

# Ofcom Broadcast and On Demand Bulletin

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8 March 2021

## Complaint by Mr Simon Cheng about *China 24*

**Type of case** Fairness and Privacy

**Outcome** Upheld

**Service** CGTN

**Date & time** 21 November 2019, 12:15

**Category** Fairness and Privacy

**Summary** Ofcom has upheld this complaint about unjust or unfair treatment in the programme as broadcast and unwarranted infringement of privacy both in connection with the obtaining of material included in the programme, and in the programme as broadcast.

Ofcom also considers that the breaches of Rules 7.1 and 8.1 of the Code are serious. We are therefore putting the Licensee on notice that we intend to consider the breaches for the imposition of a statutory sanction.

### Case summary

CGTN broadcast *China 24*, a news programme which reported on the release by the police in China of CCTV footage of Mr Cheng which it said showed him "*soliciting prostitutes and of his trial [i]n August*". The programme reported that Mr Cheng had claimed in a BBC interview that he had been "*tortured*" while in police detention in China and included footage of Mr Cheng, with a faint audio, which it said showed that he "*acknowledged his violations of the law*". The programme also included CCTV footage of him which it said had been released by the police. He was named in the programme and his face was shown unobscured.

Ofcom found that:

- The programme had the potential to materially and adversely affect viewers' perceptions of Mr Cheng. The Licensee did not take sufficient steps to ensure that material facts had not been presented, omitted or disregarded in a way that was unfair to Mr Cheng.
- The Licensee had not provided Mr Cheng with an appropriate and timely opportunity to respond to the allegations of wrongdoing being made about him in the programme as broadcast.
- Mr Cheng had a legitimate expectation of privacy in relation to the obtaining and subsequent broadcast of the footage of him in police detention without his consent in the programme. In the circumstances, Mr Cheng's legitimate expectation of privacy was not outweighed by the broadcaster's right to freedom of expression and the audience's right to receive information and ideas without interference. The Licensee had therefore unwarrantably infringed Mr Cheng's privacy in respect of the obtaining of the material included in the programme and in the programme as broadcast.

## **Background**

The licence for the provision of the CGTN service was held by Star China Media Limited ("SCML" or "the Licensee") until 4 February 2021 when the Licence was revoked by Ofcom.<sup>1</sup> Notwithstanding the fact that the Licence has been revoked and the CGTN service is no longer broadcasting, Ofcom still has power to complete its adjudication of ongoing investigations relating to broadcasts that took place before the revocation.<sup>2</sup>

In this particular case, Ofcom has decided that it is appropriate to publish its final adjudication in relation to the fairness and privacy complaint about this programme. This is to ensure there is a complete compliance record in respect of the CGTN service, to ensure that the complainant receives a final determination of his complaint and to facilitate public understanding of the Code, taking into account the seriousness of the allegations the complainant has raised (as summarised below).

## **Programme summary**

On 21 November 2019, CGTN broadcast its news programme, *China 24*, which included a story about the complainant, Mr Cheng. As the presenter introduced the story, a caption was shown which read: "*Case Cleared: Shenzhen police releases video evidence showing truth behind Simon Cheng case*". The presenter said:

*"Shenzhen police have released videos of Simon Cheng soliciting prostitutes and of his trial [i]n August. This comes after Cheng, who was a trade and investment officer at the UK consulate in Hong Kong,*

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<sup>1</sup> Ofcom revoked the Licence on 4 February 2021 under section 238(4) of the Communications Act 2003 ("the 2003 Act") and Condition 28(2)(a) of the Licence on the basis that SCML had ceased to provide the CGTN service and, in the circumstances, it was appropriate to revoke the Licence. The reasons for Ofcom's decision are set out in the [Notice of Revocation](#).

<sup>2</sup> By virtue of Section 346(3) of the 2003 Act, a person's liability to have a penalty imposed under section 237 of the Act in respect of acts or omissions of that person while a holder of a Broadcasting Act licence is not affected by that Broadcasting Act licence having ceased (for any reason) to be in force before the imposition of the penalty. It follows that Ofcom also has power to reach a decision as to whether the former holder of a Broadcasting Act licence has breached its obligations under the licence during the period that it remained a licensee.

*appeared in a BBC interview on Wednesday. He claimed he was 'tortured' while detained in the Chinese mainland. He also said he was accused of..."*

As the presenter spoke, CCTV footage was included of Mr Cheng, which the programme had circled in red, as he walked towards what appeared to be a reception desk in a lobby. The man then appeared to hand over money from his wallet to one of the receptionists. The CCTV footage was date and time stamped '31 July 2019, 18:19' and a caption in simplified Chinese characters read: "*On 31 July at 18h21 he entered the venue*".

*"...inciting political unrest in Hong Kong. However, Cheng was only detained for 15 days in Shenzhen..."*

As the presenter spoke, CCTV footage was included of a woman walking down a corridor as a man on his phone, which the programme had circled in red, followed closely behind. The woman, and then the man, entered a doorway coming off the corridor. The CCTV footage was date and time stamped 31 July 2019, 18:34 and a caption in simplified Chinese characters said: "*On 31 July at 18h34 he entered the room*".

*"...due to soliciting of prostitutes and in accordance with Chinese law. The videos show he acknowledged his violation of the law..."*

As the presenter spoke, footage was included of Mr Cheng sat in a room with a pink t-shirt with XXI written on it. Although Mr Cheng was shown speaking, his words were inaudible. A caption was shown in simplified Chinese characters included Mr Cheng's name in Chinese and that he was 28 years old. The caption also included his name in English: "*Simon Cheng*".

*"...and shows evidence of him doing it three times during half a month. Cheng, a supporter of the Hong Kong protesters..."*

As the presenter spoke, CCTV footage was included of a man, which the programme had circled in red, with his back to the camera and at the end of a corridor. The CCTV footage was date and time stamped 23 July 2019, 17:58 and a caption in simplified Chinese characters said: "*On 23 July at 17h58 he entered the room*".

*"...frequently travelled to mainland China. He'd been instructed to collect..."*

As the presenter spoke, the same CCTV footage of a man and woman was included followed by very brief close-up footage of a man, which the programme had circled in red, with his back to the camera. The CCTV footage was date and time stamped '8 August 2019, 18:54' and a caption in simplified Chinese characters read: "*On 8 August at 18h54 he entered the room*".

*"...information about the status of the protests since they began in June..."*

The report ended and there was no further reference to Mr Cheng in the programme.

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

### **Complaint**

By way of background, Mr Cheng said that he was detained by the police in China on 8 August 2019, and that on or around 20 August 2019, “after a prolonged period of both physical and mental torture”, he was made to record a number of videos by the Chinese Ministry of State Security (“MSS”) and the police.

On 20 November 2019, several months after his release, the BBC released an interview in which Mr Cheng discussed why he was detained, and his allegations of torture. The following day, on 21 November 2019, CGTN broadcast material previously recorded by the MSS and police, purporting to show Mr Cheng confessing to offences.

### *Unjust or unfair treatment*

- a) Mr Cheng complained that he was treated unjustly or unfairly in the programme as broadcast because:
  - i) The programme said that: Mr Cheng was “*tried*” in August; stated as fact that he was found guilty of soliciting prostitutes; and, included CCTV footage of him which the programme said showed him visiting or soliciting a prostitute. Mr Cheng said none of this was true.

Mr Cheng said he had been placed in “administrative detention” which he described as an extrajudicial process rather than a trial. He said that the only evidence presented by the police in relation to the claims was a purported confession that was obtained and filmed under duress while he was being held incommunicado at an unknown location, in solitary confinement and without legal representation. He said the CCTV footage does not show him visiting or soliciting a prostitute.

- ii) The programme did not make the circumstances of Mr Cheng’s purported confession clear.

Mr Cheng said that the purported confession was obtained under duress. In particular, he said that he had confessed to soliciting prostitutes because he had been told that if he cooperated with the police, he would “face a less harsh treatment, only administrative detention, and I would not get a criminal record”. Mr Cheng said that the broadcaster would have been aware of the circumstances in which the purported confession had been obtained, yet these facts were not presented in the programme and the interview was presented as a voluntary confession.

- b) Mr Cheng also complained that he was not given an opportunity to respond to the claims being made in the programme, nor did the programme fairly reflect his position, despite this being widely available and known to CGTN.

### *Unwarranted infringement of privacy*

- c) Mr Cheng complained that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme because the broadcaster had obtained footage of Mr Cheng which had been filmed in circumstances where he was being held incommunicado and

under duress at an unknown location, in solitary confinement and without legal representation. Mr Cheng said that the broadcaster would have been aware that he was filmed in such circumstances.

- d) Mr Cheng complained that his privacy was unwarrantably infringed in the programmes as broadcast because footage of the purported confession was included in the programme without his consent. Mr Cheng said that the broadcaster would have been aware that the purported confession was obtained in the circumstances described above.

### **Licensee's response**

#### *Background*

The Licensee said that the report was 55 seconds long and formed part of the news story about the complainant, Mr Cheng, a former trade and investment officer at the UK consulate in Hong Kong, who had been detained in China in August 2019 for violating the law. It said that the programme briefly covered a new development in the story on 21 November 2019, that Shenzhen police had released videos of Mr Cheng in response to his claims in a BBC interview the day before, on 20 November 2019, that he had been tortured while detained and accused of inciting political unrest in Hong Kong, claims which the Shenzhen police and Chinese government denied.

The Licensee referred to a report broadcast on CGTN 15 minutes prior to the complained about programme (a copy of which was provided to Ofcom) which it said reported that the Chinese Foreign Ministry had rejected claims by Mr Cheng that he was tortured by Shenzhen police while in detention. It referred to the following quote from the programme by Mr Geng Shuang, a spokesperson for the Chinese Foreign Ministry:

“As I said yesterday, Shenzhen police have made a statement on Cheng’s case. He was sentenced to administrative detention of 15 days under clause 66 of the Public Security Administration Punishment Act of the People’s Republic of China. During Cheng’s detention, police respected all his rights and interests according to the law. Cheng also made a full confession about his illegal actions. I want to remind you that Cheng confessed his illegal actions”.

#### *Unjust or unfair treatment*

- a) The Licensee said that while it was correct that the Shenzhen police had released videos of what they said was Mr Cheng soliciting prostitutes, it was not correct that the videos showed Mr Cheng’s “trial” in August. The Licensee said that this was an unfortunate error that was made during the script editing process, for which it apologised. The Licensee accepted that Mr Cheng had been placed in administrative detention which accorded with what Mr Cheng set out in his complaint, as well as what the Chinese Foreign Ministry publicly stated. However, it said that it was clear from the commentary and video footage shown in the programme, that it did not include any footage of a trial. For example, there was a seven second video of Mr Cheng wearing a numbered pink t-shirt, and the surrounding commentary made clear that this related to Mr Cheng’s admission of having solicited prostitutes whilst in detention, not at a trial.

The Licensee said that the programme did not state as fact that he was found guilty of soliciting prostitutes. The Licensee said that the programme clearly stated, and attributed to the Shenzhen police, that the police had released videos of Mr Cheng soliciting prostitutes. The programme said that the videos showed that Mr Cheng “acknowledged” his violation of the law (in soliciting prostitutes) which he did in the video released by the police and, showed evidence of him visiting prostitutes three times in half a month, which according to the police that was what their released video showed. The Licensee added that the programme did not state that Mr Cheng was “found guilty” of soliciting prostitutes. The Licensee also said that the programme stated that Mr Cheng was detained for 15 days in Shenzhen, which Mr Cheng does not appear to dispute.

The Licensee said that the BBC interview with Mr Cheng, during which he alleged that he had been tortured while in police detention, garnered wide attention and discussion, including rebuttals from the Shenzhen police and Chinese government regarding Mr Cheng’s allegations. The Licensee provided Ofcom with a website link to an excerpt from the BBC interview<sup>3</sup>. It said that it was in the public interest to cover this news story including reflecting both Mr Cheng’s position and China’s official response to Mr Cheng’s serious allegations. The Licensee said that the report was only 55 seconds in length, during which it expressly made clear that Mr Cheng appeared in a BBC interview and claimed he was tortured while detained in the Chinese mainland and was accused of inciting political unrest in Hong Kong. The Licensee said that the programme in its commentary reflected Mr Cheng’s statements from and/or position adopted in the BBC interview in respect of the fact that he said he was a supporter of the Hong Kong protestors, frequently travelled to the Chinese mainland and had been instructed by his employer, the UK consulate in Hong Kong, to collect information about the status of the protests since they began in June.

The Licensee said that while the programme did not include or refer to Mr Cheng’s response to the BBC journalist’s direct question as to whether he had ever visited or solicited prostitutes, it said that Mr Cheng did not deny that he had done so (and did not appear to have denied elsewhere that he had visited or solicited prostitutes). It added that in the interview, Mr Cheng replies: “I don’t want to focus on a question of whether I solicit prostitution because that’s exactly what they want. So, I just want to state clearly here I did nothing regrettable to the people I cherish and love. I did nothing regrettable to that”.

- a)ii) The Licensee said that the programme reported the fact that, following Mr Cheng’s allegations in a BBC interview that he had been tortured while in police detention, the Shenzhen police had released videos of Mr Cheng soliciting prostitutes and acknowledging his violation of the law. It said that there was a strong public interest in reporting both sides of this news story and to include some or all of the released videos. Given this, the Licensee said that it was fair and proportionate, in the context of the brief news item, to include a seven second edited version of Mr Cheng’s admission, without sound (unlike other media outlets which had published the full video, with sound, as released by the police).

The Licensee said that the programme had made it clear that the videos were released by the police in response to his recent allegations that he had been tortured while in police detention for 15 days. The Licensee said that it was therefore implicit that the video of Mr Cheng was taken

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<sup>3</sup> [Simon Cheng: Former UK consulate worker says he was tortured in China, BBC News, 20 November 2019.](#)

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while in police custody as, immediately after referring to his detention, it stated that the videos released by the police showed him acknowledging his violation of the law. The Licensee said that it also reflected Mr Cheng's position and in particular, that he said he was tortured. Further, it said that it was not clear on what basis Mr Cheng believed that CGTN "used material given to them by police". In this regard, it said that the broadcaster did not obtain the videos from the police as alleged by Mr Cheng. Rather, it obtained the videos by downloading the clip from a social media platform page of the People's Daily newspaper, which had already reported on the matter. It said that it was satisfied with the authenticity of the videos as the Shenzhen police reposted the same videos on their social media platform page five minutes later. The Licensee provided Ofcom with website links to these pages. The Licensee said that it had decided to broadcast a much shorter version, seven seconds only and it chose to edit out the sound and briefly summarise in commentary that the video showed Mr Cheng "*acknowledged his violation of the law*", which it said he did in the unedited video by saying he thought it was very embarrassing and shameful. The Licensee said that it considered that the inclusion of this very brief, edited section of Mr Cheng in detention, to be fair and proportionate in the context of this news item.

The Licensee said that there was nothing in the video to indicate that Mr Cheng was under extreme distress in respect of his purported confession, and a very brief excerpt of it was included in a short news item which made it clear that he said he had been tortured while in police detention. The Licensee said that taking into account that the programme reflected both Mr Cheng's and the Chinese authorities' positions, it considered that the strong public interest weighed in favour of showing the brief seven seconds of footage of Mr Cheng's admission (without sound) and that it was neither unfair or unjust to Mr Cheng to do so.

- b) The Licensee said that it did not offer Mr Cheng the opportunity to respond to the claims in the programme as it did not consider it necessary to contact him. It said this particular item was, as identified in the programme, a short 'news in brief' segment, rather than a full news story which would have space for, and warrant, reaction or comment from Mr Cheng. It said it was very brief in duration and was reactive to his interview with the BBC, referring to that interview and reflecting his position by including material facts from that interview (as summarised in head a)ii) above).

#### *Unwarranted infringement of privacy*

- c) The Licensee referred to its submission as set out under head a)ii) above. In particular, it said that it did not film Mr Cheng, nor did it obtain the video footage from Shenzhen police. Rather, it obtained the video footage from a social media platform page of the People's Daily newspaper. The Licensee said it was not aware of all the specific circumstances in which Mr Cheng was filmed, as alleged, namely that he was being held incommunicado, under duress, in solitary confinement and without legal representations. The Licensee said that it was aware from Mr Cheng's interview with the BBC that he said he had been tortured while in police detention, and that statement was included in the programme. The Licensee said that as the matter was already in the public domain and being reported as a major news story by other media on 21 November 2019, it covered the story in the programme given it was a matter of strong public interest. The Licensee said that the programme made clear that the videos had been released by Shenzhen police in response to an interview that Mr Cheng gave to the BBC alleging that he had been tortured while in police detention and accused of inciting political unrest in Hong Kong.

The Licensee said that in this particular case, the Licensee considered that the strong public interest in reporting this news story, including using brief excerpts of the videos released by the police (by obtaining the longer clip from a major Chinese newspaper's social media page), outweighed any right to privacy that Mr Cheng may have had in the video footage. The Licensee said that this was particularly the case as Mr Cheng himself had submitted to an interview with the BBC making serious allegations against the Chinese authorities about his time in detention, to which the Chinese authorities then responded. As noted under head a)ii) above, having considered what was fair and proportionate in the context of this news item, it chose to show only a seven second clip and edit out the sound of the police video footage, instead briefly summarising in commentary that the video showed Mr Cheng "*acknowledged his violation of the law*", which he did in the unedited video by saying he thought it was very embarrassing and shameful.

- d) The Licensee referred to its submissions as set out under head a)ii), b) and c). It said that for the same reasons, it considered that in the particular circumstances of this case, it was not necessary to obtain Mr Cheng's consent to broadcast the video footage released by the police as the strong public interest in broadcasting this news story, including brief excerpts of the videos released by the police, outweighed any right to privacy that Mr Cheng may have had in the video footage. In particular, the Licensee said that the programme emphasised that the video footage of Mr Cheng had been released by the Shenzhen police in response to Mr Cheng's claims of having been tortured while in police detention. It added that what the broadcast video footage showed was clearly attributed to the video itself. Further, it did not consider it necessary to contact Mr Cheng given the programme was, as identified in the programme, a short news in brief segment, rather than a full news story which would have space for, and warrant, reaction or comment from Mr Cheng. It said that it was very brief in duration (only 55 seconds) and was reactive to his interview with the BBC, referring to that interview and reflecting his position by including material facts from that interview (as summarised in section head a)ii) above). Further, it said that the broadcast video footage of Mr Cheng acknowledging his violation of the law in the programme lasted only seven seconds, was inaudible, and did not show him to be in any kind of distress. It added that it was also accompanied by brief, accurate commentary attributed to what the video showed.

## Preliminary View

Ofcom's Preliminary View was that the complaint should be upheld. Both parties were given the opportunity to make representations on the Preliminary View. Both parties submitted representations which, insofar as they are relevant to the complaint entertained and considered by Ofcom, are summarised below.

### *Complainant's representations*

Mr Cheng said that the Licensee was "far more aware of my true situation of distress and duress than they claim to Ofcom, and very well aware that significant parts of the police's story was disputed". In particular, Mr Cheng said that in the BBC interview (which the Licensee said it was aware of) he had indicated that he was held in solitary confinement (as well as making a claim that he was tortured). Mr Cheng also said that administrative detention does not form part of any criminal process, which meant that in the relevant Chinese law (which he indicated was the Public Security Administration Punishments Law of the People's Republic of China) he had no right to a lawyer or legal representative. Given this, Mr Cheng said the Licensee knew, or should have known, that he had no

access to legal counsel. Further, Mr Cheng said that in a prior news story about him which was published on CGTN's website<sup>4</sup>, CGTN claimed to be aware that Mr Cheng's family had not been informed about the reason for his detention, which Mr Cheng said was against the law<sup>5</sup>.

Mr Cheng said that he had difficulty understanding the Licensee's motivation behind the broadcast of the programme. He said that the reference in the programme to the Hong Kong protests was significant because it was not related to the police's unverified claim that he had visited prostitutes and, in his view, showed the true purpose for the broadcast of the programme. He added that this ulterior motive was strengthened by the Licensee's admission that the programme was reactive to his interview with the BBC, which he said coincided with the police releasing the footage of him.

Mr Cheng submitted that it was factually incorrect for the programme to state that he was "sentenced" to 15 days of detention. He said that it was an administrative procedure (akin to the issuing of a fine) and that the police take the decisions on punishment for administrative violations, and they are simply called "decisions"<sup>6</sup>. Mr Cheng said that there was no hearing, trial or sentencing involved, and that the programme's reference to him as being "sentenced" implied a higher level of guilt.

Mr Cheng said that the Licensee claimed that the harm to him was reduced because of the brief nature of the report, which he considered was a "suitable way to escape responsibility for not even trying to verify neither facts nor seek me out for comment". Mr Cheng submitted that when the "world's largest media organisation" accused him and presented as fact, despite no evidence being provided, of using prostitutes, his reputation was "destroyed" and the amount of footage of him included in the programme had no bearing on its impact on his reputation. Further, Mr Cheng submitted that the use of the programme's reporter to describe what he said, rather than allowing the audience to hear him, in his view made his "guilt appear stronger in the eyes of any viewer".

Mr Cheng submitted that while it was true that the Licensee did not broadcast all the material released by the police unlike other news outlets (as set out in the Licensee's submissions), CGTN had published on its website, with both video and text, the full material and had entitled the story "Shame on you, Simon Cheng". Mr Cheng said that he considered that the Licensee's intention in making such representations to Ofcom was to "somehow show journalistic integrity" but that, in his view, it was misleading.

Mr Cheng said that the Licensee had claimed that the CCTV footage of him included in the programme was evidence from the police of him visiting prostitutes. Mr Cheng said that the footage showed him in a lobby. Mr Cheng added that at no point was it indicated that the police's explanation had been

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<sup>4</sup> [Britain's HK Consulate staffer released after 15-day administrative detention, CGTN, 24 August 2019.](#)

<sup>5</sup> Mr Cheng referred to Articles 83 and 97 of the Public Security Administration Punishments Law as being the relevant legislation, which he quoted as: "On being taken in for interrogation, article 83: 'The public security organ shall inform a family member of the summoned of the reason of summon and his whereabouts in a timely manner.' For decision on administrative punishment, article 97: 'Where it is decided to give him an administrative punishment, the public security organ that makes the decision shall inform a family member of the person to be punished.'"

<sup>6</sup> Mr Cheng referred to Article 95 of the Public Security Administration Punishments Law.

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challenged or that they had made an attempt to enquire about it, despite him having disavowed this claim in the BBC interview which had been viewed by the Licensee prior to the broadcast of the programme.

Mr Cheng concluded that, in his view, the broadcast was made at the behest of the “Chinese authorities” and the purpose of the programme was to attack him, defend the Chinese authorities’ actions and to attack the UK government for trying to protect legally guaranteed freedoms in Hong Kong.

#### *Licensee’s representations*

The Licensee reaffirmed its contention that the programme did not breach the fairness and privacy provisions of the Code for the reasons it had set out in its statement (as summarised above). The Licensee also said that it rejected all of Mr Cheng’s representations on the Preliminary View.

The Licensee reiterated that the programme included a very short “news in brief” segment, which was only 55 seconds in duration.

The Licensee submitted that Ofcom had wrongly concluded that material facts were presented, disregarded or omitted in a way that resulted in unfairness to Mr Cheng. In particular:

- The Licensee submitted that it was wrong for Ofcom to conclude that the programme implied that Mr Cheng had been convicted via a trial process. The Licensee said that the commentary in the programme made clear that Mr Cheng had been detained in Shenzhen for a period of 15 days and the police had released a video which showed that he had acknowledged a violation of the law. It also referred to the report broadcast 15 minutes prior to the programme which referred to Mr Cheng’s “administrative detention”. It said that other than the error in the opening line of the programme which made reference to a trial, no other language such as “conviction”, “found guilty” or similar words were used in the programme to indicate that any criminal trial had taken place.
- The Licensee submitted that it was wrong for Ofcom to suggest that viewers of the programme would have been left with the impression that Mr Cheng had solicited prostitutes and that the CCTV videos shown were evidence of this. The Licensee said that there was a proper attribution of these comments to the police in the programme and viewers would have understood that it was reporting on the police’s response to Mr Cheng’s allegations of mistreatment.
- The Licensee added that the commentary accompanying the footage of Mr Cheng presented that Mr Cheng had acknowledged soliciting prostitutes, and also reflected his position as presented in his interview with the BBC. The Licensee said that it was left up to viewers to decide whether they believed Mr Cheng, who claimed he was tortured while he was detained and was accused of inciting political unrest or the police, who denied his claims of torture and said he had been detained for soliciting prostitutes, which the Licensee said Mr Cheng had admitted. The Licensee said that it was “wholly exaggerated and wrong” for Ofcom to conclude that viewers would have been left with the clear impression that Mr Cheng had solicited prostitutes as claimed by the police.
- The Licensee said that the programme referred to key elements of Mr Cheng’s position and that Ofcom had failed to properly consider this. The Licensee said that Ofcom had wrongly

concluded that contextual information included in the programme had “no bearing” on the extent to which viewers could rely on Mr Cheng’s confession and the police’s evidence, and the impression they would have had of the circumstances which led to Mr Cheng acknowledging his violation of the law. The Licensee noted that Ofcom had acknowledged the inclusion of contextual information in the programme in its Preliminary View, such as the claims of torture Mr Cheng had made in the BBC interview. The Licensee said that material facts were not presented, disregarded or omitted in a way that resulted in unfairness to Mr Cheng. It also said that Ofcom had applied the wrong test in relation to finding a breach of Rule 7.1 by use of the words “*could have*” which implies a possibility, whereas the Licensee said Ofcom must find that unfairness “*would have*” resulted in order to find a breach.

The Licensee also submitted that Ofcom had wrongly concluded that Mr Cheng was treated unfairly because he was not given an opportunity to respond to the claims made in the programme and his views were not fairly represented. The Licensee said that the key elements of Mr Cheng’s position were reflected in the programme and this was done fairly given the brevity of the programme. It added that for this same reason, there was no need for it to seek a response from Mr Cheng as the programme was about the allegations he had made against the police, and the police’s response to those allegations. It also submitted that there is no requirement in the Code to provide people with an opportunity to respond to stories about them and a failure to do so does not necessarily result in unfairness to them. It said that a programme can provide a person’s point of view by reference to what they have previously said, which happened in this case by summarising in the programme the key elements of what Mr Cheng had alleged in the BBC interview the day before.

The Licensee disagreed with Ofcom’s balancing of the complainant’s Article 8 privacy rights and the broadcaster’s and audience’s Article 10 rights to freedom of expression. The Licensee said that Ofcom had accepted that the video of Mr Cheng’s interview in police detention was already in the public domain via another media outlet before the programme was broadcast. It said that Ofcom had not given sufficient weight to this point in considering the public interest arguments and that the video was released by the police in response to Mr Cheng’s allegations against them which was a matter that Mr Cheng first decided to make public himself.

The Licensee also said that in circumstances where Ofcom accepted that Mr Cheng was not heard revealing “any information about himself” in the programme, it was wrong to conclude that the information regarding Mr Cheng was so private and sensitive in nature that the strong public interest in broadcasting the brief, seven second clip was not warranted. The Licensee added that Ofcom appeared to suggest that, while the broadcaster was aware of Mr Cheng’s claims of torture while in police detention, it had disregarded that and did not take further measures, which it disputed. The Licensee said that the programme referred to Mr Cheng’s claim in a BBC interview that he was tortured while in police detention, and it was therefore left for the audience to decide whom they believed.

The Licensee provided further background information on the story. It said that the day before the broadcast of the programme, the BBC had broadcast an interview with Mr Cheng during which he first alleged that he had been tortured while in police detention. This interview, it said, garnered widespread attention and discussion, including rebuttals from Shenzhen police and the Chinese government regarding Mr Cheng’s allegations. The Licensee argued that it was clearly in the strong

public interest to cover this news story, including reflecting both Mr Cheng's position and the Chinese authorities' official response to Mr Cheng's serious allegations. The Licensee submitted that the 55 second news in brief segment made clear that Mr Cheng appeared in a BBC interview and claimed he was tortured while detained in the Chinese mainland and was accused of inciting political unrest in Hong Kong. It added that the programme, and its commentary, reflected Mr Cheng's position as adopted in the BBC interview, noting that he said he was a supporter of the Hong Kong protestors, frequently travelled to the Chinese mainland and had been instructed by his employer, the UK consulate in Hong Kong, to collect information about the status of the protests since they began in June. While the programme did not include nor refer to Mr Cheng's response to the BBC's direct question as to whether he had ever visited or solicited prostitutes, Mr Cheng did not deny that he had done so (and the broadcaster said that he had not denied elsewhere that he had visited or solicited prostitutes). It said that there was a strong public interest in reporting on both sides of this news story and it was fair and proportionate, in the context of the brief news item, to include a seven second clip of Mr Cheng's admission, without sound, accompanied by commentary that Mr Cheng had acknowledged his violation of the law. It added that this was particularly the case as Mr Cheng had taken part in an interview with the BBC and made serious allegations against the Chinese police about his time in detention, to which they then responded, and which it said was the subject of the programme.

The Licensee submitted that it was not necessary to obtain Mr Cheng's consent to broadcast the footage of him because the strong public interest in broadcasting the news story outweighed any right to privacy that Mr Cheng may have had. The Licensee added that in particular, the programme attributed and emphasised that the footage of Mr Cheng (which was already in the public domain in longer form on another media outlet's website) had been released by the Shenzhen police in response to Mr Cheng's claims of having been tortured while in police detention. The Licensee said that it was not necessary to contact Mr Cheng as the programme was very brief in duration and reflected Mr Cheng's position by including material facts from his BBC interview.

## **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 this decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording and transcript of the programme as broadcast and both parties' written submissions and both parties' representations in response to the Preliminary View. We also considered the recording and transcript of the report broadcast on CGTN 15 minutes prior to the complained about programme which was referred to in the Licensee's statement in response to the

complaint. After careful consideration of the representations, we considered that the points raised did not materially affect the outcome of Ofcom's Preliminary View to uphold the complaint.

*Unjust or unfair treatment*

When considering 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 Ofcom's Broadcasting Code ("the Code").

In addition to this Rule, Section Seven (Fairness) 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 7.1, and failure to follow these practices will only constitute a breach where it results in unfairness to an individual or organisation in the programme.

a) We considered Mr Cheng's complaint that he was treated unjustly or unfairly in the programme as broadcast because:

- i) the programme said that Mr Cheng was "tried" in August, stated as fact that he was found guilty of soliciting prostitutes, and included CCTV footage of him which the programme said showed him visiting or soliciting a prostitute. Mr Cheng said none of this was true.

Mr Cheng said he had been placed in "administrative detention" which he described as an extrajudicial process rather than a trial. He said that the only evidence presented by the police in relation to the claims was a purported confession that was obtained and filmed under duress while he was being held incommunicado at an unknown location, in solitary confinement and without legal representation. He said the CCTV footage does not show him visiting or soliciting a prostitute.

- ii) the programme did not make the circumstances of Mr Cheng's purported confession clear.

As noted above, Mr Cheng said the purported confession was obtained under duress. In particular, he said he had confessed to soliciting prostitutes because he had been told that, if he cooperated with the police, he would "face a less harsh treatment, only administrative detention, and I would not get a criminal record". Mr Cheng said that the broadcaster would have been aware of the circumstances in which the purported confession had been obtained, yet these facts were not presented in the programme and the interview was presented as a voluntary confession.

In considering the heads of complaint a)i) and ii), we had particular regard to the following Code Practices:

- Practice 7.8 states that broadcasters should ensure that the re-use of material, i.e. use of material originally filmed or recorded for one purpose and then used in a programme for another purpose or used in a later or different programme, does not create unfairness. This applies both to material obtained from others and the broadcaster's own material.

- Practice 7.9 states that before broadcasting a factual programme, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to the individual or organisation.

As set out in the “Programme summary”, the programme reported on the release of footage by Shenzhen police of Mr Cheng *“soliciting prostitutes and of his trial [i]n August”*. The report also referred to a BBC programme where it said that Mr Cheng had *“claimed he was ‘tortured’ while detained in the Chinese mainland”*. The programme reported that Mr Cheng had been *“detained”* for 15 days in Shenzhen *“due to soliciting prostitutes and in accordance with Chinese law”*. A video was included of Mr Cheng in a room being interviewed (albeit the audio of Mr Cheng could not be heard clearly) as the reporter said: *“The videos show he acknowledged his violation of the law”*. Throughout the report, various pieces of CCTV footage of Mr Cheng were shown, including footage which showed him at a reception desk in a lobby, walking down a corridor and entering a doorway off the corridor. The report also included the caption: *“Case Cleared: Shenzhen police releases video evidence showing truth behind Simon Cheng case”*.

Ofcom considered the application of Practice 7.9 and the extent to which the Licensee had exercised reasonable care in satisfying itself that material facts had not been presented, disregarded or omitted in a way that was unfair to Mr Cheng. We also considered the application of Practice 7.8 and whether the reuse of the material of Mr Cheng in the programme created unfairness.

We took into account that the Licensee had acknowledged that it was not correct to state in the programme that the videos released by the police showed Mr Cheng’s *“trial”* in August and that this was an unfortunate error that was made during the script editing process. We considered that viewers were unlikely to have understood the footage included in the programme of Mr Cheng showed a criminal trial. However, the broadcast referred to a video being released by the police of *“his trial in August”*, which clearly implied that a criminal trial had actually taken place in relation to the offence, and which the Licensee accepts was not the case. Additionally, although we acknowledge that the broadcast did not explicitly state the outcome of that *“trial”* nor use other language such as *“conviction”* and *“found guilty”* (as set out in the Licensee’s representations on the Preliminary View), it nevertheless used the word *“trial”* and presented the assertion that he was *“detained for 15 days in Shenzhen due to soliciting of prostitutes and in accordance with Chinese law”* immediately after referring to his *“trial”*. In Ofcom’s view, the programme clearly implied he had been convicted via that process and we considered that the inference viewers may have drawn from this was that any evidence the police had gathered in relation to the offence had been tested in court and could therefore be relied upon to a greater extent than material that had not been tested in that way.

We acknowledged the Licensee’s representations that, 15 minutes prior to the programme under consideration, a programme had included a statement from a spokesperson for the Chinese Foreign Ministry, issued by the police, which said that Mr Cheng *“was sentenced to administrative detention of 15 days under clause 66 of the Public Security Administration Punishment Act of the People’s Republic of China”*. However, we took into account that there

was no link made to this earlier programme or statement in the programme under consideration. Therefore, we considered that the inclusion of the spokesperson's comments in the earlier programme was not sufficient in this case to have altered the audience's perception of the process which had led to Mr Cheng's detention i.e. that a criminal trial had taken place which led to him being detained for 15 days. Taking these factors into account, we considered that the implication that Mr Cheng had been tried and convicted in relation to the alleged offences described (as opposed to being placed in administrative detention by police) had the clear potential materially and adversely to affect viewers' opinions of the complainant.

We next had regard to the CCTV footage of Mr Cheng included in the programme, which appeared to show him at a reception desk in a lobby, walking down a corridor and entering a doorway of the corridor, and the accompanying commentary which made clear that the police had released this footage and that it showed him "*soliciting prostitutes*" and that he had violated the law "*three times during half a month*". We considered the Licensee's argument, which was reiterated in its representations on the Preliminary View, that the broadcast merely reported on allegations being made by the police in response to Mr Cheng's allegations of mistreatment while in police detention. However, although the broadcast noted that the videos were released by police and the police had done so "*after Cheng...appeared in a BBC interview*", the presenter stated that the videos showed "*Simon Cheng soliciting prostitutes*" (rather than, as the Licensee submitted, that this was merely the police's claim about the contents of the videos). In addition, a caption was shown at the beginning of the report which stated "***Case Cleared: Shenzhen police releases video evidence showing truth behind Simon Cheng case***" [Ofcom's emphasis]. Ofcom considered this caption would have been understood by viewers as an endorsement of the truth of the statements made by the police. Therefore, while it was made clear in the report that the videos had been released by the police, and that it was the police that had claimed that the videos were evidence that Mr Cheng had solicited prostitutes on three occasions, we considered that, overall, the presentation of these statements and the videos of Mr Cheng would have left viewers with the clear impression that Mr Cheng had, as a matter of fact, solicited prostitutes, and that the CCTV videos shown were evidence of this, as claimed by the police. We considered that this had the clear potential materially and adversely to affect viewers' opinions of the complainant.

In relation to the video purporting to show Mr Cheng admitting offences, we acknowledged that it was not likely that the audience would have been able to distinguish what was said by Mr Cheng in the audio of the footage of him included in the programme. We took account of the Licensee's representations that the presentation of Mr Cheng in the programme, which included the reference to his claim in the BBC interview that he had been tortured while in detention in Shenzhen, would have left it open to viewers to decide whether to believe the police's account of the events or Mr Cheng's. However, we considered that the accompanying commentary to the footage, "*The videos show he acknowledged his violation of the law*", was presented as a statement of fact, rather than as merely an allegation by the police which viewers were being invited to evaluate against Mr Cheng's claims of mistreatment by the police. As such, viewers would have understood that Mr Cheng had voluntarily confessed to

the offence of soliciting prostitutes and that the video being shown was of that voluntary confession, when there was reason to doubt this was the case (as discussed further below).

In relation to whether the purported confession was voluntary, Mr Cheng alleged that he was mistreated in custody and that the purported confession was obtained under duress. It is important to note that Ofcom's role is not to make findings of fact about the truth or otherwise of the allegations made about Mr Cheng. Rather, our role is to consider whether, by broadcasting what it did, the broadcaster took reasonable care not to present, disregard or omit material facts in a way that resulted in unfairness to him.

The Licensee said that it was not aware of all the specific circumstances in which Mr Cheng was filmed, as alleged in the complaint, namely that he was being held incommunicado, under duress, in solitary confinement and without legal representation. The Licensee also said that there was nothing in the video to indicate that Mr Cheng was under extreme distress in respect of his purported confession. We also had regard to the fact that at the beginning of the report it said that Mr Cheng claimed in a BBC programme that he had been "*tortured*" while he was detained. The report provided viewers with no further context surrounding Mr Cheng's claim of having been subjected to torture. We also had regard to Mr Cheng's representations on Ofcom's Preliminary View, in which he stated that he believed that the broadcaster ought to have known about the fact that he had no access to legal counsel – as there is no right to a lawyer when subject to administrative detention under the relevant Chinese law – and that in a news article published on CGTN's website prior to the broadcast, it had been stated that his family had not been informed about his arrest and detention.

While Ofcom is not able to, and does not need to, definitively establish details of the complainant's treatment in custody or the circumstances which had led to Mr Cheng's alleged confession, the Licensee was clearly aware of Mr Cheng's claims that he had been subject to duress during his detention when it reported the story, given that it referred to his claim that he had been "*tortured*". The Licensee provided Ofcom with a website link which included excerpts of Mr Cheng's interview with the BBC during which he clearly claimed that he told police: "You don't need to torture me. I will say anything you want me to say". The Licensee also told Ofcom that it knew the video clip of Mr Cheng, which it had obtained from a social media platform, had been filmed by the police whilst Mr Cheng was in a detention centre. The Licensee therefore ought to have been aware that the inclusion of the statement that Mr Cheng had "*acknowledged his violation of the law*" in the footage, as a statement of fact rather than merely as an allegation by the police and without making appropriately clear his claim that this footage had been obtained under duress, could have given viewers a misleading impression of the circumstances which had led to Mr Cheng making such statements.

We took into account that the Licensee said that Mr Cheng had not denied that he had visited or solicited prostitutes. However, we noted that, in the BBC interview referred to by the Licensee, Mr Cheng had explained his decision not to address those allegations directly by saying "that's exactly what they [the Chinese authorities] want" and had added, "I just want to state clearly here that I did nothing regrettable to the people I cherish and love". As such, whilst not a denial, neither could it be read as an implicit acknowledgement he had visited

prostitutes. Rather it was an expression of a wish not to talk about the matter with the media. Moreover, Mr Cheng had denied that the CCTV footage included in the report in fact showed him soliciting or visiting prostitutes.

As noted above, the Licensee had obtained the footage of Mr Cheng from the social media platform page of the People's Daily newspaper and was therefore not present during the filming of Mr Cheng, which we understood had been carried out by the police while Mr Cheng was in a detention centre. As such, the Licensee could not and did not discuss with Mr Cheng his reasons for giving the interview. The Licensee was therefore not in the position to ascertain whether Mr Cheng had given his genuine, informed consent to the filming of the interview or whether he had consented to how that interview might subsequently be used (such as uploading it to a social media platform or broadcasting it on television). Further, as set out above, the Licensee was aware of Mr Cheng's claims regarding his treatment in custody which ought to have created substantial doubt as to the extent to which consent could have been obtained and whether he was making genuine, voluntary statements.

We acknowledged that the programme made clear that it was the police who had released the videos of Mr Cheng, including the video of his purported confession, and that the report had referred to the fact that Mr Cheng had claimed in a BBC interview that he had been tortured while under detention. However, as set out above, we considered that, overall, the statements made in the programme and commentary accompanying the videos (including the caption: "*Case Cleared: Shenzhen police releases video evidence showing truth behind Simon Cheng case*" [Ofcom's emphasis]) would have left viewers with the clear impression that Mr Cheng had, as a matter of fact, solicited prostitutes, and that the CCTV footage included in the report was evidence of this. Moreover, the report presented Mr Cheng's purported confession, as shown in the footage, as a statement of fact, and as being genuine and sufficient to conclude that Mr Cheng had "*acknowledged his violation of the law*", i.e. he had committed the offence of soliciting prostitutes.

We do not consider it was reasonable for the Licensee to have presented the footage in this way because of the evidence that the Licensee had at the time that there was significant reason to doubt that these were genuine, voluntary omissions. This included that the interview was carried out by the police while Mr Cheng was in a detention centre, rather than by the Licensee; that the Licensee therefore could not and did not discuss with Mr Cheng his reasons for giving the interview and as such was not in the position to ascertain whether Mr Cheng had given his genuine, informed consent to the filming of the interview or whether he had consented to how that interview might subsequently be used; and that the Licensee had not established the circumstances which had led to Mr Cheng agreeing to the interview with the police even though it was aware of Mr Cheng's claim (which he made during the BBC interview) regarding his treatment while in police detention.

Failing to present facts which cast significant doubt on whether Mr Cheng's statements were made voluntarily had clear potential to be unfair to the complainant. In particular, we considered that presenting Mr Cheng's alleged confession in this way, and in the absence of further context relating to his allegations about his treatment while in custody, tended to imply that viewers could rely on his confession and the police's evidence against him, as

reported in the programme, and that his claim that he had been “*tortured*” while in police custody could be given less weight than the police’s claims, which were, overall, presented as statements of fact in the programme. This could have given viewers a misleading impression of the circumstances which had led to Mr Cheng making such statements. Therefore, we considered that the Licensee did not take reasonable care to satisfy itself that material facts were not presented, disregarded or omitted in a way that was unfair to Mr Cheng, as set out in Practice 7.9. We also considered that the re-use of the material of Mr Cheng in the programme had created unfairness to him, as set out in Practice 7.8.

Given the facts set out above, we considered that the Licensee had not followed the requirements as set out in Practices 7.8 and 7.9 of the Code. However, as set out in the Foreword to Section Seven of the Code, a failure to follow Practices will only constitute a breach of Rule 7.1 where it results in unfairness to an individual or organisation in the programme as broadcast. We therefore went on to consider whether the programme resulted in unfairness to him.

We acknowledged the broadcaster’s right to freedom of expression, and took account of the broadcaster’s argument that there was a strong public interest in reporting this news story and including some or all of the released videos, which had been made publicly available via social media and had been reported on by other media outlets. Ofcom recognised that it was legitimate for the broadcaster to provide an update on Mr Cheng’s case, including the police’s rebuttal of the claim that he was tortured. We also took into account the Licensee’s representations that the material complained about was 55 seconds in duration. However, Ofcom considered that the inclusion of the footage – albeit brief - of Mr Cheng in the programme as broadcast, accompanied by statements, presented as statements of fact, that the footage showed Mr Cheng soliciting prostitutes, and that he had acknowledged his violation of the law, would have given viewers the clear impression that Mr Cheng had, as a matter of fact, solicited prostitutes, and that he had made genuine and voluntary statements during his police interview confessing to having done so. This constituted unjust or unfair treatment of the complainant because, in our view, the Licensee had substantial grounds to doubt that Mr Cheng had made genuine, voluntary admissions, which the Licensee was aware that Mr Cheng disputed.

Furthermore, we considered that presenting Mr Cheng’s alleged confession in this way, and in the absence of further context relating to his assertions about his treatment while in custody, tended to imply that viewers could rely on his confession and the police’s evidence against him, as reported in the programme, and that his claim that he had been “*tortured*” while in police custody could be given less weight than the police’s claims, which were, overall, presented as statements of fact in the programme. We considered that this could have given viewers a misleading impression of the circumstances which had led to Mr Cheng making such statements. We also took into account that Mr Cheng was not given an opportunity to respond to the statements in the programme (as considered in more detail below).

Taking these factors into account, we determined that material facts were presented, disregarded or omitted in a way that resulted in unfairness to Mr Cheng.

- b) Mr Cheng also complained that he was not given an opportunity to respond to the claims being made in the programme nor did the programme fairly reflect his position, despite this being widely available and known to CGTN.

Ofcom had regard to Practice 7.11 which states that if a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond. We also had regard to Practice 7.13 of the Code which states that where it is appropriate to represent the views of a person or organisation that is not participating in the programme, this must be done in a fair manner.

In relation to Practice 7.11, we took into account that the Licensee said that it did not offer Mr Cheng the opportunity to respond to the claims in the programme as it did not consider it necessary to contact him. It also said that this particular item was reactive to Mr Cheng's interview with the BBC in which he made allegations against the police regarding his treatment in custody, referring to that interview and reflecting his position by including material facts from that interview. We also took account of the Licensee's representations that it had fairly reflected Mr Cheng's position in the programme, taking into account the brevity of the programme.

We considered that the inclusion of the footage of Mr Cheng, in conjunction with the statement made by the presenter that the footage showed Mr Cheng soliciting prostitutes amounted to an allegation of wrongdoing by Mr Cheng, and that the claim Mr Cheng had acknowledged he had violated the law was also a significant allegation. Normally, in such circumstances, the broadcaster should ensure that the person or organisation concerned is given an opportunity to respond and, where appropriate, for that response to be represented in the programme in a fair manner.

We acknowledged Mr Cheng had made public statements in the BBC interview regarding his treatment in custody of which the Licensee was aware. We also acknowledged that the programme reflected Mr Cheng's claim that he had been tortured while in police custody. However, for the reasons set out in head a), we did not consider that this reference adequately and fairly reflected the viewpoint of Mr Cheng in the programme. In particular, as set out above, we considered that the absence of further context relating to his assertions about his treatment while in custody tended to imply that his claim that he had been "tortured" while in police custody could be given less weight than the police's claims, which were, overall, presented as statements of fact in the programme. We therefore considered that the reference to Mr Cheng's claim that he had been tortured did not fairly represent the views of Mr Cheng in relation to the significant allegations made about him in the programme. We also took into account the Licensee's representations that it had reflected Mr Cheng's position in the BBC interview that he was accused of inciting political unrest in Hong Kong. However, as set out above, we considered that the programme had presented as fact that Mr Cheng had acknowledged his violation of the law in connection with the offence of soliciting prostitutes, rather than reflecting Mr Cheng's view that the real motive behind his arrest and detention was in connection with his apparent political activity. Further, the police had released the footage of Mr Cheng, some of which was subsequently included in the programme as broadcast, in response to Mr Cheng's claims in the BBC interview and made allegations as to Mr Cheng's actions in this footage. The Licensee did not seek his views on the broadcast material and, in particular, the footage provided by the police which purported to show him soliciting prostitutes and the precise nature of the claims made

against him. Taking this into account, Ofcom considered that Mr Cheng was treated unfairly in that he was not given an appropriate and timely opportunity to respond to the claims made in the programme and Mr Cheng's views were not fairly represented in the programme.

#### *Unwarranted infringement of privacy*

In Ofcom's view, the individual's right to privacy must be balanced against the competing rights of the broadcaster to freedom of expression and of the audience to receive ideas and information without undue interference. 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 which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

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.

- c) We considered Mr Cheng's complaint that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme because the broadcaster had obtained footage of Mr Cheng which had been filmed in circumstances where he was being held incommunicado and under duress at an unknown location, in solitary confinement and without legal representation. Mr Cheng said that the broadcaster would have been aware that he was filmed in such circumstances.

Ofcom had regard to Practice 8.5 which 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.

Mr Cheng's complaint of unwarranted infringement of privacy is solely about the footage of him which was filmed while in a detention centre. We therefore assessed the extent to which Mr Cheng had a legitimate expectation of privacy in the particular circumstances in which the material included in the programme of him in the detention centre was obtained. The test applied by Ofcom as to whether a legitimate expectation of privacy arises is objective: it is fact-sensitive and must always be judged in light of the circumstances in which the individual concerned finds him or herself.

We took into account that as Mr Cheng was filmed in a detention centre, access to him would have been limited and was likely to be restricted. This was particularly in light of the fact that it appeared the filming had been conducted by the police. In such circumstances, we considered that the filming took place in a highly sensitive situation where it was not clear whether Mr Cheng had been informed about the purpose for which he was being filmed or whether he understood that the material recorded might subsequently be included in a programme. As recognised in Practice 8.8. of the Code, prisons or police stations are considered potentially sensitive places, and we

considered that Mr Cheng was filmed in a sensitive environment where someone may be feeling vulnerable.

We took into account that the Licensee said that it had obtained the footage of Mr Cheng from the social media platform page of the People's Daily newspaper, and that it was not aware of all the specific circumstances in which Mr Cheng was filmed, as alleged in the complaint, although it said it was aware that the interview had been filmed by the police whilst Mr Cheng was in a detention centre. We therefore considered that the Licensee ought to have been aware that Mr Cheng was in a vulnerable position in police custody at the time of his interview. We also took into account the material available on the social media platform (the Licensee provided Ofcom with a website link to the content) and the Licensee's statement which indicated that Mr Cheng was filmed by the police disclosing highly sensitive information (i.e. apparently confessing to a criminal offence). Moreover, as explained in relation to head a) above, the Licensee was clearly aware of Mr Cheng's claims that he had been subject to duress during his detention when it reported the story, given that it referred to his claim made during an interview with the BBC that he had been "tortured". The Licensee also provided Ofcom with a website link which included excerpts of Mr Cheng's interview with the BBC, during which he clearly claimed that he told police: "You don't need to torture me. I will say anything you want me to say". Given all these circumstances, as explained in relation to head a) above, there were serious reasons to doubt whether the statements made during the interview amounted to genuine, voluntary statements.

Taking all these factors into account, Ofcom considered Mr Cheng had a legitimate expectation of privacy in connection with the obtaining of material included in the programme.

Next, we considered whether the expectation of privacy had been infringed or whether the Licensee had obtained informed consent for the filming.

We do not consider that the Licensee ensured Mr Cheng's informed consent for the filming of the interview had been obtained. In particular, the Licensee was not present during the filming of Mr Cheng, and was not in the position to ascertain whether Mr Cheng had given his genuine, informed consent to the filming of the interview, or whether he had consented to how that interview might subsequently be used (such as uploading it to a social media platform or broadcasting it on television).

In the absence of informed consent in relation to the filming of the footage, we considered it amounted to a significant intrusion into his legitimate expectation of privacy. We therefore considered whether the infringement of Mr Cheng's legitimate expectation of privacy in connection with the obtaining of the footage was warranted.

The Code states that "warranted" has a particular meaning. Where broadcasters wish to justify an infringement of privacy, 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, the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest could include revealing or detecting crime, protecting public health and safety, exposing misleading claims by individuals or organisations or disclosing incompetence that affects the public.

Ofcom carefully balanced Mr Cheng's right to privacy regarding the obtaining of the footage with the broadcaster's right to freedom of expression. We took into account the Licensee's submission that there was a strong public interest in reporting Mr Cheng's case, including using brief excerpts of the videos released by the police, which were already in the public domain. It said that this was particularly the case because Mr Cheng had given an interview to the BBC making serious allegations against the Chinese authorities about his time in detention, to which the Chinese authorities then responded. The Licensee said that the programme attributed the fact that the footage of Mr Cheng had been released in response to his claims of having been tortured by police custody, and it was in the public interest to reflect both positions.

We considered that the programme reported on a serious issue relating to alleged criminal behaviour and developments in the story, including Mr Cheng's interview with the BBC and the Chinese authorities' response to the substance of that interview. We also considered that it was important for broadcasters to be able to make programmes which report on news stories with a view to imparting information about such topics to the audience, and we took into account the Licensee's argument that only a very brief clip of the interview with Mr Cheng, with a faint audio, was included in the broadcast. However, we considered that the obtaining of the footage of Mr Cheng for inclusion in the news report was a significant intrusion into his legitimate expectation of privacy given the sensitive situation of Mr Cheng, being detained in police custody, and the highly sensitive nature of the information he disclosed. In the absence of any measures on the part of the Licensee to verify the circumstances which led to his interview and to ensure his informed consent had been obtained, we considered that such a significant intrusion into his privacy was not warranted by the public interest in obtaining the footage of Mr Cheng for inclusion in a television programme.

On this basis, Ofcom considered that Mr Cheng's legitimate expectation of privacy was unwarrantably infringed in the obtaining of the broadcast footage.

- d) We next considered Mr Cheng's complaint that his privacy was unwarrantably infringed in the programme as broadcast because footage of the purported confession was included in the programme without his consent. Mr Cheng said that the broadcaster would have been aware that the purported confession was obtained in the circumstances described above.

We 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, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

We also had regard to Practice 8.10 of the Code which states that broadcasters should ensure that the re-use of material, i.e. use of material originally filmed or recorded for one purpose and then used in a programme for another purpose or used in a later or different programme, does not create an unwarranted infringement of privacy. This applies both to material obtained from others and the broadcaster's own material.

We considered the extent to which Mr Cheng had a legitimate expectation of privacy in relation to the footage of him being included in the programme, taking into account the context in which he was filmed, as set out in detail in head c) above. For the reasons set out at head c), we considered that the footage of Mr Cheng included in the programme as broadcast showed him in a highly

sensitive environment. As set out above, we recognised that it was unlikely that the audience would have been able to distinguish what was said by Mr Cheng in the audio of the footage of him included in the programme and as such, Mr Cheng was not heard revealing any information about himself. In addition, the footage of the interview with Mr Cheng shown in the broadcast was very brief. However, the accompanying commentary indicated that the footage showed Mr Cheng “*acknowledged his violations of the law*”, i.e. making statements to the effect that he was admitting to having solicited prostitutes, which we considered to be highly sensitive information. In addition, it was also necessary to take into account the circumstances in which he had been filmed, i.e. in a very vulnerable position while in police custody, and the fact that there were serious reasons to doubt whether the statements made during the interview amounted to genuine, voluntary admissions. For example, the Licensee was aware of Mr Cheng’s claims that he had been tortured while in police custody.

We acknowledged that the footage of Mr Cheng was in the public domain at the time of broadcast. However, we do not consider that individuals are necessarily deprived of their right to privacy if information or images, in respect of which they claim that right, have been put into the public domain in the past. Each case must be considered on its own facts.

In the circumstances of this case, we took into account that Mr Cheng disputed that he had voluntarily made the statements in the footage of him included in the programme. In particular, we acknowledged that in the BBC interview referred to by the Licensee, Mr Cheng said he had told the police: “You don’t need to torture me. I will say anything you want me to say”. In Ofcom’s view, this clearly suggested that Mr Cheng had agreed to comply with any requests made by the police, including in relation to the police interview. While the footage of Mr Cheng was in the public domain at the time of broadcast, the Licensee was aware of Mr Cheng’s claims that he had been subject to duress during his detention when it reported the story and did not seek to verify with Mr Cheng the circumstances which had led to his interview. In addition, and as set out above, we considered that the footage showed Mr Cheng in a highly sensitive situation. Ofcom therefore did not consider that the availability of the footage in the public domain meant that Mr Cheng would have been deprived of his right to privacy in connection with the broadcast of the footage in this programme.

Taking all the factors above into account, Ofcom considered that he had a legitimate expectation of privacy regarding the inclusion of the footage in the programmes as broadcast.

As above in head c), we did not consider that Mr Cheng’s informed consent to the filming had been secured, nor had the Licensee subsequently obtained his consent for the interview to be broadcast. We therefore considered the broadcast of the footage was a breach of Mr Cheng’s legitimate expectation of privacy.

We next considered whether the broadcast of the material was “warranted” within the meaning set out in the Code (see above under head c)). In doing so, we carefully balanced Mr Cheng’s right to privacy regarding the inclusion of the relevant footage in the programme with the broadcaster’s right to freedom of expression and the audience’s right to receive the information broadcast without unnecessary interference.

We took into account the Licensee's representations that Ofcom had not given sufficient weight to the fact the material had been in the public domain in its consideration of the public interest in including the footage in the programme as broadcast. We took into account the public interest arguments put forward by the Licensee (as set out under head c), including the Licensee's argument that it was fair and proportionate to include this footage in circumstances where, in the Licensee's view, the broadcast emphasised this footage had been released by the police in response to Mr Cheng's claims of having been tortured while in police detention. We also took into account the Licensee's argument that only a very brief clip of the interview with Mr Cheng, with a faint audio, was included in the broadcast. However, as with head c) above, although we recognised the public interest in reporting on Mr Cheng's case and in broadcasters being able to report news stories and impart information to the audience and we acknowledged that the footage had been placed in the public domain prior to the broadcast of the programme, we considered that it did not warrant the intrusion into his legitimate expectation of privacy in this case. This is because he was shown in such a sensitive situation and footage of him apparently confessing to a criminal offence (albeit with a faint audio), in circumstances where the Licensee was aware that Mr Cheng had made claims regarding his treatment while in police custody, was included without the broadcaster having taken further measures to verify the circumstances which had led to the interview and to confirm that his consent had been obtained. Moreover, for the reasons set out in relation to head a) above, the way the programme presented this footage tended to imply that viewers could rely on his confession and the police's evidence against him, as reported in the programme, and that his claim that he had been "tortured" while in police custody could be given less weight than the police's claims.

On balance, we did not consider that the broadcaster's right to freedom of expression and the audience's right to receive information and ideas about the matters explored by the programme outweighed the very significant intrusion into Mr Cheng's right to privacy.

Ofcom therefore considered that there was an unwarranted infringement of Mr Cheng's privacy in the programme as broadcast.

**Ofcom has upheld Mr Cheng's complaint of unjust or unfair treatment and unwarranted infringement of privacy in connection with the obtaining of material included in the programme and in the programme as broadcast.**

**Ofcom also considers that the breach of Rules 7.1 and 8.1 of the Code in this particular case are serious. We are therefore putting the licensee on notice that we intend to consider the breach for the imposition of a statutory sanction.**