

Ofcom Broadcast Bulletin

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Introduction

The Broadcast Bulletin reports on the outcome of investigations into alleged breaches of those Ofcom codes which broadcasting licensees are required to comply. These include:

- a) Ofcom's Broadcasting Code ("the Code") which took effect on 25 July 2005 (with the exception of Rule 10.17 which came into effect on 1 July 2005). This Code is used to assess the compliance of all programmes broadcast on or after 25 July 2005. The Broadcasting Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>
- b) the Code on the Scheduling of Television Advertising ("COSTA") which came into effect on 1 September 2008 and contains rules on how much advertising and teleshopping may be scheduled in programmes, how many breaks are allowed and when they may be taken. COSTA can be found at http://www.ofcom.org.uk/tv/ifi/codes/code_adv/tacode.pdf.
- c) other codes and requirements that may also apply to broadcasters, depending on their circumstances. These include 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. Links to all these codes can be found at <http://www.ofcom.org.uk/tv/ifi/codes/>

From time to time adjudications relating to advertising content may appear in the Bulletin in relation to areas of advertising regulation which remain with Ofcom (including the application of statutory sanctions by Ofcom).

It is Ofcom policy to state the full language used on air by broadcasters who are the subject of a complaint where it is relevant to the case. Some of the language used in Ofcom Broadcast Bulletins may therefore cause offence.

Standards cases

In Breach

Appeals for funds for programmes

Glory TV, 1, 7 and 9 January 2009 (and repeated on other dates), various times

Introduction

Glory TV is a religious channel in the international section of the Sky Electronic Programme Guide (EPG). The channel is aimed at an Asian Christian audience. It broadcasts regular appeals for donations to fund its programming.

A viewer was concerned that the funds raised by Glory TV's appeals were not being used for the purpose described.

Rule 10.15 of the Code states that:

"Broadcasters may broadcast appeals for donations to make programmes or fund their service. The audience must be told of the purpose of the donation and how much has been raised as a result of the appeal. All donations must be separately accounted for and used for the purpose for which they were donated."

Ofcom therefore asked the broadcaster for documentary evidence to demonstrate how much money it had raised through donations from viewers and how this money had been spent.

Ofcom also noted that, during the appeals, the following text appeared continuously in a caption at the bottom of the screen "*For Donations Call Now*" which was accompanied by four mobile numbers and one landline number and the text "*Send Cheques to GLORY TV 91-93 Cleveland Street London W1T 6PL.*"

Further, underneath this ran a scroll bar which stated:

*"Dear Viewers, Jai Masih Ki, Welcome to Glory TV 'GOD'S GLORY' *****
PLEASE SUPPORT GLORY TV BY CALLING [the following are displayed: four
mobile numbers and one landline number and bank account details for Glory TV's
UK, Euro and USA Dollar accounts] ***** PLEASE SEND YOUR CHEQUES
TO GLORY TV, 91-93 CLEVELAND STREET, LONDON, W1T 6PL."*

In the programmes broadcast on 1 and 9 January 2009 this scroll bar ran throughout the majority of the appeals, however in the programme broadcast on 7 January 2009 which was 1 hour, 15 minutes long, the scroll bar only ran across the screen for 15 minutes.

During each appeal the presenters talked to callers who had pledged money. They also read psalms, sang hymns, told anecdotes and made further appeals to viewers to donate. The presenters also occasionally informed viewers about what their donations would be used for.

Ofcom further noted that during appeals for funds broadcast on Glory TV, some of the statements the presenters used to encourage viewers to donate suggested that if

viewers made generous donations to the channel, they would receive financial and other “blessings” as a result. For example:

“There are many brothers and sisters who can give five hundred or one thousand pounds, even two, three, or four thousand pounds and let us tell you that you will definitely be blessed”, and

“...on the Day of Judgement we will be answerable to everything we did.”

Ofcom therefore asked Glory TV for its comments with regards to Rule 4.6 of the Code:

“Religious programmes must not improperly exploit the susceptibilities of the audience.”

During an appeal for funds broadcast on 7 January 2009, the presenter offered ten CDs to viewers who pledged to donate £100 per month and a choice of one of the ten CDs to viewers who pledged to donate £50 per month. The presenter also talked about the contents of the CDs. During another appeal for funds broadcast on 9 January 2009, the presenter offered two of the studio guest’s (Asfi Bhatti) CDs to viewers who donated £100 and one of his CDs to viewers who donated £50. During the appeal both the presenter and the guest referred to the CDs and also to Mr Bhatti’s website:

Guest: *“I would like to say that my website is launched as well which is www.bgmm.co.uk. You can listen from Psalm one to ninety on the website. My testimony and my vision are also told on the website. We will put audios and videos on that pretty soon. Website was launched on January 1st.”*

Presenter: *“BGMM stands for Bhatti Gospel Music Ministries. Do log onto www.bgmm.co.uk for audios and videos.”*

Ofcom therefore also requested the broadcaster’s comments in relation to the following Code Rules:

- Rule 10.3 – Products and services must not be promoted in programmes. This rule does not apply to programme-related material.
- Rule 10.4 – No undue prominence may be given in any programme to a product or service.

Response

Rule 10.15

The licensee Glory TV Ltd (“Glory TV”) said that its channel does not carry advertising or sponsorship and therefore it relies on donations from viewers. It added that the channel was launched in March 2008, but that it did not begin to appeal for funds on air until June 2008.

The broadcaster said that it had spent all the money it had raised through the appeals on broadcast services such as playout facilities and its slot on the Sky platform. It provided Ofcom with bank statements as evidence of the donations it had received since June 2008 as well as supplier invoices as evidence of its expenditure.

Glory TV said that during its appeals it frequently informed viewers of the purpose of the donations and how much money it had raised. It added that it had also made a documentary to be broadcast on the channel to show its viewers the studio and playout facilities that it hires with the donations raised through broadcast appeals.

Rule 4.6

Glory TV reiterated that monies raised are used to fund the channel. It said that “many of the phrases relating to financial offering[s] stem from biblical references. This is something [Glory TV’s] viewers can relate to and [is] in context with the message that [Glory TV] is broadcasting”. It added that the channel “does not take a ‘hard sell’ approach to appeals or make any wild claims or promises...”. The broadcaster said that it does not believe that its programming “preys on viewers” or is “exploitative”.

The broadcaster said that “the reference to the Day of Judgement is a reminder that the message from God is that we are all accountable for our actions and answerable, it is better to gift [sic] than to receive. This message is something which Christians accept and endeavour to live their life by. The programmes [contain] no harmful or offensive material”. The broadcaster added that it “understand[s] that for some people religion in any form is harmful and offensive”.

Rules 10.3 and 10.4

Glory TV told Ofcom that “as a matter of course” it sends CDs and DVDs to viewers who donate money to the channel. It said that there was “no advertising and the CD was not being offered for sale”, however, it admitted that the CDs were described in an unduly prominent manner although this was unintentional; the programmes were unscripted and the presenter and the guest had not realised that they had made such frequent references to the CDs. It added that there was “no advertising or commercial activity” in the programmes and that in programmes of this nature, Glory TV often has guests that “promote their book, CD or DVD”. It argued that when looked at as a series of programmes, there is a balance and no one individual is unduly promoted. It added that the references to the guest’s website were programme-related material.

Decision

Rule 10.15

Broadcasters are permitted to appeal for funds for the purpose of funding their services or programmes. However, licensees must be able to demonstrate to Ofcom that any funds raised can be accounted for and are used solely for the purpose for which they were raised. Further, audiences must be told the purpose of the donations, and how much has been raised as a result of the appeal.

Having assessed the documentary evidence requested from Glory TV, Ofcom noted that the amount which Glory TV had spent on running the channel – in this instance, its playout facilities and its slot on the Sky platform, was greater than the amount raised from donations. Ofcom therefore concluded that there was no evidence that the funds raised by the appeals were used for any purpose other than to fund the running of the channel. However, in Ofcom’s view, the way the accounts were presented could have been clearer, and guidance has been given to the licensee in this respect.

In relation to the requirement of Rule 10.15 that the audience must be told how much has been raised as a result of the appeal, Ofcom noted that during its appeal for funds broadcast on 7 January 2009, viewers were informed about how much Glory

TV had raised during its last appeal for funds in November 2008. The licensee was therefore not in breach of this aspect of Rule 10.15. However, Ofcom also noted that during this particular appeal, the presenter only mentioned the amount raised on one occasion during the programme, so viewers who did not watch the entire programme (1 hour and 15 minutes in duration) were unlikely to have been aware of the amount Glory TV had raised in November 2008. Ofcom has given the licensee further guidance on this issue.

As regards the requirement of Rule 10.15 that the audience must be told of the purpose of the donations, Ofcom noted that in the appeals broadcast on 1, 7 and 9 January 2009, the on-screen text informed viewers *“For Donations Call Now”* and provided details of the various ways of donating. The scroll bar, (which in the appeal broadcast on 7 January 2009 only ran across the screen for a short period of the appeal), stated: *“PLEASE SUPPORT GLORY TV BY CALLING [details of various ways of donating]”*.

During each appeal the presenters talked to callers who had pledged money. They also read psalms, sang hymns, told anecdotes and made further appeals to viewers to donate. The presenters also occasionally informed viewers about what their donations would be used for, for example:

1 January 2009

“We require £42,000 every month to meet our target.”

“We are not raising this for ourselves, but to share the Word of God with you and to keep Glory TV live on satellite.”

7 January 2009

“If we get our budget for six months, I am telling you every single day you would get not three live shows but five live shows and maybe two or three brand new shows that were filmed in different countries can be gotten for you, because we do not have resources at all, because we do not have funds”; and

9 January 2009

“To run Glory TV day and night your help is needed.”

Ofcom considered that, during these lengthy appeals (sometimes lasting for the duration of the programme in question), viewers were only informed occasionally about the purpose of the appeals and were given a minimum of information about what their donations were going to be spent on. While, on balance, Ofcom considered that these explanations had met the requirements of Rule 10.15, it nevertheless took the infrequency of these explanations about the purpose of the appeals into account when considering the appeals in relation to Rule 4.6 (see further below).

Rule 4.6

When broadcasters of religious programmes are soliciting funds from their audience in the form of an appeal, they may wish to refer to Ofcom’s published guidance on Rule 4.6¹ which states: “respondents to Ofcom research on religious programmes believe that all people are susceptible at one time or another. There are times when it will be clear to the broadcaster that they are soliciting an actual response from their audience. At these times broadcasters need to take care and recognise the possible risk to audience members particularly the vulnerable.”

¹ <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/guidance4.pdf>

In this case, Ofcom was concerned about statements made by the presenters and guests at various points throughout several broadcasts appealing for funds, for example:

1 January 2009

Presenter: *"Call the numbers given on screen and somebody's waiting for your call. Give your best offering. When you give generously to God, He returns in that way too."*

Presenter: *"There are many brothers and sisters who can give five hundred or one thousand pounds, even two, three, or four thousand pounds and let us tell you that you will definitely be blessed".*

7 January 2009

Presenter: *"I will share testimonies in connection with finances. One sister who has said that Pam, when I took this commitment to lay aside one hundred pounds as long as I live, I will give one hundred pounds. Sister we are going to send you this whole packet; she said Pam I did not realise that immediately I received a profit of one thousand pounds; the Lord blessed her. This is a good testimony but we do not say that if you give one hundred, you will profit one thousand; our God doesn't work like that. It's not a deal of loss for anyone. You know how they say that if you sow a good seed you will reap a good harvest. Please don't let the phones be quiet".*

9 January 2009

Presenter: *"So kindly call on those numbers and if you want to send the cheques, note the details, which can be seen on the bottom of the screen scrolling, so you can write down the details. We are expecting calls from all over the world and when you will call in, you will say that dear Lord I love you and I want to take part in your work with faithfulness. It will be a new beginning for you, as well as for your family".*

Guest: *"I would say that the way we give to God, He gives us back like that. If we give one pound, we can't expect to get back a lot. So this is the way of giving and getting that back, I was here before and I told that the Israelites were told to take gold and silver from Egyptians. This is how God make it possible to take these things from people sometimes. This is God's work..."*

Presenter: *"What financial blessing have you got since you have become a partner [of Glory TV]?"*

Guest: *"Benefits – first of all I would say that I sleep well, which you can't buy with money and I don't fall sick, I feel great on the work. This is God's promise with me that if you are faithful with me, I will be faithful a hundred times more than that you are so. One day I was sitting somewhere and I was saying that I have no problem at all, that's the blessing of God upon me. Whatever I can afford I do spend on God's work, I would say roughly I do spend 25% of my income on God's work. I never feel sad, I feel a blessing".*

Presenter: *“This is guaranteed. When you take care of God’s work, He takes care of us.”*

Presenter: *“Give generously. God’s never let us down. We shouldn’t be left behind by not participating in God’s work and all who are enjoying watching the show.... I will request brothers and sisters, even if you are a pensioner and give five pounds, God can return these five pounds in the form of five thousand pounds.”*

Presenter: *“I told in my testimony that if we get whole richness of the world, but still lose our soul then what’s the benefit out of that. So on the Day of Judgement we will be answerable to everything we did. We want to encourage you and standing by to take your calls [for donations].”*

While Glory TV told Ofcom that it does not believe that its programming is exploitative, Ofcom considers that vulnerable people, such as those experiencing financial or emotional difficulties, may be encouraged to give large donations. In particular, Ofcom considers that persuading viewers to donate money on the basis of inducements such as better health; that God will create further wealth to donors; and that God will take particular care of donors is unacceptable. In Ofcom’s view, such inducements carry the risk that susceptible members of the audience may be exploited – and persuaded to give large donations as a result.

Ofcom also took into account, as stated above, that during these lengthy appeals, viewers were informed very infrequently about the purpose of the appeals and what the donations would be spent on. As a result, Ofcom considered that there was an even greater likelihood that susceptible members of the audience would believe that the purpose of their donation was to receive the inducements described. Ofcom therefore found the appeals in breach of Rule 4.6. This is a serious breach of the Code.

Rules 10.3 and 10.4

One of the fundamental principles of European broadcasting regulation is that advertising and programming (that is, editorial content) must be kept separate. This is set out in Article 10 of the Television Without Frontiers Directive which is in turn reflected in the rules in Section Ten (Commercial References in Programmes) of the Code.

Ofcom noted references to CDs in the appeal programmes, including:

7 January 2009

“Quickly I want to tell you about these CDs: the gospel of Luke and Mera Yesu Mahan, and the Jai Masih Ki CD is very significant because it has been sung with a very popular artist from Pakistan. Mehnaz was brother Sarfaz’s very first CD that he recorded; and other than that Lakh Mae Purab Jawan Kakh Mae Pachim Jawan CD will also be available for you if you like. Life of the Messiah in different languages is available with us; Pak Ruh Aa; all these CDs we are showing you if you have just joined us that if you become a member of, a Glory TV partner, if you become part of this and if you pledge to give £100 per month, this beautiful pack of CDs from Glory TV will be presented to you and if you pledge and or give £50 a month we will give you the choice of your favourite CD.”

9 January 2009

“To date nine CDs are available, Psalm one to ninety are recorded and available on these CDs. I [Asif Bhatti] have recorded popular Psalms separately, so they are available too in four volumes. Series of the CDs is compiled from ten to twenty like this and I have compiled those Psalms which were less famous tune wise...”

As well as references to the CDs, in the appeal for funds broadcast on 9 January 2009, both the presenter and the guest referred to the studio guest Asif Bhatti’s website:

Asif Bhatti: *“I would like to say that my website is launched as well which is www.bgmm.co.uk. You can listen from Psalm one to ninety on the website. My testimony and my vision are also told on the website. We will put audios and videos on that pretty soon. Website was launched on January 1st.”*

Presenter: *“BGMM stands for Bhatti Gospel Music Ministries. Do log onto www.bgmm.co.uk for audios and videos”.*

Undue prominence may result from the presence of, or reference to, a product or service in a programme where there is no editorial justification. Ofcom considered that there was no editorial justification for the detail given about the content of the CDs in these programmes which were appeals for funds for the channel. Therefore the references to the CDs, and the reference to the guest’s website, were unduly prominent, in breach of Rule 10.4.

Ofcom considered that the nature of these references served to promote both the CDs and the guest’s website. The licensee submitted that the references to the website constituted programme-related material, as allowed by Rule 10.3. However, Ofcom considered that the website, referred to in the appeal for funds broadcast on 9 January 2009, was not directly derived from the programme, nor did it allow viewers to benefit fully from the programme and as such could not be considered to be programme-related material. Therefore the programmes were also in breach of Rule 10.3 of the Code.

1 January 2009: Breach of Rules 4.6

7 and 9 January 2009: Breach of Rules 4.6, 10.3 and 10.4

In Breach

Specsavers Sticker Spotters

Radio Hartlepool, December 2008 to 23 March 2009, weekdays, 16:15

Introduction

Radio Hartlepool is a Community Radio music station run by and for the people of Hartlepool, providing a locally produced popular music, news and information service.

Specsavers Sticker Spotters is a competition that has featured in Radio Hartlepool's weekday drivetime show since December 2008. Listeners to Radio Hartlepool have to collect a sticker from the radio station and display it in their car. A station 'sticker spotter' then selects, at random, a car displaying a Radio Hartlepool car sticker. The registration number of the car is announced on air. The owner of the car has the chance to claim the day's prize within 102 minutes of the announcement (102.4 MHz being the frequency of the station). The prize starts at £10 and is increased by £10 each day until it is claimed.

Three listeners believed that some car registration numbers announced on air were "false or incorrect".

Ofcom listened to sample recordings of three registration number announcements, two of which did not appear on a publicly available car registration database (www.mycarcheck.com). We therefore asked Radio Hartlepool for its comments with regard to Rule 2.11 of the Code, which states, among other things, that, "competitions should be conducted fairly..."

Response

Radio Hartlepool originally thanked Ofcom for checking the registration numbers and said that to carry out such checks itself "would not be cost effective...". The broadcaster added that it had replaced the 'sticker spotter' responsible for selecting registration numbers.

After a request from Ofcom for clarification, the broadcaster provided a copy of the terms and conditions of the competition and admitted that a listener had called Radio Hartlepool on 23 March 2009, having noticed that the car registration number announced on air was not genuine. The broadcaster explained that the 'sticker spotter' had relayed "false or untrue registration numbers" to the drivetime presenter who had then broadcast them. It added that the 'sticker spotter' was "no longer with Radio Hartlepool."

Radio Hartlepool added that, since 24 March 2009, it had ensured that only genuine and eligible car registration numbers were 'spotted' for broadcast. The broadcaster said that members of the Management team now drove around Hartlepool themselves obtaining genuine vehicle registration numbers, so no further "confusion" could occur.

Decision

Ofcom recognises that *Specsavers Sticker Spotters* is effectively a weekday free prize draw. Listeners to the competition were not therefore financially disadvantaged by the announcement on air of an incorrect registration number on any specific day. Ofcom noted that, when such an announcement was made, it resulted in the prize not only remaining but also being increased by ten pounds.

Nevertheless, Ofcom believes that listeners' trust in the broadcaster is paramount. Where such competitions are found to breach that trust, Ofcom considers they have been run unfairly.

Ofcom does not agree with Radio Hartlepool's initial assertion that to check the validity of car registration numbers before broadcast "would not be cost effective...", as such a policy would appear to involve little effort and therefore negligible expense. Further, it would be expected that the radio station would transmit genuine registration numbers.

On every day the competition was run, any listener with a Radio Hartlepool sticker in their car would have legitimately expected that, in accordance with the terms and conditions of the competition, they had a chance to win the prize. However, by the licensee's own admission, on an unconfirmed number of occasions, incorrect registration numbers were announced on air.

Ofcom noted that the competition:

- was conducted in contravention of its rules;
- involved the broadcast of incorrect information; and
- could not have been won on any day an incorrect car registration number was announced on air.

The competition was therefore conducted unfairly, in breach of Rule 2.11 of the Code.

Ofcom was concerned that the broadcaster did not provide full details of what had occurred in this instance, when its formal comments on the matter were first requested. Radio Hartlepool had, in fact, been aware of the issue since 23 March 2009, when it had been contacted on the matter by a listener.

We therefore reminded the broadcaster of its obligation under General Condition 9(1) of its licence to broadcast, which states that: "The licensee shall maintain records and furnish to Ofcom in such a manner and at such times as Ofcom may reasonably require such ... information..." in carrying out its statutory duties. Any future similar delay by the licensee in the provision of information relevant to an investigation by Ofcom will result in a breach of the broadcaster's licence.

Breach of Rule 2.11

In Breach

Sunday Lie-in

Bath FM, 26 April 2009, 08:00

Introduction

Throughout the first half of this four-hour late breakfast show the presenters regularly trailed live links that would take place later in the programme, when “*Kate, Paul and the team*” would be “*live from Champneys [spa] from 10am until midday*”, as it was having a “*big open day.*”

These trails included a number of references promoting various Champneys’ services and/or offers, including:

- eyebrow shaping;
- massage;
- spray tanning;
- complementary bucks fizz and nibbles;
- makeovers; and
- free goody bags.

During commercial breaks the broadcaster also ran advertisements for Champneys’ promoting its open day, highlighting among other things, a prize draw and various beauty treatments, including an exclusive offer for Bath FM listeners (a facial for £10).

During the live links themselves, which featured throughout the second half of the programme, the presenters at Champneys (“*Kate, Paul and the team*”) spoke extensively about the products and services available at its open day, including those listed above, and interviewed Champneys’ spa manager about available beauty treatments.

Bath FM confirmed that, in addition to the advertising campaign, Champneys had also paid for the programming coverage. Ofcom noted that no sponsorship credits were aired around this programming.

We sought Bath FM’s comments, with regard to the following Code rules¹:

- Rule 9.4 – A sponsor must not influence the content and/or scheduling of a ... programme in such a way as to impair the responsibility and editorial independence of the broadcaster.
- Rule 9.5 – There must be no promotional reference to the sponsor.
- Rule 9.6 – Sponsorship ... credits must be broadcast at the beginning and/or end of the programme.
- Rule 9.7 – The relationship between the sponsor and the sponsored ... programme must be transparent.

¹ With particular reference to radio, the ‘How to Use the Code’ section of the Code states: “In this Code, the word ‘programmes’ is taken to mean ... radio programmes/programming.”

Response

Bath FM said that the Sales Manager at the time of broadcast “did not have a full understanding” of the rules concerning sponsorship, adding that it believed the programming coverage concerning Champneys’ open day was “an error in his judgement and should not have taken place in the format that it did.” The broadcaster said that it could not justify the Sales Manager’s actions and added that he no longer worked for Bath FM.

To ensure future compliance, Bath FM said it had subsequently suspended “any commercial activity that [was] not within advertising breaks”, while it sought clarification concerning Ofcom’s sponsorship rules. It added that it had also issued new guidelines concerning “paid for activity”, which included all sponsorship arrangements being approved by either the Director of Bath FM or the new Sales Director.

Decision

The coverage in programming of Champneys open day had been paid for by the spa. The trails for, and live links from, Champneys’ open day that occurred throughout the editorial content of *Sunday Lie-in* were therefore sponsored programming.

Ofcom was particularly concerned that throughout *Sunday Lie-in* most of the trails for, and broadcast links from, Champneys appeared to extend the spa’s marketing campaign by promoting its open day, which was also advertised in the programme’s commercial breaks. With no clear editorial justification for the promotion and coverage of Champneys’ open day within the trails and live links, Ofcom concluded that the sponsor had been allowed to influence programming content and impair the editorial independence of Bath FM, in breach of Rule 9.4 of the Code.

Champneys’ Spa Manager and the presenters – in both the studio and “*live from Champneys*” – promoted in programming the services available at Champneys (e.g. massage and makeovers) and specific offers available at the spa during its open day (e.g. free eyebrow shaping). The programming was therefore in breach of Rule 9.5 of the Code, which prohibits, among other things, promotional references to the sponsor and its services in programming.

Programming was broadcast from the sponsor’s venue and also featured a credited representative of the sponsor (Champneys’ Spa Manager). Even if the aired references to the sponsor had not been promotional, non-promotional references to the sponsor were aired. These were also in breach of Rule 9.5, which requires that such references are incidental.

One of the principles of Section Nine (sponsorship) of the Code is that sponsorship arrangements are made transparent to the audience. This is ensured by the broadcast of sponsorship credits around sponsored programming. However, in this case, no sponsor credits appeared around the trails or live links (i.e. the sponsored programming), in breach of Rule 9.6 of the Code, which requires that such credits appear at the beginning and/or end of sponsored programming.

Rule 9.7 of the Code states that the relationship between the sponsor and the sponsored programming must be transparent. In addition to the absence of sponsor credits in this case, Ofcom noted that the programming in question:

- was highly promotional for Champneys (the sponsor); and

- contained no other substantive editorial content.

The relationship between the sponsor and what little legitimate programming it had sponsored was therefore unclear and in breach of Rule 9.7 of the Code.

Ofcom is due to meet the broadcaster to provide the clarification it sought concerning Section Nine (Sponsorship) of the Code.

Breach of Rules 9.4, 9.5, 9.6 and 9.7

In Breach

Trail for Win with Sky

Hallam FM (South Yorkshire), 22 April 2009 to 1 May 2009, various times

Introduction

Win with Sky was a sponsored listener competition feature, broadcast daily in Hallam FM's breakfast show from 27 April 2009 to 1 May 2009. It was promoted regularly in a programming trail from 22 April 2009.

The trail lasted thirty seconds. It informed listeners that the broadcaster was conducting a competition during this or the following week, described the prize of "Sky free for a year" and ended with the following sponsorship credit:

"Win with Sky – more of the TV you want, without paying for the stuff you don't – with Big John at Breakfast on Hallam FM."

A listener disagreed with the claim, "...more of the TV you want, without paying for the stuff that you don't", adding that if someone wanted to watch only Sky Sports or Sky Movies, they would "still have to pay for at least 1 of ... 6 entertainment packs."

Rule 9.10 of the Code requires that radio sponsorship credits are "cleared for broadcast in the same way as advertisements."

Section 1 Rule 4.6 of the BCAP Radio Advertising Standards Code ("the BCAP Code") requires that "'special categories' of advertisements or sponsorship", which include forms of UK-wide media (for example, Sky – the sponsor in this case), are approved in advance for broadcast by the Radio Advertising Clearance Centre (RACC).

Ofcom sought Hallam FM's confirmation that the sponsor credit was appropriately cleared for broadcast. We also pointed out to the broadcaster that, if the credit had not been approved by the RACC, it must ensure that no sponsorship credits featuring the contested claim were broadcast again until central (i.e. RACC) copy clearance had been obtained.

Response

Bauer Radio, which owns Hallam FM, confirmed that RACC approval had not been obtained prior to the broadcast of the sponsor credit and apologised for its oversight concerning UK-wide media as a 'special category' of sponsor. Bauer said that it had taken steps to avoid recurrence, adding that it strived to comply with the Code and it intended to address the matter in its Sales and Promotions teams' compliance training programme.

Decision

We welcomed Bauer's apology, action and assurance. However, failure to ensure that sponsorship crediting any UK-wide media (in this case, Sky) is appropriately cleared for broadcast is a clear breach of Section 1 Rule 4.6 of the BCAP Code. The

sponsor credit had not been approved by the RACC in advance of broadcast, and therefore should not have been aired and was in breach of the BCAP Code.

Breach of Rule 9.10 of the Code

Breach of Section 1 (Advertisements), Rule 4.6 (Central Copy Clearance) of the BCAP Code

In Breach

Trail for Win with Sky

Absolute Radio (National), 20 April 2009 to 1 May 2009, various times

Introduction

Win with Sky was a sponsored listener competition feature, broadcast daily in Absolute Radio's breakfast show from 27 April 2009 to 1 May 2009. It was promoted on air regularly from 20 April 2009. The promotion lasted forty-five seconds and stated:

"Are you a [sound effect ("sfx"): scream] murder solver, [sfx: owl hooting] nature lover [sfx: heavy guitar chord] or a head banger? Everyone's different and, whatever you're into, with Sky, you can choose the type of TV you want without paying for the stuff you don't. Listen to Christian O'Connell when you wake up all next week, to win a holiday designed around the stuff you love. Go on safari, see your favourite band, win the ultimate murder mystery weekend – it's up to you – and you'll also win Sky, free for a year, and the choice of the entertainment pack that suits you. With Sky – choose the TV you want, without paying for the things you don't. Get more at absoluteradio.co.uk. Absolute Radio."

A listener believed the claim, "*choose the TV you want, without paying for the things you don't*", was misleading. The complainant claimed that, if someone wanted to watch only Sky Sports or Sky Movies, they would also "have to purchase at least 1 [of] their 6 Entertainment Packs...", as "Sports or Movie Packs are ... regarded as an 'Add-On'..."

On hearing the promotion, it was unclear to Ofcom whether it was an advertisement for Sky, which also promoted the listener competition feature on Absolute Radio, or whether it was intended primarily as a programming trail for the competition. Absolute Radio confirmed that the output in question was a programming trail for the listener competition feature, which was sponsored by Sky. We therefore sought the broadcaster's comments with regard to the following Code Rules:

- Rule 9.6 – Sponsorship must be clearly identified as such by reference to the name ... of the sponsor. For programmes, credits must be broadcast at the beginning and/or end of the programme.
- Rule 9.7 – The relationship between the sponsor and the sponsored ... programme must be transparent.
- Rule 9.9 – [Sponsorship] credits must be short branding statements...; and
- Rule 9.10 – [Sponsorship] credits must be cleared for broadcast in the same way as advertisements.

With regard to Rule 9.10 of the Code, Section 1 Rule 4.6 of the BCAP Radio Advertising Standards Code ("the BCAP Code") requires that "special categories' of advertisements or sponsorship", which include forms of UK-wide media (for example, Sky – the sponsor in this case), are approved in advance for broadcast by the Radio Advertising Clearance Centre (RACC). We therefore pointed out to the broadcaster that, if the credit had not been approved by the RACC, it must ensure that no sponsorship credits featuring the contested claim were broadcast again until central (i.e. RACC) copy clearance had been obtained.

Response

Absolute Radio believed it had clearly identified Sky as the sponsor of the competition.

The broadcaster said it believed that “the promotional trail had clear sponsorship credits at both the beginning and the end, and there was no promotional reference to the sponsor within the body of the actual trail itself.” It stated that the opening sponsor credit was, “*Everyone’s different and, whatever you’re into, with Sky, you can choose the type of TV you want without paying for the stuff you don’t*”, which it believed was a sufficiently short branding statement.

However, Absolute Radio acknowledged that RACC approval had not been obtained prior to the broadcast of the sponsor credits and that it had therefore breached Rule 9.10 of the Code. The broadcaster added that it had “subsequently reviewed internal operations and put new procedures in place to ensure that sponsorship credits [were] correctly cleared with the RACC in future.”

Decision

As stated in the Code, broadcast trails for sponsored programming on radio are treated as sponsored programming, and the same sponsorship rules apply.

Rule 9.6 of the Code requires that “sponsorship must be clearly identified as such by reference to the name ... of the sponsor” and “credits must be broadcast at the beginning and/or end” of the relevant programming. Rule 9.7 of the Code requires that “the relationship between the sponsor and the sponsored ... programme must be transparent.”

Ofcom noted that, while the trail did not name the title of the programming being promoted (*Win with Sky*), listeners were clearly made aware of an impending competition. The trail included the following brief reference to when the competition would run and a description of the prize being offered:

“Listen to Christian O’Connell when you wake up all next week, to win a holiday designed around the stuff you love. Go on safari, see your favourite band, win the ultimate murder mystery weekend – it’s up to you – and you’ll also win Sky, free for a year, and the choice of the entertainment pack that suits you.”

The trail was then followed by:

“With Sky – choose the TV you want, without paying for the things you don’t. Get more at absoluteradio.co.uk – Absolute Radio.”

This did not name the title of the programming that had just been promoted. However, given it was announced directly after the trail, Ofcom considers, on balance, that it amounted to a sponsor credit. Listeners were likely not only to assume that Sky had donated the prize for the competition that had just been trailed (which included, “*Sky, free for a year, and the choice of the entertainment pack that suits you*”) but also to conclude that the competition was sponsored by Sky.

The programming was not therefore in breach of Rules 9.6 or 9.7 of the Code.

Absolute Radio claimed that the programming under investigation “had clear sponsorship credits at both the beginning and the end.” However, Ofcom did not agree with the broadcaster’s view that the trail was preceded by a sponsor credit.

The trail was preceded by consideration of listeners’ different possible interests (i.e. “*Are you a murder solver, nature lover or a head banger? Everyone’s different...*”) before the announcement that “...*whatever you’re into, with Sky, you can choose the type of TV you want without paying for the stuff you don’t.*” Ofcom considers that the preamble appeared within the opening sponsor credit and merely highlighted the advertising claim it contained rather than identified any specific programming that was sponsored by Sky. It therefore sounded more like an advertisement for the satellite broadcaster than a sponsor credit for programming on Absolute Radio.

Rule 9.9 requires that “credits must be short branding statements...” Our published guidance to this Rule reminds broadcasters that the primary purpose of a sponsor credit is to inform listeners of the sponsorship arrangement. It advises broadcasters that “a full sponsor credit comprises the sponsor’s name and identifies clearly the sponsored output...”, adding that, while credits may contain limited legitimate advertising messages, they “should not sound like advertisements.” In this case, the content was not a valid sponsor credit. Its primary purpose appeared to be to promote Sky, it did not identify the sponsored output and it sounded like an advertisement. This sponsor credit was therefore in breach of Rule 9.9 of the Code.

We welcomed the action taken by Absolute Radio to ensure future compliance with Rule 9.10 of the Code, concerning appropriate clearance of sponsor credits. However, failure to ensure that sponsorship crediting any UK-wide media (in this case, Sky) is appropriately cleared for broadcast is a clear breach of Section 1 Rule 4.6 of the BCAP Code. The intended sponsor credits had not been approved by the RACC in advance of broadcast, should not have been aired and were in breach of the BCAP Code.

**Breach of Rules 9.9 and 9.10 of the Code
Breach of Section 1 (Advertisements), Rule 4.6 (Central Copy Clearance) of the BCAP Code**

In Breach

The X Files

Virgin 1, 21 April 2009, 19:00

Introduction

Virgin 1 is a general entertainment channel, which is available without access restrictions on all digital platforms. *The X Files* is a drama series devoted to two FBI agents and their attempts to solve cases that appear to have some unexplained, paranormal element.

In this episode, a family (“the Holvey family”) is apparently infiltrated by the spirit of their dead son. This particular episode of *The X Files*, entitled *The Calusari* (“the *Calusari* Episode”) had received a BBFC ‘18’ rating in April 1997 for video release.

During the course of the programme the spirit periodically possessed the Holvey family’s living son, Charlie, and brings about the death of three members of the Holvey family. The family members were killed by: being pushed into the path of an on-coming fairground train; being attacked by birds; and, strangulation.

The culmination of the episode shows Charlie, in a hospital bed, being exorcised of the spirit by several Romanian ritualists (the eponymous *Calusari*). Intercut with this scene is one in which the programme’s hero, agent Scully, is trapped in the family home and on the point of being attacked with a knife by the spirit. Whilst the exorcism was being performed, Charlie was shown as being possessed by the purported spirit and attempting to resist the effects of the ritual. At one point during the exorcism scene Charlie struggled to such an extent with the ritualists (who were holding him down) that his neck bones sounded as if they had cracked.

Ofcom received a complaint that this episode of the series contained frightening content and was unsuitable for broadcast before the watershed.

Ofcom asked Virgin Media (which complies Virgin 1) for its comments under Rule 1.21 (BBFC 18-rated films or their equivalent must not be broadcast before the watershed).

Response

Virgin Media said that: “we take compliance responsibilities very seriously and we would never intentionally broadcast any programming that we feel would offend or cause harm or distress to our viewers”. Further, the broadcaster considered the content within the *Calusari* Episode to be typical of *The X Files*, although the broadcaster admitted that the programme was “more at the stronger end of the scale”.

However, Virgin Media noted the age of this particular episode, and said that “by comparing the material to other programming offered in today’s viewing climate, the content would be less likely to cause offence or outcry, as a modern day viewing audience is more savvy and has a greater awareness about what to expect – particularly in a show that has been running for over a decade”.

With regard to Rule 1.21, Virgin Media noted that the programme had received a BBFC '18' rating, but this had been in 1997. In addition, the broadcaster said its decision to broadcast this episode was informed by two events. First, the fact that Ofcom had previously not upheld a complaint against the broadcaster under Rule 1.3 of the Code, with regard to an episode of *The X Files* that had been transmitted at 16:00. The broadcaster confirmed that this episode, entitled *Quagmire* ("the *Quagmire* Episode"), had received a BBFC '12' rating in 1998. Second, following the not uphold decision concerning the *Quagmire* Episode, the broadcaster had carried out an extensive review ("the Review") of a number of series, to see how the broadcaster could exploit its programme catalogue "in today's more challenging economic climate". The broadcaster said that Ofcom's not upheld decision in relation to the *Quagmire* Episode had led Virgin Media, as part of its Review, to re-examine various episodes of *The X Files* "to see if we could update their broadcast classifications as part of the catalogue review".

In summary, the broadcaster said that the Review had taken account of "the certification and the content in question" in the *Calusari* Episode. However, the broadcaster had concluded that though the content in this episode was "edgy and pertaining to a supernatural theme, its certification was likely to be deemed out dated when compared to the more recent certifications for such thematic content which in fact contains stronger material".

In reaching this conclusion, Virgin Media considered that as Ofcom had considered it acceptable for BBFC '12' rated content (the *Quagmire* Episode) to be broadcast at 16:00 "we felt that this BBFC certified 18 [i.e. the *Calusari*] episode, which was certified 12 years ago, would be acceptable to be broadcast at 7pm". The broadcaster also cited two examples of programmes¹ that had received BBFC '15' ratings in recent years, which the broadcaster considered contained much stronger content than the *Calusari* Episode, and which Virgin Media said it had used as comparators for justifying its broadcast of the *Calusari* Episode. For example, the broadcaster considered that *The Exorcism of Emily Rose*, which had received a BBFC '15' rating in 2005, and had been classed as "a strong supernatural horror with moderate violence" by the BBFC, contained, in Virgin Media's opinion "profound and imposing horrific scenes...which are considerably stronger than" the *Calusari* Episode. Virgin Media noted that, in comparison, the BBFC had summarised the *Calusari* Episode as containing "occasional strong horror".

The result of the Review was that the *Calusari* Episode was one of the "slightly stronger episodes" of *The X Files*, to be given a "No School Holidays' certification" (which prevented the broadcast of such programmes "over any weekend and when children are likely to be on holiday").

Decision

The X Files is a popular drama series, well known for its dramatic treatment of a range of unexplained phenomena, and the efforts of the series' two heroes, agents Mulder and Scully to unravel the mysteries behind these phenomena. Ofcom considered that, whilst the *Calusari* Episode was in that tradition, it was, as Virgin Media had noted, "stronger" than other episodes from *The X Files* strand. Ofcom noted that the overarching dark and menacing paranormal theme of the programme resulted in the *Calusari* Episode receiving a BBFC '18' rating.

¹ *The Exorcist – the Beginning* (rated '15' in 2004) and *The Exorcism of Emily Rose* (rated '15' in 2005)..

Ofcom considered Virgin Media's contention that due to Ofcom not previously upholding a complaint, under Rule 1.3 of the Code, involving the *Quagmire* Episode, which had received a BBFC '12' rating and had been shown at 16:00, the broadcaster considered it acceptable to show the *Calusari* Episode (BBFC rated '18') at 19:00, given that the latter had received its BBFC rating in 1997.

However, Ofcom noted that in the case of the *Quagmire* Episode, although Ofcom decided not to uphold the complaint in that case, Virgin Media subsequently edited the programme for all future pre-watershed transmissions. This was despite the *Quagmire* Episode receiving a BBFC '12' certificate in 1998. This contrasted with the present case, involving the *Calusari* Episode, in which a BBFC '18' rated episode was broadcast unedited at 19:00 despite there being an absolute prohibition under the Code against '18' rated material, or its equivalent, being broadcast before the 21:00 watershed on all channels which are not pay per view. Ofcom acknowledged that the '18' rating had been given to the episode some 12 years prior to the broadcast, but noted that this episode has not been re-classified by the BBFC since. To Ofcom's knowledge the *Calusari* Episode is the only episode of *The X Files* currently in receipt of a BBFC '18' certificate.

Ofcom also noted Virgin Media's comparison of the *Calusari* Episode to two films which had received BBFC '15' ratings in 2004 and 2005. Ofcom did not accept this argument because the rule clearly states that BBFC '18' rated material must not be broadcast before the watershed on any service. This Rule applies, regardless of the time that has lapsed since the material was originally rated and the broadcaster's own judgement on the strength of the material in comparison to more recent films.

Ofcom considered that the BBFC's summary of the *Calusari* Episode as containing "occasional strong horror" was an accurate reflection of this programme. This description, taken together with its BBFC '18' rating should have alerted the broadcaster to the potential harm and/or offence of various scenes within the programme (in particular the exorcism scene, to any children that might have been watching).

Given the above, the programme was therefore in breach of Rule 1.21.

Ofcom is conscious that some channels, such as Virgin 1, will be targeting their output principally towards an adult audience even before the watershed. However, such broadcasters, when they broadcast without access restrictions, must be aware of the need of ensuring that all content is appropriately scheduled so as to provide appropriate protection for any children who might be in the audience. Ofcom reminds all broadcasters of the special care that needs to be taken when considering broadcasting BBFC '18' rated content, irrespective of the time that has elapsed since the original rating.

Breach of Rule 1.21

In Breach

Talkback

BBC Radio Ulster, 22 May 2009, 13:00

Introduction

Talkback is a political and current-affairs phone-in programme broadcast daily after the midday news. This edition of *Talkback* featured a live interview with veteran Hollywood actor, Tony Curtis.

During the course of the interview Mr Curtis used the words “*bastards*”, “*bullshit*” and “*fuck*”. After each, the presenter apologised to the audience, as follows:

Tony Curtis
[speaking of journalists]: “...*some bastards go ahead and make them headlines.*”

Presenter: “*I guess I have to apologise for that Hollywood realism moment there.*”

And later:

Tony Curtis
[speaking of being
nominated for an Oscar]: “*Yeah but that was bullshit... I’m sorry.*”

Presenter: “*More Hollywood realism breaking through on Radio Ulster.*”

Finally, towards the end of the interview:

Tony Curtis: “*So I just got up and said ‘fuck off’.*”

Presenter: “*Oh no, now come on. We really, really can’t use that kind of language.*”

Tony Curtis: “*You can’t use that kind of language?*”

Presenter: “*We can’t use that language, no, I apologise to our listeners.*”

Tony Curtis: “*Now listen, my dear friend, you can take that, er... Oh, it is live.*”

Presenter: “*Yeah, we’re live, we’re live on the radio.*”

Curtis: “*I apologise to everyone...I don’t want to offend anyone. Everyone has the right to enjoy what life giveth.*”

Ofcom received two complaints from listeners who felt this language was offensive and unsuitable for the time of transmission. Ofcom considered these complaints under Rule 2.3 (material that may cause offence must be justified by the context).

Response

The BBC informed Ofcom that it regrets any offence that was caused by comments made by Tony Curtis. Mr Curtis and his press team were informed in advance that the interview was live. Therefore it wasn't expected that Mr Curtis, who is well experienced in giving media interviews, would use unacceptable language. The presenter made immediate apologies after each instance of bad language and the BBC has since issued a public apology which was reported in the media.

The BBC added that it was clear from Mr Curtis's reaction that he was genuinely unaware that the interview was live and was under the mistaken impression that his comments could be edited out before transmission. Once he realised his error, he too apologised immediately, and again at the end of the interview, both men apologised to listeners.

Decision

Ofcom research on offensive language¹ identified that "fuck" and its derivatives were considered by audiences to be among the most offensive language, while "bastard" is considered by some to be very strong language, and "shit" was regarded as mildly offensive if used around children and young people.

Ofcom noted that Talkback is a political and current affairs programme and therefore that children were not particularly likely to have been listening to this broadcast.

Notwithstanding this, Ofcom went on to consider whether the language used in the broadcast exceeded generally accepted standards and was justified by the context. Ofcom took into account the nature of the programme, the fact that it was a live broadcast, and also the apologies offered to listeners by both the presenter and Mr Curtis.

Ofcom considers that during live interviews it is important for the broadcaster to properly brief interviewees of the need to avoid offensive language (where appropriate) and also to be particularly vigilant during the broadcast itself for any potential breaches of the Code and where necessary take action to prevent them.

While Ofcom acknowledged that the apologies to listeners went some way in mitigating the potential offence of the language used, Ofcom considered that the language, in particular the use of the word "*fuck*" was likely to have gone beyond the expectations of the audience for a programme of this type and at this time.

In breach Rule 2.3

¹ "Language and Sexual Imagery in Broadcasting: A Contextual Investigation", September 2005

In Breach

To The Manor Bowen

Virgin 1, 12 July 2009, 18:00

Introduction

To The Manor Bowen is a reality-style TV series. This programme followed television presenter and designer Laurence Llewellyn-Bowen and his family as they relocate from their house in the city to a seventeenth century country home that is in need of repair. In this episode, a builder on the site used the word “*fucking*”. This was not edited out. Ofcom noted that this particular scene was also used in a mid-programme teaser but that on that occasion the word “*fucking*” had been masked.

Ofcom received one complaint from a viewer who objected to the broadcast of such strong language at this time of day and was concerned that young children may have been watching. Ofcom wrote to Virgin 1 for comment with regard to Rule 1.14 (the most offensive language must not be broadcast before the watershed).

Response

Virgin 1 apologised for the broadcast of this language before the watershed. It explained that in accordance with its compliance procedure two versions of the programme had been produced: one suitable for a pre-watershed slot (in which any language or content deemed inappropriate for daytime viewing was removed); and one post-watershed version. However, Virgin 1 offered no further explanation as to how the offensive language occurred in the earlier timeslot.

The broadcaster said that as a result of this incident the pre-watershed version of the episode was edited to ‘bleep’ out the offensive language. Also the compliance team had double checked the rest of the series to ensure all pre-watershed versions were suitably edited.

Decision

Rule 1.14 prohibits the broadcast of the most offensive language before the watershed. Ofcom research on offensive language¹ identified that “fuck” and its derivatives were considered by viewers to be very offensive. This broadcast of the most offensive language at this time therefore clearly breached the Code.

Ofcom acknowledged Virgin 1’s apology and recognised that the episode was re-edited to avoid future offence. Ofcom was however concerned that Virgin 1’s compliance check of the programme did not identify the offending word, especially given that the same language had been identified and edited from the programme’s teaser.

Breach of Rule 1.14

¹ “Language and Sexual Imagery in Broadcasting: A Contextual Investigation”, September 2005

In Breach

Lock Up

Zone Reality, 6 June 2009, 14:00

Introduction

Lock Up is a “fly-on-the-wall” documentary series about the American penal system. This particular edition focused on life inside Corcoran State Prison in California.

One viewer complained that the word “*motherfucker*” was used twice by an inmate during a performance of a rap-style song. The complainant said that despite the word being partially masked, it was nonetheless clearly discernable on both occasions.

Ofcom asked the broadcaster for its comments under Rule 1.14 of the Code (the most offensive language must not be broadcast before the watershed).

Response

The broadcaster, Zone Reality, explained that this particular edition of *Lock Up* had been the responsibility of a freelance compliance officer (who at the time believed the masking to be sufficient). The broadcaster acknowledged that the masking was not sufficient as it would have been possible for viewers to recognise the entire word, particularly when taking into account the context in which it was used.

Zone Reality recognised this was an error of judgement and has since re-edited the episode so that the offensive word is fully masked and visually obscured for future pre-watershed broadcasts. In addition, it has said that all its compliance procedures are now carried out in-house and that its own rating given to the entire series of *Lock Up* has been reviewed.

Decision

Ofcom noted the broadcaster’s acknowledgement that its masking of the word “*motherfucker*” was not adequate and welcomed the swift remedial action taken by Reality Zone to improve compliance,

However, Rule 1.14 prohibits the broadcast of the most offensive language before the watershed. Ofcom research on offensive language² identified that “fuck” and its derivatives were considered by viewers to be very offensive. Ofcom therefore considered the programme to be in breach.

Breach of Rule 1.14

² “Language and Sexual Imagery in Broadcasting: A Contextual Investigation”, September 2005

Fairness and Privacy Cases

Partly Upheld

Complaint by Mrs Karan Johnstone

Cutting Edge: 13 Kids and Wanting More, Channel 4, 22 May 2008

Summary: Ofcom has upheld parts of this complaint of unfair treatment and unwarranted infringement of privacy made by Mrs Karan Johnstone.

Channel 4 broadcast an edition of its documentary series, *Cutting Edge*, entitled *13 Kids and Wanting More*. This was an observational documentary that followed the everyday lives of three large families. One of the families included in the programme was the Johnstone family, who had their 12th child while the programme was being filmed.

Mrs Johnstone complained to Ofcom that she was treated unfairly in the programme and that her privacy was unwarrantably infringed in the making and the broadcast of the programme. Her complaint was considered by Ofcom's Fairness Committee, its most senior decision making body in matters of Fairness and Privacy.

In summary the Committee found the following:

- Whilst the Committee had concerns about the programme makers' dealing with Mrs Johnstone, it was satisfied that she had given informed consent for her participation in the programme.
- Mrs Johnstone was not unfairly portrayed as being "addicted to babies" but as a loving mother to all of her children, with a happy household. The Committee did not consider that the programme suggested that the death of Mrs Johnstone's father when she was 12 years old was the reason for her wanting a large family.
- Footage concerning whether Mrs Johnstone wanted more children was not unfairly edited, as at times Mrs Johnstone's responses to such questions were ambiguous.
- Whilst Mrs Johnstone appeared to have consented to the filming of her private family life in the context of a "light-hearted" programme about life in large families, she clearly did not consent to being filmed on certain occasions such as the hours immediately following the birth of her 12th child. This amounted to an unwarranted infringement of her privacy in the making of the programme.
- Given the lack of consent to the filming surrounding the birth, the use of such of that footage that was included in the programme as broadcast amounted to an unwarranted infringement of Mrs Johnstone's privacy in the programme as broadcast.

Introduction

On 22 May 2008, Channel 4 broadcast an edition of its documentary series, *Cutting Edge*. This edition, entitled *13 Kids and Wanting More*, was an observational documentary that followed the everyday lives of three large families in order to explore the reasons why people had large families and continued to have more

children. One of the families was the Johnstone family, who had their 12th child while the programme was being filmed. The programme contained footage of Mrs Karan Johnstone, her husband, Ellis, and their children. It included interviews with Mr and Mrs Johnstone and some of their children.

Mrs Johnstone complained to Ofcom that she was treated unfairly in the programme and that her privacy was unwarrantably infringed in the making and the broadcast of the programme.

Ofcom's Fairness Committee ("the Committee"), its most senior decision making body with regard to fairness and privacy complaints, considered, and provisionally adjudicated on, this complaint. It found that there was no unfair treatment in the broadcast of the programme and that there was an unwarranted infringement of Mrs Johnstone's privacy in the making and the broadcast of the programme.

Mrs Johnstone and Channel 4 both requested a reconsideration of the provisional finding on the ground that it was flawed.

The Committee reconvened to consider afresh Mrs Johnstone's complaint of unfair treatment and unwarranted infringement of privacy.

The Complaint

Mrs Johnstone's case

In summary, Mrs Johnstone complained that she was treated unfairly because:

- a) She did not give informed consent to take part in the programme in that:
 - She was informed incorrectly that the programme would be a "light-hearted", fun and happy programme looking at life in large families and gave consent for this. The programme makers failed to inform her that it would be a programme about the emotional, religious and psychological reasons behind someone wanting to continue to have more children. She would not have got involved in a programme of this nature.
 - She signed up to a programme called "Supersized Families". Mrs Johnstone said that although she was aware that the title might change, the actual title used in no way reflected the nature of the programme the family signed up for. The title implied, wrongly, that she had 13 children and wanted more.
 - She tried to withdraw her consent, but was informed by the production company's lawyers that she could not do so.

By way of background, Mrs Johnstone said that extensive footage of family occasions was filmed, but that hardly any of the footage filmed of her children was used. She said she believed that it was never intended to be used, because the programme was not about children (as she was informed it would be) but about the parents' reasons for having large families. Mrs Johnstone said the family's participation in the programme had resulted in incredible stress.

b) She was unfairly portrayed in that:

- She was portrayed as a person who was addicted to having babies and who did not like them once they were a few weeks old.
- Footage of what was actually a business trip she made to London was unfairly used to imply that she was getting everything ready for the new baby, adding to the impression that she was addicted to having babies.
- Although throughout the filming Mrs Johnstone told the director that the death of her father when she was 12 years old had nothing to do with her reasons for wanting a large family, the programme implied, incorrectly, that her father's death explained Mrs Johnstone's psychological reasons for wanting a large family.

c) The programme was unfairly edited. Mrs Johnstone said that she told the director throughout filming that her 12th baby would be her last, despite the director pushing her to say she would have more children. Footage of an interview given when she had just given birth was unfairly edited so as to suggest that she wanted more children.

Mrs Johnstone complained that her privacy was unwarrantably infringed during the making of the programme in that:

d) Although Mrs Johnstone had agreed to filming generally, the director put a great deal of pressure on her on occasions to allow filming to go ahead when she did not wish to be filmed.

For example, when Mrs Johnstone was seven months pregnant, feeling unwell and wanting to go to hospital, the director put her under pressure to take part in filming before going to hospital, where she was given painkillers and antibiotics as she was unwell.

On another occasion, Mrs Johnstone had agreed to the director filming her entering the hospital to give birth and holding her baby after giving birth. However the director arrived at the family home to film the day before the birth and continued filming and trying to film as the time for the birth approached. Mrs Johnstone said that, although having a baby was tiring, the director had asked her to walk up and down corridors again and again when she was in the early stages of labour so she could get the right shot. When she was closer to giving birth and was confined to bed, the director would not stop opening the door to her room and popping her head in to ask Mr Johnstone for an update. Mrs Johnstone alleged that the director was eventually removed from the delivery suite. Mrs Johnstone said that this invasion of her privacy made the birth very anxious for her.

Mrs Johnstone said that she was exhausted after the birth but that the director had "harassed" her and would not leave her alone until she agreed to let her film. The director also insisted on filming as Mrs Johnstone left the hospital, exhausted and in pain, to go home. Mrs Johnstone said that her husband had to take the director to her hotel to "make her go away". The director had also filmed for a lengthy period at the family home the following day, even though Mrs Johnstone had expected this to involve just a couple of shots of the children with the new

baby. Mrs Johnstone said she had only agreed to this because the director had become upset because she was concerned she needed more footage.

Mrs Johnstone complained that her privacy was unwarrantably infringed in the programme as broadcast in that:

- e) She and her family had their emotional, psychological and religious beliefs examined by every viewer who watched the programme. She had not agreed to take part in a programme of this nature.

Channel 4's case

In summary, Channel 4 responded to Mrs Johnstone's complaint of unfair treatment as follows:

- a) Channel 4 first responded to the complaint that Mrs Johnstone did not give informed consent to take part in the programme.
 - Channel 4 dealt with Mrs Johnstone's complaint that she was informed that the programme was to be "light-hearted", fun and happy programme, and that she was not informed that the programme would look at the emotional, religious and psychological reasons for having large families.

Channel 4 said that there was no written record documenting the way the programme was described to Mrs Johnstone prior to her agreeing to take part, as communication between the Johnstone family and staff at the production company was made by telephone and in person. At a Hearing held by Ofcom to consider the complaint, Channel 4 acknowledged that there was no contemporaneous documentation (such as letters, emails, or notes of discussions with Mrs Johnstone) that would indicate what she had been told about the nature of the programme, or that provided any record of the broadcaster's communication with the family. Nor, unusually, was there a description of the programme on the release forms signed by Mrs Johnstone and her husband. Channel 4 said that this was "a shame" and that practices had now changed at the production company concerned. However Channel 4 also said that the programme makers gave Mrs Johnstone a fair and accurate description of the nature and purpose of the programme and of her and her family's contribution within it.

At the Hearing the development producer for the programme said that she had contacted the Johnstone family towards the end of November 2007 to talk to them about potentially appearing in a programme for Channel 4. She said she was at all times open and honest about the nature and purpose of the filming and any subsequent programme, telling the Johnstone family that the aim was to look at the lives of very large families and examine the motivation of people with so many children. Mr and Mrs Johnstone agreed to be filmed and the development producer travelled to their home to film a "taster tape". Channel 4 said that this recording revealed the sorts of questions being asked and the topics being covered by the interviewer at an early stage. It therefore gave an indication of what Mrs Johnstone's expectations were likely to have been.

Channel 4 said that neither the development producer nor the director told Mrs Johnstone that the programme would simply be a "light-hearted, fun and happy programme". At the Hearing the director said that she did recall using

the expression “light-hearted” at her first meeting with the family, but that this was not meant to characterise the whole programme. Channel 4 said that nothing was concealed from Mrs Johnstone. She was explicitly told that the programme makers were interested in the motivation behind having such a large family and that this would have been clear from the nature of the questions and the topics covered from the start of filming.

As regards Mrs Johnstone’s complaint that she was not informed that the programme would be about the “...emotional, religious and psychological reasons behind having more children...”, Channel 4 said that this description came from a press release written after filming was completed, when the footage had been edited into a programme. This description of the programme was based on all the material contained within the programme, not simply that relating to the Johnstone family.

Channel 4 said that the programme makers never hid their intentions from Mrs Johnstone or misled her as to the nature and purpose of the programme. The questions she was asked and the topics covered during filming were asked “up front”. She had the opportunity to object to, or not to answer, questions. At no point did she do so. Channel 4 said that had Mrs Johnstone really been misled or not properly informed about the nature of the programme, this would have become apparent to her during filming when certain questions were being asked and topics were being raised by the director. Furthermore, Channel 4 said that the reference to “emotional, religious and psychological reasons” for having more children did not cause unfairness to Mrs Johnstone, since her religion was not explored or even touched upon within the programme, and given that the words “emotional” and “psychological” were simply broad terms that described the contributors’ motivations for wanting large families, an area which it was clear from the start was going to be an element of the programme.

- Channel 4 next responded to Mrs Johnstone’s complaint that the programme she signed up to was called “Supersized Families”.

Channel 4 noted that Mrs Johnstone had acknowledged that she was aware that “Supersized Families” might change and that the release form she signed referred to “Supersized Families” as being the “current working title”. Channel 4 said that - as was often the case - at the conclusion of filming there was a discussion about what the title of the broadcast programme should be. “Addicted to Breeding” was one title that was mooted. The director telephoned Mrs Johnstone to see how she felt about this and told her that other contributors did not object to the title. In fact another contributor had expressed reservations about it. However Channel 4 said that the director was not seeking to deliberately mislead Mrs Johnstone, but that she had just spoken to one of the other contributors, who was “fine” with the title. The director accepted she should have made this clear to Mrs Johnstone at the time of the conversation. Channel 4 said that Mrs Johnstone emailed the director expressing her strong opposition to the title. Following further discussion, the programme makers decided that “Addicted to Breeding” was inappropriate, and the director emailed Mrs Johnstone to tell her this.

With regard to Mrs Johnstone's complaint that the actual title, “*13 Kids and Wanting More*”, did not reflect the programme she signed up for, Channel 4 said that the use of this title was not a material change in the nature or purpose of the programme and so did not cause any unfairness to Mrs

Johnstone. Channel 4 said that if the title were taken entirely literally, and in isolation, suggesting that each family featured in the programme had 13 children and the parents wanted more children then - in relation to the Johnstone family - that would be inaccurate and potentially unfair, since they had 12 children and had not stated definitively that they wanted more. However, Channel 4 said that such an approach to the title would not be reasonable nor would it be one that the vast majority of viewers would have taken.

Channel 4 said that the programme stated clearly how many children there were in each of the families featured. It was clear that Mr and Mrs Johnstone had 11 children, with their 12th being born during the production, although they admitted a factual error in the programme as broadcast, when on one occasion the family were described as having twelve children while Mrs Johnstone was actually still expecting her twelfth. The only family featured with 13 children and who clearly stated they wanted more were the Simpsons. In these circumstances viewers would have immediately understood that the programme title was not meant to be taken literally in relation to each and every family featured.

Channel 4 said that Mrs Johnstone directly addressed the question of whether she wanted more children on camera. Her equivocal response was included at the end of the programme. This would have signalled to viewers that the title was meant to be understood figuratively, in the context of a programme about families with large numbers of children.

Furthermore, Channel 4 said that Mrs Johnstone was informed of the title prior to broadcast and was happy to take part in press publicity for the programme under this title. Channel 4 said that when she viewed the programme (which included the name in the title sequence) she did not object to it. Both she and her husband confirmed to the director that they were happy with the programme prior to broadcast, knowing the intended broadcast title.

- Channel 4 next responded to Mrs Johnstone's complaint that she tried to withdraw her consent to participate in the programme but was told by the production company's lawyers that she could not do so.

Channel 4 said it had no record of Mrs Johnstone ever speaking to or corresponding directly with the programme makers' lawyers. Channel 4 said that, when the director and Channel 4's publicity department were in contact with Mrs Johnstone to arrange for her to do publicity for the programme, her only reference to the title of the programme was "...that's not me", or words to that effect. The director explained that the title was meant to refer literally to the Simpson family and not to all contributors. Mrs Johnstone seemed happy with this answer and did not raise it again, nor did she seek to withdraw her consent for her contribution. In these circumstances, both the programme makers and Channel 4 assumed that Mrs Johnstone was happy with the final programme title.

Furthermore, Channel 4 said that the programme makers had agreed early on that the Johnstones could view a "fine cut" of the programme prior to broadcast. Arrangements were being made for a viewing to take place when Mr and Mrs Johnstone got hold of a press copy of the programme. After they had seen that version of the film, Mr Johnstone left two messages on the

director's phone. In one of which he thanked the director for making them look "normal". The director spoke to both Mr and Mrs Johnstone in the following days and they both reiterated that they were happy with the film.

b) Channel 4 next responded to the complaint that Mrs Johnstone was portrayed unfairly in the programme.

- Channel 4 first responded to Mrs Johnstone's complaint that she was portrayed as being "addicted" to babies.

Channel 4 said it appreciated that Mrs Johnstone would object to being described as someone "addicted" to having babies or as someone who "...did not like [babies] once they were a few weeks old", but that she was not portrayed in this way. The programme did not use the word "addicted" or anything like it at any point.

Channel 4 said that the programme included a number of comments by Mrs Johnstone about babies. Viewers would have taken these comments at face value and understood them to mean nothing more than Mrs Johnstone loved newborn babies and that her favourite part of pregnancy and early childhood was the time just after the child has been born. Channel 4 said there was nothing surprising or unusual about this, and nothing that cast Mrs Johnstone in an unfavourable light. The words included in the programme were said to camera by Mrs Johnstone and were edited fairly and accurately. They were not taken out of context. Channel 4 said that it was possible that viewers may have formed the impression that Mrs Johnstone's love for newborn babies was part of the reason why she had given birth to so many, but that the programme left that up to viewers to decide.

Channel 4 said that the programme also included a significant amount of footage that showed what a caring, loving, and committed mother Mrs Johnstone was to all 12 of her children, regardless of their ages. The vast majority of viewers would have seen Mrs Johnstone for what she clearly was: an extremely adept, devoted and loving mother of her large family.

- Channel 4 next responded to the complaint that footage of Mrs Johnstone at a baby show was used to imply that she was "addicted" to babies.

Channel 4 said that Mrs Johnstone was interested in setting up a baby clothes business, so the director had arranged for her and her husband to visit a baby show and for Mrs Johnstone to meet a business adviser to talk on camera about her business plans. In the event, the programme makers decided not to include the footage of the meeting in the programme. However, Channel 4 said that it was entirely valid for the programme makers to include in the programme some pictures of Mr and Mrs Johnstone looking around the baby show. Most viewers would not even have realised where the pictures were taken, as they were general shots of the couple doing the sorts of things many couples expecting a baby would do.

Channel 4 said that if viewers gained the impression from this footage that Mrs Johnstone she was getting things ready for the baby, this was accurate. It was not unfair, nor did it imply that she was "addicted" to having babies.

- Channel 4 next responded to Mrs Johnstone's complaint that the programme implied that the death of her father explained the psychological reasons for her wanting a large family.

Channel 4 said that the sequence in the programme about Mrs Johnstone's childhood and her father's death was included in order to develop further her character, and to give viewers a chance to reflect on what had happened in her life, so to understand and better empathise with her. There was no suggestion in the programme that Mrs Johnstone's childhood and her father's death were the cause, or even part of the cause, of her wanting a large family. The inclusion of footage of Mrs Johnstone and her children visiting her grandparents' grave was a natural progression from an earlier scene, as they were on holiday in Scotland, where Mrs Johnstone's father was born.

Channel 4 said that at no point during filming did Mrs Johnstone object to talking about her childhood, her parents, or her father's death. Nor, having spoken about these subjects on camera, did she ever raise concerns with the director about it. Mrs Johnstone viewed a copy of the programme prior to transmission and expressed no concerns about this footage.

- c) Channel 4 responded to Mrs Johnstone's complaint that footage of her was edited unfairly so as to suggest that she wanted more children.

Channel 4 said that in footage from the taster tape Mrs Johnstone stated that if she and her husband really didn't want more children they would ensure that did not happen, clearly indicating that she was not against having more children. Channel 4 said that while the programme was being made, the director did ask Mrs Johnstone whether her 12th child would be her last, but had not pushed her to say she would have more children. Mrs Johnstone had suggested to the director on a number of occasions that her 12th baby would be her last, but she had always given an ambiguous answer. Furthermore, both Mrs Johnstone's husband and her mother told the director on camera that they were unsure if she meant it when said she would not have any more children. Channel 4 said that footage included in the programme fairly summarised Mrs Johnstone's position that she and her husband had not ruled out having more children.

Channel 4 also said that, in relation to the complaint of unfair editing, Mrs Johnstone viewed a copy of the programme prior to transmission and expressed no concerns.

In summary, Channel 4 responded to Mrs Johnstone's complaint of unwarranted infringement of privacy in the making of the programme as follows:

- d) Channel 4 said that the director did not put a great deal of pressure on Mrs Johnstone during filming or do anything, or ask her to do anything, which exceeded the bounds of what she had consented to.

Channel 4 acknowledged that filming for a programme of this nature could be demanding and tiring, especially given that Mrs Johnstone was pregnant and managing a large family, but said that the director was always courteous, listened to, and always showed respect towards, Mrs Johnstone. Channel 4 said that at no point during filming did Mr or Mrs Johnstone express concerns about the behaviour of the director or the way she was conducting filming. Channel 4 said that the untransmitted footage showed that Mrs Johnstone appeared to be generally comfortable and happy with the filming. Even after all filming had

finished and Mr and Mrs Johnstone had viewed the programme, they confirmed to the director they were happy with it.

Channel 4 said that Mrs Johnstone had had numerous opportunities to tell the director that she was unhappy, that she felt harassed or that she felt filming was exceeding the limits of what she had agreed to, but did not do so. If Mrs Johnstone had done so, the director would have respected her wishes and complied with any requests she had with regard to filming. At the Hearing, the director said that everything she filmed was filmed with Mrs Johnstone's agreement, and that when Mrs Johnstone had said no to filming, she had not filmed. The director also said that she never felt that she was asking Mrs Johnstone to do anything she felt uncomfortable with, or that she was crossing any boundaries when filming.

Channel 4 said that untransmitted footage recorded on the first two days of filming in January 2008 showed that Mr and Mrs Johnstone appeared to be happy with filming, that Mrs Johnstone did not appear to be in any discomfort, and that she and her husband did not make any objection to the filming.

In response to the complaint that during filming in January 2008 the director persuaded Mrs Johnstone to undertake filming when she was ill and needed to go to hospital, Channel 4 said that the director said that she always took the lead from Mrs Johnstone as to whether she thought she was capable of filming. The director had no recollection of ever persuading Mrs Johnstone to film when she did not want to, or of Mrs Johnstone telling her she needed to go to hospital rather than film. Had she done so or even hinted at it, the director would have insisted she get medical treatment immediately. The cameraman present during this filming had also confirmed that he was unaware of Mrs Johnstone feeling unwell or needing to go to hospital.

With regard to Mrs Johnstone's complaint that the director made her late for an appointment at hospital the day before the baby was born, Channel 4 said that untransmitted footage filmed just before Mrs Johnstone went into hospital to have the baby revealed that it was not the director's filming that caused Mrs Johnstone to be late but, if anything, the slightly late arrival of Mrs Johnstone's mother who was coming to babysit the other children. Furthermore Channel 4 said that the footage filmed showed Mrs Johnstone being perfectly relaxed with filming and not being in any rush to get to the hospital.

As regards Mrs Johnstone's complaint about filming at the hospital, Channel 4 said that the director rang her to go through what could be filmed in relation to the birth. As Mrs Johnstone had an appointment to go to hospital for the baby to be induced, the director asked if she could go to hospital with Mr and Mrs Johnstone from the house. Mrs Johnstone agreed to this; to being filmed going into hospital; after the actual birth whilst in hospital; and also leaving the hospital.

Channel 4 said that Mr and Mrs Johnstone and the director waited together in the hospital waiting room. The director had not filmed the couple arriving at the hospital or Mrs Johnstone being checked in and put on the ward. At this point, she said to them both: "If you ever want me to stop filming, tell me to stop".

Channel 4 said that when Mrs Johnstone was on the ward, the director filmed an interview with her in bed for approximately 30 minutes, with her agreement. When the midwife advised Mrs Johnstone to walk around the hospital to help induce labour, the director asked if she could film and then filmed Mr and Mrs Johnstone

walking down a corridor. Channel 4 acknowledged that the director asked them if she could film them once more walking down the same corridor, as two other people had walked into the back of shot, but said that they seemed happy to do this as they had been instructed to walk around anyway.

Channel 4 said that at approximately 10pm, the director left Mr and Mrs Johnstone alone and checked on Mrs Johnstone's progress via the staff on duty. When the director later left the hospital and checked into a hotel, she texted Mr Johnstone to let him know that she had left and asked him to let her know if anything happened so that she could come back. The following morning the director texted again to let Mr and Mrs Johnstone know she was back at the hospital. She texted again to say that she wanted to film so that she could "get as close to the emotion as possible", but acknowledged that Mrs Johnstone's health was the most important thing. When the director arrived back at the hospital, Mrs Johnstone was in labour. Whilst the director didn't want to film Mrs Johnstone giving birth, she was keen to film with her soon after the birth. She did not feel this was inappropriate, as it had been agreed with Mrs Johnstone in advance.

Channel 4 said that the director was under the impression that Mrs Johnstone was going to let her know when she was happy for filming to resume, so once the baby was born the director waited near to Mrs Johnstone's room. Channel 4 said that she had popped her head around the door a couple of times. On one occasion she had asked Mr Johnstone for an update but he declined to discuss the matter, so the director went back into the staff room. Channel 4 said that at no point was the director "removed from the delivery suite", as alleged by Mrs Johnstone, and that she had not actually spoken to Mrs Johnstone at all until she popped into the room to say congratulations some time later.

Channel 4 said that when Mrs Johnstone was moved to the ward the director, with Mrs Johnstone's agreement, filmed her in a wheelchair going to the ward with the new baby and her husband. Once on the ward the director filmed Mrs Johnstone in bed, the baby in his cot and Mr Johnstone leaving to collect the children from school. After Mr Johnstone had left, the director sat with Mrs Johnstone for a while and at no point did Mrs Johnstone ask her to leave.

Channel 4 said that the director never felt that she was having any sort of "battle" with Mrs Johnstone regarding filming and that she did not "harass" her. Once she was on the ward, there were only two occasions when the director asked Mrs Johnstone if she could film and Mrs Johnstone refused. On both occasions the director respected her wishes and did not film.

Channel 4 said that the director acknowledged that on the evening of the birth she was tired and a little anxious, as she was keen to ensure that she "captured the moment", which was to form an important part of the programme. At one point, when the midwife would not allow further filming, the director had felt frustrated and a little upset and she had cried. However, this was for less than ten minutes and she was alone when it happened.

Channel 4 said that when Mr and Mrs Johnstone left the hospital the director started to film them leaving. Mrs Johnstone said she was very tired and did not want to do an interview, so the director "just asked her a couple of quick questions and did not film further". Once outside the Johnstones' home, the director asked Mr and Mrs Johnstone if she could film them at home talking about the birth and with the baby, but they declined. Channel 4 said that the director understood that Mrs Johnstone was too tired and respected her wishes. Although

Mr Johnstone did drive the director back to her hotel, she felt this was in keeping with the nature of their relationship.

Channel 4 said that the director agreed with Mr and Mrs Johnstone that she would come to their house the following day so she could finish filming. Both Mr and Mrs Johnstone said to the director that they wanted to finish the film. At no point did she feel that their consent to film was given under duress. She arrived at the house after 11:30am, spent time with the family, and started filming at 3pm, when Mrs Johnstone agreed to talk about the birth, cook dinner and put the baby to bed. Channel 4 said that Mr and Mrs Johnstone never gave the director the impression that she was asking for too much or that they were unhappy. She remembered having a good time with them because this was the end of filming and there was a sense of them celebrating together the end of filming.

At the Hearing, the director said that she felt that Mrs Johnstone and her family were happy to have her around filming and that Mrs Johnstone did not express concerns about being filmed.

In summary, Channel 4 responded to Mrs Johnstone's complaint of unwarranted infringement of privacy in the programme as broadcast as follows:

- e) Channel 4 responded to the complaint that Mrs Johnstone had her emotional, psychological and religious beliefs examined in the programme and said that, as set out in its response to head a) of the complaint above, Mrs Johnstone was given sufficient information about the nature and purpose of the programme on which to give informed consent. Channel 4 said that the programme as edited and broadcast was essentially the programme that had been described to Mrs Johnstone when she agreed to take part. Channel 4 said that the expression "emotional, psychological and religious beliefs...", as used in the press release for the programme, was merely a general description of the programme as a whole and based on all the material that was included within the programme, not simply that relating to Mrs Johnstone and her family. Channel 4 said that Mrs Johnstone's religious beliefs were not explored in the programme, nor were any "emotional and psychological" reasons as to why Mrs Johnstone wanted a large family examined, other than the programme showing that she loved being a mother and loved babies.

Channel 4 said that Mrs Johnstone and her family answered the questions put by the director during filming and at no point objected to any areas of questioning or said that they delved into areas of their privacy which went beyond what they had consented to. Given that the material in the broadcast programme was taken from this footage, Channel 4 said its use could not be an unwarranted infringement of Mrs Johnstone's privacy.

Furthermore, Channel 4 said that the Johnstone family watched a copy of the final programme prior to broadcast and confirmed to the director that they were happy with it and did not express any concerns.

Mrs Johnstone's request for reconsideration

In summary, Mrs Johnstone said that:

- b) The Provisional Decision failed to address adequately her complaint that the programme implied that she wanted a large family because of her father's death when she was 12 years old. Mrs Johnstone said that her involvement in the

programme was advertised on the programme makers' website and in the media as follows:

"The Johnstones, whose mother desperately wants to keep having children in order to make up for the loss of her own father at a young age".

In summary, Channel 4 said in response to this point:

- b) The description given by Mrs Johnstone was used on the website of the parent company of the production company that made the programme. That company acted as the global distribution arm of the business and had no editorial involvement in the making of the programme. The description did not represent the views of those involved in the making of the programme nor was it an accurate description of the programme's content. Channel 4 maintained that the programme did not suggest that the death of Mrs Johnstone's father was the reason for her wanting a large family.

Channel 4's request for reconsideration

In summary, Channel 4 said that:

- a) The Provisional Decision was flawed in that the Committee had not approached the question of whether Mrs Johnstone gave informed consent for her participation in the programme in an even-handed manner. Channel 4 said that the Committee had relied too heavily on the lack of written communications about the nature and purpose of the programme and given insufficient weight to oral evidence from the programme makers and other evidence such as recordings of untransmitted footage of Mrs Johnstone's conversations with the programme makers. Furthermore, the Committee did not give sufficient weight to the fact that Mrs Johnstone saw a "near final cut" of the programme and made no objections to what she saw. As regards withdrawal of consent, Channel 4 said that Mrs Johnstone's threat to withdraw was in relation to the proposed title "Addicted to Breeding", but that the title was not used and she did not actually withdraw her consent to participate in the programme.
- d) As regards the Provisional Decision that Mrs Johnstone's privacy was unwarrantably infringed in the making of the programme, Channel 4 accepted that Mrs Johnstone had a reasonable expectation of privacy in respect of most if not all of the footage filmed. However Channel 4 said that, when deciding that on two specified occasions Mrs Johnstone had not consented to filming, the Committee had failed to give due weight to the fact that Mr and Mrs Johnstone had expressly consented to the director being present and filming Mrs Johnstone and the baby in hospital after the birth. As Mrs Johnstone had given consent for the director to be present and to film and had not revoked that consent, there was no unwarranted infringement of privacy in this respect.
- e) As regards the Provisional Decision that Mrs Johnstone's privacy was unwarrantably infringed in the programme as broadcast, Channel 4 said that Mrs Johnstone gave informed consent for her participation in the programme and viewed a near final cut of the programme, to which she made no objections. As regards the footage filmed in the hospital and referred to under d) above, Channel 4 said that none of the footage filmed in relation to which the Committee found an unwarranted infringement of privacy was used in the programme as broadcast.

In summary, Mrs Johnstone said in response:

- a) As regards informed consent, Mrs Johnstone said that Channel 4 had ignored the evidence and that she was misled about the nature and purpose of the proposed programme. She said that she was told by the director that the recording she saw prior to broadcast was “a very early edit”.

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 unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included 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.

Mrs Johnstone’s complaint was considered by Ofcom’s Fairness Committee (“the Committee”), its most senior decision making body in matters of Fairness and Privacy. In order to assist it in reaching its decision, the Committee invited the parties to attend a Hearing. Channel 4 was represented at the Hearing. However, Mrs Johnstone declined to attend but, exceptionally, was permitted to provide a written statement. After the Hearing a verbatim transcript was provided for Mrs Johnstone, along with questions from the Committee and Channel 4. Mrs Johnstone’s response, and both her final statement and that of the broadcaster, further informed the Committee. The Committee reconvened to consider reconsideration requests from both parties.

The Committee also carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and a transcript of it; written submissions from Mrs Johnstone and Channel 4; and recordings and partial transcripts of untransmitted footage recorded for the programme.

Fairness

- a) The Committee first considered the complaint that Mrs Johnstone did not give informed consent for her participation in the programme, in that:
 - She was not properly informed about the nature and purpose of the programme.
 - The title of the programme did not reflect the nature of the programme she had signed up for.
 - She tried to withdraw from the programme but was told she could not do so.

In the context of this head of complaint, and heads (b) and (c) below, the Committee noted that Rule 7.1 of Ofcom’s Broadcasting Code (“the Code”) provides that broadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes. A lack of informed consent may lead to a finding of unfair treatment in the programme as broadcast and a breach of Rule 7.1. The

Committee considered the allegations made by Mrs Johnstone in the context of that Rule and also the “Practices to be followed” set out at paragraphs 7.2 to 7.14 of the Code.

Nature and Purpose of the Programme

The Committee assessed whether or not it could be satisfied that the programme makers had obtained Mrs Johnstone’s informed consent to participate in the programme. Specifically, in accordance with Practice 7.3 of the Code, it considered whether, on the basis of the evidence before it, it appeared that Channel 4 had taken sufficient measures to be entitled to assert that any consent given by Mrs Johnstone was *informed* consent for the purposes of the Code.

In so doing, the Committee noted that Practice 7.3 of the Code provides (amongst other things) that where a person is invited to make a contribution to a programme, they should normally, at an appropriate stage, be told about the nature and purpose of the programme; what the programme is about; and be given a clear explanation of why they have been asked to contribute.

The Committee also considered whether the programme makers had followed any of the other measures set out in Practice 7.3. In particular it noted that the measures require that where a person is invited to make a contribution, they should normally (again, amongst other things), at an appropriate stage, also:

- be informed about the areas of questioning and, wherever possible, the nature of other likely contributions;
- be made aware of any significant changes to the programme as it develops which might reasonably affect their original consent to participate, and which might cause material unfairness; and
- be told the nature of their contractual rights and obligations and those of the programme maker and broadcaster in relation to their contribution.

In considering these matters, the Committee noted that the recollections of Mrs Johnstone and the programme makers as to what Mrs Johnstone was told about the programme were very different. Mrs Johnstone was clear that she had agreed to take part in a light-hearted and fun documentary about life in a large family. The programme makers were adamant, on the other hand, that, while they had used the word “light-hearted” in describing the programme to Mrs Johnstone, they had also informed her that the programme would look at what motivated some people to have large families.

In considering whether Mrs Johnstone had given informed consent, including determining whether the programme makers were able to demonstrate that they had obtained Mrs Johnstone’s informed consent, the Committee had regard to the measures set out at Practice 7.3 of the Code.

The Committee had a number of concerns about the programme makers’ dealings with Mrs Johnstone, as follows:

- Release forms

The Committee noted that included in Channel 4's written submissions prior to the Hearing, were "release forms" that they had produced to support their claim that Mrs Johnstone had given informed consent for her participation in the programme. Having carefully considered the contents of the forms, the Committee was concerned to note, firstly the fact that the release form signed by Mrs Johnstone was evidently not signed by her until after the filming had been completed. Secondly, the form did not include any description of the programme. In response to a query from the Committee at the Hearing, the programme makers confirmed that the form was not signed until after the end of the filming and that it contained no description of the programme. Channel 4 acknowledged that this was unusual since normally such a form would include a description of the programme to which the consent related. They also later confirmed - during subsequent written submissions - that Mrs Johnstone had not been given a copy of the release form that she had signed.

- Written communications

The Committee also noted, with concern, that Channel 4 had not been able to produce any other documentation to confirm what they had told Mrs Johnstone about the nature and purpose of the programme. For example, there were no letters or emails sent to Mrs Johnstone outlining the nature and purpose of the programme. The programme makers confirmed that communication with Mrs Johnstone was primarily through personal contact or telephone conversations. However, there were no written notes made of these conversations that could be produced in support. The Committee also noted that the programme makers acknowledged at the Hearing that the lack of documentation was unfortunate, saying "...everyone accepts that it's a shame that there wasn't more in writing, specifically in relation to what the programme was about" and that they would ensure that this would be remedied if the production company were to make a similar programme again.

The Committee felt the lack of any contemporaneous written, verbal or recorded confirmation was particularly worrying, not least in view of the particular sensitivities in relation to the family and personal circumstances. Mrs Johnstone was in an advanced stage of her twelfth pregnancy; and had all the demands and responsibilities of her large family.

- Pre-broadcast viewing of the programme

The Committee further noted that the director had made arrangements to view the programme with Mrs Johnstone before the broadcast but that Mrs Johnstone had been provided with a version of the programme by another contributor before the viewing took place. The source of this version was not clear, nor how similar it was to the broadcast programme, as neither party could provide it for the Committee, and the parties' views differed on this point. Mrs Johnstone thought it was an "early edit" and that it was "very similar" to the broadcast version, while Channel 4 said that it was a near final, if not the final, version. The Committee also noted that, as Mrs Johnstone had seen a version of the programme, the director decided not to go and view the programme with the family. The Committee considered it unfortunate that the director did not adhere to the original arrangement, as had she done so, this would have provided compelling contemporaneous evidence of Mrs Johnstone's consent. However, given the uncertainty over which version she actually saw, the Committee felt unable to give weight, in relation to its consideration of the issue of informed consent, to the fact that Mrs Johnstone had seen 'a' pre-broadcast version of the programme.

The Committee went on to consider what other evidence was available to it. The Committee considered the evidence given by the programme makers at the Hearing that the nature and purpose of the programme were made clear to Mrs Johnstone. The Committee noted, however, that this evidence was given after the complaint was made in circumstances where there was no primary evidence to back up those assertions. The Committee also noted Channel 4's representations at the hearing, that the taster tape - recorded before the making of the programme began - showed that Mrs Johnstone spoke about having always wanted a large family, like *The Waltons*; and that she discussed the fact that she loved babies and had always enjoyed looking after children. However, the tape did not include any explanation by the programme makers regarding the nature and purpose of the proposed programme. The Committee also noted that Mrs Johnstone had allowed filming of her private, family life over an extended period of time without, for the most part, raising any concerns or objections. It was apparent from the untransmitted footage produced to the Committee that the majority of filming that took place was consistent with Mrs Johnstone's statement that she had believed that the filming was to be used for a light-hearted programme that looked at life in large families. The majority of this footage showed that Mrs Johnstone was clearly comfortable to be on camera discussing her family life including, on occasion, answering questions put to her about why she had such a large family and what she loved about newborn babies. The Committee therefore felt that it would have been apparent to any reasonable person in Mrs Johnstone's position that the programme was likely to consider her motivations for having a large family and, therefore, it ought to have been clear to her that this aspect of the programme makers' discussions with her was likely to be a part of the programme.

In the Committee's view, the broadcast programme was not simply a light-hearted look at life in large families, but did probe more deeply into the reasons for some people choosing to have large families. This was indicated early on by the voiceover, which said that "*Some people have an urge to have baby after baby*" and asked the question "*Why are some parents compelled to keep having kids?*" However the Committee considered that while there was nothing in the untransmitted footage to suggest that the programme would take this approach, on balance, Mrs Johnstone was given sufficient indication, during the recording of the taster tape and the interviews, that the programme would look at her reasons for having a large family.

The Title of the Programme

In support of her claim that she had not given informed consent, Mrs Johnstone also complained that the title used for the programme did not reflect the nature of the programme that she had signed up for. In considering this aspect, the Committee noted that the title "*13 Kids and Wanting More*", was not the first title that had been proposed for the programme. The first title that had been suggested to Mrs Johnstone was "Supersized Families". Whilst that title was not specifically indicative of a programme that would examine the motivations for having large families (and could therefore be consistent with Mrs Johnstone's claim that she was not told the true nature or purpose of the programme), it was clear she had been aware that that title was only a working title (as this had been reflected on the release form she had signed) and might change before the programme was broadcast. Whilst the Committee noted she had (successfully) objected to the first replacement title that had been put to her ("Addicted to Breeding") and that her objections to that were clearly consistent with her

argument that she had not consented to a programme that would focus on her motivations for having a large family, she had not objected at the time to the final title “*13 Kids and Wanting More*” despite being aware of it in advance of the broadcast.

Whilst noting that Mrs Johnstone said her reasons for not objecting at that time were that she had understood the only choice she had was between the earlier title “*Addicted to Breeding*” (to which she had already objected) and “*13 Kids and Wanting More*”, the Committee did not consider that the use of the title itself was of assistance in reaching a view as to whether Mrs Johnstone’s informed consent had been obtained for her contribution to the programme.

As to Mrs Johnstone’s additional complaint that the title implied, wrongly, that she had 13 children and wanted more, the Committee noted that the title was not an accurate representation of her own personal circumstances. Nor did it relate to the third family that was featured. However (other than on the occasion referred to by Channel 4 at page 5 above) the programme had gone on to make clear in the narrative that Mrs Johnstone had 11 children and was expecting her 12th. For example the voiceover said at one point:

“Karan and Ellis are expecting their twelfth child. So far they’ve had seven girls and four boys”.

and on another said:

“It’s Karan’s last chance to take her eleven children away before she gives birth to her twelfth”.

In view of this, the Committee did not consider that the title had specifically caused unfairness to her in this respect.

Withdrawal of consent

The Committee noted that Mrs Johnstone emailed the director and said that, if the programme were to be called “*Addicted to Breeding*”, she and her husband would have to withdraw their consent to participate in the programme. As set out above, this title was not, in the event, used for the programme. Although Mrs Johnstone told the programme makers that the title “*13 Kids and Wanting More*” did not apply to her, the Committee noted that she did not object to that title and did not follow up her suggestion that she might withdraw from the programme. She also continued to cooperate with the programme makers, signing the release forms almost a week later.

Taking all the information and circumstances into account and subject to the concerns set out above about the programme makers’ dealings with Mrs Johnstone, the Committee was satisfied, on the basis of the footage recorded during the programme making process, that the programme makers had obtained Mrs Johnstone’s informed consent for her participation in the programme. The Committee looked again at the issue of consent when dealing with Mrs Johnstone’s complaints about unwarranted infringement of privacy.

- b) The Committee considered whether Mrs Johnstone was unfairly portrayed in the programme in that:

- She was portrayed as being a person who was addicted to having babies and not liking them once they were a few weeks old.
- Footage of what was actually a business trip to a baby show was unfairly used to add to the impression that she was addicted to having babies.
- It was implied, incorrectly, that the death of her father when she was 12 years old explained the psychological reasons for her wanting a large family.

In considering this part of the complaint, the Committee took account of, in particular, Practice 7.9 of the Code, which states that broadcasters must take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation.

The programme's portrayal of Mrs Johnstone

The Committee first considered whether or not a reasonable viewer would have taken from the programme an impression of Mrs Johnstone as being “addicted” to having babies, given the pejorative meaning associated with the word. They noted that a putative (but rejected) title for the programme had been “Addicted to Breeding”. As broadcast however this edition of *Cutting Edge* had been titled differently. If an impression of “addiction” had been conveyed it would have been in the programme as a whole.

The Committee noted that throughout the programme the extracts from Mrs Johnstone's interviews with the programme makers that were included showed her as a loving and enthusiastic mother who particularly enjoyed the newborn stage, but not to the exclusion of her older children. Indeed footage – both transmitted and untransmitted – of her with her toddler and the older children showed her engaged and affectionate with them all, up to and including the adolescents. At no point was any impression given that she ceased to love her children once they were a few weeks old.

The introduction to the programme included footage filmed the day after her 12th baby had been born, in which Mrs Johnstone said:

“This is my favourite bit when they are new born like this and the first few weeks. There's nothing like having a new born baby, there's no other feeling like that for me”.

The Committee considered that this emotional reaction following birth was one with which many mothers viewing would identify, just as they would understand her statement before she went into hospital to have the baby when she said:

“It's just, it's still just as exciting having your twelfth as it is having your first. I mean I can't wait to get my hands on him. I can't wait”.

The Committee noted that the word “addicted” was not used in the programme. Furthermore, in the Committee's view, these extracts from Mrs Johnstone's interviews showed, in her own words, that she loved having babies. However, it was also clear from other footage in the programme that she was a loving and devoted mother to all of her children and that their household was a happy one.

In one interview included in the programme, Mrs Johnstone said:

"I'm good at being a mum, so I'm probably the best mum I know. You just need to just be a relaxed mum, if you're just stressed by I've got to have X amount of money in the bank you know and the kids have to go to this place and that place, all that kind of stuff, it just stresses you out so you then end up with stressed out kids. I've never felt that my God, I can't have another one you know 'cos I couldn't cope. You know I've never felt that way so that's because they are all really good, so it must be something that I'm doing right you know".

Footage was also included of the family on holiday and of Mr and Mrs Johnstone having the following conversation:

Karan: *"We can't do this all the time so when we do do something like this it's a good break, you know. You know as long as they've (the children) had a good time, then it's a success.*

Ellis: *It's been worth it I think yeah. Kids just having a ball, they're all loving it.*

Karan: *Lovely yeah."*

In the Committee's view, the footage included in the programme showed Mrs Johnstone as being a devoted mother to all of her children. While it was clear that she loved having babies, she did not appear "addicted" to having them. She certainly did not seem in any way uncaring of her older children or less attentive to them.

The baby show

The Committee next considered the use of footage of Mrs Johnstone filmed at the baby show, which she felt reinforced the impression that she was "addicted" to having babies. As set out above, the Committee did not consider that the programme gave this impression. In relation to the baby show footage, the Committee noted that the voiceover did not refer to the baby show that Mrs Johnstone had attended as part of the research for her new baby clothes business. In those circumstances, the Committee considered that viewers were unlikely to have attached any significance to the fact that filming was taking place at a baby show, if indeed they were able to identify that that was where the Johnstones were. In the Committee's opinion, the footage simply showed Mrs Johnstone preparing for the birth of her baby and did not unfairly give or add to any impression that she was "addicted" to babies.

Mrs Johnstone's father

As regards Mrs Johnstone's complaint that the programme implied that the death of her father explained the psychological reasons for her wanting a large family, the Committee noted that the only reference in the programme to Mrs Johnstone's father was in the following conversation:

Karan: *"This is, this is my nana and granddad's grave. They were old people. We are in Rosneath graveyard. This is where my grandparents are buried and it's the village where my dad was born, born and brought up.*

Voiceover: *Karan unexpectedly lost her dad to cancer when she was only 12.*

Karan: *You can't imagine what it's like being 12 and someone dies. It's just, it was just, I didn't, I didn't know about it or anything you know. I wasn't expecting it. As I say I came home from school and that was it, you know. He was dead two hours later. I know that there is a difference between good and bad in childhood. You know, it was good up until that point and then, then it changed. It didn't go bad or anything. It's just that it wasn't the same again you know."*

The Committee noted that this conversation took place when the family visited a graveyard during a holiday to Scotland, when the director asked Mrs Johnstone about her father's death. The Committee also noted that Channel 4's publicity for the programme and subsequent material on the website of the production company's parent company had referred to her father's death. The Press Release said:

"And having lost her dad when she was just 12 years old, Karan harbours a deeper need to make sure her own family do not miss out on the childhood she felt she did after her dad passed away".

Mrs Johnstone did not say this in the recording. However, Ofcom has no remit in relation to how a programme is marketed. It can only consider whether the programme as broadcast was unfair. The Committee did not consider that there was any implication in this one sequence in the programme itself that Mrs Johnstone's father's death explained why she wanted a large family, rather it showed her explaining how she felt at the time of her father's death.

The Committee accordingly found no unfairness to Mrs Johnstone in the programme as broadcast in the context of her allegation that she was portrayed as a person "addicted" to having babies. Nor, in the Committee's view, did the programme imply that the death of Mrs Johnstone's father explained her reasons for having a large family.

- c) The Committee considered Mrs Johnstone's complaint that the programme was unfairly edited so as to suggest that she wanted more children, as a result of the director pushing her on this question and then unfairly editing footage of an interview that took place just after she had given birth.

In considering this part of the complaint the Committee took account of Practices 7.6 and 7.9 of the Code. Practice 7.6 states that when a programme is edited, contributions should be represented fairly (see paragraph (b) above for the text of Practice 7.9).

The Committee considered Mrs Johnstone's complaint that footage filmed just after she had given birth was unfairly edited so as to suggest she wanted more children. The Committee noted that the footage referred to by Mrs Johnstone in her complaint was filmed at the Johnstone family home the day after the baby was born. In the Committee's view, the director probed Mrs Johnstone in this interview as to whether she wanted to have more children. The Committee noted that the footage from this conversation that was included in the programme was as follows:

“Every bit has stages that I like you know when they start smiling and that, taking notice and goo-ing away and stuff. I mean it’s all good but like my most special bit is, is just like this new born stage. It’s just all like - and I can’t imagine not having that really. But I can’t imagine thinking that I would want to be pregnant again. But I can’t imagine not having one of them either, so I’m a bit stuck aren’t I? Something’s got to give”.

In the Committee’s view, the response Mrs Johnstone gave was ambiguous. The Committee also noted that on other occasions when the question of having more children was raised in untransmitted footage, Mrs Johnstone’s responses overall remained ambiguous. In one interview Mrs Johnstone said, in response to a query from the director as to whether she would “ever stop”:

“I’ll think I’ll have to. Yeah I think this is it now. I just can’t do it anymore, I can’t run round like I used to do, you know, whenever I’ve had babies you wouldn’t hardly tell I was pregnant right up until I had them. Now I’m just yuugh it’s just terrible – I just haven’t got energy like I used to have, so yeah, I’ll have to stop. Anyway, I wouldn’t go on to have thirteen I wouldn’t like that number, so ...”

The director asked if that was because it was unlucky and Mrs Johnstone said:

“Yeah I would say so - and I’m not really superstitious, you know, I walk under ladders and stuff, but ... there’s just something that says ‘thirteen no’, you know, so...but then I said when we had six we said we weren’t having anymore but, so I don’t know. Depends how fast this baby grows ‘cos once they start getting about 4 weeks old, I’m like ‘its too big’. I love that new baby bit, but no, I’m only kidding”.

Furthermore, the Committee noted that in untransmitted footage Mr Johnstone and Mrs Johnstone’s mother both suggested that they could not be sure that this would be the last baby. Mr Johnstone said:

“We said it was the last one but we said the last one about five ago”.

Mrs Johnstone’s mother also told the director:

“...people say to me now do you think this will be the last ... your guess is as good as mine... Never say never, as she says”.

The Committee noted Mrs Johnstone’s comment in her response to questions put to her following the Hearing that her ambiguous responses had been jokes. However, having considered all the evidence, and in light of all the above information, the Committee considered that it was not unreasonable for the programme to have reflected the ambiguity in the answers Mrs Johnstone and her family had given when asked about having more children.

The Committee accordingly found no unfairness to Mrs Johnstone in the programme as broadcast in respect of this head of complaint.

Privacy

- d) The Committee then considered Mrs Johnstone’s complaint that her privacy was unwarrantably infringed in the making of the programme, in that a great deal of

pressure was put on her to allow filming to go ahead when she did not wish to be filmed.

In Ofcom's view, the line to be drawn between the public's right to information and the citizen's right to privacy can sometimes be a fine one. Rule 8.1 the Code states that any infringement of privacy in programmes or in connection with obtaining material included in programmes, must be warranted. In considering complaints about the unwarranted infringement of privacy both in relation to the making and the broadcast of the programme, Ofcom must consider three distinct questions: First, did the complainant have a legitimate expectation of privacy in the particular circumstances? Second, has there been an infringement of the complainant's privacy? Thirdly, did the complainant provide informed consent or was the infringement otherwise warranted?

In considering this part of the complaint the Committee took account of 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 consent or be otherwise warranted. Practice 8.7 states that if an individual or organisation's privacy is being infringed, and they ask that 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.

In considering whether Mrs Johnstone's privacy was infringed in the making of the programme, the Committee considered first whether she had a legitimate expectation of privacy in the circumstances in which she was filmed.

The Committee considered that the majority of the filming that took place related to very private matters concerning Mrs Johnstone's family life and, in particular, surrounding the birth of her 12th baby. In these circumstances, a legitimate expectation of privacy would clearly have arisen unless Mrs Johnstone had provided her consent to the information being filmed. Accordingly, filming would have amounted to an infringement of Mrs Johnstone's privacy if the programme makers had not obtained informed consent in advance for all of the filming that took place or the filming was not otherwise warranted.

As set out under decision head a) above, despite some concerns about the programme makers' dealings with Mrs Johnstone, the Committee was satisfied that Channel 4 had demonstrated that Mrs Johnstone had given her informed consent to participate in the programme as broadcast. The Committee took the view that Mrs Johnstone had consented to this filming of her family life despite her understanding that it would be a light-hearted programme about life in large families. In principle, therefore, the filming did not amount to an infringement of her privacy.

However, it was evident from the rushes that there were clearly occasions where the programme makers continued to film Mrs Johnstone when she had expressly asked not to be filmed or was plainly not comfortable to be filmed. The Committee noted that Mrs Johnstone said that she had agreed that the director could film her "entering hospital to give birth" and "after I had given birth holding my son". Channel 4 had not challenged this and the Committee noted that Channel 4 acknowledged in its closing statement following the Hearing that the director accepted that there were occasions (in particular when Mrs Johnstone was leaving hospital after the birth of her baby) when it "would have been better not to" have put questions to Mrs Johnstone given that she had expressly stated that

she did not want to give an interview at that time. In the Committee's view, the director went significantly beyond what had been agreed on a number of occasions, as follows:

- Before the baby was born but after Mrs Johnstone had been filmed "entering the hospital to give birth", the director filmed Mrs Johnstone walking around, as requested by a midwife in order to induce labour. This was clearly in breach of what had been agreed in advance between Mrs Johnstone and the programme makers.
- The director also asked to film Mrs Johnstone on the ward after the baby was born. The untransmitted footage showed that Mrs Johnstone was in bed in the ward (i.e. not holding her son) and that she was clearly not happy to be filmed (see below). However, the director continued in spite of Mrs Johnstone's evident unhappiness and despite of the fact that she had only agreed to be filmed "after [she] had given birth and holding [her] son". In the Committee's view, Mrs Johnstone had clearly not given consent for filming on these occasions and nothing in her actions suggested she had changed her mind. For example, in relation to the footage of her in bed very soon after the baby was born, the director said:

"If you close your eyes I will film you asleep".

Mrs Johnstone responded: "Oh God".

Later, when Mr and Mrs Johnstone were leaving the hospital, the director asked Mrs Johnstone how she was and Mrs Johnstone replied:

"...I don't want to do an interview..."

Despite these responses, the director continued to film Mrs Johnstone and ask her questions. In the Committee's view it was clearly inappropriate for filming to have continued at this time given that Mrs Johnstone had just given birth and clearly did not wish to engage with the director. This footage was obtained in the hours following the baby being born, at a time when Mrs Johnstone would have been exhausted and in a heightened emotional state, as was clear from the footage. As noted above, the producer asked Mrs Johnstone to go to sleep so that she could film her sleeping. In these circumstances, Mrs Johnstone had a legitimate expectation of privacy, and in the absence of any consent in relation to this filming, that privacy was infringed.

- The director's activities at the hospital, such as "popping her head round" the door and texting Mr Johnstone when Mrs Johnstone had had the baby, also went significantly beyond what had been agreed.

The Committee noted that Channel 4 had not submitted any other reasons why it considered that this infringement of Mrs Johnstone's privacy was warranted under Practices 8.5 and 8.7 of the Code. In the Committee's view, there were no public interest or other grounds that would have rendered such an infringement warranted.

The Committee therefore found that, as set out above, Mrs Johnstone's privacy was unwarrantably infringed in the making of the programme contrary to Rule 8.1 of the Code.

- e) The Committee finally considered Mrs Johnstone's complaint that her privacy was unwarrantably infringed in the broadcast of the programme, in that she and her family had their emotional, religious and psychological beliefs examined by every viewer who watched the programme.

In considering this part of the complaint the Committee took account of Practice 8.6 of the Code, which states that if the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

In considering whether the broadcast of the programme infringed Mrs Johnstone's privacy, Ofcom considered whether she had a legitimate expectation of privacy in relation to the footage that was broadcast.

The programme included footage of private family moments and conversations, including clips of the family at home and on holiday, preparations for the birth, footage of Mrs Johnstone in hospital having just given birth, and coming home with the new baby. The information broadcast was therefore of a personal nature and capable of giving rise to a legitimate expectation of privacy.

In considering the question of infringement, whilst the Committee noted that although the programme did not examine Mrs Johnstone's religious beliefs as alleged, it did examine her motivations for having a large family.

As set out under decision head a) above, the Committee was satisfied that Mrs Johnstone had given her informed consent and, with the exception of the specific examples of footage referred to in head d) that she had consented to the filming that took place. For the most part, therefore, the Committee found that Mrs Johnstone's privacy had not been infringed in the programme as broadcast.

However, she had not consented to the filming of the footage in the hospital referred to under decision head d). With regard to this footage, the Committee carefully examined the programme as broadcast to see how much of it had been included. Having carefully viewed the untransmitted footage filmed in the hospital, the Committee noted that the broadcast programme included two shots³ from this footage, showing Mrs Johnstone in her hospital bed after her baby was born. The Committee considered that there was clearly a legitimate expectation of privacy in relation to this material due to its highly personal and private nature. Moreover, it was clear that Mrs Johnstone had not consented to the filming of this material, as explained above, which gave rise to an unwarranted infringement of her privacy in the making.

As set out under decision head a) above, the Committee could not be satisfied as to the content of the version of the programme Mrs Johnstone saw before the broadcast and could not therefore conclude that, having viewed this, Mrs Johnstone had consented to the inclusion of this footage in the programme. Therefore, the use of this footage in the broadcast programme also amounted to a further infringement of her privacy in the broadcast.

The Committee then considered whether such infringement was warranted. It noted that Channel 4 had not submitted any reasons why it considered that these infringements of Mrs Johnstone's privacy were warranted. The Committee found

³ Between programme timecodes 10:50:24 and 10:50:58

that there was no public interest in the broadcast of this material without Mrs Johnstone's consent and that its broadcast was not otherwise warranted in the circumstances of this particular case. For these reasons, the Committee found that Mrs Johnstone's privacy was unwarrantably infringed in the broadcast.

The Committee therefore found that Mrs Johnstone's privacy was unwarrantably infringed in the broadcast of the programme.

Accordingly Ofcom has not upheld Mrs Johnstone's complaint of unfair treatment. It has upheld parts of her complaint of unwarranted infringement of her privacy in the making of the programme and in its broadcast.

Partly Upheld

Complaint by Mr C on his own behalf and on behalf of his wife, Mrs C, and son, E (a minor)

Car Wars, BBC1, 1 November 2007

Summary: Ofcom has upheld the complaint made by Mr C on his own behalf and on behalf of Mrs C of unwarranted infringement of privacy in the broadcast of the programme, but it has not upheld their complaint of unwarranted infringement of privacy in the making of the programme. Ofcom has not upheld the complaint of unwarranted infringement of privacy made by Mr C on behalf of his son (a minor).

In summary Ofcom found the following:

- Given that footage which included private information about Mr and Mrs C in sensitive circumstances was recorded without the programme makers having secured consent to film, Ofcom found that Mr and Mrs C had a legitimate expectation of privacy and that their privacy had been infringed in the making of the programme. However, in light of the public interest in recording this footage of the police undertaking their work – footage which could not have been secured had the camera operator stopped to gain consent to film – Ofcom considered that the infringement of the privacy of Mr and Mrs C in these circumstances was warranted. Ofcom therefore found that their privacy was not unwarrantably infringed in the making of the programme.
- Given that footage which revealed private information about Mr and Mrs C in sensitive circumstances was included in the programme, Mr and Mrs C had a legitimate expectation of privacy. Ofcom considered that in the particular circumstances of this case, the BBC and/or the programme makers had failed to take sufficient measures to be entitled to consider that any consent given by Mr and Mrs C was informed consent to broadcast the footage in question and that, accordingly, their privacy had been infringed by the broadcast. Ofcom considered that the nature of the subject matter, a broad look at the police's work in relation to car crime, was not a sufficiently compelling justification to warrant infringing the privacy of Mr and Mrs C in these circumstances. Ofcom therefore found that their privacy was unwarrantably infringed in the broadcast of the programme.
- In light of the fact that Mr and Mrs C's son (a minor) was neither shown nor referred to in the programme and that the programme did not indicate that Mr and Mrs C had a child, Ofcom found that Mr and Mrs C's son did not have a legitimate expectation of privacy in relation to the programme as broadcast and that his privacy was not therefore infringed. In light of this it was not necessary for Ofcom to further consider whether any infringement of his privacy was warranted.

Introduction

On 1 November 2007, BBC1 broadcast an edition of *Car Wars*, a series following the police as they track and chase car thieves.

This edition of the programme followed the Greater Manchester Police as they chased people who were allegedly stealing cars in Cheshire and then driving them back into the city.

The programme featured an incident in which some youths had allegedly tried to steal the complainant's car from his driveway. The programme showed the complainant and his wife standing outside their house at night a short while after the incident. It included footage of the front of the house, their driveway and their car. The licence plate of the car was not discernible. However the programme did refer to the colour and make of the car and the area in which the house was located. In addition, the number of another house and the name of the road it was on were audible in the programme.

Ofcom received a complaint from Mr C on his own behalf and on behalf of his wife, Mrs C, and his son, E (a minor).

Mr C complained that his privacy and that of his wife and child was unwarrantably infringed in the making and/or the broadcast of the programme.

The Complaint

Mr C's case

In summary, Mr C complained that his privacy and that of his wife was unwarrantably infringed in the making of the programme in that:

- a) He and his wife were filmed without their consent because although they had been aware of a camera they had assumed it was being used for police training purposes. Mr C added that they became aware of the extent of the events filmed and the fact that people had been arrested for them only when the programme was broadcast 15 months later.

In summary, Mr C complained that his privacy and that of his wife and child was unwarrantably infringed in the broadcast of the programme in that:

- b) He and his wife were included in the programme in a way which made them clearly identifiable without their consent. (Mr C noted that the programme showed him in full, showed his wife standing by the front door in her dressing gown, and included their car and house). Mr C added that the way in which he and his wife were included in the programme made their child identifiable and therefore that the broadcast of the programme also unwarrantably infringed his privacy.

By way of background, Mr C noted that as a result of the broadcast he and his wife received numerous phone calls which had brought the events back to them. Mr C indicated that because he had been identifiable in the programme he was concerned that his wife (who is a bank manager) and his child were at risk of being attacked and that therefore they were considering moving house. Mr C also said that his wife and son no longer stayed in the family home when he was absent on regular business trips.

The BBC's case

In summary and by way of background, the BBC said that police had been called to Mr C's house after he reported an attempt to steal his Mercedes car which was parked on his drive, and that the police team had been accompanied by a camera operator filming for an episode of *Car Wars*.

- a) In response to the complaint that Mr and Mrs C's privacy was unwarrantably infringed in the making of the programme, the BBC said that they did not accept that Mr or Mrs C's privacy was unwarrantably infringed.

The BBC said that its camera operator worked alone and that in order to maintain continuity of filming, his normal practice was to start filming as soon as he arrived at a location and obtain consent afterwards or stop filming if he was asked to do so.

On this occasion, the officers had left quickly to find the suspects who had allegedly tried to steal Mr C's car and, because the camera operator went with them, he personally could not obtain consent for filming from Mr C. However, the BBC said that two of the police officers involved in the incident had spoken to Mr C and obtained his clear and informed consent to the filming, and this was later conveyed to the camera operator. In support of its position, the BBC provided accounts of the events by both of the police officers, Sergeant A and PC B. In his account Sgt A said that he and his colleague, PC B, had responded to a call about youths who had allegedly been spotted tampering with a black Mercedes car on the driveway of a house in Woodford, Cheshire. Sgt A said that he and PC B had found Mr C in the driveway and, when Mr C asked why the camera was there, he had explained to Mr C that the BBC was filming a documentary called *Car Wars*. Sgt A added that he specifically remembered Mr C telling him that he had seen the last series of *Car Wars* and had recognised him from it. Sgt A said that Mr C had no objection to being filmed or shown and appeared comfortable to be within the range of the camera during the filming. Sgt A also added that, when he and PC B were called off to search for clues as to the whereabouts of the alleged offenders, he had told the camera operator of his conversation with Mr C.

- b) In response to the complaint that the privacy of Mr C, his wife and his child, was unwarrantably infringed in the broadcast of the programme, the BBC said that as Mr C's consent had been obtained on behalf of the programme makers in terms which made it quite clear that the filming was for inclusion in a television programme with which Mr C was familiar, the broadcasting of the filmed material did not breach Mr C's privacy, or that of his wife, who was seen very fleetingly in one of the opening shots of this sequence. In addition, the BBC said that if Mr C had consented to the filming, then the privacy of his son cannot have been breached by anything shown in the broadcast.

The BBC said that, in any event, no information was provided in the programme which would have aided identification beyond the image of Mr C himself. The house was seen only partly and in the dark. His wife was only seen in the distance and could not be recognised. Their family name was not disclosed, nor any of their first names. The BBC said that neither the house name or number nor the name of the road where they lived was shown and that the vehicle registration mark could not be seen. It argued that therefore only people who already knew Mr C were likely to have identified him.

The BBC said that it did not believe that the context in which an address on the Chester Road was included in the programme made it clear that this address was close to the complainant's home. It argued that because the address was on the main road which ran through Woodford its inclusion gave no greater an indication of the location of Mr C's property than the mention in the programme of the fact that Mr C's house is in Woodford.

The BBC added that there was no reference in the programme to the fact that Mr and Mrs C had a child and argued that this fact could not have been inferred from anything in the film. It also said that nothing in the way that Mr and Mrs C were filmed made their son identifiable.

In conclusion, the BBC said that Mr C had given clear and informed consent to the police officers present, who conveyed that consent to the production team. Given this, the BBC did not accept that it had breached Mr C's privacy, or that of any of his family members.

Mr C's comments in response to the BBC's statement

In summary, Mr C responded to the BBC's statement about both heads of his privacy complaint in the following way.

Mr C said that he recalled having conversations with more than one police officer on the night in question. He said that after the cameraman had begun filming (without his knowledge) a police officer had said to him "you don't mind the camera being on do you?" but that at no time before, during or after the events of that night was he told that the filming was for the BBC programme *Car Wars*. The complainant also said that he may have stated that he recognised one of the police officers but he did not have a lengthy discussion about television. Mr C reiterated that he had assumed that the filming was for police training purposes only and that at no time had he consented to the footage filmed being shown on television.

In addition, Mr C said that during a telephone conversation between him and the BBC on 14 November 2007, the BBC had admitted that it had made an error in showing the footage of him, and had apologised to him.

The BBC's second statement in response to the complaint

In summary, the BBC responded to Mr C's comments in the following way.

The broadcaster said that it could not account for the discrepancy between the police officers' and Mr C's recollection of events but remained content with Sgt A's and PC B's statements that Mr C was clearly informed as to the nature of the filming, and had freely consented to being filmed.

With regard to the apology given to Mr C by the BBC on 14 November 2007, the BBC said that it had been premature and made on the basis of incomplete information. It added that in the circumstances it formally withdrew that apology.

In addition, the BBC responded to Mr C's concern about the consequences of the broadcast on his family (which was considered by Ofcom solely by way of background to the complaint). The broadcaster said that as Mr C was not named and his wife was unrecognisable in the programme the only possible threat to Mrs C or their son would have been from people who both already knew them and wished Mrs C harm. The BBC concluded that therefore it was highly unlikely that any real or potential threat could have resulted from Mr C's appearance in the programme.

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 unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included 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.

Mr C's complaint was considered first by Ofcom's Executive Fairness Group. The BBC requested a review of part of the Provisional Decision in which the Executive Fairness Group upheld the complaint that Mr and Mrs C's privacy had been unwarrantably infringed in the programme *as broadcast*. Having assessed the request for review in accordance with the criteria set out in Ofcom's published procedures, a review was granted on the basis that the BBC had put forward an arguable case that this part of the Provisional Decision was procedurally flawed. The Fairness Committee, Ofcom's most senior decision-making body for the consideration of fairness and privacy complaints, therefore reviewed that part of the complaint. This Adjudication sets out the final decision in full including Ofcom's review of that part of the provisional finding concerning unwarranted infringement of privacy in the broadcast.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties, including a recording of the programme as broadcast; a transcript of the programme; and both parties' written submissions; together with all the relevant review documentation.

In Ofcom's view, the line to be drawn between the public's right to information and the citizen's right to privacy can sometimes be a fine one. In considering complaints about unwarranted infringement of privacy both in relation to the making and the broadcast of a programme, Ofcom must consider two distinct questions: First, has there been an infringement of privacy? Secondly, if so, was it warranted? This is in accordance with Rule 8.1 of Ofcom's Broadcasting Code ("the Code") which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

- a) Ofcom considered the complaint that Mr and Mrs C's privacy was unwarrantably infringed in the making of the programme because they were filmed without their consent.

In considering this head of the complaint Ofcom took account of Practice 8.5 of the Code which states that any infringement of privacy in the making of a programme should be with the person's consent or be otherwise warranted. The Code indicates that the word "warranted" in the context of justifying an infringement of privacy has a particular meaning. It means that a broadcaster must be able to demonstrate why the infringement was justified and, if the justification put forward is in the public interest, why in the particular circumstances of the case, the public interest outweighed the complainant's right to privacy.

Ofcom noted that filming arose while the camera operator was following the police in their enquiries into the report of the attempted theft of Mr C's car.

Having examined the footage in question, Ofcom observed that Mr C was filmed in the driveway and Mrs C was filmed standing outside the front door of their

home. Ofcom also observed that at the time of filming both complainants were potential victims of a crime and that Mrs C was filmed while she was in her dressing gown and turning away from the camera. Ofcom therefore considered that the complainants were filmed while in a sensitive situation and that the footage recorded included material of a private nature, i.e. images of Mr and Mrs C in a vulnerable state during the period immediately after the attempted theft of their car from their home and while the police were on the scene. As a result Ofcom concluded that the filming of the complainants in these circumstances was intrusive into the conduct of their personal and family life and that Mr and Mrs C had a legitimate expectation of privacy in these circumstances.

Given this conclusion Ofcom then assessed whether or not the programme maker had secured consent for this footage to be filmed.

Ofcom observed that within its submission in response to the complaint, the BBC indicated that its camera operator (who had worked alone) had, following his normal procedure, begun filming as soon as he arrived on the scene rather than asking permission to film prior to doing so. It also observed that the BBC said that, in contrast to his normal procedure, the camera operator had not gained consent after the filming took place but had accompanied the police officers who were searching for the people suspected of attempting to steal the complainant's car. Ofcom also noted that the BBC said that two of the police officers involved in the incident had spoken to Mr C and obtained his clear and informed consent to the filming, which was later conveyed to the camera operator.

Ofcom recognised that Mr C did not accept the BBC's account of the period during and immediately after he and his wife were filmed. It also recognised that Mr C said that he and his wife were neither asked for nor gave consent to being filmed for inclusion in the *Car Wars* television programme.

Ofcom observed that there may be circumstances where it is not only reasonable but also preferable for the police to approach someone whose privacy may be infringed by the filming of a programme in order to secure consent (for example at the scene of an accident where this approach would cause the least distress to the person in question). However, it also observed that whatever the particular circumstances of a case the responsibility for gaining consent for filming (and any subsequent broadcast) rests solely with the programme makers and/or the broadcaster.

Having assessed the submissions in relation to this complaint Ofcom concluded that while it appeared that at least one police officer had spoken to Mr C about the filming it was not clear at what point (i.e. during or after filming) this conversation took place. In addition, Ofcom concluded that it was not clear what information the police officer(s) gave to Mr C about the purpose of the filming, about the *Car Wars* programme, or about the use which would be made of any footage of Mr and Mrs C. However, Ofcom also observed that both parties appeared to agree that the camera operator started to film Mr and Mrs C without obtaining consent to do so; left with the police officers who were trying to find the suspects; and did not personally ask for consent to film Mr and Mrs C prior to, during or immediately after the event. Taking all these factors into account, Ofcom considered that the programme maker had not secured informed consent from Mr and Mrs C to their being filmed for inclusion in the *Car Wars* programme.

Since Mr and Mrs C had a legitimate expectation of privacy in relation to the circumstances in which they were filmed, and that filming took place without the

programme maker having secured informed consent to film them, Ofcom considered that their privacy had been infringed in this respect.

Ofcom then went on to consider whether the infringement of Mr and Mrs C's privacy in the making of the programme was warranted. Ofcom considered that the subject matter of the programme (which followed the police in their duties) was in the public interest. Furthermore, Ofcom considered that the need to film while the events were unfolding made it impossible for the programme maker to gain consent while recording the material. Ofcom does not believe that it would be desirable for programme makers to be unduly constrained in circumstances such as these where they would be unable to obtain material because consent could not be gained from those involved prior to filming taking place.

Taking account of the factors noted above, Ofcom found that the decision to record the material in this case was warranted by the public interest in the subject matter. Therefore the infringement of Mr and Mrs C's privacy in the recording of the material had been warranted.

In addition, Ofcom recognised that there may be pressures on programme makers in certain situations which make it difficult to judge at the time whether filming or recording is likely to unwarrantably infringe the subject's privacy. In these circumstances what is important is that the broadcaster takes steps to ensure that the subsequent broadcast of material recorded in such circumstances does not result in an unwarranted infringement of privacy. This issue is dealt with in the decision at head b) below.

In conclusion, as detailed above, Mr and Mrs C's complaint of unwarranted infringement of privacy in the making of the programme was not upheld.

- b) Ofcom considered the complaint that Mr and Mrs C's privacy and that of their son (a minor) was unwarrantably infringed in the broadcast of the programme because footage of Mr and Mrs C was included in the programme without their consent in a manner which made them, and thereby their son, identifiable.

In considering this part of the complaint Ofcom took account of Practice 8.6 of the Code. This 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. The Foreword to Section 8 (Privacy) of the Code sets out that where consent is referred to in Section 8, it refers to informed consent. So in considering this part of the complaint, Ofcom also took into account each of the measures set out in Practice 7.3 of the Code, which provides that where people are invited to make a contribution to a programme they should normally, at an appropriate stage:

- be told the nature and purpose of the programme, what the programme is about, and be given a clear explanation of why they were asked to contribute and when (if known) and where it is likely to be first broadcast;
- be told what kind of contribution they are expected to make;
- be informed about the areas of questioning and, wherever possible, the nature of other likely contributions;
- be made aware of any significant changes to the programme as it develops which might reasonably affect their original consent to participate, and which might cause material unfairness;

- be told the nature of their contractual rights and obligations and those of the programme maker and broadcaster in relation to their contribution; and
- be given clear information, if offered an opportunity to preview the programme, about whether they will be able to effect any changes to it.

Practice 7.3 of the Code goes on to set out that taking the measures listed above is likely to result in the consent that is given being 'informed consent', and that it may be fair to withhold all or some of this information where it is justified in the public interest or under other provisions of Section 7 (Fairness) of the Code.

Ofcom first considered whether Mr and/or Mrs C had a legitimate expectation of privacy in relation to the broadcast of the programme.

Ofcom noted that Mr C was shown in the programme in his driveway, outside his home, after having reported the attempted theft of his car. Although he was not named in the programme, he was identifiable, in that his face was shown clearly. It also observed that Mrs C was shown briefly in her dressing gown, turning away and while standing outside the front door of their home. Ofcom considered that, although her face was not clearly visible, by virtue of the circumstances in which she was shown – notably that Mr C's face was shown clearly in the same footage and that she was seen standing outside the front door of their home at night – she was likely to have been identifiable (albeit only to people who knew Mr C and knew that he was married).

Ofcom also noted that both Mr and Mrs C were included in the programme in circumstances where they were potential victims of a crime, during the period immediately after the attempted theft of their car from their home in the early hours of the morning and while the police were at the scene. Ofcom therefore considered that the footage of the complainants showed them in a vulnerable state and in a sensitive situation. As a result, Ofcom concluded that the broadcast of footage of Mr and Mrs C in these circumstances revealed private information about them and that they had a legitimate expectation of privacy in relation to this information.

Given this, Ofcom assessed whether or not Mr and Mrs C's consent had been obtained before the material was broadcast (in accordance with Practice 8.6 of the Code) and, specifically, whether sufficient measures had been taken so as to entitle the broadcaster to consider that it had *informed* consent from Mr and Mrs C for this footage to be broadcast (in accordance with Practice 7.3 of the Code).

The primary responsibility of ensuring compliance with the Code rests with the broadcaster, in this case, the BBC. Ofcom therefore considered that it was for the BBC to demonstrate that it had been reasonably entitled to consider that sufficient steps were taken prior to broadcast of the programme to be confident that any consent given by Mr and Mrs C was 'informed consent', within the meaning of the Code.

Ofcom noted that there was a direct conflict of evidence between the parties as to whether, as a matter of fact, Mr C had consented to the broadcast of the material and, specifically, whether any of the measures listed in Practice 7.3 had been followed. The BBC relied upon the very similar and largely mutually corroborative statements of two of the police officers, who had attended Mr C's home on the night. They stated that Mr C did not object to being filmed, that he was familiar with the programme, *Car Wars*, and content for the footage of him and his wife to be broadcast. Mr C's evidence was that no-one asked for, and that he did not

give, consent for him and his wife to be filmed for a television programme and then for the programme to be broadcast. Both parties agreed that the cameraman/ director had not himself sought Mr or Mrs C's consent, or captured Mr and Mrs C's consent on film.

Ofcom also noted that a significant amount of time had elapsed before each party's evidence was produced. This was at least 15 months after filming in the case of the BBC, and between 12 and 15 months after filming in the case of Mr and Mrs C, which might account for different, though apparently genuinely held, recollections of the events of that night.

In all the circumstances of this case, Ofcom did not consider that it was possible to resolve the conflict of evidence between the parties. The Committee did not believe that it was necessary to do so in order to reach a finding as to whether or not sufficient measures had been taken to entitle the BBC to consider that it had 'informed consent' to broadcast the footage in question.

From the information available to it, Ofcom noted that at the time of broadcast the programme makers had had no contact, beyond filming them, with Mr and Mrs C either at the time of filming, in the immediate aftermath, or at any subsequent point before the broadcast more than a year later. Moreover, it was not in dispute between the parties that there was no evidence on film of Mr or Mrs C giving consent to the material being broadcast. This appeared to be a departure from the programme makers' normal practice. Ofcom noted that the Executive Producer of the programme had stated in an email to the BBC: "Normally we would get on camera consent." Later, in a further email, he stated: "I think the circs of that night mean the cameraman was called away fast and then neglected to get [consent] on tape as evidence."

Ofcom also noted that at the time of broadcast the programme makers did not have written confirmation from the police that Mr C had given informed consent for the broadcast of the footage in question. Instead the cameraman/director appeared to have relied upon the verbal assurance of one of the police officers (who had spoken to Mr C either during or immediately after the filming) that the complainant understood the nature of the programme and had consented to the footage of him and his wife being included in it. In this regard, Ofcom noted that the cameraman/ director stated that "Ordinarily we continue shooting the scene and if we need to ask for permissions we do so after we have shot the sequence...". However, as noted above, the cameraman/director did not obtain such permission from Mr and Mrs C.

Ofcom also took into account that a substantial period of time had elapsed between the date when Mr and Mrs C were filmed and the date when the programme was broadcast. Whilst Ofcom recognised that there are circumstances where it might be appropriate to delay securing consent to broadcast until sometime after filming has taken place (for example during the filming of an emergency where delaying the securing of consent is the only way to capture images), it did not consider that any such circumstances applied in this case. In Ofcom's view, there was ample opportunity for the programme makers to have contacted Mr and Mrs C directly to ensure that they had given informed consent to the broadcast of the material. However, it was clear that there had been no attempt to do so by the programme makers.

Moreover, Ofcom observed that the police officers (who, according to the BBC, had secured Mr C's consent¹) were themselves contributors to and the subjects of the *Car Wars* series. They were not agents or employees of the BBC, or of the independent production company which produced *Car Wars*. There was no evidence that they were aware of the requirements of the Code or, specifically, of the criteria set out in practice 7.3 of the Code. Ofcom noted again the inconsistency between the account of one of the police officers and that of the cameraman/ director.

In all the circumstances of this case, Ofcom did not consider it was appropriate for the BBC to have relied upon third parties, such as the police officers, to seek to obtain the consent of Mr C to broadcast the footage. Only in exceptional circumstances is it appropriate for an individual or organisation other than the broadcaster or its directly contracted agents to seek informed consent. In such exceptional circumstances, it might be appropriate (or the only possible way forward) for third parties or fellow contributors to a programme to seek a person's consent to an infringement of their privacy in the making or broadcast of a programme. Normally, however, broadcasters and their directly contracted agents, such as independent production companies, are best placed to seek to ensure compliance with the Code. In this case, Ofcom did not consider that there were any exceptional circumstances to justify a different approach.

Ofcom observed that there was no suggestion that Mr and Mrs C were told what kind of contribution they were expected to make, or the nature of their contractual rights and obligations and those of the programme maker and broadcaster in relation to their contribution. At the most, on the basis of the police officers' statements, Mr C was informed of the nature and purpose of the programme (although this was disputed by Mr C).

Ofcom concluded on the basis of the evidence before it, that neither the measures in Practice 7.3 nor any alternative measures had been followed by the BBC and/or the programme makers so as to entitle them to consider that informed consent had been given. Ofcom reached this conclusion irrespective of the fact that it was not possible to reconcile the differing accounts of events on that night. Ofcom did not consider that it was reasonable for the BBC/ programme makers to have treated any consent that may have been provided by Mr and Mrs C to the police officers as informed consent. Furthermore, Ofcom did not consider that there were any reasons why it was fair for the BBC and/ or the programme makers to have withheld all or some of the information listed in Practice 7.3 on the basis of a public interest or under other provisions of that section of the Code.

Mr and Mrs C had a legitimate expectation of privacy in relation to the information about them that was broadcast. The BBC and/ or the programme makers had failed to take sufficient steps to ensure – or to be entitled to be satisfied – that they had obtained informed consent to broadcast the footage of Mr and Mrs C. Ofcom therefore considered that their privacy had been infringed in this respect.

Ofcom then considered whether the infringement of Mr and Mrs C's privacy in these circumstances was warranted.

¹ For the avoidance of doubt, Ofcom does not consider the time at which this conversation took place to be relevant to its consideration of whether informed consent to broadcast the material in question was obtained.

As discussed above, Ofcom considered that the subject matter of the programme, in following the police in their duties, was in the public interest. Ofcom therefore balanced considerations concerning Mr and Mrs C's expectation of privacy with those concerning the public interest in the broadcast material as part of a broad look at police work. Ofcom considered that the programme makers had not taken all reasonable steps to obtain the consent of Mr and Mrs C before the broadcast of the programme. In light of the particular circumstances of this case, namely that the footage of Mr and Mrs C showed them in a sensitive situation, Ofcom considered that the subject matter of the programme was not in itself a sufficiently compelling justification to warrant the infringement of Mr and Mrs C's privacy. Ofcom therefore found that their privacy was unwarrantably infringed in the broadcast of the programme.

Ofcom went on to consider whether Mr and Mrs C's son had a legitimate expectation of privacy in relation to the circumstances in which Mr and Mrs C were included in the programme.

Having examined the sections of the programme relating to Mr and Mrs C, Ofcom observed that their son was neither shown nor referred to in the programme and that the programme did not indicate that they had a child. In light of this, Ofcom considered that the fact that Mr and Mrs C had a child would have been known only to people who already knew the family. Ofcom therefore concluded that in these circumstances Mr and Mrs C's son did not have a legitimate expectation of privacy in relation to the programme as broadcast.

Therefore, Ofcom found that Mr and Mrs C's son's privacy had not been infringed in the programme as broadcast and it was not necessary for Ofcom to further consider whether any infringement of his privacy was warranted.

Accordingly, Ofcom has upheld Mr and Mrs C's complaint of unwarranted infringement of privacy in the broadcast of the programme. Ofcom has not upheld their complaint of unwarranted infringement of privacy in the making of the programme or the complaint of unwarranted infringement of privacy in the broadcast of the programme made on behalf of their son (a minor).

Not Upheld

Complaint by Mrs Diane Lievesley on her own behalf and on behalf of Miss Hazel Lievesley and Mr Richard Lievesley *Ghost Writer, Paranormal Channel, 8 October 2008*

Summary: Ofcom has not upheld this complaint of unfair treatment and unwarranted infringement of privacy made by Mrs Diane Lievesley.

On the 8 October 2008, the Paranormal Channel broadcast an edition of its regular series *Ghost Writer* in which paranormal activity in “The Farmhouse” was investigated. The programme included contributions from some of those living in the house and the two programme presenters, Ms Yvette Fielding and Dr Ciaran O’Keeffe. Mrs Diane Lievesley and two members of her family, Miss Hazel Lievesley and Mr Richard Lievesley (“her family”) were featured in the programme having reported paranormal activity in the house.

Mrs Lievesley’s complaint was considered by Ofcom’s Executive Fairness Group. In summary Ofcom found the following:

- Mrs Lievesley and her family provided informed consent to take part in the programme and were fairly portrayed. Their contributions and the presenters’ comments reflecting their differing viewpoints were both included.
- The programme was fairly edited.
- The complainants’ privacy was not infringed in the making or broadcast of the programme. Informed consent was given and Ofcom found no evidence of the programme maker failing to adhere to a guarantee relating to the identification of the contributors.

Introduction

On 8 October 2008, the Paranormal Channel broadcast an edition of its investigative programme, *Ghost Writer*. The programme was a retrospective report of events that had taken place in a house in October 2005 and was entitled *The Farmhouse*. The presenters were Ms Yvette Fielding, who said she had been conducting paranormal research for nearly ten years and wanted to write a book about it, and Dr Ciaran O’Keeffe, a parapsychologist, whose contribution in the programme was to provide the scientific and sceptical point of view.

Mrs Diane Lievesley and her children, Hazel and Richard Lievesley, whose home featured in this episode, talked about paranormal activity there. Footage of and comments made by them were included in the programme, along with background shots of the interior of some parts of their home. The programme also included footage and commentary by the presenters as they sought evidence of the paranormal activity reported by Mrs Lievesley and her children in their house. Mr O’Keeffe’s conclusions were generally of a sceptical nature and several natural explanations of any activity in the Lievesleys’ home were given, while Ms Fielding’s comments suggested she believed there was paranormal activity in the house.

Mrs Lievesley complained on her own behalf and on behalf of her children, Miss Hazel Lievesley and Mr Richard Lievesley, that they were treated unfairly and that

their privacy was unwarrantably infringed in the making and broadcast of the programme.

The Complaint

Mrs Lievesley's case

In summary, Mrs Lievesley complained that she, Miss Hazel Lievesley and Mr Richard Lievesley were treated unfairly in the programme as broadcast in that:

- a) They did not give informed consent for the programme to be broadcast. They were misled as to the reasons they were being filmed as they understood it was for a DVD and research for a book.

By way of background, Mrs Lievesley said that the programme makers had been informed that the landlord of the property had denied filming for television purposes.

- b) They were portrayed unfairly in that:

- (i) The conclusions of the presenters suggested they were a family of liars.

By way of background Mrs Lievesley said that she had been a spiritual medium for many years and had proved her psychic ability on many occasions with "Para.Science"¹. She said that Miss Hazel Lievesley also had psychic ability.

- (ii) One of the presenters, Mr O'Keeffe, made a comment that Miss Hazel Lievesley's bedroom was not "*the cleanest*", implying that their home was an unclean place to live.

- c) The programme was unfairly edited in that:

- (i) It unfairly presented the actual events during the filming period which gave the impression that Mrs Lievesley and her children were fraudulent. For example, the programme did not show that, during a séance, the glass on the table ceased to move when one of the presenters, Ms Fielding, removed her fingers from it.
 - (ii) The programme gave the impression that the filming and investigations were carried out overnight when, in fact, the presenter only spent a few minutes on her own. This gave a misleading impression about the existence of paranormal activity in the house.

In summary, Mrs Lievesley complained on her own behalf and on behalf of Miss Hazel Lievesley and Mr Richard Lievesley that their privacy had been unwarrantably infringed in the making of the programme in that:

- d) The programme was made without their knowledge or permission.

¹ Para.Science, an organisation established to conduct study, research and investigation into all types of paranormal phenomena. Membership covers the UK, and there are associates across the world.

In summary, Mrs Lievesley complained on her own behalf and on behalf of Miss Hazel Lievesley and Mr Richard Lievesley that their privacy had been unwarrantably infringed in the broadcast of the programme in that:

- e) They had a signed contract with the programme makers that their home would not be identifiable. Furthermore, they were given verbal assurances that the programme makers would not name or identify anyone in the family. However, the programme makers did not adhere to the instructions given.

Paranormal Channel's case

On 22 December 2008, the Paranormal Channel provided a response to the complaint along with supporting material including recordings and transcripts of unedited material. In summary and in order of the entertained complaint it said:

- a) Mrs Lievesley was initially approached to assist with a book and DVD entitled "Ghost Hunters" but the production team also asked Mrs Lievesley to sign a general broadcast release form to enable the further use of the footage for broadcast. The wording on these forms was easy to understand and was not restricted to a DVD release. Mrs Lievesley was aware of this at the time of signing and left with a copy of the document. The Paranormal Channel subsequently confirmed on 21 January 2009 that the reference to ITV on the release form stood for independent television, because this allowed the programme makers to sell the programme to advertiser funded channels. The programme makers were never told that the landlord had refused permission for filming; indeed they were not even aware that the Lievesley's did not own their home.
- b) The Paranormal Channel did not accept that the Lievesley family were portrayed unfairly. The programme makers denied that the family were portrayed as liars or their house as unclean. The role of the presenter, Mr O'Keeffe, as a parapsychologist, was to question and analyse alleged paranormal phenomena. The programme was fair and gave a balanced account of what happened at the house on the day of filming. The Paranormal Channel said that many people claimed their houses to be haunted and expected everyone to believe they were in the middle of a paranormal explosion or were psychic themselves. However, when faced with the truth some disagreed and used false accusation as a defence.

The part of the programme where an "orb" was allegedly caught on film and explained as a possible particle of dust by the presenter was not a description of the house as "dirty". It is a standard alternative explanation for spirit orbs and is always a possibility when an investigator enters a room and kicks up even the most minuscule dust particles. The only place where this may not be the case is in truly "clean" environments such as operating theatres and microchip preparation rooms.

- c) As regards the séance, the broadcaster said within the unedited material, there was evidence that on occasion the glass was moving when only Mrs Lievesley and Miss Lievesley had their fingers on it. The investigation at the house did take place at night but there is no indication in the programme that the investigation lasted the entire night. The final edited version of the footage was a true and accurate reflection of the paranormal investigation.

- d) The Paranormal Channel said that the complainants willingly participated in filming and signed documents permitting the footage to be used in any format or media. The broadcaster said that Mrs Lievesley did not raise any concerns about the use of the footage when signing her consent form. According to the programme makers she was very happy and excited to be featured on television but that she had changed her mind post broadcast because she had received unkind comments about the programme from friends that had made her question why she agreed to participate in the first place. Paranormal Channel said that at no point did they manipulate her words or paraphrase them for their own purpose.
- e) The programme referred to the family by their first names only, no surnames were used, nor was the identity of the location or any address revealed. Only close friends and family could have identified the location or recognized family members but the general viewer was not given sufficient information to do this. The Paranormal Channel said the programme makers honoured the hand written addition to the location agreement that external shots of the property were not to be included.

The complainant's comments in response

Mrs Lievesley responded in respect of the following heads of complaint:

- a) Mrs Lievesley said the broadcasters' explanation for the reference to ITV on the consent forms was false as the programme makers had been informed prior to their visit to her that their landlord had refused all permissions to film for the purposes of television. The family would not have put their tenancy in jeopardy for the benefit of the programme makers. Mrs Lievesley insisted that she was only informed of the programme maker's intention to write a book and produce a DVD. (Mrs Lievesley also submitted evidence she had obtained from Ms Winsper (from the Para.Science paranormal investigation team that introduced Mrs Lievesley to the programme makers) which confirmed that even though the intention of the filming was to carry out research for a book with accompanying DVD, the participants had signed release forms giving rights to use the media in other forms, which would usually include broadcasting.)
- b) i) The Para.Science team had been conducting regular investigations for a period of over 12 months and had come to the conclusion that the complainants were living in a haunted house. Therefore the broadcaster's assertion that "when faced with the truth some disagree and use false accusation as a defence" was unfair.
- d) All members of her family would have refused to take part in the filming if they had known it was for the purposes of a television programme.

The broadcaster's second response

Paranormal Channel said the programme makers were not informed prior to filming that the landlord had refused all permissions to film. Mrs Lievesley allowed filming to take place in her home without any objection and signed all the necessary release and consent forms which specifically referred to the right to use the footage in any and all media without restriction. The programme makers had at least seven years' experience of making television exposes on paranormal phenomena and had a very credible record for producing accurate and honest accounts of paranormal investigations. The email that Mrs Lievesley provided from correspondence she had

had with Ms Winsper from Para.Science confirmed that all necessary consents had been given.

In its view, the complainants participated willingly in the programme, but decided retrospectively to withdraw consent as the content of the programme differed from their expectations through no fault of the Paranormal Channel.

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 unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

Where there appears to have been unfairness in the making of the programme, this will only result in a finding of unfairness, if Ofcom finds that it has resulted in unfairness to the complainant in the programme as broadcast.

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.

Mrs Lievesley's complaint was considered by Ofcom's Executive Fairness Group. In reaching our decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording and transcript of the programme as broadcast, both parties' written submissions and recordings and transcripts of the unedited programme material.

- a) The Committee first considered the complaint that Mrs Lievesley and her family did not give consent for the programme to be broadcast as they understood filming was for a DVD and not a television programme.

In considering this part of the complaint Ofcom took account of Practice 7.3 of the Ofcom Broadcasting Code ("the Code") which requires that "where a person is invited to make a contribution to a programme (except when the subject matter is trivial or their participation minor) they should normally, at an appropriate stage: be told the nature and purpose of the programme, what the programme is about and be given a clear explanation of why they were asked to contribute and when (if known) and where it is likely to be first broadcast" ... [and] "be made aware of any significant changes to the programme as it develops which might reasonably affect their original consent to participate, and which might cause material unfairness".

Ofcom considered the basis on which Mrs Lievesley and her family had consented to take part in the programme and whether they were made aware that the footage might be used for the purposes of a television broadcast. Potential contributors to a programme should be given sufficient information about the programme's nature and purpose, for them to be able to make an informed decision about whether or not to take part. In reaching its decision Ofcom had regard to the release forms that Mrs Lievesley and her family had signed. Within three of these forms it said:

“The producer (or a member of the Production team) has informed me of the nature and content of the Programme and I confirm that I am willing to participate and that I will not hold the producer and/or ITV, its associates and/or other contributors to the programme responsible for any ill-effects that may be suffered as a result of my participation in the Programme”.

Ofcom also noted that Mrs Lievesley and her family were active and willing participants to filming.

It appeared to Ofcom that both parties' interpretations of the release forms differed. Mrs Lievesley said that the forms only covered filming for a DVD (and book) and that her landlord would not have agreed to filming of her home for the purposes of a television broadcast. Meanwhile, the programme makers advised that the forms included provision for use of the footage in all forms of media, that they were unaware of Mrs Lievesley's landlord's stipulations and that they did not know the house was rented.

On the information available to us, Ofcom considered that Mrs Lievesley and her family had signed consent forms which allowed the broadcaster to use the footage in a programme. Ofcom also noted that the statement from Para.Science confirmed that all participants signed release forms giving rights to use the footage in all forms including broadcasting. It appeared to Ofcom that the broadcaster took sufficient steps to satisfy itself that the consent provided by the Lievesley's was informed consent.

Given that the consent to participate was informed, taking into account all the factors as detailed above, Ofcom does not consider that Mrs Lievesley and her family were treated unfairly. We have therefore not upheld this head of complaint.

- b) Ofcom then went on to consider the complaint that Mrs Lievesley and her family were portrayed as a family of liars and that their home was presented as an unclean place to live.

In considering this head of complaint Ofcom took into account whether the broadcaster's actions were consistent with its obligation to avoid unjust or unfair treatment of individuals in programmes as set out in Rule 7.1 of the Code. In particular, Ofcom considered Practice 7.6 which states that when a programme is edited, contributions should be presented fairly. It is important to note that the editing of a programme is a matter for a broadcaster. However, broadcasters must ensure that the programme as broadcast does not result in unfairness to an individual or organisation.

Ofcom first examined the presenters' roles within the programme. The programme introduction explained the two presenters' differing viewpoints as to paranormal phenomena. Ms Fielding stated she had a background of ten years conducting paranormal investigations. Dr O'Keeffe said that he shared Ms Fielding's "*passion*", "*excitement*" and "*interest*" in the area, but that they had "*slightly different perspectives*" as he looked for the rational, objective side to things whereas Ms Fielding believed that there was "*something out there*". Therefore, Dr O'Keeffe was playing the role of the "scientific sceptic".

Ofcom then considered the content of the presenters' comments, how they were delivered within the programme and whether this resulted in any unfairness. In relation to the séance Dr O'Keeffe used the following explanation:

“Now it was very important that we conducted a séance within the framework of this investigation because it is tied into the beliefs of the mother and to some extent the daughter. So it was almost as though they became part of the investigation – strictly voluntary; it was something they definitely wanted to do... you’ve got something that for me is a simple illustration of psychology – everybody wanting and willing the glass to move and also the contact with the glass – if the glass had moved without anybody in contact with it then I’d be a lot more impressed.”

And later in relation to the time spent at Mrs Lievesley’s home:

“I think what happened in that investigation, even though there were a couple of phenomena at least as far as we’re concerned, it was nowhere near what the key eye witness claimed had happened”.

However, Ofcom also noted his comments were given in response to comments made by Ms Fielding that suggested she had experienced paranormal activity. For example, these included:

“I could have sworn I just heard a hum coming from in there...I was just slowly you know talking and I turned, it was like...I thought it was you [Mr O’Keeffe] or someone. You know when someone’s creeping up behind you and you feel the heat or the proximity of somebody?...and...”when I was standing on the landing there was something with me...you know when you know there’s something there and you are not on your own...it was as if something was right there beside me and I was scared to death didn’t like that at all”.

In this respect both viewpoints were expressed. The programme featured the believers’ comments contrasted immediately after by the opinion of the sceptic in a fair and balanced way. Ms Fielding’s conclusions were fairly summarised as were Dr O’Keeffe’s. Dr O’Keeffe’s responses were not intended to suggest the complainants were not being honest but to express his opinion on the phenomena under question. In this respect, Ofcom did not consider that the programme implied they “were a family of liars”.

With regard to the complaint that Dr O’Keeffe’s comments suggested the home was an unclean place to live, Ofcom also took account of his comments in the light of the programme as a whole, that is, a paranormal investigation by both believer and sceptic. Ms Fielding referred to “*what seemed like a mist that was falling in the room*”. Dr O’Keeffe’s explanation was that “*we’re dealing with a room that wasn’t the cleanest, but also any room you go into is going to have some element of dust and I think that what we capture there on the night vision camera was simply dust particles moving across the bed*”.

In Ofcom’s view, viewers would have understood that Mr O’Keeffe was not making a judgement about the cleanliness of the complainants’ home but rather was looking for a scientific explanation of Ms Fielding’s observation. In this respect and taken together as part of the programme as a whole, Ofcom does not consider that the complainants were portrayed unfairly as a result of this comment.

Accordingly, Ofcom has not upheld head b) of the complaint.

- c) In respect of the complaint that the programme was unfairly edited in that it gave the impression that the complainants were fraudulent and that investigations were carried out overnight when in fact they were not, Ofcom took account of Practice 7.6 as detailed above at head b).

Ofcom again examined the comments made by the presenters in the context of the programme as a whole, their different roles in the investigation and the complainants' contributions to it. Ofcom noted that the comments of Mrs Lievesley and to a lesser extent Miss Lievesley were included in some detail in the programme. In an attempt to investigate further, a séance was arranged to try and contact the spiritual beings that had been reported as present in the house. Mrs Lievesley said that, during this séance, the glass ceased to move when Ms Fielding removed her fingers from it, and the programme unfairly omitted this sequence. Ofcom noted that sequences showing the glass ceasing to move when Ms Fielding removed her fingers from it were in fact included in the programme; furthermore the programme as broadcast and unedited material provided to Ofcom also clearly showed the glass moving when only Mrs Lievesley and Miss Lievesley's fingers were upon it.

With regard to the length of time spent by the presenters investigating the phenomena, in Ofcom's view, it is not apparent from the programme what length of time had been spent in the house. However, it did note that within the programme format, there was time for all contributors to give their views and the conduct of a séance provided a further opportunity for Mrs Lievesley and her family's experiences to be investigated. The programme did not indicate how much time was involved but it did present the facts of the investigation within the timeframe of the programme in a fair and balanced way.

In this respect and taking into account the factors detailed above Ofcom has not upheld this head of complaint.

- d) Ofcom then went on to consider whether the privacy of Mrs Lievesley and her family had been unwarrantably infringed in the making of the programme in that the programme was made without their knowledge or permission.

In Ofcom's view, the line to be drawn between the public's right to information and the citizen's right to privacy can sometimes be a fine one. In considering complaints about the unwarranted infringement of privacy both in relation to the making and the broadcast of the programme, Ofcom must consider two distinct questions: First, has there been an infringement of privacy? Secondly, if so, was it warranted? This is in accordance with Rule 8.1 of the Code which states:

“Any infringement of privacy in programmes or in connection with obtaining material included in programmes, must be warranted”.

We also had regard to Practice 8.5 of the Code which states that any infringement of privacy in the making of a programme should be with the persons consent or be otherwise warranted.

Ofcom first considered whether the complainants had a legitimate expectation of privacy in relation to the obtaining of the footage. In determining whether there was a legitimate expectation of privacy, Ofcom took account of the events and images being filmed, whether for the purposes of a DVD or for television broadcast, and considered if they were of a particularly personal or sensitive nature, or attracted an expectation of privacy for any other reason.

In this particular case, filming took place in the interior of the Lievesley family home and concerned matters personal to the Lievesley's such as their belief about the paranormal activity they said they had experienced in their house.

In Ofcom's view, these circumstances would attract an expectation of privacy, and it would normally be incumbent upon programme makers to obtain consent to film before any footage was taken.

As noted earlier, in this case, release forms had been signed by the complainants for filming to take place in their home in connection with paranormal activity. They appeared to be willing and active participants to filming. Ofcom was therefore satisfied that the broadcaster was entitled to believe that informed consent had been obtained.

In these circumstances, Ofcom considered that the complainants did not have a legitimate expectation of privacy and that the privacy of Mrs Lievesley and her family was not infringed in the making of the programme. It was not therefore necessary for Ofcom to further consider whether any infringement was warranted. Ofcom has not upheld this head of complaint.

- e) Ofcom then considered whether the privacy of Mrs Lievesley and her family was unwarrantably infringed in the broadcast of the programme in that they stipulated their home should not be identifiable, and verbal assurances that the programme makers would not name or identify anyone in the family were not adhered to. In determining whether their privacy was infringed, Ofcom 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 and Practice 8.2 which 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 first considered whether Mrs Lievesley and her family had a legitimate expectation of privacy with regard to the broadcast of the programme. We looked at the type of events and images being broadcast in the programme and considered these were of a personal nature which examined the Lievesley's beliefs concerning paranormal activity, likely to attract an expectation of privacy and involve consent. We also noted that the subject of the programme was of a potentially sensitive nature. Ofcom noted that the programme broadcast interior shots of the family home including the lounge, Miss Lievesley's bedroom and the kitchen.

In determining any expectation of privacy in the broadcast of the programme, Ofcom looked at the basis on which the complainants had agreed to participate. As detailed earlier, consent appeared to be informed and the complainants appeared content to have their contribution included in a DVD, which is available to purchase publicly. Ofcom next examined the additional stipulations made on the consent form that no identifying shots be included in the programme as broadcast and whether these were adhered to. Mrs Lievesley and her family were referred to by their first names only.

We also noted that no identifying features of the interior or exterior of the house were shown that could reveal it or its location to anyone other than those who knew the family well and knew of the paranormal activity the family had claimed to have been experiencing. In addition, the house was referred to simply as *"the*

farmhouse". Furthermore, Ofcom considered that the verbal assurance that Mrs Lievesley said she had been given about not naming or identifying anyone in the family appeared to be at odds with the actions of the participants. On the information available to it, Ofcom found no evidence that the programme makers had given such a guarantee. In these circumstances and taking account of the factors detailed earlier, Ofcom concluded that there was no legitimate expectation of privacy in the broadcast of the programme.

Mrs Lievesley and her family's privacy was not infringed. It was not necessary to go on to further consider whether any infringement of privacy was warranted. Ofcom has therefore not upheld this head of complaint.

Accordingly Ofcom has not upheld Mrs Lievesley's complaint on her own behalf and on behalf of Miss Hazel and Mr Richard Lievesley of unfair treatment or unwarranted infringement of privacy in either the making or the broadcast of the programme.

Not Upheld

Complaint by Mr Mark Wilson

Racing Live, At The Races, 1 July 2008

Summary: Ofcom has not upheld this complaint of unfair treatment made by Mr Mark Wilson.

This edition of *Racing Live*, broadcast by At The Races, showed horse races from Brighton Racecourse. Just before the 15:00 race on 1 July 2008, footage was included showing a stall handler slapping the horse Caprio on the nose. The presenter and his guest commented on the incident, which was also referred to at 15:36. Footage of the incident was broadcast again at 16:38, once in real time and once in slow-motion.

Mr Mark Wilson, the stall handler, complained that he was treated unfairly in the broadcasts.

In summary, Ofcom found that editing the footage did not result in the incident being unfairly represented, that the commentary in each of the broadcasts was measured and fairly updated viewers on developments in the story and that subsequent broadcasts of the footage were justified.

Introduction

On 1 July 2008, At The Races (“ATR”) broadcast an edition of its programme *Racing Live* that included footage of the 15:00 horse race from Brighton Racecourse. One of the horses running in this race was called Caprio. The programme included footage of an incident just prior to the 15:00 race in which two stall handlers and Caprio’s rider tried to adjust Caprio’s saddle, which had become loose as a result of the horse’s fractious behaviour. During this footage Caprio was shown swinging round and pulling away from his handlers (one of whom was Mr Mark Wilson, the complainant). Mr Wilson was shown slapping Caprio on the nose. Two race commentators then discussed the incident.

Half an hour after the race, the programme reported that it had received a number of emails from viewers about the incident, including one asking why it had shown the footage. The presenter explained that they were not showing the footage again because “*we don’t want to dwell on it for reasons of taste more than anything*”. He went on to describe the incident and said that the decision to show the footage was a difficult one but that “*it did happen*” and that therefore the programme had shown it earlier. The presenter added that the programme makers understood that the incident would be looked at by the starter and the course officials and that “*if what appeared to happen happened no doubt some kind of action will be taken*”. He also said “*It’s not our job to conduct that enquiry obviously but we did make the decision to show it*”.

Footage of the incident was shown again at 16:38. The presenter said that this was because there was an ongoing story. He said that the programme makers had spoken to one of Caprio’s owners who had expressed his concern to the British Horseracing Authority (the “BHA”), the regulatory body for the sport of horse racing in Britain. The presenter also explained that the stewards at Brighton would be holding an enquiry and that RaceTech, which employed the stalls handlers, would be holding

its own enquiry into the incident. The programme then showed the incident in slow-motion with the presenter explaining that this was to make it clear that the horse had been given “*an open-handed slap*” rather than being punched as some viewers had suggested.

Mr Wilson was shown in the first and third sections of the broadcast noted above although his face was not clearly visible. He was not named in the programme but was identified as either “*a stall handler*” or “*the stall handler*” who had slapped Caprio on the nose in all three sections of the broadcast noted above.

Mr Wilson complained to Ofcom that he was treated unfairly in the programme as broadcast.

The Complaint

Mr Wilson’s case

In summary, Mr Wilson complained that he had been treated unfairly in the programme as broadcast in that the footage of him slapping Caprio on the nose at the Brighton Racecourse, which was repeatedly shown on *Racing Live* on 1 July 2008, and the comments broadcast about this incident portrayed him unfairly. Mr Wilson also complained that the programme did not show the footage around this incident or explain the horse’s difficult behaviour leading up to this incident. In particular, the fact that Caprio had injured the groom to the extent that she was hospitalised and that he had already bitten Mr Wilson’s left hand was not mentioned.

ATR’s case

In summary, ATR responded to Mr Wilson’s complaint of unfairness as follows:

ATR said that the footage was not shown repeatedly. The footage had been recorded during an advertising break on 1 July 2008 and was then broadcast on the programme’s return at 14:59, accompanied by a voiceover by the presenter. The on-course presenter and his guest, after viewing the footage on a monitor at the course, gave their live and immediate reactions. ATR said the guest’s comments were qualified with the words “*initial reaction*” and “*first impression*”. At 15:36 the presenter referred to the incident, but the footage was not shown and at 16:38 he updated viewers on developments in the ongoing story. The footage was shown again in real time and then in slow-motion, which helped the presenter clarify that the incident involved an open-handed slap and not a punch. ATR said that the incident was also referred to on 2, 6 and 18 July 2008¹.

As regards the editing of the footage, ATR said that it obtained its coverage from Dales TV and that all the footage it received of the incident from Dales TV was broadcast, except for 13 seconds immediately prior to the incident. This 13 second section was not included due to time constraints, as there was only a short period between returning from the advertising break and the scheduled start of the second race. ATR said that, had it not been for the advertising break, the whole incident would have been broadcast live. ATR said that it had no access to any other footage of the incident.

As regards the explanations of the incident in the broadcasts, ATR said that it had no knowledge of the full background at the time of the broadcasts on 1 July 2008. ATR

¹ These broadcasts were not included in the complaint entertained by Ofcom.

said that at this time it had appeared to be an isolated incident and, in that context, it was very unusual for a stall handler to hit a horse, apparently out of the blue. ATR said that at the time of the first broadcast on 1 July 2008, it had no knowledge of the incident in the stables and that it was only later in the day, when the programme maker spoke to Caprio's stable lad, that the broadcaster found out more of the background to the incident.

ATR said that it had been careful not to draw conclusions and that many comments made were sympathetic to Mr Wilson, especially as the story became clearer.

Furthermore, ATR said it had a duty to broadcast the incident as it may have affected the betting decisions of its viewers at the time. The incident was also a matter of public interest, as racing welfare was an important issue for ATR and its viewers.

ATR said that there was no attempt to sensationalise the incident and that, after the first broadcast at 15:00, the two replays that day were accompanied by further explanation by the presenter to clarify.

ATR said that its coverage of the incident was not out of line with other sports coverage such as a football match where an incident may be replayed a number of times and analysed from a number of angles.

Mr Wilson's comments

In summary Mr Wilson responded to ATR's statement as follows:

Mr Wilson said that Caprio misbehaved on four occasions at the starting stalls. The last two incidents were recorded on the Dales TV footage, but only the final incident was broadcast by ATR. As a result of only one incident of Caprio's misbehaviour being shown, combined with the accompanying remarks, the wrong impression was conveyed to viewers. Mr Wilson said that the editing of the Dales TV footage gave more impact to Caprio being struck and focused less on his prior difficult and savage behaviour.

With reference to the sports coverage point, Mr Wilson said that if a footballer was attacked and retaliated and a television programme only showed the retaliation, then he considered that would be biased coverage. Mr Wilson also considered there was a difference between an act of violence between two human beings and his situation. Mr Wilson explained that his actions were not of a violent nature, but were out of self-preservation and to gain control of a dangerous situation. He said his rebuke to the horse was a positive and did not affect the outcome of the race. Mr Wilson said he could not see how ATR could use football coverage to justify the misleading coverage on 1 July 2008.

ATR's comments

ATR said that the footage was edited for time, rather than content, and that it was not edited to maximise the impact of the incident. ATR said that there was no time in the advertising break to take detailed editorial decisions about the footage. It said that all that had been removed from the footage was a 13 second section of Caprio being resaddled.

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 unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included 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.

Mr Wilson's complaint was considered by Ofcom's Executive Fairness Group. In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included recordings and transcripts of the programme as broadcast, the untransmitted material and both parties' written submissions.

By way of background, Ofcom noted from newspaper cuttings submitted by Mr Wilson in support of his complaint that the slapping of a horse at a racecourse was a noteworthy event, and that, following the incident, two inquiries were launched into Mr Wilson's conduct, one by his employer, RaceTech, and one by the BHA. Ofcom also noted that between the broadcasts on 1 July 2008 and the outcome of the inquiries, it became clear that Caprio had misbehaved at previous race meetings. It also became clear that at Brighton on 1 July 2008 Caprio had: head butted and injured his groom, who was taken to hospital for x-rays to her nose and jaw; continued to try to head butt and bite; caused his saddle to come loose; and when taken onto the track, was difficult to handle at the start and continued to try to bite and head butt Mr Wilson. Ofcom further noted that both RaceTech and the BHA decided not to take disciplinary proceedings against Mr Wilson.

In considering Mr Wilson's complaint, Ofcom had particular regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals, as set out in Rule 7.1 of the Ofcom Broadcasting Code (the "Code"). Ofcom took account of Practice 7.9 of the Code. Practice 7.9 states that broadcasters must take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation.

Ofcom first considered Mr Wilson's complaint that ATR removed 13 seconds of footage leading up to the incident and that this created more of a focus on the fact that Caprio had been struck and less on the fact that he had been difficult and savage. It also noted ATR's response that the editing was due to time constraints and not in order to sensationalise the incident and that there was no time in the advertisement break to make detailed editorial decisions.

In considering complaints about editing of footage, Ofcom takes the view that decisions about what to include in a programme and about the editing of a programme are ultimately editorial matters for the broadcaster, provided the broadcaster complies with its obligation to ensure that the programme does not result in unfairness to an individual or organisation. In Ofcom's view, having viewed both the broadcast and the untransmitted footage, the inclusion of the 13 second section would have done little to materially alter viewers' understanding of the incident. It was only when the full extent of Caprio's misbehaviour that day (and in the past) became

apparent, that RaceTech and the BHA decided to take no disciplinary action against Mr Wilson.

Taking into account the above circumstances, Ofcom is of the view that no unfairness resulted to Mr Wilson due to the omission of the 13 second section of footage.

Ofcom then considered Mr Wilson's complaint about the commentary.

Ofcom noted that when the footage of Mr Wilson slapping Caprio was broadcast at 14:59, it was broadcast with the following commentary:

"Now Caprio, as I say, was a handful down at the start and had been err very difficult, they're trying to make adjustments to Caprio's tack here and as you can see Richard Kingscote has got off and that was a stall handler's action in the end which err took place a few moments ago."

There then followed an exchange between the presenter, Jason Weaver ("JW"), and his guest, Claude Duval ("CD"):

JW: *"Thanks Boycey yeah I don't know if he happened to take a chunk out of the stall handler there, but err certainly a strange one Claude."*

CD: *"Well my initial reaction is that he very much overreacted hasn't he? I know it was pretty dicey and that the horse was being very unfriendly at the time, but err I wouldn't have thought from first impression that that errrr it looked like something Henry Cooper might have been proud of."*

JW: *"Caprio's at the head of the market as well, he's been a little bit uneasy. I'm going to go with Doric Lady here for James Toller and Eddie Ahern. You're going to stick with Caprio?"*

CD: *"Yes if he hasn't got a too bruised nose after that."*

In Ofcom's view, Mr Weaver and Mr Duval expressed their opinions on a noteworthy incident that they had just seen for the first time, at the same time as viewers. They did so in a measured way. Mr Weaver suggested a possible explanation for the incident and Mr Duval gave his immediate reaction and used the terms *"my initial reaction"* and *"from first impression"*.

In this case Ofcom was satisfied that the presenter and his guest did not make statements of fact, but were clearly expressing their opinion on what they had seen. They were entitled to do so. Since viewers saw the incident at the same time as the presenter and his guest, they were able to make up their own minds as to whether they agreed with the opinions of the presenters or not.

Ofcom next considered the reference to the incident that was broadcast at 15:36. Ofcom noted that the incident was referred to at this point but that the footage was not shown. The following commentary was broadcast:

"We are not going to show it again, because we don't want to dwell on it for reasons of taste more than anything, but what we did see and we came back from an ad break and we told you that Caprio had been quite fractious down at the start and had been a handful down at the start, was proving difficult to errrr to control I suppose whilst some adjustments were being made to his tack. We then

saw a stalls handler strike the horse hmmm when I first saw it I thought it was a punch, watching the replay I think it was probably a slap. Either way, by which I mean the hand was open rather than a clenched fist, we haven't shown it again err because its not something to dwell on for that reason because obviously none of us want to see horses getting hit in that way. Our understanding is that it will be looked at obviously by the starter and by his officials at the course there and if, if what appeared to happen happened then err no doubt some kind of action will be taken".

Ofcom took the view that there was a legitimate public interest in revealing behaviour the racing industry would generally consider to be unacceptable and the industry's response to it, and that ATR was entitled to update viewers on developments in the story. As with the earlier broadcast, Ofcom considered that the presenter referred to the incident in a measured way and did not draw conclusions. He also clarified that Mr Wilson had slapped the horse, rather than punched him, as some viewers thought.

Ofcom finally considered the footage broadcast at 16:38. The footage of the incident was shown once in real time and once in slow-motion and the programme included the following commentary:

"Prior to the 3.00 at Brighton... there was an incident, the horse was rather fractious down at the start. We are going to show it one more time because there is clearly an ongoing story here developing. That was the stalls handler striking the horse... We're going to show it one more time... it's clearly an unfolding story, we can have a look at it now... this was going back before the incident. You can see the horse has got rather het up, nothing massively dramatic. You can see from that slow-motion the reason for showing that as many of you were emailing in feeling the horse had been punched and you can see its an open-handed slap to the face of the horse to the nose of the horse, the muzzle area of the horse which is the most sensitive part of the horse in many respects of course and subsequently the horse was very still and calm, but obviously a great deal of disquiet amongst you about what's happened."

Ofcom considered that the incident was of considerable interest to the audience, and ATR was entitled to update viewers on developments in the story. As with the earlier broadcasts, Ofcom was satisfied that the presenter used measured language and did not draw conclusions, and again clarified that Mr Wilson had slapped the horse and not punched him.

In Ofcom's view, what occurred in all the coverage on 1 July 2008 was similar to what happens in almost every type of sporting coverage, namely footage of a noteworthy incident is broadcast, often more than once, and probably in slow-motion, and commentators express their opinions on the potential issues.

In all these circumstances, Ofcom was of the view that ATR took reasonable care in relation to the three broadcasts to satisfy itself that material facts were not presented, disregarded or omitted in a way that was unfair to Mr Wilson.

Ofcom also considered Mr Wilson's complaint that the footage was shown repeatedly.

In Ofcom's view, as set out above, the incident was of considerable interest to the public, the footage was shown briefly and, on each occasion, with an up-to-date explanation of the situation. In the circumstances, Ofcom considered that there was

not excessive or sensational repetition of the incident and that ATR took reasonable care to satisfy itself that material facts were not presented, disregarded or omitted in a way that was unfair to Mr Wilson.

Accordingly Ofcom has not upheld Mr Mark Wilson's complaint of unfair treatment in the programme as broadcast.

Not Upheld

Complaint by Mr Jamie Tough

Night Cops, Sky One, 2 March 2009

Summary: Ofcom has not upheld this complaint of unfair treatment and unwarranted infringement of privacy in the programme as broadcast.

This programme featured incidents filmed during police patrols undertaken at night. One such incident involved an alleged assault and while the police were in the process of arresting the alleged assailant, Mr Jamie Tough, a friend of the assaulted man, was shown being warned and restrained by police officers after making threatening gestures towards the arrested man. Mr Tough was shown being handcuffed by a police officer until he had calmed down and then being led away from the scene under police escort. After the arrested man had been taken to the police station, the programme stated that *“the angry local [Mr Tough] eventually went on his way”*.

Mr Tough was not named in the programme, but his face was clearly shown and his voice could be heard. Mr Tough complained that he was treated unfairly and that his privacy had been unwarrantably infringed in the programme as broadcast.

Ofcom found the following:

- The programme did not portray Mr Tough or the events in which he was involved in a way that was either misleading or unfair to him.
- Mr Tough did not have a legitimate expectation of privacy in relation to the broadcast of the footage of him taken in a public place and after he had given his consent to the programme makers for the footage taken to be included in the programme. Therefore, his privacy was not unwarrantably infringed in the programme as broadcast.

Introduction

On 4 March 2009, Sky One broadcast an edition of its reality series *Night Cops*, which followed police officers from a number of police forces carrying out their duties in cities throughout the country at night.

This edition included footage of a number of incidents in Edinburgh’s city centre and the manner in which the police officers dealt with them. One of the incidents involved an English visitor who had assaulted, it was alleged, a local man. While the police were in the process of arresting the visitor, Mr Jamie Tough (who was a friend of the man alleged to have been assaulted) was shown being warned and restrained by police officers after making threatening gestures towards the arrested man. Mr Tough was also shown being handcuffed by a police officer until he had calmed down and was then led away from the scene under police escort. The programme stated that after the arrested visitor had been taken away, *“the angry local eventually went on his way”*. Mr Tough was not arrested by the police.

Mr Tough was not named in the programme, however his face was clearly shown and his voice could be heard.

Mr Tough complained to Ofcom that he was treated unfairly in the programme and that his privacy had been unwarrantably infringed in the programme as broadcast.

The Complaint

Mr Tough's case

In summary, Mr Tough complained that he was treated unfairly in the programme as broadcast in that:

- a) The programme unfairly portrayed him as being at fault and very agitated.

In particular, Mr Tough said that his friend had been assaulted and although he had reacted, he had not done so in a criminal way. He said that the police officers at the scene had been aware of the situation and had been calming him down. The programme unfairly failed to mention that Mr Tough's friend had been assaulted and failed to show his injuries. Mr Tough said that this resulted in making him appear agitated for no reason and that the programme had painted a bad picture of him.

In summary, Mr Tough complained that his privacy was unwarrantably infringed in the programme as broadcast in that:

- b) Mr Tough said that the programme makers had asked him after the incident whether or not he was happy to be shown. He declined. He said that his friend also at the scene had reiterated to the programme makers that Mr Tough was not giving his consent.

The Broadcaster's case

In summary, British Sky Broadcasting Limited, ("BSkyB") responded to Mr Tough's complaint that he was treated unfairly in the programme as follows:

Unfair treatment

- a) BSKyB said that it appeared from Mr Tough's complaint that he believed the programme had portrayed him as being "at fault" and that "fault" meant fault of a criminal act. BSKyB said that at no point during the programme was it stated or implied that Mr Tough had been guilty of a criminal act. The programme had clearly showed the police not taking any further action against Mr Tough. Although the programme showed him being escorted from the scene by the police and warned that his conduct may result in his arrest, he was not arrested and this point was made clear in the programme. BSKyB said therefore that the programme made no suggestion that Mr Tough was at fault of a criminal act.

BSkyB said that Mr Tough was clearly agitated at the time of the incident and that his agitation and his threatening behaviour toward the arrested man resulted in the police having to restrain him. It said that Mr Tough's behaviour and language was threatening and intended to be so. It was apparent from the footage included in the programme that the police officers at the scene became increasingly concerned with Mr Tough's behaviour and that their concern was reflected in the escalating way in which they addressed him, including removing him from the scene and handcuffing him. BSKyB said that the programme could not have treated Mr Tough unfairly in the fact of portraying his obvious agitation.

BSkyB said that the programme did not unfairly edit or embellish the incident involving the complainant. Mr Tough was clearly agitated and his behaviour warranted him being warned and restrained by police officers. Also, the programme's commentary accompanying the footage accurately reflected the events that occurred and did not exaggerate or downplay the seriousness of Mr Tough's behaviour. BSkyB also said that the programme made it clear that Mr Tough was not accused of or arrested for any crime by stating that he "*went on his way*". BSkyB said that viewers would not have been under the impression that Mr Tough had committed a criminal offence or that his behaviour was any more pernicious than a reasonable person may consider from witnessing the incident itself. The programme did not put a negative "gloss" on Mr Tough's behaviour and did not paint a bad picture of him in a way that was unfair.

BSkyB said that the programme made it clear the reasons for Mr Tough's behaviour. Mr Tough was heard to say when referring to the man arrested for allegedly assaulting his friend, that "*he's bashed my pal*" and "*He's...put my pal on his back and there was no reason for it*". It was therefore apparent to viewers, in BSkyB's view, that Mr Tough's reasons for acting in the way he did were connected to the alleged assault on his friend. The connection between Mr Tough's behaviour and the alleged assault was further made clear by the footage of the alleged assailant being arrested at the scene.

Privacy

In summary and in response to Mr Tough's complaint that his privacy was unwarranted infringement of privacy in the programme as broadcast, BSkyB said that Mr Tough's actions took place on a crowded street in Edinburgh and that the programme recorded the significant number of bystanders who witnessed Mr Tough's behaviour. It also said that it was clear from the untransmitted footage filmed at the scene by the programme makers (provided to Ofcom) that Mr Tough's consent was explicitly sought and granted.

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 unfair treatment in programmes included in such services and unwarrantable infringement of privacy in the broadcast and in the making of programmes included 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. This complaint was considered by Ofcom's Executive Fairness Group. Ofcom considered the complaint and the broadcaster's response, together with a recording and a transcript of the programme as broadcast. In its considerations, Ofcom took account of Ofcom's Broadcasting Code ("the Code").

Unfair treatment

- a) Ofcom considered Mr Tough's complaint that the programme portrayed him unfairly as being at fault and very agitated.

Ofcom had particular regard to whether the programme makers' actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals, as set out in Rule 7.1 of the Code, and whether they had taken reasonable care to satisfy themselves that material facts had not been presented, disregarded or omitted in a way that was unfair to an individual or organisation (as outlined in Practice 7.9 of the Code).

The programme set out to demonstrate the work of police officers who patrol the UK's cities and towns at night and the type of incidents they come across.

Ofcom examined the programme as broadcast. At the beginning of the relevant section of the programme, the commentary stated:

Commentary: *"When they [the police] arrive their colleagues up the road have collared an English tourist who's accused of assaulting a local."*

The programme went on to state that:

Commentary: *"The victim of the assault has run off but one of his mates [Mr Tough] wants to dole out his own justice."*

Mr Tough was then shown trying to get to the man the police had arrested for the alleged assault on Mr Tough's friend and subsequently being restrained and handcuffed by the police. The programme stated:

Commentary: *"The local [Mr Tough] is still spoiling for a fight and he's not going to let a couple of night cops and a pair of handcuffs stop him."*

The police officers were shown keeping Mr Tough away from the arrested man and reasoning with him by telling him that he was not helping the situation and that if he continued to behave in the way he was, he too would be arrested. Mr Tough was then shown to say:

Mr Tough: *"He's put my pal on his back and there was no reason for it."*

Mr Tough appeared to the police officers to have calmed down and as they went to take the handcuffs off him, Mr Tough was shown to say:

Mr Tough: *"I'm going to banjo this boy as soon as you take them off."*

Shortly after the handcuffs were taken off Mr Tough, he was shown being led away from the scene by police officers to a place around the corner where he could wait for a statement to be taken from him. Mr Tough again was shown attempting to get to the arrested man and was stopped by a police officer. The programme stated:

Commentary: *"As he's led away the local [Mr Tough] finally tried one more time. Sergeant Oliver has finally had enough of the drunken man's bravado."*

Police officer: *“...If you mess us about anymore I’m going to arrest you for breach of the peace alright?”*

The programme concluded with the commentary stating that:

Commentary: *“The English tourist was ordered to pay a fine for assault and the angry local [Mr Tough] eventually went on his way.”*

Ofcom considered that the footage of Mr Tough included in the programme along with the accompanying commentary made it clear to viewers that Mr Tough was reacting to a situation in which his friend had allegedly been assaulted by a man who the police arrested and subsequently fined for assault.

It was clear from the footage included in the programme that Mr Tough was upset about what he believed had happened to his friend and had reacted in a way that required the police to warn him repeatedly about his behaviour and, at one point, physically restrain him by handcuffing him. The programme’s commentary also made it clear that despite a number of warnings given by the police, Mr Tough was not arrested or otherwise dealt with by the police in a way that would suggest any criminality on his part.

Taking all the factors referred to above into account, Ofcom was satisfied that the programme did not portray Mr Tough or the events in which he was involved in a way that was either misleading or unfair to him. Ofcom considered that the broadcaster took appropriate care to satisfy itself that the programme presented the incident in which Mr Tough was involved fairly.

Ofcom, therefore, found no unfairness to Mr Tough in this regard.

Privacy

- b) Ofcom considered Mr Tough’s complaint that he had declined to give his consent for the footage of him to be included in the programme as broadcast.

Ofcom’s recognises that the line to be drawn between the public’s right to information and the citizen’s right to privacy can sometimes be a fine one. In considering complaints about the unwarranted infringement of privacy, Ofcom will therefore, where necessary, address itself to two distinct questions: First, has there been an infringement of privacy? Second, if so, was it warranted? (Rule 8.1 of the Code).

In considering whether or not there had been an infringement of Mr Tough’s privacy in the programme as broadcast, Ofcom first considered whether he had a legitimate expectation of privacy in the circumstances in which the footage of him was broadcast.

Mr Tough was filmed being warned and restrained by police officers while making threatening and abusive gestures towards a man they had arrested for allegedly assaulting Mr Tough’s friend. Mr Tough was not named in the programme, his face was shown unobscured throughout the relevant part of the programme and was therefore identifiable. However, Ofcom noted that Mr Tough’s actions took place on a public street in full view of those around him.

Ofcom also noted from the unedited and untransmitted footage provided to Ofcom by the broadcaster that Mr Tough had given his consent for the footage of him to appear in the programme. In particular, Ofcom noted the following exchange between Mr Tough and the programme makers:

Programme maker: *“Do you mind me filming you for a documentary on the police at night?”*
Mr Tough: *No, I don’t mind.*
Programme maker: *So you give me permission?”*
Mr Tough: *Yes, so long as my mum doesn’t watch.”*

Given that Mr Tough had been filmed in a public place in full view of those around him and that he had given his explicit consent to the programme makers for the footage taken of him to be included in the programme, Ofcom was satisfied that that Mr Tough did not have a legitimate expectation of privacy in relation to the inclusion of this footage of him in the programme as broadcast.

Having concluded that Mr Tough did not have a legitimate expectation of privacy in this regard, Ofcom found that his privacy was not infringed in the programme as broadcast. It was therefore not necessary for Ofcom to further consider whether any infringement of privacy was unwarranted or not.

Accordingly, Ofcom has not upheld Mr Tough’s complaint of unfair treatment and unwarranted infringement of privacy in the programme as broadcast.

Not Upheld

Complaint by Miss P

Blue Peter at 50, BBC2, 11 October 2008 and BBC1, 19 October 2008

Summary: Ofcom has not upheld Miss P's complaint of unfair treatment unwarranted infringement of privacy in the programme as broadcast.

This programme (broadcast on 11 October 2008 and repeated 19 October 2008) commemorated fifty years of the children's programme *Blue Peter* and included footage from past programmes and interviews with former presenters and production staff. One of the former presenters, Peter Duncan, recalled being invited to watch the making of a live broadcast of the programme in 1978. An excerpt from the 1978 programme was shown that included footage of Miss P, the complainant, playing tunes on household objects that had been fashioned into musical instruments. Peter Duncan commented on his experience by saying:

"...they had this sort of half man, half woman, or in transition, who used to blow all these bathroom implements...for some bizarre reason, they'd only kind of realised during the live transmission that it wasn't quite who they thought it was, it was some sort of bizarre panto dame who got carried away...and it frightened me off, and then there were lots of expletives around up in the gallery..."

Miss P complained to Ofcom that she was treated unfairly and that her privacy was unwarrantably infringed in the broadcast of the programme, and the repeat broadcast, in that she was unfairly portrayed and personal information about her revealed.

In summary, Ofcom found the following:

- Ofcom recognised the offensive, insensitive and personally hurtful (to Miss P) nature of Peter Duncan's comments, however, it considered that they were unlikely to affect viewers' understanding of Miss P and the context in which the comments were made in a way that was unfair to her.
- Ofcom considered that any expectation of privacy that Miss P had was considerably diminished, not only by the fact that Miss P was neither named or identified other than by the inclusion of thirty year old footage of her, but also by the fact that the information included was already in the public domain and a matter of public record. Ofcom was satisfied that Miss P did not have a legitimate expectation of privacy in the disclosure of this information in the programme and that her privacy was not unwarrantably infringed in the programme as broadcast.

Introduction

On 11 October 2008 (and repeated on BBC1 on 19 October 2008), BBC2 broadcast *Blue Peter at 50*, which commemorated fifty years of the children's programme *Blue Peter*. The programme included footage from *Blue Peter* programmes broadcast over the past fifty years and interviews with former presenters and production staff. One former presenter interviewed was Peter Duncan who talked about his audition to become a *Blue Peter* presenter and how he had been invited to the studio to watch a *Blue Peter* programme being made live in 1978. An excerpt from the 1978 programme was shown that included footage of Miss P, the complainant, playing

tunes on household objects that had been fashioned into musical instruments. In describing his experience and the reaction of the production staff at the time, Peter Duncan said:

“...they had this sort of half man, half woman, or in transition, who used to blow all these bathroom implements...for some bizarre reason, they’d only kind of realised during the live transmission that it wasn’t quite who they thought it was, it was some sort of bizarre panto dame who got carried away...and it frightened me off, and then there were lots of expletives around up in the gallery...”

The programme was repeated on 19 October 2008 on BBC1 and remained unchanged from the original broadcast.

Miss P complained to Ofcom that she was treated unfairly and that her privacy was unwarrantably infringed in the programme as broadcast and the repeat broadcast of it.

The Complaint

Miss P’s case

In summary, Miss P complained that she was treated unfairly in the programme (including the repeat broadcast) in that:

- a) She was unfairly portrayed in the programme.

Miss P said that although she “did transgender” in 1963, it was an irrelevant factor in her appearance in either the programme made in 1978 or *Blue Peter at 50*. She said that Peter Duncan was not at liberty to cause viewers to question her gender. Miss P said that she was not able to “defend” herself.

In summary, Miss P complained that her privacy was infringed in the programme as broadcast in that:

- b) Peter Duncan’s comments revealed personal information about her.

Miss P said that there was a need for privacy about transgender issues as many people did not understand it and that she had wanted to keep this part of her life “quiet and private”. Since the broadcast, Miss P said that people had asked her whether or not it was true that she was a “transgendered person”. Peter Duncan’s comments were humiliating, insulting and unwarranted.

The BBC’s case

In summary, the BBC responded to Miss P’s complaint that she was treated unfairly in the programme (including the repeat broadcast) as follows:

- a) The BBC said that Peter Duncan was primarily describing the impression made on himself and on members of the *Blue Peter* production team by Miss P’s appearance. It said that he was not giving, or purporting to give, factual information about Miss P’s gender status. Indeed, construed as such information, Mr Duncan’s comments would have to be regarded as inaccurate, in that Miss P was not at the time “*half man, half woman, or in transition*”, but had “transgendered” in 1963. The BBC said that footage of Miss P was included in the programme because it had a significant impact on the *Blue Peter* production

team which, in turn, influenced Peter Duncan's decision not to accept the presenter's role at that particular time. The BBC said that Peter Duncan had given an honest account of his recollections of the occasion, albeit by describing Miss P's appearance in far from flattering terms.

In summary, the BBC responded to Miss P's complaint of unwarranted infringement of privacy in the broadcast of the programme (including the repeat broadcast) as follows:

- b) The BBC said that the programme makers could have had no reasonable expectation that a thirty year-old clip of Miss P, in which she was neither named nor heard speaking, would enable her to be identified by viewers.

The BBC said that although it was a matter of regret that Miss P received unwelcome enquiries as a result of the programme, it did not believe that the programme could be said to have revealed personal information about her. The BBC said that Peter Duncan's comments had not given factual information about Miss P, but rather had given information of how her appearance struck him and others at the time.

Also, the BBC said that even if the comments had prompted speculation about Miss P's gender status, the fact that she had transgendered was a matter of public record, not least as a result of her own actions. The BBC said that in 2006, Miss P took a case to the European Court of Human Rights ("the ECHR") in which she claimed a violation of Article 8 of the European Convention on Human Rights after being refused eligibility by the UK courts to claim a state pension at the age of 60. Miss P won her case and details of it were published on the Council of Europe website, which states: "*The applicant, [Miss P], is a 68-year-old British national who lives in St Albans (the United Kingdom). She is a post-operative male-to-female transsexual*". These details were also reported on other websites, including the BBC's News website.

In relation to both heads of complaint, the BBC said that it accepted that Peter Duncan's description of Miss P could not have been welcome to her and could have been perceived by viewers as unkind. The BBC said that when Miss P's complaint came to its attention, its Head of News, Factual and Entertainment for children's programmes decided that the programme be edited to remove the sequence referring to Miss P from the programme which was repeated in December 2008. This decision was taken in response to the fact that Miss P had expressed hurt feelings about the comments made and reflected the BBC's desire not to hurt her feelings further by re-broadcasting them. However, the BBC said that the decision to edit the programme was not taken as recognition that Miss P had been unfairly treated in the manner complained of or that her privacy had been infringed by the broadcast of the programme.

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 unfair treatment and unwarranted infringement of privacy in programmes included 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.

Miss P's complaint was considered by Ofcom's Executive Fairness Group. In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording and transcript of the programme as broadcast and the parties' written submissions.

- a) Ofcom first considered Miss P's complaint that she was treated unfairly in the programme (including the repeat) in that the programme portrayed her unfairly.

Ofcom took particular account of whether the broadcaster's actions were consistent with the obligation to avoid unjust or unfair treatment of individuals in programmes (as set out in Rule 7.1 of Ofcom's Broadcasting Code ("the Code")). It also considered whether the portrayal of Miss P was consistent with the broadcaster's obligation to ensure that material facts had not been presented in a way which was unfair (as outlined in Practice 7.9).

Ofcom noted the comments made in the programme by Peter Duncan that related to Miss P:

"...they had this sort of half man, half woman, or in transition, who used to blow all these bathroom implements...for some bizarre reason, they'd only kind of realised during the live transmission that it wasn't quite who they thought it was, it was some sort of bizarre panto dame who got carried away...and it frightened me off, and then there were lots of expletives around up in the gallery..."

Ofcom noted that Peter Duncan's comments that "*...they had this sort of half man, half woman, or in transition...*" were factually inaccurate. It noted that Miss P was post-operative transsexual who had changed her gender in 1963, some fifteen years before her participation in the 1978 programme. Ofcom also noted that Peter Duncan's comments about Miss P were not part of the narrative to the programme, but formed his own personal view of the particular situation in which he had found himself at the *Blue Peter* studios in 1978. Despite the offensive, insensitive and personally hurtful (to Miss P) nature of his comments, Ofcom considered that they were unlikely to materially affect viewers' understanding of Miss P in a way that was unfair to her.

Ofcom noted Miss P's complaint that she was not able to "defend herself" from the comments made by Peter Duncan. Practice 7.11 of the Code states that if a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond.

There was little doubt in Ofcom's view that Peter Duncan's comments would be considered by the majority of viewers to be offensive, insensitive and that Miss P would have been hurt by them. However, it took the view that the comment, although offensive, did not amount to allegations of wrongdoing, incompetence or other significant allegations about Miss P. There was no obligation on the programme makers to offer her a timely and appropriate opportunity to respond to the comments made in the programme (including the repeat broadcast of it).

While Ofcom was concerned that it was deemed acceptable by the programme makers to have included comments of such an offensive (to

transsexuals generally) and hurtful (to Miss P) nature in the programme, it concluded, having taken the above factors into account, that it was satisfied that no unfairness to Miss P had resulted by the inclusion of the comments themselves in the programme (and the repeat broadcast).

- b) Ofcom considered Miss P's complaint that her privacy was unwarrantably infringed in the broadcast of the programme (including the repeat broadcast of it) in that personal information about her was revealed.

Ofcom's recognises that the line to be drawn between the public's right to information and the citizen's right to privacy can sometimes be a fine one. In considering complaints about the unwarranted infringement of privacy, Ofcom will therefore, where necessary, address itself to two distinct questions: First, has there been an infringement of privacy? Second, if so, was it warranted? (Rule 8.1 of the Code).

Ofcom first considered whether or not Miss P had a legitimate expectation of privacy in relation to the images and information included in the programme. The Code explains that "legitimate expectations of privacy will vary to the place and the nature of the information, activity or condition in question the extent to which it is in the public domain (if at all) and where the individual concerned is already in the public eye".

Ofcom noted from watching the programme and reading a transcript of it that Peter Duncan made direct reference to Miss P's physical appearance and how she had appeared to him and the production staff at the time. Ofcom took the view that although his comments were limited to his recollection of how Miss P appeared to him, the comments did, nevertheless, question her gender status. Ofcom considered that the nature of the information which referred to the gender of Miss P may be understood to be personal and sensitive and may therefore attract an expectation of privacy.

However, Ofcom noted that the footage of Miss P included in the programme was thirty years old. Also it noted that Miss P was neither named nor heard speaking in the programme. Furthermore, it considered that any expectation of privacy that Miss P might have had was considerably diminished, by the fact that the information included in the programme was already in the public domain. Ofcom noted that the gender status of Miss P had been disclosed prior to the broadcast of the programme by the media coverage Miss P's success in her ECHR case received in 2006. Ofcom noted that Miss P's full name, age and transgender status had already appeared on websites reporting the case. In Ofcom's view, therefore, Miss P's gender status was a matter of public record.

Taking all these factors into account, Ofcom was satisfied that Miss P did not have a legitimate expectation of privacy in the disclosure of this information in the programme.

Having concluded that Miss P did not have a legitimate expectation of privacy in this regard, Ofcom found that her privacy was not infringed in the programme as broadcast. It was therefore not necessary for Ofcom to further consider whether any infringement of privacy was warranted or not.

Accordingly, Ofcom has not upheld Miss P's complaint of unfair treatment and unwarranted infringement of privacy in the broadcast of the programme (or its subsequent repeat).

Not Upheld

Complaint by Mr Anthony Gordon

Motorway Cops: A Traffic Cops Special, BBC1, 26 January 2009

Summary: Ofcom has not upheld this complaint of unwarranted infringement of privacy in the programme as broadcast.

This programme included footage of Mr Anthony Gordon being stopped by the police driving a car with illegal registration number plates and carrying a passenger who appeared not to be wearing a seat belt. Mr Gordon, who was identified in the programme, was shown being questioned and then arrested by the police for possessing cannabis. The programme later stated that Mr Gordon, along with a passenger in the car, subsequently received a caution for possessing cannabis.

Mr Gordon complained to Ofcom that his privacy was unwarrantably infringed in the programme as broadcast in that footage of him was included in it without his consent.

Ofcom found that Mr Gordon did not have a legitimate expectation of privacy in relation to the broadcast of footage of him being stopped and arrested by police as he was filmed in a public place and found to be in possession of cannabis for which he was subsequently cautioned. Therefore, Ofcom found that that his privacy was not unwarrantably infringed in the programme as broadcast.

Introduction

On 26 January 2009, BBC1 broadcast an edition of its reality series *Motorway Cops*, entitled *A Traffic Cops Special*, which followed police officers who patrolled the UK's motorways. The programme included footage of two Birmingham-based police officers who had stopped a car because the registration number plate displayed was illegal and a passenger in the back of the car appeared not to be wearing a seat belt. The driver of the car, Mr Anthony Gordon, was shown being questioned by a police officer and admitting to being in possession of cannabis after the officer said that he could smell it on him. Mr Gordon was also filmed giving his name to the police officer when asked and this footage was included in the programme. Towards the end of the programme, the commentary stated:

"The Cannabis carrying driver and his passenger were given official cautions at the police station. Both had their drugs confiscated from them."

Mr Gordon complained to Ofcom that his privacy had been unwarrantably infringed in the programme as broadcast.

The Complaint

Mr Gordon's case

In summary, Mr Gordon complained that his privacy was unwarrantably infringed in the programme in that footage of him was broadcast without his consent. Mr Gordon said that no charges were brought against him and that he had only received a caution from the police for possessing cannabis.

The BBC's case

In summary and in response to Mr Gordon's complaint, the BBC said that by committing an offence while driving on a public highway and admitting to committing an offence, Mr Gordon had no legitimate expectation of privacy in relation to the broadcast of the footage of him. In the circumstances, it said that there was no requirement for the programme makers to obtain his consent to broadcast the footage.

However, the BBC said that if Ofcom took the view that Mr Gordon did have a legitimate expectation of privacy, albeit diminished in light of his actions, then it was warranted to infringe his privacy. The BBC said that it was in the public interest to show the police officers successfully detecting a crime which had occurred in a public place and had potentially serious consequences for other road users. As one of the police officers involved in the incident involving explained in the programme *"it's a major concern to me that people do drive whilst under the influence of drugs"*. This, the BBC said, was something which Mr Gordon admitted to doing. The BBC said that the public interest outweighed any right Mr Gordon had to privacy.

The BBC said that the material was filmed by a handheld camera and conspicuous, fixed in-car cameras. It said that Mr Gordon was fully aware that he was being filmed and at no stage of the filming process did he object or ask for the cameras to be turned off.

Mr Gordon's comments in response

In summary, Mr Gordon said that although he was aware of being filmed, at no time did the police or the programme makers inform him that the footage would be broadcast. He said that had he been made aware of this he would have requested that the logo of his employer on his jacket and his car registration number plate would not be shown.

Mr Gordon said that although he had been in possession of cannabis, he had not been smoking it while he was driving. He said that he had been smoking a "normal cigarette" and that he had told this to the police officer who questioned him in the police car. Mr Gordon said that he was given a caution for being in possession of cannabis and that he was not charged with the more serious offence of driving under the influence of drugs.

The BBC's final statement

In summary, the BBC said that Mr Gordon's account that he had only been smoking a "normal cigarette" did not appear to be borne out by what he told the police officer who questioned him at the time. The BBC pointed to the unedited exchange between Mr Gordon and the arresting police officer included in the programme:

Police officer:	<i>"Now I can smell a bit of cannabis</i>
Mr Gordon:	<i>I've been smoking a cigarette.</i>
Police officer:	<i>You've just had a cigarette? You've just had a spliff?</i>
Mr Gordon:	<i>A cigarette, yeah.</i>
Police officer:	<i>Is it in the car?</i>
Mr Gordon:	<i>It's finished, finished now."</i>

The BBC also highlighted a further unedited exchange between the two police officers in front of Mr Gordon:

Police officer 1: *"I could smell it [cannabis] in the car.*
Police officer 2: *He's just been smoking it.*
Police officer 1: *Has he? Alright.*
Police officer 2: *Yeah, I've got a spliff and... that's a big spliff."*

The BBC said that it was clear from these exchanges that Mr Gordon was asked specifically whether he had just smoked cannabis to which he appeared to confirm it. The BBC said that if Mr Gordon had only been smoking a "normal cigarette", it would be reasonable to assume that he would have denied smoking cannabis when asked by the police officer and that he would have corrected him when speaking to his colleague about Mr Gordon admitting to smoking cannabis.

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 unwarrantable infringement of privacy in the broadcast of programmes included 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. This complaint was considered by Ofcom's Executive Fairness Group. Ofcom considered written submission from both the complainant and the broadcaster, together with a recording and a transcript of the programme as broadcast. In its considerations, Ofcom took account of Ofcom's Broadcasting Code ("the Code"). Ofcom recognises that the line to be drawn between the public's right to information and the citizen's right to privacy can sometimes be a fine one. In considering complaints about the unwarranted infringement of privacy, Ofcom will therefore, where necessary, address itself to two distinct questions: First, has there been an infringement of privacy? Second, if so, was it warranted? (Rule 8.1 of the Code).

Ofcom considered Mr Gordon's complaint that his privacy was unwarrantably infringed in that footage of him was broadcast in the programme without his consent.

In considering whether or not Mr Gordon's privacy had been infringed, Ofcom first determined whether Mr Gordon had a legitimate expectation of privacy in relation to the footage that was broadcast.

Ofcom examined the footage that was included in the programme as broadcast and assessed the nature of the information, actions and events disclosed as well as the context of the disclosure.

Ofcom acknowledged that Mr Gordon's face was not obscured and that footage of Mr Gordon disclosing his name to a police officer was included in the programme. In Ofcom's view, these images and information identified him to viewers.

Mr Gordon was filmed being stopped by the police for driving a car with illegal registration number plates and for it appearing that one of the passengers was not wearing a seat belt. Mr Gordon was shown standing next to the police car immediately before getting into the back and the logo of his employer was visible, albeit briefly, on his jacket.

Ofcom noted that the programme then included footage of Mr Gordon being questioned by a police officer about the alleged traffic offences and whether or not he had been smoking cannabis and whether he was in possession of the drug. The programme also included footage of Mr Gordon being arrested after admitting to being in the possession of cannabis. The programme made it clear that Mr Gordon was only cautioned for possession of cannabis and was not charged with any other offences.

In this case, the footage of Mr Gordon was filmed openly from outside the police car after he had been stopped while driving on a public highway and from fixed in-car cameras. His actions had taken place in a public place in full view of those around him.

In Ofcom's view, when a person is filmed either committing an offence or being arrested for an offence, that person's expectation of privacy are likely to be significantly diminished by their actions. In Mr Gordon's case, Ofcom considered that by committing an offence for which he was subsequently cautioned (namely, for the possession of cannabis), his expectation of privacy was lessened.

Ofcom noted that the purpose of the programme was to show police officers dealing with a variety of situations that arose on the motorway network and that the footage of Mr Gordon was filmed in this context.

Taking all these factors into account, it is Ofcom's view that Mr Gordon did not have a legitimate expectation of privacy in relation to the broadcast of footage of him engaged in criminal activity (for which he was arrested and subsequently cautioned).

Having concluded that Mr Gordon did not have a legitimate expectation of privacy in this regard, Ofcom found that his privacy was not infringed in the programme as broadcast. It was therefore not necessary for Ofcom to further consider whether any infringement of privacy was warranted or not.

Accordingly, Ofcom has not upheld Mr Gordon's complaint of unwarranted infringement of privacy in the programme as broadcast.

Other Programmes Not in Breach

Up to 18 August 2009

Programme	Transmission Date	Channel	Category	Number of complaints
5 Live Breakfast	03/08/2009	BBC Radio 5 Live	Generally Accepted Standards	2
Alan Brazil	10/08/2009	talkSPORT	Generally Accepted Standards	1
Alan Carr (trailer)	07/08/2009	BBC Radio 2	Offensive Language	1
Alan Carr: Chatty Man	26/07/2009	Channel 4	Religious Offence	1
Alan Carr: Chatty Man	01/08/2009	Channel 4	Generally Accepted Standards	1
Alan Carr: Chatty Man	16/08/2009	Channel 4	Generally Accepted Standards	4
All New Generation Sex	02/08/2009	Fiver	Sex/Nudity	1
Bang Goes the Theory	03/08/2009	BBC 1	Dangerous Behaviour	1
Bath FM	n/a	Bath FM	Other	1
Betfair World Series of Poker Europe	29/07/2009	Channel 4	Commercial References	1
Big Brother	23/07/2009	Channel 4	Offensive Language	1
Big Brother	30/07/2009	Channel 4	Generally Accepted Standards	1
Big Brother	31/07/2009	Channel 4	Generally Accepted Standards	1
Big Brother	04/08/2009	Channel 4	Substance Abuse	1
Big Brother	06/08/2009	Channel 4	Generally Accepted Standards	1
Big Brother 10	25/07/2009	Channel 4	Religious Offence	1
Big Brother 10	28/07/2009	Channel 4	Offensive Language	1
Big Brother 10	29/07/2009	Channel 4	Use of Premium Rate Numbers	7
Big Brother 10	30/07/2009	Channel 4	Generally Accepted Standards	5
Big Brother 10	31/07/2009	Channel 4	Offensive Language	1
Big Brother 10	03/08/2009	Channel 4	Generally Accepted Standards	7
Big Brother 10	04/08/2009	Channel 4	Generally Accepted Standards	3
Big Brother 10	04/08/2009	Channel 4	Use of Premium Rate Numbers	12
Big Brother 10	05/08/2009	Channel 4	Generally Accepted Standards	18
Big Brother 10	07/08/2009	Channel 4	Use of Premium Rate Numbers	10
Big Brother 10	10/08/2009	Channel 4	Advertising	1
Big Brother 10	10/08/2009	Channel 4	Generally Accepted Standards	1
Big Brother 10	11/08/2009	Channel 4	Generally Accepted Standards	324
Big Brother 10	12/08/2009	Channel 4	Generally Accepted Standards	1
Big Brother 10	13/08/2009	Channel 4	Generally Accepted Standards	101
Big Brother 10	14/08/2009	Channel 4	Generally Accepted Standards	7
Big Brother 10	14/08/2009	Channel 4	Offensive Language	1
Big Brother 10	14/08/2009	Channel 4	Use of Premium Rate Numbers	1
Big Brother 10	16/08/2009	Channel 4	Crime (incite/encourage)	1
Big Brother 10	n/a	Channel 4	Inaccuracy/Misleading	1
Big Brother 10	n/a	Channel 4	Use of Premium Rate Numbers	1

Big Brother Live	27/07/2009	Channel 4	Generally Accepted Standards	1
Big Brother Live	29/07/2009	Channel 4	Generally Accepted Standards	1
Big Brother Live	29/07/2009	Channel 4	Use of Premium Rate Numbers	1
Big Brother Live	31/07/2009	Channel 4	Generally Accepted Standards	7
Big Brother Live	06/08/2009	Channel 4	Generally Accepted Standards	1
Big Brother's Little Brother	31/07/2009	E4	Other	1
Big Brother's Little Brother	11/08/2009	E4	Generally Accepted Standards	3
Big Brother's Little Brother	12/08/2009	Channel 4	Generally Accepted Standards	1
'Birthday Sex' Song Lyrics	n/a	All	Generally Accepted Standards	1
Breaking The Mould: The Story Of Penicillin	02/08/2009	BBC 4	Religious Offence	1
Britain's Got Talent - The Final	30/05/2009	ITV1	Use of Premium Rate Numbers	1
Calendar News	15/07/2009	ITV1 (Yorkshire)	Due Impartiality/Bias	1
Channel 4 News	27/07/2009	Channel 4	Due Impartiality/Bias	1
Channel 4 News	05/08/2009	Channel 4	Sex/Nudity	1
Channel 4 News	13/08/2009	Channel 4	Offensive Language	1
Channel promotions	25/07/2009	Movies 24	Generally Accepted Standards	1
Christmas Tree Lights competition	n/a	Lakeland Radio	Competitions	1
Chuck	21/07/2009	Virgin 1	Other	1
Continuity announcement	27/07/2009	Fiver	Generally Accepted Standards	1
Coronation Street	05/09/2008	ITV1	Offensive Language	1
Coronation Street	24/07/2009	ITV1	Generally Accepted Standards	15
Coronation Street	27/07/2009	ITV1	Crime (incite/encourage)	3
Coronation Street	03/08/2009	ITV1	Advertising	1
Coronation Street	03/08/2009	ITV1 London	Other	1
Coronation Street	10/08/2009	ITV1	Generally Accepted Standards	1
Cowards	04/08/2009	BBC 4	Violence	1
Crash	10/08/2009	Film 4	Offensive Language	1
Deal or No Deal: Noel's Hall of Fame	05/08/2009	Channel 4	Sex/Nudity	1
Des and Vanessa	10/08/2009	Galaxy Scotland	Offensive Language	1
Desert Island Discs	31/07/2009	BBC Radio4	Animal Welfare	1
Desperate Learners Driving School	29/07/2009	Living2	Offensive Language	1
Double Jeopardy	30/07/2009	BBC 1	Generally Accepted Standards	1
E.T. The Extra-Terrestrial	15/08/2009	ITV2	Offensive Language	1
EastEnders	27/07/2009	BBC 1	Religious Offence	1
EastEnders	28/07/2009	BBC 1	Generally Accepted Standards	1
EastEnders	30/07/2009	BBC 1	Generally Accepted Standards	4
Electric Ink	13/08/2009	BBC Radio 4	Generally Accepted Standards	1
Embarrassing Teenage Bodies	29/07/2009	Channel 4	Sex/Nudity	3
ESPN	n/a	ESPN	Inaccuracy/Misleading	1
Extreme Makeover Home Edition	29/07/2009	Home	Generally Accepted Standards	1

Fat Teens in Love	14/08/2009	ITV2	Harm/Food	1
Ferret	19/11/2008	ITV Wales	Due Impartiality/Bias	1
Five News	02/08/2009	Five	Generally Accepted Standards	2
Five News	17/08/2009	Five	Inaccuracy/Misleading	1
Four Weddings	27/07/2009	Living	Generally Accepted Standards	1
Gay to Z	01/08/2009	Teachers TV	Sex/Nudity	1
George Galloway	09/08/2009	talkSPORT	Due Impartiality/Bias	1
GMTV	06/08/2009	ITV1	Use of Premium Rate Numbers	1
GMTV	14/08/2009	ITV1	Generally Accepted Standards	1
Going Out With Alan Carr	18/07/2009	BBC Radio2	Generally Accepted Standards	1
Golden Balls	04/08/2009	ITV1 London	Crime (incite/encourage)	1
Golden Balls	11/08/2009	ITV1	Crime (incite/encourage)	1
GTV Asia	17/07/2009	Glory TV	Religious Issues	1
Halfords sponsorship of Top Gear	24/07/2009	Dave	Inaccuracy/Misleading	1
Have I Got a Bit More News for You	08/08/2009	BBC 2	Generally Accepted Standards	1
Headshrinkers of The Amazon - Revealed	23/07/2009	Five	Generally Accepted Standards	1
Heresy	04/08/2009	BBC Radio 4	Offensive Language	1
Hollyoaks	16/07/2009	E4	Violence	1
Hollyoaks	27/07/2009	Channel 4	Generally Accepted Standards	1
Hollyoaks	28/07/2009	Channel 4	Generally Accepted Standards	1
Hollyoaks	10/08/2009	E4	Substance Abuse	1
Home and Away (trailer)	03/08/2009	Fiver	Sex/Nudity	1
Home and Away (trailer)	10/08/2009	Five	Sex/Nudity	1
Home and Away (trailer)	14/08/2009	Five	Sex/Nudity	1
Horne and Corden	09/08/2009	BBC 2	Religious Offence	1
How Not to Live Your Life	03/08/2009	BBC 2	Sex/Nudity	1
How The Other Half Live	30/07/2009	Channel 4	Generally Accepted Standards	1
IPL Cricket score	24/05/2009	NDTV 24x7	Commercial References	1
IslamiQA	06/07/2009	Islam Channel	Religious Offence	1
It Pays to Watch	15/10/2008	Five	Commercial References	1
ITV News	28/07/2009	ITV1	Offensive Language	1
Jez Welham	30/07/2009	Kiss 100	Offensive Language	1
Jez Welham	05/08/2009	Kiss 100	Offensive Language	1
Jonathan Ross	26/10/2008	BBC Radio 2	Generally Accepted Standards	1
Katy Brand's Big Ass Show	30/07/2009	ITV2	Religious Offence	1
Krod Mandoon and the Flaming Sword of Fire	02/07/2009	BBC 2	Sex/Nudity	1
Ladbrokes sponsorship of Neighbours	05/03/2009	Five	Sponsorship	1
Ladbrokes sponsorship of Neighbours	10/03/2009	Five	Sponsorship	1
Ladbrokes sponsorship of Neighbours	n/a	Five	Sponsorship	3
Late Night Show	24/05/2009	HUM FM Leeds	Generally Accepted Standards	1

Life Class: Today's Nude	06/07/2009	Channel 4	Sex/Nudity	1
Life Class: Today's Nude	06/07/2009	Channel 4	Sex/Nudity	10
Life Class: Today's Nude	07/07/2009	Channel 4	Sex/Nudity	5
Life Class: Today's Nude	08/07/2009	Channel 4	Sex/Nudity	16
Life Class: Today's Nude	09/07/2009	Channel 4	Sex/Nudity	5
Lionheart Radio	23/07/2009	Lionheart Radio 107.3 fm	Offensive Language	1
Little Britain	21/07/2009	BBC Three	Generally Accepted Standards	1
London To Brighton	14/07/2009	BBC 1	U18 - Coverage of Sexual/other offences	1
London Tonight	07/08/2009	ITV1 London	Due Impartiality/Bias	1
Look North	06/07/2009	BBC1 North	Violence	1
Loose Women	06/08/2009	ITV1 London	Generally Accepted Standards	1
Maury	29/07/2009	Living +1	Generally Accepted Standards	1
Midday With Ricky	29/07/2009	Rock Radio 106.1	Religious Offence	1
Midsomer Murders	05/08/2009	ITV1	Religious Offence	1
Midsomer Murders	05/08/2009	ITV1	Sex/Nudity	8
Mike Graham	03/08/2009	talkSPORT	Generally Accepted Standards	1
Monday Monday	10/08/2009	ITV1 London	Generally Accepted Standards	1
New Tricks	30/07/2009	BBC 1	Crime (incite/encourage)	1
Newsbeat	04/08/2009	BBC Radio 1	Generally Accepted Standards	1
Newsnight	06/08/2009	BBC 2	Due Impartiality/Bias	1
Newsround	13/07/2009	BBC 1	Sex/Nudity	1
Nick Ferrari	05/08/2009	LBC 97.3FM	Due Impartiality/Bias	1
Outtake TV	18/07/2009	Watch	Generally Accepted Standards	1
Panorama	06/08/2009	BBC 1	Crime (incite/encourage)	1
Passport Patrol	11/08/2009	Living +1	Violence	1
Peppa Pig	27/07/2009	Nick Junior2	Dangerous Behaviour	1
Pete Snodden Breakfast Show	03/08/2009	Cool FM	Generally Accepted Standards	1
Poetry Please	19/07/2009	BBC Radio 4	Religious Offence	1
Points West	03/08/2009	BBC1 Bristol	Generally Accepted Standards	1
Press TV	17/07/2009	Press TV	Due Impartiality/Bias	1
Property Snakes and Ladders	21/07/2009	Channel 4	Inaccuracy/Misleading	1
Quiz Call	31/07/2009	Five	Use of Premium Rate Numbers	1
Quiz Call	01/08/2009	Five	Use of Premium Rate Numbers	1
Quiz Call	n/a	Five	Advertising	1
R Mornings	04/06/2009	Revelation TV / Genesis	Elections/Referendums	1
Raja Ki Ayegi Baraat	05/08/2009	Star Plus	Advertising	1
Reaper	06/08/2009	E4	Generally Accepted Standards	1
Regional News and Weather	05/08/2009	BBC 1	Inaccuracy/Misleading	1
Renault sponsorship	01/08/2009	Film 4	Crime (incite/encourage)	1
Renault sponsorship	09/08/2009	Film 4	Violence	1
Road Wars	26/07/2009	Sky1	Generally Accepted Standards	1

Rough Guide to Trips of a Lifetime	31/07/2009	Five	Offensive Language	1
Roulette Nation (trailer)	01/08/2009	Virgin 1	Other	1
Russell Brand Live	01/08/2009	E4	Religious Offence	2
Sarah Kennedy	15/07/2009	BBC Radio 2	Generally Accepted Standards	1
Scott Mills	06/08/2009	BBC Radio 1	Generally Accepted Standards	3
Sean Paul's Top 50	25/07/2009	TMF	Offensive Language	1
Send in the Dogs	28/07/2009	ITV1	Inaccuracy/Misleading	1
Send in the Dogs	04/08/2009	ITV1 London	Animal Welfare	1
Sex and Lies in Sin City: The Ted Binion Scandal	29/07/2009	Five	Sex/Nudity	1
Sex: My Big Decision	30/07/2009	BBC 3	U18 - Coverage of Sexual/other offences	1
Sex: The Revolution (trailer)	04/08/2009	Yesterday	Sex/Nudity	1
Shaan E Siddique Akbar	15/06/2009	Noor TV	Religious Offence	1
Shappi Talk	30/07/2009	BBC Radio 4	Generally Accepted Standards	2
Short Cuts - Omlette	26/07/2009	Comedy Central	Suicide/Self Harm	1
Single Handed	09/08/2009	ITV1	Offensive Language	1
Single Handed	09/08/2009	ITV1	Religious Offence	1
Sky News	03/07/2009	Sky News	Generally Accepted Standards	1
Sky News	17/07/2009	Sky News	Violence	1
Sky News	24/07/2009	Sky News	Due Impartiality/Bias	1
Sky News	25/07/2009	Sky News	Due Impartiality/Bias	1
Sudoku Competition	n/a	Teletext	Competitions	1
That's What I Call Television	25/07/2009	ITV1 Granada	Generally Accepted Standards	1
That's What I Call Television	01/08/2009	ITV1	Sex/Nudity	4
That's What I Call Television	08/08/2009	ITV1	Offensive Language	3
The Alan Brazil Sports Breakfast with Ronnie Irani	06/08/2009	talkSPORT	Generally Accepted Standards	2
The Best of Friends	27/07/2009	BBC 1	Harm/Food	1
The Big Questions	16/08/2009	BBC 1	Religious Offence	1
The Fuse	13/07/2009	ITV1	Competitions	1
The Gadget Show	03/08/2009	Five	Competitions	1
The Gadget Show	03/08/2009	Five	Sex/Nudity	1
The Hotel Inspector	02/08/2009	Five	Offensive Language	1
The Hotel Inspector	17/08/2009	Five	Offensive Language	1
The Inbetweeners	28/07/2009	Channel 4	Generally Accepted Standards	1
The Kevin Bishop Show	31/07/2009	Channel 4	Generally Accepted Standards	1
The Kevin Bishop Show	07/08/2009	Channel 4	Animal Welfare	1
The Kevin Bishop Show	07/08/2009	Channel 4	Generally Accepted Standards	11
The Kevin Bishop Show	07/08/2009	Channel 4	Offensive Language	1
The Kevin Bishop Show	14/08/2009	Channel 4	Generally Accepted Standards	7
The Kevin Bishop Show	14/08/2009	Channel 4	Violence	1
The Life and Times of Tim (trailer)	n/a	Virgin 1	Generally Accepted Standards	1
The Little Bang	10/07/2009	CITV	Dangerous Behaviour	1
The Match: FC Lyn v	05/08/2009	LFC TV	Generally Accepted Standards	1

Liverpool				
The O.C.	31/07/2009	Channel 4	Generally Accepted Standards	1
The One Show	n/a	BBC 1	Due Impartiality/Bias	1
The Rat Pack	30/07/2009	BBC 1	Animal Welfare	1
The Rat Pack	06/08/2009	BBC 1	Animal Welfare	7
The Rat Pack	13/08/2009	BBC 1	Animal Welfare	1
The Royal	12/07/2009	ITV1	Suicide/Self Harm	1
The Royal	12/07/2009	ITV1	Violence	1
The Scandalous Adventures of Lord Byron	27/07/2009	Channel 4	Generally Accepted Standards	7
The Scandalous Adventures of Lord Byron	03/08/2009	Channel 4	Offensive Language	2
The Secret Caribbean with Trevor McDonald	05/07/2009	ITV1	Due Impartiality/Bias	2
The Simpsons	06/07/2009	Channel 4	Flashing images	1
The Simpsons	30/07/2009	Channel 4	Sex/Nudity	1
The Simpsons	04/08/2009	Sky1	Offensive Language	1
The Simpsons	05/08/2009	Channel 4	Offensive Language	6
The Slammer	06/08/2009	CBBC	Sex/Nudity	1
The Supersizers Eat...	27/07/2009	BBC 2	Generally Accepted Standards	1
The Trouble With Girls	10/08/2009	BBC 2	Generally Accepted Standards	5
The Tube	06/08/2009	Sky Three	Offensive Language	1
The Weakest Link	27/07/2009	BBC 1	Generally Accepted Standards	1
The Weekend Party	25/07/2009	Five FM	Offensive Language	1
The Wrong Door	25/07/2009	BBC 3	Generally Accepted Standards	1
TNT Show	23/07/2009	Channel 4	Generally Accepted Standards	4
TNT Show	06/08/2009	Channel 4	Generally Accepted Standards	2
Today	28/07/2009	BBC Radio 4	Due Impartiality/Bias	1
Tom Stroud	03/08/2009	Isle of Wight Radio	Generally Accepted Standards	1
Top Gear	24/07/2009	BBC 2	Crime (incite/encourage)	1
Top Gear	27/07/2009	BBC 2	Generally Accepted Standards	1
Top Gear	02/08/2009	BBC 2	Advertising	1
Top Gear	02/08/2009	BBC 2	Offensive Language	1
Top Gear	02/08/2009	BBC 2	Religious Offence	1
Torchwood	10/08/2009	Watch	Violence	1
True Blood (trailer)	24/07/2009	National Geographic +1	Violence	1
Two Schools in Nablus	26/07/2009	Teachers TV	Due Impartiality/Bias	1
Udderbelly (Trailer)	n/a	E4	Inaccuracy/Misleading	1
Ugly Betty	04/08/2009	E4	Offensive Language	1
Victoria Derbyshire	26/06/2009	BBC Radio 5 Live	Offensive Language	1
Wake Up	18/07/2009	Clubland TV	Sex/Nudity	1
We Are Klang	01/08/2009	BBC 3	Generally Accepted Standards	1
We Are Klang	06/08/2009	BBC 3	Generally Accepted Standards	1
Whatever It Takes	26/07/2009	ITV1	Generally Accepted Standards	1
Wife Swap	02/08/2009	Channel 4	Offensive Language	1

Wordplay	15/07/2009	Five	Use of Premium Rate Numbers	1
You Have Been Watching	28/07/2009	Channel 4	Animal Welfare	1