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Case No: CO/1972/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/12/2022

Before

MR JUSTICE SWIFT

Between

THE KING
on the application of

STAR CHINA MEDIA LIMITED

Claimant

-and-

THE OFFICE OF COMMUNICATIONS

Defendant

Sam Grodzinski KC and Jason Pobjoy (instructed by **Baker & McKenzie LLP**)
for the **Claimant**

Brian Kennelly KC and David Glen (instructed by **OFCOM Legal Team**)
for the **Defendant**

Hearing date: 18 May 2022

Approved Judgment

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MR JUSTICE SWIFT**A. Introduction**

1. On 26 May 2020 the Office of Communications (“OFCOM”) concluded that Star China Media Limited (“Star China”) had acted in breach of the conditions of a licence issued under Part 1 of the Broadcasting Act 1990 which permitted it to provide a television licensable content service (under the 1990 Act, a regulated television service). Pursuant to that licence, Star China was responsible for the broadcast in the United Kingdom of CGTN, a state-run English language news channel based in Beijing. OFCOM concluded that news items on programmes broadcast between 11 August 2019 and 21 November 2019:

“were not duly impartial on a matter of major political controversy and a major matter relating to current public policy, in breach of Rules 5.1, 5.11 and 5.12 of the Broadcasting Code.”

The notice issued by OFCOM went on to state “OFCOM is minded to consider these breaches for the imposition of a statutory sanction”. On 8 March 2021, OFCOM imposed a sanction in the form of a financial penalty of £125,000. This claim concerns the legality of the decision to impose that penalty.

(1) The statutory context and the facts of this case.

2. OFCOM’s power to impose financial penalties is at section 237 of the Communications Act 2003 (“the 2003 Act”). A penalty may be imposed if OFCOM is satisfied that a license holder “has contravened a condition of [a] licence”. Section 237(3) sets the maximum penalty to be imposed but this apart, the amount of the penalty is a matter for OFCOM.
3. The Rules referred to in OFCOM’s decision of 26 May 2020 are part of its Broadcasting Code. By section 319(1) OFCOM must set “... 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”. The “standards objectives” are specified at section 319(2) of the 2003 Act and include (at paragraph (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”. So far as material for present purposes, section 320 requires “the preservation, in the case of every television service ... of due impartiality, on the part of the person providing the service, as respects ... matters of political or industrial controversy” (see section 320 (1)(b) and (2)(a)). The effect of section 325 of the 2003 Act is that compliance with the Broadcasting Code is a required licence condition.
4. The parts of the Broadcasting Code referred to in OFCOM’s decision of 26 May 2020 are as follows:

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

...

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 ... in each programme or in clearly linked and timely programmes.

Rule 5.12

In dealing in matters of major political or 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 ...”

5. In this case, the breaches of the Broadcasting Code arose from CGTN’s coverage of protests that took place in Hong Kong in 2019. The protests were prompted by new extradition laws proposed by the Hong Kong government which would permit persons suspected as having committed criminal offences in mainland China to be extradited from Hong Kong to face trial. The protests took place over an extended period, and their focus expanded to include support for democracy in Hong Kong and criticism of how the Hong Kong police had handled the protests. Put very generally, OFCOM concluded that news items broadcast by CGTN on four occasions on its “The World Today” programme in August and September 2019, and on its “China 24” programme on 21 November 2019 were one-sided, presenting only the viewpoint of the Hong Kong authorities and/or the Chinese government, and associated those protesting with sole responsibility for the violence that had occurred. Overall, OFCOM stated that taken together, the breaches of the Broadcasting Code were “a serious failure of compliance” and that it was minded to “consider these five breaches for statutory sanction”. Under the provisions of Chapter 2 of Part 3 of the 2003 Act, OFCOM may impose sanctions for breach of a licence condition. It may direct a licence-holder to take remedial action (section 236), it may impose a financial penalty (section 237), and it may revoke the licence (section 238).
6. By section 392(1) of the 2003 Act OFCOM is required to prepare and publish “a statement containing the guidelines [it proposes] to follow in determining the amount of penalties imposed ...”; by section 392(6) OFCOM must have regard to those guidelines when determining the amount of any penalty it decides to impose. The Guidelines in force at the material time were published on 14 September 2017 (“the Penalty Guidelines”). The operative part of this document is paragraph 1.11 to 1.18 which provides as follows:

“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.”

These paragraphs are preceded by an “Explanatory Note” (at paragraphs 1.3 to 1.10 of the document). Those paragraphs state that the “central objective” of any penalty is deterrence, both specific and general. At paragraph 1.4 the following is stated:

“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.”

7. OFCOM has published a document (dated 3 April 2017) setting out the procedure it will usually follow when taking a decision on whether to impose a sanction for breach of a licence condition. The procedure entails: (a) for OFCOM to state a “preliminary view” on sanction; (b) for the licence-holder then to have an opportunity to make written representations in response, and to make oral representations at a hearing; followed by (c) OFCOM’s final determination. In this case, OFCOM sent its preliminary view on 3 November 2020. The preliminary view was that a financial penalty of £125,000 should be imposed. The maximum financial penalty OFCOM is permitted to impose is set by section 237(3) of the 2003 Act as the greater of either £250,000 or 5% of the licence-holder’s “qualifying revenue”. OFCOM provided full reasons in support of this preliminary view. Star China provided written representations in response on 16 December 2020. It contended that no penalty should be imposed. The representations were to the following effect: (a) that no breach of the Broadcasting Code had occurred and that the decision to the contrary was “politically motivated ... unreasonable and unfair”; (b) that CGTN had a good record of compliance with the Broadcasting Code and adequate procedures for compliance, but on this occasion had been operating in exceptional circumstances; (c) that the circumstances of this case were materially different to “precedents” OFCOM referred to in the preliminary view; (d) that revised editorial guidelines were now in place at CGTN; and (e) that CGTN had co-operated with OFCOM’s investigation throughout. The representations stated the following, by way of conclusion:

“For the reasons set out in these and our previous written representations, CGTN submits that it is wholly unnecessary for

OFCOM to impose any statutory sanctions in this matter. This is particularly due to the facts that:

1. CGTN provides a transparently Chinese perspective, a view that often differs from, and provides an important alternative to the dominant mainstream Western media. This factor was particularly important in CGTN's coverage of the violent protests in Hong Kong SAR where most of the western media focused overwhelmingly on the voices and claims of the protestors, to the exclusion of virtually all other views;
 2. No harm was caused to the audience by these five programmes, not least because OFCOM commenced these investigations as a result of its own monitoring and OFCOM has not produced any evidence of harm to the audience;
 3. CGTN faced exceptional practical challenges in covering this major, fast-moving story.
 4. CGTN's compliance procedures are adequate and significantly, OFCOM has not found that CGTN's actions were deliberate or reckless;
 5. CGTN has been broadcasting in the UK since 2003 with an almost clean record and currently no sanctions have been imposed against it (unlike other broadcasters); and
 6. The precedent cases on which OFCOM relies are clearly distinguishable from the different facts and circumstances in CGTN's case."
8. OFCOM's final decision on sanction was made on 8 March 2021, and was to impose a financial penalty of £125,000. The reasons for the decision were set out at length. It is clear that the representations that had been made by Star China were fully considered. OFCOM re-stated the conclusion in the 26 May 2020 decision that there had been "serious and repeated" breaches of the Broadcasting Code. It further concluded that a financial penalty should be imposed. As to the level of that penalty, the reasons were set out by reference to the criteria at paragraph 1.12 of the Penalty Guidelines. The reasons given also paid close attention to the remainder of the Penalty Guidelines.
 9. On 4 February 2021, for reasons entirely unconnected with the 26 May 2020 decision that there had been a breach of licence conditions, OFCOM revoked Star China's licence to provide the CGTN service, after concluding that Star China did not exercise control over the programmes broadcast on CGTN. A licence-holder is required to exercise that function; OFCOM concluded that Star China only acted as a distributor of programmes broadcast. The consequence of the 4 February 2021 decision was that CGTN immediately ceased to broadcast.
 10. The reasons in support of the 8 March 2021 sanctions decision referred to the revocation of the licence.

“96. As set out in our Penalty Guidelines, 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 ensure compliance, having regard to the seriousness of the infringement. [Star China] no longer holds a broadcast licence following OFCOM’s decision to revoke the Licence and the CGTN service has ceased broadcasting in the UK; therefore, there is no longer a risk of future non-compliance by [Star China] or in respect of the CGTN service in this case. Nevertheless, OFCOM is concerned to ensure that enforcement against serious breaches of the Code acts as a wider deterrent against non-compliance by broadcasters in general. Accordingly, OFCOM considered what would be an appropriate and proportionate sanction, which would act as an effective deterrent had [Star China] continued to hold a broadcast licence and the CGTN service continued to be broadcast, taking into account the size and turnover of the Licensee and broadcasters’ and audiences’ rights to freedom of expression under Article 10 of the Convention.

...

99. In order to achieve OFCOM’s central objective of deterrence, we carefully considered the nature and level of the statutory sanction that should be imposed. In doing so, we have taken account of the particular seriousness of the breaches, the Licensee’s representations, the Licensee’s compliance record, the Licensee’s size and financial position, and relevant precedent cases. We have also had regard to the revocation of the Licence and the need to ensure that enforcement against serious breaches of the Code acts as a wider deterrent against future breaches by broadcasters in general. We have also had regard to our legal duties, as set out in the Breach Decisions, including the need to ensure that any sanction we impose is proportionate, consistent and targeted only at cases where action is needed.

100. Having regard to all the factors set out above, OFCOM’s Decision is that it is appropriate to impose a statutory sanction for the Code breaches and it would be proportionate to impose a financial penalty of £125,000 ...”

(2) The issues in the litigation

11. Star China’s case is that while it accepts that in principle, a financial penalty of some order may have been warranted, the penalty that was imposed, £125,000, was disproportionate: (a) because it no longer held a licence when the penalty was imposed; (b) because of the nature and seriousness of the breaches; (c) because of its prior compliance record; and (d) because of the nature and expectation of CGTN’s audience.

12. Point (a) was the focus of attention in the oral submissions. Star China submitted that the revocation of its licence was a fundamental change of circumstances that ought to have caused OFCOM substantially to depart from the conclusion in the 3 November 2020 preliminary view. The submission was that because Star China's licence had been revoked either no penalty should have been imposed or that any penalty ought to have been substantially lower than £125,000 (the figure in the preliminary view, expressed before Star China's licence was revoked). As to matters (b) – (d) Star China contended that these matters on their own ought to have caused OFCOM to impose a significantly lower financial penalty. The legal submission was that OFCOM's final decision was a disproportionate interference with Star China's article 10 right of freedom of expression, and therefore a decision made in breach of section 6 of the Human Rights Act 1998.

B. Decision

13. Star China's case laid particular emphasis on the importance of the article 10 right to impart information without interference. It is well recognised that this right is an essential foundation of liberal democracy and, for that reason, any interference with the right must be necessary. What "necessary" means can be put in different ways, but each carries the same import. In his speech in *R (Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] 1 AC 1312, Lord Bingham stated that for a restriction to be necessary "there must be a pressing social need for it". The same point can also be put in terms of the requirement that the interference must be shown to be clearly proportionate to a legitimate public interest, in the present context the public interest in regulation of broadcast media in accordance with the standards set in and under the provisions of the 2003 Act. When put in these terms, it is habitually recognised that although when assessing proportionality the court does not step into the shoes of the maker of the substantive decision, the margin of discretion that the court will allow is within a short compass. None of this is in dispute in the present case.
14. In the *Animal Defenders* case the context was the restriction on political advertising in section 321(2) of the 2003 Act; the claimant sought a declaration that this restriction was incompatible with Convention rights. In that context, Lord Bingham set out the overarching issue in this way.

"27. 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.

28. The fundamental rationale of the democratic process is that if competing views, opinions and policies are publicly debated and exposed to public scrutiny the good will over time drive out the bad and the true prevail over the false. It must be assumed that, given time, the public will make a sound choice when, in the course of the democratic process, it has the right to choose.

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

15. In the present case the risk recognised by Lord Bingham – that political objects may come to be accepted 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” arises not from advertising, but from programmes determined by OFCOM to have been in breach of Broadcasting Code. The position in the present case is similar to that considered by the Court of Appeal in *R(TV-Novosti) v OFCOM* [2022] 1 WLR 481. In that case the Court of Appeal concluded that while the court should be alert to ensure that any restriction on the Article 10 right was cogently justified, it also needed to recognise OFCOM’s specific functions under the provisions of the 2003 Act. At paragraph 62 of his judgment Sir Geoffrey Vos MR said this:

“62. Secondly, in my judgment, the fact that there is a dominant media narrative that is different from the views expressed in RT’s Programmes does not, by itself, override the special impartiality requirements that apply to programmes dealing with matters of political controversy and current public policy. Whilst it is true that Ofcom’s Breach Decisions did not analyse the harm that might be caused to viewers by the failure to present opposing views, it did analyse in great detail how the issues were treated in each of the Programmes. As regulator, it was Ofcom’s job to undertake that exercise and to evaluate whether action was needed in the interests of democratic society to protect the rights of others in the light of the degree of partiality in each Programme. The courts should give weight to Ofcom’s assessment and only second guess its expertise where it has obviously gone wrong (compare *Gaunt v United Kingdom* (2016) 63 EHRR SE15, para 61). Moreover, the analysis is not limited to the harm caused to viewers but extends to the harm

indirectly caused to members of society generally by the provision of broadcast news and current affairs that lacks due impartiality.”

16. Star China’s submission in the present case fell into two parts: the first part concerned the significance to be attached to the February 2021 decision to revoke Star China’s licence; the second part was to the effect that OFCOM had not appropriately considered the nature and seriousness of the breaches, Star China’s previous record of compliance, and the nature and expectations of Star China’s audience.
17. The second part of the submission can be addressed relatively briefly. Star China’s submission on the nature and seriousness of the breach is that insufficient significance was attached to the conclusion that the breaches were neither deliberate or reckless, and greater significance should have attached to the absence of complaints by viewers. Star China contends this latter point indicates the breaches of the Broadcasting Code caused no (or only very little) harm. OFCOM addressed the nature and seriousness of the breach between paragraphs 46 and 61 of its sanctions decision. On the lack of any complaint, OFCOM’s reasons included the following (at paragraph 54):

“... breaches of the due impartiality rules have the potential to cause harm to the specific audience of the broadcasts, and more generally, if programming of this nature was permitted on licensed radio and televised services, then at a wider societal level the balance of informed public debate and discussion on important matters of public concern is liable to become distorted. As also explained at paragraph 51 above, this could have damaging consequences for the democratic and societal objectives which the due impartiality regime is designed to promote, as well as the credibility of broadcast media as a trustworthy source of information on matters of public concern. Further, in order to impose a sanction in this case, OFCOM is not required to establish that actual harm had been caused to any particular viewers, rather it is important to determine whether there had been a potential for harm as a consequence of the breach. For the reasons already stated, it is our view that there was such a potential for harm.”

At paragraph 51 OFCOM stated:

“Further, OFCOM considers that multiple breaches of due impartiality rules, which occur during a concentrated period of time, potentially aggravate the detriment to viewers. They 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.”

18. Overall, OFCOM’s reasons emphasise the significance it attached to the fact there had been a series of breaches over an extended period. OFCOM was prepared to accept that

the breaches were not deliberate or reckless, but in that regard said this at paragraph 77 of its decision:

“... we considered that the Licensee’s compliance procedures had been inadequate to prevent multiple breaches of the due impartiality requirements in the Code within this relatively short period of time between 11 August and 21 November 2019. We considered this represented a serious and repeated failure on the part of the Licensee during this period to ensure due impartiality was preserved in relation to the matters of major political controversy and major matters of current public policy dealt with in the programmes. Although we have no evidence that the breaches were deliberate or reckless, such a serious failure in compliance ought to have been prevented by the Licensee’s compliance procedures and we were concerned about how such a failure has occurred. Given the Licensee’s compliance history ... we were particularly concerned that these five breaches represented another compliance failure relating to the same subject matter and same due impartiality requirements of the Code.”

The same analysis, rooted in context, is also at paragraphs 49 and 50 the decision.

“49. Breaches of Rule 5.1 relating to the requirement to ensure due impartiality is preserved in relation to news may or may not be serious depending on the circumstances. A breach of Rule 5.11 and/or 5.12 is potentially particularly serious, since these rules concern the specific requirement to maintain due impartiality in relation to matters of major political or industrial controversy and major matters relating to current public policy.

...

50. In assessing the seriousness of the breaches in question, OFCOM considered the nature of each of the breaches and the fact that there were five of them (four of which occurred over a very short period of time). OFCOM took into account that each of the breaches concerned a failure to preserve due impartiality in news programmes reporting on matters of major political controversy and major matters relating to current public policy, namely matters connected to the ongoing political events which were taking place in Hong Kong at the time the programmes were broadcast. These involved protests and demonstrations in Hong Kong which began in response to the Hong Kong Government introducing amendments to Hong Kong’s extradition laws and continued after the amendment had been withdrawn. Throughout the summer of 2019, a growing wave of demonstrations and protests were held in public spaces in Hong Kong, and tensions between Hong Kong police and the protestors became increasingly acute. These events attracted much media and political discussion across the world. The

protests also formed part of a longstanding tension between the Hong Kong Government and some of its residents who opposed the role of the Chinese Government in Hong Kong's affairs."

19. OFCOM also considered Star China's compliance record (at paragraph 58 of the decision).

"In determining the seriousness of the breaches in this case, we also took into account the Licensee's submissions that at that time of the breaches it had only been found in breach of the Code on one previous occasion, and that unlike some other licensees, [Star China] had not had the opportunity to meet with OFCOM to discuss compliance in this area, and that it was therefore not appropriate to proceed to sanction in this case ... While the Licensee may not previously have met with OFCOM to discuss compliance in relations to this particular issue, we notice that the Licensee's previous breaches in 2014 had, like the present case, involved breaches of Rules 5.1, 5.11 and 5.12 in news programming and had dealt with the same subject matter, namely pro-democracy protests in Hong Kong. Our previous breach decision should therefore have put the Licensee on notice that its compliance procedures in that case had been inadequate and demonstrated the need to take particular care to preserve due impartiality when reporting on this issue. We further considered that in implementing its compliance procedures, the licensee, like all OFCOM licensees, should have taken into account OFCOM's publicly available Guidance on Section Five and our published decisions including the three recent due impartiality breach decisions referred to in its representations ... We therefore considered that the Licensee ought to have been familiar with how to comply with due impartiality rules, and that the breaches therefore represented a serious failure of compliance on the part of the Licensee."
20. All these matters weighed in the balance when OFCOM came to determine the level of the penalty to be imposed. The submission Star China now makes does not come close to demonstrating that the penalty imposed was an unjustified interference with article 10 rights. It is correct to say that the court is not simply considering whether OFCOM's assessment of these matters was a permissible option; this is not a *Wednesbury* exercise. But nor is it an exercise by which the court may substitute its own view. Rather, I must approach the matter recognising both that the reasons for interference with article 10 rights must be closely scrutinised, and that the present context is one in which OFCOM has a specific statutory role under section 319 and 320 of the 2003 Act to secure, among other matters, that television news is presented with due impartiality and that for every television service due impartiality is preserved on matters of political and industrial controversy and matters relating to current public policy.
21. These two considerations led the Master of the Rolls to put the matter as he did at paragraph 62 of his judgment in *TV-Novosti*, which was to the same effect as to the

approach taken by European Court of Human Rights in its judgment in *Gaunt v United Kingdom* (2016) 63 EHRR SE15, at paragraph 61. In this case, OFCOM has not “obviously gone wrong”. Indeed, faced with the same circumstances, I would have reached the same conclusion.

22. I turn now to the first part of Star China’s submission – the significance to be attached to the revocation of its licence in February 2021. The submission here rests on the premise that OFCOM’s Penalty Guidelines emphasise both specific and general deterrence. The operative part of the Guidelines is set out above at paragraph 6. Paragraph 1.11 of the Penalty Guidelines states that deterrence is the “central objective” of imposing a penalty. The penalty must be “sufficient to ensure that it will act as an effective incentive to compliance”. The paragraph then states that when considering the necessary deterrent effect, OFCOM will “have regard to the size and turnover of the regulated body”. Read in isolation, these matters might be thought to be concerned only, or primarily, with specific deterrence – i.e. deterring the offending broadcaster from re-offending. In context, the position is different since the operative paragraphs of the Penalty Guidelines must be read taking account of the “Explanatory Note” at paragraphs 1.3 to 1.10 of the Guidelines. These paragraphs emphasise both specific and general 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.

...

1.6 ... 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 the future and which provides signals to other bodies that misconduct by them will 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-complaint behaviour by other providers.”

23. Star China’s submission may be summarised in this way. The 3 November 2020 preliminary review, reached before the licence was revoked, was that £125,000 was an appropriate financial penalty. At paragraph 95 of the reasons in support of the preliminary view OFCOM stated:

“... this sanction is appropriate and proportionate in the circumstance of this case and should send a clear message of deterrence, both to the Licensee and also to other broadcasters, against any future breaches of a similar nature.”

Thus, the need for specific deterrence – to deter Star China from future breaches of the Broadcasting Code – informed the level at which the proposed penalty was set. The revocation of Star China’s licence in February 2021 was a material change in

circumstances; it removed any need for specific deterrence. Nevertheless, this was not properly accounted for in the final 8 March 2021 decision, which concluded that £125,000 remained the appropriate penalty. In the premises, Star China submitted that that the penalty was disproportionate.

24. At paragraph 44 of its Skeleton Argument, Star China put the matter in this way:

“If £125,000 was the proportionate level of penalty when it was designed to deter both [Star China] and the wider broadcasting community, it cannot still be necessary and proportionate for precisely the same financial penalty to be set when the first of these two deterrents objectives has fallen away.”

This submission relies specifically on the third aspect of Lord Sumption’s proportionality analysis in *Bank Mellat v HM Treasury (No.2)* [2014] AC 700 at paragraph 20, that interference with a qualified Convention right (such as article 10) will not be justified if a “less intrusive measure could have been used without unacceptably compromising the objective” the interference pursued.

25. OFCOM’s reasons are at paragraph 96 of the March 2021 decision: see above, at paragraph 10. I do not consider that either that reasoning, or the conclusion that revocation of the licence should not affect the penalty reveals any error. The imposition of the financial penalty was, undoubtedly, an interference with Star China’s article 10 rights, but it was a justified interference.
26. The premise of Star China’s submission is that there must be some form of straight-line correlation between the revocation of its licence and the penalty necessary for effective deterrence. The reasoning at paragraph 96 of OFCOM’s decision is to the contrary. OFCOM’s opinion was that in this case, effective general deterrence was achieved by imposing the penalty that would have been appropriate had CGTN continued to broadcast. There is logic to this approach. Imposing that penalty would demonstrate to other licence-holders the treatment they could expect in similar circumstances. Such an approach is also consistent (or at least not inconsistent) with the Penalty Guidelines. For that matter also, it is consistent with section 346(3) of the 2003 Act (the provision that a licence-holder’s liability to be subject to a penalty and to pay a penalty imposed by OFCOM survives termination of its licence).
27. Looked at in the round, the present situation raises not just the third aspect of Lord Sumption’s proportionality analysis but also the fourth aspect of that analysis – whether a fair balance has been struck between the rights of the individual and the interests of the community.
28. In *Bank Mellat (No.2)* Lord Reed dissented in the result but not on the approach to the proportionality analysis. At paragraph 20 of his judgment, Lord Sumption, with whose judgment a majority of the court agreed, noted that so far as concerned the general approach to proportionality there was no difference between his view and the view stated by Lord Reed. (Indeed, the same was confirmed by Lord Sumption in his subsequent judgment in *R(Lord Carlile) v Secretary of State for the Home Department* [2015] AC 945 at paragraph 34). The relevant part of Lord Reed’s judgment is at paragraphs 68 to 76. The parts material for present purposes are as follows:

“71. An assessment of proportionality inevitably involves a value judgment at the stage at which a balance has to be struck between the importance of the objective pursued and the value of the right intruded upon. The principle does not however entitle the courts simply to substitute their own assessment for that of the decision-maker. ...

72. The approach to proportionality adopted in our domestic case law under the Human Rights Act 1998 has not generally mirrored that of the Strasbourg court. ... The three-limb test set out by Lord Clyde in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 has been influential:

“whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.”

... The three criteria have however an affinity to those formulated by the Strasbourg court in cases concerned with the requirement under articles 8–11 that an interference with the protected right should be necessary in a democratic society (e.g. *Jersild v Denmark* (1994) 19 EHRR 1, para 31), provided the third limb of the test is understood as permitting the primary decision-maker an area within which its judgment will be respected.

73. The *de Freitas* formulation has been applied by the House of Lords and the Supreme Court as a test of proportionality in a number of cases under the Human Rights Act. It was however observed in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 19 that the formulation was derived from the judgment of Dickson CJ in *R v Oakes* [1986] 1 SCR 103, and that a further element mentioned in that judgment was the need to balance the interests of society with those of individuals and groups. That, it was said, was an aspect which should never be overlooked or discounted. ...

74. The judgment of Dickson CJ in *Oakes* provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in *Oakes* can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally

connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in *de Freitas*, and the fourth reflects the additional observation made in *Huang*. I have formulated the fourth criterion in greater detail than Lord Sumption JSC, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.

75. In relation to the third of these criteria, Dickson CJ made clear in *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 781–782 that the limitation of the protected right must be one that “it was reasonable for the legislature to impose”, and that the courts were “not called on to substitute judicial opinions for legislative ones as to the place at which to draw a precise line”. This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down (*Illinois State Board of Elections v Socialist Workers Party* (1979) 440 US 173, 188–189); especially, one might add, if he is unaware of the relevant practicalities and indifferent to considerations of cost. To allow the legislature a margin of appreciation is also essential if a federal system such as that of Canada, or a devolved system such as that of the United Kingdom, is to work, since a strict application of a “least restrictive means” test would allow only one legislative response to an objective that involved limiting a protected right.

76. In relation to the fourth criterion, there is a meaningful distinction to be drawn (as was explained by McLachlin CJ in *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, para 76) between the question whether a particular objective is in principle sufficiently important to justify limiting a particular right (step one), and the question whether, having determined that no less drastic means of achieving the objective are available, the impact of the rights infringement is disproportionate to the likely benefits of the impugned measure (step four).”

Thus the “least restrictive means” element of proportionality does not mean there is only one permissible answer, and cannot be used by the court to usurp such area of

judgment as must be permitted to the decision-maker even though, as in the case of article 10 rights, that area or judgment will be notably confined.

29. In this case, OFCOM's conclusion on the requirements of general deterrence discloses no error of principle (it is not a conclusion on which OFCOM "has obviously gone wrong"). Moreover, OFCOM is, by reason of its statutory responsibilities, particularly well-placed to assess what general deterrence requires for this purpose. The case before it was one where there had been persistent breaches of the obligation to report news with due impartiality, and the breaches concerned reporting on demonstrations in Hong Kong which were a matter of major political controversy. All this being so, and notwithstanding the close attention that must be given to any interference with article 10 rights, the penalty imposed was not out-with the least restrictive means requirement.
30. As to the fair balance aspect of proportionality the same considerations apply. Fair balance too, is a standard calling for careful evaluation. It is not a standard that permits only of a single "right" answer. The present case is not one where the decision challenged falls into the category (as described to *Candide*) of extravagant acts taken "*pour encourager les autres*". It is nowhere close to that category, or anything like it. The margin permitted is of course much narrower; fair balance requires that the cost of pursuing a general objective of general public interest cannot, disproportionately, fall on any one individual or discrete group. The decision in March 2021 to impose the penalty proposed in the November 2020 preliminary view was, even within the narrow margin permitted, a course open to OFCOM. As stated above, what is required, appropriately, as a matter of general deterrence is a matter OFCOM is very well placed to assess. OFCOM's decision on these facts was that a penalty equivalent to that which it would have imposed had CGTN continued to broadcast, would provide an appropriate general deterrent. Having reached that conclusion, a conclusion, which in my view was lawful, it was not disproportionate to require Star China to pay that amount. That amount reflected OFCOM's evaluation of the seriousness of Star China's breaches of the Broadcasting Code, and had been calculated taking account of Star China's size and turnover. On its own terms, the £125,000 penalty was not a disproportionate response to what Star China had done. Nor was it disproportionate to impose that penalty on Star China in pursuance of the objective of deterring other broadcasters from breaching the due impartiality requirement in the Broadcasting Code.
31. I must deal with one last matter. In the course of the hearing I suggested that a consequence of section 346(3) of the 2003 Act, that a licence-holder's liability to be subject to a penalty is not affected by the termination of a licence before the imposition of the penalty, could be that for the purposes of section 6(2)(a) of the Human Rights Act 1998, OFCOM could not in its March 2021 decision have done anything other than maintain the penalty proposed in the November 2020 preliminary view. If that were the case, it would provide a complete answer to Star China's submission based on the revocation of its licence.
32. Following the hearing, and with my permission, Star China filed short written submissions on this point. I accept those submissions. They provide a complete answer to the suggestion I made. Section 346(3) of the 2003 Act does no more than preserve OFCOM's power to impose and enforce a penalty after termination of a licence. It does not give rise to any free-standing obligation or engage section 6(2)(a) of the Human Rights Act. It did not require OFCOM, in its March 2021 decision, to impose the penalty proposed in the November 2020 preliminary view.

C. Disposal

33. For the reasons above, Star China's application for judicial review fails, and is dismissed.
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