

**Decision of the Election Committee on a Due Impartiality Complaint Brought by  
Siobhan Benita in relation to *The London Debate*,  
Sky News, 19 April 2012<sup>1</sup>**

On Monday 30 April 2012, Ofcom’s Election Committee (“the Committee”)<sup>2</sup> met to consider and adjudicate upon a complaint made on behalf of Siobhan Benita, the independent candidate in the London Mayoral Election. The complaint was about the broadcast of *The London Debate* (“the Programme”) broadcast on Sky News at 20:00 on 19 April 2012. The complaint was made by email dated 25 April 2012 (the “Complaint”) from Siobhan Benita.

The Committee consisted of the following members: Tim Gardam (Chairman of the Committee, Chairman of the Ofcom Content Board); Anthony Lilley (Member of Ofcom’s Content Board); Glyn Mathias (Member for Wales of Ofcom’s Content Board); Janey Walker (Member of Ofcom’s Content Board); and Christopher Woolard (Ofcom Group Director with responsibility for Content, International and Regulatory Development and Member of Ofcom’s Content Board).

For the reasons set out below, having considered all the submissions and evidence before it under the relevant provisions of the Broadcasting Code (“the Code”), the Committee decided that Siobhan Benita’s complaint should not be upheld and that the broadcast of the Programme complied with the requirements of the Code and that no remedial action was required on the part of Sky News.

## **Background**

### *The London Debate*

The Programme was a two-hour live factual programme featuring debate on policy matters affecting London and consisted of two halves: the first half of the Programme consisted of a debate (“the Debate”) between the candidates in the current London Mayoral Election of the

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<sup>1</sup> This Decision was retaken by the Committee on 1 May 2012 after the complainant raised with Ofcom a factual inaccuracy in Head B of the Decision.

<sup>2</sup> The Committee’s Terms of Reference are available at: <http://www.ofcom.org.uk/about/how-ofcom-is-run/committees/election-committee/terms-of-reference/>

Conservative, Labour and Liberal Democrat parties, based on questions put by members of the studio audience and moderated by the presenter, Anna Botting. The second half of the Programme consisted of comment on the Debate and the issues it raised, and included brief interviews (lasting a few minutes each) with three of the other candidates in the London Mayoral Election, including Siobhan Benita, who had not participated in the Debate<sup>3</sup>. The Programme was produced by Sky Broadcasting Limited (“Sky”), which also carried out compliance of the Programme.

### *Siobhan Benita’s Complaint*

Siobhan Benita complained that the broadcast of the Programme breached the requirements for due impartiality set out in the Code.

In detailing the grounds of her complaint, Siobhan Benita made submissions as follows:

- a) Sky was in breach of its obligation of impartiality in excluding Siobhan Benita from the Debate within the Programme.
  - (i) Sky wrongly ignored a range of indicators of Siobhan Benita’s having “significant current support”, such as: public support from high-profile supporters; wide treatment as a “serious candidate” in the press; and “the highest percentage of positive tweets of any candidate”.
  - (ii) Sky was wrong to base their compliance decisions with regard to the Debate on parties’ electoral support in the 2008 London Assembly Elections because: electoral support is not the “critical factor” because “it is the individual that people vote for”; and “it is confusing and discriminatory to conflate the mayoral and London Assembly elections...by linking the two....”.
  - (iii) Television debates have become the “most important aspect of the democratic process” and Sky was wrong to invite only the candidates of the “major

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<sup>3</sup> The Green Party candidate, Jenny Jones, was invited to participate in the Programme, but was unable to attend.

parties” to participate in the Debate, as electors will be voting for an individual rather than a party.

- b) Due to the fact that television debates “carry with them both trails and post-debate news coverage” then if a candidate was not included in the Debate, Sky deprived Siobhan Benita “of this additional coverage”.

### *Response from Sky*

In response to Siobhan Benita’s complaint, Sky (by letter dated 26 April 2012) set out detailed submissions on behalf of Sky News, arguing that the broadcast of the Programme, including the Debate, was legitimate and in compliance with the requirements of the Code (together with other programming).

Siobhan Benita made further submissions by email dated 27 April 2012, which were considered by the Committee.

### **Statutory Framework & the Code**

Under section 319 of the Communications Act 2003, Ofcom has a duty to set standards objectives for the content of programmes included in television (and radio) services, which are set out in the Code.

Specifically, the standards objectives include the objective that “*the impartiality requirements of section 320 are complied with*”: section 319(2)(c).

Section 320 imposes special impartiality requirements in respect of “*matters of political or industrial controversy*” and “*matters relating to current public policy*”. In particular, section 320(1)(b) requires “*the preservation, in the case of every television programme service..., of due impartiality, on the part of the person providing the service, as respects all of those matters*”.

Section 320(4)(a) provides that the requirement in section 320(1)(b) “*may be satisfied by being satisfied in relation to a series of programmes taken as whole*”.

Section 320(5) provides that Ofcom's standards code shall contain provision setting out the rules to be observed in connection with: (a) the application of the requirement specified in section 320(1)(b); and (b) the determination of what, in relation to that requirement, constitutes a "series of programmes".

Section 320(6) then provides that any provision made for the purpose of section 320(5)(a) must, in particular, take account of the need to ensure the preservation of impartiality in relation to the following matters (taking each matter separately) – (a) matters of major political or industrial controversy, and (b) major matters relating to current public policy, as well as of the need to ensure that the requirement specified in section 320(1)(b) is satisfied generally in relation to a series of programmes taken as a whole.

### ***Applicable provisions of the Code***

Section Five of the Code makes provision in relation to "*Due Impartiality and Due Accuracy and Undue Prominence of Views and Opinions*".

The Committee considered that the Debate, as a (non-news) factual programme featuring debate between politicians on policy matters affecting London in the London Mayoral Election, was properly to be regarded as a programme relating to "*matters of major political and industrial controversy and major matters relating to current public policy*". Such matters are defined in Section Five as being "*...generally matters of political or industrial controversy or matters of current public policy which are of national, and often international, importance...*".

As such the Committee considered that the following provisions of Section Five were specifically relevant.

Rule 5.11: "*...Due impartiality must be preserved on matters of major political and industrial controversy and major matters relating to current public policy by the person providing a service... in each programme or in clearly linked and timely programmes*".

Rule 5.12: "*In dealing with matters of major political and industrial controversy and major matters relating to current public policy an appropriately wide range of significant views must be*

*included and given due weight in each programme or in clearly linked and timely programmes. Views and facts must not be misrepresented”.*

For the purposes of the rules, the Committee also considered the meaning of “due impartiality” as defined at the beginning of Section Five: *“‘Due’ is an important qualification to the concept of impartiality. Impartiality itself means not favouring one side over another. ‘Due’ means adequate or appropriate to the subject and nature of the programme. So ‘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. The approach to due impartiality may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach is signalled to the audience. Context, as defined in Section Two: Harm and Offence of the Code, is important”.*

Furthermore, given that this complaint was made by Siobhan Benita in the course of the current London Mayoral Election campaign (which began, for the purposes of the application of the Code, with the last date for the publication of notice of the election on 20 March 2012 and ends with the close of the poll on 3 May 2012), the Committee also considered the application of Section Six of the Code: *“Elections and Referendums”.*

Rule 6.1 of the Code makes clear that *“the rules in Section Five, in particular the rules relating to matters of major political or industrial controversy and major matters relating to current public policy, apply to the coverage of elections and referendums.”*

Further, Rule 6.2 provides that *“Due weight must be given to the coverage of major parties during an election period. Broadcasters must also consider giving appropriate coverage to other parties and independent candidates with significant views and perspectives.”*

As to the meaning of “major parties”, Section Six states that: *“At present in the UK major parties are the Conservative Party, the Labour Party and the Liberal Democrats...”*. This definition of “major parties” is not specific to particular elections (such as the present London Mayoral Election) but rather to elections generally.

The Committee also had regard to the rules in Section Six to *“Constituency coverage and electoral area coverage in elections”*. Section Six explains that an *“Electoral area (for example*

*electoral division, borough, ward or other area) is the local government equivalent to the parliamentary term “constituency”*. As the Debate included candidates standing in the London Mayoral Election, the Committee considered the Debate to be a report or discussion relation to an electoral area (i.e. an “electoral area discussion”).

Rule 6.8 requires that “*Due impartiality must be strictly maintained*” in an electoral area discussion.

Rule 6.9 and Rule 6.10 require that if a candidate takes part in an electoral area discussion, then “*candidates of the major parties*” (under Rule 6.9); and “*all candidates within the...electoral area representing parties with previous significant electoral support or where there is evidence of significant current support*” (under Rule 6.10) must be offered the opportunity to take part in the electoral area discussion. In both cases, if a candidate refuses or is unable to take part in an electoral area discussion, the electoral area discussion may nevertheless go ahead.

Ofcom’s published Guidance to Section Six of the Code states the following with regard to Rules 6.9 and 6.10: “*Rule 6.9 requires that if a candidate takes part in an item about his/her constituency then the broadcaster must ensure that each of the major parties (as explained in the Broadcasting Code under Rule 6.2) is offered an opportunity to take part, as well as those with evidence of significant previous or current electoral support (Rule 6.10)*”.

### **The Committee’s Decision**

The Committee carefully considered all the submissions provided by both Siobhan Benita and Sky in their helpful and prompt correspondence to assist the Committee within a necessarily limited timeframe. In the light of those submissions, the Committee proceeded to consider the relevant heads of complaint advanced by Siobhan Benita.

**A) Sky was in breach of its obligation of impartiality in excluding Siobhan Benita from the Debate.**

**(i) Sky wrongly ignored a range of indicators of Siobhan Benita’s having “significant current support”, such as: public support from high-profile supporters; wide treatment**

as a “serious candidate” in the press; and “the highest percentage of positive tweets of any candidate”.

**(ii) Sky was wrong to base their compliance decisions with regard to the Debate on parties’ electoral support in the 2008 London Assembly Elections because: electoral support is not the “critical factor” because “it is the individual that people vote for”; and “it is confusing and discriminatory to conflate the mayoral and London Assembly elections...by linking the two”.**

**(iii) Television debates have become the “most important aspect of the democratic process” and Sky was wrong to invite only the candidates of the “major parties” to participate in the Debate, as electors will be voting for an individual rather than a party.**

Under this head of complaint, the Committee first considered the application of the rules applicable to electoral area discussions (Rule 6.8 to 6.10), and then turned to the application of the due impartiality rules more generally (Rules 5.11, 5.12 and 6.2).

#### *Electoral area discussion*

The Committee first considered whether the Programme was an electoral area discussion. The Committee’s view was that it was, given that the Programme included six of the seven candidates standing in the current London Mayoral Election expressing views about the issues surrounding that election.

The Committee also considered that although the first half of the Programme comprised of the Debate, featuring only the candidates of each of the “*major parties*”, it was made clear to viewers that the Debate was linked to, and not separate from, the second half of the Programme. For example, the audience were alerted both verbally on several occasions by the presenter, and via on-screen graphics throughout the Debate, that the views of three of the other candidates (including Siobhan Benita), who had not participated in the Debate, were to be included in the second half of the Programme. Given the above, the Committee considered that the Programme as a whole, including the Debate, was a single electoral area discussion.

## Rules 6.9 and 6.10

As mentioned above, Rule 6.9 requires that if a candidate takes part in an electoral area discussion, then “*candidates of the major parties*” must be offered the opportunity to take part in the electoral area discussion. However, if a candidate refuses or is unable to take part in an electoral area discussion, the electoral area discussion may nevertheless go ahead.

Rule 6.10 requires that if a candidate takes part in an electoral area discussion, then “*all candidates within the...electoral area representing parties with previous significant electoral support or where there is evidence of significant current support*” must be offered the opportunity to take part in the electoral area discussion. This also applies to independent candidates.

Ofcom’s published Guidance to Section Six of the Code states the following with regard to Rules 6.9 and 6.10:

*“Rule 6.9 requires that if a candidate takes part in an item about his/her constituency then the broadcaster must ensure that each of the major parties (as explained in the Broadcasting Code under Rule 6.2) is offered an opportunity to take part, as well as those with evidence of significant previous or current electoral support (Rule 6.10)”.*

In the Committee’s view, it was clear that Sky had offered the candidates of the three “*major parties*” the opportunity to take part in the Programme in accordance with Rule 6.9 of the Code. Rule 6.9 requires the major parties to be offered the opportunity to take part, regardless of the previous electoral performance of those parties.

The Committee appreciated the importance of television as a medium, and the potential of televised debates to increase or decrease support for individual political leaders and for their parties as a whole. However, that being so, the Committee considered that Rule 6.9 of the Code did not specifically require the inclusion of any party not properly considered to be a “*major party*” as defined by the Code.

In relation to Rule 6.10, Siobhan Benita argued in summary that as she has “*significant current support*”, she should have been included in the Debate section of the Programme. She

considered that “*significant current support*” should not be assessed solely by reference to electoral support, and Sky should for example have taken account of public support from positive press coverage, high-profile supporters, high social media activity and bookies’ odds in her favour.

In the Committee’s opinion, Siobhan Benita was not able to show that she did have evidence of “*significant current support*” such that Sky was required to offer her the opportunity to take part in the Debate segment of the Programme.

The Committee believed that “*evidence of significant current support*” in Rule 6.10 should be interpreted in a straightforward way. In assessing evidence of “*significant current support*” broadcasters should take account of all relevant factors, and not only electoral support. However, more weight should understandably be given to evidence which is objective and measurable (such as opinion poll evidence). The Committee noted that the published Guidance to Rule 6.10 does not state that a broadcaster should base its decision as to whether to include a candidate (who cannot produce evidence of previous significant electoral support) **solely** on evidence of current electoral support. Rather the Guidance points out that if a candidate does have evidence of either previous significant electoral support or current significant electoral support (i.e. opinion polls), he or she must be offered a chance to take part.

A number of opinion polls have been conducted during the election period for the London Mayoral Election both before and after the Programme was shown on 19 April. These show various levels of support for Siobhan Benita: less than 1% (ComRes, 2-5 April); 2% (YouGov, 13-15 April); and 3% (YouGov, 23 April). The Committee also noted the 3% support indicated in the ComRes poll conducted 23-25 April was published after the Programme was broadcast<sup>4</sup>. In the Committee’s view, the opinion poll results cited above did not: either indicate evidence of significant current electoral support for Siobhan Benita, or indicate in themselves (either in the form of one poll alone or collectively) evidence of “*significant current support*”.

The Committee went on to consider whether there was evidence of significant current support for Siobhan Benita based on the polling evidence when taken together with the other factors

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<sup>4</sup> The Committee noted that it is widely acknowledged most opinion polls of intentions to vote in the UK are subject to a margin of error of plus or minus 3%. See: <http://labs.yougov.co.uk/news/2011/11/21/understanding-margin-error/>

Siobhan Benita put forward such as positive press coverage, high-profile supporters, high social media activity, positive tweets and bookies' odds. In the Committee's view, Siobhan Benita failed to demonstrate sufficient evidence of "*significant current support*" on this basis. Although this additional evidence indicated that her candidacy is supported by certain individuals, in the Committee's view, it lacked sufficient consistency and objectivity. In deciding whether a candidate is receiving "*significant current support*", broadcasters must rely on objective and measurable evidence of the levels of support of a candidate. This will help ensure that broadcasters treat all candidates in an election with the due impartiality required by the Code, and that a broadcaster can demonstrate it has done so, when applying Rule 6.10.

Given the above, the Committee considered that Sky had complied with Rules 6.9 and 6.10 of the Code.

#### Rule 6.8

The Committee next considered whether, although Sky had not breached Rule 6.10 in failing to invite Siobhan Benita to take part in the Debate element of the Programme, it had complied with Rule 6.8, i.e. that due impartiality had been "*strictly maintained*" with regard to the Programme, as an electoral area discussion.

The Committee noted the qualification imported by the word "*due*" in relation to impartiality (as defined in Section Five of the Code) was an important consideration. "*Due impartiality*" did not mean that an equal division of time has to be given to every view (or set of views) within a programme) or within clearly linked and timely programmes. Its meaning varied according to a variety of contextual factors, including the extent to which the content and approach of a programme is signalled to the audience.

The Committee noted the nature of Siobhan Benita's contribution to the Programme, namely a three minute 54 second interview included in the second half of the Programme following the Debate, which was clearly signalled during the Debate. In addition, a graphic listing the four candidates not featured in the Debate was shown during the Debate.

As the Committee considered that Siobhan Benita had not demonstrated

“*evidence of significant current support*”, (as discussed above), and that there had been a well signalled interview with Siobhan Benita in the Programme , the Committee considered that the Programme had complied with the due impartiality requirements of Rule 6.8, in respect of Siobhan Benita. The Committee acknowledged there are a range of editorial techniques by which broadcasters can comply with Rule 6.8, and that Sky had adequately reflected the viewpoint of Siobhan Benita, within the Programme, in a manner commensurate with her profile and indicators of support to that point in the campaign.

Given the above, the Committee considered that Sky had complied with Rule 6.8 and that this element of the Complaint should not be upheld.

#### *Due impartiality/due weight*

The Committee then considered the application of Rules 6.2, 5.11 and 5.12.

In the Committee’s view, given that the Debate was broadcast during the London Mayoral Election period, the Rules in 5.11 and 5.12 had to be considered together with Rule 6.2.

When reading those provisions together in these circumstances, it was clear that:

- (i) due impartiality could be achieved by broadcasters in “clearly linked and timely programmes” included in their services over the election period (Rule 5.11);
- (ii) it required an “appropriately wide range of significant views” to be included and “given due weight” in each programme, or in clearly linked and timely programmes, over the course of the election period, and required views and facts not to be misrepresented (Rule 5.12); and
- (iii) the qualification imported by the word “due” in relation to impartiality (as defined in Section Five of the Code), as noted above was an important consideration.

Further, the Committee noted that Rule 6.2 requires: *“Due weight must be given to the coverage of major parties during the election period. Broadcasters must consider giving appropriate coverage to...independent candidates with significant views and perspectives”*.

It was in that context that the Committee considered the content, format and broadcast of the Programme, including the Debate. For example, the Programme had included an interview lasting three minutes and 54 seconds with Siobhan Benita. The Committee considered it relevant under this head that the Debate had signalled to the audience (via the presenter and on-screen graphics) that Siobhan Benita would be participating in the second half of the Programme, following the Debate.

Given the Committee’s view that Siobhan Benita had not demonstrated evidence of significant current support and the level of coverage given within the Programme to Siobhan Benita, the Committee considered that Sky had given due weight to, and presented with due impartiality, the views of Siobhan Benita within the Programme.

For these reasons, the Committee concluded that the exclusion of Siobhan Benita from the Debate element of the Programme did not constitute breaches of Rules 5.11, 5.12 and 6.2 of the Code and therefore this head of complaint should not be upheld.

**B) Due to the fact that television debates “carry with them both trails and post-debate news coverage” then if a candidate was not in the Debate, Sky deprived Siobhan Benita “of this additional coverage”.**

As noted above, the Committee noted that Rule 6.2 requires: *“Due weight must be given to the coverage of major parties during the election period. Broadcasters must consider giving appropriate coverage to...independent candidates with significant views and perspectives”*. The Committee considered that Rule 6.2 concerns the coverage a candidate receives over the course of an election.

The Committee noted Sky’s submissions on this point that *“a variety of promotional trailers were used for this Programme. Scheduled promos concentrated on the candidates representing the three major parties.; however, verbal trails within programming referred to the fact that Sky News would be speaking to the other candidates during the Programme”*. The Committee

considered that this reflects the level of coverage given in the Programme itself, and that through the verbal trails viewers of Sky News were alerted to that fact that Siobhan Benita would have been appearing subsequently in the Programme.<sup>5</sup>

Given that the Committee has concluded that the level of coverage given to Siobhan Benita in respect of the Debate and the Programme complied with the Code, and the level of current support demonstrated by Siobhan Benita, the Committee considered that Rule 6.2 had not been breached by Sky. In respect of the Programme (and its promotions), Siobhan Benita had received appropriate coverage.

For these reasons, the Committee found that Sky had complied with Rule 6.2 in respect of Head B of the complaint.

### **Conclusion**

For the reasons set out above, the Committee therefore decided that Sky had complied with the Code and Siobhan Benita's complaint should not be upheld.

**Ofcom Election Committee**

**1 May 2012**

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<sup>5</sup> The original decision dated 30 April 2012 made an incorrect reference to an appearance by Siobhan Benita in the Dermot Murnaghan programme