



Neutral Citation Number: [2025] EWHC 416 (Admin)

Case No: AC-2022- LON-001669

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

Thursday, 27th February 2025

Before:
FORDHAM J

Between:
THE KING (on the application of **Claimant**
DAVID JOHN KEIGHLEY)
- and -
THE OFFICE OF COMMUNICATIONS **Defendant**
- and -
BRITISH BROADCASTING CORPORATION **Interested**
Party

Thomas Roe KC and Adam Riley (instructed by McCarthy Denning) for the **Claimant**
Jessica Boyd KC and Natasha Simonsen (instructed by Ofcom) for the **Defendant**
Jason Pobjoy (instructed by BBC) for the **Interested Party**

Hearing dates: 4 & 5.2.25
Draft judgment: 13.2.25

Approved Judgment

FORDHAM J

This Judgment was handed down remotely at 10am on 27.2.25 by circulation to the parties or their representatives by email and by release to the National Archives.

FORDHAM J:

Introduction

1. This case is about how to measure for “due impartiality” under Ofcom’s Broadcasting Code rules. Is due impartiality to be measured by looking at a programme in its context, extended in some circumstances to looking at a relevant linked series of programmes? Or is due impartiality also measured by looking more widely, across the programmes within a broadcasting service as a whole?
2. The previous case of *R (Autonomous Non-Profit Organisation TV-Novosti) v Ofcom* [2021] EWCA Civ 1534 [2022] 1 WLR 481 also involved questions about measuring due impartiality under the Code rules. But the orientation of the case was different. There, individual programmes faced condemnation, as a breach of the Code rules, for a lack of due impartiality. There, the claimant broadcaster was arguing that the virtue of due impartiality should be demonstrable by taking into account other, unlinked, programmes broadcast on the same service (§§6, 8). The Court of Appeal disagreed. Reliance could be placed, under the Code rules and its definitions, on a series of programmes and on linked and adjacent programme content (§§38-44). But the virtue of due impartiality could not be demonstrated more widely, to defend a claimed lack of due impartiality within an individual programme.
3. Here, the orientation is different. In this case, the Claimant made complaints inviting condemnation of a broadcaster (the BBC) for a lack of due impartiality. The Claimant wanted to demonstrate that vice across the service as a whole, without showing it in relation to any individual programme or series of programmes, with linked and adjacent programme content. Ofcom and the BBC say that this wider approach is not a measure of a lack of due impartiality under the Code rules, properly interpreted. The Claimant says they have both got the law wrong. That issue about interpreting the Scheme rules is the first of two issues in the case. There is a second issue about the reasonableness of a decision, but it only arises if the Claimant is right about the rules.

“Due Impartiality” [D1]

4. Section 5 of Ofcom’s Broadcasting Code contains 13 rules (rules 5.1 to 5.13). There are also eight definitions (which I am labelling [D1] to [D8]). Seven of the definitions are within Section 5 and one (namely [D2]) is “introduced into Section 5” from Section 2 (*TV-Novosti* §39). The rules and remaining definitions are set out in full at §§22-26 below. Section 5 includes rules about “due impartiality” in presenting broadcast news (rules 5.1 and 5.3); rules about preserving “due impartiality” on particular matters of controversy or policy (rules 5.5 to 5.10); and rules about preserving “due impartiality” on “major” such matters of controversy or policy (rules 5.11 and 5.12). This is the Code definition [D1] of “due impartiality”.

[D1] Meaning of “due impartiality”. “Due” is an important qualification to the concept of impartiality. Impartiality itself means not favouring one side over another. “Due” means adequate or appropriate to the subject and nature of the programme. So “due impartiality” does not mean an equal division of time has to be given to every view, or that every argument and every facet of every argument has to be represented. The approach to due impartiality may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach is

signalled to the audience. Context, as defined in Section 2: Harm and offence of the Code, is important.

5. Content from Ofcom’s non-statutory guidance on due impartiality was set out in TV-Novosti at §21. Mr Roe KC and Mr Riley for the Claimant invited the Court’s attention to a March 1977 Report of the Committee on the Future of Broadcasting (Cmnd 6753), §17.10 of which said that due impartiality was different from “balance” and “neutrality”; that it should allow “the widest possible range of views and opinions to be expressed”; that broadcasters must also “take account ... of the weight of opinion”; and that broadcasters have to “recognise” that the range and weight of opinion are “constantly changing”. They also emphasised Lord Bingham’s “fundamental rationale of the democratic process” (quoted in TV-Novosti at §32) about “competing views, opinions and policies” being “publicly debated and exposed to public scrutiny”; with “differing views ... expressed, contradicted, answered and debated”; it being a “duty of broadcasters to achieve this object in an impartial way by presenting balanced programmes in which all lawful views may be ventilated”.

“Context” [D2]

6. Here is the Code definition [D2] of “context”, referred to in the last sentence of the “due impartiality” definition [D1]. All numbering in square brackets in quotations is mine.

[D2] Meaning of “context”. [1] Context includes (but is not limited to): [i] the editorial content of the programme, programmes or series; [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. [2] Time and scheduling of broadcast are not relevant to the provision of programmes on demand but, for programmes made available on BBC ODPS, context also includes (but is not limited to) the nature of access to the content eg. whether there are measures in place that are intended to prevent children from viewing and/or listening to the content.

Ofcom’s “Enforcement Jurisdiction”

7. Ofcom has responsibilities in relation to the enforcement of the Code. Like the Code, those responsibilities extend to Code-regulated broadcasters. The parties have spoken in this case about the extent of Ofcom’s “enforcement jurisdiction”. By that, they mean the reach of the Code rules and what can constitute a breach by a broadcaster of those rules. Ofcom has since 22 March 2017 regulated the BBC in respect of the due impartiality requirements under Section 5 of the Code. The applicability of the Code to the BBC has this legal pathway: s.198(2)(a) of the Communications Act 2003; Article 49 of the BBC Charter; and then clause 59c of and Sch 3 §3 to the BBC Framework Agreement. The Charter and Framework Agreement are defined in s.362(1) of the 2003 Act.

The “Filtering Test”

8. In considering complaints, Ofcom has a Filtering Test, set out in Ofcom’s Procedures for Investigating Breaches of Content Standards on BBC Broadcasting Services and BBC On Demand Programme Services (3 April 2017) at §1.30:

Ofcom will first consider whether, on its face, a complaint raises potentially substantive issues under the Broadcasting Code that warrant investigation by Ofcom. It will do so by reference to the gravity and/or extent of the matter complained of, including, for example, whether it involves harm to minors or severe financial or physical harm; and whether Ofcom considers the BBC reached an appropriate decision on the matter...

Ofcom also has a “BBC-First Principle” (Procedures §1.14), that complaints should normally be made to the BBC in the first instance, before being pursued with Ofcom.

Three Agreed Points about Due Impartiality under the Code

9. Everyone in this case agrees these three things. First, that the Code rules requiring due impartiality can be breached in the case of an individual programme, viewed in context. Secondly, that in some circumstances the Code rules requiring due impartiality are not breached in the case of an individual programme, where due impartiality has been achieved by the broadcaster over the course of a relevant series of programmes. Thirdly, that in no circumstances can a breach of the Code rules requiring due impartiality be avoided – whether in the case of an individual programme in context or a relevant series of programmes – by the fact of achieving due impartiality more widely, across the programmes in the service as a whole. I will explain each of these at §§27-29 below.

This Claim

10. This is a claim for judicial review. The “Target Decision” – whose legality is being challenged – is Ofcom’s refusal on 23 March 2022 to proceed with the Claimant’s three linked complaints, put forward by him on 7 July 2020, 19 October 2020 and 10 February 2021. The Target Decision reached two key conclusions. First, that the Code rules on due impartiality are applicable only “at the level of” an “individual broadcast” or an “editorially linked series of programmes”. Second, that even on the assumption that that first conclusion was wrong, the Claimant’s complaints did not warrant investigating applying the Filtering Test. The judicial review claim challenges the first key conclusion as wrong in law; and the second key conclusion as vitiated by public law unreasonableness. Those are the two issues. I have received considerable assistance from everyone in the three legal teams.

What this Case is Not

11. The Court is not deciding the merits of how a breach of due impartiality should be measurable. The Court is not applying the Filtering Test to the Claimant’s complaints. The Court is not the legislator; nor the regulatory rule-maker; nor the regulatory decision-maker. Judicial review is a secondary, supervisory jurisdiction. My role is restricted. I ask and answer objective legal questions about interpretation and reasonableness.

Background

12. The Claimant heads a group called “News-Watch”, which logs and analyses the ways in which the BBC deals with news and current affairs. This is his second visit to the Administrative Court. The first culminated in R (Keighley) v BBC [2019] EWHC 3331 (Admin). That first claim argued that the BBC was not complying with an obligation under Article 20(3)(d) of its Charter, to put in place a framework to assess its performance in promoting its First Public Purpose. Supperstone J held that the claim was unarguable. He referred to the News-Watch “methodology” (§§12-13) and to points about BBC programmes which had been raised by Lord Pearson back in August 2018 (§21). The Claimant was one of seven individuals who joined Lord Pearson in a joint complaint made to Ofcom on 10 May 2018. That joint complaint was about the BBC’s Brexit coverage since the EU Referendum. It was based on detailed News-Watch research. In a letter (25.6.18), Ofcom said two things. First, that it could “only assess complaints about material broadcast or made available in specific programmes or a series of programmes”. Second, that Ofcom could only consider complaints about BBC programmes broadcast after 22 March 2017. The joint complaint was narrowed by letter (5.7.18) to the three most recent News-Watch surveys, covering 75 hours of BBC R4 programmes between 9 October 2017 and 29 March 2018. An Ofcom letter (18.1.22) describes that as “the complainants” having “narrowed the scope of their complaint to specific programmes”. The narrowed joint complaint was rejected by Ofcom, by reference to the Filtering Test, for reasons given in a decision letter (11.2.19) supported by an 8-page Complaint Assessment. A separate complaint by Lord Pearson and the Claimant – relating to BBC R4’s “Brexit: A Love Story?” – was rejected by the BBC’s Executive Complaints Unit by letters (1.4.18 and 18.4.18), and was not pursued with Ofcom. I will be saying more about the factual background in addressing the reasonableness issue: §§48-49 below.

Visibility Gaps: Patterns and Aggregation

13. Mr Roe KC and Mr Riley for the Claimant identify a basis – at a level of principle – why, they say, it really matters that the Code rules relating to due impartiality should extend to considering the programmes within a service taken as a whole, and not be limited to a focus on an individual programme or relevant series of programmes. It is all about visibility gaps. It runs as follows. When Ofcom looks at an individual programme in context, Ofcom will necessarily be “zooming in” to look at the content, context and circumstances relevant to that individual programme. It will also, necessarily, be applying a standard which affords a degree of “tolerance” to the broadcaster in the context of that individual programme. The same is true of a relevant series of programmes. This makes problems invisible and undetectable, in two ways. First, there are patterns of broadcaster behaviour which become visible only by “zooming out”, and looking at programmes within the service taken as a whole. Second, there are cumulative effects of “tolerated” practices which become visible only by “zooming out” and considering the service taken as a whole. Something might look benign viewed in isolation, but part of a damaging pattern or effect viewed overall. Only by zooming out, to see patterns and gather cumulative effects, can due impartiality properly be regulated. Any other approach, say Mr Roe KC and Mr Riley, would be “eccentric”. This is linked to a point about quantitative measurement (counting). You can count numbers of guests; numbers of minutes of airtime; numbers of words spoken. When you do that – and then you “zoom out” and see repeated patterns and accumulated doses – it becomes very much harder to dismiss counting as a method. Lack of due impartiality is a vice whether it is visible in an individual

programme; in a series of programmes; in the programmes over a day; or a week; or a month; or a year. Parliament did not countenance visibility gaps. Ofcom's Rules, properly interpreted, do not permit them.

An Avowedly Big Picture

14. It has been made clear, over many years, that Ofcom will consider due impartiality complaints about individual programmes, in context; and it will consider individual programmes side by side, to see whether any or all of the individual programmes breach the due impartiality Code rules. Take TV-Novosti, which came to the Divisional Court in March 2020 and came before the Court of Appeal in October 2021. That case was about ten news and current affairs programmes broadcast by TV-Novosti which were investigated by Ofcom. Of the ten, seven (broadcast between 17.3.18 and 26.4.18) were found by Ofcom to have infringed the Code rules regarding due impartiality. There were editions of a programme "Sputnik", and a news programme, and editions of a programme "Crosstalk" (TV-Novosti §3). Take R (Star China Media Ltd) v Ofcom [2023] EWCA Civ 843 [2024] 1 WLR 248, which came to the High Court in December 2022 and the Court of Appeal in July 2023. Star China similarly involved an Ofcom investigation which found news items broadcast on four occasions on "The World Today" programmes in August and September 2019, and one "China 24" programme on 21 November 2019, each infringed the Code rules regarding due impartiality. The Claimant knew that he could complain about programmes, viewed individually (or by linked series), but having regard to "context". The TV-Novosti case was referenced by him within the first of his three complaints (7 July 2020). In the context of dealing with his three complaints, Ofcom by a letter of 10 March 2021 explained its approach to "assessing whether or not a programme was duly impartial". That letter reminded the Claimant that he could, if he wished, make a complaint "about a specific programme". Ofcom's Guidance Note (22 March 2017) on Section 5 of the Standards Code says of Code rule 5.5 (at §1.32) that: "Broadcasters must ensure due impartiality is maintained in any programme or section of a programme that deals with matters of political or industrial controversy or matters relating to current public policy". Ofcom's letter of 18 January 2022 had described the 2018 joint complaint being "narrowed ... to specific programmes".
15. But the lawfulness of this approach – looking at specific programmes on their own due impartiality merits – is the very approach which this judicial review claim has been brought in order to challenge. As the Target Decision rightly recognised, his three complaints were alleging a "systematic failure" of due impartiality by the BBC, being said to be "demonstrated across hundreds of hours of output, in multiple contexts", with the Claimant having expressly accepted at the BBC-First stage that it was "right not to treat" his complaints as "relating to any particular item". The Claimant's position was that each complaint arose from "the consistent practice of the BBC in giving far more coverage, and far more sympathetic coverage, to broadly pro-EU/anti-Brexit views than to anti-EU/pro-Brexit views"; with the "true scale" of "this lack of due impartiality" being "revealed" by News-Watch's "rigorous analysis". The Claimant's position was, and is, an avowedly "big picture" position.

A Universal Standard

16. The broadcaster in this case is the BBC. But the due impartiality Code rules, with which Ofcom's Target Decision was concerned, are the same rules as apply universally

to all Code-regulated broadcasters. Mr Roe KC and Mr Riley accept this. In its complaints process, Ofcom has a BBC-First principle. As Ms Boyd KC and Ms Simonsen for Ofcom accept, the “likely expectation of the audience” is a factor relevant to due impartiality [D1] and to context [D2]. But the correct interpretation of the statutory provisions and Code rules as to due impartiality will apply to all broadcasters regulated under the Standards Code. The foundational underpinning of due impartiality under the Code rules is not the BBC’s Mission, Public Purposes or Editorial Standards as a public service broadcaster. There are distinct mechanisms applicable to the BBC in light of its special position (§30xi below), but these can only be of indirect relevance to this case. This case is about due impartiality under the Code, a universal standard applicable to all Code-regulated broadcasters.

Prescribed Matters and Major Prescribed Matters

17. Parliament identified these two “matters” (2003 Act s.320(2)), which I am going to call the “Prescribed Matters”:

Those matters are – (a) matters of political or industrial controversy; and (b) matters relating to current public policy.

The Prescribed Matters are the subject of Code definition [D3]. Provision is also made for “Major Prescribed Matters”: see s.320(6) and [D6]. It is common ground that the complaints in the present case – as in TV-Novosti (§14) – are about programmes involving Major Prescribed Matters.

The Rule-Making Duty (s.319)

18. Section 5 of the Code has a statutory origin story. It is found in Part 3 of the 2003 Act, whose definitions provision is s.362. By s.319 of the 2003 Act, Parliament imposed a statutory duty on Ofcom to set standards for the content of programmes included in television and radio services (s.319(1)), to be contained in one or more codes (s.319(3)). Parliament identified a series of “standards objectives” (s.319(2)) and a series of relevancies (s.319(4)). Ofcom’s standard-setting function was statutorily-required to set “such standards” as “appear to [Ofcom] best calculated to secure” the prescribed standards objectives (s.319(1)), having regard to the relevancies “to such extent as appears to [Ofcom] to be relevant to the securing of the standards objectives” (s.319(4)). The “standards objectives” include “that news included in television and radio services is presented with due impartiality and that the impartiality requirements of s.320 are complied with” (s.319(2)(c)); and “that news included in television and radio services is reported with due accuracy” (s.319(2)(d)). The relevancies include “the desirability of maintaining the independence of editorial control over programme content” (s.319(4)(f)).

19. What I have just said is a simplified overview. It is important to see s.319, in full:

319. OFCOM’s standards code.

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

(2) The standards objectives are – (a) that persons under the age of eighteen are protected; (b) that material likely to encourage or to incite the commission of crime or to lead to disorder is

not included in television and radio services; (c) that news included in television and radio services is presented with due impartiality and that the impartiality requirements of section 320 are complied with; (d) that news included in television and radio services is reported with due accuracy; (e) that the proper degree of responsibility is exercised with respect to the content of programmes which are religious programmes; (f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material; (fa) that the product placement requirements referred to in section 321(3A) are met in relation to programmes included in a television programme service (other than advertisements); (g) that advertising that contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services; (h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented; (ha) that the requirements of any EU directives, as they had effect immediately before IP completion day, with respect to advertising included in television and radio services are complied with; (i) that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with; (j) that the unsuitable sponsorship of programmes included in television and radio services is prevented; (k) that there is no undue discrimination between advertisers who seek to have advertisements included in television and radio services; and (l) that there is no use of techniques which exploit the possibility of conveying a message to viewers or listeners, or of otherwise influencing their minds, without their being aware, or fully aware, of what has occurred.

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

(4) In setting or revising any standards under this section, OFCOM must have regard, in particular and to such extent as appears to them to be relevant to the securing of the standards objectives, to each of the following matters – (a) the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally, or in programmes of a particular description; (b) the likely size and composition of the potential audience for programmes included in television and radio services generally, or in television and radio services of a particular description; (c) the likely expectation of the audience as to the nature of a programme’s content and the extent to which the nature of a programme’s content can be brought to the attention of potential members of the audience; (d) the likelihood of persons who are unaware of the nature of a programme’s content being unintentionally exposed, by their own actions, to that content; (e) the desirability of securing that the content of services identifies when there is a change affecting the nature of a service that is being watched or listened to and, in particular, a change that is relevant to the application of the standards set under this section; and (f) the desirability of maintaining the independence of editorial control over programme content.

(5) OFCOM must ensure that the standards from time to time in force under this section include – (a) minimum standards applicable to all programmes included in television and radio services; and (b) such other standards applicable to particular descriptions of programmes, or of television and radio services, as appear to them appropriate for securing the standards objectives.

(6) Standards set to secure the standards objective specified in subsection (2)(e) shall, in particular, contain provision designed to secure that religious programmes do not involve – (a) any improper exploitation of any susceptibilities of the audience for such a programme; or (b) any abusive treatment of the religious views and beliefs of those belonging to a particular religion or religious denomination.

(7) In setting standards under this section, OFCOM must take account of such of the international obligations of the United Kingdom as the Secretary of State may notify to them for the purposes of this section.

(8) In this section “news” means news in whatever form it is included in a service.

(9) Subject to subsections (10) to (12), Subsection (2)(fa) applies only in relation to programmes the production of which begins after 19th December 2009.

(10) So far as relating to product placement falling within paragraph 4(ba) of Schedule 11A (electronic cigarettes and electronic cigarette refill containers), subsection (2)(fa) applies only in relation to programmes the production of which begins after 19th May 2016.

(11) So far as relating to product placement falling within paragraph 4(bb) of Schedule 11A (undertakings whose principal activity is the manufacture or sale of electronic cigarettes or electronic cigarette refill containers), subsection (2)(fa) applies only in relation to programmes the production of which begins after 31 October 2020.

(12) Subsection (2)(fa) applies in relation to a programme the production of which began before 1 November 2020 as if, in Schedule 11A (which contains the product placement requirements referred to in section 321(3A)) – (a) paragraph 3(1)(b) to (d) were omitted, (b) in paragraph 6(1) there were inserted, as paragraph (a): “the programme is a religious, consumer affairs or current affairs programme;”, and (c) paragraph 7 included a condition that the programme in which the product, service or trademark, or the reference to it, is included is – (i) a film made for cinema, (ii) a film or series made for a television programme service or for an on-demand programme service, (iii) a sports programme, or (iv) a light entertainment programme.

The Exclusion, Preservation and Prevention Requirements (s.320)

20. There are three “impartiality requirements of s.320”, compliance with which is a prescribed “standards objective” (s.319(2)(c)) in Ofcom’s standard-setting. I will call them the “Exclusion Requirement” (s.320(1)(a)); the “Preservation Requirement” (s.320(1)(b)); and the “Prevention Requirement” (s.320(1)(c)). All three are referable to the Prescribed Matters (s.320(2)): §17 above.
- i) The Exclusion Requirement (s.320(1)(a)) applies to all TV and radio services. The Exclusion Requirement is about excluding the service-provider’s views or opinions (on the Prescribed Matters).
 - ii) The Preservation Requirement (s.320(1)(b)) applies to all TV and national radio services (and BBC local radio services). The Preservation Requirement is about preserving, in the service, “due impartiality” on the part of the service-provider (as respects the Prescribed Matters). In the case of the Preservation Requirement, Ofcom’s Code provision must “in particular, take account of” a preservation need in relation to Major Prescribed Matters (s.320(6)).
 - iii) The Prevention Requirement (s.320(1)(c)) applies to (non-BBC) local radio services. The Prevention Requirement is about preventing giving undue prominence, in the programmes in the service, to views and opinions of particular persons or bodies (on the Prescribed Matters).

Further provision is made by Parliament about satisfying the Preservation Requirement (s.320(4)(a)) and satisfying the Prevention Requirement (s.320(4)(b)). Provision is made about Code rules which are statutorily required, in connection with: the application of the Preservation Requirement (s.320(5)(a)); a particular determination relevant to the satisfying the Preservation Requirement (s.320(5)(b)); and the application of the Prevention Requirement (s.320(5)(c)).

21. What I have just said is a simplified overview. It is important to see s.320, in full:

320. Special impartiality requirements.

(1) The requirements of this section are – (a) the exclusion, in the case of television and radio services (other than a restricted service within the meaning of section 245), from programmes included in any of those services of all expressions of the views or opinions of the person providing the service on any of the matters mentioned in subsection (2); (b) the preservation, in the case of every television programme service, teletext service, national radio service and national digital sound programme service, of due impartiality, on the part of the person providing the service, as respects all of those matters; (c) the prevention, in the case of every local radio service, local digital sound programme service or radio licensable content service, of the giving of undue prominence in the programmes included in the service to the views and opinions of particular persons or bodies on any of those matters.

(2) Those matters are – (a) matters of political or industrial controversy; and (b) matters relating to current public policy.

(3) Subsection (1)(a) does not require – (a) the exclusion from television programmes of views or opinions relating to the provision of programme services; or (b) the exclusion from radio programmes of views or opinions relating to the provision of programme services.

(4) For the purposes of this section – (a) the requirement specified in subsection (1)(b) is one that (subject to any rules under subsection (5)) may be satisfied by being satisfied in relation to a series of programmes taken as a whole; (b) the requirement specified in subsection (1)(c) is one that needs to be satisfied only in relation to all the programmes included in the service in question, taken as a whole.

(5) OFCOM’s standards code shall contain provision setting out the rules to be observed in connection with the following matters – (a) the application of the requirement specified in subsection (1)(b); (b) the determination of what, in relation to that requirement, constitutes a series of programmes for the purposes of subsection (4)(a); (c) the application of the requirement in subsection (1)(c).

(6) Any provision made for the purposes of subsection (5)(a) must, in particular, take account of the need to ensure the preservation of impartiality in relation to the following matters (taking each matter separately) – (a) matters of major political or industrial controversy, and (b) major matters relating to current public policy, as well as of the need to ensure that the requirement specified in subsection (1)(b) is satisfied generally in relation to a series of programmes taken as a whole.

(7) In this section “national radio service” and “local radio service” mean, respectively, a sound broadcasting service which is a national service within the meaning of section 245 and a sound broadcasting service which is a local service within the meaning of that section.

The Code Definitions

22. There are eight relevant Code definitions for Chapter 5. [D1] (due impartiality) and [D2] (context) are already set out at §§4 and 6 above. Here are the others:

[D1] Meaning of “due impartiality”...

[D2] Meaning of “context”...

[D3] Meaning of “matters of political or industrial controversy and matters relating to current public policy”. Matters of political or industrial controversy are political or industrial issues on which politicians, industry and/or the media are in debate. Matters relating to current public policy need not be the subject of debate but relate to a policy under discussion or already decided by a local, regional or national government or by bodies mandated by those public bodies to make policy on their behalf, for example non-governmental organisations, relevant international institutions, etc.

[D4] Meaning of “series of programmes taken as a whole”. This means more than one programme in the same service, editorially linked, dealing with the same or related issues within an appropriate period and aimed at a like audience. A series can include, for example, a strand, or two programmes (such as a drama and a debate about the drama) or a ‘cluster’ or ‘season’ of programmes on the same subject.

[D5] Meaning of “personal view” and “authored”. “Personal view” programmes are programmes presenting a particular view or perspective. Personal view programmes can range from the outright expression of highly partial views, for example by a person who is a member of a lobby group and is campaigning on the subject, to the considered “authored” opinion of a journalist, commentator or academic, with professional expertise or a specialism in an area which enables her or him to express opinions which are not necessarily mainstream.

[D6] Meaning of “matters of major political or industrial controversy and major matters relating to current public policy”. These will vary according to events but are generally matters of political or industrial controversy or matters of current public policy which are of national, and often international, importance, or are of similar significance within a smaller broadcast area.

[D7] Meaning of “undue prominence of views and opinions”. Undue prominence is a significant imbalance of views aired within coverage of matters of political or industrial controversy or matters relating to current public policy.

[D8] Meaning of “programmes included in any service...Taken as a whole”. Programmes included in any service taken as a whole means all programming on a service dealing with the same or related issues within an appropriate period.

The Code Rules on Due Impartiality and Due Accuracy in News

23. The Code rules in Section 5 start with the presentation of news (s.319(8)) with due impartiality, and the reporting of news with due accuracy. These feature in s.319(2)(c) and (d). [D1] addresses “due impartiality”, with its reference to [D2] “context”. The Code rules on due impartiality and due accuracy in news are Code rules 5.1 to 5.3 (ODPS stands for On-Demand Programme Service):

Due impartiality and due accuracy in news. 5.1: News, in whatever form, must be reported with due accuracy and presented with due impartiality. 5.2: Significant mistakes in news should normally be acknowledged and corrected on air quickly (or, in the case of BBC ODPS, corrected quickly). Corrections should be appropriately scheduled (or, in the case of BBC ODPS, appropriately signalled to viewers). 5.3: No politician may be used as a newsreader, interviewer or reporter in any news programmes unless, exceptionally, it is editorially justified. In that case, the political allegiance of that person must be made clear to the audience.

The Code Rule on the Exclusion Requirement

24. The Exclusion Requirement features in s.320(1)(a) and (3), by reference to the Prescribed Matters (s.329(2)) addressed at [D3]. The relevant Code rule is 5.4:

The exclusion of views or opinions. (Rule 5.4 applies to television and radio services (except restricted services) and to BBC ODPS.) 5.4: Programmes in the services (listed above) must exclude all expressions of the views and opinions of the person providing the service on matters of political and industrial controversy and matters relating to current public policy (unless that person is speaking in a legislative forum or in a court of law). Views and opinions relating to the provision of programme services are also excluded from this requirement.

The Code Rules on the Preservation Requirement

25. The Preservation Requirement features in s.320(1)(b), (4)(a), (5)(a)(b) and (6), by reference to the Prescribed Matters (s.329(2)) addressed at [D3]. It features “due impartiality” [D1], read with [D2]; and the definitions [D4] to [D6]. The relevant Code rules are 5.5 to 5.12. Rules 5.11 and 5.12 are special rules about Major Prescribed Matters.

The preservation of due impartiality. (Rules 5.5 to 5.12 apply to television programme services, teletext services, national radio and national digital sound programme services, all BBC radio services and BBC ODPS.)

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

5.6: The broadcast of editorially linked programmes dealing with the same subject matter (as part of a series in which the broadcaster aims to achieve due impartiality) should normally be made clear to the audience on air. [footnote: For BBC ODPS this should be made clear to the audience by appropriate signalling to the audience.]

5.7: Views and facts must not be misrepresented. Views must also be presented with due weight over appropriate timeframes.

5.8: Any personal interest of a reporter or presenter, which would call into question the due impartiality of the programme, must be made clear to the audience.

5.9: Presenters and reporters (with the exception of news presenters and reporters in news programmes), presenters of “personal view” or “authored” programmes or items, and chairs of discussion programmes may express their own views on matters of political or industrial controversy or matters relating to current public policy. However, alternative viewpoints must be adequately represented either in the programme, or in a series of programmes taken as a whole. Additionally, presenters must not use the advantage of regular appearances to promote their views in a way that compromises the requirement for due impartiality. Presenter phone-ins must encourage and must not exclude alternative views.

5.10: A personal view or authored programme or item must be clearly signalled to the audience at the outset. This is a minimum requirement and may not be sufficient in all circumstances. (Personality phone in hosts on radio are exempted from this provision unless their personal view status is unclear.)

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.

The Code Rule on the Prevention Requirement

26. The Prevention Requirement features in s.320(1)(c), (4)(b) and (5)(c) and (6), by reference to the Prescribed Matters (s.329(2)) addressed at [D3]. It features the definitions [D7] and [D8]. Here is the relevant Code rule 5.13:

The prevention of undue prominence of views and opinions on matters of political or industrial controversy and matters relating to current public policy. (Rule 5.13 applies to local radio

services (including community radio services), local digital sound programme services (including community digital sound programme services) and radio licensable content services. For the avoidance of doubt, it does not apply to any BBC services.) 5.13: Broadcasters should not give undue prominence to the views and opinions of particular persons or bodies on matters of political or industrial controversy and matters relating to current public policy in all the programmes included in any service (listed above) taken as a whole.

An Express Focus on “Context”

27. It is time to return to flesh out the position as to each of three agreed points which I described earlier (§9 above). The first point is that the Code rules requiring due impartiality can be breached in the case of an individual programme, viewed in context. For rules 5.1, 5.5 and 5.11, “due impartiality” is defined in [D1] to bring in “context” which is defined in [D2] to bring in “the editorial content of the programme, programmes or series” and “what other programmes are scheduled before and after the programme or programmes concerned”. In TV-Novosti, the Court of Appeal considered that “relevant context” could extend to “linked” or “adjacent” programme content: see §§38-44. Ofcom’s Guidance Notes on Due Impartiality and Due Accuracy and Undue Prominence of Views and Opinions (22 March 2017) countenance – on what, as I see it, is this TV-Novosti “context” basis – that “due impartiality in news might be achieved through broadcasting different viewpoints on a particular issue on successive days in a series of explicitly linked ‘special’ news reports” (§1.11). This, in turn, explains why the Target Decision said that the Code requirements of due impartiality apply in respect of news “in general” at the level of the individual broadcast.

An Express Focus on “Editorially-Linked” and “Clearly Linked and Timely” Programmes

28. The second point is that in some circumstances the Code rules requiring due impartiality are not breached in the case of an individual programme, where due impartiality has been achieved by the broadcaster over the course of a relevant series of programmes. This is not based on “context”, but on express provision within the Code rules. It has been seen that in rule 5.5 the preservation of due impartiality can be achieved over a series of programmes taken as a whole, defined in [D4] (in accordance with s.320(5)(b)) to require that the series be “editorially linked”. It has also been seen that in rule 5.11 the preservation of due impartiality for “major” controversies or policies can be achieved by “clearly linked and timely programmes”. These are in the nature of express concessions; or they can be seen as special defences. The measure of the preservation of due impartiality being achieved – or not achieved – extends beyond the individual programme in context, to the relevant series: “editorially-linked” or “clearly linked and timely”. In R (Liberal Democrats) v ITV Ltd [2019] EWHC 3282 (Admin) [2020] 4 WLR 4, the Divisional Court spoke (at §110) of “the express authorisation in the Code ... of a series of linked programmes as a method of achieving overall balance”.

No Wider Due Impartiality Concession

29. The third point is that in no circumstances can a breach of the Code rules requiring due impartiality be avoided – whether in the case of an individual programme in context or a relevant series of programmes – by the fact of achieving due impartiality more widely, across the programmes in the service as a whole. Mr Roe KC and Mr Riley concede that this is so. TV-Novosti decided that it is so. The Code rules spell out that the Preservation Requirement may be satisfied by the “context” [D2] including linked

and adjacent programmes; by the concessions for “editorially-linked” series (rules 5.5 and 5.9); and by the concession for “clearly linked and timely” programmes (rules 5.11 and 5.12). The broadcaster would not be permitted to defend a lack of preservation of due impartiality by pointing to non-adjacent programmes in a series which is not “editorially-linked”, or (for Major Prescribed Matters) “clearly linked” and “timely”. There is one much wider concession, defined under the Code. But it does not relate to due impartiality. It relates to the Prevention Requirement, undue prominence, and (non-BBC) local radio services: see rule 5.13. It is defined at [D8].

Issue 1: The Claimant’s Case

30. Mr Roe KC and Mr Riley submitted – in essence as I saw it – as follows. Ofcom was wrong in law in the Target Decision, to conclude that the Code requirements of due impartiality apply “at the level” of the individual broadcast and, so far as Prescribed Matters are concerned, “at the level” of an individual programme or editorially-linked series of programmes. The Code rules have an objective legal meaning. Interpretation is a hard edged question engaging the primary responsibility of the judicial review court. On the correct objective interpretation of the relevant Code rules, a breach can arise at a “level” which is beyond an individual news broadcast or an individual programme or editorially linked series of programmes, and which is at the level of the programmes in the service taken as a whole. The visibility gap point is at the forefront as to why it really matters (§13 above).

- i) It all starts with the primary legislation and the provisions of ss.319 and 320 of the 2003 Act. Yes, Ofcom is the rule-maker under s.319(1), setting the Code standards which appear to Ofcom to be best calculated to secure the standards objectives including (s.319(2)(c)) due impartiality in news presentation and compliance with the special impartiality requirements of s.320. But Parliament has imposed a rule-making “duty”, to act to “secure” the standards objectives, including the s.320 “requirements”, so that they are “complied with”. The Code rules must be interpreted – if at all possible – against the clear and express provision which required them, to match that provision and achieve its statutory purpose, and so that Ofcom’s Code rules are lawful. In interpreting the statutory provisions of ss.319 and 320, the usual approach to statutory interpretation applies. That includes the principle that explanatory notes, being “prepared under the authority of Parliament”, may cast light on the meaning of particular statutory provisions, without displacing meanings conveyed by the statutory words after consideration of context and purpose: see R (O) v SSHD [2022] UKSC 3 [2023] AC 255 at §30.
- ii) The statutory provisions provide a clear answer. Under s.319(1), Ofcom’s duty is to set “standards” for the content of programmes to be included in television and radio “services”. The unmistakable emphasis on “services” is explicit within the Preservation Requirement (s.320(2)(b)). Parliament did not speak of the preservation of due impartiality in the case of “each programme”; but rather its preservation in the case of “every ... service”. The clear and express starting point is that the “service” must deliver due impartiality, viewed as a “service”.
- iii) This point is reinforced by the fact that Parliament spoke, across the board, of the Preservation Requirement as due impartiality “on the part of the person providing the service”. The focus was not on the maker or editor of a particular individual

programme or broadcast. Due impartiality is unmistakably about the service provider, which reinforces the fact that it is about due impartiality across the service which that person provides.

- iv) None of this is undermined by the fact that due impartiality must be secured in the presentation of each individual news broadcast (s.319(2)(c)). None of it is undermined by the fact that the preservation of due impartiality must be satisfied in each individual programme, or alternatively by a defined series of programmes (s.320(4)(a) and (5)(b)). Satisfaction, by these alternative modes, in the context of individual programmes is necessary. But it is not sufficient. Parliament did not say that this was a sole and exclusive focus. Nothing indicates that due impartiality is confined. Nothing cuts back on the express requirements of due impartiality in the “service” and on the part of the “person providing the service” (s.320(1)(b)). Parliament was not, and is not to be taken as, countenancing visibility gaps (§13 above) in relation to the service and the service-provider. This is “both/and” provision: due impartiality is required both at the level of each individual programme in context – or each relevant series – and at the level of the service as a whole. Nor is this undermined by the fact that the broadcaster is not permitted to excuse a lack of due impartiality at the level of an individual programme in context – or a relevant series – by pointing to the wider picture across the service as a whole. Some vices – bullying and harassment are examples – may be seen in an individual incident or seen only by looking at a bigger picture; but that does not give a bigger picture defence to a demonstrated individual incident. The fact that TV-Novosti could not in law defend the due impartiality of individual news programmes by relying on its service as a whole does not deprive a complainant of the ability to demonstrate a lack of due impartiality from the service as a whole. Again, this is a “both/and” provision. Due impartiality is required both in individual programmes (or series) and at the level of the service as a whole. The existence of one will not excuse the absence of the other. The presence of either will be a breach of the Code.
- v) It follows that when in s.320(4)(a) Parliament said that the Preservation Requirement “may” be satisfied by a relevant series of programmes taken as a whole, this was simply one part of the “both/and”. It was a description of a concession relating to individual programmes. The same is true when the same language appears at the end of s.320(6). That is all that is happening in the second sentence of Code rule 5.5.
- vi) The provision which Parliament made for non-BBC local radio services and undue prominence, in s.320(4)(b), is significant. Here, the drafter used the language of the Prevention Requirement being one that “needs to be satisfied only in relation to all the programmes included in the service in question, taken as a whole”. The drafter could, and if intended would, have said in s.320(4)(a) that the Preservation Requirement was one which “needs to be satisfied only in relation to a programme or a series of programmes taken as a whole”. Parliament did not use the language “needs to be satisfied only” in s.320(4)(a). Parliament used the open textured language of “may”, to describe one part of the “both/and”. There is a further point. What was being recognised (at s.320(4)(b)), in the context of undue prominence and (non-BBC) local radio services (s.320(1)(c)), was the relevance in principle, as well as the workability in practice, of looking at the service as a

whole. A standard for the “service” is applicable to the service as a whole; but for the Prevention Requirement it was only applicable to the service as a whole. The bigger picture, which suffices for local radio undue prominence, remains as part of the “both/and” for due impartiality.

- vii) There is no lack of clarity, no ambiguity, and no obscurity when the statutory provisions are read and applied straightforwardly. But even if there were ambiguity, the Explanatory Notes provide emphatic illumination. This is what they say (§677) about the Preservation Requirement, the emphasis added emphatically reflecting the “both/and” nature of the duty:

as regards every television programme service, teletext service, national radio service and national digital sound programme service, the service provider must preserve due impartiality about such matters. The relevant rules in OFCOM’s standards code must particularly take account of the need to preserve impartiality for major matters of political or industrial controversy or relating to current public policy. Fulfilment of this requirement need not necessarily be measured programme by programme, but on balance over all programmes included in the relevant service.

This is what the Explanatory Notes say about the Prevention Requirement:

as regards local radio services, local digital sound programme services, and radio licensable content services, the service provider must ensure that undue prominence is not given to any particular viewpoint about such matters. This need be satisfied only by considering the entire service, rather than programme by programme, or even series by series.

So, the Explanatory Notes spell out in terms that the measurement of fulfilment or non-fulfilment of the Preservation requirement is both/and: both one which is programme by programme; and also one “over all programmes included in the relevant service”.

- viii) Turning to the Code rules themselves, and even if consideration were only being given to the rules, the same analysis is clear and explicit. There is a trap to be avoided. The following provision is undoubtedly made: that due impartiality “may” be achieved within a programme or over a series of programmes taken as a whole (second sentence of rule 5.5) that alternative viewpoints must be adequately represented “either in the programme or in a series of programmes taken as a whole” (second sentence of rule 5.9); and that in the case of Major Prescribed Matters, due impartiality “must be preserved ... in each programme or in clearly linked and timely programmes” (rules 5.11 and 5.12). The trap is to read those provisions as though they are describing an exhaustive sufficiency across the service as a whole. They are doing no such thing. They are parts of a “both/and” requirement. They leave entirely untouched the general provision about due impartiality in news (rule 5.1) and the general provision about due impartiality in relation to relevant controversies or policies (first sentence of rule 5.5).
- ix) The Code rules at no stage say that they are referring only to an individual programme. Rule 5.1 is the Code rule applicable to due impartiality in news. It is not framed as a requirement of due impartiality in an individual news broadcast. It is framed as a requirement applicable to “news”. There is no restriction. There is no language of achievement within a programme or series of programmes.

Once it is recognised that rule 5.1 is not confined to an individual programme, Ofcom is unable to point to anything in the statute or the Code rules that confines the reach of rule 5.1. Given that rule 5.1 was one of the Code rules being relied on in the Claimant's complaints, and given that rule 5.1 is addressed in the Target Decision later in a legally erroneous way, the claim must succeed on the first issue on this basis alone.

- x) The same error of law arises in relation to rules 5.5 to 5.12 and due impartiality under the Preservation Rule, in relation to the Prescribed Matters. There are these key points. First, these are the Code rules about the preservation of due impartiality which apply to "services". Ofcom as the rule-maker rightly spelled that out under the heading above rule 5.5, where "services" is used four times.

(Rules 5.5 to 5.12 apply to television programme services, teletext services, national radio and national digital sound programme services, all BBC radio services and BBC ODPS.)

Secondly, the governing rule so far as the Preservation Requirement is concerned is found in the first sentence of rule 5.5. It emphasises the "service" and refers to services "listed above". It emphasises the preservation of due impartiality "on the part of any person providing a service". It is a rule expressed in entirely open terms, in relation to the service and the service provider.

Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service (listed above).

Thirdly, the second sentence of rule 5.5 follows. But it is distinct. The structure and language of the rule are not run together, in a single composite sentence, as they are in rules 5.11, 5.12 and (for the Prevention Requirement) rule 5.13. The second sentence of rule 5.5 does not cut down, or derogate, or restrict the general terms of the first sentence. It does not use the language of "need only be achieved". It uses the open language of "may". It is a specific provision which is part of the "both/and", where the general first sentence is the other part. It is about the need to achieve due impartiality in each individual programme, but it is giving the permitted alternative in that context of the relevant series of programmes. None of that is framed now to excuse the service provider from having to meet due impartiality across the service. The same is true of the language within rule 5.9. Fourthly, the further provisions in rules 5.11 and 5.12, which do spell out what "must be preserved" and "must be included and given due weight", solely by reference to each programme or in clearly linked and timely programmes, are expressly "in addition to the rules above" (rule 5.11). They are expressly "in addition" to the first sentence of rule 5.5; and for that matter to rule 5.1 for news presentation.

- xi) Three things follow from all of this. First, due impartiality is a standard applicable throughout a relevant service, as the responsibility of the service provider. Patterns are relevant. Cumulative doses within individualised tolerances are relevant. Visibility gaps are avoided (§13 above). Programmes are not simply viewed in isolation. Second, it remains a matter for Ofcom as the regulator to decide what matters warrant investigation and how investigations should be undertaken and complaints dealt with. There is considerable latitude at that level,

provided always that Ofcom acts reasonably. Third, since Ofcom already accepts that a complainant can make a complaint about a number of individual programmes, to be looked at side by side; the only difference is a modest but crucial one, that programmes and patterns and cumulative harm can be seen for what they are; rather than taking a blinkered view which looks at each programme in isolation.

- xii) Finally, there is a revealing dimension to Ofcom and the BBC's defence of this claim. Faced with the Claimant's arguments about a regulatory lacuna, because of the visibility gaps, this was the response. Ofcom emphasises that viewers with concerns about the BBC's output at an aggregate level, or about recurring themes and tendencies, or about overall systemic impartiality, have avenues of recourse. There are the responsibilities of the BBC Board and editor-in-chief, in relation to the BBC's first public purpose in its charter; to an impartiality and editorial standards action plan; to thematic reviews; to Ofcom's own role in setting the terms of the BBC's operating licence and the setting of BBC performance measures. These are said to show that concerns about a regulatory gap are ill-founded. The BBC similarly argues that it is manifestly not the case that there is some sort of regulatory lacuna. It emphasises these same considerations: impartiality under the BBC Charter; information gathering to assess performance of the BBC's mission; regulatory obligations under the BBC Framework Agreement; the setting of Editorial Standards; the setting of Editorial Guidelines overseen by an Editorial Guidelines and Standards Committee. The BBC's submission is that there is a robust framework of regulatory measures in place pursuant to which the BBC, Ofcom and ultimately Central Government assess compliance with the due impartiality obligation more generally. All of this really gives the game away. It recognises that due impartiality raises broader concerns, unanswered on a programme by programme or series by series basis. It also recognises that significant due impartiality concerns need to be, and can be, looked at by zooming out to see the true picture.

Those were the key submissions for the Claimant on the first issue.

Issue 1: Discussion

31. I have been unable to accept these submissions. On this first part of the case, I accept the submissions of Ms Boyd KC and Ms Simonsen for Ofcom and Mr Pobjoy for the BBC. In my judgment, the correct analysis in law is as follows:
32. Parliament unmistakably identified Ofcom as the rule-maker. The making and designing of Code rules was Ofcom's statutory duty. The due impartiality in news presentation identified by Parliament was a "standards objective"; so was the Preservation Requirement, regarding due impartiality and the Prescribed Matters. Parliament provided that it was for Ofcom to set such standards as appeared to it best calculated to secure these standards objectives (s.319(1)). Parliament included some express provision as to rules which Ofcom was duty-bound to include within the standards Code (s.320(5)). Parliament made clear that one such required rule was about determining what constitutes "a series of programmes" for the purposes of the s.320(4) (a) concession (satisfying due impartiality for the Preservation Requirement in relation to a series of programmes taken as a whole), which shows that this concession itself had to be within the rules. Parliament also required Ofcom to include within the Code

rules to be observed in connection with “the application” of the Preservation Requirement (s.320(5)(a)). But it was for Ofcom then to design those rules.

33. It is right that the Preservation Requirement was expressed by Parliament in s.320(1)(b) as one applicable in the case of every Code-regulated “service” – leaving aside non-BBC local radio services to which the Prevention Requirement applies – and that it was to be due impartiality on the part of the service provider (“on the part of the person providing the service”). It is also right that due impartiality in news presentation (s.319(2)(c)) is not defined by reference to an individual news broadcast or news programme. But these statutory features do not mandate a measurement by reference to the service viewed as a whole, rather than measured by reference to relevant programmes within the service. And Parliament itself framed Ofcom’s duty as being to set programme content standards, being (s.319(1)):

standards for the content of programmes to be included in television and radio services ...

Parliament also provided (s.319(4)(f)) that, in setting the Code standards, Ofcom was duty-bound to have regard in particular – and to such extent as appeared to it to be relevant in securing the standards objectives – to:

The desirability of maintaining the independence of editorial control over programme content.

I cannot accept that the statutory language or structure was mandating that the programme content standards must impose a due impartiality requirement which must be measurable by reference to the programmes in the service taken as a whole, as a necessary part of a “both/and” provision for due impartiality. I can see no provision having that meaning, purpose or effect. Parliament could, and in my judgment would, have spelled it out had such a mandate been intended.

34. What Parliament did spell out, in the context of the Preservation Requirement (s.320(1)(b)) was that the Code rules had to allow for the possibility of due impartiality being satisfied in relation to a series of programmes taken as a whole (s.320(4)(a)). That was not optional, because Parliament mandated that the rules had to specify how “series of programmes” was to be approached (s.320(5)(b)). The language “may be satisfied by being satisfied” looks at first sight clumsy. But in fact it is not. It makes sense viewed on a programme by programme basis. The starting point is that due impartiality needs to be satisfied for each programme. But for a programme which is within a relevant series, due impartiality is “satisfied” for that programme, “by being satisfied” in relation to the series of programmes. Of course, the individual programme could satisfy due impartiality standing alone. That explains the word “may”. It also explains why the drafter did not here say “needs to be satisfied only”. Programmes which are part of a relevant series have two ways to satisfy the Preservation Requirement. Mr Roe KC and Mr Riley do not quarrel with that. They say there is a “both/and” which Parliament has mandated. But in my judgment a mandatory “both/and” is absent from the statutory provisions.
35. Nor can the Explanatory Notes support a mandatory “both/and”. In my judgment, the natural explanation of the two final sentences of the paragraphs (§30vii above) is that they are describing the provision made by Parliament in s.320(4)(a) and (b). Here again is the key sentence from the Explanatory Notes, relied on by Mr Roe KC and Mr Riley:

Fulfilment of this requirement need not necessarily be measured programme by programme, but on balance over all programmes included in the relevant service.

This reads as a description of how a broadcaster complies (“fulfilment”), involving an alternative (“but”), all of which makes it read like a description of a concession (“fulfilment ... measured ... over all programmes”). It misstates s.320(4)(a) by omission, because it misses out “in a series”. It does not say “the entire service”, as the next paragraph of the Explanatory Notes does. If the statute had said what the Explanatory Notes says, TV-Novosti might have had its global defence. The statute does not say what the Explanatory Notes say. TV-Novosti did not have a global defence. I do not see what provision within s.320 involves an ambiguity which the Explanatory Notes then resolves. Finally, the word “necessarily” suggests it would ultimately be for Ofcom as the rule-maker to identify how the Preservation Requirement is measured. So, in the end, all roads lead to Code rule 5.5.

36. I am unable to see an identifiable statutory purpose mandating that due impartiality be measured by reference to all the programmes included in the service in question taken as a whole. That does not follow from the fact of express provision that a lesser standard – the Prevention Requirement relating to “due prominence” of view and opinions on Prescribed Matters “of particular persons or bodies” – is to be measured in that wider way (s.320(4)(b)). Nor do I accept that it would be “eccentric” for Code rules to fail to require due impartiality measured in that wider way, such that Parliament cannot have intended a Code whose rules (s.320(5)(a)) failed to provide such a global measure. Programme standards could be imposed and enforced which required – for each individual programme or relevant series of programmes – a standard of due impartiality. Individual programmes or relevant series could be viewed in context, alive to the fact that they are being viewed individually, and alive to the fact that whatever viewers or listeners are receiving could be repeated again and again, across the board, as a pattern and as an accumulation. I find nothing eccentric, in any direction. But what I find more surprising is the idea of a zoom-out picture which can be used against the broadcaster, to identify patterns or accumulations, while at the same time refusing to look at patterns or accumulations which would operate in favour of the broadcaster. The highest, in my judgment, that the Claimant is able to put it – based on the statutory scheme – is that Parliament was ultimately leaving it to Ofcom as the rule-making public authority to design the relevant Code rules on due impartiality, including as to whether there was or was not to be a global measure of due impartiality across the programmes in the service as a whole. That could be found within Ofcom’s Code “rules” on the “application” of the Prevention Requirement (s.320(5)(a)). That is the case on the statutory provisions, at its most generous to the Claimant. We turn to the Code rules.
37. When we read the rules, two things are conspicuous about them. First, that due impartiality starts with an individual programme. This can be seen in the Code definition of “due impartiality” at [D1].

“Due” is an important qualification to the concept of impartiality. Impartiality itself means not favouring one side over another. “Due” means adequate or appropriate to the subject and nature of the programme.

Second, that where there is to be measurement of compliance on a wider basis, the Rules spell out what that wider basis is. There is always clarity, when a wider focus is intended. Rule 5.5 does this in the second sentence and definition [D4]. Rule 5.9 does

this in the second sentence and definition [D4]. Rule 5.11 does this, referring to “clearly linked and timely programmes”. Rule 5.12 does this, referring to “clearly linked and timely programmes”. Then – in the context of the Prevention Requirement to reflect s.320(4)(b) – the wider basis is identified in Code definition [D8].

38. Reading the Code rules straightforwardly and as a whole, it is in my judgment implausible that a wider measure of due impartiality was being included for due impartiality in news presentation (rule 5.1) – beyond a news broadcast or programme viewed in its context – and without the rule-making making clear what that wider basis was. If news had a “both/and” wider measurement – such as programmes included in the service taken as a whole – then there would have been the use of an express definition like [D8]. There is none. That is rule 5.1 and news. I turn to the Preservation Requirement.
39. Rule 5.5 is clear. The first sentence of rule 5.5 states the Preservation Requirement. It does so by reference to “due impartiality”, which by definition [D1] “means adequate or appropriate to the subject and nature of the programme”. The rule-maker then spells out in the second sentence of rule 5.5 how “due impartiality” is to be “achieved”. The second sentence then flows from the first. It explains how the first works. There are two ways. There is due impartiality achieved within a programme. There is due impartiality achieved, not within a programme, but instead “over a series of programmes taken as a whole”. Where a programme is within a relevant series – defined in [D4] – there is an “either/or”. There is no “both/and”. And if there were a wider “and”, the reader is confident that the Code rules would have identified it, and would have explained what it was; just as the Code rules do for every other wider measure of compliance. And that includes a measure – the Prevention Requirement – concerned with programmes in a service taken as a whole (rule 5.13), which Parliament did not say had to be defined, but which the rule-maker has decided to define (at [D8]).
40. There is one other big clue. The Code rules make general provision for due impartiality in relation to Prescribed Matters (rules 5.5 to 5.10). There is then the specific provision – more exacting provision – for due impartiality in relation to Major Prescribed Matters (rules 5.11 and 5.12). The specific provision is that due impartiality “must be preserved ... in each programme or in clearly linked and timely programmes” (rule 5.11); but not by reference to any wider and undefined “both/and” measurement. The specific provision is that an “appropriately wide range of significant views must be included and given due weight” (rule 5.12), “in each programme or in clearly linked and timely programmes”; but again not by reference to any wider and undefined “both/and” measurement. It is implausible – reading the rules sensibly and as a whole – that the drafter of the Code rules would have limited the provision for due impartiality in relation to Major Prescribed Matters by excluding the wider “both/and” global measurement, if such a measurement were applicable to due impartiality in relation to Prescribed Matters. The answer is straightforward. There is no wider “both/and” global measurement applicable to due impartiality in relation to Prescribed Matters. There are the alternatives spelled out, expressly, in rule 5.5 and 5.9.
41. All of this can be put straightforwardly, in this Q&A:

Q. How does a broadcaster perform the duty of due impartiality in the presentation of news (rule 5.1)? A. By presenting the news with impartiality

adequate or appropriate to the subject and nature of the news programme viewed in context (see [D1]). Q. Is there an undefined wider measure? A. No.

Q. How does a broadcaster perform the duty of due impartiality in relation to Prescribed Matters (rule 5.5)? A. By impartiality adequate or appropriate to the subject and nature of the programme viewed in context, within the programme or over a series of editorially-linked programmes as defined (see rule 5.5 and [D4]).

Q. Is there an undefined wider measure? A. No.

42. That is the analysis. And for those reasons, I accept the submissions of Ofcom and the BBC. The universal due impartiality standards within the Code rules involve a measurement by reference to a programme, viewed in context; and in the case of the Preservation Requirement a single defined alternative; and in the case of the rules relating to Major Relevant Matters, further specific duties with a more focused defined alternative. I also agree that this promotes clarity and certainty. It promotes workability. It means achievability at the practical level of a person given editorial responsibility for a programme or linked series of programmes. This makes for a focused set of rules, in a context of editorial independence and freedom of expression, applicable to all Code-regulated broadcasters. It is then for Ofcom to identify the lawful, reasonable, fair and proportionate application of the defined standard of “due impartiality”, knowing that viewers and listeners may receive multiple programmes in which the same features may be repeated, and making appropriate evaluative merits judgments in that setting. All of which means that Ofcom as the rule-maker has identified a standard designed to strike the appropriate balance, where a complainant cannot use a global measure to rely on patterns or cumulative effects to demonstrate an absence of due impartiality across a service overall; but where a broadcaster equally cannot use a global measure to rely on patterns or cumulative effects to demonstrate the presence of due impartiality across a service overall.
43. That leaves points made by Ofcom and the BBC about any possible regulatory lacuna. At first sight, it was striking – in a case about universal due impartiality Code rules – to find points made, by anyone, about any special position of the BBC or any special arrangements applicable to the BBC. On examination, Ofcom and the BBC were making responsive points, in a context where the Claimant has made points about how impartiality is said to operate in the special case of the BBC, including by reference to the BBC Charter and Framework Agreement. I have emphasised that this case is about universal due impartiality rules applicable to all Code-regulated broadcasters. As to those universal due impartiality rules, Ofcom’s position is squarely that due impartiality on the part of the person providing the service overall is achieved – for the purposes of the statutory objective – if it is achieved on a programme-by-programme or series-by-series basis. That is an answer with which the BBC agrees. Wider points about the special position of the BBC, and special arrangements relating to the BBC, featured in the judicial review proceedings before Supperstone J. They have no real relevance, on either side of the argument, to the present case. This case begins and ends with the Code. The analysis would be the same if the Complaints concerned another Code-regulated broadcaster.
44. TV-Novosti was not concerned with whether a lack of due impartiality could be a breach, measured across the relevant service. I have in mind that the Court of Appeal was speaking in the context of a broadcaster defending an individual programme when

it said (at §40) that “there is no express legislative or Code requirement that Ofcom consider other unlinked ... programming”; and (at §44) that “the thrust of the Code is that due impartiality must be met by each programme or by a linked set of programmes”. Nothing in TV-Novosti supports a wider measurement of due impartiality, as to its absence or its presence, for the purposes of the Code rules.

Issue 2: Setting the Scene

45. In the light of my conclusions on the first issue, this claim for judicial review cannot succeed. The Target Decision said that Ofcom had, in any event, gone on to apply the Filtering Test, on the premise that “contrary to the above” the Claimant’s avowedly big picture complaint did “fall within Ofcom’s remit”. I am asked to consider the reasonableness of the Target Decision, on that same premise, assuming that I had decided the first issue in the Claimant’s favour.
46. That alternative-premise approach was a challenging exercise for the decision-maker at Ofcom to conduct. After all, Ofcom’s position as a regulator was that its Code rules and Guidance Notes expressly focus on individual programmes (or relevant series) viewed on their individual merits. That mind-set is not easy to shake off. The decision-maker had to posit the regulator having a responsibility which extended to finding breaches of rule 5.1 or 5.5, by looking at the programmes within the service as a whole. Questions of appropriateness and proportionality also had to be considered on that alternative basis, suspending Ofcom’s regulatory disbelief as to its legitimacy. The Target Decision soon faltered in the suspension of this disbelief. It gave this as an initial reason: the complaints failed the Filtering Test (potentially substantive issues “under the Code”) because the Code rules required due impartiality to be achieved in each individual programme or series of programmes; the rules did not apply at the level of the service as a whole. That was adopting the very analysis (“as set out above”) which was supposedly being supposed to be wrong (“contrary to the above”). There is force in Mr Roe KC and Mr Riley’s submission that this misstep – which Ms Boyd KC and Ms Simonsen did not defend – vitiated the decision, involving “mixed reasons”. The answer, in my judgment, is that the Target Decision went on to give three further reasons, prefaced by the phrase “further and in any event”; which should be taken at face value. The reasonableness of the decision would turn on the three paragraphs of further reasons to see whether they satisfy public law standards of reasonableness. They must be approached on the basis that I have got the law wrong so far, and Ofcom can look for breach of due impartiality at the level of the programmes within the service as a whole.
47. I start with the law. The test for “unreasonableness” (as irrationality is “more accurately described”) involves two aspects: (a) whether the decision is outside the range of reasonable decisions open to the decision-maker; and (b) whether there is a demonstrable flaw in the reasoning which led to the decision (R (Law Society) v Lord Chancellor [2018] EWHC 2094 (Admin) [2019] 1 WLR 1649 at §98). Mr Roe KC and Mr Riley rely squarely on aspect (b). They invoke Sedley J’s insight in R v Parliamentary Commissioner for Administration, ex p Balchin [1998] 1 PLR 1 at 13 about “a decision which does not add up”, because there is “an error of reasoning which robs the decision of logic”. As to the intensity of review, I was not persuaded that anything in this case supports deviation from a standard intensity. The candidates were the importance of issue 1 (from Mr Roe KC and Mr Riley); the Article 10 freedom of expression context from a broadcaster’s perspective (from Mr Pobjoy); or special

latitude afforded to prosecutors and law enforcers (from Ms Boyd KC and Ms Simonsen). I therefore conducted the quest for a Balchin error without the presence or absence of heightened rigour or heightened benevolence. But, in the event, no such adjustment could have affected my conclusions.

48. I return to the facts, having previously given some background (§12 above). Many points are made in the Claimant's three complaints. Mr Roe KC and Mr Riley ensured that I had a good appreciation of the general nature and flavour. There are points about the prominence given to EU issues within the BBC's news and other broadcasts, viewed in terms of airtime and place in the sequence of news. There are points about speakers: their point of view (broadly identifying pro-EU and anti-EU); their profile (eg. politician, celebrity etc); and their air-time (minutes and words). There are points about presenters and interviewers: about exploration (eg. into positives and negatives); and about language (eg. Brexit as a "divorce"). There are points about visual signs; about satirists; and about celebration. The Claimant's first complaint (7.7.20) was an analysis with conclusions based on 20 years of coverage from 1999. "Exhibit A" was the 38-page News-Watch briefing note about coverage 1999-2020. The research focus was 6,000 hours and 8,000 transcripts (4 million words) 1999-2015; then 7,900 hours of programme content across all of the BBC's radio and television channels in 2016; then 12 further surveys spanning 415 hours of output since the 2016 referendum, including three elections (to December 2019). There was, for example, a survey of a morning radio programme in October/November 2017, and again in September/October 2018; a lunchtime radio series in February 2018; a day of radio coverage in March 2018; and a lunchtime radio series ("Brexit: A Love Story?") between March and September 2018. The second complaint (19.10.20) was a further analysis based on a 96-page News-Watch report about Brexit coverage in July 2020. This was 8 days of coverage drawn from three TV channels and a radio channel, taking 10 flagship programmes, taking 2 hours 41 minutes of content from 45 hours overall. The third complaint (10.2.21) was a 5-page letter about BBC coverage at the end of 2020 and beginning of 2021, giving "examples". The letter included points such as: choice of interviewees, language used by news correspondents, approach to advantages and disadvantages, including consequences of Brexit, and confusing consequences of Covid and Brexit; four examples of "satirical attacks"; and a point about public perception.
49. The following letters are of relevance. First, there was Ofcom's decision letter of 11 February 2019, rejecting the narrowed joint complaint by reference to the Filtering Test, supported by an 8-page Complaint Assessment. This is available in the public domain in the Ofcom Broadcast and On Demand Bulletin (issue 372, 11.2.19 pp.23-30). This addressed the three most recent News-Watch surveys, and the 75 hours of R4 programmes between 9 October 2017 and 29 March 2018. Ofcom explained that it had assessed an extensive amount of associated content. Having done so, Ofcom "identified a number of relevant contextual factors", which it explained, including nature and content of the programmes assessed, the way content was signalled, and variation in format, content and presentation. Ofcom explained that the public debate had developed from discussion of a binary question to more complex and nuanced discussion with many different viewpoints. Second, there were the letters of 1 and 18 April 2018 by the BBC's Executive Complaints Unit rejecting the second joint complaint ("Brexit: A Love Story?"), in which detailed points were made about the nature and content of the series of programme, including points about editorial techniques to ensure that opposing views are fairly represented. That included a reasoned explanation why the

writer did not believe that News-Watch’s manner of counting contributions offered an effective means of assessing due impartiality of a programme. Third, there are the BBC’s letters of 17 June 2021 and 3 September 2021 in relation to the Claimant’s three complaints. The first of these (17.6.21) addressed the examples in the Claimant’s 5-page letter (10.2.21), explaining why the BBC was confident that its coverage was reflective of different views and offered detailed analysis of the changes entailed in the UK’s departure from the EU; explaining the approach to comedy and satire, including audience expectations as to content, style and tone. The second (3.9.21) responded to the general complaints, explaining why the writer shared the view that the manner of counting contributions did not offer an effective means of assessing due impartiality; had the clear impression that the analysis employed did not take into account a consideration of the context in which contributors took part in the broadcasts; considered that the previous binary position had to a large extent been superseded by more nuanced points not apparently reflected in the analysis. Fourthly, there was Ofcom’s letter of 18 January 2022, containing three paragraphs headed “how we regulate due impartiality”, emphasising: broadcaster editorial autonomy; what due impartiality means and does not mean; that there is no single way to achieve it; and the range of editorial techniques available.

50. Here are the three paragraphs of further reasons from the Target Decision:

[1] Further and in any event, the first of your client’s three complaints relates to the BBC’s output over a twenty-year period, most of which pre-dates Ofcom’s regulation of the BBC. We cannot investigate or address alleged breaches that occurred before Ofcom became the BBC’s external regulator in March 2017.

[2] The scope of the Complaint is huge, alleging as it does a systemic lack of due impartiality. We do not consider that it is warranted or proportionate or otherwise appropriate for Ofcom to seek to address the complaint by ‘sampling’ some of the content referred to in the way we have on some previous occasions. This is because: (i) the scope of the Complaint is such that any meaningful sample would be disproportionately costly of Ofcom’s time and resources; (ii) sampling at a proportionate level would not answer a complaint about systemic bias; (iii) a similar complaint, alleging systematic anti-Brexit bias by the BBC on the basis of similar methodology, was assessed and rejected by the Ofcom in 2019, for reasons set out in its Broadcast and On Demand Bulletin, Issue 372. We consider that the present complaint is sufficiently similar that broadcasters will not be assisted by further guidance on its application of the due impartiality standards in this context; and (iv), as regards the gravity of the matter (see Procedures, paragraph 1.30), we note that the debate about Brexit is now historical.

[3] Moreover, we consider that the BBC reached an appropriate decision on the matter. In particular, we endorse the BBC’s conclusion that quantitative analysis of the pro- and anti-EU contributions made across the BBC’s services, divorced from analysis of the context and the nature of the programming in question, is not on its own capable of establishing a breach of the due impartiality requirements. Our letter of 18 January 2022 explained how we regulate due impartiality. We do not repeat that explanation here.

Issue 2: The Claimant’s Case

51. Mr Roe KC and Mr Riley say there is a demonstrable flaw in the reasoning, in that the decision does not add up because of an error of reasoning which robs the decision of logic. This, in essence as I saw it, is their case as to why that is so:

- i) Reason [1] makes a good point, but it only relates to “the first” of the “three complaints”, and only part of that complaint. The rest of the first complaint, and all of the second and third complaints, were severable. Reason [1] cannot in logic

be a reason why the complaints do not satisfy the Filtering Test. It can be put to one side.

- ii) Reason [2] does not add up. The scope is huge, and systemic, because that is what fits – on the necessary hypothesis as to issue 1 – with the proper scope of the Code rules. Proportionality cannot be a backdoor route to repeating the points about scope which are supposedly being put to one side. The decision-maker proceeds immediately to points about “sampling”. But why? This completely misses the duty to address the complaints (post March 2017) as they stand, as a whole. If sampling would not “answer” a “systemic” complaint, that is because the complaint needs to be addressed as to its substance. No reason is given for not doing so. There is a clear gap in the logic.
- iii) The other points within reason [2] do not assist. Sampling at a proportionate level could answer points about patterns and aggregation. It – or at least a form of auditing – could test the methodology and the reliability of the descriptions in the analysis. The 2019 decision was considering a materially different set of programmes, when Ofcom was fixated on programme-by-programme approach. It proves that the detailed content of the programmes could be assessed, and at the Filtering Test stage. It is in any event a question primarily of breach, not “guidance”. And the “debate” is not “historical”, there being a clear gap in this thinking given the ongoing political prominence of the idea of rejoining.
- iv) Reason [3] does not make the decision add up. It simply adopts and endorses a BBC decision which was itself demonstrably cursory. It repeats over-simplistic and unfair points about the News-Watch analysis as solely “quantitative”, as based on unnuanced “pro- and anti-EU contributions”, and as missing “nature and context”. None of this is a fair or sustainable characterisation of the detailed, rigorous and sophisticated analysis.

Issue 2: Discussion

52. I have not been persuaded by these submissions. I remind myself of three things. First, the public law ideas of “demonstrable flaw in the reasoning”, by reason of a decision that does not “add up” because of “an error of reasoning which robs the decision of logic”, is not a platform for skilfully presented merits disagreements. Secondly, this is not a case where it is said a decision that the complaints fail the Filtering Test is an outcome outside the range of reasonable decisions open to the decision-maker. Thirdly, this is not a case where it is said that that reasons are unclear, where there is any genuine doubt about what the decision-maker has decided and why. In my judgment, remembering these three things, there is no difficulty in following the “logic” of the reasons; and there is no “demonstrable flaw” or “error of reasoning”. In my judgment:

- i) It was logical to start with the temporal reach of the complaints. The post-March 2017 focus for a Code-based complaint about the BBC is a matter of public record. It was carefully explained to the Claimant and his co-complainants in Ofcom’s letter dated 25 June 2018. That had led in July 2018 to a narrowed complaint (75 hours of R4 programmes between 9 October 2017 and 29 March 2018). Now, the Claimant’s first complaint chose to revert to an analysis of 20 years from 1999, with thematic conclusions put forward from that body of material as a whole. That temporal reach was a valid and logical concern. It is not

a logical gap in the reasoning that the decision-maker did not proceed to spell out what could be left from the first complaint. Reason [1] said “most of” the “first” complaint, and gave the date (March 2017). It was logical to start with what could not properly be considered. It could not raise potentially substantive issues worthy of Code investigation.

- ii) It was logical then to address how the remaining claim of “systematic” lack of due impartiality was to be investigated. It included the 75 hours of R4 programmes between 9 October 2017 and 29 March 2018, addressed in Ofcom’s 11 February 2019 8-page Complaint Assessment, and much more. It was logical to think about “sampling”, viewed both ways. Would a meaningful sample be proportionate? Would a proportionate sample be meaningful? Answers were given. This was logically linked to the practical experience of the work done when the 75 hours of R4 programmes (October 2017 to March 2018) “was assessed” in Ofcom’s February 2019 Complaint Assessment. The decision-maker has neither overlooked, nor left unanswered, the wider idea of Ofcom assessing for itself the entirety of the post-March 2017 programming referenced.
 - iii) It was logical, in that context, to think about what was being put forward; what had gone before; and wider reasons which strengthen the case for investigation, points including the prospect of deriving new useful guidance for broadcasters and the gravity of the matter. There was Ofcom’s February 2019 Complaint Assessment (Bulletin issue 372). There were the key points of substance from the BBC-First decision (3.9.21); and the points about regulating due impartiality from Ofcom’s decision (18.1.22). Mr Roe KC was able to assist me with whether nuanced viewpoints featured in a non-binary method (answer, no); or in an adjusted-binary method (answer, yes). The decision-maker’s points about “quantitative” (counting) as a dominant method carry no obscurity. These and the point about a method which does not include “relevant contextual factors” seen from looking at the “content” are all referable to points made in February 2019. All of that material was well known to the Claimant and his representatives. Answers were given.
53. I have been left unable to accept that there is some demonstrable flaw in the reasoning, such that the decision does not add up because of an error of reasoning which robs the decision of logic. Ofcom has given clear and logical reasons why, even if the Code rules on due impartiality can be breached by reference to all the programmes in the service as a whole, these complaints did not in all the circumstances pass the Filtering Test. That was its decision to take. The decision was lawful, being reasonable in public law terms. That is the sole question for me to answer. By way of end-note, I add that Mr Roe KC and Mr Riley at one point asserted that “the service” would include different channels on TV and radio. I detected no substantiation for that assertion, which was squarely challenged and undefended on reply, but nothing in this case turns on that point.

Answers

54. Here are my answers to the parties’ agreed issues:

(1). Are OFCOM and the BBC correct that complaints about lack of due impartiality on television and national radio that are not directed at an individual programme or an editorially

linked series of programmes (such as the complaints made by Mr Keighley in this case) are outside the scope of OFCOM's enforcement jurisdiction under the Broadcasting Code because under the Code the relevant requirement of due impartiality applies only at the level of the individual programme or editorially linked series of programmes. Answer: YES.

Or is Mr Keighley correct that the Code contains no requirement that compliance with the obligation of due impartiality be measured only programme by programme or series by series, and that such complaints fall within the scope of OFCOM's enforcement jurisdiction under the Code? Answer: NO.

(2). If the answer to issue (1) were that Mr Keighley is correct, did OFCOM's decision of 23 March 2022 (taken on that assumption but without prejudice to OFCOM's contrary view) comply with common law standards of reasonableness? Answer: YES.

Conclusion

55. For the reasons I have given, I will dismiss the claim for judicial review. Having circulated this judgment in draft, I can deal here with consequential matters, on the helpful written submissions of all parties. In light of the terms of this judgment, the parties are agreed that the claim is to be dismissed, with an order that the Claimant pay Ofcom's costs on the standards basis, to be the subject of detailed assessment if not agreed. That leaves two contested consequential matters.
56. As to the Interested Party's contested application for costs, the Court does not generally order an unsuccessful claimant to pay two sets of costs (see Administrative Court Judicial Review Guide 2024 §25.6.1). In this case, as a matter of judgment and my discretion, I have concluded that a second costs order is justified and appropriate in all the circumstances of the present case. Mr Roe KC and Mr Riley now emphasise that the logic of the claim has rightly been identified as one solely relating to rules applicable universally (§16 above). But the claim brought and put forward included points about how impartiality is said to operate in the special case of the BBC, including by reference to the BBC Charter and Framework Agreement, which is what brought in the distinct and responsive points (§43 above). Further, the claim – at its heart – alleged a systemic lack of due impartiality by the BBC. It also involved impugning a BBC decision as demonstrably cursory (§51iv above). It was, in my judgment, inevitable that the BBC would participate. The BBC instructed junior Counsel. Its interests were distinct. So were the points it made, in writing and orally. These were not, as has been suggested, “simply duplicative”. I cannot accept the characterisation of this as a claim brought in the “public interest”; nor that a fact-specific second costs order in this case will introduce new deterrence for public-spirited individuals challenging unlawful public authority decisions; nor that a costs order should cover part only of the BBC's costs.
57. I am going to refuse the Claimant's contested application for permission to appeal. In relation to issue 1, the proposed ground of appeal maintains the suggested clear answer from the 2003 Act (§30ii above), but having analysed that and the other arguments in detail, I am not able to see any realistic prospect of success on appeal; nor any other reason for granting permission. The same is true of the suggested ground of appeal (reflecting §51i, iii and iv above) on issue 2, which moreover could only arise if the Claimant had a viable appeal on issue 1 (§45 above).