



Neutral Citation Number: [2023] EWCA Civ 843

Appeal No: CA-2023-000112

Case No: CO/1972/2021

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**  
**Mr Justice SWIFT**  
**[2022] EWHC 3136 (Admin)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 14/07/2023

**Before:**

**SIR GEOFFREY VOS, MASTER OF THE ROLLS**  
**LADY JUSTICE SIMLER**  
and  
**LORD JUSTICE WARBY**

**Between:**

**THE KING (on the application of STAR CHINA MEDIA LIMITED)** **Claimant/**  
**Appellant**

**- and -**

**THE OFFICE OF COMMUNICATIONS** **Defendant/**  
**Respondent**

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

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

Hearing date: 4 July 2023

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**JUDGMENT**

**SIR GEOFFREY VOS, MASTER OF THE ROLLS:**

1. The single question in this case is whether Ofcom acted lawfully in imposing a penalty of £125,000 (the penalty) on Star China. The penalty was imposed for 5 serious breaches of the requirement of due impartiality contained in the Communications Act 2003 (the 2003 Act) and Ofcom’s Broadcasting Code (the Code). Star China breached this requirement in broadcasting 5 news programmes between 11 August and 21 November 2019 on its China Global Television Network (the channel), for which it held a licence from Ofcom at the time.
2. Mr Justice Swift (the judge) decided that Star China had failed to demonstrate that the penalty was an unjustified interference with its rights under article 10 (article 10) of the European Convention on Human Rights (ECHR). Article 10(2) allows such an interference with a broadcaster’s right of freedom of expression if it is “prescribed by law” and, amongst other things, “necessary in a democratic society, ... for the protection of the reputation or rights of others”.
3. Star China submitted that the judge ought to have held that the penalty infringed article 10 because it was disproportionate to the pursuit of the legitimate aims identified in article 10(2). In short, Ofcom had said, in its preliminary view on sanction of 3 November 2020 (the Preliminary View), that it was proportionate to impose a financial penalty of £125,000 for the breaches in order to “send a clear message of deterrence” **both** to Star China and to other broadcasters. But, on 4 February 2021, Star China’s broadcasting licence was revoked by Ofcom for reasons that were separate from the infringements (namely that it lacked editorial control of the channel). Accordingly, when Ofcom came to reach its sanction decision on 8 March 2021 (the Sanction Decision), Star China submit, Ofcom ought to have: (i) reduced or abrogated its proposed £125,000 financial penalty on the basis that there was no continuing need to deter Star China from further breaches, and/or (ii) published a clearly worded sanction decision explaining that, but for the revocation of Star China’s licence, it would have imposed a higher financial penalty. That approach would have been an appropriate “less intrusive measure” of the kind suggested at [20] by Lord Sumption in *Bank Mellat v. HM Treasury (No 2)* [2014] AC 700 (*Bank Mellat*).
4. Ofcom sought to justify their imposition of the unreduced financial penalty of £125,000 on the grounds that it was “concerned to ensure that enforcement against [these] serious breaches of the Code [acted] as a wider deterrent against non-compliance by broadcasters in general” (see [96] of its Sanction Decision).
5. I have undertaken a close and penetrating examination of the factual justification for the restriction on Star China’s article 10 rights that the imposition of the penalty constituted. I have concluded, in consequence of that examination and in agreement with the judge, and for the reasons that follow, that Ofcom’s decision to impose the penalty was justified and proportionate to the legitimate aim of ensuring that news broadcasting satisfies the due impartiality requirements. It was within the margin of appreciation properly to be accorded to Ofcom as the expert and experienced broadcasting regulator. Accordingly, it was not an infringement of Star China’s article 10 rights.
6. In this judgment, I will now briefly summarise (i) the statutory backdrop, (ii) the relevant provisions of the Code, Ofcom’s Penalty Guidelines of 14 September 2017

(the Penalty Guidelines) and Ofcom’s “Procedures for the consideration of statutory sanctions in breaches of broadcast licences” (Ofcom’s Sanctions Procedures), (iii) the essential facts, (iv) the judge’s decision, and (v) my discussion of Star China’s challenges to that decision.

7. Much of the statutory and legal background and relevant provisions of the Code are the same in this case as I described in this court’s recent decision in *R (Autonomous Non-profit Organisation TV-Novosti) v. Ofcom* [2021] EWCA Civ 1534 (*Novosti*). Save in one minor respect, to which I refer at [37]-[40] below, none of what I said in *Novosti* has been challenged in this case. Accordingly, I will only repeat what is in that judgment where absolutely necessary to an understanding of this case.

### The statutory backdrop

8. Article 10 of the ECHR is central to this case. It provides as follows:

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.

9. Section 3 provides for the “General Duties of Ofcom” including requiring it to secure under section 3(2)(e) the application, in the case of all television services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material. (All sections referred to in this judgment are to the 2003 Act). Section 3(3) requires Ofcom to have regard, in all cases, to (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and (b) any other principles appearing to Ofcom to represent the best regulatory practice. Section 3(4)(g) requires Ofcom to have regard, in performing its duties, to the need to secure that the application of standards to television services is “in the manner that best guarantees an appropriate level of freedom of expression”.
10. Subsections 319(3) and (1) respectively provide for Ofcom to set standards in codes, and to set “such standards for the content of programmes to be included in television ... services as appear to them best calculated to secure the standards objectives”. Those objectives include by section 319(2)(c) that news is presented with due impartiality and compliance with the impartiality requirements of section 320.
11. The “special impartiality requirements” in section 320(1) include “(b) the preservation, in the case of every television programme service ... of due impartiality, on the part of

the person providing the service, as respects all of those matters [mentioned in section 320(2)]”. By section 320(2), those matters are - (a) matters of political or industrial controversy; and (b) matters relating to current public policy.

12. Section 237(1) provides that, if Ofcom is satisfied that a licence holder has contravened a condition of its licence, it may impose a penalty. Section 237(3) provides that the maximum penalty is the greater of £250,000 or 5% of the licensee’s “qualifying revenue”. It may be noted here that compliance with the standards set under section 319(1) were a condition of Star China’s licence (see [26] of the Sanction Decision).

### The relevant provisions of the Code, the Penalty Guidelines and Ofcom’s Sanctions Procedures

#### *The Code*

13. The first section of the Code makes clear that it has been drafted in the light of the Human Rights Act 1998 and the ECHR. The principles laid down in section 5 of the Code are “[t]o ensure that news, in whatever form, is reported with due accuracy and presented with due impartiality”, and “[t]o ensure that the special impartiality requirements of the [2003 Act] are complied with”.
14. The definition of “due impartiality” explains that “impartiality” means “not favouring one side over another” and “due” is an important qualification meaning “adequate or appropriate to the subject and nature of the programme”.
15. The Sanction Decision found that Star China had infringed the following rules included in section 5 of the Code:

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

5.11 In addition to the rules above, due impartiality must be preserved on matters of major political and industrial controversy and major matters relating to current public policy by the person providing a service ... in each programme or in clearly linked and timely programmes.

5.12 In dealing with matters of major political and industrial controversy and major matters relating to current public policy an appropriately wide range of significant views must be included and given due weight in each programme, or in clearly linked and timely programmes. Views and facts must not be misrepresented.

#### *The Penalty Guidelines*

16. [1.3] of the Penalty Guidelines provides that Ofcom has “powers to punish those who act ... in breach of the relevant regulatory requirements”. [1.4] provides that the “central objective of imposing a penalty is deterrence” and “[t]he level of the penalty must be sufficient to deter the business from contravening regulatory requirements, and to deter the wider industry from doing so”. [1.6] provides that “[a] relevant factor in securing this objective of deterrence is the turnover of the regulated body subject to the penalty. Penalties should be set at levels which, having regard to that turnover, will have an impact on the body that deters it from misconduct in future and which provides signals to other bodies that misconduct by them would result in penalties having a similar

impact. That is, it must be at a level which can also change and correct any non-compliant behaviour, or potential non-compliant behaviour, by other providers”.

17. The Penalty Guidelines include the following under the heading “How Ofcom will determine the amount of a penalty”:

1.11 Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement. Ofcom will have regard to the size and turnover of the regulated body when considering the deterrent effect of any penalty.

1.12 The factors taken into account in each case will vary, depending on what is relevant. Some examples of potentially relevant factors are:

- The seriousness and duration of the contravention;
- The degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants;
- Any gain (financial or otherwise) made by the regulated body in breach (or any connected body) as a result of the contravention;
- Whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention;
- The extent to which the contravention occurred deliberately or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur;
- Whether the contravention in question continued, or timely and effective steps were taken to end it, once the regulated body became aware of it;
- Any steps taken for remedying the consequences of the contravention;
- Whether the regulated body in breach has a history of contraventions (repeated contraventions may lead to significantly increased penalties); and
- The extent to which the regulated body in breach has cooperated with our investigation.

1.14 Ofcom will have regard to any relevant precedents set by previous cases, but may depart from them depending on the facts and the context of each case. We will not, however, regard the amounts of previously imposed penalties as placing upper thresholds on the amount of any penalty.

1.15 Ofcom will have regard to any representations made to us by the regulated body in breach.

1.16 Ofcom will ensure that the overall amount of the penalty is appropriate and proportionate to the contravention in respect of which it is imposed, taking into account the size and turnover of the regulated body.

1.18 Ofcom will have regard to the need for transparency in applying these guidelines, particularly as regards the weighting of the factors considered.

### *Ofcom's Sanctions Procedures*

18. [1.13] of Ofcom's Sanctions Procedures provides that: "[t]he imposition of a sanction against a broadcaster is a serious matter. Ofcom may, following due process, impose a sanction if it considers that a broadcaster has seriously, deliberately, repeatedly or recklessly breached a relevant requirement".
19. [1.28] of Ofcom's Sanctions Procedures provides that: "[i]f, after considering all the evidence and representations from the broadcaster, Ofcom believes that a sanction is appropriate, it shall consider which of the available sanctions is appropriate and will reach a decision to this effect. Where Ofcom decides that the appropriate sanction should include a financial penalty, then it will, as appropriate, have regard to the [Penalty Guidelines]". [1.14] provides that the sanctions available to Ofcom include issuing a direction not to repeat a programme or to broadcast a statement of Ofcom's findings, the imposition of a financial penalty, and shortening, suspending or revoking a licence.

### The essential facts

20. Four of the 5 news programmes in question were editions of "The World Today" and one was an edition of "China 24". The first four were broadcast within a 22-day period. According to [3] of the Sanction Decision:

[each] programme was concerned with the protests which were ongoing in Hong Kong during this period. These protests were initially in response to the Hong Kong Government's Extradition Law Amendment Bill that would have allowed criminal suspects in Hong Kong to be sent to mainland China for trial. The protests were organised by the Anti-Extradition Law Amendment Bill Movement.
21. On 26 May 2020, Ofcom found that the 5 programmes had breached the Code. The summary of its 61-page decision said that: "[v]arious news items on protests in Hong Kong were not duly impartial on a matter of major political controversy and a major matter relating to current public policy. In breach of Rules 5.1, 5.11 and 5.12 of [the Code]. Ofcom is minded to consider these breaches for the imposition of a statutory sanction".
22. On 10 June 2020, Star China made written representations to Ofcom in relation to the imposition of sanctions.
23. On 3 November 2020, Ofcom issued its 21-page Preliminary View to the effect that it was minded to impose a statutory sanction in respect of the breaches and considered

that it would be proportionate: (i) to impose a financial penalty of £125,000, and (ii) to direct Star China to broadcast a statement of Ofcom's findings in a form and on dates to be determined by Ofcom. At [85]-[88] of the Preliminary View, Ofcom referred specifically to the Penalty Guidelines and to the fact that it had taken account of Star China's qualifying revenue. It recognised that the penalty had to be proportionate taking into account Star China's rights under article 10, and said that it considered it proportionate to impose a £125,000 penalty.

24. On 16 December 2020, Star China made written submissions to Ofcom contending that no penalty should be imposed. The judge set out Star China's main points at [7] of his judgment. In essence, Star China complained that the decision was politically motivated and unfair, and said that (a) the channel provided a transparently Chinese perspective that often differed from, the dominant mainstream Western media, (b) no harm was caused to the audiences, (c) Star China faced exceptional practical challenges in covering a major fast-moving story, (d) Star China's compliance procedures and revised editorial guidelines were adequate, (e) there had been no finding that the breaches were deliberate or reckless, (f) Star China had been broadcasting in the UK since 2003 with an almost clean record, and (g) the precedents relied on by Ofcom were clearly distinguishable.
25. On 4 February 2021, Ofcom terminated Star China's broadcasting licence with immediate effect, but indicated that it would be continuing with the sanctions process. It was common ground that Ofcom had revoked Star China's licence following a lengthy investigation. Ofcom concluded that the channel was no longer being provided by Star China, but by related Chinese media organisations, which would have been disqualified from holding a broadcast licence under the 2003 Act by reason of their political affiliations to the Chinese Communist Party. Ofcom also refused an application to transfer the licence from Star China to China Global Television Network Corporation for the same reasons.
26. On 8 March 2021, Ofcom issued its 25-page Sanction Decision imposing the same £125,000 penalty presaged in the Preliminary View. It recorded at [7]-[8] that Star China's licence had been revoked but that it nonetheless had power under section 346(3) to impose the penalty. The Sanction Decision dealt in detail at [11]-[25] with the legal framework including article 10 and the decisions in *R (Animal Defenders International) v. Secretary of State for Media, Culture and Sport* [2008] UKHL 15, [2008] 1 AC 1312 and *Animal Defenders International* (2013) 57 EHRR 21 (*Animal Defenders*), and the Divisional Court's decision in *Novosti* [2020] EWHC 689 (Admin), which this court subsequently upheld. Under the heading "Financial penalty" at [64]-[95], the Sanction Decision dealt with all the relevant factors enumerated in [1.12] of the Penalty Guidelines (set out at [17] above), the relevant precedents, and concluded at [96] as follows:

As set out in our Penalty Guidelines, the central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to ensure compliance, having regard to the seriousness of the infringement. [Star China] no longer holds a broadcast licence following Ofcom's decision to revoke the Licence and the [channel] has ceased broadcasting in the UK; therefore, there is no longer a risk of future non-compliance by [Star China] or in respect of the [channel] in this case. Nevertheless, Ofcom is concerned to ensure that enforcement against serious breaches of the Code acts as a wider

deterrent against non-compliance by broadcasters in general. Accordingly, Ofcom considered what would be an appropriate and proportionate sanction, which would act as an effective deterrent, had [Star China] continued to hold a broadcast licence and the [channel] continued to be broadcast, taking into account the size and turnover of the [Star China] and broadcasters' and audiences' rights to freedom of expression under Article 10 of the [ECHR].

### The judge's decision

27. The judge described Star China's contentions before him at [11] as being that "while it accepts that in principle, a financial penalty of some order may have been warranted, ... £125,000, was disproportionate: (a) because it no longer held a licence when the penalty was imposed; (b) because of the nature and seriousness of the breaches; (c) because of its prior compliance record; and (d) because of the nature and expectation of CGTN's audience". He said that the revocation of its licence had been the focus of oral submissions, and that Star China had submitted that it represented "a fundamental change of circumstances that ought to have caused Ofcom substantially to depart from the conclusion in [the Preliminary View]".
28. The judge summarised the law relying both on [27] and [28] in Lord Bingham's speech in *Animal Defenders* and on my judgment in *Novosti*. At [17]-[21], the judge dealt with Star China's submission (summarised at [16]) that Ofcom had not appropriately considered the nature and seriousness of the breaches, Star China's previous record of compliance, and the nature and expectations of Star China's audience. He concluded at [20] that this submission did "not come close to demonstrating that the penalty imposed was an unjustified interference with article 10 rights". He said at [21] that Ofcom had not "obviously gone wrong" (the words I used at [62] in *Novosti* – see [35] below) and that he would have reached the same conclusion. It was only at that point in his judgment that the judge turned (at [22]-[30]) to deal with Star China's primary submission (now pursued on this appeal) that the licence revocation made all the difference.
29. The judge referred to [1.4] and [1.6] of the Penalty Guidelines which mentioned the need to deter the industry generally in addition to the licensee. He noted at [24] Star China's reliance on the third aspect of Lord Sumption's proportionality analysis in *Bank Mellat* at [20] to the effect that interference with a qualified ECHR right, like article 10, would not be justified if a "less intrusive measure could have been used without unacceptably compromising the objective".
30. The judge concluded at [25] by saying that he did not think that there was any error in Ofcom's reasoning or conclusion in [96] of its Sanction Decision that the licence revocation should not affect the penalty. At [26], he said this:

The premise of Star China's submission is that there must be some form of straight-line correlation between the revocation of its licence and the penalty necessary for effective deterrence. The reasoning at paragraph 96 of Ofcom's decision is to the contrary. Ofcom's opinion was that in this case, effective general deterrence was achieved by imposing the penalty that would have been appropriate had [the channel] continued to broadcast. There is logic to this approach. Imposing that penalty would demonstrate to other licence-holders the treatment they could expect in similar circumstances. Such an approach is also consistent (or at least not



inconsistent) with the Penalty Guidelines. For that matter also, it is consistent with section 346(3) of the 2003 Act (the provision that a licence-holder's liability to be subject to a penalty and to pay a penalty imposed by OFCOM survives termination of its licence).

31. The judge then prayed in aid both: (a) Lord Sumption's fourth aspect in *Bank Mellat* to the effect that there had to be an exacting analysis of the factual case in order to determine whether a fair balance had been struck between the rights of the individual and the interests of the community (confirmed in *R (Lord Carlile) v Secretary of State for the Home Department* [2015] AC 945 at [34]), and (b) Lord Reed's judgment in *Bank Mellat* at [68]-[76]. Thus, he said that the "less restrictive means" element of proportionality did not mean there was only one permissible answer, and could not be used to "usurp such area of judgment as must be permitted to the decision-maker even though, as in the case of article 10 rights, that area of judgment will be notably confined". At [29]-[30], the judge explained why he thought Ofcom was peculiarly well placed to assess both what general deterrence and the fair balance required. There was no single right answer and the penalty was not disproportionate.

### Discussion

32. Star China submitted to us that it was not saying that a zero penalty was the only lawful solution. Ofcom could, for example, have lawfully imposed half the indicated penalty and published its reasons saying that, had the licence not been revoked, it would have imposed the full amount. The penalty was not, however, the least restrictive means of achieving the legitimate objective of due impartiality. Ofcom had ignored the revocation of Star China's licence which meant that there could be no continuing deterrent effect on the licensee itself. Star China accepted that it was not making a "reasons challenge" to Ofcom's decision, but argued that it was entitled to say that less respect should be paid to Ofcom's expertise as a regulator when it was relying in this court on reasons that had not been mentioned in its Sanction Decision (see, for example, Baroness Hale at [37] in *Belfast City Council v. Miss Behavin' Ltd* [2007] 1 WLR 1420). Star China referred, in particular, to Ofcom's new-found reliance on its power to "punish" infringers in [1.3] of the Penalty Guidelines. That word was, Star China submitted, to be read in context as meaning no more than deterrence. The court had to undertake a close penetrating scrupulous examination of the factual justification for the penalty in order to determine whether a less intrusive measure could have been used without unacceptably compromising the relevant objectives, which were to deter other broadcasters from breaching the due impartiality requirements. Star China accepted that the need for rigorous scrutiny did not mean that the court was the primary decision maker, and there had to be a margin of appreciation, and that there could be more than one answer. But, Star China submitted, the margin of discretion was narrow in an article 10 case concerned with free political speech. That context did not displace the need for such a penetrating examination.
33. In my judgment, we should follow the approach adopted by Lord Bingham at [28] in *Animal Defenders*, and by this court at [61]-[62] in *Novosti*.
34. It will be recalled that in *Animal Defenders*, Lord Bingham explained the fundamental rationale of the democratic process in the context of a ban on political advertising as follows:

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

35. *Novosti* was a challenge to Ofcom's decision to sanction Russia Today (RT) for 7 broadcasts that had allegedly infringed the due impartiality provisions of the Code. The Divisional Court upheld a penalty of £200,000 for those repeated infringements. . On appeal, this court rejected the argument that the dominant media narrative justified a one-sided approach and that the opposing viewpoint could be legitimately provided in other programming. I said this at [59]-[66]:

59. Keeping closely in mind the question that the court must answer under article 10(2), namely whether the enforcement action taken by Ofcom against RT was necessary in a democratic society in the interests of the protection of the rights of others, the first question is who are the "others" in question. They are obviously, I think, members of that democratic society in general and the viewers of RT in particular. ...

60. As I have said, it is accepted that providing news and current affairs broadcasting that satisfies the due impartiality requirement is a legitimate aim for Parliament and Ofcom to be pursuing. The question is whether the actions taken by Ofcom are proportionate to that legitimate aim, bearing in mind the main contextual features relied upon, namely the dominant media narrative, other programming on RT and the expectations of RT's audience. ...

62. Secondly, in my judgment, the fact that there is a dominant media narrative that is different from the views expressed in RT's Programmes does not, by itself, override the special impartiality requirements that apply to programmes dealing with matters of political controversy and current public policy. Whilst it is true that Ofcom's Breach Decisions did not analyse the harm that might be caused to viewers by the failure to present opposing views, it did analyse in great detail how the issues were treated in each of the Programmes. As regulator, it was Ofcom's job to undertake that exercise and to evaluate whether action was needed in the

interests of democratic society to protect the rights of others in the light of the degree of partiality in each Programme. The courts should give weight to Ofcom's assessment and only second guess its expertise where it has obviously gone wrong (compare *Gaunt v. United Kingdom* (2016) 63 EHRR SE15 at [61]) [*Gaunt*]. Moreover, the analysis is not limited to the harm caused to viewers but extends to the harm indirectly caused to members of society generally by the provision of broadcast news and current affairs that lacks due impartiality. ...

66. Ultimately, therefore, I answer the critical question under article 10(2) in the same way as the Divisional Court. The enforcement action taken by Ofcom against RT in respect of each of the Programmes was indeed necessary in a democratic society in the interests of the protection of the rights of members of that democratic society in general and the viewers of RT in particular.

36. The passage in the judgment of the European Court of Human Rights at [61] in *Gaunt*, to which I referred at [62] in *Novosti*, was as follows:

In such a case, in deciding what is capable of offending a broadcast audience, weight must be given both to the opinion of the domestic courts and, to an even greater extent, to that of a specialist regulator of broadcast standards - such as Ofcom - which has considerable experience of balancing the parameters of potentially offensive content with the fluctuating expectations of contemporary radio audiences in the Contracting State.

37. Star China submitted in its skeleton (but not orally) that the judge had been wrong at [29] to ask himself whether Ofcom had "obviously gone wrong", in reliance on [62] of my judgment in *Novosti*. Star China acknowledged that the "*less restrictive means*" aspect of proportionality could not be interpreted as allowing only one outcome, but said that it did not follow, anyway in a case where freedom of political speech was concerned, that Ofcom's conclusion must be respected unless it "discloses [an] error of principle" or "has obviously gone wrong". The standard of justification in such cases was high, and the margin of appreciation was correspondingly small.

38. I accept, just as I did in *Novosti* at [47], that:

- i) A close and penetrating examination of the factual justification for the restriction on freedom of speech (i.e. the derogation from article 10) is required in order to ascertain whether it was proportionate to the legitimate aim, namely due impartiality.
- ii) The importance of free expression is such that the standard of justification required is high and the margin of appreciation correspondingly small, particularly where political speech is in issue.

39. That is not, however, inconsistent with according weight to the opinion of a specialist regulator, such as Ofcom, which has considerable experience in the area of broadcasting in general and the need for due impartiality in particular. In the context of the close and penetrating examination that I undertook in *Novosti* and am undertaking in this case, it was right to say that the courts should give weight to Ofcom's assessment and only second guess its expertise where it has obviously gone wrong.

40. That approach is also not inconsistent with Lord Sumption’s proportionality analysis in *Bank Mellat* where he said at [20]:
- ... the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.
41. I should say, however, that I agree with the judge that, in this case, Lord Sumption’s fourth factor (the fair balance) is quite as important as his third factor (the less intrusive means).
42. Against that background, I turn to consider Star China’s central point. I should say at once that the submission that, after revocation of its licence, there was no continuing need to deter Star China, and, therefore, a lesser penalty than suggested in the Preliminary View was appropriate, appears superficially logical and attractive. In my judgment, however, it is wrong, for the following reasons.
43. First, it does not follow that because a financial penalty of £125,000 was necessary and proportionate (on the basis explained above) to deter **both** Star China **and** other broadcasters, the same financial penalty was not necessary and proportionate to deter other broadcasters alone. It may be so, but it is not obvious that it is. It will depend on the circumstances.
44. Secondly, it was obviously relevant for Ofcom to consider whether the financial penalty imposed in this case would be effective to deter other broadcasters. It would do so, no doubt, in the knowledge that those other broadcasters would be looking at the financial penalty itself to see what would be likely to be imposed upon them if they infringed the due impartiality requirements to the extent that Star China had done. The financial penalty had presumably to fit within the structure of Ofcom’s own precedents considered in its Preliminary View and in its Sanction Decision.
45. Thirdly, [1.4] and [1.6] of the Penalty Guidelines make it clear that “[t]he level of the penalty must be sufficient to deter” **both** the licensee **and** the wider industry. [1.6] expressly provides that it must provide “signals to other bodies that misconduct by them would result in penalties having a similar impact”. Had Ofcom, for example, halved the penalty that it thought in its Preliminary View would have that effect, it would, no doubt, have sent a different and less impactful signal to other broadcasters.
46. Fourthly, no suggestion has been made that Ofcom failed properly to undertake the exercise laid down in [1.11]-[1.13] of its Penalty Guidelines. Its Sanction Decision shows that it considered “all the circumstances of the case in the round”, whether the penalty would act as an “effective incentive to compliance”, having regard to the seriousness of the infringement, the size and turnover of Star China, and all the relevant factors set out in [1.12].
47. Fifthly, I find it hard to see how publishing a clearly worded sanction decision explaining that, but for the revocation of Star China’s licence, Ofcom would have

imposed a higher financial penalty, could be a proper substitute for the imposition of a penalty likely to deter other broadcasters, which the rules require. It is true that Ofcom can and does deal with some more minor infringements without imposing any financial penalty, but these were serious breaches requiring a sanction at the higher end of the scale. One can well understand why Ofcom would not want to encourage other broadcasters to think that a penalty could be avoided or reduced by forfeiting the licence.

48. Sixthly, I accept that Ofcom did not explain in detail in the Sanction Decision why it was imposing the same penalty as it had proposed in the Preliminary View, notwithstanding the revocation of Star China's licence. But it did make clear in the crucial [96] that the penalty had to "be sufficient to ensure that it will act as an effective incentive to ensure compliance, having regard to the seriousness of the infringement", and that it understood that there was no longer a risk of future non-compliance by Star China in this case. Ofcom said, as seems to me to be right, that it was nevertheless "concerned to ensure that enforcement against serious breaches of the Code [acted] as a wider deterrent against non-compliance by broadcasters in general".
49. Finally, I do not think that Ofcom gave substantially different reasons for its decision either to the judge or in this court. It is true that Ofcom referred us to its power to "punish" in [1.3] of the Penalty Guidelines, but I do not think the use of that word has much impact on the overall tenor of deterrence evident throughout.

### Conclusions

50. I conclude, therefore, that Star China's ground of appeal cannot succeed. I have undertaken the necessary close and penetrating examination of the factual justification for the imposition of a penalty of £125,000 in derogation of Star China's article 10 rights and in all the circumstances of this case. I have applied the four aspects of the proportionality exercise explained by Lord Sumption in *Bank Mellat*. I have formed the same view as both Ofcom and the judge to the effect that the imposition of the penalty of £125,000 (a) struck an acceptable balance between the rights of Star China and the interests of the community, and (b) was within the range of the least intrusive measures needed to achieve the legitimate objective of achieving due impartiality, allowing Ofcom an appropriate margin of appreciation. Due impartiality in news broadcasting is prescribed by law in the 2003 Act and is necessary in our democratic society for the protection of the rights of the members of that society.
51. Accordingly, the imposition of the financial penalty of £125,000 in this case fell within the exception in article 10(2) and did not infringe article 10(1). Like the judge, I have no doubt that Ofcom's decision was right, and nowhere close to being wrong or obviously wrong.
52. I would dismiss this appeal.

### **Lady Justice Simler:**

53. I agree.

### **Lord Justice Warby:**

54. I also agree.