



Neutral Citation Number: [2024] EWHC 2028 (Admin)

Case No: AC-2023-LON-001656  
AC-2023-LON-002280

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 31/07/2024

**Before :**

**THE HONOURABLE MRS JUSTICE FARBEY**

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**Between :**

**THE KING**

**ON THE APPLICATION OF**

**MARK STEYN**

**Claimant**

**- and -**

**OFFICE OF COMMUNICATIONS**

**Defendant**

**- and -**

**GB NEWS LIMITED**

**Interested  
Party**

**THE KING**

**ON THE APPLICATION OF**

**MARK STEYN**

**Claimant**

**- and -**

**OFFICE OF COMMUNICATIONS**

**Defendant**

**- and -**

**(1) GB NEWS LIMITED**

**Interested**

**Mr Jonathan Price** (instructed by **Preiskel and Co**) for the **Claimant**  
**Ms Jessica Boyd KC** and **Mr David Glen** (instructed by **Office of Communications**) for the  
**Defendant**

The First Interested Party did not appear and was not represented  
The Second Interested Party made a written statement

Hearing date: 11 June 2024

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**Approved Judgment**

This judgment was handed down remotely at 16:00 pm on 31 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

## **MRS JUSTICE FARBEY:**

### **The Claims**

1. The journalist and television presenter Mr Mark Steyn brings claims for judicial review of two decisions of the Office of Communications (Ofcom). The decisions relate to a television programme called *The Mark Steyn Show* (“the Show”). Mr Steyn presented the Show on the GB News television channel for which GB News Limited holds the broadcasting licence. The first claim (AC-2023-LON-001656) seeks to challenge Ofcom’s decision concerning one of Mr Steyn’s regular monologues which would form the opening segment of the Show and which were known as *The Steyn Line*. The second claim (AC-2023-LON-002280) seeks to challenge Ofcom’s decision concerning one of Mr Steyn’s interviews with author and journalist Dr Naomi Wolf.
2. The claims were heard together. Mr Jonathan Price appeared on behalf of Mr Steyn (the Claimant). Ms Jessica Boyd KC and Mr David Glen appeared on behalf of Ofcom (the Defendant). GB News Limited (an Interested Party in both claims) took no part in the proceedings. Dr Naomi Wolf (an Interested Party in the second claim) did not file an acknowledgment of service but came to court and handed up a written submission supporting the second claim.
3. Ofcom’s decisions relate to Mr Steyn’s treatment of the safety of the vaccines administered for Covid-19 during the period of the global pandemic and their effectiveness in the sense of whether or not vaccinations prevented individuals from getting ill, being hospitalised or dying. In the first decision, Ofcom concluded that passages of the monologue materially misled the audience in portrayals of factual matters, contrary to paragraph 2.2 of the Ofcom Broadcasting Code (“the Code”). In the second decision, Ofcom concluded that the interview with Dr Wolf failed to provide adequate protection for members of the public from the inclusion of harmful material, contrary to paragraph 2.1 of the Code.
4. Mr Steyn has permission to advance two grounds of challenge that range over both decisions. First, he contends that the decisions were not founded on any proper or sustainable findings of fact. Secondly, it is contended that each decision amounted to a breach of his right to freedom of expression under article 10 of the European Convention on Human Rights (“the Convention”).
5. Mr Steyn renews his application for permission to rely on a further ground in the first claim. By this further ground, he contends that Ofcom’s decision in relation to the monologue relied on the unreasonable and unsustainable premise that the monologue portrayed factual matters when it plainly conveyed statements of opinion rather than fact.
6. Permission to apply for judicial review on this further ground was refused by Lavender J on the papers. The notice of renewal was filed some weeks out of time. I am not impressed by the reasons for delay (which arose primarily from Mr Steyn’s previous solicitors’ slowness to engage with the renewal process over the Christmas period followed by his decision to change solicitors). Nevertheless, Ofcom’s written opposition to the grant of an extension of time was only faintly pursued at the hearing and the importance of the issue warrants a degree of generosity by the court in

considering Mr Steyn's delay. I extend time, grant permission to apply for judicial review on the basis that the additional ground is arguable, and deal with it substantively in this judgment.

## **Ofcom**

7. Ofcom's regulatory functions are conferred by Parliament. Under the Communications Act 2003 ("the Act"), Ofcom has a statutory duty to set broadcasting standards (section 319(1)) and to codify those standards (section 319(3)). Ofcom operates the Code pursuant to those statutory duties.

8. Section 2 of the Code is headed "Harm and offence" and outlines "standards for broadcast content so as to provide adequate protection for members of the public from harmful and/or offensive material." Within Section 2, Rule 2.1 states:

"2.1: Generally accepted standards must be applied to the contents of television and radio services and BBC ODPS so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material."

9. Rule 2.2 states:

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

The Code states the principle that underlies these Rules, namely: "To ensure that generally accepted standards are applied in the content of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material."

## **Overarching legal framework**

10. As I have indicated, the claims each raise questions of freedom of expression under article 10 of the Convention. Article 10 states:

"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.”

11. The connection between freedom of expression and democratic government is well-established in case law. In *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247, Lord Bingham of Cornhill expressed the connection in terms upon which it is not possible to improve:

“21. The fundamental right of free expression has been recognised at common law for very many years...Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process...

22...The European Court of Human Rights for its part has not wavered in asserting the fundamental nature of this right. In paragraph 52 of its judgment in *Vogt v Germany*(1995) 21 EHRR 205 the court said:

‘The court reiterates the basic principles laid down in its judgments concerning article 10:

‘...Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to article 10(2), it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”

12. The press must be free not only to analyse matters of public importance but also to perform that role in a variety of ways. As the European Court of Human Rights (“ECtHR”) stated in *Jersild v Denmark* (1995) 19 EHRR 1, para 31:

“[T]he methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. In this context the Court recalls that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.”

13. On the other side of the scales, the right to freedom of expression is not an absolute right. The various different and important public interests set out in article 10(2) may

justify restrictions even on journalists and broadcasters. The court will apply a “close and penetrating examination” to the justification for a restriction on freedom of speech advanced by a public authority (*R (TV-Novosti) v Ofcom* [2021] EWCA Civ 1543, [2022] 1 WLR 481, para 47, per Sir Geoffrey Vos MR). The standard of justification is high and the margin of appreciation afforded to a public authority is correspondingly small, particularly when (as in the present claims) political speech is in issue (*TV-Novosti*, para 47; citing *R (Animal Defenders International) v Secretary of State for Media, Culture and Sport* [2008] UKHL 15, [2008] AC 1312, para 26, per Lord Bingham). Nevertheless, in considering the justification for interfering with press and journalistic freedoms, the courts will accord weight to the opinion of a specialist regulator, such as Ofcom, and only second guess its expertise where it has “obviously gone wrong” (*TV-Novosti*, para 62, citing *Gaunt v United Kingdom* (2016) 63 EHRR SE15, para 61; *R (Star China Media Ltd) v Ofcom* [2023] EWCA Civ 843, [2024] 1 WLR 248, para 39).

14. I shall return to the law below but, in accordance with this overarching legal framework, I confirm that I have throughout applied a “close and penetrating examination” to Ofcom’s decisions. I have kept the importance of freedom of expression at the front of my mind.

### **The Facts**

15. I turn to the facts which I derive from the documents in the bundles and from viewing the monologue and interview (which I was not asked to play in court). Mr Steyn is an experienced television and radio host of many years standing. Among the many different aspects of his career, in the autumn of 2021, he and his co-producer transferred the broadcast of the Show to GB News. At the date of the Ofcom decisions, the Show was broadcast on Mondays to Thursdays from 8pm to 9pm.

#### *The monologue*

16. Mr Steyn would start the Show with a regular section, *The Steyn Line*, in which he would give a monologue setting out his views on a particular topic. On 21 April 2022, he talked about the safety and effectiveness of the Government’s Covid-19 vaccination programme, particularly the third “booster” dose. During the monologue, a banner displayed across the bottom of the screen informed the audience that the monologue was “Mark’s take on the vaccine debate.”
17. The monologue criticised the Government’s booster programme in trenchant and at times polemical terms. Lest there be any misunderstanding, the courts will jealously guard the right to polemical speech, which has a longstanding place in a democratic and pluralistic society. However, in conveying his opinions, Mr Steyn relied on, and drew conclusions from, data published by the United Kingdom Health Security Agency (“UKHSA”). He used the data to make three principal assertions to his audience: (i) a person who had had the booster was twice as likely to contract Covid-19 as a person who had not had the booster shot; (ii) triple-vaccinated people were being hospitalised at “twice the rate” of those who had been vaccinated once or twice, or who were unvaccinated; and (iii) taking the period of 28 days from vaccination (the period used by the Government for counting Covid-19 deaths), triple-vaccinated people were dying “at a rate approximately three times higher than the rest of the population.”

18. I shall return below to the language of the monologue. In broad summary, Mr Steyn used these assertions as a foundation for the expression of his opinion that the Government, supported by uncritical media outlets, was promoting a failed and harmful vaccination programme. He expressed the opinion that the vaccination programme had proceeded in a pervasive culture of misinformation, promulgated by the Government and the press. Those who challenged official views were “cancelled”: their voices were excluded from public debate on social media and elsewhere which had a chilling effect on free speech. Using Government data on vaccinations as an example, Mr Steyn told his audience that there needed to be a full and proper debate on what were, in his opinion, a wide variety of harmful Government policies and restrictions during the pandemic. He expressed the opinion that the Government should be held accountable to a Royal Commission for damage caused by vaccinations and by other Covid restrictions which he regarded as disastrous.
19. The bundle of documents filed in support of the claim contains one set of UKHSA statistics which deal with the week ending 10 April 2022 (“the 10 April statistics”). Mr Steyn relied on these and other statistics to make his points on the Show. It was not in dispute that the 10 April statistics were published with the following caveat:

“We present data on COVID-19 cases, hospitalisations and deaths by vaccination status. **This raw data should not be used to estimate vaccine effectiveness** as the data does not take into account inherent biases present such as differences in risk, behaviour and testing in the vaccinated and unvaccinated populations” (emphasis in the original).

I shall refer to this as the “caveat on effectiveness.” Other statistics appeared to the audience as a backdrop during the monologue but were not the subject of argument before me either orally or in writing. All the statistics featured in the programme contained the following statement:

“In the context of very high vaccine coverage in the population, even with a highly effective vaccine, it is expected that a large proportion of cases, hospitalisations and deaths would occur in vaccinated individuals, simply because a larger proportion of the population are vaccinated than unvaccinated and no vaccine is 100% effective. This is especially true because vaccination has been prioritised in individuals who are more susceptible or more at risk of severe disease. Individuals in risk groups may also be more at risk of hospitalisation or death due to non Covid-19 causes, and thus may be hospitalised or die with Covid-19 rather than because of Covid-19.”

I shall refer to this information as the “contextual statement.”

20. On 11 July 2022, Ofcom wrote to the Compliance Officer at GB News (Mr Nick Pollard) to say that it had launched an investigation into a potential breach of Rule 2.2 of the Code. The grounds for investigation were that Mr Steyn had deployed UKHSA statistics in a misleading manner because he had not referred to, or reflected, the

caveat on effectiveness. Ofcom sought the formal comments of GB News as the licensee.

21. On 29 July 2022, Mr Pollard duly made written representations to Ofcom which have not been provided to me but which are reflected in Ofcom's decision letter. Among other things, the representations asserted that Mr Steyn's interpretation of the statistics was "a legitimate one" and that there "can be nothing 'sacred' or unchallengeable about data – particularly when there is no universally agreed or acknowledged method of collecting and analysing empirical data." Mr Pollard argued that others "may have a different interpretation and it is up to them to promote and argue for it." It was said that the programme had put forward a "reasonable" interpretation of publicly available data. Mr Steyn had explained his thinking to the audience so that "people could see his logic for themselves." His use of the data was said to be "the product of lengthy research, analysis and consideration."
22. Mr Pollard argued that Mr Steyn had made clear to the audience both that he was giving his personal opinion and that his own view was at odds with the "official version of events." It was emphasised that audience views taking issue with Mr Steyn's views were included in the programme. A clear alternative view had been provided by a former analyst at the Office for National Statistics ("ONS") in the next edition of the Show on 25 April 2022.
23. Mr Pollard submitted that there was no evidence of actual harm and that it was hard to conceive of potential harm caused by the monologue. He said that GB News did not accept that the caveat on effectiveness should have been mentioned in the programme or have been a bar to discussion altogether.
24. Having considered Mr Pollard's representations, Ofcom produced a written Preliminary View in which it reached the conclusion that GB News had breached Rule 2.2 of the Code. In a written response to that Preliminary View, Mr Pollard submitted that different interpretations of official data are inevitable. He reiterated the submission that Mr Steyn's interpretation of official data had been legitimate. He accepted that Mr Steyn had asserted that his interpretation was the only possible conclusion from the data whereas he could have made clear that the statistics could be interpreted in other ways. Mr Pollard denied, however, that this failure in itself breached the Code.

*Ofcom's decision on the monologue*

25. In its final, published decision, Ofcom reviewed the content of the monologue and the representations from Mr Pollard. It directed itself on the terms of Rule 2.2, stating:

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



26. Ofcom agreed that it was legitimate to interrogate official data robustly and emphasised that:

“broadcasters are free to broadcast programming which present controversial or critical comments concerning the policies and actions of the Government or of public health bodies in accordance with their rights and the rights of their audiences to freedom of expression. However, in doing so, broadcasters must ensure, in accordance with Rule 2.2, that programmes dealing with factual matters do not materially mislead the audience.”

27. As Rule 2.2 concerns “portrayals of factual matters”, Ofcom considered the nature of the factual matters presented in the Show in relation to UKHSA data. In undertaking this exercise, Ofcom noted that Mr Steyn explained the 10 April statistics as showing a pool of 63 million people of whom approximately the same number were triple vaccinated (around 32 million) as the combined total of those who had received a single or double dose or who were unvaccinated (around 31 million). Ofcom has no complaint about that factual analysis. However, Ofcom concluded that Mr Steyn had portrayed factual matters to his audience in three significant ways which the decision analysed and which I shall analyse now.

28. *(i) Direct comparison of groups:* Mr Steyn said:

“So, we have two groups of similar size. 31, 32 million. So, it’s relatively easy to weigh the merits of the third shot upon group A vs group B...”

He went on to “weigh the merits” of vaccination by carrying out a direct comparison between “group A” and “group B”:

“We matched these numbers across all age groups. So, the point is, an 80-year-old with a booster shot is more likely to die than an 80-year-old without a booster shot. And likewise, a 30-year-old with the booster shot is more likely to die than a 30-year-old without a booster shot”; and

“There’s 32 million who had the third booster shot, there’s 31 million who didn’t. **So, we can directly compare the numbers**, overall numbers, because they’re the same size. So, if you got the booster shot, you’re dying at three times the rate of the people who didn’t get the booster shot” (emphasis added).

29. Although viewers were informed that the numbers had been “matched” across all age groups, Mr Price was bound to accept that there was no evidence that GB News had carried out any statistically valid matching process and that none had been supplied to Ofcom when it took its decision. I accept Ms Boyd’s submission that Ofcom was entitled to conclude that Mr Steyn presented the raw data as providing two groups of the same size (those who had received the Covid-19 booster shot and those who had

not) that could be directly compared in order to draw conclusions about the safety of vaccination.

30. Making direct comparisons between the two groups, Mr Steyn informed viewers as follows:

“So, the triple vaccinated, in March, were responsible for just over a million Covid cases and everybody else 475,000 cases. So the triple vaccinated are contracting Covid at approximately twice the rate of the double, single and unvaccinated. Got that? If you get the booster shot, you’ve got twice as high a chance of getting the Covid”; and

“So, triple vaccinated people who wound up spending a night in hospital, 6750 everybody else 3576. So the triple vaccinated are being hospitalised overnight for Covid at approximately twice the rate of the double, single and unvaccinated. And one notes, in particular, the significant differences in hospitalisation numbers in those over 60”; and

“Deaths within 28 days of positive Covid tests in all age groups. And the triple-vaccinated again, the far-right hand column there, and everybody else the other columns, let’s just add it up because it’s such a huge difference. Triple-vaccinated who are dead within 28 days, 1557. Everybody else, dead within 28 days, 577. So, the triple-vaccinated are dying within 28 days at a rate approximately three times higher than the rest of the population”.

31. Mr Price contended that these comparisons were not portrayals of factual matters but were the expression of Mr Steyn’s opinions and value judgments, as flagged to viewers both in the language of the monologue and in the banner across the screen. I agree that some of the monologue was the expression of opinion, such as the call for a critical debate of Government policy on vaccination and on Covid restrictions more widely. I agree that his call for a Royal Commission was the expression of an opinion. He was entitled to challenge Government statistics and to expose inaccuracies. Nevertheless, in the context of health statistics, the assertion that two groups of people can be directly compared cannot be regarded as a subjective matter dependant on the opinion of the person who makes it. Ofcom’s decision that, in making that comparison, Mr Steyn portrayed factual matters within the meaning of Rule 2.2 of the Code is unimpeachable.
32. **(ii) Causation:** Mr Steyn made a direct comparison between the groups to assert that the booster vaccine caused increased levels of infection, hospitalisation and death. The following extracts are illustrative of how he advanced this assertion about the cause of health problems among vaccinated people (with emphasis added):

“If the booster shot is **making it more, thrice as likely that you’re going to [die]**, why aren’t we talking about that?”; and

“Now we’ve designed a **booster shot that kills** almost four times as many old people if you get this shot, as if you don’t. The third shot not only has no efficacy, **it increases your chances of hospitalisation and death**”.

“The third shot was clearly a shot too far that has **damaged the immune systems of many people and made them less able to resist infection and death**”; and

“it’s not just that they’re useless, it’s that **you’re more likely to be infected, you’re more likely to be hospitalised overnight and you’re more likely to be dead**”; and

“Those zombies who [follow] Government spokespersons, have injected themselves with **something that increases their likelihood of infection, hospitalisation and death.**”

33. I set aside the trenchant language because Ofcom’s concerns did not relate to journalistic style. Ofcom’s key concern was that Mr Steyn used direct comparison between two groups of people to reach conclusions on vaccine effectiveness. Ofcom was entitled to conclude that, in making these assertions about causation, Mr Steyn was portraying factual matters and to conclude that Mr Steyn had “repeatedly asserted that the third booster dose of the Covid-19 vaccination was the cause of increased infection, hospitalisation and death rates among those that had taken it.”
34. *(iii) Only one conclusion:* As Ofcom’s decision emphasises, Mr Steyn informed viewers that “only one conclusion” followed from the 10 April statistics, namely that the booster shot had “failed” and had in fact exposed people to “significantly greater risk of infection, hospitalisation and death.” Mr Price submitted that the assertion that Mr Steyn’s view of the statistics was the “only” conclusion that the statistics permitted was not to be taken literally but should have been recognised by Ofcom as rhetorical flourish. Mr Price submitted that, in the context of the Show’s familiar style, the audience would have understood that the assertion amounted to no more than a strong and polemical challenge to conclusions drawn by others. I do not agree. The attribution of definitive status to the Show’s analysis of the statistics (shutting out any other conclusion) was properly treated by Ofcom as the portrayal of a factual matter within Rule 2.2. Ofcom was plainly entitled to reach that conclusion.
35. Ofcom then asked itself whether Mr Steyn’s statements that the UKHSA data could be used to draw conclusions about vaccine effectiveness were likely to have materially misled the audience. It took into consideration that Mr Steyn did not himself refer to the caveat on effectiveness; nor did he make any reference to the contextual statement, whether by referring to it or by putting it on screen. Ofcom concluded:

“Consistent with this information provided in the original UKHSA reports, but not included in this programme, Ofcom took account of the fundamental biases within the two groups that Mark Steyn compared. For example, at the time of broadcast, in every age-group over 70, triple-vaccination rates were estimated to be more than 90%. In younger age groups,

they were significantly lower, with all age groups under 40 at less than 50%. The rates for young adults and children were even lower with less than 10% of 16 to under 18s and less than 0.5% of under 16s having received a third dose of the vaccine. Therefore, in the two groups that Mark Steyn said could be directly compared (i.e. those that had and those that had not had a third Covid-19 vaccination) one included far larger numbers of older people. **The simple comparison between the two groups made by Mark Steyn failed to take into account these inherent biases and, for example, the fact that older people are more likely to die or be hospitalised than younger people (emphasis added).**”

36. Taking account of the key information that Mr Steyn had not included as part of his analysis and presentation of the data, Ofcom considered that:
- i. It was misleading to state that, based solely on the number of people who were triple vaccinated and those who were not, it was possible to draw a simple comparison between the UKHSA data for each group and make an assessment of the effectiveness of the third Covid-19 vaccine dose; and
  - ii. Given the inherent biases in the two groups that Mr Steyn had presented to viewers as directly comparable, it was misleading to say that “only one conclusion” could be drawn from the data, namely that the third vaccination dose increased the risks of infection from Covid-19, hospitalisation and death.
37. Ofcom considered whether there was any mitigation in the form of the presentation of a different view of the data. Mr Steyn had read out the view of one audience member who had contacted the Show to say: “I think to be fair you have to take other factors into account. People are dying with Covid not of Covid. Older people are generally more likely to die of any cause.” Mr Steyn immediately disagreed with the audience member and, as Ofcom noted, responded to this alternative point of view in terms that suggested that the viewer’s analysis was wrong and his own analysis definitive. Ofcom noted that he claimed again to have “matched these numbers across all age groups” albeit that there is no evidence of statistically valid matching.
38. Mr Steyn expressly rejected anything other than a direct comparison between the two groups when he rejected a comment on social media by another viewer suggesting that the statistics needed to be weighted. A third viewer response that “the vaccine is safe and has saved millions of lives” was rejected as relying too much on anecdotal evidence in contrast to Mr Steyn’s conclusions which he said relied on Government statistics.
39. Ofcom concluded that, in light of Mr Steyn’s treatment of these audience members’ comments, the Show failed to provide a genuine counterweight or challenge for viewers to prevent them from being misled by Mr Steyn’s presentation of, and statements about, Government data. Dealing with the appearance by the former ONS official on 25 April 2022, Ofcom took into consideration that this guest appeared on the Show four days after the monologue and that there had been no indication in the programme that the discussion of the UKHSA data was going to continue in a future

episode. For these reasons, Ofcom concluded that the Show had failed to provide mitigation against the misleading content in the monologue.

40. Ofcom considered whether the programme had caused, or had the potential to cause, harm to the audience. Central to its analysis of harm was Ofcom's view that the broadcasting of misleading claims about the effects of being vaccinated might prevent viewers from making properly informed choices about a matter affecting health:

“Ofcom acknowledged that policies to manage the spread of the virus had undoubtedly evolved over the course of the pandemic, but considered that at the time of broadcast the vaccination programme had not come to an end and the potential for harm remained...A significant proportion of the population was yet to receive a third vaccination and **the statements broadcast in this programme could result in viewers making important decisions about their health based on misleading information.** Moreover, although the urgency of the Covid vaccination programme had diminished, the [10 April statistics] found that immunity declined over time and that Spring boosters were recommended for the elderly, care home residents and immunosuppressed individuals aged 12 or over. These vulnerable individuals have a higher risk of contracting severe Covid and as such, the decision as to whether or not to take up a booster vaccine might carry significant health implications. Ofcom considered that, **notwithstanding the status of the pandemic, viewers needed to be able to make properly informed choices about vaccination and that broadcasting misleading claims of this nature might prevent them from doing so**” (emphasis added).

41. By way of further potential harm, Ofcom considered that the programme had the potential to cause significant concern and alarm among viewers who had already received a booster vaccine as “they may have perceived themselves as being at greater risk of death or hospitalisation on the basis of the misleading information contained in the programme.” Ofcom acknowledged that GB News is a “minority channel” but the decision pointed out that all Ofcom-licensed broadcasters must adhere to the Code, regardless of their size.
42. Against this background, GB News was found to have breached Rule 2.2 in the following terms:

“It is clearly in the public interest to scrutinise information of this nature, provided programming is compliant with the Code, specifically that the portrayals of factual matters are not materially misleading. However, in this case, Ofcom considered that this programme incorrectly claimed that official UKHSA data provided definitive evidence that there was a causal link between receiving the third Covid-19 booster vaccine and higher infection, hospitalisation and death rates. This was misleading because the programme failed to reflect

that the reports made clear that the raw data contained within them should not be used to draw conclusions about vaccine efficacy, due to the biases inherent in those in the vaccinated and unvaccinated populations. Given the content was broadcast as part of a factual programme on a news and current affairs service, and may have resulted in viewers making important decisions about their own health, we found that the programme was materially misleading and in breach of Rule 2.2 of the Code.”

*The interview*

43. On 11 October 2022, Ofcom wrote to Mr Pollard to say that it had launched an investigation into a potential breach of Rule 2.1 of the Code. The grounds for investigation related to certain parts of Mr Steyn’s interview of Dr Wolf on the Show on 4 October 2022. Ofcom’s letter quoted various parts of the interview and expressed particular concern about Dr Wolf’s allegations that the “roll-out” of Covid-19 vaccines was a form of “mass murder” and a “massive crime.” Ofcom asked for comments from GB News.
44. On 28 October 2022, Mr Pollard made detailed written representations. He emphasised that the interview covered an important subject of public interest. He stated that both Mr Steyn and Dr Wolf had expressed strong and, at times, controversial views but submitted that they had done so in a way that was consistent with debating and testing perceived orthodoxies. He submitted that, in the absence of any credible proof of “harm” under the Code, the statements made by Mr Steyn and Dr Wolf were protected by law.
45. Mr Pollard pointed out that, by the date of the interview, the time of exceptional activity by the Government to persuade members of the public to be vaccinated had ended. Circumstances had changed since the height of the pandemic. Rules and restrictions on social gathering had ended. The “official heavy promotion of widespread vaccination had run its course.” Mr Pollard submitted that evidence had come to light which cast reasonable doubt on the claims about the very high levels of safety and effectiveness of some Covid vaccines. Much of that evidence was strongly disputed. However, time had passed since any discussion and assertion of specific dangers could be regarded as harmful and irresponsible. It was submitted that the risk of harm from the content of the interview was very low.
46. Mr Pollard went on to deal with the language used by Dr Wolf, saying:

“We accept that Dr Wolf expressed herself in forceful terms and in a way which might have upset some viewers and listeners but we believe she was entitled to do that in the circumstances and that we were justified in broadcasting it by the context we have set out above. Dr Wolf is a Jewish woman and believed that the reference to the actions of doctors in the early days of Nazi Germany was not excessive and a reasonable comparison with the situation faced today. Similarly, she expressed strong views that the handling of the Covid epidemic had threatened the stability and future safety of the West.

Dr Wolf's strongly stated views were not aimed at individuals or at any named organisation so no one could have been 'harmed' by her words. They were a general expression of her own strongly held opinions including her anger and concern that the course of events over the past two years had been exceptionally damaging for populations and western values and security. They were her opinion, nothing more, nothing less" (emphasis in the original).

47. Turning to audience expectations, Mr Pollard described how the Show clearly signalled its purpose and approach to the audience. The Show was opinion-driven, questioning, combative, suspicious of easy consensus and "healthily sceptical" of "the official view." Mr Steyn had a regular and loyal audience who understood the nature of the Show and understood his approach. Any viewer coming across the Show accidentally would understand its nature very quickly.
48. Mr Pollard said that the Show had at no stage adopted an anti-vaccination approach. Mr Steyn had consistently tested and questioned specific aspects of Covid policy and had focused on evidence from a wide range of sources. The Show had taken a particular interest in the balance of risk and benefit from vaccination. Mr Pollard submitted that there had been very little official acknowledgment of serious illness or death brought about by the vaccine and minimal media discussion about that topic. GB News had properly covered the Government's position. However it had also provided the widest possible range of opinion. A breach of the Code was denied.
49. On 6 February 2023, Ofcom produced a detailed written Preliminary View in which it concluded that the Show did not include adequate protection for viewers from the inclusion of potentially harmful material and that GB News were therefore in breach of Rule 2.1. On 20 February 2023, Mr Pollard responded to the Preliminary View by email. Raising issues of freedom of speech, he said that Ofcom should not treat outspoken and combative language as harmful. The Show was just one small voice among the vast amount of information available to the public about the wisdom or otherwise of vaccination. There could have been no possibility that someone watching the Show could have been unaware that the Government continued to promote vaccination. The likelihood of harm from the Show was purely theoretical and could not be proved.
50. Mr Pollard ended his response in the following way:

**"We agree with Ofcom's position that the presence of an 'appropriately wide range of significant views' provides context and an element of audience protection when controversial matters are being discussed, and we accept that such a range of views was absent in this case. It seems clear to us that if an alternative view had been provided in the programme, it is more than likely that Ofcom would have come to a different conclusion in its Preliminary View.**

But it is still our view that only minimal harm could have been caused by this broadcast... Our position remains that the programme did not breach the Ofcom Code.

We welcome Ofcom’s continued assertion that no subject is too controversial or unpalatable to be aired with appropriate context and will continue to broadcast programmes on that basis” (emphasis added).

*Ofcom’s decision on the interview*

51. In its final, published decision, Ofcom reviewed the content of the interview and the representations from Mr Pollard. It directed itself on the terms and meaning of Rule 2.1 and on the importance of the right to freedom of expression under article 10 such that any limitation on the right must be strictly considered.
52. The decision examined whether Dr Wolf’s comments were potentially harmful to viewers. It referred to the Ofcom Guidance Notes and, in particular, to factors in the Notes relevant to the assessment of the potential for harm, including the severity of the situation (i.e. whether the comments related to the most serious medical condition); whether the material was targeted at a particularly vulnerable audience; and whether the comments were made by a speaker portrayed as having authority. Ofcom referred to the need to take into consideration the context and “whether there was a degree of challenge or the inclusion of opposing views.” It referred to its published research on health claims.
53. The decision cited Dr Wolf’s comments that the vaccination “roll out” represented pre-meditated “mass murder” and that it had disabled and sterilised people. It noted Dr Wolf’s claim that there had been a “wholesale purchasing of the medical establishment” and that it had been left to independent journalists to reveal “these 360 degree harms.” In addition, the decision noted the that Dr Wolf had made the following claims during the interview:

“It was the **doctors in pre-Nazi Germany** in the early thirties who were co-opted by the National Socialists and **sent to do exactly what we’re seeing kind of replaying now...**” and

“This is why I believe these are bioweapons because **they are literally sterilising people**. I mean, it's not surprising, a mass, you know, a mass murder has taken place”; and

“This is a **massive crime**. Of course they want to sweep it under the rug because a **mass murder** has not just taken place. It is still taking place, **disabling people into the future, sterilising the next generation**”; and

“So the reason I say **mass murder** with such calmness is that if, if, and not only that the FDA [i.e. the USA’s federal drug agency] knew, because at the bottom of these documents, it says ‘FDA confidential’...They knew three months in that 1200 people were dead, four of them the day they were injected, and they kept going. They knew in April of last year that children's hearts were being damaged a week after the injection and they kept going” (emphasis added).



54. Ofcom acknowledged the importance of broadcasters discussing and debating policies relating to Covid-19, including the side-effects of the vaccines and matters relating to their effectiveness. It agreed with GB News that, at the time of the interview, public policy relating to the Covid virus was not having an impact on people's lives in the same way as at the start of the pandemic. It acknowledged the high level of vaccination in the general population and took into consideration that, at the time of the broadcast, there was no heavy promotion of vaccination.
55. Ofcom noted nevertheless that there was a targeted autumn booster programme aimed at those aged 50 or over and people with other vulnerabilities who might be at greater risk of a severe outcome from the virus. For these more vulnerable people, the decision whether or not to take up a vaccine might carry significant health implications. Ofcom took the view that it was vital that these people were able to make properly informed choices.
56. Ofcom's decision took into consideration that Dr Wolf had made serious claims about the possible side effects and safety of Covid vaccines. The potentially harmful impact of these claims was increased by accusations levelled at those providing the vaccine programmes, including governments and medical organisations, who were said to be involved in the most serious, pre-meditated crime, i.e. mass murder. Dr Wolf had claimed that doctors in pre-Nazi Germany had been co-opted by the Nazis to do the sort of things that governments were doing in their vaccination programmes. These claims were made by a guest who was, in Ofcom's view, presented as a figure of authority. Dr Wolf had referred to her work with medical and scientific experts which would have conveyed to viewers that she had knowledge of, and expertise in, the subject matter and which would have lent credence and authority to her claims.
57. Importantly, the decision stated:
- “In particular, we took into account that there was **an absence of any opposing views, challenge or proper contextualisation**, which further served to reinforce her authority and the credibility of her claims. As set out above, the presenter at points agreed with Naomi Wolf and appeared to endorse her as a credible expert” (emphasis added).
58. Ofcom did not agree with Mr Pollard that Dr Wolf's claims were simply expressions of concern and warning. On the contrary, Ofcom's view was that:
- “We considered the claims – in particular that the vaccine rollout was a pre-meditated crime ie ‘mass murder’ – amounted to the promotion of a serious, unchallenged conspiracy theory which was presented with authority. These claims had the potential to impact on viewers' decisions about their health and were therefore potentially harmful. As a result, it was incumbent upon the Licensee, when broadcasting such content, to include adequate audience protection, in accordance with Rule 2.1. ”
59. In considering whether the programme had provided adequate protection for its viewers, Ofcom took into consideration (i) GB News' position among broadcasters as

a channel committed to airing a wide range of views; (ii) the Show's aim of challenging the status quo in relation to important public issues; (iii) the expectations of a regular and loyal audience who understood the nature of the Show and understood Mr Steyn's approach; (iv) Mr Pollard's view that anyone coming to the Show for the first time would understand both the Show and Mr Steyn's approach quickly; and (v) that neither Dr Wolf nor Mr Steyn could be expected to limit their discussion to literal truths. Ofcom concluded, however, that these factors did not remove the broadcaster's responsibility to comply with the Code and provide protection from potentially harmful statements.

60. The decision went on to deal in more detail with the lack of challenge to Dr Wolf's claims. In this important part of the decision, Ofcom gave weight to the following factors:
- i. Far from challenging Dr Wolf, Mr Steyn had appeared supportive of many of her comments;
  - ii. There was no other "contextualising content" during the interview;
  - iii. There was no scientific scrutiny of the evidence she relied on to support her claims;
  - iv. Any balance supplied by the content of GB News programmes was unrelated to the interview and did not provide adequate context or challenge to Dr Wolf's views;
  - v. GB News had admitted that a range of views was absent in this case; and
  - vi. Dr Wolf was presented as a figure of authority.
61. Against this background, Ofcom concluded:

"Ofcom considered that the interview with Naomi Wolf contained claims which amounted to the promotion of a serious, unchallenged conspiracy theory which was presented with authority. **We were particularly concerned about the significant and alarming claim that 'mass murder' was taking place through the rollout of the Covid-19 vaccinations which she repeated three times. These claims had the potential to impact on viewers' decisions about their health and were therefore potentially harmful.** In accordance with Rule 2.1, **the Licensee should have ensured that Naomi Wolf's potentially harmful comments were challenged or otherwise contextualised to provide adequate protection for the audience, which they were not.** Ofcom further took account of the fact that these claims were broadcast on a regulated service as part of a factual programme on a current affairs channel.

Taking all the above factors into account, Ofcom did not consider that the programme included adequate protection for

viewers from the inclusion of potentially harmful material and it was therefore in breach of Rule 2.1” (emphasis added).

*Outcome*

62. Ofcom imposed no sanction for either breach of the Code but, following the second decision, requested that GB News attend a meeting to discuss its approach to compliance.

*Other evidence*

63. Mr Steyn has filed a witness statement in support of the claims. He sets out a distinguished career history (which is not in issue). He claims that the Show has been the first and only show to devote significant time to people either bereaved or physically harmed by Covid vaccinations. He says that it is usually not possible to cover both sides of public debates because the representatives of public bodies refuse to engage with the Show.
64. While I have considered Mr Steyn’s observations with care, I have concluded that they are not relevant to the issues in the claim. None of these factors affected the obligation of GB News to adhere to the Ofcom Code and none founds any argument that the Code was not breached.
65. Mr Price directed my attention to Mr Steyn’s evidence that the Ofcom decisions have ruined his and Dr Wolf’s careers in the United Kingdom:
- “I and my friend Naomi Wolf...are fortunate in that neither of us live in the UK. For the effect of these ‘convictions’ has been utterly to kill our careers in the British Isles, and to see crude defamations of us recycled throughout the London papers as if they have the force of criminal convictions.”
66. Mr Price submitted that this passage of Mr Steyn’s witness statement demonstrates the seriousness of the interference with Mr Steyn’s freedom of expression under article 10. However, it is difficult to see how press coverage of Ofcom’s decisions is relevant to the issues in the claim; nor is the court concerned in these claims with employment law or the law of defamation.
67. Mr Steyn relies on the witness statement of Melissa Howes (the Show’s Executive Producer and Mr Steyn’s manager). Her statement mainly concerns the souring of relations between Mr Steyn and GB News as a result of the Ofcom investigations, a topic which falls outside the purview of the court in these proceedings. She complains that GB News shut Mr Steyn out of the investigation process but there is nothing that the court can do about that now.
68. Dr Wolf took no part in the proceedings until the day of the hearing, when she asked to rely on a Statement to the Court and an Addendum. Ofcom did not object to the lateness of her documents which I have considered. In her Statement, Dr Wolf asserts the objective and scientific underpinning of what she said on the Show and denies that it can be regarded as harmful:

“The material I described to Mark Steyn is not my work. I am a nonfiction writer and journalist. I am not a medical doctor or a scientist. The material I presented is from scientific reports compiled by 3250 highly credentialed doctors and scientists... that convened from 2021 to the present, to read through and issue reports based on the 450,000 internal documents released under court order due to a successful lawsuit against the Food and Drug Administration by US attorney Aaron Siri. These are internal Pfizer documents submitted to the FDA for the purpose of securing the Emergency Use Authorization that allowed for the rollout in the US of an experimental injection that bypassed normal trials. They are primarily internal documents produced by Pfizer [ie the manufacturer of the vaccine], that date from November 2020 to February 2021 and that record that 43,000 plus adverse events and more than 1220 deaths recorded by Pfizer in those three months...”

Ofcom seeks to portray this material as ‘harmful.’ But can findings be ‘harmful’ if they are true? I am a reporter and base my opinion on facts.

The Reports’ accuracy is not in doubt. They have been published on hundreds of news outlets globally for nearly three years...”

69. Dr Wolf goes on to describe how she has presented the findings of doctors and scientists to reputable bodies in the United States of America and Europe. The gist of her Statement is that Ofcom’s decision in relation to her interview with Mr Steyn has had a chilling effect on the exchange of scientifically-researched contributions in public health debates.
70. Dr Wolf sets out in detail her own academic, literary and journalistic achievements as well as giving a flavour of the credentials of her research team in the Addendum. She complains that Ofcom – which did not seek her views before taking its decision – have discredited her by calling her a “conspiracy theorist” in public documents.

## **The Law**

### *The regulatory scheme*

71. The regulation of licensed broadcasters by Ofcom has the following features:
  - i. In performing its general duties, Ofcom must have regard to principles under which regulatory activities should be “transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed” (section 3(3) of the Act). It is plain from the language (in particular “proportionate” and “targeted only at cases in which action is needed”) that Parliament intended to embody in the legislative scheme the principle of proportionality in article 10(2) of the Convention.

- ii. There is nothing in the scheme of the Act (whether express or implied) that would prejudice the expression of minority opinions or unpopular speech about Government policies or actions. Nor does the Act prejudice the right to “offend, shock or disturb” the Government to the extent that such speech is protected by the common law and by article 10 (see *Vogt v Germany*, cited in *Shayler*, above).
- iii. Ofcom must in carrying out its functions secure a sufficient plurality of service providers (section 3(2)(d)) of the Act) and must (where appropriate) promote competition (section 3(1)(b)). These duties are intended to enhance – rather than detract from – the range of opinions covered on television and radio.
- iv. The broadcast of harmful material is not prohibited or banned but is expressly confronted by Parliament. If a broadcaster decides to air harmful material, it is free to do so but the public must be protected from that harm. In order to provide adequate protection, Parliament has stipulated, as a regulatory objective, that “generally accepted standards” are to be applied to the contents of programmes (section 319(2)(f)). This reflects a legislative balance between an individual’s free speech rights under article 10(1) and the broader public interest protected by article 10(2). It is not, and cannot be, suggested that Parliament has struck the balance in a way that is incompatible with article 10.
- v. Parliament strikes a similar balance between freedom of expression and potential harm to the public in relation to Ofcom’s standard-setting function. The purpose of codified standards in relation to potentially harmful material is not to prohibit its broadcast but to secure “adequate protection to members of the public from the inclusion of...harmful material” (section 3(2)(e) of the Act). Ofcom’s standard-setting duties and, in particular, the obligation to secure standards that protect the public from harm, are intended to ensure that restrictions imposed on journalists are proportionate and compatible with article 10.
- vi. Ofcom’s general duty to set proportionate standards is underlined and fortified by a specific duty in setting standards to have regard to certain specified matters that promote proportionate restrictions and decisions; namely: (a) the degree of harm likely to be caused by the inclusion of particular material; (b) the likely size and composition of the potential audience; (c) the likely expectation of the audience as to the nature of a programme’s content and the extent to which the nature of the 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 broadcast service and, in particular, a change that is relevant to the application of Ofcom standards; and (f) the desirability of maintaining the independence of editorial control over programme content (section 319(4) of the Act).
- vii. Ofcom must ensure that its standards include (a) minimum standards applicable to all programmes; and (b) such other standards, applicable to

particular descriptions of programmes, as appear to Ofcom appropriate for securing the standards objectives (section 319(5) of the Act). Factual programmes represent a particular description of programme that may be subject to particular standards. An ability to set specific standards for specific types of programme is plainly proportionate.

- viii. The provisions of the Code must be interpreted, and applied in a particular case, so as to comply with the requirements of article 10. I have been provided with no reason why article 10 requires actual harm to have materialised before Ofcom may take regulatory action. An assessment that there is potential harm is enough. The public is protected from restrictions on free speech that rely on a tenuous connection to the prospect of harm by the court's duty to apply rigorous scrutiny (*Regina (Gaunt) v Office of Communications (Liberty intervening)* [2011] EWCA Civ 692, [2011] 1 WLR 2355, para 36, per Lord Neuberger of Abbotsbury MR as he then was; citing *Shayler*, paras 59-61, per Lord Hope). It was not argued with any real force that the provisions of the Code on harmful material did not apply to potentially harmful material.
- ix. Ofcom's expertise is founded not only on its experience as the specialist regulator of broadcast standards but on the arrangements it is bound to make for the carrying out of research into matters relating to, or connected with, the setting of standards (section 14(6)(b)). In relation to audience expectations on coverage of health issues, Ofcom commissioned qualitative research from an independent company which reported in July 2017 on "Health and wealth claims in programming: audience attitudes to potential harm." This kind of research means that Ofcom standards are neither applied in a vacuum nor set in stone: they are informed by the "fluctuating expectations of...audiences" (*Gaunt v United Kingdom*, para 61).
- x. The Ofcom Code is a public document. Members of the public and broadcasters alike can scrutinise it and can challenge it by any of the usual political or legal avenues available in the United Kingdom. Its publication is consistent with the transparency and accountability envisaged by section 3(3) of the Act.
- xi. Notwithstanding the vital role played by the press in a democratic society, article 10(2) recognises that those who exercise their freedom of expression, including journalists, undertake "duties and responsibilities" even with respect to press coverage of matters of serious public concern (*Stoll v Switzerland* (2008) 47 EHRR 59, para 102). In relation to the broadcast of harmful material, the balance struck in the Act between an individual's right to free expression and the broader public interest goes no further than to enforce those responsibilities.

*The court's assessment of proportionality*

72. Mr Price submitted that the court must make its own assessment of proportionality under article 10(2), based on the individual facts of each decision under challenge. Ms Boyd submitted that, while it is correct that a proportionality review by the court will ordinarily require a greater intensity of review than would be appropriate on a

rationality challenge, this does not mean that the court will substitute its own view for that of the regulator or be drawn into a merits-based review of the underlying decisions. She submitted that the court should review the decisions with an intensity appropriate to the circumstances of the case, having regard to the margin of appreciation properly afforded to the regulator as the original decision-maker (*R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, paras 27-28).

73. It seems to me that each side's submissions capture something of the court's function. I need to decide for myself whether Ofcom has complied with the principle of proportionality rather than to apply a rationality standard but, in doing so, two key contextual factors must be acknowledged.
74. First, as I have already explained, a democratically elected Parliament has struck the proportionality balance in the legislative scheme itself. There is no challenge to the scheme of the Act or to the Code made under it. Nor has a persuasive argument been made to undermine the proposition (advanced on Ofcom's behalf by Mr Glen) that, if properly applied by Ofcom, the Act itself ensures that interference with freedom of expression is no more than is proportionate. Secondly, Ofcom is a specialist regulator with relevant statutory authority, institutional competence and expertise. These factors mean that the court is bound to give considerable weight to Ofcom's assessment of where the public interest lies because Ofcom is the constitutional decision-maker. For these constitutional reasons, in matters of judgment that fall within Ofcom's expertise, the court should not interfere unless Ofcom has "obviously gone wrong" (*TV-Novosti*, above, para 62).

#### *Interpretation of the Code*

75. Mr Price in his written and oral submissions emphasised that the law gives greater protection to the expressions of opinion and value judgments than to the expressions of fact. He submitted that, when interpreting the reference in Rule 2.2 of the Code to the portrayal of "factual matters", the court should apply the distinction between opinion and fact that has been identified in the law of defamation. In *Koutsogiannis v The Random House Group Ltd* [2019] EWHC 48 (QB), [2020] 4 WLR 25, para 16, Nicklin J referred to previous case law and summarised the approach that the courts have taken in defamation cases in the following terms:

"when determining whether the words complained of contain allegations of fact or opinion, the court will be guided by the following points:

(i) The statement must be recognisable as comment, as distinct from an imputation of fact.

(ii) Opinion is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc.

(iii) The ultimate question is how the word would strike the ordinary reasonable reader. The subject matter and context of

the words may be an important indicator of whether they are fact or opinion.

(iv) Some statements which are, by their nature and appearance opinion, are nevertheless treated as statements of fact where, for instance, the opinion implies that a claimant has done something but does not indicate what that something is, ie the statement is a bare comment.

(v) Whether an allegation that someone has acted ‘dishonestly’ or ‘criminally’ is an allegation of fact or expression of opinion will very much depend upon context. There is no fixed rule that a statement that someone has been dishonest must be treated as an allegation of fact.”

76. There may at times be a certain fluidity between opinions, value judgments and facts. In certain scenarios, these concepts may (as Ms Boyd submitted) overlap. But context is important. The Code is a regulatory document intended to be understood by broadcasters and members of the public and applied in a practical, effective way by Ofcom decision-makers. The importation of principles from a different area of the law as a tool for the Code’s interpretation would in my judgment give rise to undue complexity. This is not to prevent the courts from intense scrutiny of important rights. Rather, it is to prevent the undue judicialisation of an area of decision-making entrusted by Parliament to Ofcom. In this case, I do not accept that Ofcom has misdirected itself under its own Code as to what counts as fact.

### **Ofcom policy and guidance**

#### *Generally accepted standards*

77. In addition to the text of the Code, Ofcom has published “Guidance Notes” to assist broadcasters to understand and comply with their obligations under Section 2 of the Code and the broadcasting of potentially harmful material.

78. In relation to the application of generally accepted standards under Rule 2.1, the Guidance Notes state:

“We recognise that some programming may include material that has the potential to be harmful or offensive. This puts a responsibility on the broadcaster [i.e. the licensee] to take steps to provide adequate protection for the audience...”

79. The Guidance Notes properly recognise and address the potential for harm to arise from claims or advice in relation to health. Such claims are expressly considered in the context of rights bestowed by article 10:

“In previous investigations under Rule 2.1, Ofcom has identified claims or advice in programmes about viewers’ and listeners’ health or wealth as being potentially harmful. These have included, for example, statements that specific products, practices or activities will result in various benefits to health or



wealth. This kind of content has also sometimes been accompanied by dismissive or derogatory comments about more conventional treatments or advice. Health or wealth claims could be especially harmful to people who are vulnerable, for example, those who are suffering from serious medical conditions, or are in serious financial difficulty, who may be more susceptible to these messages.

Programmes including health or wealth claims and advice may be broadcast, as long as broadcasters provide adequate protection for viewers or listeners from any potentially harmful content. **Ofcom must seek an appropriate balance between ensuring members of the public are adequately protected from potentially harmful material, and the broadcaster's and audience's right to freedom of expression, as set out in Article 10 of the European Convention on Human Rights...** (emphasis added).

80. The Guidance Notes set out a hierarchy of factors which affect the level of the potential harm likely to be caused by health claims and identify a non-exhaustive list of considerations. It is relevant to note in the present context that:
- i. There is a higher level of potential harm where claims are made about “the most serious medical conditions.”
  - ii. There is a greater risk of harm if vulnerable people seem to be directly addressed, or if persuasive messages, especially relevant to them, are included in a programme, with either the intention or the likely effect that they will act on that advice, for example by discontinuing existing medical treatment in favour of alternative treatments.
  - iii. The authority of the speaker making the claims is relevant to assessment of potential harm. The Guidance Notes emphasise that: “If potentially harmful claims about health and wealth are made by a speaker who is perceived by the audience as having authority, then there is more chance of them treating those claims as credible and making decisions based on them. The kinds of figures who might possess such authority will depend on the context, but could include a well-known or popular presenter... or **anyone presented as an expert**” (emphasis added).
81. Other, secondary factors identified in the Guidance Notes as increasing the risk of harm include:
- i. The absence in a programme of a range of alternative views or opinions about contentious health issues.
  - ii. If potentially harmful claims are presented with a high degree of certainty, or advice is phrased as an explicit call or direction to action, the messages are likely to be more persuasive, with an increased chance that viewers or listeners will make decisions about their health based on the content of the programme.

82. There was no challenge to any of the Guidance Notes. They plainly provide guidance to Ofcom decision-makers tasked with performing the article 10 proportionality exercise when considering whether to take regulatory action in relation to claims broadcast about health. They are consistent with the Code and the Act. They operationalise the 2017 research which suggested a high degree of public concern about harm arising from broadcasting that “directly targets people with serious health conditions” and which showed participants in the research wanting warnings about harmful health claims.
83. Rule 2.3 of the Code states (in so far as relevant) that in applying generally accepted standards, broadcasters must ensure that material which may cause offence is justified by the “context”. Although this Rule does not refer to harm (as opposed to offence which is not the issue in this claim), I was referred to the meaning of “context” in the Code which includes but is not limited to:
- i. The editorial content of the programme;
  - ii. The service on which the material is broadcast;
  - iii. The time of broadcast;
  - iv. What other programmes are scheduled before and after the programme or programmes concerned;
  - v. 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;
  - vi. The likely size and composition of the potential audience and likely expectation of the audience;
  - vii. 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
  - viii. The effect of the material on viewers or listeners who may come across it unawares.

*Misleading material*

84. The Guidance Notes make plain that Rule 2.2 is not concerned with the accuracy of content per se but with guarding against harmful or offensive material. The Rule is “designed to deal with content that **materially misleads the audience so as to cause harm or offence**” (emphasis in the original). The Guidance Notes say that whether a programme or item is “materially” misleading depends on a number of factors such as “the context, the editorial approach taken in the programme, the nature of the misleading material and, above all, either what the potential effect could be or what actual harm or offence has occurred.”
85. The Guidance Notes are not prescriptive: they make clear that it is for broadcasters to decide how they provide adequate protection for their audiences from potentially

harmful material.

*Guidance to broadcasters during the pandemic*

86. On 26 May 2020, Ofcom published one of a number of Notes to Broadcasters dealing with the ramifications of the pandemic. The Note stated that Ofcom would continue to prioritise enforcement of broadcasting standards in relation to Covid-related content. Ofcom's position was that:

“We recognise that licensees will continue to want to broadcast content relating to the Coronavirus and that dissemination of accurate and up-to-date information to audiences will be essential during the current situation. However, we remind all broadcasters of the significant potential harm that can be caused by material relating to the Coronavirus. This could include:

- Health claims related to the virus which may be harmful.
- Medical advice which may be harmful.
- Accuracy or material misleadingness in programmes in relation to the virus or public policy regarding it.

In light of the serious and rapidly developing nature of the Coronavirus pandemic and the associated significant risk to public health there is a particular need for factual statements about Coronavirus to be presented with appropriate care, given the ongoing significant national and international concern about the crisis.”

87. Ofcom advised broadcasters to “take particular care” when broadcasting (among other things):

“statements that seek to question or undermine the advice of public health bodies on the Coronavirus, or otherwise undermine people's trust in the advice of mainstream sources of information about the disease”.

88. Mr Price submitted that this warning to broadcasters strayed into the realms of public health policy and was inconsistent with Ofcom's duty to “further the interests of citizens in relation to communications matters” under section 3(1)(a) of the Act. By making such a statement, Ofcom had aligned itself with the Government and other public bodies which was wrong and unlawful.

89. The lawfulness of the Note to Broadcasters is not itself under challenge in these proceedings. It survived judicial scrutiny in *R (Free Speech Union) v Ofcom* [2020] EWHC 3390 (Admin) but the judge in that case (Fordham J) refused permission to apply for judicial review so that his judgment is not binding. The decisions under challenge neither mention nor rely on the Note. It played no part in the decision-making process and is irrelevant to any issue that I have to decide within the proper

parameters of the claims before me. The content of the Note cannot advance the claims. I see no reason to reach any decision about it.

90. It is convenient to deal here with Mr Price's related submission that Ofcom had not made any negative decisions about broadcasters who had said unequivocally, and without presenting any alternative evidence, that Covid vaccines were safe. Mr Price asked me to infer that Ofcom was thereby operating the Code from one point of view: that vaccines were safe and it was harmful to dissuade people from taking them. Ofcom had unlawfully allied itself to the Government and other public bodies at the expense of the general public whose interests it was bound (by section 3(1)(a) of the Act) to serve.
91. I have been provided with three other Ofcom decisions relating to health claims. Of these, two are unrelated to the pandemic. The third decision related to a television interview between presenter Brian Rose and guest David Icke on a programme called "London Real: Covid-19" on the London Live channel. The licensee, ESTV Limited, was found to have breached Rule 2.1 on the grounds (among other things) that Mr Icke's views "cast doubt on the motivation behind mainstream health advice being given by governments and health organisations to protect the public from the Coronavirus." The views were found to have had the potential to cause significant harm to viewers and the licensee had not provided adequate protection.
92. Neither the London Live decision nor the present decisions lead to an inference that Ofcom had a predisposition during the pandemic against broadcasters who challenged Government advice. There is no evidence before me that Ofcom was predisposed to take the side of the Government during the pandemic. The present decisions fall to be considered in accordance with principles of public law: they stand or fall by reference to those principles and without flimsy assertion of bias towards the Government.

### **The first claim (AC-2023-LON-001656)**

#### *The parties' submissions*

93. Mr Price submitted that Ofcom's conclusion that the monologue contained harmful material was unreasonable and unsustainable. The harm identified by Ofcom was that viewers would potentially be put off taking vaccinations. Mr Price submitted that a failure to take ineffective or unsafe medicine cannot be harmful. It followed that, in the absence of any evidence from Ofcom that Covid vaccinations were safe and effective, the restriction on Mr Steyn's freedom of expression was not properly reasoned and was irrational. He submitted that Ofcom had been unreasonable to accept uncritically the Government's views of the vaccine. Such an approach led to a chilling effect on free speech.
94. Mr Price contended that, in the absence of properly identified harm, the question of protection from harm did not arise. To the extent that the first decision relied on the absence of protection from harm, it was flawed because it relied on a factor that did not come into play.
95. Mr Price submitted that Ofcom had failed to justify the restriction on Mr Steyn's freedom of expression by reference to any of the public interests specified in article 10(2)) and had failed to give proper or adequate reasons for the first decision under

the framework of article 10. Mr Steyn’s article 10 rights had been breached because the first decision failed convincingly to justify the interference with free speech: the decision lacked coherence and failed to recognise the rights of viewers to receive a plurality of views on such an important topic.

96. Mr Price further submitted that the monologue fell outside the scope of Rule 2.2 because it should have been treated as containing Mr Steyn’s opinion and not as portraying factual matters. Mr Steyn had expressed his own value judgments based on published statistics which were available to the audience and which he showed on screen. The language in the monologue contained many indicators of opinion, such as that the booster shot was “at best useless and at worst decidedly dangerous”; that the statistics suggested “an unnecessary tragedy” and that “there’s something going on here.” Mr Price submitted that the statements which Ofcom regarded as harmful were plainly inferences from primary facts and should on that basis be treated as opinion.
97. Ms Boyd submitted that the claims made in the monologue about vaccine safety and effectiveness were plainly “portrayals of factual matters” within the meaning of Rule 2.2. In relation to harm, she submitted that Ofcom’s regulatory assessment of potential harm was reasonable and cogent and that Ofcom did not need to make findings of truth or falsity in order reasonably to conclude that content discouraging the audience from having a vaccination against a serious disease may be potentially harmful.
98. Ms Boyd submitted that, where such discouragement runs contrary to established medical advice on which there is broad consensus, or is based on a misleading presentation of evidence, Ofcom may reasonably conclude there is potential harm – such that some viewer protection, in the form of challenge, contextualisation or appropriate presentation is required – without itself assessing the safety of the vaccine. No protection was offered to viewers of the Show. Ofcom was entitled to conclude that the broadcast of such content, in such a context, without appropriate challenge contextualisation or appropriate presentation, may prevent viewers from making properly informed choices about their health, in circumstances where the stakes are high. Ofcom was further entitled to conclude that those who had already received the booster shot might experience significant concern and alarm. She submitted that neither of these conclusions about harm required Ofcom itself to make an evidenced finding that the vaccine was effective.
99. Dealing with article 10, Mr Glen submitted that the first decision was thoroughly reasoned and had properly and lawfully balanced Mr Steyn’s right to freedom of expression with the potential for harm brought about by misleading claims about the effects of Covid vaccination. Article 10(2) expressly referred to the protection of health and the rights of others. There was no need for Ofcom to recite the provisions of article 10(2) in order to justify and explain its decision. Ofcom had properly applied the provisions of the Act with due regard for the provisions of the Code and the Guidance Notes made under it. Mr Glen submitted that, in circumstances in which Parliament had struck the proportionality balance, the court should not interfere unless Ofcom had gone “obviously wrong.” In the present claims, such a contention should be rejected.

*Conclusions on the monologue*

100. The considerable public interest in journalistic speech about human health is not in dispute (see, for example, *OOO Regnum v Russia*, App No 22649/08, 8 September 2020, ECtHR, unreported, para 68). It is the function of journalists and the press (including broadcasters) to impart information and ideas and to “expose, analyse and explain” issues of public concern (*Jersild*, paras 31 and 33). Such is the importance of journalistic freedom that it covers possible recourse to a degree of exaggeration or even provocation (*Prager v Austria* (1995) 21 EHRR 1, para 38).
101. The right to provoke will be protected by the courts but it does not found any right to mislead. Statistics may be used to provoke and to challenge the status quo; but Ofcom is entitled to insist – in the public interest – that they should not be misused so as to mislead. Neither the common law nor the Convention require otherwise.
102. It is wrong to say that the interpretation of the 10 April statistics amounted to no more than a value judgment or to characterise the process of statistical analysis as no more than a person’s individual opinion of the subject matter. The argument that the presentation of statistical data about Covid-19 was not a portrayal of factual matters is unrealistic.
103. The purpose of both the caveat on effectiveness and the contextual statement was to sound a warning against the simple and undifferentiating comparison of groups. Yet, an undifferentiating comparison was undertaken on the Show. In addition to informing his audience that the two groups were directly comparable, Mr Steyn invited them to accept two other propositions: first, that booster vaccines caused increased levels of infection, hospitalisation and death; secondly, that the only conclusion from Government data was that having the booster shot exposed people to significantly greater risk of infection, hospitalisation and death. The submission that Ofcom was not entitled to treat both the direct comparison of the two groups and also these additional propositions as factual matters is unsustainable.
104. The content of the caveat and the contextual statement provide ample grounds for Ofcom’s conclusion that the Show’s approach was materially misleading. Ofcom was entitled to conclude that the direct comparison of the two groups was in itself misleading and also that the comparison provided a misleading foundation for what were expressly conveyed as being definitive conclusions about vaccine safety and effectiveness. I reach that conclusion irrespective of the level of intensity of review that I must apply.
105. Rule 2.2 deals with misleading material and does not mention harm. However, I accept Ms Boyd’s submission that the Act has as one of its objectives the protection of the public from harm or potential harm. Rule 2.2 is contained in a section of the Code dealing with harm. It is plainly proportionate for a regulator to have harm in mind in considering whether to take any action against a licensee who has broadcast misleading material.
106. Ofcom was entitled to conclude that the Show’s misleading statements were harmful. To ask whether or not Covid vaccinations were as a matter of fact safe and effective is to engage with the wrong question. Ofcom was not required to make evidenced findings about scientific or medical issues but to consider the potential harm from a misleading broadcast, deploying its expertise as a regulator. In the context of the discussion of a virus that had caused serious illness and death throughout the United

Kingdom and across the world, Ofcom was far from “obviously wrong” to insist that broadcasters did not undermine the ability of audiences to make properly informed choices about vaccination, Ofcom was not “obviously wrong” to insist that broadcasters avoid the risk that vaccinated individuals be caused alarm.

107. In its detailed and comprehensive decision, Ofcom gave proper and adequate reasons for its conclusion that Rule 2.2 had been breached. The written decision demonstrates on its face a proper and rigorous balance between restrictions on Mr Steyn’s freedom of expression and the public interest in the protection of health under article 10(2). Mr Steyn cannot be in any realistic doubt from reading the lengthy decision document as to whether and how Ofcom struck the article 10 balance. Exercising a judgment of my own, but acknowledging both the legislative scheme and Ofcom’s expertise as a specialist regulator, I do not regard the decision as a disproportionate interference with Mr Steyn’s article 10 rights.
108. For these reasons, the grounds of challenge do not succeed and the first claim is dismissed.

### **The second claim (AC-2023-LON-002280)**

#### *The parties’ submissions*

109. In relation to the second claim, Mr Price reiterated his submission that Ofcom had reached the second decision on the basis of the same unjustified assumption that vaccination was safe and effective without demonstrating the factual basis for that assumption. He disagreed strongly with Ms Boyd’s submission that the second decision relied only on the proposition that Dr Wolf’s claims *may* have been wrong on the grounds that calling her a conspiracy theorist was an assertion that she *was* wrong. It followed that Ofcom had proceeded on the assumption that Covid vaccines were as a matter of fact effective and that Dr Wolf’s claims were as a matter of fact wrong. Such an approach was unreasonable and unlawful because Ofcom’s decision contained no evidence about the effectiveness of the vaccine.
110. Mr Price submitted that it was irrational for Ofcom to call Dr Wolf a conspiracy theorist and at the same time to assert that her views might be regarded by viewers as being authoritative. Ofcom had given inadequate reasons for its critical conclusion that Dr Wolf’s statements amounted to an unchallenged conspiracy theory. Mr Price emphasised the journalistic nature of Mr Steyn’s approach, and Dr Wolf’s contribution, to the interview. He pointed out that Dr Wolf told the audience that she was drawing on material that was already in one of her books. She relied in the interview not on her own research but on research that she had received from others. Mr Price submitted that Dr Wolf presented herself not as an authority on vaccine effectiveness but as an independent journalist investigating the effect of vaccination. Ofcom’s conclusion that she was presented as a figure of authority was irrational.
111. Mr Price submitted that the second decision was poorly reasoned in relation to article 10 and had failed to justify the interference with free speech rights. He submitted that Dr Wolf’s accusation of mass murder was, in context, a polemical device which was subject to proper challenge by Mr Steyn. Dr Wolf had, by deploying polemical speech, conveyed her opinion that institutions were aware of dangerous side effects but continued to “roll out” the vaccines in any event. The expression “mass murder”

was in context the expression of an opinion or value judgment about a political issue of high importance which should be given a high degree of protection by the court. Mr Price submitted that none of these factors were recognised or dealt with in the second decision.

112. In her written documents in support of the claim, Dr Wolf submitted essentially that she had relied on the medical expertise of many people. She had sought to present their work in the interview. She submitted that Ofcom's decision to criticise her and the Show was incompatible with free speech rights that have been deeply entrenched in the United Kingdom over centuries but which are in danger now.
113. Ms Boyd submitted that Ofcom was entitled to conclude that Dr Wolf's claims that the vaccination programme represented pre-meditated "mass murder" and that it had disabled and sterilised people were potentially harmful because they had the potential to have an impact on viewers' decisions about their health in circumstances where those decisions might have significant health implications. She submitted that Ofcom was justified in concluding that it remained vital that viewers were able to make properly informed choices.
114. Ms Boyd contended that Ofcom's conclusions did not rely on an unsupported finding by Ofcom that Dr Wolf's claims *were* wrong but only on the proposition that they *may* be wrong in that they were not uncontrovertibly correct. Ofcom had properly found that the claims were presented with authority. It was open to Ofcom to conclude that claims about health matters, delivered with authority, were potentially harmful. Given their persuasive force and the potential implications for the health decisions of (in particular) those with health vulnerabilities, they were potentially harmful if not adequately challenged and contextualised, which plainly had not happened.
115. In relation to article 10, Mr Glen submitted that the decision was fully reasoned, engaging closely with the detail of the programme, and that it took into account Mr Pollard's representations. He submitted that Ofcom had had careful regard to the requirements of article 10. The justification for the interference with article 10 rights was the protection of health or the rights of others. Ofcom had directed itself properly in law and there was no reason to suppose that, in reaching conclusions that engaged its expertise, Ofcom had gone "obviously wrong."

#### *Conclusions on the interview*

116. As Mr Glen indicated, GB News, as the licensee, was the target of the decision and was responsible for breaching the Code. Dr Wolf was entitled to accept an invitation to be interviewed on the Show. She was entitled to answer Mr Steyn's questions. Nor can a public authority take action against a broadcaster whose interviewee says that the dangers of a vaccination programme should be the subject of rigorous public debate. That is not the dispute here.
117. I shall not engage with the merits or demerits of what Dr Wolf said during the interview or with whether Ofcom was right to call her a conspiracy theorist. Those issues fall outside even the widest possible boundaries of the jurisdiction of the High Court in exercising its supervisory function in judicial review proceedings. The key legal issues are (i) whether Ofcom was entitled to conclude that the broadcast of Dr



Wolf's claims was potentially harmful; and (ii) if so, whether Ofcom was entitled to conclude that Mr Steyn failed to challenge her or to contextualise her claims for the protection of viewers.

118. As for the first of these questions, as regards potential harm, Ofcom's decision states (as I have set out above) that it was "particularly concerned about the significant and alarming claim that 'mass murder' was taking place through the rollout of the Covid-19 vaccinations which [Dr Wolf] repeated three times." Applying "generally accepted standards", there can be no claim more grave about the relationship between the individual and the State than the claim that the State is using a medical procedure to kill its citizenry.
119. Mr Steyn and Dr Wolf say that there have been occasions in history – including in the recent past – where this has happened. However, in the public law context where the court exercises a reviewing function, it is arid to submit that Ofcom was bound to agree with the comparison between these historical examples and a present-day, democratically elected government, supported by an advanced health service such as operates in the United Kingdom. By any standard of review, Ofcom was entitled to conclude both that Dr Wolf's views were "significant" and that they were "alarming."
120. I reject Mr Price's submission that the polemical tone of the interview should have prevented Ofcom from finding that Dr Wolf's claim was not, and would not have been regarded by viewers, as seriously made. In this regard, it is notable that Dr Wolf herself does not say that she was not making a serious claim about the State killing people. Ofcom was entitled to treat the claim as serious.
121. It was open to Ofcom (on any standard of review) to regard the claim as controversial and as having the potential to have an impact on viewers' decisions about their health. On this basis, Ofcom was entitled to conclude that the broadcast of the claim of State killing was potentially harmful. The description of Dr Wolf as a conspiracy theorist does not undermine Ofcom's overall decision which is what the court is concerned about.
122. Ofcom was entitled to conclude that it was in the public interest for GB News to ensure that, in relation to a deadly disease, viewers should be able to take informed decisions about their health. It was entitled to conclude that GB News failed to ensure that the claim was challenged or otherwise contextualised to provide adequate protection for the audience.
123. It is correct to note that Mr Steyn introduced Dr Wolf as a "dogged contrarian" which would have conveyed to viewers that she did not hold majority views. Mr Price submitted that Mr Steyn challenged Dr Wolf when he described her claims of mass murder as a "serious charge." In context, it is doubtful whether Mr Steyn was challenging Dr Wolf or simply reinforcing Dr Wolf's own view of the serious harm being caused by governments by vaccination programmes.
124. In any event, Mr Steyn plainly endorsed Dr Wolf's views in other parts of the interview. He introduced her as someone "ahead of the game" in the sense of being an early exposé of the dangers of vaccination whose views were being adopted by successive governments. He reinforced her view of the harm caused by vaccination by saying that Covid-19 vaccines had caused "almost every conceivable kind of

damage.” He compared doctors administering Covid vaccines with doctors in Stalinist Russia who were “ideological, which meant that they were crap” which also served to promote Dr Wolf’s claims.

125. In relation to possible forms of contextualisation and challenge, Ofcom was entitled to take into consideration that, during the programme, there was no scientific scrutiny of the evidence on which Dr Wolf relied. There were no other contributions in the programme which challenged or otherwise contextualised what she said. Nor did Ofcom consider that material that was broadcast in unrelated programming could provide adequate context or challenge.
126. Given these factors – which were unarguably open to Ofcom to weigh – Ofcom was entitled to conclude that there was no adequate challenge or contextualisation. Having watched the interview, I would myself have reached the same conclusion. The absence of any challenge is striking.
127. As for the level and quality of Ofcom’s reasoning, the decision plainly demonstrates that Ofcom balanced the right to freedom of expression against the protection of health under article 10. The decision is detailed and comprehensive. The particular criticism made by Mr Price, namely that the decision does not clearly or adequately identify the potential harm arising from Dr Wolf’s comments, is not made out. It is plain from reading the decision that the central harm was identified as being the adverse impact on viewers’ decisions about their own health. I do not regard the common law or the terms of article 10 of the Convention as requiring any more detailed or different analysis.
128. Accordingly, the grounds of challenge fail and the second claim is dismissed.

## **Conclusion**

129. For all the above reasons, both claims are dismissed. I direct that the parties shall agree the terms of a draft order reflecting this judgment for my approval. In the event that they cannot agree on the terms, they may revert to the court.