



Neutral Citation Number: [2020] EWHC 689 (Admin)

Case No: CO/1069/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2020

Before :
PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE DINGEMANS

Between :

R (Autonomous Non-Profit Organisation TV- Novosti)	<u>Claimant</u>
- and -	
The Office of Communications	<u>Defendant</u>

Sam Grodzinski QC and Jason Pobjoy (instructed by Reed Smith) for the Claimant
Brian Kennelly QC, David Glen and Jessica Boyd (instructed by Ofcom) for the Defendant

Hearing dates: 15th, 16th and 17th October 2019
Further written submissions dated 22 October 2019

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10 o'clock on Friday, 27 March 2020.

Lord Justice Dingemans (giving the judgment of the Court):

Introduction

1. This case raises two central issues. First, the proper interpretation of the ‘due impartiality’ provisions in the Communications Act 2003 (the 2003 Act) and in the Ofcom Broadcasting Code (the Code); and secondly, the compatibility of those provisions with freedom of expression protected by article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) to which domestic effect was given by the Human Rights Act 1998 (the 1998 Act).
2. The claimant, referred to by the parties as RT, is the Autonomous Non-Profit Organisation TV-Novosti, a Russian corporation, which holds a licence to broadcast the RT television service in the United Kingdom. It is common ground that RT is funded by the Russian Government, and in 2017 it received annual funding of about 18.7 billion roubles or about US\$323 million. RT has an average audience of 3,400 viewers at any given point in the day and an average reach of 1.06 per cent of adults in the United Kingdom, that is, about 540,000 people.
3. The defendant, the Office of Communications, generally known as Ofcom, is the United Kingdom’s regulatory and competition authority for the broadcasting, telecommunications and postal industries and has statutory powers and duties under the 2003 Act in relation to television and radio services amongst other matters. The 2003 Act and the Code made under the 2003 Act provide for the preservation of ‘due impartiality’ in news and television programmes.
4. Since the 1950s, the licensed broadcast media in the United Kingdom have been subject to requirements of ‘due impartiality’. The current requirements are to be found in sections 319 and 320 of the 2003 Act. Section 319(1) requires Ofcom to set and from time to time 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’. Section 319(2) identifies 13 standards objectives, the third of which is that “news included in television and radio services is presented with due impartiality and that the impartiality requirements of section 320 are complied with”: see section 319(2)(c). Section 320 deals with “special impartiality requirements”. These include: “the preservation, in the case of every television programme service, teletext service, national radio service, and national digital sound programme service, of due impartiality on the part of the person providing the service” as respects “matters of political or industrial controversy” and “matters relating to current public policy”: see section 320(1)(b) and (2). Section 320(4) provides that the requirement for due impartiality may be satisfied “by being satisfied in relation to a series of programmes taken as a whole”.
5. Two of the programmes with which this claim is concerned had been broadcast in the wake of the poisoning of Sergei Skripal and his daughter, Yulia Skripal on 4 March 2018 in Salisbury (the Salisbury poisoning) and allegations by the Government of the United Kingdom and others, of Russian state involvement in those events.
6. Following complaints, and in consequence of its own monitoring, Ofcom decided to open an investigation into a number of news and current affairs programmes broadcast

by RT; and on 13 March 2018 Ofcom informed RT it was assessing whether it was fit and proper to hold a UK broadcast licence.

7. The investigations were opened into seven programmes on 18 April 2018, and into three more programmes on 14 May 2018. In accordance with Ofcom's procedures, RT was given opportunities to make written representations to Ofcom in relation to the original decision to open the investigations and then in relation to Ofcom's initial findings set out in Ofcom's Preliminary View (the Preliminary View) which was sent to RT on 13 September 2018. In the Preliminary View, Ofcom provisionally found that nine of the ten programmes investigated breached the Code. There was then an oral hearing on 5 December 2018 held before Ofcom's Director of Content Standards, Licensing and Enforcement, who is the final decision maker at Ofcom in such cases, after which the seven programmes were found to be in breach of the Code.
8. On 20 December 2018 Ofcom determined that seven television programmes broadcast by RT between 17 March and 26 April 2018 had infringed the requirement of due impartiality as defined in the 2003 Act (the breach decision¹). The seven programmes that Ofcom found had breached the Code requirements for due impartiality, and the subjects they addressed, were as follows: ²
 - i) Two separate editions of a programme called Sputnik. These were broadcast on 17 March 2018 and 7 April 2018 respectively and presented by George Galloway, and addressed the Salisbury poisoning;
 - ii) A news programme broadcast on 18 March 2018 and three separate editions of a programme called Crosstalk broadcast on 13, 16 and 20 April 2018 respectively which addressed the role of the Government of the United States of America in Syria; and
 - iii) A news programme broadcast on 26 April 2018 concerning the Ukrainian Government's position on Roma gypsies and Nazism (the Ukrainian broadcast). This broadcast raises a distinct factual issue: which is addressed at the end of issue two below.
9. On 26 July 2019, Ofcom imposed a financial penalty of £200,000 on RT for the breaches it had identified (the sanction decision). RT now challenge the breach decisions by an application for judicial review, permission for which was given by Lewis J on 13 June 2019. By consent this is also the rolled up hearing of its application for judicial review of the sanction decision.

¹ A separate decision was reached for each of the seven programmes, but for convenience these are referred to compendiously as the breach decision.

² The provisions of the Code breached were Rules 5.1 (in respect of the obligation that news be presented with due impartiality only), 5.11 (preserving due impartiality on matters of major political and current public policy in each programme or clearly linked and timely programmes) and 5.12 (in dealing with major political and current public policy matters, including an appropriately wide range of significant views and giving such views due weight, again in clearly linked and timely programmes).

The competing submissions

10. The principal arguments raised by RT before us were advanced by RT in materially similar terms before Ofcom, and were as follows.
11. RT does not challenge the ‘due impartiality’ obligation or any provision of the Code or the 2003 Act. Further, RT accepts, as they did before Ofcom, that Ofcom was entitled to find (the Ukraine programme apart) that the programmes when looked at on their own were partial, and that judged by the criteria Ofcom identified, the ‘due impartiality’ provisions of the Code were not met.
12. RT submit however that Ofcom’s breach decisions were a disproportionate interference with RT’s right to freedom of expression protected by article 10 of the Convention. This was because Ofcom’s decisions contained errors of approach in their application of the relevant standards viewed by reference to article 10. In particular, Ofcom failed to take account of various contextual matters including the ‘dominant media narrative’ to which regard must be had when considering whether the requirement of due impartiality has been met, and because Ofcom failed to take account of RT’s other broadcasts when assessing whether due impartiality had been met. RT particularly note that Ofcom did not complain that the contents of the broadcasts were inaccurate. RT’s challenge (as set out in grounds one and two of its amended detailed statement of grounds for judicial review) is that the court should reinterpret the 2003 Act and Code to give a Convention compliant interpretation under section 3 of the 1998 Act to enable the “dominant media narrative” and other broadcasts by RT to be taken into account (ground one), or the Court should grant a declaration of incompatibility under section 4 of the 1998 Act in respect of sections 319 and 320 and/or declare that Rules 5.1, 5.11 and/or 5.12 of the Code are unlawful (ground two). At the hearing it became common ground that the challenge to Ofcom’s decision in respect of the Ukrainian broadcast raises distinct issues. Finally, it is said that the sanction is in any event, disproportionate (ground three).
13. RT submit that the dominant media narrative is to be found in the output from broadcasters, of television services in this jurisdiction, other than RT. At the time of the broadcast of the Sputnik programmes on 17 March and 7 April 2018 for example, it is said that the dominant media narrative was the United Kingdom Government’s perspective on these events, which was that the Russian state had been involved in the Salisbury poisoning. RT did not need therefore to reproduce this perspective or alert their viewers to it in the programmes. RT submit that it is also to be found in the output from RT in its own news programmes (where relevant) broadcast around the time of the Sputnik programmes, which, it is said, would also have alerted viewers to the UK Government’s perspective. RT submit that if these matters had been taken into account the programmes would not be found to have breached the requirements of “due impartiality”.
14. Ofcom’s position in summary is as follows. First, that it is an expert regulator with vast experience in applying the statutory requirements of ‘due impartiality’. Its findings of breach followed a long and detailed appraisal which paid careful attention to the rights of RT and the need for proportionality. The court should not lightly overturn an expert regulator’s assessment as to proportionality, and Ofcom’s decisions as to breach and sanction were well within the applicable margin. Secondly, there was in any event no error of approach. Ofcom interpreted and applied the Code and the underlying statutory

provisions correctly, and consistently with article 10 afforded proper weight to all relevant contextual factors. To the extent that Ofcom declined to take account of certain wider contextual factors relied on by RT, this is because they were not relevant and would serve to undermine the legislative objectives which the due impartiality regime is designed to safeguard. Thirdly, so interpreted, the domestic regime is consistent with article 10 of the Convention: see *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21 (the *Animal Defenders International* case). There is therefore no need to read down the domestic regime under article 3 of the 1998 Act and no basis for a declaration of incompatibility. The point RT makes about the absence of a complaint of inaccuracy misses the point, because Ofcom (and any viewer) was not in a position to assess the accuracy of the claims, but that made the requirement of due impartiality more and not less important. Finally, on sanction, there is no proper basis for the court to conclude that the fine that Ofcom has imposed is disproportionate in the circumstances of this case.

15. I am very grateful to Mr Grodzinski QC and Mr Kennelly QC and their respective legal teams for their helpful oral and written submissions. It was apparent by the conclusion of the oral submissions that the following matters were in issue: (1) 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; (2) whether the “due impartiality” provisions of 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 of the Convention; (3) whether Ofcom was entitled to find that the Ukraine programme did not comply with the due impartiality provisions; (4) whether permission to apply for judicial review of the sanction should be granted; and (5) whether the sanction is disproportionate.

The relevant legislative provisions

16. I deal first with the legislative provisions relating to Ofcom. Sections 1 and 2 of the 2003 Act provide for the transfer to Ofcom of the functions of the previous regulators, namely the Broadcasting Standards Commission, the Independent Television Commission, the Office of Telecommunications, the Radio Authority and the Radiocommunications Agency. Section 3 sets out the General Duties of Ofcom, and identifies one of the two principal duties of Ofcom in carrying out its function as to “further the interests of citizens in relation to communication matters”: see section 3(1)(a). In carrying out its functions, Ofcom is required to secure amongst other things, in particular, the availability throughout the United Kingdom of a wide range of electronic communications services; 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 and the maintenance of a sufficient plurality of providers of different television and radio services and 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: see sections 3(2)(b) to (e). In performing its duties under section 3(1), Ofcom must have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and any other principles appearing to Ofcom to represent the best regulatory practice: see section 3(3).

17. Further, by section 3(4) of the 2003 Act Ofcom must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances: “(a) the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom; (b) the desirability of promoting competition in relevant markets; (c) the desirability of promoting and facilitating the development and use of effective forms of self-regulation; ... (g) the need to secure that the application in the case of television and radio services of standards falling within subsection (2)(e) and (f) is in the manner that best guarantees an appropriate level of freedom of expression; ... (l) the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural and in urban areas; (m) the extent to which, in the circumstances of the case, the furthering or securing of the matters mentioned in subsections (1) and (2) is reasonably practicable”.
18. The legislation also provides that where it appears to Ofcom that any of its general duties conflict with each other in a particular case, it must secure that the conflict is resolved in the manner it thinks best in the circumstances: see section 3(7) of the 2003 Act.
19. It was common ground that Ofcom was a specialist regulator of broadcasting standards. As such this Court will pay particular regard to its view on areas within its expertise. This is relevant to issues such as an assessment of the broadcasts and whether, on the material considered by Ofcom, there was “due impartiality”. It is also relevant to the issue of the amount of the sanction. However, I agree with RT’s submission that the fact that Ofcom is an expert regulator does not prevent the Court making its own assessment of whether the context of other broadcasts, whether by RT or other broadcasters, should be taken into account in deciding whether the “due impartiality” requirement can be satisfied and in assessing the harm caused by the broadcast.
20. I deal next with the relevant provisions relating to due impartiality. The requirement of due impartiality in relation to the broadcast of television services has been a consistent feature of the legislation regulating the broadcast media in this jurisdiction for many years, most recently in the 2003 Act.³
21. Ofcom submit, and I agree, that the due impartiality provisions form part of a carefully designed tripartite series of measures (together with the prohibition on paid political advertising in section 321(2) and the provision of free party political and party election broadcasts under section 333) designed to safeguard and enhance democratic debate on matters of public concern in the manner identified in the White Paper⁴ (the White Paper) that preceded the enactment of the 2003 Act. It is not the case therefore, that the due impartiality requirements were simply carried over into the 2003 Act from previous legislation, without consideration of their implications for freedom of expression. Nor do I accept that the passage of time and the technological developments which have occurred since the due impartiality requirements were introduced in 1954 into the regime for regulating the broadcast media, mandates a different interpretative approach or affects the underlying policy considerations. This is because, at present, the

³ See the Television Act 1954, section 3, the Television Act 1963, the Television Act 1964 (which consolidated 1954 and 1963 Acts), the Broadcasting Act 1990 and now the 2003 Act.

⁴ “A New Future for Communications” (Cm 5010)

broadcast media maintains a reach and immediacy that remains unrivalled by other media.

22. In a Chapter entitled ‘Safeguarding the interests of citizens’, the White Paper states:

“Accuracy and impartiality will remain at the heart of licensed broadcasting services. This will guarantee the availability of accurate and impartial news services and political impartiality in programme making.

The Government believes that these obligations have played a major part in ensuring wide public access to impartial and accurate information about our society and the opportunity to encounter a diverse array of voices and perspectives.

[And such obligations] ...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.”

23. There is nothing to suggest that the need for accuracy or impartiality in the broadcasting media, or the contribution that an adherence to those standards in broadcasting makes to a properly informed democratic debate, has diminished or is any less important to safeguarding the interests of citizens now than it was at the time of the White Paper or the enactment of the 2003 Act. Indeed, there is reason to consider that the need is at least as great, if not greater than ever before, given current concerns about the effect on the democratic process of news manipulation and of fake news.

24. It is to be noted that Ofcom’s Guidance on section five of the Code, updated in 2013 and 2017, says that: “Ofcom has consistently found that audiences say that impartiality and accuracy in broadcast news is important to them” (para 1.13) and its News Consumption report of 2016, recorded that ninety per cent of people thought that it was important that television news sources were impartial, sixty nine per cent valued impartiality in current affairs programmes and seventy per cent felt it was important that such programmes offered a range of opinions. Further, industry responses to a 2007 Discussion Paper published by Ofcom were overwhelmingly in favour of retaining the due impartiality requirements, for the reason, amongst others, that they secure the credibility of broadcast media in the United Kingdom. It is worth recording four of those responses.

- i) Channel 4 said: “impartiality rules provide the bedrock upon which all standards in UK TV news broadcasting are built” and “It is likely that the fact that a service is licensed, and therefore regulated, will become a valuable sign of trustworthiness for consumers. Arguably, with a plethora of news sources, it is ever more important to viewers to be able to identify who it is they can trust for an objective view.”
- ii) ITV said that relaxing the requirements would “undermine the tradition of impartial broadcast news and act against the public interest” and that “impartiality should have less to do with being niche, or mainstream, and more

to do with ensuring that the service can be relied upon to be duly impartial and provide balanced coverage.”

- iii) The Advisory Committee for Scotland said: “news consumers in the UK take it as a ‘given’ that news from broadcasters is broadly impartial.”
- iv) The National Union of Journalists said: “in this mixed landscape it was even more important that impartiality is maintained across all television standards.”

25. As already noted, Ofcom is under a duty to set such standards for the content of programmes to be included in television and radio services as appear to them to be best calculated to secure a number of standards objectives, one of which is that news included in television and radio services is presented with due impartiality, and that the special impartiality requirements, as defined by section 320 of the 2003 Act are complied with, see section 319(1) and section 319(2)(c). Section 319(1) of the 2003 Act provides that:

“It shall be the duty of OFCOM 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.”

26. Thirteen standards objectives are identified in section 319(2) and include:

“(c) that news included in television and radio services is presented with due impartiality and that the impartiality requirements of section 320 are complied with; ...”

27. Section 319(3) of the 2003 Act provides that:

“The standards set by Ofcom under this section must be contained in one or more codes.”

28. The “Special impartiality requirements” are contained in section 320 of the 2003 Act. Special provision is made for matters of major political or industrial controversy and major matters relating to current public policy in section 320(6)(a) and (b) of the 2003 Act. It is common ground that these provisions are engaged in this case as the subject matter of the seven programmes are matters of major political controversy. The material parts of section 320 (emphasis added) provide that:

“(1)The requirements of this section are—

(a) the exclusion, in the case of television and radio services (other than a restricted service within the meaning of section 245), from programmes included in any of those services of all expressions of the views or opinions of the person providing the service on any of the matters mentioned in subsection (2);

(b) the preservation, in the case of every television programme service, teletext service, national radio service and national digital sound programme service, of due

impartiality, on the part of the person providing the service, as respects all of those matters; [emphasis added]

...

(2) Those matters are—

(a) matters of political or industrial controversy; and

(b) matters relating to current public policy...

....

(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;”

“(5) Ofcom’s standards code shall contain provision setting out the rules to be observed in connection with the following matters—

(a) the application of the requirement specified in subsection (1)(b);

(b) the determination of what, in relation to that requirement, constitutes a series of programmes for the purposes of subsection (4)(a);

...

(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.”

Material provisions of the Code

29. Ofcom is required under the 2003 Act and the Broadcasting Act 1996 to draw up a code for television and radio covering standards in programmes, sponsorship, product placement in television programmes, fairness and privacy, with which broadcast licensees, such as RT, are required to comply as a condition of their licences. The Introductory parts of the Code in Part One reminds broadcasters of the legislative background to the Code which has informed the rules, of the principles that apply to

each section, of the meanings given by Ofcom and of the guidance issued by Ofcom, all of which Ofcom says may be relevant in interpreting and applying the Code. The introduction states that no rule should be read in isolation but within the context of the whole Code, including the headings, cross-references and other linking text.

30. Section 5 of the Code headed: Due Impartiality and Due Accuracy and Undue Prominence of Views and Opinions, is the part which deals with impartiality. The meaning of “due impartiality”; of “matters of political or industrial controversy and matters relating to current public policy” and of a “series of programmes taken as a whole” are set out, together with the relevant rules of the Code:

“Meaning of “due impartiality”:

“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.

Due Impartiality and due accuracy in news.

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

...

Special impartiality requirements: news and other programmes

Matters of political or industrial controversy and matters relating to current public policy

Meaning of “matters of political or industrial controversy and matters relating to current public policy”:

Matters of political or industrial controversy are political or industrial issues on which politicians, industry and/or the media are in debate. Matters relating to current public policy need not be the subject of debate but relate to a policy under discussion or already decided by a local, regional or national government or by bodies mandated by those public bodies to make policy on their behalf, for example non-governmental organisations, relevant European institutions, etc.

...

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 (listed above). 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 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.

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

Meaning of “matters of major political or industrial controversy and major matters relating to current public policy”:

These will vary according to events but are generally matters of political or industrial controversy or matters of current public policy which are of national, and often international, importance, or are of similar significance within a smaller broadcast area”.

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.”

31. Section 2 of the Code, to which reference is made in the meaning of due impartiality, provides that:

“Context includes (but is not limited to):

- the editorial content of the programme, programmes or series;
- the service on which the material is broadcast;

- the time of broadcast
- what other programmes are scheduled before and after the programme or programmes concerned
- 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;
- the likely size and composition of the potential audience and likely expectation of the audience;
- 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
- the effect of the material on viewers or listeners who may come across it unawares.

Time and scheduling of broadcast are not relevant to the provision of programmes on demand but, for programmes made available on BBC ODPS, context also includes (but is not limited to) the nature of access to the content e.g. whether there are measures in place that are intended to prevent children from viewing and/or listening to the content.”

32. Ofcom has published Guidance (the Guidance) on section 5 of the Code, including on the application of the heightened requirements in rules 5.11 and 5.12. The Guidance 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: see para 1.6.

Issue One: 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.

33. The 2003 Act does 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. This is because section 320(1)(b), a provision which is accurately reflected by rule 5.5 of the Code, states that due impartiality must be preserved ‘*on the part of the person providing the service*’. It is impossible to read this provision (whether looked at in isolation or in the context of the legislation as a whole) as suggesting that the content of television broadcasts by other providers should be taken into account. Furthermore, the definition of ‘Context’ in the Code, which is relevant to construing ‘due impartiality’ in the Code, does not include the broadcasts of other broadcasters. Instead, the contextual factors in the definition are plainly focused on the output of the actual broadcaster (that is, the person providing the service).

34. What then of RT’s submission that Ofcom when assessing whether the programmes lacked “due impartiality” should have considered other television programmes that RT

itself broadcast. Section 320(4)(a) of the 2003 Act makes clear that the impartiality obligation may be satisfied ‘in relation to a series of programmes’. RT submitted that Ofcom should have considered all of its other broadcasts as part of “a series of programmes”. In my judgment there are two answers to this submission as a matter of statutory interpretation. First the phrase “a series of programmes” in this context suggests programmes which will be 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. Secondly Ofcom was obliged, by section 320(5) of the 2003 Act to provide for rules in the Code to determine what constituted a series of programmes for these purposes; and Ofcom has duly done this in rule 5.12 of the Code. This says:

“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 ...**”
[emphasis added]

35. Other 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. It is common ground that RT’s other programmes were not “clearly linked” to those which were sanctioned. It follows that RT was obliged to satisfy the requirement of due impartiality by reference to the content of the particular programme under consideration.
36. Although it is not a necessary part of the interpretative process in this case, it might be noted that the requirement that due impartiality has to be satisfied by the actual broadcaster and by the programme under consideration or specifically linked programmes drawn to the attention of the viewer, is one that accords with good sense and with the legislative objective, which the due impartiality regime is designed to safeguard. The legislative objective is the preservation of the democratic process itself, which is safeguarded by providing a level playing field for competing views and opinions so that those views and opinions are expressed, heard, answered and debated.
37. We were shown evidence by RT that, as might be expected, on average, a viewer will obtain news from a number of different sources. In my judgment this does not undermine or affect the need for what is a carefully thought out and calibrated legislative scheme which is taken forward by the Code, nor does it address the mischief at which the legislation is aimed, which is ensuring that all viewers are exposed to the competing views. There could be no assurance for example that a particular viewer would be aware of what the dominant media narrative was, or would see other ‘balancing’ material from the broadcaster (to which, necessarily for this purpose, their attention had not been drawn), or that the viewer would not otherwise be drawn into an ‘echo chamber’ of output which reinforced or reflected their pre-existing views.
38. Moreover, as a pragmatic matter, the concept of a dominant media narrative is a nebulous one, which it would be difficult to define, let alone identify by any acceptable criteria in a particular case. It would be difficult, if not impossible, for broadcasters to discern in advance, precisely what the dominant media narrative was, and what could

be broadcast, consistent with the requirements of the legislation and the Code. Compliance would in those circumstances be a matter of luck rather than judgment. It is questionable whether introducing this element of uncertainty would be consistent with the requirement that any restriction on the right to freedom of expression should be prescribed by law. In any event the chilling effect that such uncertainty would or might produce for the broadcast media, would, in my judgment, be likely to inhibit rather than enhance their freedom of expression, which is a matter considered below in issue two. On the proper interpretation of the 2003 Act and Code it is plain that Ofcom was right to find that the seven television programmes broadcast by RT had infringed the requirement of due impartiality for the reasons given in the breach decision.

Issue two: 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 of the Convention

39. This brings me to the second question namely whether, on the above analysis, sections 319 and 320 of the 2003 Act are incompatible with RT’s rights under article 10 of the Convention. RT submit that in the event that the ordinary interpretation of the 2003 Act is incompatible with RT’s rights, then that interpretation of the Act should be re-read pursuant to section 3 of the 1998 Act to permit the dominant media narrative and other broadcasts by RT to be taken into account. Alternatively RT seeks a declaration that the 2003 Act is not compatible with RT’s rights should be made pursuant to section 4 of the 1998 Act.

40. Article 10 of the Convention provides that:

“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.”

The importance of freedom of speech

41. Freedom of speech and expression is a fundamental human right and freedom. It constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every person. The liberal toleration set out in the Convention would be worthless if it was only extended to tolerant liberals, compare *R(Williamson) v Secretary of State for Education* [2005] UKHL 15; [2005] 2 AC 246 at paragraph 60. The common law has long protected

freedom of speech not only for inoffensive views, but also to those which offend, shock or disturb, see *R v Central Independent Television plc* [1994] Fam 192 at pages 202-203. The freedom to express political views is vital, and in *Lingens v Austria* (1986) 8 EHRR 407 at paragraph 42 the European Court of Human Rights (the ECtHR) stated:

‘Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.’

42. Therefore any limitation on the right of freedom of expression, particularly political freedom of expression, must be strictly considered. Any limitation must be prescribed by law, pursue a legitimate aim and be necessary in a democratic society.
43. In order to be ‘necessary’, relevant and sufficient reasons must be provided to justify the restriction, the restriction must correspond to a pressing social need and it must be proportionate to the legitimate aim pursued, see for example, *Morice v France* [2016] 62 EHRR 1. The Court will assess the proportionality of any measure. In *R v Shayler* [2002] UKHL 11; [2003] 1 AC 247 it was noted that a “a close and penetrating examination of the factual justification for the restriction is needed if the fundamental rights enshrined in the Convention are to remain practical and effective for everyone who wishes to exercise them”. Any restriction must “be sensitive to the facts of each case”. In *R(Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621 the test was framed at paragraph 45 as follows:

‘Is the legislative objective sufficiently important to justify limiting a fundamental right? Are the measures which have been designed to meet it rationally connected to it? Are they no more than necessary to accomplish it? Do they strike a fair balance between the rights of the individual and the interests of the community?’

The Animal Defenders International case

44. Both RT and Ofcom addressed the judgment of the House of Lords in *R (Animal Defenders International) v Secretary of State for Media, Culture and Sport* [2008] UKHL 15; [2008] 1 AC 1312 at length and so it is necessary to address the case in some detail. I have relied on the summary of facts and circumstances set out in the judgment of the ECtHR (2013) 57 EHRR 21 in the narrative below. In *Animal Defenders International* the claimant was a non-profit making company and wanted to air on television an advertisement publicising the plight of primates in captivity as part of its campaign against the use of animals in commerce, science and leisure. The Broadcasting Advertising and Clearance Centre declined to clear the advertisement on the ground transmission would breach the prohibition on political advertising in section 321(2) of the 2003 Act. Animal Defenders International applied for judicial review and for a declaration that the prohibition of political advertising in section 321(2) of the 2003 Act was incompatible with article 10 of the Convention. The only contested issue was whether the prohibition could be considered “necessary in a democratic society”. The Divisional Court (Auld LJ, Ouseley J) dismissed the application: see [2006] EWHC 3069 (Admin); [2007] HRLR 197. The House of Lords (Lord Bingham of Cornhill,

Lord Scott of Foscote, Baroness Hale of Richmond and Lord Neuberger of Abbotsbury) unanimously dismissed the applicant's appeal: see [2008] UKHL 15; [2008] 1 AC 1312.

45. The House of Lords held that the rights of others which a restriction on the exercise of the right to freedom of expression might properly be designed to protect, included a right to be protected against the potential mischief of partial political advertising, which Parliament had been entitled to regard as a real danger; that there might be a pressing social need for a blanket prohibition on political advertising on television and radio by reason of the immediacy and impact of such advertising and because Parliament had judged that it was not possible to devise a more limited restriction which was fair and workable and would suffice to address the problem; that the judgment of Parliament in the context should be accorded great weight; and that, accordingly, the prohibition on political advertising in section 319 and 321 of the 2003 Act was justified as being necessary in a democratic society and compatible with the Convention.
46. It is relevant to refer to some of the background to that decision. In June 2001, the ECtHR in *VgT Verein gegen Tierfabriken v Switzerland* (2002) 34 EHRR 4, had decided that a ban on political advertising in Switzerland was incompatible with article 10. In consequence, as there was concern expressed by the Joint Committee on Human Rights in the period leading up to the enactment of the 2003 Act, the compatibility of its provisions on due impartiality received extensive attention. In its Nineteenth Report of Session 2001-02 (19 July 2002, HL Paper 149, HC 1102) the committee acknowledged the risk that the continuation of the ban on political advertising could well be found incompatible with article 10, but urged caution in moving from the current position in the UK because of the fear of the annexation of the democratic process by the rich and powerful. By the time that the judgment of the House of Lords was decided the ECtHR had decided in *Murphy v Ireland* (2003) 38 EHRR 212 that a ban on the broadcasting of any advertisement directed towards any religious or political end or having any relation to an industrial dispute did not impermissibly infringe the rights protected by article 10.
47. Lord Bingham gave the lead judgment in the House of Lords in *Animal Defenders International*. Lord Bingham reaffirmed the vital importance of freedom of expression in paragraph 27 of his judgment:

“Freedom of thought and expression is an essential condition of an intellectually healthy society. The free communication of information, opinions and argument about the laws which a state should enact and the policies its government at all levels should pursue is an essential condition of truly democratic government. These are the values which article 10 exists to protect, and their importance gives it a central role in the Convention regime, protecting free speech in general and free political speech in particular.”
48. He recognised that, since the prohibition interfered with political expression, the standard of justification imposed on the State was “high” and the margin of appreciation was correspondingly small. The objective of the prohibition was as follows:

“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.”

49. He continued noting that the objective was not 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.”

50. Lord Bingham did not think that the full strength of this argument had been deployed in *VgT*. He considered that a blanket prohibition was necessary to avoid the risk of advertisements by organisations with objectionable goals and he observed that this option had been discounted in *VgT* but recognised in the later judgment of *Murphy v Ireland*. The fact that the prohibition was confined to the broadcast media only was, as Ouseley J. had found, explained by the particular pervasiveness and potency of television and radio, a factor recognised in *Jersild v. Denmark* (1994) 19 EHRR 1.

51. As to whether a less restrictive prohibition (regulated by time, frequency, expenditure or by the nature and quality of advertisements) would avoid the mischief sought to be avoided, Lord Bingham considered it unnecessary to explore this option in detail because, among other matters, any less restrictive system could be circumvented by the formation of small groups pursuing very similar political objects; it would be difficult to apply objectively and coherently; and it would be even more difficult for broadcasters to fulfil their duty of impartiality. While the JCHR had requested a compromise solution, the Government had judged that no fair and workable compromise solution could be found which would address the problem, “a judgment which Parliament accepted. I see no reason to challenge that judgment”. Parliament’s judgment was to be given “great weight” for three reasons. In the first place, it was reasonable to expect that democratically-elected politicians would be “peculiarly sensitive” to the measures necessary to safeguard the integrity of democracy. Secondly, while Parliament considered that the prohibition might “possibly although improbably” infringe Article 10, Parliament had resolved to proceed because of the importance it attached to the

prohibition and its judgment should not be “lightly overridden”. Thirdly, legislation could not be framed to address particular cases but had to lay down general rules and Parliament would decide where the line would be. While that inevitably meant that hard cases would fall on the wrong side of the line, “that should not be held to invalidate the rule if, judged in the round, it is beneficial.”

52. The fact that other means of communication were available to the applicant was a “factor of some weight” and this was to be contrasted with *Bowman v United Kingdom* (1998) 26 EHRR 1 where the impugned provision was found to amount to be a total barrier to the applicant’s communication of her views.
53. Finally, Lord Bingham observed that there was no clear consensus among member States on how to legislate for the broadcasting of political advertisements. The ECtHR had widened the margin of appreciation in such instances and suggested that it might be that each State was best fitted to judge the checks and balances necessary to safeguard, consistently with Article 10, the integrity of its own democracy. He dismissed the appeal, agreeing with Ouseley J and, in the main, with Auld LJ. He did not accept Lord Scott’s view that the domestic courts could differ from this Court in interpreting Convention rights since the former should, in the absence of special circumstances, follow any clear and constant case-law of the ECtHR.
54. Lord Scott agreed with Lord Bingham, adding two comments. In the first place, the prohibition could give rise to further Article 10 claims given its “remarkable” width, because it could withhold from the applicant the ability to place advertisements for broadcasting with no political content or with an entirely neutral content and prevent the applicant from ‘countering’ permitted commercial advertising which offended their principles. As a result, there might be respects in which sections 319 and 321 were incompatible with Article 10. However, the power to make a declaration of incompatibility under section 4 of the HRA was a discretionary one. As a general rule it ought not to be exercised unless the circumstances of the case showed that the legislative provision in question had “affected a Convention right of the applicant ... in a manner that is incompatible with that right” and hypothetical examples of ways in which the legislative provision might be incompatible with a Convention right did not suffice. The conclusion was that the prohibition was not incompatible with the applicant’s Article 10 rights.
55. Secondly Lord Scott said it was not possible to assume from the *VgT* judgment that the Court would disagree with the House of Lords in the present case. The Court in *Murphy* did not distinguish or qualify its reasoning in *VgT* and this Court’s judgments focused closely on the particular facts of each case. There was no more than the possibility of a divergence between the finding of the House of Lords and of this Court.
56. Baroness Hale began her judgment by pointing out that there had been “an elephant in the room” when the case was heard and it was the dominance of advertising, not only in elections but also in the formation of political opinion, in the United States. She underlined the enormous amounts spent, and which have to be raised, for elections in the United States. There was no limit in the United States to the amount that pressure groups could spend on getting their message across in the most powerful and pervasive media available.

57. Baroness Hale went on to describe the rationale of the prohibition as ensuring that Government and its policies were not decided by the highest spenders:

“Our democracy is based upon more than one person one vote. It is based on the view that each person has equal value. ... We want everyone to be able to make up their own minds on the important issues of the day. For this we need the free exchange of information and ideas. We have to accept that some people have greater resources than others with which to put their views across. But we want to avoid the grosser distortions which unrestricted access to the broadcast media will bring.

So this case is not just about permissible restrictions on freedom of expression. It is about striking the right balance between the two most important components of a democracy: freedom of expression and voter equality.”

58. Baroness Hale held, in full agreement with the reasons given by Lord Bingham, that the prohibition as it operated in the case was not incompatible with the applicant’s Article 10 rights. On the contrary, it was:

“51. ... a balanced and proportionate response to the problem: they can seek to put their case across in any other way, but not the one which so greatly risks distorting the public debate in favour of the rich. There has to be the same rule for the same kind of advertising, whatever the cause for which it campaigns and whatever the resources of the campaigners. We must not distinguish between causes of which we approve and causes of which we disapprove. Nor in practice can we distinguish between small organisations which have to fight for every penny and rich ones with access to massive sums. Capping or rationing will not work...”

59. Baroness Hale doubted the application of the Court’s judgment in the *VgT* case since, like all of the ECtHR’s judgments, it was fact specific:

“52. ... Similar though the organisations were, the advertisements were rather different: “eat less meat” is a different message from “help us to stop their suffering”. Important arguments which were given less weight in *VgT* were accepted in *Murphy*. If anything, the need to strike a fair balance between the competing interests is stronger in the political than in the religious context. Important though political speech is, the political rights of others are equally important in a democracy. The issue is whether the ban, as it applies to these facts, was proportionate to the legitimate aim of protecting the democratic rights of others. As Lord Bingham has demonstrated, Government and Parliament have recently examined with some care whether a more limited ban could be made to work and have concluded that it could not. The solution chosen has all-party support. Parliamentarians of all political persuasions take the

view that the ban is necessary in this democratic society. Any court would be slow indeed to take a different view on a question such as this. There may be room for argument at the very margins of the rule, for example, in banning any advertisement of any kind by a political body, or in banning any advertisement by anyone of matters of public controversy. But that is not this case.”

60. Finally, Baroness Hale agreed with Lord Bingham (disagreeing with Lord Scott) that the correct interpretation of the incorporated Convention rights lay ultimately with this Court. The domestic courts should adopt a “cautious approach” where they must not “leap ahead” of the Court’s interpretations but “keep pace with the Strasbourg jurisprudence as it develops over time, no more and no less”.
61. Both Lord Carswell and Lord Neuberger dismissed the appeal for the reasons given by Lord Bingham.
62. On 22 April, the Grand Chamber of the ECtHR held by a majority of 9 to 8, that the UK’s broadcasting ban on political advertising under the 2003 Act did not violate the free speech rights of Animal Defenders, see *Animal Defenders International* (2013) 57 EHRR 21. In that judgment the ECtHR confirmed that the broadcast media have a particularly influential and powerful role (because in essence, television has an immediacy of impact not yet matched by other media) which justifies a distinction in the measures that are applied to the broadcast of television services on the one hand and other forms of media communication on the other. The majority of the Grand Chamber in *Animal Defenders International* at paragraph 119 said:

‘...the Court considers coherent a distinction based on the particular influence of the broadcast media. In particular, the Court recognises the immediate and powerful effect of the broadcast media, an impact reinforced by the continuing function of radio and television as familiar sources of entertainment in the intimacy of the home (*Jersild v. Denmark*, § 31; *Murphy v. Ireland*, § 74; *TV Vest*, at § 60; and *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, § 132, all cited above). In addition, the choices inherent in the use of the internet and social media mean that the information emerging therefrom does not have the same synchronicity or impact as broadcasted information. Notwithstanding therefore the significant development of the internet and social media in recent years, there is no evidence of a sufficiently serious shift in the respective influences of the new and of the broadcast media in the respondent State to undermine the need for special measures for the latter’.

63. The availability of other avenues of expression was also considered at paragraph 125:

‘The Court notes, in this respect, the other media which remain open to the present applicant, and it recalls that access to alternative media is key to the proportionality of a restriction on access to other potentially useful media. In particular, it remains

open to the applicant NGO to participate in radio or TV discussion programmes of a political nature (i.e. broadcasts other than paid advertisements). It can also advertise on radio and television on a non-political matter if it sets up a charitable arm to do so and it has not been demonstrated that the costs of this are prohibitive. Importantly, the applicant has full access for its advertisement to non-broadcasting media including the print media and the internet (including social media), as well as to demonstrations, posters and flyers. Even if it has not been shown that the internet, with its social media, is more influential than the broadcast media in the respondent State, those new media remain powerful communication tools which can be of significant assistance to the applicant NGO in achieving its own objectives.’

It is compatible with article 10 to exclude the dominant media narrative and other broadcasts by RT when assessing whether the due impartiality provision has been satisfied in the broadcast

64. As is common ground, the 2003 Act and the Code are law for the purposes of article 10(2) of the Convention. The legitimate aim pursued by the Act and the Code is 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. As noted in the White Paper the requirements of due impartiality are 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’*.
65. RT submit that Ofcom had identified a legitimate aim in the abstract and that Ofcom has failed to demonstrate that in assessing “due impartiality” regard could not be had to the broadcasts from other broadcasters or other programmes which were not linked as part of a series of programmes broadcast by RT. RT relied on statistics produced by Ofcom showing that average viewers obtained news from more than one source. RT also relied on the practice reported in New Zealand where there is an impartiality requirement but the regulator will take account of the “dominant media narrative” when assessing whether impartiality has been delivered.
66. As to the statistics it should be noted that they deal only with average viewers. Many viewers may obtain news from different sources, but it was accepted not all will do so and not all will obtain news from media which is required to satisfy the provisions of “due impartiality”. If 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 that enable that individual viewer to come to an informed view on individual topics. This is because where viewers access news on media which is not the subject of a requirement of “due impartiality”, they may receive only one viewpoint to the exclusion of other viewpoints. In such circumstances a viewer may interact only with one viewpoint, and the media accessed by that viewer may become “an echo chamber” or “information silo” for that single viewpoint. Given the multiplicity of sources, and the corresponding increased likelihood of a viewer accessing only media according with or reflecting that viewer’s own viewpoint, the importance of a provider of television services maintaining “due impartiality” in each broadcast programme becomes of greater, and not lesser,

importance. This is because it may be the only occasion on which the viewer is exposed to differing viewpoints.

67. As to other broadcasts from the broadcaster there is no guarantee that a viewer will look at other output from a broadcaster, unless that viewer is specifically directed to the other programme. Permitting 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.
68. RT’s complaint that Ofcom did not complain that the contents of the broadcasts were not accurate does not, in my judgment, assist RT. The reason why Ofcom could not complain about the inaccuracy of the statements was because Ofcom, like the viewers, would have no way of determining for example who was responsible for the Salisbury poisoning or what role was being performed by the US in Syria. In such circumstances the importance of due impartiality is heightened, and not lessened. This is so the viewers may be exposed to the competing views and opinions and that in time the good will drive out the bad and the true prevail over the false, see Lord Bingham in *Animal Defenders International* at paragraph 28.
69. RT submit that it is difficult to justify the imposition of such a requirement on RT whilst, for example, newspapers with a larger circulation are not subject to the requirement either online or in their paper formats, and they point to other online news providers who are similarly exempt from the requirement of “due impartiality”. However this takes no account of the immediate and real effect of the impact of television broadcasts, which has been recognised in the authorities. The fact that television broadcasts still have a more immediate and wider impact than online news providers in the United Kingdom appears in part from the fact that RT could, if it wished, provide online any lawful current affairs or news programme without needing to satisfy the “due impartiality” requirements of the 2003 Act and Code. The fact that RT choose to provide broadcast television news and programmes illustrates the fact that the online provision is still not a substitute for the immediacy and impact of the broadcast media.
70. In my judgment it is also important to emphasise that RT were not prevented from broadcasting any material. This is not a case where RT were restricted from broadcasting the material that they wished to broadcast on the Salisbury poisoning, the war in Syria, or on events in Ukraine. The only requirement was that, in the programme as broadcast, RT provided balance to ensure that there was “due impartiality”. Further the way in which the balance was provided was a matter for RT to decide. There was no requirement to give the necessary balance by broadcasting a form of words, this was all left to the editorial judgment of RT, so long as “due impartiality” was observed.
71. As to the position in New Zealand the court was not provided with any information about the way in which media is accessed in that jurisdiction by those who also access broadcast media. Further there was no answer suggested by RT to the problem that individuals may only interact with broadcast media which reflects their own viewpoint, regardless of what the “dominant media narrative” may be elsewhere.

72. In my judgment the legitimate objective pursued by the 2003 Act and Code of due impartiality, as it is properly interpreted, is sufficiently important to justify limiting RT's freedom to broadcast television programmes which do not themselves satisfy the "due impartiality" provisions. These measures are no more than is necessary to accomplish that aim. This conclusion applies both when assessing whether RT was in breach of the due impartiality provision, and in assessing whether harm has been caused by RT's breach. The requirement of "due impartiality" in each broadcast programme strikes a fair balance between the rights of RT and the viewers of its television services for the following reasons.
73. First, all viewers, and not just average consumers of news, are entitled to be presented with the relevant viewpoints. Indeed it might be most important to address those who only listen to media output which reflects their own viewpoints and who can become detached from democratic debate. Secondly the requirement for due impartiality applies only in respect of broadcast media, meaning that RT can put online any lawful news or current affairs programmes, such as those which are the subject matter of this challenge without having to have regard to "due impartiality". The requirement of "due impartiality" applies to the broadcast media because of its immediacy and impact. Thirdly the requirement applies only in respect of narrowly defined categories of content (news, political, industrial and current public policy controversy). Fourthly the requirement of due impartiality does not prevent the broadcast of any views, so long as alternative views and opinions are accurately and adequately reflected within the broadcast or a series of programmes. Fifthly the means by which due impartiality is achieved is left up to editorial discretion of the broadcaster, there is no question of directing the reporting techniques of the broadcaster so long as due impartiality is achieved. Sixthly requiring a broadcaster of television services to consider the content of programmes from other providers when considering whether "due impartiality" has been satisfied would make the requirement impermissibly uncertain. This is because what was required to maintain impartiality would change, in real time, with each broadcast from any UK broadcaster on a given subject. Finally it might be noted 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. In my judgment the approach of RT to "due impartiality" risks undermining Parliament's principled aim of ensuring that all broadcast content satisfies the provisions of "due impartiality". This conclusion means that it is not necessary to address RT's submissions on remedies for infringement of article 10 of the Convention, because there was no infringement.

Issue three: whether Ofcom was entitled to find that the programme on Ukraine was in breach of the due impartiality provisions

74. RT did not submit that there was any relevant dominant media narrative in relation to Ukraine, and so even if it was successful on either issue one or two it would not affect the decision to find a breach in relation to Ukraine. RT however submitted that the decision to find a breach was unlawful because it had provided the perspective of the Ukrainian state in the broadcast.
75. It is necessary to provide a little more detail about this broadcast. The Ukraine Programme was a news item, broadcast at 0800 hours on 26 April 2018 on the RT channel. The item reported on the Ukrainian Government's position in respect of Nazism and the treatment of Roma gypsies. The first part of the item discussed Amnesty International's call for attacks by Ukrainian nationalists on Roma camps in Kiev to be

investigated by the Ukrainian authorities. This part did contain an interview with the Chief Officer of police who said that there had only been random fires. The second item concerned a painting contest in which the Ukrainian Department of Education had, according to the news item, launched a painting competition for school children requiring them to depict Ukrainians who had fought in a Nazi unit in the Second World War. The second item featured an interview with a Jewish writer who was of the view that the competition was glorifying Nazism. There was no reporting of any Ukrainian Government response to this item of news.

76. Ofcom found that the programme was critical of the Ukrainian authorities' policies and actions. Ofcom found, specifically, that the programme contained an accusation that the Ukrainian Government had glorified Nazism and had a policy of failing to protect minority groups such as the Roma people.
77. In its submissions to Ofcom, RT argued that the programme included the perspective of the Ukrainian police, who stated that there had been no reports of violence and that the Roma people's temporary camps would be protected. Ofcom accepted this but made the point that this did not amount to presenting the view of the Ukrainian Government on the specific allegation that it had a policy of failing to protect certain minority groups. RT also submitted to Ofcom that it had given the perspective of the Ukrainian State on the painting competition by displaying the Facebook post advertising the competition. Ofcom made the point that this did not amount to presenting the perspective of the Ukrainian Government on the allegation that it has a policy of glorifying Nazism.
78. In my judgment the programme did not include the view of the Ukrainian Government on the wider allegation that it had a policy of failing to protect certain minority groups when dealing with the issue of the Roma gypsies. Further in relation to the painting competition RT made allegations that the Ukrainian State had a policy of glorifying Nazism. The perspective of the Ukrainian Government was not presented in respect of this allegation. RT submitted that Ofcom had not complained that the news broadcast was inaccurate, but that was because Ofcom was not in a position to establish the accuracy of the report. As already noted, this made it more important to let the viewer know what was the Ukrainian Government response to the allegations broadcast by RT. In my judgment it is plain that there was no attempt to comply with the provision of "due impartiality" by RT and Ofcom was entitled to find a breach of this provision.

Issues four and five: whether permission to apply for judicial review to challenge the sanction should be granted, and whether the sanction is disproportionate

79. I turn now to the challenge to the sanction decision. The sanction decision directed RT to broadcast a summary of Ofcom's findings on its channel at various times and imposed a financial penalty of £200,000.

Relevant provisions of the 2003 Act and the Code

80. I set out below the relevant provisions of the 2003 Act and the Code relating to the issue of sanction. Section 237 of the 2003 Act permits Ofcom to issue a financial penalty for, among other matters, failing to comply with the "due impartiality" provisions. The amount is limited by section 237(3) to the greater of £250,000 or 5 per cent of qualifying revenue. Qualifying revenue is defined elsewhere to be the advertising revenue or

monies received from persons for receipt of the programmes. Provision is made by section 393 for confidentiality of revenue figures provided to Ofcom for the purposes of investigations.

81. Section 392 provides for the making of guidelines in respect of penalties:

“392 Penalties imposed by Ofcom

(1) It shall be the duty of Ofcom to prepare and publish a statement containing the guidelines they propose to follow in determining the amount of penalties imposed by them under provisions contained in this Act ...

(2) Ofcom may from time to time revise that statement as they think fit.

...

(6) It shall be the duty of Ofcom, in determining the amount of any penalty to be imposed by them under this Act or any other enactment (apart from the Competition Act 1998 (c. 41)) to have regard to the guidelines contained in the statement for the time being in force under this section.”

82. The current relevant guidelines (the ‘Penalty Guidance’) have been in force since September 2017. The relevant passages for the purposes of this case are as follows:

“Explanatory Note

1.3 Ofcom has powers to punish those who act unlawfully or in breach of the relevant regulatory requirements. Ofcom has updated the penalty guidelines to clarify its approach to setting penalties. In particular, to ensure that we can impose penalties at the appropriate level effectively to deter contraventions of regulatory requirements, and to explain the weight to be attributed to any precedents set by previous cases in the process of deciding an appropriate and proportionate penalty. Decisions made under the previous penalty guidelines may be relevant to Ofcom’s future decision-making. However, they are likely to become less relevant to future enforcement work over time, and Ofcom may, in light of the circumstances of each case, impose higher penalties in future cases than in previous ones to secure effective deterrence.

1.4 All businesses should operate in compliance with the law, taking into account any relevant guidelines where appropriate. As such, the central objective of imposing a penalty is deterrence. The level of the penalty must be sufficient to deter the business from contravening regulatory requirements, and to deter the wider industry from doing so.

1.5 In particular, the level of the penalty must be sufficiently high to have the appropriate impact on the regulated body at an organisational level. It should incentivise the management (which is ultimately responsible for the conduct and culture of the regulated body) to change the conduct of the regulated body as a whole and bring it into compliance, achieving this, where necessary, by changing the conduct at different levels within the organisation. The level of the penalty should be high enough that the management recognises that it is not more profitable for a business to break the law and pay the consequences, than it is to comply with the law in the first instance, and that it should therefore discourage bad conduct and encourage good practices and a culture of compliance across the organisation.

1.6 A relevant factor in securing this objective of deterrence is the turnover of the regulated body subject to the penalty. Penalties should be set at levels which, having regard to that turnover, will have an impact on the body that deters it from misconduct in future and which provides signals to other bodies that misconduct by them would result in penalties having a similar impact. That is, it must be at a level which can also change and correct any non-compliant behaviour, or potential non-compliant behaviour, by other providers.

1.7 In making this assessment, Ofcom will have regard to precedents set by previous cases where they are relevant. However, Ofcom may depart from them depending on the facts and context of each case. Our penalty decisions will therefore focus the discussion of precedents to cases we consider particularly relevant, if any.

1.8 If, in making our assessment in any particular case, we consider that the level of penalties set in previous cases is not sufficient effectively to enforce against the regulatory contravention concerned, and to deter future breaches, Ofcom may set higher penalties under these revised guidelines. Regulated bodies with a large turnover, for example, may be subject to higher penalties in order for a deterrent effect to be achieved. These revised guidelines provide Ofcom with the flexibility to impose higher penalties in appropriate cases and penalties Ofcom has previously imposed should not be seen as placing upper thresholds on the amounts of penalties we may impose.

1.9 This is not to say there is a direct linear relationship between the size and turnover of the regulated body and the level of the penalty. While a body with a larger turnover might face a larger penalty in absolute terms, a body with a smaller turnover may be subject to a penalty which is larger as a proportion of its turnover, for example. We will impose the penalty which is appropriate

and proportionate, taking into account all the circumstances of the case in the round together with the objective of deterrence.

1.10 Amongst the other relevant considerations we may take into account, Ofcom may consider the degree of harm caused by the contravention and/or any gain made by the regulated body as a result of the contravention. We may seek to quantify those amounts in appropriate cases. However, Ofcom will not necessarily do so in all cases and, even where it does, the calculation does not determine or limit the level of the penalty, which, as explained above, is to ensure that the management of the regulated body is incentivised to modify the behaviour of that body (and deter other regulated bodies accordingly). Any quantified harm/gain is only one of the factors in determining the appropriate and proportionate level of the penalty.

How Ofcom will determine the amount of a penalty

1.11 Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement. Ofcom will have regard to the size and turnover of the regulated body when considering the deterrent effect of any penalty.

1.12 The factors taken into account in each case will vary, depending on what is relevant. Some examples of potentially relevant factors are:

- The seriousness and duration of the contravention;
- The degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants;
- Any gain (financial or otherwise) made by the regulated body in breach (or any connected body) as a result of the contravention;
- Whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention;
- The extent to which the contravention occurred deliberately or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur;

- Whether the contravention in question continued, or timely and effective steps were taken to end it, once the regulated body became aware of it;
- Any steps taken for remedying the consequences of the contravention;
- Whether the regulated body in breach has a history of contraventions (repeated contraventions may lead to significantly increased penalties); and
- The extent to which the regulated body in breach has cooperated with our investigation.

1.13 When considering the degree of harm caused by the contravention and/or any gain made by the regulated body as a result of the contravention Ofcom may seek to quantify those amounts in appropriate cases but will not necessarily do so in all cases.

1.14 Ofcom will have regard to any relevant precedents set by previous cases, but may depart from them depending on the facts and the context of each case. We will not, however, regard the amounts of previously imposed penalties as placing upper thresholds on the amount of any penalty.

1.15 Ofcom will have regard to any representations made to us by the regulated body in breach.

1.16 Ofcom will ensure that the overall amount of the penalty is appropriate and proportionate to the contravention in respect of which it is imposed, taking into account the size and turnover of the regulated body.

1.17 Ofcom will ensure that the overall amount does not exceed the maximum penalty for the particular type of contravention.

1.18 Ofcom will have regard to the need for transparency in applying these guidelines, particularly as regards the weighting of the factors considered.”

The sanction decision and the respective submissions

83. Having found that the seven programmes breached the “due impartiality” provisions, Ofcom then considered the imposition of a sanction in respect of the breaches of the Code. Ofcom gave its Sanction Preliminary View on 18 March 2019 and RT provided written representations in response. An oral hearing in respect of the sanction decision took place on 20 May 2019 and Ofcom published its final sanction decision on 26 July 2019. The sanction decision directed RT to broadcast a summary of the Ofcom’s findings on its channel at various times and imposed a financial penalty of £200,000.

84. In paragraphs 45, 50 and 51 Ofcom addressed the issue of harm and the alternative media perspective.

45. ... Ofcom did not consider that the seriousness of the breaches was lessened by the likely expectation of the audience as to the nature of the programmes' content or the content of the programmes, for example that the programmes were likely to examine recent events such as the Skripal poisoning from a largely Russian geopolitical perspective.

50 The Licensee argued that the breaches were not serious because alternative perspectives on the subject matters in question were readily available from a wide range of other media sources, including in other programmes broadcast on RT. We disagree. It is clear that the due impartiality requirements are imposed at the level of individual licensees. These requirements therefore cannot be met by considering whether a collection of broadcasters or services taken together preserve due impartiality and it would be inappropriate to place weight on the conduct of those other broadcasters in assessing the seriousness of the breaches

51 Similarly, other programmes on a licensed service are only relevant to the question of whether due impartiality has been preserved in respect of Rules 5.11 and/or 5.12 insofar as these programmes are 'clearly linked and timely'. For the reasons set out in the breach decisions, Ofcom did not consider any of the programmes on which the Licensee sought to rely as providing an alternative perspective were 'clearly linked' to the programmes in question. In terms of the requirement for news to be presented with due impartiality under Rule 5.1, there is no provision for due impartiality to be maintained through other linked programming on a particular service. We place little weight on the existence of such programming in assessing the seriousness of the breaches.

85. As to the issue relating to the use of the word systemic, it is relevant to note that in the Sanction Preliminary View it was written that: 'there had been a systemic failure of compliance' [35]; 'Ofcom considered to be a systemic failure of compliance' [51]; 'There was a systemic failure of the Licensee's compliance procedures to ensure due impartiality' [60]; '[w]e considered that this represented a systemic failure on the part [of] the Licensee' [61]; 'we are concerned about how such a systemic failure has occurred' [61]; and 'these seven breaches of Rules 5.1 and/or 5.11 and 5.12 over a six week period were a serious systemic failure of compliance' [86].
86. In paragraph 49 of the sanction decision reference was made to the use of the word "systemic". This provided:

"In our Preliminary View we stated that the fact that multiple breaches of the due impartiality requirements had occurred within a six-week period also indicated that there had been a

“systemic” failure of compliance during this period. We have taken into account the Licensee’s representations that the breaches in this case do not represent a systemic failure of compliance, and we accept that we did not clearly describe our concern in this regard in our Preliminary View. Our concern was that seven due impartiality breaches, including six regarding matters of major political or industrial controversy or major matters of public policy, had occurred in a short period of time, and that this represented serious and repeated failures of compliance. We do not consider that the use of the word ‘systemic’ in our Preliminary View has any effect on Ofcom’s findings in relation to the seriousness of the breaches. As explained above at paragraph 43, Ofcom considers that multiple breaches which occur during a concentrated period of time potentially aggravate the damage to viewers, and have the effect of undermining public confidence in the impartiality of, and therefore trust in, broadcast news and current affairs, which the rules in Section Five of the Code are intended to safeguard.”

87. In relation to the previous guidance from Ofcom to RT, this was referred to at paragraph 76 of the Sanction Decision:

“We took into account that the Licensee had considerable previous engagement with Ofcom regarding the requirements of, and compliance with, Section Five. This took the form of several meetings between senior RT editorial and/or compliance staff and senior members of Ofcom’s Standards and Audience Protection team, following a number of cases in which we found breaches of due impartiality requirements (News, RT, 12 July 2012; Syrian Diary, RT, 7 March 2013 and Crosstalk, RT, 11 July 2016). Specific guidance was also provided to the Licensee in these previous decisions as to what Ofcom considered necessary to comply with the requirements of Section Five. In addition, the previous direction Ofcom imposed on the Licensee in respect of a breach of Rule 5.5 should have indicated that the Licensee’s compliance procedures at that time were inadequate. In light of this, we consider the Licensee should have been particularly well-informed about how to preserve due impartiality on its service.”

88. At paragraph 91 there was reference to RT’s further steps in relation to compliance:

“Ofcom has taken into account the Licensee’s representations regarding the steps it has taken in relation to compliance since we launched the investigations in question, and the fact that Ofcom has not become aware of any further breaches of Section Five of the Code by the Licensee to date.”

89. At paragraph 79 Ofcom stated that there was a ‘trend of non-compliance’ in relation to Russian foreign policy related matters:

“Taking into account RT’s previous compliance history and the breaches at issue in this case, we have noticed a trend of non-compliance in RT programmes which discuss Russian foreign policy matters that differ to, or conflict with, the general policy position of Western countries. This is of particular concern given such matters are likely to constitute matters of major political or industrial controversy or major matters of public policy, as was the case in six out of the seven breaches in question.”

90. RT criticises the sanction decision on a number of specific grounds, including the failure to take account of the dominant media narrative. First it is submitted that Ofcom had failed to identify the harm caused by the television broadcast, particularly in the light of the dominant media narrative which meant that the viewers would have been aware of other relevant viewpoints. Secondly it is submitted that in the Sanction Preliminary View Ofcom purported to identify a “systemic” failing on the part of RT. When RT pointed out, and Ofcom accepted, that the use of the word “systemic” was not appropriate, Ofcom did not reduce the proposed financial penalty. Thirdly it is submitted that Ofcom had failed to take proper account of RT’s previous record of compliance. Fourthly it is submitted that Ofcom had wrongly taken into account the funding provided to RT by the Russian state which was not available to pay fines imposed by Ofcom. Fifthly it was submitted that the level of financial penalty was inconsistent with previous sanctions imposed by Ofcom.
91. Ofcom submit that the sanction was a proper and proportionate one. Ofcom said that the harm was identified which was the failure to provide impartial reporting to individuals. Ofcom say that it was accepted that “systemic” was an inaccurate use of language, which is why it was removed from the final decision, but the point made by Ofcom that there were a number of breaches in a short period of time was a good one and remained. Ofcom had had proper regard to RT’s previous record and had rightly taken into account the funding provided to RT. Ofcom submitted that the other cases were different with different considerations.

The sanction is proportionate

92. As noted above part of RT’s challenge to the sanction was on the basis that Ofcom had failed to have regard to “the dominant media narrative” when considering the issue of harm, and that the sanction therefore infringed RT’s rights under article 10 of the Convention. RT pointed to the fact that paragraph 1.12 of the Penalty Guidance refers to the “the degree of harm, whether actual or potential ...” caused by the relevant breach. In my judgment this ground of challenge is properly arguable and I therefore grant permission to apply for judicial review of the sanction, which determines issue four.
93. However I do not consider that the challenge is well-founded. There was both actual and potential harm. This is because there will have been viewers of the relevant broadcast, unknowable in number, who were not exposed to the other viewpoint or dominant media narrative or other broadcasts from RT in which the alternative viewpoint was given. There will be viewers who might have some idea of the dominant media narrative but who do not consider it when watching the relevant broadcast, and so are denied the opportunity to assess the good from the bad. RT’s submission that the dominant media narrative reduces the harm from the broadcasts in my judgment

misses the point about the importance of the viewers who are not aware of the other viewpoint, as explained when dealing with the issue of the compatibility of the Communication Act and Code with article 10 of the Convention. Ofcom was therefore right when imposing the sanction to ignore both the dominant media narrative and other programmes broadcast by RT.

94. RT's other grounds of challenge to the sanction decision are summarised in paragraph 90 above. In my judgment none of them are sustainable. The use of the 'systemic' in the Sanction Preliminary View was clearly meant to reflect 'seven breaches of Rules 5.1 and/or 5.11 and 5.12 over a six week period' as appears from paragraph 86 of the preliminary sanction view. RT was right to note that this was not a "systemic" failure, within the proper meaning of the word as understood for the purposes of the law of England and Wales, and Ofcom properly corrected this in the final sanction decision. However this did not undermine the point that there were seven breaches in a six week period, and that this number of breaches in a short period of time was a relevant factor to take into account when assessing the sanction.
95. Ofcom had proper regard to RT's record as showing 'a trend of non-compliance' at paragraph 79 of the Sanction Decision. This was because RT had twice been subject to directions as described in Annex 1 of the Sanction Decision. There have been 14 breaches of the Code by RT since 2012, eight of which were due impartiality breaches. Ofcom set out RT's history of breaches at paragraphs 94 to 101 of the sanction decision. It is right to balance these matters with the fact that Ofcom described RT's compliance record as having been 'not ... materially out of line with other broadcasters' (18 April 2018 update from Ofcom) and the facts that: there had not been a finding of breach of Section 5 of the Code for over 18 months; from 2015-2017 only two programmes were found to breach Section 5 of the Code; RT had never been subject to a statutory sanction; RT had a history of co-operation with Ofcom; and RT took a number of steps following notification of the investigation into the breaching programmes to improve its compliance with the Code. However there is nothing in Ofcom's decision to suggest that it did not make a fair appreciation of all relevant factors.
96. Finally Ofcom was entitled to have regard to the financial support available to it from the Russian state. The Penalty Guidance makes reference to 'turnover' at 1.6, 1.8, 1.9 and 1.11 and there is nothing to suggest that 'turnover' is meant to be restricted to 'qualifying revenue' as defined in the 2003 Act. Qualifying revenue is there to provide an upper restriction on penalties in cases where 5 per cent of qualifying revenue is greater than £250,000. In taking into account the whole of the Russian State funding, all of which falls out of the 'qualifying revenue' definition (as this focuses on revenue from commercial sources) a fine has been imposed that is a very high proportion of RT's overall 'qualifying revenue' (it is not necessary to give details of the qualifying revenue in circumstances where 'qualifying revenue' is provided on a confidential basis to Ofcom pursuant to section 393 of the 2003 Act as set out above). As Ofcom noted the Penalty Guidance emphasises the importance of deterrence at paragraph 1.3. RT's construction of "turnover" in the Penalty Guidance would render state funded broadcasters who were unattractive to commercial sponsors, who would have a small "qualifying revenue", immune from any system of deterrence because the level of any financial penalty would be vanishingly small.
97. RT submitted that it was unable to use its state funding to pay any financial penalty, and that it had not been given an opportunity to address this to Ofcom. It is plain that

Ofcom reported that it was considering as a relevant factor the funding received by RT, and so there is no unfairness to RT in having regard to the funds provided. Even accepting that RT could not use its state funding to pay the penalty there is nothing to suggest that its commercial revenue, which overtopped the level of the financial penalty, could not be so used, or that RT could not seek to obtain future funding from the state which was free of relevant restrictions. In these circumstances there is nothing to suggest that Ofcom was wrong to impose the financial penalty which it did.

98. RT's final points concerned previous sanctions imposed on other broadcasters. However the Penalty Guidance provides in terms at paragraph 1.7 that Ofcom may depart from previous cases. In this case Ofcom had regard to relevant previous decisions and relevant factors. The potential relevance of the previous cases is adversely affected by the fact that the resources of the broadcasters in the other cases were limited. It was for Ofcom to assess what weight to place on previous decisions, and its judgment in this case was reasonable and lawful. The sanction was proportionate for the reasons set out by Ofcom in its sanction decision.

Conclusion

99. For the detailed reasons set out above: (1) as a matter of statutory interpretation the "due impartiality" provision had to be satisfied in the relevant broadcast programmes; (2) this interpretation of the Communication Act and Code is compatible with article 10 of the Convention; (3) the programme on Ukraine infringed the due impartiality provisions; (4) RT is granted permission to apply for judicial review of the proportionality of the sanction; and (5) Ofcom was entitled to impose the financial penalty, which was proportionate.
100. The claim for judicial review of Ofcom's determinations of breach and sanctions decision is therefore dismissed.