Case No: AC-2024-LON-002688

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2024] EWHC 2658 (Admin)

The Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 4 October 2024

BEFORE:
MR JUSTICE CHAMBERLAIN

BETWEEN:

THE KING
(on the application of GB NEWS LIMITED)

Claimant

- and -

OFFICE OF COMMUNICATIONS

Defendant

MR T HICKMAN KC (instructed by Brown Rudnick LLP) appeared on behalf of the Claimant.
MISS A PROOPS KC, **MR Z SAMMOUR** and **MR R HOGARTH** (instructed Ofcom) appeared on behalf of the Defendant.

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

1. MR JUSTICE CHAMBERLAIN: The claimant, GB News Limited, is a broadcaster regulated by Ofcom under powers conferred by the Communications Act 2003. It is subject to the Broadcasting Code ("the Code"). It seeks permission to apply for judicial review of a decision by Ofcom communicated to it under embargo on 17 May 2024 and published on 20 May 2024.

2. The decision concerned a current affairs programme broadcast on GB News on 12 February 2024 under the title "People's Forum: The Prime Minister". The programme was an hour long question-and-answer session between the then Prime Minister, Rishi Sunak, and a studio audience mediated by a presenter from GB News.

3. At the end of the programme, the presenter said that GB News was hoping that the then Leader of the Opposition, Sir Keir Starmer, would participate in a similar programme. He never did.

4. Ofcom received some 500 complaints, launched an investigation and in due course found that this programme breached rules 5.11 and 5.12 of the Code, which impose obligations of impartiality.

5. The nub of the decision was that the claimant had given a platform to the Prime Minister and had not included or given due weight to the views of other political parties, in particular, the then official opposition, the Labour Party.

6. In the document recording the decision, the following words appeared:

> "Given the circumstances of this case, Ofcom considers that this breach is serious and, given the licensee's compliance history repeated, we will, therefore, consider this breach for the imposition of a statutory sanction".

7. The process of considering whether to impose a statutory sanction is very close to completion, but, if permission is granted, the claimant applies for relief in the form of a stay to prevent Ofcom from proceeding further; alternatively, in the form of an interim injunction "to the same effect".

8. If permission is granted, there are three further procedural issues: the first is whether this case should be listed together with another judicial review claim brought by the claimant

against Ofcom, which challenges another Ofcom decision in relation to two programmes in the series "Jacob Rees-Mogg's State of the Nation". I granted permission on the papers in that case. The claimant says that the two claims should be heard together. Ofcom says that their subject matter is different and there is no sufficient reason for joinder.

9. The second procedural issue concerns an application for an order that, if a non-party applies for documents pursuant to CPR rule 5.4C(2), the parties must be given an opportunity to respond to the application before it is determined. This is agreed, in principle, although there is a dispute about the number of days' notice that should be given.

10. The third issue is whether I should make an order establishing a confidentiality ring and ancillary confidentiality provisions in respect of correspondence passing between GB News and the Labour Party, which may be relevant to the claim.

11. As my decision on the question of permission to apply for judicial review and on the application for a stay may affect these procedural issues, I have decided that I should announce my decision on the main issues first before inviting brief further submissions on the procedural matters.

Issue 1: Permission to apply for judicial review

12. The parts of the Code which Ofcom found were breached were as follows:

> "5.11 In addition to the Rules above, due impartiality must be preserved on matters of major political and industrial controversy and major matters relating to current public policy by the person providing a service (listed above) in each programme or in clearly linked and timely programmes.
>
> 5.12 In dealing with matters of major political and industrial controversy and major matters relating to current public policy, an appropriately wide range of significant views must be included and given due weight in each programme or in clearly linked and timely programmes. Views and facts must not be misrepresented."

13. The claimant submits that Ofcom's decision is unlawful on three grounds. First, it says that the investigation and resulting decision were unreasonable, disproportionate and/or unfair. On its case, rules 5.11 and 5.12 allow a broadcaster to supply a range of different

views, either within a single programme or in a series of clearly-linked programmes. It is a matter for the broadcaster's editorial choice in which of these ways it complies with its obligations.

14. The claimant had been in discussions with Sir Keir Starmer's office in advance of the programme with Rishi Sunak. Those discussions were advanced, but had not yet reached the point of agreement. Ofcom's public announcement a week after the programme was broadcast that it was conducting an investigation meant that the Labour Party withdrew from the discussions rendering the claimant unable to comply with its obligations under the Code. This, the claimant submits, was contrary to its rights under Article 10 of the European Convention on Human Rights ("the ECHR"). In addition, the claimant contends that Ofcom's decision was reached in a procedurally unfair way.

15. Secondly, the claimant contends that the decision involved a mistaken interpretation of the phrase "clearly-linked and timely programmes", in that Ofcom's decision effectively imposes a new requirement, not present on the face of the Code, that a broadcaster wishing to rely on this means of discharging its obligations under the rule must have a confirmed agreement for a future programme or programmes or at least must confirm such an agreement within a week.

16. Thirdly, the claimant complains about the finding that this was a "serious and repeated breach". This, it says, was premature. The issue should have been left for the next stage of the process when Ofcom considered whether to impose a sanction and, if so, what sanction.

17. Ofcom has set out a detailed response in its Summary Grounds of Defence and in its skeleton argument for today's hearing. As to ground 1, it contends that the decision-making process was fair and that the resulting decision was a proportionate interference with the claimant's Article 10 rights. As to ground 2, it disputes the claimant's characterisation of the decision and contends that, on a proper reading, no new requirement was imposed. As to ground 3, Ofcom says that it is clear from the context that the finding was provisional only, so, on a proper analysis, there is no decision to challenge.

18. At the start of the hearing yesterday, I indicated that I was provisionally minded to conclude that all grounds were arguable and, accordingly, to grant permission to apply for judicial review. Anya Proops KC, for Ofcom, sought to persuade me that they were not. Her cogent submissions have convinced me that Ofcom has substantial answers to the grounds of challenge, which may well succeed in due course, but, in respect of grounds 1 and 2, they have not dislodged my initial view that the claimant's grounds do surmount the modest threshold of being reasonably arguable.

19. Grounds 1 and 2 also raise matters of considerable public importance concerning the interpretation and application of the Code. Those matters should be considered at a substantive hearing and should be the subject of a fully-reasoned judgment.

20. In those circumstances, I grant the claimant permission to apply for judicial review on grounds 1 and 2.

21. As to ground 3, Ofcom's position was that the finding that the breach was serious and repeated was provisional only. This appears from Ofcom's Summary Grounds of Defence and skeleton argument and was repeated in court yesterday by Miss Proops. In the light of that, I asked Mr Hickman why ground 3 was necessary and I invited Miss Proops to take instructions as to whether Ofcom would be prepared to place on its website, underneath the challenged decision, a statement that the conclusion as to whether the breach was serious and repeated was provisional only. Miss Proops has taken instructions overnight and has confirmed that Ofcom is prepared to place such a statement on its website. In the light of that confirmation, Mr Hickman confirms that he no longer pursues ground 3, so I need say nothing more about it.

Issue 2: The application for a stay/an injunction

22. Before summarising the positions of the parties on the application for a stay, it is necessary to set out the key parts of the chronology. As I have said, the challenged decision was sent to the claimant on 17 May 2024. The letter in which it was communicated indicated that a sanctions process would follow.

23. On 22 May 2024, there were news reports, including on GB News itself, reporting the claimant's intention to bring proceedings for judicial review. However, the pre-action protocol letter was not sent until 11 June 2024 and the claim was not filed until 23 July 2024. Even then, there was no application for interim relief.

24. That application for interim relief, in the form of a stay of the sanctions proceedings pursuant to CPR rule 54.10(2)(a), or an interim injunction to the same effect, was not made until 16 August, nearly three months after the challenged decision was published. The application was not accompanied by an application for urgent consideration. The interim relief application was opposed.

25. During the period between the publication of the challenged decision and the application for interim relief, the sanctions process had been continuing and a number of steps had been taken. Ofcom had requested financial information. The claimant had queried the basis for requesting this information. Ofcom had responded, explaining why it needed the information. The claimant had provided some financial information and queried the need for other information. Ofcom had responded. The claimant had provided further information. Ofcom had sent a "preliminary view", namely, that it would impose a specified financial penalty and require GB News to broadcast a statement of its findings and it had invited representations on this. The claimant had applied for an extension of time in which to provide these. Ofcom had agreed to one extension but not a second and the claimant had filed its written representations on Ofcom's preliminary view.

26. Since the application for interim relief was filed, there has been an oral hearing before Ofcom on the question of sanction. Ofcom expects to be in a position to issue its final decision in early or mid-October. It initially said that the decision might be made and published any time from 1 October, but, at my invitation, undertook that this would not be before the determination of the interim application which was pursued at yesterday's hearing.

27. Ofcom has confirmed that, in the event that permission to apply for judicial review is granted but interim relief is refused, it will not seek to enforce any monetary sanction or any requirement on GB News to broadcast a statement of reasons until the determination of the judicial review claim.

28. There is a dispute between the parties as to the proper approach to interim relief in a case such as this, where permission has been granted and the applicant seeks a stay of administrative proceedings before a final decision has been taken. The essence of the dispute is as follows.

29. Tom Hickman KC, for the claimant, submits that the test for imposing a stay, pursuant to CPR rule 54.10(2)(a), in a case where permission is granted is the balance of convenience test set out in *American Cyanamid v Ethicon* [1975] AC 396, but, absent some special context justifying a different result, the grant of a stay will usually be the just and convenient result. For the latter proposition, he relies on the observations of Dyson LJ in *R (H) v Ashworth Hospital Authority* [2002] EWCA Civ 923; [2003] 1WLR 127, at paragraph 42.

30. Miss Proops, for Ofcom, disputes that this is the correct approach and relies on *R (Governing Body of X) v Ofsted* [2020] EWCA Civ 594; [2020] EMLR 22. That was a case concerning an application for interim relief to prevent publication of an Ofsted report, which was already in existence. At paragraph 77, Lindblom LJ, with whom Sir Geoffrey Vos C and Henderson LJ agreed, approved the approach I had taken in a previous case, *R (Barking and Dagenham College) v Office for Students* [2019] EWCA 2667 (Admin), at paragraphs 35 to 37.

31. Mr Hickman accepted in oral submissions that the proper approach to the grant of interim relief cannot differ depending on whether the application is for a stay of proceedings or an interim injunction "to the same effect". In my judgment, he was right to accept that. If the effect of the relief sought is the same, the threshold for its grant should also be the same. This is consistent with the approach of Laws LJ in *R v Advertising Standards Authority ex p. Vernons* [1992] 1 WLR 1289, at 1291, and of Glidewell LJ in *R v Inspectorate of Pollution ex p. Greenpeace Limited (No. 1)* [1994] 1 WLR 570, at 573.

32. It is true that a stay under CPR 54.10(2)(a) is available only when permission to apply for judicial review has been granted (ie only when the court has already concluded that the claim is arguable), but it has never been the law that the grant of permission to apply for judicial review automatically, or even presumptively, results in the grant of a stay.

33. On a proper reading of Dyson LJ's judgment in *H*, there is nothing there to suggest that it does. The comments on which Mr Hickman relies appear in a section of that judgment under the heading, "Is there a jurisdiction to grant a stay?" There was argument about whether the court would have jurisdiction to grant a stay in various cases, including the case where the decision under challenge has been fully implemented (see at paragraphs 39 to 40). It was that jurisdictional argument that Dyson LJ was addressing when he said at paragraph 42 that the Administrative Court "routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried into effect". The word "routinely" does not imply anything about the circumstances in which the jurisdiction should be exercised. It was simply part of a reasoning supporting the conclusion that the jurisdiction exists in the first place.

34. The test for the grant of a stay was addressed in the next section starting at paragraph 47. That paragraph begins by noting: "As CPR 54.10 makes clear, the grant of permission to apply for judicial review is a necessary condition of a stay". The next sentence records that, "In the special context of orders for discharge by Mental Health Tribunals, it is, in my view, not a sufficient condition". Dyson LJ did not say, in terms, that the grant of permission to apply for judicial review would be a sufficient condition in other cases and nothing in his judgment, read as a whole, implies that. Any such implication would, in my judgment, be contrary to a well-established line of authority.

35. Even under *American Cyanamid*, which annunciates the test for interim relief applicable in cases between private parties, the presence of a serious issue to be tried is a necessary but not a sufficient condition for the grant of relief. The court has to go on to consider the balance of convenience. In public law cases, it is well-established that the balance includes the public interest in allowing a public authority to continue to perform its public function (see the case law referred to by Lindblom LJ in the *Governing Body of X* case, at paragraphs 63 to 66).

36. In cases where the relief sought will prevent the body in question from publishing a report or a decision, that public interest includes the interest of those with rights under Article 10 ECHR to receive information which the authority wishes to impart to them. This is why interim relief in the latter category of case requires the applicant to surmount what has been described as a high hurdle by showing "pressing grounds", "the most

compelling reasons" or "exceptional circumstances" (see the passage from paragraph 35 to 37 of my judgment in the *Barking and Dagenham* case approved in *Governing Body of X*, at paragraph 77).

37. Mr Hickman places considerable emphasis on the fact that in this case what was sought was not an injunction to restrain the publication of its decision, but a stay to prevent the continuation of proceedings before such a decision had come into being at all. In my judgment, this argument elevates form over substance in two critical respects. First, while I accept that it may be inappropriate to apply the heightened test I applied in the *Barking and Dagenham* case in the context where an applicant applies for interim relief at the start of a process which may lead to a decision, those are far from the facts here.

38. In this case, the administrative process which the claimant seeks to stay is nearly complete. As I have said, it had been proceeding for nearly three months before the application for interim relief was made. A decision is now very close to being made. It would be surprising if a fundamentally different test applied, depending on whether the application for interim relief was made immediately after the communication in the decision or shortly before that point.

39. Secondly, and relatedly, when a party acts timeously to seek a stay of an administrative process, the basis is often that continuation of the process will involve a cost and waste of time and resources. That argument is not available, or at least not available with any substantial force here, because the process is close to completion. Instead the harms which the claimant seeks to avoid are those which it says will flow from advertisers and viewers becoming aware of Ofcom's decision and altering their behaviour. In other words, the evidential basis for the claimant's application for interim relief focuses on harms that are said to flow from the publication of the decision, not the continuation of the almost complete sanctions process. That being so, it is difficult to see why the test that applies to interim relief to restrain publication of a report already in existence should not also apply here.

40. In this particular regulatory context, there is, in my judgment, a significant public interest in allowing Ofcom to complete its process and publish its decision. Parliament has decided to impose obligations of impartiality on broadcasters and it has decided to entrust

decisions about the enforcement of those obligations to Ofcom. It has also imposed on Ofcom a statutory duty of transparency in section 3(3)(a) of the Communications Act 2003. If Ofcom decides that a financial penalty or other sanction is warranted, the publication of its decision to that effect can, in principle, serve three important purposes, even in a case where the decision as to breach is subject to challenge in court.

41. These are: first, to promote public confidence in the integrity of the regime for enforcing the Code; secondly, to reinforce in other market participants the importance of compliance with the Code; and, thirdly, to inform viewers and advertisers of the regulator's conclusions. I do not accept the claimant's contention that there is no time sensitivity to the publication of the decision. Any delay to publication delays these public benefits and deprives viewers, advertisers and other market participants of information which could rationally affect their economic choices. The fact that other sanction decisions have taken longer than this one does not supply any justification for delaying a process which, in this case, is close to completion.

42. Because the relief sought here would, in practice, prevent advertisers, viewers and other market participants from receiving information, which Ofcom considers in the exercise of its functions they should have, it would, in my judgment, interfere with their right to receive information which is guaranteed by article 10 of the ECHR. That being so, section 12(3) of the Human Rights Act 1998 permits the grant of interim relief only if I am satisfied that the claimant is "likely to establish" that publication of the decision should not be allowed.

43. Mr Hickman relied on *Banerjee v Cream Holdings Ltd* [2004] UKHL 44; [2005] 1 AC 253, at paragraphs 19 and 20, for the proposition that, in this context, "likely" could mean something less than "more likely than not".

44. On the facts of this case, where the question of interim relief is being considered at a fully-argued hearing, on notice, with the benefit of extensive written and oral argument, I doubt that anything less than satisfaction to the civil standard would suffice. I note Lord Nicholls' observation at paragraph 22 of his speech in *Cream Holdings* that courts should be "exceedingly slow" to grant relief in cases where section 12(3) applies, where the claimant has not satisfied the civil standard. But, as in *Barking and Dagenham*, this

point is not critical to my decision and I am, accordingly, prepared to proceed on the assumption, without deciding, that whatever standard is set by section 12(3) is satisfied.

45. Mr Hickman contends that there will be real prejudice to the claimant if no stay is ordered and the claim later succeeds. He relies on various aspects of prejudice set out in the witness statement of Mr Frangopoulos to make good the submission that the claimant will suffer serious commercial and reputational harm from Ofcom taking and publishing a decision on sanction; all the more so if the sanction is on the highly significant scale provisionally proposed.

46. I consider these aspects in turn. They can be grouped under four heads. First, Mr Hickman points to the impact on the perception of advertisers. In my judgment, the likely impact is overstated. As a result of the publication of the challenged decision, advertisers already know that Ofcom has found that GB News was in breach of the Code and they already know Ofcom's view, or at least its provisional view, that the breach was serious and repeated. As a result of information that the claimant has chosen to put into the public domain in these proceedings, they also know that Ofcom is provisionally minded to impose a penalty which is "very significant".

47. The incremental impact of publication of a decision communicating a final conclusion on the question of whether the breach was serious and repeated and specifying the amount of the penalty, in circumstances where it is known that the breach decision is subject to challenge, seems to be unlikely to be great. Furthermore, as I said in the *Barking and Dagenham* case, in a passage expressly endorsed by the Court of Appeal, those hearing of Ofcom's sanctions decision can be expected to factor in the fact that it is being challenged before reacting to it. I do not accept that this applies any less to advertisers or viewers than to those interested in the regulatory decisions in the *Barking and Dagenham* or *X* cases or the other cases cited in those judgments.

48. In any event, if and to that extent that the additional information contained in the sanctions decision does have an incremental impact, that impact will arise because of economic choices made by advertisers and viewers on the basis of the information contained in the decision. On this footing, denying that information to advertisers and viewers would give rise to a detriment to them if the claim proceeds and ultimately fails.

In that scenario, the denial to them of the information which Ofcom wishes to convey will cause them, or may cause them, to make suboptimal economic choices.

49. Secondly, Mr Hickman says that Ofcom's undertaking, that it will not require GB News to publish a sanctions statement until the conclusion of the judicial proceedings, sits uneasily with its assertion that any harm arising from publication can be addressed through an announcement that the breach decision is under challenge. I do not accept that.

50. There is a qualitative difference between Ofcom publishing a sanctions decision, something which, unless restrained by the court, it is empowered to do, and requiring GB News itself to publish such a statement, something which impacts substantially, or would impact substantially, on the claimant's Convention right to freedom of expression. The latter would be a considerably greater interference with the claimant's rights. Ofcom has properly concluded that it would not be appropriate to require GB News to publish a sanctions statement or, indeed, to pay any financial penalty imposed until the conclusion of the judicial review proceedings. This seems to me significantly to attenuate any prejudice which might be caused by permitting Ofcom to continue with the regulatory process.

51. Thirdly, Mr Hickman prays in aid the costs of responding to a sanctions decision which might potentially include the legal costs involved in further judicial review proceedings. I accept that there will be some costs. However, allowing the sanctions decision to proceed seems to me to be likely to save costs overall. The sanctions decision may be in the claimant's favour, for example, because Ofcom decides, contrary to its provisional view, that, although there was a breach, it was neither serious nor repeated. If so, it may be that these proceedings are rendered unnecessary.

52. If the sanctions decision is not in the claimant's favour and in the scenario where the present claim fails, it would reduce both costs and delay if any challenge to the sanctions decision were heard together with these proceedings. That would enable a single set of proceedings dealing with all aspects of this regulatory process, as happened in a previous case brought by TV Novosti: [2021] EWCA Civ 1534; [2022] 1 WLR 481.

53. Fourthly, Mr Hickman submits that the court's judgment on the grounds of challenge to the breach decision will be highly relevant to Ofcom's consideration of sanction and, if the latter decision is allowed to be taken before the judgment is given, there is a danger of Ofcom proceeding on a wrong legal basis.

54. I accept that, other things being equal, this point may have had some force, but it is firmly outweighed by the other factors that I have mentioned, particularly given the late stage in the sanctions proceedings at which the application for interim relief was made.

55. In my judgment, the matters relied upon by the claimant do not establish the pressing grounds", "most compelling reasons" or "exceptional circumstances" which, on the authorities, I conclude are required to justify the grant of interim relief in the present circumstances. However, I add that, even if the test to be applied were the ordinary *American Cyanamid* balance of convenience test, modified for the public law context, I would still have refused relief, because at this stage the harms said by the claimant to flow from allowing Ofcom to continue the sanctions process are firmly outweighed by the public interest in allowing that process to be completed and the private interests of advertisers, viewers and other market participants in learning of the result of that process.

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