

OFCOM BROADCAST AND ON DEMAND BULLETIN

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Introduction

Under the Communications Act 2003 ("the Act"), Ofcom has a duty to set standards for broadcast content to secure the standards objectives¹. Ofcom also has a duty to ensure that On Demand Programme Services ("ODPS") comply with certain standards requirements set out in the Act².

Ofcom reflects these requirements in its codes and rules. The Broadcast and On Demand Bulletin reports on the outcome of Ofcom's investigations into alleged breaches of its codes and rules, as well as conditions with which broadcasters licensed by Ofcom are required to comply. The codes and rules include:

- a) [Ofcom's Broadcasting Code](#) ("the Code") for content broadcast on television and radio services licensed by Ofcom, and for content on the BBC's licence fee funded television, radio and on demand services.
- b) the [Code on the Scheduling of Television Advertising](#) ("COSTA"), containing rules on how much advertising and teleshopping may be scheduled on commercial television, how many breaks are allowed and when they may be taken.
- c) certain sections of the [BCAP Code: the UK Code of Broadcast Advertising](#), for which Ofcom retains regulatory responsibility for television and radio services. These include:
 - the prohibition on 'political' advertising;
 - 'participation TV' advertising, e.g. long-form advertising predicated on premium rate telephone services – notably chat (including 'adult' chat), 'psychic' readings and dedicated quiz TV (Call TV quiz services); and
 - gambling, dating and 'message board' material where these are broadcast as advertising³.
- d) other conditions with which Ofcom licensed services must comply, such as requirements to pay fees and submit information required for Ofcom to carry out its statutory duties. Further information can be found on Ofcom's website for [television](#) and [radio](#) licences.
- e) Ofcom's [Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services](#) for editorial content on ODPS (apart from BBC ODPS). Ofcom considers sanctions for advertising content on ODPS referred to it by the Advertising Standards Authority ("ASA"), the co-regulator of ODPS for advertising, or may do so as a concurrent regulator.

[Other codes and requirements](#) may also apply to broadcasters, depending on their circumstances. These include the requirements in the BBC Agreement, the Code on Television Access Services (which sets out how much subtitling, signing and audio description relevant licensees must provide), the Code on Electronic Programme Guides, the Code on Listed Events, and the Cross Promotion Code.

It is Ofcom's policy to describe fully television, radio and on demand content. Some of the language and descriptions used in Ofcom's Broadcast and On Demand Bulletin may therefore cause offence.

¹ The relevant legislation is set out in detail in Annex 1 of the Code.

² The relevant legislation can be found at Part 4A of the Act.

³ BCAP and ASA continue to regulate conventional teleshopping content and spot advertising for these types of services where it is permitted. Ofcom remains responsible for statutory sanctions in all advertising cases.

Broadcast Standards cases

In Breach

The American President

Sony Movie Channel, 18 August 2017, 18:35

Introduction

Sony Movie Channel is a general entertainment service which broadcasts on terrestrial, satellite and cable platforms. The licence is held by Entertainment Networks (UK) Limited ("ENL" or "the Licensee").

The American President is a 'romcom' about a widower President who pursues a relationship with an environmental lobbyist while attempting to win the passage of a crime control bill.

We received a complaint about three instances of the word "fuck" being used by characters in the programme as follows:

At around 19:55 a character said:

"...I'm going to go to Sam and Harry's and order a big steak, and I'm going to make a list of everybody who's tried to fuck us this week".

At around 20:05 another character said:

"Oh, fuck the sweater...".

In the next scene, another character shouted "fuck you".

Ofcom considered this material raised issues under the following rule of the Code:

Rule 1.14: "The most offensive language must not be broadcast before the watershed".

We therefore asked ENL how the content complied with this rule.

Response

The Licensee said that due to human error and a technical issue with its scheduling software, the unedited post-watershed version of *The American President* was scheduled and broadcast. It apologised for this error and told Ofcom that it was working with its software providers to resolve the technical issue. The Licensee stated that in the meantime it has implemented further manual schedule checks to ensure that all content is appropriately scheduled.

Decision

Reflecting our duties under the Communications Act 2003¹, Section One of the Code requires that people under eighteen are protected from unsuitable material in programmes.

Rule 1.14 states that the most offensive language must not be broadcast before the watershed.

Ofcom's 2016² research on offensive language clearly indicates that the word "fuck" and variations of it are considered by audiences to be amongst the most offensive language. The use of the word "fuck" in this film was a clear case of the most offensive language being broadcast before the watershed.

We acknowledged that this incident occurred as a result of human error and a technical failure, and that the Licensee had apologised. We also took into account that ENL said it had taken steps to prevent a recurrence. However, Ofcom's Decision is that the repeated broadcast of the word "fuck" in this programme was therefore a clear breach of Rule 1.14.

Breach of Rule 1.14

¹ <http://www.legislation.gov.uk/ukpga/2003/21/section/319>

² https://www.ofcom.org.uk/_data/assets/pdf_file/0022/91624/OfcomOffensiveLanguage.pdf

In Breach

Advice Bureau

Akaal Channel, 15 and 22 May 2017, 11:00

Introduction

Akaal Channel is a general entertainment channel broadcast in English and Punjabi, serving the Sikh Community in the UK and Europe. The licence for the service is held by Akaal Channel Limited ("ACL" or "the Licensee").

Ofcom received a complaint about Advice Bureau, a health programme, broadcast mainly in Punjabi. Ofcom commissioned an independent translation of both programmes translated into English and provided a copy of the translation to the Licensee, which agreed it was accurate.

The programmes invited viewers to call in to speak to Mr Abdul Wali, who was credited throughout the programmes in a caption that said:

"DR. ABDUL WALI, DVM, IMD, DOCTRATE AND PHD (IN NATURAL MEDICINE)".

The following captions were also shown:

"FOR ANY OFF AIR ADVICE CALL 0208 7675769" and "FOR ANY ADVICE CALL NOW ON 0208 571 4279 OR 0121 551 1001".

During both programmes, Mr Wali encouraged viewers to contact him directly or via the "OFF AIR ADVICE" number, which is also the phone number for Care & Cure Nutraceuticals Limited, a company with which Dr Wali is associated¹, for example:

15 May 2017:

"Yes, I was going to announce, that on the 3rd of June I will be in Wolverhampton. I will be taking appointments over there. If you want to book an appointment in Wolverhampton, then please call my office. They will let you know if any slot is available or not. I will also say this in Punjabi as well. We will be in Wolverhampton on the 3rd of June. Limited appointments are available. I don't know if the appointments are still available or not. Please call my office and ask them if any slot is available. You can bring your wife there".

22 May 2017:

"Yes, on Saturday I am coming to Wolverhampton, you can call in my office for the appointment. But it is already fully booked. My office colleagues must be listening to this programme. I will personally tell them to give you a special appointment. You can meet me at Wolverhampton".

¹ Dr Abdul Wali is a Director of Care & Cure Nutraceuticals Limited.

"Please visit the Care and Cure website. You will find the Facebook link there. Please Like it. We cannot recommend or share some information in the programme. I can only give you limited information right now. There are many things that we cannot tell you here because there are some rules. But we can talk openly on the show that is aired on net radio. I can answer the questions in detail as it is of two hours. In weekdays it is from 11am to 1pm. Please like our Facebook page. You will start getting updates. But I cannot tell about the medicines now".

The presenter added:

"If you don't know about the Facebook page you can contact our receptionist. Thank you".

Dr Wali:

"Yes, you can take my office number shown on the screen, please write this number. Call this number and talk to my colleagues. They will talk to you and book an appointment. If you want to communicate over the phone or you want to meet me, they will guide you. There are no charges for meeting me. You can come and talk to me, but you will have to wait for that. You can ask some questions on the phone. My office is in London".

We requested information from the Licensee about any commercial arrangements associated with the references to the services offered by Dr Wali. Based on the information provided, we considered the material raised issues under the following Code rules:

Rule 9.4: "Products, services and trade marks must not be promoted in programming".

Rule 9.5: "No undue prominence may be given in programming to a product, service or trade mark. Undue prominence may result from:

- the presence of, or reference to, a product, service or trade mark in programming where there is no editorial justification; or
- the manner in which a product, service or trade mark appears or is referred to in programming".

Ofcom requested comments from the Licensee on how the programmes complied with these rules.

Response

The Licensee said that some viewers would not be comfortable discussing certain health related issues on live television and "the decision taken was to provide viewers with the option to contact [Dr Wali] directly". ACL added that staff also recorded the phone numbers of all callers to the programmes so that Dr Wali could conduct follow-up consultations if necessary, adding that "we view this as a 'two-way street'".

The Licensee said “[w]e note that other magazine style programming providing health and welfare advice often ask callers to stay on the line off-air or that they will be called back after the programme has ended. In adopting this approach, the channel is in line with many other programme formats from major broadcasters. The style of this programme may not be as slick [as] that of the mainstream in the application how it has conveyed off-air follow up with the viewer. However, the intention is to demonstrate, care and attention to...viewers, particularly those that are seeking advice”.

Decision

Reflecting our duties under the Communications Act 2003², Section Nine of the Code limits the extent to which commercial references can feature within television programming. This helps ensure a distinction is maintained between advertising and programming. Section Nine does not proscribe all references to products and services in programmes. However, it does require such references to be justified by the editorial requirements of a programme and not to be promotional or unduly prominent.

Rule 9.4 requires that products, services and trademarks must not be promoted in programming. Ofcom's published guidance on Rule 9.4 states: “Where a reference to a product or service features in a programme...the extent to which a reference will be considered promotional will be judged by the context in which it appears. In general, products or services should not be referred to using favourable or superlative language and prices and availability should not be discussed”.

In this case both programmes included references to the availability of one-to-one consultations with Dr Wali, the locations of his clinics (London and Wolverhampton) and viewers were repeatedly advised call to “*book an appointment*”. These references to Dr Wali's practice were therefore promotional and the programmes were in breach of Rule 9.4.

Rule 9.5 requires that no undue prominence is given in programming to a product, service or trade mark. It makes clear that undue prominence may result from a reference to a product, service or trade mark where there is no editorial justification, or from the manner to which the product etc. is referred. Ofcom's published guidance³ relating to undue prominence states that “whether a product, service or trade mark appears in a programme for solely editorial reasons...or as a result of a commercial arrangement between the broadcaster or producer and a third-party funder...there must be editorial justification for its inclusion. The level of prominence given to a product, service or trade mark will be judged against the editorial context in which the reference appears”.

In both programmes, Dr Wali asked callers and viewers to make an appointment for an individual consultation with him or call the “*OFF AIR ADVICE*” number, which was the phone number for his business. We took into account the Licensee's argument that the provision of this number was to demonstrate “care and attention” to viewers and callers and is a format adopted by other broadcasters (albeit off-air) to conduct follow-up consultations. We recognise that the provision of aftercare following the broadcast of a programme of this nature may be necessary and demonstrates a responsible approach to compliance and

² <http://www.legislation.gov.uk/ukpga/2003/21/section/319>

³ https://www.ofcom.org.uk/_data/assets/pdf_file/0014/33611/section9_may16.pdf

audience welfare. However, this does not justify references to contact details or the availability of products or services for a commercial entity in a programme.

The references in *Advice Bureau* to Care & Cure Nutraceuticals were therefore given undue prominence, in breach of Rule 9.5 of the Code.

Breaches of Rules 9.4 and 9.5

Fairness and Privacy cases

Upheld

Complaint by Miss F made on her own behalf and on behalf of her uncle, and her parents

Can't Pay? We'll Take it Away!, Channel 5, 20 April 2016

Summary

Ofcom has upheld a complaint of unwarranted infringement of privacy made by Miss F on her own behalf and on behalf of her uncle, and her parents.

The programme included footage of Miss F speaking to two High Court Enforcement Agents ("HCEAs"), as the HCEAs explained their presence to Miss F and then proceeded to enforce a High Court Writ for the repayment of personal debt which Miss F had accrued. The initial filming took place on the threshold of Miss F's parents' house (in which she was living), but most of the footage was recorded inside the family home – initially in the hallway and then in other rooms (including one of the bedrooms). The footage of the interior of the property was recorded by the body cameras belonging to the programme makers and worn by the HCEAs as they took an inventory of items in the property with a view to potentially seizing some of these items in lieu of the immediate repayment of Miss F's debt. Footage and audio of Miss F discussing the matter with her uncle in the presence of the HCEAs and then with her father, both via phone and later in person, was also included.

Ofcom found that Miss F, her uncle, and her father had a legitimate expectation of privacy in relation to the filming of the footage and that they all, including Miss F's mother, had a legitimate expectation of privacy in relation to the subsequent broadcast of the footage. We considered that their legitimate expectation of privacy outweighed the broadcaster's right to freedom of expression and the public interest in the particular circumstances of the case. Their privacy was, therefore, unwarrantably infringed in both the obtaining and broadcast of the footage included in the programme.

Programme summary

On 20 April 2016, Channel 5 broadcast an edition of *Can't Pay? We'll Take it Away!*, a series which follows HCEAs as they attempt to resolve debt disputes through negotiated settlements and asset seizures. This edition included a segment about Miss F who had defaulted on a repayment plan for personal debt. The programme's narrator introduced this section of the programme:

"Average debts amongst young people aged 15 to 24 have more than trebled in the last ten years. More than half have personal debts including pay day loans and credit card bills, and many are turning to their families to help".

This caption also appeared: *"YOUNG PEOPLE HAVE AVERAGE DEBTS OF £12,000 EACH".*

Two HCEAs, Mr Stuart McCracken and Mr Elmore Victor (who was referred to in the programme as "Vic"), were shown as they called on Miss F at her parents' home in Bolton, Lancashire, where she was living.

As the HCEAs drove towards the property, the narrator said:

"Student nurse, [Miss F], owes just over £750.00, but this isn't the first time Vic has tried to recover the debt".

As the HCEAs got out of their van and approached the house, the narrator said:

"The last time Vic met [Miss F] she agreed to make monthly instalments to repay the debt, but she's defaulted, and now Vic is back with Stuart to recover payment in full or seize goods if [Miss F] can't or won't pay".

Footage of the HCEAs knocking on the front door of the house, and a man, Miss F's uncle, answering the door was then shown. (The house number was blurred out). During this footage, the narrator said:

"[Miss F] lives at home with her mum and dad but it's her uncle who answers the door".

The HCEAs were shown asking Miss F's uncle if they could speak to Miss F and explaining that they had come to "execute a High court writ" before Miss F's uncle started to walk back along the hallway to get Miss F. When Miss F's uncle walked away from the door, Mr McCracken was shown stepping over the threshold of the house. As he did, the narrator said:

"The writ allows the agents to make peaceful entry into the house".

Miss F's uncle turned back to Mr McCracken and said "Hang on, I haven't given you permission to come in" to which Mr McCracken responded "Yeah, it's like I said, we're here now to take control, a writ of control. I'll stay here. I won't go any further. But, it's important that we speak to [Miss F]".

Miss F then came downstairs and approached the HCEAs who were still standing in the doorway. Mr Victor introduced himself to Miss F, told her that there was "an outstanding balance [on her debt] of £750.90" and said "we need payment in full today". In response, Miss F said that she had been paying £100.00 each month to clear the debt, following a previous visit from the HCEAs when she agreed a repayment plan with them. Mr McCracken was shown going back to the van and returning with some paperwork. The narrator said:

"As [Miss F] claims, she's been paying off her loan. Stuart goes to check his paperwork. But the documentation shows that [Miss F] has defaulted on her payment plan".

Mr Victor explained that at some point, Miss F had missed a few payments and Mr McCracken, showing Miss F the paperwork, observed that "the office" had telephoned her on several occasions, but there had been no reply. Miss F responded "Yeah, I know, I don't answer any number I don't know". Mr McCracken said "if you don't answer the phone, that's the reason we've come back".

The narrator then explained that Miss F needed to raise the full amount, but that there was a problem and that:

"During Vic's last visit [Miss F's] father agreed to pay back some of his daughter's debt on the condition she paid off the rest. She's reluctant to ask him for more help, but the agents need to settle the case today one way or another".

Mr McCracken was heard saying *"It's been ten minutes. I'm going to have to start doing an inventory of goods"*. He subsequently told Miss F's uncle what this would involve, before both HCEAs explained to Miss F that if, as she claimed, the only items in the house which belonged to her were those in her bedroom, she would have to provide proof of her parents' ownership of the other items in the house. Mr McCracken also said *"If we do an inventory of goods, it [the debt owed] goes up to £1,380 because we've then, technically, seized the goods"*.

Miss F's uncle encouraged Miss F to call her father before the programme cut to footage of Mr Victor talking to camera:

"I don't know why young people think that if they're not going to pay it back, that it's going to go away. But, debt, unfortunately, follows you and, wherever you are registered to live, that's where we'll go to collect the debt from".

Miss F was shown standing in the living room looking at her mobile phone as the narrator said *"After ten minutes, there's still no sign of any payment. Stuart's patience is running out"*.

Mr McCracken was shown saying that *"She isn't really doing much apart from texting, texting, texting. So, I think it's about time now. We're going to have to start putting our foot down and assessing what we can take control of to sell at public auction if she can't raise the funds"*. This was followed by footage of Mr McCracken, who had re-entered the property, walking around the living room and listing some of the items. As he did so, Miss F's uncle could be heard telling him *"All these [i.e. the items in the living room] are her mother's, all these"* to which Mr McCracken replied *"I need to see some documentary proof or something like that"*. Mr McCracken was then shown walking into the kitchen.

The narrator said *"[Miss F's] time to raise some funds is up. Stuart starts to make a list of goods"*. The narrator also said *"As Stuart makes the inventory; [Miss F] finally decides to call her father for help"*. Footage of Miss F talking to her father on her mobile phone was then shown. She could be heard saying *"Dad don't, because you're just making it worse for me. Please don't"* as well as explaining to him that the HCEAs would not take any of the property in the house away if she could pay them the money she owed.

Miss F was shown telling Mr Victor that her father had agreed to pay the outstanding debt, before the narrator explained that, because the agents had started taking the inventory this *"might not be enough"*. This section of the programme also included footage of the first floor of the house, including a bedroom, as one of the HCEAs took an inventory upstairs. Miss F was shown crying as she asked the agents to accept £750 in cash and to not charge her the extra amount. The narrator subsequently said that the agents agreed to this offer.

Miss F was shown leaving the house, where the HCEAs remained with her uncle, and then returning with her father. Miss F's father was shown with the agents in the living room as he

paid them the outstanding debt. Miss F, who was visibly upset, could be seen in some of this footage. The HCEAs then left the house.

No further footage of, or references to, Miss F, her uncle, her father or the house were included in the programme. Neither Miss F's uncle nor Miss F's father were referred to by name and Miss F's mother was not shown or named in the programme.

Summary of the complaint and the broadcaster's response

The complaint

- a) Miss F complained that her privacy, and that of her uncle and her father was unwarrantably infringed in connection with the obtaining of material included in the programme because they were filmed in Miss F's home, a private place which she shared with her parents, without their consent.

By way of background, Miss F said that the film crew had "turned up at her address with no warning"; "did not explain what they were actually filming for"; and, "did not ask for permission" to film her in her home. She also said that the film crew walked up the pathway to the front door, which was private property, without being invited to do so.

- b) Miss F also complained that her privacy, and that of her uncle and her father was unwarrantably infringed in the programme as broadcast because footage of them in Miss F's home was broadcast without their knowledge or consent. Miss F said that she was not told by the programme makers that footage filmed by the body cameras worn by the HCEAs would appear in the programme.

Both Miss F's uncle and father said in their letters authorising Miss F to make the complaints on their behalf that Miss F had made a mistake and had "learned her lesson". However, given that "the debt was paid in full" and the matter resolved to the complete satisfaction of the HCEAs within minutes of Miss F's father's arrival, the "exposure [in the programme] was completely unnecessary and unjustifiable. Miss F's father also said that "because the debt was not mine, I distinctly stated I did not want to be named or filmed whatsoever". He also said that he "did not expect to be filmed in close up quarters" and that he had assumed that, because the issue was promptly settled "the recording would not be televised".

- c) Miss F also complained that her mother's privacy was unwarrantably infringed in the programme as broadcast because footage of her home, including her bedroom, was broadcast without her consent.

In her letter authorising Miss F to make this complaint on her behalf, Miss F's mother said that she was "absolutely disgusted" that this footage had been broadcast particularly given that the debt in question was not hers. She also said that people had recognised her house and had questioned her about its inclusion in the programme.

The broadcaster's response

Channel 5 said that the law in the UK does not provide people with a right not to be on television nor does the law prevent footage of people being filmed and then broadcast without their consent. What mattered in every case was whether or not an individual's right

to privacy had been infringed. It said that this required the balancing of the individual's right to privacy (Article 8 of the European Convention of Human Rights ("ECHR")) against the right to freely broadcast matters of public interest (Article 10 of the ECHR).

Channel 5 also argued that there could be no doubt that the activities of HCEAs; the way the law is utilised or ignored; the kinds of difficulties the HCEAs face when executing their duties; and, the impact of their activities on the lives of those who are affected are all matters of "acute public interest". It said that, for these reasons, it considered that, generally speaking, it was appropriate and reasonable to include footage of people interacting with the HCEAs in the programme. However, it acknowledged that each case turned on its own facts, and matters such as the unusual vulnerability of a particular person or situation could impact on decisions about whether to include footage in a programme.

- a) Responding to the complaint that the privacy of Miss F, her uncle, and her father was unwarrantably infringed in connection with the obtaining of material included in the programme as broadcast, Channel 5 said the following:

Miss F

Miss F was the subject of a Writ of Control that the HCEAs were executing. It also said that the HCEAs had sought to enforce the Writ previously; and, that, on this earlier occasion, Miss F agreed to a repayment plan for her debt, but she subsequently defaulted on this repayment plan.

The broadcaster said that the execution of a Writ was a public matter, not a private one, adding that, in this particular case, the execution of the Writ was not a matter connected with the complainants' private lives, protected by Article 8 of the ECHR, but a public matter that involved the complainants.

It acknowledged that Miss F said that she did not wish to appear in the programme, but said that no undertaking that she would not be shown was given to her. It also acknowledged that Miss F did not consent to being filmed herself or to having her parents' house filmed. However, it argued that, given that the HCEAs were engaged in official court business, it was not necessary to obtain the complainants' consent in relation to the filming.

In addition, Channel 5 accepted that the HCEAs arrived at Miss F's home without warning, but said that it was not necessary to give warning prior to executing a Writ and that doing so might lead to the frustration of the court order in question.

Channel 5 said that the Writ authorised the HCEAs to enter Miss F's home and seize any items which could not be proven to be the property of a person other than Miss F. If the debt was not settled or an appropriate arrangement made, the HCEAs could have legally removed all the goods and chattels in the house, put them in storage and allowed the rightful owners seven days to prove their ownership. Failing such proof, anything seized could be sold to reduce or satisfy the debt. The broadcaster argued that, "accordingly, any right to privacy the complainants might have claimed was outweighed by Channel 5's Article 10 right to communicate; and the public's right to receive information concerning matters of public interest including, without doubt, the activities of [the HCEAs] carrying out official court duties".

Channel 5 also said that Miss F:

- was incorrect to claim that the camera crew did not explain why they were filming (it said that both she and her uncle were told that the filming was for a Channel 5 series that followed HCEAs and that Miss F had admitted that she had seen the programme before and must have understood that the filming was for a future episode);
- was incorrect to say that her permission to film was not requested (it said that permission was requested but Miss F declined the opportunity she was given to explain her situation on camera); and,
- did not ask the camera crew to leave her home (it said that a member of the camera crew suggested that, in the absence of the owners, the crew should retreat to the public highway – if that was Miss F's preference – and this was done immediately).

The broadcaster also said that most of the footage in the broadcast was recorded by body cameras worn by the HCEAs and was carried out lawfully. Channel 5 said:

“As a matter of usual policy, High Court Enforcement Agents wear body cameras which record their interactions with members of the public while they are carrying out their official Court duties. This is for the safety of the Agents as well as providing a record of their activities in case of complaint or inquiry¹.

There is no breach of any of the complainants' privacy rights involved in the High Court Enforcement Agents recording their activities by using body cameras especially as, at no time, were the cameras hidden or concealed”.

Miss F's uncle

Channel 5 said that Miss F's uncle was not filmed doing anything that was intrinsically private; spoke freely with the camera crew; did not complain about being filmed (at the time); and, was not filmed in his own home. It also said that Miss F's uncle involved himself in the discussions between Miss F and the HCEAs and was important in convincing Miss F to contact her father, the person who eventually settled the debt for her. In addition, Channel 5 argued that the reasons set out above concerning why any privacy right of Miss F was not infringed by the filming process applied equally to her uncle.

Miss F's father

Channel 5 said that Miss F's father was not filmed doing anything that was intrinsically private and chose to involve himself in the events which were being filmed. It added that Miss F tried to persuade her father to stay away and intended to drive to him to obtain the monies necessary to settle the debt and satisfy the Writ. However, he insisted on coming to personally make the payment. Channel 5 also again argued that the reasons set out above concerning why any privacy right of Miss F was not infringed by the filming process applied equally to her father.

¹ See the “Supplementary material” section below.

- b) In response to the complaints that the privacy of Miss F, her uncle and her father was unwarrantably infringed in the programme as broadcast, Channel 5 said the following:

Miss F

Channel 5 said that, for the reasons set out above, it did not accept that Miss F had any right of privacy in relation to her interactions with the HCEAs. It said that Miss F brought their attendance upon herself by failing to adhere to the repayment arrangement agreed on the first occasion that an attempt was made to execute the Writ. Channel 5 said that the execution of a Writ, wherever it occurs, is a public act that the HCEAs, in accordance with the law, are obliged to carry out.

It also said that, for the reasons set out above, there was a clear public interest in showing the activities of the HCEAs in executing their official duties. It argued that the public interest outweighed any right to privacy Miss F might have in relation to such activities.

The broadcaster said that the sequence in question made several things clear to the public, all of which it was in the public interest for the public to know:

- High Court Writs can be executed at any time, without notice;
- when a Writ of Control has been issued, goods and chattels which belong to anyone at the place where the debtor resides can be taken into possession by the HCEAs unless proof of ownership of those goods or chattels can be immediately produced;
- significant costs can be incurred if the various stages of the execution of the Writ of Control are reached;
- repayment agreements made in the light of a Writ of Control must be strictly performed or the consequences can be costly and dramatic; and,
- failure to pay judgment debts, or failure to answer calls from those collecting judgment debts, can lead to the property of the people who live with the judgment debtor being seized, disrupting ordinary family life.

Channel 5 said that the broadcast “demonstrated the stark reality of situations such as that in which [Miss F] put herself by her actions”. It also said that the inclusion of the relevant material “was entirely in the public interest” and “did not exceed what was necessary and appropriate to make viewers understand the situation and the ramifications of what Miss F had done”. Channel 5 added that footage of the interior of Miss F’s home was included solely because it demonstrated the kinds of items the HCEAs would seize if payment was not made. It also argued that “without sight of the interior, it would not have been clear to the viewer the kind of stakes that were in play under the Writ of Control”.

Channel 5 said that including Miss F’s uncle in the programme served the public interest. It said that this was because he was an integral part of sorting out the situation that Miss F was in and it was his questioning of the HCEAs which elucidated, for the audience, the powers the HCEAs could invoke in relation to the seizure of goods that did not belong to Miss F but could not be proven to be the property of another.

Channel 5 said that for these reasons, and those given in relation to Miss F, there was no unwarranted infringement of Miss F's uncle's privacy, because, if any privacy right arose, which it did not accept was the case, the public interest warranted any such infringement.

Miss F's father

Channel 5 again argued that including Miss F's father in the programme served the public interest. It said that if her father had not decided to provide the funds to settle the debt, the HCEAs would have been obliged to seize goods that did not belong to Miss F but could not be proven to be someone else's property, including him and his wife. It also said that Miss F's father's interests were "inextricably entwined" with those of Miss F and that "it was clearly in the public interest to explain how those that are not involved in debt themselves can, nevertheless, find themselves in the position where their goods and chattels are impounded".

Channel 5 said that for these reasons, and those given in relation to Miss F, there was no unwarranted infringement of Miss F's father's privacy, because, if any privacy right arose, which it did not accept was the case, the public interest warranted any such infringement.

Regarding the points raised by Miss F's father in his letter of authorisation, the broadcaster said that:

- there was no reason for Miss F's father to assume that because the debt was settled the incident would not appear in the programme (it said that the complainants – except for Miss F's mother who was not present – were told that decisions about what would appear in any final broadcast would be made later so there was no reason for Miss F's father to make this assumption); and,
 - while it did not understand what Miss F's father meant when he said he "did not expect to be filmed in close-up quarters" this was "an irrelevant consideration" because "given the clear public interest, the fact that Miss F's father stated he did not want to be filmed or included in the broadcast is not a determinative factor".
- c) Channel 5 said that Miss F's mother did not appear in the broadcast and that the footage of the interior of the house in which Miss F resided (Miss F's mother's home) was not extensive or detailed. It also argued that it was necessary to show the interior of the house because one of the key issues facing the HCEAs when executing the Writ was determining which chattels and goods might be impounded. It said that the HCEAs had to explore the premises and it was appropriate that the options they were forced to explore were filmed to properly explain the issues they face in executing their duties. Channel 5 also said that "nothing especially private was disclosed in the footage of the interior of the home".

Channel 5 said that for these reasons, and those given in relation to Miss F, there was no unwarranted infringement of Miss F's mother's privacy, because, if any privacy right arose, which it did not accept was the case, the public interest warranted any such infringement.

Regarding the points raised by Miss F's mother in her letter of authorisation, the broadcaster said that:

- every precaution was taken to ensure that the actual location of the complainants' home was not identifiable; and,
- although it accepted that Miss F's mother was "absolutely disgusted" by the broadcast, and it regretted this, "the public interest in the making of the broadcast outweighed any personal feelings [Miss F's mother] may have".

Channel 5 also rejected the complainants' position that the "exposure [in the programme] was completely unnecessary and unjustifiable" because Miss F had "learned her lesson". It said that if this was the case Miss F "would not have defaulted on the agreed repayment plan and there would have been no need for the HCEAs to carry out their duties". It also said that Miss F had not answered any phone calls from the company which was managing the repayments and there had been several incidents where there were difficulties with repayments.

In addition, Channel 5 said that Miss F's story was included in the programme not to show her "personal position" but "to advise the public of how easy it is for debt issues to become overwhelming and what happens when Writs of Control are issued and executed". It said that "these are important matters that the public, especially young people, need to understand and appreciate" and that "by demonstrating how failing to meet your responsibility as a debtor can lead to further cost and trauma, the public interest was served". It added that "telling [Miss F's] story, including the fact that she had to be funded by her father to avoid the impounding of the family's goods and chattels, was entirely in the public interest".

Ofcom's First Preliminary View

On 9 November 2016, Ofcom issued its first Preliminary View on this case that the complaint made by Miss F on her own behalf and on behalf of her uncle, father and mother should not be upheld. This was provided to the parties with an invitation for them to make representations. Miss F made representations in which she said that she did not agree with the decision and reiterated the concerns she raised in her complaint as entertained by Ofcom. Channel 5 did not make any representations.

Following further consideration of the issues raised in this case, Ofcom was concerned that we had not correctly balanced the competing rights of the complainant and the broadcaster under Articles 8 and 10 of the ECHR. We also decided to ask Channel 5 for further information (see "Supplementary material" below) on the nature of the arrangement with the HCEAs before reaching a final Adjudication.

Supplementary material

Ofcom asked Channel 5 about any arrangements that existed between the HCEA company and the programme makers in relation to the provision and use of the body cameras worn by the HCEAs and the subsequent use of the material recorded (both visual and audio) on the body cameras.

Channel 5 provided Ofcom with a document entitled "Main Contributor Release Form" ("Release Form") which the programme makers issued to and agreed with the HCEA company and which was in place at the time of the filming. In summary, the Release Form agreed that:

- the body cameras would be provided to the HCEAs by the programme makers and that the HCEAs would film in the way that they would do normally (i.e. with their own cameras when not engaged in activities with the programme makers);
- the entire copyright in the material recorded by the body cameras belonged to the programme makers for the purposes of the programme; and,
- reasonable access to view the body camera material would be given to the HCEA company upon request, but that material remained the property of the programme makers.

Ofcom was concerned about Channel 5's response given the significant further detail regarding the ownership and use of the body cameras which had not been disclosed by Channel 5 in the information it had provided to Ofcom in its statement in response to the complaint. In its initial statement, Channel 5 had said: "As a matter of usual policy, High Court Enforcement Agents wear body cameras which record their interactions with members of the public while they are carrying out their official Court duties. This is for the safety of the Agents as well as providing a record of their activities in case of complaint or inquiry".

Channel 5 also provided Ofcom with the programme production "bible" which provided further detail about the relevant practices and procedures governing the activities of the production team in making *Can't Pay? We'll Take It Away*. In particular, the document stated that:

- each HCEA wore a body camera and a microphone with sound fed to a central recorder unit. Both the camera and the microphone recorded continuously while they dealt with a case;
- while HCEAs routinely wear body cameras, they are of low quality. Therefore, the programme makers replace them with their own, better quality body cameras and ensure that there is always a sound recordist on the shoots;
- the production team maintain the body cameras while filming and ensure that replacement batteries are carried, and the data backed up;
- if a "debtor" queries the use of the body cameras, the programme makers should respond that they are worn for the HCEAs' security, but that the material may be made available to the programme makers if it is in the public interest to show it; and,
- Ofcom does not view the filming by the HCEAs on the body cameras or the subsequent broadcast of the filmed footage as being surreptitious filming and so it can "be treated for all intent and purpose as being the same as your (i.e. camera crew) filming in most cases".

Ofcom's Second Preliminary View

Having reconsidered the balance between the competing rights of the complainant and the broadcaster under Articles 8 and 10 of the ECHR, and taking account of the supplementary material, Ofcom decided that it was not appropriate to continue with the first Preliminary View. We decided to withdraw it and issue a new, second Preliminary View.

On 28 April 2017, Ofcom issued its second Preliminary View on this case that the complaint should be upheld. Both the complainant and the broadcaster were given the opportunity to make representations on the second Preliminary View. The complainant did not submit any representations. Channel 5 made representations which are summarised below.

Summary of Channel 5's representations

Channel 5 said it repeated and relied upon its earlier submissions.

In response to Ofcom's second Preliminary View, Channel 5 reiterated that it is not the law in the United Kingdom that people have a right not to be on television. Nor is it the law that footage or photographs of persons cannot be taken and then broadcast without their consent. It said that *Campbell v MGN Ltd* [2004] 2 AC 457 provided clear authority. The photographing of Ms Campbell, by a camera of which she was unaware, was not, of itself, a breach of her privacy. That was because she was not engaged in any private activity when the photos were taken: she was walking along a public road². Channel 5 noted Lord Hope and Lady Hale both observed that the activity photographed must be private³.

Channel 5 said that Article 8 did not confer an unqualified right of privacy. What it conferred was a right to "respect" for privacy rather than an absolute right: *M v Secretary of State for Work and Pensions* [2006] 2 AC 91 at [83]. It said that it was neither possible, nor desirable, to seek to give individuals complete autonomous control over information that relates to them: *O'Halloran v UK* (2008) 46 EHRR 21. In addition, sub-article (2) provided that the right conferred by: (1) should not be interfered with by a public authority unless such interference is lawful and necessary in a democratic society in the interests of, inter-alia, the economic well-being of the country, the prevention of disorder, and for the protection of the rights and freedoms of others. Channel 5 said that it was only if the claimant establishes that his or her Article 8 rights are engaged, that the Court must perform a balancing exercise and weigh the claimant's Article 8 rights against the defendant's rights under Article 10: *Murray v Express Newspapers plc* [2009] Ch 481 at [27; *Associated Newspapers Ltd v HRH the Prince of Wales* [2008] Ch 57; *McKennitt v Ash* [2008] QB 73 at [11]. If the claimants had no reasonable expectation of privacy, Article 8 is not engaged, and the claim fails at the outset.

Channel 5 said that in this case, the footage about which the complainants take issue is not footage of and concerning them. It was footage concerning the HCEAs going about their

² Ibid. Lord Nicholls, para 73: "In the present case, the pictures were taken without Ms Campbell's consent. That in my opinion is not enough to amount to a wrongful invasion of privacy. The famous and even the not so famous who go out in public must accept that they may be photographed without their consent, just as they may be observed by others without their consent. As Glesson CJ said in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1, 13, para 41: 'Part of the price we pay for living in an organised society is that we are exposed to observation in a variety of ways by other people.'"

³ Ibid. Lord Hope, para 93 and 94; Lady Hale, para 154.

court-ordered business. While the complainants featured in the footage, Channel 5 said that it was not footage of the complainants doing anything private, but of them reacting to a court enforcement activity. By way of example, Channel 5 said that if the complainants in this case were having afternoon tea together in their home, that would be a private matter and any filming of that activity would be legitimately private in all the circumstances. However, if the complainants' home was broken into and "some criminals used their home as a base to create chemical weapons", then the footage of that activity in the complainants' home would not be private and that any filming of it would not "breach the law of privacy". Channel 5 said that it was not the location where filming occurred which established whether Article 8 was invoked or not, but rather it was the activity filmed that was the determining factor.

The broadcaster said that in this case, the activities of the HCEAs were not private; they were part of the requirements of an ordered society, which the public was entitled to scrutinise to understand how the legal system works, the ramifications of failing to comply with court orders, and the kinds of powers HCEAs have when carrying out their duties. For all these reasons, Channel 5 said that no aspect of the activities of the HCEAs carrying out their official duties could properly be regarded as private, even if carried out on private property. It said that given that the HCEAs were engaged in public activities, Article 8 was not engaged in relation to the filming of their activities concerning the complainants; Article 8 is only engaged in filming when the activity being filmed is private. It is only if the claimant establishes that his or her Article 8 rights are engaged, that the Court must perform a balancing exercise and weigh the claimant's Article 8 rights against the defendant's rights under Article 10 (*Murray v Express Newspapers plc* [2009] Ch 4812 at [27]; *Associated Newspapers Ltd v HRH the Prince of Wales* [2008] Ch 57; *McKennit v Ash* [2008] QB 73 at [11]).

Channel 5 said that there can be no doubt that the activities of the HCEAs were matters of genuine public interest and that the way the law was utilised, or ignored, was a matter of acute public interest. The kinds of difficulties the HCEAs face when executing their duties was also a matter of acute public interest as was the impact of their activities on the lives of those affected. It said that the programme makers take the greatest of care to ensure that a legitimate topic of public interest is given sensitive and appropriate care and that every person is treated with respect and accurately portrayed. For all these reasons, Channel 5 took the view that, generally speaking, it was appropriate and reasonable to include footage of people interacting with the HCEAs in the programme. Without that, the public would not see hear and understand the actions of the HCEAs.

Channel 5 said that each case featured in all the programmes in the series was considered by the external legal adviser for the programme makers and at the highest levels within Channel 5. It said that each case turns on its own facts and matters such as the unusual vulnerability of a particular person or situation impact on decisions to include particular footage in particular programmes. It said that no two rights are necessarily the same and the nature of the right is a factor that comes into play when the balancing exercise is underway; it has no place in whether there is, in fact, anything private for Article 8 to protect⁴. Channel 5 said that no legitimate right of privacy was ever intentionally infringed by any broadcast. As per Lord Hope in *Campbell*, the law of privacy is not designed to protect the unduly sensitive⁵;

⁴ *Campbell v MGN Ltd* [2004] 2 AC 457, Baroness Hale at para 157.

⁵ *Ibid*, para 94.

the fact that the complainants were distressed by the broadcast did not mean that any privacy rights were engaged.

Supplementary material requested by Ofcom

Channel 5 said that it was clear that Ofcom had seized upon the documents provided by Channel 5 at its request to justify its complete re-evaluation of the complaint. For the following reasons, the broadcaster said that Ofcom was wrong to do so:

- Ownership of the body cameras

The broadcaster said that Ofcom had completely ignored the communication from the HCEA company, which was provided to Ofcom, which made it clear that all its HCEAs wore body cameras for their personal protection "at all times". It said it can scarcely be the case that the purpose of wearing these cameras by the HCEAs could be different depending upon who owned the cameras. The cameras were used solely for the safety of the HCEAs and to ensure a record of their work is available in the event of dispute. Therefore, Channel 5 said that there was no basis for Ofcom's view that "*the primary purpose of the body cameras worn by the HCEAs was, unequivocally, to enable the programme makers to obtain material from inside [Miss F's] home as she interacted with the HCEAs and her family*".

The broadcaster said that the critical question was not who owns the cameras (which was not relevant to whether or not footage may be used in a broadcast), but why they are worn. It stated that this was not a case where the programme makers had introduced a camera into a situation where an officer of the court would not otherwise wear one. Nor was it a case where the programme makers had sought to make the HCEAs *de facto* members of the production team. Channel 5 also said that it was not the case that there was any collusion between the programme makers and the HCEAs with a view to creating tension, drama or entertainment. The body cameras merely recorded the activities of the HCEAs.

Channel 5 said that it was fortified in its view that ownership of the body cameras made no difference, because of Ofcom's earlier decisions in the cases of *Danin*⁶, *Kitoko*⁷ and *Islam*⁸. In each of those cases, Ofcom did not uphold the complaints of unwarranted infringements of privacy in relation to three separate episodes of *Can't Pay? We'll Take It Away*. The broadcaster said that in none of these earlier cases did Ofcom make any enquiry of Channel 5 about how access to the footage from the body cameras had been obtained by the programme makers. It said that it followed therefore that either Ofcom did not consider it relevant how the footage came to be accessed by the programme makers; or, that Ofcom assumed that an arrangement was in place between the HCEA company and the programme makers which permitted such access for the purposes of possible inclusion in a broadcast. In any event, it said that Ofcom had found in Channel 5's favour even though it must have been plain to Ofcom, no matter who owned the cameras, that the programme makers had access to the footage from the body cameras and that such access might result in content appearing in television broadcasts. The fact

⁶ https://www.ofcom.org.uk/_data/assets/pdf_file/0021/50079/issue_285.pdf

⁷ https://www.ofcom.org.uk/_data/assets/pdf_file/0021/50349/issue_282.pdf

⁸ https://www.ofcom.org.uk/_data/assets/pdf_file/0025/47932/obb279.pdf

that nothing had been said to any of the complainants in *Islam*, *Kitoko* and *Danin* about the fact that the footage on the body cameras may eventually be broadcast was not a matter that troubled Ofcom in those cases.

Channel 5 said that, naturally, the purpose of filming was always a critical factor and that in this case, the HCEA company made it clear that the purpose was not making television broadcasts, but the safety of the HCEAs and the need to have a record of events. The broadcaster said that unequivocally, then, the body camera filming was for a purpose other than "to enable the programme makers to obtain material from inside [Miss F's] home as she interacted with the HCEAs and her family", as stated in Ofcom's second Preliminary View, particularly as there is never any guarantee that the footage would be capable of or suitable for broadcast.

- Surreptitious Filming

Channel 5 said that in this case, the body cameras were worn by the HCEAs prominently on their chests, and a light on the camera flashes to indicate that it is recording. The cameras are clearly out in the open and there was no reason to think that the complainants were not aware of the presence of the body cameras.

The broadcaster said that the body cameras were: not devices with long-lenses; not unattended cameras left on private property; and, not "akin" to either cameras with long lenses or unattended cameras left on private property. Channel 5 said that quite simply, the body cameras could not be, and were not, devices for surreptitious filming.

Channel 5 said that in the previous Ofcom decision of *Islam* (referred to above), although footage using the body cameras was included in that broadcast, Ofcom was untroubled by any consideration of surreptitious filming in reaching its decision not to uphold the complaint. In *Kitoko*, Ofcom again did not uphold the complaint even though the complainant had expressly complained about the use of "hidden" cameras. In that decision, Ofcom concluded:

"It was Ofcom's understanding, from Channel 5's statement, that [HCEAs] routinely wore body cameras in order to record their interaction with members of the public while they are carrying out their official duties. This is for personal safety reasons and in case of a complaint or inquiry. Ofcom acknowledged that Mr Kitoko had complained that he had been unaware that he was being filmed by the [HCEA] with whom he had had a conversation (as detailed in the "Introduction and programme summary" above). We also noted from viewing the programme as broadcast and the unedited footage of Mr Kitoko's contribution that the [HCEA] did not expressly inform Mr Kitoko of the fact that he was being filmed by a body camera. We also observed that the body cameras worn by the [HCEAs], while small in size, were not concealed in any way, and were mounted prominently on the chest of their anti-stab vests.

Ofcom therefore took the view that the cameras were not being worn in a way as to deceive Mr Kitoko to their presence or to capture the interaction between him and the [HCEAs] as they carried out their duties in a surreptitious manner. Given the above, we therefore did not consider the footage filmed of Mr Kitoko by the body camera to have been obtained surreptitiously for the purposes of Practice 8.13 and, as such, we did not find it necessary to go on to consider whether such filming was warranted in the circumstances".

Channel 5 said that in *Danin*, Ofcom came to a similar conclusion:

"We also noted from the unedited footage that the [HCEAs] did not expressly inform Ms Danin at any point that she was being filmed by their body cameras. We also observed that the body cameras worn by the [HCEAs], while small in size, were not concealed in any way, and were mounted prominently on the chest of the [HCEAs] anti-stab vests. Ofcom therefore took the view that the cameras were not being worn in a manner designed to deceive Ms Danin as to their presence or to capture the interaction between her and the [HCEAs] as they carried out their duties in a surreptitious manner. (emphasis added by Channel 5).

Given the above, we therefore did not consider the footage filmed of Ms Danin and her business by the body cameras to have been obtained surreptitiously for the purposes of Practice 8.13 and, as such, we did not find it necessary to go on to consider whether such filming was warranted in the circumstances".

Channel 5 said that these decisions made it clear that Ofcom took the view that the body cameras worn by the HCEAs did not constitute surreptitious filming, even in cases where the complainants maintained that they were unaware of the presence of the cameras, despite their obvious visibility. It said that the situations in both *Kitoko* and *Danin* were very similar to the present case and that there was no special tactic designed to deceive the complainants. In neither case was the complainant made aware that footage from the body cameras might appear in a broadcast. Ofcom saw no difficulty with that in those cases. It said that the filming protocol for the series reflected those decisions, and that the filming was carried out openly with no attempt to deceive.

Channel 5 said that even if it was wrong and that the filming was found "by a Court of law" to be surreptitious filming, the use of such filming would be warranted in the circumstances. It referred to Ofcom's *Islam* decision, in which:

"Ofcom considered that there was a genuine public interest in broadcasting programmes of this nature and which showed [HCEAs] as they executed their official duties with the aim of conveying to viewers an understanding of the work they do in recovering outstanding debts and, the often-lengthy negotiations between the [HCEAs] and those they come into contact with. In our view, the footage of Mr Islam negotiating on behalf of his friend with the [HCEAs] was important in enabling the broadcaster to illustrate this work and the difficulties experienced by individuals and the [HCEAs]. On this basis, therefore, and notwithstanding that Mr Islam did not give his consent, Ofcom concluded that the infringement of his legitimate expectation of privacy was warranted in the circumstances".

In *Kitoko*, Ofcom said:

"In our view, the filming of Mr Kitoko by the [HCEA] was important as it enabled the broadcaster to use an actual example to illustrate the type of interaction [HCEAs] routinely engage in with members of the public in carrying out their duties. On this basis, and notwithstanding the fact that Mr Kitoko did not consent to the original filming or the subsequent obtaining of the footage by Channel 5 with a view of its being broadcast, Ofcom concluded that any infringement of his legitimate, but

limited, expectation of privacy in connection with the obtaining of this material was warranted and proportionate in the circumstances of this particular case”.

In *Danin*, Ofcom said:

“Ofcom considered that there was a genuine public interest in the making of observational programmes of this nature and in filming of the [HCEAs] as they executed their official duties with the aim of conveying to viewers an understanding of the work they do in recovering outstanding debts, the often-lengthy negotiating between the [HCEAs] and those they come into contact with, and the impact the repossession of goods to satisfy an outstanding debt can have on individuals. In our view, the filming of Ms Danin by the programme makers was important as it enabled the broadcaster to use an authentic example to illustrate the work of the [HCEAs] and the difficulties experienced by individuals in the position of Ms Danin. On this basis, and notwithstanding that Ms Danin did not give her consent to the filming, Ofcom concluded that the infringement into Ms Danin’s legitimate expectation of privacy was warranted”.

Channel 5 said that in each of these cases, Ofcom considered the term “warranted” and found no breach of its Broadcasting Code in the circumstances. It said that the programme subject to the current complaint was cleared for broadcast on Channel 5 consistently with those decisions. Channel 5 said that there was no cogent reason given by Ofcom in its second Preliminary View for departing from its previous decisions.

- Justification for “Surreptitious Filming”

Channel 5 said that Ofcom’s reasoning in this respect was flawed and completely inconsistent with its earlier decisions. It said that Ofcom focused, wrongly, on the location where the filming occurred, not the activity.

In order to see how well, or how badly, the law and the HCEAs interact with and resolve issues involving debtors, Channel 5 said that viewers needed to see the interaction between them and the debtors and those who assist in settling the debt. Channel 5 said that the incident filmed was not the first time that Miss F had been in difficulties in relation to this debt: she had defaulted on an agreed repayment plan; had refused to answer telephone calls from the company that was managing the repayments; and there had been several incidents where there were difficulties with repayments. The attendance at her home was the last step in a long line of chances Miss F had been given to deal with her debt situation privately.

Channel 5 said that these failures to meet her obligations were sufficient to warrant surreptitious filming. By choosing not to comply with a court order, it said that Miss F was responsible for the attendance at her home of the HCEAs. The broadcaster said that the likelihood that the HCEAs would encounter difficulties was high, but not certain. It also said that no surreptitious filming can ever be certain of results – but to the extent it might have been thought necessary to engage in surreptitious filming, that would have been justified in all the circumstances.

The involvement of HCEAs in ensuring court judgments are paid made public issues that might otherwise be private. Channel 5 reiterated that the activities of the HCEAs were not private matters, but were public matters carried out by officers of the court. It said

that including Miss F's story in the programme was not about her personal position, but was included to advise the public of how easy it was for debt issues to become overwhelming and what happened when Writs were issued and executed, including the often-lengthy negotiating between HCEAs and debtors and the impact repossession can have on debtors. These were important matters that the public, especially young people, need to understand and appreciate. Telling Miss F's story was, therefore, entirely in the public interest.

The broadcaster said that in the previous decision of *Danin*, Ofcom had stated that there was a "genuine public interest" in making programmes "with the aim of conveying to viewers an understanding of the work they do in recovering outstanding debts, the often lengthy negotiating between the HCEOs and those they come into contact with, and the impact the repossession of goods to satisfy an outstanding debt can have on individuals" and that the filming was important in enabling the broadcaster "to use an authentic example to illustrate the work of the [HCEAs]. Channel 5 said that Miss F's case, and that of her family, was precisely the same.

Based upon Ofcom's decisions in *Islam*, *Kitoko* and *Danin*, Channel 5 said that it expected that consistent principles would be in play when Ofcom considered Miss F's complaint and in the absence of any cogent reason by Ofcom for why those principles should not be followed. Accordingly, had it been necessary to justify surreptitious filming, which it is not for the reasons set out above, the public interest as articulated in the *Danin* decision would have provided more than sufficient justification.

- Knowledge that footage might appear on television

Channel 5 said that, generally speaking, a person could not give informed consent to filming unless that person knew that the footage may be used in a television broadcast. That, it said, was uncontroversial, although, as always, context can accommodate exceptions.

It said that there was no provision under Ofcom's Broadcasting Code, Guidance or previous decisions that suggested that footage could not be included in a television programme unless those featured in the footage had consented, or they have been told that the footage might subsequently be broadcast. It said that such a provision would bring the production of documentaries and current affairs programmes to a halt. Channel 5 said that if Ofcom's position in the second Preliminary View was correct, then no broadcaster could ever broadcast footage taken by CCTV cameras, persons witnessing live events and capturing them on their handheld devices, or any official wearing a body camera.

To the extent that Ofcom based its second Preliminary View on a failure to inform the complainants that the footage filmed by the body cameras might appear in a television programme, Channel 5 said that "irrelevant considerations are in play". It said that none of the complainants in *Islam*, *Kitoko* or *Danin* were told that the footage might appear on television. The broadcaster said that if the material involving the complainants had been filmed entirely on body cameras owned by the HCEAs, and the programme makers subsequently sought access to that footage, the complainants would not have known that the material filmed might appear on television. Routinely, broadcasters access footage from official bodies for broadcast without those official bodies needing to have advised persons filmed that the footage might be broadcast. Channel 5 said that there

was nothing controversial or surprising about this and that its treatment of the complainants in this case was consistent with the manner complainants were treated in previous cases considered by Ofcom. The complainants had not been singled out or mistreated and the public interest was sufficient to outweigh whatever privacy right they had, if any.

- Proportionality

Channel 5 said that Ofcom's assertions in the second Preliminary View that "the primary purpose" of the filming by the body cameras was misguided for all the reasons already set out above. Regardless of who owned the cameras, the purpose of filming, which was open and unobtrusive, was for the safety of the HCEAs and to ensure there was a record of their activities.

The broadcaster said that in the *Danin* decision, Ofcom said, in relation to proportionality under Practice 8.9, that "taking into account the public interest in the obtaining of this material, Ofcom considered that the means of the obtaining of the material had been proportionate". Channel 5 said that it knew of no cogent reason why the situation in *Danin* was appreciably different from the position in the present case. In all the circumstances, and taking into account the public interest in the obtaining of the material, Channel 5 said that the means of obtaining the footage of Miss F and her family was proportionate.

- The Balancing Equation

Channel 5 said that it appeared from the Preliminary View that Ofcom "undervalues the public interest" in the segment of the programme dealing with Miss F and her family and that it did not believe that Ofcom's considerations of these matters were "either fair or consistent with its earlier decisions".

Channel 5 said that the fact that Miss F was unable to pay the debt was not a matter private to her given that there was a judgment of the Court in existence. Further, the fact that the Writ had been issued was a matter of public record. Further, in the exercise of their public duties, the HCEAs would, inevitably, enquire about whether she could pay the debt or not. The broadcaster said that understanding all of this and seeing how the HCEAs dealt with the situation was, as Ofcom has previously held, a matter of genuine public interest, enabling an authentic example of a debt collection activity to illustrate the work of the HCEAs and the difficulties experienced by individuals such as Miss F.

It also said that the fact that Miss F had defaulted on the repayment plan agreed previously with the HCEAs and had not responded to the telephone calls made to her by the HCEAs' office was a matter which was important for viewers to understand as it demonstrated how Miss F got into the position she did and how it was impossible to "put your head in the sand" when it came to debt. This was a matter of genuine public interest. Channel 5 again referred to *Campbell* noting that Lady Hale considered there were different kinds of speech for which protection of Article 10 could be claimed and that some "*are more deserving of protection in a democratic society than others*". In Lady Hale's words, this programme involved "*matters relevant to the organisation of the*

economic, social and political life of the country [which] is crucial to any democracy” and without which “it can scarcely be called a democracy at all”⁹.

Channel 5 said that the issues surrounding whether Miss F’s father could repay the debt on her behalf and her candid disclosures to the HCEAs regarding her father’s access to credit and her feelings about asking him for help were, again, examples of debt collection activity to illustrate the work of the HCEAs and, as such, were matters of genuine public interest. It also said that the inclusion of footage of Miss F being visibly distressed at the enforcement action being taken against her was part of part of the educational aspect of the programme, and another reason why the genuine public interest was served by its broadcast. It said this was not a situation where someone is in their own home and receives devastating news about a death in the family which would be unconnected with the enforcement activity; Miss F’s distress was connected with the activities of the HCEAs executing a public court order. Channel 5 said that showing her anxiety and distress allowed viewers to see for themselves how much worse a situation of debt was if it was allowed to drift. It said that this footage of Miss F showed that the law was dispassionate and that if a judgment for payment was ordered by the court, it would be paid regardless of the anxieties or distress of the debtor.

Channel 5 said that the enforcement of the debt was a public matter; it was not private to the parties to the judgment. The fact that enforcement action occurs and the way debtors and HCEAs react to it were, to Channel 5, matters of genuine public interest. It said that for Ofcom to take the view that the events surrounding the enforcement of a debt were not necessarily matters of public record was missing the point. The point, Channel 5 said, was that those matters were of genuine public interest.

Channel 5 said that none of the complainants had any heightened expectations of privacy in this case. It said that what HCEAs were told when enforcing court orders was a public matter, not a private one. When HCEAs are authorised to search a home and seize assets, if any privacy rights attach to the home during the enforcement activity, those rights must give way to the powers of the HCEAs. It said that while the enforcement action is carried out, the home was no longer simply a home – but a place where court officers were conducting public business. Channel 5 acknowledged that this was not to say that private things, unrelated to the enforcement action, may not occur during the enforcement action and that broadcasting such matters without consent could be in breach of the Broadcasting Code.

On the issue of consent, Channel 5 said that it was never in dispute that the complainants did not give their consent to filming or broadcast. It said that if consent had been given, no question of the balancing exercise would have arisen. It was only because there had not been consent that any prospect of a balancing exercise arose. It said that it followed that the lack of consent, being a prerequisite to the balancing exercise, could not be a relevant, let alone a decisive factor in that exercise. Channel 5 said that there was no consent when Ofcom issued its first Preliminary View in which, after several months of deliberation, Ofcom found that Article 10 outweighed whatever Article 8 rights the complainants may have had.

Channel 5 said that many programmes which are broadcast every day in the UK cause upset or distress to persons featured in them. However, it was not the point whether one felt some sympathy with the plight of persons who complain about broadcasts or

⁹ Ibid, para 148.

not. The sole question was whether there has been a breach of the Broadcasting Code. The broadcaster said that it was incumbent upon Ofcom to ensure its decisions were consistent, transparent and proportionate. It said that Ofcom's second Preliminary View in this case was inconsistent with its previous decisions, "completely disproportionate, and completely opaque".

In concluding, Channel 5 said that as far as it was aware, no other broadcaster has been treated the way Channel 5 has in relation to this matter. Ofcom seemed determined to rewrite the way in which its approach to broadcasts involving aspects of privacy are considered and to throw into chaos routine arrangements broadcasters have with sourcing footage and broadcasting it in the public interest. It said that it could scarcely be thought fair to rewrite the regulatory approach in such a way. All the episodes in the series were made in accordance with the clear and consistent line taken by Ofcom in its earlier decisions.

Channel 5 said that the second Preliminary View as it stands would cause incalculable damage to the reputation of the programme makers that have done no more than assiduously follow Ofcom's previous decisions in relation to *Can't Pay? We'll Take It Away* and its general approach to the question of privacy in relation to filming and broadcasts. It said that production companies and broadcasters across the UK would be unable to proceed along established industry practices in relation to observational programme making.

While Channel 5 accepted that there may be matters about which reasonable minds might differ, it said that Ofcom's second Preliminary View sought to reposition *Can't Pay? We'll Take It Away* as a programme made carelessly, deceptively and not in the public interest. This position was inconsistent with Ofcom's previous decisions in relation to this series, as well as other series and other broadcasters. Channel 5 said that if Ofcom's second Preliminary View remained unchanged, "privacy will become an unacceptable chilling effect on free speech".

Channel 5 said that it did not believe the complainants' privacy was infringed by either the making of the programme or its broadcast and that the complaint should not be upheld.

Further submission

In a further brief submission Channel 5 said it wished to raise the decision of the Supreme Court in *Khuja v Times Newspapers Ltd and others* [2017] UKSC 49 for Ofcom's consideration as this had been handed down since Channel 5 made its last representations. Quoting Lord Sumption at paragraph 34 of the judgment, Channel 5 said that the Supreme Court accepted that publishers and broadcasters were entitled to an editorial margin of appreciation in connection with how stories were told and information conveyed.¹⁰ Channel 5 said that the

¹⁰ "... Does the public interest extend to PNM's identity? This case differs from earlier cases in which the same question has arisen because the order sought by PNM would not prevent the identification of a party to the criminal proceedings or even of a witness. To my mind that makes it even more difficult to justify an injunction, for reasons which I have given. But in any event, I do not think it can be a relevant distinction. The policy which permits media reporting of judicial proceedings does not depend on the person adversely affected by the publicity being a participant in the proceedings. It depends on (i) the right of the public to be informed about a significant public act of the state. And (ii) the law's recognition that, within the limits imposed by the law of defamation, the way in which the story is presented is a matter of editorial judgment, in which the desire to increase the interest of the story by giving it a human face is a legitimate consideration. PNM's identity is not a peripheral or irrelevant feature of this particular story".

reactions of Miss F and her family and the circumstances in which they faced the High Court Agents carrying out their duties pursuant to orders issued in open court was not a peripheral or irrelevant feature in the broadcast; rather, they were central to the story told by the broadcast. It said that the matters about which the complainants complain are all matters which were included under editorial judgment, and were part of the legitimate consideration of giving the story concerning them its human face.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unjust or unfair treatment and unwarranted infringement of privacy in, or in connection with the obtaining of material included in, programmes in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

We carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast, a transcript of it, and both parties' written submissions and supporting material. We also examined the unedited footage of the HCEAs' visit to Miss F's home. We also took account of the supplementary material provided to us by Channel 5 and its representations on the second Preliminary View. Ofcom carefully considered the points raised by the broadcaster in its representations on our reasoning and concluded that the points raised did not materially affect the outcome of our decision to uphold the complaint.

In Ofcom's view, the individual's right to privacy under Article 8 of the ECHR has to be balanced against the competing rights of the broadcaster's right to freedom of expression and the audience's right to receive information under Article 10. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Code which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

In addition to this rule, Section Eight (Privacy) of the Code contains "practices to be followed" by broadcasters when dealing with individuals or organisations participating in, or otherwise directly affected by, programmes, or in the making of programmes. Following these practices will not necessarily avoid a breach of Rule 8.1 and failure to follow these practices will only constitute a breach where it results in an unwarranted infringement of privacy.

- a) In considering the complaints that the privacy of Miss F, her uncle, and her father was unwarrantably infringed in connection with the obtaining of material included in the programme, Ofcom had regard to Practices 8.5, 8.7 and 8.9 of the Code. Practice 8.5 states that any infringement of privacy in the making of a programme should be with the person's and/or organisation's consent or be otherwise warranted. Practice 8.7 states that if an individual or organisation's privacy is being infringed, and they ask that the filming, recording or live broadcast be stopped, the broadcaster should do so, unless it is warranted to continue. Practice 8.9 states that the means of obtaining material must be proportionate in all the circumstances and, in particular, to the subject matter of the programme. Ofcom also had regard to Practice 8.13 which states that surreptitious filming or recording should only be used where it is warranted.

Miss F

We assessed the extent to which Miss F had a legitimate expectation of privacy in the particular circumstances in which the relevant material was obtained. The test applied by Ofcom as to whether a legitimate expectation of privacy arises is objective: it is fact-sensitive and must always be judged in light of the circumstances in which the individual concerned finds him or herself.

On several occasions, Miss F asked about the presence of the broadcast cameras used by the camera crew to film the HCEAs and their interactions with Miss F's uncle and then Miss F from outside the property. She made it clear that she did not want to appear in a television programme and she was told by the HCEAs that the camera crew were following them as they worked and that they did not have "any control" (i.e. over what was being recorded by the programme makers). Ofcom was told by Channel 5 in its statement that the HCEAs routinely wore body cameras during their work "for their safety and in case of complaint or inquiry" and that these cameras "were not hidden". However, in this instance, the body cameras being worn were, in fact, provided to the HCEAs by the programme makers with a view to potentially including all or part of the HCEAs' interaction with Miss F in the programme as broadcast. We observed that even if Miss F was aware at the time that she was being filmed by these body cameras (and we did not draw a conclusion on this matter either way), she was unlikely to have appreciated that the material recorded by these body cameras might subsequently be included in the programme as broadcast, particularly as there was no evidence that she was specifically told by the programme makers or the HCEAs that this would be the case. In fact, their actions appeared to suggest the opposite (see further below).

In considering the way this material was obtained, we took account of Practice 8.13 which states that "surreptitious filming or recording should only be used where it is warranted. Normally, any infringement will only be warranted if: there is a *prima facie* evidence of a story in the public interest; there are reasonable grounds to suspect that further material evidence could be obtained; and, it is necessary to the credibility and authenticity of the programme".

The Code defines the meaning of "surreptitious filming and recording" as including "the use of long lenses or recording devices, as well as leaving an unattended camera or recording device on private property without the full and informed consent of the occupiers or their agent. It may also include recording telephone conversations without the knowledge of the other party, or deliberately continuing with a recording when the other party thinks that it has come to an end".

Channel 5's initial statement said that HCEAs routinely wore body cameras to record their interaction with members of the public while they are carrying out their official duties. Channel 5 said this was for personal safety reasons and in case of a complaint or inquiry. Ofcom had understood from this statement that these cameras belonged to the HCEAs and were used by them primarily for that purpose. This was consistent with Ofcom's understanding in the previous decisions which Channel 5 referred to and this was why the ownership of the body cameras (or the intention or purpose for which they had been deployed) had not been an issue in those decisions. However, the "Supplementary material" provided to Ofcom by Channel 5 revealed that the body cameras were, in fact, the property of the programme makers who owned the entire copyright in the material recorded by the body cameras and had control of access to the footage by the HCEA company. As it not been aware of the existence of these arrangements until this point Ofcom had reasonably assumed from the information provided by Channel 5 that the body cameras belonged to the HCEAs and therefore that the footage captured by them was taken and retained for official purposes.

We took into account Channel 5's representations on the ownership of the body cameras and its submission that the issue was not who owned them, but why they were being worn. However, it was apparent that the body cameras were not being worn by the HCEAs solely for the benefit of the HCEAs. Rather, the provision of the cameras by the programme makers and their ownership of the footage unequivocally showed that a fundamental purpose of the cameras was for the programme makers to obtain and retain footage for potential broadcast. The ownership and operation of the cameras guaranteed them exclusivity to the material recorded and enabled free, uninhibited access to Miss F's home as she interacted with the HCEAs and her family. This afforded the programme makers a level of access that exceeded substantially any exposure which anyone in Miss F's position, or that of her family members, could possibly have expected at the time. As a consequence, the programme makers acquired access to unguarded interactions and disclosures within the confines of the domestic family home and were able to observe and record sensitive and intimate exchanges between Miss F and her family (as well as with the HCEAs themselves) during a stressful and emotional event.

From the complaint made to Ofcom and the unedited footage provided by Channel 5, we observed that at no time during the filming was Miss F or any of the other complainants made aware that the body cameras and the material recorded by them belonged to the programme makers and could subsequently be used in the television programme. We recognised that broadcasters often obtain material for broadcast from third parties but in this case a camera crew was visibly present, and they had expressly offered to withdraw to the public highway. In our view this action of the programme makers would have sent a clear message to the complainants that their interactions with the HCEAs inside the house would not be filmed from this point on by the programme makers for potential use in a television programme. This was misleading as it was in direct contrast to the actual position in light of the programme makers' exclusivity to the material recorded by the body cameras. In these circumstances, it was significant that the complainants were not made aware of the programme makers' use of the body cameras, or the potential consequences of that filming.

Taking all these factors into account, Ofcom considered that the material recorded of Miss F, her uncle and father, and the interior of her home that she shared with her family

by the body cameras had been obtained by the programme makers surreptitiously notwithstanding the fact that the body cameras themselves were worn openly. An intrinsic purpose of the filming from these cameras was to obtain footage for potential broadcast and Miss F was not made aware of this, even if she was aware of the body cameras. As a result, she would not have understood their full significance, particularly as she was led to believe that the cameras belonging to the programme makers had remained outside the property. In these circumstances, the actions of the programme makers were akin to deliberately continuing with a recording when the other party thinks that it has come to an end. Similarly, by not making Miss F aware of the full significance of the body cameras, the method in which this footage was obtained was akin to the programme makers leaving an unattended camera or recording device on private property without the consent of the occupiers. These factors distinguished Miss F's case from the understanding which had underlain Ofcom's previous decisions and led Ofcom to consider the filming to amount to surreptitious filming in this instance.

Channel 5 argued that even if it was accepted that the filming was surreptitious this was more than sufficiently justified by the public interest in conveying to viewers an understanding of the work HCEAs do, the often-lengthy negotiating between the HCEAs and those they encountered, and the impact the experience could have on people. Channel 5 submitted that the execution of a writ issued by the High Court is a public matter and that the activities of HCEAs, the kinds of difficulties they face when executing their duties, the way the law is utilised or ignored and the impact on the lives of those affected by the activities of HCEAs are all matters of acute public interest. However, in Ofcom's view, none of these arguments pointed to a *prima facie* story in the public interest of a type or order which would ordinarily warrant the use of surreptitious filming (as envisaged by Practice 8.13), particularly as the filming itself took place in a private home and concerned not simply the fact of the Writ or its enforcement, but a family's personal reaction to that event and their intimate interactions with one another in light of the situation which confronted them in their own home.

Ofcom considered that, ordinarily, financial conversations and negotiations in which the people concerned felt that they could speak openly (i.e. where they understood that the matter they were talking about would be treated in confidence) could reasonably be regarded as sensitive and attract an expectation of privacy. In this case, Miss F was approached by the HCEAs and the camera crew unannounced and questioned about an outstanding personal debt and informed that there was a Writ against her which allowed the HCEAs to seize items in the property if she did not repay the debt in full immediately. Miss F was therefore obliged to respond to the HCEAs and discuss financial matters with them while filming continued. Additionally, the conversation took place within the home Miss F shared and used with her parents and family after the crew had retreated, and the rest of the conversation was filmed solely by the body cameras belonging to the programme makers and worn by the HCEAs. As set out above, the evidence strongly suggested that Miss F was not aware that this subsequent material might subsequently be broadcast. She was therefore considerably more unguarded than might have been the case if she had reason to believe that she was still being filmed for the purposes of a television programme. The topics discussed while this footage was obtained included: Miss F's inability to pay the debt; the fact that she had defaulted on the repayment plan agreed previously with the HCEAs and had not responded to the telephone calls made to her by the HCEAs' office; whether her father could repay the debt on her behalf (as well as previous arrangements which had been made to similar effect); and, most notably, Miss F's candid disclosures to the HCEAs regarding her father's access to credit, her

personal feelings about asking him for help and the possibly serious implications for her private and family life which arose as a result of her failure to repay the existing debt. In addition, the material recorded included footage of Miss F while she was visibly distressed and twice while she pleaded with and spoke to her father about her situation (during both conversations, which again involved intimate exchanges between daughter and father, Miss F was again visibly distressed).

We took into account Channel 5's assertion that the execution of a Writ was a public matter, not a private one, and that the execution of the Writ was not a matter connected with Miss F's private life, but a public matter. We also noted Channel 5's submission that it was not the location where filming occurred that established whether Article 8 rights were engaged, but rather the activity that was filmed. We further noted Channel 5's reference to the Supreme Court's decision in *Khuja*. Ofcom considered that while the existence of a county court judgment against Miss F may be considered a matter of public record and may not, therefore, be information in relation to which she had a legitimate expectation of privacy, the information captured by the filming of Miss F went beyond the fact of her debt to capture the events surrounding the enforcement of the debt and the personal consequences and impact of the enforcement process on Miss F and her family. We do not agree that the events surrounding the enforcement of a debt are necessarily a matter of public record, or that there can be no legitimate expectation of privacy in relation to those events (and especially not where those events take place within the confines of a private, family home). In this instance, our view is that much of the information contained in the obtained footage about Miss F and her family was sensitive and constituted an intrusion into her private and family life which went beyond the information which might otherwise have been in the public domain as a consequence of the court enforcement process.

The test as to whether a legitimate expectation of privacy arises is objective: it is fact sensitive and must always be judged in light of the circumstances in which the individual concerned finds him or herself¹¹. The location where the filming occurred was one of several factors that was relevant to Ofcom's consideration of this case. Taking into account all the circumstances in this case, in our view, the events involving Miss F and her family which the footage captured could reasonably be characterised as highly sensitive to her (and her immediate family) and plainly came within the scope of "private and family life" and thus engaged Article 8. Therefore, we considered that the situation Miss F was in attracted a heightened legitimate expectation of privacy.

Given all the factors above, and taking into account the use of surreptitious filming and its consequences, Ofcom considered that the interference with Miss F's privacy which was caused by the obtaining of this material with a view to its being broadcast was very significant.

Ofcom took account of Channel 5's representations that consent was not a relevant factor in this case, let alone a decisive one. However, as there was no dispute between

¹¹ See, for example, Anthony Clarke MR in *Murray v Express Newspapers Ltd* [2009] CH 481, at para 36: "the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher".

the parties that the complainants' consent was not sought for the filming and subsequent broadcast of the footage, it was not necessary for Ofcom to consider this point further. We therefore went on to consider whether the infringement of her legitimate expectation of privacy was warranted on these facts.

The Code states that "warranted" has a particular meaning. This is that, where broadcasters wish to justify an infringement of privacy, they should be able to demonstrate why, in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest could include revealing or detecting crime, protecting public health and safety, exposing misleading claims by individuals or organisations or disclosing incompetence that affects the public.

We took into account Channel 5's argument that there was a public interest in the filming (and subsequent broadcast) of the footage in that it showed the activities of the HCEAs while executing their official duties. We also considered Channel 5's representations that the enforcement of the debt was a public matter and that for Ofcom to take the view that the events surrounding the enforcement of a debt were not necessarily matters of public record was missing the point; the point being those matters were of genuine public interest.

As in previous decisions, Ofcom accepted that the public interest was engaged in making this programme in that it illustrated the type of interaction HCEAs routinely engage in and the difficulties experienced by people in the position of Miss F. However, we considered the circumstances in this case were distinct from those in the previous Ofcom decisions cited by the broadcaster. In particular, we considered that Miss F had a heightened legitimate expectation of privacy in respect of the filming given the subject of her discussions with the HCEAs and her uncle and father; the location in her private home and the particular circumstances in which the discussions with the HCEAs took place; and that the material which was filmed without her knowledge was sensitive and private in nature. The level of interference with Miss F's legitimate expectation of privacy was very significant and was an important consideration in weighing up the competing right to freedom of expression of the broadcaster and audience, against Miss F's right to privacy.

Ofcom also considered whether, in accordance with Practice 8.9, the material had been obtained proportionately in all the circumstances. The footage was obtained while the programme makers accompanied the HCEAs in carrying out their duties. The filming by the camera crew appeared to be open and unobtrusive and took place outside Miss F's home. However, as set out already above in relation to Practice 8.13, we considered that the manner in which the footage inside her home was obtained was surreptitious. In Ofcom's view, the use of surreptitious filming in this instance was not warranted, particularly as it took place in a private home and therefore allowed the programme makers unfettered access to intimate family interactions. As noted above, although the fact of the enforcement of a Writ may be a matter of public record, it does not follow that its consequences and impact for a debtor are also necessarily public matters in respect of which no legitimate expectation of privacy arises. Nor does it follow that intrusive footage capturing the debtor's reaction and intimate exchanges between the debtor and their family in a family home is justified by the public interest in learning about the HCEAs' work and the enforcement process. While we took into account

Channel 5's representations on this point, Ofcom considered that the means of obtaining the material had not, in all the circumstances, been proportionate for the purpose of Practice 8.9.

Having taken all the above factors into account, Ofcom considered that, on balance, the broadcaster's right to freedom of expression and the public interest in the obtaining the footage of Miss F in this instance did not outweigh her heightened expectation of privacy in relation to the filming of her or justify the very significant intrusion which the obtaining of the footage caused to her rights in this regard. Therefore, we considered that Miss F's privacy in connection with the obtaining of material included in the programme and the use of surreptitious filming was unwarrantably infringed.

Miss F's uncle

From the unedited footage and the programme as broadcast, we observed that Miss F's uncle was filmed as he answered the door to the HCEAs, and as he spoke to the HCEAs and to Miss F both in the hallway of the property and later in other rooms in the house. During these conversations, Miss F's uncle spoke about not only Miss F's situation, but also his own financial circumstances. He was filmed urging Miss F to ask her father to help her because he was not able to do so; and, while explaining to the HCEAs that items they were listing as part of their inventory belonged not to Miss F but to his sister (Miss F's mother).

Soon after answering the door to the HCEAs, Miss F's uncle asked about the presence of the cameras used by the camera crew to film from outside the property. He was told by the HCEAs that the camera crew were following them as they worked for a documentary on Channel 5 and that they (the HCEAs) did not have "control" (i.e. over what was recorded) by these cameras. However, most of the footage of Miss F's uncle was recorded using the body cameras worn by the HCEAs, but belonging to the programme makers, while he and they were inside the property. When the HCEAs crossed the threshold of his sister and brother-in-law's home, Miss F's uncle said that he had not given them permission to do so. However, he was informed by one of the HCEAs that he and his colleague had a right to enter the property because they were executing a Writ.

As before with Miss F in head a) above, we considered that, Miss F's uncle would have been unaware that the body cameras belonged to the programme makers and that the footage recorded on them could potentially be included in the television programme as broadcast.

Also, for the same reasons given in head a) above, we considered that the method in which this footage was obtained amounted to surreptitious filming and that there was no *prima facie* story in the public interest which would ordinarily warrant the use of such filming (as envisaged by Practice 8.13).

We accepted that Miss F's uncle involved himself in this situation, but given that there were no other family members present at the time and that the programme makers had called unannounced, we considered that Miss F's uncle found himself in a position where he was obliged to discuss these sensitive, financial matters with Miss F and the HCEAs, if he wanted to help his niece. It was also significant that these conversations took place in the private, domestic setting of a family home and without it being anticipated that they were being recorded for potential broadcast. We therefore considered that Miss F's

uncle's unguarded and intimate interactions with his niece about an event which was obviously stressful and distressing for them both could be regarded as notably sensitive and to attract a heightened legitimate expectation of privacy.

Given these reasons, and those set out in relation to Miss F above, and taking into account the use and consequences of surreptitious filming in this instance, Ofcom considered that the interference with Miss F's uncle's privacy which was caused by the obtaining of this material with a view to it being broadcast was very significant.

As with Miss F above, we considered that Miss F's uncle had not given his consent for the filming of him. We observed that although Miss F's uncle may not, as Channel 5 claimed, have explicitly "complain[ed] about being filmed (at the time)", he made it clear to the HCEAs that he was unhappy with the presence of the camera crew. Also, there was no evidence that Miss F's uncle was informed that the body cameras belonged to the programme makers or that the footage captured by them might subsequently be retained and deployed by the programme makers for the purposes of broadcast. Therefore, Ofcom went on to consider whether the infringement of Miss F's uncle's legitimate expectation of privacy in the obtaining of the surreptitious footage was nonetheless warranted under the Code in this instance.

For the same reasons given for Miss F under head a), taking into account Miss F's uncle's legitimate expectation of privacy and lack of consent and that it was obtained by means that, in Ofcom's view, amounted to surreptitious filming, in Ofcom's view the infringement of his legitimate expectation of privacy was not warranted.

For the reasons already set out for Miss F above, Ofcom considered that the means of obtaining the material had not been proportionate for the purpose of Practice 8.9 in this instance.

Having taken all the above factors into account, Ofcom considered that, on balance, the broadcaster's right to freedom of expression and the public interest in obtaining the footage of Miss F's uncle did not outweigh his heightened expectation of privacy or justify the very significant intrusion which the obtaining of the footage caused to his rights in this regard. Therefore, we considered that Miss F's uncle's privacy, in connection with the obtaining of material included in the programme was unwarrantably infringed.

Miss F's father

Miss F's father was first filmed from the street by the camera crew as he arrived home. However, regarding this head of complaint, we observed that Miss F's father was subsequently filmed by the HCEAs inside his own home and as he discussed Miss F's financial situation with her and with the HCEAs and subsequently as he repaid his daughter's debt. Moreover, although his side of the call was not audible, the footage also recorded Miss F's initial attempts to contact her father by mobile phone, her plea to him not to make "it worse for me", and shed light on his previous involvement in and reaction to his daughter's financial difficulties.

As above in relation to Miss F and Miss F's uncle, we considered that Miss F's father would have been unaware that the body cameras belonged to the programme makers

and that the footage recorded on them could potentially be included in the television programme as broadcast.

For the same reasons as given in head a), we considered that the method in which this footage was obtained amounted to surreptitious filming and that there was no prima facie story in the public interest which would ordinarily warrant the use of such filming (as envisaged by Practice 8.13).

For the same reasons, as for Miss F and her uncle above, Ofcom also considered that Miss F's father could reasonably have expected his conversations about his daughter's debt issue and her family's reaction to it to be regarded as sensitive and attract a heightened expectation of privacy, particularly as they took place within the confines of his own home and involved sensitive and intimate exchanges with his own daughter and family. We accepted that Miss F's father involved himself in this situation and noted Channel 5's comment that he "insisted on coming to personally make the payment" despite his daughter's attempt to persuade him not to do so. However, in our view, given that he was Miss F's father; and, taking account of the nature of Miss F's situation (and the potential risk to his property and that of his wife), it was not unreasonable for Miss F's father to want to resolve the situation in person. We do not consider that his decision to attend materially detracted from his heightened expectation of privacy in respect of these matters when he reached the family home.

Given these circumstances and taking into account the use and consequences of surreptitious filming in this instance, Ofcom considered that the interference with Miss F's father's privacy which was caused by the obtaining of this material with a view to it being broadcast was very significant.

As previously in relation to Miss F and her uncle above, we noted that it was not disputed that Miss F's father did not consent to being filmed and that he would have been unaware that the HCEAs' body cameras belonged to the programme makers and that the footage recorded on them could potentially be included in the television programme as broadcast.

Ofcom went on to consider whether the infringement of Miss F's father's heightened legitimate expectation of privacy was warranted under the Code in this instance.

For the same reasons, as for Miss F and her uncle above, Ofcom considered that the recording of this material involved a very significant intrusion into Miss F's father's privacy in that it took place without his consent and within the confines of his own home. In the absence of any consent to the filming and that it was obtained by means that, in Ofcom's view, amounted to surreptitious filming, we considered that the infringement into Miss F's father's heightened legitimate expectation of privacy in this sphere of his private and family life was not warranted.

For the reasons already set out for Miss F and her uncle above, Ofcom considered that the means of obtaining the material had not been proportionate for the purpose of Practice 8.9.

Having taken all the above factors into account, Ofcom considered that, on balance, the broadcaster's right to freedom of expression and the public interest in obtaining the footage of Miss F's father did not outweigh his heightened expectation of privacy in the

circumstances of this case or justify the very significant interference with his rights in this regard. Therefore, we considered that Miss F's father's privacy, in connection with the obtaining of material included in the programme was unwarrantably infringed.

- b) Ofcom next considered Miss F's complaint on her own behalf and on behalf of her uncle and her parents that their privacy was unwarrantably infringed in the programme as broadcast. We had regard to Practice 8.6 of the Code which states that, if the broadcast of a programme would infringe the privacy of a person, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

Miss F

We assessed whether Miss F had a legitimate expectation of privacy regarding the broadcast of footage of her included in the programme. We applied the same objective test as set out in head a) above.

As set out in the "Programme summary" above, we took account of what material was shown in the programme. In particular, Miss F was shown not only discussing her financial situation and that of her father with the HCEAs, but also candidly expressing her feelings about asking her father for help. On a number of occasions, including as she spoke to her father about her situation, Miss F was shown visibly distressed. Neither her face, nor her voice were obscured or disguised in the programme and she was identified by name in the programme.

Practice 8.14 states that "Material gained by surreptitious filming and recording should only be broadcast when it is warranted". As explained in detail at head a) above, Ofcom considered that the footage filmed of Miss F had been obtained surreptitiously.

For the reasons set out in head a) above, Ofcom considered that the footage in question was highly sensitive and private in nature. We also considered that the intrusion was particularly acute as a result of the subsequent disclosure of that footage in a nationally televised programme (with attendant exposure that substantially exceeded anything which someone in Miss F's position could possibly have expected at the time)¹². In these circumstances, we considered that the inclusion of this material in the programme as broadcast constituted a very significant interference with Miss F's privacy rights.

It was not disputed by the broadcaster that the footage was included without Miss F's consent. We therefore went on to consider whether the broadcast of this material was warranted under the Code.

We again carefully balanced Miss F's right to privacy regarding the inclusion of the relevant footage in the programme with the broadcaster's right to freedom of expression and the audience's right to receive the information broadcast without unnecessary interference. This was a particularly hard-hitting piece which involved a very significant intrusion into Miss F's privacy, including into her sensitive financial circumstances (which went substantially beyond the fact of the outstanding debt itself), the interior of her home, how she lived and interacted with others in that environment and her intimate

¹² *Peck v United Kingdom* [2003] ECHR 44.

family relationships. As above, the material recorded included footage of her while she was visibly distressed.

As above in head a), we took into account Channel 5's argument and its representations on the second Preliminary View that there was a public interest in broadcasting the footage in that it showed the activities of the HCEAs while executing their official duties. We also took account of the reference Channel 5 made in its further submission to the Supreme Court's decision in *Khuja*.

As previously, we acknowledged that the public interest was engaged in broadcasting programmes that highlight the serious issue of debt and the issues which the HCEAs encounter when seeking to enforce court orders made in that regard. We also accepted that the inclusion of named or identifiable individuals may enhance that public interest by making the broadcast footage more accessible or engaging to the watching audience¹³. In this regard, we noted Channel 5's submission that the matters raised in Miss F's complaint were included under editorial judgement and were all part of the legitimate consideration of giving the story its human face. However, in weighing up the competing rights of the parties, Ofcom took particular account of Miss F's heightened legitimate expectation of privacy in respect of the material broadcast, namely, the subject of her discussions with the HCEAs and, in particular, with her uncle and father; the location in her private home and the particular circumstances in which the events took place; and that much of the information conveyed in the broadcast footage was notably sensitive and private in nature. Ofcom considered that Miss F's heightened legitimate expectation of privacy, together with the fact that she did not give her consent to the broadcast of this material and that it was obtained by means that, in Ofcom's view, amounted to surreptitious filming were significant factors in weighing up the competing rights of the parties.

Having taken all the factors above into account, Ofcom considered that, on balance, the broadcaster's right to freedom of expression and the public interest in broadcasting the footage of Miss F did not outweigh her heightened legitimate expectation of privacy, or justify the very significant interference with that right. Ofcom also took the view that the broadcast of the footage of Miss F gained by the surreptitious filming was not warranted for the purpose of Practice 8.14 in these circumstances. Therefore, we considered that Miss F's privacy was unwarrantably infringed in the programme as broadcast.

Miss F's uncle

As set out in the "Programme Summary" above, the programme included footage of Miss F's uncle speaking to the HCEAs as they enforced a Writ for the repayment of personal debt against his niece. While Miss F's uncle was not named in the programme, his face was shown on several occasions, his undisguised voice was audible, and he was identified as Miss F's uncle. Sensitive exchanges between Miss F's uncle and his niece were broadcast within the confines of the family home. We considered that the intrusion was particularly acute as a result of the subsequent disclosure of that footage in a nationally televised programme (with attendant exposure that substantially exceeded anything which someone in Miss F's uncle's position could possibly have expected at the time).

¹³ *In re S (identification: Restrictions on Publication)* [2005] 1 AC 593 (at p604); *In re Guardian News & Media Ltd* [2010] 2 AC 697 (at para 63).

For the reasons set out in relation to Miss F at head b) above, (and notably, the particular circumstances in which this footage was recorded), Ofcom also considered that the footage in question was sensitive and private in nature, and that Miss F's uncle had a heightened legitimate expectation of privacy with regard to the inclusion of this material in the programme as broadcast. We considered that the interference with that right in the broadcast of that footage in a nationally televised programme to be significant.

It was not disputed that the footage was included without his consent. We therefore went on to consider whether the infringement into his legitimate expectation of privacy in the broadcast of this material was warranted under the Code.

Again, as in head b) above, we carefully balanced Miss F's uncle's right to privacy regarding the inclusion of the relevant footage in the programme with the broadcaster's right to freedom of expression and the audience's right to receive the information broadcast without unnecessary interference. Although the debt did not relate to Miss F's uncle, the footage showed that he willingly engaged with the HCEAs and that he did so in a genuine effort to help his niece.

For the same reasons, as for Miss F above, Ofcom considered that the broadcast of this material involved a significant intrusion into Miss F's uncle's privacy in that it took place without his consent and within a private domestic setting.

Having taken all the factors above into account, Ofcom considered that, on balance, the broadcaster's right to freedom of expression and the public interest in broadcasting the footage of Miss F's uncle did not outweigh his heightened legitimate expectation of privacy, or justify the significant intrusion into Miss F's uncle's privacy which was occasioned by the broadcast of footage of intimate and sensitive aspects and interactions of his family life. In such circumstances, therefore, we considered the broadcast of the footage of Miss F's uncle gained by the surreptitious filming was not warranted for the purpose of Practice 8.14 on these facts and considered that Miss F's uncle's privacy was unwarrantably infringed in the programme as broadcast.

Miss F's father

As set out in the "Programme summary" above, the programme included footage of Miss F's father in the living room of his home as he discussed his daughter's debt with the HCEAs and as he subsequently paid them the money which Miss F owed. It also showed Miss F's father while he was engaged in a very sensitive and emotionally charged discussion with his daughter and while he sought to comfort her in her distress. Information was given regarding previous financial arrangements made by Miss F's father to settle his daughter's debt. We also observed that, although Miss F's father was not named in the programme, his face was shown, his undisguised voice was audible, and he was identified as Miss F's father's father.

For the reasons set out for Miss F and her uncle above, Ofcom also considered that the footage in question was highly sensitive and private in nature, Miss F's father had a heightened legitimate expectation of privacy with regard to the inclusion of this material in the programme as broadcast. Again, we also considered that the intrusion was

particularly acute as a result of the subsequent disclosure of that footage in a nationally televised programme.

It was not disputed by the broadcaster that the footage was included without his consent. We therefore went on to consider whether the infringement into his heightened legitimate expectation of privacy in the broadcast of this material was warranted under the Code.

We carefully balanced Miss F's father's right to privacy regarding the inclusion of the relevant footage in the programme with the broadcaster's right to freedom of expression and the audience's right to receive the information broadcast without unnecessary interference. We recognised that although the debt itself was not owed by Miss F's father, the footage showed his critical and timely role in helping Miss F to make immediate payment to the HCEAs to avoid the seizure of items in the family home. More generally, the broadcast footage disclosed significant detail about the personal and emotional consequences which his daughter's financial difficulties caused for him (including the nature of their intimate exchanges about this situation and details of previous arrangements between themselves).

For the same reasons as for Miss F and her uncle above, Ofcom considered that the broadcast of this material in a national television programme involved a very significant intrusion into Miss F's father's privacy which took place without his consent and within his home.

Having taken all the factors above into account, Ofcom considered that, on balance, the broadcaster's right to freedom of expression and the public interest in broadcasting the footage of Miss F's father did not outweigh his heightened legitimate expectation of privacy or justify the very significant interference with his right in this regard. We considered the broadcast of the footage of Miss F's father gained by the surreptitious filming was not warranted for the purpose of Practice 8.14 on these facts. Therefore, we considered that Miss F's father's privacy was unwarrantably infringed in the programme as broadcast.

Miss F's mother

We considered Miss F's complaint that her mother's privacy was unwarrantably infringed in the programme as broadcast because footage of her home was broadcast without her consent.

Practice 8.2 of the Code states that information which discloses the location of a person's home or family should not be revealed without permission, unless it is warranted.

Ofcom observed that the programme included footage of the exterior of Miss F's mother's property. However, we also observed that it was a terraced house which looked very like many other houses. In addition, the door number hanging next to the front door was obscured in the footage and the only information about the location of the property included in the programme was that it was in Bolton in Lancashire.

Although it appeared that a number of people to whom Miss F's mother and her property were already known recognised the house from the footage shown, in our view

the programme did not disclose the location of Miss F's mother's home. Therefore, we considered that Miss F's mother did not have a legitimate expectation of privacy in relation to the broadcast of footage of the exterior of her house and, as such, it was not necessary for Ofcom to consider this aspect of the complaint further.

In relation to the footage of the interior of Miss F's mother's house obtained by the use of surreptitious filming by the body cameras worn by the HCEAs, we observed that the programme clearly showed the hallway, the living room, the kitchen and, as Ofcom understood it, Miss F's mother's bedroom (as well as many of the objects contained within these rooms). In addition, the broadcast footage revealed information about intimate and personal aspects of Miss F's mother's family life, about Miss F's relationship with her parents, and disclosed significant detail regarding the impact and consequences which Miss F's financial difficulties were causing to her parents and immediate family.

We assessed the extent to which Miss F's mother had a legitimate expectation of privacy regarding this footage. We noted that, in its response to this head of complaint, Channel 5 said that this footage was "not extensive or detailed" and that "nothing especially private was disclosed in the footage of the interior of the home".

Miss F's mother herself did not feature in the programme and she was not named. However, as noted above, she was referred to by her brother (Miss F's uncle) and she was identifiable through her daughter (who was named) and her husband and brother who were not named, but were also identifiable from the context. It was also clear that the property and its contents (which were subject to a roving enquiry by the HCEAs and captured by the body cameras) belonged to Miss F's mother and formed part of her family home.

Given the subject of the relevant footage, the information which was given in the programme regarding it (namely that the HCEAs were considering seizing the objects shown in the footage and the wider information which it disclosed about the personal consequences for Miss F's mother and her family of her daughter's financial difficulties), Ofcom considered that Miss F's mother had a legitimate expectation of privacy regarding the inclusion of this footage in the programme. We further considered that the interference with that right which was caused by the broadcast of the footage in question on a national television programme was significant (albeit to a lesser degree than that experienced by the other complainants by the broadcast).

It was not disputed that Miss F's mother did not give her consent for the infringement of her legitimate expectation of privacy in the broadcast of this material. We therefore went on to consider whether it was warranted within the meaning of the Code (as set out in head a) above) and whether it complied with Practice 8.14.

We carefully balanced Miss F's mother's right to privacy regarding the inclusion of the relevant footage in the programme with the broadcaster's right to freedom of expression and the audience's right to receive the information broadcast without unnecessary interference. Although the debt did not relate to Miss F's mother, the interaction between her daughter, husband and brother and the HCEAs took place in the family home, details about her family's financial situation and relationships and the potentially serious and distressing impact of her daughter's financial situation (both at the time of footage and historically) for both herself and her family were discussed and disclosed on

a nationally televised programme to an extent which exceeded that which Miss F's mother could reasonably have expected.

Ofcom considered, therefore, that the broadcast of this material involved a significant intrusion into Miss F's mother's privacy in that the broadcast of the footage disclosed a discussion of personal, family financial matters which took place in her home without her consent.

Having taken all the factors above into account, Ofcom considered that, on balance, the broadcaster's right to freedom of expression and the public interest in broadcasting the footage of the interior of Miss F's mother's home did not outweigh her legitimate expectation of privacy, or justify the significant interference with her rights in this regard. We also considered that the use of footage obtained by surreptitious filming inside a family home was not warranted in this instance. Therefore, we considered that Miss F's mother's privacy was unwarrantably infringed in the programme as broadcast.

Late Representations

In accordance with Ofcom's Procedures¹⁴, we provided Channel 5 and Miss F with an embargoed copy of our Adjudication for information only in advance of publication. We then received a further separate submission from solicitors acting for the programme makers, Brinkworth Films. As well as raising a number of procedural issues regarding the process Ofcom had followed, the programme makers made various representations relating to Ofcom's findings about the nature of the privacy rights engaged, the manner in which Ofcom had balanced those rights, and the countervailing right of freedom of expression in issue. They explained that the reason for making their own separate submission at this late stage of the process was because they believed that their rights and arguments had not been properly reflected by Ofcom's conclusions in the Adjudication.

Ofcom had proceeded in this investigation on the understanding that the programme makers' position had been taken into account in Channel 5's representations to Ofcom. Notwithstanding this understanding (which has not been contradicted by either Channel 5 or Brinkworth Films), Ofcom agreed to delay publication of the Adjudication until the programme makers had been afforded a proper opportunity to make representations and Ofcom had considered them. The programme makers' representations were subsequently set out in letters of 28 September and 4 October 2017. In light of those representations, and as part of its consideration of the same, Ofcom sought additional responses on various matters raised from Miss F and Channel 5.

Taking into account all the matters raised, along with the matters previously considered, Ofcom has retaken its decision.

The following paragraphs provide a summary of the programme makers' further submissions, together with a summary of the additional responses from Miss F and Channel 5. We then explain Ofcom's findings on the issues raised by the programme makers before setting out Ofcom's decision.

Further separate submissions made by the programme makers

- *Surreptitious filming*

¹⁴ https://www.ofcom.org.uk/data/assets/pdf_file/0031/57388/fairness-privacy-complaints.pdf

The programme makers said that there has not and never has been any concealment from, or misrepresentation to, persons filmed by the HCEAs' body cameras in any episode of *Can't Pay? We'll Take It Away!*. They submitted that this had been accepted by Ofcom in the previous decisions of *Danin* and *Kitoko* in which Ofcom found substantially similar objections to those in the present case not to lead to breaches of the Code. However, according to the programme makers, everything changed following the first Preliminary View, after Ofcom sought further information from Channel 5 about the ownership of the body cameras and the footage. No other relevant factors had altered, so Ofcom's change of view that the filming was surreptitious must have turned on the presentation of the facts of the contractual arrangements between the programme makers and the HCEA company regarding the programme makers' "substitution, (not addition), of better quality body cameras, and its contractual rights over the footage obtained from those cameras".

The programme makers submitted that Ofcom's reasoning based on the contractual arrangements was "quite obviously wrong". Ofcom was aware that body cameras were worn by all HCEAs in the course of their work and that they would be worn whether a television camera crew was present or not as they provided evidence of encounters between the HCEAs and those they have to enforce against and others who may intervene.

The programme makers said that it was important for Ofcom to appreciate that the reason for securing the copyright in the body camera footage was to better combat any unauthorised use of it on social media or other places. They said that the contractual arrangements allowed for the HCEA company to have "reasonable access" to the recordings, which includes all the purposes for which the HCEA company issues its own cameras and would use recordings. The purposes of the body cameras as previously understood by Ofcom — for personal safety reasons and in case of a complaint or inquiry — were entirely unaffected by ownership of the cameras or of rights in recordings. Crucially, the programme makers would have access to the footage whether or not they supplied the cameras and secured the rights to the recordings. The programme makers argued that Ofcom clearly knew this because it had seen many hours of *Can't Pay? We'll Take It Away!* when it believed that the cameras and copyright were supplied by, and the property of, the HCEA company. The programme makers said that it has always been plain on the face of the programmes that the body camera footage was made available to them and could not possibly have been regarded as "solely" for the benefit of those wearing them or their employer. Footage would be obtained in this way whoever owned it, and would be used in the programme irrespective of ownership of the cameras or copyright in the footage.

The programme makers said it was therefore perverse to distinguish between ownership of the body cameras and footage by the HCEA company and ownership by the programme makers to deem the body camera footage to have been obtained surreptitiously.

- *Heightened legitimate expectation of privacy*

The programme makers said that there is no "heightened legitimate expectation of privacy" in English law. They argued that references to this phrase in the Adjudication indicated that Ofcom was creating a class of higher right of privacy than was recognised

by the courts and that the analysis adopted by Ofcom attempted to load the scales in favour of a particular outcome before balancing the respective rights of the parties under Article 8 and Article 10 of the ECHR.

- *Unedited footage of Miss F*

The programme makers said that the following exchange in the unedited footage demonstrated that Ofcom should not have found that Miss F was being surreptitiously filmed:

Miss F's father: *"What's this camcorder? Is this, it's not going on camera is it or anything?"*

Miss F: *Yeah it is.*

Mr McCracken: *I don't know.*

Miss F: *That's what we said.*

Mr McCracken: *We just do our job and the TV crew follow us you see. Have you got the phone there Vic? I just need to photo this receipt and then we'll leave you to get on with the rest of your day guys.*

Mr Victor: *It's all done now.*

Miss F: *It's not all done. We might be on telly and everything".*

Given what was said by Miss F in this exchange, the programme makers argued that it was clear that Miss F was aware that the footage from the body cameras might subsequently be broadcast. To find otherwise, it said, was perverse. The sequence showed that the body cameras were visible and openly discussed, that there are no other cameras present, and that immediately at the end of the brief sequence Miss F expresses her concern that "it's not all done... we might be on telly and everything".

Response from Miss F

Given that this argument had not previously been raised, Ofcom provided Miss F with an opportunity to comment on the programme makers' submission relating to the unedited footage of her.

Miss F said that she did not know that the footage filmed on the body cameras worn by the HCEAs would be shown in the programme. She had only thought that the footage filmed by the camera crew would be shown on television. Miss F said that this was the reason she had told the camera crew to "stand back". She added that although she had "heard of the show", she had thought that if she did not let the camera crew in to her home, "they wouldn't have any actual footage inside the house and wouldn't see me pleading not to be on TV". Miss F added that she did not think "for one moment that the footage was to be used, as I remember the first set of bailiffs used body cameras for their own safety" and said that she had assumed that they (i.e. the HCEAs, Mr McCracken and Mr Victor) were "doing the same". She had thought that only the footage filmed from the outside of her house could be used in the programme.

Response from Channel 5

Ofcom provided Channel 5 with an opportunity to comment on Miss F's response to the programme makers' submission relating to the unedited footage of Miss F.

Channel 5 noted the discrepancy between the programme makers' view of the factual question of what was meant by this section of the unedited footage and Miss F's view about that factual question. Channel 5 considered that the existence of the factual dispute should be taken into account by Ofcom in the Adjudication.

Channel 5 also noted that the complaints made by Miss F and the other members of her family focused on their identification in the broadcast and embarrassment as a consequence, rather than the method of the filming itself.

Response from the programme makers

In a further letter to Ofcom, the programme makers submitted that Miss F had "had words put into her mouth" in respect of the comments she had provided on the unedited footage of her. This was because Ofcom had already provided Miss F with a copy of the proposed Adjudication and therefore she could not answer for what she knew or understood at the time in a manner uninfluenced by Ofcom's proposed findings. As a result, Miss F's evidence was contaminated and, for that reason, unreliable. The programme makers also questioned why this sequence of unedited footage was not previously considered and not put to Miss F at an appropriate, earlier point.

The programme makers also repeated previous submissions they had made in relation to the issue of surreptitious filming and the ownership of the body cameras and copyright over the footage.

Ofcom's findings and decision

Surreptitious filming

Ofcom's finding on this issue has regard to the fact that an advance arrangement, of which it was previously unaware, was in place between the programme makers and the HCEA company which provided the programme makers with unfettered access to the footage recorded by the body cameras for the purposes of broadcast. Until this point, Ofcom had reasonably assumed that any request for access to the footage captured by the body cameras worn by the HCEAs was made by the programme makers **after** that footage had been captured for the HCEA's own official purposes, and in circumstances where the programme makers were satisfied that a sufficient public interest in the events or matters depicted justified any privacy intrusion which would potentially arise from obtaining access to the official footage in question.

In fact, it was evident from the "Supplementary material" provided by Channel 5 that the arrangement in this instance was such that the programme makers owned the body cameras provided to the HCEAs as well as the entire copyright in the material captured by them. For the sake of clarity, however, while the ownership of the body cameras and the copyright in the footage was a notable feature of the arrangement, it was the fact that the body cameras were worn with the prior objective of obtaining footage for the purpose of broadcast, rather

than the fact of the ownership itself, which was the material consideration in this part of Ofcom's analysis (not least as it served to define the purpose for which the footage was obtained in the first place and allowed the programme makers unfettered access to, and use of, the footage which was recorded as a consequence).

The fact that the body cameras were worn with the prior objective of obtaining footage for the purpose of broadcast was not something which was explained to Miss F or her family, nor would it have been something which they could reasonably have foreseen or appreciated. In Ofcom's view, this justifies classifying the manner in which footage was obtained as "surreptitious" in the sense envisaged by the Code.

Ofcom stresses that the Code does not prohibit the use of surreptitious filming, indeed it can be an important means of enabling broadcasters to obtain material evidence where, as envisaged by Practice 8.13, there is a *prima facie* evidence of a story in the public interest; there are reasonable grounds to suspect that further material evidence could be obtained; and, it is necessary to the credibility and authenticity of the programme. These important prior considerations, which arise because of the potentially significant privacy consequences which surreptitious or covert filming may cause (and which did arise in this case) are designed to ensure that broadcasters do not use such methods indiscriminately, or without due cause in the speculative hope of gathering material for potential broadcast. In this case, however, Ofcom does not accept that the public interest arguments submitted by Channel 5 or the programme makers are of sufficient order and weight to warrant filming of this nature in these circumstances, particularly given that the filming took place within the confines of a domestic home and was thereby able to record intimate and sensitive interactions between Miss F and her family in that context. In Ofcom's view, although Miss F was the subject of the High Court enforcement process, neither that fact nor the public interest in programming which seeks to shed light on the issues and difficulties encountered by HCEAs warranted the decision of the programme makers and Channel 5 to obtain footage of these particular events inside the complainants' family home in this manner.

The factual question as to Miss F's awareness that the material recorded by the body cameras could be used for potential broadcast

Ofcom wishes to make clear that we watched all the unedited footage in our assessment of the evidence, including the sequence which the programme makers specifically relied upon. Our clear understanding, which was not contradicted by Channel 5 in any of its previous representations, is that Miss F's reference to the possibility of being "on telly", when viewed in its full context, arose from her previous awareness of the camera crew who had been present at the beginning of the HCEA visit and her ongoing concern that this meant that she would now potentially be the subject of a broadcast programme. As neither Channel 5 nor the programme makers had sought to question the meaning of this footage previously, Ofcom had no reason to question that understanding or to ask Miss F to explain what she meant at the time. Indeed, Miss F has since explained that her awareness of events at the time accorded with Ofcom's previous interpretation of the sequence in question.

Nevertheless, we recognise that the programme makers dispute what Miss F has now said and her reasons for saying it. It is therefore important to approach the relevant footage and the parties' representations on its alleged significance in an objective manner. In Ofcom's view, the following factors are material to its assessment and justify its conclusion that Miss F was unaware of the potential use to which footage obtained by the body cameras worn by the HCEAs might be put at the time when it was recorded:

- There is no evidence that Miss F was warned by the programme makers or the HCEAs that the material recorded by the body cameras might subsequently be included in the programme as broadcast, or that she had any reason to believe that the body cameras were being used for any reason other than their official purpose (i.e. the safety and protection of the HCEAs).
- Miss F did vigorously object to being filmed at the outset of her exchange with the HCEAs (while they were still outside the front door to the property). However, that objection was addressed directly at the perceived threat posed to her privacy by the camera crew.
- The actions of the camera crew in offering to withdraw from the pavement outside of the house and “to film from public land” were entirely consistent with the impression that any events taking place out of their view inside the property would no longer be subject to filming for potential broadcast (not least given that their offer to withdraw would otherwise be essentially worthless). The impression given to Miss F by that offer was immediately bolstered by the distinction drawn in this context by Mr McCracken who informed her that he knew “it might be a little bit distressing, and it is for us, you know what I mean, because **we don't want people filming us either**, but we haven't got a choice” [Ofcom's emphasis].
- The reactions and behaviour of Miss F, her father, and her uncle inside the house similarly gave no indication that they were aware that they were still being filmed for broadcast purposes. Indeed, the exchange identified by the programme makers came at the end of the visit by the HCEAs and was the first and only occasion when any family member appears even arguably to question the potential significance or use of footage recorded by the body cameras in a broadcast context. Even at that stage, however, the answer given by Mr McCracken was a non-committal “don't know”, a comment which was immediately followed by him repeating the distinction between the work of the HCEAs in this context and the potential consequences for Miss F and her father of being followed by the camera crew.

In these circumstances, Ofcom considers there is no evidence that Miss F had been warned about the purpose of the filming by the body cameras, or that she either had appreciated, or should reasonably have foreseen, the full significance of the purposes for which the body cameras were being worn by the HCEAs. On balance, her evidence on this point appears to be consistent with Ofcom's original understanding of both her and her family's interactions with the HCEAs on this issue. Nothing has caused us to change our previous conclusion on this issue.

It is important for Ofcom to point out that its finding that the use of body cameras in this manner constitutes surreptitious filming would not have arisen if Miss F had been made aware at the outset that the footage was to be used for purposes of potential broadcast (rather than simply for the HCEAs own official use). To be clear, this Adjudication should not be interpreted as having the effect going forward of preventing programme makers from making any use of body cameras or the footage obtained from them. However, where such cameras are used surreptitiously (i.e. with the prior purpose of obtaining footage for broadcast in circumstances where that purpose is not disclosed or otherwise reasonably identifiable to the individual(s) being filmed), the use of such filming must be warranted in the particular circumstances. In this instance, for the reasons referred to above, Ofcom's view is that it was not warranted.

The references to a "heightened legitimate expectation of privacy" and the test applied by Ofcom

Ofcom has approached its consideration of this case by reference to the threshold of whether each of the complainants held a legitimate expectation of privacy in relation to the obtaining of the footage and in the programme which was subsequently broadcast – indeed, this threshold for whether any privacy issue arises in respect of a given complaint is expressly cited at the outset of Ofcom's assessment of both heads of the complaint.

Having satisfied itself that the complainants had a legitimate expectation of privacy in each regard, Ofcom has intensely focussed on the weight and order of the comparative rights under Articles 8 and 10 that are in issue in order to decide where the balance lies in these particular circumstances. It is in this context (i.e. as part of Ofcom's comparative assessment of the specific rights in issue on the facts of the case) that the reference to a "heightened" legitimate expectation of privacy is used in this Adjudication. When properly understood in that context, the term is simply intended to describe and reflect what Ofcom considers to be the particularly serious nature of the interference with the complainants' Article 8 rights on the facts of this case (particularly in light of the manner in which the footage was obtained within the family home, and the sensitive and intimate matters which were recorded and broadcast about their private and family life). For the avoidance of any confusion on the part of the programme makers, the use of this term in this manner is not intended to import a different threshold test, nor should it be taken as establishing a presumptive priority in favour of the complainants' privacy rights from the outset.

In Ofcom's view, the interference with the complainants' rights to privacy in this case was significant and of such a nature and gravity as to outweigh the public interest in programming of this nature and the wider Article 10 rights of the broadcaster and programme makers. For these reasons, Ofcom considers that the complainants' privacy was unwarrantably infringed in this instance.

Ofcom has upheld Miss F's complaint of unwarranted infringement of privacy in connection with the obtaining of material included in the programme and in the programme as broadcast, made on her own behalf and on behalf of her uncle, and her parents.

Not Upheld

Complaint by Mrs Laura Whitfield *Police Interceptors, Channel 5, 22 May 2017*

Summary

Ofcom has not upheld this complaint made by Mrs Laura Whitfield of unwarranted infringement of privacy.

The programme, which followed the work of police interceptor units across the UK, included footage of police officers searching Mrs Whitfield's house in connection with suspected drug offences.

Ofcom found that:

- Mrs Whitfield had a legitimate expectation of privacy both in connection with the obtaining of material included in the programme and in the programme as broadcast with regards to the footage of her in her home. However, on balance, and in the particular circumstances of this case, the public interest in filming and broadcasting the material, which showed the work of the police investigating crime, outweighed Mrs Whitfield's right to privacy.
- Mrs Whitfield did not have a legitimate expectation of privacy in relation to the broadcast of the footage of the outside of her house.

Programme summary

On 22 March 2017, Channel 5 broadcast an edition of *Police Interceptors*, a series which followed the work of police units across the UK.

This particular edition followed the work of a police unit in Runcorn, Cheshire, and included a segment which focused on drug related crime. Police officers were shown being briefed ahead of a property search after receiving information suggesting that there was a cannabis farm there.

PC Jim Hunt, an "entry specialist" said:

"There is some suggestion that the occupant has dealt in class-A before as well, there may be something more than just cannabis there, so it's very much a case of what the search brings up really".

Police officers were shown leaving the police station in vehicles. PC Hunt was shown saying as he drove to the scene:

"... this guy has got his fingers in a few pies if he's willing to cultivate cannabis in his own home address where his kids are. What else is he willing to do?"

Footage of the outside of the complainant's house was shown as the police officers arrived. The house number and the numbers of neighbouring houses were blurred.

Police officers were then shown forcing open the front door and entering the house. One police officer entered the living room and was shown trying to calm someone who was out of shot.

Police officers were shown ascending the stairs and passing Mrs Whitfield, who was standing on the stairs wearing a dressing gown. Mrs Whitfield was shown for approximately three seconds and her face was blurred. A police officer asked her:

"Who's up here?"

Mrs Whitfield responded:

"No one's up there".

Footage of police officers was shown as they searched different rooms of the house.

The programme's narrator said:

"There's one more floor to search, but there's no sign of the suspect or any cannabis farm".

Footage of PC Hunt was shown as he searched one of the bedrooms, and calling to another police officer saying that he had found "Coke" inside a drawer, and more white powder in some sealed chocolate eggs.

The narrator said:

"For a family man like Jim, the find is all the more disturbing".

PC Hunt said:

"It's in a house where you've got two young kids, look at the mouse-mat here, a bloke with a baby on his shoulder. He is portraying himself as a decent father yet he's got class-A drugs which are close to hand, it's not right, it's not right at all. If one of the kids was to take something like that and ingest it, they'd die".

PC Hunt was shown opening an envelope filled with bank notes. The narrator explained:

"While the penalty for possession of cannabis maxes out at five years in prison, possession of class-A's carries up to seven years depending on the circumstances, and the evidence".

PC Hunt said:

"This now will have to be sent off to be forensically tested. A, to prove what it is and B, to get the weight measurement...the purity etcetera. That will be used in evidence in court and will be interpreted by a drug expert somewhere in the force. Also, potentially the wrapping will need to be sent off for DNA and fingerprint analysis. So, that gets popped into a sealed evidence bag and seized".

Footage of the outside of the complainant's house was shown as an unobscured man (the complainant's husband) was led away by officers towards a police vehicle and then placed inside. The narrator said:

"The suspect returned to the house minutes after the drugs were discovered. He was arrested and taken into custody for questioning".

A clip from footage shown earlier in the programme, which included footage of the outside of the complainant's house, was shown as police officers forced open the front door. The complainant's house number was blurred, though the number of one of the neighbouring houses was visible. The narrator said:

"The heat source picked up by the thermal imaging camera may have been down to a badly insulated roof. But whilst there was no cannabis farm, a stash of class-A's is a decent result".

Towards the end to this segment of the programme, the narrator said:

"Whilst it was not proved that the suspect had been involved in dealing this time, he did plead guilty to possession of class-A's and was given fines totalling £235".

No further footage of or reference to the complainant was included in the programme.

Summary of the complaint and broadcaster's response

The complaint

- a) Mrs Whitfield complained that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme because she was filmed in her house without her consent.
- b) Mrs Whitfield also complained that her privacy was unwarrantably infringed in the programme as broadcast because:
 - i) Footage filmed of her in her house was included in the programme without her consent.
 - ii) Footage of the outside of her house, was included in the programme without her consent.

By way of background, Mrs Whitfield said that her two disabled children had been put at risk as a result of the broadcast of the programme.

The broadcaster's response

Background

Prior to addressing the specific heads of this complaint, Channel 5 said it was not the law in the United Kingdom that people had a right not to be on television, or that footage or photographs of a person could not be taken and broadcast without their consent¹.

Channel 5 said that it was not the location where filming occurred which established whether Article 8 was invoked or not, but rather it was the activity filmed that was the determining factor.² Channel 5 said by way of example that if the complainant was having afternoon tea with friends inside her home, that would be a private matter and any filming of that activity would be legitimately private in all the circumstances. However, if the complainant's home was broken into and "some criminals used the home as a base to create chemical weapons", then the footage of that activity in the complainant's home would not be private and that any filming of it would not "breach the law of privacy".

Channel 5 said that no aspect of the activities of police officers carrying out their official duties could properly be regarded as private, and that no "right thinking, ordinary, reasonable person" could think that such activities were private. The broadcaster said, as in the case of *Lenah Game Meats*³, the filming in this case might have occurred on private property but the activity, in itself, was not private.

Channel 5 said that case law made it "unequivocally clear" that the fact that Article 8 might be engaged on the question of a *broadcast* does not mean that Article 8 is engaged when *filming* occurs. It said that Article 8 was only engaged in filming when the activity being filmed is private, which it said the activities of police officers in carrying out their court approved duties were not.

Channel 5 said that each case would turn on its own facts, that matters such as the vulnerability of a particular person or situation would impact on decisions to include particular footage in a particular programme and that no two private rights were necessarily the same. It said that the nature of the right to privacy, whether it was a strong claim or weaker one, was a factor that would come into play when the balancing exercise was

¹ Channel 5 cited *Campbell v MGN Ltd* [2004] 2 AC 457 as authority for this, referencing Lord Nicholls' judgment at paragraph 73: "*In the present case, the pictures were taken without Ms Campbell's consent. That in my opinion is not enough to amount to a wrongful invasion of privacy. The famous and even the not so famous who go out in public must accept that they may be photographed without their consent, just as they may be observed by others without their consent. As Gleeson CJ said in Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] 185 ALR 113, paragraph 41: 'Part of the price we pay for living in an organised society is that we are exposed to observation in a variety of ways by other people'*". Channel 5 also referred to Lord Hope's judgment at paragraphs 93-94, 107-108 and Lady Hale's judgment at paragraph 154.

² Channel 5 considered that *Weller v Associated Newspapers* [2015] EWCA Civ 1176 provided authority for this, citing paragraphs 60 and 61.

³ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63.

underway and that it had no place in the determination of whether or not there was, in fact, anything private for Article 8 to protect⁴.

In the case of *Police Interceptors*, Channel 5 said there was an undoubted public interest in seeing how and in what manner police officers carried out their duties, how the investigation of criminal offences affected members of the public and society in general, and what difficulties and situations police officers encountered when performing their public duties. It said that each story featured in the programme was considered carefully and no legitimate right of privacy was ever intentionally infringed by any broadcast.

Response to the complaint

- a) Channel 5 said that, in this case, the sequence in the programme which was the subject of Mrs Whitfield's complaint concerned the activities of police officers executing a court approved warrant under Section 23 of the Misuse of Drugs Act 1971.

Channel 5 said that the footage about which the complainant had taken issue was not footage of, or concerning, the complainant. It said that the footage was of, and concerning, police officers going about their court sanctioned business and that while it was true that the complainant might have featured briefly in the footage, the footage did not show the complainant doing anything private. It said the complainant was shown reacting to a court sanctioned activity, a matter which it said was clearly part of the orderly arrangement of society.

In this instance, the broadcaster said that the police, pursuant to a warrant, raided a private home where it was suspected that illegal substances were being stockpiled and stored. Channel 5 said that filming of the activities of the police officers which reflected what they did or saw during the raid could not breach Article 8 and that the filming was not of a private home but of an official, authorised police operation, which in those circumstances it said were public, wherever they occurred.

Channel 5 said that the public was entitled to scrutinise the activities of police officers in order to understand how the legal system worked, the kinds of powers police officers have when carrying out their duties and the ramifications of breaking the law. It said that these matters were all clearly matters of real public interest.

- b) Channel 5 said that *Police Interceptors* was "edifying", in that it demonstrated, even in sometimes emotionally charged situations, the constant work carried out by police officers to ensure that the laws of the land were enforced, and that criminals were prosecuted and punished, to ensure the social good that came from the rule of law in a democracy. The broadcaster said that the programme and the sequence about which the complainant took issue involved "matters relevant to the organisation of the economic, social and political life of the country [which] is crucial to any democracy", and without which "it can scarcely be called a democracy at all".

The broadcaster noted that cocaine was a class-A drug according to the laws of the UK, and that possessing cocaine was a crime. It said that seeing those who broke the law, in so far as it concerned cocaine possession and use, was clearly in the public interest as it

⁴ Channel 5 quoted Baroness Hale in *Campbell v MGN Ltd*, para 157 and *Weller v Associated Newspapers* [2015] EWCA Civ 1176, paragraph 15.

contributed to the debate about the threats drug use and abuse posed for society as well as reminding viewers that that if a person is found with cocaine, they will be prosecuted. It said that the public interest, and strength of the relevant Article 10 right to communicate to the public about the issue could not be clearer.

Channel 5 said that every reasonable step had been taken to obscure the complainant's identity and the location of her home. It said the complainant only appeared briefly in the programme and that her face was blurred, the house number of the property was obscured and the street name or suburb was not revealed. The broadcaster said all family photographs featured in the footage inside of Mrs Whitfield's home were blurred, as were any identifying details on the evidence bag used by officers. It said that, while it was true that the complainant's husband's face was not blurred and that anybody who knew the complainant would likely have been able to identify her because of this, those people were, in any event, likely to have known about the husband's arrest and conviction.

Channel 5 said that in this case, the sequence in question made the following things clear to the public, all of which the broadcaster said it was in the public interest to know:

- warrants issued under the Misuse of Drugs Act 1971 ("the Act") can be executed at any time, without notice;
- a warrant issued under the Act will be executed notwithstanding that the persons present at the premises specified on the warrant when the warrant is executed are not charged with any offence or themselves the subject of investigation;
- warrants issued under the Act do not constrict police officers and if evidence of wrong-doing or criminality not referred to in the warrant is uncovered, the police officers may take appropriate action; and
- possession of illegal substances can lead to the property of the people who live with the possessor being searched, disrupting ordinary family life.

The broadcaster said that the programme demonstrated the stark reality of situations such as that in which Mrs Whitfield was put by her husband and his actions. It said that the broadcast of the programme was entirely in the public interest and that, by blurring the images of Mrs Whitfield, the programme did not exceed what was necessary and appropriate to make viewers understand the situation and the ramifications of the illegal possession of cocaine.

In reference to Mrs Whitfield's concern that her children had been put at risk due to the footage of the outside of her house being included in the programme, Channel 5 said that it was unclear from her complaint whether any actual events had occurred following the broadcast of the programme which put the children at risk, or whether the complainant was simply fearful that the children might be at risk. It said that, either way, Channel 5 did not condone any action directed at Mrs Whitfield's children, however:

- the location of the complainant's house was not given in the programme;
- the complainant's house number was obscured; and

- the complainant's children were not featured in the programme.

The broadcaster said it was unlikely that any action would be taken against Mrs Whitfield's children as a result of the programme. It said that if the complainant was concerned about people potentially targeting her home because of the fact that illegal substances had been found there, her concern "should be directed to the person who secreted illegal substances in her home".

Conclusion

Channel 5 said that it did not believe that any Article 8 right on the part of Mrs Whitfield arose in the circumstances of this case, and therefore the filming did not involve any breach of the complainant's right to privacy.

The broadcaster said that even if the Article 8 rights of the complainant were engaged, the filming and subsequent broadcast of key aspects of the execution of a warrant under the Misuse of Drugs Act was a matter of genuine public interest, and the relevant Article 10 rights would outweigh any such Article 8 rights. Therefore, Channel 5 said it did not believe that any breach of Ofcom's Broadcasting Code ("the Code") was involved in either the filming or the broadcast of the programme.

Ofcom's Preliminary View

Ofcom prepared a Preliminary View on this case that the complaint should not be upheld. Both the complainant and the broadcaster were given the opportunity to make representations on the Preliminary View, but neither chose to do so.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unjust or unfair treatment and unwarranted infringement of privacy in, or in connection with the obtaining of material included in, programmes in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching this decision, Ofcom carefully considered all the relevant material. This included a recording of the programme as broadcast, both parties' written submissions, and supporting documentation.

In Ofcom's view, the individual's right to privacy under Article 8 of the ECHR has to be balanced against the competing rights of the broadcaster to freedom of expression and the audience's right to receive information under Article 10. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights in the circumstances of the case. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Code which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

In addition to this Rule, Section Eight (Privacy) of the Code contains "practices to be followed" by broadcasters when dealing with individuals or organisations participating in, or otherwise directly affected by programmes, or in the making of programmes. Following these practices will not necessarily avoid a breach of Rule 8.1 and failure to follow these practices will only constitute a breach where it results in an unwarranted infringement of privacy.

- a) We first considered Mrs Whitfield's complaint that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme because she was filmed in her house without her consent.

Ofcom had regard to Practices 8.5 and 8.9 of the Code. Practice 8.5 states:

"Any infringement of privacy in the making of a programme should be with the person's and/or organisation's consent or be otherwise warranted".

Practice 8.9 states:

"The means of obtaining material must be proportionate in all circumstances and in particular to the subject matter of the programme".

Ofcom first considered the extent to which Mrs Whitfield had a legitimate expectation of privacy, in the circumstances of the case, in relation to the obtaining of the footage of her in her house. The test applied by Ofcom as to whether a legitimate expectation of privacy arises is objective: it is fact sensitive and must always be judged in light of the circumstances in which the individual concerned finds him or herself. The Code's statement on the meaning of "legitimate expectation of privacy" makes clear that such an expectation:

"...will vary according to the place and nature of the information, activity or condition in question, the extent to which it is in the public domain (if at all) and whether the individual concerned is already in the public eye. There may be circumstances where people can reasonably expect privacy even in a public place...".

We assessed the nature of the material obtained and included in the programme. Mrs Whitfield was filmed dressed in a dressing gown in her home reacting to police officers as they conducted a search of the property based on information relating to suspected drug offences (as detailed above in the "Programme summary").

We noted Channel 5's view that filming the activities of police officers, which reflects what they do or see during an official police raid, cannot breach Article 8 and that the circumstances of the raid were "public", regardless of where it occurred. Ofcom considers that in each case the question of whether or not someone has a legitimate expectation of privacy with regards to the filming of footage of them for broadcast during the course of a police investigation is fact sensitive, and depends on all the relevant circumstances. In this case, other than being associated with her husband who

was being investigated for drug offences, Mrs Whitfield herself was not filmed engaged in any conduct or action that could reasonably be regarded as being particularly private or confidential in nature. However, Mrs Whitfield was filmed dressed in her nightwear during an unannounced police raid and subsequent search of her home in connection with possible drug offences. The interior of her home and personal belonging were filmed. We considered that being filmed in these circumstances could reasonably be regarded as being filmed in a sensitive situation.

Given all the factors above, we considered that Mrs Whitfield had a legitimate expectation of privacy in connection with the obtaining of the material included in the programme.

It was not disputed by the broadcaster that the footage of Mrs Whitfield was obtained without her consent. Ofcom therefore went on to consider whether this infringement of Mrs Whitfield's privacy was warranted in the circumstances of this case.

The Code states that "warranted" has a particular meaning. It means that, where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why, in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public.

Ofcom considers that there is a genuine public interest in the making and broadcasting of programmes such as this, which show the work of the police and the challenges they face. In particular, in this case, we considered that there was a public interest in a programme which explored the prevalence of drug related crime in the UK, and the efforts of police in their work to detect and prevent it. In our view, the obtaining of footage showing police officers gaining access to Mrs Whitfield's house during an unannounced raid and her reaction to it was important to this end. This was because it enabled the broadcaster to illustrate, by way of a real example, the work of the police in tackling drug related crime and the potential challenges faced as they carried out their work.

Ofcom also considered whether, in accordance with Practice 8.9, the footage filmed of Mrs Whitfield had been obtained proportionately in all the circumstances. The footage was filmed while the programme makers accompanied the police officers in carrying out their duties and the filming appeared to have been conducted openly and in an unobtrusive way. Given these circumstances, and taking into account the public interest in obtaining the material, Ofcom considered that the means of obtaining it had been proportionate.

Taking all the above factors into account, Ofcom considered that, on balance, the broadcaster's right to freedom of expression and the public interest in obtaining the footage of the police search of Mrs Whitfield's house outweighed her right to privacy in the circumstances of this case.

Therefore, Ofcom found that Mrs Whitfield's privacy was not unwarrantably infringed in connection with the obtaining of the material included in the programme.

- b) Ofcom then considered Mrs Whitfield's complaint that her privacy was unwarrantably infringed in the programme as broadcast.

We considered each of the sub-heads in turn.

- i) Footage of Mrs Whitfield in her house was included in the programme without her consent.

In considering this head of Mrs Whitfield's complaint, we had particular regard to Practice 8.6 of the Code which states:

"If the broadcast of a programme would infringe the privacy of a person, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted".

In considering whether Mrs Whitfield's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first assessed the extent to which she had a legitimate expectation of privacy in relation to the broadcast of the footage of her in her home included in the programme. As stated above, the test applied by Ofcom as to whether a legitimate expectation of privacy is objective is fact sensitive and must always be judged in light of the circumstances in which the individual finds him or herself.

As set out in detail above at head a) and in the "Programme summary" section, footage of Mrs Whitfield filmed in her home during an unannounced police drug raid was included in the programme. The footage showed Mrs Whitfield dressed in a dressing gown in her home reacting to police officers as they conducted a search of the property based on information relating to suspected drug offences. Mrs Whitfield was shown very briefly in the footage, her face was blurred and she was not named or referred to in the programme.

For the same reasons as set out at head a), we considered Mrs Whitfield had a legitimate expectation of privacy in relation to the inclusion of footage of her in the programme, although this was limited by the fact that the footage in which she was shown was very brief, her face was blurred, and no particularly sensitive information about her was revealed.

Having come to the Preliminary View that Mrs Whitfield had a legitimate expectation of privacy in relation to the inclusion of footage of her in the programme, and given that this footage was included in the programme without her consent, we therefore went on to consider whether the broadcast of the material was "warranted" (as explained above under head a)).

We carefully balanced Mrs Whitfield's right to privacy in the broadcast of the footage of her in the programme, with the broadcaster's right to freedom of expression and the audience's right to receive the information broadcast without unnecessary interference. For the same reasons as outlined in detail above in head a), Ofcom considered that there was a genuine public interest in the broadcasting of this programme which explored the prevalence of drug related crime in the UK, the efforts of the police in their work to detect and prevent it, and the impact that their

investigations can have on those under investigation and their family. It was in this context that Ofcom considered that there was a public interest in broadcasting the footage of Mrs Whitfield, who, although not under investigation herself, was present in her and her husband's home as it was being searched in relation to the drug investigation into her husband. The footage enabled the broadcaster to illustrate, by way of a real example, the work of the police, and, in particular, the effect that a police raid can have on the family of those who are under investigation. In balancing this public interest in broadcasting the footage against Mrs Whitfield's right to privacy, we took particular account of the circumstances of the case, specifically that, as set out above, Mrs Whitfield's expectation of privacy was limited in light of the nature of the footage.

Taking all these factors into account, we considered that, on balance, the public interest in including this particular footage in the programme outweighed Mrs Whitfield's limited legitimate expectation of privacy.

Therefore, Ofcom found that there was no unwarranted infringement of Mrs Whitfield's privacy relating to inclusion of the footage of her in her home in the programme as broadcast.

- ii) Footage of the outside of Mrs Whitfield's house was included in the programme without her consent.

In considering this head of Mrs Whitfield's complaint, we had particular regard to Practice 8.6 of the Code, as outlined above and also Practice 8.2 which states:

"Information which discloses the location of a person's home or family should not be revealed without permission, unless it is warranted".

In considering this head of complaint, Ofcom first assessed the extent to which Mrs Whitfield had a legitimate expectation of privacy in relation to the inclusion of the footage of the outside of her house in the programme. As stated above, the test applied by Ofcom as to whether a legitimate expectation of privacy is objective, it is fact sensitive and must always be judged in light of the circumstances in which the individual finds him or herself.

As set out in detail above in the "Programme summary", the programme included footage of police officers arriving at Mrs Whitfield's house before gaining entry by force in order to conduct a search in relation to possible drug offenses at the property. The street name was not shown and the complainant's house number, and the numbers of neighbouring houses were blurred, with the exception of one, which was shown fleetingly.

The programme did not give specific details of Mrs Whitfield's address (i.e. it did not disclose the street name). The programme stated that the location was Runcorn, a town in Cheshire, and only showed the number of a neighbouring house for a very short time. We therefore considered that it was unlikely that anyone to whom Mrs Whitfield and her family and their property were not already known would have discerned the location of Mrs Whitfield's home from the programme as broadcast. We also considered that the footage of the outside of her house appeared to have

been filmed openly and from a public street, and showed no more than would otherwise have been visible from the public street.

Taking all these factors into account, in the circumstances of this case, we did not consider that Mrs Whitfield had a legitimate expectation of privacy in relation to the inclusion of the footage of the outside of her house in the programme as broadcast. Having found that Mrs Whitfield did not have a legitimate expectation of privacy in relation to the inclusion of the footage of the outside of her house, it was unnecessary for Ofcom to consider whether any infringement of Mrs Whitfield's privacy was warranted.

Therefore, Ofcom found that there was no unwarranted infringement of Mrs Whitfield's privacy in the programme as broadcast.

Ofcom has not upheld Mrs Whitfield's complaint of unwarranted infringement of privacy in connection with the obtaining of material included in the programme, and in the programme as broadcast.