

Neutral Citation Number: [2021] EWCA Civ 1534

Appeal No. C1/2020/1011

Case No: CO/1069/2019

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN’S BENCH DIVISION

ADMINISTRATIVE COURT

Dame Victoria Sharp, President of the Queen’s Bench Division, and Dingemans LJ

[2020] EWHC 689 (Admin)

Royal Courts of Justice

Strand

London WC2A 2LL

Date: 26/10/2021

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS

LORD JUSTICE BAKER

and

LORD JUSTICE WARBY

BETWEEN:

THE QUEEN on the application of
AUTONOMOUS NON-PROFIT ORGANISATION TV-NOVOSTI

Claimant/Appellant

-and-

THE OFFICE OF COMMUNICATIONS

Defendant/Respondent

Sam Grodzinski QC and Jason Pobjoy (instructed by **Reed Smith LLP**) appeared on behalf of the **Appellant** (“RT”)

Brian Kennelly QC, David Glen and Jessica Boyd (instructed by **Ofcom**) appeared on behalf of the **Respondent** (“Ofcom”)

Hearing dates: 12 and 13 October 2021

JUDGMENT

“Covid-19 Protocol:

This judgment was handed down remotely by circulation to the parties’ representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am, Tuesday 26 October 2021.”

Sir Geoffrey Vos, Master of the Rolls:

Introduction

1. This appeal raises two questions. The first is as to the proper interpretation of the provisions of the Communications Act 2003 (the 2003 Act)¹ and the Ofcom Broadcasting Code (the Code) that require television programme services to be presented with due impartiality. The second is as to the matters that ought to be taken into account in determining whether, when Ofcom takes action against a broadcaster in respect of programmes that are alleged not to be presented with due impartiality, it has justified that action as a necessary interference with the broadcaster's rights of freedom of expression under article 10 (article 10) of the European Convention on Human Rights and Fundamental Freedoms (the Convention). Article 10(2) allows such an interference with a broadcaster's right of freedom of expression if it is "prescribed by law" and, amongst other things, "necessary in a democratic society, ... for the protection of the reputation or rights of others".
2. RT is licensed by Ofcom to broadcast in the UK. It is incorporated in Russia and funded by the Russian Government. It aims to provide a non-mainstream, mostly Russian, perspective on global news and current affairs.
3. On 20 December 2018, Ofcom determined that 7 television programmes broadcast by RT had breached the requirement of due impartiality (the Breach

¹ All section numbers mentioned in this judgment are references to the 2003 Act unless otherwise stated.

Decisions).² The 6 programmes relevant to this appeal (the Programmes) are:

(a) two editions of “Sputnik” broadcast on 17 March 2018 and 7 April 2018, which concerned the poisoning of Sergei and Yulia Skripal in Salisbury on 4 March 2018, and (b) a news programme broadcast on 18 March 2018, and three editions of “Crosstalk” broadcast on 13, 16 and 20 April 2018, concerning the role of the US Government in Syria.

4. On 26 July 2019, Ofcom imposed a penalty of £200,000 on RT for its breaches (the Penalty).³ On 13 June 2019, Lewis J granted RT permission to apply for judicial review of the Breach Decisions. The Divisional Court (Dame Victoria Sharp, President of the Queen’s Bench Division, and Dingemans LJ) dismissed RT’s application in its judgment of 27 March 2020.

5. The Divisional Court decided that:

- i) Other content broadcast by the same broadcaster in one programme may be relevant to the assessment of due impartiality in another programme if, but only if, that other content forms part of a series of programmes and the programmes are clearly linked.
- ii) Ofcom had not infringed article 10, because the legitimate objective pursued by the 2003 Act and the Code of due impartiality was sufficiently important to justify limiting RT’s freedom to broadcast the Programmes which did not themselves satisfy the due impartiality

² The decision can be found at:
https://www.ofcom.org.uk/_data/assets/pdf_file/0020/131159/Issue-369-Broadcast-and-On-Demand-Bulletin.pdf

³ The sanction decision can be found at:
https://www.ofcom.org.uk/_data/assets/pdf_file/0027/158571/sanction-decision-rt.pdf

provisions. The Breach Decisions and the Penalty were no more than was necessary to accomplish that objective, whether one was assessing whether RT was in breach of the due impartiality provision or whether harm had been caused by RT's breach. The requirement of due impartiality in each broadcast programme struck a fair balance between the rights of RT and its viewers.

iii) Ofcom was entitled to find that a programme concerning Ukraine (the 7th of the Breach Decisions) was in breach of the due impartiality provisions.

iv) The Penalty was proportionate.

6. RT submitted that the Divisional Court was wrong in two respects. It was wrong to hold that Ofcom was precluded by the 2003 Act from taking into account other programmes broadcast on RT over the same period addressing different viewpoints on the subjects in question. The Divisional Court was also wrong to hold that the Breach Decisions did not infringe article 10, having regard to 5 contextual factors, namely: (i) the likely expectations of the audience as to the nature of the Programmes' content, (ii) the content of the Programmes, (iii) the content of programmes scheduled immediately before and after the Programmes, (iv) the content of other programmes broadcast by RT on the same subjects on the same day, and (v) the fact that RT's audiences had access to a dominant media narrative supporting an opposing point of view on other news platforms. In oral argument, RT placed the greatest emphasis on that last factor, submitting that, in this case, the dominant media narratives on both the Skripal poisoning and US involvement in Syria were so clear that it was unrealistic to

think that a viewer watching the Programmes on RT would not have been aware of them.

7. Ofcom submitted that it had been entitled, as it did, to place much less weight on the extent to which other perspectives were represented in unlinked RT programming before and after each of the Programmes. Ofcom did not seek to support the Divisional Court's holding that it would have been entitled to place no weight on such programming. Whatever was decided on the construction of the 2003 Act, the article 10 question, as to whether the Breach Decisions constituted a disproportionate interference with RT's rights, was determinative. The degree of interference with RT's article 10 rights was limited and justified by and proportionate to the policy ends pursued. The Divisional Court had been right to hold that the Breach Decisions were proportionate and to refuse to displace Ofcom's detailed and expert assessment that the Programmes were not duly impartial.
8. In these circumstances, the issues before this court are relatively narrow. The first issue is whether the Divisional Court was wrong to hold that the 2003 Act precluded Ofcom from taking into account other programmes broadcast on RT, that were not explicitly linked to the Programmes, over the same period addressing different viewpoints on the subjects in question. The second issue is whether the Divisional Court was wrong to hold that the Breach Decisions did not infringe article 10.
9. I will first set out the relevant legislation, and then the relevant provisions of the Code and Ofcom's guidance, the essential points of Ofcom's Breach Decisions

and the Divisional Court's judgment, before addressing the two issues which the court has to decide.

The relevant legislation

10. Article 10 of the Convention provides as follows:

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

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

11. Section 3 of the 2003 Act provides for the "General Duties of Ofcom" as follows:

- i) By section 3(1), that the principal duty of Ofcom, in carrying out its functions is (a) to further the interests of citizens in relation to communications matters, and (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- ii) By section 3(2), Ofcom is required to secure (c) the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests, (d) the maintenance of a sufficient plurality of providers of different television and radio services,

(e) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services, and (f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from (i) unfair treatment in programmes included in such services

iii) By section 3(3), Ofcom must, in performing its duties under subsection (1), have regard, in all cases, to (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and (b) any other principles appearing to OFCOM to represent the best regulatory practice.

iv) By section 3(4), Ofcom must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances - (g) the need to secure that the application in the case of television and radio services of standards ... is in the manner that best guarantees an appropriate level of freedom of expression ... (k) the opinions of consumers in relevant markets and of members of the public generally.

12. Section 319 of the 2003 Act provides for the Code as follows:

i) By section 319(1), it is Ofcom's duty to set, and from time to time to review and revise, such standards for the content of programmes to be

included in television and radio services as appear to them best calculated to secure the standards objectives.

- ii) By section 319(2), the standards objectives include (c) that news (in whatever form it is included in television and radio services) is presented with due impartiality and that the impartiality requirements of section 320 are complied with, (d) that news included in television and radio services is reported with due accuracy, (f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material, and (g) that advertising that contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services.
- iii) By section 319(3), the standards set by Ofcom must be contained in one or more codes.
- iv) By section 319(4), in setting or revising any standards, Ofcom must have regard, in particular and to such extent as appears to them to be relevant to the securing of the standards objectives, to each of the following matters - (a) the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally, or in programmes of a particular description; (b) the likely size and composition of the potential audience for programmes included in television and radio services generally, or in television and radio services of a particular description; (c) the likely expectation of the audience as to the nature of a programme's content and the extent to which the nature

of a programme's content can be brought to the attention of potential members of the audience; (d) the likelihood of persons who are unaware of the nature of a programme's content being unintentionally exposed, by their own actions, to that content; (e) the desirability of securing that the content of services identifies when there is a change affecting the nature of a service that is being watched or listened to and, in particular, a change that is relevant to the application of the standards set under this section; and (f) the desirability of maintaining the independence of editorial control over programme content.

13. Section 320 provides for the "[s]pecial impartiality requirements" as follows:

- i) By section 320(1), the requirements include (b) 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 [mentioned in section 320(2)]; and (c) the prevention, in the case of every local radio service, ... of the giving of undue prominence in the programmes included in the service to the views and opinions of particular persons or bodies on any of those matters [mentioned in section 320(2)].
- ii) By section 320(2), those matters are - (a) matters of political or industrial controversy; and (b) matters relating to current public policy.
- iii) By section 320(4)(a), the requirement specified in subsection (1)(b) is one that (subject to any rules under subsection (5)) may be satisfied by being satisfied in relation to a series of programmes taken as a whole.

- iv) By section 320(5), 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 subsection (1)(b), and (b) the determination of what, in relation to that requirement, constitutes a series of programmes for the purposes of subsection (4)(a).
 - v) By section 320(6), any provision made for the purposes of subsection (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 subsection (1)(b) is satisfied generally in relation to a series of programmes taken as a whole.
14. It was common ground before us that the special impartiality requirements applied to the Programmes, because they dealt with matters of major political controversy and/or major matters relating to current public policy.

The relevant provisions of the Code

15. The Code is presented as a series of principles explained in subsequent rules. The first section on the legislative background to the Code explains that "[t]he Code has also been drafted in the light of the Human Rights Act 1998 and [the Convention]. In particular, the right to freedom of expression, as expressed in [article 10], encompasses the audience's right to receive creative material, information and ideas without interference but subject to restrictions prescribed by law and necessary in a democratic society".

16. Section 2 of the Code⁴ deals with “Harm and Offence” under the principle: “[t]o ensure that generally accepted standards are applied to the content of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material”. The word “context” is defined in section 2 in relation to the rule that “[i]n applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context”.
17. The meaning of “context” is then said to include (but not to be limited to) 8 bullet points as follows: (i) the editorial content of the programme, programmes or series, (ii) the service on which the material is broadcast, (iii) the time of broadcast, (iv) what other programmes are scheduled before and after the programme or programmes concerned, (v) the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally or programmes of a particular description, (vi) the likely size and composition of the potential audience and likely expectation of the audience, (vii) the extent to which the nature of the content can be brought to the attention of the potential audience for example by giving information, and (viii) the effect of the material on viewers or listeners who may come across it unawares.
18. Section 5 of the Code deals with “due impartiality and due accuracy and undue prominence of views and opinions”. The principles are “[t]o ensure that news, in whatever form, is reported with due accuracy and presented with due

⁴ All section numbers and rule numbers in this judgment refer to the Code unless otherwise stated.

impartiality”, and “[t]o ensure that the special impartiality requirements of the [2003 Act] are complied with”.

19. The meaning of “due impartiality” is then provided under the heading of “[r]ules”:

‘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 2 of the Code] is important.

20. The most relevant rules included in section 5 are as follows:

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

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.

5.6 The broadcast of editorially linked programmes dealing with the same subject matter (as part of a series in which the broadcaster aims to achieve due impartiality) should normally be made clear to the audience on air.

5.11 In addition to the rules above, due impartiality must be preserved on matters of major political and industrial controversy and major matters relating to current public policy by the person providing a service ... in each programme or in clearly linked and timely programmes.

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.

21. Paragraph 1.6 of Ofcom’s non-statutory guidance on the meaning of due impartiality in section 5 of the Code emphasises that it is an editorial matter for the broadcaster as to how due impartiality is preserved, as long as the Code is complied with. Paragraphs 1.32-1.33 of Ofcom’s guidance on rule 5.5 provided that “[b]roadcasters must ensure due impartiality is maintained in any programme ... that deals with matters of political ... controversy ...”, and that “[i]t will not always be necessary to present an opposing view which is at odds with the established view of the majority or inconsistent with established fact in order to preserve due impartiality. Further, whether or not due impartiality has been preserved will also be dependent on a range of other factors such as: the nature of the programme; the programme’s presentation of its argument; the transparency of its agenda; the audience it is aimed at, and what the audience’s expectations are”. Paragraph 1.34 of Ofcom’s guidance added that “[i]t is important to note that the broadcasting of highly critical comments concerning the policies and actions of, for example, any one state or institution, is not in itself a breach of due impartiality. It is, in fact, essential that current affairs programmes are able to explore and examine issues and take a position even if that is highly critical. However, a broadcaster must maintain an adequate and appropriate level of impartiality in its presentation of matters of politically controversy. Depending on the specifics of the issue, it may be necessary, in order to fulfil the due impartiality requirements, that alternative viewpoints are broadcast”.

Ofcom's Breach Decisions

22. Ofcom's Breach Decisions (taken together with the decisions on three other programmes that were found not to be in breach) run to nearly 200 pages and it is not possible satisfactorily to summarise them in this judgment. They record the process that Ofcom followed in reaching its decisions.
23. RT complains in its skeleton that the Divisional Court failed to analyse why the interference with RT's article 10 rights was justified in the particular context of the Programmes themselves, and failed to have any regard to the nature or content of the individual programmes and what harm would be done by viewers watching them. This complaint is made in the context of the submission that an interference with a broadcaster's rights of freedom of expression under article 10 must be based on a "close and penetrating examination of the factual justification for the restriction" (*R v. Shayler* [2003] 1 AC 247 per Lord Hope at [61]), and that the court must "scrupulously examine ... the proportionality of a restriction of expression by the press in a TV programme on a subject of general interest" (*Animal Defenders v. United Kingdom* [2013] 57 EHRR 21 at [103]) in order to establish that findings of regulatory breach were strictly necessary to protect the relevant legitimate aim, namely the "rights of others".
24. Annex A to RT's Grounds for Judicial Review provides a detailed analysis of the five contextual factors (mentioned at [6] above) on which RT relies in respect of each of the Programmes (numbered in that document as Programmes 1, 2, 5, 6, 7, and 8). Ofcom's full treatment of these factors is, as I have said, too lengthy to summarise. It is, however, exemplified by the following

important passage contained in the introduction to the Breach Decisions in relation to general contextual factors:-

“RT is a global news and current affairs channel produced in Russia and funded by the Federal Agency for Press and Media Communications of the Russian Federation. The channel is made for UK audiences, providing a Russian perspective on UK and global news and current affairs related programming.

In our view, the points raised by the Licensee [RT] regarding general contextual factors related to the nature of RT as a service and audience expectations (as discussed above under ‘Licensee’s Initial Response – General’) are important and significant factors in our approach to considering the preservation of due impartiality on RT. However, it does not obviate the impartiality requirements, especially when dealing with matters of major political and industrial controversy and major matters relating to current public policy.

We acknowledged that all the programmes were broadcast at the time of an ongoing, highly politically sensitive issue, namely, the aftermath of the poisoning of Sergei and Yulia Skripal, and that, in relation to those programmes discussing the Skripal poisoning, the RT audience would expect a Russian perspective on this subject.

As explained above, Ofcom recognises the importance of the broadcaster’s right to freedom of expression and the audience’s right to receive information and ideas without undue interference in our democratic society. We acknowledge that the right to freedom of expression encompasses the right of broadcasters to make programmes providing audiences with the Russian viewpoint on news and current affairs, including programmes which feature viewpoints that are supportive of certain nation-states, or which are critical of the policies of particular governments, including the UK. We recognise that this may include programmes challenging accusations made against Russia, for example accusations by the UK Government about the Russian authorities’ alleged role in the Skripal case.

However, to the extent that the programmes examined politically controversial matters, TV Novosti [RT] still needed to comply with Section Five of the Code by ensuring that due impartiality was preserved. These rules, amongst others, require broadcasters to ensure that alternative viewpoints are reflected, as appropriate, on matters of major political and industrial controversy and relating to current public policy. The way due impartiality is preserved is an editorial matter for each individual broadcaster.

In a number of programmes, the Licensee argued that it had preserved due impartiality across its service by, for example, broadcasting other

significant viewpoints in its news bulletins and also by broadcasting live the Prime Minister's statements to the House of Commons on the Salisbury incident. However, as mentioned above in relation to the UK statutory framework, television services such as RT cannot preserve due impartiality by relying on what is broadcast across their service as a whole. It is possible for television services such as RT to preserve due impartiality, in the context of Rule 5.12, in clearly linked and timely programmes. However, because it cannot be guaranteed that a person watching one programme will have been watching the programme that precedes it or follows it, the broadcaster must take steps to ensure that the two programmes are "clearly linked".

We took into account the Licensee's argument that a relevant contextual factor, contained within the non-exhaustive list of such factors in Section Two of the Code is "what other programmes are scheduled before and after the programme or programmes concerned". However, we considered it appropriate to put much less weight on this contextual factor compared with other factors listed in Section Two of the Code such as the likely size and composition of the potential audience and likely expectation of the audience. This is because, as set out in Rule 5.6 of the Code, the due impartiality rules envisage that if a broadcaster is seeking to preserve due impartiality by reflecting alternative viewpoints in linked programming, this should be made clear to the audience on air.

The Licensee argued that in many of these programmes, as the dominant narrative was widely disseminated by most if not all other media outlets/broadcasters, it was not necessary for RT to repeat that perspective explicitly in the programme. However, as detailed above, when dealing with matters of major political and industrial controversy (such as the Salisbury incident and its aftermath), the Code requires compliance with the special impartiality provisions. When dealing with matters of major political and industrial controversy and major matters relating to current public policy, broadcasters are required to take additional steps in order to preserve due impartiality, namely an appropriately wide range of significant views must be included and given due weight. In our view, to attempt to do so only by implicit means would not be appropriate and would not be giving those matters due weight.

In each individual programme, in considering whether the Licensee has complied with the due impartiality requirements of the Code, we took account of all these general contextual factors as well as the specific individual contextual factors for each programme, with careful regard to the broadcaster's and audience's Article 10 rights".

25. Ofcom's individual treatment of the Programmes deals in each case with the specific contextual submissions made by RT to which I have referred.

The Divisional Court's judgment

26. The Divisional Court described the first issue that it was deciding as “whether, as a matter of statutory interpretation, either the “dominant media narrative” or the other broadcasts from RT were to be taken into account by Ofcom when assessing whether there has been a breach of the “due impartiality” provisions of the 2003 Act and Code”. It began its treatment of this issue at [33] by stating that the 2003 Act did not “require Ofcom to take account of the output of others, and the so-called dominant media narrative that such output may or may not create, when assessing whether a programme is duly impartial”. Section 320(1)(b) (reflected in rule 5.5) stated that due impartiality must be preserved “on the part of the person providing the service”. That could not be read as “suggesting that the content of television broadcasts by other providers should be taken into account”. The definition of ‘Context’ in the Code, which was relevant to construing ‘due impartiality’ in the Code, did not include the broadcasts of other broadcasters. Instead, the contextual factors in the definition were plainly focused on the output of the broadcaster in question.
27. The Divisional Court concluded at [35] that “[o]ther content broadcast by RT in one programme may be relevant therefore to the assessment of “due impartiality” in another programme if, but only if that other content forms part of a series of programmes and the programmes are clearly linked”. This holding, as I have said, went further than Ofcom’s submission. The two reasons given were (i) the phrase “a series of programmes” in section 320(4)(a) suggested programmes known by the viewer to be linked as a series, because otherwise it would be a matter of chance whether the viewer knew about the other

programmes in the series, and (ii) Ofcom was obliged by section 320(5) to provide for rules in the Code to determine what constituted a series of programmes for these purposes, and Ofcom did so in rule 5.12.

28. The Divisional Court noted at [36] that the requirement that due impartiality has to be satisfied by the broadcaster and the programme under consideration or specifically linked programmes was one that accorded with good sense and with the legislative objective, which the due impartiality regime was designed to safeguard. The legislative objective in question was the preservation of the democratic process itself, which was safeguarded by providing a level playing field for competing views and opinions so that those views and opinions are expressed, heard, answered and debated.
29. The Divisional Court rejected the relevance of an average viewer obtaining news from different sources, because “[t]here could be no assurance ... that a particular viewer would be aware of what the dominant media narrative was, or would see other ‘balancing’ material from the broadcaster [not drawn to their attention], or that the viewer would not otherwise be drawn into an ‘echo chamber’ of output which reinforced or reflected their pre-existing views”.
30. Finally on the first issue, the Divisional Court said that the concept of a dominant media narrative was a nebulous one that would be difficult to define, making it difficult for broadcasters to discern it in advance, and producing a chilling effect on the broadcast media. Compliance would, therefore, be a matter of luck rather than judgment, and possibly inconsistent with the requirement in article 10(2) that any restriction on the right to freedom of expression should be prescribed by law. Ofcom had been right to find that the Programmes infringed

due impartiality on the proper interpretation of the 2003 Act and Code for the reasons given in the breach decision.

31. The Divisional Court described the second issue that it was deciding as whether the 2003 Act and Code, if interpreted without reference to the dominant media narrative or the other broadcasts from RT, infringe RT's rights guaranteed by article 10. It may have framed the question in this way, because it then recorded RT's submissions that (i) in the event that the ordinary interpretation of the 2003 Act was incompatible with RT's rights, then that interpretation of the Act should be re-read pursuant to section 3 of the Human Rights Act 1998 to permit the dominant media narrative and other broadcasts by RT to be taken into account, and (ii) in the alternative, it was entitled to a declaration that the 2003 Act was not compatible with RT's rights under section 4 of the Human Rights Act 1998. This seems to have led RT to submit before us that the Divisional Court misunderstood the question it was deciding since RT's case was "not that the *"due impartiality"* requirement itself [infringed article 10]".
32. The Divisional Court began its substantive treatment of the article 10 issue with lengthy sections at [41]-[63] on the importance of freedom of speech and the decision in *R (Animal Defenders International) v. Secretary of State for Media, Culture and Sport* [2008] UKHL 15, [2008] 1 AC 1312 and *Animal Defenders International* (2013) 57 EHRR 21 ("*Animal Defenders*"). None of what is said in these sections has been contested before us, and accordingly, I do not repeat it here. Nonetheless, since heavy reliance has been placed by both sides before us on the seminal paragraph [28] of Lord Bingham's speech, I set it out in full.

It explains the rather different context of *Animal Defenders* itself, which was that of political advertising likely to be often repeated:

“28 The fundamental rationale of the democratic process is that if competing views, opinions and policies are publicly debated and exposed to public scrutiny the good will over time drive out the bad and the true prevail over the false. It must be assumed that, given time, the public will make a sound choice when, in the course of the democratic process, it has the right to choose. But it is highly desirable that the playing field of debate should be so far as practicable level. This is achieved where, in public discussion, differing views are expressed, contradicted, answered and debated. It is the duty of broadcasters to achieve this object in an impartial way by presenting balanced programmes in which all lawful views may be ventilated. It is not achieved if political parties can, in proportion to their resources, buy unlimited opportunities to advertise in the most effective media, so that elections become little more than an auction. Nor is it achieved if well-endowed interests which are not political parties are able to use the power of the purse to give enhanced prominence to views which may be true or false, attractive to progressive minds or unattractive, beneficial or injurious. The risk is that objects which are essentially political may come to be accepted by the public not because they are shown in public debate to be right but because, by dint of constant repetition, the public has been conditioned to accept them. The rights of others which a restriction on the exercise of the right to free expression may properly be designed to protect must, in my judgment, include a right to be protected against the potential mischief of partial political advertising”.

33. The Divisional Court then recorded the common ground that the 2003 Act and the Code were “law” for the purposes of article 10(2). It stated the legitimate aim pursued by the 2003 Act and the Code in slightly (though perhaps not materially) different terms from those it had stated at [36] as “to ensure that other viewpoints are received by viewers who may then participate on an informed basis in the democratic processes including those of debate and voting”, mentioning the White Paper that led to the 2003 Act as having stated the purpose of the requirements of due impartiality as being to “ensure that the broadcast media provide a counter-weight to other, often partial sources of

news. They therefore contribute significantly to properly informed democratic debate”. The Divisional Court then commented at [66]-[67] that many, but not all viewers will obtain news from different sources, and there was no guarantee that any viewer would “look at other output from a broadcaster, unless that viewer is specifically directed to the other programme”. Accordingly, it concluded that “[p]ermitting a provider of television services to avoid the requirement of “due impartiality”, even for one programme, would severely harm the quality of political discourse in this country and in doing so seriously harm the ‘rights of others’ in article 10(2) because individual viewers will not be exposed to the contrasting views necessary to assist the viewer to take a full role in the modern democratic state”. The fact that newspapers and online news providers had no requirement for due impartiality did not assist RT. RT was not prevented from broadcasting any material. It had to provide balance, and the way in which it did so was up to it.

34. The Divisional Court concluded at [72] that the legitimate objective pursued by the 2003 Act and Code of due impartiality was sufficiently important to justify limiting RT’s freedom to broadcast television programmes which do not themselves satisfy the “due impartiality” provisions. As mentioned at [5] above, the Divisional Court held that the Breach Decisions and the Penalty were no more than was necessary to accomplish that objective, whether one was assessing whether RT was in breach of the due impartiality provision or whether harm had been caused by RT’s breach. The requirement of due impartiality in each broadcast programme struck a fair balance between the rights of RT and its viewers.

35. The Divisional Court gave 7 reasons for those conclusions as follows: (i) all viewers, and not just average consumers of news, were entitled to be presented with relevant viewpoints, (ii) the requirement for due impartiality applied only in respect of broadcast media, so that RT could put programmes of this kind online without regard to due impartiality, (iii) the requirement applied only in respect of narrowly defined content i.e. news, political, industrial and current public policy controversy, (iv) the requirement of due impartiality did not prevent the broadcast of any views, so long as alternative views were also within the broadcast or a series of programmes, (v) the means by which due impartiality was achieved was left to the broadcaster, (vi) requiring a broadcaster to examine the content of programmes from other providers when considering its own due impartiality would make the requirement impermissibly uncertain, and (vii) the scheme was established by Parliament to ensure a plural democracy and to enable others to participate in it on an informed basis; RT's approach risked undermining the aim of ensuring that broadcast content satisfied due impartiality.

Was the Divisional Court wrong to hold that the 2003 Act precluded Ofcom from taking into account other programmes broadcast on RT, that were not explicitly linked to the Programmes, over the same period addressing different viewpoints?

36. This question first requires consideration of the 2003 Act and the Code.
37. One of Ofcom's standards objectives under section 319(2)(c) is to secure that news included in television services is presented with due impartiality and that the impartiality requirements of section 320 are complied with. Section 320(1)(b) imports the requirement "in the case of every television programme service ... of due impartiality". This is to be contrasted with the requirement

relating to local radio services in section 320(1)(c) which prevents them “giving ... undue prominence in the programmes included in the service to the views and opinions of particular persons or bodies”. The television requirement focuses on the “programme service”, whilst the radio requirement focuses on the service as a whole.

38. Even though there is nothing about linked television programmes in the 2003 Act, such a concept is introduced in rule 5.6 which implies that editorially linked programmes dealing with the same subject matter, which are part of a series, may be used by a broadcaster to achieve due impartiality. The question is whether Ofcom was precluded, as the Divisional Court thought, from considering other non-linked RT programmes (whether close in time or not to those complained about) as a matter of context.
39. First, it is to be noted that “context”, as defined in section 2, is introduced into section 5 by the definition of due impartiality, which says expressly that context is important in relation to the approach to due impartiality. In this case, Ofcom placed some weight, as part of the relevant context, on RT’s programming “before or after” the Programmes, but placed less weight on it than on other contextual factors.
40. Secondly, whilst section 320(1)(b) imposes due impartiality on “every television programme service”, section 320(4)(a) makes it clear that that requirement may be satisfied in relation to a series of programmes taken as a whole. It makes no mention of adjacent or other programming on the service. Rule 5.6 then reinforces that approach by requiring that editorially linked programmes, which are part of a series used by a broadcaster to achieve due

impartiality, “should normally” be made clear to the audience on air. Thus, there is no express legislative or Code requirement that Ofcom consider other unlinked RT programming.

41. In my judgment, however, the matter does not end there as the Divisional Court seems to have thought. Section 2 provides as I have said, for context to include other programmes scheduled before and after the programme concerned. The definition in section 2 is, as I have also said, expressly applied to the due impartiality requirements. Whilst rule 5.11 provides, in addition to the other rules, that due impartiality should be preserved on matters of major political controversy either in each programme or in clearly linked and timely programmes, this provision neither expressly nor impliedly excludes relevant context. The same can be said of rule 5.5 which provides that “impartiality may be achieved within a programme or over a series of programmes taken as a whole”.
42. In these circumstances, I think the Divisional Court overstated the position when it said that other content broadcast by RT was relevant to the assessment of due impartiality “if, but only if that other content forms part of a series of programmes and the programmes are clearly linked”. Those programmes shown before or after the Programmes in question are undoubtedly relevant context as the definitions of context in section 2 and of due impartiality in section 5 make clear.
43. It is not clear from the Code whether programmes “before or after” the Programmes need actually to be adjacent to them in order to be relevant context. It seems to me that they would at least need to be close in time to the

Programmes themselves for there to be any real likelihood that any specific viewer would see them. It may be that that question does not need to be decided in this case. In considering other programming on RT, I shall refer to programmes “before or after” the Programmes as “adjacent” and other programmes as “non-adjacent”.

44. The last question in this connection is whether unlinked and non-adjacent content is relevant context. I agree with the Divisional Court that it is not. The thrust of the Code is that due impartiality must be met by each programme or by a linked series of programmes (see the definition of due impartiality itself, and rules 5.5, 5.6, 5.11 and 5.12). Whilst adjacent programming can be relevant context, unlinked non-adjacent programming is unlikely to be of any relevance for a number of reasons: (i) neither the statutory regime nor the Code mentions it, (ii) it would be a matter of chance whether a viewer knew of or viewed such other content, and (iii) Ofcom was required by section 320(5) to provide rules in relation to what constituted a series of programmes, which indicates that Parliament thought such a series to be the most relevant way that due impartiality could be provided outside the programme itself.
45. This last point supports, in my judgment, the point made by Ofcom as to the lesser weight to be attached to adjacent programming as compared to a linked series of programmes.
46. I conclude that RT is right to submit that the Divisional Court was wrong to exclude altogether consideration of adjacent programmes as relevant context, but that Ofcom correctly had regard to them, and applied an appropriate relative weighting to them.

Was the Divisional Court wrong to hold that the Breach Decisions did not infringe article 10?

47. The thrust of RT's argument was that the right to freedom of expression protected by article 10 was one of the essential foundations of a democratic society. Article 10 applied as much to innocuous opinions as to those that offend or shock. The restriction in article 10(2) was a narrow one that must be construed strictly. Any interference with the right of freedom of expression must be necessary in a democratic society and pursue one of the legitimate aims referred to in article 10(2); in this case, the relevant aim was that it was necessary to protect the rights of others. In order to be necessary, Ofcom needed to show clearly the reasons that justified the restriction, and that the restriction was proportionate to the legitimate aim (*Morice v. France* (2016) 62 EHRR 1 at [124]) and corresponded to a pressing social need. Moreover, as Lord Bingham said in *Animal Defenders* at [26], "the importance of free expression is such that the standard of justification required of member states is high and their margin of appreciation correspondingly small, particularly where political speech is in issue". A close and penetrating examination of the factual justification for the restriction was needed in order to ascertain whether it was proportionate to the legitimate aim. I can say at once that I accept all that, just as the Divisional Court did.
48. It is not really suggested, save in one respect, that the Divisional Court departed from these principles. Instead, it is submitted, as I have said, that it failed to have regard to 5 contextual factors namely, to summarise [6] above, the

audience's likely expectations,⁵ the content of the Programmes, the content of adjacent programmes, the content of other RT programmes, and the dominant media narrative on other news platforms.

49. RT accepts that Ofcom was not expressly required either by the 2003 Act or the Code to have regard either to the content of other RT programmes or to the dominant media narrative on other news platforms, but submits that they are required to be taken into account (i) by sections 3 and 6 of the Human Rights Act 1998 in order to assess whether the restriction on the article 10 rights of RT and its audience corresponded to a pressing social need and were proportionate to the legitimate aim of protecting the rights of others, and (ii) in order to properly consider “the degree of harm ... likely to be caused” by the Programmes under section 319(4)(a) and “the effect of the material on viewers ...”, as provided for in the Code definition of “context”.
50. I can say at once that Ofcom did indeed pay attention to the content of the Programmes (see the lengthy description of each in the Breach Decisions), and indeed the adjacent programmes relied upon by RT.⁶ I do not think there is any merit in RT's criticism that Ofcom paid **insufficient** regard to adjacent programmes. If the Programmes themselves did not demonstrate due impartiality and merited regulatory action applying the appropriate test under article 10(2), it is hard to see how content of unlinked programmes before or after the ones in question could save them. Indeed, RT did not address the point

⁵ Mentioned in section 319(4)(c) as being relevant to Ofcom's setting of standards, and in the 6th bullet point to the definition of “context” in the Code.

⁶ See, for example, the treatment of (i) Sputnik on 7 April 2018 at page 55, (ii) Crosstalk on 16 April 2018 at pages 112 and 121-2, and (iii) Crosstalk on 20 April at page 143-144.

in detail in oral argument. I have already explained why the legislation and the Code does not require Ofcom to have regard to the content of non-adjacent RT programmes, since they require news and political programmes themselves to be duly impartial.

51. As I see it, therefore, RT’s complaint boils down to an attack on the failure by either Ofcom or the Divisional Court to pay sufficient regard to the dominant media narrative on other platforms and in the press and to the audience’s likely expectations, alongside what is suggested to be the low levels of likely harm to RT’s viewers.
52. Although the dominant media narrative is not mentioned in the legislation or the Code, Ofcom referred to that narrative in the Breach Decisions (see the penultimate paragraph in the quotation at [24] above), declining to have regard to it on the basis that attempting to provide due impartiality “only by implicit means would not be appropriate and would not be giving” due weight to the “appropriately wide range of significant views” required under rule 5.12 where the special impartiality provisions apply.
53. Before dealing with the likely harm to RT’s viewers in the context of the dominant media narrative and the audience’s expectations, it is worth revisiting the Divisional Court’s approach.
54. The Divisional Court said at [66] that: “[i]f every person is entitled to participate in a modern democratic state, and every person is so entitled, it is essential that all viewers, and not just average viewers, have access to the differing viewpoints”. At [67], it said that “[p]ermitting a provider of television services to avoid the requirement of “due impartiality”, even for one programme, would

severely harm the quality of political discourse in this country and in doing so seriously harm the ‘rights of others’ in article 10(2) because individual viewers will not be exposed to the contrasting views necessary to assist the viewer to take a full role in the modern democratic state”. It also said at [73] that “this was a scheme established by Parliament to ensure a plural democracy and the rights of others to participate in the democracy on an informed basis”, and that RT’s approach to due impartiality risked undermining Parliament’s principled aim of ensuring that all broadcast content satisfies the provisions of due impartiality, having given the 7 reasons for that proposition set out at [34] above.

55. RT submitted that the Divisional Court was wrong at [66] and [72] to treat the theoretical possibility that one viewer might only obtain news from RT as excluding the relevance of broadcasting on other channels. It was, in reality, vanishingly unlikely that any viewer of the Programmes would be unaware of the narrative of the mainstream media in relation to the responsibility for the Skripal poisoning and the use of chemical weapons in Syria. In those circumstances, RT asked rhetorically how it could be proportionate to take action against it on the grounds of due impartiality? If everyone watching knew the opposing view and expected RT’s Programmes to espouse Russia’s views, surely no harm could be done? When one asked the correct question, namely whether the enforcement action taken by Ofcom against RT was necessary in a democratic society in the interests of the protection of the rights of others, RT said that the answer was obvious. It was neither necessary nor proportionate to protect the rights of RT viewers to penalise RT for having screened the Programmes. None of those viewers was harmed. Ofcom had anyway failed to

analyse the specific harm likely to be done to the viewer by watching any of the Programmes, let alone undertaken any rigorous analysis of that harm.

56. In this context, it is worth repeating the 7 reasons that the Divisional Court gave for its conclusion. They were, in summary, that: (i) all viewers are entitled to be presented with relevant viewpoints, (ii) - (iv) due impartiality applies only to broadcast media not online content, only to narrowly defined content, and does not prevent the broadcast of any views, (v) the broadcaster can decide how to achieve impartiality, (vi) it would be impossibly uncertain if a broadcaster had to consider other broadcaster's content, and (vii) the scheme was established to ensure a plural democracy and to enable participation in it on an informed basis.
57. Mr Sam Grodzinski QC, leading counsel for RT, criticised these reasons, but only disagreed directly with the suggestion that it would make a broadcaster's task impossibly uncertain if it had to consider content from other broadcasters. RT submitted that in the case of these Programmes, at least, the dominant media narrative was clear, so no uncertainty could have been said to exist.
58. In dealing with these submissions, it is important to understand the regime that Parliament has put in place. It has decided that only broadcast radio and television channels are to be subject to the due impartiality provisions. As Ofcom's research published in July 2021 shows some 79% of people in the UK receive television news, whilst 73% receive news from the internet, and 49% from social media. Despite the undoubted increase in the numbers of those receiving internet and social media news posts since the 2003 Act, RT did not challenge the due impartiality regime itself.

59. Keeping closely in mind the question that the court must answer under article 10(2), namely whether the enforcement action taken by Ofcom against RT was necessary in a democratic society in the interests of the protection of the rights of others, the first question is who are the “others” in question. They are obviously, I think, members of that democratic society in general and the viewers of RT in particular. It is, I think, material also to ask how many such viewers are affected, even if the answer is not determinative of the outcome. Here, the precise number of viewers is not clear, but it would have been in the low thousands at most. The main right of those viewers that regulatory action might be necessary to protect would be the right to receive duly impartial news programmes, particularly on subjects of political controversy.
60. As I have said, it is accepted that providing news and current affairs broadcasting that satisfies the due impartiality requirement is a legitimate aim for Parliament and Ofcom to be pursuing. The question is whether the actions taken by Ofcom are proportionate to that legitimate aim, bearing in mind the main contextual features relied upon, namely the dominant media narrative, other programming on RT and the expectations of RT’s audience. The other programming takes the matter no further as I have said, but the dominant media narrative, the viewers’ expectations and the likely harm all point, according to RT, in the same direction; as RT said, the viewers knew what everyone else thought and got what they wanted and expected which was the Russian perspective.
61. The first thing to say is that the dominant media narrative may be perceived differently by different people. Mr Grodzinski correctly accepted that the

dominant media narrative had to be considered specifically as it was perceived by RT viewers, not the viewing public in general. But it goes further than that. A regular viewer of RT might be expected to be interested in a Russian government perspective, even to support it. That class of persons may consume news and current affairs from other sources differently to the average UK citizen. They may also receive news and current affairs on the internet and on social media about the Russian perspective. And it is well known that internet and social media news tends to focus and reinforce the user's own opinions (the so-called echo chamber effect). Thus, I do not think that the dominant media narrative, even on a subject like the Skripal poisoning, can be assumed to be a constant to all the "others" whose rights might be protected under the article 10(2) exemption. This factor would make it all the more difficult for a broadcaster accurately to identify the appropriate dominant media narrative reaching its body of viewers.

62. Secondly, in my judgment, the fact that there is a dominant media narrative that is different from the views expressed in RT's Programmes does not, by itself, override the special impartiality requirements that apply to programmes dealing with matters of political controversy and current public policy. Whilst it is true that Ofcom's Breach Decisions did not analyse the harm that might be caused to viewers by the failure to present opposing views, it did analyse in great detail how the issues were treated in each of the Programmes. As regulator, it was Ofcom's job to undertake that exercise and to evaluate whether action was needed in the interests of democratic society to protect the rights of others in the light of the degree of partiality in each Programme. The courts should give weight to Ofcom's assessment and only second guess its expertise where it has

obviously gone wrong (compare *Gaunt v. United Kingdom* (2016) 63 EHRR SE15 at [61]). Moreover, the analysis is not limited to the harm caused to viewers but extends to the harm indirectly caused to members of society generally by the provision of broadcast news and current affairs that lacks due impartiality.

63. Thirdly, RT has not challenged the statutory regime that puts the due impartiality and the special impartiality requirements in place. That regime makes clear that, on matters of the kind covered in the Programmes, an appropriately wide range of significant views must be included and given due weight in each programme or in clearly linked and timely programmes (see rule 5.12 and the contrast between section 320(1)(b) and 320(1)(c) referred to at [37] above).
64. Fourthly, the Programmes themselves were significantly partial. Whilst reference was made to opposing views in the Programmes, those references were either sarcastic or ridiculing. Mr Brian Kennelly QC, leading counsel for Ofcom, took us to three egregious examples,⁷ but, having watched the Programmes themselves, I can say that the Programmes were each partial and unbalanced. They were seemingly deliberately so.
65. In these circumstances, I agree with Ofcom and the Divisional Court that, even if one makes the assumption that RT viewers may, in some or even most cases, be aware of the contrary views expressed in mainstream media, that is not

⁷ The Sputnik broadcast on 17 March 2018, the news programme broadcast on 18 March 2018, and the Crosstalk broadcast on 13 April 2018.

sufficient to outweigh the requirement for due impartiality in programming on matters of political controversy. As I have said, the number of viewers affected by the partial broadcasting is not the point, because Parliament has determined that such broadcasting shall be duly impartial. The regulatory action taken by Ofcom was, therefore, appropriate. It was also proportionate for all the reasons explained by Lord Bingham in *Animal Defenders* at [26]-[28] (albeit in a different context) and by the Divisional Court at [67], where it said that “[p]ermitting a provider of television services to avoid the requirement of “due impartiality”, even for one programme, would severely harm the quality of political discourse in this country and in doing so seriously harm the ‘rights of others’ in article 10(2) because individual viewers will not be exposed to the contrasting views necessary to assist the viewer to take a full role in the modern democratic state”.

66. Ultimately, therefore, I answer the critical question under article 10(2) in the same way as the Divisional Court. The enforcement action taken by Ofcom against RT in respect of each of the Programmes was indeed necessary in a democratic society in the interests of the protection of the rights of members of that democratic society in general and the viewers of RT in particular.
67. This answer is not affected by any of the context relied upon by RT as I have explained. Moreover, Ofcom was entitled to view the question of harm caused to RT’s viewers through the lens of the partial nature of the Programmes themselves as it did. The Divisional Court may not have undertaken a “close and penetrating examination of the factual justification for the restriction”, but Ofcom did indeed scrupulously examine whether it was proportionate to

penalise RT for the Programmes in question, concluding, taking into account the relevant context, that it was. I agree.

Conclusions

68. I have concluded in relation to the first issue before the court that the Divisional Court was wrong to hold that the 2003 Act precluded Ofcom from taking into account, in relation to the issue of due impartiality, programmes broadcast on RT before and after the Programmes. In fact, however, Ofcom did take such adjacent programming into account as relevant context and gave it appropriate weight. Unlinked and non-adjacent content is not relevant context either under the 2003 Act or the Code.
69. In relation to the second issue, the Divisional Court was right to decide that the enforcement action taken by Ofcom against RT in respect of each of the Programmes was necessary in a democratic society in the interests of the protection of the rights of members of that democratic society in general and the viewers of RT in particular. Ofcom had not infringed article 10, because the legitimate objective of due impartiality pursued by the 2003 Act and the Code was sufficiently important to justify limiting RT's freedom to broadcast the Programmes which did not themselves satisfy the due impartiality provisions.
70. I would dismiss this appeal.

Lord Justice Baker:

71. I agree.

Lord Justice Warby:

72. I also agree.