pulling” involved chatting to complete strangers at bus stops. The broadcaster said that the programme included a sequence where Keith demonstrated his technique. Channel 5 explained that this sequence was about the contributor, not about the people with whom he spoke. It said that nothing detrimental or embarrassing was revealed about the women with whom the contributor interacted.

Channel 5 said that the production company spoke with each woman with whom the contributor interacted as part of this sequence. It said that the women were told that they had been filmed and they were also told the purpose of the filming. The broadcaster explained that the women were asked whether or not they were prepared to consent to use of the footage in the programme. The broadcaster said that when consent was not given, as was the case with Ms A, they acted in accordance with the usual conventions by blurring the identity of the person who was filmed and taking steps to limit the coverage of that person in the body of the programme.

Channel 5 submitted that the filming in question was not secret or surreptitious filming, but it said that even if Practice 8.15 of Ofcom’s Broadcasting Code (the “Code”)<sup>6</sup> did apply, Channel 5 considered that the filming of the interactions at the bus stop did not “amount to a significant infringement of privacy such as to cause

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*anyone else who happened to be watching what was going on. He took the risk of being seen and his movements noted down”.*

<sup>6</sup> Practice 8.15 of the Code provides that: “Surreptitious filming or recording, doorstepping or recorded ‘wind-up’ calls to obtain material for entertainment purposes may be warranted if it is intrinsic to the entertainment and does not amount to a significant infringement of privacy such as to cause significant annoyance, distress or embarrassment. The resulting material should not be broadcast without the consent of those involved. However if the individual and/or organisation is not identifiable in the programme then consent for broadcast will not be required”.

significant annoyance, distress or embarrassment". Notwithstanding this, Channel 5 said that it ensured that "the individual and/or organisation [was] not identifiable in the programme" and, accordingly, no occasion arose for obtaining Ms A's consent.

In responding specifically to head a) of the complaint, Channel 5 submitted that no privacy right of Ms A was infringed by the recording of the events at the bus stop. It said that the events occurred in public, were witnessed by everyone who was present and they were not private.

In responding specifically to head b), Channel 5 submitted that this was not a case where the production company made an agreement with Ms A to the effect that the footage of her would not appear in the broadcast. It said that no privacy right of Ms A was infringed by the broadcasting of the events at the bus stop and that no Article 8 right was engaged. The broadcaster said that the actions were not carried out in private and they did not attract any reasonable expectation of privacy and that therefore it was open to Channel 5 to identify Ms A in relation to these matters, but it had not done so. The broadcaster said that in the sequence in the programme involving Ms A, her identity was obscured. It acknowledged that Ms A's voice was not obscured, but that it did not consider that it was necessary or appropriate given that:

- Ms A's face was blurred in accordance with the usual blurring conventions utilised by UK broadcasters;
- Ms A was not heard in the broadcast of the material revealing any private information concerning herself, such as her telephone number;
- anyone who was there could have overheard the exchange;
- although, clearly, Ms A did not wish to be included in the broadcast, there was no legal or regulatory reason not to include the exchange between her and the contributor at the bus stop in the broadcast; and,
- broadcasting Ms A's voice would not make her identifiable for the purposes of Practice 8.15 of the Code had it been applicable.

Channel 5 submitted that no information about Ms A sufficient to identify her to the world at large was broadcast. It acknowledged that while it was possible that the broadcast had the capacity to cause Ms A limited annoyance, distress or embarrassment, any such limited consequence could never, and did not, amount to "significant annoyance, distress or embarrassment" as envisaged by Practice 8.15 of the Code, which must be higher than the appropriate standard, given there was no secret or surreptitious filming involved. Channel 5 said that even if it was wrong about that, the capacity for the broadcast to do serious harm to Ms A was insufficient to outweigh Channel 5's Article 10 rights to broadcast the programme.

In conclusion, for all of the reasons given above, Channel 5 said that it did not accept that the programme had breached the Code. Channel 5 submitted that the Code does not establish any rights to privacy over and above those conferred by the general law. Channel 5 said that it cannot be said that the programme as broadcast violated a right known to the law and that, therefore, the complaint must fail. Channel 5 said that in these circumstances, the complaint must be dismissed.

### **Ofcom's initial Preliminary View**

Ofcom prepared an initial Preliminary View on this case that Ms A's complaint of unwarranted infringement of privacy in connection with the obtaining of material included in the programme and in the programme as broadcast should be upheld.

Both parties were given the opportunity to comment on the initial Preliminary View. Both parties made representations and the relevant points in relation to the initial Preliminary View are summarised below.

#### Ms A's representations on Ofcom's initial Preliminary View

Ms A said she "had absolutely no idea" she was being filmed and said she would not have spoken to Keith if she had known. Ms A also said that the programme makers asked her repeatedly if they could use the footage of her and would not at first take no for an answer. Ms A said that a member of the film crew told her that Keith had only approached "women whom he found attractive in a bid to flatter [her] into saying yes to the footage being used". Ms A said that only when she saw the programme did she hear that Keith referred to her as "a fatty" before approaching her. Ms A also said that the programme makers did not make clear to her what they were filming and the true nature of the programme.

#### Channel 5's representations on Ofcom's initial Preliminary View

Channel 5 stated that for the reasons outlined below, it did not consider that the programme was in breach of the Code and that the complaint should be dismissed.

As a preliminary point Channel 5 considered that, Ofcom, in balancing the various interests in relation to privacy, "failed to take into account the rights of Keith". Channel 5 submitted that Keith has an Article 10 right, separate and distinct from Channel 5's, to freely communicate his opinions, views and activities to the public and the public has the right to freely receive those opinions, views and activities. Channel 5 submitted that, if Ms A enjoyed any Article 8 rights in relation to the footage as broadcast, those rights were outweighed by the combined Article 10 rights of both Channel 5 and Keith.

#### *The obtaining of the footage of Ms A*

Channel 5 referred to Ofcom's recent adjudication concerning a complaint by Mrs Alison Sinton<sup>7</sup> in which Ofcom found that Mrs Sinton did not have a legitimate expectation of privacy. Channel 5 submitted that unless different considerations and standards are applied, it was difficult to understand how Ofcom could have concluded that Mrs Sinton did not have a legitimate expectation of privacy in relation to the obtaining and broadcast of the footage and then conclude that Ms A did. The broadcaster said that, given the decision made by Ofcom in the Sinton adjudication, there should be no question of a different decision regarding Ms A's complaint and that the obtaining of the footage of Ms A did not constitute an unwarrantable infringement of privacy.

Channel 5 then went on to compare the circumstances in which the respective footage in relation to Ms A's and Mrs Sinton's complaint was obtained and broadcast, as follows:

- Channel 5 said that neither Ms A nor Mrs Sinton consented to the filming or broadcast.

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<sup>7</sup> See Broadcast Bulletin No 286 dated 1 September 2015.

- Channel 5 also submitted that Mrs Sinton was filmed at home when she was not expecting visitors and Ms A was filmed on a busy public road at a bus stop. The broadcaster said that Mrs Sinton’s home “*must* be a place which attracts the possibility of a legitimate expectation of privacy to a greater extent than a public bus stop does” (emphasis in original).
- Further, Channel 5 stated that the filming of Mrs Sinton took place openly on a public road and was unobtrusive. It said that Ms A was filmed in “similar circumstances”.
- The broadcaster stated that both Mrs Sinton and Ms A were fully dressed and exhibited no sign of anxiety or distress and that Ofcom found in its Preliminary View that Ms A answered Keith’s questions willingly and appeared fairly comfortable in doing so.
- The broadcaster also stated that both Mrs Sinton’s and Ms A’s faces had been obscured, their names were not given, and no specific features, apart from their voices, were capable of identifying either of them.
- Channel 5 submitted that no personal information pertaining to Mrs Sinton was revealed in the filming whereas Ms A freely disclosed her mobile phone number and her relationship status to a complete stranger, in the middle of the day, at a busy public bus stop. The broadcaster said that, in those circumstances, it was difficult to see how Ms A considered either matter private or confidential. The broadcaster also said that Ms A did not take any steps to keep her phone number private and her behaviour did not suggest that she considered the information she imparted to Keith to be private or confidential. Channel 5 also submitted that an individual’s relationship status was not a matter which was inherently private.

Channel 5 stated that Ofcom, in its initial Preliminary View, had wrongly concluded that “it did not appear...that Ms A knew that she was being filmed” and that “Channel 5 did not dispute this”. The broadcaster referred to an email it sent to Ofcom on 19 June 2015 in which Channel 5 said that: “It is quite clear from the rushes that [Ms A] was, at all times, aware of the camera and aware that she was being filmed and accepted that”. Channel 5 said that the filming of the exchange between Ms A and Keith occurred in public and no attempt was made to secretly film the encounter. Channel 5 also said that the unedited footage showed Ms A looking directly at the camera and it submitted that Ms A knew the filming was occurring.

Channel 5 said that “if Ofcom’s view is correct, it follows that no broadcaster could ever undertake observational filming of any person who interacts with any other person where that other person discloses personal information” (emphasis in original). Channel 5 submitted that this was not the legal position. The broadcaster referred to its initial representations on *Wood* and *Browne*<sup>8</sup> and said that Ofcom did not address these points in its Preliminary View. It said that *Wood* establishes that “in the ordinary case *filming* in a public street will not involve an interference with

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<sup>8</sup> Channel 5 cited the same paragraphs as it had done in its initial representations (see footnotes 2 and 3). The broadcaster also cited the following paragraph in *Browne*:

*“As Campbell makes clear, it is not to the point whether or not the subject of the disclosure takes offence; what is important is whether, objectively speaking, it would be reasonable for an ordinary person, objectively to consider the particular disclosure to be offensive”.*

anyone's privacy rights, although *broadcast* of the filmed material may involve such interference" (emphasis in original). The broadcaster also referred to *Campbell*, which Channel 5 said, established that Ms A's subjective view was not relevant.

Finally, Channel 5 said that the filming of the footage of Ms A was in the public interest in that "the programme examined an aspect of modern life which carried a significant public financial burden – multiple children borne to one father who does not support them financially" and that it sought to examine the conduct and lives of men who were fathers of large families and "gain some sort of insight into why they behaved as they did and how the consequences of their actions and behaviour impacted upon society". The broadcaster said that Keith's activities at the bus stop were part of this and demonstrated the kind of techniques he used to meet new women with whom he hoped he could have more children. Channel 5 said that, apart from anything else, there was a clear public interest in identifying Keith to single young women who might encounter him.

#### *The broadcast of the footage of Ms A*

Channel 5 repeated and relied on its submissions in relation to the obtaining of the footage of Ms A (as set out above). The broadcaster also made the following additional points.

Channel 5 noted that the only matter that Ofcom identified as private in the broadcast of the footage was Ms A's statement that she was single. Channel 5 said that "confirmation of one's relationship is not a matter to which a legitimate expectation of privacy attaches". The broadcaster said that it was "not a matter which is *inherently* private, unlike one's sexuality, sexual preferences, financial or medical affairs" (emphasis in original).

Referring to the Sinton adjudication, Channel 5 noted that Ofcom considered that it was unlikely that Mrs Sinton was identifiable to anyone who did not already know her. Further, Channel 5 noted that Ofcom, in its initial Preliminary View, stated that Ms A was identifiable in the programme as broadcast to people who already knew her. Channel 5 also stated if Ms A was identifiable to people who knew her then those people would not have learnt anything personal about Ms A from the broadcast as they would have known she was single. Channel 5 said that "the *Sinton* approach is correct and preferable" and that there was no basis for Ofcom to apply, in relation to Channel 5's broadcasts, "a wholly different test, than the one Ofcom applies to Channel 4's broadcasts".

Channel 5 also said that Mrs Sinton and Ms A were both obscured in the same way in that both of their faces were obscured, but their hair and clothes were not and their voices were unaltered.

Channel 5 said by not identifying Ms A to strangers, it took appropriate steps to ensure that the programme did not exceed the requirements of the public interest. It stated that Keith's right to tell his story and Channel 5's independent rights to broadcast the programme were legitimate rights. The broadcaster submitted that by balancing Ms A's competing rights, if any existed, by ensuring that she was not identifiable to people who did not know her, Channel 5 acted responsibly and appropriately, in accordance with the law, the Code and established broadcasting practice.

#### **Ofcom's revised Preliminary View**



Having carefully considered both parties' representations on its initial Preliminary View, Ofcom considered it appropriate to reconsider its initial Preliminary View in respect of head a) of Ms A's complaint that her privacy was unwarrantably infringed in connection with the obtaining of material of her included in the programme.

As such, Ofcom prepared a revised Preliminary View on this case that the complaint should be upheld in part. After considering Channel 5's and Ms A's representations on the initial Preliminary View, Ofcom considered that:

- Ms A had a legitimate expectation of privacy, albeit limited, in connection with the obtaining of the material of her in the programme as broadcast but that, on balance, the broadcaster's right to freedom of expression and the public interest in obtaining the material of Ms A outweighed her legitimate expectation of privacy; and,
- Ms A had a legitimate expectation of privacy, albeit limited, in the programme as broadcast and, on balance, her right to privacy outweighed the broadcaster's right to freedom of expression and the audience's right to receive information and ideas without interference. Ofcom found therefore that Ms A's privacy was unwarrantably infringed in the programme as broadcast.

Both parties were given the opportunity to make representations on the revised Preliminary View. While Ms A did not make any representations on the revised Preliminary View, Channel 5 stated that it repeated and relied on its previous submissions, and also provided additional representations all of which related to head b) of the complaint of unwarranted infringement of privacy in the programme as broadcast.

#### Channel 5's representations on Ofcom's revised Preliminary View

Channel 5 stated that before an Article 8 right can be invoked there must be a level of seriousness about the information sought to be protected by Article 8. In support of this point, the broadcaster referred to case law (*McKennitt v Ash*<sup>9</sup>, *Ferdinand v MGN Ltd*<sup>10</sup> and *Carina Trimmingham v Associated Newspapers Limited*<sup>11</sup>). It stated that, in

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<sup>9</sup> [2005] EWHC 3003 (QB): "*Having regard to proportionality, I do not believe that the passing references to friendships with various men are objectionable or offensive by modern standards. The only passage which in my judgment oversteps the mark is that containing the private and intimate observations ... It seems to me that there is a clear distinction to be drawn between general background, much of which would be anodyne or already in the public domain, and the details of her emotional reaction to bereavement. That is remarkably intrusive and insensitive*".

[2006] EWCA Civ 1714: "*(The judge) refused protection for many of them because he regarded their content as "anodyne", imprecise or already known to the public. In an authority shown to us after argument had closed, M v Secretary of State for Work and Pensions [2006] 2 AC 91 [83] Lord Walker of Gestingthorpe pointed out that interference with private life had to be of some seriousness before article 8 was engaged*".

<sup>10</sup> [2011] EWHC 2454 (QB) at paragraph 54: "*Wood v Commissioner of Police for the Metropolis [2011] WLR 123 confirms that an intrusion must reach a certain level of seriousness before it is even in principle capable of being protected by Article 8*".

<sup>11</sup> [2012] EWHC 1296 (QB), paragraphs 285, 290, 303, 304, 305: "*While there will commonly be a reasonable expectation of privacy in respect of the details of a sexual or family relationship, the position is not the same in respect of the bare fact of a sexual relationship ...*

Ms A's circumstances, there is nothing sufficiently serious to justify a finding that her privacy was unwarrantably infringed by the broadcast.

The broadcaster said that if, as a matter of law, there could be no reasonable expectation of privacy in relation to the ending of a civil partnership, it was difficult to understand how there could be a reasonable expectation of privacy in relation to a person's status as being single. The broadcaster said that "everyone is born single. Many people remain single throughout their life". It said that "accordingly, there is no basis upon which a reasonable person of ordinary sensibilities could or would think that their status as a single person was a matter entitled to the protection of the law". The broadcaster said that given that Ms A was only identifiable to people who knew her, her single status was not conveyed to anyone who was not likely to already know it. Channel 5 stated that even if that was not so, "the requisite level of seriousness simply had not been reached". The broadcaster said that it is not "degrading, humiliating or scandalous" to state that someone is single, and that whilst this information might be interesting, it is not capable of attracting the attention of Article 8. The broadcaster said that "if the bare fact of a sexual relationship is insufficient to attract the attention of Article 8, it is impossible for the elucidation of one's status as single to have that quality". It said that this would be the case in a publication or broadcast at large, where the single person was identified. However, the broadcaster stated that where, as in Ms A's case, the subject is only identifiable to those who knew her and who "are certain to already know that Ms A is single, there can be no question of Article 8 being invoked".

Channel 5 stated that the same was true for the conversation between Ms A and Keith in general. It said that, "at its highest", the broadcast of the conversation simply revealed that Ms A was persuaded by Keith to give him her phone number and to agree to the possibility of a date with him in the future. The broadcaster said that there was nothing serious about this. Channel 5 also stated the fact that people who knew Ms A and knew that she gave her phone number to a stranger who asked for it did not justify the intervention of Article 8 and that the threshold of seriousness required by *Wood* was "simply not in play". The broadcaster said that it might be different if Ms A's phone number had been revealed in the broadcast, or if the conversation had extended to "canvas intimate matters, such as what they might do after a prospective date" but that the broadcast did not cover anything other than, as

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*Mr White submits that...negative references to appearance and sexuality may be hurtful, but are not disclosures of information which (sic) above the threshold of seriousness required to be shown for there to be a misuse of private information ... In my judgment Ms Tringham could have no reasonable expectation of privacy in respect of the ending of her relationship with her civil partner.*

*The statements about Mr Hughes are in a different category, since they relate to events many years ago, with a different man, and have little to do with the scandal. It is part of Ms Tringham's complaint about the statements that they are not true and cast her in a poor light. Neither of these points is an obstacle to a claim for misuse of private information in relation to these statements.*

*If these statements had stood alone and there had been no scandal with Mr Huhne, for example if they had appeared in a short diary piece, I would have accepted that Ms Tringham had a reasonable expectation of privacy, and that there was little to be said by way of defence. The issue would have been whether the misuse of this information was sufficiently grave to pass the necessary threshold of seriousness. The circumstances as I have found them to be are very different. In the actual circumstances I conclude that the addition of these statements is not sufficiently serious to justify a finding that the Defendant has misused Ms Tringham's private information".*

Eady J put it, “anodyne matters”. Channel 5 concluded that Ms A “was not entitled to avail herself of Article 8 protection as the threshold of seriousness had not been crossed”. It said that as no Article 8 right of Ms A’s was engaged, it ought to follow that the reasoning in the Sinton adjudication would apply in equal force here.

Channel 5 stated that, in obscuring Ms A’s appearance, it had adopted the ordinary procedures used by broadcasters to protect individuals appearing in programmes without consent. The broadcaster referred to the Sinton adjudication and said that, in this case, the fact that the complainant would not have been identifiable to persons who did not already know her was important, and that there was no appreciable difference in Ms A’s case. The broadcaster said that, if Ofcom found it in breach of the Code in circumstances where Ms A was not identifiable to the public at large, “there will be an immediate and serious chilling effect on broadcasters”. Channel 5 stated that as such “[t]he usual position, one that has prevailed for many years, that obscuring identity permits publication of material for which consent has not been obtained, would be replaced by an unpredictable and uncertain standard” and that this would be untenable.

The broadcaster also said that Ofcom had not given sufficient, or indeed any, consideration to Keith’s rights. The broadcaster stated that the segment of the programme Ms A complains about concerned Keith and was illustrating the techniques Keith used to strike up relationships with women. Further, Channel 5 stated that showing Keith put to the test about his statements was a “key issue” and the point of the segment was to ascertain whether or not Keith’s “tried and tested formula for pulling girls” worked. The broadcaster said that “[e]ditorially, it was key to the integrity of the programme to examine whether or not Keith’s claims stood up” and that the only way to achieve that was to film him in action and to seek post-filming consent. The broadcaster stated that where consent was not obtained, as in Ms A’s case, the only option was to include the footage with the identity of any relevantly affected person obscured. Channel 5 said that this was a course frequently adopted by broadcasters and it was a matter entirely “within the range of editorial judgment, given the overall nature and content of the programme”<sup>12</sup>.

Channel 5 again referred to *Campbell*<sup>13</sup> and stated that case law recognised that courts must give latitude to the view of the publisher/ broadcaster about what is appropriate to be published or broadcast. Channel 5 said this latitude should be afforded to broadcasters who disseminate information to the public about matters of public interest. Channel 5 noted that Lord Hoffman in *Campbell* stated that a publisher was not limited to the publication of bare facts but could include circumstantial details, including photographs, because media outlets, consistent with their Article 10 rights, should have latitude about how stories are told or presented to the public.

Channel 5 stated that the segment in the programme involving Ms A was presented as a segment with an unidentifiable woman on whom Keith was testing his “‘tried and tested’ technique”. The broadcaster said that most viewers would have no idea that Ms A was involved and that those viewers who knew her would have learnt nothing about her that they did not already know. The broadcaster said that the purpose and point of segment was not to invade Ms A’s privacy or say anything at all about her. Rather Channel 5 said the point of the segment was to examine Keith’s claims and

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<sup>12</sup> *Trimingham v Associated Newspapers Limited* [2012] EWHC 1296 (QB), para 307 – 308.

<sup>13</sup> *Campbell v MGN Ltd* [2004] UKHL 22: “Judges are not newspaper editors” and para 154.

attitudes, and how that was conveyed was a matter of editorial judgment. The broadcaster also stated that if the court in *Trimingham* considered that repeating personal information about Ms Trimingham's sexual relations with Mr Huhne was "wild", "incredible" or "amazing" was not something which required the intervention of the court, then it is difficult to see why information far less personal or confronting would require the intervention of Ofcom.

The broadcaster referred to Ms A's representations on Ofcom's initial Preliminary View in which Ms A said: "*Only when I saw the programme did I see how he had referred to me as a fatty moments before approaching me*". Channel 5 submitted that this was the key issue underpinning Ms A's complaint. The broadcaster stated that no part of Ms A's complaint turns on anything Keith said about Ms A and that "[s]omething which is not private, or sufficiently serious to attract the protection of Article 8, does not become private or sufficiently serious because of a statement made separate to the event said to be private and serious". Channel 5 went on to say that Article 10 protects all kinds of speech including offensive speech<sup>14</sup> and that just as Article 10 protects words that may cause a claimant distress, Article 8 does not protect matters which are distressing but not private or sufficiently serious. The broadcaster said that the "mere fact that a claimant is, understandably, distressed by a segment of a broadcast does not mean that the claimant can substantiate a claim for unwarranted infringement of privacy". The broadcaster said that Ofcom had accepted this in a previous decision<sup>15</sup> in which it found that "distress alone is not sufficient to engage the complainants' privacy rights". The broadcaster stated that Ms A's distress was therefore not a basis for the engagement of any Article 8 right.

## Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unjust or unfair treatment and unwarranted infringement of privacy in, or in connection with the obtaining of material included in, programmes in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

The individual's right to privacy has to be balanced against the competing right of the broadcaster to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate. This is reflected in how Ofcom applies Rule 8.1 of the Code, which states that any infringement of privacy in programmes or in connection with obtaining material included in programmes must be warranted.

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<sup>14</sup> Channel 5 referred to *Livingstone v Adjudication Panel for England [2006] EWHC 2533*: "*Surprising as it may perhaps appear to some, the right of freedom of speech does extend to abuse. Observations, however offensive, are covered*".

<sup>15</sup> Complaint by Mrs B and Mr C: Broadcast Bulletin No 284 dated 27 July 2015.

In addition to this Rule, Section Eight (Privacy) of the Code contains “practices to be followed” by broadcasters when dealing with individuals or organisations participating in, or otherwise directly affected by, programmes, or in the making of programmes. Following these practices will not necessarily avoid a breach of Rule 8.1 and failure to follow these practices will only constitute a breach where it results in an unwarranted infringement of privacy.

In reaching its Decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast, a transcript of it and both parties’ written submissions. It also included the unedited footage of Ms A and the transcript of this footage. We also took account of both parties’ relevant representations in response to Ofcom’s initial Preliminary View on this complaint (which was to uphold the complaint) and Channel 5’s representations on the revised Preliminary View (which was to uphold the complaint in part).

- a) Ofcom first considered Ms A’s complaint that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme because she was filmed in public without her knowledge or consent.

In considering this part of the complaint, Ofcom had regard to Practices 8.5 and 8.9 of the Code. Practice 8.5 states that “any infringement of privacy in the making of a programme should be with the person’s and/or organisation’s consent or be otherwise warranted”. Practice 8.9 provides that “the means of obtaining material must be proportionate in all the circumstances and in particular to the subject matter of the programme”.

In considering whether or not Ms A’s privacy was unwarrantably infringed in connection with the obtaining of material included in the programme, Ofcom assessed whether Ms A had a legitimate expectation of privacy in the circumstances in which the material included in the footage was obtained. In doing so, we had regard to Section Eight of the Code which states that legitimate expectations of privacy will vary according to the place and nature of the information, activity or condition in question...” We also noted Section Eight states that “there may be circumstances where people can reasonably expect privacy even in a public place...” Further, the Guidance to Section Eight of the Code (the “Guidance”)<sup>16</sup> states that “privacy is least likely to be infringed in a public place” but that “there may be circumstances where people can reasonably expect a *degree* of privacy even in a public place” (emphasis in original)<sup>17</sup>. The Guidance says that the degree of privacy a person can reasonably expect in a public place will “always be dependent on the circumstances”.

In assessing whether Ms A had a legitimate expectation of privacy we took into consideration the broadcaster’s submissions regarding the Sinton adjudication. In particular, we noted Channel 5’s concern that unless different considerations and standards are applied by Ofcom, it was difficult to see how Ofcom could have concluded that Mrs Sinton did not have a legitimate expectation of privacy with regard to the obtaining (and broadcast) of the footage and also find that Ms A did have a legitimate expectation of privacy. The test always applied by Ofcom as to

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<sup>16</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section8.pdf>

<sup>17</sup> *PG v United Kingdom* [2006] 46 EHRR 51 (para 56): “Article 8 also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world... There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of “private life””.

whether a legitimate expectation of privacy arises is objective: it is fact sensitive and must be judged in light of all of the relevant circumstances in which the individual concerned finds him- or herself. Ofcom therefore approaches each case on its facts and applied this test in assessing both Ms A's and Mrs Sinton's complaints.

Looking at the circumstances, Ofcom considered the nature of the material obtained of Ms A, in both the programme and the unedited footage. We observed that the unedited footage showed that Ms A, who was standing at a public bus stop, was approached by Keith. A conversation ensued in which Keith was heard asking Ms A for the time, where to go out nearby, whether she was single and if he could have her telephone number. He also asked for her name. Ms A answered all of these questions, telling Keith her relationship status and providing him with her telephone number. We also noted that this exchange appeared to take place at dusk (cars passing on the road had their headlights on), not in daylight as the broadcaster submitted.

As noted above, we observed that the exchange between Ms A and Keith took place in a public place. Looking at the activity in question, and despite the public setting of a bus stop, we considered that the conversation between Ms A and Keith was an interaction of a private nature. The context and nature of the conversation captured on film and audio is relevant and showed Ms A interacting in close proximity with a stranger who approached her in an attempt to "chat her up" at a bus stop. She was filmed in close focus and covertly recorded responding to him in a positive manner, confirming she was single and giving him her telephone number. In our view, the conversation was personal and intimate in nature and the circumstances in which it took place and was recorded were sufficiently sensitive so as to cross the threshold of seriousness and give rise to a legitimate expectation of privacy. Taking all this into account, we considered that the conversation between Ms A and Keith was such that it could reasonably be regarded as private, notwithstanding its public setting.

We then went on to consider whether Ms A was aware that her conversation was being filmed and recorded. In doing so, we noted that the parties disputed the extent to which Ms A was aware that she was being filmed. In particular, we noted that Ms A complained that she was filmed without her knowledge. In her representations on our initial Preliminary View she said that she "had absolutely no idea" that she was being filmed and that, had she known she was being filmed, she would not have spoken to Keith. We also noted that Channel 5 stated that the unedited footage showed Ms A looking directly at the camera. Channel 5 also submitted that it was clear from the unedited footage that Ms A was aware of the camera at all times and that she was being filmed, and that she accepted this.

However, it did not appear to Ofcom from the programme or the unedited footage that Ms A was looking directly at the camera or that she gave any indication that she was aware of the camera. Ofcom also noted that the footage of the conversation between Ms A and Keith appeared to be shot from a distance and that a number of passers-by walked between Ms A and the camera. Therefore, it appeared to Ofcom that the camera was positioned a distance away from the bus stop. As noted above, it also appeared that the filming took place at dusk on a busy public road. In Ofcom's view these factors made it more likely that the presence of the camera and film crew would not have been obvious to an ordinary member of the public like Ms A. In any event, whatever Ms A knew of a camera, she was clearly unaware that Keith was wearing a hidden microphone to record their conversation.

Ofcom noted that the film crew approached Ms A only after the filming had occurred. Therefore, we considered that, even if Ms A had been aware of the presence of a camera, or film crew, it was unlikely that she would have been aware until after the filming that her interaction with Keith the subject of, and not incidental to, the filming or that she was being filmed talking to a contributor to the programme and that their conversation was being recorded.

In all these circumstances, Ofcom took the view that the camera had captured the interaction between Ms A and Keith without Ms A being aware that she was being filmed and recorded for the purposes of the programme.

As set out above, we noted that Channel 5 had argued that some of the circumstances in this case and those referred to in the Sinton adjudication were analogous, and therefore it should not be the case that Ms A had a legitimate expectation of privacy in the circumstances. In particular, Channel 5 stated that Mrs Sinton was filmed at home and that this “*must* be a place which attracts the possibility of a legitimate expectation of privacy to a greater extent than a public bus stop does” (emphasis in original). However, the facts of each case are clearly different: Mrs Sinton was filmed at the entrance to her home from the public pavement, and Ofcom found that the filming did not reveal any private or personal information about Mrs Sinton. In contrast, as noted above although Ms A was filmed in a public place, she was filmed and recorded having an intimate conversation which, in terms of both its context and nature, could reasonably be regarded as private.

However, we also noted that the conversation between Ms A and Keith took place at a bus stop in a busy public street and that the conversation could have been overheard by a member of the public who was in close proximity to the pair at the bus stop or walking by. We considered that this limited Ms A’s expectation of privacy to some extent.

For all these reasons, therefore, Ofcom considered that Ms A had a legitimate expectation of privacy, albeit limited to some extent, in relation to the obtaining of the footage.

Ofcom then considered whether the programme makers had secured Ms A’s consent to obtain the material. It was not disputed by the broadcaster that it had not obtained Ms A’s consent. Given that Ms A had a legitimate expectation of privacy, albeit limited to some extent, in relation to the obtaining of the footage and that the footage was obtained without her consent, Ofcom then assessed whether obtaining footage of the exchange that Ms A had with Keith in the street was warranted and whether the means of obtaining the footage were proportionate in all the circumstances.

For the purposes of Section Eight “warranted” has a particular meaning. The Code makes it clear that where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in the particular circumstances of the case it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. In assessing whether the infringement of Ms A’s privacy was warranted, Ofcom considered the broadcaster’s competing right to freedom of expression and to obtain information and ideas without unnecessary interference and the audience’s right to receive such information against Ms A’s right to privacy. We noted Channel 5’s representations that the

filming of the footage of Ms A was in the public interest. Ofcom considered that, in the particular circumstances of this case, the need for the programme makers to film while events were unfolding made it unrealistic to gain Ms A's consent before filming her. Ofcom also took into account that the programme makers were seeking to deal with serious themes in the programme, exploring the promiscuity of the men featured and that one way of doing this was to film Keith's interaction with women to demonstrate his "pulling" techniques. Furthermore, Ofcom took the view that it would be undesirable for programme makers to be unduly constrained in their ability to carry out filming in a public place in circumstances such as these where they would be unable to obtain consent from those involved prior to filming taking place.

Having taken all the above factors into account, Ofcom considered that, on balance, the broadcaster's right to freedom of expression to obtain footage of Ms A for the purpose of making observational programmes of this nature outweighed her limited legitimate expectation of privacy in the circumstances of this case.

Therefore, we found that there was no unwarranted infringement of privacy in connection with the obtaining of footage of Ms A for inclusion in the programme.

- b) Ofcom went on to consider the complaint that Ms A's privacy was unwarrantably infringed in the programme as broadcast because footage of her was included in the programme without her consent.

In considering this part of the complaint, Ofcom had regard to Practice 8.4 and Practice 8.6 of the Code. Practice 8.4 states that "broadcasters should ensure that words, images or actions filmed or recorded in, or broadcast from, a public place, are not so private that prior consent is required before broadcast from the individual or organisation concerned, unless broadcasting without their consent is warranted". Practice 8.6 states that "if the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted".

Ofcom first assessed whether Ms A had a legitimate expectation of privacy with regard to the broadcast of footage of her included in the programme. In doing so we had regard to the provisions of Section Eight of the Code and the Guidance (as stated above under head a)). As noted above, the test applied by Ofcom as to whether a legitimate expectation of privacy arises is objective and fact sensitive, and must always be judged in light of the specific circumstances.

In assessing whether Ms A had a legitimate expectation of privacy in relation to the broadcast of the footage, we noted that the exchange between Ms A and Keith took place in a public place. However, as stated above, we considered that the conversation was an intimate exchange which could reasonably be regarded as private. Ms A was shown in the programme interacting with Keith, a stranger who approached her in an attempt to "chat her up" at a bus stop. She was shown responding to him in a positive manner, confirming she was single and agreeing to give him her telephone number. As Keith commented as he was walking away, the conversation demonstrates how "easy it is" for Keith to "pull around here". Further, for the reasons stated under head a), Ofcom was of the view that Ms A was not aware that she was speaking to a contributor to a television programme who was wearing a hidden microphone to record their conversation or that she was being made deliberately the subject of the filming for this purpose. We considered that the footage of the exchange between Ms A and Keith disclosed



an intimate and personal conversation and that, in the circumstances, it crossed the threshold of seriousness and engaged Ms A's right to privacy.

We also assessed whether Ms A was identifiable in the programme as broadcast. Ofcom recognised that Ms A was not identified by name in the programme and that the programme makers had blurred her face in the broadcast footage in an attempt to reduce the likelihood of her identity being revealed. However, we noted that Ms A's hair was not obscured and the full length of her body was shown with the outline and shape of her body and clothing clearly visible. Further, Ms A's voice was audible and not disguised. We noted that Ms A complained that her voice was heard unobscured and that although her face was blurred, she was still recognisable from her hair and clothes. She said that she had been recognised by people who knew her. Given this, Ofcom took the view that the broadcast of Ms A with only her face obscured, taken together with her undistorted voice, was such that there was a genuine risk of her being identified to third parties and to those who knew her.

We again noted Channel 5's submissions on the Sinton adjudication, namely that Mrs Sinton's home must be a place which attracts a legitimate expectation of privacy to a greater extent than a public bus stop. We also took into consideration Channel 5's submission on the initial Preliminary View that both Ms A and Mrs Sinton were obscured in the same way and that both were identifiable from the programmes to people who knew them. However, the facts of each case are clearly different: Mrs Sinton was filmed at the entrance to her home from the public pavement, and Ofcom found that the broadcast footage did not reveal any private or personal information about Mrs Sinton. In contrast, as noted above, although Ms A was filmed in a public place, she was filmed and recorded, and broadcast, having an intimate conversation which could reasonably be regarded as private.

We considered that there was a risk that Ms A was identifiable from the broadcast footage. We noted that the conversation between Ms A and Keith took place at a bus stop in a busy public street and that the conversation could have been overheard by a member of the public who was in close proximity to the pair at the bus stop or walking by. We also acknowledged that the programme makers had blurred Ms A's face in the material broadcast. We acknowledged that the blurring limited to some degree the extent of infringement into her legitimate expectation of privacy. However, as noted above, we considered that the blurring was inadequate and, taken together with her full body outline and clothes shown and her undisguised voice, the broadcast material gave rise to a risk of Ms A being identified to third parties and to those who already knew her. Moreover, we considered that the private information disclosed in the broadcast footage went beyond mere confirmation of Ms A's single status and revealed the fact of her exchange with Keith, its intimate and personal nature and the fact that she had reacted positively to Keith's attempt to "chat her up" (ostensibly private matters which would not otherwise have been known even to those who knew Ms A well).

Therefore, taking all of the above into account, it was our view that Ms A had a legitimate expectation of privacy in relation to the broadcast of the footage of her engaging in an intimate conversation with Keith. Further, given that we considered that Ms A was identifiable from the footage broadcast in the programme and the notably greater intrusion which was occasioned by its disclosure in a nationally televised programme (with attendant exposure that substantially exceeded anything which someone in Ms A's position could possibly

have expected at the time)<sup>18</sup>, we considered that Ms A's legitimate expectation of privacy in relation to the broadcast (as compared to the obtaining) of that conversation was significantly more engaged.

We then assessed whether Ms A's consent had been secured before the broadcast of the footage. It was not disputed that the broadcaster had asked for Ms A's consent for the footage of her to be broadcast in the programme and that Ms A had declined to give her consent.

Given that Ms A had a legitimate expectation of privacy in relation to the broadcast of the footage, and this was broadcast without her consent, it was necessary to establish whether or not this infringement of her privacy was warranted. In doing so, we had regard to the meaning of "warranted" as set out in the Code (as summarised above under head a)). The Code makes it clear that where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in the particular circumstances of the case it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy.

We took into account the broadcaster's and Keith's right to freedom of expression and the audience's right to receive the information broadcast without unnecessary interference and balanced this against Ms A's right to privacy. Ofcom noted Channel 5's representations on our initial Preliminary View that the broadcast of the footage of Ms A was in the public interest because "the programme examined an aspect of modern life which carried a significant public financial burden – multiple children born to one father who does not support them financially". Ofcom also took into account that the programme makers were seeking to deal with serious themes in the programme, exploring the promiscuity of the men featured and that one way of doing this was to film and broadcast Keith's interaction with women to demonstrate his "pulling" techniques. We carefully considered Channel 5's representations regarding Keith's right to freedom of expression and we expressly considered his rights in our balancing exercise. In this regard, we took into account the fact that those rights are not a trump card when competing rights are in play and that if Keith wished to reveal information about aspects of his private life any such revelation should be crafted so as far as possible to protect Ms A's privacy from unwarranted or disproportionate infringement<sup>19</sup>.

In considering whether the broadcast of footage of Ms A's conversation with Keith unwarrantably infringed her privacy, Ofcom took into account all the relevant factors set out above, including the nature of the programme, and we intensely focused on the balance between the competing rights. In particular, Ofcom considered that the nature of the conversation between Ms A and Keith was intimate and gave rise to a legitimate expectation of privacy; that Ms A was unaware that she was speaking to a contributor to a television programme and that she was being made deliberately the subject of the filming or that her conversation with Keith was being covertly recorded for this purpose; and that she had refused to give her consent to the use of the footage in any broadcast.

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<sup>18</sup> *Peck v United Kingdom* [2003] ECHR 44.

<sup>19</sup> *McKennitt v Ash* [2006] EMLR 10, para 77: "It does not follow, because one can reveal one's own private life, that one can also expose confidential matters in respect of which others are entitled to protection if their consent is not forthcoming".

Moreover, although we noted the broadcaster's efforts to limit the intrusion into Ms A's privacy by blurring her face, despite those efforts, we concluded that Ms A was identifiable in the footage as broadcast to third parties and to those who knew her and that the information which the programme revealed about her was thereby disclosed in a medium and on a scale which significantly exceeded that which someone in her position could reasonably have expected at the time. As a result, we considered that Ms A's legitimate expectation of privacy was significantly more engaged in relation to the broadcast footage and that the interference with her expectation of privacy was greater as a consequence of the decision to broadcast that footage in the programme itself.

Ofcom recognised the broadcaster's right to freedom of expression and the audience's right to receive information and ideas without interference and we took into account the public interest in exploring the lifestyles and promiscuity of the men featured in the programme. We also gave weight to Keith's right to freedom of expression and the editorial latitude afforded to broadcasters as to how they choose to present their programmes.

After an intense focus on the comparative weight of all the above factors, Ofcom considered that the infringement of Ms A's right to privacy in the broadcast of the footage without her consent was not warranted in the particular circumstances of this case. On balance, we did not consider that the broadcaster's and Keith's rights to freedom of expression and the audience's right to receive information and ideas about the matters explored by the programme were of sufficient weight so as to justify the interference with Ms A's right to privacy which was occasioned by the broadcast of the particular footage used in the programme.

Therefore, Ofcom found that Ms A's privacy was unwarrantably infringed in the programme as broadcast.

**Ofcom has upheld Ms A's complaint of unwarranted infringement of privacy in the programme as broadcast. However, Ofcom has not upheld Ms A's complaint of unwarranted infringement of privacy in connection with the obtaining of material of her included in the programme.**

## Not Upheld

### Complaint by Mr Inderjit Bhogal

*Akaal Uncensored, Akaal Channel, 21 November 2014*

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#### Summary

Ofcom has not upheld Mr Inderjit Bhogal's complaint of unjust or unfair treatment and unwarranted infringement of privacy in the programme as broadcast.

The live debate programme *Akaal Uncensored* included a discussion about a telephone conversation between Mr Bhogal and a man calling himself "Asif" that Mr Bhogal believed had been a "hoax" telephone call.

Ofcom found that:

- From the information available, it was not possible for Ofcom to conclude whether or not Mr Bhogal was informed about the true nature and purpose of the programme prior to his participation in it. However, we did not consider that Mr Bhogal was portrayed in the programme in a way that was likely to materially and adversely affect viewers' perceptions of him in a way that was unfair. Therefore, in the particular circumstances of this case, we did not consider that Mr Bhogal had been treated unjustly or unfairly in the programme as broadcast.
- Mr Bhogal did not have a legitimate expectation of privacy in relation to the broadcast of the recorded telephone conversation. Ofcom therefore considered that Mr Bhogal's privacy was not unwarrantably infringed in the programme as broadcast.

#### Introduction and programme summary

Akaal Channel is a television channel providing programming for the Sikh community throughout the UK and Europe. On 21 November 2014, Akaal Channel broadcast an edition of its live debate programme *Akaal Uncensored*. This edition of the programme included a discussion about an alleged "hoax" telephone call ("the hoax call") which had been made to the complainant, Mr Bhogal.

A transcript in English (translated from the original Panjabi and English) of the programme as broadcast was prepared for Ofcom by an independent translation company. Both parties to the complaint were given a copy of it and provided comments which were taken into account by the translator. An amended, final version of the translation was then sent to the parties. Neither party raised any objections to Ofcom using it for the purpose of investigating the complaint.

The presenter, Mr Gurnaam Singh, began by introducing two guests to the programme: Mr Bhogal, the Chairman of the Sikh Aid International<sup>1</sup> charity, who the

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<sup>1</sup> According to its website, the aims of Sikh Aid International is to "serve suffering humanity by providing and coordinating humanitarian assistance by offering aid and assistance to victims of disaster; strive to assist in any possible way to combat poverty; support and uphold human dignity and freedom; and, promote the Sikh fundamental principle through education, material and financial support.

presenter explained “*is well known for contributing a lot to the Sikh congregation*”, and Mr Kuldeep Singh, another presenter on Akaal Channel who he said “*has contributed a lot to Sikh religious groups*”. The presenter then introduced the topic for discussion:

*“Today we have a news. Our Akaal Channel received news that our committed Sikh Brother Inderjit Singh Bhogal [the complainant] has been accused of something in the form of a telephone conversation with him which was recorded: someone made a bogus call to him in which he played a certain role and discussed some things with Inderjit in which certain things were revealed. This call is in English; we are not going to broadcast it, but you can watch it on Facebook. It contains something objectionable and we are going to ask Inderjit to what extent these are true, and to what extent things were revealed in this call. Brother Kuldeep Singh is with me, who has listened to this audio which is about two minutes long. He is going to ask Inderjit Singh about the points in this call that might be objectionable”.*

The presenter said that he first wanted to discuss Mr Bhogal’s background. As Mr Bhogal was explaining this, the presenter interrupted and said: “*Hold on, I have just been told that we have that audio [i.e. the recording of the hoax call]. Should we listen to the audio first, then afterwards we shall continue with our discussion?*”

A five minute audio recording of a telephone call between Mr Bhogal and an individual named “Asif” was then played. Asif asked Mr Bhogal about tickets for a forthcoming charity event which Mr Bhogal was helping to organise and sell tickets for. Asif said that he would need about 20 tickets for his friends. Asif let it be known to Mr Bhogal that he was a Muslim and he asked him questions about the event, including whether there would be alcohol available. Asif also asked if there would be Sikh girls in attendance and, if so, would he and his friends be permitted to speak with them. Mr Bhogal explained that alcohol would not be served at the event, but if people wanted to buy alcohol, they could do at the bar of the venue. He also said that:

*“...at Sikh Aid, we have Muslim people volunteering with us as well; we have Hindu people volunteering, volunteering black people, white people...you can talk to any Sikh girls you want you know; you are young people, you will have fun, you can do whatever you want to do. Our only request will be that – as long as you don’t have so much alcohol that you get out of order”.*

While the recording of the telephone conversation was being played, Mr Bhogal was shown engaged in conversation with the presenter and Mr Kuldeep Singh.

Once the audio recording had finished playing, the presenter asked Mr Bhogal to describe the event and his role in it. Mr Bhogal explained that it was a Save the Children charity event to acknowledge the work of organisations which had helped children. He explained that the funds raised would go to Save the Children projects and that: “*We don’t make money for ourselves, for our organisation [i.e. Sikh Aid International]*”.

The presenter interrupted Mr Bhogal to ask him about the role of Sikh Aid International and his profession as a Sikh coach/mentor. Mr Bhogal explained that his day to day job of Sikh coach/mentor had no involvement with Sikh Aid International and that Sikh Aid International was “*One hundred percent charitable*” with all of the proceeds from the event going to Save the Children.

The presenter then turned to his second guest, Mr Kuldeep Singh, and requested that he ask Mr Bhogal about the issue of alcohol being available at the event. Mr Kuldeep Singh started by praising Mr Bhogal's charity work, but then expressed concerns about how Mr Bhogal had responded to the hoax caller. He said:

*"However, with this call, I think there is a bit of a concern I have and two things: how manipulative this caller was; whether the caller was a hoax caller or genuine groomer and in some ways, what was more worrying for me was how you got taken in and I have done charity work and I do know when you do charity work you get too anxious and you will do anything to raise money and I don't know if that was exploited, but if someone who is as articulate as you - and I believe you understand the psychology of coaching - can get exploited in this way, what's the chance for the rest of us and what I would like to take away from this, whether it was a hoax caller or a real caller, is to, if you don't mind, show how you got duped and how he even got you to support some of his negative comments – and learn from that these groomers are very sophisticated people".*

The presenter then added:

*"Particularly getting you into a dialogue around alcohol; just explain that to me for that is to me some of the key issues".*

Mr Bhogal thanked Mr Kuldeep Singh for acknowledging his charitable work and began talking about the good work the team at Sikh Aid International had been doing. The presenter interrupted him again saying: *"Just come to [the] alcohol"*. The following dialogue then took place between the three men:

- Mr Bhogal: *"Let me come back to what you said. I don't drink.*
- Presenter: *I don't mind if you are engaged in discussion about alcohol with this kind [he was interrupted]*
- Mr Bhogal: *I don't drink alcohol, and as a baptised Sikh and as a coach especially I will always say, 'Don't drink alcohol'...*
- Presenter: *Yes, we understand that, but this caller is saying 'Will alcohol be available?' And you seem to be implying 'yes', and that they can have a good time. How will you [he was interrupted]*
- Mr Bhogal: *I totally agree. Sikh Aid International is not serving alcohol...We are not serving alcohol. However those of Save the Children, any number that are coming may be having alcohol at the bar on the sides because it is a public environment and it is a mixed event where all kinds of cultures will be there...*
- Presenter: *So what you are saying is that ICC, the facility itself has these [alcohol serving] facilities and there is no way you can close those down. But your event has nothing to do with those facilities or facilitating [alcohol consumption].*
- Mr Bhogal: *Exactly, we are not providing alcohol or meat in this event...But we can't prevent somebody going down to Broad Street and buying some – you know [alcohol].*

Presenter: *So you have absolutely no hand in facilitating any consumption of alcohol in the event.*

Mr Bhogal: *Exactly, no hand at all.*

Presenter: *Okay. Kuldeep Singh do you want to say something?*

Mr Kuldeep Singh: *I think even the alcohol is not really the issue...what I think is more important is the way this groomer uses the alcohol to actually ascertain, will there be his Muslim sisters there...I do think, if I am honest, you were a bit naive with that call but again it might happen to me tomorrow, so I am not going to be too harsh because first he was saying, 'There are 20 of us and we are just single and looking for good time', and that, you know...".*

Mr Bhogal then explained that there had been "a follow up call from this call" in which he had told the hoax caller:

*"Look I have got to meet you; I can't talk to you anymore; I have got to meet you and find out who you are; I can't sell you these tickets until I actually see who you are; so come down and let's have a meeting".*

The presenter then asked Mr Bhogal:

*"Let's just clarify, because then you come to the crux of it. There is a bit of a dialogue where he is saying, 'We are 20 single Muslim lads and we want to have a good time', and obviously in the context of alcohol; but then there is something about Sikh girls and Hindus, and you said, others will be there, but not many Muslims. What was in your mind when you were responding there?"*

Mr Bhogal responded that he had only wanted to promote diversity and equality and make it clear that the event was open to everybody. He said the event was about "...holding hands and collaborating with people from all faiths".

The presenter then asked him: "...What about when somebody says actually you were in effect colluding with the desire to may be groom?"

Mr Bhogal replied he "definitely wasn't colluding" or encouraging the caller to drink alcohol. He explained that following the call he had called his team to inform them that someone had made a "strange" telephone call to him and that he did not understand it.

Mr Kuldeep Singh then said that he thought Mr Bhogal "should have picked up" that the caller's request to buy tickets for 20 men to drink away from other Muslims was questionable. He said that Mr Bhogal was "complicit" when the caller kept talking about Sikh girls "again and again and again". He said:

*"So, to me it is very obvious that alarm bells should have rung, 'Why is he asking me about Sikh girls almost eight times in the conversation,' and, 'If I can talk to them,' and it's almost I feel like you were partly groomed there and if we are going to take anything from this is to take that how clever these people are".*

The presenter then asked Mr Bhogal:

*“Can you please just respond to that: what was going in your mind? Was it the fact that you wanted to raise money and sell tickets and may be that did compromise your own faculties or do you accept that may be your choice of words on hind sight could have been better?”*

Mr Bhogal explained that he had trusted the hoax caller and said that he had wanted to sell tickets because he was trying to raise donations for the charity.

The presenter then asked him:

*“What would you say to people who say that there is Sikh ethics involved in it, and you do talk about Sikh ethics a lot, whether you compromised Sikh ethics in trying to, obviously, for a good cause, a charitable cause? What do you say to those people because it is the crux of the issue, isn't it?”*

As Mr Bhogal started to answer, the presenter interrupted him and said: *“Were you, as we say, entangled in the trap of wealth?”* Mr Bhogal explained that at first he had: *“...got concerned, towards the end of the call for I didn't want 20 people to get drunk at this thing”*.

The presenter then took several live calls from viewers. The first caller said he was concerned about what Mr Bhogal had said in the telephone call and seemed to be: *“...in a hurry about raising funds and he has no concerns about ethics or morals”*. He added: *“Are we to raise funds...by selling the honour of our sisters and daughters...”*.

Mr Bhogal responded, explaining that the debate should focus on the person who had *“...maliciously created a fake phone call...”* and who had *“...tried to trap us by taking great pains to record it”*.

The presenter then took a second call from a viewer who said that hearing the call had made her feel *“very bad”* and that *“...we cannot do charity to the extent of selling ourselves”*. Mr Bhogal responded that he had wanted to raise money for the children, but agreed with the caller that charity should not be done *“...at the expense of ruining our honour”*.

A third caller said that Mr Bhogal *“...should run charities after he has learned it, and until then, he should take off the T-shirt he is wearing with the Sikh logo imprinted on it... You need to see that people like him have done a lot of harm to our work [Sikhism]”*.

Mr Bhogal responded that he disagreed and said: *“A Sikh keeps learning all the time”*.

Mr Kuldeep Singh then said:

*“... I do agree with the caller in one sense: If this was a malicious call, if this was a setup, I think I can get to the crux of it and it was when we had the 1984<sup>2</sup> Show a couple of weeks ago; I watched it and I have to say that listening to you [Mr Bhogal] my feelings were hurt there as well and I had that same opinion there because I think it was when you said, ‘Why don't we talk about the Sikhs attacking Hindus’, and to make a statement like this...”*

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<sup>2</sup> See footnote 4.



He later added:

*“This Charity is helping children, but as we know in 1984 the number of children that were raped, women raped, men that were burned, all of that and you did come across a bit like, ‘All those wounds to the Sikhs, well get over it’. And I am just saying that it is a separate issue but...”*

The following exchange then took place between Mr Kuldeep Singh and Mr Bhogal:

Mr Kuldeep Singh: *“But you were complicit in that call and really he played you like a fiddle. Let us speak about 1984 when you say that we were to blame, let me just respond [he was interrupted]*

Mr Bhogal: *“I didn’t say that it is our fault. Let me make it clearer [he was interrupted]*

Mr Kuldeep Singh: *In 1984, there was none of our fault and that is what we have got to discuss if I may. About 1984, every time we try to talk about genocide and the mass murder, it is turned back on ourselves. That is where you got wrong.*

Mr Bhogal: *I did not say that it was our fault. I am not saying that.*

Mr Kuldeep Singh: *That is the word you just used. I can play it back. [‘We don’t see] what was our fault’. That was your words.*

Mr Bhogal: *I did not say ‘what was our fault’ but ‘what was our responsibility; what we could have done different’”.*

The presenter then took another call from a viewer who said that he wanted “...to keep focus on the real issue” and that “...selling tickets was more important to him [Mr Bhogal] than anything else...Had he been leading a life based on Sikhism, he would never have committed a mistake like this”. Mr Bhogal responded that he did not say that he was an “accomplished Sikh”, but that he was “trying”.

The presenter then quoted from the Sikh holy book and said: “Your soul is different from your face, O weak willed [i.e. your words do match your deeds]”. Mr Bhogal then said: “...I am just trying to do a small and petty service and I am learning. And we learn as we serve”.

The presenter then said:

*“The other thing that Kuldeep had said, about 1984. Please clarify a bit because it has been suggested that perhaps you are indifferent to the suffering of the Sikh children and the Sikh women. So please clarify your position”.*

Mr Bhogal explained that he was “extremely grieved” about what happened to the Sikh people in 1984.

The presenter took a further call in which the caller said:

*“I have heard the recording in which the caller clearly says again and again, ‘will there be Sikh girls there; can we talk to them; can we drink; can we enjoy’ and this brother accepts again and again that, ‘I have been doing all this to sell tickets and make the show a success’...our main complaint is that he should not bring*

*Sikhism in it. He may go on doing his job [his charity work] and leave aside Sikhism”.*

The presenter then asked Mr Kuldeep Singh if he wanted to sum up the discussion with any further points. Mr Kuldeep Singh started by praising Mr Bhogal's charity work, and then said:

*“...but I do think that to wear the emblem of Sikhism, you may not be quite where you may think you are, from the point of view of actually being a commentator of Sikhism, and particularly 1984, because if this [call] was a hoax, I personally think that is where you went wrong... You can't say some Sikhs did wrong...what it feels like you are doing is you are trying to just put plaster on Sikhs' wounds and like saying we haven't used guidance”.*

Mr Bhogal argued that Mr Kuldeep Singh had misunderstood what he had said and explained that:

*“All I am saying is in future too we will face many attacks. 1984 was a horrible time”.*

The presenter then said:

*“I think that is partly the crux of the issue. On one hand you are involved as a public figure, you are leading an organisation; you are doing some amazing work. But in a sense as they say, the taller you are, the higher you fall. And therefore, our ethics have got to be impeccable – absolutely impeccable – as the callers were saying; it would have been okay for a foot soldier but for you leading the organisation”.*

Mr Bhogal went on to say: *“...every day I am learning about ethics; every day I am growing ...Never will I say that I am free from mistakes...”.*

The presenter then asked Mr Bhogal: *“Do you accept that you have committed a big mistake in this issue?”*

Mr Bhogal responded: *“I did make a mistake while serving”.*

The presenter then asked Mr Bhogal: *“What last message would you like to give to the community whose feelings were hurt?”*

Mr Bhogal explained that the programme had been about his mistake, but that there was a wider discussion to be had.

The presenter then invited Mr Kuldeep Singh to make his last point. Mr Kuldeep Singh told Mr Bhogal:

*“...Maybe I have got an issue with you wearing that T-Shirt and falling like you did for this [hoax call]. But even then you were set up [by the caller]. What I think personally is that if you are going to be a commentator on 1984 with such a massive impact on the Sikhs, to just make a small statement and not let it debate further, that is a problem...”.*

The presenter then commented that it was admirable that Mr Bhogal had not *“gone into hiding”* and that he had shown courage by appearing on the programme.

Mr Kuldeep Singh made a last statement commenting that Surt Jarnail Singh Bhindranwale "...could wear the logo, he was the greatest Sikh of the 20<sup>th</sup> century" and that Mr Bhogal should not be compared to him.

The presenter then concluded the programme.

## **Summary of the complaint and the broadcaster's response**

### Unjust or unfair treatment

- a) In summary, Mr Bhogal said he was treated unjustly or unfairly in the programme as broadcast because he was not informed about the true nature and purpose of the programme prior to his participation. In particular, Mr Bhogal said that:
- He had understood from the broadcaster that he would appear on *The One Show*<sup>3</sup> to talk about being a victim of a hoax telephone call. He said that he was not informed that he would be appearing on the programme *Akaal Uncensored*. Mr Bhogal said that he would never have agreed to appear on this programme had he known.
  - He had been informed by the broadcaster that he would be interviewed on a one-to-one basis by a presenter about the hoax telephone call. However, one minute before the live programme began, he said that he became aware that there would be two people interviewing him, the presenter and another guest, Mr Kuldeep Singh (who was also a presenter on Akaal Channel). Mr Bhogal said that the interview quickly turned into an interrogation and that he felt bullied by them. He said that: "My charity and I were accused of inviting Muslim men to drink and seduce Sikh girls, which is far from the truth".
  - He was told that no live telephone calls from viewers would be taken during the interview, however, the presenter took a number of calls during the interview.
  - He was told that the interview would be 20 minutes in length when, in fact, it continued for 45 minutes. Mr Bhogal explained that he was told that his contribution would be a continuation of *The One Show* and that it would be brief. In fact, he said that it became a "gruelling interrogation" which he was not prepared for.
  - The audio of the hoax call was broadcast despite him being told that it would not be.
  - Prior to the programme, the presenter had asked him to provide four questions in relation to his charity work which he would be asked during the interview. Mr Bhogal said that the presenter did not ask him any of these questions during the programme as broadcast. Mr Bhogal said that the questions he was asked had no relevance to what he understood would be the agenda of the programme.

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<sup>3</sup> *The One Show* is a programme on Akaal Channel which, according to its website (<http://akaalchannel.tv>) is "a show discussing the facts of religion and politics in Sikhism".

- Mr Kuldeep Singh changed the subject of the interview suddenly and questioned Mr Bhogal without any prior warning about his views on 'Operation Blue Star 1984'<sup>4</sup>, which he had expressed in a previous programme. Mr Bhogal said that he had not been prepared to answer questions on this subject, which he said he knew very little about.

By way of background, Mr Bhogal said that following the broadcast of the programme he had received threatening telephone calls and Facebook messages and had also been the victim of bullying in temple meetings, as he and his charity had been accused of "being groomers that invites Sikh girls to get drunk and flirt with Muslims". He said that the programme had brought bad publicity to his business and that several of his business clients had "backed off" since the broadcast.

In response to the complaint, Akaal Channel said it refuted Mr Bhogal's allegations and accepted no wrongdoing with regards to the programme broadcast. Akaal Channel argued that "...by running the broadcast the channels did a service to Mr Bhogal to allow him to respond to the said alleged 'bogus' telephone conversation...".

The broadcaster explained that Mr Bhogal had been a regular contributor to Akaal Channel programmes, including *The One Show*. It said that it had been supportive of his charitable work and had actively publicised this, including the event Sikh Aid International Excellence Awards. Akaal Channel said that Mr Bhogal had been in negotiations with the channel about the possibility of it covering the event.

Akaal Channel said that Mr Bhogal had been due to appear on *The One Show* on 21 November 2014 to speak about this event. However, a day prior to the broadcast on 20 November 2014, the telephone conversation (i.e. the hoax call) between Mr Bhogal and Asif was brought to the Akaal Channel's attention. It said that during this conversation "...Mr Bhogal's integrity and character was questioned in ways that would potentially hurt the sensitivities of our viewers" and that "...in the light of this we could not proceed with the broadcast of *The One Show* as planned". It explained that this was communicated to Mr Bhogal.

Akaal Channel said that by this time the recorded telephone conversation had "gone viral" and that the channel had received calls from concerned viewers who did not agree with Mr Bhogal being provided with airtime. It therefore said that as it wanted to continue to support Mr Bhogal's charitable work, it was suggested to him that "...to clarify any doubts about his integrity and ethics that [he] be given the opportunity to appear on the channel to refute allegations that had been made about his behaviour and character as implied in the telephone recording".

Akaal Channel said that Mr Bhogal had accepted this offer and had freely appeared on *Akaal Uncensored*. It reiterated that: "...the motivation of the channel and [Mr] Gurnaam Singh was to allow Mr Bhogal to respond to specific allegations that had arisen out of the telephone conversation and to clarify the

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<sup>4</sup> Operation Blue Star was a military operation that took place in June 1984 to take control of the Harmandir Sahib Complex of buildings in Amritsar, Punjab. The military action led to anger among the Sikh community and in October 1984, Mrs Indira Gandhi, the Indian Prime Minister who had ordered the operation, was assassinated by two Sikh bodyguards. Over 3,000 members of India's Sikh community were killed in the subsequent violence of anti-Sikh rioting.

situation with the intention that the channel could continue to support him and his work”.

Akaal Channel explained that Mr Bhogal was given every opportunity to respond to claims made. It pointed out that a small number of telephone calls from viewers were taken (four in total) and that Mr Bhogal was given the opportunity to respond to each one. It said that “...Mr Bhogal, as an experienced media performed [sic], was able to provide a solid defence of his actions and that the programme had achieved its objectives to air issues of concern to the community in a balanced manner”.

In response to the specific points complained of, Akaal Channel said that:

- Mr Bhogal was informed that the channel would not be going ahead with *The One Show*, but that “...as an alternative we would do a straight interview with him”. It said that the name of the programme was immaterial. However, it added that given the investigative nature of *Akaal Uncensored*, “...this seemed like the most appropriate branding for the show”.
- It was with Mr Bhogal’s total agreement that the programme was broadcast. It said that Mr Bhogal was clearly informed about the content and nature of the programme.
- Akaal Channel did not respond to the specific point of complaint that Mr Bhogal was told that no live telephone calls from viewers would be taken during the interview. However, the broadcaster did explain that calls to the programme are uncensored, though callers are told to put their points across in a polite manner.
- It was unsure of the relevance of the length of the programme, but said that the interview lasted about 30 minutes and the recording of the telephone conversation was about 15 minutes in length.
- Akaal Channel did not respond to the specific point of complaint that Mr Bhogal was told that the recording of the hoax call would not be played on the programme.
- The presenter of *Akaal Uncensored*, Mr Gurnaam Singh, always offered guests on the programme the opportunity to submit appropriate questions to be asked on the programme and that this was done in this case. However, it said that editorial control over which questions were asked or not ultimately lay with the broadcaster. It said that on this occasion, Mr Bhogal was “...given every opportunity to express his thoughts”. It said that the programme was “...put on to allow him [Mr Bhogal] to put his side of the argument”.
- With regards to Mr Kuldeep Singh changing the subject of the interview to the issue of ‘Operation Blue Star 1984’, the presenter intervened and challenged Mr Kuldeep Singh on this matter. It said that: “There is no way that the channel could have provided ‘prior warning’ to Mr Bhogal, but he was allowed to respond to the point, even if it was out of context”.

### Unwarranted infringement of privacy

- b) Mr Bhogal also complained that his privacy had been unwarrantably infringed in the programme as broadcast because he did not give his consent for the programme to broadcast a recording of the hoax telephone conversation. He said that the broadcaster had told him that hoax call would not be broadcast.

In response, Akaal Channel said that by the time the programme was broadcast, the recorded telephone conversation had “gone viral” and explained that the programme was designed to clear-up any confusion and misinformation relating to the hoax call. It said that Mr Bhogal must have realised that it would be impossible to have achieved this without making viewers aware of the telephone conversation in question. It also said that with regards to consent: “...there would have been no reason to obtain consent from Mr Bhogal as the said telephone conversation was in the public domain and therefore of public interest”.

### **Ofcom’s Preliminary View**

Ofcom prepared a Preliminary View that Mr Bhogal’s complaint should not be upheld. The parties were given the opportunity to make representations on the Preliminary View. Both parties made representations which are summarised below.

#### *Mr Bhogal’s representations*

Mr Bhogal and a supporter of his charity who also provided comments on his behalf, said:

- Akaal Channel had misrepresented the nature of the programme to Mr Bhogal prior to his participation in it.
- The recording provided to Ofcom had been “edited since being aired”.
- The programme represented a “pre-planned attack” on Mr Bhogal and he was publically put on the spot in being asked questions about ‘Operation Blue Star 1984’.
- When callers were invited to contribute to the programme, “no one from our charity could get through”.
- The programme did not include a recording of a second telephone call in which “Mr Bhogal informed the caller that he would need to meet with them, prior to any tickets for a table being sold. He made it perfectly clear that this was a family event and a sit down dinner was taking place”.
- The programme implied that Mr Bhogal had encouraged the hoax caller to “behave inappropriately with Sikh women”.

#### *Akaal Channel’s representations*

Akaal Channel said that:

- It refuted the suggestion that the recording sent to Ofcom had been “tampered with”.

- Mr Bhogal had initially been due to appear on The One Show but that having become aware of the recording of the hoax call, Akaal Channel “could not allow him to appear”. Accordingly, it said it had offered Mr Bhogal the opportunity to “do a special interview to refute/clarify the points...and also answer his critics”. Akaal Channel said that Mr Bhogal had agreed to this.
- The reference to Operation Blue Star 1984 was made by one of the guests on the programme, Mr Kuldeep Singh, and it “was not something that the channel feels was appropriate”. However, Akaal Channel argued that “the relevance of the issue was quickly challenged by the presenter” and “Mr Bhogal, who is a very articulate and educated individual with considerable media experience, had plenty of opportunity to question the relevance of this, which he did”.
- There was limited time during the programme for calls, stating that it “did not in any way vet these to exclude a charity rep”. Akaal Channel said that given Mr Bhogal was there to represent himself and the charity, “every opportunity was given to provide his and the charity’s perspective”.
- Mr Bhogal was given the opportunity to refute the allegations emanating from the hoax call and also any subsequent telephone calls taken during the programme. It said that: “The whole point of the programme was to give Mr Bhogal an opportunity to put his side, which he did...Our aim all along was to allow him an opportunity to defend his character and the good work of the charity”.

## Decision

Ofcom’s statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unjust or unfair treatment and unwarranted infringement of privacy in, or in connection with the obtaining of material included in, programmes in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material. This included a recording of the programme as broadcast and translated transcript, both parties’ written submissions, and supporting documentation. Ofcom also took account of the representations made by both parties in response to being given the opportunity to comment on Ofcom’s Preliminary View on this complaint. After careful consideration of the representations, we concluded that some of the issues raised were not relevant to the complaint as entertained and considered by Ofcom in the Preliminary View, and we have therefore not reflected these in the Decision below. We considered that other points raised (which were relevant to the entertained complaint and considered by Ofcom in the Preliminary View) did not materially affect the outcome of Ofcom’s decision not to uphold the complaint. With regards to the allegation that the recording that Akaal Channel provided to Ofcom had been altered since being aired, Ofcom provided both parties with the opportunity to make further representations on this issue. After careful consideration of the information provided, and in light of the fact that Ofcom has not been provided with an alternative recording

of the programme, we were satisfied that it was appropriate for us to use the recording provided by Akaal Channel in order to make our decision.

### Unjust or unfair treatment

- a) Ofcom considered Mr Bhogal's complaint that he was treated unjustly or unfairly in the programme as broadcast because he was not informed about the true nature and purpose of the programme prior to his participation.

When considering and deciding complaints of unjust or unfair treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of the Code. It is important to note that where there appears to have been unfairness in the making of the programme, this will only result in a finding of unfairness, if Ofcom consider that it has resulted in unjust or unfair treatment to the complainant in the programme as broadcast.

In this case, Ofcom considered whether the programme makers were fair in their dealings with Mr Bhogal as a potential contributor to the programme, as outlined in Practice 7.2 of the Code which states that: "Broadcasters and programme makers should normally be fair in their dealings with potential contributors to programmes, unless, exceptionally, it is justified to do otherwise". In particular, we considered whether Mr Bhogal gave his informed consent to participate in the programme, as outlined in Practice 7.3. Practice 7.3 sets out that where a person is invited to contribute to a programme, they should normally be told at an appropriate stage: the programme's nature and purpose; what kind of contribution they are expected to make; the areas of questioning and, wherever possible, the nature of other likely contributions; and, any changes to the programme that might affect their decision to contribute. Taking these measures is likely to result in the consent that is given as being 'informed consent'.

Ofcom therefore considered the information that was available to Mr Bhogal with regards to the nature, likely content of the programme and his likely contribution in advance of agreeing to participate. In doing so, we took account of both parties' submissions (set out in detail in the "Summary of the complaint and the broadcaster's response" section above). We noted that there was a conflict between Mr Bhogal's recollection and that of the programme makers and Akaal Channel. In particular, we noted that Mr Bhogal said that he had expected to be appearing on *The One Show* and was not informed that this had changed and that he would instead be appearing on *Akaal Uncensored*. He also said that he had been told that he would be interviewed on a one-to-one basis by only the presenter, however, this had not been the case. Akaal disputed this and said that Mr Bhogal was informed of the programme change. It said that: "...it was with Mr Bhogal's total agreement that the programme was run" and that "Mr Bhogal was clearly informed about the content and nature of the programme".

We also noted that Mr Bhogal said that he was told that the recording of the hoax telephone call would not be broadcast; we acknowledged that the presenter had in fact announced in the programme itself that it would not be broadcast, when only a few minutes after this, it was indeed broadcast. Mr Bhogal also said that he was told that no live telephone calls from viewers would be taken during the programme. Akaal Channel did not provide a specific response to Mr Bhogal's complaint regarding the inclusion in the programme of the hoax telephone call nor with regards to the live telephone calls taken. Akaal Channel simply stated that Mr Bhogal was provided with the opportunity to respond to these during the



programme. However, in considering whether Mr Bhogal had been appropriately informed of the nature of the programme, we also took into consideration the fact that Mr Bhogal had willingly appeared in a live television programme, with a view to discussing the content of the hoax telephone call and, in our view, it was likely that he would have expected his conduct during this call to come under some scrutiny.

In any event, Ofcom noted that neither Mr Bhogal nor the broadcaster provided any corroborative documentary evidence, in the way of emails, letters or contemporaneous notes of telephone conversations between them, to support their respective positions about what Mr Bhogal was or was not told about the nature and purpose of the programme. Given the lack of such material, it was not possible for Ofcom to conclude whether or not Mr Bhogal was informed about the true nature and purpose of the programme prior to his participation in it.

Whilst Ofcom was not able to determine Mr Bhogal's understanding of the content and nature of the programme, prior to his participation in it, we were able to consider and adjudicate on whether or not Mr Bhogal was portrayed in the programme as broadcast in a manner that resulted in him being treated unfairly.

In considering whether Mr Bhogal had been treated unfairly in the programme as broadcast, we had particular regard to Practice 7.9 which states that, before broadcasting a factual programme, broadcasters should take reasonable care to satisfy themselves that material facts have not be presented, disregarded or omitted in a way that is unfair to an individual or organisation.

Ofcom acknowledged the broadcasters' right to freedom of expression and that they must be able to broadcast programmes of matters of interest to viewers freely, including the ability to express views and critical opinions without undue constraints. However, this freedom comes with responsibility and an obligation on broadcasters to comply with the Code and, with particular reference to this case, avoid unjust or unfair treatment of individuals or organisations in programmes.

Having carefully viewed the programme and examined the translated transcript of it, we noted that the presenter, his guest Mr Kuldeep Singh and the callers to the programme made comments about Mr Bhogal's conduct during the hoax telephone call. For example, the presenter asked Mr Bhogal: "...*What about when somebody says actually you were in effect colluding with the desire to may be groom?*" Also, Mr Kuldeep Singh said that he thought that Mr Bhogal "*should have picked up*" that the caller's request to buy tickets for 20 men to drink away from other Muslims was questionable. He said that Mr Bhogal was "*complicit*" when the caller kept talking about Sikh girls "*again and again and again*". In a further example, one of the callers expressed their concern that Mr Bhogal was: "*...in a hurry about raising funds and he has no concerns about ethics or morals*". He added: "*Are we to raise funds...by selling the honour of our sisters and daughters...*". Another caller added that: "*...we cannot do charity to the extent of selling ourselves*". Also, Mr Kuldeep Singh later said: "*But you were complicit in that call and really he played you like a fiddle*".

From these examples, Ofcom considered that the language used by the presenter, his guest Mr Kuldeep Singh and the callers was accusatory in nature and would have left viewers in no doubt that, in their view, Mr Bhogal had conducted himself in a questionable manner during the hoax call.

We recognised that the programme was broadcast live and that, with such broadcasts, broadcasters need to take particular care. Given the nature of this type of programming, contributors can sometimes make unexpected comments which have the potential to cause unfairness to an individual or organisation. Given this, Ofcom then assessed what steps, if any, the broadcaster took to satisfy itself that material facts were not presented, disregarded or omitted in a way that was unfair to Mr Bhogal. In this case, while we acknowledged that some of the comments made in the programme were critical of Mr Bhogal, we noted that he was given the opportunity to respond. In particular and in relation to the hoax call we noted:

- Mr Bhogal refuted strongly the suggestion that alcohol would be served at the charity event. He said: *“Sikh Aid International is not serving alcohol...We are not serving alcohol. However, those of Save the Children, any number that are coming may be having alcohol at the bar on the sides [of the venue] because it is a public environment and it is a mixed event where all kinds of cultures will be there...”*.
- Mr Bhogal explained that he had only wanted to promote diversity and equality and make it clear that the event was open to everyone. He said the event was about *“...holding hands and collaborating with people from all faiths”*.
- He made clear that he was not encouraging the hoax caller to drink alcohol.
- In response to accusations that he was *“... in effect colluding with the desire to may be groom”*, Mr Bhogal said that he *“definitely wasn’t colluding”*.
- He made his view clearly known that he considered the debate should focus on the person who had *“...maliciously created a fake phone call...”* and who had *“...tried to trap us by taking great pains to record it”*.

While Ofcom was unable to determine what Mr Bhogal had understood the nature of the programme would be and his contribution to it, it appeared to Ofcom that the content of the hoax call had “gone viral” and had been the subject of comment and debate within the Sikh community. While Mr Bhogal said in his complaint that he had understood that he would be interviewed from the perspective of a victim of a hoax call (which was refuted by the broadcaster), it was not unreasonable, in our view, to assume that Mr Bhogal would have anticipated that he would be questioned about his own conduct and the comments he had made during the hoax call, and that some of the questioning would be critical of him.

Ofcom noted that while some of the questioning of Mr Bhogal was critical towards him, he was able to respond to the criticism and put his views forward. It was our view that, although under scrutiny, Mr Bhogal was able to defend and explain the comments he had made during the hoax call and clearly refuted allegations made about him in the programme. Ofcom considered that Mr Bhogal responded articulately and confidently and was more than capable of answering difficult questions that put him on the spot and that he was not necessarily prepared for. For example, when he was asked about Operation Blue Star 1984 by Mr Kuldeep Singh, he made it clear that he was *“extremely grieved”* about what had happened to the Sikh people and pointed out where he considered Mr Kuldeep Singh had misunderstood him.

Given all the factors above, we did not consider that Mr Bhogal was portrayed in the programme in a way that was likely to materially and adversely affect viewers' perceptions of him in a way that was unfair. In the particular circumstances of this case, Ofcom concluded that Mr Bhogal was not treated unjustly or unfairly in the programme as broadcast.

#### Unwarranted infringement of privacy

- b) Ofcom considered Mr Bhogal's complaint that his privacy had been unwarrantably infringed in the programme as broadcast because he did not give his consent for the programme to broadcast the hoax call.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing right of the broadcaster to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Code, which states that any infringement of privacy in programmes or in connection with obtaining material included in programmes must be warranted<sup>5</sup>.

In considering this head of complaint, Ofcom had regard to Practice 8.6 of the Code which states that if the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless it is warranted.

We first assessed the extent to which Mr Bhogal had a legitimate expectation of privacy that the content of the hoax telephone call would not be included in the programme. In doing so, we had regard to the Code which states that "legitimate expectations of privacy will vary according to the place and nature of the information, activity or condition in question".

We noted that a recording of the hoax call was included in the programme (as described in detail above in the "Introduction and programme summary" section). We took the view that a telephone conversation of this type, i.e. a conversation conducted between two individuals where both parties felt they could speak freely and openly about the purchase of tickets, could reasonably be regarded as being confidential and therefore could attract an expectation of privacy. We also acknowledged that Mr Bhogal was not aware that the telephone conversation was being recorded.

However, from the footage broadcast in the programme, Ofcom considered that Mr Bhogal did not disclose anything particularly private in relation to his personal life during the telephone conversation. In addition, although he said he had been assured that the recording call would not be broadcast, he had been prepared to discuss the content of the hoax call in interview on a live television programme.

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<sup>5</sup> The explanation of the meaning of "warranted" under Rule 8.1 of the Code identifies revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations, disclosing incompetence that affects the public, as examples of public interest.

We also took into account the fact that the recording of the hoax call appeared to have been in the public domain before its use in the programme. Akaal Channel said in its response to the complaint that: "...by this time [i.e. the date the programme was broadcast] the recorded telephone conversation had gone viral and the channel had received calls from concerns [sic] viewers who did not agree with Mr Bhogal being provided with airtime".

Taking all of these factors into account, Ofcom considered that Mr Bhogal did not have a legitimate expectation of privacy in relation to the broadcast of the hoax call. Having decided on the particular facts of this case that Mr Bhogal did not have a legitimate expectation of privacy, Ofcom did not need to go on to consider whether any infringement of his privacy was warranted or not.

Ofcom concluded therefore that Mr Bhogal's privacy was not unwarrantably infringed in the programme as broadcast.

**Ofcom has not upheld Mr Bhogal's complaint of unjust or unfair treatment in the programme as broadcast and of an unwarranted infringement of privacy in the programme as broadcast.**

## Investigations Not in Breach

Here are alphabetical lists of investigations that Ofcom has completed between 15 and 28 February 2016 and decided that the broadcaster or service provider did not breach Ofcom's codes, rules, licence conditions or other regulatory requirements.

### Investigations conducted under the Procedures for investigating breaches of content standards for television and radio

Programme	Broadcaster	Transmission date	Categories
Teenage Mutant Ninja Turtles	Channel 5	13/12/2015	Scheduling
Witch Hunt: A Century of Murder (trailer)	Channel 5	13/10/2015	Scheduling
Punjab Crisis	Sikh Channel	04/11/2015	Due impartiality/bias
Programme sponsorship	Sony Max	n/a	Sponsorship credits

For more information about how Ofcom conducts investigations about content standards on television and radio programmes, go to:

<http://stakeholders.ofcom.org.uk/broadcasting/procedures/standards/>

## Complaints assessed, not investigated

Here are alphabetical lists of complaints that, after careful assessment, Ofcom has decided not to pursue between 15 and 28 February 2016 because they did not raise issues warranting investigation.

### Complaints assessed under the Procedures for investigating breaches of content standards for television and radio<sup>1</sup>

For more information about how Ofcom assesses complaints about content standards on television and radio programmes, go to:

<http://stakeholders.ofcom.org.uk/broadcasting/procedures/standards/>

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
Gogglebox	4Seven	24/02/2016	Generally accepted standards	1
Dance Moms	5*	12/02/2016	Under 18s in programmes	1
Rush Hour	5*	16/02/2016	Offensive language	1
Programming	BBC	n/a	Outside of remit / other	1
Bargain Hunt	BBC 1	10/02/2016	Generally accepted standards	1
Bargain Hunt	BBC 1	19/02/2016	Gender discrimination/offence	1
BBC London News	BBC 1	18/02/2016	Violence and dangerous behaviour	1
BBC News at One	BBC 1	25/02/2016	Generally accepted standards	1
BBC News at Six	BBC 1	25/02/2016	Generally accepted standards	2
BBC News at Ten	BBC 1	25/02/2016	Generally accepted standards	1
Breakfast	BBC 1	17/02/2016	Generally accepted standards	2
Breakfast: The Film Review	BBC 1	13/02/2016	Violence and dangerous behaviour	1
Call the Midwife	BBC 1	21/02/2016	Generally accepted standards	2
Death in Paradise	BBC 1	21/01/2016	Generally accepted standards	1
Doctors	BBC 1	16/02/2016	Generally accepted standards	1
Doctors	BBC 1	23/02/2016	Generally accepted standards	1
EastEnders	BBC 1	09/02/2016	Race discrimination/offence	1
EastEnders	BBC 1	21/02/2016	Outside of remit / other	1
EastEnders	BBC 1	25/02/2016	Violence and dangerous behaviour	1
Happy Valley	BBC 1	16/02/2016	Outside of remit / other	3

<sup>1</sup> This table was amended after publication to correct a factual inaccuracy.

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
Happy Valley	BBC 1	23/02/2016	Suicide and self harm	4
Panorama	BBC 1	15/02/2016	Religious/Beliefs discrimination/offence	1
Regional News and Weather	BBC 1	18/02/2016	Outside of remit / other	1
Six Nations Rugby Union	BBC 1	13/02/2016	Religious/Beliefs discrimination/offence	1
Six Nations Rugby Union	BBC 1	13/02/2016	Outside of remit / other	1
The British Academy Film Awards	BBC 1	14/02/2016	Religious/Beliefs discrimination/offence	2
The British Academy Film Awards	BBC 1	14/02/2016	Generally accepted standards	2
The Voice UK	BBC 1	20/02/2016	Offensive language	1
Party Election Broadcast by the Scottish Labour Party	BBC 1 Scotland	17/02/2016	Under 18s in programmes	1
Sportscene	BBC 1 Scotland	07/02/2016	Race discrimination/offence	1
Back in Time for the Weekend	BBC 2	09/02/2016	Generally accepted standards	1
How to Die: Simon's Choice	BBC 2	10/02/2016	Generally accepted standards	1
How to Die: Simon's Choice	BBC 2	10/02/2016	Harm	1
Newsnight	BBC 2	21/01/2016	Generally accepted standards	1
The Daily Politics	BBC 2	25/02/2016	Animal welfare	1
Victoria Derbyshire	BBC 2	19/02/2016	Crime	1
What to Buy and Why	BBC 2	12/02/2016	Outside of remit / other	1
Snooker	BBC 2 Wales	19/02/2016	Materially misleading	1
Webcam Boys	BBC 3	03/02/2016	Under 18s in programmes	1
BBC News	BBC News Channel	25/02/2016	Generally accepted standards	1
Dateline London	BBC News Channel	14/02/2016	Religious/Beliefs discrimination/offence	1
Clara Amfo	BBC Radio 1	22/02/2016	Drugs, smoking, solvents or alcohol	1
Nick Grimshaw	BBC Radio 1	12/02/2016	Offensive language	1
Programming	BBC Radio 1	23/02/2016	Drugs, smoking, solvents or alcohol	1
The Radio 1 Breakfast Show with Nick Grimshaw	BBC Radio 1	25/02/2016	Drugs, smoking, solvents or alcohol	3
Dilemma	BBC Radio 4	19/02/2016	Religious/Beliefs discrimination/offence	1
The News Quiz	BBC Radio 4	08/02/2016	Religious/Beliefs discrimination/offence	1
The News Quiz	BBC Radio 4	12/02/2016	Religious/Beliefs discrimination/offence	1

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
The News Quiz	BBC Radio 4	19/02/2016	Generally accepted standards	1
Woman's Hour: The 15-Minute Drama	BBC Radio 4	11/02/2016	Offensive language	1
Woman's Hour: The 15-Minute Drama	BBC Radio 4	24/02/2016	Offensive language	3
Programme sponsorship	Cartoon Network Poland	n/a	Sponsorship	1
Programme trailers	CBS Drama	20/02/2016	Generally accepted standards	1
"True Colour TV" promotion	Channel 4	08/02/2016	Generally accepted standards	1
"True Colour TV" promotion	Channel 4	23/02/2016	Scheduling	1
Bernard Matthews' sponsorship of The Simpsons	Channel 4	19/02/2016	Sponsorship credits	1
Bernard Matthews' sponsorship of The Simpsons	Channel 4	n/a	Sponsorship credits	2
British Army advertisement	Channel 4	15/02/2016	Political advertising	1
Gogglebox	Channel 4	19/02/2016	Generally accepted standards	2
The Girl Who Forgave the Nazis	Channel 4	23/01/2016	Scheduling	2
The Jump	Channel 4	07/02/2016	Violence and dangerous behaviour	1
The Jump	Channel 4	14/02/2016	Offensive language	7
The Jump	Channel 4	21/02/2016	Offensive language	1
The Last Leg	Channel 4	12/02/2016	Generally accepted standards	3
The Last Leg	Channel 4	19/02/2016	Religious/Beliefs discrimination/offence	2
The Simpsons	Channel 4	22/02/2016	Generally accepted standards	1
10,000 BC: Two Tribes	Channel 5	17/02/2016	Animal welfare	1
Can't Pay? We'll Take it Away!	Channel 5	20/02/2016	Generally accepted standards	1
Can't Pay? We'll Take it Away!	Channel 5	24/02/2016	Fairness	1
Celebrity Big Brother's Bit on the Side: Live in the House	Channel 5	04/02/2016	Offensive language	1
Celebrity Big Brother's Bit on the Side: Live in the House	Channel 5	04/02/2016	Scheduling	1
Drillbit Taylor	Channel 5	24/01/2016	Scheduling	1
Neighbours (trailer)	Channel 5	23/02/2016	Scheduling	1
The Great British Benefits Handout	Channel 5	17/02/2016	Animal welfare	1



Programme	Broadcaster	Transmission Date	Categories	Number of complaints
The Great British Benefits Handout	Channel 5	23/02/2016	Animal welfare	1
The Wright Stuff	Channel 5	22/01/2016	Animal welfare	1
The Wright Stuff	Channel 5	02/02/2016	Due impartiality/bias	1
The X Files	Channel 5	16/02/2016	Disability discrimination/offence	1
Violent Child, Desperate Parents	Channel 5	10/02/2016	Harm	1
World War II Battlefield Recovery	Channel 5	09/01/2016	Generally accepted standards	100
World War II Battlefield Recovery	Channel 5	09/01/2016	Outside of remit / other	3
World War II Battlefield Recovery	Channel 5	16/01/2016	Generally accepted standards	51
World War II Battlefield Recovery	Channel 5	23/01/2016	Generally accepted standards	4
World War II Battlefield Recovery	Channel 5	30/01/2016	Generally accepted standards	12
Birthday of Gaffar Choudhury	Channel i	12/12/2015	Race discrimination/offence	1
Grizzly Tales for Gruesome Kids	CITV	06/02/2016	Scheduling	1
Scrambled!	CITV	14/02/2016	Scheduling	1
CNN International Desk	CNN	15/02/2016	Due impartiality/bias	1
Friends	Comedy Central	18/02/2016	Offensive language	1
Dick Barrie on Sunday Afternoon	Crystal FM	14/02/2016	Offensive language	1
Storage Hunters UK	Dave	20/02/2016	Offensive language	2
Captain Jake and the Neverland Pirates	Disney Junior	17/02/2016	Offensive language	1
Alien League (trailer)	Film4	n/a	Generally accepted standards	1
The Secret Life of Bees	Film4	22/01/2016	Scheduling	1
The Holy Quraan	Huda TV	06/02/2016	Crime	1
Bayan - ul - Quran by Dr. Israr Ahmed	Islam Channel Urdu	27/01/2016	Generally accepted standards	1
118118.com's sponsorship of movies on ITV	ITV	n/a	Fairness & Privacy	1
Advertisement	ITV	24/02/2016	Advertising content	1
Benidorm	ITV	22/02/2016	Generally accepted standards	1
Beowulf: Return to the Shieldlands	ITV	21/02/2016	Sexual material	1
Beowulf: Return to the Shieldlands	ITV	21/02/2016	Violence and dangerous behaviour	1
Coronation Street	ITV	12/02/2016	Drugs, smoking, solvents or alcohol	1
Coronation Street	ITV	22/02/2016	Generally accepted standards	1
Emmerdale	ITV	08/02/2016	Scheduling	1

<b>Programme</b>	<b>Broadcaster</b>	<b>Transmission Date</b>	<b>Categories</b>	<b>Number of complaints</b>
Emmerdale	ITV	22/02/2016	Generally accepted standards	1
Emmerdale	ITV	22/02/2016	Sexual material	1
Family Guy (trailer)	ITV	13/02/2016	Generally accepted standards	1
Good Morning Britain	ITV	10/02/2016	Due impartiality/bias	1
Good Morning Britain	ITV	17/02/2016	Generally accepted standards	25
Good Morning Britain	ITV	24/02/2016	Scheduling	1
Green Flag's sponsorship of ITV Weather	ITV	15/02/2016	Sponsorship credits	2
ITV Evening News	ITV	16/02/2016	Generally accepted standards	1
ITV Lunchtime News	ITV	22/02/2016	Generally accepted standards	1
ITV Lunchtime News	ITV	25/02/2016	Due accuracy	1
ITV News at Ten and Weather	ITV	09/02/2016	Generally accepted standards	2
ITV News at Ten and Weather	ITV	16/02/2016	Generally accepted standards	1
ITV News at Ten and Weather	ITV	22/02/2016	Due impartiality/bias	1
ITV News at Ten and Weather	ITV	22/02/2016	Religious/Beliefs discrimination/offence	1
Jeremy Kyle's Emergency Room	ITV	24/02/2016	Nudity	3
Loose Women	ITV	15/02/2016	Generally accepted standards	2
Loose Women	ITV	16/02/2016	Offensive language	1
Loose Women	ITV	17/02/2016	Generally accepted standards	1
Loose Women	ITV	18/02/2016	Advertising/editorial distinction	2
Six Nations Rugby	ITV	14/02/2016	Due impartiality/bias	2
Skoda's sponsorship of mystery drama on ITV	ITV	21/02/2016	Sponsorship credits	1
The Chase	ITV	23/02/2016	Competitions	1
The Jeremy Kyle Show	ITV	16/02/2016	Transgender discrimination/offence	1
The Jeremy Kyle Show	ITV	23/02/2016	Sexual orientation discrimination/offence	4
The Jeremy Kyle Show	ITV	25/02/2016	Generally accepted standards	1
The Kyle Files	ITV	16/02/2016	Generally accepted standards	1
The Kyle Files	ITV	17/02/2016	Fairness	1
The Kyle Files	ITV	17/02/2016	Disability discrimination/offence	1
This Morning	ITV	16/02/2016	Under 18s in programmes	7

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
This Morning	ITV	18/02/2016	Race discrimination/offence	1
Tipping Point	ITV	18/02/2016	Crime	1
Tonight	ITV	18/02/2016	Due impartiality/bias	1
Vera	ITV	21/02/2016	Offensive language	1
You've Been Framed!	ITV	13/02/2016	Generally accepted standards	1
ITV News Meridian	ITV Meridian	13/02/2016	Violence and dangerous behaviour	1
The Keith Lemon Sketch Show	ITV2	11/02/2016	Generally accepted standards	1
Midsomer Murders	ITV3	06/02/2016	Scheduling	1
118118.com's sponsorship of movies on ITV	ITV4	06/02/2016	Sponsorship credits	1
The Chase	ITV4	16/02/2016	Fairness	1
Sam Faiers: The Baby Diaries	ITVBe	07/02/2016	Generally accepted standards	1
Zoe Lyons & Jen Brister	Juice 107.2	07/02/2016	Gender discrimination/offence	1
Boutched	Kanal 11	09/02/2016	Gender discrimination/offence	1
America's Funniest Home Videos	Kanal 5	27/12/2015	Animal welfare	1
Baksmällan (The Hangover)	Kanal 5	21/02/2016	Gender discrimination/offence	1
Shameless	Kanal 9	21/02/2016	Gender discrimination/offence	1
Urban Take Over Show	Legacy 90.1 (Manchester)	08/02/2016	Race discrimination/offence	1
Ravi Sharma Show	Lyca Radio Station Dil Say	n/a	Race discrimination/offence	1
9/11: 102 Minutes that Changed America	More4	13/02/2016	Due impartiality/bias	1
A Place in the Sun: Summer Sun	More4	n/a	Outside of remit / other	1
Programming	n/a	n/a	Advertising scheduling	1
Programming	New Style Radio	05/02/2016	Offensive language	1
Programme sponsorship	Nick Jnr Too	n/a	Sponsorship	1
Scotland's Talk In	Northsound 2	14/02/2016	Due impartiality/bias	1
Notts TV News at 10	Notts TV	26/01/2016	Undue prominence	1
Cold Case	Pick	15/02/2016	Violence and dangerous behaviour	1
Hitler's Henchmen	Quest	20/01/2016	Materially misleading	1
Connor Philips Show	Radio Aire 96.3	04/02/2016	Competitions	1
News	RT	06/02/2016	Due impartiality/bias	1
Vinyl	Sky Atlantic	15/02/2016	Violence and dangerous behaviour	1

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
Ian King Live	Sky News	23/02/2016	Due accuracy	1
Press Preview	Sky News	29/01/2016	Due accuracy	1
Press Preview	Sky News	20/02/2016	Race discrimination/offence	1
Programming	Sky News	n/a	Due impartiality/bias	1
Sky News	Sky News	19/02/2016	Due impartiality/bias	1
Sky News	Sky News	21/02/2016	Due impartiality/bias	1
Sky News at Seven with Steve Dixon	Sky News	20/02/2016	Due impartiality/bias	1
Sky News Tonight with Adam Boulton	Sky News	24/02/2016	Due impartiality/bias	1
Sky News with Kay Burley	Sky News	11/02/2016	Gender discrimination/offence	1
Sky News with Kay Burley	Sky News	23/02/2016	Generally accepted standards	1
Sky News with Kay Burley	Sky News	24/02/2016	Due impartiality/bias	1
Sky Sports News	Sky Sports News HQ	02/02/2016	Undue prominence	1
A League of Their Own	Sky1	18/02/2016	Religious/Beliefs discrimination/offence	1
Dogs Might Fly (pre-transmission)	Sky1	28/02/2016	Outside of remit / other	1
Bar Rescue	Spike	07/02/2016	Drugs, smoking, solvents or alcohol	1
Drivetime	Sunrise Radio	18/01/2016	Generally accepted standards	1
Killjoys	SyFy	17/02/2016	Offensive language	1
Call Collymore	Talksport	30/01/2016	Outside of remit / other	1
Big Church Day Out	TBN UK	09/01/2016	Flashing images/risk to viewers who have PSE	1
Skönhetsfällan	TV3	08/02/2016	Gender discrimination/offence	1
Skönhetsfällan	TV3	15/02/2016	Gender discrimination/offence	1
Skönhetsfällan	TV3	22/02/2016	Gender discrimination/offence	1
Nemas Problemas Erik och Mackan	TV6	31/01/2016	Religious/Beliefs discrimination/offence	1
HM Government advertisement for The National Living Wage	Various	Various	Political advertising	5
EastEnders	W	24/02/2016	Outside of remit / other	1
Masterchef USA	W	15/02/2016	Offensive language	1
Blitz Street	Yesterday	04/02/2016	Generally accepted standards	1
Nazi Hunters (EPG guide)	Yesterday	20/02/2016	Materially misleading	1

### Complaints assessed under the Interim Breach Procedures for investigating breaches of rules for On Demand programme services

Programme	Service name	Accessed date	Categories
Endeavour	ITV Player	05/02/2016	Generally accepted standards
Southern Hell (trailer)	Sky Sports On Demand	06/02/2016	Scheduling

For more information about how Ofcom assesses complaints about on demand services, go to: [http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/interim\\_procedures.pdf](http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/interim_procedures.pdf).

## Complaints outside of remit

Here are alphabetical lists of complaints received by Ofcom that fell outside of our remit. This is because Ofcom is not responsible for regulating the issue complained about. For example, the complaints were about the content of television, radio or on demand adverts, accuracy in BBC programmes or an on demand service does not fall within the scope of regulation.

For more information about what Ofcom's rules cover, go to:

<http://consumers.ofcom.org.uk/complain/tv-and-radio-complaints/what-does-ofcom-cover/>

### Complaints about television or radio programmes

For more information about how Ofcom assesses complaints about television and radio programmes, go to:

<http://stakeholders.ofcom.org.uk/broadcasting/procedures/standards/>

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
BBC News	BBC 1	21/02/2016	Due impartiality/bias	1
BBC News at Six	BBC 1	23/02/2016	Due impartiality/bias	1
Food: Truth or Scare	BBC 1	22/02/2016	Outside of remit / other	1
Party Political Broadcast by the Conservative Party	BBC 1	13/01/2016	GAS - Materially misleading	1
Reporting Scotland	BBC 1 Scotland	10/02/2016	Due accuracy	1
South Today	BBC 1 South	11/02/2016	Due accuracy	1
BBC News	BBC News Channel	20/02/2016	Due impartiality/bias	1
The Chris Evans Breakfast Show	BBC Radio 2	17/02/2016	Commercial communications on radio	1
The World at One	BBC Radio 4	24/02/2016	Due impartiality/bias	1
BBC Radio 5 Live Breakfast	BBC Radio 5 Live	23/08/2015	Due impartiality/bias	1
Vanessa Feltz	BBC Radio London	15/02/2016	Due impartiality/bias	1
Advertisement	Channel 4	16/02/2016	Advertising content	1
Advertisement	Channel 5	21/02/2016	Advertising content	1
Advertisements	Chilled TV	25/02/2016	Advertising content	1
Advertisement	Dave	19/02/2016	Advertising content	1
Advertisement	Disney Junior	12/02/2016	Advertising content	1
Advertisement	E4	22/02/2016	Advertising content	1
Advertisement	ITV	10/02/2016	Advertising content	1
Advertisement	ITV	11/02/2016	Advertising content	1
Advertisement	ITV	16/02/2016	Advertising content	1
Advertisement	ITV	18/02/2016	Advertising content	1
Advertisement	ITV	19/02/2016	Advertising content	1

<b>Programme</b>	<b>Broadcaster</b>	<b>Transmission Date</b>	<b>Categories</b>	<b>Number of complaints</b>
Advertisements	ITV	12/02/2016	Advertising content	2
Advertisements	ITV	20/02/2016	Advertising content	2
Advertisements	ITV	22/02/2016	Advertising content	2
Advertisements	ITV	24/02/2016	Advertising content	2
Advertisements	ITV	n/a	Advertising content	1
Advertisement	ITV3	22/02/2016	Advertising content	1
Advertisement	More4	16/02/2016	Advertising content	1
Advertisements	Sky channels	23/02/2016	Advertising content	1
Advertisement	Sky Sports 4	14/02/2016	Advertising content	1
Advertisements	Sun FM	12/02/2016	Advertising content	1
Advertisement	TLC HD	24/02/2016	Advertising content	1
Advertisement	Travel Channel	19/02/2016	Advertising content	1
Advertisement	Yesterday	19/02/2016	Advertising content	1

### **Complaints about on demand services**

<b>Programme</b>	<b>Service name</b>	<b>Accessed date</b>	<b>Categories</b>	<b>Number of complaints</b>
HM Government advertisement for The National Living Wage	YouTube	21/02/2016	Political advertising	1

For more information about how Ofcom assesses complaints about on demand services, go to: [http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/interim\\_procedures.pdf](http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/interim_procedures.pdf)

## Investigations List

If Ofcom considers that a broadcaster or service provider may have breached its codes, rules, licence condition or other regulatory requirements, it will start an investigation.

**It is important to note that an investigation by Ofcom does not necessarily mean the broadcaster or service provider has done anything wrong. Not all investigations result in breaches of the codes, rules, licence conditions or other regulatory requirements being recorded.**

Here are alphabetical lists of new investigations launched between 15 and 28 February 2016

### Investigations launched under the Procedures for investigating breaches of content standards for television and radio

Programme	Broadcaster	Transmission date
Holiday Mood	Akaal Channel	1 December 2015
Sawal Yeh Hai	ARY News	7 February 2016
VPA Testifies	Believe TV	7 February 2016
Hasbro Nerf Modulus' sponsorship of Cartoon Network UK	Cartoon Network	Various
The Wright Stuff	Channel 5	8 February 2016
DC Thompson's sponsorship of CITV	CITV	Various
Våra Pinsamma Kroppar (Embarrassing Bodies)	Kanal 11	8 February 2016
Can't Pay? We'll Take It Away!	Spike	4 February 2016
News	That's Solent	14 January 2016
Schweppes sponsorship credits	TV3 Plus	Various

For more information about how Ofcom assesses complaints and conducts investigations about content standards on television and radio programmes, go to: <http://stakeholders.ofcom.org.uk/broadcasting/procedures/standards/>

### Investigations launched under the General Procedures for investigating breaches of broadcast licences

Licensee	Licensed Service
Bridgwater Young Men's Christian Association	Access FM



For more information about how Ofcom assesses complaints and conducts investigations about broadcast licences, go to:

<http://stakeholders.ofcom.org.uk/broadcasting/procedures/general-procedures/>