

Ofcom Broadcast Bulletin

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Introduction

Under the Communications Act 2003 (“the Act”), Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives¹. Ofcom must include these standards in a code or codes. These are listed below. Ofcom also has a duty to secure that every provider of a notifiable On Demand Programme Services (“ODPS”) complies with certain standards requirements as set out in the Act².

The Broadcast Bulletin reports on the outcome of investigations into alleged breaches of those Ofcom codes below, as well as licence conditions with which broadcasters regulated by Ofcom are required to comply. We also report on the outcome of ODPS sanctions referrals made by ATVOD and the ASA on the basis of their rules and guidance for ODPS. These Codes, rules and guidance documents include:

- a) [Ofcom’s Broadcasting Code](#) (“the Code”).
- b) the [Code on the Scheduling of Television Advertising](#) (“COSTA”) which contains rules on how much advertising and teleshopping may be scheduled in programmes, how many breaks are allowed and when they may be taken.
- c) certain sections of the [BCAP Code: the UK Code of Broadcast Advertising](#), which relate to those areas of the BCAP Code for which Ofcom retains regulatory responsibility. These include:
 - the prohibition on ‘political’ advertising;
 - sponsorship and product placement on television (see Rules 9.13, 9.16 and 9.17 of the Code) and all commercial communications in radio programming (see Rules 10.6 to 10.8 of the Code);
 - ‘participation TV’ advertising. This includes long-form advertising predicated on premium rate telephone services – most notably chat (including ‘adult’ chat), ‘psychic’ readings and dedicated quiz TV (Call TV quiz services). Ofcom is also responsible for regulating gambling, dating and ‘message board’ material where these are broadcast as advertising³.
- d) other licence conditions which broadcasters must comply with, such as requirements to pay fees and submit information which enables Ofcom to carry out its statutory duties. Further information can be found on Ofcom’s website for [television](#) and [radio](#) licences.
- e) rules and guidance for both [editorial content and advertising content on ODPS](#). Ofcom considers sanctions in relation to ODPS on referral by the Authority for Television On-Demand (“ATVOD”) or the Advertising Standards Authority (“ASA”), co-regulators of ODPS for editorial content and advertising respectively, or may do so as a concurrent regulator.

[Other codes and requirements](#) may also apply to broadcasters and ODPS, depending on their circumstances. These include the Code on Television Access Services (which sets out how much subtitling, signing and audio description relevant

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

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

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

licensees must provide), the Code on Electronic Programme Guides, the Code on Listed Events, and the Cross Promotion Code.

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

Standards cases

In Breach

The Truthseeker: Genocide of Eastern Ukraine

RT Europe, 13 July 2014, 05:45, 09:45, 13:45, 21:45 and 14 July 2014, 01:45

Introduction

RT Europe is a news and current affairs channel targeted primarily at audiences on the European mainland. The licence for RT Europe is held by Autonomous Non-Profit Organisation TV-Novosti (“TV Novosti” or the “Licensee”)¹ and is funded by the Federal Agency for Press and Mass Communications of the Russian Federation².

The Truthseeker (“Truthseeker”) was an investigative current affairs series broadcast on RT Europe. Two viewers contacted Ofcom to complain that an episode of Truthseeker which appeared to be titled *Genocide of Eastern Ukraine* (the “Programme”), and which concerned the policies and actions of the Ukrainian Government towards the population of eastern Ukraine, made “no effort to provide balance” and contained “horrific” and “wild” claims.

Ofcom assessed the entire Programme, which was just over 14 minutes long, and noted the following:

The presenter, Daniel Bushell (the “Presenter”), introduced the Programme by saying:

“The genocide in eastern Ukraine and its quote ‘shameful cover-up’”.

A voiceover then gave the following summary of the Programme’s content:

“Bombing the wheat fields to make sure there’s famine. Kiev’s leaders repeat Hitler’s genocidal oath. And Ukraine’s kids taught to occupy Western Europe”.

The Presenter then referred to the genocides in Rwanda and the Congo and the US Government’s involvement in these atrocities. During this section of the Programme, a number of captions related to the Presenter’s comments were shown on screen. A short video clip of Bill Clinton was also shown in which he briefly referred to the US Government’s involvement in “*ethnic conflicts*”. The Presenter also interviewed investigative journalist William Engdahl who discussed the involvement of the US Government in the conflicts in the Congo and Ukraine. In relation to US involvement in the Ukrainian conflict, Mr Engdahl said:

¹ The Licensee holds licences for two separate services: RT Europe and RT UK. Although RT Europe is widely available to viewers in mainland Europe, UK viewers require specialist receiving equipment in order to receive it. RT UK is targeted at UK-based audiences and broadcasts on a variety of readily available digital television platforms in the UK. The Programme was shown solely on the RT Europe service.

² See the description of RT in *Television News Channels in Europe (Based on a Report prepared by the European Audiovisual Observatory for the European Commission – DG COMM, October 2013, <http://www.obs.coe.int/documents/205595/264629/European+news+Market+2013+FINAL.pdf/116afdf3-758b-4572-af0f-61297651ae80>)* Section 5.4.6 of this report states that Russia Today: “can be considered as a state funded or public media service”.

“I think the same cast are trying to orchestrate a genocide in eastern Ukraine”.

The Presenter then said:

“Body parts lying on the ground. Another villager’s organs hanging on the outside only a torso left. The latest victims of Kiev’s mass daily bombings of unarmed civilians. Reportedly Kiev has again used banned cluster bombs in this attack designed to kill indiscriminately. The bombs splinter, maiming or killing everybody in the surrounding area. Vanya celebrated his fifth birthday the day before the bombing. The next day the Junta’s³ cluster bomb blew his leg off. He died almost immediately in front of Vanya’s mother’s eyes. How would US backed president Poroshenko feel she says if that was his children?”

The Presenter also said:

“Kiev, notes historian Eric Zuesse, is the most far right-wing government on the face of the earth. It’s on a one-way killing-spree. He points out that the self-defence forces are not bombing or massacring anyone. Residents of eastern Ukraine told Op-Ed News that they used to think pilots were just flying blind and missing their targets. Then they found they were actually highly accurate, always hitting civilians who had no other crime than their ethnicity. In the pretty countryside of east Ukraine a tiny village called Saurovka. The openly Nazi mercenaries who make up Kiev’s new army despise the place because it has a memorial commemorating World War II victory over their fascist heroes. The memorial is shelled by Kiev’s army almost every day. One day its mercenaries attack the village itself. Locals claim this is what happened next”.

The following statement was shown both as on-screen text and in voiceover:

“Kiev’s army, being a direct successor to Hitler’s Wehrmacht, terribly hates the Saurovka memorial⁴. All the time their artillery and mortars lob shells directly at the memorial. One day the Right Sector⁵, National Guard, Azov and Dnepr Battalion⁶ mercenaries came to Saurovka village, and they instilled European values. They took the men alive and cut off the limbs. First their arms, then legs, then the heads. They did not cut the women – they raped them”.

The Presenter said:

“Village after village, town after town in eastern Ukraine, eyewitnesses report unarmed civilians being systematically massacred, all under complete mainstream media silence. Independent journalists who might reveal what Kiev’s doing are prize targets. It’s already murdered and tortured numerous war correspondents such as Channel One cameraman Anatoly Klyan, the

³ A military or political group that rules a country after taking power by force.
Source: Oxford Dictionaries (Oxford University Press)
<http://www.oxforddictionaries.com/definition/english/junta>

⁴ An image of the war memorial at Savur-Mohyla was shown. The memorial commemorates soldiers killed during the Second World War.

⁵ Ofcom understands that Right Sector was set up in late 2013 as a grouping of Ukrainian far right-wing groups, and in late March 2014 became a political party.

⁶ Ofcom understands the Azov and Dnepr battalions to be volunteer far right-wing paramilitary forces.

correspondent and sound engineer for Rossiya TV and Italian photographer Andrea Rocchelli. The UN admits refugees are in the hundreds of thousands. The biggest humanitarian crisis in Europe since World War Two. Real numbers are likely to be much higher...Kiev has cut off the remaining humanitarian corridors so that millions in eastern Ukraine are no longer allowed out or food allowed in. Some of the locals survive on berries, famine now as catastrophic as the daily shelling. Once winter comes, they say, it will be another Leningrad siege. The city of Leningrad was besieged by the Nazis in World War Two for years leading to an estimated one million deaths”.

The Presenter said:

“American George Eliason, who lives with his Ukrainian family near Lugansk, is bombed daily by Ukrainian mercenaries. He’s surrounded by Kiev snipers and tanks. Killers from the Nazi Right Sector Party now control the streets of his village...First of all can you tell us the situation there?”

There was then the following exchange:

George Eliason: *“Hitting hospitals, orphanages, the city market, five, six, seven, eight times. It’s not a mistake any more. I mean it’s just horrific, the body count right now. Just people, there were no soldiers there; there was no military equipment there. They just dropped the bombs using phosphorus. Back in the War time they didn’t do this against the foreign invader. Never mind against people who didn’t attack anybody. So the level in terms of genocide, doing something that is beyond humanity. Walking up to somebody and disembowelling them, a child, that’s an act of heroism for Bandera⁷ [Described on screen as ‘Ukraine Nazi followers]”.*

The Presenter: *“Is Kiev trying to create a humanitarian catastrophe in the region?”*

George Eliason: *“One hundred per cent. What’s going on right now – they’re even burning the wheat fields so the crop doesn’t come in, just to make sure it happens. They’re bombing fields that need to be harvested. One of my neighbours went out to harvest his wheat, they shot up his tractor, sniper fire, just to get him off the field so the grain goes bad. It doesn’t get harvested. We’re looking at the possibility of a few hundred thousand people starving to death. They were shooting up all the medical transport. So right now it’s becoming critical. It’s very, very difficult to find any type of medication you need. It’s almost as though the more horrific thing they do, the easier it is for them to get away with it”.*

⁷ Ofcom understands this to be a reference to Stepan Bandera (1909-1959), a Ukrainian political activist and leader of the Ukrainian national and independence movement. Bandera is a controversial figure for many due to his widely debated involvement with Nazi Germany during the Second World War. He has been described by The Washington Post as: “idolized by some in the capital and western Ukraine, he is reviled as a fascist in much of the heavily ethnic-Russian east and south as well as in Russia itself”.
(http://www.washingtonpost.com/world/a-ghost-of-world-war-ii-history-haunts-ukraines-standoff-with-russia/2014/03/25/18d4b1e0-a503-4f73-aaa7-5dd5d6a1c665_story.html)

Shortly afterwards the Presenter said:

“Poroshenko⁸ officially calls eastern Ukrainians quote ‘parasites’. Washington’s blog notes that Hitler gave the same reason for ethnically cleansing his country. US appointed premier Yatsenyuk⁹ in his official statement calls eastern Ukrainians sub-humans for extermination...But buoyed by the silence in the West, Poroshenko just said it again in his official address, branding almost his entire country sub-human. Liveleak notes that sub-human is ‘untermench’ in German, precisely how Hitler described the Slavs in World War II. After Hitler’s invasion, survivors were put in so-called filtration camps and their living space, in German ‘lebensraum’ awarded to invading soldiers. Kiev’s defence ministry says its putting surviving eastern Ukrainians in filtration camps and will give lebensraum, eastern Ukrainian’s land, to Kiev’s soldiers after they’ve quote ‘cleansed’ the current inhabitants. Last week Kiev’s defence council bragged that it had already cleansed the first three villages”.

At this point, the Presenter conducted an interview via video link with Mark Sleboda who was described as a “US Navy vet and former senior lecturer in international relations”. The Presenter asked “[h]ow are these orders being carried out?” to which Mr Sleboda replied:

“This mass artillery attacks, the use of weapons such as Grads, multiple large rocket systems, Hurricanes, the Smerch city flatteners, are extremely ineffective in targeting small self-defence forces, the military forces of Novorossiia¹⁰ that are resisting them. They are specifically a weapon of ethnic cleansing. They are specifically targeting cities, towns. They have wiped out water supplies, very specifically, multiple times, with very precision targeting”.

The Presenter then asked Professor Francis Boyle (described in the Programme as a “top war crimes prosecutor”) the following question:

“Is Kiev committing genocide?”

Professor Boyle responded:

“Yes, I’m afraid what we’re seeing is a degeneration into genocide at this point. The United States here, under Obama, is guilty as sin in aiding and abetting what Poroshenko and his neo-fascists are doing now. Indeed yesterday and the day before the Obama administration and their spokespeople supported Poroshenko in acts of genocide against the Russian speakers”.

The Presenter then discussed the teaching of “extremist ultra-nationalist views” and “Nazi slogans and Hitler salutes” to Ukrainian children. The Presenter then said that “[G]angster president Poroshenko presumably approves of this since to him all eastern Ukrainians are parasites.”

⁸ Petro Poroshenko is the current President of Ukraine.

⁹ Arseniy Yatsenyuk is the Ukrainian Prime Minister.

¹⁰ Literally “New Russia”. Ofcom understands this to be a reference to the Russian-speaking regions of eastern Ukraine.

The Presenter concluded the Programme by saying:

“All of Western Europe was occupied by these people’s heroes not too long ago. Millions were quote ‘cleansed’ in the filtration camps that Kiev is again setting up today. Western leaders nurturing and financing today’s openly genocidal fascists is a slap in the face to every victim who died fighting the Nazis and it seems a perverse effort to want to go through it all again. Seek truth from facts – this is The Truthseeker”.

On-screen Captions

A number of captions were shown at the bottom of the screen at various points during the Programme. Ofcom noted the following:

“Eyewitnesses: Such attacks on civilians can only be described as genocidal”.

“Pro-Kiev supporter in Slavyansk admits Kiev snipers deliberately shooting babies”.

“Kiev claims it’s not committing genocide, denies casualty reports”.

“Anna-News: Kiev seizes city of Slavyansk, death squads going house to house executing all males under 35”¹¹.

“Kiev defense [sic] minister publically voices plan to corral citizens in ‘filtration’ camps”.

“Ukrainians’ homes – ‘Lebensraum’ in German – are handed to Hitler’s army”.

“Eyewitnesses: Kiev army now literally crucify babies in seized towns, force mothers to watch”.

“Kiev brags of filtration camps for ‘cleansing’ all E. Ukrainians”.

¹¹ Ofcom understands that Anna-News is a news agency based in Abkhazia. Abkhazia is described by the Encyclopaedia Britannica as an “autonomous republic in north-western Georgia that declared independence in 2008.”

Investigation under Rule 2.2

In Ofcom's opinion the inclusion of the numerous highly serious allegations about the Ukrainian Government and its military forces towards the population of eastern Ukraine in the Programme raised issues warranting investigation under Rule 2.2 of the Code. Rule 2.2 states:

"Factual programmes or items or portrayals of factual matters must not materially mislead the audience".

We therefore asked the Licensee to explain how the Programme complied with Rule 2.2. Ofcom noted that the comments and allegations in the Programme were made in the context of an ongoing highly sensitive, politically contentious situation both in the Ukraine and internationally. Against this background it became evident in considering the Licensee's representations that the underlying facts on which the comments and allegations were based remained largely unsettled. In the absence of a firm or independently established set of facts that Ofcom could rely on, we concluded that it was not possible to pursue our investigation under Rule 2.2. However, we remained concerned about the strength of the comments and allegations and the manner in which they were made, particularly in light of reviewing the evidence and the sources the Licensee said it had relied on. We address this more fully in the context of considering the Programme's compliance with the special impartiality requirements under Rule 5.5 below.

Investigation under Rule 5.5

Ofcom considered that the Programme dealt with matters of political controversy i.e. the policies and actions of the Ukrainian Government and its military forces towards the population of eastern Ukraine. To the extent that the Programme dealt with these matters, the material referred to above raised issues warranting investigation under Rule 5.5 of the Code, which states:

"Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service... This may be achieved within a programme or over a series of programmes taken as a whole".

We therefore asked the Licensee to comment on how the Programme had complied with this rule.

Response

Background and summary

The Licensee said that Truthseeker was a series of 13 minute programmes, produced in-house by RT, which has now been terminated. TV Novosti said that Truthseeker was "designed to cover news-related events in a non-news format with a focus on topics that were inadequately covered by mainstream media".

The Licensee went on to say that the background to the Programme was evidence from the UN refugee agency, the UNHCR, that "forced displacement was rising in Ukraine". TV Novosti said that Melissa Fleming of the UNHCR said that the rise in numbers of internally displaced people coincided "with a recent deterioration of the situation in eastern Ukraine" and that displaced people had cited "worsening law and order, fear of abductions, human rights violations and the disruption of state

services”. The Licensee also noted that: “More recently, despite the ceasefire, UNHCR reports that the humanitarian suffering continues in Ukraine. It reports that the official figure of internally displaced people has risen to 300,000 “but UNHCR officials believe the real number is two to three times higher”¹². The Russian authorities say around 814,000 Ukrainians have entered Russia since the start of the year”.

TV Novosti said that there had been “relatively little news coverage of the reasons for these displacements and the human cost at least on UK television”. In particular, the Licensee stated that the “actions of Ukrainian government forces and their irregulars and their impact on civilian populations in Eastern Ukraine were receiving little coverage in the mainstream media, which were instead focusing on the role supposedly played by Russia in the conflict”. TV Novosti explained that the Programme “was a serious contribution to public understanding of events in Ukraine which the mainstream media, for whatever reason, had not provided”. In particular, the Licensee said it “offered the kind of insight into events behind the UN figures that investigative journalism should provide and a counterbalance to the general lack of coverage” and “aimed to fill the information vacuum that been left by the mainstream media”.

TV Novosti said that as a result of concerns that one of the various captions that had appeared in the Programme as text at the bottom of the screen contained insufficiently corroborated information senior RT management took an almost immediate decision, well before Ofcom took action, to terminate Truthseeker with immediate effect and all historical episodes were removed from RT’s website.

Rule 5.5

The Licensee said it was not clear that the Programme breached Rule 5.5 and questioned whether Rule 5.5 was applicable in this case.

Application of due impartiality

TV Novosti stated that Ofcom’s guidance makes it clear that audience expectation “is a factor to be taken into account not only in considering whether due impartiality has been preserved in any particular case but also in considering whether due impartiality needs to be preserved in the first place”. The Licensee then said “that the likely expectation of RT’s audience would not be such as to engage the special impartiality requirements, having regard to the nature and mission or remit of the channel, the custom and practice in war reporting amongst broadcasters and to the very low number of complaints (two)”.

TV Novosti went on to say that audience expectations concerning the Programme would have been shaped by a number of factors, including “RT’s explicit mission which is, among other things, ‘to provide an alternative perspective on major global events, and acquaints an international audience with the Russian viewpoint’”¹³. The Licensee stated that the Programme aimed to pursue that mission and (in RT’s words) “to provide people with more answers to more questions, to examine world events from different point or points of view and to encourage people to keep questioning more”. TV Novosti also said that “it is reasonable to expect that audiences are familiar with a broadcasting format in which the broadcaster

¹² <http://www.unhcr.org/541c52839.html>

¹³ <http://rt.com/about-us/>

challenges the views of the mainstream media and provides alternative perspectives". Further, the Licensee said that the Programme was viewed almost solely by an international audience, whose expectations would have been somewhat different to a UK audience.

TV Novosti added that the "exigencies of war reporting" was another factor that "can be expected to shape audience expectations". The Licensee said that "[w]ar correspondents, whether embedded with one side's forces or acting independently, are likely to report events from one side or the other and not from both" and gave a number of examples.

Preservation of due impartiality

TV Novosti then went on to consider whether (if Ofcom decided that Rule 5.5 was engaged in this case) the Programme preserved due impartiality.

The Licensee submitted that the producers of the Programme had "prudently approached the making of the programme as though the rules were engaged" and that "they took steps to preserve due impartiality by including the Ukrainian government's viewpoint" in the caption which read "*Kiev claims it's not committing genocide, denies casualty reports*" (the "Caption").

TV Novosti also said that it had intended to broadcast immediately after the Programme a slate setting out the position of the Ukrainian Government as follows:

"The Ukrainian government denies all accusations regarding crimes against civilians.

Kiev says affected residents in the country's east are just a side effect of the anti-terrorist operation".

The Licensee explained that "[h]uman error unfortunately led to [this] statement being omitted". TV Novosti expressed regret for this omission.

The Licensee stated that a judgment as to due impartiality requires a "multi-factorial assessment". TV Novosti then set out various factors which it argued Ofcom should take into account in deciding whether it had complied with Rule 5.5. These factors included:

- a) the nature of the subject: the Licensee said the subject of the Programme, as indicated by the Presenter's words "*Genocide in Eastern Ukraine and its shameful cover-up*", was "the treatment of a civilian population in the course of a civil war and the lack of coverage by the mainstream media." TV Novosti said this was "presented in a broad international context focusing in particular on the alleged role of the United States in the Rwandan genocide, in Libya and the recent events in Ukraine". The Licensee said the passages that Ofcom has picked out for assessment are "taken out of context as criticisms of the Ukrainian government, its armed forces and supporters which is only indirectly what the Programme is about";
- b) the type of programme: TV Novosti submitted that the Programme was not a news programme and that Truthseeker "was designed to cover news-related events in a non-news format with a focus on topics that were inadequately covered by mainstream media." The Licensee said that the Programme's aims were "to provide people with more answers to more questions, to examine world events from different points or points of view and to encourage

people to keep questioning more.” TV Novosti added “it was not reporting news but was presenting a thesis which was intended to be challenging”;

- c) the type of channel: the Licensee said that RT as a channel “is intended to be challenging” and that RT news “aims to cover the major issues of our time for viewers wishing to question more and delivers stories often missed by the mainstream media to create news with an edge”. TV Novosti added that RT news “aims to provide an alternative perspective on major global events, and acquaints an international audience with the Russian viewpoint”;
- d) the likely expectation of the audience: the Licensee said it doubts that the Programme “was out of line with audience expectations”;
- e) the extent to which the content and approach was signalled to the audience: TV Novosti stated that “the content and approach will have been familiar to the audience from the nature of the channel and of the series, from the RT website and from the synopsis in the EPG: ‘The Truthseeker with its anchor Daniel Bushell laces hard-hitting reporting with humor (sic), featuring exclusive interviews and investigations’”. The Licensee said the title of the Programme itself would also have been a good indication as to the content and approach;
- f) the editorial content: TV Novosti said that the editorial thrust of the Programme “was not primarily aimed at criticising the Ukrainian government, its forces and supporters”. The Licensee submitted that the captions shown during the Programme were “an integral part of the editorial content, partly emphasising editorial themes and partly supportive by indicating the sources of the stories”;
- g) programmes scheduled before and after: TV Novosti explained that the Programme was a current affairs programme within a rolling 24 hour news channel, presenting opinions instead of the news. The Licensee said it was readily distinguishable from the news programmes scheduled before and after it and that audiences will have known to adjust their expectations accordingly; and
- h) the likely size and composition of the potential audience: TV Novosti highlighted the fact that the Programme was included in RT’s European service and was for reception by an international audience. The Licensee submitted, while accepting that the Code still applied, that “the different nature of the audience should be taken into account in any assessment of whether due impartiality was achieved”.

TV Novosti said that “any assessment of whether due impartiality was preserved should at least have regard to the above factors as well as other factors if relevant”.

The Licensee also questioned the extent to which the preservation of due impartiality required the Programme to reflect alternative viewpoints appropriately. TV Novosti said that under Rule 5.5 a broadcaster “may” be required to reflect alternative viewpoints in order to preserve due impartiality and that it is an editorial matter for the broadcaster as to how it maintains due impartiality. The Licensee went on to say that, in including the Ukrainian Government’s denials in the Caption it had followed Ofcom’s Guidance to Section Five of the Code which states that “alternative viewpoints could be summarised, with due objectivity and context, within a programme”. TV Novosti said that the Caption was an “express statement of the

Ukrainian government's position" and an "integral part of the editorial content of the Programme".

Licensee's comments on the Preliminary View

TV Novosti also commented on Ofcom's Preliminary View, which was to find a breach of Rule 5.5, and questioned whether a breach of Rule 5.5 was justified. A number of these submissions repeated or expanded on points made in its previous representations. The Licensee also made a number of additional comments, which are summarised below.

Application of due impartiality

TV Novosti referred to Ofcom's reasoning in the Preliminary View that the Programme dealt with a matter of political controversy. The Licensee said it did not think that the Preliminary View made out a case that the special impartiality rules applied to the Programme. TV Novosti did not think that Ofcom's reasoning was sufficient and it said that Ofcom had not given any consideration to what other factors might affect its conclusion on the application of due impartiality.

In particular, the Licensee questioned whether Ofcom had given due weight to TV Novosti's right to freedom of expression in relation to the application of the special impartiality requirements (and any of the other issues addressed in the Preliminary View). In support of this argument, TV Novosti referred to a previous Ofcom decision relating to the documentary feature film *An Inconvenient Truth*¹⁴. The Licensee said that in light of this decision there is a balance to be struck between freedom of expression and regulatory intervention and that the threshold for intervention is high. TV Novosti stated that it could not find any indication in the Preliminary View that Ofcom had considered whether the Programme crossed this threshold. Specifically, in relation to the Programme, the Licensee said that it seemed that matters of political controversy could include almost any conceivable subject that concerns Ukraine at present and as such a high test must be applied to ensure freedom of expression. TV Novosti submitted that "[a] very wide application of Section Five to cover not only discussions of particular political controversies but also all issues that might in some way have a relationship to those controversies (i.e. effectively any subject on which a factual documentary programme could be made where there was a reference to Ukraine) would have a chilling effect on RT's ability to explore what appeared to be genocidal behaviour in eastern Ukraine in conditions of mainstream media silence".

The Licensee disagreed that the subject matter of the Programme was the criticisms of the Ukrainian Government and its military forces towards the population of eastern Ukraine. Rather its view was that the subject matter of the Programme as a whole seemed to be more about mainstream media silence and the impact of US foreign policy as opposed to criticisms of the Ukrainian Government, its armed forces and supporters. In support of this assertion, TV Novosti said that the name of the Programme was "The Truthseeker" and not, as Ofcom stated, "Genocide of Eastern Ukraine". The Licensee also said that the Presenter, in the Programme's introduction, introduced the theme of mainstream media silence through the phrase "*shameful cover-up*". The Licensee said that this was followed by possible explanations for the silence and the genocide "pointing the finger not at the Ukrainian government but at

¹⁴ *An Inconvenient Truth* is a 2006 documentary feature film about global warming. Ofcom's decision relating to this case is available at:
<http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb165/>

the US". Therefore the criticism of the Ukrainian Government, its armed forces and supporters was only indirectly what the Programme was about.

Preservation of due impartiality

On the assumption that the due impartiality rules were applicable, TV Novosti did not think that Ofcom's provisional conclusion on the preservation of due impartiality was sustainable.

The Licensee said that it was not appropriate for Ofcom to reject the sufficiency of the Caption on quantitative grounds relating to its screen duration or the number of times it appeared without considering qualitative factors. In TV Novosti's view "it is the denial itself, not its duration or the number of times it appears, that is the key test of sufficiency here". The Licensee said that the denial in the Caption was categorical, unambiguous, clear and unmistakable. It added that "[i]t is reasonable to expect that audiences will perceive no undue bias in presentations where criticisms are balanced by a clear indication, however brief, that the criticisms are rejected". TV Novosti went on to say that Ofcom has "advanced no cogent reason why the [C]aption should not be treated as the presentation of the required alternative viewpoint sufficient to preserve due impartiality". The Licensee also submitted that the Programme's approach to the presentation of an alternative view in these circumstances was not out of line with industry practice, and gave examples of that practice. Further, TV Novosti said that it had "intended to emphasise the Ukrainian government's denial with the closing slate" (which was "inadvertently omitted") and that the Licensee's intention to include this slate should be taken into account by Ofcom when considering its response to the Programme.

TV Novosti expanded on its previous assertion that Ofcom did not appear to have taken a "multi-factorial" assessment of due impartiality. Specifically, the Licensee said that the Preliminary View started by looking for alternative views and then assessed the sufficiency of these views against a number of factors. In its view this approach was not procedurally appropriate. TV Novosti submitted that the Preliminary View considered the nature of the Programme, its subject matter and one aspect of audience expectations but none of these matters appeared to have any bearing on the assessment of whether the Caption was adequate and sufficient to preserve due impartiality.

Further, the Licensee made reference to having relied on guidance given in compliance meetings with Ofcom in November 2012 and March 2014 in which the special impartiality rules were discussed¹⁵.

In conclusion, TV Novosti submitted that Ofcom had not made a compelling case that the Programme was in breach of Rule 5.5.

¹⁵ In meetings with licensees Ofcom stresses that it cannot provide specific compliance advice about particular programmes in advance of broadcast. Compliance in specific programmes is the responsibility of licensees, not Ofcom. Ofcom can only provide general guidance, especially in an area like due impartiality, where cases tend to be very dependent on the individual facts. This is what happened in Ofcom's meetings with RT. Ofcom provided the Licensee with some general guidance about how to preserve due impartiality, and this advice largely echoed the published Guidance on due impartiality.

Decision

Under the Communications Act 2003 (“the Act”), Ofcom has a statutory duty to set standards for broadcast content which it considers best calculated to secure a number of standards objectives. These objectives include ensuring that the special impartiality requirements set out in section 320 of the Act are complied with, including that “due impartiality” is preserved on matters of political controversy. This objective is reflected in Section Five of the Code. In particular, Rule 5.5 states that:

“Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service...This may be achieved within a programme or over a series of programmes taken as a whole”.

In reaching a Decision in this case, Ofcom acknowledged the importance attached to freedom of expression in the broadcasting environment, as contained in Article 10 of the European Convention on Human Rights (“ECHR”). This provides for the broadcaster’s and audience’s right to freedom of expression, which encompasses the right to hold opinions and to receive and impart information and ideas without undue interference by public authority.

Article 10 of the ECHR also provides that the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Accordingly, Ofcom is required to set standards to secure the standards objectives in section 319(2) of the Act, including that the special impartiality requirements under section 320 of the Act are complied with, which includes the need to ensure that due impartiality is preserved in respect of matters of political controversy. Ofcom secures the application of the special impartiality rules through making and enforcing the Code, which includes the rules in Section Five relating to due impartiality.

Ofcom must also consider the broadcaster’s right to freedom of expression and the audience’s right to receive information. Therefore, in applying the due impartiality rules, Ofcom must balance the right to freedom of expression against the requirements of Section Five of the Code.

It is important to note the broadcasting of highly critical comments concerning the policies and actions of any individual or organisation, including a government or state agency, is not, in itself, a breach of the special impartiality rules. Further, the special impartiality rules do not prevent a broadcaster from making programmes about politically controversial subject matters, and it is crucial that broadcasters have the editorial freedom to do so. However, in doing so, broadcasters must ensure, in accordance with Rule 5.5, that programmes dealing with politically controversial matters preserve a level of impartiality which is appropriate to the subject and nature of the programme, taking into account other relevant contextual factors.

Therefore, in this case Ofcom took careful account of the Licensee’s right to freedom of expression and the audience’s right to receive information against the requirements of Rule 5.5. In doing so, we acknowledged that the Programme was made in the context of an ongoing, politically sensitive conflict in Ukraine. We noted

TV Novosti's representations detailing evidence from the UN refugee agency (the UNHCR) regarding the humanitarian suffering and the recent deterioration of the situation in eastern Ukraine. We also took into account the Licensee's representations that there had been very little coverage in the mainstream media about the actions of Ukrainian Government forces and the impact on the civilian population in eastern Ukraine. In light of the above, and in line with broadcasters' right to freedom of expression and audience's right to receive information, we considered that it was legitimate for TV Novosti to make and broadcast a programme which examined and explored the situation in eastern Ukraine. However, for the reasons we explain below, we considered that the Programme examined politically controversial matters; therefore, we considered that it was incumbent on the Licensee to comply with Rule 5.5 by ensuring that due impartiality was preserved in the Programme.

Application of due impartiality

The Code makes it clear that matters of political controversy are "political...issues on which politicians...and/or the media are in debate". Ofcom's published Guidance to Section Five of the Code¹⁶ ("the Guidance") explains that whether a matter of political controversy is being dealt with in a programme will depend on a "range of factors". In particular, the Guidance says that "[j]ust because a 'political'...matter is referred to in a programme, or broadcasters deal with particular matters that elicit strong emotions, does not mean that the special impartiality rules are engaged". The Guidance also explains that "just because a number of individuals and institutions, or the majority of the audience to a service, share the same viewpoint on a contentious issue, does not necessarily mean that a matter is not...a matter of political...controversy".

In assessing whether the Programme dealt with matters of political controversy, Ofcom first considered the subject matter of the Programme. We noted TV Novosti's representations that the Programme appeared to be more about mainstream media silence and the impact of United States foreign policy, as opposed to criticisms of the Ukrainian Government, its armed forces and supporters. This was not apparent to us when we viewed the Programme, although we noted that elements of the Programme did touch on these themes. In particular, the introductory section of the Programme highlighted the alleged role played by the US Government in the Rwandan genocide and speculated whether the US Government was involved in an alleged genocide in Ukraine. We also noted there were other brief references in the Programme to US involvement, for example references to the "*Obama administration*" supporting and "*aiding and abetting*" the Ukrainian Government. The Programme also contained one brief reference to "*mainstream media silence*" and another to the "*silence in the West*", as well as the reference to a "*shameful cover up*" in the introduction.

Taking the Programme as a whole however, it was clear to Ofcom that the main subject matter of discussion was the current situation in eastern Ukraine. Ofcom noted that the Programme contained commentary by the Presenter, and various interviews with individuals, which included a number of very serious allegations against, and critical comments about, the Ukrainian Government and its military forces regarding their policies and actions towards the population of eastern Ukraine. In particular, the Programme included accusations that the Ukrainian Government and its military forces had committed atrocities, and were attempting to commit genocide, against the population of eastern Ukraine. Ofcom also noted that the

¹⁶ <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section5.pdf>

subtitle of this particular episode of Truthseeker was “*Graphic*¹⁷: *Genocide of Eastern Ukraine*” and that the Presenter introduced the Programme by saying: “*The genocide in eastern Ukraine and its quote ‘shameful cover up’*”.

Further, Ofcom noted that the serious and politically sensitive allegations and comments made in the Programme were broadcast in the context of an ongoing and politically contentious situation in Ukraine which was the subject of political and media debate in the UK, Ukraine and internationally.

Taking all of the above into account, Ofcom considered the content of the Programme was primarily focused on the events unfolding in eastern Ukraine and in particular, an alleged policy of genocide being carried out, alongside other atrocities, by the Ukrainian Government and its military forces against the population of eastern Ukraine.

Therefore, Ofcom was of the view that the Programme dealt with matters of political controversy i.e. the actions and policies of the Ukrainian Government and its military forces policy towards the population of eastern Ukraine and that the Licensee was required to preserve due impartiality pursuant to Rule 5.5 of the Code.

Preservation of due impartiality

Having established that the Programme dealt with matters of political controversy, Ofcom assessed whether the Programme preserved due impartiality pursuant to Rule 5.5 of the Code.

In judging whether due impartiality has been preserved in a programme, the Code makes clear that the term “due” means “adequate or appropriate to the subject and nature of the programme”. Therefore, the Code states that “‘due impartiality’ does not mean an equal division of time has to be given to every view, or that every argument and every facet of every argument has to be represented”. In particular the Code states that “[t]he approach to due impartiality may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach is signalled to the audience.” In addition, the Code makes it clear that context, as set out in Section Two (Harm and Offence) of the Code is an important factor in relation to preserving due impartiality. This covers a number of factors including the editorial content of the programme, the service on which the material is broadcast, the likely size, composition and expectation of the audience and the effect on viewers who may come across the programme unawares.

The Guidance states that whether or not due impartiality has been preserved will depend on a range of factors including the programme’s presentation of the argument and the transparency of its agenda. The Guidance also makes it clear that the broadcasting of highly critical comments concerning the policies and actions of any one state or institution is not, in itself, a breach of the Code’s rules on due impartiality. In particular, the Guidance states that it is essential that current affairs programmes are able to explore and examine issues and take a position even if that is highly critical. The Guidance also says that the preservation of due impartiality

¹⁷ In keeping with other programmes in Truthseeker, this subtitle was broadcast at the conclusion of the opening sequence and appeared to Ofcom to be the title of the Programme. Ofcom was unclear why the word “*Graphic*” was included as part of this caption but considered that it did not in any way contradict or affect the words which followed.

does not require a broadcaster to include every argument on a particular subject or provide a directly opposing argument to the one presented in a programme.

Nevertheless, the Guidance is clear that broadcasters “must maintain an adequate and appropriate level of impartiality in its presentation of matters of political controversy”. In particular, it says that “[d]epending on the specifics of the issue...it **may** be necessary, in order to fulfil the due impartiality requirements, that alternative viewpoints are broadcast” (emphasis added). The Guidance explains that due impartiality will not be maintained by “merely offering people or institutions likely to represent alternative viewpoints (for example, representatives of a foreign government) the opportunity to participate in programmes, who decline to do so”. If a broadcaster cannot obtain an interview or a statement on a particular viewpoint on a matter of political controversy then it “**must** find other methods of ensuring that due impartiality is maintained” (emphasis added). The Guidance gives examples of a number of editorial techniques which a broadcaster might consider employing, where alternative views are not readily available, in order to preserve due impartiality. However, the Guidance makes it clear that it is an “editorial matter for the broadcaster as to how it maintains due impartiality”.

Having viewed the Programme in full, Ofcom was of the view that it presented a significantly negative picture of the Ukrainian Government and its military forces. As discussed above, the Programme made numerous highly serious allegations about the Ukrainian Government and military forces including allegations of atrocities and attempts to commit genocide. The allegations were accompanied by emotive footage of warfare and its after effects and numerous comparisons of the Ukrainian Government and its military forces to Hitler and Nazi Germany. All of this was broadcast with little or no counterbalance or objectivity and, in Ofcom’s view, this contributed to the Programme’s negative portrayal of the Ukrainian Government and its military forces.

Ofcom was particularly concerned that the Programme included allegations and statements that did not appear to be supported by the sources the Licensee said that it had relied on. For example, the Presenter said that “Kiev” had “*murdered and tortured numerous war correspondents such as Channel 1 cameraman Anatoly Klan, the correspondent and sound engineer for Rossiya TV and Italian photographer Andrea Rocchelli*”. In its original representations to Ofcom regarding Rule 2.2, TV Novosti said that reports of the precise circumstances were “conflicting” and it accepted that the reference to these journalists being tortured by the Ukrainian government or its military forces “does not appear to be substantiated in these accounts”. Having investigated the matter further, TV Novosti made further representations stating that: “Reports were sometimes conflicting but it was a reasonable inference that [Mr Klan and Mr Roccheilli] were killed by Ukrainian government forces and their irregulars”. The Licensee also said that at the same time there was “mounting evidence of abduction and torture of journalists and others by both sides in the conflict, for example as reported by Amnesty International”. According to its own sources, however, there did not appear to be any evidence that Mr Rocchelli was “*tortured*” prior to his death.

In contrast to the numerous allegations made against the Ukrainian Government and its military forces, Ofcom noted that the Programme contained one reference to the Ukrainian Government’s viewpoint regarding these allegations in the Caption, which read:

“Kiev claims it’s not committing genocide, denies casualty reports”.

Further, Ofcom noted that TV Novosti had intended for a 'slate' to be broadcast at the end of the Programme that set out the Ukrainian Government's viewpoint but that this was not in fact broadcast due to human error. Given that such a slate did not form part of the Programme as broadcast, Ofcom did not and could not take this into consideration in its assessment of whether the Programme preserved due impartiality.

Ofcom also noted that the Programme referred to statements made by the Ukrainian Government, in particular, statements made by the Ukrainian President, the Ukrainian Prime Minister and Kiev's defence ministry and defence council. However, we noted that these statements were not presented in an impartial way; rather they were presented in a way which served to undermine the Ukrainian Government's viewpoint and reinforce the highly critical and negative approach of the Programme as a whole. In particular, the Programme compared the policies, actions and opinions expressed in these statements to the policies and actions of Hitler and the Nazi government. Ofcom therefore did not consider that these statements provided balance to the negative picture presented in the Programme of the Ukrainian Government and its military forces.

As noted above, the Programme contained interviews with a number of individuals which were highly critical of the actions and policies of the Ukrainian Government and its military forces. Rather than questioning these interviewees in a challenging or objective manner, the Presenter asked leading questions such as "*[i]s Kiev deliberately trying to create a humanitarian catastrophe?*" and "*[i]s Kiev committing genocide?*" which, in Ofcom's view, had the effect of encouraging and eliciting further criticism from the interviewees of the Ukrainian Government and its military forces.

Apart from the Caption, we considered that the Programme did not include any other viewpoints that could reasonably and adequately be classed either as supportive of the policies and actions of the Ukrainian Government or which provided an alternative or more balanced viewpoint to those presented in the Programme. We also did not consider that, apart from the Caption, the Programme adopted any other methods or editorial techniques which provided any balance to the negative picture of the Ukrainian Government and its military forces in the Programme.

Having assessed the extent to which editorial techniques were employed by the Licensee to preserve impartiality in the Programme, we then went on to consider whether, taking into account relevant contextual factors, and the subject and nature of the Programme, "due" impartiality was, in fact, preserved.

Regarding the subject matter of the Programme, as stated above, we were of the view that its central theme was the policies and actions of the Ukrainian Government and its military forces towards the population of eastern Ukraine, and we noted that it contained highly serious allegations of atrocities and genocide.

In terms of contextual factors, we noted that the Programme was broadcast on RT Europe, a channel which TV Novosti said was "intended to be challenging" and "aims to provide an alternative perspective on major global events, and acquaints an international audience with a Russian perspective." We also noted that the Truthseeker series was described on RT's website as one which "laces hard hitting reporting" and that the Programme's aims were "to provide people with more answers to more questions, to examine world events from different points or points of view and to encourage people to question more". Further, we acknowledged, the Licensee's representations that the content and approach of the Programme would have been familiar to the audience from the nature of the channel and the series.

Taking all of this into account, we considered that viewers would have expected programmes on the channel and in the Truthseeker series to address controversial issues, and to do so from the perspective of TV Novosti, reflecting major global events from a Russian perspective. However, notwithstanding the nature of the channel and the audience's expectation, we considered that these contextual factors were outweighed by the strength of the allegations shown in a programme which dealt with matters of political controversy. In our view, therefore, the Licensee was nevertheless obliged to ensure that due impartiality was preserved in the Programme.

Ofcom also took into consideration TV Novosti's representations that the Caption was a "categorical" denial of the accusations of genocide within the Programme and we noted that the Caption stated that "Kiev" denied genocide. However, the Caption was broadcast on one occasion for a duration of approximately six seconds and it was one of 37 captions in total shown in a similar format during the Programme. In addition, we noted that the Caption was broadcast at the bottom of the screen alongside a news ticker and the Programme's other audio-visual content. We therefore considered the prominence and impact of the Caption was significantly reduced and limited by the way in which it was presented in the Programme and we did not consider, in the context of the Programme as a whole, that it provided sufficient or adequate counterbalance to preserve due impartiality.

Further, and importantly, the Licensee did not provide any evidence that due impartiality on the politically controversial matters in the Programme had been preserved in the Truthseeker series taken as whole (i.e. more than one programme in the same service, editorially linked, dealing with the same or related issues within an appropriate period and aimed at a like audience).

Therefore, for all the reasons stated above, Ofcom did not consider that due impartiality was preserved in the Programme.

Conclusion

Ofcom noted TV Novosti's representations that, as a result of concerns that the Programme contained certain information that had been insufficiently corroborated, its senior management had terminated Truthseeker with immediate effect and all past episodes had been removed from RT's website. We also recognised that the Licensee had intended for a "slate" to be broadcast at the end of the Programme that further set out the Ukrainian Government's viewpoint.

However, for all the reasons set out above, Ofcom was of the view that the Programme was a current affairs programme which dealt with matters of political controversy, and the failure of the Licensee to maintain due impartiality resulted in a serious breach of Rule 5.5 of the Code.

Ofcom therefore directs the Licensee to broadcast a summary of its Decision.

Breach of Rule 5.5

In Breach

The Truthseeker: Media ‘Staged’ Syria Chem Attack

RT, 23 March 2014, 04:45, 08:45, 12:45, 16:45, 20:45 and 24 March 2014, 00:45

Introduction

RT (formerly Russia Today) is a global news and current affairs channel produced in Russia, and funded by the Federal Agency for Press and Mass Communications of the Russian Federation¹. In the UK, the channel broadcasts on satellite and digital terrestrial platforms. The licence for RT is held by Autonomous Non-profit Organisation TV-Novosti (“TV Novosti” or the “Licensee”).

The Truthseeker (“Truthseeker”) was an investigative current affairs series broadcast on RT. On 3 June 2014, Ofcom received a complaint² from the BBC regarding an episode of Truthseeker entitled “*Media ‘Staged’ Syria Chem Attack*” (“the Programme”) which was presented by Daniel Bushell (“the Presenter”) and broadcast on a number of occasions on 23 and 24 March 2014.

The Programme made a number of allegations about the BBC which centred on the following three BBC programmes (the “BBC Programmes”):

- an edition of *BBC News at Ten* broadcast on 29 August 2013 (the “29 August BBC News”);
- an edition of *BBC News at Ten* broadcast on 30 September 2013 (the “30 September BBC News”); and
- an episode of the BBC current affairs programme *Panorama* entitled “*Saving Syria’s Children*” broadcast on 30 September 2013 (the “BBC Panorama Programme”).

Programme summary

Ofcom reviewed the entire Programme, which was approximately 13 minutes long, and noted the following:

The Programme was introduced by the Presenter who said:

“Stunning fakery in the alleged chemical weapons attack according to a former UK ambassador. Coming up”.

Footage was shown of a number of people, covered in what appeared to be blood, lacerations and burns, standing or lying on the floor of a room.

¹ See the description of RT in *Television News Channels in Europe (Based on a Report prepared by the European Audiovisual Observatory for the European Commission – DG COMM, October 2013, <http://www.obs.coe.int/documents/205595/264629/European+news+Market+2013+FINAL.pdf/116afdf3-758b-4572-af0f-61297651ae80>)*. Section 5.4.6 of this report states that Russia Today “can be considered as a state funded or public media service”.

² The BBC also made a fairness complaint about the Programme (see page 89).

This footage was accompanied by the following voiceover commentary:

“The British Broadcasting Corporation is accused of staging chemical weapons attack”.

Shortly afterwards, the Presenter said:

“August 2013 and NATO leaders can’t get the public onside for the imminent bombing of Syria. Suddenly the BBC says it was filming a small rural hospital, and a game-changing atrocity happens right there the moment they were filming”.

A caption was also shown on-screen which said:

“World changing atrocity happens when BBC invited to film in remote hospital”.

Footage was shown labelled with the following on-screen graphic:

“Syria Crisis’, Ian Pannell, BBC (August, 2013)”.

This footage showed various wounded people being brought into a hospital. The voiceover within this footage said:

“Last month we were filming the doctors working at this hospital, when victims of an incendiary bomb attack on a school playground started pouring in”.

Footage was shown labelled with the on-screen graphic:

“Saving Syria’s Children’, Ian Pannell, BBC (September 2013)”.

The footage showed a female³ (“Dr Hallam”), wearing a surgical mask which covered her mouth, who said:

“Absolute chaos and carnage here, it must have been some sort of napalm”.

The Programme switched back to the Presenter who said:

“But a highly sceptical public stayed hostile to military intervention. Exactly one month later the leaders are trying to pin a chemical weapons attack on Syria without success”.

Two versions of the footage of Dr Hallam were shown side by side on-screen labelled “August 2013” and “September 2013”, respectively, while the Presenter said:

“The BBC airs exactly the same footage, but digitally alters the word ‘napalm’ for quote ‘chemical weapons’ hoping no-one will notice”.

Footage was then shown in which Dr Hallam said:

“Absolute chaos and carnage here, it must have been some sort of chemical weapon”.

³ This individual was later identified by the Licensee as Dr Rola Hallam.

The Presenter said:

“Not only did folks notice but it unleashed a massive public investigation which made some extremely disturbing findings”.

An image of a letter of complaint to the BBC labelled “*First letter of complaint to the BBC*” was shown on-screen whilst the Presenter made this comment. The following captions were shown above and below the image of the letter, respectively:

“Fabrication in BBC Panorama’s ‘Saving Syria’s Children’”, and

“BBC ‘napalm/ chemical attack’ a ‘stunning fakery’: frmr [sic] UK Ambassador C. Murray”.

An on-screen graphic showed the following text, which was also spoken by a voice-over:

“This is the total fabrication – from beginning to end – of an atrocity with BBC ‘reporter’ Ian Pannell standing amidst a tableau of very bad actors. This is completely beyond the pale – Robert Stuart⁴”.

A graphic entitled “BBC doctors claims from ‘napalm’ to ‘chemical weapon’” was shown on-screen. Below this graphic the following text was shown:

*“Absolute chaos and carnage here, it must have been some sort of **napalm**”, and*

*“Absolute chaos and carnage here, it must have been some sort of **chemical weapon**”.*

These sentences were accompanied by images of their respective graphical ‘audio analyses’⁵ which were identical, save for the words ‘napalm’ and ‘chemical weapon’ in which the graphical audio analyses differed.

As these graphics were shown, the Presenter said:

“This audio analysis by media investigator, Robin Upson, shows both versions are identical and from the same speech. The BBC then digitally altered the words

⁴ After the broadcast of the BBC Programmes, Robert Stuart complained to the BBC that the BBC Programmes included faked footage. As of the date of the broadcast of the Programme, Mr Stuart had written two letters of complaint to the BBC, both of which the BBC had responded to substantively but in the Licensee’s view implausibly in certain respects. Shortly before the broadcast of the Programme, on 17 March 2014, Mr Stuart sent a third letter of complaint to the BBC Editorial Complaints Unit (the “ECU”). Following the broadcast of the Programme, on 23 April 2014, the ECU provided its provisional outcome concluding that there were no grounds to uphold any aspect of Mr Stuart’s complaint. On 19 May 2014, the ECU made its final decision and did not uphold Mr Stuart’s complaint. The BBC provided, as annexes to its complaint, letters of complaint from Mr Stuart to the BBC and the BBC’s responses to these letters. The BBC also provided Mr Stuart’s letter to the ECU and its preliminary outcome. The BBC did not provide the ECU’s final decision but referred to it in the body of its complaint to Ofcom. Ofcom notes that Mr Stuart’s correspondence with the BBC in relation to his complaint has been published by him at <https://bbcpanoramasavingsyriaschildren.wordpress.com/>

⁵ That is, a graphical depiction of the sounds of the words.

from 'napalm' to 'chemical weapon', the exact justification NATO was finding difficult to prove".

The Presenter said:

"The game-changing allegation was made by two doctors that had travelled with the BBC, who claimed the number of sudden casualties is quote 'overwhelming'. 'What kind of doctor', notes media investigator Robert Stuart, 'gives interviews, when she is surrounded by supposedly seriously burnt and dying teenagers?'"

The following caption was shown on-screen:

"Investigator: what kind of doctor does interviews when number of victims 'overwhelming'"

Footage of a hospital was shown and within this footage a medic said:

"Get anyone who isn't a patient out of here".

The Presenter said:

"When a nurse does finally start to help, her order to 'get anyone who isn't a patient out of here' doesn't apply to the cameramen. Even worse, notes Stuart, is the bizarre acting which starts when the man in the centre gives the sign".

Footage was shown labelled with the following on-screen graphic:

"'Syria Crisis', Ian Pannell, BBC (August, 2013)".

This footage, which lasted approximately 12 seconds, showed various individuals, covered in what appeared to be blood, lacerations and burns, standing or lying down on the floor of a room apparently in a hospital. In the foreground of this footage, one man was initially shown standing still for approximately two seconds and then lifting his arm and starting to move and groan. An extract of this footage, without sound, was also shown at the beginning of the Programme.

During this footage a voice off-camera said:

"What do you need to see? We are just human beings, we want to live, you know? This is our right to live".

A caption was shown on-screen which stated:

"Investigator R. Stuart – BBC's report on 'napalm/ chemical weapon attack' is 'staged'"

The Presenter stated:

"Dr Rola, on whose sole claim the BBC sends napalm/chemical weapons allegations around the world, is actually the daughter of Syrian rebel Mousa Al-

Kurdi. The parallel to the Gulf War and ‘Nurse Nayirah’⁶ is stunning. Congressmen said the nurse’s tearful testimony that Iraqis were killing children swung their vote in favour of war...Nurse Nayirah became the mainstream’s darling, but once the vote had safely passed, she admitted inventing the whole thing and was actually the daughter of the Kuwaiti Ambassador to Washington lying to get the public to back war”.

Whilst the Presenter made the above comments, the following captions were shown on-screen:

“‘Dr Rola’, responsible for chem [sic] claim, is daughter of Syrian rebel Mousa Al-Kurdi: ‘Liveleak’”; and

“‘Nurse Nayirah’ lies pushed U.S. to bomb Iraq”.

The Presenter asked George Galloway, then an MP, the following question:

“Why do we get almost identical claims before each war, which then prove lies?”

George Galloway, who was shown via video-link, said in reply:

“Well, the Bush and Blair Corporation as it became in the run up to the Iraq war, has almost entirely lost its reputation for journalistic integrity. A full enquiry must be launched into why the BBC used a piece of material, which was not just wrong, but was falsified and falsified with the purpose of propelling our country into war. That’s not what the British public pays its BBC licence fee for; so that it can be tricked into a war”.

Whilst George Galloway made the above comments, the following captions were shown on-screen:

“In lead-up to Iraq war 97% of BBC airtime given to pro-war media speakers, highest of any media: Cardiff Univ. study”;

“Full enquiry must be launched into BBC ‘napalm/ chemical’ claim”; and

“Parliamentarian: both sides guilty in Syria but we’re being tricked into supporting the rebels”.

The Presenter said:

“In a statement, the British Broadcasting Corporation says it stands by its report. The Syrian opposition denies the allegations. Investigators such as Robert Stuart note their many questions sent officially to the Corporation remain unanswered.

⁶ Ofcom understands this to be a reference to Nayirah al-Şabah, who gave testimony to the US House of Representatives’ Congressional Human Rights Caucus in 1990, alleging that atrocities had been carried out by Iraqi soldiers in Kuwait following Iraq’s invasion of Kuwait. It has been reported that Nayirah al-Şabah’s testimony was cited by some US politicians as a rationale for US participation in the 1990 Gulf War. It was subsequently reported that Nayirah al-Şabah was the daughter of Saud Al-Sabah, the Kuwaiti ambassador to the United States and her testimony had been arranged by a public relations company for a “Kuwaiti-sponsored” organisation. These revelations called into question the authenticity of Nayirah al-Şabah’s original testimony. (See for example <http://www.nytimes.com/1992/01/15/opinion/deception-on-capitol-hill.html>).

There are also numerous such precedents both in this war and previous invasions”.

Whilst the Presenter made these comments an image of a further letter of complaint to the BBC labelled “*Third letter of complaint to the BBC*” was shown on-screen and the following on-screen caption was shown above the image of the letter:

“Fabrication in BBC Panorama’s ‘Saving Syria’s Children”.

The Programme went on to discuss the alleged widespread faking of atrocities by the mainstream western media, including the BBC.

The Presenter said:

“Brilliant’ is how a top western official called tricking the public through routine faking of atrocities and commonly aired on mainstream bulletins. Nightly News⁷ show just a few cases of what happened next after mainstream cameras ended their reports”.

Footage from an online programme (“*Nightly News*”)⁸ was shown in which the presenter of this broadcast said:

“It shows people putting on, you know, fake wounds, it shows – there is some guys; there - look there’s their head wounds, ‘peace everybody. You know we’re doing the right thing, we’re creating fake propaganda’. I mean it’s not even real atrocity so there they’re lined up. There is another video action showing a guy kicking his leg and with a fake blood wound. Here is a guy who wakes up from his funeral! Watch this: they’re up; wait, err there, oh he’s awake – he’s not even really dead, and so I mean this is just crazy what goes on. There is another video that was shot of a supposed massacre; and it cuts, you don’t see the whole thing ...”.

This section of the Programme included a screen shot of some data from the “*Lexis Media Database*”. This data, in combination with the accompanying commentary by the Presenter, suggested that on 205 occasions the BBC had published or broadcast information which was sourced from “*so called activists behind the fakes*”. The Presenter said:

“The so-called activists behind the fakes are by far the most popular source, despite them never being verified and regularly disproved as fabrications to justify for more NATO arms. The term ‘activist’ may sound like a well-meaning western campaigner or charity but the foreign policy journal notes it’s just news speak for insurgents”.

The Presenter said that the “*official source on Syria casualties or what mainstream claims is official is the impressive sounding organisation The Syrian Observatory for Human Rights*”. The Presenter said that “*Reuters exposed the fact three years ago [that] it was not an organisation at all or even working in Syria. It’s a single pro-insurgency supporter living in Coventry, England*”. The following caption was also shown:

⁷ An online programme (see <http://tv.infowars.com/index/channel/category/>).

⁸ Ibid.

“Official’ Syria narrative comes from ‘some guy in a British apartment’ – NSNBC”.

Shortly afterwards, the Presenter said: *“In leaked footage ordinary Syrians told the BBC they are tired of its lies and the insurgents they’re cheer-leading are a tiny minority led by foreign gangs”.*

The Programme showed footage of a reporter questioning people on a street in Syria. The reporter asked a passer-by *“you don’t like BBC? Why?”*, to which the passer-by replied: *“Because you are talking very bad about Syria. Everybody when they hear BBC Arabic they can hear lies about Syria...”*. This footage was accompanied by the following captions:

“Courtesy Syrian to BBC reporter: you are not telling the truth about Syria”; and

“Leaked footage: Syrian’s won’t speak to the BBC because of its lies”.

The next part of the Programme focused on the US Central Intelligence Agency (“CIA”).

In particular, the Presenter said:

“Pro-war media forced to resort to colossal lies since Intelligence Chiefs revealed to America’s top investigative reporter Sy Hersh quote ‘Obama’s cronies are making it up’”.

An on-screen graphic showed the following text, which was also spoken by a voiceover:

“The attack ‘was not the result of the current regime’ the high-level intelligence officer wrote in an email to a colleague. ‘The guys are throwing their hands in the air and saying ‘How can we help this guy – Obama – when he and his cronies in the White House make up the intelligence as they go along?’, said a former senior intelligence official (Sy Hersh, Author, ‘Whose Sarin’)”.

The Presenter also said:

“The Senate Committee Enquiry revealed CIA running mainstream media in the vast operation known as ‘MockingBird’. More than 400 journalists and media chiefs claiming to watchdog the government were the exact opposite joining to mask US Government crime at home and abroad. The operation continues despite Agency denials. Counter Punch discovered CIA imposing agents on firms like CNN. Former CIA executive Michael Scheuer British media are even closer to Intel targets [sic]”.

During this part of the Programme, the Presenter also interviewed Francis Boyle, Professor of International Law at Illinois University. The Presenter asked: *“How can nations stop war media that now perform the CIA’s covert operations?”* to which Francis Boyle replied:

“They certainly have their visas revoked and sent packing home because I really don’t understand why some of these countries keep, you know, European journalists, certainly in the United States, why they let them into the countries; because they are just using their coverage to provoke war and military intervention at home. In addition Bush junior administration lifted what was supposed to be the previous prohibition that intelligence agents were not

supposed to infiltrate the media. You know, you have to be very careful certainly dealing with US reporters whether or not they are intelligence agents”.

The Presenter then said: *“Banning active units of the military also known as ‘War Stream Media’ shows how serious the situation is now”.*

During this section of the Programme, the following comments were also made about Western mainstream media and the BBC:

- regarding media reporting of the conflict in Ukraine, the Presenter said: *“A leaked phone call with EU Foreign Minister Ashton, revealed the opposition planned and executed the infamous sniper violence of Kiev shooting both the police and their own supporters in the back. The study found a total of 250 mainstream sources lied that the snipers belonged to Yanukovich. Only seven of the entire mass media even mentioned the bombshell leak and those that did, framed the report to suggest it couldn’t possibly be true. Former Wall Street Journal editor Paul Craig-Roberts calls the coverage of Ukraine ‘a new low in the history of the mainstream’, which is now simply what he describes as a ‘Ministry of Lies”.* Whilst the Presenter made these comments, the following captions were shown on-screen:
 - *“New mystery snipers in Crimea, mainstream all backs opposition’s claims about their identity”;* and
 - *“New ‘NNDA’ Act legalizes media disinfo campaigns against Americans [sic]”;*
- the Presenter said: *“Investigative reporter John Helmner has uncovered the main stream staging demonstrations and attempts to provoke disorder...one US scholar notes the coverage has now become Orwellian. What’s going on?”.* Referring to President Obama, David Cameron and the “French President”, John Helmer then said: *“When you’ve got weak political leaders you need to look stronger than you are in the public opinion in the media. So there’s this process of misleading and disinforming.”* These comments were accompanied by the following captions:
 - *“BBC digitally inserted political statements into riot ‘Concerts’, all fabricated: J. Helmner”;* and
 - *“‘Weak’ Hollande, Cameron and Obama ‘need to look stronger than they are in media’”;*
- specifically regarding the BBC, the Presenter said *“Scheuer adds the BBC now takes the lead in regime change operations that cause quote ‘anarchy and violence’”.* This was accompanied by a caption which read: *“Scheuer: Violence starts with the BBC”;* and
- the Presenter also said: *“Mainstream audiences are in freefall. CNN and NSNBC have shed half of their entire viewership in the last year alone. The question is how many more coups will they stage or help before they lose the public’s trust altogether?”.* Whilst this comment was made, the following caption was shown on-screen:

“Refuse visas for BBC journalists to ‘cover’ foreign ‘protests’ – Former CIA exec. M. Scheuer.”

The Presenter concluded the Programme by saying: *“Seek truth from facts, this is The Truthseeker.”*

The BBC’s complaint

The BBC’s complaint is that the Licensee failed to report news with due accuracy in breach of Rule 5.1 of the Ofcom Broadcasting Code (the “Code”)⁹.

In summary, the BBC said that the Programme presented information in an inaccurate and misleading way by asserting as fact that:

- the BBC had “completely fabricated a report of an atrocity in Syria and subsequently fabricated an interviewee’s speech in a further report”;
- the BBC report of the attack was “stage-managed for the cameras” and that the “BBC knowingly used actors in the reports pretending to be victims”;
- the BBC relied on the claims of a doctor of “questionable authenticity” and who was biased as result of family political connections who was lying to get the public to back war;
- the BBC had altered the “‘fabricated’ report” in a “deliberate attempt to mislead its audience hoping that no one would notice”; and
- the discovery of the fabrication and subsequent alteration of the report led to a “massive public investigation” which found that the BBC (and BBC reporter, Ian Pannell) were guilty of the total fabrication of an atrocity.

The BBC said that the “factual assertions” made about the BBC in the Programme were based on Mr Stuart’s complaint to the BBC. The BBC said that the “extremely disturbing findings” of the “massive public investigation” referred to and relied on in the Programme were in fact the complaints of Mr Stuart and that the statement of Mr Stuart which is read out in the Programme is portrayed as the “outcome of an official public investigation”. The BBC said that these assertions are false and “un-evidenced” and that Mr Stuart’s complaint had been “denied and rejected with detailed reasons” by the BBC at the date of the broadcast of the Programme.

The BBC also made the following additional points:

- regarding the allegation that the BBC had “digitally altered” interview footage, the BBC said that:
 - there was no fabrication of what the interviewee said in the BBC Programmes and that examination of the unedited rushes shows that the two versions of the interview footage used two different extracts from the same interview; and
 - the Programme based its statement that the BBC “digitally altered” the interview footage solely on an “unexplained purported ‘audio analysis’ by a media investigator”. The BBC said that the Programme did not provide any corroborating information for this statement or any explanation regarding the audio analysis “that would allow viewers to arrive at their own conclusions”;

⁹ Rule 5.1 applies to news reports and is therefore not applicable to the Programme which was an investigative current affairs programme.

- the Programme drew what it says to be a “stunning parallel” between the BBC Programmes and the “Nurse Nayirah” testimony by suggesting that both “were complete inventions/lies to get the public to back war”;
- the Programme stated that in a “statement” the BBC had said that “it stands by its report”. The BBC said that this misled viewers by giving them the impression that the BBC was given an opportunity to comment on the assertions made in the Programme before the Programme was broadcast when this was not the case. The BBC said that the Licensee made no attempt to put these assertions of fabrication to the BBC. The BBC said that the reference to the BBC standing by its report may have been to the BBC’s responses to Mr Stuart’s complaint and that the Programme failed to accurately represent the BBC’s position in this regard by omitting information as to the BBC’s grounds for refuting Mr Stuart’s complaint;
- the Programme adopted the views of interviewees in the Programme that the BBC used the reports to provoke war and military intervention in Syria;
- TV Novosti made no attempt to put these allegations of fabrication to the BBC or to convey an alternative viewpoint to the claims of fabrication; and
- there was nothing in the Programme to suggest that the Licensee took any steps to corroborate its “very serious claims”.

Ofcom’s investigation

Ofcom has not taken forward the BBC’s complaint of due accuracy under Rule 5.1 as this rule applies to news reports and is therefore not applicable to the Programme which was an investigative current affairs programme. However, Ofcom considered that the Programme raised issues warranting investigation under Rule 2.2 of the Code which states:

“Factual programmes or items or portrayals of factual matters must not materially mislead the audience”.

We therefore sought the Licensee’s comments as to how the Programme complied with this Rule.

Response

In its response to Ofcom’s request for comments, TV Novosti said that its view of the BBC’s standards complaint had been fully addressed in its representations in relation to the BBC’s separate fairness complaint about the Programme and asked Ofcom to consider these representations in relation to whether the Programme complied with Rule 2.2¹⁰. In particular, the Licensee said that it thought it would be apparent from its representations in relation to the fairness complaint that it had taken the view that the Programme did not materially mislead the audience and that it was the BBC Programmes, not the Programme, which had “misled the audience”.

¹⁰ In reaching this Decision, Ofcom considered the representations made by the Licensee in response to Ofcom’s request for comments on the Programme’s compliance with Rule 2.2 following the BBC’s standards complaint. Ofcom also considered the Licensee’s representations in response to the BBC’s fairness complaint insofar as they were relevant to an assessment of the Programme’s compliance with Section Two of the Code.

By way of background, the Licensee said that the Programme had “questioned the authenticity of BBC reports of an atrocity described as taking place in Syria a few days after the use of chemical weapons in Damascus on 21 August 2013”.

TV Novosti said that following the broadcast of the 29 August BBC News “[d]oubts about the authenticity of the reports emerged within days” and that, after the 30 September BBC News and the BBC Panorama Programme had been broadcast, complaints had been made to the BBC alleging that some of the material in the BBC Programmes had been “faked”. In particular, the Licensee said that:

- a former UK ambassador had spoken of the “obvious faking of an interview casting doubt on some of the images presented” in the BBC Programmes; and
- Mr Stuart had “suggested...that some of the events were staged, misleading and implausible”.

Referring to the BBC’s response to Mr Stuart’s complaint, TV Novosti said that the BBC had “responded in detail” and had “denied all the claims in its response” to Mr Stuart’s complaint. In particular, the Licensee said that the BBC:

- “has accepted, in correspondence with Mr Stuart, that the material was edited, including changing the words spoken by a witness and presenting events out of chronological order, but denies that they were staged”; and
- “contends that what was done fell within the latitude allowed to broadcasters by the use of the word ‘due’ in relation to accuracy”.

The Licensee said that it disagreed with the BBC’s response to Mr Stuart and that the editing of the footage in the BBC Programmes “went far beyond what was proper in the circumstances” and that it was not surprising that audiences thought the material was faked. TV Novosti also said that to the extent the evidence was open to testing, it “clearly was faked”. The Licensee said that the BBC Programmes “presented a relentlessly one-sided view of the conflict in Syria which fell far short of achieving the impartiality on which the BBC’s reputation rests and on which the trust of audiences is also built”. TV Novosti also said that the BBC “having compromised the trust of its audience by editing and broadcasting this material in this way, suffered no injustice”, “that any damage to the reputation and good name of the BBC [was] self-inflicted” and that the BBC Programmes “should never have been broadcast”.

Regarding the Programme, the Licensee said that it reported on the matter with its “own take on what had happened” and that what was said about the BBC in the Programme was “legitimate” and “richly deserved”.

TV Novosti recognised that Ofcom’s functions do not extend to regulating the provision of the BBC’s services in so far as they concern the accuracy or impartiality of the content of any programme included in the BBC’s UK public broadcasting services and that this standards investigation was concerned with “Ofcom’s regulation of the provision of RT’s services”; but it said that if, as the Licensee considered was the case in this investigation, “it is necessary for Ofcom in the discharge of that function to decide whether the content of any BBC programme complies with the relevant requirements of accuracy and impartiality, [Ofcom] may and indeed must make that decision on the evidence before it independently of the

BBC". The Licensee then assessed in detail whether the BBC Programmes had preserved impartiality and accuracy and submitted that they had failed to do so¹¹. TV Novosti also made representations on whether the BBC Programmes preserved accuracy and impartiality in the context of Ofcom's assessment of whether the Programme had complied with Rule 2.2 of the Code, as follows:

- the Licensee gave specific detail on the doubts it referred to, which appeared online, about the authenticity of the 29 August BBC News. In particular, TV Novosti referred to an online article posted on 3 September by Francisco Santoianni which suggested that a number of the features in the 29 August BBC News report were either "implausible or not genuine" and that it appeared to him that at least one scene had been acted;
- the Licensee also gave specific detail about the doubts it referred to, which appeared online, about the authenticity of the BBC Programmes following the broadcast of the 30 September BBC News and the BBC Panorama Programme. In particular the Licensee stated that:
 - on or shortly after 4 October 2013, Mr Stuart posted on his website a copy of his complaint to the BBC¹² in which he complained of a "large measure of fabrication" and in particular complained about:
 - the editing of the footage to present events out of sequence to suggest that there were more victims than was really the case;
 - a supposed eyewitness covertly reading from a prepared text;
 - the faking of distress on the part of supposed victims;
 - the undisclosed background and affiliations of the charity Hand in Hand; and
 - the alteration of Dr Hallam's words.
 - on 7 October 2013 an individual whom it understood to be a former UK ambassador to Uzbekistan and a former Rector of the University of Dundee, posted a comparison of the two versions of Dr Hallam's interview under the title "Fake BBC Video" showing that it had been:

"...edited so as to give the impression the medic is talking in real time in her natural voice – there are none of the accepted devices used to indicate a voiceover translation. But it must be true that in at least one, and possibly both, the clips she is not talking in real time in her own voice. It is very hard to judge as her mouth and lips are fully covered throughout. Perhaps neither of the above is what she actually said".

¹¹ Ofcom does not regulate BBC licence fee funded services in respect of accuracy and impartiality and Ofcom has not undertaken an assessment of the accuracy and/or impartiality of the BBC Programmes in reaching this Decision. However, the representations made by the Licensee regarding the accuracy and impartiality of the BBC Programmes have been considered to the extent that they are relevant to Ofcom's assessment of the Programme's compliance with Section 2 of the Code.

¹² <http://bbcpanoramasavingsyriaschildren.wordpress.com/2014/01/18/first-letter-of-complaint-to-the-bbc-4-october-2013/>

TV Novosti also said that this individual went on to indicate that his confidence in the rest of the footage was therefore undermined and he said:

“But once you realise the indisputable fact of the fake interview the BBC has put out, some of the images in this video begin to be less than convincing on close inspection too”¹³;

- a report was posted on 7 October 2013 in which a reviewer¹⁴ indicated that they had written to Dame Fiona Reynolds, Senior Independent Director of the BBC Executive (in the mistaken belief that she was a Trustee), saying:

“[...] I, myself suspect the BBC of fraudulently altering audio in the report from Syria. I suspect the motive in this instance ...[is] propaganda intended to affect public opinion in the UK in such a way as to congregate [sic] support and underpin an offensive against the Syrian government”; and

- at “about the same time” an individual, John Hilley, also appeared to have complained to the BBC that Dr Hallam’s comments had been altered “because on 18 October he posted a reply from one Neil Salt of BBC Complaints, in which Mr Salt explained how the interview had been edited and sought to justify it”¹⁵.
- regarding the volume of complaints to the BBC, the Licensee said that it could not know what other complaints about the BBC Programmes were made to the BBC but said that “it [was] clear that the [BBC] programmes, on each occasion they were broadcast, elicited doubts from audiences as to the authenticity of what had been shown”;
- referring specifically to the editing of the footage of the interview with Dr Hallam TV Novosti said that:

¹³ <http://www.craigmurray.org.uk/archives/2013/10/fake-bbc-video/> Ofcom accessed this website and noted that in an online blog dated 7 October 2013 and entitled “*Fake BBC Video*”, Craig Murray wrote (apparently in relation to the BBC Programmes): “Irrefutable evidence of a stunning bit of fakery by the BBC....The disturbing thing is the footage of the doctor talking is precisely the same each time. It is edited so as to give the impression the medic is talking in real time in her natural voice – there are none of the accepted devices used to indicate a voiceover translation. But it must be true that in at least one, and possibly both, the clips she is not talking in real time in her own voice. It is very hard to judge as her mouth and lips are fully covered throughout. Perhaps neither of the above is what she actually said. Terrible things are happening all the time in Syria’s civil war, between Assad’s disparate forces and still more disparate opposition forces, and innocent people are suffering. There are dreadful crimes against civilians on all sides. I have no desire at all to downplay or mitigate that. But once you realise the indisputable fact of the fake interview the BBC has put out, some of the images in this video begin to be less than convincing on close inspection too”.

¹⁴ Ofcom observed that the link to the review provided by the Licensee (<https://archive.org/details/BBCSyriareport1>) showed that the review was posted by someone identifying themselves under the name “coiaorguk”. We also noted that <http://www.coia.org.uk/> is the website of an organisation called the Children of Iraq Association which describes itself as a charity (it does not appear to be registered with the Charity Commission). From its website it appears that the COIA holds the UK and the USA responsible the deaths of hundreds of children in Iraq.

¹⁵ http://www.medialens.org/23_fg_75_lc/viewtopic.php?p=12230&sid=2b42a51ab54629944641b22f401bcf16

- viewers of the BBC Programme were presented with the same interview but “some of the words the witness used on one occasion were different from those used on another occasion” and that the words had “plainly been changed by the BBC”;
- it had not seen the footage and it provided an analysis of the footage which it had drawn from the BBC’s responses to Mr Stuart’s complaint.

The Licensee said that in the original unedited footage Dr Hallam said:

“I need a pause because it’s just absolute chaos and carnage here...umm... we’ve had a massive influx of what look like serious burns... Er... it seems like it must be some sort of chemical weapon, I’m not really sure, maybe napalm, something similar to that. Um so we are trying to do a bit of triage and stabilisation. We’ve got a lot of walking wounded who are managing to manage OK but obviously within the chaos of the situation it’s very difficult to know exactly what’s going on...”.

TV Novosti said that the footage was edited for broadcast in the 29 August BBC News as follows (with omitted words from the original unedited footage struck-through):

“I need a pause because it’s just absolute chaos and carnage here...umm... we’ve had a massive influx of what look like serious burns... Er... it seems like it must be some sort of ~~chemical weapon~~, I’m not really sure, maybe napalm, something similar to that. Um so we are ~~trying to do a bit of triage and stabilisation~~. We’ve got a lot of walking wounded who are managing to manage OK but obviously within the chaos of the situation it’s very difficult to know exactly what’s going on...”.

The Licensee said that the footage was edited for broadcast in the 30 September BBC News and the BBC Panorama Programme as follows (with omitted words from the original unedited footage struck-through):

“~~I need a pause because~~ it’s just absolute chaos and carnage here...umm... we’ve had a massive influx of what look like serious burns... Er... it seems like it must be some sort of chemical weapon, I’m not really sure, maybe napalm, something similar to that. Um so we are ~~trying to do a bit of triage and stabilisation~~. We’ve got a lot of walking wounded who are managing to manage OK but obviously within the chaos of the situation it’s very difficult to know exactly what’s going on...”.

- it was “wholly wrong”, “inexcusable” and “violated one of the central principles of the [BBC’s] Editorial Guidelines”;
- there “were none of the usual indications by which a broadcaster usually signals to the audience that the material has been edited”;
- the “only conclusion” which viewers of the BBC Programmes could have drawn was that Dr Hallam had been “made by the BBC to appear to say something different”;
- “[f]aced with such a substitution [i.e. the word ‘napalm’ for ‘chemical weapon’], any reasonable person would conclude that someone had tampered with the

- evidence – that one or other report, or both, had been faked” and that this “would have confirmed (and no doubt did so) the doubts that Mr Stuart and others entertained about the authenticity of the [BBC] programmes”; and
- the “contribution presented as fact was to some extent invented” and that it would have “fundamentally undermine[d] trust in the content”. The Licensee said that it “does not help that there is an explanation [from the BBC] and that there may be a distinction between internal editing and other sorts of editing” as the “damage would have been done by broadcasting as fact two versions of the same thing”;
- TV Novosti also made further representations on the BBC’s response to Mr Stuart’s complaint, in particular the Licensee said:
 - that the BBC had denied Mr Stuart’s allegations in “extensive correspondence” with Mr Stuart which had been posted online by Mr Stuart;
 - that it was “not confident” that the BBC’s denials were “well founded”;
 - that the BBC had accepted that “the producers [of the BBC Programmes] used material in a way which was not chronological but [it] is satisfied that the manner in which the programme was edited made the content more engaging or presented complex issues in a readily comprehensible way without changing the reality of the narrative or the truth of the events that occurred”;
 - in relation to a specific allegation made by Mr Stuart in his complaint to the BBC that an eyewitness, Mohammed Abdullatif, featured in the 29 August BBC News was “covertly reading from a prepared text”, that the BBC had denied this allegation and it had not been “pursued in the subsequent correspondence”. Referring to a specific error and subsequent immediate correction the eyewitness made in his account, the Licensee said that there was “no plausible explanation” for this other than that the eyewitness misread from a prepared text. TV Novosti referred to the eyewitness saying “you’re recalling peace – you’re calling for peace” and said that the “only plausible explanation for his having said ‘recalling’ is that he misread the text by making the link underlined here: ‘you’re calling’”. The Licensee said: “No other explanation is conceivable”. TV Novosti argued that in light of this, it was “difficult to have confidence in the BBC’s other denials where the evidence is less easy to test”; and
 - with regard to the allegation that the BBC had altered the footage of the interview with Dr Hallam, the BBC:
 - had accepted that the interview was “edited on different occasions in a different way without the edits being visible” to the audience (because Dr Hallam was wearing a face mask) but that it had offered an explanation for the editing of the footage and it had said that:
 - “it is acceptable for programme-makers to edit the words of a contributor so long as that editing does not materially alter or change the meaning of what they said or any understanding that the audience might take away”;
 - “the 29 August version was edited for a number of reasons, including avoiding confusion with the incident in Damascus a few days earlier involving chemical weapons”; and

- “the 30 September version was used ‘unedited’ in the Panorama programme and that the context in which it was used was such that there would be no confusion with the incident in Damascus”;
- said that the interview was shot as a single sequence, the first version had been subject to “‘internal’ edits” and the second version had been “used ‘without any internal audio editing’”;
- “did not think that the audience [of the BBC Programmes] would have been misled”;
- in its assessment did not consider the “likely effect on the audience of being presented with the same interview on different occasions but with the words ‘chemical weapons’ substituted for ‘napalm’”; and
- did not go on to consider how editing footage of the interview with Dr Hallam “might be perceived when it was repeated in an altered form in later [BBC] programmes” or “whether altering the words would be at least misleading and at worst a fabrication”;

and

- the Licensee also referred in more detail to the political context in which the BBC Programmes were broadcast. In particular, the Licensee said that:
 - the BBC Programmes reported on “the political crisis in August and September 2013 after chemical weapons had been used in Syria (widely considered to be one of the most serious developments in the Syrian conflict) leading up to Syria’s declaration of its stockpiles to the Organisation of Prohibition of Chemical Weapons (OPCW) and the UN Security Council’s endorsement of OPCW’s timeline for their destruction”;
 - the requirements in the BBC Guidelines for due accuracy are at their highest level for news and current affairs programmes; that the content of the BBC Programmes was “concerned with events that may decide the fate of nations and/or their leaders”; and therefore “it is difficult to believe that any faking whatsoever would be tolerated”;
 - the 29 August BBC News “was broadcast when Parliament was virtually in the act of voting down the government motion to seek a UN Security Council resolution backing military action with respect to the use of chemical weapons in Syria”;
 - the 30 September BBC News was broadcast “a few days after the [UN] Security Council had adopted a resolution backing a plan to eliminate Syria’s chemical weapons and calling for those responsible for their use to be held accountable”; and
 - therefore the “nature of the content” of the BBC Programmes was “a contribution to the most momentous decisions and policies of the day”.

Having set out its detailed assessment of whether the BBC Programmes preserved accuracy and impartiality, TV Novosti then made representations specifically about the Programme.

- the Licensee said that it was “not the first to have gone public with an assessment of the failings of the three [BBC] programmes” and that “the failings [of the BBC Programmes] were of so serious a nature that they were a subject of legitimate debate”. The Licensee said that the BBC Programmes “invited exposure of their failings and speculation as to the BBC’s motives”. In particular, the Licensee said that broadcasting different versions of the same thing undermined trust and that, together with other implausible features of the BBC Programmes, “invited speculation of the BBC’s motives...which in all the circumstances was legitimate”. TV Novosti said that given these failings the BBC could not be “surprised at speculation as to its motives.” It explained that this was because of:

“the absence of any explanation why the BBC editors thought that the reference to chemical weapons should be omitted on 29 August [BBC News] but could be included in place of ‘napalm’ on 30 September in a Panorama programme which emphasised the chemical nature of the attack”;

and

- the Licensee said that the Programme began by making it clear that it was reporting on allegations about the BBC Programmes that were already in the public domain and that it then briefly set the scene politically by providing the context in which the 29 August BBC News was broadcast. TV Novosti said that the Programme introduced the issue of the alteration of Dr Hallam’s words in order to lead into Mr Stuart’s accusation of fabrication and the suggestion that the public was being misled into backing war. The Licensee said that the Programme then moved on to suggestions from various sources that “fakery is common in mainstream broadcasting”.

The Licensee also made representations on specific aspects of the Programme:

- regarding the statement: “Stunning fakery in the alleged chemical weapons attack according to a former UK ambassador”...the British Broadcasting Corporation is accused of staging a chemical weapons attack”, the Licensee said:
 - that this was an accurate report of an article by Craig Murray, former UK Ambassador to Uzbekistan in which he said, in relation to the BBC’s various broadcasts of the interview with Dr Hallam, “Irrefutable evidence of a stunning bit of fakery by the BBC”;
 - that there was nothing factually incorrect in the words used and that the factual matter was presented accurately in the Programme and “did not mislead”;
 - with regard to whether it was misleading to refer to “fakery” at all, that it had shown in the fairness representations that there was fakery; and
 - that in all the circumstances, “stunning” seemed to be “a reasonable adjective to use”.
- with regard to the statements in the Programme that the BBC “digitally altered” the footage of the interview with Dr Hallam, the Licensee said:
 - the “BBC’s editorial processes are no doubt digital and it did alter the words”;

- that it “remains unclear why the BBC editors thought that the reference to chemical weapons should be omitted on 29 August but could be included in place of ‘napalm’ on 30 September in a Panorama programme that did not flinch from mentioning chemical weapons prominently in the programme” and if “the BBC placed particular emphasis on chemical attacks in the programme, it is legitimate to consider why”;
- that the Programme “advanced its own reasons for doubting the report by showing how Dr Hallam’s interview had been manipulated”; and
- that the audio analysis featured in the Programme was “manifestly not false” and it “showed that the BBC had altered the words spoken by the witness”;
- in relation to the statement that the BBC was the subject of a “massive public investigation which made some extremely disturbing findings”, TV Novosti said:
 - that “it appears that the alteration of Dr Hallam’s words led to an undisclosed number of complaints to the BBC”;
 - that the investigation by Mr Stuart (into the BBC Programmes) “might fairly be described as massive and he provides cogent reasons for being extremely concerned about fabrication in the [BBC] programmes”; and
 - it was “true that the description of Mr Stuart’s complaint might have been misleading but in all the circumstances it did not result in any unfairness to the BBC”;
- with regard to the statement made by the Presenter that Mr Stuart’s questions to the BBC remained “unanswered”, the Licensee said it seemed to it to be a “fair reading of the relevant correspondence”;
- regarding the allegations that the BBC used actors in the BBC Programmes, TV Novosti:
 - said that the statement “[e]ven worse, notes Stuart, is the bizarre acting which starts when the man in the centre gives the sign” accurately reflected Mr Stuart’s critique of the BBC material;
 - said that the BBC denies that the sequence was acted or that it used actors in the BBC Programmes but that “evidence is not available to prove it one way or the other”; and
 - referred to the BBC’s denial (in its response to Mr Stuart’s complaint) that an interview (in the 29 August BBC News with an eyewitness, Mohammed Abdullatif) had been “scripted”. The Licensee said that Mr Stuart “thought the interview with Mr Abdullatif was scripted and the BBC denied that too, but the evidence was more amenable to testing and we were able to expose the truth”. The Licensee said that evidence was available which rendered the BBC’s denial “implausible” and it was therefore “legitimate to infer that the same may be true of the acting”;

and

- regarding the comment “In a statement, the British Broadcasting Association says it stands by its report” the Licensee said that:
 - the Programme “made it clear that the BBC stood by its report”;
 - “the BBC’s rejection of the accusations is recorded, albeit by referring to a ‘statement’ rather than publically available correspondence with Mr Stuart”;
 - this could have been better expressed but the material point this comment was making was that the BBC denied the allegations;
 - it may have given the impression that it had contacted the BBC when it had not done so and that that was “to be regretted”; and
 - the BBC’s denial of the accusations in Mr Stuart’s complaint was available online and that the “BBC’s views were fairly represented and the audience was not materially misled”.

Licensee’s comments on the Preliminary View

TV Novosti commented on Ofcom’s Preliminary View, which was to find a breach of Rule 2.2. A number of these submissions repeated points already made in the Licensee’s initial representations¹⁶. TV Novosti made a number of additional comments, which are summarised below.

Context

First, the Licensee submitted that Ofcom took insufficient account of the context in which the Programme was broadcast, and in particular, the editorial content of the Programme. The Licensee said that the editorial content was concerned with “the BBC’s reporting of events in Syria at a time when a public debate was taking place in many countries regarding allegations that the Syrian government had used chemical weapons and whether there should be a military response”. TV Novosti said that Ofcom’s Preliminary View “ignores the BBC’s reporting of those events and limits itself to the narrow question [of] whether the Programme had misrepresented a fact so as to cause harm and offence to the audience”. The Licensee said that Ofcom had chosen to ignore the BBC’s reporting of events, allegations about the use of chemical weapons and whether there should be a military response because it did not think it could or should “establish where the truth lay”. According to TV Novosti, this approach was incorrect and procedurally inappropriate as Ofcom has not considered the criteria set out in the meaning of “context” under Section Two of the Code and in particular the main thrust of the editorial content of the Programme.

The Licensee said that by not undertaking an assessment of the truth or otherwise of the allegations in the Programme, Ofcom did not do justice to the facts. In particular, TV Novosti went on to assert that the “Programme begins with a factual demonstration of how the BBC had doctored the interview with Dr Hallam. That was not in dispute. The BBC had edited what Dr Hallam said in an interview so as to make her appear to say one thing on one occasion and something else on another occasion. What was in dispute was whether or not this mattered”. The Licensee said that this was something that Ofcom could and should have taken a view on because the doctoring of the footage warrants investigation under Section Two of the Code

¹⁶ To the extent that this is case, such representations have not been summarised again in this section.

and ensuring compliance by the BBC with Section Two falls within Ofcom's functions. TV Novosti said that in reaching a decision on whether RT complied with Rule 2.2 "[t]o assess compliance by a whistleblower such as RT in this Programme while ignoring the mischief that RT was seeking to expose, would...fail to fulfil the contextual requirements of Section 2".

High test

Second, the Licensee suggested that Ofcom "may have misdirected itself as to the standard to apply" when considering whether the Licensee had breached Rule 2.2 in this case. TV Novosti cited an Ofcom 2010 decision which contained the statement that "the requirement that content must not materially mislead the audience is necessarily a high test"¹⁷. The Licensee said that if Ofcom had applied this "high test" to the Programme "it would have treated it as not having crossed the threshold and therefore not being in breach."

Freedom of expression

Third, TV Novosti argued that in finding on a preliminary basis that the Licensee had contravened Rule 2.2, Ofcom did not take sufficient account of the Licensee's right to freedom of expression. In particular, the Licensee said that there was no evidence in the Preliminary View that Ofcom had considered the need to secure that the application of Rule 2.2 is in the manner that best guarantees an appropriate level of freedom of expression under section 3(4)(g) of the Communications Act 2003 (the "Act"). TV Novosti submitted that therefore Ofcom may have treated what was said in the Programme as being in breach when, if it had considered how best to guarantee an appropriate level of freedom of expression, it would not have treated Rule 2.2 as being engaged.

Misrepresentation

Fourth, the Licensee commented on Ofcom's assertion that "one fact that was misrepresented was the description [in the Programme] of Mr Stuart's complaint to the BBC as a *"massive public investigation which made some extremely disturbing findings"*". TV Novosti said that in reaching this view Ofcom misrepresented the content of the Programme and overstated the case against a number of reasons, which are summarised below:

- TV Novosti noted that the Preliminary View stated that the various comments and allegations about the BBC were "speculative opinion". The Licensee said that the "general tenor" of the Preliminary View was that the allegations that Ofcom refers to "embrace amongst other things the manipulation or doctoring of" the Dr Hallam interview. The Licensee said that the video sequences of the Dr Hallam interview shown in the Programme "presented evidence, not speculative opinion, of the BBC altering a statement by a witness" and were the opening proposition from which the rest of the Programme flowed. TV Novosti added that some of what followed in the Programme might be speculative opinion but was likely to have been justified editorially by the opening proposition;
- the Licensee noted that Ofcom was of the view that the description of Mr Stuart's complaint in the Programme as a "massive public investigation which made some

¹⁷ See Ofcom's decision concerning *An Inconvenient Truth*, Broadcast Bulletin 165, 13 September 2010, page 44 (<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb165/issue165.pdf>).

extremely disturbing findings” was misleading. TV Novosti said that this description may have “over-egged” the position to some extent and that there was perhaps “an element of hyperbole” in the words used. However, the Licensee suggested that in the context of what followed in the Programme “no viewer could conceivably be left in any doubt that there had been no official investigation of the kind Ofcom has in mind”. In particular, TV Novosti referred to the fact that the description of Mr Stuart’s complaint was:

- accompanied by a screenshot of Mr Stuart’s first letter of complaint (rather than a command paper or Ofcom report);
 - followed by a quote from Mr Stuart (rather than the chairman of a committee of inquiry or CEO of Ofcom);
 - followed by an audio analysis by a media investigator (as opposed to extracts from an official report) which was in turn followed by references to a “game changing allegation” and to Mr Stuart as a “media investigator”; and
 - followed by George Galloway MP calling for a “full enquiry”;
- the Licensee also noted that, in its Preliminary View, Ofcom said that the “*extremely disturbing findings*” were in fact allegations made by Mr Stuart to the BBC which had been “investigated by the BBC and dismissed with detailed reasoning”. TV Novosti’s view was that, in the context of what followed in the Programme (see above), viewers would not have been misled into thinking that the reference to “findings”, was a reference to the findings of some form of official and independent investigation;
 - the Licensee noted that Ofcom said that Mr Stuart’s conclusions had been “dismissed” by the BBC with detailed reasoning. TV Novosti said that this suggested that the dismissal by the BBC was the firm conclusion of a significant and detailed independent investigation by the BBC. The Licensee said that this suggestion was not well founded because as of the date of broadcast of the Programme, Mr Stuart’s complaint was at an early stage of the BBC complaints procedure and that the ECU (which provides a degree of independence) had not yet responded to his complaint; and
 - the Licensee also said that it is clear from Mr Stuart’s letters to the BBC that he was not satisfied with the BBC’s responses. Specifically, the Licensee said that Mr Stuart had said that the BBC had only responded to some of his points. TV Novosti said that this was reflected in the Presenter’s comment: “*Investigators such as Robert Stuart note their many questions sent officially to the BBC remain unanswered*”.

Materially misleading

Next, the Licensee questioned whether the factors on which Ofcom relied to decide that the Programme “materially” misled the audience were relevant. In particular, the Licensee said that it was not sure that, by giving viewers the “incorrect impression” of Mr Stuart’s complaint, the Programme was materially misleading. TV Novosti also said it was not sure that the fact that viewers would have considered the BBC to be at fault in some “extremely disturbing” respects went to materiality either. The Licensee said that any incorrect impression of what had been found and by whom would have been corrected by what followed in the Programme.

Harm

Lastly, TV Novosti denied that any misrepresentations in the Programme were potentially harmful.

The Licensee said that Ofcom did not explain in the Preliminary View what the harm might have been in the Programme and how it was caused. TV Novosti said that any incorrect impression would have been corrected by the editorial content which followed the alleged misrepresentation and it was therefore unlikely that any harm or offence would have occurred.

Further, the Licensee noted that the harm referred to in the Preliminary View was a “breach of audience trust”. In this context, TV Novosti referred to *Traveller Movement v Ofcom and Channel 4*¹⁸ in which Mr Justice Ouseley reviewed Ofcom’s approach to the assessment of harm under Rule 2.1. The Licensee said that it had no reason to suppose that Ofcom’s approach to the assessment of harm under Rule 2.1 would be any different to an assessment of harm under Rule 2.2. TV Novosti referred to Ofcom’s reasoning in the standards decision which was the subject of this judicial review and said that Ofcom’s description of harm “distinguish[ed] between the relatively straightforward case where the link between the content and harm was direct and the more complex case where the harm may have been caused indirectly.” The Licensee noted that Mr Justice Ouseley found that the approach to the evidence required to establish harm is “reasonable and proper”¹⁹.

TV Novosti said that applying this approach to the Programme, “Ofcom must satisfy itself that there is a sufficient causal link between the editorial content in question and instances of actual or potential harm”. It submitted that Ofcom’s Preliminary View failed to show “any instances of actual or potential harm, still less any causal link”. Further, the Licensee said that treating loss of audience trust as a form of harm “would break new ground in the regulation of programme content”. TV Novosti explained that there is a straightforward case of direct harm, such as causing viewers to abandon conventional cancer treatment; however, there is a more complex case where the harm is caused indirectly by changing particular attitudes and opinions such as encouraging prejudice or discriminatory conduct towards a particular ethnic or social group, as described by Mr Justice Ouseley in *Traveller Movement*. The Licensee did not think that there was any authority to extend Ofcom’s approach where the only harm alleged was breach of audience trust. TV Novosti also said that treating a loss of audience trust as a form of harm would remove all substance from the requirement that harm be shown before a finding of a breach of Rule 2.2 can be made, since any material that was materially misleading could be described as a breach of audience trust.

The Licensee said that that Ofcom’s assessment of harm in the Preliminary View was not (i) “reasonable and proper” (having regard to the judgment in *Traveller Movement*); (ii) consistent with the “high test” (referred to above); or (iii) in line with s3(4)(g) of the Act. TV Novosti also said that it was not apparent that a breach of audience trust falls within any of the harm identified in Article 10 of the European Convention on Human Rights (“ECHR”).

The Licensee said that the potential for real harm was in the “undisclosed doctoring” and broadcast by the BBC of the Dr Hallam interview “when the whole world was

¹⁸ [2015] EWHC 406 (Admin).

¹⁹ *Ibid*, para 49.

affected by Syria's behaviour in the conduct of its civil war". The Licensee stated that there was evidence before Ofcom that the BBC adopted a "cavalier approach" to the editing of the footage in the BBC Programmes and the Licensee said there was evidence elsewhere that this approach might be widespread in the BBC. The Licensee also expressed concerns regarding "[t]he BBC's apparent willingness to use, and its complaints staff to accept, any old video footage in any old order to tell a news story".

The Licensee concluded that it did not agree with the Preliminary View that the Programme (in stating that the BBC was the subject of a "massive public investigation which made some extremely disturbing findings") was materially misleading and had the potential to cause harm to viewers.

Decision

Under the Act, Ofcom has a statutory duty to set standards for broadcast content which it considers best calculated to secure a number of standards objectives. These objectives include ensuring that generally accepted standards are applied to broadcast content to provide adequate protection for members of the public from harmful and offensive material. This objective is reflected in Section Two of the Code.

Rule 2.2 of the Code states that: "Factual programmes or items or portrayals of factual matters must not materially mislead the audience".

Ofcom's published Guidance²⁰ to Rule 2.2 (the "Guidance") states that Ofcom is "required to guard against harmful or offensive material, and it is possible that actual or potential harm and/or offence may be the result of misleading material in relation to the representation of factual issues". The Guidance says that Rule 2.2 is therefore "designed to deal with content that **materially misleads the audience so as to cause harm or offence**" [emphasis in original] and not with "issues of inaccuracy in non-news programmes". Further, the Guidance states that "[w]hether a programme or item is *materially* misleading depends on a number of factors such as the context, the editorial approach taken in the programme, the nature of the misleading material and, above all, either what the potential effect could be or what actual harm or offence has occurred [emphasis in original]".

Rule 2.2 is therefore concerned with the misrepresentation of facts and whether facts have been misrepresented in a way which materially misleads viewers. Broadcasters should therefore take care to ensure that facts are not presented in programmes in a way that is materially misleading. This is particularly important in factual programmes such as current affairs programmes or programmes of an investigative nature as the level of audience trust and the audience's expectation that such programmes will not be materially misleading is likely to be higher.

In reaching this Decision, Ofcom acknowledged the importance attached to freedom of expression in the broadcasting environment, as contained in Article 10 of the ECHR. This provides for the broadcaster's and audience's right to freedom of expression, which encompasses the right to hold opinions and to receive and impart information and ideas without undue interference by public authority.

Article 10 of the ECHR also provides that the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a

²⁰ See <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section2.pdf>

democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Accordingly, Ofcom is required to set standards to secure the standards objectives in section 319(2) of the Act, including that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material. Ofcom secures the application of such standards through making and enforcing the Code, which includes the rules in Section Two relating to harm and offence.

Ofcom is also required to have regard to the need to secure the application of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in programme in television services in the manner which best guarantees “an appropriate level of freedom of expression” (section 3(4)(g) of the Act).

It is important to note that Section Two does not prevent a broadcaster from making serious allegations of wrongdoing about organisations and individuals; nor does it prevent broadcasters from making programmes about controversial subject matters. Indeed, it is crucial that broadcasters have the editorial freedom to do so. However, in broadcasting such programmes and making such allegations, licensees are required to ensure they comply with the applicable rules in Section Two. These include the obligation to ensure that facts are not misrepresented in a way which materially misleads the audience under Rule 2.2.

In considering the issues in this case Ofcom took account of the political context in which the Programme was broadcast, including the Licensee’s representations relating to the fact that a public debate was taking place at the time in many countries, and in particular the UK, regarding allegations that the Syrian Government had used chemical weapons and whether there should be a military response against Syria²¹. We also noted TV Novosti’s representations that a number of individuals, at the time, were of the opinion that the BBC had manipulated footage of a chemical weapons attack in Syria and that some of these individuals had published such opinions online and/or raised them with the BBC. We noted that a number of the individuals who queried whether the footage had been manipulated speculated as to the BBC’s motives for doing so and questioned whether this was to encourage support for military intervention in Syria. A number of these allegations were referred to and explored in the Programme. In line with the right to freedom of expression, we considered it legitimate for the Licensee to make and broadcast a programme examining such allegations about the BBC and for the audience to receive such information, and be informed about such allegations. However, in doing so, we considered that TV Novosti needed to comply with Rule 2.2 by ensuring that facts

²¹ In particular, Ofcom noted that following 21 August 2013, the issue of alleged use of chemical weapons by the regime of Bashar al-Assad dominated political discourse across the world, including in the UK. In the UK for example there was controversy about whether the UK should take part in military action against the regime of Bashar al-Assad in Syria following the attack on Ghouta and on 29 August 2013, after a lengthy debate, the UK Parliament rejected a government call to sanction UK military action. See also the UN Report published in September 2013 confirmed that the chemical agent sarin has been used in an attack at Ghouta, Syria on 21 August 2013. The report did not attribute responsibility for the attack (see http://www.un.org/disarmament/content/slideshow/Secretary_General_Report_of_CW_Investigation.pdf).

were not misrepresented in the Programme in a way which was materially misleading.

In assessing the application of Rule 2.2 Ofcom first considered the editorial context within which the comments were broadcast and the nature of the Programme. Ofcom noted that Truthseeker was an established series of factual current affairs programmes which aimed to provide an alternative perspective on major global events by questioning established viewpoints. Ofcom considered that the content and approach would have been familiar to its audience from the nature of the channel and the series. Accordingly, in Ofcom's view, it was likely that viewers would have expected the Programme to take a critical editorial approach, to address controversial issues, and to do so from the perspective of the Licensee, that is, reflecting major global events from a Russian viewpoint. Nevertheless, and given that the Programme was part of a factual current affairs series, we considered that it was important that the Programme did not present facts in a way which was materially misleading.

Ofcom noted that the events regarding alleged chemical weapons attacks examined in the Programme were matters of dispute at an international level, and that the various allegations made or reported in the Programme about the BBC were equally in dispute. Ofcom is not a fact finding tribunal and is not able or empowered, therefore, to establish the truth or otherwise of such allegations and to make findings of fact. Accordingly, it was not possible or appropriate for Ofcom to attempt to prove or disprove the allegations made about the BBC in the Programme. Similarly, Ofcom had no statutory jurisdiction to assess the accuracy and impartiality of the BBC Programmes²². Taking all this into account the question for Ofcom was a narrow one. That is, was an established fact materially misrepresented in the Programme?

In addressing this question it appeared to us that one fact that was misrepresented in the Programme was the description of Mr Stuart's complaint to the BBC as a "*massive public investigation which made some extremely disturbing findings*". This had the effect of elevating the various opinions expressed, and the allegations made, about the BBC in the Programme to the firm conclusions of a significant and detailed official investigation.

Ofcom noted that the reference to a "*massive public investigation which made some extremely disturbing findings*" was accompanied by an image, shown just afterwards, of a letter of complaint to the BBC together with a voice-over and onscreen graphic of the following quote attributed to Mr Stuart: "*This is total fabrication, from beginning to end, of an atrocity, with BBC 'reporter' Ian Pannell standing amidst a tableau of very bad actors. This is completely beyond the pale*". It therefore appeared to Ofcom that the reference to a "*massive public investigation*" was a reference to Mr Stuart's complaint to the BBC. However, the Programme did not make it clear that Mr Stuart's complaint was a complaint from a member of the public (albeit someone described in the Programme as a "*media investigator*") that was being dealt with internally by the BBC. Further, the Programme asserted that this "*massive public investigation*" had made a number of "*extremely disturbing findings*" that the BBC had fabricated a chemical weapons attack and used actors in its report of this attack in the BBC Programmes. However, these "*findings*" were in fact allegations made by Mr Stuart to the BBC to which the BBC had provided detailed responses; this was not explained in the Programme.

²² See footnote 11.

Ofcom noted that the Licensee had not been able to point to any official investigation or to any firm conclusions that had been published by such an investigation. Rather, TV Novosti had stated in its submissions to Ofcom that “Mr Stuart’s investigation might fairly be described as massive and that he provides cogent reasons for being extremely concerned about fabrication in the [BBC P]rogrammes”. We also noted that the Licensee had accepted that “[i]t is true that the description of Mr Stuart’s complaint might have been misleading” and that there was perhaps a level of hyperbole in the words used.

Further, it appeared to Ofcom, from TV Novosti’s representations, that the Programme based the statement that the BBC was the subject of a “*massive public investigation which made some extremely disturbing findings*” on a number of online articles which were posted following the broadcast of the BBC Programmes, including the online post of a former UK ambassador who had accused the BBC of “stunning fakery”. However, these articles did not show that the BBC was the subject of a “*massive public investigation*” or that there had been any “*extremely disturbing findings*”, rather they contained speculation by various individuals about the authenticity of the footage in the BBC Programmes. Again, this was not made clear in the Programme.

We therefore considered that to state that the BBC was the subject of a “*massive public investigation which made some extremely disturbing findings*” was a misrepresentation and overstatement of the nature of Mr Stuart’s complaint and these online articles.

Ofcom went on to assess whether this misrepresentation was “materially” misleading. In doing so, we considered context, the editorial approach, the nature of the misrepresentation and importantly the potential effect or actual harm or offence caused.

We noted the Licensee’s representations that, irrespective of any hyperbole in the words used in the statement “*massive public investigation which made some extremely disturbing findings*”, as a consequence of the editorial context in which the statement was made “no viewer could conceivably be left in any doubt that there had been [an] official investigation of the kind Ofcom has in mind”. We took careful account of the editorial context surrounding the broadcast of the statement in the Programme. In particular, as stated above, we noted that the statement was followed by an image of a letter of complaint to the BBC and a quote attributed to Mr Stuart. Nevertheless, we considered that viewers would have been given the incorrect impression that the BBC was the subject of a “*massive public investigation which made some extremely disturbing findings*” when this was not the case. Given the categorical nature of this statement, coupled with the various serious allegations made about the BBC throughout the Programme, we considered that viewers would have understood the statement to mean that the BBC Programmes had been subject to some form of significant and detailed official investigation. We were also of the view that viewers would have considered that the BBC had been found at fault in some “*extremely disturbing*” respects, in particular that the BBC had been found to have fabricated an atrocity and used actors in the BBC Programmes.

We did not consider this impression would have been corrected by the references to Mr Stuart, the image of the letter to the BBC, or any other content, which followed in the Programme. We did not consider that viewers would have clearly understood that the “*massive public investigation which made some extremely disturbing findings*” was a complaint by a member of the public to the BBC which had been responded to in detail by the BBC and that it was also based on a number of online articles

detailing individuals' opinions. Further, we considered that the content which followed in the Programme, and in particular the comments regarding the "*routine faking*" of atrocities by mainstream media including the BBC, would have reinforced viewers' understanding of the statement.

In assessing whether the Programme caused, or had the potential to cause, harm or offence to the audience, Ofcom considered that it is important that the content of factual programmes and current affairs programmes of an investigative nature can be relied on by viewers, particularly as audience trust in these programmes is likely to be higher. We considered that the presentation of materially misleading facts in programmes of this nature has the potential to cause harm to viewers. If programmes contain materially misleading facts, it is harmful or potentially harmful, to that audience. For the reasons stated above, Ofcom was of the view that the Programme, in stating that the BBC was the subject of a "*massive public investigation which made some extremely disturbing findings*" presented the audience with a materially misleading fact, and therefore, within the context of the Programme which was a current affairs programme, had the potential to cause harm to viewers. We did not consider, as the Licensee submitted, that the Programme provided sufficient editorial context so as to correct the materially misleading fact.

It is important to note that Section Two does not prevent a broadcaster from making serious allegations of wrongdoing about organisations and individuals; nor does it prevent broadcasters from making programmes about controversial subject matters. Indeed, it is crucial that broadcasters have the editorial freedom to do so. However, in broadcasting such programmes and making such allegations, licensees are required to ensure they comply with the applicable rules in Section Two. These include the obligation to ensure that facts are not misrepresented in a way which materially misleads the audience under Rule 2.2.

Given the reasons set out above, Ofcom's view is that Programme was in breach of Rule 2.2 of the Code.

Ofcom directs the Licensee to broadcast a summary of this Decision.

Breach of Rule 2.2

In Breach

Ukraine's Refugees

RT, 18 July 2014, 17:30, 19 July 2014, 16:30 and 20 July 2014, 18:30

Introduction

RT (formerly Russia Today) is a global news and current affairs channel produced in Russia and funded by the Federal Agency for Press and Mass Communications of the Russian Federation¹. In the UK, the channel broadcasts on satellite and digital terrestrial platforms. The licence for RT is held by Autonomous Non-Profit Organisation TV-Novosti ("TV Novosti" or the "Licensee").

As part of routine monitoring, Ofcom assessed the programme *Ukraine's Refugees* (the "Programme"). The Programme was an observational current affairs documentary which was approximately 26 minutes long. The Programme featured a number of Ukrainian refugees, as well as a doctor and two Russian officials, describing their personal experiences of the on-going conflict in eastern Ukraine between the Ukrainian Government and separatist groups. A number of these individuals also discussed the actions and policies of the Ukrainian Government and its military forces towards the population of eastern Ukraine. These accounts were accompanied by footage of refugees travelling from Ukraine to Russia, including footage at the Ukrainian-Russian border and footage in refugee camps. The Programme also included footage of warfare and its after-effects, including footage of victims and individuals receiving medical treatment. The Programme had no narration. The commentary, which was in Russian accompanied by in-vision English subtitles, came exclusively from the individuals themselves.

Ofcom reviewed the entire Programme and noted the following subtitles in particular:

Olga: *"They [i.e. Ukrainian Government forces] have no pity for children or the elderly. They just go after their target. If there's a militia man in the house, they'll kill the entire family"*.

Unnamed woman: *"We're not happy with the Ukrainian authorities who are killing men and raping women. They've created chaos. They're fascists. Real fascists. Nazis"*.

Maksim Korobkin: *"Ukraine fired at checkpoints and its own citizens. I'm a Ukrainian citizen with a Ukrainian passport. I don't understand why they're shooting at us"*.

¹ See the description of RT in *Television News Channels in Europe (Based on a Report prepared by the European Audiovisual Observatory for the European Commission – DG COMM, October 2013)* <http://www.obs.coe.int/documents/205595/264629/European+news+Market+2013+FINAL.pdf/116afdf3-758b-4572-af0f-61297651ae80>. Section 5.4.6 of this report states that Russia Today "can be considered as a state funded or public media service".

Unnamed man: *“The Ukrainian media started to stir up tension. They’ve come up with the idea of concentration camps. That is, they’re going to filter the population. Who they’re going to filter isn’t really clear. Just sort of weed out the Donetsk region². To get rid of the people they don’t want or to move them away. It’s crazy”.*

Denis: *“There are three groups fighting. First, there’s the militia, the guys fighting for our rights. Second is the Right Sector³. They’re mercenaries, it’s just work for them. And then there’s the National Guard⁴. They just kill. They got the order to clear the southeast, so they set out killing”.*

Lyubov: *“When western Ukraine was protesting on Maidan...The Western media went there to figure out what was happening. They tried to help resolve the conflict peacefully. But now the war’s come here, to our Donbass region⁵, and there’s no Western media at all”.*

Elena Bugaeva: *“They [i.e. Ukrainian Government forces] took a guy from our [i.e. separatist] militia, tied him to a tank, and dragged him on the road until he died. They’d go into apartments and force men to join them. If they refused, they’d kill their whole family before their eyes”.*

Second unnamed man: *“The Ukrainian army is recruiting young guys to, well, shoot their own people. You either go fight for them or they kill you and bury you in the garden”.*

Third unnamed man: *“Given the current government’s policy, even if anyone is left alive here, the region will be poverty-stricken”.*

Fourth unnamed man: *“Yes, it’s a full-on civil war. They’re shooting their own people. Terrorists they say, separatists, the entire south-eastern population. They’re all citizens of Ukraine, they all have Ukrainian passports”.*

² A region in eastern Ukraine.

³ Ofcom understands that Right Sector was set up in late 2013 as a grouping of Ukrainian far right-wing groups, and in late March 2014 became a political party.

⁴ The Ukrainian National Guard are the reserves of the Ukrainian Armed Forces.

⁵ A region in eastern Ukraine.

Elena Kornilova: *“An entire nearby village was wiped out...As for leaving our homes behind; we know we can never come back, because of the fascism, that’s very real. We came seeking refuge and a place to live”.*

Alyona: *“It’s a real civil war. We’re seen as second class citizens, it’s been repeated many times. Our Prime Minister Yatsenyuk⁶ went as far as to call us non-human. I just want to look him in the eye and say ‘What makes us non-humans?’ These are all our children. Separatists, murderers, terrorists, here they are! These are who they’re fighting against. Against us, and our children”.*

Mourner at funeral of child [described as a victim “of Ukrainian shelling”]: *“We never invited them! We were living here peacefully!”*

Svetlana: *“Why are they killing us and our children? We’re simply being eliminated”.*

Denis: *“I want to address the Ukrainian army: if they’re protecting our town, why are they shelling us? What for? Or are they, maybe they enjoy it? Maybe they don’t want us in their way? That time we were walking, it was our plane. Why was it bombing us? Why? Or do they want this whole town wiped off the face of the earth? Or maybe they don’t want us to live there? They want us to leave? Why are they shooting, even knowing they will be shot back at?”*

Ofcom also noted that the following on-screen slate was broadcast at the end of the Programme for approximately six seconds:

“The Ukrainian Government denies all accusations regarding crimes against civilians. Kiev says affected residents in the country’s east are just a side effect of the anti-terrorist operation”.

Ofcom considered that the Programme dealt with matters of political controversy i.e. the policies and actions of the Ukrainian Government and its military forces towards the population of eastern Ukraine. We therefore considered the Programme raised issues warranting investigation under Rule 5.5 of the Code which states:

“Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service...This may be achieved within a programme or over a series of programmes taken as a whole”.

We therefore asked the Licensee to provide comments on how the Programme complied with Rule 5.5.

⁶ The Ukrainian Prime Minister since February 2014.

Response

The Licensee accepted that the Ukrainian Government's policy and actions towards the ethnic Russian population in eastern Ukraine are matters of political controversy. However, the Licensee submitted that the Programme was "mainly about the flight of the civilian population from the conflict and the human toll of being caught up in it". TV Novosti submitted that, therefore, it "is only because the refugees made it clear that they were in little doubt about whom they were fleeing from that the due impartiality rules were engaged". The Licensee also said that this was why the Programme concluded with a six second slate setting out the Ukrainian Government's viewpoint.

TV Novosti also said that "[s]ince the programme was mainly about refugees and flight, it did not dwell on the political reasons for the conflict", on whether the information provided to its journalists by these refugees constituted evidence of war crimes or on "the refugees' views of those by whom they had been attacked".

The Licensee said that the Programme "contained implied criticism of the Ukrainian Government and of those who were implementing its policies". However, the Licensee argued that "the main focus of the programme was the flight of the civilian population and the human toll and the main target of criticism was the Western media whose journalists had failed to cover the events". TV Novosti reiterated that it considered that criticism of the Ukrainian Government conveyed by the Programme "was implicit rather than explicit" and that such criticism "was secondary to the main editorial narrative and criticism". The Licensee said that it believed that the six second slate explicitly made the "viewpoint of the Ukrainian government quite clear" and was a "sufficient counterweight to that criticism to have preserved due impartiality in the programme".

TV Novosti said that "[t]here is no doubt that the programme could have been more well-rounded" if its journalists had been able to go to Kiev and put questions to the Ukrainian Government. The Licensee explained that: "At the time of filming (July 2014),... Russian journalists were not afforded a chance to work in Central Ukraine". In this regard, TV Novosti cited various examples of how restrictions were placed on Russian journalists and Russian male citizens entering Ukraine around the time the Programme was being produced. In particular, the Licensee explained that in "April and May, three Russian TV crews sent by RT to the government-controlled areas of Ukraine, all having proper journalistic IDs and more than sufficient financial backing, were denied entry by officials on wholly implausible pretexts or with no explanation at all". As a result, TV Novosti said that its journalists had "had no access to the government or indeed the other side in the conflict". It added that it had tried to get around this in June 2014 by sending a Chilean journalist but he was also denied entry.

Nevertheless, the Licensee stated that it believed that the onscreen slate "fairly and accurately set...out the government's viewpoint and preserves impartiality" as "[i]t balances the views expressed by the refugees and allows the audience to reach its own conclusions on this aspect of the conflict".

Licensee's comments on the Preliminary View

TV Novosti commented on Ofcom's Preliminary View, which was to find a breach of Rule 5.5. A number of these submissions repeated or expanded on points made in its

previous representations. The Licensee also made a number of additional comments, which are summarised below⁷.

Application of due impartiality

The Licensee acknowledged that in its initial representations it had accepted that the Ukrainian Government's policy and actions towards the Russian population in eastern Ukraine was a matter of political controversy. TV Novosti said that this is not a decisive factor so far as Ofcom's investigation is concerned and that Ofcom needed to decide whether the Programme dealt with a matter of political controversy in accordance with the relevant criteria. The Licensee said it was "not sure" that the reason given by Ofcom in the Preliminary View for finding that the Programme dealt with a matter of political controversy was "a sufficient reason for the conclusion" that Ofcom had reached.

TV Novosti queried whether Ofcom had given due or any weight to the Licensee's right to freedom of expression in relation to the application of the special impartiality requirements (and any of the other issues addressed in the Preliminary View). In this regard, TV Novosti referred to a previous Ofcom decision relating to the documentary feature film *An Inconvenient Truth*⁸ and said in light of this decision the threshold for regulatory intervention should be high.

The Licensee said that, in light of the *An Inconvenient Truth* decision, there is a balance to be weighed between freedom of expression and regulatory intervention and that the threshold for intervention is a high one. It said that it could not find anything in the Preliminary View to suggest that Ofcom had considered whether the Programme had reached this threshold and TV Novosti submitted that the Programme did not pass this test.

Specifically, the Licensee said that by applying the principles in the *An Inconvenient Truth* decision it must follow that the application of the rules on due impartiality should take into account RT's right to freedom of expression and viewers' rights to receive information freely. TV Novosti said that it seemed matters of political controversy "could include almost any conceivable subject that concerns Ukraine at present" and that therefore the test as to whether a programme deals with a matter of political controversy should be a high one to allow Ofcom to regulate in a way which protects freedom of expression. The Licensee submitted that "[a] very wide application of Section Five to cover not only discussions of particular political controversies but also all issues that might in some way have a relationship to those controversies (i.e. effectively any subject on which a documentary programme could be made where there was a reference to Ukraine) would have a chilling effect on RT's ability to explore what appeared to be a refugee crisis taking place in conditions of mainstream media silence".

⁷ The Licensee also asked Ofcom to take account of the representations it made regarding the Preliminary View on the programme *The Truthseeker: Genocide of Eastern Ukraine* (see Decision on this case at page 5 of this Bulletin). Ofcom has not summarised these representations in this Decision. However, we took these representations into consideration in reaching this Decision (to the extent that they were relevant to the Programme).

⁸ *An Inconvenient Truth* is a 2006 documentary feature film about global warming. Ofcom's decision relating to this case is available at:
<http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb165/>

TV Novosti reiterated the point that “the main focus of the [P]rogramme was the flight of the civilian population and the human toll” and “that the main target of criticism [in the Programme] was the Western media”. It said that Ofcom did not offer any suggestion as to the subject matter of the Programme but had appeared to reject the contention that the Western media was the main target. The Licensee referred to the comment in Ofcom’s Preliminary View that it had “counted just one reference to the lack of coverage by the Western media”. TV Novosti said “it was not sure that a quantitative approach to analysis of what is primary and what is secondary in a programme is appropriate and there is room for dispute here”. It could see no reason why a single reference to the lack of coverage by the Western media should not establish it as the main target of the Programme’s criticism. The Licensee went on to say that: “If the criticisms of the Ukrainian authorities were not the main subject matter of the Programme, the question arises whether they should nevertheless be treated as a matter of a political controversy”. The Licensee said that it seemed to it that the answer to the question fell squarely within the principle established by Ofcom in its decision in the *An Inconvenient Truth* case and that “[a] very wide application of Section Five to cover an issue that was not the main subject matter of a programme but only a related issue would have a chilling effect on broadcasters’ ability to explore a future refugee crisis”.

Preservation of due impartiality

TV Novosti stated that, even if Ofcom was of the view that the special impartiality requirements applied, it did not think that Ofcom’s conclusion that the Programme failed to preserve due impartiality was “sustainable”.

The Licensee said that the Programme’s end slate was “unambiguous in the terms of its denial and presents the [Ukrainian] government’s viewpoint with appropriate force and clarity”. TV Novosti said that an assessment of editorial material such as the slate should be qualitative not quantitative. Assessed qualitatively, the slate was sufficient to preserve due impartiality and it was inappropriate for Ofcom to reject the sufficiency of a slate on quantitative grounds. Further, the Licensee said that it saw “no reason why a single six second slate, suitably worded, should not be sufficient”.

TV Novosti said that it had used the slate as a “method of maintaining due impartiality when alternative views are not available from the target of criticism, as was the case here”. The Licensee referred to Ofcom’s Guidance to Section Five of the Code (the “Guidance”)⁹ which suggests that broadcasters might use one or more of a number of editorial techniques including the provision of “a summary, with due objectivity and context, within the programme”. The Licensee described the slate as such a summary.

The Licensee also made reference to having relied on guidance given in compliance meetings with Ofcom in November 2012 and March 2014 in which the special impartiality rules were discussed¹⁰.

⁹ <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section5.pdf>

¹⁰ In meetings with licensees Ofcom stresses that it cannot provide specific compliance advice about particular programmes in advance of broadcast. Compliance in specific programmes is the responsibility of licensees, not Ofcom. Ofcom can only provide general guidance, especially in an area like due impartiality, where cases tend to be very dependent on the individual facts. This is what happened in Ofcom’s meetings with RT. Ofcom provided the Licensee with some general guidance about how to preserve due impartiality, and this advice largely echoed the published Guidance on due impartiality.

TV Novosti stated that Ofcom had assessed the Programme exclusively by reference to alternative viewpoints and that this ignored the fact that the preservation of due impartiality falls to be established by a multi-factorial assessment with reference to a “range of factors”. The Licensee said Ofcom had failed to assess in the Preliminary View this range of factors in any material way and the analysis it had set out was based exclusively on alternative viewpoints. TV Novosti also said it was “manifestly irregular” and wrong for Ofcom’s Preliminary View to decide whether due impartiality was preserved by reference to the slate on its own.

Finally, the Licensee said no account was taken by Ofcom of audience expectations which will have been shaped by a number of factors including RT’s explicit mission and the exigencies of war reporting.

TV Novosti concluded that it did not think that Ofcom had made a compelling case for a breach of Rule 5.5.

Decision

Under the Communications Act 2003 (“the Act”), Ofcom has a statutory duty to set standards for broadcast content which it considers best calculated to secure a number of standards objectives. These objectives include ensuring that the special impartiality requirements set out in section 320 of the Act are complied with, including that “due impartiality” is preserved on matters of political controversy. This objective is reflected in Section Five of the Code. In particular, Rule 5.5 states that:

“Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service [...]. This may be achieved within a programme or over a series of programmes taken as a whole”.

In reaching a Decision in this case, Ofcom acknowledged the importance attached to the right to freedom of expression in the broadcasting environment, as contained in Article 10 of the European Convention on Human Rights (“ECHR”). This provides for the broadcaster’s and audience’s right to freedom of expression, which encompasses the right to hold opinions and to receive and impart information and ideas without undue interference by public authority.

Article 10 of the ECHR also provides that the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Accordingly, Ofcom is required to set standards to secure the standards objectives in section 319(2) of the Act, including that the special impartiality requirements under section 320 of the Act are complied with, which includes the need to ensure that due impartiality is preserved in respect of matters of political controversy. Ofcom secures the application of the special impartiality rules through making and enforcing the Code, which includes the rules in Section Five relating to due impartiality.

However, Ofcom must also consider the broadcaster’s right to freedom of expression and the audience’s right to receive information. Therefore, in applying the due

impartiality rules, Ofcom must balance the right to freedom of expression against the requirements of Section Five of the Code.

It is important to note that the broadcasting of highly critical comments concerning the policies and actions of any individual or organisation, including a government or state agency is not, in itself, a breach of the special impartiality rules. The special impartiality rules do not prevent a broadcaster from making programmes about politically controversial subject matters and it is crucial that broadcasters have the editorial freedom to do so. However, in doing so broadcasters must ensure that, in accordance with Rule 5.5, programmes dealing with politically controversial matters preserve a level of impartiality which is appropriate to the subject and nature of the programme, taking into account other relevant contextual factors.

Ofcom took careful account of the Licensee's right to freedom of expression and the audience's right to receive information against the requirements of Rule 5.5. In doing so, we acknowledged that the Programme was made in the context of an ongoing, politically sensitive conflict in Ukraine which has impacted significantly on the lives of many Ukrainian citizens. We also noted TV Novosti's representations that a wide application of Section Five to cover any subject in a documentary programme which referenced Ukraine, would have a chilling effect on RT's ability to explore "what appeared to be a refugee crisis taking place in conditions of mainstream media silence" in Ukraine. In light of the above, and in line with broadcasters' right to freedom of expression and audience's right to receive information, we considered that it was legitimate for the Licensee to make and broadcast a programme which examined and explored the situation in eastern Ukraine, including the impact the conflict was having on the lives of Ukrainian citizens. However, to the extent that such a programme examined politically controversial matters, we considered that TV Novosti needed to comply with Rule 5.5 by ensuring that due impartiality was preserved.

Application of due impartiality

The Code makes it clear that matters of political controversy are "political issues...on which politicians,...and/or the media are in debate". Ofcom's published Guidance to Section Five of the Code ("the Guidance")¹¹ explains that whether a matter of political controversy is being dealt with in a programme will depend on a "range of factors". In particular, the Guidance says that "[j]ust because a 'political'...matter is referred to in a programme, or broadcasters deal with particular matters that elicit strong emotions, does not mean that the special impartiality rules are engaged". The Guidance also explains that "just because a number of individuals and institutions, or the majority of the audience to a service, share the same viewpoint on a contentious issue, does not necessarily mean that a matter is not...a matter of political...controversy".

In assessing whether the Programme dealt with matters of political controversy, Ofcom first considered the subject matter of the Programme, including the main target of the criticism in the Programme. Ofcom noted that the Licensee said that the Programme was "mainly about the flight of the civilian population from the conflict" in Ukraine and "the human toll of being caught up in" this conflict. In particular, we noted TV Novosti's argument that the Programme did not dwell on the "political reasons for the conflict" or on "the refugees' views of those by whom they had been attacked". We also noted the Licensee's comments that "the main target of criticism was the Western media" and that "criticism of the Ukrainian government was secondary".

¹¹ <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section5.pdf>

Ofcom did not consider that the Programme dealt only with the “human toll” of the conflict in Ukraine. Ofcom acknowledged that the Programme contained interviews with a number of refugees who discussed their own individual experiences of the conflict in Ukraine. However, we noted that a significant number of the interviewees also made a number of highly serious allegations and critical comments about the Ukrainian Government and its military forces regarding their policies and actions towards the population of eastern Ukraine. In particular, some of the interviewees made accusations that the Ukrainian Government and its military forces had committed atrocities, including rape and murder, against the population of eastern Ukraine. These comments and allegations were broadcast in the context of an ongoing highly sensitive politically contentious situation which was the subject of political and media debate in the UK, Ukraine and internationally.

It was not apparent to Ofcom on viewing the Programme that the main target of the Programme was the Western media. Ofcom noted that the Programme contained one observation that the Western media had been absent from the Donbass region in eastern Ukraine; the Programme contained no express criticism of the Western media. In contrast, as stated above, the Programme made numerous references to the Ukrainian Government and its military forces; many of these statements were highly critical and included serious allegations of atrocities. Taking all of this into account, we concluded that the Ukrainian Government and its military forces were the main target of criticism in the Programme.

Taking all of the above into account, it was Ofcom’s view that the Programme dealt with matters of political controversy i.e. the policies and actions of the Ukrainian Government and its military forces towards the population of eastern Ukraine and that TV Novosti was required to preserve due impartiality pursuant to Rule 5.5 of the Code.

Preservation of due impartiality

Having established that the Programme dealt with matters of political controversy, Ofcom went on to assess whether the Programme preserved due impartiality pursuant to Rule 5.5 of the Code.

In judging whether due impartiality has been preserved in a programme, the Code makes it clear that the term “due” means “adequate or appropriate to the subject and nature of the programme”. Therefore, the Code states that “‘due impartiality’ does not mean an equal division of time has to be given to every view, or that every argument and every facet of every argument has to be represented”. In particular, the Code states that “[t]he approach to due impartiality may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach is signalled to the audience.” In addition, the Code makes it clear that context, as set out in Section Two (Harm and Offence) of the Code, is an important factor in relation to preserving due impartiality. This covers a number of factors including the editorial content of the programme, the service on which the material is broadcast, the likely size, composition and expectation of the audience and the effect on viewers who may come across the programme unawares.

The Guidance states that whether or not due impartiality has been preserved will depend on a range of factors including the programme’s presentation of the argument and the transparency of its agenda. The Guidance also makes it clear that the broadcasting of highly critical comments concerning the policies and actions of any one state or institution is not, in itself, a breach of the Code’s rules on due

impartiality. In particular, the Guidance states that it is essential that current affairs programmes are able to explore and examine issues and take a position even if that is highly critical. The Guidance also says that the preservation of due impartiality does not require a broadcaster to include every argument on a particular subject or provide a directly opposing argument to the one presented in a programme.

Nevertheless, the Guidance is clear that a broadcaster “must maintain an adequate and appropriate level of impartiality in its presentation of matters of political controversy”. In particular, it says that “[d]epending on the specifics of the issue” that “it **may** be necessary, in order to fulfil the due impartiality requirements, that alternative viewpoints are broadcast” (emphasis added). The Guidance explains that due impartiality will not be maintained by “merely offering people or institutions likely to represent alternative viewpoints (for example, representatives of a foreign government) the opportunity to participate in programmes, who decline to do so”. If a broadcaster cannot obtain an interview or a statement on a particular viewpoint on a matter of political controversy then it “**must** find other methods of ensuring that due impartiality is maintained” (emphasis added). The Guidance gives examples of a number of editorial techniques which a broadcaster might consider employing, where alternative views are not readily available, in order to preserve due impartiality. However, it is an “editorial matter for the broadcaster as to how it maintains due impartiality.”

Ofcom reviewed the Programme in full and was of the view that it presented a negative picture of the Ukrainian Government and its military forces. As discussed above, the Programme made numerous serious and critical comments about the Ukrainian Government and its military forces including allegations of serious atrocities such as rape and murder. These comments were accompanied by emotive, graphic footage of what appeared to be warfare in Ukraine, its victims and after-effects as well as footage of bloodied corpses and a dead child. All of this was broadcast with little or no counterbalance, which in Ofcom’s view contributed to the Programme’s negative portrayal of the Ukrainian Government and its military forces.

In contrast, Ofcom noted that the Programme contained one statement which summarised the Ukrainian Government’s viewpoint in the form of the on-screen slate which was shown at the end of the Programme:

“The Ukrainian government denies all accusations regarding crimes against civilians. Kiev says affected residents in the country’s east are just a side effect of the anti-terrorist operation”.

Ofcom acknowledges the difficulties that can be faced by programme makers when seeking to make programmes in conflict zones and we took account of the Licensee’s comment that the “programme could have been more well-rounded if...[its] journalists had been able to go to Kiev and put questions to the [Ukrainian] government”. We noted that TV Novosti said that its journalists “had no access to the [Ukrainian] government or indeed the other side in the conflict”. We also had regard to the Licensee’s comments regarding the difficulties faced by Russian journalists in entering central Ukraine. In particular, we noted that TV Novosti had attempted to overcome these difficulties by sending a Chilean journalist to central Ukraine but this journalist had been denied entry.

However, as stated above, if a broadcaster is unable to obtain statements or interviews offering particular viewpoints then it must find other editorial techniques to preserve due impartiality in programmes which deal with matters of political

controversy. Other than the slate, it did not appear to Ofcom that the Programme contained any such other techniques.

Having assessed the extent to which editorial techniques were used by the Licensee to preserve impartiality in the Programme, we went on to consider whether, taking into account relevant contextual factors, and the subject and nature of the Programme, “due” impartiality was, in fact, preserved.

Regarding the subject matter of the Programme, as stated above, we considered that the Programme mainly targeted the actions and policies of the Ukrainian Government and its military forces towards the population of eastern Ukraine and that it contained very serious allegations accompanied by graphic and emotive footage.

In terms of contextual factors, Ofcom noted that RT “provides an alternative perspective on major global events, and acquaints international audience with a Russian viewpoint”¹². We also took into account the Licensee’s representations that audience expectation of the Programme will have been shaped by the nature of the channel upon which it was broadcast. We therefore considered that the content and approach of the Programme would have been familiar to the audience from the nature of the channel and that it was likely that viewers would have expected programmes broadcast by RT, such as the Programme, to address controversial issues and to do so from the perspective of TV Novosti by reflecting major global events from a Russian viewpoint. However, notwithstanding the nature of the channel and the audience’s expectation, we considered that these contextual factors were outweighed by the strength of the allegations and emotive and graphic footage shown in a programme which dealt with matters of political controversy. In our view, therefore, the Licensee was nevertheless obliged to ensure that due impartiality was preserved in the Programme.

Ofcom noted TV Novosti’s comment that the slate was “unambiguous in the terms of its denial” and that it presented the Ukrainian Government’s viewpoint with “appropriate force and clarity”. We noted that the slate outlined the Ukrainian Government’s denial and that it was given prominence, taking up the full screen. However, we were concerned that the slate gave only very brief reasoning as to why the population of eastern Ukraine had been affected by the conflict. We also noted it was broadcast at the end of the Programme, which was approximately 26 minutes long. Consequently, viewers would have been presented with a highly negative picture of the Ukrainian Government and its military forces throughout the Programme’s duration before any sort of counterbalance was offered. We considered that this had the effect of limiting the impact of the slate and we did not consider, in the context of the Programme as a whole, that it provided sufficient or adequate counterbalance to preserve due impartiality.

Ofcom also noted that the Licensee did not provide any evidence that due impartiality on these issues had been preserved in a “series of programmes taken as a whole” (i.e. more than one programme in the same service, editorially linked, dealing with the same or related issues within an appropriate period and aimed at a like audience).

Therefore, for all of the reasons stated above, Ofcom was of the view that due impartiality was not preserved in the Programme.

¹² <http://www.rt.com/about-us/>

Conclusion

For all the reasons set out above, Ofcom was of the view that the Programme dealt with matters of political controversy and the Licensee did not preserve due impartiality in breach of Rule 5.5 of the Code.

Breach of Rule 5.5

In Breach

Justice with Jeanine Pirro

Fox News, 11 January 2015, 02:00

Introduction

Fox News is a news channel originating in the USA, broadcast on the digital satellite platform and licensed by Ofcom in the UK. The licence for this channel is held by Fox News Network, Limited Liability Company (“FNN” or the “Licensee”). *Justice with Jeanine Pirro* is a weekly current affairs programme providing Jeanine Pirro’s (“Judge Jeanine”) legal insights and critical analysis on current news events.

Ofcom was alerted to an episode of *Justice with Jeanine Pirro* broadcast on 11 January 2015 at 02:00 (the “Programme”) by four complainants in relation to assertions in the Programme that there were areas of Paris which were “no-go zones” and that the English city of Birmingham was an example of a city “where non-Muslims just simply don’t go”. The complaints considered that these assertions were misleading and potentially offensive.

The Programme, which was one hour in duration, focused on Islamic extremism following the attack on the offices of the French satirical weekly newspaper *Charlie Hebdo* in Paris on 7 January 2015 (the “Hebdo Attack”)¹ and incidents in the Île-de-France region from 7 January 2015 to 9 January 2015².

Ofcom reviewed the Programme which contained the following:

- an opening statement by Judge Jeanine in which she gave her perspective on Islamic extremism;
- an interview with Fox News reporter Amy Kellogg on the latest events in Paris following the Hebdo Attack and the subsequent incidents;
- an interview with Nolan Peterson a former US air force officer and described as “an expert on the radicalisation of the French Muslims”;
- an interview with Steve Emerson, founder of the Investigative Project on Terrorism³;

¹ On 7 January 2015, Said Kouachi and Cherif Kouachi forced their way into the offices of the French satirical weekly newspaper *Charlie Hebdo* in Paris, murdering 11 members of staff and one police officer.

² Following the Hebdo Attack, a third assailant shot a man in Fontenay-aux-Roses on 7 January 2015 and murdered a police officer on 8 January 2015. On 9 January 2015, Said Kouachi and Cherif Kouachi fled to a signage production company in Dammartin-en-Goële. Here the Kouachi brothers were surrounded and eventually shot dead by French security forces.

³ The Investigative Project on Terrorism is a US-based organisation that describes itself as the “world’s most comprehensive data centre on radical Islamic terrorist groups” (see: <http://www.investigativeproject.org/about.php>).

- an interview with Harris Zafar described as the “*author of Demystifying Islam*” and Zuhdi Jasser from the American Islamic Forum for Democracy which discussed the relationship between terrorism and Islam, and “jihad”⁴;
- an interview with Sergeant Ed Mullins of NYPD which included a discussion of the recent fatal attacks of two police officers, the threat of terrorism on New York City and issues for police following the Hebdo Attack and subsequent incidents;
- an interview with Judge Michael Mukasey which included a discussion of “fatwas”⁵ in light of the Hebdo Attack and his involvement in one of the first US terrorist trials; and
- an interview with Bill Donohue, Catholic League President, which included discussion of the depiction of religious figures in the media, including in *Charlie Hebdo*.

Ofcom noted in particular the following two interviews in the Programme:

The Peterson Interview

This was broadcast about eight minutes into the Programme and featured a four minute interview between Judge Jeanine and Nolan Peterson (who was located in another studio), with both individuals shown facing the camera, on a split screen. Judge Jeanine and Mr Peterson had the following discussion:

Judge Jeanine: *“And with me now, former air force officer, an expert on the radicalisation of the French Muslims, Nolan Peterson [...]. When people think of France, of Paris, they think of the Eiffel tower, the Louvre but you say there is a hidden world that few non-Muslims have ever seen. Tell us about that.”*

Nolan Peterson: *“Well Judge, it’s a troubling situation. France which is a NATO ally has been fighting alongside the United States in Afghanistan for more than a decade to deny terrorists a safe haven. Yet a ten minute cab ride from the Eiffel Tower there are neighbourhoods where Islamists from the Muslim brotherhood and Al Qaeda are openly recruiting on the streets. I want to be clear that these neighbourhoods aren’t like a training camp in Tora-Bora or anything like that but it’s very troubling that there is a mix of disenfranchised Muslim youths who don’t believe that they have a place in French society and who are living alongside what basically amounts to scouting parties of Islamist groups.”*

Judge Jeanine: *“Alright. When you say, Nolan, that they are recruiting young people, who feel disenfranchised? Are they sending them to Yemen? What do you know about the recruiting?”*

Nolan Peterson: *“I wrote a story on blueforcetracker.com where I told the story of some of my French Muslim friends while I was living in Paris [...] and they told me how on the streets they would be approached by*

⁴ Jihad means holy war or struggle.

⁵ A fatwa is a legal opinion or learned interpretation issued by an Islamic scholar on issues pertaining to Islamic law.

elements of these groups, invited to go to mosques where they would see videos of extremists imams or preachers or militants who would try to indoctrinate them into the ideology and then convince them to go to these countries to fight.”

Judge Jeanine: *“To go to which countries and fight?”*

Nolan Peterson: *“At the time I was there it was Iraq.”*

Judge Jeanine: *“OK, so they would learn how to fight there. Now you were not surprised by this terrorist attack in France. Why is that?”*

Nolan Peterson: *“Sadly I was not surprised. I was in France right at the kick off of the Iraq war. I was very surprised by how brazen the Islamist elements were in the banlieues⁶, which is the French name for the ghettos, and I actually predicted back in 2006 that something like this would happen. France has usually been very reluctant to have an aggressive foreign policy against terrorists abroad. Yet in the last several years France has adopted a much more aggressive stance. In addition to that ISIS had created this brand of home grown terrorism so the tables have turned a little bit and I think we are at a tipping point now where we might see a lot more attacks like we saw last week”.*

Judge Jeanine: *“There are areas called ‘no-go zones’ where apparently the French police will not go [and] Sharia laws [are] imposed. These are dangerous areas in the ghetto [Nolan Peterson indicated his agreement]. What can you tell us about those?”*

Nolan Peterson: *“There are basically portions of the banlieues, which are the French ghettos that the French authorities have abandoned. They don’t provide an ambulance service, they don’t provide police service”.*

Judge Jeanine: *“[Interrupting] Is it because they are fearful? Why would they abandon that?”*

Nolan Peterson: *“They are afraid. Correct. It’s dangerous. Like I said, the Islamist elements are on the streets and the police officers and the authorities just don’t want to be there. However, there is a strong French intelligence presence in these areas. So they are trying to keep tabs on what’s going on”.*

Judge Jeanine: *“Well, it didn’t work so well to be honest!”*

Nolan Peterson: *“It didn’t work. You’re correct”.*

Judge Jeanine: *“[...]Up next: new warnings and reports and terrorist sleeper cells may have been activated in France[...][cuts to an advertisement break]”.*

The Emerson Interview

⁶ Banlieues are suburbs of large French cities.

Immediately following the advertisement break, in a segment broadcast about 15 minutes into the Programme, Judge Jeanine interviewed Steve Emerson (who was located in another studio). The interview, lasting four minutes in duration, showed both individuals on a split screen and facing the camera. There was the following exchange:

Judge Jeanine: *“Developing tonight, new reports that terrorist sleeper cells may have been activated in France. This is, we are learning, new details about hundreds of ‘no-go zones’ across France and other countries that are off limits to non-Muslims. Steve Emerson, founder of the Investigative Project, joins us. Alright Steve, my last guest told us some chilling details about these no-go zones. What more can you tell us about these zones Steve?”*

Steve Emerson: *“Well these ‘no-go zones’ exist, not only in France, but they exist throughout Europe. They are sort of amorphous. They are not contiguous necessarily but sort of safe havens and they’re places where the governments like France, Britain, Sweden [and] Germany they don’t exercise any sovereignty. So you basically have zones where Sharia courts are set up, where Muslim density is very intense, where the police don’t go in, and where it is basically a separate country almost. A country within a country”.*

Judge Jeanine: *“You know what it sounds like to me Steve? It sounds like a caliphate⁷ within a particular country?”*

Steve Emerson: *“It certainly does sound like that. You know it’s almost the prescription that they’re asking Israel to do – to set up a separate state within their own state except they are not recognising it, they are not dealing with it because they don’t want to. I got into a tweet fight with the French ambassador who denied that there are any such things as ‘no-go zones’, except on the French official website it says there are and it actually has a map of them. So in Britain there are not just ‘no-go zones’ there are actually cities like Birmingham that are totally Muslim, where non-Muslims just simply don’t go in. [In] [p]arts of London there are actually Muslim religious police that actually beat and actually wound seriously anyone who doesn’t dress according to Muslim religious attire. So there’s a situation that Western Europe is not dealing with. And in this country we have the selective orientation to what is radical Islam[...].”*

Judge Jeanine: *“Steve, is there any way to get these ‘no-go zones’ back? In other words does France want it back? Does Belgium want it back? Does Germany want these zones back? Because what[s] happening is this is metastasizing into a simple takeover. I think even you said Europe is over, what did you say Steve?”*

Steve Emerson: *“I said the other day that Europe is finished because if you extrapolate the number of Muslims and I’m not saying that all Muslims are terrorists far from it”.*

⁷ A caliphate is the jurisdiction of an Islamic leader or Caliph.

Judge Jeanine: *“Of course not”.*

Steve Emerson: *“The problem is the leadership of the Muslim communities in Europe deliberately don’t want to integrate and so they established these zones, which refuse to integrate, and use them as leverage against the host country as political and military leverage. So, will these countries take it back? I don’t see it happening at this point. You see the reaction by the population Judge but I don’t see the country elites taking them back. It’s really unfortunate because it fosters the whole perpetuation of radical Islamic generations from here to come”.*

Judge Jeanine: *“[...] Tell us very quickly about these women, we hear about this woman [Hayat] Boumeddiene⁸ as well as some of the other female terrorists. There are a lot of them in France I understand.”*

Steve Emerson: *“[...] there are many of them in France. I can’t give you the specific number but they trained [...] first of all they have carried out terrorist attacks in the Middle East for sure, Hezbollah, Hamas, Islamic jihad, ISIS even has women trained. Islamic female terrorists. Europe also, we’ve seen now in Britain where women wear burqas to hide their identities and in fact in certain airports believe it or not they don’t require the burqas to be removed to identify them”.*

Judge Jeanine: *“Exactly [...]. Great point. I have seen it at airports myself [...]”.*

The apologies and corrections

A week after the broadcast of the Programme, the following apologies were broadcast on Fox News:

Justice with Jeanine Pirro, 18 January 2015 at 03:00

We noted that during the next episode of *Justice with Jeanine Pirro*, Judge Jeanine made the following apology:

“Last week on this programme a guest made a serious factual error that we wrongly let stand unchallenged and uncorrected. The guest asserted that the city of Birmingham, England, is totally Muslim and it is a place where non-Muslims don’t go. Both are incorrect. The most recent census data, which is from 2011, indicates that 22% of the population of Birmingham identifies themselves as Muslim. Also we could find no credible source that indicates Birmingham is a so called ‘no-go zone’. We deeply regret these errors and apologise to the people of Birmingham, our viewers, and all that have been offended”.

Fox Report Weekend, 18 January 2015 at 12:35

During this programme we noted the presenter, Julie Banderas, stated the following:

⁸ Hayat Boumeddiene is the widow of Amedy Coulibaly (a gunman who shot a police officer, in Paris, on 8 January 2015 following the Hebdo Attack and stormed a Jewish supermarket in the Porte de Vincennes area of the city on 9 January 2015, killing four men and taking several hostages).

“A correction now. Over the course of this last week we have made some regrettable errors on air regarding the Muslim population in Europe particularly with regards to England and France. Now this applies especially to discussions of so called ‘no-go zones’. Areas where non-Muslims allegedly aren’t allowed in and police supposedly won’t go. To be clear there is no formal designation of these zones in either country and no credible information to support the assertion there are specific areas in these countries that exclude individuals based solely on their religion. There are certainly areas of high crime in Europe, as there are in the United States and other countries, where police and visitors enter with caution. We deeply regret the errors and apologise to any and all who may have taken offence including the people of France and England”.

Ofcom’s investigation

Ofcom considered that the Programme, in particular the interviews with Steve Emerson and Nolan Peterson, raised issues warranting investigation under Rule 2.2 of the Code, which states:

“Factual programmes or items or portrayal of factual matters must not materially mislead the audience”.

We therefore sought comments from the Licensee as to how the Programme, and in particular these interviews, complied with this rule.

Response

The Licensee considered that the interviews were not materially misleading and complied with Rule 2.2 of the Code.

Background

By way of background, the Licensee explained that the Hebdo Attack had been described by *Le Figaro* as “the deadliest act of terrorism in France since 1961 and it prompted the French government to hold a National Day of Mourning”. The Licensee said that the Hebdo Attack “received widespread international focus and reporting, including much coverage by Fox News” and that because “the Hebdo Attack was so violent and intersected with religion, free speech, and international politics, it was ripe for critical analysis”. The Licensee said that Judge Jeanine and her production team “could not ignore such a timely and relevant topic” and they sought to address it in the Programme.

FNN said that the series *Justice with Jeanine Pirro* is broadcast weekly and presents Judge Jeanine’s “legal insights on the news of the week, current high-profile cases, and recent issues and trends in the world of crime and justice”. It does not generally deliver factual reports of news events and is built around Judge Jeanine’s “positions and commentary of the news”. According to the Licensee, *Justice with Jeanine Pirro* does not target a specific demographic but that rating statistics show it generally appeals to adults.

The Licensee explained that the Programme provided “opinion and news analysis of current events” and although it relied “heavily on facts and research” the Licensee said that the thrust of the Programme was commentary.

FNN also explained that Judge Jeanine is a licensed US attorney and former criminal prosecutor.

The Peterson Interview

The Licensee said that during this interview, prior to the discussion on the alleged “no-go-zones”, Mr Peterson, “prompted by questions by [Judge Jeanine] gives more facts and information”. In particular, Mr Peterson explained how “France has endeavored to fight terrorism around the world and that the no-go zones are certainly not like the terrorist training camps in the Tora Bora Mountains of Afghanistan”. Accordingly, Mr Peterson explained that “what France must contend with [...] are neighbourhoods with a dangerous mix of disaffected French-Muslim youth [...] who are led to watch lectures by fundamentalist imams who encourage them to fight in volatile regions of the world” and that the “aggressive stance of France in fighting in Muslim-dominated regions in the world may have made the country a target by Islamists”.

FNN said that Judge Jeanine and Mr Peterson “sought to understand the extent and nature of ‘no-go zones’ in the city of Paris”. The Licensee explained that Judge Jeanine was “making a factual inquiry to provide the basis on which to develop her opinions and analysis on the ways in which the conduct and practices of the French government and the Muslim communities of Paris may have given rise to the attacks on the Hebdo office” and both did not “intend for Peterson’s comments to be a full statement on the matter of no-go zones or a comprehensive assessment of what they are, how they operate, and how or why they have developed”.

According to the Licensee, Mr Peterson’s “overview of no-go zones was appropriate given the time demands of a television segment” and in particular he had provided a brief description “in concordance with the demands of a television format”. The Licensee added that the interview demonstrated that Mr Peterson’s comments “were intended to be brief and preliminary so as to offer aspects of no-go zones that fit with the major themes” of the Programme, in particular “why did the Hebdo attack happen and how do we talk about it, confront it, and stop similar attacks from happening again.”

The Licensee also stated that Mr Peterson explains his assessment regarding “the complex relationship between racism, unemployment, global terrorism, and the challenges these issues pose to France domestically”. The Licensee said that Mr Peterson’s description of “no-go zones is buttressed by the historical developments he offers and balanced by his statement that these areas are not completely cut off from a French government presence.” The Licensee added that “[b]y providing context and caveats, Peterson fails to be materially misleading in contravention of” Rule 2.2.

The Emerson Interview

The Licensee explained that during this interview Mr Emerson “described how no-go zones are not problems that are exclusive to France” and that “they exist in other parts of Europe”. The Licensee added that this “exploration was designed to understand and gauge the extent of the problems that underpin terrorist attacks and possible ways to help eliminate them”. The Licensee also explained that Mr Emerson, prompted by further questions from Judge Jeanine, “direct[ed] his criticism to the leadership of some Muslim communities in Europe” and explained that in his opinion “some of them are unwilling to integrate into the societies in which they live and this detachment may explain the rise of no-go zones, the isolation European Muslims experience, and the way this seclusion can fester into acts of terrorism”. The Licensee noted that Mr Emerson makes it clear, and Judge Jeanine confirms that all Muslims are not terrorists. The Licensee said that Mr Emerson “gave no indication

that what he described was an overstatement, false, or otherwise misleading” and that he “sought to state a problem, document its origins, and advance a potential solution”.

The Licensee explained that following the broadcast, it “further investigated the statements Emerson made and determined that they were not supported by proper facts”. As a result, an apology was broadcast on the next edition of *Justice with Jeanine Pirro* “emphasi[s]ing that some of Emerson’s assertions were wrong”. The Licensee suggested that the audience who viewed the interview with Mr Emerson would have been similar to the audience who viewed this apology. The Licensee argued that because this apology offered “relevant statistics and information that contradicts and corrects some of Emerson’s statements, there can be no finding that the program[me], taken as a whole to include both the Emerson segment and [this] apology, is materially misleading”.

Conclusion

The Licensee explained that after the Programme was aired Fox News researched the statements made by Mr Peterson and Mr Emerson and “found that both guests misspoke”. The Licensee said that it aired apologies (as described above) to rectify these errors and that when taken together “these apologies convey that no-go zones are not-official government designations” and that “some of the details described” by Mr Emerson and Mr Peterson “are simply untrue”.

The Licensee said that a conclusion that both the interviews with Mr Peterson and Mr Emerson were materially misleading was “difficult to support”. The Licensee stated that the interviews were “aired live” and “not scripted”. As such, “guest overstatements, generalisations and regrettably, misstatements can occur”. The Licensee added that the interviews “may not have been nuanced in the same way as scripted program[me]s, news articles or even academic prose, but the conversation and information presented cannot not be viewed as misleading”. The Licensee went on to say that “to be misleading requires intent to mislead”. However, in this case although the statements made by Mr Peterson and Mr Emerson “may not be a full or wholly accurate picture neither they, nor Fox News intended to misinform viewers or the public at large”. Accordingly neither interview was materially misleading and therefore Rule 2.2 was not breached.

FNN’s comments on the Preliminary View

The Licensee disagreed with Ofcom’s Preliminary View and said that no elements of the Programme breached Rule 2.2.

Freedom of expression

The Licensee submitted that Article 10 of the European Convention on Human Rights (“ECHR”) creates a legal context in which there is a presumption of freedom of expression which should only be “curtailed to the extent necessary”. The Licensee went on to say that the Programme was broadcast at a time when “the press’s freedom to engage in discussions about [...] passion-inducing topics had literally come under attack” and that the response of leaders in the UK and US was to re-

emphasise their commitment to the right to freedom of expression⁹. The Licensee submitted that difficult discussions will not and cannot happen if there is fear of sanctions and censorship.

The Licensee went on to say that the statements were made “at a time when the media generally [...] were leaning over backwards to assert a responsibility and right for people to express and share controversial views”. The Licensee said that the “potential for forms of segregation and alienation to be the cause of problems in European societies was and is clearly a legitimate one for discussion”. The Licensee added that it was “wholly appropriate” for Judge Jeanine to ask a question about no-go zones.

Harm and offence

The Licensee said that harm and offence should be assessed in the context of the likely size and composition of the audience for the programme itself and that this should not include persons who may hear second hand of the content of a programme. In particular, no broadcaster can be held responsible under the Code for the way in which “broader society reports, repeats, debates or comments upon its programmes, as that necessarily creates a different context and one which the broadcaster cannot control”. The Licensee said that in assessing potential offence, it was not legitimate for Ofcom to take into account offence caused by comment in the press or on social media about the broadcast.

The Licensee also said that Ofcom “presupposes offence” by the population of Paris, whereas the population of Paris would not form part of the Programme’s UK audience. The Licensee submitted that any potential for causing offence to the residents of Paris should not be taken into consideration by Ofcom.

Further, the Licensee said that the comment about Birmingham would “in the mind of any UK viewer, have been so clearly inaccurate as to render all statements about no-go areas in the [Programme] self-evidently unreliable (and indeed risible) and so incapable of being misleading or offensive”. The Licensee said that therefore it was not reasonable to expect that the likely potential UK audience would suffer material harm or offence.

The Licensee said that the context for the statements was a show broadcast late at night in the UK with a very small number of viewers who “would have been very familiar with the robust and free thinking nature of any discussion”. The Licensee said that the Programme is known for its “brassy host, strident opinions and sometimes biting remarks”. The Licensee said that “any potential offence was assuredly mitigated by the audience’s understanding that a passionate discussion on a foreign program[me] could contain statements that were hyperbolic.” The Licensee went on to say that it was difficult to see how the committed viewers willing to stay awake until 2am to watch the Programme would be “bristled” by the statements to a degree that might cause them harm and offence.

⁹ The Licensee referred to a joint press conference hosted by David Cameron and Barack Obama five days after the broadcast of the Programme in which freedom of expression and “the rise of domestic extremism” were discussed. The Licensee said that Barack Obama “raised some of the same concerns that animated” the Programme’s discussion regarding no-go zones and David Cameron emphasised the need to better integrate communities in order to combat extremism.

The Licensee also commented on Ofcom's assertion in the Preliminary View that the Programme breached its audience's trust. The Licensee said this was unlikely because the trust afforded by UK audiences to the Programme (a foreign television programme of "robust opinions rather than forensic academic character") may be lower than that afforded [...] to "more traditional staples of UK current affairs (e.g. Panorama)". The Licensee said that this lower expectation would mean that the misstatements in the Programme would not result in a breach of audience trust "so severe that it could mislead the audience or otherwise buttress a conclusion of a [Rule] 2.2 breach".

Editorial approach

The Licensee was of the view that, in applying standards, a distinction should be made between the approaches taken to editorial content put forward by the programme itself and the opinions expressed by third party contributors to the programme. The Licensee said that editorial teams have less control over comments of third party contributors and that under the Code a broadcaster is not made absolutely responsible for the accuracy of statements made by third party contributors. However, the Licensee accepted that in certain circumstances the conduct of a programme maker "may cross a line such that they will have failed in their duties with respect to third party contributors". For example, the Licensee said a breach of Rule 2.2 could occur (i) if a programme maker broadcast their own introductory segment containing harmfully misleading content; or (ii) they failed to take a generally accepted degree of care over the conduct of third party contributors by "systematically and recklessly" allowing them to make misleading or harmful statements without any pre-checking or subsequent correction. The Licensee concluded that no broadcaster to date has been found by Ofcom to have breached Rule 2.2 on the basis of the opinions of a third party.

In this regard, the Licensee said there is always a risk involved when inviting guests to a live programme and it asked Ofcom to take into consideration the considerable background research and vetting that it undertook in preparing the Peterson and Emerson interviews.¹⁰ The Licensee said there was no indication following this vetting that Mr Peterson or Mr Emerson would make the statements about Birmingham or Paris. The Licensee also explained that Mr Peterson had appeared four times on Fox News programmes and Mr Emerson had appeared 445 times. The Licensee said it was therefore reasonable to rely on these guests to refrain from making inaccurate statements. The Licensee submitted that it took appropriate measures before the broadcast of the Programme to ensure that misleading statements were not made and that its editorial approach was reasonable and justified.

Further, the Licensee stated that once the statements were made on the live Programme, it "had a reasonable editorial basis, given its previous unchallenged reporting, not to immediately (and without the opportunity to conduct an investigation) conclude that the [s]tatements were inaccurate". Therefore, given the live format of the Programme, it was clear that the Licensee acted with "appropriate care and diligence to ensure that its content was accurate".

¹⁰ The Licensee explained the research and vetting it had undertaken. In summary, editorial staff: gauged the perspective of Mr Peterson and Mr Emerson before broadcast; explored their education, professional background and experience in relation to the topics covered by the Programme; and held discussions with these guests regarding topics which might come up in the Programme.

The Licensee also commented on Ofcom's observation in its Preliminary View that the statements about Birmingham and Paris were allowed to be made "without challenge". The Licensee said that the interviews with Mr Peterson and Mr Emerson were not designed to be adversarial rather they were designed to flesh out the guests' views. It was of the view that Ofcom was "overreaching in its investigation" in stating that the Programme should have challenged the perspectives of the guests and that such format decisions were a "privilege of a licensee".

The Licensee concluded that the "editorial approach to the Programme strongly counsels in favour of a finding that no breach occurred here".

The apologies

The Licensee noted that in its Preliminary View, Ofcom questioned the effect of the apologies because they were broadcast a week after the Programme. The Licensee was concerned that Ofcom had failed to recognise that the apologies were deliberately timed in this way in order to maximise the impact to viewers of the Programme. The Licensee said that this timing recognised that, given the "patent absurdity" of the statement about Birmingham to a UK viewer, UK viewers would have been unlikely to give the statements sufficient credibility to be concerned by them. Therefore the key target audience of any apology would be the US and broader non-UK audience.

The Licensee also said that the "best way to reach the audience that might have viewed the inaccurate statements" in the Programme was to air a correction during the same programme series in which the inaccuracies occurred; capturing this audience meant broadcasting the apologies one week later – the next immediate episode of *Justice with Jeanine Pirro*. Further, the Licensee said that it took the time it needed to properly conduct its own investigation and wanted to ensure that the audience for the statements would match the audience for the apologies in order to "boost their effect".

The Licensee went on to say that its objective in making two apologies was to make a more general "network" apology as well as a more focused "programme" apology. It explained that it elected to issue an apology on the *Fox Report Weekend* programme because it has the highest number of viewers on Fox News' Saturday line-up and many more viewers watch this series than *Justice with Jeanine Pirro*. In doing so, the Licensee said that it "endeavored to capture that large audience".

Decision

Under the Communications Act 2003 (the "Act"), Ofcom has a statutory duty to set standards for broadcast content which it considers best calculated to secure a number of standards objectives. These objectives include ensuring that generally accepted standards are applied to broadcast content to provide adequate protection to members of the public from the inclusion of offensive and harmful material. This objective is reflected in Section Two of the Code.

Rule 2.2 of the Code states that: "Factual programmes or items or portrayals of factual matters must not materially mislead the audience".

Ofcom's published guidance to Section Two of the Code¹¹ (the "Guidance") states that Ofcom is "required to guard against harmful or offensive material, and it is

¹¹ <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section2.pdf>

possible that actual or potential harm and/or offence may be the result of misleading material in relation to the representation of factual issues". The Guidance says Rule 2.2 is therefore "designed to deal with content that **materially misleads the audience so as to cause harm or offence**" [emphasis in original] and not with "issues of inaccuracy in non-news programmes". The Guidance also states that "[w]hether a programme or item is *materially* misleading depends on a number of factors such as the context, the editorial approach taken in the programme, the nature of the misleading material and, above all, either what the potential effect could be or what actual harm or offence has occurred [emphasis in original]".

Rule 2.2 is therefore concerned with the misrepresentation of facts in a programme and whether facts have been misrepresented in a way which materially misleads the audience of that programme.

Broadcasters should therefore take care to ensure that facts are not presented in programmes in a way which is materially misleading. This is particularly important in factual programmes such as current affairs programmes as the level of audience trust and the audience expectation that such programmes will not be materially misleading is likely to be higher.

In reaching this Decision, Ofcom acknowledged the importance attached to freedom of expression in the broadcasting environment, as contained in Article 10 of the ECHR. This provides for the broadcaster's and audience's right to freedom of expression, which encompasses the right to hold opinions and to receive and impart information and ideas without due interference by public authority.

Article 10 of the ECHR also provides that the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Accordingly, Ofcom is required to set standards to secure the standards objectives in section 319(2) of the Act, including that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material. Ofcom secures the application of such standards through making and enforcing the Code, which includes the rules in Section Two relating to harm and offence.

Ofcom is also required to have regard to the need to secure the application of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in programmes in television services in the manner which best guarantees "an appropriate level of freedom of expression" (section 3(4)(g) of the Act).

It is important to note that Section Two does not prevent a broadcaster from making programmes about controversial subject matters or topics which may elicit strong opinions and emotions, indeed it is crucial that broadcasters have the editorial freedom to do so. However, in broadcasting such programmes licensees are required to ensure they comply with Section Two, including ensuring that facts are not misrepresented in a way which materially misleads the audience under Rule 2.2.

Ofcom took into account the context in which the Programme was broadcast. In particular, Ofcom noted that the Hebdo Attack and the subsequent incidents had taken place around a week before the Programme was broadcast. We also noted that the Licensee stated that Judge Jeanine and her production team “could not ignore such a timely and relevant topic” and that the Hebdo Attack “was so violent and intersected with religion, free speech and international politics, it was ripe for critical analysis”. We also took into consideration the Licensee’s representations that freedom of expression should only be “curtailed to the extent necessary” and that the Programme was broadcast at a time when the freedom of the press to engage in discussions about “passion-inducing” topics had come under attack. Against this background, and in line with the right to freedom of expression, we considered it legitimate for the Licensee to make and broadcast a programme examining these events and related issues in the aftermath of the Hebdo Attack. Nevertheless, in making and broadcasting such a programme, we considered that the Licensee needed to comply with Rule 2.2 of the Code by ensuring that facts were not presented in the Programme in a way which was materially misleading.

Ofcom also assessed the nature of the Programme and the *Justice with Jeanine Pirro* series, and audience expectations. Ofcom noted that *Justice with Jeanine Pirro* is an established series which, as the Licensee explained, provided “opinion and news analysis on current events”. We also noted that the Licensee said that the Programme was known for its “brassy host, strident opinions and sometimes biting remarks” and that the audience would have been “very familiar with the robust and free thinking nature of any discussion”. Ofcom therefore considered that the audience would have been familiar with the content and approach of the Programme from the nature of the series and, in particular, would have expected it to address and provide critical analysis on recent news stories and current events and to take a controversial approach. Nevertheless, and given that the Programme was part of a discursive current affairs series, we considered that it was important that the Programme did not misrepresent facts in a way which was materially misleading.

It appeared to Ofcom that there were two sets of facts that were misrepresented in the Programme:

- i. during the interview with Mr Peterson, Judge Jeanine said that there were dangerous areas in Paris and other French cities “called ‘no-go zones’ where apparently the French police will not go [and] Sharia laws [are] imposed” and Mr Peterson stated that:

“There are basically portions of the banlieues, which are the French ghettos, which the French authorities have abandoned. They don’t provide an ambulance service, they don’t provide police service”; and

- ii. during the interview with Mr Emerson, he said:

“So in Britain there are not just ‘no-go zones’ there are actually cities like Birmingham that are totally Muslim, where non-Muslims simply don’t go in”.

Ofcom noted that the inaccuracy of the comments was not in dispute. The Licensee did not provide any evidence to suggest that there are areas of Paris or other French cities which are “no-go zones” which have been abandoned by the French authorities and that are not serviced by police or ambulance services. Nor did it seek to argue that this was the case. Further, the Licensee did not provide evidence to suggest that Birmingham was “totally Muslim” and a city “where non-Muslims simply do not go in” and it did not seek to argue that this was the case. In fact, the Licensee, in its

representations to Ofcom, admitted that some of the details described by Mr Peterson and Mr Emerson were “simply untrue” and that they did not present a “wholly accurate picture”. The Licensee also explained that it had researched the statements made by Mr Peterson and Mr Emerson after the Programme was broadcast and “found that both guests misspoke”. An apology was broadcast a week later following the Programme in which the Licensee explained that Mr Emerson had made a “*serious factual error*”, that the statements that Birmingham was totally Muslim and a place where non-Muslims do not go was “*incorrect*” and that there was no credible source indicating that Birmingham was a no-go zone. A further broadcast apology, made clear that the Programme had made “*regrettable errors*” in stating that there were “*no-go zones*” in France or England and that there is “*no formal designation*” of such no-go zones and “*no credible information to support the assertion that there are specific areas [in England and France] that exclude individuals based solely on their religion*”.

In Ofcom’s view it was clearly misleading for the Programme to have stated categorically that Paris contained “*no-go zones*” and that Birmingham was “*totally Muslim*” and a city “*where non-Muslims simply don’t go in*”.

Ofcom went on to assess whether these misrepresentations were “materially” misleading. In doing so we considered the context, the editorial approach and importantly whether the Programme caused, or had the potential to cause, harm or offence to viewers of the Programme.

We were particularly concerned about the context in which these statements were made – at a time of heightened sensitivity in the wake of the Hebdo Attack and subsequent incidents which had taken place only around a week before the broadcast of the Programme.

We took into account that these statements were presented in a discursive current affairs programme and considered the Licensee’s comments regarding audience expectations of the Programme, as outlined above. We also noted that the Licensee said that the trust viewers would have placed in the Programme would have been lower than “afforded [...] to more traditional staples of UK current affairs”. Ofcom acknowledged that the audience may have had a different, and lower, expectation of the Programme compared to other current affairs programmes given the nature of the *Justice with Jeanine Pirro* series. However, we noted that the Programme was a current affairs programme which dealt with sensitive issues following the Hebdo Attack. We considered that viewers would have still placed a relatively high level of trust in the Programme and would expect to be able to rely on factual statements made, given its genre and subject matter.

Further, we also noted that Mr Peterson was presented as an expert in the field of Islamic extremism and Mr Emerson’s position as the founder of the Investigative Project on Terrorism was also made clear in the Programme. Similarly, the Programme’s presenter, who was referred to in the Programme as ‘*Judge*’ Jeanine, was a licensed US attorney and former criminal prosecutor. As such, we considered that the views, opinions and lines of enquiry in the interviews were more likely to be trusted and relied on by viewers.

We also noted that these statements were presented in the context of a wider discussion of no-go zones across Europe. In particular, Judge Jeanine referred to “*hundreds of no-go zones*” across France and in other countries and Mr Emerson said that in these areas “*Muslim density is very intense*”, governments do not “*exercise any sovereignty*” and “*police don’t go in*”. Further, Mr Emerson spoke of

“Muslim religious police” beating and wounding people in London. In addition, Mr Peterson referred to the recruitment by Islamic extremists such as Al-Qaeda and the Muslim Brotherhood *“in the streets”* of Paris and spoke of the *“indoctrina[ti]on”* of French Muslims by these extremists.

Further, it appeared to Ofcom from the Licensee’s representations that the Programme was broadcast live and we carefully considered this. In particular, we noted the Licensee’s representations regarding the background research it undertook before the broadcast of the Programme and also its assertion that a different approach should be taken to third party contributions by Ofcom when applying standards. Ofcom acknowledges the difficulties and unpredictability broadcasters face in broadcasting live programmes, particularly those which contain live third party contributions. However, in broadcasting live programmes, including live programmes containing third party contributions, licensees must still comply with Section Two of the Code. If materially misleading statements are made in a live programme, it may be appropriate for a Licensee to appropriately contextualise, mitigate and/or correct such statements in the Programme.

Ofcom acknowledged the Licensee’s comments that after Mr Peterson and Mr Emerson had made the statements, it considered that it had a reasonable editorial basis not to conclude immediately that the statements were inaccurate. However, we noted that the topic of no-go zones was introduced in the Programme by Judge Jeanine, not a third party contributor. Judge Jeanine also asked Mr Peterson and Mr Emerson leading questions which, in Ofcom’s view, encouraged the discussion of no-go zones and led to further misstatements about Paris and Birmingham.

We noted that Mr Peterson said that the areas of Paris he discussed were not *“like a training camp in Tora-Bora”* in Afghanistan and that Judge Jeanine agreed with Mr Emerson when he said that he was *“not saying that all Muslims are terrorists”*. However, we did not consider that these comments corrected or mitigated the statements in the Programme that there were areas of Paris which were *“no-go zones”*, and that Birmingham was *“totally Muslim”* and off limits to non-Muslims.

We then went on to assess whether the Programme caused, or had the potential to cause, harm or offence to viewers of the Programme. In making this assessment, Ofcom noted that the Programme was broadcast as part of a service licensed by Ofcom which we understand is receivable throughout mainland Europe. We also noted that the Programme was broadcast in the UK at 02:00 and therefore the audience was likely to be quite small.

In considering whether the Programme caused actual or potential offence to viewers, we took into account the Licensee’s comment that the statement about Birmingham would *“in the mind of any UK viewer, have been so clearly inaccurate as to render all the statements about no-go areas in the [Programme] self-evidently unreliable (and indeed risible) and so incapable of being misleading or offensive”*. As stated above, the Programme was provided on a service which we understand is receivable throughout Europe which made it more likely that there would have been some viewers who would not have been aware that the statement about Birmingham was incorrect. Nevertheless, we considered that, irrespective of whether viewers knew that the statement was incorrect, the statement was inaccurate and therefore misleading, and it had the potential, along with the statements about Paris, to cause offence to viewers of the Programme. We considered that the statements had the potential to cause considerable offence to viewers, particularly viewers in these cities and Muslim viewers, and especially viewers who were part of Muslim communities in these cities.

In assessing whether the Programme caused, or had the potential to cause, harm to the audience, Ofcom considered that it is important that current affairs programmes can be relied on by viewers, particularly as audience trust in such programmes is likely to be higher than in other programme genres. We considered that the presentation of materially misleading facts in programmes of this nature has the potential to cause harm to viewers. For the reasons stated above, Ofcom was of the view that the Programme, in stating that Paris contained “no-go zones” and that the entirety of Birmingham was “*totally Muslim*” and a city “*where non-Muslims simply don’t go in*” presented the audience with materially misleading facts. Therefore, these statements had the potential to cause harm to viewers by eroding their trust in current affairs programmes.

Taking all this into account and for the reasons set out above, we considered that the Programme in stating that Paris contained “no-go zones” and that Birmingham was “*totally Muslim*” and a city “*where non-Muslims simply don’t go in*” was materially misleading and had the potential to cause harm and offence to viewers of the Programme.

Having reached this view, we considered whether, and if so to what extent, the two apologies and corrections broadcast approximately one week after the Programme mitigated the potential harm and offence to viewers.

Ofcom noted that the apologies and corrections did make it clear that misleading statements had been made in the Programme. In particular, we noted that the apologies and corrections stated that the assertion that Birmingham was a “*totally Muslim*” city and a place where non-Muslims “*don’t go in*” was incorrect, and that this assertion, along with the assertions that England and France contained “no-go zones”, were not supported by credible evidence. We also noted the Licensee’s comments that it had broadcast an apology in the subsequent edition of *Justice with Jeanine Pirro*, as the “the best way to reach the audience that might have viewed the inaccurate statements”. In addition, we took account of the Licensee’s explanation that the second apology was broadcast during an edition of *Fox Report Weekend* in order to reach a wider audience. Noting all these factors, Ofcom was of the view that the apologies and corrections did help to some extent to mitigate the materially misleading statements broadcast in the Programme.

However, in the particular circumstances of this case, we remained concerned that the Licensee had not acted sooner to correct the statements or to broadcast an apology. Critically, our concerns stemmed from the fact that the statements were made in a current affairs programme which dealt with a controversial subject matter at an extremely sensitive time following the Hebdo Attack and subsequent incidents. For these reasons, we did not consider that the apologies and corrections sufficiently mitigated the materially misleading statements and the potential harm and offence caused to viewers of the Programme.

We therefore considered the Programme to be in breach of Rule 2.2 of the Code.

Breach of Rule 2.2

In Breach

Blinging Up Baby

Channel 5, 28 July 2014, 21:00

Introduction

Blinging Up Baby was an observational documentary broadcast by Channel 5 (“the Licensee”) which observed mothers and daughters as they engaged in beauty treatments, glamorous clothing, or attending children’s beauty pageants.

Ofcom received 11 complaints about the participation of a four year old girl in this documentary. Particular concern was raised by her being shown taking part in a beauty pageant wearing a Hooters¹ themed outfit, made by her mother, and performing a dance routine which some complainants considered too sexualised.

In the programme, the mother of the four year old was shown making the Hooters themed outfit for her daughter in preparation for the pageant. In response to a question about whether it might be a controversial choice for her young daughter, the mother explained the reasons why she considered the pageant was a suitable environment for the outfit:

“Some people may say it’s controversial – the theme that I’ve chosen – but at the end of the day little girls wear swimming costumes to the beach everyday – all summer – and that’s not a controlled environment. The environment my kids go in is a controlled environment and it is ticket entry and if anyone thinks it’s controversial then please explain”.

The girl was shown before the first ‘beauty’ round of the pageant refusing to go on stage. Two scenes (at approximately 21:45, 30 seconds in duration; and at 21:56, 15 seconds in duration) showed the child appearing distressed about going on stage for the round and refusing to go on. She was shown crying and explaining to her mother why she was crying – she said, *“I’m scared mummy. I’m scared.”* and *“I feel scared on the stage”.*

The girl was then shown during the ‘freestyle’ round of the pageant wearing the Hooters outfit made by her mother: a white leotard with one sleeve and the word ‘Hooters’ sewn in sequins across her chest and orange shorts. This sequence started at about 21:57, lasted about 40 seconds in total, and consisted of shots of the girl performing a dance sequence and each shot intercut with clips of her mother watching or of other parents commenting on the girl’s costume and performance. The girl was shown in long and medium shots (but not in close-up) on an unlit stage as follows:

- marching onto the stage;
- wiggling her hips from side to side with her hands on her head;
- doing the ‘splits’, then leaning forward to rest on her chest, and then arching her body;

¹ Hooters is a restaurant chain founded in the USA which has a number of franchises in other countries. Its waitresses are known as “Hooter Girls” and wear revealing outfits. The term “hooters” is also American slang for breasts.

- standing up facing the audience and bouncing from side to side with her hands on her hips;
- doing a cartwheel;
- leaning backwards on all fours and thrusting her hips backwards and forwards four times towards the audience; and
- standing up with her hands on her hips and moving her hips from side to side, first facing away from and then facing the audience.

Ofcom considered that this content raised issues warranting investigation under the following Code rules:

Rule 1.28: “Due care must be taken over the physical and emotional welfare and the dignity of people under-eighteen who take part or are otherwise involved in programmes. This is irrespective of any consent given by the participant or by a parent, guardian or other person over the age of eighteen in loco parentis”.

Rule 1.29: “People under-eighteen must not be caused unnecessary distress or anxiety by their involvement in programmes or by the broadcast of those programmes”.

We therefore sought Channel 5’s comments as to how this material complied with these rules.

Also, in line with Ofcom’s published procedures, where individuals may be directly affected by the outcome of an Ofcom investigation, we may invite their representations. We therefore gave the girl’s family an opportunity to make such representations on the draft of this Decision but they did not provide any comments.

Response

Rules 1.28 and 1.29

Channel 5 explained that this observational documentary focused “more on the adult contributions and their interaction with the children rather than the children themselves”. However, given that children would play a part in this programme, it said that: “a great deal of thought and care was given from the start as to how the children of the adult contributors would be treated”.

Channel 5 set out the steps it took to ensure care at each stage of the production.

Pre-production

Channel 5 explained that the production company, Alaska TV, reviewed the Ofcom Code Guidance on Rules 1.28 and 1.29, the BBC’s Child Care Policy and other available guidelines about working with under-eighteens in programmes and prepared a code of conduct for the programme. It said that each production team member was required to read and sign the production company’s child protection policy and read all the relevant guidance. Disclosure and Barring Service (DBS)² checks were also undertaken for members of the production team.

² The Disclosure and Barring Service (DBS) is a non-departmental public body of the Home Office. The DBS enables organisations in the public, private and voluntary sectors to make safer recruitment decisions by identifying candidates who may be unsuitable for certain work,

The Licensee explained that at the outset a number of families were considered for participation in the programme and detailed information was provided to them including: an accurate description of the programme; the likely time commitment; and, any likely negative consequences of appearing on the programme. In addition the production company obtained information about the families and their personal circumstances. Channel 5 said that these actions assisted the team in ascertaining whether the families were “sufficiently strong and supported” to make them suitable contributors in the programme.

The Licensee also said that, to support contributors a single point of contact for the families, the Producer, was established from the outset and this continued until post-production. The Licensee confirmed that at no point did any contributors express concern about the production process to the Producer.

The Licensee also stated that “careful consideration” was also given to whether the child contributors should undergo a psychological assessment prior to being accepted as contributors. It said that, after seeking expert advice from an experienced psychologist, it was decided that this was unnecessary. In the Licensee’s view, the observational documentary format meant that the children would be filmed in an environment they were comfortable in and they were not required to play a role or be placed in a situation in which conflict or stress was likely.

During production

The Licensee explained that during production, the production team were under instructions to report any concerns regarding the physical and emotional welfare of the child contributors to the Producer and these concerns would be discussed with the production team before being escalated to Channel 5 or the psychologist. It was considered that if any contributors or a child showed signs of distress or anxiety, a psychological assessment or counselling could be undertaken. Channel 5 said that the experienced psychologist was therefore on hand to advise on welfare issues and to assist with any problems before, during and after production (although the psychologist was not on location during production). It confirmed however that, although all contributors were told a psychologist and counsellors were available on request, none took up the offer for themselves or their children.

In response to Ofcom’s concern about the four year old girl contributor appearing distressed before the first round of the pageant (as described in the Introduction), and whether this had been an example of a matter that had been escalated to the psychologist, the Licensee confirmed that this matter had not been escalated. It said that the Producer was present throughout the incident. Channel 5 explained that, taking into consideration the child’s character, familiarity with pageants, her mother’s assurances and the girl’s enthusiasm to take part, the Producer considered that the filming and the child’s involvement in the programme “had not been the cause of the tantrum and had not caused [the child] unnecessary anxiety or distress”. The Licensee stated that it understood the cause of the child’s behaviour was that she was the last child to walk on the stage and she was not scared but “emotionally manipulating her mother for a reaction”. It said that the Producer did however stop filming temporarily to allow the situation to calm down. Further, Channel 5 said that the matter was then discussed with the Executive Producer, who, taking into consideration the points above, did not think it necessary to raise this matter with the psychologist or Channel 5.

especially that involve children or vulnerable adults, and provides wider access to criminal record information through its disclosure service for England and Wales.

The Licensee said that contributors were advised during production that they did not have to be filmed and could request that filming be stopped at any point.

It was anticipated by Channel 5 that the programme might attract press interest and social media activity. The Licensee explained that, accordingly, at various points during the production, the Producer spoke with the parents about this possibility and the steps that could be taken with regard to ensuring care of the children featured.

Post-production

Channel 5 said that specific advice was given to the featured contributors (particularly those attending school) that teasing and bullying were possible outcomes of the broadcast. It said that advice was given on changing social media settings to private for the time of the broadcast and the period afterwards in order to avoid unwanted attention. Advice was also provided on how to block or complain about abuse from social media sites.

The Licensee also explained that following broadcast, press interest was handled by a PR company who fielded requests for interviews and assisted the contributors with media enquiries.

It also said that the production company contacted the contributors after broadcast and asked for feedback on the programme and to check they were content. No issues had been raised by the contributors.

The Licensee also made representations on its decision to broadcast the four year old's Hooters-themed dance routine:

- the Licensee explained that, because this programme was an observational documentary, it was intended to be a record of what happened. The purpose of the programme was to provide an insight into the way certain individuals lived and, in doing so, "it would be quite wrong for the production company to attempt to change the narrative". The Licensee stated that it recognised that this had to be done with care and that the safety and well-being of all the contributors, particularly the children, were at the forefront of all considerations.
- while Channel 5 was aware that the Hooters-themed outfit might "attract criticism due to its association with Hooters girls and their revealing outfits", this was discussed with the child's mother. The outfit however was in the Licensee's opinion "not immodest at all" and the girl "was not sexualised by the outfit" which consisted of shorts, top and tights. It said that the girl: "was simply performing a series of 'freestyle' semi-acrobatic moves and she was not in any way simulating a provocative act". It said that the fact that her routine might have been "misinterpreted" was due to "some viewers...imposing a sexualised adult perspective on it". In reviewing the footage, with a view to its inclusion in the programme, Channel 5 said that it and the production company "bore in mind" the welfare of the four year old and her dignity. Taking account of these factors, they were satisfied that it was appropriate to include the footage as part of the story. Channel 5 stated: "we also bore in mind that if the programme did give rise to criticism or comment this was unlikely to impinge on [the child] in anyway as she was too young to comprehend any criticisms of her outfit and routine and in any event, any such criticism was likely to be directed at her mother".

Channel 5 noted the comments made by the four year old's mother about the competition being a "controlled environment". It said that the production company did

discuss with her the fact that if the competition was filmed then a national television audience would see her daughter in her Hooters-themed outfit and there was a possibility of an adverse reaction to this. However, the child's mother "remained happy" for the filming to take place and she was keen for further opportunities to undertake more filming with her daughters. In addition, Channel 5 said that the child's mother knew that if necessary the Producer and the production company were available at any time to support her and her children.

Further, in response to Ofcom's Preliminary View that Channel 5 did not appear to have demonstrated due care in broadcasting the footage of the four year old girl performing, the Licensee provided the following comments:

Firstly, Channel 5 stated it was "particularly concerned" that Ofcom had exceeded its remit in this case. It explained that "the whole thrust" of the Preliminary View was based upon Ofcom's view that the broadcast of the "brief footage of the child's performance at the pageant harmed her welfare and dignity rather than a consideration of the care taken during production". In the Licensee's view, in applying Rule 1.28, "it was not part of Ofcom's remit to decide whether in fact a child's welfare and/or dignity has been adversely affected by a particular broadcast (which on the evidence it was not) and, in the absence of professional input, it may not be an area Ofcom should be drawn into."

The second point raised by Channel 5 was that Ofcom had not given sufficient weight to the fact that the programme was an observational documentary and "that not all the Code Guidance (relating to Rules 1.28 and 1.29) is necessarily appropriate for this genre." In this case Channel 5 stated that the child was participating in a pageant just as she would have done had the cameras not been there. Therefore Channel 5 disputed Ofcom's view that there should have been a full risk assessment when the production company became aware of the child's Hooters-themed costume, particularly as Ofcom had stated in its Preliminary View that it was not a revealing costume. To support this view, Channel 5 highlighted Ofcom's previous investigation into the Channel 4 programme *Benefits Street*, also an observational documentary, in which Ofcom determined that: "Ofcom's role in applying Rule 1.28 and 1.29 is not to judge whether it is appropriate to reflect a child's life in a certain way, even if it is uncomfortable to some viewers to see children living in certain environments. Our duty is, rather, to ensure that the broadcaster took care of the children in terms of their physical and emotional well-being while they were participating in each stage of the production and following transmission."³

Thirdly, Channel 5 expressed concern that the way in which Ofcom had highlighted the issue of the mother's interest in this case which, in their view, was not fair. Channel 5 questioned how Ofcom had come to the conclusion that the mother had a particular interest in her child participating in the programme as it did not reflect its own understanding of the situation and therefore it considered this to be an unfair characterisation of her.

Finally, Channel 5 stated that the welfare of all the children "was taken extremely seriously throughout the production". It explained that although a formal risk assessment was not completed in relation to the particular piece of footage, "both we and the production company considered carefully whether, and if so, what footage to include." Therefore, Channel 5 concluded that due care had been taken in relation to

³ See: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb257/obb257.pdf>

the child's welfare and dignity which was "appropriate to the particular circumstances of this observational documentary".

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appears to it best calculated to secure the standards objectives. One of these objectives is that people under the age of eighteen are protected (including young people under the age of eighteen who take part in programmes). This objective is reflected in Section One (Protecting the Under-Eighteens) of the Code.

Under-eighteens can participate in television and radio programmes provided the broadcaster complies with Rules 1.28 and 1.29 of the Code.

Ofcom has published detailed guidance on these rules which was drafted with the assistance of child experts and child welfare groups. The purpose of the Guidance is to help broadcasters achieve the appropriate level of protection for under eighteens in programmes when complying with Rules 1.28 and 1.29 ("the Code Guidance").

In coming to this Decision, Ofcom took careful account of the broadcaster's and audience's right to freedom of expression. This is set out in Article 10 of the European Convention on Human Rights. Article 10 provides for the right of freedom of expression, which encompasses the right to hold opinions and to receive and impart information and ideas without interference by public authority. Observational documentaries which reflect real life experiences can challenge viewers' perceptions and attitudes, particularly where children and/or the vulnerable are concerned.

Ofcom's role in applying Rules 1.28 and 1.29 is not to judge whether the subject matter of a documentary is appropriate even if that subject matter makes uncomfortable viewing for some. Ofcom's role is to ensure that the broadcaster has taken due care of any children who have participated in the programme before, during and after production. The factors Ofcom expects a licensee to consider when providing due care at each of these stages are set out in the Code Guidance.

Rule 1.28

Rule 1.28 of the Code states that:

"Due care must be taken over the physical and emotional welfare and the dignity of people under-eighteen who take part or are otherwise involved in programmes. This is irrespective of any consent given by the participant or by a parent, guardian or other person over the age of eighteen in loco parentis".

The concept of "due care" is central to Rule 1.28. The Code Guidance makes clear that the level of care must be "appropriate to the particular circumstances". Broadcasters are required to decide what measures are appropriate in the context of individual programmes, genres and formats and the level of child participation involved. Relevant factors include a participant's age, and maturity and capacity to make judgments about participation and its likely consequences.

In this case, a four year old girl appeared in a post-watershed observational documentary wearing an outfit based on the uniform of the female staff of the Hooters restaurant chain. In the programme she was shown performing a dance routine which included some movements (such as leaning backwards on all fours,

while thrusting her hips backwards and forwards to the audience) which could, in our view, be interpreted by some adults as being of a sexualised nature.

To assess whether Channel 5 complied with Rule 1.28, we considered the various steps it took before, during and after production to ensure due care of the four year old girl.

Before and during production

We noted first that Channel 5 confirmed that the production team for this programme had prepared its own code of conduct for the programme and a child protection policy. Channel 5 confirmed this was based on “the Ofcom Code Guidance, the BBC’s Child Care Policy and other available guidelines”.

We also noted the fairly extensive steps (see Response section above) that the production company took to protect the child in terms of her involvement in the programme before production and during production. These included: providing information regarding the nature of the proposed programme and the likely commitment; obtaining parental consent; establishing a single point of contact for all of the families throughout the production process; considering whether psychological assessments of contributors were necessary prior to filming and the availability of a psychologist (on request) to advise on welfare issues throughout the production; information on the potential negative outcomes; and practical advice on handling the media and social media settings.

The child’s mother consented to her daughter participating in the programme and being filmed. We noted however her view, as broadcast in the programme, that the appearance of her daughter in the Hooters-themed outfit should not be “controversial” because it was no different to a “*little girl*” wearing a “*swimming costume*”, and the pageant was “*a controlled environment*” and “*ticket only*”. In Ofcom’s view, this suggested that the closed nature of the pageant itself initially contributed to the mother’s decision that it was suitable for her daughter to be filmed wearing the outfit. We further noted that, despite the comments made by the child’s mother about the controlled environment, the production team did discuss with her later that if the pageant was filmed then a national television audience would also see her child in the Hooters-themed outfit and there was “the possibility of an adverse reaction” to this. Nonetheless the child’s mother “remained happy for the filming to take place”. Therefore, despite recognition and concern from the production team that there may be “an adverse reaction” to the four year old child appearing on television in a Hooters-themed outfit, the mother provided consent for filming to take place and the production company proceeded on this basis.

Ofcom acknowledges that there will be many circumstances in which it might be appropriate for a parent to have a substantial role in determining a child’s contribution to a programme. However, in the Code Guidance, we make clear that whilst we “do not seek to lessen the importance of the views of parents or guardians on children’s participation...many parents and guardians will not be familiar with the production process or have a full understanding of the implications of their child’s participation”.

The Code Guidance states that in cases where a parent or guardian may have an especially strong interest in a child participating in a programme (for example where a parent is keen to promote their child’s talents or abilities), broadcasters and programme makers have a responsibility to assess for themselves whether it is in the best interests of the child to participate, and what impacts the participation may have on the child in question. Rule 1.28 makes clear that due care involves the

broadcaster making a judgment on this, irrespective of the consent of the child, a parent or guardian.

We noted Channel 5's view that the way in which Ofcom had highlighted the mother's interest in her child performing in this programme, as set out above, was "an unfair characterisation of her". Ofcom's guidance here does not relate to the individual actions taken by the mother in this case but reflects best practice for all broadcasters where they are filming with a parent who clearly has a strong interest in their child performing. The aim of the guidance is to ensure that the broadcaster considers the requirements of applying Rule 1.28 without being unduly influenced by a third party. In this case the fact that the production team highlighted to the mother that there might be "an adverse reaction" to the child appearing in the Hooters-themed outfit but accepted her consent that she "remained happy" for the filming to continue appeared to Ofcom to indicate that Channel 5 had unduly relied on the mother's consent rather than making its own considered and independent assessment of any adverse consequences arising from the broadcast of the images of the child wearing this outfit.

We noted that Channel 5 did take the advice of an experienced psychologist at the pre-production stage who decided it was not necessary to undertake psychological assessment of the contributors prior to filming given the format of the programme. The psychologist and other counsellors were also retained (on request) for the duration of the production "to assist with any problems the production company or any of the contributors might have before, during or after filming and broadcast." However, Channel 5 confirmed that none of the contributors took up this offer and no further information was offered with regard to the production company seeking the advice of, or escalating any matters to, the psychologist.

The Code Guidance also suggests that where appropriate a thorough risk assessment may help to ensure that the requirements of Rules 1.28 and 1.29 are met, for example, where the child's participation in a particular scene in the production may involve potential negative risks to their "physical and emotional wellbeing". In addition, the Guidance states that "...where necessary risk assessments should be ongoing during the production and post-production stages." The Guidance also suggests that it is for broadcasters to decide whether to seek advice from an appropriate expert and indicates that "a specific scene and/or the age of the young person and their experience and maturity may influence the extent of expert opinion required."

In this case, the Licensee did produce evidence of taking a number of measures before and during production (as set out above) to ensure due care was taken of all the children participating in the programme. For example Channel 5 had sought the view of a professional child psychologist at the pre-production stage (see above) . However, its response did not provide any evidence of any initial risk assessment nor any other evidence of any ongoing risk assessment, as suggested in the Guidance. This was despite the fact that the Licensee had recognised and informed the child's mother that there may be "an adverse reaction" to her daughter being shown on television in a Hooters-themed outfit.

Nonetheless, Channel 5 stated in its later representations that it was "not sure", in this instance a full risk assessment was required. In its opinion, the child was not appearing in, for example, a drama in which she was being asked to do something unfamiliar but in an observational documentary which was reflecting "a part of the child's normal life" and she was behaving "as she would have done had the cameras not been there."

The Code Guidance does not specifically indicate that any particular genre is less or more likely to require a broadcaster to conduct a thorough risk assessment. A formal risk assessment may not be necessary at all. Rather the Guidance advises broadcasters to consider what is appropriate in each case depending on the particular programme and the nature and degree of the child's involvement. It also advises that the participant's age and capacity to make judgments about participation and its likely consequences may also impact on the broadcaster's decision. Further, while it may not appear to a broadcaster at the start of a production that a risk assessment is required, it may become apparent during production that the nature of a child's participation has developed in a certain way and the broadcaster needs to be responsive to such changes.

In Ofcom's opinion, one such opportunity for considering a risk assessment in this case would have been during production when the production team became aware of the child's dance performance at the pageant when she was shown wearing the Hooters-themed outfit. We noted that the production team had advised the mother previously that the Hooters-themed costume had the potential to generate an "adverse reaction" which suggested that there was a concern about the adult connotations of a four year old wearing such an outfit. In Ofcom's view therefore, the combination of both the outfit and the more adult style dance routine had the potential to involve negative risks to the child's welfare and dignity. A risk assessment and/or expert advice on this development during production would have enabled Channel 5 to undertake a more robust and considered assessment of whether it was appropriate to include this material in the programme as broadcast.

Post-production

Ofcom took account of the steps taken by Channel 5 to ensure compliance at the post-production stage of the programme as set out in the Response section above, including advice provided to contributors on teasing and bullying and the handling of social media. Nonetheless, Ofcom was concerned about the Licensee's decision to broadcast the sequence showing the four year old girl performing in the Hooters-themed outfit, and in particular the shot of her leaning backwards on all fours facing upwards and thrusting her hips backwards and forwards to the audience (see Introduction for a detailed summary of this sequence).

We noted that in Channel 5's view the outfit was "not immodest at all" and that the girl "was simply performing a series of 'freestyle' semi-acrobatic moves and she was not in any way simulating a provocative act". In Ofcom's view the shorts and leotard worn by the child were not particularly revealing or out of place within the pageant. However, Ofcom was concerned that Channel 5 did not consider carefully enough whether it was ensuring due care of the girl in deciding to broadcast the shots of her performing her 'freestyle' routine while wearing the Hooters-themed outfit. This was because, although not revealing in itself, the outfit she wore was created deliberately to be linked with a restaurant chain which is known to incorporate sex appeal in its corporate branding (the word "Hooters" was written in sequins across her chest). While wearing this outfit, the four year old girl was performing a routine, which to the child may have simply been a series of semi-acrobatic dance moves, but to some adult viewers could have been interpreted as being of a sexualised nature. Ofcom's concern focused on the shot of her leaning backwards on all fours thrusting her hips back and forwards, although we were also concerned (but to a lesser extent) about the shots of her standing up and moving her hips back and forth and from side to side.

It was a clearly a delicate matter of editorial judgment for Channel 5 to decide what footage to show of the girl performing in the Hooters-themed outfit. The Licensee needed to balance the paramount need to protect the young child's welfare and dignity against, in the context of an observational documentary, its objective of reflecting the reality of children participating in pageants.

Ofcom noted that the shots of the girl performing her 'freestyle' routine were brief and intercut with shots of her mother watching her and of other parents commenting (both positively and negatively) on the girl's costume and performance. These factors helped, in Ofcom's view, to reduce the potential adverse impact of the clips on the child's dignity and welfare.

Ofcom acknowledged that this programme was a documentary which featured the girl taking part in an activity – performing at the pageant – which she would have done irrespective of whether she was featured in the programme. We acknowledge that a broadcaster's considerations in taking due care of a child participant are likely to be more significant in certain programme genres, such as drama or a constructed reality format, compared to an observational documentary. However, the filming of a child in a real-life situation still requires the broadcaster to consider whether featuring the child in that way in the programme may present any risks to the child's welfare or dignity. In this case, Ofcom considered that broadcasting the footage of this four year old girl leaning backwards on all fours and thrusting her hips backwards and forwards four times towards the audience had the potential to compromise the child's dignity and welfare. In Ofcom's opinion, broadcasting this material indicated that Channel 5 had not considered carefully enough the potential adverse effects on the child, who, it accepted was unaware of how it could have been interpreted by some adults in the audience.

In particular, we noted that Channel 5 took the view that: "...if the programme did give rise to criticism or comment this was unlikely to impinge on [the child] in any way as she was too young to comprehend any criticisms of her outfit and routine and in any event, any such criticism was likely to be directed at her mother". We also noted the Licensee's view that the child "was not sexualised by the outfit" and that the child's "innocent and acrobatic dance routine" might have been "misinterpreted" was due to "some viewers...imposing a sexualised adult perspective on it". We disagreed with Channel 5 on these points. The Code Guidance specifically advises that factors such as a child's age and their capacity to make judgments for themselves may influence the level of due care required from the broadcaster. The fact that the four year old girl was too young to understand any criticisms of her outfit and routine increased the need for Channel 5 to consider very carefully the possible impacts on the child's welfare and dignity of the broadcast of this material. It is precisely because some viewers could have interpreted the routine as sexualised that Ofcom considered the Licensee had not taken due care of the child by broadcasting this material.

Ofcom noted that Channel 5 did not conduct a risk assessment at the post-production stage to consider any risks associated with broadcasting the child's Hooters-themed performance and/or to seek additional expert advice. The Licensee did submit that both it and the production company "considered carefully whether, and if so, what footage to include". Given the child's age, her lack of understanding of the potential impact of her 'freestyle' performance in a Hooters-themed outfit being broadcast, and her mother's interest in her participating in the programme, it was, in Ofcom's view, even more important for the Licensee to consider very carefully which shots of the child to broadcast. Ofcom concluded that the Licensee had either not undertaken a considered assessment of the potential risks to the child's welfare and

dignity by the broadcast of this particular content, or had made an error of judgment in deciding it was appropriate to include this material in the broadcast..

It appeared to Ofcom that Channel 5 had made its decision to include this material on the basis that the child was participating in the pageant as part of her normal activities, did not understand how the performance could be interpreted by adult viewers, any criticism of it was unlikely to be directed at her, and her mother (who clearly had an interest in the child participating in the programme) had provided consent and was happy for the child to be featured in this way. Given the nature of the material and the potential risks it presented to the child's welfare and dignity, we considered this was an error of judgment.

Ofcom noted Channel 5's view that it was "not part of Ofcom's remit to decide whether in fact a child's welfare and/or dignity has been adversely affected by a particular broadcast." Rather, Channel 5 argued, having taken a view that a child's involvement in a programme had the potential to impact upon her welfare and/or dignity, the provisions of Rule 1.28 require Ofcom to consider whether due care had been taken by the Licensee in the circumstances. In effect, Channel 5 considered that Ofcom had decided that certain footage should not have been broadcast rather than Ofcom "examining the care taken during participation at this stage of the production and following transmission".

Ofcom takes this opportunity to clarify the scope of Rule 1.28 to all broadcasters. The care of child participants taken by a broadcaster before, during and after production is clearly central to the rule's requirements. However, compliance with Rule 1.28 must also involve editorial decisions made by the broadcaster as to whether it is appropriate to transmit material including a child participant. Such judgments need to be made independently, without undue reliance on measures the broadcaster may have already taken to ensure due care of that child. The broadcaster must determine whether the broadcast of material could potentially negatively impact on the child's physical or emotional welfare, or their dignity and make an appropriate decision about whether it is right to broadcast the material in the circumstances.⁴

Ofcom concluded that in broadcasting this material, the Licensee did not take due care of the child's welfare and dignity, irrespective of the consent given by the child's mother. This was a breach of Rule 1.28 of the Code.

Rule 1.29

Rule 1.29 of the Code states that:

"People under eighteen must not be caused unnecessary distress or anxiety by their involvement in programmes or by the broadcast of those programmes".

We noted the scenes shown at 21:45 and 21:56 in which the child was crying and refusing to go on stage. Channel 5 stated in its representations that the production team was satisfied that the distressed behaviour of the child during the beauty round of the pageant was not a result of her involvement in the programme but her character and desire to appear on stage first. The mother's assurances here served to satisfy the Producer this was the case, and other than stopping the filming for a

⁴ Ofcom has added this guidance to the recently published Guidance on Rules 1.28 and 1.29. See <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/updated-code-guidance.pdf> for the most up to date guidance on these rules.

period to allow matters to calm down, it was decided it was not “necessary to raise the matter with either Channel 5 or the psychologist”.

It did not appear to Ofcom that the child’s obvious distress had resulted from the presence of the production team, rather that she was distressed by aspects of her participation in the pageant. On the basis of the evidence available to Ofcom on this issue, we considered there was no breach of Rule 1.29 of the Code.

We noted however that the production team took the decision not to escalate this matter and seemed to rely largely on the mother’s assurances in reaching this decision. We take this opportunity to remind broadcasters that if a parent or guardian has a strong interest in a child participating in a programme, broadcasters and programme makers have a responsibility to reach a decision themselves whether it is in the best interests of the child to participate, and what impacts the participation may have on the child.

Breach of Rule 1.28

Fairness and Privacy cases

Upheld

Complaint by The British Broadcasting Corporation

The Truthseeker: Media 'Staged' Syria Chem Attack

RT, 23 March 2014 at 04:45, 08:45, 12:45, 16:45, 20:45 and 24 March 2014 at 00:45

Summary

Ofcom has upheld this complaint of unjust or unfair treatment made by the British Broadcasting Corporation (“the BBC”).

RT (formerly Russia Today) is a global news and current affairs channel produced in Russia, and funded by the Federal Agency for Press and Mass Communications of the Russian Federation¹. In the UK, the channel broadcasts on satellite and digital terrestrial platforms. The licence for RT is held by Autonomous Non-profit Organisation TV-Novosti (the “TV Novosti” or the “Licensee”).

The Truthseeker (“Truthseeker”) was an investigative current affairs series broadcast on RT. On 3 June 2014, Ofcom received a fairness complaint² from the BBC regarding an episode of Truthseeker entitled “*Media 'Staged' Syria Chem Attack*” (the “Programme”) which was broadcast on a number of occasions on 23 and 24 March 2014 and presented by Daniel Bushell (the “Presenter”).

The Programme made a number of allegations about the BBC which centred on the following three BBC programmes (the “BBC Programmes”):

- an edition of *BBC News at Ten* broadcast on 29 August 2013 (the “29 August BBC News”);
- an edition of *BBC News at Ten* broadcast on 30 September 2013 (the “30 September BBC News”); and
- an episode of the BBC current affairs programme *Panorama* entitled “*Saving Syria's Children*” broadcast on 30 September 2013 (the “BBC Panorama Programme”).

The BBC complained that it was treated unjustly and unfairly in the Programme. The BBC said that a number of unsubstantiated and untrue allegations were made against it in the Programme, including that the BBC had fabricated an atrocity in reports on Syria and had digitally altered the words spoken by an interviewee in footage in the BBC Programmes. The BBC complained that it was treated unfairly because material facts about or related to it in the Programme were presented,

¹ See the description of RT in *Television News Channels in Europe (Based on a Report prepared by the European Audiovisual Observatory for the European Commission – DG COMM, October 2013, <http://www.obs.coe.int/documents/205595/264629/European+news+Market+2013+FINAL.pdf/116afdf3-758b-4572-af0f-61297651ae80>)*. Section 5.4.6 of this report states that Russia Today “can be considered as a state funded or public media service”.

² The BBC also made a standards complaint about the Programme (see page 22).

disregarded and omitted in way which was unfair to the BBC and that the BBC was not given the opportunity to respond to the allegations made in the Programme. The BBC also complained its position in relation to the allegations was misrepresented in an unfair manner.

Ofcom found that the Programme as broadcast resulted in unfairness to the BBC. This was because, having made serious allegations of wrongdoing about the BBC in the Programme, the Licensee failed to take reasonable care to satisfy itself that material about, or in relation to, the BBC with regard to these allegations were not presented in a way which was unfair to the BBC. In addition, the BBC was not afforded an appropriate and timely opportunity to respond to the allegations made about it in the Programme nor was its position on these matters fairly represented.

Programme summary

Ofcom reviewed the entire Programme, which was approximately 13 minutes long, and noted the following.

The Programme was introduced by the Presenter who said:

“Stunning fakery in the alleged chemical weapons attack according to a former UK ambassador. Coming up”.

Footage was shown of a number of people, covered in what appeared to be blood, lacerations and burns, standing or lying on the floor of a room.

This footage was accompanied by the following voiceover commentary:

“The British Broadcasting Corporation is accused of staging chemical weapons attack”.

Shortly afterwards, the Presenter said:

“August 2013 and NATO leaders can’t get the public onside for the imminent bombing of Syria. Suddenly the BBC says it was filming a small rural hospital, and a game-changing atrocity happens right there the moment they were filming”.

A caption was also shown on-screen which said:

“World changing atrocity happens when BBC invited to film in remote hospital”.

Footage was shown labelled with the following on-screen graphic:

“‘Syria Crisis’, Ian Pannell, BBC (August, 2013)”.

This footage showed various wounded people being brought into a hospital. The voiceover within this footage said:

“Last month we were filming the doctors working at this hospital, when victims of an incendiary bomb attack on a school playground started pouring in”.

Footage was shown labelled with the on-screen graphic:

“‘Saving Syria’s Children’, Ian Pannell, BBC (September 2013)”.

The footage showed a female³ (“Dr Hallam”), wearing a surgical mask which covered her mouth, who said:

“Absolute chaos and carnage here, it must have been some sort of napalm”.

The Programme switched back to the Presenter who said:

“But a highly sceptical public stayed hostile to military intervention. Exactly one month later the leaders are trying to pin a chemical weapons attack on Syria without success”.

Two versions of the footage of Dr Hallam were shown side by side on-screen labelled “August 2013” and “September 2013”, respectively, while the Presenter said:

“The BBC airs exactly the same footage, but digitally alters the word ‘napalm’ for quote ‘chemical weapon’ hoping no-one will notice”.

Footage was then shown in which Dr Hallam said:

“Absolute chaos and carnage here, it must have been some sort of chemical weapon”.

The Presenter said:

“Not only did folks notice but it unleashed a massive public investigation which made some extremely disturbing findings”.

An image of a letter of complaint to the BBC labelled “First letter of complaint to the BBC” was shown on-screen whilst the Presenter made this comment. The following captions were shown above and below the image of the letter, respectively:

“Fabrication in BBC Panorama’s ‘Saving Syria’s Children’”; and

“BBC ‘napalm/ chemical attack’ a ‘stunning fakery’: fmr [sic] UK Ambassador C. Murray”.

An on-screen graphic showed the following text, which was also spoken by a voice-over:

“This is the total fabrication – from beginning to end – of an atrocity with BBC ‘reporter’ Ian Pannell standing amidst a tableau of very bad actors. This is completely beyond the pale – Robert Stuart”⁴.

³ This individual was later identified by TV Novosti as Dr Rola Hallam.

⁴ After the broadcast of the BBC Programmes, Robert Stuart complained to the BBC that the BBC Programmes included faked footage. As of the date of the broadcast of the Programme, Mr Stuart had written two letters of complaint to the BBC, both of which the BBC had responded to substantively “but in the Licensee’s view ‘implausibly in certain respects’”. Shortly before the broadcast of the Programme, on 17 March 2014, Mr Stuart sent a third letter of complaint to the BBC Editorial Complaints Unit (the “ECU”). Following the broadcast of the Programme, on 23 April 2014, the ECU provided its provisional outcome concluding that there were no grounds to uphold any aspect of Mr Stuart’s complaint. On 19 May 2014, the ECU made its final decision and did not uphold Mr Stuart’s complaint. The BBC provided, as annexes to its complaint, letters of complaint from Mr Stuart to the BBC and the BBC’s responses to these letters. The BBC also provided Mr Stuart’s letter to the ECU and its

A graphic entitled “BBC doctors claims from ‘napalm’ to ‘chemical weapon’” was shown on-screen. Below this graphic the following text was shown:

“Absolute chaos and carnage here, it must have been some sort of napalm”; and

“Absolute chaos and carnage here, it must have been some sort of chemical weapon”.

These sentences were accompanied by images of their respective graphical ‘audio analyses’⁵ which were identical, save for the words ‘napalm’ and ‘chemical weapon’ in which the graphical audio analyses differed.

As these graphics were shown, the Presenter said:

“This audio analysis by media investigator, Robin Upson, shows both versions are identical and from the same speech. The BBC then digitally altered the words from ‘napalm’ to ‘chemical weapon’, the exact justification NATO was finding difficult to prove”.

The Presenter said:

“The game-changing allegation was made by two doctors that had travelled with the BBC, who claimed the number of sudden casualties is quote ‘overwhelming’. ‘What kind of doctor’, notes media investigator Robert Stuart, ‘gives interviews, when she is surrounded by supposedly seriously burnt and dying teenagers?’”

The following caption was shown on-screen:

“Investigator: what kind of doctor does interviews when number of victims ‘overwhelming’”.

Footage of a hospital was shown and within this footage a medic said:

“Get anyone who isn’t a patient out of here”.

The Presenter said:

“When a nurse does finally start to help, her order to ‘get anyone who isn’t a patient out of here’ doesn’t apply to the cameramen. Even worse, notes Stuart, is the bizarre acting which starts when the man in the centre gives the sign”.

Footage was shown labelled with the following on-screen graphic:

“‘Syria Crisis’, Ian Pannell, BBC (August, 2013)”.

This footage, which lasted approximately 12 seconds, showed various individuals, covered in what appeared to be blood, lacerations and burns, standing or lying down on the floor of a room apparently in a hospital. In the foreground of this footage, one

preliminary outcome. The BBC did not provide the ECU’s final decision but referred to it in the body of its complaint to Ofcom. Ofcom notes that Mr Stuart’s correspondence with the BBC in relation to his complaint has been published by him at <https://bbcp panoramasavingsyriaschildren.wordpress.com/>

⁵ That is, a graphical depiction of the sounds of the words.

man was initially shown standing still for approximately two seconds and then lifting his arm and starting to move and groan. An extract of this footage, without sound, was also shown at the beginning of the Programme.

During this footage a voice off-camera said:

"What do you need to see? We are just human beings, we want to live, you know? This is our right to live".

A caption was shown on-screen which stated:

"Investigator R. Stuart – BBC's report on 'napalm/ chemical weapon attack' is 'staged'".

The Presenter stated:

"Dr Rola, on whose sole claim the BBC sends napalm/chemical weapons allegations around the world, is actually the daughter of Syrian rebel Mousa Al-Kurdi. The parallel to the Gulf War and 'Nurse Nayirah'⁶ is stunning. Congressmen said the nurse's tearful testimony that Iraqis were killing children swung their vote in favour of war...Nurse Nayirah became the mainstream's darling, but once the vote had safely passed, she admitted inventing the whole thing and was actually the daughter of the Kuwaiti Ambassador to Washington lying to get the public to back war".

Whilst the Presenter made the above comments, the following captions were shown on-screen:

"'Dr Rola', responsible for chem [sic] claim, is daughter of Syrian rebel Mousa Al-Kurdi: 'Liveleak'"; and

"'Nurse Nayirah' lies pushed U.S. to bomb Iraq".

The Presenter asked George Galloway MP the following question:

"Why do we get almost identical claims before each war, which then prove lies?"

George Galloway, who was shown via video-link, said in reply:

"Well, the Bush and Blair Corporation as it became in the run up to the Iraq war, has almost entirely lost its reputation for journalistic integrity. A full enquiry must be launched into why the BBC used a piece of material, which was not just wrong, but was falsified and falsified with the purpose of propelling our country

⁶ Ofcom understands this to be a reference to Nayirah al-Şabah, who gave testimony to the US House of Representatives' Congressional Human Rights Caucus in 1990, alleging that atrocities had been carried out by Iraqi soldiers in Kuwait following Iraq's invasion of Kuwait. It has been reported that Nayirah al-Şabah's testimony was cited by some US politicians as a rationale for US participation in the 1990 Gulf War. It was subsequently reported that Nayirah al-Şabah was the daughter of Saud Al-Sabah, the Kuwaiti ambassador to the United States and her testimony had been arranged by a public relations company for a "Kuwaiti-sponsored" organisation. These revelations called into question the authenticity of Nayirah al-Şabah's original testimony. (See for example <http://www.nytimes.com/1992/01/15/opinion/deception-on-capitol-hill.html>).

into war. That's not what the British public pays its BBC licence fee for; so that it can be tricked into a war".

Whilst George Galloway made the above comments, the following captions were shown on-screen:

"In lead-up to Iraq war 97% of BBC airtime given to pro-war media speakers, highest of any media: Cardiff Univ. study";

"Full enquiry must be launched into BBC 'napalm/ chemical' claim"; and

"Parliamentarian: both sides guilty in Syria but we're being tricked into supporting the rebels".

The Presenter said:

"In a statement, the British Broadcasting Corporation says it stands by its report. The Syrian opposition denies the allegations. Investigators such as Robert Stuart note their many questions sent officially to the Corporation remain unanswered. There are also numerous such precedents both in this war and previous invasions".

Whilst the Presenter made these comments an image of a further letter of complaint to the BBC labelled *"Third letter of complaint to the BBC"* was shown on-screen and the following caption was shown above the image of the letter:

"Fabrication in BBC Panorama's 'Saving Syria's Children'".

The Programme went on to discuss the alleged widespread faking of atrocities by the mainstream western media, including the BBC.

The Presenter said:

"'Brilliant' is how a top western official called tricking the public through routine faking of atrocities and commonly aired on mainstream bulletins. Nightly News show just a few cases of what happened next after mainstream cameras ended their reports".

Footage from a Nightly News broadcast was shown in which the presenter of this broadcast said:

"It shows people putting on, you know, fake wounds, it shows – there is some guys; there - look there's their head wounds, 'peace everybody. You know we're doing the right thing, we're creating fake propaganda'. I mean it's not even real atrocity so there they're lined up. There is another video action showing a guy kicking his leg and with a fake blood wound. Here is a guy who wakes up from his funeral! Watch this: they're up; wait, err there, oh he's awake – he's not even really dead, and so I mean this is just crazy what goes on. There is another video that was shot of a supposed massacre; and it cuts, you don't see the whole thing".

This section of the Programme included a screen shot of some data from the "Lexis Media Database". This data, in combination with the accompanying commentary by the Presenter, suggested that on 205 occasions the BBC had published or broadcast

information which was sourced from “so called activists behind the fakes”. The Presenter said:

“The so-called activists behind the fakes are by far the most popular source, despite them never being verified and regularly disproved as fabrications to justify for more NATO arms. The term ‘activist’ may sound like a well-meaning western campaigner or charity but the foreign policy journal notes it’s just news speak for insurgents”.

The Presenter said that the “official source on Syria casualties or what mainstream claims is official is the impressive sounding organisation The Syrian Observatory for Human Rights”. The Presenter said that “Reuters exposed the fact three years ago [that] it was not an organisation at all or even working in Syria. It’s a single pro-insurgency supporter living in Coventry, England”. The following caption was also shown:

“‘Official’ Syria narrative comes from ‘some guy in a British apartment’ – NSNBC”.

Shortly afterwards the Presenter said: “In leaked footage ordinary Syrians told the BBC they are tired of its lies and the insurgents they’re cheer-leading are a tiny minority led by foreign gangs”.

The Programme showed footage of a reporter questioning people on a street in Syria. The reporter asked a passerby “you don’t like BBC? Why?”, to which the passerby replied: “Because you are talking very bad about Syria. Everybody when they hear BBC Arabic they can hear lies about Syria”. This footage was accompanied by the following captions:

“Courtesy ‘Syrian to BBC reporter: you are not telling the truth about Syria’”; and

“Leaked footage: Syrian’s won’t speak to the BBC because of its lies”.

The next part of the Programme focused on the US Central Intelligence Agency (“CIA”).

In particular, the Presenter said:

“Pro-war media forced to resort to colossal lies since Intelligence Chiefs revealed to America’s top investigative reporter Sy Hersh quote ‘Obama’s cronies are making it up’”.

An onscreen graphic showed the following text which was also spoken by a voiceover:

“The attack ‘was not the result of the current regime’ the high-level intelligence officer wrote in an email to a colleague. ‘The guys are throwing their hands in the air and saying “How can we help this guy” – Obama – when he and his cronies in the White House make up the intelligence as they go along?’, said a former senior intelligence official...(Sy Hersh, Author, ‘Whose Sarin’)”.

The Presenter also said:

“The Senate Committee Enquiry revealed CIA running mainstream media in the vast operation known as ‘MockingBird’. More than 400 journalists and media chiefs claiming to watchdog the government were the exact opposite joining to

mask US government crime at home and abroad. The operation continues despite Agency denials. Counter Punch discovered CIA imposing agents on firms like CNN. Former CIA executive Michael Scheuer British media are even closer to Intel targets [sic]”.

During this part of the Programme, the Presenter also interviewed Francis Boyle, Professor of International Law at Illinois University. The Presenter asked “[H]ow can nations stop war media that now perform the CIA’s covert operations?” to which Francis Boyle replied:

“They certainly have their visas revoked and sent packing home because I really don’t understand why some of these countries keep, you know, European journalists, certainly in the United States, why they let them into the countries; because they are just using their coverage to provoke war and military intervention at home. In addition Bush junior administration lifted what was supposed to be the previous prohibition that intelligence agents were not supposed to infiltrate the media. You know, you have to be very careful certainly dealing with US reporters whether or not they are intelligence agents”.

The Presenter then said: *“Banning active units of the military also known as ‘War Stream Media’ shows how serious the situation is now”.*

During this section of the Programme, the following comments were also made about western mainstream media and the BBC:

- regarding media reporting of the conflict in Ukraine, the Presenter said: *“A leaked phone call with EU Foreign Minister Ashton, revealed the opposition planned and executed the infamous sniper violence of Kiev shooting both the police and their own supporters in the back. The study found a total of 250 mainstream sources lied that the snipers belonged to Yanukovich. Only seven of the entire mass media even mentioned the bombshell leak and those that did, framed the report to suggest it couldn’t possibly be true. Former Wall Street Journal editor Paul Craig-Roberts calls the coverage of Ukraine ‘a new low in the history of the main stream’, which is now simply what he describes as a ‘Ministry of Lies’”.* Whilst the Presenter made these comments, the following captions were shown on-screen:
 - *“New mystery snipers in Crimea, mainstream all backs opposition’s claims about their identity”;* and
 - *“New ‘NNDA’ Act legalizes media disinfo campaigns against Americans [sic]”;*
- the Presenter said: *“Investigative reporter John Helmner has uncovered the main stream staging demonstrations and attempts to provoke disorder...one US scholar notes the coverage has now become Orwellian. What’s going on?”* Referring to President Obama, David Cameron and the “French President”, John Helmer then said: *“When you’ve got weak political leaders you need to look stronger than you are in the public opinion in the media. So there’s this process of misleading and disinforming”.* These comments were accompanied by the following captions:
 - *“BBC digitally inserted political statements into P.riot ‘Concerts’, all fabricated: J. Helmner”;* and
 - *“‘Weak’ Hollande, Cameron and Obama ‘need to look stronger than they are in media’”;*

- specifically regarding the BBC, the Presenter said “*Scheuer adds the BBC now takes the lead in regime change operations that cause quote ‘anarchy and violence’*”. This was *accompanied* by a caption which read: “*Scheuer: Violence starts with the BBC*”; and
- the Presenter also said: “*Mainstream audiences are in freefall. CNN and MSMBC have shed half of their entire viewership in the last year alone. The question is how many more coups will they stage or help before they lose the public’s trust altogether?*”. Whilst this comment was made, the following caption was shown on-screen:

“Refuse visas for BBC journalists to ‘cover’ foreign ‘protests’ – Former CIA exec. M. Scheuer”.

The Presenter concluded the Programme by saying; “*Seek truth from facts, this is the Truthseeker*”.

Summary of the entertained complaint and the broadcaster’s response

The entertained complaint

- a) The BBC complained that it was treated unjustly or unfairly in the Programme because material facts about or related to it were presented, disregarded or omitted in a manner which gave viewers an unfair impression of it. In particular, the BBC said that the Programme included the following unsupported allegations:
 - i) the BBC fabricated an atrocity in a report on Syria in an attempt to deliberately mislead the public and to increase support for military intervention in Syria and to trick the public into war;
 - ii) the BBC subsequently “*digitally alter[ed]*” words spoken by an interviewee to state that there had been a chemical weapons attack to mislead the public when western governments were trying to “*pin a chemical weapons attack on Syria without success*” to justify military intervention in Syria;
 - iii) the BBC’s alteration of the fabricated report led to “*a massive public investigation which made some of the extremely disturbing findings*”: that the BBC and reporter Ian Pannell were guilty of a total fabrication of an atrocity;
 - iv) the BBC knowingly used actors in the reports pretending to be victims and relied on the questionable claims of a doctor who was both biased as a result of family political connections and who was lying to get the UK public to back war against the Syrian government; and
 - v) the BBC used the reports to provoke war and military intervention in Syria.

The BBC said that the Programme “*uncritically adopted the complaint which Mr Stuart had made to the BBC*”; misleadingly described this complaint from an individual as “*a massive public investigation which made some of the extremely disturbing findings*”; and unfairly included Mr Stuart’s claim that his questions [to the BBC – i.e. his complaint] “*remain unanswered*” without making any reference to the BBC’s letters to him of 2 December 2013 and 18 February 2014. The BBC added that no evidence was presented in the Programme to support the claims

set out above beyond Mr Stuart's letters to the BBC and the unexplained audio analysis, which the BBC said was false.

- b) The BBC complained that it was not given an appropriate and timely opportunity to respond to the claims made about it in the Programme. The BBC said that it knew nothing about the Programme until after it was broadcast. The BBC also said that RT had confirmed (by email to the BBC) that it did not put the allegations to the BBC prior to the broadcast and that it took a deliberate decision not to give the BBC an opportunity to respond to the relevant claims as a form of retribution for grievances some RT staff held regarding reports broadcast on BBC Radio.
- c) In addition, the BBC complained that its views were unfairly represented. It said that the inclusion of the comment "*In a statement, the British Broadcasting Corporation says its stands by its report*" unfairly gave the impression that RT had contacted the BBC and put its allegations of wrongdoing to it before the broadcast when this was not the case.

In making this complaint, the BBC said that the allegations that it had fabricated an atrocity in its reports and then digitally altered words spoken by an interviewee to deliberately mislead its audience are "incredibly serious" and "strike at the heart of the its obligations of due accuracy and impartiality".

By way of background to the Entertainment Decision, the BBC complained that the Licensee failed to follow Practice 7.9 for the following reasons:

- the BBC said that the Programme uncritically adopted Mr Stuart's complaint to the BBC in a way which was unfair to the BBC. The BBC complained that the Programme adopted and went further than the allegations against the BBC in Mr Stuart's complaint in that it suggested that the alleged fabrication was an attempt to deliberately mislead the public, to increase support for military intervention in Syria and to "trick the public into a war";
- the BBC complained that the Programme misleadingly described Mr Stuart's individual complaint as "*a massive public investigation which made some extremely disturbing findings*" when in fact the complaint was that of a private individual that the BBC has responded to in detail under its complaints procedure. The BBC said to describe a complaint made by a single private individual as a "massive public investigation" was an "absurd exaggeration";
- the BBC also said that the Programme had compounded this misleading impression by describing Mr Stuart's questions to the BBC as "*unanswered*". The BBC noted that at the time of broadcast of the Programme, it had already provided Mr Stuart with two "full and reasoned" responses to his letters of complaint⁷. Therefore, the BBC said that it was "grossly misleading" and unfair to the BBC and its complaints process to describe Mr Stuart's questions as "unanswered"; and
- the BBC was of the view that the Programme adopted Mr Stuart's unsubstantiated allegations that the atrocity was fabricated by the BBC and that the interview audio was digitally altered by the BBC. The BBC said "no evidence was presented" to support the allegations (save for Mr Stuart's

⁷ The BBC referred to the letters of 2 December 2013 and 18 February 2014 from the BBC to Mr Stuart.

letters to the BBC) and “an unexplained ‘audio analysis’ of the interviewee’s speech, which is false”. As such, the BBC said that material facts were presented in a way which was grossly unfair to it.

The BBC also complained that TV Novosti failed to follow Practice 7.11 (and the second bullet point of Practice 7.9) as the BBC was not given any opportunity to respond to the above allegations (or given any opportunity to contribute to the Programme). The BBC said that it knew nothing about the Programme until after it was broadcast. The BBC also said that the Licensee had responded (by email to the BBC) suggesting that the content of the Programme and TV Novosti’s failure to contact the BBC for comment were deliberate decisions made by the Licensee as a form of reprisal for grievances some RT staff held regarding reports broadcast on BBC Radio. The BBC also noted that the Programme did not quote or summarise the BBC’s responses to Mr Stuart and that this resulted in unfairness to the BBC.

In addition, the BBC complained that TV Novosti failed to follow Practice 7.13 as the views of the BBC, which was not invited to participate in the Programme, were not represented fairly. The BBC said that the only reference to the BBC’s position in the Programme was inclusion of the comment: “*In a statement, the British Broadcasting Corporation says its stands by its report*”. The BBC said this unfairly gave the impression that the Licensee had contacted the BBC and put the allegations of wrongdoing to it before the broadcast of the Programme when this was not the case.

The broadcaster’s response

Before addressing the specific points made by the BBC in its complaint, TV Novosti made a number of preliminary comments.

By way of background, the Licensee said that the Programme “questioned the authenticity of BBC reports of an atrocity described as taking place in Syria a few days after the use of chemical weapons in Damascus on 21 August 2013”.

TV Novosti said that following the broadcast of the 29 August BBC News “[d]oubts about the authenticity of the reports emerged within days” and that, after the 30 September BBC News and the BBC Panorama Programme had been broadcast, complaints had been made to the BBC alleging that some of the material in the BBC Programmes had been “faked”. In particular, the Licensee said that:

- a former UK ambassador had spoken of the “obvious faking of an interview casting doubt on some of the images presented” in the BBC Programmes; and
- a Mr Stuart had “suggested...that some of the events were staged, misleading and implausible”.

Referring to the BBC’s responses to Mr Stuart’s complaint, TV Novosti said that the BBC had “responded in detail” and had “denied all the claims in its response” to Mr Stuart’s complaint. In particular, the Licensee said that the BBC:

- “has accepted, in correspondence with Mr Stuart, that the material was edited, including changing the words spoken by a witness and presenting events out of chronological order, but denies that they were staged.”; and

- “contends that what was done fell within the latitude allowed to broadcasters by the use of the word ‘due’ in relation to accuracy”.

TV Novosti said that it disagreed with the BBC’s response to Mr Stuart and that the editing of the footage in the BBC Programmes “went far beyond what was proper in the circumstances” and, to the extent the evidence was open to testing, it “clearly was faked”.

Regarding the Programme, the Licensee denied that the BBC’s complaint was well-founded. TV Novosti said that it reported on the matter with its “own take on what had happened” and that the “treatment of the BBC in the Programme was neither unjust nor unfair”. In particular, TV Novosti said that the BBC suffered “no injustice of unfairness at all” because it had “compromised the trust of its audience by editing and broadcasting this material in this way”. TV Novosti also said that what was said about the BBC in the Programme was “legitimate and not unfair” and “richly deserved”, and that “any damage to the reputation and good name of the BBC [was] self-inflicted”.

With regard to offering the BBC an opportunity to respond to the allegations in the Programme, the Licensee said that “since the BBC had responded to the claims in its correspondence with Mr Stuart, the failure of [TV Novosti] to give the BBC a further opportunity to respond to the claims could not very well result in any unfairness”.

TV Novosti recognised that Ofcom’s functions do not extend to regulating the provision of the BBC’s services in so far as they concern the accuracy or impartiality of the content of any programme included in the BBC’s UK public broadcasting services and that this investigation was concerned with “Ofcom’s regulation of the provision of RT’s services”; but it said that if, as TV Novosti considered was the case in this investigation, “it is necessary for Ofcom in the discharge of that function to decide whether the content of any BBC programme complies with the relevant requirements of accuracy and impartiality, [Ofcom] may and indeed must make that decision on the evidence before it independently of the BBC”. The Licensee then assessed in detail whether the BBC had preserved impartiality and accuracy in the BBC Programmes and submitted that they had failed to do so⁸.

TV Novosti then made representations on whether the BBC Programmes preserved accuracy and impartiality in the context of Ofcom’s assessment of the BBC’s complaint.

- the Licensee said that the “principal question” in this case was whether the BBC had faked material included in the BBC Programmes;
- TV Novosti gave specific detail on the doubts it referred to, which appeared online, about the authenticity of the 29 August BBC News. In particular, the Licensee referred to an online article posted on 3 September by Francisco Santoanni which suggested that a number of the features in the 29 August BBC

⁸ Ofcom does not regulate BBC licence fee funded services in respect of accuracy and impartiality and Ofcom has not undertaken an assessment of the accuracy and/or impartiality of the BBC Programmes in reaching this Decision on the BBC’s complaint about the Programme because it does not have jurisdiction to do so. However, the representations made by TV Novosti regarding the accuracy and impartiality of the BBC Programmes have been considered to the extent that they are relevant to Ofcom’s assessment of the BBC’s complaint.

News report were either “implausible or not genuine” and that it appeared to him that at least one scene had been acted;

- TV Novosti also gave specific detail about the doubts it referred to, which appeared online, about the authenticity of the BBC Programmes following the broadcast of the 30 September BBC News and the BBC Panorama Programme. In particular the Licensee stated that:
 - on or shortly after 4 October 2013, Mr Stuart posted on his website a copy of his complaint to the BBC⁹ in which he complained of a “large measure of fabrication” and in particular complained about:
 - the editing of the footage to present events out of sequence to suggest that there were more victims than was really the case;
 - a supposed eyewitness covertly reading from a prepared text;
 - the faking of distress on the part of supposed victims;
 - the undisclosed background and affiliations of the charity Hand in Hand; and
 - the alteration of Dr Hallam’s words;
 - on 7 October 2013 an individual whom it understood to be a former UK ambassador to Uzbekistan and a former Rector of the University of Dundee, posted a comparison of the two versions of Dr Hallam’s interview under the title “Fake BBC Video” showing that it had been:

“...edited so as to give the impression the medic is talking in real time in her natural voice – there are none of the accepted devices used to indicate a voiceover translation. But it must be true that in at least one, and possibly both, the clips she is not talking in real time in her own voice. It is very hard to judge as her mouth and lips are fully covered throughout. Perhaps neither of the above is what she actually said”.

TV Novosti also said that this individual went on to indicate that his confidence in the rest of the footage was therefore undermined and he said:

“But once you realise the indisputable fact of the fake interview the BBC has put out, some of the images in this video begin to be less than convincing on close inspection too”¹⁰;

⁹ <http://bbcpanoramasavingsyriaschildren.wordpress.com/2014/01/18/first-letter-of-complaint-to-the-bbc-4-october-2013/>

¹⁰ <http://www.craigmurray.org.uk/archives/2013/10/fake-bbc-video/> Ofcom accessed this website and noted that in an online blog dated 7 October 2013 and entitled “Fake BBC Video”, Craig Murray wrote (apparently in relation to the BBC Programmes): “Irrefutable evidence of a stunning bit of fakery by the BBC....The disturbing thing is the footage of the doctor talking is precisely the same each time. It is edited so as to give the impression the medic is talking in real time in her natural voice – there are none of the accepted devices used to indicate a voiceover translation. But it must be true that in at least one, and possibly both, the clips she is not talking in real time in her own voice. It is very hard to judge as her mouth and lips are fully covered throughout. Perhaps neither of the above is what she actually said. Terrible things are happening all the time in Syria’s civil war, between Assad’s disparate

- a report was posted on 7 October 2013 in which a reviewer¹¹ indicated that he/ she had written to Dame Fiona Reynolds, Senior Independent Director of the BBC Executive (in the mistaken belief that she was a Trustee), saying:

“I, myself suspect the BBC of fraudulently altering audio in the report from Syria. I suspect the motive in this instance ... [is] propaganda intended to affect public opinion in the UK in such a way as to congregate [sic] support and underpin an offensive against the Syrian government”;
and
- at “about the same time” an individual, John Hilley, also appeared to have complained to the BBC that Dr Hallam’s comments had been altered “because on 18 October he posted a reply from one Neil Salt of BBC Complaints, in which Mr Salt explained how the interview had been edited and sought to justify it”¹².
- regarding the volume of complaints to the BBC, the Licensee said that it could not know what other complaints about the BBC Programmes were made to the BBC but said that it was “clear that the [BBC] programmes, on each occasion they were broadcast, elicited doubts from audiences as to the authenticity of what had been shown”. TV Novosti said that whether “the doubts were well founded is obviously relevant to the question whether [its] treatment of the BBC in the Truthseeker (sic) programme was unjust or unfair”;
- referring specifically to the editing of the footage of the interview with Dr Hallam, the Licensee said that:
 - viewers of the BBC Programme were presented with the same interview but “some of the words the witness used on one occasion were different from those used on another occasion” and that the words had “plainly been changed by the BBC”;
 - it had not seen the footage and it provided an analysis of the footage which it had drawn from the BBC’s responses to Mr Stuart’s complaint.

TV Novosti said that in the original unedited footage Dr Hallam said:

forces and still more disparate opposition forces, and innocent people are suffering. There are dreadful crimes against civilians on all sides. I have no desire at all to downplay or mitigate that. But once you realise the indisputable fact of the fake interview the BBC has put out, some of the images in this video begin to be less than convincing on close inspection too”.

¹¹ Ofcom observed that the link to the review provided by the Licensee (<https://archive.org/details/BBCSyriareport1>) showed that the review was posted by someone identifying themselves under the name “coiaorguk”. We also noted that <http://www.coia.org.uk/> is the website of an organisation called the Children of Iraq Association which describes itself as a charity (it does not appear to be registered with the Charity Commission). From its website it appears that the COIA holds the UK and the USA responsible the deaths of hundreds of children in Iraq.

¹² http://www.medialens.org/23_fg_75_lc/viewtopic.php?p=12230&sid=2b42a51ab54629944641b22f401bcf16

“I need a pause because it’s just absolute chaos and carnage here...umm... we’ve had a massive influx of what look like serious burns... Er... it seems like it must be some sort of chemical weapon, I’m not really sure, maybe napalm, something similar to that. Um so we are trying to do a bit of triage and stabilisation. We’ve got a lot of walking wounded who are managing to manage OK but obviously within the chaos of the situation it’s very difficult to know exactly what’s going on...”

TV Novosti said that the footage was edited for broadcast in the 29 August BBC News as follows:

“I need a pause because it’s just absolute chaos and carnage here...umm... we’ve had a massive influx of what look like serious burns... Er... it seems like it must be some sort of ~~chemical weapon,~~ I’m not really sure, maybe napalm, something similar to that. ~~Um so we are trying to do a bit of triage and stabilisation. We’ve got a lot of walking wounded who are managing to manage OK but obviously~~ within the chaos of the situation it’s very difficult to know exactly what’s going on...”

The Licensee said that the footage was edited for broadcast in the 30 September BBC News and the BBC Panorama Programme as follows:

~~“I need a pause because it’s just absolute chaos and carnage here...umm... we’ve had a massive influx of what look like serious burns... Er... it seems like it must be some sort of chemical weapon, I’m not really sure, maybe napalm, something similar to that. Um so we are trying to do a bit of triage and stabilisation. We’ve got a lot of walking wounded who are managing to manage OK but obviously within the chaos of the situation it’s very difficult to know exactly what’s going on...”~~

- it was “wholly wrong”, “inexcusable” and “violated one of the central principles of the [BBC’s] Editorial Guidelines”;
- it was the “principal reason why...the BBC cannot complain of unjust or unfair treatment” in the Programme, which TV Novosti said drew attention to the BBC’s “extraordinary lapse of editorial judgment” and was why the BBC’s complaint should not have been brought;
- there “were none of the usual indications by which a broadcaster usually signals to the audience that the material has been edited”;
- the “only conclusion” which viewers of the BBC Programmes could have drawn was that Dr Hallam had been “made by the BBC to appear to say something different”;
- “[f]aced with such a substitution [i.e. the word ‘napalm’ for ‘chemical weapon’], any reasonable person would conclude that someone had tampered with the evidence – that one or other report, or both, had been faked” and that this “would have confirmed (and no doubt did so) the doubts that Mr Stuart and others entertained about the authenticity of the [BBC] programmes”; and

- the “contribution presented as fact was to some extent invented” and that it would have “fundamentally undermine[d] trust in the content”. The Licensee said that it “does not help that there is an explanation [from the BBC] and that there may be a distinction between internal editing and other sorts of editing” as the “damage would have been done by broadcasting as fact two versions of the same thing”.
- TV Novosti made further representations about the BBC’s responses to Mr Stuart’s complaint and in particular, the Licensee said:
 - that the BBC had denied Mr Stuart’s allegations in “extensive correspondence” with Mr Stuart which had been posted by Mr Stuart on the internet;
 - it was “not confident” that the BBC’s denials were “well founded”;
 - that the BBC had accepted that “the producers [of the BBC Programmes] used material in a way which was not chronological but [it] is satisfied that the manner in which the programme was edited made the content more engaging or presented complex issues in a readily comprehensible way without changing the reality of the narrative or the truth of the events that occurred”;
 - in relation to a specific allegation made by Mr Stuart in his complaint to the BBC that an eyewitness, Mohammed Abdullatif, featured in the 29 August BBC News was “covertly reading from a prepared text”, that the BBC had denied this allegation and it had not been “pursued in the subsequent correspondence”. Referring to a specific error and subsequent immediate correction the eyewitness made in his account, TV Novosti said that there was “no plausible explanation” for this other than that the eyewitness misread from a prepared text. The Licensee referred to the eyewitness saying “you’re recalling peace – you’re calling for peace” and said that the “only plausible explanation for his having said ‘recalling’ is that he misread the text by making the link underlined here: ‘you’re calling’. TV Novosti said: “No other explanation is conceivable”. The Licensee argued that in light of this, it was “difficult to have confidence in the BBC’s other denials where the evidence is less easy to test”; and
 - with regard to the allegation that the BBC had altered the footage of the interview with Dr Hallam, the BBC:
 - had accepted that the interview was “edited on different occasions in a different way without the edits being visible” to the audience (because Dr Hallam was wearing a face mask) but that it, had offered an explanation for the editing of the footage and that it had said that:
 - “it is acceptable for programme-makers to edit the words of a contributor so long as that editing does not materially alter or change the meaning of what they said or any understanding that the audience might take away”;
 - “the 29 August version was edited for a number of reasons, including avoiding confusion with the incident in Damascus a few days earlier involving chemical weapons”; and

- “the 30 September version was used ‘unedited’ in the Panorama programme and that the context in which it was used was such that there would be no confusion with the incident in Damascus”;
- said that the interview was shot as a single sequence, the first version had been subject to “‘internal’ edits” and the second version had been “used ‘without any internal audio editing’”;
- “did not think that the audience [of the BBC Programmes] would have been misled”;
- in its assessment did not consider the “likely effect on the audience of being presented with the same interview on different occasions but with the words ‘chemical weapons’ substituted for ‘napalm’”; and
- did not go on to consider how editing footage of the interview with Dr Hallam “might be perceived when it was repeated in an altered form in later [BBC] programmes” or “whether altering the words would be at least misleading and at worst a fabrication”;

and

- TV Novosti also referred in more detail to the political context in which the BBC Programmes were broadcast. In particular, the Licensee said that:
 - the BBC Programmes reported on “the political crisis in August and September 2013 after chemical weapons had been used in Syria (widely considered to be one of the most serious developments in the Syrian conflict) leading up to Syria’s declaration of its stockpiles to the Organisation of Prohibition of Chemical Weapons (OPCW) and the UN Security Council’s endorsement of OPCW’s timeline for their destruction”;
 - the requirements in the BBC Guidelines for due accuracy are at their highest level for news and current affairs programmes; that the content of the BBC Programmes was “concerned with events that may decide the fate of nations and/ or their leaders” and therefore “it is difficult to believe that any faking whatsoever would be tolerated”;
 - the 29 August BBC News “was broadcast when Parliament was virtually in the act of voting down the government motion to seek a UN Security Council resolution backing military action with respect to the use of chemical weapons in Syria”;
 - the 30 September BBC News was broadcast “a few days after the [UN] Security Council had adopted a resolution backing a plan to eliminate Syria’s chemical weapons and calling for those responsible for their use to be held accountable”; and
 - the “nature of the content” of the BBC Programmes was “a contribution to the most momentous decisions and policies of the day”.

Having set out its detailed assessment of whether the BBC Programmes preserved accuracy and impartiality, TV Novosti then made representations specifically about the Programme.

- the Licensee said that it was “not the first to have gone public with an assessment of the failings of the three [BBC] programmes”. TV Novosti then said that “the failings [of the BBC Programmes] were of so serious a nature that they were a subject of legitimate debate”;
- the Licensee said that the Programme began by making it clear that it was reporting on allegations about the BBC Programmes that were already in the public domain and that it then briefly set the scene politically by providing the context in which the 29 August BBC News was broadcast. TV Novosti said that the Programme introduced the alteration of Dr Hallam’s words in order to lead into Mr Stuart’s accusation of fabrication and the suggestion that the public was being misled into backing war. The Licensee said that the Programme then moved on to suggestions from various sources that “fakery is common in mainstream broadcasting”; and
- TV Novosti said that if the BBC Programmes “had respected the required standards of accuracy and impartiality, it would have been unjust and unfair to have treated the BBC in this way.” The Licensee then went on to say that “[o]n the contrary, [the BBC Programmes] invited exposure of their failings and speculation as to the BBC motives” and they “should never have been broadcast”.

TV Novosti then addressed some of the points made by the BBC in its complaint.

- a) the Licensee noted that the BBC complained that it was treated unjustly or unfairly in the Programme because material facts about it or related to it were presented, disregarded or omitted in a way which gave viewers an unfair impression of it. TV Novosti noted that the BBC said that the Programme included a number of unsupported allegations, and the Licensee provided the following specific representations on each of these allegations:
- i) The BBC fabricated an atrocity in a report on Syria in an attempt to deliberately mislead the public and to increase support for military intervention in Syria and to trick the public into war

TV Novosti said that the Programme was not a “report on Syria” rather that it was a report on allegations of fakery on the BBC and elsewhere with an analysis of the interview with Dr Hallam showing that words had been altered. The Licensee then said that broadcasting different versions of the same thing “undermined trust” and that “together with other implausible features of the programmes, invited speculation as to the BBC’s motives (and their partiality) which, in all the circumstances, was legitimate”.

- ii) The BBC subsequently “digitally alter[ed]” words spoken by an interviewee to state that there had been a chemical weapons attack to mislead the public when western governments were trying to “pin a chemical weapons attack on Syria without success” to justify military intervention in Syria

TV Novosti said that the BBC’s editorial processes were “no doubt digital” and that the BBC did alter the words. The Licensee also said that the BBC’s complaint exaggerated that the “alteration made Dr Hallam state that there had been a chemical weapons attack”. Rather, TV Novosti said that Dr Hallam was made to say: “it seems like it must be some sort of chemical weapon, I’m not really sure”.

The Licensee then went on to say that it remained “unclear” why the BBC editors thought that the reference to “chemical weapons” should be omitted on 29 August but could be included in place of the word “napalm” on 30 September in a Panorama programme, a programme which TV Novosti said “did not flinch from mentioning chemical weapons prominently”. The Licensee said that if the BBC placed particular emphasis on chemical attacks in the BBC Panorama Programme that “it is legitimate to consider why”.

- iii) The BBC’s alteration of the fabricated report led to “a massive public investigation which made some of the extremely disturbing findings”: that the BBC and reporter Ian Pannell were guilty of a total fabrication of an atrocity

TV Novosti said that the alteration of Dr Hallam’s words appeared to have led to an undisclosed number of complaints to the BBC. The Licensee also said that Mr Stuart’s investigation might fairly be described as “massive” and that he had provided “cogent reasons for being extremely concerned about fabrication in the BBC programmes”.

- iv) The BBC knowingly used actors in the reports pretending to be victims and relied on the questionable claims of a doctor who was both biased as a result of family political connections and who was lying to get the UK public to back war against the Syrian government

TV Novosti said that the BBC denies using actors and that “evidence is not available to prove it one way or the other”. The Licensee said that the BBC had also denied that an interview with an eyewitness, Mr Adbullatif, in the 29 August BBC News, was scripted and that evidence was available which rendered the BBC’s denial “implausible”.

TV Novosti said it understood that Dr Hallam was working for a charity linked with the Syrian opposition, with which her husband was also involved, and that her father, Dr Mousa Al-Kurdi, may be or may have been a member of the Syrian National Council¹³ (an organisation which it described as a “western funded opposition group”). The Licensee said that representing Dr Hallam as a doctor working for a charity without more would encourage audiences to think that what she said was dispassionate. However, TV Novosti said Dr Hallam’s family connections suggested otherwise and that the charity’s logo is similar to the flag of the Free Syrian Army. The Licensee also said that the Programme did not say that Dr Hallam was lying but did draw a parallel with the “Nurse Nayirah” episode at the time of the Gulf War, which it said was “legitimate in all the circumstances”.

- v) The BBC used the reports to provoke war and military intervention in Syria.

TV Novosti said that given the various failings of the BBC Programmes, and in the absence of an explanation as to why the BBC editors thought that the reference to chemical weapons should be omitted from the 29 August BBC News but could be included in place of the word “*napalm*” in the BBC Panorama Programme (a programme which the Licensee said emphasised the chemical nature of the attack), the BBC cannot be surprised by speculation regarding its motives.

¹³ <http://www.syriancouncil.org/en/about.html>

TV Novosti also responded to the BBC's complaint that the Programme: uncritically adopted Mr Stuart's complaint to the BBC; misleadingly described Mr Stuart's individual complaint as a "massive public investigation which made some of the extremely disturbing findings"; unfairly included Mr Stuart's allegation that his questions to the BBC "remain unanswered" (and omitted references to the BBC's letters of response to him); and did not present evidence in the Programme to support the allegations about the BBC Programmes other than Mr Stuart's letters and the unexplained audio analysis, which the BBC said was false.

In response to these points, the Licensee said that:

- the Programme made it clear that the BBC stood by its report and was not uncritical because it "advanced its own reasons for doubting the report by showing how Dr Hallam's interview had been manipulated";
 - the description of Mr Stuart's complaint "might have been misleading but in all the circumstances it did not result in any unfairness to the BBC";
 - the failure of the BBC Programmes to "comply with proper standards and the BBC's implausible denial that the Abdullatif interview was scripted are extremely disturbing";
 - Mr Stuart's questions "remained unanswered" seemed to it to be "a fair reading of the relevant correspondence"; and
 - the audio analysis is "manifestly not false" and showed that the BBC had altered the words spoken by the witness.
- b) TV Novosti also noted that the BBC complained that it was not given an appropriate and timely opportunity to respond to the allegations made about it in the Programme. In particular, the Licensee noted that the BBC said that it knew nothing about the Programme until after it was broadcast. TV Novosti also said that the BBC said that it had confirmed (by email to the BBC) that it did not put the allegations to the BBC prior to the broadcast and that it took a deliberate decision not to give the BBC an opportunity to respond to the relevant claims as a form of retribution for grievances some RT staff held regarding reports broadcast on BBC Radio.

In response to these points, the Licensee said the BBC had made its position "quite plain" in its correspondence with Mr Stuart and that it was "implausible to suppose that offering the BBC a further opportunity to respond would have led to it saying anything different". TV Novosti said, therefore, that the absence of an opportunity to respond did not result in any unfairness to the BBC.

The Licensee added that if "there was any grievance, it concerned the failure of the BBC to offer [it] an opportunity to respond to material broadcast by the BBC on another occasion but in any event the absence of any opportunity for the BBC to respond in this case did not result in any unfairness to the BBC".

- c) TV Novosti also responded to the BBC's complaint that its views were unfairly represented. In particular, the Licensee noted that the BBC's complaint said that the inclusion of the comment "[i]n a statement, the British Broadcasting Corporation says it stands by its report" unfairly gave the impression that TV

Novosti had contacted the BBC and put its allegations of wrongdoing to it before the broadcast when this was not the case.

The Licensee said that the BBC's views were fairly represented. In a preliminary point, TV Novosti said that the Programme "made it clear that the BBC stood by its report" and "that the BBC's rejection of the accusations is recorded [...] albeit by referring to 'statement' rather than publically available correspondence with Mr Stuart".

However, the Licensee said that the point could have been better expressed but the material point that it was making was that the BBC denied the allegations. In particular, TV Novosti noted that this comment may have given the impression that it had contacted the BBC when it had not done so, and that that "is to be regretted". Nevertheless, the Licensee said that this did not result in any unfairness since TV Novosti "had made the BBC's denial clear."

The Licensee concluded: "For all the reasons set out above, we do not consider that anything done in the programme complained of resulted in any injustice or unfairness to the BBC".

Ofcom's Preliminary View

Ofcom prepared a Preliminary View on this case that the BBC's complaint should be upheld. In particular, we considered that TV Novosti did not avoid unjust or unfair treatment of the BBC in the Programme and in failing to do so was in breach of Rule 7.1 of Ofcom's Broadcasting Code (the "Code"). We concluded that:

"[T]he Licensee had not taken reasonable care to satisfy itself, before broadcasting the Programme, that material facts were not presented, disregarded or omitted in a way that was unfair to the BBC. We considered that the BBC should have been, and was not given an appropriate and timely opportunity to respond to the allegations made about it in the Programme and that this was unfair to the BBC. We also considered that the BBC's views were unfairly represented in the Programme.

Therefore, Ofcom's Preliminary View is that the Licensee did not avoid unjust or unfair treatment to the BBC in the Programme and in failing to do so was in breach of Rule 7.1 of the Code".

Both parties were given the opportunity to make representations on the Preliminary View. The BBC did not make representations. However, TV Novosti made a number of representations and was of the view that the complaint should not be upheld. The Licensee's representations are summarised below¹⁴.

Application of Section Seven of the Code

TV Novosti said that in the Preliminary View Ofcom had misdirected itself as to the nature of Section Seven of the Code (Fairness). In particular, the Licensee said that the Code consists of guidance including the practices to be followed and that Ofcom had reached its Preliminary View solely according to whether the Programme complied with the guidance, including whether it had followed Practices 7.9, 7.11 and

¹⁴ Some of the representations made by the Licensee reiterated points it made in its initial representations which have already been summarised above. To the extent that this is case, such representations have not been summarised again in this section.

7.13, instead of deciding whether there was unjust or unfair treatment of the BBC in the Programme.

Specifically, TV Novosti said that under section 107 of the Broadcasting Act 1996 (“BA96”) the provisions of Section Seven give only “guidance”. The Licensee also said that under section 110(1) BA96, in considering and adjudicating on fairness complaints, Ofcom must “take into account any relevant provisions of the code maintained by [it] under section 107”. TV Novosti said that Ofcom’s role under section 110 BA96 is to consider and adjudicate on whether the Programme’s treatment of the BBC was unjust or unfair not whether a breach of the Code has occurred. The Licensee noted that failure to follow the practices under Section Seven will not necessarily be a breach of the Code and that a breach can only arise if unjust or unfair treatment occurs.

TV Novosti also said that Ofcom’s analysis was incorrect in that it stated in the Preliminary View that its statutory duties “include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unjust or unfair treatment in, **or in connection with the obtaining of material included in** programmes in such services” [Licensee’s emphasis]. It said this statement was incorrect because Ofcom does not have a statutory duty to apply standards to provide protection from unjust or unfair treatment in connection with the obtaining of material included in programmes. TV Novosti said that Ofcom had misread its duties and that this had compromised its approach. In particular, the Licensee said that this had encouraged Ofcom to treat the assessment as if it were a standards issue and as though it were a question of compliance with its licence obligations. TV Novosti said that this was apparent from the way in which Ofcom had considered whether the Licensee had complied with the practices to be followed rather than whether unjust or unfair treatment had occurred. TV Novosti also said that the misreading of its duties had compromised Ofcom’s approach to its application of Practice 7.9¹⁵.

The Licensee also said that the Preliminary View did not make it clear how, specifically in relation to this case, Ofcom had had regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, as required under section 3(3)(a) of the Communications Act 2003 (“the Act”).

Freedom of expression

TV Novosti said that it was not clear from the Preliminary View whether or how Ofcom had considered the need to secure that the application of fairness standards in the manner that best guarantees an appropriate level of freedom of expression, as required under section 3(4)(g) of the Act. The Licensee said that Ofcom did not appear to have taken this into account. TV Novosti said that this failure compromised any decision as to whether the Programme’s treatment of the BBC was unjust or unfair.

¹⁵ The wording “or in connection with the obtaining of material included in” programmes was included in the Preliminary View in error, and it has now been deleted from the Decision. In undertaking its assessment and preparing its Preliminary View, Ofcom did not assess whether the BBC was treated unjustly or unfairly in connection with the obtaining of material included in the Programme. Ofcom’s assessment was concerned only with whether the BBC was treated unjustly or unfairly in the Programme as broadcast.

The Licensee said that the public interest in exposing the manipulation of the footage of the Dr Hallam interview and the legitimate doubts regarding the authenticity of other elements of the BBC Programmes, having regard to the political context in which they were broadcast, points overwhelmingly to priority being given to TV Novosti's and its viewers' freedom of expression.

In this context, the Licensee referred to Ofcom's decision on the film *An Inconvenient Truth*¹⁶. TV Novosti said that in assessing whether the special impartiality rules applied to this film under Section Five of the Code, Ofcom took the view that the test had to be a high one in order to protect freedom of expression. The Licensee was of the view that since programmes that are subject to the fairness regime may be made on almost any conceivable subject, the test of fairness must also necessarily be a high one in order for Ofcom to be able to regulate in such a way as to protect freedom of expression. It said that if this was not the case it would have a chilling effect on broadcasters' ability to explore important subject matter. TV Novosti also said that the test must be even higher in relation to a fairness complaint because of Ofcom's duties under section 3(4)(g) of the Act. Therefore, the Licensee said that Ofcom "must be exceptionally slow to interfere with RT's freedom of expression in this case".

The Programme

TV Novosti said that many of Ofcom's assertions in relation to the Programme's non-compliance with the practices to be followed started from the premise that the allegations about the BBC are based on Mr Stuart's complaint. The Licensee said that this was misleading as it suggested that RT did not "trouble to form its own view or take on the facts". TV Novosti also said that this was tainted by Ofcom's procedural error in assuming that its statutory remit in relation to fairness complaints extended to the obtaining of material included in programmes.

The Licensee commented on Ofcom's assertion that the description in the Programme of the alteration of footage in the BBC Programmes as an "*extremely disturbing finding*" of a "*massive public investigation*" was an overstatement. TV Novosti said that there may have been an element of hyperbole in the words used but any incorrect impression created would have been corrected by the editorial context in which the statement was made. The Licensee said that Ofcom had taken this overstatement out of context and thereby had overstated the case against TV Novosti. The Licensee referred to its representations in the standards Preliminary View¹⁷ on this point, which stated that in light of the editorial context in which this statement was presented, no viewer would have thought that there had been an official investigation. In particular, TV Novosti referred to the fact that the statement was:

- i) accompanied by a screenshot of Mr Stuart's first letter of complaint (rather than a command paper or Ofcom report);
- ii) followed by a quote from Mr Stuart (rather than the chairman of a committee of inquiry or CEO of Ofcom);

¹⁶ *An Inconvenient Truth* is a 2006 documentary feature film about global warming. Ofcom's decision relating to this case is available at:
<http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb165/>

¹⁷ See footnote 2.

- iii) followed by an audio analysis by a media investigator (as opposed to extracts from an official report) which was in turn followed by references to a “game changing allegation” and to Mr Stuart as a “media investigator”; and
- iv) followed by George Galloway MP calling for a “full inquiry”.

The Licensee also commented on Ofcom’s assertion that the reference in the Programme to the “statement” in which the BBC said it “stands by its report” was an insufficient reflection of the BBC’s viewpoint. TV Novosti said in the standards representations it had “pointed out the BBC’s own overstatement of the case against it on this point and that the reference is not an unbalanced account of what happened”. The Licensee said that the BBC’s position, i.e. that it stood by what appeared in the BBC Programmes, was made perfectly clear in the Programme.

In addition TV Novosti also made the following further points:¹⁸

- regarding head (a)(ii), TV Novosti said that the allegation reflected the Programme’s own take on the matter and that any overstatement was negated by the context;
- regarding head a(iv), the Licensee said that the material on Mr Stuart’s finding was sufficiently contextualised. Regarding Dr Hallam’s background affiliations, TV Novosti said that it conducted its own research before the broadcast of the Programme and on the basis of its research it seemed reasonable to suppose that she might not be an impartial witness having regard to her family’s political connections; and
- regarding head (a)(v), in relation to the reference to the “routine faking” of atrocities, the Licensee said that if a practice has developed within the BBC to use “any old video” to make a news story, it is to be deplored and it invites allegations of the kind of which the BBC complains.

Assessment of the BBC Programmes

TV Novosti said that Ofcom was wrong to exclude from its assessment any consideration of the truth or otherwise of the allegations made about the BBC in the Programme and that, as a result, it was not following due process in its adjudication under section 110 BA96. The Licensee also said that Ofcom was wrong not to assess the accuracy and impartiality of the BBC Programmes. TV Novosti said that without undertaking these assessments Ofcom cannot properly make a decision as to whether the Programme was unfair to the BBC. In particular, the Licensee said that if the allegations made in the Programme about the BBC are true then the Programme’s treatment of the BBC cannot be considered unfair. TV Novosti also said that an assessment of whether the Programme was unfair to the BBC must be decided according to all relevant and available circumstances and “all such inferences as may reasonably be drawn from them as to the reliability of the evidence and otherwise”.

With regard to Ofcom’s jurisdiction, the Licensee said that under section 198(1) of the Act, one of Ofcom’s functions is to regulate the provision of the BBC’s services and the carrying on by it of certain other activities to the extent that provision for it to do

¹⁸ A number of these representations repeated points addressed earlier in the representations (or in the Licensee’s initial representations) as summarised above.

so is contained in the BBC Charter and Agreement and certain other statutory provisions. TV Novosti acknowledged that no provision has been made for Ofcom to regulate the BBC's services with respect to accuracy and impartiality and that therefore Ofcom has no jurisdiction to regulate those services in that respect. However, the Licensee said that, in the exercise of its quasi-judicial functions under section 110 BA96, "Ofcom should not be inhibited from making an assessment of the accuracy and impartiality of the BBC [P]rogrammes on the ground that, under other statutory provisions, it has no regulatory function in relation to BBC services".

TV Novosti also made a number of representations on accuracy in BBC programmes. In particular, the Licensee expressed concerns that the BBC was willing to use "what might loosely be called any old video to tell a story in the news". Referring to specific footage used by BBC News in August 2014 of an alleged chemical weapons attack which had taken place in April 2013 but which the Licensee said was falsely described on air as having taken place in August 2013 at the time of the Parliamentary vote on military intervention in Syria on 29 August 2013, TV Novosti said that "this bears on the question of fairness because it suggests that the cavalier editorial practice ...had already taken hold within the BBC" when the BBC Programmes were made and broadcast. The Licensee said that it indicated that what it said in its initial representations about the BBC Programmes was "neither fanciful or exaggerated".

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unjust or unfair treatment in programmes in such services. This is reflected in Section Seven of the Code.

Section 107(1)(a) BA96 states that Ofcom must "draw up, and from time to time review, a code giving guidance as to the principles to be observed, and practices to be followed, in connection with the avoidance of [...]unjust or unfair treatment in programmes [...]".

Accordingly, Section Seven of the Code sets out the following over-arching principle:

"To ensure that broadcasters avoid unjust or unfair treatment of individuals or organisations in programmes."

This principle is encapsulated in Rule 7.1 which states that:

"Broadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes".

It is made clear in the Code that broadcasters "must ensure that they comply with the Rules as set out in the Code", including Rule 7.1.

Section Seven also contains 'practices to be followed' by broadcasters when dealing with individuals or organisations participating or otherwise directly affected by programmes. Section Seven makes it clear that following these practices will not necessarily avoid a breach of Rule 7.1 and that failure to follow these practices will constitute a breach of Rule 7.1 where it results in unfairness to an individual or organisation in the programme.

Therefore, in reaching a decision under Section Seven, Ofcom's concern is whether a broadcaster has avoided unjust or unfair treatment to individuals or organisations in programmes. In carrying out this assessment Ofcom will consider whether the broadcaster has followed the practices but its decision will ultimately be based on whether unfairness was avoided, irrespective of the fact that a broadcaster may have followed the practices. In assessing whether a programme has treated an individual or organisation fairly, Ofcom must take into account a number of factors including the programme's presentation of material, and importantly whether the individual or organisation concerned has been given an appropriate and timely opportunity to reply to any allegations of wrongdoing made about it in the programme.

Further, in carrying out its duties, 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, under section 110(1) BA96, Ofcom is under a duty to consider and adjudicate on complaints of unjust or unfair treatment in programmes made to it in accordance with the requirements set out in sections 111 and 114.

In reaching this Decision, we carefully considered all of the material provided by TV Novosti and the BBC. This included a recording, and transcripts of, the Programme and both parties' written submissions.

Ofcom acknowledged the importance attached to freedom of expression in the broadcasting environment, as contained in Article 10 of the ECHR. This provides for the broadcaster's and audience's right to freedom of expression, which encompasses the right to hold opinions and to receive and impart information and ideas without undue interference by public authority.

Article 10 of the ECHR also provides that the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. By sections 107 and 110(1) BA96, Ofcom is required to draw up a code giving guidance as to the principles to be observed, and practices to be followed, in connection with the avoidance of unjust or unfair treatment in programmes and to require it to consider and adjudicate on complaints about such matters. Accordingly, Section Seven of the Code sets out the principle, which is enshrined in Rule 7.1, to ensure that broadcasters avoid unjust or unfair treatment of individuals or organisations in programmes. In accordance with section 107 BA96 Section Seven also sets out the practices to be followed by broadcasters in connection with the avoidance of such treatment.

Ofcom is also required to have regard to the need to secure the application of standards that provide adequate protection to members of the public and all persons from unfair treatment in programme in television services in the manner which best guarantees "an appropriate level of freedom of expression" (section 3(4)(g) of the Act).

Section Seven does not prohibit a broadcaster from making programmes about controversial subjects or from making serious allegations about organisations and individuals in programmes. However, in doing so a broadcaster must ensure that they comply with the Code, including the requirement in Section Seven to ensure that individuals and organisations are not treated unjustly or unfairly.

Therefore, in assessing the Complaint we were careful to balance the Licensee's right to freedom of expression and the audience's right to receive information against the requirement of Rule 7.1 not to treat individuals or organisations unfairly in the Programme. We began this exercise by taking account the political context in which the Programme was broadcast and TV Novosti's representations regarding this. These reflected the fact that a public debate was taking place at the time in many countries, and in particular, in the UK, over allegations that the Syrian government had used chemical weapons and whether there should be a military response against it¹⁹. We also noted the Licensee's representations that a number of individuals, at the time, were of the opinion that the BBC had manipulated footage of a chemical weapons attack in Syria and that some of these individuals had published such opinions online and/or raised them with the BBC. We noted that a number of the individuals who queried whether the footage had been manipulated speculated as to the BBC's motives for doing so and questioned whether this was to encourage support for military intervention in Syria. A number of these allegations were referred to and explored in the Programme. In accordance with the right to freedom of expression, we considered it legitimate for TV Novosti to make and broadcast a programme examining such allegations made about the BBC. However, in doing so, it was also incumbent on the Licensee to ensure that it avoided unjust or unfair treatment of the BBC in the Programme.

We noted TV Novosti's position, as set out in its representations on the Preliminary View above, that it was necessary for Ofcom to make a finding of fact with regard to whether or not the BBC Programmes included faked material and to consider whether the BBC Programmes preserved due accuracy and impartiality. Ofcom noted that the events regarding alleged chemical weapon attacks examined in the Programme were matters of dispute at an international level, and that the various allegations made or reported in the Programme about the BBC were equally in dispute. Ofcom is not a fact finding tribunal and is not able or empowered, therefore, to establish the truth or otherwise of such allegations and to make findings of fact. Accordingly, it was not possible or appropriate for Ofcom to attempt to prove or disprove the allegations made about the BBC in the Programme. Similarly, Ofcom had no statutory jurisdiction to assess the accuracy and impartiality of the BBC Programmes²⁰. Rather, our concern in this case was solely whether, taking account of Section Seven of the Code, the Programme had resulted in unfairness to the BBC.

Ofcom considered the BBC's complaint, as entertained by Ofcom, that it was treated unjustly or unfairly in the Programme.

- a) Ofcom first considered whether material facts about or related to the BBC were presented, disregarded or omitted in a manner which gave viewers an unfair impression of it through the inclusion of the following allegations:

¹⁹ In particular, Ofcom noted that following 21 August 2013, the issue of alleged use of chemical weapons by the regime of Bashar al-Assad dominated political discourse across the world, including in the UK. In the UK for example there was controversy about whether the UK should take part in military action against the regime of Bashar al-Assad in Syria following the attack on Ghouta and on 29 August 2013, after a lengthy debate, the UK Parliament rejected a government call to sanction UK military action. See also the UN Report published in September 2013 confirmed that the chemical agent sarin has been used in an attack at Ghouta, Syria on 21 August 2013. The report did not attribute responsibility for the attack (see http://www.un.org/disarmament/content/slideshow/Secretary_General_Report_of_CW_Investigation.pdf).

²⁰ See footnote 8.

- i) the BBC fabricated an atrocity in a report on Syria in an attempt to deliberately mislead the public and to increase support for military intervention in Syria and to trick the public into war;
- ii) the BBC subsequently “digitally alter[ed]” words spoken by an interviewee to state that there had been a chemical weapons attack to mislead the public when western governments were trying to “pin a chemical weapons attack on Syria without success” to justify military intervention in Syria;
- iii) the BBC’s alteration of the fabricated report led to “a massive public investigation which made some of the extremely disturbing findings”: that the BBC and reporter Ian Pannell were guilty of a total fabrication of an atrocity;
- iv) the BBC knowingly used actors in the reports pretending to be victims and relied on the questionable claims of a doctor who was both biased as a result of family political connections and who was lying to get the UK public to back war against the Syrian government; and
- v) the BBC used the reports to provoke war and military intervention in Syria.

In considering whether material facts about or related to the BBC were presented, disregarded or omitted in a manner which gave viewers an unfair impression of it through the inclusion of the a number of allegations, Ofcom had regard to Practice 7.9 of the Code which states:

“Before broadcasting a factual programme...broadcasters should 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 considered whether the manner in which each allegation under head (a) of the BBC’s complaint as entertained by Ofcom was presented in the Programme resulted in unfairness to the BBC.

- i) The BBC fabricated an atrocity in a report on Syria in an attempt to deliberately mislead the public and to increase support for military intervention in Syria and to trick the public into war

We noted that the Programme’s introduction said that the BBC had been accused of “*stunning fakery*” by a former UK ambassador and of “*staging a chemical weapons attack*”. It followed this saying that in August 2013: “*NATO leaders can’t get the public on side for the imminent bombing of Syria. Suddenly the BBC says it was filming a small rural hospital and a game-changing atrocity happened right there, the moment they were filming*”. The Programme then included footage described as “*‘Syria Crisis’, Ian Pannell, BBC (August 2013)*” and footage described as “*‘Saving Syria’s Children’, Ian Pannell, BBC (September 2013)*”. This was followed by the Presenter saying: “*But a highly sceptical public stayed hostile to military intervention. Exactly one month later, the leaders are trying to pin a chemical weapons attack on Syria without success. The BBC airs exactly the same footage, but digitally alters the word ‘napalm’ for ‘chemical weapons’, hoping no one will notice*”. The Presenter says: “*Not only did folks notice but it unleashed a massive public investigation which made some extremely disturbing findings*”. Whilst the Presenter made this statement, an image of a letter of complaint to the BBC labelled “*First letter of complaint to the BBC*” was shown on screen. This

was followed by a quote on screen and in audio from Mr Stuart: "*This is the total fabrication, from beginning to end, of an atrocity, with BBC 'reporter' Ian Pannell standing amidst a tableau of very bad actors. This is completely beyond the pale*". In our view, the Programme clearly alleged that the BBC had fabricated this atrocity in its report on Syria in the BBC Programmes in order to mislead the public and to increase public support for military intervention in Syria and that there had been "*a massive public investigation*" with "*some extremely disturbing findings*".

The Licensee submitted that the BBC's failings were of "so serious a nature that they were the subject of legitimate debate". It said that "if the three BBC programmes had respected the required standards of accuracy and impartiality it would have been unjust and unfair to have treated the BBC in this way" but "they did not". Further, TV Novosti submitted that the BBC Programmes had undermined trust and invited legitimate speculation as to the BBC's motives.

It appeared to Ofcom that this allegation was based on Mr Stuart's complaint to the BBC, and on other individual's opinions, all of which alleged that the BBC had altered footage in the BBC Programmes and some of which questioned whether the BBC had done so to encourage public support for military intervention in Syria.

Whilst the Programme attributed the allegation to Mr Stuart, the allegation was presented as an "*extremely disturbing finding*" of a "*massive public investigation*". We did not consider that the Programme made it clear that this allegation was based on an individual complaint to the BBC and other's opinions which questioned whether the footage had been altered and speculated as to the BBC's motives for doing so. We therefore considered that the Programme over-stated the material on which this allegation was based and, as such, the way in which it was presented resulted in unfairness to the BBC.

Further, we noted that the BBC's viewpoint on this allegation was not included in the Programme. Notably, the Programme did not refer to or reflect the BBC's responses to Mr Stuart's complaint. Given that Mr Stuart's correspondence with the BBC was included in the Programme and that Mr Stuart was quoted in the Programme, we considered that the Licensee would have had access to the BBC's responses to Mr Stuart's complaint and it could have reflected these in the Programme.

Whilst we noted that the Programme did make one general reference to the viewpoint of the BBC, in that the Presenter referred to a "*statement*" in which the BBC said that "*it stands by its report*", we did not consider that this single brief comment adequately reflected the BBC's position in relation to this allegation so as to avoid unfairness to the BBC. We were of the view that this statement erroneously gave the impression that TV Novosti had contacted the BBC and put the allegations to it before the broadcast of the Programme. It further gave the impression that the BBC had provided only a brief response and that it had chosen not to comment more substantively on this allegation when this was not the case.

We therefore considered that the way in which this allegation was presented in the Programme resulted in unfairness to the BBC.

- ii) The BBC subsequently “digitally alter[ed]” words spoken by an interviewee to state that there had been a chemical weapons attack to mislead the public when western governments were trying to “pin a chemical weapons attack on Syria without success” to justify military intervention in Syria.

As noted above, the Programme stated that the BBC had digitally altered footage of the interview with Dr Hallam and that this had “*unleashed a massive public investigation which made some extremely disturbing findings*”, and that the footage had been altered in order to increase public support for military intervention in Syria.

It appeared to Ofcom that the allegation that the BBC had altered the interview footage to encourage public support for military intervention in Syria was based on Mr Stuart’s complaint to the BBC, an opinion of a former UK Ambassador to Uzbekistan, Craig Murray, posted on his website, and other individual opinions which questioned whether the footage had been altered and some of which speculated whether the BBC had altered the interview footage to encourage support for military intervention in Syria.

We noted that the Licensee submitted that the BBC’s editorial processes were no doubt digital and that it did alter the words. It said it was legitimate for the Programme to consider why the BBC had done this. We also noted that TV Novosti said that the BBC, in its original response to Mr Stuart’s complaint, had accepted that the footage had been edited and had said that this had been done for a number of reasons including avoiding confusion with an earlier incident in Damascus involving chemical weapons. In reaching this Decision, it was not for Ofcom to establish the BBC’s motives or reasoning for altering or editing the footage. Rather, Ofcom’s concern was whether the way in which the allegation that the BBC had altered the footage in order to encourage support for military intervention in Syria was presented in the Programme was fair to the BBC.

In making this assessment, Ofcom was of the view that whilst the Programme attributed this allegation that the BBC had altered the footage in order to encourage support for military intervention in Syria to Mr Stuart and Mr Murray, the way in which it was presented, as being part of the “*extremely disturbing findings*” of a “*massive public investigation*”, had the effect of elevating their comments from individual opinion to what appeared to be the firm conclusions of a significant and detailed official investigation. As a result, we considered that the Programme over-stated the material upon which this allegation was based and, as such, the way it was presented resulted in unfairness to the BBC.

Again, we considered that the Programme failed to include the viewpoint of the BBC. In particular, we noted that the BBC’s responses to Mr Stuart’s complaint were not referred to or reflected in the Programme, which we considered, for the reasons stated above, the Licensee would have had access to.

As above, we noted that the Programme did make one general reference to the viewpoint of the BBC, in that the Presenter referred to a “*statement*” in which the BBC said that “*it stands by its report*”. However, for the reasons stated above, we did not consider that this single brief comment adequately reflected the BBC’s position in relation to this allegation so as to avoid unfairness to the BBC.

We therefore considered that the way in this allegation was presented in the Programme resulted in unfairness to the BBC.

- iii) The BBC's alteration of the fabricated report led to "a massive public investigation which made some of the extremely disturbing findings" that the BBC and reporter, Ian Pannell, were guilty of a total fabrication of an atrocity.

As noted above, the Programme alleged that the BBC's alteration of the footage of the interview with Dr Hallam "*unleashed a massive public investigation which made some extremely disturbing findings*" including that the BBC had fabricated the atrocity and had used actors in the report on Syria in the BBC Programmes.

Ofcom noted that the phrase "*massive public investigation which made some extremely disturbing findings*" was followed in the Programme by an image of a letter of complaint to the BBC and a voice-over and onscreen graphic of a quote attributed to Mr Stuart. As noted above, it appeared to Ofcom that this was a reference to Mr Stuart's complaint to the BBC.

Further, it appeared to Ofcom, from TV Novosti's representations, that the Programme also based the statement that the BBC was the subject of a "*massive public investigation which made some extremely disturbing findings*" on a number of online articles which were posted following the broadcast of the BBC Programmes, including the online post of a former UK ambassador who had accused the BBC of "stunning fakery".

We noted that the Licensee, in its response, said that Mr Stuart's "investigation might fairly be described as massive and he provides cogent reasons for being extremely concerned about fabrication in the [BBC] programmes". TV Novosti also acknowledged that it "is true that the description of Mr Stuart's complaint [in the Programme] might have been misleading" but it said that this description did not result in any unfairness to the BBC. We also took into consideration the Licensee's representations that, irrespective of any hyperbole in the words used in the statement "*massive public investigation which made some extremely disturbing findings*", the editorial context in which the statement was made meant that no viewer would have thought that there had been an official investigation.

We considered that viewers would have been given the incorrect impression that the BBC was the subject of a "*massive public investigation which made some extremely disturbing findings*" when this was not the case. Given the categorical nature of this statement, coupled with the various serious allegations made about the BBC throughout the Programme, we considered that viewers would have understood the statement to mean that the BBC Programmes had been subject to some form of significant and detailed official investigation. We were also of the view that viewers would have considered that the BBC had been found at fault in some "*extremely disturbing*" respects, in particular that the BBC had been found to have fabricated an atrocity and used actors in the BBC Programmes.

We did not consider this impression would have been corrected by the references to Mr Stuart, the image of the letter to the BBC, or any other content, which followed in the Programme. We did not consider that viewers would have clearly understood that the "*massive public investigation which*

made some extremely disturbing findings” was a complaint by a member of the public to the BBC which had been responded to in detail by the BBC and that it was also based on a number of online articles detailing individuals’ opinions. Further, we considered that the content which followed in the Programme and, in particular, the comments regarding the “routine faking” of atrocities by mainstream media including the BBC, would have reinforced viewers’ understanding of the statement.

We therefore considered that to refer to this material as a “*massive public investigation*” which produced “*some extremely disturbing findings*” was an over-statement of the nature of Mr Stuart’s complaint and the individual opinions expressed about the BBC programmes, and that this resulted in unfairness to the BBC.

Further, we noted that the Programme stated that Mr Stuart’s questions to the BBC “*remain unanswered*” and the Programme failed to explain that the BBC had responded in detail to Mr Stuart’s complaint. In particular, we noted that no reference was made in the Programme to the content of the BBC’s responses to Mr Stuart’s complaint. As noted above, we considered that TV Novosti would have had access to the BBC’s responses to Mr Stuart and could have reflected them in the Programme.

Again, whilst we noted that the Programme referred to a “*statement*” in which the BBC said it “*stands by its report*”, we did not consider, for the reasons stated above, that this was adequate to reflect the BBC’s viewpoint on Mr Stuart’s complaint to avoid unfairness to the BBC.

Ofcom therefore considered that the way in which the Programme referred to Mr Stuart’s complaint as a “*massive public investigation which made some extremely disturbing findings*” resulted in unfairness to the BBC.

- iv) The BBC knowingly used actors in the reports pretending to be victims and relied on the questionable claims of a doctor who was both biased as a result of family political connections and who was lying to get the UK public to back war against the Syrian government.

Regarding the allegation that the BBC knowingly used actors in the BBC Programmes, we considered that the Programme alleged that the BBC had been found to have used actors in its report on Syria in the BBC Programmes following a “*massive public investigation which made some extremely disturbing findings*”.

As above, it appeared to Ofcom that these allegations were based on Mr Stuart’s complaint to the BBC, and on other individual opinions, which questioned whether actors had been used in the BBC Programmes.

The Licensee submitted that the “BBC denies using actors and evidence is not available to prove it one way or the other” and said that the BBC’s denial was “implausible”.

We noted that although TV Novosti attributed these allegations to Mr Stuart in the Programme, they were nevertheless presented as “*findings*” following what the Programme referred to as a “*massive public investigation*”. In fact these were not findings from any public investigation, rather they were allegations made by Mr Stuart in his complaint to the BBC, to which the BBC

had responded. As such, we considered that the Programme overstated and failed to properly contextualise the material upon which these allegations were based and, as such, it resulted in unfairness to the BBC.

Regarding the allegation that the BBC had relied on the questionable claims of a doctor who was both biased as a result of family political connections and who was lying to get the UK public to back war against the Syrian government, we considered that the Programme implied that Dr Hallam was biased through comparing her to Nurse Nayirah, whom the Presenter said had admitted lying to encourage public support for war.

We noted that Mr Stuart, in his complaint to the BBC, questioned Dr Hallam's background and affiliations and it appeared to Ofcom that this allegation was based on Mr Stuart's complaint to the BBC. We also noted that TV Novosti said that it had undertaken its own research and had concluded that it was "reasonable to suppose that Dr Hallam was not an impartial witness". However, we did not consider that the Programme made it clear that the allegation that Dr Hallam was biased and lying was based on an individual complaint to the BBC or on conclusions RT had drawn from its own research. We therefore considered that TV Novosti failed to properly contextualise in the Programme the material upon which this allegation was based; as such we considered the way in which this allegation was presented in the Programme resulted in unfairness to the BBC.

In relation to both of these allegations, again we noted that the BBC's responses to Mr Stuart's complaint were not referred to or reflected in the Programme. We considered, for the reasons stated above, that the Licensee would have had access to these responses. We also considered, for the reasons stated above, that the reference in the Programme to a "statement" in which the BBC said it "stands by its report" was not sufficient to reflect the viewpoint of the BBC in relation to these allegations in order to avoid unfairness to the BBC. We therefore considered that the way in which these allegations were presented in the Programme resulted in unfairness to the BBC.

v) The BBC used the reports to provoke war and military intervention in Syria

As stated above, the Programme alleged that the BBC had used the reports in the BBC Programmes in order to provoke war and military intervention in Syria.

Ofcom considered that this allegation was based on the opinion of particular individuals, including Mr Stuart's complaint to the BBC, which questioned whether the BBC had altered footage in the BBC Programmes and speculated whether it had done so to provoke war and military intervention in Syria. The Programme did not make clear that this allegation was based on individual speculation. The allegation was given further weight in that it was presented alongside allegations that the mainstream media, including the BBC, were involved in the "routine faking" of atrocities to provoke war. As such we considered that the Programme overstated the material upon which this allegation was based and presented it in the Programme in a way which resulted in unfairness to the BBC.

Again we considered that the Programme did not reflect the BBC's responses to Mr Stuart's complaint. We considered, for the reasons stated above, that

TV Novosti would have had access to the BBC's responses to Mr Stuart. Again, we did not consider, for the reasons stated above, that the single reference to a "*statement*" in which the BBC said it "*stands by its report*" was adequate to reflect the viewpoint of the BBC in order to avoid unfairness to it.

Therefore Ofcom considered that the way in this allegation was presented in the Programme resulted in unfairness to the BBC.

In conclusion to head (a) of the BBC's complaint, taking into account all of the circumstances and for all the reasons stated above, Ofcom considered that, the Licensee failed to take reasonable care to satisfy itself that material facts made about or in relation to the BBC in the Programme, were not presented in a way which was unfair to the BBC and accordingly we considered that the BBC was treated unfairly in the Programme.

- b) Ofcom considered whether the BBC was given an appropriate and timely opportunity to respond to the claims made about it in the Programme²¹.

In assessing this part of the complaint, Ofcom had particular regard to Practice 7.11 of the Code which states:

"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".

Ofcom considered that the allegations made about or in relation to the BBC in the Programme were significant in that they fundamentally questioned the impartiality and integrity of the BBC. We considered that these allegations had the potential to significantly undermine the reputation and integrity of the BBC and, in particular, undermine the trust viewers place in it. Therefore, it was incumbent on the Licensee to ensure that these allegations were put to the BBC and that the BBC was given an appropriate and timely opportunity to respond to these allegations.

TV Novosti acknowledged that it did not give the BBC an opportunity to respond to these allegations. The BBC said that it knew nothing about the Programme until after it was broadcast.

We noted that the Licensee said, in its response to the BBC's complaint, that the absence of an opportunity to allow the BBC to respond to the allegations did not result in any unfairness to the BBC. In particular, TV Novosti said that the BBC had made its position "quite plain" in its correspondence with Mr Stuart and that it was "implausible to suppose that offering the BBC a further opportunity to respond would have led to it saying anything different". Ofcom noted that the Licensee failed to include any of the detail of the BBC's responses to Mr Stuart. Ofcom considered that, irrespective of the BBC's responses to Mr Stuart's complaint, given the seriousness of the allegations of wrongdoing being made in the Programme, TV Novosti should have given the BBC an appropriate and timely opportunity to respond to the allegations and such response should have been referred to and fairly reflected in the Programme.

²¹ Ofcom did not consider the alleged motive of TV Novosti in not giving the BBC an opportunity to respond to the allegations made about it in the Programme, as per the BBC's complaint, as it was not appropriate for Ofcom to do so.

We therefore considered that the Programme failed to give the BBC an appropriate and timely opportunity to respond to the allegations made about it in the Programme and that this resulted in unfairness to the BBC.

- c) Ofcom then considered whether the BBC's views were fairly represented in the Programme.

In assessing this part of the complaint, Ofcom considered Practice 7.13 of the Code which states:

"Where it is appropriate to represent the views of a person or organisation that is not participating in the programme, this must be done in a fair manner".

We considered that, given the seriousness of the allegations made about the BBC in the Programme, and the potential impact these allegations could have on the BBC, it was appropriate to represent the views of the BBC in the Programme.

We noted that the Programme made one general reference to the viewpoint of the BBC, in that the Presenter said:

"In a statement, the British Broadcasting Corporation says it stands by its report".

We took into consideration the Licensee's representations that this reference in the Programme made the BBC's position clear and it was not an unbalanced account of what happened. However, we did not consider that this comment adequately and fairly reflected the viewpoint of the BBC in the Programme. This comment gave the impression that TV Novosti had contacted the BBC and put the allegations to it before the broadcast of the Programme when this was not the case. Further, this comment incorrectly and unfairly gave the impression that the BBC had provided only a brief response to the Licensee and it had chosen not to comment more substantively on the allegations made about it in the Programme. We therefore considered that this comment did not fairly represent the views of the BBC in response to the serious allegations made about it in the Programme.

We also did not consider that this comment reflected the detailed responses given by the BBC in its response to Mr Stuart's complaint. The Programme made no reference to the content of the BBC's responses to Mr Stuart's complaint (which as noted previously we considered it would have had access to); rather, the Presenter stated that Mr Stuart's questions to the BBC *"remain unanswered"*. By failing to refer to the detail of the BBC's responses to Mr Stuart's complaint, the Programme was unfair to the BBC.

Therefore, for all the reasons stated above, we considered that the BBC's views were not fairly represented in the Programme and that this resulted in unfairness to the BBC.

Conclusion

For the reasons outlined above, we considered that TV Novosti had not taken reasonable care to satisfy itself, before broadcasting the Programme, that material facts were not presented, disregarded or omitted in a way that was unfair to the BBC. We considered that the BBC should have been, and was not given, an appropriate and timely opportunity to respond to the allegations made about it in the Programme and that this was unfair to the BBC. We also considered that the BBC's views were

unfairly represented in the Programme. In our view, the Licensee's failure to take these steps resulted in unfairness to the BBC in the Programme as broadcast.

For all of these reasons, and taking full account of the need to secure the application of standards of protection from unfair treatment in the manner that best guarantees an appropriate level of freedom of expression, Ofcom found that the Programme as broadcast resulted in unfairness to the BBC.

Therefore, Ofcom has upheld the BBC's complaint of unjust or unfair treatment in the Programme as broadcast.

Upheld

Complaint by Mr Davinder Singh on behalf of himself and Mr Sucha Singh and Mrs Dyal Kaur

Sikh Channel News, Sikh Channel, 21 November 2014

Summary

Ofcom has upheld this complaint made by Mr Davinder Singh, on behalf of himself and his parents, Mr Sucha Singh and Mrs Dyal Kaur, of unjust or unfair treatment and of unwarranted infringement of privacy in the programme as broadcast.

The programme included a report about foreign bridegrooms marrying women from the Punjab region in India and then divorcing them a few months later. The report focused on the wedding of Mr Davinder Singh (the complainant) to Ms Kulwinder Kaur and it included an interview with Ms Kaur who made a number of allegations about Mr Davinder Singh and his parents. Photographs of the wedding were shown in the programme and the full address of Mr Davinder Singh and his parents was disclosed.

Ofcom found that:

- The broadcaster did not take reasonable steps to satisfy itself that material facts about Mr Davinder Singh and his parents in relation to the claims made by Ms Kulwinder Kaur were not presented, disregarded or omitted in a manner which gave viewers an unfair impression of them.
- Given the significant allegations made in the programme, the broadcaster was required to offer Mr Davinder Singh an appropriate and timely opportunity to respond, or if that opportunity was offered but refused (as Sikh Channel said that it was), this should have been made clear in the programme, to avoid unfairness to Mr Davinder Singh and his parents.
- Mr Davinder Singh, Mr Sucha Singh and Mrs Dyal Kaur had a legitimate expectation of privacy in relation to the broadcast of photographs and information about their home address and the broadcaster had unwarrantably infringed their privacy in respect of the broadcast of this material without their consent in the circumstances.

Introduction and programme summary

Sikh Channel is a television station providing religious and cultural programming to the Sikh community in the UK and Europe.

A transcript in English (translated from the original Punjabi) of the relevant part of the programme broadcast on 21 November 2014 was prepared by an independent translation company for Ofcom. Both parties to the complaint confirmed that the translated transcript accurately represented the content in the programme relevant to the complaint, and that they were satisfied for Ofcom to use the translated transcript for the purpose of considering whether or not to entertain and investigate the complaint.

On 21 November 2014, Sikh Channel broadcast an edition of *Sikh Channel News*. This particular edition featured a story about foreign bridegrooms marrying women from the Punjab region and then divorcing them. The news presenter focused on one reported incident, the wedding of Ms Kulwinder Kaur to Mr Davinder Singh. The report began by showing the news presenter in the studio:

Presenter: *“There is a lot of talk about foreign bridegrooms marrying girls from Punjab and then divorcing them, these reports are surfacing day in day out. A similar incident was reported from the village of Raipur in Nawan Shehar. Here, Kulwinder Kaur daughter of Sardar Gian Singh was married on 21st of October, 2012 to Davinder Singh son of Sucha Singh, living in England, from the village of Dadial in Hoshiarpur. Sometime after the marriage, the in-laws family called her over to England. But after keeping her for five and half months, returned her back to India. The girl explained that after staying for five and half months in UK she came to India with her husband. But while returning back to the UK, the husband took Kulwinder’s passport back with him. In the UK, he had her divorce papers made and sent them to her, which were given to her at her house via a solicitor in Jalandhar. She was shocked to see them. After this, Kulwinder tried to phone them quite a few times, but no one would talk to her and would put the receiver to one side. Kulwinder has requested that the culprits should be given the harshest punishment and her passport retrieved”.*

The programme then showed camera footage of a Sikh Channel News reporter interviewing Ms Kulwinder Kaur:

Ms Kaur: *“For the marriage on 21st of October, 2012, my husband’s family came over from England. After the wedding, they went back to England and I was called over. They kept torturing me, torturing me. Then, I was brought back to India using the excuse that it’s their cousins wedding and they had to attend. When I arrived in India, I was left in a hotel in Delhi and he returned back to the UK with my passport. I carried on waiting, that he would come back for me. But he did not return. After two months, divorce papers were sent to me. Please I should be helped, I want justice for myself, the government there but I–*

Reporter: *Sister, can you tell us what is his name, address, where does he live?*

Ms Kaur: *My husband’s name is Davinder Singh, father-in-law’s name is Sucha Singh, mother-in-law’s name is Dyal Kaur, sister-in-law’s name is Kalminder Kaur. They live at [full address].*

Reporter: *After that did you talk to them on the phone?*

Ms Kaur: *When he had left me, for some time I used to speak to my husband. But afterwards, when I would call, upon hearing my voice, they would put the receiver to one side and disconnect the phone. I use[d] to call them at 12 o’clock India time, upon hearing my voice, they will put the receiver to one side.*

Reporter: *Has he been married before or are you the only one he was married to?*

Ms Kaur: *He was married before. I found this out later that he did the same thing with other girl. She was also sent back after five months”.*

The programme then returned to the studio:

Presenter: *“Bureau report from Nawan Shehar, Sikh Channel”.*

Photographs of Mr Davinder Singh and his parents at his wedding to Ms Kulwinder Kaur were shown in the programme with their faces unobscured. Mr Davinder Singh and Ms Kulwinder Kaur were not shown or mentioned any further in the programme.

The news programme was repeated on 21 November 2014.

Summary of the complaint and the broadcaster’s response

Unjust or unfair treatment

The complaint

Mr Davinder Singh complained that he and his parents were treated unjustly or unfairly in the programme as broadcast, in that:

- a) Material facts were presented, disregarded or omitted in a way that was unfair to them. In particular, Mr Davinder Singh said that his former wife, Ms Kulwinder Kaur, made false allegations in the programme, namely that:
 - Mr Davinder Singh’s family kept *“torturing me [Ms Kulwinder Kaur]”*;
 - Ms Kulwinder Kaur had been brought back to India from the UK by the family on the pretence that it was to attend the wedding of a cousin. Mr Davinder Singh said that, in fact, his wife had taken him to India on the “pretence of getting treatment for a medical condition”;
 - Ms Kulwinder Kaur was left at a hotel in Delhi while Mr Davinder Singh returned to the UK, taking her passport with him. Mr Davinder Singh said that Ms Kaur had made her own travel arrangements with people whom Mr Davinder Singh did not know, and asked them to meet at 1pm the next day. Mr Davinder Singh said that she also said she would not attend the hospital and asked Mr Davinder Singh to attend instead. Mr Davinder Singh said he left India as he feared violence from Ms Kulwinder Kaur’s associates;
 - two months after waiting for him, without his return, Ms Kulwinder Kaur was served divorce papers from a solicitor acting on behalf of Mr Davinder Singh;
 - when Ms Kulwinder Kaur called her husband (Mr Davinder Singh), upon her voice being heard, the telephone receiver would be “put to one side” and the call disconnected; and,
 - Mr Davinder Singh had been married before and had done the same thing, i.e. sent his wife back to India after five months of marriage. Mr Davinder Singh said this was false and that his first wife had left of her own free will and returned to the UK. Mr Davinder Singh said he did not go to India with his first wife.

Mr Davinder Singh said that his character and that of his family was “assassinated” by the inclusion of these allegations which he said were false and had been presented in the programme as facts.

- b) Mr Davinder Singh complained that he was not advised that he would feature in the news report and was not given the opportunity to respond to the allegations made by Ms Kulwinder Kaur.

Unwarranted infringement of privacy

- c) In summary, Mr Davinder Singh complained that his privacy and that of his parents was unwarrantably infringed in the programme as broadcast in that:
- his photograph was shown in the programme, together with his parents;
 - the full address of the family home was given in the programme, including the house number and postcode; and,
 - the programme discussed his marriage break up.

By way of background, Mr Davinder Singh said that since the broadcast of the programme he and his family had received threats and that strangers had knocked on his door.

Sikh Channel's response

Sikh Channel stated that its daily news programme is recorded in India and undergoes a broadcast compliance check by the news team in India. The programme is then given a further "cursory check" when received for broadcast in the UK.

The broadcaster explained that on 21 November 2014, its daily news programme was received at 18:32 for broadcast at 19:00. Following a "cursory compliance check" by the Gallery Manager at Sikh Channel news, the story about Mr Davinder Singh and his family was determined unsuitable for broadcast. The broadcaster said that the programme was therefore edited to omit this story and a new, edited version of the programme was added into the slot for the regular news programme broadcast at 19:00.

However, Sikh Channel said that the original version of the programme had "automatically locked to the playlist". Therefore, it was only when the programme was broadcast that it discovered that the software had failed to broadcast the edited version of the news programme which omitted the story about Mr Davinder Singh. The broadcaster said that while an attempt was made to override the playlist to cease the broadcast, however, this was unsuccessful.

Sikh Channel said that following the incident, the Editorial Standards Committee at Sikh Channel met on Monday 24 November 2014 to commence an investigation. The broadcaster said that the incident took place during a trial of new advertising software and that the software provider was immediately contacted, following which changes to the software were made to prevent a repeat of the incident. The broadcaster provided Ofcom with further details about why this error had occurred with the software.

Sikh Channel stated that the news story about Mr Davinder Singh was thoroughly assessed and that the Indian news team producer provided details and evidence about the news report and the circumstances leading to its inclusion. The broadcaster said that this included a Punjab police First Incident Report¹ ("FIR")

¹ Ofcom understood that a First Incident Report ("FIR") was a written document which is prepared by the police in India when they receive information about the commission of a serious criminal offence. Generally, a complaint will be lodged with the police by the victim of

dated 21 May 2014 for offences registered against Mr Davinder Singh, Mr Sucha Singh, Ms Dyal Kaur and Ms Kalminder Kaur by Ms Kulwinder Kaur and which included the full address of Mr Davinder Singh and his family. Sikh Channel also stated that an affidavit from Ms Kulwinder Kaur dated 10 October 2014 included evidential photographs of the marriage ceremony. Sikh Channel said that the content of the news report about Mr Davinder Singh and his family was based upon the information included in the FIR and the affidavit.

The broadcaster provided Ofcom with a copy and translation of the FIR. Sikh Channel said that the FIR was in the public domain and it provided a website address for where the report could be found. Sikh Channel said it was unable to provide a copy of the affidavit because it was currently subject to legal proceedings in India.²

Sikh Channel said that the Indian news producer confirmed that Mr Davinder Singh had been contacted and was offered an opportunity to respond to the allegation “to which he is alleged to have promptly declined”. Sikh Channel said that the inclusion of the names and address of the accused in the report was “as per the F.I.R. in accordance with Indian reporting norms”.

Sikh Channel said that as a consequence of the incident, an internal investigation identified further compliance training for the Indian news team in addition to disciplinary proceedings for the relevant producer.

Sikh Channel said that it redressed the incident as a matter of urgency with a statement of apology being broadcast a total of six times after its news reports during the course of four days between 28 November 2014 and 6 December 2014. Sikh Channel said that this was narrated in Punjabi with a statement in English as follows:

“On 21 November 2014, Sikh Channel broadcast an episode of the daily Punjab news in which a segment contained allegations directed towards Mr Davinder Singh, Mr Sucha Singh, Mrs Dyal Kaur and Ms Kulminder Kaur of [area of UK], United Kingdom by Mrs Kulwinder Kaur of Nawanshahr, Punjab, India. Upon concerns over this report, the Sikh Channel editorial standards committee conducted an investigation following which it decided that as the allegations contained in the report were under investigation, the accused will be given an opportunity to reply to the report aired in the programme. The report was found to be misleading and unfair to parties concerned. Sikh Channel would like to apologise to Mr Davinder Singh, his family and our audiences for the broadcast of this report. Full details will be available on the Sikh Channel website in due course”.

Sikh Channel said that on 25 November 2014, Mr Davinder Singh, along with two other people, visited the Sikh Channel Head Office in Birmingham to obtain a copy of the recording of the programme. The broadcaster said that it refused to provide a copy of the programme to Mr Davinder Singh due to an ongoing internal investigation into Sikh Channel procedures. However, the broadcaster said that the full circumstances surrounding the broadcast of the report were explained to Mr

the offence and it is only after the FIR is registered in the police station that the police can investigate.

² In our Preliminary View, Ofcom inadvertently stated that Sikh Channel had informed Ofcom that the affidavit was in the public domain. We acknowledge that this was not in fact the case. However, this has not affected Ofcom’s findings in this case, as we did not place reliance on this issue in reaching our conclusions.

Davinder Singh, including the official apology and offer to provide a response to the allegations made about him. Sikh Channel said that Mr Davinder Singh said he was not interested in providing a response to the allegations. Sikh Channel said that the opportunity for Mr Davinder Singh to respond to the allegations continued to stand.

The broadcaster said that it always ensured that news programming complied with Ofcom's Broadcasting Code ("the Code") and to ethical and moral considerations. Sikh Channel said that all programmes were inspected and edited wherever necessary to ensure their compliance with the Code. It said that on this occasion, while a " cursory " pre-broadcast compliance check in the UK identified that further enquiries were appropriate, this particular report "slipped through the net" due to circumstances beyond their control.

Ofcom's Preliminary View

Ofcom prepared a Preliminary View in this case that the complaint of unjust or unfair treatment and unwarranted infringement of privacy in the programme as broadcast should be upheld.

Both parties were given the opportunity to comment on the Preliminary View. Both parties made representations and the relevant points relating to the Preliminary View are summarised below.

Mr Davinder Singh's representations

Mr Davinder Singh said the statement made by Kulwinder Kaur that "*He was married before. I found this out later that he did the same thing with other girl. She was also sent back after five months*" was made without any foundation and evidence by Kulwinder Kaur.

Mr Davinder Singh said that even though Sikh Channel asserted that the news report was based on the FIR and affidavit, neither were mentioned in the broadcast.

In response to head b) of the Preliminary View, Mr Davinder Singh stated that he and his parents were not contacted by anyone from Sikh Channel prior to the broadcast.

Sikh Channel's representations

Sikh Channel referred to the fact that Ofcom had stated in its Preliminary View that it had told Ofcom that the affidavit (as mentioned above) was in the public domain. Sikh Channel said that this was incorrect and that it had never told Ofcom that it was in the public domain, and said that it was concerned that those erroneous statements would be "prejudicial" to Ofcom's investigation into this case.³

In response to head b) of the Preliminary View, Sikh Channel said that the complainant was offered the opportunity to respond over the telephone on the morning following the initial broadcast. Sikh Channel said they understood that the opportunity to respond post-broadcast is not considered sufficient, however it was intended that the anticipated response would have been broadcast in the same format as the original report. Sikh Channel said the opportunity to respond was offered to the complainant again in person three days after the broadcast. Following

³ As noted above, we acknowledge that this was a factual error and have corrected this in our Adjudication. However, it has not affected the outcome of our findings as we did not place reliance on this point.

the Sikh Channel editorial standards committee's investigation, a statement was broadcast in the same series, at the same time slot, one week apart. Sikh Channel said that given the limited audience of the show, it was deemed that broadcast would have by and large targeted the same audience who had seen the original report.

In response to Mr Davinder Singh's representations, Sikh Channel said that the marriage between Mr Davinder Singh and Ms Kulwinder Kaur was conducted in India and the producer of the programme was under the belief that the divorce proceedings related solely to India. Sikh Channel added that they only became aware of UK legal proceedings following the broadcast of the programme.

Sikh Channel also argued that as the F.I.R remains outstanding, a fair conclusion to this matter cannot be reached until the completion of the legal proceedings in India, as this would allow all evidence pertaining to the broadcast of the news report to be considered.

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 unwarranted infringement of privacy in, or in connection with the obtaining of material included in, programmes in such services.

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

In reaching this Decision, we carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and translated transcript agreed by both parties and both parties' written submissions. We also took into account both parties representations on Ofcom's Preliminary View, however, we concluded that their representations did not materially affect the outcome of Ofcom's Decision to uphold the complaint.

Unjust or unfair treatment

In assessing this case it was not Ofcom's role to make a determination about the truth or otherwise of the claims made in the programme. Our concern in this case was solely whether the programme had complied with Section Seven (Fairness) of the Code. In carrying out this assessment, we took into consideration the nature of the claims made against Mr Davinder Singh and his parents. Against this background and in line with the right to freedom of expression, we considered it legitimate for a broadcaster to make and broadcast a report on matters of regional concern, i.e. foreign bridegrooms marrying women from the Punjab region and then divorcing them. Nevertheless, we considered that, in making and broadcasting such a programme, a broadcaster must ensure that it avoids unjust or unfair treatment of organisations or individuals in the programme pursuant to Section Seven (Fairness) of the Code.

When considering complaints of unjust or unfair treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals or organisations, as set out in Rule 7.1 of the

Code. Ofcom had regard to this Rule when reaching its Preliminary View.

- a) We first considered Mr Davinder Singh's complaint that he and Mr Sucha Singh and Mrs Dyal Kaur (his parents) were treated unjustly or unfairly in the programme as broadcast because material facts were presented, disregarded or omitted in a way that was unfair to them through the inclusion of the comments referred to under head a) of Mr Davinder Singh's and his parents' complaint.

In assessing this part of the complaint, Ofcom had regard to Practice 7.9 of the Code. This provides that before broadcasting a factual programme, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to the individual or organisation.

Whether a broadcaster has taken reasonable care to present material facts in a way that is not unfair to an individual or organisation will depend on all the particular facts and circumstances of the case including, for example, the seriousness of any allegations and the context within which they are made.

We began by considering the seriousness of the allegations and whether they had the potential to materially and adversely affect viewers' opinions of Mr Davinder Singh and his parents in a way that was unfair. We then went on to consider whether, if they did have this potential, the manner in which the allegations were presented in the programme resulted in unfairness.

Having carefully viewed the programme and examined a translated transcript of it, we noted that in relation to Mr Davinder Singh and his parents, the programme and Ms Kulwinder Kaur made a number of allegations about them. The full extent of these allegations are set out in the "Introduction and programme summary" section above. In summary these included:

- Mr Davinder Singh's family kept "*torturing me* [Ms Kulwinder Kaur]".
- Ms Kulwinder Kaur had been brought back to India from the UK by the family on the pretence that it was to attend the wedding of a cousin.
- Ms Kulwinder Kaur was left at a hotel in Delhi while Mr Davinder Singh returned to the UK, taking her passport with him.
- Two months after waiting for him, without his return, Ms Kulwinder Kaur was served divorce papers from a solicitor acting on behalf of Mr Davinder Singh.
- When Ms Kulwinder Kaur called her husband (Mr Davinder Singh), upon her voice being heard, the telephone receiver would be "put to one side" and the call disconnected.
- Mr Davinder Singh had been married before and had done the same thing, i.e. sent his wife back to India after five months of marriage.

We considered that the language used by the programme's presenter and Ms Kulwinder Kaur was accusatory in nature and would have left viewers in no doubt that the programme claimed that Mr Davinder Singh and his parents had acted improperly towards Ms Kulwinder Kaur following, during, and in the lead up to the breakdown of, the marriage to Mr Singh. In particular, we considered that the programme made allegations which questioned Mr Davinder Singh's and his parents' honesty and integrity. We noted too that these statements were presented as statements of fact and that the broadcast made no reference to the FIR or any pending police investigation or legal proceedings. Therefore, it was

our view that given the serious nature of the allegations made in the programme, it had the clear potential to materially and adversely affect viewers' opinions of Mr Davinder Singh and his parents.

Therefore, having established that the comments made about Mr Davinder Singh and his parents were serious allegations which were likely to materially and adversely affect viewers' opinion of them, we next considered whether the broadcaster had taken reasonable care to satisfy itself that material facts had not been presented in a way that was unfair to Mr Davinder Singh and his parents.

It was clear to Ofcom that the viewpoints of Mr Davinder Singh and his parents on the allegations made by Ms Kulwinder Kaur were not included in the programme and that the report was one-sided. We also noted that the broadcaster in its statement of apology admitted that the report was "found to be misleading and unfair to parties concerned". For the reasons set out above, Ofcom considered that the allegations were serious and had the clear potential to materially and adversely affect viewers' opinions of Mr Davinder Singh and his parents. We noted that in its response, the broadcaster had stated that the pre-broadcast check identified that further enquiries were deemed appropriate, and that the broadcast had only taken place "due to circumstances beyond our reasonable control". Therefore, it was our view that the facts in relation to this story had not been fully established prior to the broadcast of the programme. In accordance with Practice 7.9, the broadcaster had therefore failed to take reasonable steps to satisfy itself that material facts about Mr Davinder Singh and his parents had not been presented, disregarded or omitted in a way that was unfair to them.

We also had regard to the broadcaster's statement that it had had taken steps following the broadcast of the programme, i.e. by carrying out an internal investigation, contacting Mr Singh and offering him the opportunity to respond following the broadcast and broadcasting a statement of apology, in an attempt to redress the matter. We also noted that the Sikh Channel had argued that it considered that the broadcast of the statement of apology in the same series, at the same time slot and one week later should have by and large targeted the same audience who had seen the original report. While we recognise that the broadcaster did attempt to resolve the issue by broadcasting a statement of apology in a manner that was intended to target the same audience who would have seen the original report, it was our view that, given the serious nature of the allegations made in the programme, this was not sufficient in this case to avoid unfairness to Mr Davinder Singh and his parents in the programme as broadcast.

We also noted Sikh Channel's submission in response to the Preliminary View that it would not be fair for Ofcom to reach a decision on the case pending the completion of the legal proceedings relating to the FIR in India (although the broadcaster did not explain further if it had any updated information as to the status of the police investigation or why it considered that the outcome of any potential legal proceedings in India would affect Ofcom's decision in this case). We further noted that the complainant had told us that he had not been served with any legal papers from India and that it was not clear what the status of any investigation into this matter was presently (including as to whether any charges had been, or would be, formally brought against Mr Davinder Singh and/or his parents). As noted above, it is not Ofcom's role to determine disputed issues of fact, rather Ofcom is concerned with deciding whether the complainant has been subject to unfair treatment in the programme as broadcast. As further noted above, Ofcom considered that the allegations were serious and had the clear potential to materially and adversely affect viewers' opinions of Mr Davinder

Singh and his parents and that the broadcaster had itself identified that further checks were appropriate prior to broadcast as the facts had not been fully established. Therefore, Ofcom did not consider that it was necessary or appropriate to await confirmation of the resolution of the FIR prior to reaching its conclusion as to whether Mr Davinder Singh and his parents had been unfairly treated in the programme as broadcast.

We therefore considered that the way in which the allegations were presented in the programme meant that Mr Davinder Singh and his parents had been treated unfairly in the programme as broadcast.

- b) We next assessed Mr Davinder Singh's complaint that he was not advised that he would feature in the news report and was not given the opportunity to respond to the allegations made by Ms Kulwinder Kaur.

In assessing this head of complaint Ofcom took into account Practice 7.11 which 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. We also had regard to Practice 7.12 which provides that where a person approached to contribute to a programme chooses to make no comment or refuses to appear in a broadcast, the broadcast should make clear that the individual concerned has chosen not to appear and should give their explanation if it would be unfair not to do so.

For the reasons already given in head a) above, Ofcom considered that the comments made in the programme about Mr Davinder Singh and his parents amounted to serious allegations about their conduct towards Ms Kulwinder Kaur, which essentially amounted to allegations of wrongdoing. Normally, in accordance with Practice 7.11, if a significant allegation is made about an individual or organisation in a programme, the broadcaster should ensure that the individual or organisation concerned is given an opportunity to respond and, where appropriate, for that response to be represented in the programme in a fair manner.

In Sikh Channel's response to the complaint, it said that the report featuring the story about Mr Davinder Singh had been broadcast by mistake but that the Indian news producer confirmed that Mr Davinder Singh had been contacted and was offered an opportunity to respond to the allegation "to which he is alleged to have promptly declined". We noted that Sikh Channel provided no evidence (such as email correspondence) that it had sought any comment from Mr Davinder Singh or his parents prior to the broadcast. We noted also that Mr Davinder Singh said that Sikh Channel had not contacted him prior to the broadcast of the programme. It is clear that this was a matter of dispute between the parties and it was neither possible nor appropriate for Ofcom to make a determination about whether or not Mr Davinder Singh had been contacted by Sikh Channel.

In any event, even if the broadcaster (as it claimed) had attempted to contact Mr Davinder Singh (which Mr Davinder Singh denies), the broadcaster did not make clear in the programme that it had sought a response in any form in advance of the programme going on air from Mr Davinder Singh or whether one had been provided.

Therefore, we considered that given the serious nature of the allegations made against Mr Davinder Singh and his parents (set out in head a) above), consistently with Practice 7.11, the broadcaster should have given Mr Davinder

Singh an appropriate and timely opportunity to respond, or, consistently with Practice 7.12, if that opportunity was offered but refused, this should have been made clear in the programme.

We also had regard to the broadcaster's statement in which it said that the opportunity to respond to the allegations remained open to Mr Davinder Singh and that it had contacted the complainant on the morning following the initial broadcast to make this clear and three days later when Mr Davinder Singh visited the broadcaster's head office following the broadcast of the programme. Nevertheless, in our view, given the serious nature of the allegations made in the programme, it was not sufficient to attempt to avoid unfairness in this case, for the broadcaster to offer an opportunity to respond to the allegations after the broadcast of the programme.

Taking all of this into account, and for the reasons given above, Ofcom considered that the failure to give Mr Davinder Singh an appropriate or timely opportunity to respond to the allegations prior to broadcast, or alternatively, the failure to make clear in the programme as broadcast that this opportunity had been offered and refused had resulted in unfairness to Mr Davinder Singh in the programme as broadcast.

Unwarranted infringement of privacy

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights of the broadcaster to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate. This is reflected in how Ofcom applies Rule 8.1 which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

- c) We considered Mr Davinder Singh's complaint that his privacy and that of his parents was unwarrantably infringed in the programme as broadcast because:
- his photograph was shown in the programme, together with photographs of his parents;
 - the full address of the family home was given in the programme, including the house number and postcode; and,
 - the programme discussed his marriage break-up.

In assessing this head of complaint, Ofcom had particular regard to Practice 8.6 of the Code. This 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. We also had regard to Practices 8.2 and 8.3. Practice 8.2 states that information which discloses the location of a person's home or family should not be revealed without permission, unless it is warranted. Practice 8.3 provides that when people are caught up in events which are covered by the news they still have a right to privacy both in the making and the broadcast of a programme, unless it is warranted to infringe it. This applies to both the time when these events are taking place and to any later programmes that revisit those events.

Ofcom began by assessing the extent to which each of the complainants (i.e. Mr Davinder Singh and his parents) had a legitimate expectation of privacy in relation to above-mentioned material included in the programme as broadcast.

As set out in the “Introduction and programme summary” section above, the programme included a detailed account of the Mr Davinder Singh’s marriage break up from the viewpoint of his former wife, Ms Kulwinder Kaur. During the interview, Ms Kulwinder Kaur was asked by the presenter to name and provide the address of Mr Davinder Singh and his parents and she provided these details. To accompany the report, photographs of Mr Davinder Singh and his parents were also shown. The photographs appeared to be taken from Mr Davinder Singh’s and Ms Kulwinder Kaur’s marriage ceremony. Two of the photographs showed Mr Davinder Singh and Ms Kulwinder Kaur with his parents, one of the photographs showed Mr Davinder Singh, Ms Kulwinder Kaur and his parents with a group of other people and the other two photographs were of Mr Davinder Singh and Ms Kulwinder Kaur on their own. Further, we noted that the programme’s reporter explicitly stated that “*Kulwinder has requested that the culprits should be given the harshest punishment and her passport retrieved*”.

We considered first whether Mr Davinder Singh and had a legitimate expectation of privacy in relation to the matters complained about.

The test applied by Ofcom as to whether a legitimate expectation of privacy arises is objective: it is fact sensitive and must always be judged in light of the circumstances in which the individual concerned finds him or herself.

We recognised that an individual may have a legitimate expectation of privacy in relation to aspects of their personal relationships with other people. Mr Davinder Singh complained that the programme included a discussion of his marriage breakdown, although he did not specifically identify information which he considered to be private. However, in our view, Mr Davinder Singh’s concerns appeared to be that the programme included a number of allegations made by Ms Kulwinder Kaur about him and their marriage breakdown which were false (see head a) of the Preliminary View section above). Given that Mr Davinder Singh considered the allegations included in the programme to be false, we considered that Mr Davinder Singh’s complaint in that regard related more to fairness (as dealt with under head a), rather than a complaint that his privacy had been unwarrantably infringed in relation to the inclusion of these allegations in the programme as broadcast because they disclosed information which was private or sensitive about Mr Davinder Singh. We did not consider that the fact that Mr Davinder Singh’s marriage had broken down in itself was information in relation to which he had a legitimate expectation of privacy in the circumstances, especially given that we understood that this was the subject of ongoing divorce proceedings at the time of broadcast. Therefore it was not necessary for Ofcom to go on to consider whether any infringement into Mr Davinder Singh’s privacy was warranted in this respect.

We next considered the nature of the photographs in question. We noted that there were five photographs of Mr Davinder Singh shown in the programme which appeared to be of him at his wedding to Ms Kulwinder Kaur. We noted that Mr Davinder Singh was named in the programme and therefore would have been identifiable. We recognise that photographs of a person’s wedding day could be regarded as being private and sensitive in nature depending on the circumstances, although we noted that the photographs did not appear to disclose anything particularly private or sensitive about Mr Davinder Singh, other

than the fact he was at his wedding. In our view, Mr Davinder Singh is a private individual (i.e. he is not in the public eye) and we understand that his image and these photographs had previously not been widely disseminated⁴. Therefore, in the circumstances of this case, we considered that Mr Davinder Singh had a legitimate expectation of privacy in relation to the photographs of him included in the programme as broadcast. However, this expectation was limited because the photographs themselves did not disclose anything particularly private or sensitive about Mr Davinder Singh.

In relation to the inclusion of Mr Davinder Singh's full address in the programme, we considered that an individual's full home address would generally be regarded as personal information in relation to which an individual may have a legitimate expectation of privacy. We also noted that the disclosure of Mr Davinder Singh's full address in the programme took place in a context where allegations had been made about Mr Davinder Singh acting improperly towards Ms Kulwinder Kaur, that the programme's reporter had stated that Ms Kulwinder Kaur wanted Mr Davinder Singh to receive the "*harshesht punishment*" and that Mr Davinder Singh said that he had been the subject of reprisals following the report. We had regard to the broadcaster's response in which it said that the full name and address of Mr Davinder Singh was included in the FIR which, the broadcaster said, was in the public domain via the Indian police website. Nevertheless, we took into account that even if this information may have been in the public domain through the FIR, it would likely only have been viewed by a limited number of people in that context. We therefore considered that the disclosure of Mr Davinder Singh's full address in the programme could reasonably be regarded as the disclosure of information in relation to which Mr Davinder Singh had a legitimate expectation of privacy in these circumstances.

Taking all the above factors into consideration, we considered that Mr Davinder Singh did have a legitimate expectation of privacy in relation to the broadcast of photographs of him and disclosure of his full address in the programme as broadcast.

We next considered whether Mr Sucha Singh and Mrs Dyal Kaur had a legitimate expectation of privacy in relation to the matters complained about.

Again, we considered the nature of the photographs in question and noted that there were three photographs of Mr Sucha Singh and Mrs Dyal Kaur shown in the programme which appeared to be from the wedding of Mr Davinder Singh to Ms Kulwinder Kaur. We noted that Mr Sucha Singh and Mrs Dyal Kaur were named in the programme and therefore would have been identifiable. For the reasons given above, we also considered that the inclusion of photographs of Mr Sucha Singh and Mrs Dyal Kaur in the programme could reasonably be regarded as private photographs in relation to which they had a legitimate expectation of privacy and that this expectation was also limited given that the photographs did not disclose anything particularly private or sensitive about Mr Sucha Singh and Mrs Dyal Kaur.

⁴ As noted above, in our Preliminary View, Ofcom inadvertently stated that Sikh Channel had informed Ofcom that Ms Kulwinder Kaur's affidavit (which included photographs of the marriage ceremony between Ms Kulwinder Kaur and Mr Davinder Singh) was in the public domain. We acknowledge that this was not in fact the case. However, this has not affected Ofcom's findings in this case.

In relation to the inclusion of Mr Sucha Singh's and Mrs Dyal Kaur full address in the programme, and as noted above, we considered that an individual's full home address would generally be regarded as personal information in relation to which an individual may have a legitimate expectation of privacy. For the reasons given above, we also considered that the disclosure of Mr Sucha Singh's and Mrs Dyal Kaur's full address in the programme could reasonably be regarded as the disclosure of information in relation to which they had a legitimate expectation of privacy in these circumstances.

Taking all the above factors into consideration, we considered that Mr Sucha Singh and Mrs Dyal Kaur did have a legitimate expectation of privacy in relation to photographs of them and disclosure of their full address in the programme as broadcast.

Having concluded that Mr Davinder Singh and his parents had a legitimate expectation of privacy in relation to the inclusion of photographs of them and disclosure of their full address in the programme, we then assessed whether Mr Davinder Singh and his parents' consent had been secured to include this material and information about them. We noted that it was not disputed that the broadcaster had not obtained, nor sought Mr Davinder Singh's or his parents' consent prior to the broadcast of material and information about them in the programme.

Given that Mr Davinder Singh and his parents had a legitimate expectation of privacy in relation to the broadcast of material and information in the programme, it was necessary to establish whether or not the infringement of Mr Davinder Singh's and his parents' privacy was warranted. The Code states that "warranted" has a particular meaning. It means that, where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why, in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy.

In determining whether or not the infringement into Mr Davinder Singh's and his parents' privacy was warranted, we carefully balanced the broadcaster's competing rights to freedom of expression and viewers' right to receive information and ideas without unnecessary interference against the rights to privacy of Mr Davinder Singh and his parents (as discussed above). We also took into account Ms Kulwinder Kaur's right to freedom of expression in relation to her account of the breakdown of the marriage. In particular, we considered whether there was sufficient public interest or other reason to justify the infringement of Mr Davinder Singh's and his parents' privacy in broadcasting this material without their consent.

We noted that Sikh Channel did not provide any specific arguments regarding why, in its view, it might be warranted to have included this material which infringed the privacy of Mr Davinder Singh and his family. However, it did say that the Sikh Channel Punjab news producer perceived the report to be in the public interest given the pending status of the FIR against the four named individuals, i.e. Mr Davinder Singh and his family and that the nature of the allegations were considered "serious non-bailable offences for which the Punjab Police regularly utilise the Indian media when pursuing". Further, we noted that in its response, Sikh Channel said that the names and address of Mr Davinder Singh and his parents were included in the news report "as per the FIR in accordance with Indian reporting norms".

We took into account the need to have careful regard to the editorial freedom of the broadcaster and the proper exercise of the right to freedom of expression, as well as the audience's right to receive the information that was broadcast. The broadcaster's interests in this case were its ability to make a news programme about the practice of foreign bridegrooms marrying and divorcing women from the Punjab region. In doing so, the programme included Ms Kulwinder Kaur's views in accordance with the broadcaster's and Ms Kulwinder Kaur's rights to freedom of expression and the viewers' right to receive such information.

However, we also had regard to Sikh Channel's response in which it said the report about Mr Davinder Singh had not passed compliance checks and had been deemed unsuitable for broadcast and had only been broadcast by mistake. We noted that Sikh Channel did not provide more specific details about the reason the report had not passed compliance checks, but had acknowledged that further enquiries were required before broadcast of this report and that the report was found to be misleading and unfair to the parties concerned by Sikh Channel's editorial standards committee. We also noted our conclusion (as explained above), that Mr Singh and his parents had been treated unfairly in the programme as broadcast. Accordingly, taking all these factors into account, we considered that the public interest in broadcasting this particular report was limited.

In light of all the factors set out above, Ofcom considered that, on balance, any public interest in broadcasting the photographs and full address of Mr Davinder Singh and his parents was not sufficient to justify the infringement of their rights to privacy in the particular circumstances of this case, and that those rights were not outweighed by the broadcaster's right to freedom of expression in this case.

Therefore, Ofcom's view was that there was an unwarranted infringement of Mr Davinder Singh's and his parents' privacy in the programme as broadcast.

Therefore, Ofcom has upheld Mr Davinder Singh's complaint made on behalf of himself, Mr Sucha Singh and Mrs Dyal Kaur of unfair and unjust treatment and unwarranted infringement of privacy in the programme as broadcast.

Investigations Not in Breach

Here are alphabetical lists of investigations that Ofcom has completed between 5 and 11 September 2015 and decided that the broadcaster did not breach Ofcom's codes, licence conditions or other regulatory requirements.

Investigations conducted under the Procedures for investigating breaches of content standards for television and radio

Programme	Broadcaster	Transmission date	Categories
RT News Report	RT	20/08/2014	Scheduling / offence
Sophie & Co	RT	27/03/2015	Due impartiality/bias

For more information about how Ofcom conducts investigations about content standards, go to: <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/standards/>.

Complaints assessed, not investigated

Here are alphabetical lists of complaints that, after careful assessment, Ofcom has decided not to pursue between 5 and 11 September 2015 because they did not raise issues warranting investigation.

Complaints assessed under the Procedures for investigating breaches of content standards for television and radio

For more information about how Ofcom assesses conducts investigations about content standards, go to:

<http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/standards/>.

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
News	Al Jazeera Eng	24/08/2015	Violence and dangerous behaviour	1
BBC News Website	BBC	07/09/2015	Outside of remit / other	1
BBC News at Six	BBC 1	28/08/2015	Disability discrimination/offence	1
BBC News at Six	BBC 1	28/08/2015	Generally accepted standards	1
Casualty	BBC 1	30/08/2015	Violence and dangerous behaviour	1
Lady Chatterley's Lover (trailer)	BBC 1	03/09/2015	Scheduling	1
Lady Chatterley's Lover (trailer)	BBC 1	04/09/2015	Scheduling	1
The Great British Bake Off	BBC 1	02/09/2015	Materially misleading	1
The One Show	BBC 1	03/09/2015	Scheduling	1
Athletics	BBC 2	30/08/2015	Disability discrimination/offence	1
Great British Menu	BBC 2	08/09/2015	Outside of remit / other	2
Newsnight	BBC 2	12/08/2015	Sexual orientation discrimination/offence	7
BBC News	BBC News	04/09/2015	Outside of remit / other	1
BBC News	BBC News Channel	03/09/2015	Generally accepted standards	1
News	BBC News Channel / Sky News	n/a	Due impartiality/bias	1
Dev	BBC Radio 1	02/09/2015	Offensive language	1
Profile: Michel Houellebecq	BBC Radio 4	06/09/2015	Offensive language	1
The Archers	BBC Radio 4	27/08/2015	Generally accepted standards	1
News (trailer)	BBC Radio Surrey and Sussex	01/09/2015	Generally accepted standards	1
Baby Loony Tunes	Cartoonito	24/08/2015	Offensive language	1
Footy Pups	CBeebies	03/09/2015	Generally accepted standards	1

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
Footy Pups	CBeebies	08/09/2015	Race discrimination/offence	1
Channel 4 News	Channel 4	31/08/2015	Scheduling	1
Channel 4 News	Channel 4	04/09/2015	Due impartiality/bias	1
Channel 4 News	Channel 4	08/09/2015	Due impartiality/bias	1
Come Dine with Me	Channel 4	19/08/2015	Sexual orientation discrimination/offence	1
Come Dine With Me	Channel 4	n/a	Outside of remit / other	1
Helluva Tour sponsors 8 Out of 10 Cats Does Countdown	Channel 4	04/09/2015	Sponsorship credits	1
Hollyoaks	Channel 4	17/08/2015	Scheduling	1
Hollyoaks	Channel 4	18/08/2015	Scheduling	1
Hollyoaks	Channel 4	19/08/2015	Race discrimination/offence	1
Hunted	Channel 4	10/09/2015	Fairness & Privacy	1
The Last Leg	Channel 4	04/09/2015	Generally accepted standards	1
The Last Leg	Channel 4	08/09/2015	Materially misleading	1
The Three Day Nanny	Channel 4	18/08/2015	Under 18s in programmes	1
5 News Update	Channel 5	17/08/2015	Materially misleading	1
Celebrity Big Brother	Channel 5	01/09/2015	Disability discrimination/offence	1
Celebrity Big Brother	Channel 5	01/09/2015	Generally accepted standards	1
Celebrity Big Brother	Channel 5	03/09/2015	Fairness	1
Celebrity Big Brother	Channel 5	05/09/2015	Voting	1
Psycho Pussies: When Cats Attack	Channel 5	05/09/2015	Disability discrimination/offence	1
The Nightmare Neighbour Next Door	Channel 5	05/09/2015	Offensive language	1
The Nightmare Neighbour Next Door	Channel 5	09/09/2015	Materially misleading	1
The Special Needs Hotel	Channel 5	04/09/2015	Disability discrimination/offence	1
The Wright Stuff	Channel 5	31/08/2015	Generally accepted standards	1
Live at the Apollo	Comedy Central Extra +1	31/08/2015	Race discrimination/offence	1
Hollyoaks	E4	17/08/2015	Scheduling	1
Rude Tube	E4	11/08/2015	Animal welfare	1
Young, Free and Single	E4	10/08/2015	Generally accepted standards	1
Young, Free and Single	E4	10/08/2015	Sexual orientation discrimination/offence	1
Young, Free and Single (trailer)	E4	07/09/2015	Scheduling	1
Live Pirates @ Cardinals	ESPN	07/09/2015	Outside of remit / other	1

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
The O'Reilly Factor	Fox News	25/08/2015	Due impartiality/bias	1
Coronation Street	ITV	02/09/2015	Generally accepted standards	1
Coronation Street	ITV	02/09/2015	Offensive language	1
Coronation Street	ITV	04/09/2015	Generally accepted standards	1
Emmerdale	ITV	03/08/2015	Race discrimination/offence	1
Emmerdale	ITV	01/09/2015	Generally accepted standards	3
Emmerdale	ITV	10/09/2015	Drugs, smoking, solvents or alcohol	1
Emmerdale	ITV	n/a	Generally accepted standards	1
ITV News and Weather	ITV	18/08/2015	Due accuracy	1
ITV News and Weather	ITV	26/08/2015	Due impartiality/bias	1
ITV News and Weather	ITV	30/08/2015	Due accuracy	1
ITV News and Weather	ITV	31/08/2015	Scheduling	2
ITV News at Ten and Weather	ITV	07/09/2015	Generally accepted standards	1
Loose Women	ITV	01/09/2015	Generally accepted standards	1
Nationwide's sponsorship of ITV documentaries	ITV	25/08/2015	Generally accepted standards	1
Programming	ITV	n/a	Outside of remit / other	1
Rugby World Cup 2015 (trailer)	ITV	22/08/2015	Violence and dangerous behaviour	1
Smokey and the Bandit II	ITV	23/08/2015	Offensive language	1
The Aquabats! Super Show!	ITV	02/08/2015	Scheduling	1
The X Factor	ITV	29/08/2015	Gender discrimination/offence	1
The X Factor	ITV	03/09/2015	Materially misleading	1
The X Factor	ITV	06/09/2015	Offensive language	1
Through the Keyhole	ITV	29/08/2015	Offensive language	1
Through the Keyhole	ITV	05/09/2015	Offensive language	1
ITV News Calendar	ITV Yorkshire	25/08/2015	Generally accepted standards	1
The Xtra Factor	ITV2	05/09/2015	Generally accepted standards	1
Cycling	ITV4	10/09/2015	Religious/Beliefs discrimination/offence	1
Justin	Kiss FM	26/08/2015	Offensive language	1
James O'Brien	LBC 97.3FM	04/09/2015	Generally accepted standards	1
Let's Rock It Out With Zumba	London Live	06/09/2015	Advertising minutage	1

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
SpongeBob Squarepants	Nicktoons	07/09/2015	Offensive language	1
Sky News with Anna Jones	Sky News	04/09/2015	Due impartiality/bias	1
Sunrise	Sky News	01/09/2015	Due impartiality/bias	1
Sunrise	Sky News	04/09/2015	Due impartiality/bias	1
Sunrise	Sky News	08/09/2015	Due accuracy	1
Sunrise	Sky News	08/09/2015	Race discrimination/offence	1
Soccer A.M.	Sky1	05/09/2015	Scheduling	5
Skin Wars (trailer)	TruTV	27/08/2015	Scheduling	1

Complaints assessed under the General Procedures for investigating breaches of broadcast licences

For more information about how Ofcom conducts investigations about broadcast licences, go to: <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/general-procedures/>.

Licensee	Licensed service	Categories
Leisure FM	Leisure FM Limited	Key Commitments

Complaints outside of remit

Here are alphabetical lists of complaints received by Ofcom that fell outside of our remit. This is because Ofcom is not responsible for regulating the issue complained about. For example, the complaints were about the content of television and radio adverts, or accuracy in BBC programmes.

For more information about what Ofcom's rules cover, go to:

<http://consumers.ofcom.org.uk/complain/tv-and-radio-complaints/what-does-ofcom-cover/>

Complaints about television or radio programmes

For more information about how Ofcom assesses conducts investigations about content standards, go to:

<http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/standards/>

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
BBC News	BBC 1	04/09/2015	Due impartiality/bias	1
BBC News	BBC 1	07/09/2015	Due accuracy	1
BBC News at Six	BBC 1	04/09/2015	Due impartiality/bias	1
Panorama	BBC 1	07/09/2015	Due impartiality/bias	21
BBC News	BBC News Channel	02/09/2015	Due impartiality/bias	1
BBC News	BBC News Channel	03/09/2015	Due impartiality/bias	1
BBC News	BBC News Channel	03/09/2015	Due impartiality/bias	1
Jeremy Vine	BBC Radio 2	04/09/2015	Due impartiality/bias	1
Advertisement	Channel 4	05/09/2015	Advertising content	1
Advertisement	E4	07/09/2015	Advertising content	1
Advertisements	Film4	05/09/2015	Advertising content	1
Advertisement	ITV	02/09/2015	Advertising content	2
Advertisement	ITV	04/09/2015	Advertising content	1
Advertisement	ITV	06/09/2015	Advertising content	1
Advertisement	ITV	07/09/2015	Advertising content	1
Advertisement	ITV	09/09/2015	Advertising content	1
Advertisement	ITV	n/a	Advertising content	1
Advertisement	ITV2	02/09/2015	Advertising content	1
Advertisement	n/a	n/a	Advertising content	2
Programming	QVC	05/09/2015	Advertising content	1

Investigations List

If Ofcom considers that a broadcaster may have breached its codes, a condition of its licence or other regulatory requirements, it will start an investigation.

It is important to note that an investigation by Ofcom does not necessarily mean the broadcaster has done anything wrong. Not all investigations result in breaches of the licence or other regulatory requirements being recorded.

Here are alphabetical lists of new investigations launched between 5 and 11 September 2015.

Investigations launched under the Procedures for investigating breaches of content standards for television and radio

Programme	Broadcaster	Transmission date
Programming	ATN Bangla	22 June 2015
Masie May	Ujima Bristol 98 FM	28 July 2015

For more information about how Ofcom assesses complaints and conducts investigations about content standards, go to:

<http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/standards/>.

Investigations launched under the General Procedures for investigating breaches of broadcast licences

Licensee	Licensed Service
Pulse Media Broadcasting Limited	Pulse

For more information about how Ofcom assesses complaints and conducts investigations about broadcast licences, go to:

<http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/general-procedures/>.