

# **Ofcom Broadcast 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 must include these standards in a code or codes. These are listed below. 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>.

The Broadcast Bulletin reports on the outcome of investigations into alleged breaches of those Ofcom codes 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 ATVOD and the ASA on the basis of their rules and guidance for ODPS. These Codes, rules and guidance documents include:

- a) [Ofcom’s Broadcasting Code](#) (“the Code”).
- b) the [Code on the Scheduling of Television Advertising](#) (“COSTA”) which contains rules on how much advertising and teleshopping may be scheduled in 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. 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) rules and guidance for both [editorial content and advertising content on ODPS](#). Ofcom considers sanctions in relation to ODPS on referral by the Authority for Television On-Demand (“ATVOD”) or the Advertising Standards Authority (“ASA”), co-regulators of ODPS for editorial content and advertising respectively, or may do so as a concurrent regulator.

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

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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.

licensees must 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 Bulletin may therefore cause offence.**

## Standards cases

### In Breach

#### Dick and Dom's Hoopla!

CBBC, 9 November 2012, 18:00

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##### Introduction

*Dick and Dom's Hoopla!* is a children's entertainment programme, hosted by Richard McCourt ("Dick") and Dominic Wood ("Dom"), in which they play the part of ringmasters in a programme format based on a traditional travelling circus. Each edition of the programme is broadcast from the same indoor fairground location and includes performances and audience participation in games and competitions. As part of the programmes, members of the audience are invited to compete in a variety of games, with the winner of each game going on to take part in a "Finaleval".

Two complainants alerted Ofcom to an edition of *Dick and Dom's Hoopla!*, which featured an item called "Gypsy Rose Dick". The complainants objected to the girl and boy involved in this competition being encouraged to drink "vile concoctions" in front of a live audience, and appearing distressed while participating in this item. They also complained about a very brief section at the end of the item which they described as the girl vomiting into a bucket.

Ofcom noted that the item "Gypsy Rose Dick" was an eating competition introduced by the presenter, Dick, dressed in the guise of a fortune-teller character ("Gypsy Rose Dick"), and featuring a boy and an 11-year-old girl. All three sat around a table on a stage in front of an audience of adults and children.

The first part of the eating competition was divided into three rounds. In each round, Dick first invited the boy to pick a card at random from a selection of upside down cards on the table. In doing so, Dick said the following:

*"Cards, cards, we'll make a brew. When they see it, they will spew."*

This statement was then followed by the audience mimicking the sound of vomiting.

On the card was written the name of a food. Dick then handed a jar of that food to the girl and she was invited to eat as many spoonfuls of this food as she could in ten seconds. When she had finished, Dick then put the same number of spoonfuls of the food as the girl had managed to eat into a pint glass of water in front of the boy.

The same set of steps was then repeated, starting with Dick making the above statement, but with the girl picking a card and the boy being asked to eat as much of the food shown on the card as possible in ten seconds. The round was then completed.

In the three rounds, the boy was required to eat separately: mayonnaise; cold spaghetti hoops; and cold tomato soup. The girl was required to eat separately: custard; marmalade; and apple sauce. We noted that at times, while she was eating the foods allocated to her, the girl appeared to be in some discomfort. For example, on being presented with the jar of apple sauce she said: "I can't eat that."

At the end of the three rounds, there was a second part of the eating competition. This consisted of Dick instructing both children to hold steady their glasses containing the water and all the foods mixed together. Dick then inserted hand-held food mixers into both glasses at the same time to mix the foods in each glass of water. He then said the following, referring to the mixtures of different foods in the glasses in front of each child:

*"[To the boy] You've got custard, marmalade and apple sauce...[To the girl] You've got mayonnaise, spaghetti hoops and tomato soup. Lovely! It'll be lovely, [girl's name]. Right then, the first person to down it [i.e. the mixture] and stick the empty pint on top of their head is the winner!"*

While the boy initially seemed reluctant to drink his glass of mixture, he did start to do so. Meanwhile, the girl drank the whole glass, and put the glass on her head, and then immediately reached for a bucket beside the table and appeared to vomit. Dick then declared the girl to be the winner.

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

- Rule 1.28: "Due care must be taken over the physical and emotional welfare and the dignity of people under eighteen who take part or are otherwise involved in programmes. This is irrespective of any consent given by the participant or by a parent, guardian or other person over the age of eighteen in loco parentis."
- Rule 1.29: "People under eighteen must not be caused unnecessary distress or anxiety by their involvement in programmes or by the broadcast of those programmes."
- Rule 2.3: "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context...Appropriate information should also be broadcast where it could assist in avoiding or minimising offence."

Ofcom therefore asked the BBC how the content complied with these rules.

## **Response**

By way of introduction, the BBC said that Dick and Dom have presented a range of BBC children's and mainstream programmes for 15 years, and "their anarchic and "naughty boy" comedy personas have become very familiar to children and adults alike". The BBC added that *Dick and Dom's Hoopla!* "is part talent show and part game show, with the game in question, 'Gypsy Rose Dick' being a feature of every episode".

### Protection of Under-Eighteens

The BBC set out the compliance steps taken as part of the production process in this case:

- The BBC said that as with all programmes in which children participate, Section 9 of the BBC's Editorial Guidelines<sup>1</sup> and the associated Editorial Policy Guidance

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<sup>1</sup> Children and Young People as Contributors.

applied. However, the BBC added that it was its expectation that editorial discussions and decisions should be “based on an understanding of the Editorial Guidelines and the principles they embody, but not that there should (necessarily) be constant and detailed reference to their text during production”.

- According to the BBC: production staff were “well aware of their responsibilities towards contributors”; “child welfare was [the production staff’s] first priority”; and “adequate time was allocated to ensure that agreed processes were followed fully”.
- Prior to recording of the series a “Child Welfare Process” was agreed, with input from the BBC’s Editorial Policy Unit. The BBC explained that the Child Welfare Process is bespoke for each individual production “to take account of the different ways in which children may be involved”. In relation to *Dick and Dom’s Hoopla!*, the Child Welfare process involved pre-production meetings with senior staff from the BBC Editorial Policy Unit, who had expertise in children’s programming, to discuss issues such as rules for contests, audience and contestant supervision, and issues unique to the series (such as clown phobias). As a result of these meetings, an audience briefing and contestant process document was produced. The BBC provided a copy of this to Ofcom.
- In relation to children, the audience briefing and contestant process document made clear that: “No one will be cajoled into taking part and ‘stand by’ contestants will be available” in case a contestant dropped out; and certain production staff would be “responsible for briefing [contestants] thoroughly before filming starts and checking they are happy during and after filming”.
- On arrival at the filming of the episode in question, the whole audience was briefed about the nature of the programme. In relation to the “*Gypsy Rose Dick*” item, the audience were informed that the game involved the contestants eating different everyday foods and drinking a blended mixture of them at the end. The BBC added that production staff stressed that the game could not be played by anyone with certain medical conditions or specific allergies.
- The BBC said that having established that all the audience knew who Dick and Dom were, and that they were familiar with other eating challenge games broadcast on CBBC, such as *Gastronuts*, *Incredible Edibles* and *Hacker Time*, production staff then asked for volunteers.
- “Contributor Consent and Child Health/Fitness to Participate Forms” were completed by each child volunteer, signed by one of the adults accompanying them, and checked by production staff who briefed the volunteers “in more detail about what [the] game entailed and the specific rules”. In relation to obtaining consent for the girl’s participation in the programme, the BBC said they obtained written consent from the girl’s mother, who had accompanied her to the recording of the programme.
- Before filming, the two contestants were reminded that the “*Gypsy Rose Dick*” item would involve “eating spoonfuls of different foods and then drinking a blended mixture at the end”, and both contestants were asked about any relevant allergies. The BBC said the contestants were not told what they would be eating but “were assured that everything was edible and were given a few typical examples (e.g. cold lumpy gravy, ketchup)”. Furthermore, the children were told that they could “refuse to eat anything at any time, or spit it out into the bins

provided, and that if they decided not to eat anything Gypsy Rose Dick [Dick] would have to eat it on their behalf, with an equal amount of whatever he ate being put into their opponent's glass".

- Production staff gave the chosen contestants a safety briefing and an explanation of how the filming would take place. In addition, the BBC said that two production staff accompanied the children and their families throughout filming of the item and "regularly checked that they were happy with what they were doing and still prepared to take part". In this regard, the BBC said that: "During the briefing process, potential contestants had every opportunity to withdraw if they decided they did not want to take part, and over the course of the series [of *Dick and Dom's Hoopla!*] a number did so". In addition, the BBC stated that there "was no pressure to participate...The programme-makers were alert to the possibility that some children might put themselves forward as a result of parental encouragement rather their own wish to participate". In this respect, the BBC said that "in anticipation of a contestant having a last minute change of heart, the production team always had back-up contestants on standby". However, in this case, the BBC said that the boy and the girl (who was 11) "confirmed at this point that they were happy to go ahead". The BBC added that the two children "were reminded that they could refuse at any time to eat or drink any item".
- In order to "minimise the pressure on the contestants, filming of the Gypsy Rose Dick game took place in a smaller side tent, away from the main arena, with a small audience of some twenty to thirty people which mainly comprised the contestants' friends and families and who were encouraged to cheer them on".
- In addition to the above precautionary measures, the BBC added that "three qualified first aiders and a paramedic were on site [during] filming in the event that participants suffered any adverse physical symptoms".

The BBC accepted that during the course of the item, "[the girl] in particular appeared uncomfortable at some points in the game". However, the BBC added that the Executive Producer was "observing from the studio floor and would have halted recording, if it had appeared to her that [the girl] was becoming distressed or that acceptable editorial limits were being exceeded". The BBC went on to say that "it should be added that the impression formed by someone present during the game and familiar with the precautions associated with it would not necessarily be the same as the impression conveyed to viewers at home".

The BBC explained that during filming of the "*Gypsy Rose Dick*" item, Dick was "wearing an earpiece and was in constant contact" with the Series Producer. According to the BBC, when the girl said she "couldn't eat the apple sauce" the fact that the Series Producer "reminded [Dick] that [the girl] was under no obligation to eat any of the food" prompted Dick to give her time to decide "whether or not to go ahead before" Dick asked the girl to "make a decision". At this point in the item, she replied "*I'll try it*". The BBC continued that when the girl appeared to struggle to swallow the food, Dick "reminded her of the presence of the bucket, into which she could spit it out". The broadcaster added that Dick "was well aware that he himself would have to eat the food if a contestant refused (though it is perhaps noteworthy that, while the programme-makers had thought it likely that most contestants would exercise this option at least once, no contestant during the course of the series in fact did so)".

In relation to the drinking of the glass of mixture in the second part of the of the "*Gypsy Rose Dick*" item, the BBC said that: "Having drunk the blended drink, [the girl]

did appear to retch, but the production team stress that she was not sick, and she was able to go ahead and perform the winner's hoopla immediately afterwards, during which she smiled and laughed". In addition, the girl and the adults accompanying her were then "taken to a quiet area at the back of the tent away from the crowd, where she was given some water and assured that she did not have to take part in the imminent Finaleval if she preferred not to". However, according to the BBC, the girl told production staff that "she felt all right and was willing and able to continue, and her accompanying adults confirmed that they were happy for her to do so".

The broadcaster said that after the initiation of Ofcom's investigation in this case, the Executive Producer of the programme contacted the girl's mother, who said she "was aware of the existence of Ofcom's investigation (presumably as a result of press coverage), though not of its focus, and she asked the Executive Producer whether it was related to [her daughter] and the Gypsy Rose Dick game". According to the BBC, the Executive Producer explained that Ofcom's concern was with "child welfare issues in relation to the game, but was careful not to indicate that the investigation was specific to the episode in which [the girl] appeared". The BBC added that: "Without further prompting, [the girl's mother] said she had been very impressed by the care the programme-makers had taken of [the girl], especially after the Gypsy Rose Dick game while she was preparing for the Finaleval". Furthermore, the girl's mother was reported to have made clear that the girl: "[H]erself had particularly appreciated a visit from [Dom] at this point...[and the girl's mother] praised everyone concerned, and said she and her family had all enjoyed the experience."

In summary, the BBC stated its belief that the various compliance steps it had taken "would have sufficed to ensure compliance with Rules 1.28 and 1.29 in most circumstances, and that they did ensure compliance in every other instance in the series" of *Dick and Dom's Hoopla!*. However the BBC accepted that in this instance "the atmosphere generated in the tent may have created a situation in which the children felt less able than they ideally should have to exercise their right to opt out, and that one contestant [i.e. the girl] was encouraged to go further beyond the boundaries of comfort than was appropriate".

### Offence

The BBC stated its belief that the "Gypsy Rose Dick" item was "firmly within the tradition of rumbustious and anarchic entertainment which has long been a valued element in children's programming on British television, and in keeping with the expectations established over fifteen years by these two presenters in particular". However, the BBC accepted that, in the light of the complaints to Ofcom and a complaint to the BBC about the item, "the spectacle of [the girl]'s obvious discomfort would have struck some viewers as going beyond acceptable boundaries, even though her subsequent participation in the programme made clear that her discomfort was temporary".

In conclusion, the BBC said no contestant that appeared in any of the games in the 10-programme series of *Dick and Dom's Hoopla!* "expressed any concern at the time or afterwards about their participation or the care they received". In addition, the BBC said that it had reviewed all the programmes in the series and had "found no further grounds for concern" about the "Gypsy Rose Dick" item.

## 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 to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material”. These duties are reflected in Section One (Protecting the Under-Eighteens) and Section Two (Harm and Offence) of the Code.

In reaching this Decision Ofcom has taken account of the audience’s and the broadcaster’s right to freedom of expression. This is set out in Article 10 of the European Convention on Human Rights. Article 10 provides for the right of freedom of expression, which encompasses the right to hold opinions and to receive and impart information and ideas without interference by public authority. In particular, Ofcom’s research<sup>2</sup> in this area has demonstrated that both adults and children value and enjoy under-eighteens being represented in programming.

### Protection of Under-Eighteens

The Code sets out rules covering the participation of any under-eighteens in broadcast content.

Rule 1.28 of the Code states that:

“Due care must be taken over the physical and emotional welfare and the dignity of people under eighteen who take part or are otherwise involved in programmes. This is irrespective of any consent given by the participant or by a parent, guardian or other person over the age of eighteen in loco parentis.”

Rule 1.29 of the Code states that:

“People under eighteen must not be caused unnecessary distress or anxiety by their involvement in programmes or by the broadcast of those programmes.”

Ofcom has published detailed Code Guidance on Rules 1.28 and 1.29 which was drafted with the assistance of child experts and child welfare groups. The purpose of the Guidance is to help broadcasters achieve the appropriate level of protection for under-eighteens in programmes when seeking to ensure compliance with Rules 1.28 and 1.29 of the Code (“the Code Guidance”)<sup>3</sup>.

Importantly, as is made clear in the Code Guidance, expert opinion indicates that the vulnerability of participants can vary widely depending on age, maturity and individual circumstances. In Rule 1.28, the phrase “physical and emotional welfare and the dignity of people under eighteen” indicates the broad potential impact that participating in a programme might have on this age group. In short, broadcasters need to take care when involving under-eighteens in programmes. The need for are will be especially acute in the case of certain types of programmes where it is

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<sup>2</sup> *Children in Programmes: An independent research report for Ofcom by Sherbet Research, 2007*, [http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/children\\_in\\_programmes](http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/children_in_programmes).

<sup>3</sup> See: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section1.pdf>.

reasonably foreseeable that there is some risk to the physical and emotional welfare, or dignity, of the children involved.

The Code Guidance also makes clear that an important consideration for broadcasters in this area is the development of documented guidelines for working with under-eighteens, and that production staff are made fully aware of these so that they have clear information on the broadcaster's key considerations in this area. In this respect, Ofcom noted the detailed and extensive guidelines and additional policies and guidance the BBC has put in place for the participation of children and young people in its programmes. Ofcom considered these documents to be very clear and thorough in their reflection of the Code's requirements, and that the welfare of any under-eighteen participating in programmes is of paramount importance. In particular, Ofcom noted Section 9 of the BBC's Editorial Guidelines, which is headed "Children and Young People as Contributors", which directly refers to and reflects<sup>4</sup> the requirements of Rules 1.28 and 1.29 of the Code.

We noted that this case related to an audience participation competition, "*Gypsy Rose Dick*", in a children's programme hosted by one member of a well-known pair of children's programme presenters. This game was an eating competition where two pre-teenage contestants were asked to eat a number of foods, while a small live audience cheered them on.

In assessing this material under Rule 1.28, Ofcom noted the various points above, and the BBC's assurances that: it was its expectation that editorial discussions and decisions should "based on an understanding of the Editorial Guidelines and the principles they embody"; BBC production staff in this case were "well aware of their responsibilities towards contributors"; "child welfare was [production staff's] first priority"; and "adequate time was allocated to ensure that agreed processes were followed fully".

We next considered the various steps that the BBC and production staff implemented during pre-production, production and post-production to take due care of the welfare and dignity of the child contestants in the "*Gypsy Rose Dick*" item, as required by Rule 1.28.

#### *Pre-production*

Measures at this stage included: the creation of a "Child Welfare Process"; obtaining the informed consent of the contestants' parents; briefing the contestants about what they would be required to do during the item; and, explaining to the girl and the boy that they would not have to participate in the item if they did not wish to.

We noted these measures, and the detailed and comprehensive nature of the BBC's Editorial Guidelines and associated policies and guidance which it has in place to ensure compliance with the Code in this area. In our view, however, the BBC did not take other necessary measures to ascertain the appropriateness of including the girl and the boy in this item, in line with Rule 1.28.

Ofcom was extremely concerned, for example, that at no time pre-broadcast did any BBC staff assess or query the potential risk or appropriateness of organising an eating competition for children in which, in our view, the combination of the presenter and audience would have put pressure on the contestants to consume potentially

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<sup>4</sup> See paragraphs 9.2.1 and 9.2.2.

unpalatable foods and combinations of these foods. The BBC: provided no evidence of having conducted a risk assessment as to the potential risk and appropriateness of children being required to appear in this eating competition; and did not appear to have regard to the potential negative impacts on children participating in this item, such as the fact that a contestant might feel discomfort or under inappropriate pressure while taking part in this eating contest. In addition, the BBC did not provide evidence that the girl and the boy had been sufficiently briefed about the likely issues they might face through appearing in the “*Gypsy Rose Dick*” item, such as: the fact that the contestants might feel uncomfortable being asked to eat unpalatable food while being filmed for national television in front of a local and vocal audience; and that the presenter Dick would be encouraging them in a very direct manner that they should eat the foods.

We noted that in its representations the BBC stressed that: “there was no pressure [on the girl and the boy] to participate in the item”; and production staff “were alert to the possibility that some children might put themselves forward as a result of parental encouragement rather than their own wish to participate”. In this regard, we noted that: the BBC’s audience briefing and process document made clear that “[n]o one will be cajoled into taking part” in the “*Gypsy Rose Dick*” item, and that production staff would be responsible for checking that contestants were “happy during and after filming”; and production staff in this case briefed the contestants that they could withdraw from the competition if they wished.

Ofcom’s Code Guidance states that “from an early age, children are capable of indicating their willingness (“assent”) to participate in a programme” and “[e]xpert opinion indicates that vulnerability could vary significantly, depending on factors such as age, maturity, and personal circumstances”. In this case, we noted that the girl and the boy gave their assent to take part in the “*Gypsy Rose Dick*” item. However, given the very particular and potentially challenging competition that the contestants were being asked to participate in, we were concerned that the BBC did not provide evidence of whether the girl was provided with meaningful, child-friendly information on any likely negative consequences of appearing in the programme. These might, for example, include that she might end up being sick in a bucket on television, or being mocked by her peers at school.

The Code Guidance specifically states that: “[D]epending on the programme genre, it may be beneficial to seek advice from an appropriately qualified professional, such as a child counsellor or psychologist, who does not have a vested interest in the child’s participation.” In this case, Ofcom was concerned that the BBC did not involve anyone who was independent, and had no direct interest in the girl and the boy’s participation in the programme, in assessing whether it was appropriate for them to take part. In our view, it was especially appropriate to obtain such independent third party advice, given the widely-known issues that exist around eating and young girls in particular<sup>5</sup>.

We noted that the BBC sought the informed consent of the girl’s mother in relation to her participation in the “*Gypsy Rose Dick*” item, and that the BBC said she was “happy to go ahead” with her participation in the competition. We recognise that there may be circumstances in which a parent should have a substantial role in relation to a child’s contribution to a programme. However, in the Code Guidance we make clear that while we “do not seek to lessen the importance of the views of parents or guardians on children’s participation...many parents and guardians will not be familiar

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<sup>5</sup> For example, see:  
<http://www.childline.org.uk/Explore/DamagingYourself/Pages/EatingProblems.aspx>.

with the production process or have a full understanding of the implications of their child's participation". In Ofcom's view, it appeared that the BBC and production staff had relied on their own opinions, the girl's apparent assent, and the consent of her parents to too great an extent. They did not engage a third party to assess whether the children's participation in the programme might involve potential risks to their emotional and physical welfare.

### *Production*

Ofcom went on to consider: the particular features of this item; and the related steps that the BBC and production staff had implemented during the production process to take due care of the welfare and dignity of the children involved in the "*Gypsy Rose Dick*" item in this programme. In particular, we were concerned that the nature of the "*Gypsy Rose Dick*" item could have put certain contestants under undue pressure to complete various aspects of the challenge.

We noted the BBC said that the "*Gypsy Rose Dick*" item was filmed in front of a small audience to "minimise the pressure on the contestants". However, in our view, the audience were loudly urging the children to eat the various foods during the challenge. In addition, each time either the girl or the boy picked a card in the first half of the game, Dick said the following immediately before:

*"Cards, cards, we'll make a brew. When they see it, they will spew."*

Every time Dick made this statement, the audience loudly mimicked the sound of vomiting. We considered that the vocal presence of the audience, and their reactions to the presenter Dick, would have served to increase the pressure on the contestants to eat the various types of food, even if they were reluctant to do so.

Another relevant factor is the general propensity of children to, where possible, follow the instructions of adults. In this regard, the Code Guidance states that: "An adult is often seen by a child, especially a young child, as an authority figure"; and that: "Careful consideration of the programme format and its likely impact on the participant is recommended. For instance, springing high-impact surprises on under-eighteens in 'live' or 'as live' programmes where conflict or highly emotional situations may be involved could cause harm and or distress." It also points out that: "[I]n genres which involve young children in competition with others, performance anxieties and pressure to succeed may be issues." We considered it likely that, irrespective of their personal concerns about what they were being asked to do, the contestants in this case would want to comply with the instructions being given to them, by an adult, who was a celebrity performer, in a competitive environment. This would, in our view, have been particularly likely given that the girl and the boy knew they were taking part in a contest that would be broadcast on a national television channel.

An additional relevant feature of the "*Gypsy Rose Dick*" item, in ensuring whether due care was taken over [the girl]'s physical and emotional welfare, was the role of the presenter Dick during filming. In this regard, we took into account that Dick is an established children's programme presenter, who has built up a particularly direct and anarchic comedic style, in tandem with his fellow presenter Dom. In this case, as the character "*Gypsy Rose Dick*", we considered that the presenter adopted a particularly direct comic persona that could be described as acerbic and verging on the aggressive. During the "*Gypsy Rose Dick*" competition he repeatedly shouted at, berated and chided the girl and the boy, albeit in a comedic manner, to urge them to eat the various foods they were presented with.

The BBC explained that during filming of the “*Gypsy Rose Dick*” item, Dick was “wearing an earpiece and was in constant contact” with the Series Producer. According to the BBC, when the girl said she “couldn’t eat the apple sauce”, the Series Producer “reminded [Dick] that [the girl] was under no obligation to eat any of the food”. However, we noted that Dick did not say that she was under no obligation to eat the food, but rather this prompted Dick to ask the girl to “make a decision”. In our view, this appeared to place additional pressure on the girl to eat the food.

The BBC continued that when the girl appeared to struggle to swallow the food Dick reminded her of the presence of the bucket, into which she could spit it out. Ofcom noted that Dick, at this point, in fact said:

*“Your bucket’s down there, look.”*

Ofcom did not consider this to mitigate the pressure being put on the girl, especially in circumstances where she was showing signs of discomfort.

We recognised that different children would react in different ways to a character like “*Gypsy Rose Dick*”. Indeed, throughout the “*Gypsy Rose Dick*” item, the boy appeared comfortable with the situation and answered back or rebuked Dick when the presenter was directing him to, for example, eat particular foods. However, in our view (with which the BBC agreed), the girl appeared much less comfortable with Dick’s demeanour and presentational style.

We noted that BBC production staff before the item had reminded the girl and the boy that they could “refuse to eat anything at any time”. However, we considered that in this case the girl’s obvious discomfort resulted from the pressure on her caused by the particular features of this item, as set out above. Importantly, we noted the BBC accepted that “the atmosphere generated in the tent may have created a situation in which the children felt less able than they ideally should have to exercise their right to opt out, and that one contestant [i.e. the girl] was encouraged to go further beyond the boundaries of comfort than was appropriate”.

We then went on to consider how BBC production staff dealt with the fact that the girl showed obvious discomfort whilst taking part in the “*Gypsy Rose Dick*” item. In this regard, we noted that: the Executive Producer was on standby to intervene in filming if “it had appeared to her that [girl’s name] was becoming distressed”; and the Series Producer reminded Dick, via an earpiece, that “[the girl] was under no obligation to eat any of the food” during the item. However, despite the various measures taken by the BBC, we considered that the broadcaster did not take adequate steps at this stage to ensure that due care was taken over the girl’s physical and emotional welfare. Bearing in mind the BBC conceded that the girl “in particular appeared uncomfortable at some points in the game”, and that the Executive Producer was “observing from the studio floor and would have halted recording, if it had appeared to her that [she] was becoming distressed”, Ofcom was very concerned that production staff did not intervene during filming of this item.

#### *Post-production*

In reaching our Decision under this rule, we took into account the BBC’s representations that, following the “*Gypsy Rose Dick*” item, the girl indicated to production staff that “she felt alright” and she and the adult accompanying her had said she was “happy” to participate further in the programme. We also took into account the information given by the girl’s mother to the BBC later that she had enjoyed her experience on the programme and not suffered any ill effects.

### Rule 1.28

We acknowledged the efforts made by the BBC to ensure compliance with Rule 1.28. However, Ofcom considered that in the circumstances of this case the steps taken by the BBC were inadequate. In our view, it was reasonably foreseeable that not all children would have been comfortable with the editorial format of the “*Gypsy Rose Dick*” competition. The BBC should have taken some extra measures to assess and inform the individuals who wished to take part to confirm it was appropriate for them to participate in this item. Given the above, Ofcom is of the view that the BBC did not take sufficient steps to protect the two children’s welfare and dignity as a result of appearing in this competition.

We recognise that there may be circumstances in which it might be appropriate for a parent, guardian or another person over eighteen in loco parentis, to have a substantial role in relation to a child’s contribution to a programme. In the Code Guidance, Ofcom makes clear that while we “do not seek to lessen the importance of the views of parents or guardians on children’s participation...many parents and guardians will not be familiar with the production process or have a full understanding of the implications of their child’s participation”. In this case we considered that the BBC and production staff had relied too much on their own opinions and the consent of the girl’s parent, without engaging a third party to assess whether the children’s participation in the “*Gypsy Rose Dick*” item might involve potential risks to her emotional and physical welfare.

In summary, given all the factors above, we considered that the steps taken by the BBC were insufficient to ensure that due care was taken of the emotional welfare of the children. The eating competition therefore breached Rule 1.28 of the Code.

### Rule 1.29

We noted the various representations made by the BBC to the effect that this rule was complied with. In reaching our Decision under this rule, we took into account the BBC’s representations that, following the “*Gypsy Rose Dick*” item, the girl indicated to production staff that “she felt alright” and she and the adult accompanying her said she was “happy” to participate further in the programme. We also took into account the information given by the girl’s mother to the BBC that she had enjoyed her experience on the programme. On the basis of the information available to Ofcom on this issue, we were not aware of any evidence that the girl had been caused unnecessary distress or anxiety as a result of her involvement in, or broadcast of, the programme in this case. We therefore considered that there was no breach of Rule 1.29 of the Code.

### Rule 2.3

Rule 2.3 of the Code requires that:

“In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context...Appropriate information should also be broadcast where it could assist in avoiding or minimising offence.”

The Code does not prohibit the broadcast of potentially offensive material in any circumstances. What is essential for compliance with the Code is the way in which such material is transmitted by the broadcaster. As set out in the Code, material that is potentially offensive may be broadcast as long as its inclusion is justified by the context, so as to provide adequate protection to members of the public. There is

significant room for innovation and creativity within children's programming, but there are limits on such programming in terms of offensive material. Broadcasters must ensure that any potentially offensive content is justified by contextual factors, such as: the editorial content of the programme; the time of broadcast; the degree of offence likely to be caused by the material; the likely expectations of the audience; and any warnings given to the audience.

We assessed first whether the material in question was capable of causing offence.

In this programme, there was an audience participation game in a children's programme hosted by one member of a well-known pair of children's programme presenters ("*Gypsy Rose Dick*"). This competition was described above in the Introduction and, in summary, was an eating competition in which two child contestants had to eat a number of foods, while a small live audience cheered them on. In Ofcom's view, the boy appeared to be enjoying the experience of appearing in this item, but the girl seemed at times to be uncomfortable, especially when asked to consume certain foods. Although the girl did eat all the food that she was requested to consume, including the glass of mixed ingredients at the end of the item, we considered the discomfort she was exhibiting was manifest to the audience and had the potential to be offensive to viewers.

Ofcom next examined whether this offence was justified by the context.

Ofcom recognised that there is a rich tradition of children's programming in the UK in which children are shown playing humorous games that might require the child participants to undertake unusual tasks, sometimes in somewhat surreal circumstances. In this regard, we considered that *Dick and Dom's Hoopla!* in general fitted into that tradition of programming. Further, the presenters Dick and Dom have established themselves over a number of years as well known presenters in this area, employing their own brand of anarchic and "zany" humour. As a result, we considered that the games and competitions included in *Dick and Dom's Hoopla!* would not have normally exceeded likely audience expectations for these programmes.

However, we had concerns about the "*Gypsy Rose Dick*" competition. An 11-year-old girl was shown to be visibly distressed while being asked to eat a range of foods, and this in Ofcom's opinion would have been offensive to many viewers (especially when she appeared to retch or vomit). The likely level of potential offence would have been increased by the manner in which the presenter Dick interacted with the children, and in particular, the girl. While, as noted above, the boy, in general, appeared able to stand up to Dick, we considered that the girl seemed much more unsure and nervous. For example, when the girl, at one stage, appeared in some discomfort, Dick's reaction, on seeing the girl's discomfort, was to point to the bucket in which she could spit or vomit ("*Your bucket's down there, look*").

We considered that the spectacle of a young girl being encouraged, in the context of a televised contest in a children's programme, to eat a food she patently disliked to the point where she could have vomited was clearly capable of causing considerable offence. The presenting style of Dick served to increase the level of offence. This was because, in our view, his direct manner, albeit in a comedic vein, was likely to have been perceived as putting the girl under inappropriate pressure to eat what was being presented to her during the contest. In reaching this view, we noted that (irrespective of what was being said to Dick by the series producer via his earpiece) viewers would not have been aware that the BBC intended that the girl should have been under no obligation to eat the apple sauce at that point. We noted that Rule 2.3

states that “appropriate information should...be broadcast where it would assist in avoiding or minimising offence”. Therefore, Ofcom’s view is that it would have helped at this and other points during the challenge if Dick had stated on air that there was no obligation on the contestants to eat the food if they did not want to.

The fact that the girl and the boy were asked by Dick to drink the glass of blended ingredients in the second part of the of the “*Gypsy Rose Dick*” competition was particularly offensive, given that, as the BBC said: “Having drunk the blended drink, [the girl] did appear to retch.” BBC production staff stressed that the girl was not sick in this case. However, in our view, noting that the girl, on finishing the blended drink, immediately reached for a bucket and began retching into it, the impression was given of a young girl being caused to vomit through her participation in a game in a children’s television programme. In assessing the likely level of offence to viewers in this case, we took account of the BBC’s statement concerning the “*Gypsy Rose Dick*” challenge that “the impression formed by someone present during the game and familiar with the precautions associated with it would not necessarily be the same as the impression conveyed to viewers at home”. We viewed this as implicit recognition by the BBC that it did not ensure that this item was presented with sufficient context to ensure generally accepted standards were applied.

We also had regard to the BBC’s representations that: no contestant who appeared in any of the games in the 10-programme series of *Dick and Dom’s Hoopla!* “expressed any concern at the time or afterwards about their participation or the care they received”; and the broadcaster had reviewed all the programmes in the series and had “found no further grounds for concern” about the “*Gypsy Rose Dick*” item. Ofcom also took account of the BBC’s representations that, following the “*Gypsy Rose Dick*” item, the girl told production staff that “she felt all right and was willing and able to continue, and her accompanying adults confirmed that they were happy for her to do so”; and that while “the spectacle of [the girl]’s obvious discomfort would have struck some viewers as going beyond acceptable boundaries,...her subsequent participation in the programme made clear that her discomfort was temporary”. However, in our view, none of these factors was sufficient to justify the offence caused in this case.

Taking all the above into consideration, Ofcom decided that the BBC did not apply generally accepted standards and that this content was in breach of Rule 2.3.

### Conclusion

When determining whether and how to include children in programming, all broadcasters must be mindful of the requirements of the Code – especially as regards protection of the children themselves, but also of the need to take account of the sensitivities of viewers with regard to programming featuring children which appears to cause them distress or discomfort. Therefore, broadcasters must: have robust procedures in place to ensure that due care is taken over the physical and emotional welfare and the dignity of under-eighteens; and, as appropriate, provide information concerning steps taken to protect child participants, so as to protect viewers adequately from offence that may result from not supplying such information.

In Issue 220 of Ofcom’s Broadcast Bulletin<sup>6</sup>, we recorded a breach of Rule 1.28 in relation to another BBC programme that included a child contributor. That case

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<sup>6</sup> Issue 220 of Ofcom’s Broadcast Bulletin, 17 December 2012, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb220/obb220.pdf>.

related to a child actor's participation in a challenging post-watershed drama of a violent nature, and included the child actor being exposed to sexualised language. In that Decision, Ofcom said we would be requiring the BBC to attend a meeting to reiterate the paramount importance of ensuring its compliance with the Code rules to protect child participants in its programmes. However, Ofcom postponed the meeting until the conclusion of this investigation. At our meeting, we will be seeking assurances from the BBC as to the effectiveness of its compliance processes going forward, relating to the protection of child participants in all programmes, not just drama.

**Breaches of Rules 1.28 and 2.3**  
**Not in Breach of Rule 1.29**

## In Breach

### I'm a Celebrity Get Me Out of Here!

ITV1, 27 November 2012, 20:30

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#### Introduction

*I'm a Celebrity Get Me Out of Here* (“*I'm a Celebrity...*”) is a long-running reality television programme broadcast on ITV1, which pitches a number of celebrity personalities in competition against each other, in a series of trials and challenges, while living in the Australian jungle for several weeks. Each edition of *I'm a Celebrity...* typically follows the same format, namely, a live broadcast from Australia, introduced by the two presenters Anthony McPartlin (“Ant”) and Declan Donnelly (“Dec”), during which they introduce pre-recorded segments showing the challenges and other activities that the celebrities have been involved in during the previous 24 hours. The latter stages of the series of “*I'm a Celebrity...*” involve an elimination phase, during which the celebrities are gradually eliminated from the programme by means of audience voting in a daily ‘vote off’, with the last celebrity remaining being ‘crowned’ King or Queen of the Jungle.

Ofcom received 66 complaints about a challenge (called “*Door to Door*”) that was broadcast in this edition of *I'm a Celebrity...* In summary, complainants objected to a challenge involving Kiki, the seven-year-old daughter of one of the contestants, Charlene (“Charlie”) Brooks, an actress in *EastEnders*. Complainants variously considered that:

- it was inappropriate and “exploitative” for Kiki, and caused her trauma and “emotional harm”, for her to be included in the *Door to Door* challenge, and hear her mother’s voice yet not be reunited with her;
- while Charlie Brooks could consent to participate in the programme, Kiki could not do so; and
- after the *Door to Door* challenge, it was upsetting for Charlie Brooks subsequently to discover that she had had the opportunity to win a meeting with Kiki.

We noted that the *Door to Door* challenge involved two of the celebrities, Charlie Brooks and Eric Bristow. The aim of the challenge was for the pair to pick one of five doors situated in a row in a jungle clearing, behind which there was either a surprise “*treat*” or a sign saying that the game was over. The doors were coloured: red; yellow; blue; brown (with panels); and brown (with glazed glass). If the contestants opened a door with a treat behind, they could opt to reject the treat and open another door to see if they got a better treat. This process would continue until the contestants either opted to retain a treat, or opened the door behind which was the sign saying that the game was over.

In common with the format of the programme, this challenge was a pre-recorded segment introduced by the programme’s presenters, Ant and Dec, during a live broadcast. At the beginning of the segment the camera showed what lay behind the five doors featured in the challenge: two ice cream sundaes; freshly laundered clothes; a pizza to share; a sign reading “Game Over”; and, Charlie Brooks’ seven-year-old daughter, Kiki, and Eric Bristow’s 19 year-old son, James, waving to the camera (who were behind the yellow door).

As the challenge commenced, Charlie Brooks and Eric Bristow discussed which door to choose, and Charlie Brooks opted for the brown door with glazed glass. The programme then featured a brief shot of Kiki and James, standing behind the yellow door, reacting to this decision: Kiki shook her fist silently to show her disappointment that her door had not been chosen. Behind the brown door with glazed glass was a treat: freshly laundered clothes. However, Charlie Brooks and Eric Bristow declined this and opted to choose another door.

Eric Bristow then opted for the blue door, because it reminded him of the colour of Chelsea Football Club. The programme again featured a brief shot of Kiki and James, standing behind the yellow door, reacting to this decision, and Kiki showed her clear disappointment. Charlie Brooks supported Eric Bristow's decision by mentioning the fact that her daughter, Kiki "*loves Chelsea*". When opened, this door had the "Game Over" sign behind it. There were then two further brief shots of Kiki and James, standing behind the yellow door that had not been picked, with Kiki hanging her head in disappointment in the first shot and waving in a disappointed manner at the camera in the second shot.

Subsequently, there was footage of the various celebrities having returned to camp after completing the same challenge and discussing how they had fared. When David Haye and Rosemary Shrager, who had been a previous pair in the challenge, discussed it with the rest of the celebrities, they said that: they had chosen the yellow door behind which were members of their family; and that their family members had been able to hear everything that had gone in the challenge. At this news, Charlie Brooks was shown to become visibly upset as she apparently realised that her daughter had been behind one of the doors. The next few minutes of the programme showed Charlie Brooks' reaction in front of the other celebrities to the fact that she had not picked the yellow door in the challenge, behind which was Kiki, and also her reaction and that of the other celebrities to the same issue filmed privately to camera in the 'diary room'<sup>1</sup>.

For example, in her 'diary room' comments Charlie Brooks said (describing her reaction to news that one of the treats in the challenge was to see a member of her family):

*"I swear to God, I felt like somebody had got a boot and kicked me in the gut...I didn't even think that having your family behind the door would have even been an option."*

Within this part of the package, the following exchange between Charlie Brooks ("CB") and Rosemary Shrager ("RS") was shown:

CB: *"Did you see our family [meaning Charlie Brooks' and Eric Bristow's family in the area where the Door to Door challenge took place] or not?"*

RS: *"No darling, it was only us...Sweetheart, it would have been your Mum".*

CB: *"No, it's fine it would have been Kiki."*

RS: *"It would have been Kiki, you think?"*

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<sup>1</sup> The 'diary room' was an enclosed space near to the celebrities' campsite in the jungle, in which they could share their personal thoughts to camera during the filming of *I'm a Celebrity...*

CB: *“Yeah, it’s fine, like I just can’t believe she [Kiki] was there; that’s what’s got me more than anything. It doesn’t matter that we didn’t get it. It’s just the fact she was so close... Yellow’s my favourite colour: why didn’t I go for yellow?... She would have been thinking “Mummy will pick yellow, Mummy will pick yellow”... So I’m really glad I didn’t get anything. If I’d sat there and enjoyed something knowing afterwards that she was there while I sat there thinking this is the best prize, I think I would have felt even worse. So I’d rather have nothing. Oh, my God. I can’t cope.”*

During this exchange, the package switched to two other celebrities, speaking later privately to camera in the ‘diary room’, empathising with the distress that Charlie Brooks was going through. Firstly, Ashley Roberts, said:

*“Poor Charlie is just gutted. You know, it’s her daughter, it’s her child, and she’s having a tough time with it. She’s trying to keep it together and we’re trying to give her, you know, positive thoughts, and stuff, but she’s really bummed out that her daughter was standing on the other side.”*

Second, David Haye, said:

*“I know Charlie’s feeling it, ’cause I know that I would have been feeling it. That would have been such a kick in the guts.”*

At the end of the item, Charlie Brooks was shown speaking to camera, and said:

*“[Kiki] was that close. It’s a real heartbreaker.”*

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

- Rule 1.28: “Due care must be taken over the physical and emotional welfare and the dignity of people under eighteen who take part or are otherwise involved in programmes. This is irrespective of any consent given by the participant or by a parent, guardian or other person over the age of eighteen in loco parentis.”
- Rule 1.29: “People under eighteen must not be caused unnecessary distress or anxiety by their involvement in programmes or by the broadcast of those programmes.”
- Rule 2.3: “In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context... Appropriate information should also be broadcast where it could assist in avoiding or minimising offence.”

Ofcom therefore asked ITV how the content complied with these rules.

## **Response**

By way of introduction, ITV said that this programme was part of the 12<sup>th</sup> series of *I’m a Celebrity*.... Therefore, in ITV’s view: “Viewers are therefore now well aware that the participants live in challenging conditions without contact with the outside world, and that they also regularly face trials which can be challenging physically, mentally and emotionally.” ITV added that at any time during the series a celebrity can opt to leave the programme.

ITV said that: “[T]he editorial content of the show very much follows the spontaneous reactions of the celebrities as they interact in the camp.” ITV added that challenges like *Door to Door* are pre-recorded, and, along with the viewer voting results, “form the editorial spine of the show”. Further, the *Door to Door* challenge followed a typical format in *I’m a Celebrity...*, whereby the celebrities would undertake a task and if successful they would obtain a treat for themselves, but if unsuccessful they would “go back to the camp empty-handed”.

ITV said the design of the *Door to Door* challenge, including the idea “to include a prize...involving a potential brief physical reunion with friends and family members”, was carried out prior to the start of the series. However, the decision as to which friends and family members would be used was only taken the day before the challenge “once it became clear which friends and family would be available”. In this regard, ITV said that during the elimination phase of *I’m a Celebrity...*, friends and family of competing celebrities “are regularly present at the production site, because there is always the possibility that the contestant will be eliminated that day”. Therefore friends and family are “in regular contact with the production team throughout the series”.

#### Rules 1.28 and 1.29

In complying with Rules 1.28 and 1.29, ITV said that production staff always had regard to the requirements of the Code and ITV’s Child Protection Policy, which for example provides that ITV is committed to: take all necessary steps to protect and take due care of young people involved in programming; ensure that children take part in programmes in a “safe, reassuring and welcoming environment”; and ensure that children “are treated with respect as individuals”.

In particular, ITV said that, as well as observing the contestants in *I’m a Celebrity...* as to “their state of mind and how well or otherwise they are dealing with the separation from their loved ones”, production staff were “also aware of how the family and friends of participants, who have travelled to Australia to wait for them to emerge from the camp, are dealing with that separation”.

By way of background, ITV said that: “Like many other family members of the [programme] participants, Kiki attended the production site each day, in the care of her grandmother, during the ‘vote off’ stage of the series.” In ITV’s view, both the producers and Kiki’s grandmother had “therefore been able to assess how well she was coping with this situation, as the ‘vote off’ has some similarities to the ‘door’ challenge (i.e. on any one of the vote result “reveals”, it was possible that her mother would be voted out, and she would therefore be immediately reunited with Kiki)”. ITV added that: “Kiki’s reactions to her mum being ‘saved’ each day (and therefore continuing their separation) was obviously another helpful indicator to both the production team and her grandmother as to whether taking part in the “door” challenge might be in any way damaging to Kiki’s welfare”.

ITV gave further information as to Kiki’s daily attendance at the production site, during the ‘vote off’ stage of the programme. In summary, each day, Kiki:

- was driven for an hour to the production site “in the knowledge that Charlie was nearby physically, and that she would be reunited with the family if she was voted out”;

- watched each “show as it is played out with other participants’ family and friends...seeing Charlie talking about how much she was missing Kiki”;
- saw Charlie Brooks “being voted for and thereby kept in the show on at least 5 consecutive days prior to the ‘door’ challenge”; and
- saw “other contestants being reunited with their family and friends on site and at the hotel”.

ITV said that Kiki “would have been in close contact with production staff, and would have become well-used to the presence of cameras and of being filmed, as family and friends are filmed throughout the series, mainly for the purposes of the *Coming Out* show, which is a pre-recorded programme featuring footage of what happens when participants leave the jungle and rejoin their loved ones”.

Given the above background, ITV went on to set out the specific compliance steps taken as part of the production process in this case:

#### *Pre-production*

- The decision to include Kiki in the *Door to Door* challenge was taken “after careful consideration” of the welfare of both the celebrities and family members concerned. ITV said that: “In particular, the possible emotional impact on Kiki of having an opportunity to meet her mother, given this would be denied should her mother be unsuccessful in the challenge, was considered carefully.” In particular, ITV said that the production team’s “ongoing contact with and filming of Kiki” on a daily basis, as outlined above, helped to inform the: decision as to her participation in the *Door to Door* challenge; and the assessment of “her likely reaction to the disappointment of not seeing her mother, if Charlie did not successfully pick the right door”.
- The consent for Kiki’s participation in the challenge was given by Kiki’s maternal grandmother, who was acting in loco parentis while Kiki stayed in Australia. According to ITV, Kiki’s grandmother is a talent agent and therefore “well able to consider the suitability of [Kiki] taking part in a television programme and any potential adverse consequences”.
- The production team explained to Kiki’s grandmother that “there was a very good chance that [Kiki] would not get to see Charlie, although she would be very close by on the other side of the door”. The broadcaster said that production staff were assured of Kiki being able to deal with taking part in the challenge by: assurances from Kiki’s grandmother; and their own view that Kiki was a “very pragmatic and confident child” through their own contact with Kiki.
- As well as the individual explanation of the challenge given to Kiki’s grandmother, a senior producer gave a full briefing about the challenge to all the celebrities’ friends and families, including Kiki. In the briefing, it was clearly explained that “the friends and family might not see their loved one at the conclusion” of the challenge. ITV said that during this briefing Kiki “was completely “switched on” and aware of everything that was explained to her”. In particular it was made clear to friends and family members that they would be in close proximity to the celebrities during the challenge “and Kiki understood...that she needed to avoid making any noise to avoid “giving the game away””. In ITV’s view, Kiki therefore “would have understood she would be close enough to hear” her mother deciding

which door to choose during the challenge. Furthermore, ITV said there was discussion with Kiki of the only likely “negative consequence” of appearing in the programme, namely that if her mum did not pick the right door, she would not get to see her at the end of the challenge. ITV added that: “Kiki would not have been invited to take part had the producers not been satisfied that there was no prospect of any serious negative outcome.”

- Given the above steps, in ITV’s view, Kiki’s grandmother gave “informed consent” and Kiki herself gave her “informed assent” to take part in the programme.
- ITV stated that given: the limited nature of Kiki’s participation in the programme; the “careful consideration” given to Kiki’s welfare and dignity in taking part in the programme; and the “unlikelihood of any serious negative outcome in these circumstances”, it was not considered that an independent assessment of Kiki or the “potential outcome of the challenge” was required. Such an assessment was not thought necessary because of, for example: Kiki’s “existing established relationship” with the production, as outlined above; production staff’s “direct observation” of Kiki during the course of the production; and the specific discussion with Kiki and her grandmother concerning the nature of the challenge. In conclusion on this point, ITV said that: “[The Code Guidance] does not require producers to take professional advice every time a child participates in a programme....It cannot be right that participation by a child should only ever proceed after consultation with someone “independent” and who has “no direct interest” in that participation.”

#### *Production*

- The location for the challenge was, according to ITV, “very close to where Kiki had been on site all week, so it would not have been an unfamiliar environment for her”. In addition, ITV said that “her grandmother was close by at all times, and she was also accompanied by Eric [Bristow]’s son James, who she knew already from having been present with him at the various ‘vote offs’”.
- During the challenge itself, ITV said that both the senior producer and Kiki’s grandmother were close by “with a clear line of sight to Kiki at all times” and would have been able to intervene if Kiki became distressed. However, ITV said that at no point during filming did Kiki’s grandmother “express any concerns about Kiki’s response to the disappointment of not seeing her mother”.
- ITV acknowledged that Kiki reacted during the challenge as her mother and Eric Bristow chose the ‘wrong’ doors. However, in ITV’s view, Kiki’s demeanour was “that of annoyance and disappointment rather than distress”. Furthermore, she “showed great control over her reactions, putting her hand to her mouth to avoid making any noise”. ITV added that when it became apparent that her mother had lost the challenge, Eric Bristow’s son, James, consoled her and Kiki’s grandmother “rejoined her very shortly”.

#### *Post-production*

- After filming, the Series Executive Producer went to see Kiki to ensure “she was not upset about having not seen her mother”. ITV said that Kiki was “understandably disappointed, but in no way unduly distressed”. Rather, Kiki was

“excited to have taken part in the show, and was more concerned about being allowed onto the ‘Eviction Bridge’<sup>2</sup> when her mother finally left the jungle”.

- In a subsequent episode, broadcast two days after the episode in the present case, Kiki had a telephone conversation with her mother, during which Kiki was “in no way distressed”.

In summary, in relation to Rule 1.28, ITV said that “the vulnerability of child participants can vary widely”. However, in this case, ITV considered that Kiki is a “very articulate and self-confident child, whose immediate family are involved in show business”. Furthermore, ITV said: “This was therefore not a situation where a young child was being placed in an unfamiliar environment of an adult reality show – rather it was an opportunity for her to be further involved in a particular challenge, in the context of being already very much involved in the day to day production of the programme and related programmes.”

The production staff were of the view that participation in the challenge would not cause Kiki unnecessary distress or anxiety given: Kiki’s personality; the nature of the challenge; the briefings given to Kiki and her grandmother; and the “assurances that the production team received from her grandmother as to [Kiki’s] likely reaction”. In addition, ITV considered that Kiki was “fully aware of that possibility” that she “would not be allowed to see or talk to her mother”, and in ITV’s view “there is nothing to suggest she was incapable of understanding this simply by virtue of her age”.

Therefore, given all the above, ITV considered that Rule 1.28 had been complied with.

In relation to Rule 1.29, ITV said that Kiki’s participation in the challenge did not cause her any distress or anxiety, and therefore this rule was complied with. In this regard, ITV cited an interview with Kiki’s grandmother on the ITV1 programme *Daybreak*, on the day after the challenge was broadcast, in which she said that Kiki had been “absolutely fine” after the challenge. Furthermore, ITV said that the telephone conversation between Kiki and Charlie Brooks, referred to above, and Kiki’s “clearly delighted” appearance on set to congratulate her mother when Charlie Brooks was crowned Queen of the Jungle, would have “demonstrated conclusively to regular viewers...that Kiki had not suffered any emotional harm or other negative effect from having taken part” in the challenge. In addition, the broadcaster cited a newspaper interview following the series of *I’m a Celebrity...*, in which Charlie Brooks said the following about Kiki’s participation in the *Door to Door* challenge:

“A lot of people have said they think it was a step too far and maybe it was. But I wasn’t cross with the show. I didn’t think like that in there. I was just worried that [Kiki] was upset. If she had been really upset I would have felt differently about it, but I know that she got over the whole thing very quickly. She’s a tough cookie. And she was surrounded by all the people who love her the most – except me obviously.”

### Rule 2.3

ITV said it did not intend to offend viewers and stated that “we sincerely regret that [viewers]...were offended or distressed by seeing Kiki disappointed at the end of the challenge and that some considered it was “cruel” to her in some way”. However, ITV

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<sup>2</sup> When *I’m a Celebrity...* contestants leave the jungle, they walk across a narrow bridge to meet their friends and relations.

stated its belief that most viewers would not have considered that the item exceeded generally accepted standards or that “in the editorial context the participation of Kiki was of itself unjustified, harmful or offensive”.

ITV gave its comments as to how the appearance of Kiki in the *Door to Door* challenge, and in particular how Kiki’s reaction to her not being able to see her mother during the challenge, complied with this rule. In ITV’s view, the nature of Kiki’s participation was carefully edited: in the early ‘establishment’ shots, Kiki was shown smiling to camera; subsequently, Kiki and James, Eric Bristow’s son, were shown standing behind their door sharing “the emotional ups and downs” caused by the decisions their respective parents were making during the challenge. For example, ITV said that when the “Game Over” sign was chosen, Kiki was shown making a “gesture of annoyance familiar to parents of younger children everywhere, and bow[ed] her head in disappointment”.

ITV maintained that during the challenge Kiki displayed the “natural reactions of childish excitement and then disappointment during the challenge”, but that at no point was she seen “exhibiting real distress”, and in ITV’s view the situation that Kiki was in “was clearly not traumatic”. Furthermore, throughout the challenge, Kiki was being supported by James and “the viewer...[was] left in the final shot of her with the impression of a mildly disappointed little girl, waving goodbye to her mother”.

ITV also gave its comments on how the reaction of Charlie Brooks to the fact that she had missed out on the opportunity of seeing Kiki in the challenge complied with Rule 2.3. ITV said that Charlie Brooks was “understandably far more distressed and frustrated than Kiki had been, when she learned from the other contestants that one of the available treats was to see friends and family, and realised that she would have seen Kiki had she chosen the right door”. However, ITV added that the “footage in camp of her initial shocked reaction was carefully juxtaposed with her later calmer reflections in the diary room...By this time she [had] clearly recovered from the initial shock and [was] coping well with the disappointment of not seeing Kiki”.

By way of context, ITV said that an established element of *I’m a Celebrity...* is that the celebrities do experience and display a “range of sometimes intense emotions” in reaction to the physical and emotional challenges of appearing on the programme. Therefore, there is “an established viewer expectation that the celebrities will sometimes be downcast and even tearful in the jungle, particularly in relation missing their loved ones”. In the broadcaster’s view, the scenes of Charlie Brooks’ distress in relation to Kiki in the context of the *Door to Door* challenge did not exceed “those established expectations”. In addition, these expectations arose in the context of “an entertainment/reality show in which celebrities and their families are always only temporarily separated, and in which the celebrity can rejoin their family at any time if they so choose”.

ITV said that further context was provided to mitigate any potential offence in the following ways:

- The programme presenters, Ant and Dec, during the live part of the programme in this case following the broadcast of the pre-recorded segment including the challenge, said that “*mother and daughter would be reunited very soon*”.
- In the following day’s episode, broadcast on 28 November 2012, a handwritten and “upbeat” letter from Kiki to her mother was read out by one of the contestants, Ashley Roberts, to Charlie Brooks. In the letter, “Kiki expresses how much fun she is having and that her mum shouldn’t worry about her”.

- In the episode broadcast on 29 November 2012, regular viewers of *I'm a Celebrity...* would have also seen that, in a telephone conversation between Kiki and Charlie Brooks, Kiki was “entirely happy and supportive of how her mother was doing in the jungle, and looking forward to seeing her mother soon”.

ITV said that as a result of the two subsequent episodes the audience would have been “reassured that Kiki was indeed fine”.

Given the above, ITV was of the view that “in a nightly...series such as this programme, it is appropriate for Ofcom to consider the question of viewer expectations and offence in one incident in the wider context of the information provided to viewers in subsequent episodes about the incident”. ITV added that in this case “most viewers, including parents, would not have considered the overall progress of this story was offensive in a manner exceeding generally accepted standards, given the clear context, namely: the inclusion of Kiki in the challenge; the footage of her during the challenge expressing disappointment but not distress; the emotional reaction of Charlie when first discovering Kiki would have been behind the door; her subsequently more composed reaction in the same programme; the reassurance given in comments by the presenters in the same episode; and the consequent clear signposting that Charlie had fully recovered her composure and that Kiki was perfectly happy in the following 2 episodes”.

Given the above, ITV said that, in its view, the programme complied with Rule 2.3 of the Code.

In conclusion, ITV said that “with hindsight, we do accept that it might have been helpful to indicate in the programme the support for Kiki not only from James but from her grandmother who was close by throughout the challenge, or to have shown viewers more clearly that after the challenge she had not in fact suffered any distress or emotional harm”. In addition, ITV said that it had taken into account the concerns expressed by complainants to Ofcom, and that such concerns “will certainly inform our planning and execution of future series of [*I'm a Celebrity...*] in relation to any participation of the children of the celebrities”.

## 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 to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material”. These duties are reflected in Section One (Protecting the Under-Eighteens) and Section Two (Harm and Offence) of the Code.

In reaching this Decision Ofcom has taken account of the audience’s and the broadcaster’s right to freedom of expression. This is set out in Article 10 of the European Convention on Human Rights. Article 10 provides for the right of freedom of expression, which encompasses the right to hold opinions and to receive and impart information and ideas without interference by public authority. In particular, Ofcom’s research<sup>3</sup> in this area has demonstrated that both adults and children value and enjoy under-eighteens being represented in programming.

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<sup>3</sup> *Children in Programmes: An independent research report for Ofcom by Sherbet Research*, 2007, [http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/children\\_in\\_programmes](http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/children_in_programmes).

## Protection of Under-Eighteens

The Code sets out rules covering the participation of any under-eighteens in broadcast content.

Rule 1.28 of the Code states that:

“Due care must be taken over the physical and emotional welfare and the dignity of people under eighteen who take part or are otherwise involved in programmes. This is irrespective of any consent given by the participant or by a parent, guardian or other person over the age of eighteen in loco parentis.”

Rule 1.29 of the Code states that:

“People under eighteen must not be caused unnecessary distress or anxiety by their involvement in programmes or by the broadcast of those programmes.”

Ofcom has published detailed Guidance which was drafted with the assistance of child experts and child welfare groups. The purpose of the Guidance is to help broadcasters achieve the appropriate level of protection for under eighteens in programmes when seeking to ensure compliance with Rules 1.28 and 1.29 (“the Code Guidance”)<sup>4</sup>.

Importantly, as is made clear in the Code Guidance, expert opinion indicates that the vulnerability of participants can vary widely depending on age, maturity and individual circumstances. In Rule 1.28, the phrase “physical and emotional welfare and the dignity of people under eighteen” indicates the broad potential impact that participating in a programme might have on this age group. In short, broadcasters need to make careful decisions when involving under-eighteens in programmes, and that need will be especially acute in the case of certain types of programmes.

The Code Guidance also makes clear that an important consideration for broadcasters in this area is the development of documented guidelines for working with under-eighteens, and that production staff are made fully aware of these so that they have clear information on the broadcaster’s key considerations in this area. In this respect, Ofcom noted that ITV production staff in this case had regard to the Code and ITV’s Child Protection Policy, which for example provides that ITV is committed to: take all necessary steps to protect and take due care young people involved in programming; ensure that children take part in programmes in a “safe, reassuring and welcoming environment”; and ensure that children “are treated with respect as individuals”.

This case related to a seven-year-old child being required to participate in a challenge in an adult ‘reality’ television programme. We considered that the child concerned was placed in the unusual situation of: being in close proximity to her mother in an unfamiliar environment a long way from home, after a number of days of being separated; listening to her mother making decisions as to possible ‘treats’ that her mother and a fellow contestant might win, with one such ‘treat’ being the opportunity for Kiki and her mother to be reunited; being required not to alert her mother to her presence; and with the real likelihood, which happened in this case, of not actually being able to meet and talk to her mother.

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

Ofcom noted all these factors and ITV's assurance that the decision to include Kiki in this item was taken after "careful consideration" of her welfare and the welfare of her mother, Charlie Brooks. Ofcom next went on to consider the measures that ITV and production staff had implemented during the pre-production process to take due care of the welfare and dignity of the child, Kiki, as required by Rule 1.28.

ITV took a number of steps, before production, to seek to protect Kiki in terms of her involvement in the *Door to Door* challenge item in this programme. These included: obtaining the informed consent of Kiki's grandmother who assured production staff as to the suitability of Kiki taking part in the *Door to Door* challenge; and briefing Kiki and her grandmother as to what was involved in the challenge. In particular, it was explained to Kiki that she might not see her mother at the conclusion of the challenge. We also noted the steps ITV took, before production, to assess whether Kiki had the intellectual and emotional maturity to handle participating in this challenge. In this regard, we noted that ITV was assured of the suitability of Kiki being able to deal with taking part in the challenge by assurances given by Kiki's grandmother and ITV production staff's own daily assessment of Kiki being a "very pragmatic and confident child".

In particular, we noted that Kiki attended the production site each day, in the care of her grandmother, during the 'vote off' stage of the series, and that she was familiar with, for example: the presence of cameras and being filmed; the location where the challenge took place; production staff on the programme; and the editorial format of the programme, whereby there is a possibility that family members will be reunited with contestants at some point during the series of *I'm a Celebrity...* For example, we noted that for five days prior to the episode in question, Kiki had been denied the chance of being reunited with her mother, due to Charlie Brooks being 'saved' during the audience 'vote off' in each programme. We acknowledged therefore that, by observing, as ITV put it, "Kiki's reactions to her mum being 'saved' each day (and therefore continuing their separation)" ITV production staff, informed by input from Kiki's grandmother, were likely to have been able to build up a reasonable assessment of the appropriateness of including her in the *Door to Door* challenge. The latter, in our view, had similarities with the daily audience 'vote off', in that the challenge held up the possibility of Kiki being reunited with her mother, albeit briefly.

We considered therefore that, in participating in the *Door to Door* challenge, and in the context of Kiki being familiar with the production location of *I'm a Celebrity...* and its production staff over a number of days, Kiki would have demonstrated that she was coping well with the uncertainty of not being reunited with her mother, given her experience of the previous five days of not being reunited with her mother as a result of the daily audience 'vote off'.

In reaching our Decision, we took into account ITV's argument that the Code Guidance does not require broadcasters to seek advice from an appropriately qualified professional, such as a child counsellor or psychologist every time a child participates in a programme. We took into account that in this case production staff, aided by input from Kiki's grandmother, were in a good position to assess the appropriateness of including Kiki in the *Door to Door* challenge, given: Kiki's close involvement with the making of *I'm a Celebrity...* on a daily basis; and her familiarity with the production. However, we emphasise that depending on the individual child and the nature of their proposed participation there may well be circumstances when broadcasters should consider consulting appropriately qualified experts on the likely impact of the child's participation.

We also took into account the steps taken during production by ITV production staff. As mentioned above for example we considered that it was likely that Kiki would have been familiar with: the production staff; the surroundings where the challenge took place; and that she had to some extent become accustomed to not being reunited with her mother, due to Charlie Brooks surviving five days of audience votes. However, we noted that, as a safeguard, both the senior producer and Kiki's grandmother were close by to Kiki during filming so that they would have been able to intervene if Kiki became distressed.

In summary, given all the factors above, we considered that the steps taken by ITV were sufficient to ensure that due care was taken of the emotional welfare of Kiki. The programme was therefore not in breach of Rule 1.28 of the Code.

With regard to Rule 1.29, we noted the various representations made by ITV to the effect that this rule was complied with. In reaching our Decision under this rule, we considered that while Kiki certainly appeared disappointed, she did not, in our view, display signs of significant distress during the challenge as shown in the programme. Furthermore, we took into account ITV's representations that for example Kiki was: "understandably disappointed, but in no way unduly distressed" by not seeing her mother during the challenge; "excited to have taken part in the show"; and during a subsequent telephone conversation with her mother "in no way distressed".

On the basis of the information available to Ofcom on this issue, we were not aware of any evidence that Kiki had been caused unnecessary distress or anxiety as a result of her involvement in, or broadcast of, the programme in this case. We therefore considered there was no breach of Rule 1.29 of the Code.

### Offence

Rule 2.3 of the Code requires that:

"In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context...Appropriate information should also be broadcast where it could assist in avoiding or minimising offence."

There is significant room for innovation and creativity within entertainment programming, but such programming does not have *unlimited* licence in terms of offensive material. Broadcasters must ensure that any potentially offensive content is justified by contextual factors, such as: the editorial content of the programme; the time of broadcast; the degree of offence likely to be caused by the material; the likely expectations of the audience; and any warnings given to the audience.

The issues for Ofcom in reaching a Decision in this case were: first, to establish whether the material in question was capable of causing offence; and, if so, second, to determine whether ITV had ensured that it had applied generally accepted standards by justifying the inclusion of that material by reference to the context of the broadcast.

In this programme, we noted that a seven-year-old child, Kiki, was required to be involved in a challenge in an adult 'reality' programme. We considered that from the child's perspective, her involvement in the challenge meant she would be in close proximity to her mother who was not aware of her presence. Her mother would be making random choices with the possibility of winning 'treats', one of which included the opportunity of her being reunited with after a period of separation. We considered the editorial premise of this challenge would have been potentially offensive to

viewers: in effect a seven-year-old child was being offered as a prize in a competition, and viewers would have known that a possible outcome of the challenge would be that that young child, in an unfamiliar environment a long way from home, would be prevented from seeing her mother (and this was in fact what happened). The potential for offence would have been heightened in this case by the facts that: Kiki was required to stay quiet, and not allowed to indicate her presence to Charlie Brooks, while being in such close proximity to her mother; and that she was shown reacting with disappointment to the successive decisions made by her mother and Eric Bristow during the challenge.

Ofcom next examined to what extent this offence was justified by the context.

Ofcom took into account that *I'm a Celebrity...* is an established 'reality' format, broadcast both after and just before the watershed, which requires a group of celebrities to live in the Australian jungle, while undertaking a series of challenges. It is a well-established feature of the programme that the contestants will be stretched physically and emotionally during their participation in the programme. Furthermore, the challenges often prove especially difficult for many of the contestants. We considered that the likely audience would have been used to the established editorial format, whereby each live episode included pre-recorded segments featuring celebrities shown grappling with the problems thrown up by the challenges, and reacting to and discussing the aftermath of the challenges while back in camp. In our view, the audience's expectations in this respect take into account that the celebrities have freely chosen to participate in the full knowledge of what they might experience in the jungle.

However, we had serious concerns about Kiki's appearance in the programme. We took into account, as mentioned above, that a young child was placed in a challenge in an adult 'reality' programme, in which she was, for example: in close proximity to her mother; required to stay quiet, and not being allowed to indicate her presence to her mother; and shown reacting with disappointment to the fact she had been denied the chance of seeing her mother. In our view, the appearance of a seven-year-old child placed in such a scenario would have gone beyond the likely expectations of the audience for this programme, which rather would have expected consenting adults to participate in the challenges featured on *I'm a Celebrity...*

We took account of ITV's various representations as to how Kiki appeared on screen to viewers. For example, ITV maintained that, during the challenge, Kiki displayed "the natural reactions of childish excitement and then disappointment" but at no point was seen "exhibiting real distress". ITV added: "In addition, throughout the challenge, Kiki was being supported by Eric Bristow's son, and nature of Kiki's participation was carefully edited." Ofcom considered that, irrespective of, for example, Kiki's demeanour on screen, a significant level of offence would nonetheless have been caused by the editorial decision to place a seven-year-old child in a situation whereby that child: was being used as what could be characterised as a form of prize in an adult 'reality' programme; and was shown on screen in close proximity to her parent, and reacting to the fact that she had been denied the chance of being reunited with that parent.

We also assessed whether the shots of Charlie Brooks after the *Door to Door* challenge (being shown distressed at realising that she had lost the opportunity to be reunited with her daughter) were justified by the context. We considered that in general the audience of *I'm a Celebrity...* would be used to seeing celebrity participants being caused distress both during and after challenges they compete in: it is a key premise of the programme that it highlights how different individuals deal

with these challenges. The contestants' behaviour and reaction to what is expected of them will, in large part, dictate audience voting as to who stays and who leaves the programme. In this regard, we agreed with ITV that there is "an established viewer expectation that the celebrities will sometimes be downcast and even tearful in the jungle". In this case we noted that Charlie Brooks' initial distress was followed by, as ITV put it, her "later calmer reflection in the diary room".

However, we considered that Charlie Brooks' distressed reaction to the realisation that she had been in close proximity to Kiki and had lost the opportunity to be reunited with her daughter served to increase the potential offence caused in this case. This is because Charlie Brooks' distress and concern about her daughter would have been likely to emphasise to viewers that a young child, separated from her mother, had been asked to participate in this challenge, and had been denied the chance to be reunited with her.

Rule 2.3 states that "appropriate information should...be broadcast where it would assist in avoiding or minimising offence". We therefore took into account what information was provided to viewers in the programme regarding the various safeguards that were in place to protect Kiki. In particular, we considered whether there was any appropriate information in terms of providing viewers with sufficient reassurance regarding Kiki's welfare, and therefore providing adequate protection to members of the public.

We noted that the presenters Ant and Dec stated the following, during the live part of the programme that immediately followed the segment including the *Door to Door* challenge:

Ant: "Aaah."

Dec: "Got to feel sorry for [Charlie Brooks]."

Ant: "You do, you really do, poor thing."

Dec: "Not long left though."

Ant: "No."

Dec: "Not long left now. She'll [i.e. Charlie Brooks] be reunited [with Kiki] very soon."

ITV said that the above exchange provided context to justify any offence caused by the *Door to Door* challenge. We disagreed. Although this exchange would have helped alert viewers to the fact that the format of *I'm a Celebrity...* meant that in a matter of days Kiki would be reunited with her mother, the presenters did not refer to – and nor did the programme include any details of – the steps ITV had taken to help ensure due care was taken of Kiki's welfare when participating in the programme itself. For example, viewers had no knowledge that Kiki: was being supported and cared for by her grandmother; and had become very familiar with the details of the production of *I'm a Celebrity...* through her daily attendance at the production location. Furthermore, the audience would not have been aware of the amount of consideration and judgement ITV production staff had given to deciding to include Kiki in the *Door to Door* challenge. Given that the child's own mother had appeared so distressed at what had happened, such information might have served to help reassure the audience and so reduce the offence caused by Kiki's participation.

In addition, in reaching our Decision in this case, we took into account ITV's arguments that content in the subsequent two episodes of *I'm a Celebrity* helped provide sufficient context to justify any offence caused in this case. We noted that on 28 November 2013, the day after the episode that included the *Door to Door* challenge, Ashley Roberts read out a hand written letter from Kiki, as follows:

*"Dear Mummy, I miss you so much. You are doing brilliantly and I am really proud of you. I love the room service, we've been having ice cream, pink champagne and lots of fun on your bill everyday."*

Ashley Roberts commented about Kiki that: *"She's a sassy little thing"*, and continued reading the letter, as follows:

*"Don't worry about us, you are in it now, you may as well try and win it for all of us. Can't wait to see you, you should have picked the yellow door. I was behind it. You are the best mummy in the world. All my love. Kiki xxxxxxxx. P.S. Can't wait to go to the fun things with you."*

Later in this episode, Charlie Brooks, speaking in the diary room, said:

*"Reading Kiki's hand written little letter was brilliant, I'm really glad I kept it together 'cause I don't like seeing Mummy upset, it gives you strength though, and to just have it coming from her little heart and her own head makes me smile."*

We further noted that on 29 November 2013, two days after the episode that included the *Door to Door* challenge, the episode that day included excerpts from a telephone conversation between Charlie Brooks ("CB") and Kiki. These excerpts were interspersed with clips of Charlie Brooks subsequently discussing the telephone conversation between them, whilst in the diary room:

Kiki: *"Mummy."*

CB: *"Arghhhhh! Kiki!! I miss you so much."*

Kiki: *"I love you, you're doing really well."*

Charlie Brooks was then shown subsequently saying the following about the telephone conversation with Kiki, whilst in the diary room:

*"In the beginning I was really emotional, I thought, oh my god, am I going to hold it together? But she was so happy that it just made me smile so much. I've never felt so overjoyed like, inside, and it was just like my little heart was singing."*

The telephone conversation continued as follows:

Kiki: *"I can't tell you how proud I am of you."*

CB: *"I can't tell you how much I love you."*

Kiki: *"I miss you so much."*

CB: *"I miss you baby, Mummy's going to be home soon to see you."*

Charlie Brooks was then shown subsequently saying the following, whilst in the diary room:

*"I've never been away from Kiki for this length of time so I can't tell you what my heart was doing, there's so much you want to say and do."*

The telephone conversation continued as follows:

CB: *"I can't wait for snuggles."*

Kiki: *"I can't wait to do champion liner uppers."*

CB: *"I'm going to give you champion liner uppers, uh oh sister, I'm going to win."*

Kiki: *"You'll win it now, you may as well stay and win it."*

CB: *"I'm going to try baby, I'm going to try."*

Kiki: *"I want to be princess of the jungle."*

CB: *"You want to be princess of the jungle...I think you can be princess of the jungle no matter what."*

This content concluded with Charlie Brooks being shown saying the following, whilst in the diary room:

*"It's so reassuring knowing that my baby's proud, just boosts you to go on this last few days."*

In assessing the above content, we took into account ITV's representation that "in a nightly...series such as this programme, it is appropriate for Ofcom to consider the question of viewer expectations and offence in one incident in the wider context of the information provided to viewers in subsequent episodes about the incident". However, we disagreed with ITV's argument in this regard. We considered that the content broadcast in the two days following the episode in this case did not provide sufficient context to justify the level of immediate offence caused by Kiki's participation in the *Door to Door* challenge, on the day of broadcast, which in our view was likely to have been considerable.

Although the content broadcast in the two subsequent episodes would have gone some way to reassure viewers that Kiki was apparently in good spirits in the days following the *Door to Door* challenge, we considered that this material would have been unlikely to soften to any material extent the initial offence caused by viewers seeing Kiki being involved in the *Door to Door* challenge. This was because in the subsequent two episodes ITV did not include additional information which would have explained the steps the broadcaster had taken in reaching the editorial decision to include Kiki in the challenge. For example, viewers would have still been unaware that: at all times, Kiki was being accompanied by her grandmother during her involvement in the programme-making process; and, through her daily attendance at the making of the programme, Kiki had become familiar with the mechanics of the programme whereby, for example, she had already experienced not being reunited with her mother five days in a row, due to Charlie Brooks not being voted out of the programme. In our view, without such additional information, viewers of the episode containing the *Door to Door* challenge would have still been likely to have been concerned that a seven-year-old child had been placed in a potentially highly

upsetting scenario for the purposes of entertainment. Therefore, the reading out of Kiki's letter, and the telephone conversation between Charlie Brooks and Kiki, shown in subsequent programmes after the programme in question, in our view, did not fully justify the offence caused by Kiki's inclusion in the *Door to Door* challenge.

In reaching our Decision, we took account of: ITV's sincere "regret" for offending any viewers; the fact that both ITV and its viewers have rights to freedom of expression, which includes the freedom to impart and receive information and ideas; ITV's admission that "with hindsight, we do accept that it might have been helpful to indicate in the programme the support for Kiki"; and the fact that ITV said that it had had regard to the concerns expressed by complainants to Ofcom, and that such concerns "will certainly inform our planning and execution of future series of *I'm a Celebrity...* in relation to any participation of the children of the celebrities".

Nonetheless, taking all the above into consideration, Ofcom decided that ITV did not apply generally accepted standards and this content was in breach of Rule 2.3.

When determining whether and how to include children in programming, we remind all broadcasters of the need to be mindful of the sensitivities of viewers. In particular, broadcasters should, as appropriate, provide adequate information so as to protect viewers from offence that may result from the appearance that the broadcaster had failed to take due care of a child participating in the programmes.

**Not in Breach of Rules 1.28 and 1.29  
Breach of Rule 2.3**

## In Breach

### John Mahon

*Kerrang! Radio, 3 February 2013, 11:30*

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#### Introduction

Kerrang! Radio is a station that specialises in rock music. The licence for this service is held by Bauer Media (“the Licensee”).

A complainant alerted Ofcom to the appearance of offensive language in the broadcast of the track *Longview* by the band Green Day in the late morning of Sunday, 3 February 2013.

On assessing the material Ofcom noted the following:

*“... and I'm fucking lazy.”*

*“When masturbation's lost its fun, you're fucking lonely.”*

At the end of the next song the presenter gave the following apology:

*“Sorry if there was a couple of words in that Green Day track that may have caused some offence.”*

Ofcom considered the material raised issues warranting investigation under Rule 1.14 of the Code, which states:

*“The most offensive language must not be broadcast...when children are particularly likely to be listening (in the case of radio).”*

Ofcom therefore requested comments from the Licensee on how the programme material complied with this rule.

#### Response

The Licensee said that the presenter concerned had been fully briefed on compliance with the Code. However, the wrong version of the song was played in error. The Licensee pointed out that an apology was broadcast immediately after the incident.

#### Decision

Under the Communications Act 2003, Ofcom has a 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”. This objective is reflected in Section One of the Code.

Rule 1.14 states that the most offensive language must not be broadcast on radio when children are particularly likely to be listening. Ofcom’s research on offensive language<sup>1</sup> clearly notes that the word “fuck” and other variations of this word are

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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>.

considered by audiences to be among the most offensive language.

The Code states that the phrase “when children are particularly likely to be listening” particularly refers to “the school run and breakfast time, but might include other times”. Ofcom’s guidance on offensive language on radio<sup>2</sup> notes that:

“For the purpose of determining when children are particularly likely to be listening, Ofcom will take account of all relevant information available to it. However, based on Ofcom’s analysis of audience listening data, and previous Ofcom decisions, radio broadcasters should have particular regard to broadcasting content at the following times:...

- between 06:00 and 19:00 at weekends all year around, and in addition, during the same times from Monday to Fridays during school holidays.”

Given that the programme was broadcast at 11:30 on a Sunday and the RAJAR figures indicate that a significant number of listeners to this programme were children aged between 10 and 14 (over 16%), it is clear that the most offensive language was broadcast at a time when children were likely to be listening.

We noted that the Licensee acknowledged that the incorrect version of the song was played in error and that the presenter made an on-air apology after the next track. Nonetheless, the broadcast of this material clearly breached Rule 1.14 of the Code.

#### **Breach of Rule 1.14**

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<sup>2</sup> *Offensive language on radio*, December 2011, <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/offensive-language.pdf>.

## In Breach

### Live: Gurdwara Guru Hargobind Sahib Ji

Sangat TV, 11 November 2012, 18:30

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#### Introduction

Sangat TV broadcasts religious and general entertainment content in English and Punjabi. It is primarily directed towards the Sikh community in the UK, and is available on the Sky digital satellite platform. The licence for Sangat TV is held by Regis 1 Limited (“Regis 1” or “the Licensee”).

Four complainants alerted Ofcom to the above programme, objecting to a speech which the complainants considered to be derogatory about the preacher Darshan Das<sup>1</sup>, on the 25th anniversary of his murder in Southall in West London.

On assessing the programme, Ofcom noted that this was a live broadcast, which featured a young adult male speaker, dressed in a Sikh turban, who delivered a speech in English about Darshan Das on the anniversary of his death. We did not consider that any of the references to Darshan Das himself presented issues under the Code. However, we were concerned that the speaker made a number of references to Manjit Singh and Rajinder Singh, who shot and killed Darshan Das on 11 November 1987 when he was attending a meeting of a Sikh religious society<sup>2</sup>. (Darshan Das was born in the Punjab but came to the UK in 1979. He was chairman of a Sikh religious society, and had expressed views which had upset members of the orthodox Sikh community. Darshan Das was attending a meeting of that society when he was killed.)

The speaker made a number of comments (in English) about the murder of Darshan Das, including as follows:

*“A little bit into [Darshan Das’s] programme [Manjit Singh] got up and unleashes some justice on [Darshan Das]. [Rajinder Singh] jumps on stage and unleashes some more.”*

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*“But people feel that we should get rid of this part of our history. We shouldn’t talk about people like [Rajinder Singh]. We shouldn’t talk about [Manjit Singh]. Fair enough, talk about...Baba Div Singh<sup>3</sup>, but don’t talk about the heroes of today, because the new people, the youngsters who are sitting today – and all*

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<sup>1</sup> Darshan Das was a controversial religious figure within the Sikh Community, with many Sikhs considering that his religious teachings clashed with established Sikh religious doctrine.

<sup>2</sup> Manjit Singh and Rajinder Singh shot and killed Darshan Das while he was delivering a sermon in Southall. Two members of the congregation were also shot dead by Manjit Singh and Rajinder Singh in the incident. Both Manjit Singh and Rajinder Singh were sentenced in 1989 to life imprisonment for murder and other offences. See: [http://webarchive.nationalarchives.gov.uk/20110218200720/http://www.hmcourts-service.gov.uk/cms/144\\_14210.htm](http://webarchive.nationalarchives.gov.uk/20110218200720/http://www.hmcourts-service.gov.uk/cms/144_14210.htm).

<sup>3</sup> Ofcom interprets this to be reference to a revered Sikh figure who died in the mid-eighteenth century.

*the people who are watching at home – you’ve got the ability to be inspired by them. You don’t have to look 300 years in your history to find your heroes. Your heroes still stand here today. There’s one<sup>4</sup> in jail in Portsmouth today.”*

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*“What was amazing about what [Rajinder Singh and Manjit Singh] done, was that they done it living in the UK.”*

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*“No matter how tight the noose is...no matter how high or strong the wall is for [Rajinder Singh and Manjit Singh]...if in our lifetime, in our very own generation, we can have diamonds like these...”*

In addition, at the end of his speech, the speaker recited the following poem that he said he had written to commemorate the actions of Rajinder Singh and Manjit Singh:

*“Dazzling escapades of Sikh warriors in Punjab left an incredible mark;  
stories filtered through of triumph in the midst of the dark.  
Their sacrifice and martyrdom restored Sikh dignity and pride;  
these defenders of faith instilled a new powerful drive.  
Yet Sikhs outside of India were resigned to being a mere onlooker;  
Tears, anguish and prayer is all they could offer.  
But two young brave hearts, who resided in the UK,  
did the unthinkable and offered their heads on a tray.  
Currents of courage in the veins of Punjab’s freedom fighters  
ran through Rajinder Singh and Manjit Singh, history’s new raiders.  
Casting off pleasures provided by the Western sphere,  
abandoning home, work and all those who were dear.  
Embarking their journey on a path hidden in a strand of hair;  
accepting their destiny, steadfast, unyielding with nothing but prayer.  
Devising a plan to obliterate the fountainhead of terror, Darshan Das,  
a puppet of fascist India, who dubbed Guru Sahib Ji<sup>5</sup> an outmoded farce.  
By placing his feet on our Sahib Guru<sup>6</sup>, the eternal King of Kings, the eternal  
king of the universe;  
this epitome of...Satan’s very son, with sin, had immersed  
Sikhs across the UK staged conferences in dismay;  
but these two tigers had nothing to say  
Comprehending Sahib Bindranwale’s<sup>7</sup> revolver’s solution;  
the time was right for Darshan Das’s execution.  
Attending a seminar in which the crowd jeered at Sikhi,  
Dashan Das took centre stage to begin his speech.  
‘Evade this, you dog!’ shouted Manjit Singh,*

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<sup>4</sup> i.e. one of Manjit Singh and Rajinder Singh is currently being held in Portsmouth prison.

<sup>5</sup> One of Sikhism’s founding Gurus.

<sup>6</sup> Ibid.

<sup>7</sup> Jarnail Singh Bindranwale was the leader of the Sikh militants who occupied the Golden Temple in Amritsar in June 1984. In response to this occupation, the Indian Army launched its controversial military operation, known as Operation Bluestar, which resulted in a number of deaths.

*releasing a barrage of bullets towards a man who said he could dodge anything.  
There lay slain the self-proclaimed king, drenched in blood;  
the mission was complete; rather than flee, with honour they stood.  
Sentenced to life incarceration by the courts of the land;  
but bestowed with guidance and valour by Guru Ji's hand.  
Offered parole on the condition that they [i.e. Rajinder Singh and Manjit Singh] express remorse and guilt,  
these same soldiers replied: 'For anyone disrespecting Gurbani<sup>8</sup>, more blood will be spilt'.  
While in prison, they have lived like shining stars, by raining money for charity;  
stunned and in awe, prison warders have never seen characters so saintly.  
To protect the basic tenets of Guru Nanak Sikhism;  
these two tigers sacrificed it all for a lifetime in prison.  
We salute you for restoring our glory and pride of the Khalsa<sup>9</sup>;  
you have inspired our generation..."*

Ofcom considered<sup>10</sup> that the material raised issues warranting investigation under Rule 2.3 of the Code. This was, in summary, because the speaker made comments warmly praising the convicted killers of a religious figure, which might be regarded as offensive. Rule 2.3 states:

"In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context...Appropriate information should also be broadcast where it would assist in avoiding or minimising offence."

Ofcom therefore requested comments from the Licensee on how the material complied with this rule.

## **Response**

The Licensee said that: the programme "happened inside a place of worship on the 25th anniversary of a historical event" which was a "very exceptional and isolated act"; and "the context is well defined and the consequences are well explained". Regis 1 also added that "martyrs for one community may be the killers for another community but the law takes its own course". Therefore, in relation to Rule 2.3, the Licensee said that the material was justified by the context. However, Regis 1 said: "In such a situation, though, it would almost be impossible for us to predict the nature of the content." The Licensee added that: "[W]ith hindsight, however, some editing would have diffused the situation."

By way of mitigation, Regis 1 said that Sangat TV is a "wholly owned subsidiary of a Charitable Trust and we have no intentions to ever hurt anyone's feelings but our aim is always to educate the society and enhance community cohesion and promote the

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<sup>8</sup> Any writing of the Sikh Gurus.

<sup>9</sup> Ofcom understands this to be a Sikh term for "pure".

<sup>10</sup> Ofcom did also consider the content in the programme against Rule 3.1 of the Code which states: "Material likely to encourage or incite the commission of crime or lead to disorder must not be included in television or radio services." After very careful assessment, however, Ofcom concluded that the material did not on balance raise issues under Rule 3.1.

related social values like patience, tolerance and forgiveness". In addition, the Licensee added that "the majority of our programmes are making our audience aware of the benefits of gaining divine wisdom".

In terms of steps it would take to improve compliance, Regis 1 said that: "As a precautionary measure live broadcasting of such programmes in future would be minimised."

## Decision

Under the Communications Act 2003, Ofcom has a 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 harmful and/or offensive material". This objective is reflected in Section Two of the Code.

In reaching this Decision, Ofcom has taken careful account of the broadcaster's and audience's right to freedom of expression. This is set out in Article 10 of the European Convention on Human Rights ("ECHR"). Article 10 provides for the right of freedom of expression, and, as the Legislative Background to the Code states, "encompasses the audience's right to receive creative material, information and ideas without interference" by public authority.

Ofcom has also had regard to Article 9 of the ECHR, which states that everyone "has the right to freedom of thought, conscience and religion". This Article goes on to make clear that freedom to "manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of...health...or for the protection of the rights and freedoms of others".

We recognise that as a channel targeted at the Sikh community, Sangat TV will want to produce content concerning issues that are of interest to Sikhs. This could include the killing of a controversial figure within the Sikh community, such as Darshan Das. We also recognise that poetry and songs have a long tradition of dealing with the full range of human experiences and emotions. Further, just because content in lyrical form praises individuals who have committed criminal acts, this does not necessarily mean that there has been a breach of Section Two of the Code.

Rule 2.3 requires that broadcasters ensure that the broadcast of potentially offensive material must be justified by the context.

Ofcom first considered whether this material had the potential to cause offence.

Ofcom noted that in this programme the speaker delivered a speech in English about the religious leader Darshan Das on the 25th anniversary of his death. We also noted that the speaker made a number of highly positive references to: Manjit Singh and Rajinder Singh, the convicted killers of Darshan Das; and the fact that they had killed Darshan Das. For example, the speaker referred to Manjit Singh and Rajinder Singh as: "*diamonds*"; "*heroes*" who would inspire the "*youngsters*"; and "*two young brave hearts*". The speaker also referred positively to the killing of Darshan Das by Manjit Singh and Rajinder Singh as: "*justice*"; a "[d]azzling escapade"; as having restored "*glory and pride*"; and as having "*inspired our generation*". In addition, the speaker said "*the time was right for Darshan Das's execution*" and that "[f]or anyone disrespecting Gurbani, more blood will be spilt".

In Ofcom's opinion, a speech containing numerous positive references to two living convicted killers and the act of murder that they had committed had the potential to cause serious offence. We considered that the potential offence in this case was increased by the fact that several times the speaker positively referred to the fact that the killing of Darshan Das had taken place in the UK, and that his killers were residing in a UK prison. We considered that these references served to make Rajinder Singh and Manjit Singh and their actions of extreme violence more immediate and relevant to a UK audience. For example, the speaker said the following:

*"What was amazing about what [Rajinder Singh and Manjit Singh] done, was that they done it living in the UK."*

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*"Your heroes still stand here today. There's one in jail in Portsmouth today."*

For these reasons Ofcom concluded that the speaker's remarks were clearly capable of causing offence. We therefore went on to consider whether the material was justified by the context.

Ofcom recognises that: the Sikh religion reveres a number of sacred figures who are regarded as martyrs by their followers, in that they have died or undergone suffering, including imprisonment, in the name of the Sikh religion; and that martyrdom represents an important element in this faith. Further, we also recognise that it has been a feature of many religions, including Sikhism, that: figures or groups originating from within a particular religious tradition have sought to reinterpret or provide new teaching about aspects of that religion; and that this has sometimes elicited negative and occasionally violent reactions from members of the established religious tradition. Ofcom accepts that since Sangat TV is aimed at the Sikh community, it might wish to broadcast content about Darshan Das and make reference to the individuals who were responsible for his death. Some Sikh martyrs are widely and universally accepted as martyrs by Sikhs, beginning in the 17th century. It appears to Ofcom that there is less consensus in the Sikh community about the status of certain Sikhs who have died, or undergone suffering, including imprisonment, in the name of the Sikh faith more recently. In this case, the programme included various statements and a long poem that praised Manjit Singh and Rajinder Singh and the fact that they killed Darshan Das, a figure whom a number of Sikhs believe misinterpreted their religion. It appears that a number of Sikhs regard Manjit Singh and Rajinder Singh as martyrs, for going to prison for killing Darshan Das.

Consistent with both the broadcaster's right to freedom of expression and right to freedom of thought, conscience and religion, the Code does not prevent broadcasters from referring to individuals whom some followers of a particular religion may consider to have taken legitimate violent action against persons with an alternative interpretation of that religion. However, in doing so, broadcasters must ensure that any references to individuals who have carried out extreme acts of violence, including murder, are sufficiently contextualised to ensure compliance with the Code.

In this case, we noted that the speaker made a number of statements and recited a lengthy poem in which he strongly praised the two Sikh individuals, Manjit Singh and Rajinder Singh, who had murdered Darshan Das in November 1987. The speaker spoke directly to camera and to the audience in the Gurdwara. In Ofcom's opinion these factors increased the impact of his words and so the potential for offence. At no

point was the speaker challenged to justify his unqualified praise for Manjit Singh and Rajinder Singh, by referring for example to the fact that these men had committed murder on UK soil. We considered that the vast majority of a UK audience would find such positive references to convicted murderers still serving their prison sentences for their crimes to be highly offensive. Further, we noted that neither the Licensee nor the speaker himself attempted to place the speaker's positive statements in praise of Manjit Singh and Rajinder Singh in context by acknowledging, for example, that irrespective of the fact that many in the Sikh community would disagree with Darshan Das and what he preached, it was wholly unacceptable for Manjit Singh and Rajinder Singh to have murdered him. For these reasons Ofcom considered that this content was not sufficiently contextualised to justify the potential offence caused by such unqualified praise for two convicted killers, currently imprisoned for their crimes. In reaching our Decision, we took careful account of the Licensee's representations. First, the Licensee said that the programme was contextualised because it "happened inside a place of worship on the 25th anniversary of a historical event" which was a "very exceptional and isolated act"; and "the context is well defined and the consequences are well explained". We strongly disagreed with the Licensee's arguments in this regard. We noted that the programme: was broadcast from a place of worship; referred to what some may have considered to be a "very exceptional and isolated act", but only indicated implicitly the consequences of what Manjit Singh and Rajinder Singh had done (i.e. imprisonment). These factors did not, however, sufficiently contextualize the offence in this case. This was because the praise lavished by the speaker on Manjit Singh and Rajinder Singh for their criminal actions far outweighed the implicit reference to their imprisonment.

Further, although the speaker was referring to a historical event, we considered it likely that many in the audience would have, or would know people who have, direct memories of the killing of Darshan Das having taken place. This is in our view was likely to have made the events that were being referred to more immediate and therefore the potential for offence was likely to have been higher.

Second, Regis 1 said that: "[M]artyrs for one community may be the killers for another community but the law takes its own course." As already mentioned above, we recognise that the concept of martyrdom is a feature of the Sikh religion. We also recognise that in this case the programme did indicate that Manjit Singh and Rajinder Singh were imprisoned for the crime of murdering Darshan Das. However, we reiterate that, if broadcasters refer to "martyred" individuals, they must do so in a way that ensures that any potential offence caused by such references is justified by the context.

Third, the Licensee said that: "In such a situation, though, it would almost be impossible for us to predict the nature of the content." Ofcom recognises the practical issues for compliance with the Code presented by live programming. However, the Licensee allowed the material to be broadcast uninterrupted and provided no evidence to Ofcom whatsoever to show that it had any proper procedures or systems in place for monitoring live content to ensure compliance with the Code or to take urgent and robust action when required. For instance, in the circumstances it would have been open to the Licensee to have considered intervening in or terminating the live transmission, or broadcasting an apology during the same programme.

Fourth, Regis 1 pointed to the fact that Sangat TV is a "wholly owned subsidiary of a Charitable Trust" and said that it has "no intentions to ever hurt anyone's feelings but our aim is always to educate the society and enhance community cohesion and promote the related social values like patience, tolerance and forgiveness", and that

“the majority of our programmes are making our audience aware of the benefits of gaining divine wisdom”. We noted these points and in particular we recognise the practical challenges facing licensees in the not-for-profit sector. However, we question how the broadcasting of these offensive remarks could have enhanced community cohesion and tolerance, and underline that every Ofcom licensee must comply with the Code. If necessary and appropriate, licensees should seek professional compliance advice or informal guidance from Ofcom in order to help them meet their obligations under the Code.

We noted that the Licensee said that “with hindsight, however, some editing would have diffused the situation”; and that as “a precautionary measure live broadcasting of such programmes in future would be minimised”. Nonetheless, we concluded that the programme included potentially offensive content that was clearly not justified by the context. We have therefore recorded a breach of Rule 2.3.

On balance we do not consider that this breach is so serious as to warrant consideration for the imposition of a statutory sanction. However, we expect the Licensee to take any necessary action urgently to ensure that its processes are sufficiently robust to ensure compliance with Rule 2.3 of the Code. **If it fails to do so, and similar Code breaches occur, Ofcom puts the Licensee on notice that it will consider whether a further possible statutory sanction is warranted, pending the result of a separate sanctions process which is currently ongoing.**

### **Breach of Rule 2.3**

## In Breach

### Bangladesh Nationalist Party item

NTV, 19 January 2013, 21:00

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#### Introduction

NTV is a news and general entertainment channel broadcast in Bengali and serving a Bangladeshi audience. The licence for NTV is held by International Television Channel Europe Ltd (“ITCE” or “the Licensee”)<sup>1</sup>.

A complainant drew Ofcom’s attention to what appeared to be an advertisement placed on NTV by a Bangladeshi political party, the Bangladesh Nationalist Party. The complainant alleged that the advertisement promoted a political body in breach of the ban on political advertising contained within the Communications Act 2003 (“the Act”).

The item lasted 30 seconds. The voiceover was in Bengali. The images consisted only of a single slate carrying Bengali text and three small pictures – one of the Bangladesh Nationalist Party logo and two photographs of figures associated with the party.

The item was placed during an advertising break, between advertisements for plastic food containers and a firm of accountants. Nothing on screen or in voiceover distinguished the item from the advertisements that came before and after it.

Ofcom obtained a translation of the item. In English it said:

*“Initiated by All Europe [Bangladesh Nationalist Party] and managed (organised) overall by Bangladesh Nationalist Party Austria, celebration of 77th birthday of Shaheed [martyr] President Ziaur Rahman, a discussion meeting of All Europe BNP and a Human Rights seminar will be held at 4pm on 20 January in Vienna.*

*All expatriate Bangladeshis are invited to attend these events.*

*And at 11am on 21 January, a human chain will be formed in front of the United Nations office at Vienna along with organization of protest gathering and submission of memorandum demanding the implementation of Care Taker Government, release of all leaders including General Secretary (Bangladesh Nationalist Party) Fakhruul Islam Alamgir, and withdrawal of false cases against Mahmudur Rahman, the editor of Amardesh.”*

Viennese addresses were given for the two events.

On seeking the Licensee’s comments in respect of the terms on which the item was included in its schedule, ITCE told us that no money or other consideration had been offered in return for its broadcast.

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<sup>1</sup> A service under the name NTV has been operated previously by a licensee called Runners TV Limited. This other service is also a Bengali language channel and continues to operate, but under a new and different name. Findings regarding the NTV service licensed to Runners TV Ltd that have appeared in previous issues of Ofcom’s Broadcast Bulletin do not therefore relate to the separate and unconnected NTV service that is the subject of the present Finding.

Further, ITCE said, the item was not programming:

“It was not made by us and nor do we have any relationship with the makers. It was broadcasted purely as information only and as a community event and hence why we did not ask for or receive any payments.”

However, taking into account the circumstances of the item’s appearance, and in particular that it was not paid for, Ofcom took the view that it must be regarded as programming.

Given that in Ofcom’s view the item was programming and that it contained an apparently unmediated and uncontextualised message from the Bangladesh Nationalist Party, we considered that it raised issues warranting investigation under the following rules of the Code:

Rule 5.5: “Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service...This may be achieved within a programme or over a series of programmes taken as a whole.”

“Meaning of “series of programmes taken as a whole”:

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

Rule 9.1: “Broadcasters must maintain independent editorial control over programming.”

Rule 9.2: “Broadcasters must ensure that editorial content is distinct from advertising.”

We therefore sought ITCE’s comments on how the items complied with the above rules.

## **Response**

The Licensee said that it “can understand” why there could be “questions about impartiality”. ITCE said it was not its intention to include partial material and it had therefore instructed its staff not to broadcast any items that could be considered partial in respect of political or controversial matters.

Further, ITCE said, any items about which there may be doubts will be seen by the Licensee’s Chief Executive so that they can be reviewed before broadcast.

ITCE told us that it takes matters of impartiality very seriously and that circumstances of this sort would not arise again.

## **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 the

special impartiality requirements set out in section 320 of the Act are complied with. This standard is 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: “Television advertising...shall be readily recognisable and distinguishable from editorial content...and...shall be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means.” The purpose of this distinction is to prevent viewers being confused or misled about the status and purpose of the material they are watching and to protect viewers from surreptitious advertising. It also prevents editorial content from being used to circumvent the restrictions on advertising minutage.

The AVMS Directive requirements are therefore reflected in, among other Code rules, Rule 9.2, which requires that editorial content is kept distinct from advertising.

The Act also requires Ofcom to have regard to the “desirability of maintaining the independence of editorial control over programme content”. This is reflected in Rule 9.1 of the Code.

Ofcom therefore considered the item’s compliance with Rules 5.5, 9.1 and 9.2 of the Code.

#### Rule 5.5

This rule states:

“Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service...This may be achieved within a programme or over a series of programmes taken as a whole.”

It is not part of Ofcom’s remit to question or investigate the validity of the political views expressed in a case like the current one, but to require the broadcaster to comply with the relevant standards in the Code. The Code does not prohibit broadcasters from discussing any controversial subject or including any particular point of view in a programme. To do so would be an unacceptable restriction on a broadcaster’s freedom of expression.

However, 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 with 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.

In this case, Ofcom firstly had to ascertain whether the requirements of Section Five of the Code should be applied, i.e. whether the content in this case was dealing with matters of political or industrial controversy and/or matters relating to current public policy. In this case, we noted that the item was a brief statement that alerted viewers of NTV to the existence of a forthcoming meeting and demonstration. Just because editorial content refers to political parties or politicians does not necessarily mean that the rules in Section Five are applicable. Further, in judging the applicability of Section Five in any case, Ofcom will take into account the manner in which political issues are dealt with, and how they are presented within programming.

In this case, we considered that the item, although brief, clearly touched on matters of political controversy and matters of current public policy in Bangladesh, namely, a demand for the installation of a new, temporary government (the present government is formed by the Awami League; the Bangladesh Nationalist Party is the main opposition) and intervention in the detention of, or judicial proceedings against, those individuals mentioned in the item.

We considered that these statements appeared to convey particular viewpoints on these controversial issues. In our view, the fact that the statements were presented as standalone pieces of editorial content articulating a single policy viewpoint would have helped to increase their likely effect on viewers, namely members of the Bangladeshi community in the UK and Europe.

Given the above, Ofcom therefore considered that this content dealt with matters of political controversy and matters relating to current public policy. Rule 5.5 was therefore applicable.

In assessing whether due impartiality has been preserved, the term “due” is important. Under the Code, it means adequate or appropriate to the subject and nature of the programme. Therefore, “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 every 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.

In this case, Ofcom considered that the item under consideration was a self-contained expression of specific viewpoints on particular matters of political controversy and matters relating to current public policy. The item did not contain any alternative views which could be reasonably and adequately classed as critical or counter to the Bangladesh Nationalist Party’s demand for a change in the government of Bangladesh, or that party’s position on the propriety and motives of action taken against Fakhruul Islam Alamgir and Mahmudur Rahman.

As such we considered that the item, when taken in isolation, gave one-sided views on such matters and did not contain any alternative viewpoints. Further, the Licensee did not provide any evidence of alternative views on these issues in a series of programmes taken as a whole (i.e. more than one programme in the same service, editorially linked, dealing with the same or related issues within an appropriate period and aimed at a like audience).

In reaching our Decision, we took account of the Licensee’s explanation of the item publicising a community event. Ofcom recognises that broadcasters serving

particular communities, such as in this case the expatriate Bangladeshi community, will want to provide content that presents issues of topical interest to their target audience. However, in doing so such broadcasters must ensure that if editorial content touches on matters of political controversy and matters relating to current public policy, alternative viewpoints must be reflected, as appropriate.

Given the above, Ofcom therefore concluded that the item breached Rule 5.5.

### Rule 9.1

This rule states:

“Broadcasters must maintain independent editorial control over programming.”

Ofcom was concerned that, in the absence of any editorial treatment, programme time had effectively been donated to a third party’s interests. Where a political message is included in programming (generally in news or current affairs programming), it will usually be clearly contextualised – for example to illustrate a party’s or pressure group’s stance – labelled and included only as far as editorial justification allows. This last consideration will generally mean both that the item (advertisement, campaign video, etc) will not be shown in full, and that the programme will offer a clear explanation for the reason for its inclusion.

In Ofcom’s view, by broadcasting this item of a political nature that apparently reflected one political group’s interests – whether general aims or particular events and meetings – without any editorial context or analysis, ITCE had failed to maintain independent editorial control. Ofcom therefore concluded that Rule 9.1 had been breached by the inclusion of the item.

### Rule 9.2

This rule states:

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

The item was a self-standing message, of short duration, which appeared to be broadcast as part of a series of advertisements in an advertising break between programmes. As such, it resembled an advertisement very strongly. In fact, in Ofcom’s view, it was very much more likely to be understood by viewers as an advertisement than as a programme.

In view of the item’s presentation within the Licensee’s schedule Ofcom concluded that it was not distinct as programme material and that Rule 9.2 had been breached.

This case is of considerable concern to Ofcom. Under section 321 of the Act, political bodies are banned from advertising altogether on Ofcom-licensed services (both TV and radio). This ban applies to political bodies from anywhere in the world. In the course of Ofcom’s investigation ITCE did not seek to argue that it was unaware of the political nature of the organisation mentioned in the item. Further, Ofcom has reported previously on breaches of the prohibition on political advertising and breaches of Section Five that concerned Bangladeshi political bodies and of which

the Licensee ought to have been aware<sup>2</sup>.

Ofcom noted the Licensee's comments that it would no longer broadcast directly political material and that it had installed a referral system for questionable content.

**However, Ofcom is putting ITCE on notice that it would treat any similar future breaches as extremely serious, and that any future such breaches may be considered for the imposition of statutory sanctions.**

### **Breaches of Rules 5.5, 9.1 and 9.2**

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<sup>2</sup> See:

Issue 197 of Ofcom's Broadcast Bulletin, 9 January 2012,  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb197/obb197.pdf>;

Issue 220 of Ofcom's Broadcast Bulletin, 19 March 2012,  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb202/obb202.pdf>;

Issue 221 of Ofcom's Broadcast Bulletin, 7 January 2013,  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb221/obb221.pdf>; and

Issue 224 of Ofcom's Broadcast Bulletin, 18 February 2013,  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb224/obb224.pdf>.

## In Breach

### Sponsorship credits

*NTV, 20 May 2012 to present, various dates*

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#### Introduction

NTV is a news and general entertainment channel that is broadcast in Bengali and serves the Bangladeshi community in the UK and Europe. The licence for NTV is held by International Television Channel Europe Limited (“ITCE” or “the Licensee”)<sup>1</sup>.

The channel broadcasts a delayed feed of content originally broadcast on NTV in Bangladesh.

While assessing NTV’s content relating to a complaint on a separate matter, Ofcom noted the following sponsorship credits:

#### National Exchange Company

The sponsorship credit for this international money transfer service has been broadcast on NTV since 20 May 2012. The credit consisted of the following:

Visual: An animated image of the globe. To the left of the globe were dollar bank notes, and to the right were Euro bank notes.

On-screen text: The following on-screen text appeared around the globe:  
  
*“NEC”, “Money Transfer”, “Send Now”, “Receive Now” and “National Exchange Company S.R.L.”*

The credit also stated the company’s address, two telephone numbers, fax number, email address and website address.

Voiceover: *“Sponsored by National Exchange Company Italy.”*

#### Dolphins

The sponsorship credit for this shop has been broadcast on NTV since 1 October 2012. The credit consisted of the following:

Visual: A shot of hair oil products on a shelf in a shop followed by footage of a shopkeeper serving a customer.

On-screen text: *“Dolphins”, “Call: [telephone number]” and “Watney Market”.*

Voiceover: *“Sponsored by Dolphin Store.”*

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<sup>1</sup> A service under the name NTV has been operated previously by a licensee called Runners TV Limited. This other service is also a Bengali language channel and continues to operate, but under a new and different name. Findings regarding the NTV service licensed to Runners TV Ltd that have appeared in previous issues of Ofcom’s Broadcast Bulletin do not therefore relate to the separate and unconnected NTV service that is the subject of the present Finding.

### Human Relief Foundation

The sponsorship credit for this charity was broadcast on NTV between 1 August 2102 and 15 November 2012. The credit consisted of the following:

Visual: A man giving to a woman a sack of aid supplies with Human Relief Foundation branding on it. The Human Relief Foundation logo appeared in the top left-hand corner.

On-screen text: “[www.hrf.org.uk](http://www.hrf.org.uk)” and “Call on: [telephone number]”.

Voiceover: “Sponsored by Human Relief Foundation.”

### Global Bengali Marriage

The credit for this online match-making service was broadcast on NTV between 13 August 2012 and 13 November 2012.

The credit opened with the voiceover: “Sponsored by Global Bengali Marriage dot com.” A photo of a couple on the left and a photo of a woman on the right appeared on screen. In between the photos appeared the following text: “The No. 1 Matrimony Portal For Bengalis Across the Globe” and “[www.globalbengalimarriage.com](http://www.globalbengalimarriage.com)”. The concluding shot included the following on-screen text: “Free registration [Bengali text]” and “Log in [Bengali text] [www.globalbengalimarriage.com](http://www.globalbengalimarriage.com)”.

### Islamic Relief and Simple Call

In the content Ofcom viewed, this charity and phone company were both credited as programme sponsors. The Islamic Relief element of the credit was broadcast on NTV between 12 October 2012 and 19 November 2012, while the Simple Call element of the credit was broadcast between 1 May 2012 and 30 November 2012.

The voiceover stated: “Sponsored by Islamic Relief”, followed by the Islamic Relief credit which contained the charity’s logo and the following on-screen text: “Give a little love”, “Qurbani”<sup>2</sup>, “Call [telephone number]” and “[islamic-relief.org.uk](http://islamic-relief.org.uk)”.

The voiceover continued: “And [sponsored by] Simple Call. It’s simple.” This was followed by the Simple Call credit which contained the Simple Call logo and an image of a man and next to him the on-screen text: “Keep your loved ones closer.” The concluding shot contained an image of a mobile phone and the on-screen text: “simple call”, “...it’s simple” and in the bottom left-hand corner “OUT NOW Download your free Simple Call App”.

### AN Express and Think Debt

In the content Ofcom viewed these international money transfer service and debt advice and management service were both credited as programme sponsors. The AN Express element of the credit was broadcast on NTV between 1 October 2012 and 8 January 2013, while the Simple Call element of the credit was broadcast between 1 October 2012 and 30 November 2012.

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<sup>2</sup> Qurbāni is Arabic for the sacrifice of a livestock animal during the Islamic festival of Eid-ul-Adha (Festival of Sacrifice).

The credit opened with the voiceover: *“Sponsored by AN Express”*. The credit included a spinning sphere with bank notes from different countries on it. This was followed by a shot which showed the sponsor’s logo and stated in both voiceover and on-screen text: *“An express your trusted remittance partner.”* The sponsor’s website address and telephone number appeared on screen throughout the credit.

The voiceover continued: *“And [sponsored by] Think Debt. Let us get you debt free.”* The on-screen text stated: *“Think debt. Let us get you debt free”, “Call [telephone number]”* and *“www.thinkdebt.co.uk”*.

### M1 Claims

M1 Claims is a no-win, no-fee compensation service. The credit has been broadcast on NTV since 1 May 2012.

The voiceover in the credit stated: *“Sponsored by M1 Claims.”* This was followed by the M1 Claims credit, during which the sponsor’s logo appeared in the bottom left-hand corner, while its address, telephone number, email address and website address appeared in on-screen text. The credit also included the on-screen text: *“Regulated by Ministry of Justice”*, with the Ministry of Justice’s logo.

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

- Rule 9.22: “Sponsorship credits must be distinct from advertising. In particular:
- (a) Sponsorship credits broadcast around sponsored programmes must not contain advertising messages or calls to action. Credits must not encourage the purchase or rental of the products or services of the sponsor or a third party. The focus of the credit must be the sponsorship arrangement itself. Such credits may include explicit reference to the sponsor’s products, services or trade marks for the sole purpose of helping to identify the sponsor and/or the sponsorship arrangement.”

We therefore asked the Licensee for its comments as to how the content complied with Rule 9.22(a).

### **Response**

ITCE stated that it was not aware that sponsorship credits could not contain a call to action, but that all its sponsorship credits will now be reviewed to ensure compliance with the Code.

The Licensee said that it had worked in association with a media consultancy which “was responsible” for ensuring that sponsorship credits complied with the Code. ITCE explained that it had terminated its contract with this company on 1 January 2013<sup>3</sup>.

The Licensee apologised for the errors and stated that it is “doing its utmost best to follow all the rules and regulations to the best of...[its] knowledge”.

ITCE explained that it has been making all the necessary changes in order to ensure that its output is compliant with the Code. It said that it is now “constantly monitoring”

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<sup>3</sup> This was prior to Ofcom’s investigation into the sponsorship credits detailed in this Finding.

its output to pick up problematic sponsorship credits and any other problematic content.

## 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 “the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with”. The rules in Section Nine of the Code, among others, reflect this objective.

The EU Audiovisual Media Services Directive limits the amount of advertising a broadcaster can transmit and requires that advertising is kept distinct from other parts of the programme service. Sponsorship credits are treated as part of the sponsored content and do not count towards the amount of airtime a broadcaster is allowed to use for advertising. To prevent credits effectively becoming advertisements, and therefore increasing the amount of advertising transmitted, broadcasters are required to ensure that sponsorship credits do not contain advertising messages.

Rule 9.22(a) of the Code therefore requires that sponsorship credits broadcast around sponsored programmes must not contain advertising messages or calls to action, or encourage the purchase or rental of the products or services of the sponsor or a third party. The focus of the credit must be the sponsorship arrangement itself and references to the sponsor’s products, services or trade marks should be for the sole purpose of helping identify the sponsor and/or the sponsorship arrangement.

In particular, Ofcom’s published guidance on Rule 9.22(a) includes the following:

- “claims about the sponsor’s products/services (in particular those that are capable of objective substantiation) are likely to be considered as advertising messages and therefore should not be included in sponsorship credits. Examples include: claims about market leadership...the use of promotional language and/or superlatives to describe the sponsor and/or its products and services...”;
- “credits that contain direct invitations to the audience to contact the sponsor are likely to breach the Code”; and
- “if sponsorship credits contain contact details, these should be minimal”.

### National Exchange Company

Ofcom considered the on-screen text “*Send Now*” and “*Receive Now*” to be calls to action to use the sponsor’s service.

In addition, Ofcom considered the amount of contact information, i.e. the company’s address, two telephone numbers, fax number, email address and website address, exceeded the minimum information necessary to allow viewers to make initial contact with the sponsor.

The call to action and the excessive contact details caused the credit to breach Rule 9.22(a).

### Dolphins

The on-screen text “*Call*: [telephone number]” directly invited the viewer to contact the sponsor and was therefore a clear call to action, in breach of Rule 9.22(a).

### Human Relief Foundation

The on-screen text “*Call on*: [telephone number]” directly invited the viewer to contact the sponsor and was therefore a clear call to action, in breach of Rule 9.22(a).

### Global Bengali Marriage

Ofcom considered the on-screen text “*The No. 1 Matrimony Portal For Bengalis Across the Globe*” to be a claim about the sponsor’s service which was capable of objective substantiation. The claim amounted to an advertising message. We also considered the on-screen text “*Free registration*” promoted the cost of the sponsor’s service and encouraged viewers to try it. Further, the on-screen text “*Log in www.globalbengalimarriage.com*” directly invited the viewer to contact the sponsor and was therefore a clear call to action.

The advertising messages and call to action caused the credit to breach Rule 9.22(a).

### Islamic Relief and Simple Call

Ofcom considered the on-screen text “*Call* [telephone number]” directly invited the viewer to contact the sponsor, Islamic Relief, and was therefore a clear call to action.

In addition, we considered the line “*Simple Call. It’s simple*”, which was included in the credit in voiceover and on-screen text, was a claim about the ease of use of the sponsor’s service and was therefore an advertising message. Further, we considered the on-screen text, “*OUT NOW Download your free Simple Call App*”, to be a clear call to action to the viewer to download the sponsor’s app.

The calls to action and advertising message caused the credit to breach Rule 9.22(a).

### AN Express and Think Debt

Ofcom considered the line “*an express your trusted remittance partner*” which was provided in both voiceover and on-screen text served only to promote the sponsor, AN Express, as being a reputable company. Ofcom therefore considered the line to be an advertising message.

Ofcom considered the on-screen text “*Call* [telephone number]” directly invited the viewer to contact the sponsor, Think Debt, and was therefore a clear call to action.

The advertising message and call to action caused the credit to breach Rule 9.22(a).

### M1 Claims

Ofcom could find no editorial justification for the inclusion of the on-screen text “*Regulated by Ministry of Justice*” accompanied by the Ministry of Justice’s logo. Its inclusion is not subject to any mandatory requirement and, in Ofcom’s view, served only to promote the impression of the sponsor being a reputable company. Ofcom

therefore found its inclusion amounted to an advertising message in breach of Rule 9.22(a).

### Conclusion

Ofcom was concerned that in its response on how the above credits complied with Rule 9.22(a), the Licensee did not refer to the advertising messages and was unaware of the prohibition of calls to action in sponsorship credits. As detailed above, a number of these credits also contained advertising messages which are prohibited by Rule 9.22(a). Ofcom has published a number of findings in relation to sponsorship credits in recent years, and has made clear the need for broadcasters to exercise care to ensure that credits do not contain advertising messages.

Ofcom therefore expects NTV to take the necessary steps to ensure the compliance of its sponsorship credits and will continue to monitor this.

Ofcom noted the Licensee had worked in association with a media consultancy which it said “was responsible” for ensuring that sponsorship credits complied with the Code. Licensees should be aware that as a condition of their licence to broadcast they are responsible for ensuring that content included in their Licensed Service complies with the Code and other relevant rules. While licensees may choose to employ the services of compliance consultants, ultimate responsibility for compliance with the Code and other relevant rules lies with the licensee.

### **Breaches of Rule 9.22(a)**

## In Breach

### Fox Extra

*Fox News, 5 February 2013, 21:40*

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#### Introduction

Fox News Channel is a news channel originating in the USA, broadcast on the Sky digital satellite platform and licensed by Ofcom in the UK. The licence for this channel is held by Fox News Channel Limited Liability Company (“Fox News” or “the Licensee”). *Fox Extra* is an additional news package reporting on lighter issues unrelated to current news events, which Fox News inserts into its international feed in place of the advertisements which are transmitted in its American feed.

This three minute *Fox Extra* insert consisted of the presenter Anna Kooiman talking to a vet, Dr Ernie Ward, about the how to care for older pets, in particular dogs and cats. The presenter defined older pets as being 11 years old and over.

In the studio, Ms Kooiman and Dr Ward stood behind a demonstration table on which the following items were visible in all long shots during the item:

- two unbranded cat toys;
- a 7.3kg pack of IAMS Senior Plus cat food and a 7.3kg pack of IAMS Senior Plus dog food, with both foods also displayed in bowls in front of the packs;
- a folded IAMS branded mat; and
- four pet toys, three of which were unbranded, while the branding on the fourth was not clearly visible.

The discussion in the item covered how to maintain or control your pet’s mental function, nutrition, obesity and exercise.

When discussing maintaining your pet’s mental function, Dr Ward briefly pointed to the two unbranded toys on the table as examples of toys which are designed to maintain the mental function of pets by keeping their minds engaged.

Secondly, the issue of nutrition was discussed as follows:

Dr Ward: *“As pets age just like we do, there are changes in digestion, metabolism, and so what we now have are things like the Senior Plus [Dr Ward points to the pet food packs which are seen in medium close-up shot, gradually zooming into a close-up shot]. We have these new formulations that address those needs because as they age they need more antioxidants, they need more omega-3 fatty acids, glucosamine, chondroitin for those achey joints. So I think this is really neat, this Senior Plus sort of fills this void for dogs and cats that are 11 and older that we’ve never seen before.”*

AK: *“And how important is portion control and having certain times that pets eat?”*

- Dr Ward: *“Anna, that’s huge because obesity now affects about 54 per cent of all dogs and cats, so feeding a well balanced good diet [Dr Ward gestures towards the IAMS pet food on the table] and the proper amount [very close-up shot of the IAMS pet food packs focusing on the part of the packs that detail the health benefits of the products, which gradually zooms out] as prescribed by your vet is the key to a long life.”*
- AK: *“And just like in humans our animals can suffer all sorts of problems associated with obesity, like what?”*
- Dr Ward: *“So many! Type 2 diabetes, high blood pressure, arthritis, heart disease, cancer. I mean the list goes on and on.”*
- AK: *“Even tearing ligaments and tendons, huh?”*
- Dr Ward: *“Absolutely.”*
- AK: *“Costly surgery.”*
- Dr Ward: *“If your pet is carrying too much weight, you’re paying too much in vet bills.”*
- AK: *“And right, what else do we have here? [Medium close-up shot of the IAMS pet food packs]”*
- Dr Ward: *“Exercise, exercise, exercise. [The camera pans slowly past the IAMS pet food packs in a close-up shot to focus on the pet toys]”*

The presenter and the vet continued to talk briefly about exercise and exercise toys.

A complainant was concerned about the amount of focus placed on IAMS pet food during the item.

The Licensee confirmed to Ofcom that neither it, the programme producer, nor any person connected with either<sup>1</sup>, received payment or other valuable consideration for the inclusion of the references to IAMS during the item, and that therefore the references had not been subject to any product placement arrangement.

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

- Rule 9.4: “Products, services and trade marks must not be promoted in programming.”
- Rule 9.5: “No undue prominence may be given in programming to a product, service or trade mark. Undue prominence may result from:
- the presence of, or reference to, a product, service or trade mark in programming where there is no editorial justification; or
  - the manner in which a product, service or trade mark appears or is referred to in programming.”

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<sup>1</sup> “Connected person” is defined in Part 1 of Schedule 2 of the Broadcasting Act 1990.

We therefore asked the Licensee for its comments on how the material complied with Rules 9.4 and 9.5.

## **Response**

Fox News stated that no products, services or trade marks were promoted during the item. The Licensee submitted that Dr Ward discussed mental function, nutrition and activity for older pets, and while he recommended certain characteristics in toys and foods for these animals, the segment did not promote any particular product, service or trade mark. Fox News said that Dr Ward noted what older pets' diets should consist of (e.g. antioxidants, omega-3 fatty acids, and glucosamine) and merely referenced a type of pet food as one option for pet owners.

Fox News submitted that no product, service or trade mark was given undue prominence during the item. It said that there were no on-screen graphics to highlight any product, service or trade mark. Various products were displayed on a demonstration table, none of which were presented, appeared, or referenced more prominently than the other.

The Licensee also explained that this particular Fox Extra episode is no longer in the Fox News feed that airs in the UK.

## **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 specific standards objectives, one of which is "that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with".

Article 19 of the EU Audiovisual Media Services Directive ("the AVMS Directive") requires, among other things, that television advertising is kept visually and/or audibly distinct from programming. The purpose of this is to prevent programmes becoming vehicles for advertising and to protect viewers from surreptitious advertising. Further, Article 23 of the AVMS Directive requires that television advertising is limited to a maximum of 12 minutes in any clock hour.

The above requirements are reflected in, among other rules, Rule 9.4 of the Code, which states that products, services or trade marks must not be promoted in programming. Rule 9.5 of the Code prohibits products, services or trade marks being given undue prominence in programming.

Undue prominence can arise from the inclusion in a programme of a reference to a product, service or trade mark and/or from the manner in which the reference is made.

In this case, we noted the Licensee's submission that no product, service or trade mark was highlighted, promoted or given undue prominence. Further, we noted that the Licensee argued that: "Various products were displayed on a demonstration table, none of which were presented, appeared, or referenced more prominently than the other." We disagreed.

Ofcom was concerned by the manner in which IAMS was referred to both visually and verbally during the item. The packs of IAMS Senior Plus pet food on the demonstration table were in vision throughout much of the item and were seen in

medium close-up and close-up shots (even when the focus of the discussion was exercise rather than nutrition). In addition, when talking about the importance of pet nutrition, Dr Ward specifically referred to and endorsed IAMS Senior Plus as a product that addresses the needs of older pets:

*“What we now have are things like the Senior Plus [Dr Ward points to the IAMS Senior Plus pet food packs which are seen in medium close-up shot, gradually zooming into a close-up shot]...So I think this is really neat, this Senior Plus sort of fills this void for dogs and cats that are 11 and older that we’ve never seen before.”*

No other pet foods were referred to during the item. Ofcom considered that the manner in which the references to IAMS pet food were included in the item provided undue prominence to the brand, in breach of Rule 9.5 of the Code.

Further, Ofcom noted that Dr Ward has an arrangement with IAMS to educate people about the importance of appropriate nutrition for pets 11 years old and over, and to endorse its Senior Plus pet food<sup>2</sup>. Therefore, Ofcom considered that Dr Ward’s endorsement of IAMS Senior Plus pet food in this broadcast was, in all likelihood, as a result of his commercial relationship with the IAMS brand. Further, Ofcom noted that this commercial relationship was not referred to during the item and therefore was not made clear to the viewer. Instead, Dr Ward was presented as an independent veterinary expert.

Ofcom noted that during the item, Dr Ward made specific references to the health benefits of IAMS Senior Plus pet food:

*“We have these new formulations that address those needs because as they age they need more antioxidants, they need more omega-3 fatty acids, glucosamine/chondroitin for those achey joints. So I think this is really neat, this Senior Plus sort of fills this void for dogs and cats that are 11 and older that we’ve never seen before.”*

Ofcom therefore concluded that the content promoted and endorsed IAMS Senior Plus pet food, in breach of Rule 9.4 of the Code.

### **Breaches of Rules 9.4 and 9.5**

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<sup>2</sup> See: <http://www.iams.com/about-us/iams-news/iams-senior-plus-release>.

## Advertising Scheduling Findings

### In Breach

#### Breach findings table

*Code on the Scheduling of Television Advertising compliance reports*

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Rule 4 of the Code on the Scheduling of Television Advertising (“COSTA”) states:

“... time devoted to television advertising and teleshopping spots on any channel must not exceed 12 minutes.”

Channel	Transmission date and time	Code and rule / licence condition	Summary finding
BuzMuzik	3 January 2013, 01:00	COSTA Rule 4	BuzMuzik exceeded the permitted advertising allowance on this date by 50 seconds  <b>Finding: Breach</b>

## Fairness and Privacy cases

### Upheld

#### **Complaint by Mr Gary Cooper on his own behalf and on behalf of The Leeds United Supporters' Trust**

*The Chairman's Interview, Yorkshire Radio, 15 and 29 February 2012*

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#### **Summary**

Ofcom has upheld this complaint of unjust or unfair treatment and unwarranted infringement of privacy in two programmes broadcast by Yorkshire Radio made by Mr Gary Cooper on his own behalf and on behalf of The Leeds United Supporters' Trust ("the LUS Trust").

These programmes included interviews with Mr Ken Bates, the Chairman of Leeds United Association Football Club ("LUFC"), who discussed with the programme's presenter topics relating to the club and football in general. In particular, Mr Bates commented on criticism and demonstrations held by the LUS Trust about the running of the club by its management. Mr Bates also commented on the LUS Trust's Chairman, Mr Cooper, and referred to the number of times in the past year that Mr Cooper had actually attended a "home" game. Mr Bates said that he had gained this information from the club's "computer".

Mr Cooper complained that Mr Bates used his own, self-controlled radio station, Yorkshire Radio, to launch personal attacks on Mr Cooper and the LUS Trust and that he was not given a right to respond to the comments made by Mr Bates in the programmes. Mr Cooper also complained that his privacy was unwarrantably infringed in that Mr Bates had searched LUFC's computer database for personal information about Mr Cooper and subsequently disclosed that information in the programmes.

Ofcom found that:

- Mr Bates' comments about Mr Cooper were likely to have materially or adversely affected listeners' views of Mr Cooper and the LUS Trust in a way that was unfair to them. It also considered that Mr Bates had taken advantage of his position as a company director of Yorkshire Radio and, ultimately, its owner, to use the programmes as a vehicle to air his views about Mr Cooper and the LUS Trust. On this basis, it was also incumbent on the broadcaster to have provided Mr Cooper an appropriate and timely opportunity to respond to comments made by Mr Bates in the programmes.
- Mr Cooper had a legitimate expectation of privacy in the circumstances of this particular case and the broadcaster's right to freedom of expression (as well as that of Mr Bates) did not outweigh the intrusion into Mr Cooper's privacy. Ofcom concluded that Mr Cooper's privacy was unwarrantably infringed in connection with the obtaining of material included in the programmes and in the programmes as broadcast.

## Introduction

Yorkshire Radio is a local digital radio station which broadcasts live coverage of all Leeds United Association Football Club (“LUFC”) first-team games, music and predominantly sport-related programming. Yorkshire Radio can be received in the Yorkshire, Lincolnshire and north Midlands areas of England.

On 15 and 29 February 2012, Yorkshire Radio broadcast editions of its regular programme *The Chairman’s Interview*, in which the LUFC Chairman, Mr Ken Bates, discussed with the presenter topics relating to the club and football in general. One topic discussed was criticism about the management of the club by the Leeds United Supporters’ Trust (“the LUS Trust”)<sup>1</sup>. Mr Bates addressed this criticism in the programme broadcast on 15 February 2012, and said the following:

*“So I think we will now find out who truly loves their club and those who profess to. And over the next few weeks we’re going to examine the credentials of these people who like to make a lot of noise to see how much they love the club. But their Chairman [i.e. the LUS Trust’s Chairman, Mr Gary Cooper], I’ve just been looking at our computer, he’s a season ticket holder this year, this season, who didn’t come at all last season – his excuse to me when I quizzed him about it a year ago was “family commitments”. Well that’s as maybe, it hardly makes [him] justified or qualified to claim to speak for the ordinary fans, does it? The Vice-Chairman lives in America. He came to two play-off matches, I think [20]06, [20]08 – I may have got the years wrong, but the [inaudible] are right. Remember, these are based on our computer which says tickets were bought in these people’s names. I think it’s not just about putting your money where your mouth is, but putting your body where your mouth is and actually turn up for a game.”*

In the programme broadcast on 29 February 2012, Mr Bates again talked about the LUS Trust and said that their actions [e.g. staging demonstrations outside the football ground on match days] were jeopardising potential sponsors and investment. Mr Bates also said that the LUS Trust consisted of a “*bunch of self-appointed, self-important people*” who were “*an irritant to the majority of Leeds fans*”. He went on to say:

*“I should mention the Chairman [of the LUS Trust], a Mr Gary Cooper; I understand he’s an IT technician so he’s never had to run a business and make a profit and be accountable. He didn’t come to a game last season. He’s bought a season ticket this year and stated that he would not be coming next year, so who does he think he is? Who does he think he represents? Who does he speak for? Nobody, except himself. And another member of the Board – their so-called Board – lives in America and, according to our computer records, in his own name, he’s only come to two games in the last six years, and they were both play-off semi finals. So, there’s a loyal supporter for you.”*

Following the broadcast of the programme on 29 February 2012, Mr Cooper, the Chairman of the LUS Trust, complained to Ofcom that he and the LUS Trust were treated unjustly or unfairly in the programmes as broadcast and that his privacy was unwarrantably infringed in connection with obtaining material included in the programmes and in the programmes as broadcast.

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<sup>1</sup> According to its own website, the LUS Trust is “an independent, democratic, not-for-profit co-operative organisation, committed to providing a voice for Leeds United fans all over the world”.

## Summary of the complaint and broadcaster's response

### Unjust or unfair treatment

In summary, Mr Cooper complained that both he and the LUS Trust were treated unjustly or unfairly in the programmes as broadcast in that:

- a) The Chairman of LUFC used his own, self-controlled radio station to launch a personal attack on Mr Cooper and the LUS Trust, which Mr Cooper represents.

Before addressing the particular elements of Mr Cooper's complaint, Yorkshire Radio explained in summary that LUFC (which owns and operates the football club) and Yorkshire Radio Limited (which owns and operates the radio station) are subsidiaries of Leeds City Holdings Limited ("Leeds City Holdings"), which is majority-owned by Mr Bates. Mr Bates is also Chairman of LUFC and a director of Yorkshire Radio. It said that the weekly interviews with Mr Bates formed part of the station's remit to keep LUFC fans up-to-date with developments at the club and that it was in his capacity as Chairman of LUFC, rather than his capacity as a director of Yorkshire Radio, that Mr Bates discussed current issues and news concerning the club and football matters in general.

By way of background, Yorkshire Radio said that the LUS Trust was one of a number of LUFC supporter's groups and that Mr Cooper (and the LUS Trust through him), a vocal figure in the media, had led a call for a change of control of the club and had been vociferous in his criticism of Mr Bates. It also said that Mr Cooper had organised protest marches to the club's stadium and on-line campaigns.

In response to the complaint itself, Yorkshire Radio said that Mr Bates commented on Mr Cooper and the LUS Trust's campaigns, as was his right, and that this was of obvious public interest to the fans and others interested in the club. It said that the presenter was not aware of what Mr Bates planned to say before either of the interviews, though it said that his comments appeared to be a perfectly acceptable response to Mr Cooper and the LUS Trust's very public criticisms and attacks on him and the board of LUFC. Yorkshire Radio said that this was entirely legitimate and it was entirely appropriate for it to broadcast Mr Bates' replies.

Yorkshire Radio said that Mr Bates' response was entirely "on point" in commenting on Mr Cooper's credentials to attack him and the LUFC management. It said that it understood that LUFC had approximately 13,000 season ticket holders, over 20,000 members of its official supporters' organisation and an average home match attendance rate of about 23,000. In contrast, the LUS Trust claimed to have 350 shareholder members and approximately 5,000 or more members (according to a LUS Trust press release dated 24 April 2012). However, it was not known how many of these members actually supported its campaigns. Yorkshire Radio said, therefore, that Mr Bates' view point was an entirely legitimate one and while his response was forthright, it did not include gratuitous or offensive language.

Yorkshire Radio said that Mr Cooper publicly stated in his profile on the LUS Trust website that: "*He attends home games regularly with his three eldest daughters.*" It said that while this may have been correct at the time it was originally written, it did not appear to be correct now. Yorkshire Radio said that Mr

Bates' comments about Mr Cooper's attendance were, therefore, relevant in relation to his claim.

- b) Mr Cooper said that he was not given a right to respond to the comments made by Mr Bates in the programmes.

In response, Yorkshire Radio said that it gave fans the opportunity to reply to material broadcast by it and that after every game it features an hour long 'phone in' programme in which callers often question the actions of the current LUFC management.

Yorkshire Radio said that it received an email on 1 March 2012 from Mr Cooper who said that he challenged the presenter to interview him "as chairman of [the LUS Trust] at a time to suit you with an independent observer present to ensure you don't edit out anything said". Yorkshire Radio said that it would have been irresponsible for it to have agreed to this, considering the language used in the email and the condition not to edit anything out of the interview. The decision therefore was taken not to conduct an interview on those conditions. Yorkshire Radio said that Mr Cooper could have replied using Yorkshire Radio's hour long 'phone-in' programme of which he should have been aware.

#### Unwarranted infringement of privacy

Mr Cooper complained that his privacy was unwarrantably infringed in connection with obtaining material included in the programmes in that:

- c) Mr Bates had searched LUFC's computer database for personal information about Mr Cooper.

In response, Yorkshire Radio said that Mr Bates referred in his first interview on 15 February 2012 to looking at "*our computer*". It said that the presenter was unaware that Mr Bates had done this prior to the interview. By way of explanation, Yorkshire Radio said that the relevant computer system was not owned or operated by the station, but was owned and operated by LUFC. Mr Bates had said only that he has been "*looking at our computer*" which he was entitled to do as Chairman of LUFC for the purposes of LUFC's business.

Mr Cooper also complained that his privacy was unwarrantably infringed in the programmes as broadcast in that:

- d) Personal information accessed from the LUFC computer database was disclosed by Mr Bates in the programmes without Mr Cooper's permission.

Yorkshire Radio said that Mr Bates did not reveal any private or personal information about Mr Cooper. It said that the fact that Mr Cooper was a season ticket holder was not personal or private information and that anyone seeing his position as Chairman of the LUS Trust would immediately assume that he was a season ticket holder. As the Chairman of the LUS Trust, Yorkshire Radio said that it would be remarkable and noteworthy if Mr Cooper was not a season ticket holder.

Yorkshire Radio said that the claim that Mr Cooper had not attended any match during the previous season was not personal or private information that Mr Cooper had given LUFC. It stated that it understood that it was information about who had bought match tickets from LUFC's direct ticket sales. It also said that the

reference to “*family commitments*” came from a conversation Mr Bates had had with Mr Cooper some while ago and was not information from a computer system at all (and this was reflected by Mr Bates’ comments in the first interview).

Yorkshire Radio said that the information broadcast was plainly warranted in the circumstances as being in the public interest as part of Mr Bates’ reply to Mr Cooper’s attacks on him and LUFC’s management. Its broadcast was also in the public interest with regard to what appeared to be an inaccuracy in Mr Cooper’s personal profile on the LUS Trust website in his claimed attendance at matches.

Having considered the written submissions of the parties in this case, Ofcom prepared a Preliminary View that Mr Cooper’s complaint should not be upheld. The Preliminary View was based upon the complaint and the response to it provided by the broadcaster. Ofcom’s Preliminary View was sent to both the complainant and the broadcaster for representations.

### **Representations on Ofcom’s initial Preliminary View**

In commenting on the Preliminary View, Mr Cooper’s main points and Yorkshire Radio’s responses were, in summary, as follows.

#### Unjust or unfair treatment

Mr Cooper said that Ofcom had failed repeatedly to distinguish those instances in which Mr Bates’ comments were purported statements of fact, rather than Mr Bates’ personal opinion. This distinction was critical because false or incomplete representation of the facts differed substantially from expressions of opinion. Mr Cooper said that Mr Bates was free to express his opinions on events surrounding the football club, however, he was not free to misrepresent or present incomplete information. Mr Cooper said that Mr Bates’ disclosure of his season ticket information was exceptionally misleading because season tickets are not the only means by which football fans attend matches. Football supporters regularly purchase tickets on an individual basis to home matches, as well as away matches. Furthermore, it is common practice for football supporters to attend matches using tickets purchased by others, including family members and friends. Mr Cooper said that Mr Bates’ remarks were imbued with a false sense of accuracy by Mr Bates’ remarks that “*I’ve been looking at our computer*”. Notwithstanding, whether actual match attendance has any relevance to public debate about the topics concerning the management and future of LUFC, Mr Bates’ incomplete statement was designed to mislead Yorkshire Radio listeners into believing that Mr Cooper did not attend matches.

Mr Cooper also said Ofcom’s Preliminary View that Mr Bates’ control of Yorkshire Radio was not material to the substance of the complaint was mistaken, and that it failed to take into account that Mr Bates’ control of Yorkshire Radio was so complete that Ofcom should not consider Mr Bates and Yorkshire Radio to be separate entities with respect to the complaint. Mr Cooper said that Mr Bates’ control had a direct effect on the nature of the programme, which was whatever Mr Bates wanted the programme to be.

In addition to his representations, Mr Cooper provided Ofcom with a copy of the judgment in a court case between Mr Melvyn Levi (a former LUFC director) and Mr Bates, Leeds United Football Club Limited and Yorkshire Radio (“the Levi

case”)<sup>2</sup>, which Mr Cooper believed had relevance to his complaint “in terms of the judge’s observations regarding Mr Bates’ use of Yorkshire Radio to pursue personal agendas”.

Mr Cooper said that Ofcom made the incorrect assumption, without evidence to support it, that listeners were familiar with the programme and its format. Nor was there any evidence to support a conclusion that listeners were familiar with Mr Bates, his persona, or his manner of responding and the veracity thereof. Mr Cooper also said that Ofcom incorrectly assumed that there “was a history of antagonism between the LUFC management and the LUS Trust” which again was not supported by any evidence.

Mr Cooper said that Ofcom had given inappropriate weight to its opinion that listeners were familiar with Mr Bates and his “blustery” style, and that listeners would either not believe him at all due to this familiarity, or would give less weight to his comments, even if they appeared to be factual in nature. This was not a proper basis for not upholding the complaint. Indeed, Mr Cooper said that the inference that Mr Bates might not have been credible lent additional weight to the need for Mr Cooper and LUS Trust to be allowed to respond to the same audience. Such an opportunity, Mr Cooper said, would have allowed the listeners to make up their own mind about whom to believe.

In summary and in response to Ofcom’s Preliminary View and Mr Cooper’s comments on it, Yorkshire Radio said that Mr Cooper claimed that the programmes misrepresented his attendance at LUFC matches, but nowhere in his submissions to Ofcom had Mr Cooper stated what he says are the correct facts with regard to his attendance at matches and other relevant matters. Therefore, Yorkshire Radio said that it was far from clear that anything said by Mr Bates was, in fact, incorrect or misleading, as Mr Cooper now contended.

An email dated 1 October 2012 was subsequently sent to Ofcom from Yorkshire Radio in which it provided an extract from a BBC Radio 5 Live<sup>3</sup> interview with Mr Cooper. In the interview, Mr Cooper stated that he did not “*take to heart*” any comments that Mr Bates had made about him and referred to Yorkshire Radio in this context. Yorkshire Radio said that Mr Cooper’s comments seemed to go against the substance of his complaint with Ofcom.

#### Unwarranted infringement of privacy

Mr Cooper said that Ofcom’s view that Mr Cooper had a limited expectation of privacy set a dangerous precedent and suggested that Mr Cooper’s history of purchasing tickets was not worthy of an expectation of privacy. Mr Cooper said that public debate over the operations and results of a football club are hardly dependent on match attendance, and Mr. Bates’ attempts to draw such a tenuous connection should not “eviscerate” privacy rights of LUFC customers.

Mr Cooper said the balance between the individual’s right to privacy versus the broadcaster’s right to freedom of expression reflected in the Preliminary View was

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<sup>2</sup> The judgment, handed down on 7 June 2012 in the Leeds County Court, ordered Mr Bates to pay Mr Levi damages of £10,000 for harassment. In brief, Mr Levi and his wife, made a number of allegations of harassment, one of which included the broadcasts of announcements on Yorkshire Radio (Levi v Bates [2012] EW Misc 9 (CC)).

<sup>3</sup> Broadcast on 27 September 2012.

an incorrect reading of the circumstances. He said that Mr Bates' control of Yorkshire Radio was so complete that he had used his radio station to release information that he would not be otherwise entitled to make public. Mr Cooper said that freedom of expression was not involved here, because Mr Bates' control of Yorkshire Radio was such that the programming was more in line with advertisements than with editorial expression.

Mr Cooper added that Ofcom's view that Yorkshire Radio should not be held responsible for the behaviour of contributors to its programming could not be maintained in light of the fact that Mr Bates has complete and total control of Yorkshire Radio. He said that the broadcaster's assertion that it was unaware that Mr Bates might reveal private information was disingenuous at the very least because it implied that the broadcaster might have refused to broadcast the information had it been so aware. Mr Cooper said that it defied common sense to accept a notion that a presenter would act in any way to stop the owner of the broadcaster from making comments on a programme played out on that broadcaster.

Mr Cooper concluded by stating that while Mr Bates was free to express his opinions on Mr Cooper and his views, what Mr Bates was not free to do was to reveal Mr Cooper's private information (i.e. his customer purchase history), or selectively disclose other confidential information in order to support his opinion.

In summary, Yorkshire Radio made the following representations on Ofcom's Preliminary View and Mr Cooper's comments.

Yorkshire Radio said that it and Mr Bates were not one and the same; they were separate legal entities and that Yorkshire Radio had final editorial control over what was and was not broadcast on the station. It stated that Mr Bates had never sought to override this.

Yorkshire Radio said that the fact that Mr Cooper was a season ticket holder was not private information and nor was his attendance record at LUFC's matches (particularly given his position as Chairman of LUS Trust, claims on his profile on the LUS Trust website, and his and LUS Trust's very public campaign against Mr Bates).

Ofcom, having had regard to the representations made by Mr Cooper and Yorkshire Radio on its initial Preliminary View on this complaint, concluded that the further points raised by Mr Cooper and the supporting material provided by him, and further information on the shareholding of Yorkshire Radio, merited Ofcom considering the complaint afresh.

Having considered the written submissions of the parties in this case, Ofcom prepared a revised Preliminary View that Mr Cooper's complaint should be upheld. The revised Preliminary View was based upon the complaint and the response to it provided by the broadcaster and the representations made by the parties on the initial Preliminary View.

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

In commenting on the revised Preliminary View, Mr Cooper's and Yorkshire Radio's responses (where directly relevant to the revised Preliminary View) were, in summary, as follows.

Mr Cooper said that both he and the LUS Trust agreed with Ofcom's revised Preliminary View to uphold the complaint against the two programmes broadcast by Yorkshire Radio. Mr Cooper said that the revised Preliminary View assessed correctly the degree of control Mr Bates exerted over the radio station and its programming and the lack of editorial efforts made by the station in respect of Mr Bates' "offending and misleading remarks". Mr Cooper said there was a sharp distinction between information in the public sphere and this case where the information was gleaned solely from a database in which he had a total expectation of privacy. Mr Cooper said that his privacy rights were violated and utterly disregarded for "improper purposes" and that a broadcaster's right to freedom of speech was not interfered with by the fact that they cannot use their customers' private information as they see fit.

Carter Ruck Solicitors ("Carter Ruck") submitted representations on behalf of its client, Yorkshire Radio, in respect of Ofcom's revised Preliminary View. Carter Ruck said that the Levi case was completely irrelevant to Mr Cooper's complaint. It said that the broadcasts relating to the Levi case were of an entirely different nature to the interviews with Mr Bates complained of and that they had nothing to do with the subject matter of the Levi case. Carter Ruck said that Mr Bates had denied pursuing any personal agenda and continued to do so.

Carter Ruck said that at no time over the five years in which *The Chairman's Interview* has been broadcast by Yorkshire Radio did Mr Bates improperly seek to interfere in the interviews, nor did he seek editorial control over the interview or how it was conducted. It said that it did not occur to the programme's presenter during the interviews that Mr Bates was improperly seeking to pursue personal agendas against anyone.

Carter Ruck said that Mr Bates' comments about Mr Cooper and the LUS Trust were his personal comments and were not the comments of Yorkshire Radio. It said that this was the point of the interview, namely to obtain the views of the LUFC chairman on matters concerning the club. It said that (as implicitly found in Ofcom's initial Preliminary View) Mr Bates' comments were not such that the presenter should have intervened.

Carter Ruck said that no regard had been given to the fact that from before February 2011 and until Mr Bates sold LUFC in December 2012 there were ongoing public exchanges between the complainant and Mr Bates. Had Mr Cooper and the LUS Trust not publicly campaigned against Mr Bates, Yorkshire Radio would have had no reason to raise their activities with Mr Bates and he would not have had a reason to respond in the way he did.

Carter Ruck said that it appeared from the revised Preliminary View that the complainant had disputed that there was any issue between Mr Cooper and the LUS Trust and Mr Bates prior to the broadcast of the programmes complained of. However, it said it was self evident from the public activities of Mr Cooper and the LUS Trust that the presenter would ask Mr Bates for his views on them.

Carter Ruck said that the comments made by Mr Bates were, in fact, mild in the world of football where views were often expressed in very trenchant terms. They were not a "personal attack" on Mr Cooper and/or the LUS Trust. Mr Bates' comments were plainly intended to question who they, in fact, represented in their campaign and their commitment and loyalty to LUFC. Carter Ruck said that although Mr Cooper made general claims that Mr Bates' comments were inaccurate and misleading, he did not directly deny the central claims, namely that he was not a

season ticket holder and was an extremely infrequent attendee at matches. Therefore, Carter Ruck said that it would appear that Mr Bates' factual claims were accurate and not misleading at all.

In relation to Mr Cooper not being offered a reply to Mr Bates' comments, Carter Ruck said that Yorkshire Radio did not consult Mr Bates about this decision. It said that as neither Mr Cooper nor the LUS Trust was being interviewed, they were not in a position to respond immediately. Mr Cooper had sent an 'inflammatory' email to Yorkshire Radio the day following the second broadcast and so was not permitted a right to reply. It said that the complainant had the means to respond if they had so wished and indeed they did so regularly through the press, their website and other activities making their displeasure of Mr Bates well known in and around Leeds.

Carter Ruck referred to comments made by Mr Cooper on BBC Radio 5 Live on 27 September 2012 in response to being asked for his views on Mr Bates. It quoted Mr Cooper by stating:

"Ken Bates has always been his own man. He's had an awful lot to say about different aspects of the support, about me personally but I really don't take any of that to heart at all. Ken's his own man; he'll say what he wants and he'll do what he wants...I respect his right to do that. Had Ken had a different approach or a different attitude I would really have enjoyed working with the man."

Carter Ruck said that in light of these comments, Mr Cooper could hardly continue to claim that he was upset about the broadcasts subject to his complaint and he also acknowledged Mr Bates' right to say what he said and that he did not take his comments to heart. Mr Bates had said what he said in defence of himself, whereas Mr Cooper and the LUS Trust were campaigning and organising protests against him.

Carter Ruck said that Ofcom should give very careful consideration to Yorkshire Radio's fundamental right of freedom of speech under Article 10 of the ECHR. It said that no fetter of this right is proportionate or necessary in this case and that the views expressed were entirely relevant to Mr Cooper's claimed authority to speak on behalf of fans of Leeds United. Carter Ruck concluded by stating that nothing material had changed since Ofcom's initial Preliminary View was made and that its client relied upon its outcome that the complaint should not be upheld.

Carter Ruck also questioned whether Mr Cooper's attendance at Leeds United football matches, or whether or not he was a season ticket holder, should be considered private information. Even if it was, its publication was in the public interest as it concerned whether LUS Trust's Chairman had attended any home games in the previous season and therefore had any authority to represent the views of ordinary fans of Leeds United.

### **Ofcom's 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 programmes, 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 provided by both parties. This included recordings of the relevant parts of the programmes as broadcast and both parties' written submissions. Ofcom also took careful account of the representations made by Mr Cooper and the broadcaster in response to being given the opportunity to comment on both Ofcom's initial and revised Preliminary Views. While Ofcom had attentive regard to these representations in finalising its decision, Ofcom concluded that the further points raised by the parties in reply to the revised Preliminary View did not materially affect the final outcome of the complaint.

### Unjust or unfair treatment

When considering complaints of unjust or unfair treatment, Ofcom has regard to whether the broadcaster avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of the Code.

- a) Ofcom first considered Mr Cooper's complaint that the Chairman of LUFC used his "self-controlled radio station" to launch "a personal attack" on him and the LUS Trust.

In determining this head of complaint, Ofcom had regard to Practice 7.9 of the Code which states that when 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 an individual or organisation.

The Code also recognises the importance of freedom of expression and the need to allow broadcasters the freedom in broadcasting programmes that include debate and comment on areas of local and specialised interest. However, in presenting material in such programmes, broadcasters must ensure that reasonable care is taken not to do so in a manner that causes unfairness to individuals or organisations.

Before considering whether or not Mr Bates' comments amounted to "a personal attack" on Mr Cooper and the LUS Trust which resulted in unfairness, Ofcom considered Mr Cooper's claim that Mr Bates had used "his own, self-controlled radio station" to launch the "personal attack" of which he complains.

Ofcom noted from Mr Cooper's original complaint that he did not provide Ofcom with any evidence to support his claim that Mr Bates had used his "self-controlled radio station" to make his comments. It also noted the response to the complaint from Yorkshire Radio that, although Mr Bates owned a majority shareholding of Leeds City Holdings, of which Yorkshire Radio and LUFC were subsidiary companies, Mr Bates' interview (as the LUFC Chairman) was a regular feature of the station's weekly schedule and was given in his capacity of the club's Chairman, rather than as a company director of the radio station.

Ofcom noted the comments made by the parties in their representations on Ofcom's Preliminary Views about Mr Bates' relationship with Yorkshire Radio. In particular, it noted Mr Cooper's reference to the judgment in the Levi case and the reference to Mr Bates' ownership of the radio station that Mr Cooper believed was relevant to his complaint. It was clear from Mr Cooper's representations that

he believed that Mr Bates was in total control of Yorkshire Radio and that he had a direct effect on the nature of its programmes. Ofcom considered the Levi case and in particular the extent that Mr Bates (as a majority shareholder in the companies concerned in the court case) could exert influence or control over those companies. Ofcom noted, with particular reference to Yorkshire Radio, that the judge concluded that as a matter of fact in that case both Mr Bates and LUFC had “procured” the radio station to broadcast announcements about the claimant in the case that amounted to harassment, and that the motivation for this had been a personal grudge that Mr Bates held against the claimant in the case that had arisen from business dealings between them in 2004.

In light of the further representations made by the parties to the initial Preliminary View and the remarks of the judge in the Levi case (which Ofcom acknowledges is a case not connected with Mr Cooper or the LUS Trust), Ofcom examined in detail the corporate structure of the companies that were connected to this complaint through Mr Bates<sup>4</sup>. From information provided to Ofcom by Leeds United Football Club Limited in relation to Yorkshire Radio’s broadcasting licence, the corporate structure was, at the of the broadcast of the programmes subject to Mr Cooper’s complaint, as follows:

- 95% of Yorkshire Radio was owned by Leeds United Media (the remaining 5% being owned by two individual minority shareholders);
- 100% of Leeds United Media was owned by Leeds City Holdings Limited;
- 72.85% of Leeds City Holdings Limited was owned by Outro Limited (the remaining share percentages being owned by four separate companies, the largest shareholding being just 7.71%); and
- 100% of Outro Limited was owned by Mr Bates and his wife.

The net effect of these holdings was that Mr Bates and his wife owned 72.85% of Leeds City Holdings Limited, which in turn owned 95% of Yorkshire Radio.

Ofcom noted from Yorkshire Radio’s first statement in response to the complaint and from the information about the corporate structure of companies associated with Yorkshire Radio, that Mr Bates was a director of Yorkshire Radio at the time the programmes were broadcast and owned the majority shareholding of Leeds City Holdings (through his company Outro Limited) which in turn was the parent company of Leeds United Media, the majority shareholder of Yorkshire Radio. Ofcom therefore takes the view that Mr Bates was in a position to be able to exert a degree of influence or control over the radio station. Ofcom considered that the extent of this influence or control was evident from the Levi case Mr Cooper relied on in his representations to Ofcom to demonstrate that Mr Bates had used his influence over Yorkshire Radio to pursue personal agendas; and in which Mr Bates had been found, albeit in different circumstances, to have used Yorkshire

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<sup>4</sup> In a letter to Ofcom (dated 14 February 2013), Carter Ruck explained that Yorkshire Radio was now majority owned by GFH Capital Limited and that Mr Bates no longer owned shares in the station or any company that had ownership of it. It also said that Mr Bates was no longer on the board of Yorkshire Radio and did not hold any executive position in any other company with ownership of it. His sole remaining position is that of non-executive chairman of LUFC and he will retire from this position at the end of the current 2012-2013 football season to become President of LUFC.

Radio on a previous occasion as a vehicle to make comments motivated by personal grievances or animosity towards others.

In light of the further information received, Ofcom considered that Mr Bates was a central and influential figure in the management structure of Yorkshire Radio at the time the programmes were broadcast. It was against this background that Ofcom considered whether Mr Bates' comments in the programmes amounted to unfairness to Mr Cooper and the LUS Trust.

Ofcom noted Carter Ruck's representations on Ofcom's revised Preliminary View that the Levi case was irrelevant to Mr Cooper's complaint. As noted above, the Levi case was referred to by Mr Cooper in his representations, and in the light of the remarks made by the judge in that case, Ofcom investigated the corporate structure of Yorkshire Radio. Having considered the structure of the companies associated with Yorkshire Radio, Ofcom concluded that Mr Bates exerted a degree of influence or control over Yorkshire Radio such that, in the circumstances of this case, the comments made by Mr Bates had the potential to cause unfairness to Mr Cooper. For this reason, Ofcom considered that Carter Ruck's representations on this point did not alter its view on this aspect of the complaint.

Ofcom noted Carter Ruck's representations that the comments were intended to question who Mr Cooper and/or LUS Trust represented and their loyalty to LUFC. Ofcom considered that Mr Bates' comments about Mr Cooper were intended to cast doubt on the credibility of Mr Cooper and the board members of the LUS Trust by questioning whether they had genuine motives to improve, and were actively committed to improving, the fortunes of the club and whether they were truly representative of the "ordinary fans". When taken in this context, Ofcom considered that the comments made by Mr Bates had the potential to materially and adversely affect listeners' perception and understanding of Mr Cooper, the organisation that he represented, and the position he held as its chairman. Ofcom therefore took the view that Mr Bates' comments were made with the intention of discrediting Mr Cooper in his capacity as the Trust's chairman.

Ofcom noted Carter Ruck's representations in relation to Mr Cooper's comments made in the BBC Radio 5 Live interview on 27 September 2012. Ofcom considered that Mr Cooper's complaint to Ofcom had not been that he was simply "upset" about Mr Bates' comments or had taken them "to heart", but rather that Mr Bates had used "his own, self-controlled radio station to launch a personal attack" and that he had not been given an opportunity to respond to it. The issue that Ofcom addressed in its consideration of the complaint was whether Mr Bates had taken advantage of his position as company director of Yorkshire Radio and as its ultimate owner, to use the two programmes complained about as a vehicle to air his views about Mr Cooper and the LUS Trust and, if so, this resulted in unfairness to them. Ofcom considered that the comments made subsequently by Mr Cooper did not materially affect the substance of Mr Cooper's complaint of unjust or unfair treatment as entertained by Ofcom. For this reason, Ofcom considered that Carter Ruck's representations on this point did not alter its view on this aspect of the complaint.

Having considered that Mr Bates' comments could result in unfairness to Mr Cooper, Ofcom had regard to whether the broadcaster took reasonable care to ensure that the material facts had not been presented, disregarded or omitted in a way that was unfair to Mr Cooper. Ofcom recognised that both programmes were broadcast live and that, to some extent, the broadcaster had little control

over what Mr Bates said in relation to Mr Cooper. However, Ofcom noted that at no time during the relevant parts of Mr Bates' interviews did the programme's presenter challenge or query Mr Bates' comments or question how he had obtained the information from the LUSFC "computer" that he used to attempt to discredit Mr Cooper. Ofcom noted too that in the programme the presenter did not intervene for the benefit of listeners, and that neither Mr Cooper nor a representative of the LUS Trust was present or available at that moment to respond to the comments or were invited to participate in a future edition of the programme to respond to the comments (also see head b) below). In these circumstances, Ofcom considered that the presenter's failure to query or, at least, make it clear to listeners that Mr Cooper was not able to respond to Mr Bates' remarks, demonstrated that the broadcaster had failed to take reasonable care to avoid unfairness to Mr Cooper. Ofcom considered that the availability of a subsequent "phone in" programme was not sufficient to provide Mr Cooper with an adequate means of response.

While Ofcom recognised that Mr Bates was entitled to his own point of view and his right to express it, it also considered that a position such as that occupied by Mr Bates should not be used in a way that could be reasonably considered as inappropriate. Ofcom considered that Mr Bates had taken advantage of his position as company director of Yorkshire Radio and as its ultimate owner, to use the two programmes complained about as a vehicle to air his views about Mr Cooper and the LUS Trust. Without any attempt by the presenter to counter the comments made by Mr Bates in the programmes, it appeared to Ofcom that Mr Bates could and did say what he wished without any balance or challenge from the subject of his comments or from the presenter.

Consequently, taking all the above factors into account, Ofcom considered that Mr Bates' comments, in the absence of appropriate context from the presenter, were likely to have materially or adversely affected listeners' views of the LUS Trust or Mr Cooper in a way that was unfair to them.

Ofcom found that there was unfairness to Mr Cooper and the LUS Trust in this respect.

- b) Ofcom next considered Mr Cooper's complaint that he was not given an opportunity to respond.

In considering this head of complaint, Ofcom had regard to Practice 7.11 of the Code 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.

Ofcom again considered the nature and character of the comments made by Mr Bates in the programmes and the context in which they were made (see head a) above). Ofcom considered that Mr Bates' comments were emotive and critical of both Mr Cooper and the LUS Trust, and, for the reasons given in the preceding head, could reasonably be considered to amount to significant allegations as envisaged by the provisions of the Code. In these circumstances, Ofcom considered that the broadcaster should have provided Mr Cooper with an appropriate and timely opportunity to respond to Mr Bates' comments made in the programmes.

Ofcom recognised however that in certain formats of programming, such as news reporting or live events, and in particular, live interviews and studio discussions, it

is not always possible for broadcasters to obtain responses from others prior to or during the broadcast of a programme. However, in such circumstances, Ofcom considers that when including material that has the potential to amount to a significant allegation, reasonable care must be taken by the broadcaster that the broadcast material is consistent with the requirements of the Code and that it does not mislead listeners or create unfairness to individuals or organisations.

In this particular case, Ofcom recognised that it was impracticable for the broadcaster to have given Mr Cooper an appropriate and timely opportunity to respond to Mr Bates' comments made in interview owing to the live format of the programmes. Nevertheless, there remained an obligation on the broadcaster to ensure that it avoided unjust or unfair treatment of individuals and organisations in programmes. Ofcom noted, as it did in head a) above, that at no stage during the interviews in either programme did the presenter make clear to viewers that neither Mr Cooper nor a representative from the LUS Trust were in a position (owing to them not being present) to respond to Mr Bates' criticism. Ofcom noted that on 1 March 2012, following the broadcast of the programme on 29 February 2012, Mr Cooper had sent an email to Yorkshire Radio in which he "challenged" it to an interview with him and an independent observer present to "ensure you don't edit out anything said". It noted too that it was because of this language that Yorkshire Radio decided it would be "irresponsible" for it to accept the interview on those terms and, in any event, Mr Cooper could have replied by calling into another programme. However, as noted above in head a), Ofcom considered that the availability of a subsequent "phone in" programme was not sufficient to provide Mr Cooper with an adequate means of response to Mr Bates' comments.

Ofcom considered that it was particularly important, given that Mr Bates' comments contained a significant criticism of Mr Cooper and questioned his credibility and reputation as the chairman of the LUS Trust, that the broadcaster ensured that Mr Cooper was offered an opportunity to respond to them. As it was, the comments made by Mr Bates went unchallenged and nothing was said by the presenter to make it clear to listeners that Mr Cooper had not had an opportunity to comment, and that the station might attempt to seek Mr Cooper's views in the phone in programmes that followed.

Taking all these factors above into account, Ofcom considered that it was not practicable (owing to the live broadcast format of the programmes) for the broadcaster to provide Mr Cooper with an opportunity to respond to Mr Bates' comments in the programmes themselves. However Mr Bates' comments amounted to significant allegations about Mr Cooper and the broadcaster failed to take reasonable care to avoid unfairness to him in failing to making it clear to listeners that Mr Cooper was not able to respond.

Ofcom found that there was unfairness to Mr Cooper in this respect.

#### Unwarranted infringement of privacy

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.

- c) In considering this head of complaint, Ofcom had regard to Practice 8.5 of the Code which states that any infringement in the making of a programme should be with the person's consent or otherwise be warranted. It also had regard to Practice 8.9 which states 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 Mr Cooper's privacy was unwarrantably infringed in the obtaining of material included in the programme as broadcast, Ofcom first considered the extent to which he had a legitimate expectation of privacy, in that the information about his match attendance and his season ticket holder status held in the LUFC database would not be obtained for use in the programmes.

Ofcom noted the comments made by Mr Bates in the programmes that referred to obtaining the information about Mr Cooper's past attendance at matches and current season ticket:

19 February 2012

*"I've just been looking at our computer, he's a season ticket holder this year, this season, didn't come at all last season[.]"*

*"Remember, these are based on our computer which says tickets were bought in these peoples' names [i.e. Mr Cooper and the Vice-Chairman of the LUS Trust]."*

29 February 2012

*"He [Mr Cooper] didn't come to a game last season. He's bought a season ticket this year and stated that he would not be coming next year, so who does he think he is?"*

Ofcom is not in a position to know specifically the purpose for which the information relating to Mr Cooper's season ticket and match attendance was held on the LUFC database, or whether or not Mr Bates, by virtue of his position as Chairman of LUFC, had legitimate access to the information held on the database. Nevertheless, Ofcom took the view that normally an individual may have an expectation that information held on a database for a particular purpose (i.e. a record of the purchase of a season ticket and a record of the match attendance of a season ticket holder) would not be accessed for the intended purpose of using that information to discredit or criticise him/her.

Ofcom also considered the nature of the information that Mr Bates had obtained. It took the view that, in itself, whether Mr Cooper had bought a season ticket and whether he had regularly attended matches the previous season was not information that could be reasonably considered as being particularly sensitive or private in nature deserving of the highest level of protection. However, Ofcom considered that this information was not readily available and that it was personal information held on a database. Whilst acknowledging that it was not the most personal, sensitive information, Ofcom considered nevertheless that Mr Cooper had a legitimate expectation of privacy in it. Therefore, given the circumstances in

which this information was obtained, Ofcom considered that Mr Cooper had a legitimate expectation of privacy regarding this information.

Having concluded that Mr Cooper had a legitimate expectation of privacy in relation to the obtaining of the material included in the programmes, Ofcom went on to consider whether any infringement into Mr Cooper's expectation of privacy was warranted. In doing so, Ofcom considered the broadcaster's competing right to freedom of expression and the audience's right to receive information and ideas without unnecessary interference.

Ofcom noted Yorkshire Radio's submission that it and the presenter had no prior knowledge that Mr Bates had obtained information about Mr Cooper from the LUFC database with the intention of using it in his interviews. Ofcom also considered that the broadcaster had not been in a position to prevent Mr Bates obtaining the information in the manner he did. Ordinarily, Ofcom recognises that if broadcasters were to be held accountable for the behaviour of contributors to programmes prior to the broadcast of programmes that was outside their control, this would be a disproportionate restriction on the broadcasters' right to freedom of expression.

In this case, Ofcom acknowledged that the comments relating to Mr Cooper (who claimed on the LUS Trust website to attend "home games regularly") were made by Mr Bates, who was invited to discuss issues relating to LUFC in a live interview, and not the programme's presenter. It also considered that Mr Bates had a right to impart his personal viewpoint and to address criticism levelled at him and the LUFC management without undue constraint. However, Ofcom considered that in the particular circumstances of this case, there was no justification for Mr Bates using his position as the Chairman of LUFC (and the club's majority shareowner through his majority shareholding in Leeds City Holdings) to access and obtain information about Mr Cooper, which was held on a database for a particular purpose and was not available publicly, with the aim of using it if he decided to in subsequent broadcast interviews for the intended purpose of using that information to discredit or criticise Mr Cooper. For these reasons, Ofcom considered that the obtaining of this information by Mr Bates in the manner he did was a disproportionate interference with Mr Cooper's expectation of privacy and it was not warranted.

Therefore, on balance, and taking account of all the circumstances of this case, Ofcom concluded that the broadcaster's right to freedom of expression (as well as that of Mr Bates) and the audience's right to receive and impart information and ideas without interference, in the circumstances of this particular case, did not outweigh Mr Cooper's legitimate expectation of privacy in respect of the information complained of. Ofcom concluded therefore in the particular circumstances of this case that there had been an unwarranted infringement of Mr Cooper's privacy in the obtaining of the material complained of and subsequently included in the programmes.

- d) Ofcom considered Mr Cooper's complaint that his privacy was unwarrantably infringed in the broadcast of the programme in that personal information accessed from the LUFC database was disclosed without his permission.

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.

In considering whether or not Mr Cooper's privacy was unwarrantably infringed in the broadcast of the programmes, Ofcom first considered the extent to which he had a legitimate expectation of privacy that details relating to his season ticket and match attendance taken from an LUFC database would not be disclosed in the programmes.

Again, as in head c) above, Ofcom recognised that the manner in which information is held on a database for a particular purpose, can give rise to an individual having a legitimate expectation of privacy as to the use of that information. It considered too the nature of the information about Mr Cooper that Mr Bates revealed in the programmes. Ofcom took the view that, in itself, the information was not what could be reasonably considered as being particularly private or sensitive in nature deserving of the highest level of protection. However, Ofcom considered that this information was not readily available and it was personal information held on a database. Whilst not the most personal, sensitive information, Ofcom considered that Mr Cooper had a legitimate expectation of privacy in it. Therefore, in these circumstances, Ofcom considered that Mr Cooper had a legitimate expectation of privacy.

Having concluded that Mr Cooper had a legitimate expectation of privacy in relation to the information about him being included in the programmes, Ofcom went on to consider whether any infringement into Mr Cooper's expectation of privacy was warranted. In doing so, Ofcom considered the broadcaster's competing right to freedom of expression and the audience's right to receive information and ideas without unnecessary interference.

As already considered in head c) above, Ofcom considered the nature of the comments made by Mr Bates in both programmes and the context in which they were given. Ofcom noted Yorkshire Radio's submission that it and the presenter had no prior knowledge that Mr Bates would disclose the information about Mr Cooper obtained from the LUFC database in the live programmes. Ofcom also considered that the broadcaster had not been in a position to have prevented Mr Bates from disclosing the information in programmes in the manner he did. Ofcom recognised that there was some public interest locally and to those with a special interest in LUFC, in the programmes including the views of the LUFC chairman about the club and the criticisms levelled against its management. Ofcom acknowledged too that Mr Bates had a right to impart his personal viewpoint and to address criticism he and the LUFC management had received in the public arena from Mr Cooper, the LUS Trust and other supporters' groups without undue constraint. Ofcom noted the representations made by Carter Ruck that Mr Bates' comments sought to challenge Mr Cooper's claimed authority to speak on behalf of Leeds United fans.

However, Ofcom took the view that the purpose and intention behind Mr Bates' disclosure of this information was to discredit Mr Cooper in his position of Chairman of the LUS Trust and that it had been obtained by Mr Bates for this purpose. In Ofcom's view, there was no justification for Mr Bates using his position as Chairman of LUFC (nor for using his control over Yorkshire Radio) to broadcast the information for the purpose of discrediting Mr Cooper by means of critical comments made in broadcast interviews on Yorkshire Radio. For these reasons, Ofcom considered that the broadcast of this information by Mr Bates in the two programmes was a disproportionate interference with Mr Cooper's expectation of privacy and it was not warranted.

Therefore, on balance, and given all the factors referred to above, Ofcom concluded that the broadcaster's right to freedom of expression (and that of Mr Bates) and the audience's right to receive information and ideas without interference, in the circumstances of this particular case, did not outweigh the legitimate expectation of privacy that Mr Cooper had in relation to the information about him that was disclosed in the programmes without his consent. Ofcom concluded that there had been an unwarranted infringement of Mr Cooper's privacy in the broadcast of the programmes.

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

## Upheld

### Complaint by Ms B

*The Sketchbook Killer, Crime & Investigation Network, 7 July 2012*

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#### Summary

Ofcom has upheld Ms B's complaint of unwarranted infringement of privacy in the programme as broadcast.

The programme gave a retrospective account of the crimes of the convicted serial killer, Mr John Sweeney, known as the "Sketchbook Killer". The complainant, Ms B, who is Mr Sweeney's daughter, did not appear in the programme, however other members of Mr Sweeney's family did and they recalled their memories of him. During this part of the programme, family photographs were shown. One of the photographs broadcast in the programme was of Ms B when she was a child. Another photograph was a group of people including Ms B and her son. Both photographs were shown only very briefly. Ms B complained that these photographs had been included in the programme without her consent.

Ofcom considered that Ms B had a legitimate expectation of privacy in relation to the broadcast of the photographs included in the programme and also had a legitimate expectation to privacy in relation to the disclosure of the close family connection she had to Mr Sweeney. In these circumstances, Ofcom found that the broadcaster's and audience's right to freedom of expression did not outweigh Ms B's legitimate expectation of privacy. Ofcom decided that the broadcast of the photographs of the complainant and of her son was not warranted without her consent and that there was an unwarranted infringement of her privacy in the programme as broadcast.

#### Introduction

On 7 July 2012, the Crime and Investigation Network broadcast *The Sketchbook Killer*, a programme about convicted serial killer Mr John Sweeney who had murdered and dismembered the bodies of two former girlfriends before disposing of their remains in canals in Rotterdam and London. He was known as "The Sketchbook Killer" because of the drawings he kept in a sketchbook which were "inspired" by the murders he committed. The programme included interviews with detectives who investigated the murders and criminal psychologists who gave their opinions on Mr Sweeney's character and motives for the killings.

The programme also included interview footage of Ms Natasha Iarrobino, described in the programme as Mr Sweeney's step-daughter, who recalled her encounters with Mr Sweeney when he would visit the family home. During this part of the programme, Ms Iarrobino was shown looking through what appeared to be a number of family photographs. One of the photographs shown was a portrait of two young children, a boy and a girl, which was shown in close up for approximately five seconds. Another photograph, which appeared to be a family group of four people, was shown in which a young child could be seen. While the photographs were shown, Ms Iarrobino described occasions when Mr Sweeney would arrive unannounced, outside the family home in Northampton. While this second photograph was not shown in close up, and appeared on screen for less than half a second, the faces of those in it could be seen.

The complainant is a close family member of Mr Sweeney and was the girl featured in the first photograph shown in close up. Ms B's son was the young child shown in the second photograph.

Following the broadcast of the programme, Ms B complained to Ofcom that her privacy was unwarrantably infringed in the programme as broadcast.

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

Ms B complained that her privacy was unwarrantably infringed in the programme as broadcast in that a photograph of her when she was eight years old was broadcast, along with a photograph of her son without her knowledge or consent.

Ms B said that she had chosen to remain unidentified with respect to her relationship to Mr Sweeney and that she wanted to protect her young children from knowing about him. She said that the programme's inclusion of the photographs had taken away her right to privacy.

By way of background, Ms B said that although she appeared younger in the photograph, old school friends had recognised her from the photograph. These friends had had no knowledge of her relationship to Mr Sweeney until they saw her in the photograph in the programme.

In response, A and E Networks UK ("A&E"), who hold the licence for the Crime and Investigation Network, said that both Mr Sweeney's son, Mr Michael Sweeney, and Ms Iarrobino, were heavily involved in the making of the programme and their contributions formed significant eye witness accounts throughout it. They both also willingly gave the programme makers some old family photographs, a couple of which were eventually used in the final, broadcast version of the programme.

A&E said that it recognised the importance of notifying family members about plans for any programme and intended broadcast where distress might be caused to relatives. However in this case, the programme makers were aware of tensions within the family and that, due to these tensions, Ms B was no longer in contact with Mr Michael Sweeney or Ms Iarrobino. Ms B had also changed her name and had maintained a deliberately low profile in the press. For these reasons, A&E took the view that it would have been reasonably impractical and extremely challenging for the programme makers to notify her in advance. A&E further explained that it was for these reasons that the programme makers chose to refrain from referring to Ms B in any capacity during the programme. A&E made the point that neutral viewers would have been given no reason to believe there were any other family members of John Sweeney, other than those specifically referred to, for example Mr Michael Sweeney and Ms Iarrobino.

A&E said that Ms B originally contacted it on 16 July 2012 (after the programme was broadcast) to contest the use of only one photograph (that is, of her taken 25 years ago). A&E said that this photograph was not clear due to its age and that the shot pans across the screen for a mere two seconds in the programme. During extensive discussions with Mr Michael Sweeney and Ms Iarrobino, they signed release forms (copies of which were provided to Ofcom) for several old family photographs to be used in the programme. A&E stated that the programme makers were not aware that Ms B or her own family featured in any of these photographs. It was believed that the girl in the photograph was Ms Iarrobino. In light of family tensions, A&E said that it would not have been expected that Mr Michael Sweeney and Ms Iarrobino would have provided photographs of a family member with whom they had no contact.

Nonetheless, the photographs were filmed and broadcast in good faith. A&E said that they responded to Ms B's initial email and apologised for any distress and served to placate her concerns by blurring the image in future broadcasts of the programme.

A&E added that because it and the programme makers had believed the girl in the photograph, which had been taken approximately 25 years ago, was Ms Iarrobino, a viewer without any knowledge of the story would have also come to the same conclusion due to the fact that Ms Iarrobino was shown talking at the point the photographs were featured in the programme. A&E said even if someone did question whether the girl in the photo was Ms Iarrobino, the complainant's surname would not have been associated with her. A&E said that it would naturally have been assumed by any viewer that any sibling would be called either "Iarrobino", "Deans" (Ms B's mother's married name following her marriage to another partner), or "Sweeney". The complainant and Ms Iarrobino also live in completely different areas of the country which further removed any chance of Ms B being linked to the story. This was a story which a very short period of time before the broadcast had been covered by most national newspapers. Ms B was referred to by her birth name in a number of articles.

In relation to the second photograph in which Ms B's son was shown, A&E said that it was taken at least 11 years ago. It said that the image was not focussed on or shown in full frame and was seen lying on a table at a sharp camera angle, meaning that a viewer would have to tilt their head and squint to be able to see anything. It appeared on screen for less than one second and, as with the photograph of Ms B as a child, it was given to the programme makers in good faith by Mr Michael Sweeney and Ms Iarrobino. Both A&E and the programme makers believed the photograph to be an old incidental picture from Ms Iarrobino's or Mr Michael Sweeney's childhood.

A&E said that the fact that Ms B is Mr Sweeney's daughter is already in the public domain. In support of this assertion, A&E provided Ofcom with two newspaper articles which it said showed that this fact was already in the public domain.

A&E said that it was for all these reasons that it believed that it required "a stretch to infer that this incidental inclusion of a very fleeting photograph and even briefer and hard to make out shot of Ms B's son" had, in turn, breached Ms B's privacy to the point that this complaint should be upheld. A&E said that the photographs were never a foundation for the programme, but were something for Ms Iarrobino to muse over whilst recounting her childhood. The programme makers had no inkling that Ms B or her son were in the photographs.

A&E said that while it and the programme makers apologised to Ms B, their position remained that in light of the circumstances outlined above that the inadvertent, brief inclusion of these photographs had not constituted an unwarranted infringement of her privacy.

### **Representations on Ofcom's Preliminary View**

Ofcom prepared a Preliminary View that Ms B's complaint should be upheld. In commenting on that Preliminary View, A&E's main points (in so far as they were relevant to the complaint entertained by Ofcom) were that it had never considered that Ms B did not have a right to expect privacy. However, it felt that all avenues for gaining consent had been addressed and stressed that it had believed that the photograph was of Ms Iarrobino.

Ms B chose not to make any representations on the Preliminary View.

## 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 unfair treatment in programmes included in such services.

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 unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included 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 provided by both parties. This included a recording and a transcript of the programme as broadcast, and both parties' written submissions. Ofcom also took careful account of the representations made by A&E in response to Ofcom's Preliminary View on this complaint (which was to uphold). While Ofcom had attentive regard to A&E's comments in finalising its Decision, it concluded that the points raised did not materially affect the outcome of this complaint.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights of the broadcasters 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.

Ofcom considered Ms B's complaint that her privacy was unwarrantably infringed in the programme as broadcast in that photographs of her and her son were shown in the programme without her knowledge or consent.

Ms B said that she had chosen to remain unidentified in relation to Mr John Sweeney and had wanted to protect her young children from knowing about him. She said that the programme's inclusion of the photographs had taken away her right to privacy.

By way of background, the complainant said that, while she was younger in the photograph, old school friends of hers had recognised her from the photograph. These friends had no knowledge of her relationship to Mr John Sweeney until they saw her in the photograph in the programme.

In considering this complaint, Ofcom also had regard to Practices 8.6 and 8.19 of the Code. Practice 8.6 of the Code states that if the broadcast of the 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. Practice 8.19 states that broadcasters should try to reduce the potential distress to victims and/or relatives when making or broadcasting programmes intended to

examine past events that involve trauma to individuals (including crime) unless it is warranted to do otherwise. This applies to dramatic reconstructions and factual dramas, as well as factual programmes. In particular, so far as is reasonably practicable, surviving victims and/or the immediate families of those whose experience is to feature in a programme, should be informed of the plans for the programme and its intended broadcast, even if the events or material to be broadcast have been in the public domain in the past.

Ofcom first assessed the extent to which the complainant had a legitimate expectation of privacy in relation to the photographs of herself and her son.

Ofcom viewed the programme and noted that the photographs complained about were shown when Ms Larrobino discussed the period in her childhood when Mr John Sweeney, who did not live in the family home at the time, would turn up unannounced at the family home in Northampton. Ms Larrobino was shown looking at a number of what appeared to be family photographs and one of those photographs was of the complainant when she was eight years old. This photograph was visible on the table and then shown in close up for approximately five seconds. A photograph of a group of people was also shown, but the complainant and her son were not as identifiable as in the previous photograph.

Ofcom observed that the complainant's surname differed from that of Ms Larrobino, that the complainant's name was not given in the programme, and that any possibility of identifying the complainant was, therefore, limited to recognition from the photograph of her taken some 25 years ago. The group photograph which included Ms B and her son was shown very briefly in the programme and it was, in Ofcom's view, difficult to identify Ms B or her son from that shot. However, Ms B said that the photograph showing herself when she was young was clear enough to identify her to people who she would have known when she was younger, particularly when the programme also revealed that at that time the family home was in Northampton.

In Ofcom's view, however, the extent to which Ms B or her son may have been identifiable in the photographs is somewhat ancillary to the two main issues, first, whether or not the complainant had a legitimate expectation of privacy in her family photographs and the way in which those photographs might be used; and secondly, whether or not the complainant had a legitimate expectation of privacy in the fact of her family connection to Mr Sweeney. Ofcom concluded that Ms B had a legitimate expectation of privacy in relation to both these issues.

Ofcom took into consideration that while the photographs themselves did not show anything of a particularly sensitive nature, they were private to the complainant insofar as they depicted images of her and her family life which she had not chosen to make publicly available. While Ofcom took into account the fact that the photographs were historical, and the broadcaster's representations that the photographs were fleeting and incidental (as stated earlier), the fact remains that the photographs were private to the complainant. Accordingly, it is Ofcom's view that the complainant had a legitimate expectation of privacy in the photographs and the context in which they were used.

Ofcom further considered whether the complainant had a legitimate expectation of privacy in the fact of her close family connection to Mr Sweeney. Ofcom took into account Ms B's submissions, first that "[t]hroughout the interest of the media and press I have chosen to stay unidentified," and secondly, that a number of old school friends had recognised her from the photographs in circumstances where they had not otherwise known anything about her close family connection to Mr Sweeney.

Ofcom also took into account the submissions made by the broadcaster, that this family connection was already in the public domain, as made clear from two newspaper articles provided by the broadcaster.

Ofcom reviewed both articles referred to by the broadcaster and observed that, while Ms B's first name, age and home town were mentioned, no other details were published about her and the articles did not include any photographs which could identify her or her son. One of the articles also mentioned that, when she was approached by the press, the complainant had "refused to comment" which, in Ofcom's view, gave a clear indication that she did not want to engage with the media or accrue any publicity. Therefore, to the extent that the complainant's close family connection with Mr Sweeney was already in the public domain, this was not in our view sufficient to extinguish her legitimate expectation of privacy in that information.

Taking all the above factors into account and particularly Ms B's efforts to stay away from the media attention and publicity, Ofcom considered that Ms B had a legitimate expectation of privacy in the photographs of herself and her son which were broadcast in the programme. She further had a legitimate expectation of privacy in the fact of her close family connection to Mr Sweeney. Ofcom went on to consider whether or not the infringement of Ms B's legitimate expectations of privacy was warranted, in accordance with Rule 8.1 of the Code.

Ofcom noted the part of the programme in which the photographs were broadcast and noted the following commentary:

Voiceover: *"But [John] Sweeney hadn't forgotten his former life. Two years after they'd fled – he tracked down his family – living in Northamptonshire. His stepdaughter recalls some chilling encounters."*

Ms larrobino: *"I'd be playing out on the street with other kids and he'd just be standing in the street watching our house. He wouldn't come and knock at the door or anything, he'd just stand there watching. I'd run in and tell my mum and she'd usually run out and say, "What are you doing here?" He was a strange, strange person."*

Ofcom took into account the broadcaster's submission that the photographs were used as a "prop" when Ms larrobino was discussing her childhood experiences and the impact it had on the family. In this context, Ofcom noted that the photographs were used simply as a visual aid to illustrate Ms larrobino's experience of the effect that Mr Sweeney's unannounced visits had on the family.

Ofcom also had regard to the statement made by the producer of the programme, that in making programmes producers are often required to use "judgment based on experience to make what are often delicate calls". The footage of photographs themselves included in the programme was brief and that any "neutral viewer" is likely to have believed that the girl in the photograph was Ms larrobino. The broadcaster also pointed out that it had obtained "release forms" from both Mr Michael Sweeney and Ms larrobino, giving their consent to use the photographs. Ofcom noted the broadcaster's submission that it recognised the importance of notifying family members where the broadcasting of programmes may cause distress, but that this was an exceptional case. Here, the broadcaster had reason to believe that there was, in the words of the producer, a "deep family rift".

Ofcom recognised that in signing the release form, Mr Michael Sweeney and Ms Larrobino confirmed that they were entitled to grant the broadcaster rights to use the photographs. However, it was unclear whether either individual was actually asked by the programme makers who the individuals in the photographs were before the decision was made to use them. In Ofcom's view, had this relatively simple step been taken, it may have become apparent that the photographs were of Ms B and that consent should first be sought in order to use them, in accordance with Practice 8.6 of the Code.

Further, the fact that there may have been a deep family rift between two of the key eye-witnesses and the complainant was precisely the reason why the broadcaster should have taken proportionate steps to try to ensure that the complainant was informed that the programme was being made. While it may be the case that Mr Michael Sweeney and Ms Larrobino were no longer in contact with the complainant, it was not clear what steps were taken, if any, to locate her by other means for example, contacting other close family relatives.

Ofcom acknowledges that the broadcaster and programme acted in good faith when making and complying the sequence in the programme that was complained about. However, having balanced all the factors set out above, Ofcom's view is that the broadcaster's right to freedom of expression and to impart information and ideas and the audience's right to receive the same without interference did not outweigh Ms B's legitimate expectation of privacy in this particular case. Ofcom's Decision is, therefore, that on balance the broadcast of the photographs of the complainant and of her son was not warranted without her consent and that there was an unwarranted infringement of her privacy in the programme as broadcast.

**Accordingly, Ofcom's Decision is that Ms B's complaint of unwarranted infringement of privacy in the programme as broadcast should be upheld.**

## Not Upheld

### Complaint by Miss Hester Bank

*The X Factor, ITV1, 1 September 2012*

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#### Summary

Ofcom has not upheld this complaint of unjust or unfair treatment and unwarranted infringement of privacy made by Miss Hester Bank.

This edition of *The X Factor* included an audition by Miss Bank, who performed *Wild Thing* by The Troggs. The judges were not impressed by her performance and did not put her through to the next round.

Miss Bank complained to Ofcom that she was treated unjustly or unfairly in the programme as broadcast and that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme.

Ofcom found that:

- The process of referring contestants to the programme's psychologist before auditions is reasonable and, although Miss Bank was nervous when auditioning, this was not solely related to her meeting with the psychologist before her audition. The programme makers were not unfair in their dealings with Miss Bank in this respect.
- The footage of Miss Bank was not unfairly edited.
- The questions Miss Bank was asked during her audition were of a kind a contestant could expect to be asked and there was no evidence that they were asked as a result of the programme makers looking through her personal belongings. Ofcom therefore found no unwarranted infringement of Miss Bank's privacy in connection with the obtaining of material included in the programme.

#### Introduction

On 1 September 2012, ITV1 broadcast an edition of *The X Factor*, a series in which members of the public compete to be the next *X Factor* winner by singing in front of a panel of celebrity judges and a live audience. The contestants are either selected to go through to the next round or rejected according to the judges' opinions of their performances.

Miss Hester Bank was one of the contestants featured in this edition of *The X Factor*. Before Miss Bank went on stage, she was shown saying:

*"I could do with a drink right now...If I pass out on stage just somebody bring me a whisky".*

Her performance of *Wild Thing* by The Troggs was cut short by the celebrity judges and she was not put through to the next round. She said after her performance: *"That was terrible...They didn't like me."* The presenter, Mr Dermot O'Leary, asked what she was going to do, she replied *"Get drunk"* and he commented *"Again"*. One of the

judges was heard saying “*That was rough*”, and as Miss Bank made her way backstage she said “*Not good at all*” and appeared to burp.

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

### Unjust or unfair treatment

- a) Miss Bank complained that the programme makers were not fair in their dealings with her.

Before responding to Miss Bank’s specific complaints, set out below, in reply and in summary ITV said that *The X Factor* was in its ninth series and that, given the very well established format and style of the series, all potential participants were well aware that their auditions may be the subject of negative as well as positive comments from the judges. They were also aware that their performances at the auditions were pre-recorded and would be edited for broadcast. ITV said that it was inevitable that some unsuccessful contestants may feel that they should not have been rejected in the judging process and may have a different recollection of the process than the actual recorded events. ITV said that Miss Bank’s audition went badly, as she admitted herself on stage at the time, when she said: “*That was terrible.*”

ITV responded as follows to the specific issues under this head of complaint:

- i) Before Miss Bank’s performance she was psychologically assessed, although she was only informed very late on the day of her performance that this would happen. Miss Bank found this intimidating and it made her nervous just before going on stage.

ITV said that auditioning for *The X Factor* could be a nerve-wracking experience and that the producers always sought to exercise due care regarding the participants’ psychological welfare. A psychologist was present at all auditions to observe, to advise the producers and to assess a participant’s state of mind where necessary. The decision as to whether a participant should speak to the psychologist was in most cases taken by the senior producers, having spoken to the participant’s designated researcher, who would have spoken at some length with each participant. A participant might mention something which the researcher considered worthwhile discussing further with the psychologist on the day of the audition, to ensure the participant was considered able to cope with the stressful process of auditioning in front of the judges and a large audience. One of the senior producers might then take the decision to ask a contestant to see the psychologist.

ITV said that Miss Bank was put on the producer’s list to see the psychologist in advance of her audition, following her initial conversations with a researcher. The concerns were relatively minor, but it was decided Miss Bank should see the psychologist in any event. On the day of the audition, the psychologist saw Miss Bank before she went on stage and concluded that she was fully able and fit to audition. ITV said that it was self evident from the untransmitted footage that Miss Bank was nervous about auditioning and said so explicitly and repeatedly. ITV said it was sorry that Miss Bank considered her conversation with the psychologist intimidating, but it did not accept that this conversation was the only cause of her nerves before going on stage.

She was clearly nervous in any event and, for example, mentioned in conversation that she could not remember all of her song lyrics.

- ii) When Miss Bank informed the psychologist that she had had some issues previously, she was told that she could perform but would not be allowed to go through to the next stage because of these past issues. She said that this had a negative effect on her performance.

ITV said that, following the first conversation with Miss Bank, the psychologist was happy for her to audition and noted that she still appeared in good humour after the audition was over. ITV was not able to discuss private medical information provided by Miss Bank to the psychologist but stated that at no point did the psychologist suggest that Miss Bank would not be allowed to go through to the next round because of any previous issues. It said that contestants would never be told they could not go through to the next round prior to an audition, because that was a decision for the judges.

ITV said that, in response to Miss Bank's original letter of complaint to the producers, it had offered to arrange for the programme's psychologist to call her if she thought this would help. Miss Bank agreed to this. ITV said that, in these circumstances, it did not accept that Miss Bank's contact with the psychologist was anything other than a proper exercise by the producers of concern for her welfare or that it led to any unfair treatment of her in the programme.

- b) Miss Bank complained that footage of her was unfairly edited.

- i) Miss Bank said that she performed her first song well, with some of the audience on their feet, joining in the song, but despite this, her voice was still dubbed.

In response, ITV said that Miss Bank was mistaken regarding editing of her vocal performance and that no dubbing of voices was undertaken in the audition shows.

- ii) Miss Bank's response when asked by Mr Louis Walsh, one of the judges, what she would do with the prize money, namely that she would donate it to the Madeleine McCann fund, was unfairly edited out.

ITV said in response that the producers could not and were not obliged to include every exchange between the contestants and judges and that the omission of this comment was not unfair to Miss Bank.

- iii) One of the judges, "Anastacia", an American singer, was shown standing up and yelling "No" at her after her performance, although this did not happen. She was also shown sneering and saying "rough" as Miss Bank left the stage. This did not happen on the day Miss Bank was filmed.

In response, ITV said that, whilst comments by judges and contestants were edited for broadcast purposes, the producers sought to represent the audition fairly. ITV said that all the material was recorded on the day of the audition, and that judges' comments were not recorded after the event and included in the audition sequence later.

In Miss Bank's case, Anastacia had said after Miss Bank left the stage "*That was rough*", referring to the performance and not to Miss Bank as an individual. ITV said that at no point during the broadcast programme did Anastacia stand up and yell "*No*" as suggested by Miss Bank.

- iv) Mr O'Leary was shown putting his arm round Miss Bank after her performance and muttering something about not drinking and performing, although this did not happen.

ITV said that the untransmitted footage confirmed that Miss Bank did speak to Mr O'Leary after her performance. This incident and their exchange was included in the programme as it happened.

- v) A fake burp was added, to give the false impression that Miss Bank was drunk.

ITV said in response that the programme did not give the false impression that Miss Bank was drunk, although she admitted to the judges on stage that she had had a drink before her audition. ITV said that a fake burp was not added to the footage of Miss Bank leaving the building with a member of the production team and that a real burp was very clearly present in the original recording.

- c) Miss Bank was unfairly portrayed as a rough, uneducated, Glasgow girl who was an alcoholic and one of the judges referred to her as "*rough*".

In response, ITV said that all people who auditioned were aware that the auditions were pre-recorded and edited and that the judges may be brutally honest and sometimes caustic about performances. Miss Bank suggested in her complaint that she understood that if a participant sang badly, it would be "used in a humorous way". Many audition sequences were preceded by comments from the person auditioning and in Miss Bank's case her audition was preceded by backstage comments made by her, such as "I could do with a drink right now" and: "If I pass out on stage somebody give me a whisky there". ITV said that these were light-hearted comments expressing Miss Bank's nervousness prior to performing but were not included to treat her unfairly or to suggest she was an alcoholic, nor did the programme do so. After her performance, Mr O'Leary asked Miss Bank what she would do next, to which she replied "*get drunk*".

ITV said that this exchange was included in the programme because it was humorous and reflected Miss Bank's mood immediately after leaving the stage, a common element in many *X Factor* auditions. The comments were not included to reflect on Miss Bank unfairly, nor were they edited unfairly. They were representative of Miss Bank's comments throughout the filming day.

The use of the word "*rough*" by Anastacia was specifically in relation to Miss Bank's performance, not to her as an individual. At no point was there any reference to Miss Bank's education.

#### Unwarranted infringement of privacy

In summary, Miss Bank complained that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that she suspected that the programme makers had looked in her bags. (She had been asked to put her bags under a table, where they were left for a long time). For example in

footage that was not broadcast, one of the judges, Mr Walsh, asked her questions about other auditions she had attended and she believed he may have known about these from information in her unattended bag.

In response, ITV said that it was commonplace for judges to ask contestants whether they had done any previous auditions or had previous singing experience. ITV said that at no point did any of the production team look through Miss Bank's unattended bags or obtain any information in this way.

### Comments on Ofcom's Preliminary View

Ofcom gave an opportunity to both parties to comment on its Preliminary View (which was not to uphold Miss Bank's complaint).

Miss Bank stated that she did not agree that her complaint should not be upheld. She made a number of comments regarding Ofcom's description of the programme and its summary of ITV's statement in response to Miss Bank's complaint. In Ofcom's view, these did not materially affect the outcome of the complaint. Miss Bank also took issue with Ofcom's interpretation of a number of Practices set out in Sections Seven and Eight of the Code. Ofcom is satisfied that these Practices were correctly considered in this case. Miss Bank also repeated a number of points she had made in her complaint and that had already been considered by Ofcom in reaching its Preliminary View, for example with reference to the role played by the programme's psychologist.

ITV did not make any comment in response to Miss Bank's representations on the Preliminary View.

### **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 provided by both parties. This included a recording of the programme as broadcast and a transcript, both parties' written submissions and a recording and transcript of untransmitted footage. Ofcom also took careful account of the representations made by Miss Bank in response to being given the opportunity to comment on Ofcom's Preliminary View on this complaint (see above). While Ofcom had attentive regard to all of Miss Bank's comments in finalising this Decision, it concluded that none of the further points Miss Bank raised materially affected the outcome of this complaint. The broadcaster chose not to make any representations on Ofcom's Preliminary View.

When considering complaints of 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.

Ofcom had regard to this rule when reaching its Decision on the individual heads of complaint detailed below.

### Unjust or unfair treatment

- a) Ofcom first considered the complaint that the programme makers were not fair in their dealings with Miss Bank.

In considering this part of the complaint, Ofcom had regard to Practice 7.2 of its Code, which states that broadcaster and programme makers should normally be fair in their dealings with potential contributors to programmes unless, exceptionally, it is justified to do otherwise.

Ofcom then considered the specific issues raised under this head of complaint.

- i) Before Miss Bank's performance she was psychologically assessed, although she was only informed very late on the day of her performance that this would happen. She found this intimidating and it made her nervous just before going on stage.

Ofcom recognised that some contestants in the programme would be nervous before auditioning and that this might have a significant impact on some of them. Also, given the potentially negative impact that could result from an audition, Ofcom understood that some contestants might be advised not to audition. Ofcom therefore took the view that the programme makers' process of assessing whether a participant would benefit from a meeting with a psychologist, and then offering such a meeting in appropriate cases, was a reasonable one. Ofcom also acknowledged that a discussion between a contestant and a psychologist may result in personal and sensitive matters being discussed. Ofcom noted that although they did not have major concerns, the programme makers, at a senior level, decided to refer Miss Bank to the psychologist before her audition. Ofcom acknowledged that Miss Bank found this meeting stressful and that it may have added to her nervousness before her audition. However, Ofcom also noted that Miss Bank made numerous references in the untransmitted footage to feeling nervous about her performance, many of which related to her being unable to remember the lyrics of one of her songs. She mentioned her nervousness to a number of fellow contestants and to a member of the production team, repeatedly, referring to her concern that she could not remember the lyrics for one of her songs. In Ofcom's view, it is therefore unlikely that the meeting with the psychologist was the sole cause of Miss Bank's nervousness about performing her audition.

- ii) When Miss Bank informed the psychologist that she had had some issues previously, she was told that she could perform but would not be allowed to go through to the next stage because of these past issues. She said that this had a negative effect on her performance.

Ofcom noted that ITV denied that Miss Bank had been told she would not be put through to the next round of the contest and that that decision was one for the judges. Where there is a conflict of recollection between the parties to a complaint, it is not Ofcom's role to adjudicate on that conflict, but rather to determine whether there was any unfairness to the complainant in the programme as broadcast.

Having viewed both the untransmitted footage of Miss Bank's audition and the programme as broadcast, Ofcom took the view that the judges believed that Miss Bank's performance was not good (as she herself acknowledged when she said "*That was terrible*") and that they therefore decided, on the basis of her performance, not to put her through to the next round of the contest.

Ofcom therefore concluded that the broadcaster had not been unfair in its dealings with Miss Bank and did not uphold her complaint that there was unfairness to her in the programme as broadcast.

b) Footage of Miss Bank was unfairly edited.

In considering this part of the complaint, Ofcom had regard to Practice 7.6 of the Code, which states that when a programme is edited, contributions should be represented fairly.

Ofcom then considered the specific issues raised under this head of complaint.

- i) Miss Bank said that she performed her first song well, with some of the audience on their feet, joining in the song, but despite this her voice was still dubbed.

Ofcom noted ITV's position that Miss Bank's voice was not dubbed as she believed. Having watched both the untransmitted footage and the footage broadcast in the programme, Ofcom took the view that Miss Bank's performance at her audition was portrayed accurately and did not consider that there was any evidence that her voice had been dubbed or edited so as to diminish the quality of her singing. It was clear from the untransmitted footage and the programme itself that Miss Bank herself was not happy with her performance at the time. Therefore, Ofcom took the view that the programme makers had not dubbed or otherwise edited Miss Bank's voice unfairly.

- ii) Miss Bank's response when asked by Mr Walsh what she would do with the prize money, namely that she would donate it to the Madeleine McCann fund, was unfairly edited out.

Ofcom considers that the question of which material to include in a programme is an editorial matter for the programme makers and the broadcaster to make, provided that the editing does not result in unfair treatment. Ofcom noted that the format of the programme was that clips of a number of contestants before, during and after their auditions was included, giving a brief insight into a number of the people taking part in the competition.

Ofcom noted that the untransmitted footage showed that Miss Bank had a brief conversation with the judges when she was on stage. Mr Walsh asked her age, where she was from, whether she sang professionally and what she did for a living. He also asked if she had been to other auditions and why she was taking part in *The X Factor*. Mr Walsh's final question before he invited Miss Bank to perform was what she would do with the prize money if she won. Miss Bank replied that she would donate it to the Madeleine McCann fund, to which Mr Walsh queried whether she would keep any money for herself. The only part of this conversation that was included in the broadcast

programme was Miss Banks' response to Mr Walsh that she did not sing professionally.

Ofcom acknowledged that most of Miss Bank's conversation with the judges was not included in the programme as broadcast. However, this was in keeping with the format of the programme, in which brief clips of both successful and unsuccessful participants are included to give a flavour of the competition as a whole. Ofcom took the view that the programme makers' exercise of their editorial discretion did not result in unfairness to Miss Bank.

- iii) One of the judges, Anastacia, was shown standing up and yelling "No" at her after her performance, although this did not happen. She was also shown sneering and saying "rough" as Miss Bank left the stage. This did not happen on the day Miss Bank was filmed.

Ofcom noted that the programme included a brief clip of Miss Bank's audition. After judge Mr Gary Barlow raised his hand to stop Miss Bank's performance after a short time, Mr Walsh asked Anastacia for her reaction. Anastacia appeared somewhat taken aback by the performance and, after a few monosyllable utterances, said "no". In Ofcom's view, the "no" was very emphatic and it was clear from Anastacia's facial expression that she was not impressed by Miss Bank's performance. Ofcom noted however that Anastacia did not "yell" and did not stand up when she made her comments to Miss Bank. Nevertheless, having watched the untransmitted footage, Ofcom considered that this edited version of the audition fairly and accurately conveyed Miss Bank's audition and the judges' general reaction to it.

As regards the use of the word "rough", Ofcom noted that both the untransmitted footage and the programme as broadcast showed that after Miss Bank left the stage following her audition, Anastacia said "that was rough". It appeared to Ofcom that viewers would have understood that this remark concerned Miss Bank's performance and was not a personal remark about her.

- iv) Mr O'Leary was shown putting his arm round Miss Bank after her performance and muttering something about not drinking and performing, although this did not happen.

Ofcom noted that the untransmitted footage showed that Miss Bank had a brief conversation with Mr O'Leary as she left the stage in which she said that the judges did not like her but that she thought she had performed well. The broadcast programme included an edited version of this conversation, showing that, as Miss Bank left the stage, she said to Mr O'Leary:

*"They didn't like me."*

Mr O'Leary agreed with her and, after a brief chat about her performance, asked what she was going to do. Miss Bank replied:

*"I don't know, get drunk."*

Mr O'Leary put his arm around her, apparently to guide her away from the back stage area, and said:

*"Again. Alright, thanks a lot. Cheers."*

Ofcom noted that Mr O’Leary did not say anything about “not drinking and performing”, either in the programme or in the untransmitted footage. Having viewed the untransmitted footage, Ofcom considered that the version of Miss Bank’s conversation with Mr O’Leary included in the programme, albeit edited, accurately conveyed the conversation with Mr O’Leary.

- v) A fake burp was added, to give the false impression that Miss Bank was drunk.

Ofcom noted that there was a conflict of evidence between the parties on this point. As set out above, where there is a conflict of recollection between the parties to a complaint, it is not Ofcom’s role to adjudicate on that conflict, but rather to determine whether there was any unfairness to the complainant in the programme as broadcast.

Ofcom noted that the programme as broadcast did show Miss Bank burping as she left the audition in the company of a member of the production team.

Having viewed the untransmitted footage and the programme as broadcast, Ofcom took the view that a fake burp was not added and that Miss Bank did indeed burp as she left the building after her audition.

Ofcom noted that Miss Bank herself made a number of references to drinking before and after the audition, both in the untransmitted footage and in the programme as broadcast. Based on this, Ofcom considered that viewers would have been able to form their own view as to whether Miss Bank was drunk.

Ofcom therefore found that there was no unfairness to Miss Bank in the editing of the programme as broadcast.

- c) Miss Bank was unfairly portrayed as a rough, uneducated, Glasgow girl who was an alcoholic and one of the judges referred to her as “*rough*”.

When considering this complaint, Ofcom had regard to whether reasonable care was taken by the broadcaster to satisfy itself that material facts had not been presented, disregarded or omitted in a way which was unfair to Miss Bank (as outlined in Practice 7.9 of the Code).

As set out under head b) iii) above, Ofcom did not consider that Anastacia referred to Miss Bank as “*rough*”, but that she made this remark about Miss Bank’s performance. Ofcom noted that no references were made in the programme to Miss Bank’s education. Further, although there were references to drinking, several made by Miss Bank herself before and during her audition, there was no suggestion in the programme that she was an alcoholic.

Ofcom therefore found no unfairness to Miss Bank in this respect.

#### Unwarranted infringement of privacy

In summary, Miss Bank complained that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that Miss Bank suspected that the programme makers had looked in her bags. (She had been asked to put her bags under a table, where they were left for a long time). For example in footage that was not broadcast, Mr Walsh asked her questions about

other auditions she had attended and she believed he may have known about these from information in her unattended bag.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights of the broadcasters 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, and in connection with obtaining material included in programmes, must be warranted.

In considering this part of the complaint, Ofcom had regard to Practice 8.5 of the Code, which states that any infringement of privacy in the making of a programme should be with the person's consent or be otherwise warranted.

In order to establish whether or not Miss Bank's privacy was unwarrantably infringed in connection with the obtaining of material included in the programme, Ofcom first assessed the extent to which she had a legitimate expectation of privacy in relation to questions asked by the judges during her audition.

Ofcom noted first that Miss Bank believed that the programme makers had looked through her bags and ITV's denial that this had taken place. As noted above, it is not Ofcom's role to resolve a conflict of evidence between the parties, but, in this case, to determine whether Miss Bank had a legitimate expectation of privacy in relation to the filming of her audition. Ofcom therefore considered the nature of the questions asked of Miss Bank by Mr Walsh. Ofcom noted that the untransmitted footage showed that, after some introductory questions, Mr Walsh asked if this was Miss Bank's first audition. She said that it was not and Mr Walsh asked her about previous auditions. In Ofcom's view, this was a predictable and standard question for one of the judges to ask a contestant prior to an audition and did not indicate that the programme makers must have looked in Miss Bank's bags or had acted in a surreptitious manner to prompt this question from Mr Walsh. While Ofcom considered that Miss Bank had a legitimate expectation that she would not be asked about unduly personal or sensitive matters, the questions Mr Walsh asked during her audition were of a kind a contestant could expect to be asked and there was no evidence that they were asked as a result of the programme makers looking through her personal belongings.

Ofcom therefore found no unwarranted infringement of Miss Bank's privacy in connection with the obtaining of material included in the programme.

**Accordingly, Ofcom has not upheld Miss Bank's complaint of unjust or unfair treatment and unwarranted infringement of privacy in connection with the obtaining of material included in the programme.**

## Not Upheld

### Complaint by Mr Gareth Emery

*The Ferret, HTV Wales, ITV1, 15 October 2012*

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#### Summary

Ofcom has not upheld Mr Emery's complaint of unjust or unfair treatment in the programme as broadcast.

On 15 October 2012, ITV1 Wales broadcast an edition of *The Ferret*, a consumer affairs programme. This edition of the programme featured a couple (Mr and Mrs Bell) who were dissatisfied with the photographs that had been taken at their wedding. The complainant, Mr Gareth Emery, had been hired to take the photographs. Mr and Mrs Bell complained that the quality of the photographs was poor and that it had taken over two months for the photographs to be delivered.

Mr Emery complained to Ofcom that he was treated unjustly or unfairly in the programme as broadcast.

Ofcom found that Mr Emery was given sufficient information about the allegations made in the programme and was also provided with a timely and appropriate opportunity to respond to those allegations. In addition Ofcom considered that the broadcaster had taken reasonable care to satisfy itself that material facts were not presented, omitted or disregarded in a way that portrayed Mr Emery unfairly.

#### Introduction

On 15 October 2012, ITV1 HTV Wales broadcast an edition of its consumer affairs programme, *The Ferret*. This featured a report about a wedding photography service, True Blue Photography, that it said was provided by Mr Gareth Emery.

The programme interviewed Mr Vince Bell and Mrs Anne Bell who claimed that Mr Emery had been slow in providing them with the photographs of their wedding and that the quality of the photographs had been poor. Mr and Mrs Bell said that the photography on the wedding day had been disorganised and that the photographs taken had an *"informal feel"* about them. Also, they said that it had taken over two months for the photographs to be delivered to them and that Mr Emery had been difficult to contact.

The programme's reporter stated that he had tried to contact Mr Emery who, he reported, had said that *"it was with sorrow that he heard the Bells were not happy"*. The reporter then said that Mr Emery had told him that he had ordered all the *"photographs to be developed and, as a gesture, a canvas [i.e. a photograph printed on canvas]"*. The reporter also said that Mr Emery stated that his *"company had now changed suppliers to prevent this happening again and [had] implemented new protocols"*. The reporter concluded the report by stating that: *"Since going to air, they [i.e. the programme makers] had received three more complaints about Mr Emery's work."*

Following the broadcast of the programme, Mr Emery complained to Ofcom that he was treated unjustly and unfairly in the programme as broadcast.

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

In summary, Mr Emery complained that he was treated unjustly or unfairly in the programme as broadcast. In particular, Mr Emery said that:

- a) He was not provided with any information about the allegations made in the programme.

In response, ITV said that all allegations that were made in the programme by Mr and Mrs Bell were put to Mr Emery well in advance of the broadcast on 15 October 2012. ITV added that the programme makers emailed Mr Emery on 4 October 2012 (a copy of which was provided to Ofcom), in which the allegations Mr and Mrs Bell made about him were clearly set out. Mr Emery responded to this email on the same day. The programme makers emailed Mr Emery again with further allegations after speaking further with Mr Bell, and Mr Emery also responded to this email on the same day.

- b) Mr Emery was represented incorrectly in the programme as broadcast. He said that the company referred to in the programme had been rebranded and that he was no longer in charge of it. Mr Emery said that he had informed the programme makers that Mr Robert Lewis was the new owner of the company and that he was now responsible for dealing with any complaints.

In response, ITV said that Mr Emery had first informed the programme makers of Mr Robert Lewis' existence by email on 4 October 2012 and had asked for a telephone number to contact them. The programme makers responded by providing their contact telephone number and also enquired who Mr Lewis was. ITV said that Mr Emery said that Mr Lewis was his boss.

ITV said that on 9 October 2012, Mr Emery emailed the programme makers to say that Mr Lewis had asked that the programme referred to the company "Valleyblue Photography" as he had taken over the company and was registering at Companies House.

ITV said that at 14:26 hours on 11 October 2012, Mr Emery emailed the programme makers informing them that he was editing a statement from Mr Lewis and would send it over to them. At 17:19 hours on the same day, the programme makers emailed Mr Emery to reiterate that the programme would be featuring a story about True Blue Photography and Mr Emery's involvement with Mr and Mrs Bell. Mr Emery emailed the programme makers again at 09:38 hours on 12 October 2012 informing them that Mr Lewis was the owner of the company and that Mr Emery's role was to check and edit the photographs and to check all work before being sent out. Mr Emery also said that Mr Lewis had taken over True Blue Photography and had rebranded it as Valley Blue Photography.

ITV said that the decision was taken not to name Mr Lewis or Valleyblue Photography in the programme for a number of reasons. It said that the photographs of Mr and Mrs Bell's wedding had been taken by Mr Emery whilst he was trading as True Blue Photography. It said that Mr and Mrs Bell had contracted with Mr Emery on behalf of True Blue Photography, which was evidenced by an invoice bearing the logo 'True Blue Photography' and Mr Emery's signature. In addition, ITV said that the printed address on the invoice was known to be Mr Emery's previous residential address, whilst the handwritten address also on the invoice was his current residential address according to

publicly available records. ITV said that Mr and Mrs Bell had only ever dealt with Mr Emery and had never heard of Mr Lewis or Valleyblue Photography.

ITV said that the programme makers did not have any contact with Mr Lewis before the broadcast of the programme on 15 October 2012 and that checks with Companies House had not uncovered any company named Valleyblue Photography. Further, ITV said that Mr Lewis was not an uncommon name in Wales and that, as such, he would have been extremely hard to trace given the limited information provided by Mr Emery. ITV also said that there was no evidence to show Mr Lewis' involvement in the photographs of Mr and Mrs Bell's wedding.

- c) Mr Emery said that he had provided a statement to the programme makers and had spoken to the reporter on the telephone. He also said that his employer, Mr Lewis, had also provided a statement. However, neither statement was used in the programme. As a result, Mr Emery said that the report was one sided and biased and he had not been given the chance to put his side of the story across.

In response, ITV said that Mr Emery emailed the programme makers on 11 October 2012 to say he was editing a statement from Mr Lewis and would send it to them. Mr Emery emailed the programme makers on the following morning with a statement from 'Valleyblue Photography'. Mr Emery submitted only this one statement before the broadcast of the programme and which said the following (the text is reproduced below in the form it was received by the programme makers):

"It is with much sorrow that the Bells were not happy with the photographs and the problems they had in receiving the photos. They were resolved by sending them to the daughter's house which were received. We did not hear about any problems with the photographs until we were contacted by your program. We have ordered all prints to be developed and as a good will gesture and order an extra canvass to be produced. We are awaiting reply to which print they would like put onto canvass.

Due to unforeseen events this would have been sorted a lot sooner and disappointed it had come to this. We have since changed suppliers with our courier company's and implemented new protocol to prevent this happening in the future. Valleyblue Photography."

ITV said that the programme's reporter stated in the programme that he had contacted Mr Emery of True Blue Photography who had said that "it was with much sorrow that he had heard the Bell's were not happy". The reporter then said that Mr Emery had told him he had "ordered all the prints to be developed and as a gesture an extra canvas". The reporter also said that Mr Emery had stated that his company had "since changed suppliers and implemented a new protocol to prevent this happening again". ITV said that the gist of Mr Emery's statement was included fairly in the programme, insofar as it was relevant, and was not already apparent from other parts of the programme.

## 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 unfair treatment in programmes included 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 provided by both parties. This included a recording and a transcript of the programme as broadcast, and both parties' written submissions. Ofcom provided a copy of its Preliminary View (which was not to uphold Mr Emery's complaint) to both parties for comment. Neither made any submissions to Ofcom on this document.

When considering complaints of 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. Ofcom had regard to this rule when reaching its Decision on the complaint detailed below.

- a) Ofcom considered the complaint that Mr Emery was treated unjustly or unfairly in the broadcast in that he was not provided with any information about the allegations made in the programme.

Ofcom had regard to 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. It also had regard to Practice 7.3 which sets out that in order for a person who is invited to contribute to a programme to be able to make an informed decision about taking part, they should be given sufficient information about: the programme's nature and purpose; their likely contribution; be informed about the areas of questioning and wherever possible, the nature of other contributors; and, any significant changes to the programme that might affect their decision to contribute.

In considering whether or not Mr Emery had been provided with information about the allegations made in the programme before its broadcast, Ofcom examined the pre-broadcast correspondence between Mr Emery and the programme makers. It noted that prior to the programme being broadcast on 15 October 2012, Mr Emery was contacted by the programme makers by email on 4 October 2012. In the email, details were given to Mr Emery informing him what the programme was about and set out Mr and Mrs Bell's complaint about him. In particular, the email said:

"They [i.e. Mr and Mrs Bell] hired you to take photographs of their wedding at Cardiff City Hall in August. They have told us in an interview that they paid you £300 to take photographs of the ceremony and reception. The deal included a disc, 60 prints and a canvas. After much cajoling, they have finally received a disc with photographs on it. However the quality is poor. Many of the photographs are not posed; there are backs of heads out of focus and very informal shots. This is not what the couple were led to believe you would provide. Mrs Bell says you did not take charge when the photographs were being taken and she did most of the work encouraging people to get together for shots. The couple are still waiting for the prints and canvas, they are unhappy with the service and say you ruined their day. The best photograph, they say, was taken by their photograph on their phone. At best, they say there are about 20 photographs, which are acceptable on the disc. The

couple say they would like a refund for the parts of the service you have failed to provide, despite numerous calls from the Bell's daughter. I am planning to run this story on October 15<sup>th</sup> and would welcome your response[.]”

Ofcom noted that Mr Emery responded to this email later that day asking for a contact number for the programme makers and informing them that they “need to ask for Robert Lewis”. Another email was sent by the programme makers to Mr Emery on 8 October 2012 which set out further allegations made by Mr and Mrs Bell about the wedding photographs and the service they had received from him. In particular, the email alleged that Mr and Mrs Bell could not get in touch with Mr Emery after the wedding and that even though Mr Emery had told them on six occasions that the photographs had been sent out, they never received them until they were eventually delivered to their daughter. The programme makers also stated that Mr and Mrs Bell felt that Mr Emery did not organise people on the wedding day. Ofcom noted that Mr Emery replied to this email later on the same day and responded to the specific allegations made about his conduct on the day of the wedding by Mr and Mrs Bell in a further email to the programme makers dated 12 October 2012.

Ofcom then noted the reporter's commentary and interview footage of Mrs Bell included in the programme:

Reporter: *“Vince and Anne [Bell] paid £300 to hire Mr Emery for the day and night. They expected formal photographs but they say there was a lack of organisation on the day and the photos have more of an informal feel.”*

Mrs Bell: *“He should have (said) ‘Anne, pay attention, I am taking your photo now, people I’m taking your photo.’ But he was just, willy-nilly, click, click, click. So there was a lot of back of the heads and the organisation wasn’t there again – that’s what I feel.”*

Reporter: *“The couple say they waited over two months for the disc and photos to arrive. They were also promised 60 prints and a canvas.”*

Mrs Bell: *“People were saying to me ‘Where’s your photos?’ ‘Oh they’ll come, they’ll come’ and it was going on and on. Well then because he kept getting in touch with my daughter she kept texting him saying ‘my mother’s not happy’ and he said ‘oh, I want them to be nice, so I’m taking my time’. And then after, he said ‘I’ve sent them now’. ‘Well she still hasn’t had them’. ‘Well I’ve sent them’. And this was six times he said he’d sent them. He said they got lost and he was chasing up the Royal Mail.”*

Having examined the pre-broadcast correspondence between Mr Emery and the programme makers and noted the allegations made in the programme, Ofcom compared the content of both to ascertain whether or not Mr Emery had been given information about the allegations to be made in the programme sufficient enough to avoid unfairness to him. Ofcom noted that the following allegations were made in the programme by either the reporter or Mrs Bell:

- Mr and Mrs Bell had expected formal photographs of their wedding. However, there was a lack of organisation on the day and the photographs had an informal feel to them;

- The photographs took over two months to arrive and that the quality of some of the photographs was poor including shots of the backs of people's heads;
- Although Mr and Mrs Bell had received the CD containing the photographs, they were still awaiting the 60 prints and the canvas print; and
- Mr Emery had been difficult to get in touch with, and he had told Mr and Mrs Bell in six occasions that the photographs had been sent out, but they still did not receive them. The photographs were eventually sent to Mr and Mrs Bell's daughter.

Ofcom considered that it was clear that the allegations made in the programme reflected the allegations that had been put to Mr Emery in the pre-broadcast email correspondence between him and the programme makers. Ofcom took the view that the information provided by the programme makers prior to the broadcast was sufficient for Mr Emery to provide an informed and timely response to the allegations that would be made in the programme (which he did by way of email to the programme makers on 9 October 2012. Mr Emery's response and the extent to which it was reflected in the programme is discussed further in head c) below).

Given the factors considered above, Ofcom was satisfied that Mr Emery was given specific information about the allegations to be made in the programme and that there was no unfairness to him in the circumstances.

- b) Ofcom next considered Mr Emery's complaint that he was represented incorrectly in the programme as broadcast, in that the company had rebranded and that he was no longer in charge of it. Mr Emery said that he had informed the programme makers that Mr Lewis was the new owner of the company and that he was now responsible for dealing with any complaints.

In considering this head of complaint, Ofcom had regard to Practice 7.9 of the Code which states that before broadcasting a 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 an individual or organisation and anyone whose omission could be unfair to an individual or organisation has been offered an opportunity to contribute.

Ofcom acknowledged that Mr Emery said that the company, True Blue Photography had been rebranded to Valleyblue Photography and that it was now owned by a Mr Robert Lewis. Ofcom also took note of the reasons submitted by ITV in its statement in response to the complaint (summarised on page 2 above) why the programme makers did not make reference to Mr Lewis and Valleyblue Photography. Ofcom noted too that while Mr Emery had mentioned the existence of Mr Lewis to the programme makers, no direct contact was made between Mr Lewis and the programme makers. Mr Emery had been the point of contact throughout the pre-broadcast correspondence between the company and the programme makers.

Ofcom was not in a position to determine whether or not Mr Lewis now owned the company and whether or not it had been rebranded. However, it considered in the particular circumstances of this case, the current ownership and name of the company was not a relevant and material factor in deciding whether or not Mr Emery was treated unjustly or unfairly in the programme as broadcast. In Ofcom's

view, Mr Emery of True Blue Photography had been hired by Mr and Mrs Bell, and it was against him that the allegations made in the programme were directed. It was in this context that Ofcom considered whether or not Mr Emery had been treated unjustly or unfairly in the programme.

Ofcom noted from the pre-broadcast correspondence between the programme makers and Mr Emery that Mr and Mrs Bell had contacted the programme to complain that they had hired Mr Emery of True blue Photography to take photographs of their wedding day and they were not happy with their experience. In Ofcom's view, the complaint made by Mr and Mrs Bell was very clearly set in terms of their dissatisfaction with Mr Emery not only in producing photographs of poor quality, but also not providing them with the service they had expected. This was clearly represented in the programme as broadcast and, in Ofcom's view, viewers would have understood that Mr and Mrs Bell had dealt with Mr Emery and it was against him that they complained.

Ofcom was satisfied that the broadcaster had taken reasonable steps to present material facts in the programme, including the statement which Mr Emery made to the programme. On account of the information available to them, it was not unfair for the programme makers to omit Mr Lewis' name from the broadcast because of the information they had with reference to his involvement with Mr and Mrs Bell's complaint.

In these circumstances, Ofcom considered that it was reasonable for the programme to make specific reference to Mr Emery and True Blue Photography in the programme as broadcast, and it was satisfied that reasonable care had been taken not to misrepresent the role Mr Emery occupied in Mr and Mrs Bell's story in a way that was unfair to him.

Ofcom therefore found no unfairness to Mr Emery in this regard.

- c) Ofcom also considered Mr Emery's complaint that the statements provided to the programme makers by him and his employer, Mr Lewis, were not used in the programme. As a result, Mr Emery said that the programme was one sided and biased and that he had not been given the chance to put his side of the story across.

Ofcom had regard to Practice 7.11 of the Code when considering this part of the complaint 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. It also had regard to Practice 7.13 of the Code which states that where it is appropriate to represent the views of a person not participating in the programme this must be done in a fair manner.

Ofcom noted that the programme makers provided Mr Emery with an opportunity to respond to the allegations that were to be made in the programme in an email dated 4 October 2012. It noted too that Mr Emery was given a further opportunity to engage with the programme makers in an email dated 8 October 2012 by being offered an interview or, if he preferred, to provide them with a written statement. On 12 October 2012, Mr Emery provided the programme makers with the following statement by email:

"It is with much sorrow that the Bells were not happy with the photographs and the problems they had in receiving the photos. They were resolved by sending them to the daughter's house which were received. We did not hear

about any problems with the photographs until we were contacted by your program. We have ordered all prints to be developed and as a good will gesture and order an extra canvass to be produced. We are awaiting reply to which print they would like put onto canvass.

Due to unforeseen events this would have been sorted a lot sooner and disappointed it had come to this. We have since changed suppliers with our courier company's and implemented new protocol to prevent this happening in the future Valleyblue Photography."

In relation to Mr Emery's assertion that he provided the programme makers with a statement from Mr Lewis, Ofcom noted that although Mr Emery had told the programme makers in an email dated 11 October 2012 that he would send them a statement he was editing from Mr Lewis, it was not forthcoming. Ofcom noted that the next email received by the programme makers relating to a statement was that of 12 October 2012, which contained the statement immediately above. While this statement ended "Valleyblue Photography", it was clear that it was sent by Mr Emery from the email account he had been communicating with the programme makers since 4 October 2012. It appears to Ofcom that no separate email from Mr Lewis was received by the programme makers.

Towards the end of the report, Ofcom noted the following comments made by the reporter in the programme:

*"The Bells say Mr Emery was difficult to get hold of. So we contacted Gareth Emery of True Blue who said it was with much sorrow that he'd heard the Bells weren't happy. He's ordered all the prints to be developed and as a gesture an extra canvas. The company has since changed suppliers and implemented a new protocol to prevent this happening again."*

Ofcom considered that it was clear from the material provided to it by the broadcaster that the programme makers had provided Mr Emery with an opportunity to respond to the allegations to be made in the programme and that his response demonstrated that it was given in an appropriate and timely manner. Mr Emery's statement was edited and summarised in the programme and was not read out in its entirety. However, Ofcom considered that the summarised points from Mr Emery's statement included in the broadcast report adequately set out Mr Emery's position regarding the allegations relating to Mr and Mrs Bell's wedding photographs, and would have left viewers in no doubt that he was sorry that: they were not happy with the photographs; he had taken steps to prevent such a situation happening again; and, had made a good will gesture to them.

Taking all the factors above the account, Ofcom was satisfied that the programme makers had given Mr Emery an appropriate and timely opportunity to respond and that his response to the allegations was fairly presented in the programme as broadcast.

**Accordingly, Ofcom has not upheld Mr Emery's complaint of unjust or unfair treatment in the programme as broadcast.**

## Not Upheld

### Complaint by Miss Christine Davies

*Homes under the Hammer, BBC1, 14 September 2012*

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#### Summary

Ofcom has not upheld this complaint of unwarranted infringement of privacy made by Miss Christine Davies.

Brief footage of Miss Davies' back garden was included in the programme, showing that she kept a number of dogs in the garden. No other information about Miss Davies, such as her name or address, was given in the programme.

Ofcom found that Miss Davies' privacy was not unwarrantably infringed in connection with the obtaining of material included in the programme or in the programme as broadcast. This is because, in the particular circumstances of the case, she did not have a legitimate expectation of privacy in relation to the filming and broadcast of footage of her back garden.

#### Introduction

On 14 September 2012, BBC1 broadcast an edition of *Homes Under the Hammer*, which follows the stories of properties sold through auctions. One of the properties included in this edition was a semi-detached house in County Durham. One of the programme's presenters viewed the property before the auction and footage was shown of the interior and exterior of the house. The presenter went back with the successful buyers before they began refurbishing the house and visited again when the work was finished.

During the presenter's initial visit, footage lasting around ten seconds was shown of the back garden of the adjoining property, where three dogs were seen in pens. This property belongs to the complainant, Miss Christine Davies. The presenter said:

*"The first thing I'd want to do is to put in new double glazed windows, if nothing else to keep out the noise from the dogs next door."*

Further footage of the garden and the dogs of around three seconds' duration was shown a little later in the programme, without any comments.

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

Miss Davies complained that her privacy was unwarrantably infringed in connection with obtaining of material included in the programme in that:

- a) Footage of her rear garden and her dogs was filmed without her permission.

In response the BBC said that initial filming of the house next door to Miss Davies' home took place in November 2011. The update on the renovations to the featured property was filmed in the spring of 2012, several months prior to transmission of the programme. At the time of the initial filming, when the semi-detached house adjoining that of Miss Davies was on the market, it was open to any interested member of the public to make an appointment to view it. As

regards Miss Davies' point that a camera would have had to be angled and aimed into her garden to obtain the footage in question, the BBC said that the shots of her garden were filmed from an upstairs window of one of the rear bedrooms of the adjacent house which was being auctioned, from which there was a clear and uninterrupted view of it. It could therefore have been seen by anyone viewing the house while it was on the market, and it was overlooked by several other properties in the vicinity.

Miss Davies also complained that her privacy was unwarrantably infringed in the programme as broadcast in that:

- b) Footage of her home was featured in the programme without her permission. Miss Davies said that this was not a background shot and the camera would have had to be angled and aimed into Miss Davies' garden, which is enclosed by a seven foot all-round fence.

By way of background, Miss Davies said that she was now inundated by total strangers walking and driving past to look at the house and to ask if her dogs were OK, as they had seen them on television. Miss Davies said that she was also receiving daily telephone calls and visits from friends and family who had been asked if this was "the house with the dogs". She had been exposed to unnecessary stress and worry that her dogs were going to be stolen.

In response the BBC said that the programme makers were very careful not to identify the exact location of the property and that no street names or house numbers were featured in the programme. Although the commentary mentioned that the house was in the village of Bowburn, it could be seen on Google Street View that many of the houses in the village are of a similar construction to the one shown, so that it would be very difficult to pinpoint with any degree of certainty which of them belonged to Miss Davies.

The BBC said that at the time of filming there was nothing of an intrinsically private nature taking place in Miss Davies' garden and that no individuals were present. It was clear that the whole of her back garden was given over to housing dogs, but the commentary accompanying the footage of the dogs was brief and uncritical, other than an acknowledgement that the prospective buyers might want to soundproof the house against the noise of barking.

The BBC said that it was justified, in the context of a programme which sought to advise viewers on the potential issues of buying a property at auction, to include the footage of the dogs as an example of the sort of problem that buyers might have to allow for in planning the renovation of the property they were buying. It was entirely pertinent to draw attention to the fact that the windows of the property were not double glazed and that the noise from the dogs would be a major consideration for a prospective buyer. The BBC said that throughout filming the noise from the dogs was such that the programme makers could not reasonably have avoided giving an explanation to viewers about the source of it. The sound of the dogs could be clearly heard when filming in the back garden of the featured house and the production team had confirmed that it could also be clearly heard from the front of the properties. It would therefore have been apparent to anyone living in the area that Miss Davies kept dogs.

## 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 provided by both parties. This included a recording of the programme as broadcast and transcript and both parties' written submissions. Neither the complainant nor the broadcaster chose to make any representations on Ofcom's Preliminary View.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights of the broadcaster's 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.

- a) Ofcom first considered the complaint that Miss Davies' privacy was unwarrantably infringed in connection with the obtaining of material included in the programme, in that footage of her rear garden and her dogs was filmed without her permission.

In considering this part of the complaint, Ofcom had regard to Practice 8.5 of the Code, which states that any infringement of privacy in the making of a programme should be with the person's consent or be otherwise warranted.

In considering whether or not Miss Davies' privacy was unwarrantably infringed in the making of the programme as broadcast, Ofcom first considered the extent to which she could have legitimately expected that the footage of her private garden and her dogs would not be filmed without her consent.

Ofcom noted from the footage shown in the programme that Miss Davies' back garden had been filmed from an upstairs room in the neighbouring property, which was being offered for sale by auction. Ofcom noted Miss Davies' view that the camera would have had to be "angled" towards her garden in order to carry out the filming and the BBC's argument that what was filmed was visible from the neighbouring property. However, having viewed the broadcast footage, Ofcom considered that the shots appeared to be of a straightforward view from an upstairs room in one property into the next door garden.

Ofcom recognised that the filming of footage of an individual's home, including the garden, in particular a back garden that is not accessible or visible from the public highway, may give rise to an expectation of privacy in some circumstances. Ofcom also noted that Miss Davies' back garden was only overlooked by a relatively small number of surrounding properties, albeit that the garden and the dogs would have been visible to a larger number of people while the property next door was for sale and was being viewed by prospective purchasers. Further Ofcom took the view that nothing of an inherently private or sensitive nature was taking place in Miss Davies' garden when the footage was filmed. In this regard Ofcom noted the BBC's position that the dogs were audible from the next door property from which the filming was carried out as well as from the public highway at the front of the property, and that neither Miss Davies nor any other individuals were filmed in the back garden. Furthermore, there was nothing in the footage to reveal the location of the property or identify Miss Davies as its inhabitant. Ofcom further considered that the manner in which the footage was obtained appeared not to be intrusive and there was no suggestion by Miss Davies that the programme makers had disturbed her in the process of filming the property.

Taking all the above factors into account, Ofcom considered that Miss Davies did not have a legitimate expectation of privacy in relation to her back garden being filmed without the programme makers securing her prior consent. Given this conclusion, it was not necessary for Ofcom to consider whether any intrusion into Miss Davies' privacy in connection with the obtaining of material included in the programme was warranted.

Ofcom has therefore not upheld Miss Davies's complaint of unwarranted infringement of Miss Davies' privacy in connection with the obtaining of material included in the programme.

- b) Ofcom then considered the complaint that Miss Davies' privacy was unwarrantably infringed in the programme as broadcast in that footage of her home was featured in the programme without her permission. Miss Davies said the footage broadcast was not a background shot and the camera would have to have been angled and aimed into Miss Davies' garden, which is enclosed by a seven foot all-round fence.

By way of background, Miss Davies said that she was now inundated by total strangers walking and driving past to look at the house and to ask if her dogs were OK, as they had seen them on television. Miss Davies said that she was also receiving daily telephone calls and visits from friends and family who had been asked if this was "the house with the dogs". She had been exposed to unnecessary stress and worry that her dogs were going to be stolen.

Ofcom took into consideration 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.

In considering whether Miss Davies' privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered the extent to which she had a legitimate expectation of privacy in relation to the broadcast of footage of the property in the programme.

Ofcom noted that the section of the programme that looked at the auction and subsequent sale of the property included two very brief shots of Miss Davies' back garden, filmed from the neighbouring property. The first of these shots was accompanied by the presenter saying:

*"The first thing I'd want to do is to put in new double glazed windows, if nothing else to keep out the noise from the dogs next door."*

The second shot appeared later, without accompanying commentary.

Ofcom recognised that the inclusion in a programme of footage of an individual's home and, in particular, a back garden may give rise to an expectation of privacy in some circumstances. Ofcom also noted that the Miss Davies' back garden was not visible from the public highway and was only overlooked by a relatively small number of surrounding properties, albeit that it would have been visible to a larger number of people visiting the property next door which was for sale.

However, Ofcom considered that the footage was of a very short duration and, as set out under head a) above, appeared to be of a straightforward view from an upstairs room in one property into the next door garden. The footage broadcast did not reveal anything of an inherently private or sensitive nature taking place in Miss Davies' garden. It also noted that the dogs were audible from the next door property, as was apparent from the programme. Ofcom noted that the BBC stated that the dogs were also audible from the public highway at the front of the property and that neither Miss Davies nor any other individuals were shown in the back garden. Furthermore, Miss Davies was not referred to by name in the programme, nor was the location of her home identified beyond the programme's reference to the name of the village in which the property which featured in the programme was located. Therefore, identification of Miss Davies or the location of her property would have been difficult for people with no knowledge of the immediate location.

Taking all the above factors into account, Ofcom considered that Miss Davies did not have a legitimate expectation of privacy, in relation to the inclusion of footage of her back garden in the programme without her consent. Given this conclusion, it was not necessary for Ofcom to consider whether any intrusion into Miss Davies' privacy in connection with the obtaining of material included in the programme was warranted.

Ofcom has therefore not upheld Miss Davies' complaint of unwarranted infringement of privacy in the programme as broadcast.

**Accordingly, Ofcom has not upheld Miss Davies' complaint of unwarranted infringement of privacy in connection with the obtaining of material included in the programme and in the programme as broadcast.**

## Other Programmes Not in Breach

Up to 25 March 2013

Programme	Broadcaster	Transmission Date	Categories
Desperate Midwives	Really	20/02/2013	Scheduling
Emmerdale	ITV1	24/12/2012	Violence and dangerous behaviour
Hollyoaks	Channel 4	04/01/2013	Violence and dangerous behaviour
Looser Women Live	Controversial TV	03/03/2013	Crime
The Jeremy Kyle Show	ITV1	05/11/2012	Generally accepted standards
The Jeremy Kyle Show	ITV1	16/11/2012	Disability discrimination/offence
The Jeremy Kyle Show	ITV1	17/11/2012	Under 18s in programmes
World Without End	Channel 4	26/01/2013	Violence and dangerous behaviour

## Complaints Assessed, not Investigated

### Between 5 and 25 March 2013

This is a list of complaints that, after careful assessment, Ofcom has decided not to pursue because they did not raise issues warranting investigation.

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
"More Music Variety" slogan	Heart FM	n/a	Materially misleading	1
02 advertisement tracks	ITV2	11/03/2013	Advertising content	1
2 Broke Girls	E4	16/03/2013	Generally accepted standards	1
5 News	Channel 5	07/03/2013	Sexual orientation discrimination/offence	1
8 Out of 10 Cats	Channel 4	08/03/2013	Generally accepted standards	5
A Very British Wedding	BBC 2	13/03/2013	Offensive language	1
Adrian Durham	Talksport	n/a	Due accuracy	1
Advertisements	5*	07/03/2013	Advertising scheduling	1
Advertisements	Bangla TV	n/a	Advertising minutage	1
Advertisements	Channel S	n/a	Advertising minutage	1
Advertisements	Various	n/a	Advertising content	1
Afrobeat	Choice FM	02/03/2013	Generally accepted standards	1
Afterlife (trailer)	ITV3	24/02/2013	Scheduling	2
Agatha Christie's Poirot	ITV3	18/02/2013	Television Access Services	1
Aldi's sponsorship of Neighbours	Channel 5	n/a	Religious/Beliefs discrimination/offence	1
Alex Polizzi: The Fixer	BBC 2	05/03/2013	Offensive language	1
Alex Polizzi: The Fixer	BBC 2	05/03/2013	Outside of remit / other	1
Alex Polizzi: The Fixer	BBC 2	05/03/2013	Product placement	1
American Guns	Discovery Channel UK	17/11/2012	Advertising scheduling	1
Animal Antics	BBC 1	02/03/2013	Animal welfare	1
Anna and Katy (trailer)	4seven	02/03/2013	Scheduling	1
Anna and Katy (trailer)	Channel 4	03/03/2013	Scheduling	1
Anna and Katy (trailer)	Channel 4	06/03/2013	Race discrimination/offence	1
Anna and Katy (trailer)	Channel 4 +1	03/03/2013	Scheduling	1
Anna and Katy (trailer)	E4	28/02/2013	Scheduling	2
Ant and Dec's Saturday Night Takeaway	ITV	02/03/2013	Generally accepted standards	1

Ant and Dec's Saturday Night Takeaway	ITV	09/03/2013	Harm	3
Ant and Dec's Saturday Night Takeaway	ITV	23/03/2013	Outside of remit / other	7
Any Answers	BBC Radio 4	16/03/2013	Sexual orientation discrimination/offence	1
Arctic with Bruce Parry	Eden	24/02/2013	Violence and dangerous behaviour	1
Ary News	Ary News	19/01/2013	Scheduling	1
Babedraw	Controversial TV	29/11/2012	Offensive language	1
Baby Looney Tunes	Cartoonito	28/02/2013	Offensive language	1
Bad Teacher	Sky Movies Comedy	18/03/2013	Scheduling	1
Barry John: The King	BBC 1 Wales	08/03/2013	Generally accepted standards	1
BBC News at Six	BBC 1	12/03/2013	Generally accepted standards	1
BBC News at Ten	BBC 1	15/03/2013	Outside of remit / other	1
BBC News at Ten	BBC 1	21/03/2013	Outside of remit / other	1
BBC Parliament	BBC	05/03/2013	Television Access Services	1
Bet365.com's sponsorship of Premier League Football	Sky Sports 1	03/03/2013	Gambling	1
Blue Bloods	Sky Atlantic	15/03/2013	Advertising minutage	1
Bobby K	Point 103.1 FM	07/03/2013	Commercial communications on radio	1
Bombardier's sponsorship of Comedy on Dave	Dave	26/02/2013	Sponsorship credits	1
Bombardier's sponsorship of Dave	Dave	25/02/2013	Advertising content	1
Bombardier's sponsorship of Dave	Dave	n/a	Generally accepted standards	1
Bombardier's sponsorship of Dave	Dave	n/a	Race discrimination/offence	1
Boulton and Co	Sky News	06/03/2013	Outside of remit / other	1
Breakfast	BBC 1	11/03/2013	Generally accepted standards	1
Breakfast	BBC 1	13/03/2013	Outside of remit / other	1
Breakfast Show	Absolute 80s	22/02/2013	Competitions	1
Britain's Secret Shoppers	Channel 4	07/03/2013	Materially misleading	1
Broadchurch	ITV	18/03/2013	Materially misleading	1
Built (trailer)	Syfy	n/a	Outside of remit / other	1
Capital Breakfast	Capital FM	06/03/2013	Offensive language	1
Capital Breakfast	Capital FM	n/a	Offensive language	1

Celebrity Juice (trailer)	ITV2	03/03/2013	Generally accepted standards	2
Channel 4 News	Channel 4	09/03/2013	Offensive language	1
Channel 4 News	Channel 4	11/03/2013	Generally accepted standards	1
Channel 4 News	Channel 4	18/03/2013	Scheduling	1
Channel 4 News	Channel 4	n/a	Generally accepted standards	1
Channel promotion	Comedy Central	22/02/2013	Advertising content	1
Channel promotion	Comedy Central	07/03/2013	Religious/Beliefs discrimination/offence	1
Channel promotion	Comedy Central	08/03/2013	Religious/Beliefs discrimination/offence	1
Chart Show	BBC Radio 1	17/03/2013	Race discrimination/offence	1
Chart Show	Kiss FM	17/03/2013	Offensive language	1
Child of Our Time	BBC 1	28/02/2013	Harm	1
Come Dine with Me	Channel 4	01/03/2013	Materially misleading	1
Come Dine with Me	Channel 4	08/03/2013	Disability discrimination/offence	2
Come Dine with Me	Channel 4	19/03/2013	Generally accepted standards	2
Conference 2013	BBC 2 Wales	23/03/2013	Outside of remit / other	1
Continuity announcement	Sky1	13/03/2013	Generally accepted standards	1
Coronation Street	ITV	04/03/2013	Scheduling	1
Coronation Street	ITV	06/03/2013	Disability discrimination/offence	4
Coronation Street	ITV	06/03/2013	Outside of remit / other	1
Coronation Street	ITV	08/03/2013	Harm	2
Coronation Street	ITV	18/03/2013	Generally accepted standards	2
Coronation Street	ITV	20/03/2013	Materially misleading	1
Coronation Street	ITV	n/a	Scheduling	1
Countdown	Channel 4	18/03/2013	Offensive language	1
Countryfile	BBC 1	10/03/2013	Animal welfare	1
Coverage of Papal election	BBC / Sky News	n/a	Outside of remit / other	1
Coverage of Papal election	BBC 1	13/03/2013	Religious/Beliefs discrimination/offence	1
Coverage of Papal inauguration	BBC / ITV / Channel 4	19/03/2013	Outside of remit / other	1
Cowboy Builders	Channel 5	24/03/2013	Offensive language	1
Crufts 2013	Channel 4	10/03/2013	Animal welfare	1
Crufts 2013	Channel 4	10/03/2013	Gender discrimination/offence	1
Dancing on Ice	ITV	03/03/2013	Generally accepted standards	1
Dancing on Ice	ITV	10/03/2013	Voting	3
Daybreak	ITV	05/03/2013	Materially misleading	1
Daybreak	ITV	21/03/2013	Due impartiality/bias	9

Deal or No Deal	Channel 4	05/03/2013	Generally accepted standards	1
Demand 5 promotion	5*	01/03/2013	Materially misleading	1
Dino and Pete Breakfast Show	Capital Radio FM	31/01/2013	Generally accepted standards	1
Dispatches: Death on the Wards	Channel 4	04/03/2013	Due impartiality/bias	5
Dispatches: Rich and on Benefits	Channel 4	18/03/2013	Due accuracy	2
Doctor in the House	BBC 2	02/03/2013	Offensive language	1
Doctor Who	WATCH	22/03/2013	Outside of remit / other	1
Dog the Bounty Hunter	Pick TV	16/02/2013	Offensive language	1
Don't Tell The Bride	Really	05/03/2013	Scheduling	1
Dr G Medical Examiner (trailer)	Really	15/02/2013	Scheduling	1
Dr Who	Watch	06/03/2013	Outside of remit / other	1
Drivetime	Talksport	18/03/2013	Generally accepted standards	1
East Midlands Today	BBC 1	18/03/2013	Drugs, smoking, solvents or alcohol	1
EastEnders	BBC 1	01/03/2013	Scheduling	1
EastEnders	BBC 1	05/03/2013	Gender discrimination/offence	1
EastEnders	BBC 1	07/03/2013	Outside of remit / other	1
EastEnders	BBC 1	13/03/2013	Scheduling	1
EastEnders	BBC 1 Wales	n/a	Generally accepted standards	1
Easter Eggs Live (trailer)	Channel 4	17/03/2013	Scheduling	1
Embarrassing Bodies	Channel 4	18/03/2013	Nudity	1
Emmerdale	ITV	14/03/2013	Age discrimination/offence	1
Emmerdale	ITV	15/03/2013	Scheduling	1
Emmerdale	ITV	18/03/2013	Offensive language	1
Emmerdale	ITV	19/03/2013	Generally accepted standards	1
Emmerdale	ITV	n/a	Generally accepted standards	1
ER	Sky Atlantic	12/03/2013	Offensive language	1
Fighting Talk	BBC Radio 5 Live	23/03/2013	Generally accepted standards	1
First Among Equals: The Laurie Cunningham Story	ITV	06/03/2013	Materially misleading	1
Food Glorious Food	ITV	20/03/2013	Materially misleading	53
Format	Fire 107.6 FM	10/03/2013	Format	1
Format	Radio Ikhlas	n/a	Format	1
Foxy Bingo's sponsorship of The Jeremy Kyle Show	ITV	25/03/2013	Sponsorship	1

Free Radio News	Free Radio Birmingham	08/03/2013	Outside of remit / other	1
Friday Night Fusion	Unity FM	22/02/2012	Due impartiality/bias	1
Geordie Shore	MTV	n/a	Generally accepted standards	1
Get Squiggling!	CBeebies	11/03/2013	Materially misleading	1
Giff Gaff's sponsorship of The Big Bang Theory	E4	19/03/2013	Materially misleading	1
Gogglebox	Channel 4	07/03/2013	Gender discrimination/offence	1
Gogglebox	Channel 4	14/03/2013	Sexual orientation discrimination/offence	2
Got to Dance	Sky1	03/03/2013	Voting	2
Got to Dance	Sky1	10/03/2013	Voting	1
Got to Dance	Sky1	17/03/2013	Materially misleading	3
Got to Dance	Sky1	17/03/2013	Under 18s in programmes	1
Great British Menu	BBC 2	14/03/2013	Generally accepted standards	2
Greg James	BBC Radio 1	28/02/2013	Scheduling	1
Halfords' sponsorship of Top Gear	Dave	13/03/2013	Generally accepted standards	1
Have I Got News For You	Dave	19/01/2013	Television Access Services	1
Heading Out	BBC 2	26/02/2013	Generally accepted standards	1
Hirsty's Daily Dose	Capital Yorkshire	n/a	Offensive language	1
Hollyoaks	Channel 4	07/03/2013	Violence and dangerous behaviour	1
Hollyoaks	Channel 4	19/03/2013	Violence and dangerous behaviour	1
Hollyoaks	E4	07/03/2013	Product placement	1
Hollyoaks (trailer)	Channel 4	21/03/2013	Scheduling	1
How I Met Your Mother	TV6	11/02/2013	Gender discrimination/offence	1
How the Other Half Live	Channel 4	27/05/2010	Materially misleading	1
Hugh's Big Fish Fight	Channel 4	14/02/2013	Violence and dangerous behaviour	6
Ice Road Truckers	Channel 5	08/03/2013	Offensive language	1
ILM Qurbani Appeal	UCTV	16/10/2012	Charity appeals	1
Ink Master USA	TV6	10/02/2013	Gender discrimination/offence	1
ITV News and Weather	ITV	17/03/2013	Outside of remit / other	1
ITV News at Ten and Weather	ITV	15/03/2013	Disability discrimination/offence	1
ITV News Lookaround	ITV Border (Scottish)	19/03/2013	National/regional/local issues	1
ITV News Meridian	ITV	19/02/2013	Crime	1
ITV Sport (trailer)	ITV	14/03/2013	Materially misleading	1
Jacob's Creek's sponsorship of The	ITV	14/03/2013	Sponsorship credits	1

Jonathan Ross Show				
James O'Brien	LBC 97.3FM	12/03/2013	Generally accepted standards	1
Jeremy Vine	BBC Radio 2	04/03/2013	Generally accepted standards	1
Killers Behind Bars	Channel 5	14/03/2013	Generally accepted standards	1
Lee Nelson's Well Funny People	BBC 3	15/03/2013	Generally accepted standards	2
Lee Nelson's Well Funny People	BBC 3	15/03/2013	Race discrimination/offence	1
Legally Blonde	Channel 5	17/03/2013	Sexual orientation discrimination/offence	1
Legally Blonde	Channel 5	24/03/2013	Scheduling	1
Let's Dance For Comic Relief	BBC 1	02/03/2013	Generally accepted standards	1
Let's Dance for Comic Relief	BBC 1	02/03/2013	Scheduling	2
Lifecycle	BBC Radio 5 Live	13/12/2012	Outside of remit / other	1
London Irish	Channel 4	n/a	Outside of remit / other	1
Look North (Yorkshire)	BBC 1	21/03/2013	Outside of remit / other	2
Loudness of advertisements	Channel i	n/a	Advertising content	1
Love Actually	ITV2	15/03/2013	Scheduling	1
Man Vs Food	Dave	23/03/2013	Outside of remit / other	1
Match of the Day	BBC 1	02/03/2013	Outside of remit / other	1
Match of the Day	BBC 1	03/03/2013	Offensive language	1
Matt, Polly and Geraint	Capital FM (South Wales)	24/03/2013	Race discrimination/offence	1
Mayday	BBC 1	03/03/2013	Generally accepted standards	1
Mayday	BBC 1	05/03/2013	Generally accepted standards	1
Mayday	BBC 1	07/03/2013	Generally accepted standards	1
Meridian FM	Meridian FM 107.0	n/a	Due impartiality/bias	1
News	BBC Radio 2	24/03/2013	Outside of remit / other	1
No Mercy	Movie Mix	22/02/2013	Offensive language	1
Obhimot	CHSTV	01/03/2013	Generally accepted standards	1
Obsessive Compulsive Cleaners	Channel 4	13/02/2013	Materially misleading	1
Obsessive Compulsive Cleaners	Channel 4	13/02/2013	Disability discrimination/offence	11
Obsessive Compulsive Cleaners	Channel 4	13/02/2013	Violence and dangerous behaviour	2
Obsessive Compulsive Cleaners	Channel 4	27/02/2013	Disability discrimination/offence	5
Obsessive	Channel 4	27/02/2013	Offensive language	1

Compulsive Cleaners				
Obsessive Compulsive Cleaners	Channel 4	06/03/2013	Disability discrimination/offence	10
Obsessive Compulsive Cleaners	Channel 4	13/03/2013	Disability discrimination/offence	2
Obsessive Compulsive Cleaners	Channel 4	20/03/2013	Disability discrimination/offence	5
Obsessive Compulsive Cleaners (trailer)	Channel 4	05/03/2013	Generally accepted standards	1
One Born Every Minute	Channel 4	13/03/2013	Outside of remit / other	1
One Direction competition	Hallam FM	08/03/2013	Competitions	1
Only Fools and Horses	BBC 1 Northern Ireland	04/03/2013	Offensive language	1
Oscar Pistorius: What Really Happened?	BBC 3	13/03/2013	Generally accepted standards	1
Pair of Kings	Disney XD	27/02/2013	Generally accepted standards	1
Panorama	BBC 1	11/03/2013	Disability discrimination/offence	1
Panorama	BBC 1	11/03/2013	Outside of remit / other	1
Panorama	BBC 1	11/03/2013	Violence and dangerous behaviour	1
Paul Merton Looks at Alfred Hitchcock	BBC 2	27/12/2012	Religious/Beliefs discrimination/offence	1
Pawb a'i Farn	S4C	07/02/2013	Due impartiality/bias	1
Plebs (trailer)	ITV2	09/03/2013	Generally accepted standards	1
Pranked	Viva	08/03/2013	Generally accepted standards	1
Press Preview	Sky News	11/03/2013	Race discrimination/offence	1
Pret-a-Porter	Sky Indie	19/03/2013	Nudity	1
Prisoners' Wives	BBC 1	14/03/2013	Generally accepted standards	2
Prisoners' Wives	BBC 1	14/03/2013	Violence and dangerous behaviour	1
Programming	BBC Radio 1	n/a	Race discrimination/offence	1
Programming	MTV Hits	n/a	Generally accepted standards	1
Programming	Various	n/a	Offensive language	1
Programming	Various	n/a	Outside of remit / other	1
Question Time	BBC 1	07/03/2013	Generally accepted standards	6
Reality With Mahee	CHSTV	14/02/2013	Drugs, smoking, solvents or alcohol	1
Regional News and Weather	BBC 1	06/03/2013	Outside of remit / other	1
Regional News and Weather	BBC 1	19/03/2013	Outside of remit / other	1

Religious programming	Various	n/a	Generally accepted standards	1
Renegade Rock Show	Koast Radio	n/a	Generally accepted standards	1
Reporting Scotland	BBC 1 Scotland	28/02/2013	Outside of remit / other	1
Rich and on Benefits	Channel 4	18/03/2013	Due impartiality/bias	1
Ricky Gervais: Science	E4	08/03/2013	Generally accepted standards	1
Ripper Street	BBC 1	24/02/2013	Scheduling	1
Robson's Extreme Fishing Challenge	Channel 5	04/03/2013	Generally accepted standards	1
Rude Tube	E4	21/03/2013	Animal welfare	1
Sarah Beeny's Selling Houses (trailer)	More4	09/03/2013	Violence and dangerous behaviour	1
Sarah Beeny's Selling Houses (trailer)	More4	14/03/2013	Violence and dangerous behaviour	1
Saw: The Final Chapter	Channel 5	24/02/2013	Generally accepted standards	1
Scottish Football	ESPN	23/02/2013	Religious/Beliefs discrimination/offence	2
Secrets of the Pickpockets	Channel 4	26/02/2013	Race discrimination/offence	1
See No Evil, Hear No Evil	Channel 5	03/03/2013	Generally accepted standards	1
Show Dogs: The Road to Crufts (Trailer)	More4	01/03/2013	Scheduling	1
Show Dogs: The Road to Crufts (Trailer)	More4	02/03/2013	Scheduling	1
Show Dogs: The Road to Crufts (Trailer)	More4	06/03/2013	Generally accepted standards	1
Show Dogs: The Road to Crufts (Trailer)	More4	08/03/2013	Generally accepted standards	1
Six Nations Rugby Union	BBC 1	16/03/2013	Religious/Beliefs discrimination/offence	1
Sky News	Sky News	13/03/2013	Offensive language	1
Sky News at 5 with Jeremy Thompson	Sky News	11/03/2013	Generally accepted standards	1
Sky News with Kay Burley	Sky News	15/03/2013	Generally accepted standards	1
Sky Sports Special Report: Racism in Football	Sky Sports	11/02/2013	Generally accepted standards	1
Sky World News	Sky News	06/03/2013	Outside of remit / other	1
Something Special	CBeebies	21/03/2013	Violence and dangerous behaviour	1
Spartacus: War of the Damned	Sky1	04/03/2013	Generally accepted standards	1
Sponsorship	Pick TV	n/a	Sponsorship	1
Sports rights	Sky Sports	01/01/2013	Outside of remit /	1

			other	
Stacey Solomon: Depression, Teen Mums and Me	BBC 3	19/03/2013	Outside of remit / other	1
STAR Breakfast	STAR 107	06/03/2013	Generally accepted standards	1
Star of Politics	Bangla TV	09/02/2013	Generally accepted standards	1
Station ident	Sunrise Radio	n/a	Materially misleading	1
Stella	Sky1	01/03/2013	Generally accepted standards	1
Stella	Sky1	08/03/2013	Drugs, smoking, solvents or alcohol	1
Steve Allen	LBC 97.3FM	03/03/2013	Commercial communications on radio	1
Steve Allen	LBC 97.3FM	19/03/2013	Due accuracy	1
Steve and Karen Breakfast	Metro Radio	11/02/2013	Generally accepted standards	1
Storm	Storm	09/03/2013	Premium rate services	1
Strange Sex	DMAX	02/02/2013	Scheduling	1
STV News	STV	08/03/2013	Generally accepted standards	1
STV News at Six	STV	26/02/2013	Generally accepted standards	1
Talk Show	ATN Bangla	05/02/2013	Due impartiality/bias	1
Tesco Mum of the Year Awards 2013	Channel 5	10/03/2013	Violence and dangerous behaviour	1
The Alan Titchmarsh Show	ITV	08/03/2013	Gender discrimination/offence	3
The Alan Titchmarsh Show	ITV	11/03/2013	Drugs, smoking, solvents or alcohol	1
The Alan Titchmarsh Show	ITV	11/03/2013	Scheduling	1
The Andrew Marr Show	BBC 1	24/03/2013	Generally accepted standards	7
The Bassman	Capital FM	19/03/2013	Offensive language	1
The Big Questions	BBC 1	03/03/2013	Generally accepted standards	2
The Borgias	Pick TV	28/02/2013	Outside of remit / other	1
The Chase	ITV	06/03/2013	Competitions	1
The Chase	ITV	15/03/2013	Race discrimination/offence	1
The Chase	ITV	19/03/2013	Generally accepted standards	1
The Following	Sky Atlantic	19/02/2013	Advertising minutage	1
The Following	Sky Atlantic	12/03/2013	Generally accepted standards	1
The Fried Chicken Shop: Life in a Day	Channel 4	19/02/2013	Disability discrimination/offence	1
The Graham Norton Show	BBC 1	04/03/2013	Religious/Beliefs discrimination/offence	1
The Incredible Mr Goodwin (trailer)	Gold	24/02/2013	Scheduling	1

The Jeremy Kyle Show	ITV	13/03/2013	Generally accepted standards	1
The Jeremy Kyle Show	ITV	14/03/2013	Race discrimination/offence	1
The Jeremy Kyle Show	ITV	19/03/2013	Generally accepted standards	1
The Jeremy Kyle Show	ITV	20/03/2013	Under 18s in programmes	1
The Jeremy Kyle Show US	ITV	16/03/2013	Scheduling	1
The John Smith's Grand National (trailer)	Channel 4	20/03/2013	Animal welfare	1
The John Smith's Grand National (trailer)	Channel 4	22/03/2013	Animal welfare	1
The Jonathan Ross Show	ITV	23/02/2013	Drugs, smoking, solvents or alcohol	3
The Jonathan Ross Show	ITV	16/03/2013	Outside of remit / other	1
The Lady Vanishes	BBC 1	17/03/2013	Drugs, smoking, solvents or alcohol	1
The Matt Lucas Awards	BBC 1	05/03/2013	Generally accepted standards	1
The New Avengers	ITV4	08/03/2013	Sponsorship credits	1
The Now Show	BBC Radio 4	16/03/2013	Age discrimination/offence	2
The One Show	BBC 1	13/03/2013	Outside of remit / other	3
The One Show	BBC 1	21/03/2013	Generally accepted standards	1
The Only Way is Essex (trailer)	ITV2	09/03/2013	Scheduling	1
The Only Way is Essex (trailer)	ITV2	10/03/2013	Scheduling	2
The Planners	BBC 2	07/03/2013	Disability discrimination/offence	2
The Planners	BBC 2	14/03/2013	Generally accepted standards	1
The Radio 1 Breakfast Show with Nick Grimshaw	BBC Radio 1	21/02/2013	Violence and dangerous behaviour	2
The Radio 1 Breakfast Show with Nick Grimshaw	BBC Radio 1	04/03/2013	Generally accepted standards	1
The Radio 1 Breakfast Show with Nick Grimshaw - Dizzee Rascal "Baseline Junkie"	BBC Radio 1	n/a	Drugs, smoking, solvents or alcohol	1
The Simpsons	Sky1	17/03/2013	Scheduling	1
The Today Programme	BBC Radio 4	12/03/2013	Outside of remit / other	1
The Today Programme	BBC Radio 4	n/a	Outside of remit / other	1
The Walking Dead (trailer)	n/a	n/a	Scheduling	1

The World in 1993	Viasat History	05/03/2013	Materially misleading	1
The Wright Stuff	Channel 5	11/03/2013	Generally accepted standards	1
The Wright Stuff	Channel 5	21/03/2013	Generally accepted standards	1
This Morning	ITV	05/03/2013	Offensive language	2
This Morning	ITV	08/03/2013	Generally accepted standards	1
This Morning	ITV	11/03/2013	Offensive language	1
This Morning	ITV	15/03/2013	Generally accepted standards	2
This Morning	ITV	20/03/2013	Generally accepted standards	1
Today	BBC Radio 4	16/03/2013	Outside of remit / other	1
Top Gear	BBC 2	24/02/2013	Offensive language	1
Top Gear	BBC 2	09/03/2013	Offensive language	1
Top Gear	BBC 2	09/03/2013	Religious/Beliefs discrimination/offence	1
Top Gear	BBC 2	17/03/2013	Offensive language	1
Traffic Cops	Dave	27/02/2013	Gender discrimination/offence	1
Trisha	Channel 5	07/03/2013	Scheduling	1
Trisha	Channel 5	08/03/2013	Offensive language	1
Two and a Half Men	TV6	12/02/2013	Gender discrimination/offence	1
Victoria Derbyshire	BBC Radio 5 Live	12/03/2013	Generally accepted standards	1
World Cup 2014 Qualifier	ITV	22/03/2013	Generally accepted standards	4
World Cup 2014 Qualifier	ITV	22/03/2013	Outside of remit / other	1
WPC 56	BBC 1	18/03/2013	Race discrimination/offence	1
You and Yours	BBC Radio 4	28/02/2013	Harm	4
Young Apprentice	BBC 1	13/12/2013	Generally accepted standards	1
You've Been Framed!	ITV	15/03/2013	Generally accepted standards	1
You've Been Framed!	ITV2	06/03/2013	Animal welfare	1
You've Been Framed!	ITV2	16/03/2013	Nudity	1
Yukon Men	Discovery Channel	09/03/2013	Animal welfare	1

## Investigations List

If Ofcom considers that a broadcast may have breached its codes, it will start an investigation.

Here is an alphabetical list of new investigations launched between 7 and 27 March 2013.

<b>Programme</b>	<b>Broadcaster</b>	<b>Transmission Date</b>
40 Year Old Virgins (trailer)	Channel 4	23/03/2013
Advert for Bangladesh Premier League	Channel Nine UK	18/02/2013
Advertisement for Free Mawlana Sayeedi Federation	Bangla TV	11/02/2013
Advertisement for The Bangladesh Awami League	Channel Nine UK	28/02/2013
Advertising minutage	Channel I	n/a
Advertising minutage	Channel S	n/a
Advertising minutage	Rishtey	22/03/2013
Advertising minutage	Sunrise TV	19/01/2013
Advertising scheduling	NTV	14/02/2013
Crufts 2013	Channel 4	10/03/2013
Hollyoaks	Channel 4	19/03/2013
Islamic Debate	Ummah Channel	09/02/2013
Journey of a Life Time	Channel I	27/01/2013
Looser Women Live	Controversial TV	03/03/2013
Neal Atkinson: Loser Line	Wish FM 102.4	28/02/2013
News	ATN Bangla	15/02/2013
News	Channel I	03/03/2013
News	CHS	12/02/2013
Round Table	Bangla TV	09/02/2013
Sky Sports (promotion)	Sky News	13/02/2013
The Daily Show (Global Edition)	Comedy Central Extra	05/03/2013
Today	BBC Radio 4	22/03/2013

Viking River Cruises' sponsorship of Mystery Dramas on ITV	ITV1	04/03/2013
What's Cooking? From the Sainsbury's Kitchen	Channel 4	26/02/2013
Youth Show	Sangat TV	17/02/2013
<p>Complaint from BT against Sky</p> <p>Ofcom has opened an investigation following a complaint from BT against Sky under Ofcom's Code on the Prevention of Undue Discrimination between Broadcast Advertisers ("the Code")<sup>1</sup>. Rule 4.1 of the Code states:</p> <p style="text-align: center;"><b>"A television broadcaster must not unduly discriminate between advertisers<sup>2</sup> that seek to have advertising included in its licensed service."</b></p> <p>Under section 319 of the Communications Act 2003 ("the Act"), Ofcom has a duty to set standards for the content of programmes to be included in television and radio services, in one or more codes. Under section 319(2)(k) of the Act, one of the standards objectives Ofcom must secure through such codes is that "there is no undue discrimination between advertisers who seek to have advertisements included in television and radio services"<sup>3</sup>.</p>		

**It is important to note that an investigation by Ofcom does not necessarily mean the broadcaster has done anything wrong. Not all investigations result in breaches of the Codes being recorded.**

For more information about how Ofcom assesses complaints and conducts investigations go to:

<http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/standards/>.

For fairness and privacy complaints go to:

<http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/fairness/>.

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<sup>1</sup> Available at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/undue-discrimination.pdf>.

<sup>2</sup> For the sake of clarity, an 'advertiser' includes, but is not restricted to, any commercial or non-commercial entity.

<sup>3</sup> See sections 319(1), 319(2) and 319(3) of the Act.