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Case No: AC-LON-2024-002150

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2025

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE DBE CB

Between :

The King
on the application of

GB NEWS LIMITED

Claimant

– and –

THE OFFICE OF COMMUNICATIONS
(‘OFCOM’)

Defendant

Mr Tom Hickman KC & Mr Christopher Knight (instructed by Brown Rudnick LLP) for the
Claimant

Miss Jessica Boyd KC, Mr David Glen & Mr Rowan Stennett (instructed by OFCOM) for
the **Defendant**

Hearing dates: 29th & 30th January 2025

Approved Judgment

This judgment was handed down remotely at 12pm on 28 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MRS JUSTICE COLLINS RICE DBE CB

Mrs Justice Collins Rice :

Introduction

1. GB News is a UK free-to-air television and radio news channel. Launched in the summer of 2021, it was the first new entrant into the TV news and current affairs arena for more than thirty years. Its editorial charter says:

We are pioneers – leading the charge for a new kind of journalism. One that refuses to bow to convention or be swayed by those who shout loudest. We are here for everyone, not the establishment, nor just for popular opinion. We believe in elevating the unheard, giving them a platform, and creating a space where every voice is respected, valued, and heard. **This is journalism for the people, by the people.**

One of its points of distinctiveness has been hiring prominent politicians still active on the national stage to host their own topical discussion programmes. Current Reform UK Party leader Nigel Farage was given a prime-time show shortly after the launch, and Dehenna Davison, Lee Anderson, Esther McVey and Philip Davies have all had presenting roles while sitting as Conservative MPs. Former Conservative Cabinet Minister Jacob Rees-Mogg (now Sir Jacob) joined the broadcaster in 2023, on return to the backbenches, to present a regular topical discussion show, *Jacob Rees-Mogg's State of the Nation*, airing four times a week for an hour.

2. TV broadcasting is subject to statutory regulation, overseen by broadcast regulator OFCOM. On receipt of a number of complaints, and after further investigation and procedure, OFCOM issued decisions on 18th March 2024 that two editions of *Jacob Rees-Mogg's State of the Nation* – broadcast on 9th May 2023 and 13th June 2023 – breached rules in its Broadcasting Code.
3. GB News challenges those decisions in these Judicial Review proceedings. The parties agree the challenge requires determination of a point of law about the interpretation of the Broadcasting Code's provisions relating to '*due impartiality and due accuracy in news*'.

Legal framework

(a) Article 10 ECHR

4. Freedom of expression is a fundamental right. It currently has force in UK law through the Human Rights Act 1998, which enshrines Article 10 of the European Convention on Human Rights. As a public authority, compliance with Article 10 is legally binding on OFCOM in the exercise of its functions.
5. Article 10 provides as follows:

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
6. Freedom of journalistic expression – including editorial freedom – is an especially important exercise of the right, fundamental to any democracy. Significantly, Art.10(1) expressly confirms that is compatible with having broadcast licensing regimes, because they are a form of intrusion into the freedom of journalistic expression. As such, Art.10(2) requires broadcasting regulation to be, among other things, ‘*prescribed by law*’.
 7. The decided caselaw provides guidance about what that means in practice. The law in question must be sufficiently clear, predictable and foreseeable in application. The ECtHR emphasises that particularly where restraint of journalism is concerned: ‘...*the relevant law must provide a clear indication of the circumstances when such restraints are permissible and, a fortiori, when the consequences of the restraint are to block publication of a periodical completely, as in the present case.*’ (*Gaweda v Poland* (2004) 39 E.H.R.R. 4, at [40]).
 8. But these standards are subject to reasonableness and practicality. Lord Sumption put it this way in *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland & Anor* [2015] AC 1065 (at [11]):

... the rules need not be statutory, provided that they operate within a framework of law and that there are effective means of enforcing them. Their application, including the manner in which any discretion will be exercised, should be reasonably predictable, if necessary with the assistance of expert advice. But except perhaps in the simplest cases, this does not mean that the law has to codify the answers to every possible issue which may arise. It is enough that it lays down principles which are capable of being predictably applied to any situation.
 9. And the ECtHR in *Satakunnan v Finland* (2018) 66 EHRR 8 held, at [143]:

As regards the requirement of foreseeability, the Court has repeatedly held that a norm cannot be regarded as a “law” within the meaning of art.10(2) unless it is formulated with sufficient

precision to enable a person to regulate his or her conduct. That person must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice.

Again, at [145], regarding the standard as applied to professionals:

The Court has found that persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation, can on this account be expected to take special care in assessing the risks that such activity entails.

10. So foreseeability reasonable in the circumstances is consistent with an element of flexibility, interpretation and adaptation over time. In *S.W. v United Kingdom* (Application no.20166/92), 22 November 1995, the ECtHR said this, in the context of criminal law (at [36]):

However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.

11. The ECtHR in *Huhtamäki v. Finland* (App. No. 54468/09; 6 March 2012), again in the context of criminal law, observed in the same vein that (at [51]):

Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen... Even when a point is ruled upon for the first time in an applicant's case, a violation of Article 7 of the Convention will not arise if the meaning given is both foreseeable and consistent with the essence of the offence...

12. Expanding on this in *Perinçek v Switzerland* (2016) 63 E.H.R.R. 6, the ECtHR held (at [133]):

Even in cases in which the interference with the applicants' right to freedom of expression had taken the form of a criminal "penalty", the Court has recognised the impossibility of attaining absolute precision in the framing of laws, especially in fields in which the situation changes according to the prevailing views of society, and has accepted that the need to avoid rigidity and keep pace with changing circumstances means that many laws are couched in terms which are to some extent vague and whose interpretation and application are questions of practice.

(b) *The Communications Act 2003*

13. The regulatory regime governing TV licensing is 'prescribed by law' in and through the Communications Act 2003 ('the 2003 Act'). That is the statute which set up OFCOM and gave it its powers and duties. Central to those functions is the promulgation and enforcement of a 'standards code' about the content of programmes. The 2003 Act imposes a duty on OFCOM to set, and from time to time review and revise, such a code, as follows:

319. OFCOM's standards code

(1) It shall be the duty of OFCOM to set, and from time to time to review and revise, such standards for the content of programmes to be included in television and radio services as appear to them best calculated to secure the standards objectives.

...

(3) The standards set by OFCOM under this section must be contained in one or more codes.

14. The 'standards objectives', which are thus mandated on OFCOM in its function of creating a standards code, are set out in s.319(2). They form a list of fourteen matters ranging over public policy issues such as the protection of children, the avoidance of subliminal influence, and the control of advertising and product placement. They also include the following provisions about news broadcasting:

(2) The standards objectives are—

...

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

(d) that news included in television and radio services is reported with due accuracy;

...

Subsection (8) adds that for these purposes ‘news’ means ‘news in whatever form it is included in a service’. ‘Due impartiality’ is not defined in the Act.

15. The cross-reference to s.320 is to a provision which is not itself specifically about news – it is a general provision about programme impartiality in ‘*matters of political or industrial controversy*’ and ‘*matters relating to current public policy*’. So far as TV broadcasting is concerned, it excludes all expressions of the views or opinions of the broadcast service provider, and the preservation of ‘*due impartiality*’, on such matters. It requires OFCOM’s standards code to set out the rules to be observed in connection with the preservation of this due impartiality.
16. Section 319(4) sets out particular matters to which OFCOM must have regard in setting or revising its standards code:
 - (4) In setting or revising any standards under this section, OFCOM must have regard, in particular and to such extent as appears to them to be relevant to the securing of the standards objectives, to each of the following matters—
 - (a) the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally, or in programmes of a particular description;
 - (b) the likely size and composition of the potential audience for programmes included in television and radio services generally, or in television and radio services of a particular description;
 - (c) the likely expectation of the audience as to the nature of a programme’s content and the extent to which the nature of a programme’s content can be brought to the attention of potential members of the audience;
 - (d) the likelihood of persons who are unaware of the nature of a programme’s content being unintentionally exposed, by their own actions, to that content;
 - (e) the desirability of securing that the content of services identifies when there is a change affecting the nature of a service that is being watched or listened to and, in particular, a change that is relevant to the application of the standards set under this section; and
 - (f) the desirability of maintaining the independence of editorial control over programme content.

That last consideration is notable. It is mindful of the Art.10 rights of broadcasters and their audiences, and indicates that there is inevitably a degree of balance looked for in the code-setting exercise.

17. Subsection (5) of section 319 makes further provision about the mandatory content of the code, with particular reference to its scope and application to ‘*programmes*’ both general and specific:

(5) OFCOM must ensure that the standards from time to time in force under this section include—

(a) minimum standards applicable to all programmes included in television and radio services; and

(b) such other standards applicable to particular descriptions of programmes, or of television and radio services, as appear to them appropriate for securing the standards objectives.

18. This reference to ‘*programmes*’ reflects a formulation used throughout the Act and well understood in the industry and beyond. There is a partial definition in section 405 (‘“*programme*” includes an advertisement and, in relation to a service, anything included in that service which is an individual item (irrespective of length)’). The term is, in particular, used without further definition in order to make bespoke provision in the Act for ‘*particular descriptions*’ of programmes which classifies them according to subject matter. Section 319 itself makes particular provision in relation to ‘religious programmes’. And s.279 makes this particular provision:

279. News and current affairs programmes

(1) The regulatory regime for every licensed public service channel includes the conditions that OFCOM consider appropriate for securing—

(a) that the programmes included in the channel include news programmes and current affairs programmes;

(b) that the news programmes and current affairs programmes included in the service are of high quality and deal with both national and international matters; and

(c) that the news programmes so included are broadcast for viewing at intervals throughout the period for which the channel is provided.

...

The section goes on to make distinct provision about the scheduling of news programmes and of current affairs programmes.

19. As well as provisions about the content of the OFCOM standards code, the 2003 Act makes important provision about the procedure which OFCOM must follow before making or revising the code. It requires extensive consultation in draft, within the industry and with audience interests, and it requires clear communication of the final version, including by sending a copy to the Secretary of State. Section 324 provides as follows:

324. Setting and publication of standards

(1) Before setting standards under section 319, OFCOM must publish, in such manner as they think fit, a draft of the proposed code containing those standards.

(2) After publishing the draft code and before setting the standards, OFCOM must consult every person who holds a relevant licence and such of the following as they think fit—

(a) persons appearing to OFCOM to represent the interests of those who watch television programmes;

(b) persons appearing to OFCOM to represent the interests of those who make use of teletext services; and

(c) persons appearing to OFCOM to represent the interests of those who listen to sound programmes.

...

(5) If it appears to OFCOM that a body exists which represents the interests of a number of the persons who hold relevant licences, they may perform their duty under subsection (2) of consulting such persons, so far as it relates to the persons whose interests are so represented, by consulting that body.

(6) OFCOM may set standards under section 319 either—

(a) in the terms proposed in a draft code published under subsection (1); or

(b) with such modifications as OFCOM consider appropriate in the light of the consultation carried out as a result of subsections (2) to (5).

(7) Subsections (1) to (6) apply to a proposal by OFCOM to revise standards set under section 319 as they apply to a proposal to set such standards.

(8) Where OFCOM set standards under section 319, they must publish the code containing the standards in such manner as they consider appropriate for bringing it to the attention of the persons who, in their opinion, are likely to be affected by the standards.

(9) Where OFCOM revise standards set under section 319, they shall so publish the code containing the standards as revised.

(10) Where OFCOM publish a code under subsection (8) or (9), they shall send a copy of it—

(a) to the Secretary of State;

- (b) except in the case of a code containing standards for advertising or sponsorship, to the BBC; and
- (c) if the code relates to television programme services, to S4C.

...

20. Enforcement of the OFCOM standards code is provided for in s.325 of the Act. This requires compliance to be included in licence conditions, and the establishment by OFCOM of a complaints procedure. And it confers a power on OFCOM to report to the Secretary of State on compliance issues which appear to raise ‘*questions of general broadcasting policy*’.

325. Observance of standards code

(1) The regulatory regime for every programme service licensed by a Broadcasting Act licence includes conditions for securing—

- (a) that standards set under section 319 are observed in the provision of that service; and
- (b) that procedures for the handling and resolution of complaints about the observance of those standards are established and maintained.

(2) It shall be the duty of OFCOM themselves to establish procedures for the handling and resolution of complaints about the observance of standards set under section 319.

(3) OFCOM may from time to time make a report to the Secretary of State on any issues with respect to OFCOM’s standards code which—

- (a) have been identified by them in the course of carrying out their functions; and
- (b) appear to them to raise questions of general broadcasting policy.

...

(c) *The OFCOM Broadcasting Code*

21. OFCOM’s Broadcasting Code (‘the Code’) was put in place by OFCOM, following consultation and promulgation, in 2005 and has since been amended in a number of specific respects which do not have a direct bearing on the current case.
22. The Code is divided up into a series of sections, each presenting a principle or principles and then some specific rules by reference to that principle. Characteristically, they take as their starting point one of the statutory *standards objectives* and unpack the ‘meaning’ of the statutory language.

23. Section Five of the Code deals with ‘*due impartiality*’ and ‘*due accuracy*’. It makes specific cross-reference to section 319(2)(c) and (d), 319(8), and 320 of the 2003 Act. It provides as follows:

Section five: Due impartiality and due accuracy

This section relates to the concept of “due impartiality” as it applies to news and other programmes.

...

Principles

To ensure that news, in whatever form, is reported with due accuracy and presented with due impartiality.

To ensure that the special impartiality requirements of the Act are complied with.

Rules

Meaning of “due impartiality”

“Due” is an important qualification to the concept of impartiality. Impartiality itself means not favouring one side over another. “Due” means adequate or appropriate to the subject and nature of the programme. So “due impartiality” does not mean an equal division of time has to be given to every view, or that every argument and every facet of every argument has to be represented. The approach to due impartiality may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach is signalled to the audience. Context, as defined in Section two: Harm and offence of the Code, is important.

Due impartiality and due accuracy in news

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

5.2: Significant mistakes in news should normally be acknowledged and corrected on air quickly ...

5.3: No politician may be used as a newsreader, interviewer or reporter in any news programmes unless, exceptionally, it is editorially justified. In that case, the political allegiance of that person must be made clear to the audience.

...

24. The cross reference to the definition of ‘*context*’ within the ‘Rules’ part of Section Two is to this:

Meaning of “context”

Context includes (but is not limited to):

- the editorial content of the programme, programmes or series;
- the service on which the material is broadcast;
- the time of broadcast;
- what other programmes are scheduled before and after the programme or programmes concerned;
- the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally or programmes of a particular description;
- the likely size and composition of the potential audience and likely expectation of the audience;
- the extent to which the nature of the content can be brought to the attention of the potential audience for example by giving information; and
- the effect of the material on viewers or listeners who may come across it unawares.

...

(d) Published OFCOM Guidance on the Broadcasting Code

25. OFCOM publishes Guidance Notes on each Section of the Code.
26. Its notes on Section Five state that Rules 5.1 to 5.3 together cover ‘*news programming*’.
27. Under the heading of Rule 5.1, the Guidance Notes (as in force at the relevant time) include this:

1.8. In terms of this section of the Code (i.e. the requirement for ‘due impartiality’ and ‘due accuracy’), news in whatever form would include news bulletins, news flashes and daily news magazine programmes. Just because material is broadcast on a ‘rolling news’ channel does not necessarily mean that the material would be characterised as ‘news’ content.

and

1.10. Rule 5.1 is potentially applicable to any topic included in news programming, and not just matters of political or industrial controversy and matters relating to current public policy. There is no requirement on broadcasters to provide an alternative

viewpoint in all news stories or all issues in the news. However, all news stories must be reported with due accuracy and presented with due impartiality i.e. impartiality adequate or appropriate to the subject.

28. Under the heading of Rule 5.3, the Guidance Notes include this:
- 1.20. The use of politicians as reporters or presenters in news programmes could be problematic in the context of the requirement for due impartiality. A politician is likely to include an elected representative e.g. an MP or councillor, a candidate, an applicant to be a candidate or a prospective candidate (that is a candidate for election who knows they have been chosen to represent a party at an election), an employee of a political party or an activist.
- 1.21. A previous Ofcom decision in this area is *London Greek Radio*.
29. That last is a reference to a 2006 OFCOM decision in which a Conservative councillor in a London Borough had been presenting news programmes on local radio in the run-up to local elections. OFCOM found a breach of Rule 5.3, and also of Rule 6.6 which provides that election candidates ‘*must not act as news presenters, interviewers, or presenters of any type of programme during the election period*’. But although the rule breaches were ‘clear and undisputed’, OFCOM concluded that, on the facts, the potential for electoral advantage had been minimal.
30. A more specific short piece of guidance was published by OFCOM in the spring of 2023. It goes as follows:

Can politicians present TV and radio shows? How our rules apply

Kevin Bakhurst, Group Director for Broadcasting and Online Content, explains the rules for politicians presenting and appearing on television programmes.

There has been a lot of recent discussion about politicians presenting, and appearing on, television and radio programmes.

So this is a good opportunity to clarify our rules in this area.

In general, serving politicians cannot be a newsreader, interviewer or reporter in any news programme. They *are* allowed to present other kinds of shows, however, including current affairs. Sometimes those programmes may be on channels that also broadcast news; what matters here is the format of the particular show.

The right to freedom of expression is a really important factor here. Broadcasters should be free to make editorial and creative choices. As the viewer or listener, you have the right to receive a range of information and ideas.

But generally speaking, if it's a news programme, a politician cannot present. This includes a ban on candidates doing so during an election period.

What exactly is a news programme?

Every programme is different, but here are some typical factors that could lead us to classify content as a news programme:

- a newsreader presenting directly to the audience;
- a running order or list of stories, often in short form;
- the use of reporters or correspondents to deliver packages or live reports; and/or
- a mix of video and reporter items.

Factors that could lead us to classify content as current affairs (in other words, not 'news'), include:

- a more long-form programme;
- extensive discussion, analysis or interviews with guests, often live; and
- long-form video reports.

(e) OFCOM's investigatory procedures

31. OFCOM has discharged its duty under s.325(2) of the 2003 Act by publishing a set of investigatory procedures for the investigation and resolution of complaints ('the Procedures').
32. Paragraph 1.4 of the Procedures states that if OFCOM considers in any particular case it is necessary to depart from the procedures set out, it will notify the broadcaster in advance, giving its reasons.
33. Investigations are to begin by OFCOM forming a view that a broadcaster '*may have failed to comply with particular provisions of the Broadcasting Code*', and writing to the broadcaster complained of setting out those provisions and inviting representations (paragraph 1.26). OFCOM is then to prepare a *Preliminary View* taking account of any such representations. '*This Preliminary View is only provisional and may be subject to change in the light of subsequent representations/material provided by the broadcaster*' (paragraph 1.29).
34. The Preliminary View must specify the particular provisions of the Code OFCOM considers relevant to the complaint, and its preliminary assessment of whether any

breaches of those provisions have occurred (paragraph 1.30). If it needs to obtain further information so it can properly and fairly prepare its Preliminary View, it will seek that information first (paragraph 1.31).

35. The Preliminary View must be provided to the broadcaster, who then has an opportunity to make written representations (paragraph 1.32). Once OFCOM has received and considered any such representations, it must reach its final decision (paragraph 1.34).

GB News's present challenge

(a) The OFCOM decisions challenged

36. The decisions challenged in these proceedings relate to two editions of *Jacob Rees-Mogg's State of the Nation*. To borrow OFCOM's description, '*the programme typically features comment and debate about topical issues, including monologues, interviews and panel discussions with guests from the worlds of politics and journalism. The programme also included a scheduled news bulletin, presented by a news anchor, lasting approximately three minutes.*'
37. The first edition featuring in these proceedings was broadcast on 9th May 2023 (less than two months after the publication of the Kevin Bakhurst guidance cited above). During the course of a programme covering a range of topical issues, the news broke of the decision in the civil proceedings brought in the USA against (the then former) President Donald Trump by writer Ms E Jean Carroll making allegations of rape. Mr Rees-Mogg broke off to read out an autocue summary of the breaking news lasting 53 seconds.
38. The second broadcast was on 13th June 2023. This time the programme opened with a news bulletin from a news anchor in the newsroom before returning to Mr Rees-Mogg. The news bulletin had included a 30-second pre-recorded report from GB News home and security correspondent Mark White from outside a police station in Nottingham. That was about the breaking news of the fatal attacks on three individuals in the city centre (for which Valdo Calocane was in due course convicted of diminished responsibility manslaughter). After the bulletin, Mr Rees-Mogg went back to Mark White, live outside the Nottingham police station, for an update. Their exchange lasted some three and a half minutes.
39. In both cases, scrolling text at the bottom of the screen was carrying the news headlines.
40. On 18th March 2024, OFCOM issued decisions on '*five cases involving politicians acting as newsreaders, news interviewers or news reporters on television*'. As well as the two broadcasts above, it had investigated complaints about two editions of *Friday Morning with Esther and Phil* and one of *Saturday Morning with Esther and Phil* airing in May and June 2023. It also explained why it had decided not to investigate a sixth case – another edition of *Jacob Rees-Mogg's State of the Nation*.
41. The decisions were grouped together in a single bulletin, with an extended introduction rehearsing the general legislative and policy background and history. These were the first OFCOM decisions to address the recent emergence of politician-led topical TV and were clearly intended to have general resonance and provide future guidance in a novel context.

42. The overarching summary states that, in all five cases,

Politicians acted as a newsreader, news interviewer or news reporter in sequences which constituted news for the purposes of Section Five of the Code, without exceptional justification, and news was therefore not presented with due impartiality.

Ofcom considered that the programmes in question were both news and current affairs programmes. Programmes can feature a mix of news and non-news content and move between the two. However, if a licensee chooses to use a politician as a presenter, it must take steps to ensure they do not act as a newsreader, news interviewer or news reporter.

...

The rationale for the restriction on politicians acting as newsreaders, news interviewers or news reporters is clear – politicians represent a political party or position and are therefore inherently partial on topical issues. ...

43. In relation to each broadcast featured in these proceedings, the decision found that, by reference to s.319(8) of the 2003 Act, the short clip in which Mr Rees-Mogg read out the news headline, and the exchange with the reporter in Nottingham, comprised ‘news’ content. By reading the former, and engaging in the latter, he had acted as a newsreader. Each programme was both a news and a current affairs programme. There was no exceptional editorial justification for a politician to have acted as a newsreader in such a programme. There was therefore a breach of Rule 5.3. The presentation of broadcast news content by a politician without exceptional editorial justification gives rise to an inherent lack of due impartiality which conflicts with the fundamental standard in Rule 5.1 of the Code. The news was therefore not presented with due impartiality, and there was a breach of Rule 5.1.
44. In relation to the third edition of *State of the Nation* where OFCOM had decided not to pursue an investigation, it considered that there *had* been exceptional editorial justification because it had had to do with a matter in which Mr Rees-Mogg had been personally involved.

(b) Grounds of challenge

45. GB News brings its challenge on three grounds:

(1) OFCOM erred in law in its interpretation of Rules 5.1 and 5.3.

- a. In relation to Rule 5.3, it erred in considering it applicable to news content in any or all programmes, rather than being restricted to ‘news programmes’.
- b. In relation to Rule 5.1, it erred in considering it to prohibit any politician ever delivering news content (otherwise than by reference

to exceptional editorial justification) irrespective of individual context, circumstances or facts.

- (2) OFCOM's interpretation is incompatible with Article 10. Its quasi-legislative approach to making new interpretations of the Code in these decisions was not reasonably foreseeable and was not prescribed by law.
- (3) OFCOM erred in law in its application of its own procedural rules in the investigations which led to the first of these decisions. It impermissibly widened the original scope of its investigation into a breach of Rule 5.3, after issuing its Preliminary View, by extending it to include an alleged breach of Rule 5.1 also, and proceeding to issue a second Preliminary View and claiming impermissibly that that amounted to compliance with its Procedures rather than a departure from its Procedures which required advance notice and an explanation (neither of which occurred). GB News does not complain, however, of substantive procedural unfairness.

Consideration

(a) The interpretative questions

46. In this challenge, both parties seek an authoritative determination of the meaning of Rule 5 of the Code, in its application to politicians. The parties identify that as a question of law and of interpretation. I was invited by Mr Hickman KC, Leading Counsel for GB News, to take as my starting point the admirably pithy summary of Lord Carnwath JSC in *Lambeth LBC v Secretary of State for HCLG* [2019] 1 WLR 4317 at [19]: '*In summary, whatever the legal character of the document in question, the starting point – and usually the end point – is to find “the natural and ordinary meaning” of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense.*' – and to be wary of the risk of over-complication (*Ibid* at [28]).
47. If I start with the words of Rule 5, and distil GB News's challenge to its linguistic essence, then I have two interpretative questions to answer about each decision challenged in this case: (a) was Mr Rees-Mogg, a politician, *being used as a newsreader, interviewer or reporter in any news programme* contrary to Rule 5.3 – does the prohibition in that rule, in other words, apply here? and (b) *by virtue of being a politician*, was Mr Rees-Mogg *presenting news, in whatever form, without due impartiality* contrary to Rule 5.1 – is that how that rule works? That second formulation is important, because the parties agree that no issue of *content* partiality arose on either example. Mr Rees-Mogg had delivered the news itself straightforwardly without personal inflection or intrinsic comment. The issue of partiality was confined, in OFCOM's decisions, to the individual's status as a politician *per se*.
48. The parties agree that there must, as questions of law, be an objective right and wrong answer to them, but also that – as is often the case with 'pure' questions of law – they unavoidably arise as questions about the application of the law to example facts, and equally cannot avoid consideration from a wider perspective.
49. Those linguistic questions in turn give rise to two important structural questions of interpretation. First: what is the relationship between Rule 5.3 and Rule 5.1? OFCOM

says a breach of Rule 5.3 will *always* be a breach of Rule 5.1: the latter is an overarching rule and the former a specific example within it. But GB News says Rule 5.3 is a special rule about politicians – the only one of its kind in the entire scheme – which cannot simply be imported into Rule 5.1 in that way; Rule 5.1 requires an assessment of ‘*due impartiality*’ in a fact-sensitive and case-by-case manner which cannot be shortcut by hard-edged rules about politicians as a class outside the confines of Rule 5.3.

50. And second, perhaps the most fundamental question raised by this case: what is the proper legal boundary in a code of this sort between on the one hand a commodious approach to interpretation, enabling it flexibly to accommodate new developments in the broadcasting sector, and on the other hand respecting the careful regime put in place by statute where *changes* to the Code are concerned? Where, in law, does applying the rules stop and changing them start?
51. Applying the *Lambeth* maxim plainly requires all these interpretative questions to be *viewed in their particular context (statutory or otherwise) and in the light of common sense*. The dominant character of the document giving rise to the interpretative questions here is that it is a code issued by a statutory regulator in the discharge of statutory duties. Those statutory duties engage a range of public interest, and legal, considerations. And the Code is addressed to a regulated sector – broadcasters – by way of a limitation on their editorial freedom through incorporation into their licence conditions and by making them subject to sanctions for breach.
52. Interpreting any statutory code begins with the question of whether any ambiguity genuinely arises about any individual point. If it does, then the next question is whether any such ambiguity can be resolved by considering the code as a whole. If not, then the context must widen to consider whether the necessary light can be shed by the parent statute, and in particular the provisions relating to the code itself. That engages principles of statutory interpretation, which in turn may or may not involve wider historical or policy perspectives.

(b) Interpreting Rule 5.3

53. The first question then is whether there is any ambiguity in the principal prohibition of Rule 5.3: *no politician may be used as a newsreader, interviewer or reporter in any news programmes*. No dispute about ‘*politician*’ arises in the present case. There was some debate before me about ‘*used as a newsreader, interviewer or reporter*’ – did that import an idea of a distinctive role specification, or was it apt to apply to any isolated act that could be described as reading, interviewing or reporting news (it was agreed that the content delivered by Mr Rees-Mogg in the clips concerned was ‘*news*’)? But either way, the principal dispute before me was about ‘*in any news programmes*’.
54. That expression appears on the face of it to circumscribe the scope of Rule 5.3. Syntactically, there is little if any room for doubt or ambiguity about that. On a plain reading of Rule 5.3, ‘*news programme*’ is a compound limiting factor – it limits the prohibition on politicians being used as newsreaders, interviewers or reporters, and it does so by ‘*programme*’ and by type of programme. Comparison with the language of Rule 6.6 is interesting: ‘*Candidates in UK elections, and representatives of permitted participants in UK referendums, must not act as news presenters, interviewers or presenters of any type of programme during the election period*’. Rule 6.6 indicates a

relevant comparative point: the reference to ‘*news programme*’ in Rule 5.3 implies specificity – news programmes are a distinct subset of ‘*any type of programme*’.

55. There is no real dispute in this case about ‘*programme*’. *Jacob Rees-Mogg’s State of the Nation* was a programme (an ‘*individual item*’ contained in a service). And programmes of various ‘*types*’, or ‘*programmes of a particular description*’ (section 319(4) of the Act), are also referred to freely in the legislative scheme as attracting different provisions of both the Code and the Act (see also ‘*standards applicable to particular descriptions of programmes*’ – section 319(5)(b)).
56. ‘*Religious programmes*’ are one example. These are picked out without further definition in section 319(6) of the Act for additional controls, and dealt with in Section Four of the Code. Section Four then includes a ‘*meaning of a “religious programme”*’ provision as follows: ‘*A religious programme is a programme which deals with matters of religion as the central subject, or as a significant part, of the programme*’. That might be thought a common-sense definition.
57. ‘*News programmes*’ also have a footprint in the 2003 Act, without further definition as such. I am told the compound expression is mentioned 37 times in the statutory scheme. It is given some specific treatment in section 279, the provision dealing with the scheduling of news programmes and current affairs programmes, which clearly distinguishes between the two in so doing (neither being further defined). In this context at least, the scheme makes it important to know whether a programme is a news programme *or* a current affairs programme, because only the former are required by s.279(1) to be broadcast ‘*at intervals throughout the period for which the channel is provided*’, and each is subject to a potentially different total time allocation by s.279(2).
58. Unlike ‘*religious programmes*’, however, ‘*news programmes*’ are not given a ‘*meaning*’ provision in the Code. Section Five simply says it relates to the concept of due impartiality in ‘*news and other programmes*’.
59. So was *Jacob Rees-Mogg’s State of the Nation* a news programme? The parties could agree it was a current affairs programme. A programme which, as OFCOM put it, *typically features comment and debate about topical issues, including monologues, interviews and panel discussions with guests from the worlds of politics and journalism* is readily identifiable as such, on any basis, common sense included. However, the OFCOM decisions challenged in these proceedings were based on an interpretation that a programme could be *both* a current affairs programme *and* a news programme for the purposes of Rule 5.3.
60. Can a programme be a current affairs programme *as distinct from* a news programme for scheduling purposes under s.279, but *both at the same time* for the purposes of Rule 5.3? That is a proposition which on the face of it appears to place the coherence of the statutory scheme under some strain.
61. It is also not what the Kevin Bakhurst guidance says, with reference to the specific factual matrix arising in the present case. To be clear, guidance of this sort is not an aid to the construction of a statutory code – the interpretative hierarchy works the other way around. I cite the Bakhurst guidance for illustrative purposes only, because it is simpler to reconcile with the statutory scheme than the OFCOM decisions, and to show

why, as I go on to consider below, it is also a practical and coherent proposition in its own right.

62. The Bakhurst guidance makes a clear distinction between news programmes and current affairs programmes. That is at least straightforwardly consistent with s.279 of the Act, which treats them differently. The guidance sets out that serving politicians cannot be a newsreader, interviewer or reporter in any news programme (the wording of Rule 5.3) but they are allowed to present ‘*other kinds of shows ... including current affairs*’. Current affairs programmes may be on channels that also broadcast news, but *what matters is the format of the show*, or programme. If it is a *news programme* a politician cannot present it. A news programme is characteristically composed of a newsreader presenting direct to audience, a running order of stories in short form, and reporters or correspondents delivering packages or live reports or a mix of video and reporter items. A programme will characteristically be ‘*current affairs (in other words not ‘news’)*’ if it is more long-form, and includes extensive discussion, analysis or interviews with guests, often live, and long-form video reports.
63. This distinction is instantly and intuitively recognisable. *Jacob Rees-Mogg’s State of the Nation* is as instantly and intuitively recognisable as a current affairs programme rather than a news programme, albeit one including, or consecutive to, a *news bulletin*. There is no dispute that a *news bulletin*, however brief, is a *news programme*, not least for the purposes of the scheduling requirements of s.279 of the Act.
64. And it is not disputed that, as a politician, Mr Rees-Mogg could present a current affairs programme. But he could not present a news programme. So how could a programme be both at once, if he could present one but not the other?
65. The issue of the potential hybridity of *daily news magazine programmes*, referred to as such in the explanatory text within Rule 5, was raised as a test example. These include, for example, BBC Radio programmes such as *Today* and *The World at One*. But without unnecessarily determining the point, even if a *daily news magazine programme* of these sorts might be capable of being considered an explanatory or extended *news programme* for the purposes of Rule 5.3, it remains distinguishable from a *current affairs programme*. *Jacob Rees-Mogg’s State of the Nation* is not easily recognisable as a *daily news magazine programme* of this sort nor, therefore, as an *extended news programme*. The fact that it bears its presenter’s name in its title is itself something of a distinguishing feature.
66. If the simplest analysis of *Jacob Rees-Mogg’s State of the Nation* is that it is a current affairs programme, with adjacent news bulletins, then on a straightforward reading, Rule 5.3 applied to the bulletins but did not apply to the programme. Whatever Mr Rees-Mogg was doing was not *in any news programme*. It was in a distinct current affairs programme.

(c) *The relationship between Rule 5.3 and Rule 5.1*

67. That interpretation cannot, however, be confidently reached without immediately turning to examine its implications within the scheme of the Code. The parties agree that, in delivering one major breaking (international) story and following up another major (national) story, Mr Rees-Mogg was stepping into the arena of ‘*news*’. *News*, and the delivery of news, is a core concept in, and a major preoccupation of, the

statutory broadcasting regulation regime. The regime is concerned with the quantity, and frequency, of news broadcasting. And it is fundamentally concerned with its *accuracy* and its *due impartiality*.

68. *News* is accordingly a concept with a wide-reaching scope far beyond its presence in any *news programme*. Its wide scope is underlined by its appearance in both the 2003 Act (s.319(8)) and the Code (Section Five) in the formulation '*news in whatever form*'. It is otherwise subject to no limiting definition. Any and all news is news, whatever it is about and in whatever programme it is imparted.
69. The overarching principle of Section Five of the Code is that news, in whatever form, be reported with due accuracy and *presented with due impartiality*. That is also the content of Rule 5.1. The direct descent of both provisions from the statutory *standards objectives* in the Act's s.319(2)(c) (and (d)) is obvious.
70. The Code allocates '*due impartiality*' a 'meaning' provision in Section Five. That identifies impartiality with its literal meaning of *not favouring one side over another* (the scheme does not use the expression *objectivity* in this context). And it identifies '*due*' as meaning *adequate or appropriate to the subject and nature of the programme*. Further, it expands that *due impartiality* requires an approach which is variable according to news *subject* and to *type of programme*, as well as audience expectation as to *content* and audience signalling. It emphasises that context is important. It also cross-refers to that '*meaning*' provision earlier in the Code relating to *context*, making non-exclusive, and expansive, reference to the whole of any broadcasting event.
71. It is not surprising to find such a richly context-sensitive approach to the concept of due impartiality, for two reasons. First, there is the unlimited scope of the concept of *news in whatever form* to which it applies. What due impartiality requires will depend on what sort of news is involved, not least how political or controversial it is and therefore how susceptible to being presented partially (favouring one *side* over another) in the first place. It will also depend crucially on its immediate context – in what sort of programme it is being presented, for example. And secondly, there is the fact that due impartiality extends beyond news into the territory covered by s.320 of the Act. For both reasons, context is all. *Due impartiality* is a highly fact specific and evaluative concept.
72. If Rule 5.3 did not apply to *Jacob Rees-Mogg's State of the Nation* because it was not a news programme, Rule 5.1 certainly applied to Mr Rees-Mogg's delivery of a news-flash and his interaction with a news presenter. He was himself presenting news. That is not controversial. But to be clear, Rule 5.1 applied not because Rule 5.3 *had* been breached, but because it *had not*. And it engaged all the highly fact-sensitive 'meaning' provisions relating to *due impartiality* and *context*.
73. The relationship between the two provisions is hierarchical, but not in the sense contended for by OFCOM. Rule 5.1 is a general rule about due impartiality in the presentation of news and requires a highly context-specific approach. Rule 5.3 is a specific rule, also about due impartiality in the presentation of news; that is plainly its statutory ancestry and obvious from its immediate Code context. It identifies a limited factual category – politicians engaging in specified news activities in news programmes – where due impartiality is, in effect, conclusively presumed absent. It is subject to a carve-out by way of the discharge of an editorial burden to demonstrate exceptional

justification. But that does not imply that due impartiality is present in such a case – or if it does, it places considerable attenuating weight on what is *due* in exceptional circumstances. It is in the nature of a defence by reference to overriding factors.

74. The conclusive rule in Rule 5.3 makes it an exception to the fact-specific contextual case-by-case approach demanded by Rule 5.1. So although Rule 5.3 can be regarded as a specific example of a general rule about due impartiality, the structure of Rule 5 as a whole marks Rule 5.1 and Rule 5.3 out as alternatives. A conclusive rule cannot apply at the same time as a requirement for a case-by-case contextualised approach. If Rule 5.3 applies, that is the end of the matter. If it does not, then Rule 5.1 governs the residual category of the presentation of *news in whatever form* by direct application of the *due impartiality* test, derived from the statutory standards objectives and applying to all types of programmes, on a fully contextual basis.
75. If that is right, then it has implications for the proper interpretative approach to Rule 5.3. If any ambiguity were identified in the scope of 5.3, then, as an exception to a general rule by way of conclusive prohibition, and subject to a reverse-burden editorial defence, it would, both on ordinary interpretative principles and having regard to the place of Art.10 within the statutory scheme, fall to be narrowly construed.

(d) OFCOM's competing analysis

76. If my analysis so far has largely tracked the submissions of GB News in this case, that is because it has started with the words of the Code in issue, and worked outwards so far as that has appeared to be interpretatively necessary to resolve any ambiguity. That is the recognisably orthodox approach. It has not found much ambiguity nor worked outwards very far.
77. But Miss Boyd KC, Leading Counsel for OFCOM, advanced a competing analysis, drawing on a rich historical and policy context, that, as she frankly and disarmingly put it at one point, *apart from the words*, OFCOM's interpretative approach to Rule 5 in this case was the right one, driven by the obvious and powerful public interest imperatives of the statutory regime. And on any basis, in Judicial Review proceedings, even where a pure point of law is at stake and a right or wrong answer must be objectively identified, it is necessary to pay close attention to the understanding and perspective of a statutory regulator, as to the legal context within which it has its entire existence, and as to the ways in which legal language comes up against reality. The OFCOM analysis proceeds along the following lines.
78. The preoccupation of the 2003 Act with the place of news in broadcasting, and with '*due impartiality*' in general but especially in the presentation of news, reflects policy and law long predating it. At the most fundamental level, this has had to do with public access to broadcast news information being part of the lifeblood of democracy, and for news, if so presenting itself, to be basically reliable as being such. From its inception, the power of TV broadcasting in particular to exert unprecedented reach and influence raised this issue of reliability in an acute form – especially in the early decades in which TV channels were few and a small number of voices correspondingly dominant. There had to be some level of guarantee as to accuracy – to distinguish news from fiction or indeed misinformation. There had to be some level of guarantee as to impartiality – to distinguish news from opinion and propaganda. And so broadcasting regulation became the vehicle of media-specific news standards.

79. It is a distinctive phenomenon. In the world of public access to news via the print media, both before and since the arrival of broadcasting media, the dominant philosophy has been that the multiplicity of voices, and the raucous market-place of ideas and perspectives, has indicated an overriding democratic imperative to free speech, and to leaving self-regulation as the best guarantee of empowering citizens to access news and make up their own mind. But Parliament has always viewed broadcasting differently, and introduced law into the regulation of broadcast news.
80. It was, among other things, important concerns about the reliability of news on such a powerful medium which led it to do so. The history of policy, law and practice in this area gives consistent evidence of concern about what might loosely be called the politicisation of broadcast news. There is a strand in this which is particularly focused on the risk of news presentation during election periods being, or being perceived to be, partial, and so unduly assisting one candidate or party above others. That was understood to be a straightforward risk of the corruption of electoral process – a risk to democracy itself. But there is also a distinct strand which had to do with the separation of news and comment, and the imperative that, where broadcasts by politicians were concerned, the public should be left in no doubt about which was which.
81. Politicians presenting broadcast news, however they did it, was a high-risk area. Politicians were, by definition, politically partial. For citizens to have confidence in the reliability of the news, there was an obvious issue which went beyond the bare content of what was being said and took in the context of who was saying it. The appearance of partiality was omnipresent where politicians were concerned. That was an issue going even wider than that specific case; it went to trust in broadcast news in general.
82. The legislative regime is preoccupied with *news in any form*. Politicians presenting news, in *any* form, creates the inherent problem of trust, a problem of the appearance of bias or partiality which goes beyond the decontextualised content of what they are saying. There is nothing in the statutory scheme, its history, its policy imperatives or its logic, to suggest that this is a concern which can sensibly be understood to be confined to a rigid format category at programme level, rather than to the broad content category of *news in any form*.
83. Apart, that is, from the wording of Rule 5.3. But, Miss Boyd KC says, the reference there to *in any news programmes* is referable to simpler times in which almost all broadcast news content was delivered in clearly separated and delineated packages expressly labelled as such. The 2003 Act was passed at a time when cable TV channels were relatively recent arrivals on the UK news scene, and the 24-hour news cycle was still in the process of gaining momentum. In the near quarter-century since, the transformation of the news media landscape has been nothing short of revolutionary. The raucous market-place of the print media must now itself fight to be heard above the deafening roar of social media free speech – information, misinformation and disinformation – where partiality reigns supreme and reliability means little beyond personal preference.
84. But Parliament’s intention – the legislation itself – has not changed. Its application must move meaningfully with the times. Broadcast news remains the only regulated source of reliable – accurate and duly impartial – news in an increasingly challenging context. That remains vital for democracy. Even as TV holds a diminishing market

share of citizens' preferred means of access to news, so the importance of the reliability guaranteed by regulation if anything increases.

85. And onto the scene so set arrives very recently a distinctively new kind of TV, with a manifesto as such, provided by self-described 'challenger broadcasters' like GB News. Their challenge, to at least some extent, is to where exactly on the political, or Political, dial the needle of 'due impartiality' should properly come to rest. It puts the challenge into effect by both using politician presenters, and blending news and comment content, in an unprecedented manner. Challenger broadcasters can expect to get challenged in turn about matters like that, both publicly and politically. And when they are, it is OFCOM's duty to maintain the reliability and due impartiality of TV news as Parliament has entrusted it to do, by applying the Code accordingly.
86. That is my summary of OFCOM's alternative analysis. I recognise in it a powerful, and forensically and constitutionally informed, piece of advocacy, in its own terms, for a point of view about what the law *ought* to be in this area. But that is not a question for me or for any court. My question is what the law *is*. And as to that, there are five distinct problems with OFCOM's analysis.
87. First, in law, the words matter. OFCOM's analysis requires me effectively to ignore the words '*in any news programmes*' in Rule 5.3. Rule 5 could have included a provision to the effect that *no politician may present news in whatever form, or be used as a newsreader, interviewer or reporter in any type of programme, unless, exceptionally, it is editorially justified*. OFCOM chose that sort of language in Rule 5.1 and in Rule 6.6. But it chose different language for Rule 5.3. It is a basic of legal interpretation that the starting point is that words chosen by the authors of statutory regulatory codes mean something rather than nothing, and different words mean different things. OFCOM's analysis, in my judgment, does violence to the wording of the Code. OFCOM's primary duty under the 2003 Act is to set, and then apply, the Code. That is how it regulates broadcasting: with words. So it must be taken to have chosen its words with great care and specificity, knowing that the industry and the public relies on them, and that courts will ultimately pronounce on them.
88. Second, the OFCOM account of the regulatory imperative if anything reinforces the importance of the separation of news and comment not just at content level but at programme level. News programmes, including news bulletins, if explicitly badged or readily identifiable as such, engage the imperatives of reliability – accuracy and due impartiality – in an especially acute form. It is when citizens recognise that they are receiving *the news* as such that their democratic need to be able to rely on it is most crucially engaged. The statutory imperatives of scheduling news programmes do not belong in a separate sphere from the imperatives of the reliability of that which is *so* scheduled. It is far from obvious that the statutory scheme requires or permits the regulator, faced with a perceived problem of blending of news and comment in politician-led current affairs programmes, to respond by doing the same.
89. Third, it is not necessary to adopt the interpretation for which OFCOM contends, to achieve a regulatory outcome consistent with the regulatory imperative so described. Politicians reading or interviewing or reporting news, in whatever form, outside news programmes are regulated by Rule 5.1. That imports a fully contextual approach. There is nothing in '*due impartiality*' which limits it to content (accepted not to cause concern *per se* in the present cases), quite the contrary. The fact that the news activity is being

undertaken by a politician may be highly relevant, depending on context. The fully contextual approach is entirely consistent with the regulator recognising an omnipresent *risk* to due impartiality where a politician presents news in any form, and to being able to assess that risk case by case in practice, as well as in theory.

90. Fourth, the OFCOM analysis goes too far, and produces results a long way outside the regulatory imperative, and for which there is no plausibly contended justification. That is because of its attempted combination of the completely open-ended scope of *news in whatever form* with the conclusive politician-specific bar in Rule 5.3.
91. In the course of the hearing of this case, we looked at various *reductio ad absurdum* counterfactuals. I choose one of the less far-fetched: a politician presenting a broadcast music show, interrupting it to announce the sudden death of an international music star. The politician is plainly presenting *news in whatever form*. It is fanciful to regard the combination of politician and news in this context as presenting an acute – or any – prima facie risk to *due impartiality*. The fully contextual approach of Rule 5.1 produces the right result here: one factoring in the content of the news and the context of the programme as well as the status of the politician. OFCOM’s analysis produces a conclusive presumption of partiality with a reverse editorial burden to demonstrate exceptionality. There is no possible support for such an outcome on any interpretation of the Code or statute.
92. That example is a useful bridge into the fifth problem with the OFCOM analysis. On closer inspection, OFCOM’s analysis, and its decisions in this case, turn out not to be about *news in whatever form* at all. They are about the very particular concern it has with the blending, or muddling, of news and comment in the new style of politician-led topical current affairs programmes. It sees inherently partisan politicians presenting news in the context of current affairs programmes dealing with highly politically controversial issues. It sees that news content, including in the present examples, being (a) trailed and (b) followed up in discussion in those programmes. It considers that squarely within the *mischief* addressed by Rule 5.3 – as being *tantamount* to the politicisation of news programmes and the corresponding damage to the reliability of news, and to demand the accommodation of the problem within the solution Rule 5.3 provides.
93. OFCOM argues in these circumstances that the separation of news and current affairs programmes explicit in s.279 of the Act is itself being put under too much pressure by the ‘challenger broadcasters’; that the Code is not itself a statute; and that it *can* and should accommodate the result contended for. But this fifth difficulty with OFCOM’s analysis lies in the statutory limitations on OFCOM’s own functions in such circumstances.

(e) Section 324 of the 2003 Act: OFCOM’s statutory duties in relation to the Code

94. Section 319(1) of the Act places a duty on OFCOM not just to set, but *from time to time to review and revise*, the Code. And s.324 prescribes clear requirements for consultation before doing so and for promulgation afterwards. The duty for OFCOM to set, review and revise the Code is an onerous one. It is mandated by statute. It entails the abridgment of editorial freedom, and a balance between the public interest in the rights of audiences to receive any and all information and the public interest in the reliability of news in any and all forms. It places broadcasters under substantial

- jeopardy. It is not surprising to find correspondingly onerous consultation and promulgation duties attached.
95. Since it was published in 2005, I am told there have been two substantial public consultation and review exercises on whole sections of the Code: (a) in 2009-2010, dealing with Section Nine (commercial references in television programming) and Section Ten (commercial communications in radio programming); and (b) in 2016, dealing with Section Three (crime, disorder, hatred and abuse). These are recognisably thematic exercises, responsive to changing circumstances, commercial pressures and public (and public interest) concerns.
96. There have also been more limited ad hoc consultation and review exercises on individual rules within the Code: some ten minor amendment exercises distributed across the period in question. These are described as largely technical or consequential matters, responsive to changes in law or practice. About half of them relate to changes to Sections Nine and Ten both before and after the thematic review in 2009-2010. One of the other exercises, in 2016-2017, dealt with consequential matters arising out of new duties of OFCOM in relation to the BBC and produced minor consequential amendments throughout the Code, including to Section Five. But that section has not otherwise been amended since the Code was introduced 20 years ago.
97. OFCOM told me that it takes a restrained approach to Code amendment. The Code is designed to be robust and enduring; it is undesirable for many reasons for it to be subjected to *frequent* change. The onerous consultation and promulgation requirements encourage a view that change should be reserved for substantial review exercises and those where technical change is necessary to reflect changes in the legal landscape elsewhere. Nevertheless, the duty *from time to time* to review and revise the Code indicates a function of active monitoring and of ensuring its *responsiveness* to external developments so that it remains fully up to date and relevant. And any responsive changes the regulator does identify as appropriate, are required to be fully and carefully scrutinised and understood before being put into effect.
98. I have already indicated some of the reasons why, if there were considered to be ambiguity in Rule 5.3, it should nevertheless be narrowly construed. There are those arising from the language and structure of the Rule itself, the wider Code, and the 2003 Act. There are also those arising, including via Article 10, from what is, on a proper analysis, its character as a hard-edged limitation on editorial freedom – essentially a conclusive prohibition with a reverse-burden defence. It is not an inherently elastic provision.
99. In my judgment, the duty to review and revise, with its ancillary procedural requirements, is a further reason for not inferring the elasticity into Rule 5.3 for which OFCOM contends. The duty to review and revise the Code from time to time is itself a bespoke and distinctive mechanism provided by the Act for maintaining the Code's elasticity and responsiveness to significant industry developments. Parliament's demands for consultation and promulgation when doing so, however, introduce constraints to which courts should be properly alert, particularly where issues may arise over whether the regulator has arrogated to itself a degree of Code development which Parliament may have intended to be subject to consultation and promulgation.

100. It is in many ways a tribute to the resilience of Section Five that it has stood the test of such extraordinary times in the world of broadcast news and the wider media context over the last 20 years. But OFCOM's responsive analysis to the present challenge, as presented in this litigation, appears to amount to its own identification of a contemporary justification, and the desirability or even necessity, for the insertion of the words '*or current affairs*' between '*news*' and '*programmes*' in Rule 5.3 to reflect the new developments in the industry, including politician-led topical programmes, about which it has identified concerns. Those words would convert a fact-sensitive and case-by-case evaluative exercise into a conclusive bar with a limited defence. They are not there at present. And a court must be slow indeed to import them, and all their regulatory consequences, when Parliament has gone to careful and specific lengths to prescribe others' entitlements to be consulted and informed before the words of the Code are changed, and has limited OFCOM's latitude accordingly.
101. I bear in mind also OFCOM's statutory function (section 325(3)) of reporting to the Secretary of State from time to time on Code issues it identifies in the course of carrying out its functions which appear to it to raise *questions of general broadcasting policy*. The updating of the Code for which OFCOM has contended in these proceedings may or may not amount to that. But in my judgment it amounts to a responsive policy adjustment to the Code which is not obviously less significant than the 'minor or technical' amendments in relation to which OFCOM has historically accepted a duty to consult. It is hard to ignore the Parliamentary signposting down the route of s.324 consultation in those circumstances.

(f) *Conclusions on the interpretation of Rule 5*

102. For the reasons given, I do not find material ambiguity in Rule 5.3. It is limited by its reference to the news-related activities of politicians *in any news programmes*. Programmes identified or identifiable as such present the risk to due impartiality in the presentation of news content by politicians at its most acute, and are dealt with as such conclusively by a prohibition with a limited defence.
103. News-related activities of politicians in any other programmes, including in current affairs programmes, fall outside Rule 5.3 and are regulated on a full-context basis under Rule 5.1.
104. Rule 5.1 and Rule 5.3 do not intersect or apply simultaneously. Rule 5.3 makes specific provision by way of a carve-out from Rule 5.1, which to that extent is a residual provision. They cannot both apply at the same time because their evidential, evaluative and defensive apparatus is distinctively different.
105. A programme cannot be a news programme and a current affairs programme at the same time. The statutory scheme deals with them differently. Blending the two as a response to such perceived blending by broadcasters is not a solution within the current scope of the statutory scheme.
106. If I had found ambiguity in Rule 5.3, I would have reached the same conclusion by applying a number of principles indicating that ambiguity should be resolved by preferring a narrower to a wider construction. Those include: (a) principles applicable to the construction of statutory codes for construing limited exceptions to general rules; (b) principles applicable to the construction of statutory regimes abridging freedom of

expression; and (c) the anxious scrutiny necessary where specific statutory procedures have been provided governing revision of a statutory code.

(g) Article 10

107. GB News's challenge on Art.10 grounds has the flavour of an alternative submission. If I am right about the meaning of Rule 5 then the meaning OFCOM sought to enforce in its decisions was not one *prescribed by law* at all.
108. Perhaps for present purposes therefore it suffices to say this. I am satisfied on the evidence before me that the interpretation of Rule 5 which OFCOM adopted in its decision was novel. I do not recognise in the history of its application an articulation of the interpretation currently contended for. At their highest, OFCOM decisions such as the *London Greek Radio* decision mentioned above, and its 2023 decision not to pursue a complaint about Talk TV's edition of *Friday Night with Nadine* broadcast on 3rd February 2023 are not positively inconsistent (although the reference in the latter decision to a distinction between news programmes and current affairs programmes is interesting – including this: '*outside of news programmes, there is no OFCOM rule that prevents a serving politician or political candidate from hosting or appearing on a TV or radio programme*'). But nor do they support it. These cases are distinguishable on their facts.
109. OFCOM itself says the question before me has not been exposed in its decision-making before. It accepts it represents the application of the Code in a new and evolving media context. Its contention that Rule 5 provides that no politician may present *news in whatever form* unless, *exceptionally*, it is editorially justified produces startling results and was not reasonably foreseeable, even bearing in mind the expectations it is right to have of well-advised professionals. Even if it is understood to be a contention for such a rule in current affairs programmes only, that was not reasonably foreseeable either. OFCOM's general guidance on Rule 5.3 goes no further than saying the use of politicians as reporters or presenters *in news programmes* themselves *could be problematic in the context of the requirement for due impartiality*. And the Bakhurst guidance – directed specifically in the spring of 2023 to the precise issue of recent discussion of politician presenters and taking that very opportunity to *clarify our rules in this area* – does not articulate the proposition contended for or prepare the way for it; it is not straightforwardly easy to reconcile with this guidance at all.

(h) The procedural challenge

110. GB News's challenge on procedural grounds also has the flavour of an alternative submission. I observe in the first place that a court of review may well hesitate to embark on an investigation of alleged procedural irregularity where, as here, no substantive unfairness is alleged. Just because an issue of procedural irregularity is capable of being presented as a question of law – is the regulator entitled to claim the application of its own procedural rules to the procedure in fact adopted? – does not mean a claimant is automatically entitled to a full determination of that question where little material appears to turn on it. I limit my observations to the following.
111. The present procedural challenge relates solely to the procedure adopted in relation to the first of the two broadcasts complained of. It seeks a declaration that OFCOM did not properly follow its own procedures. It complains that OFCOM put a breach of Rule

5.3 to the broadcaster by way of a Preliminary View but then, impermissibly, had second thoughts of its own and issued a second Preliminary View adding a breach of Rule 5.1. It complains that that turn of events was a departure from published procedure without any sufficient contemporary justifying explanation.

112. The material problem with the procedure here was not so much that OFCOM started out with a Preliminary View about breach of Rule 5.3 and added a second Preliminary View (which may or may not have been responsive to GB News's representations) about breach of Rule 5.1 at a later stage, but the unclarity in its correspondence about why it was doing that. If, as it maintained in these proceedings, a breach of Rule 5.3 was always a breach of Rule 5.1, why add the latter at a late stage without explaining that? If, however, they were alternative charges, what was the relevant difference? If there is a procedural irregularity, or muddle, here, it seems to me to proceed directly from the interpretative unclarity set out above, and is perhaps best left there. I doubt this is an appropriate case in which it would be proportionate to attempt any conclusive analysis of the procedure followed. The real issues are substantive.

Decision and next steps

113. The OFCOM decisions were, for the reasons set out above, vitiated by error of law.
114. That was because, in the first place, they found a breach of Rule 5.3 even though Mr Rees-Mogg had read, or presented news, otherwise than in a *news programme*, including because they applied Rule 5.3 to *news in any form* outside the confines of a *news programme*, and because they conflated a *news programme* and a *current affairs programme*. Rule 5.3 does not apply outside *news programmes*. This was a *current affairs programme* and not a *news programme*.
115. In the second place, the decisions found a breach of Rule 5.1 as being constituted solely by the presentation of broadcast news content by a politician without exceptional editorial justification: these circumstances *gave rise to an inherent lack of due impartiality*. Rule 5.1 *does* apply to the delivery of news in current affairs programmes. Whether there had been a breach of Rule 5.1 depended on a fully contextual analysis. The fact that news was being presented by a politician was a relevant factor. The nature and content of the news was a relevant factor. The nature and content of the programme in which the news is being presented was a relevant factor. There is no *exceptional editorial justification* test in Rule 5.1; it simply requires a fully contextual assessment applying the test of *due impartiality*.
116. In the third place, the decisions found a breach of *both* Rule 5.1 *and* Rule 5.3. Both rules derive from the statutory standards objective of ensuring *due impartiality* in news, but each constitutes a distinctively different approach. Cases falling within Rule 5.3 are subject to a prohibition with an exceptional reverse-burden defence of editorial justification. All other cases require the *due impartiality* test to be applied on a fully contextual basis.
117. Subject to any further representations as to the grant of relief, I am minded to quash the two decisions in this case, and remit them to be reconsidered by OFCOM, subject to whatever further procedure may be fairly indicated. That is because, on the law as I have found it and the factual matrices I have looked at, it remains open to OFCOM, *in law*, to pursue investigations into either or both broadcasts as a potential breach of Rule

5.1, and to make fresh decisions about that on a full-context basis. In saying that much, I make clear that I am not deciding, indicating, or taking any view about any matter within the exercise of OFCOM's proper functions. And, of course, I take no view of the merits or the possible outcomes of any such investigations or reconsideration either way. It is not my place to do so.