**FREE SPEECH UNION & ORS v OFFICE OF COMMUNICATIONS**

**Summary and outcome**

England’s High Court of Justice rejected a judicial review claim contesting the legality of the UK’s communications regulator’s guidance on reporting coronavirus (COVID-19) disinformation. The Free Speech Union and its general secretary argued that the communications regulator had prohibited any discussion which challenges public policy, public health advice, mainstream source of information or otherwise reduces trust in government bodies, by labelling them as “harmful”. The Court stated that, whilst the threshold of arguability was relatively low, there was no realistic prospect of a court granting a claim for judicial review when arguments based around what constitutes “harm” failed to consider the wider context of the COVID-19 pandemic. The Court further reasoned that the regulator had not failed its obligations to protect freedom of expression under Article 10 of the European Convention Human Rights or under domestic law, but rather, supported the legitimate need of broadcasters to challenge, discuss and consider public policy in a democratic society – particularly during a serious public health crisis.

**Facts**

On 24 April 2020, English journalist and general secretary of free speech campaign group the Free Speech Union, Toby Young, wrote to the Office of Communications (Ofcom) (the Defendant) to raise issue with its reprimand of television presenter Eamonn Holmes.

On 13 April 2020, Holmes [made comments](https://www.bbc.co.uk/news/entertainment-arts-52270736) during a popular morning show segment on the ITV television channel to the effect that the widely debunked theories of 5G causing coronavirus should not be “immediately [slapped] down” by the mainstream media just because “it suits the state narrative.” Following 755 viewer complaints about the broadcast of the alleged link between 5G and coronavirus, the Defendant investigated the case under its duties per section two of the [Ofcom Broadcasting Code](https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/section-two-harm-offence) to protect the public from harmful and/or offensive material in programmes. Having [critically assessed](https://www.ofcom.org.uk/__data/assets/pdf_file/0021/194403/assessment-decision-this-morning-itv-13-apr-2020.pdf) his co-host’s strong rejection of the 5G theory earlier in the program, the segment’s accompanying caption of “Coronavirus: Spotting Fake News”, and Holmes’ later comments rejecting the theory, Defendant fell short of imposing any sanctions on ITV and its presenters. Instead, it [issued guidance](https://www.ofcom.org.uk/about-ofcom/latest/features-and-news/david-icke-and-eamonn-holmes-decision) stating that Holmes’ comments were “ill-judged and risked undermining viewers’ trust in advice from public authorities and scientific evidence”, and warned that the broadcaster had a responsibility to ensure that its viewers were sufficiently protected from “unproven claims and theories” during a serious public health crisis, given the significant risk of harm. While emphasising that ITV and its presenters still had “editorial freedom to discuss and challenge the approach taken by public authorities” during the coronavirus, the Defendant stipulated that any broadcasted discussions of such unproven theories and claims during a national health crisis must provide its audience with “adequate protection”, such as further context or significant challenge.

In [his letter to Ofcom](https://freespeechunion.org/letter-to-ofcom-following-its-decision-to-sanction-itv-and-london-live/), Young raised concerns that Defendant’s guidance notes warning against the broadcasting of views which undermine trust in public authorities during the coronavirus pandemic could be extended to any general challenge to the government’s official line. Further, Young argued that the best way to minimise any harm to the public during the pandemic was to encourage the discussion of all advice, so informed decisions can be made as to which information to trust and which to reject. As such, Young believed that Defendant had curtailed the right to free speech through its decision to stifle the expression of dissenting views – particularly views which “dissent from the official orthodoxy” during the coronavirus pandemic – “without strong and compelling reasons for concluding that such expression will cause harm”. Thus, he argued the Defendant was in violation of Article 10 of the European Convention of Human Rights.

In his letter, Young requested that the Defendant withdraw its warning to ITV and Holmes, and issue a public statement confirming its commitment to freedom of expression during the pandemic.

Following the Defendant’s refusal and a subsequent follow-up letter, Young and the Free Speech Union (the Claimants) asked the High Court of Justice for permission to apply for a Judicial Review of the Defendant’s two Guidance Notes issued to broadcasters. The second Guidance Note to which the Claimants refer is the [Defendant’s Code Guidance Notes](https://www.ofcom.org.uk/__data/assets/pdf_file/0023/104657/Section-2-Guidance-Notes.pdf) on Section 2 of the Standards Code, issued 18 July 2017.

Permission was initially refused on the papers by Justice May on 20 October 2020, and the Claimants were ordered to pay the Defendant’s costs. The Claimants appealed this decision, accompanied by a costs capping order application. The application reached the High Court of Justice, Queen’s Bench Division, within the Royal Courts of Justice.

**Decision Overview**

On 9 December 2020, Justice Fordham delivered the judgment for the Court. The main issue for the Court was whether broadcast materials that materially question public policy, undermine the advice of public health bodies or mainstream sources of information, or reduce trust in government or public institutions could be considered “harmful” to the public, and thus be regulated by the Claimants.

*The Claimants’ arguments*

The Claimants argued that the Defendant should not be entitled to regulate broadcast material which solely questions public policy, undermines the advice of public health bodies or mainstream sources of information, or reduces trust in government or public institutions – including enforcing their Code, providing Guidance Notes or taking any action against a broadcaster (para 8). This is because such material should not be defined as “harmful” per the [Communications Act 2003](https://www.legislation.gov.uk/ukpga/2003/21/contents) (the Act), which provides the duties under which the Defendant can set standards for broadcasted content in order to protect the public.

As such, the Claimants argued that the Defendant lacked the power to censor any discussion or speech contradicting “the official narrative” purely because “that such speech is feared to undermine trust in public authorities and the policies that they have adopted” (para 9). The inference was made that even a curious mind could thus be in breach of the Defendant’s Guidance Notes – which could have “extremely far-reaching and chilling” impacts (para 9).

In submitting that the Defendant’s “narrow” definition of “harmful” is one with “no limits” and includes “speculative” harm (para 7), the Claimants relied on the following arguments:

* That the Act empowered the Defendant to protect the public from “offensive and harmful material” per section 3(2)(e), and that the two should only be considered together;
* That the Defendant’s Standards Code has a section on “violence, dangerous behaviour and suicide” content which it stated was “harmful”, and as such, those specific examples constituted an exhaustive definition of “harmful” under that Code;
* That section 368E of the Act regulating on-demand services referred to pornography, child abuse and terrorism under a section entitled “harmful material”, as such, assists in the interpretation of the term elsewhere in the Act;
* That section 329 of the Act, which regulates “unacceptable” foreign broadcast services, and listed categories of “unacceptable” content. [EU Directive 2018/1808](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808&from=EN) compels EU member states to ensure viewer protections are in place, including acting when there is “a serious and grave risk of prejudice to public health” (para 17). Reading these two together should provide an aid to interpreting the meaning of “harmful” under the Defendant’s Code; and
* That the Defendant has gone outside its powers in issuing these Guidance Notes because it has no regulatory function to consider the accuracy nor the misleading nature of such services in the context of them being “harmful” as they had been classed into separate standards under section 319 of the Act.

The Claimants also relied on Article 10 of the European Convention of Human Rights and the Human Rights Act 1998, and argued that a wider interpretation of the Act is consistent with the Defendant’s obligations to assure freedom of expression, both in terms of broadcasting and receiving information. However, the Claimants were quick to emphasise that they were not advocating for a “‘free for all’ of untrammelled and unprotected broadcasting of content” (para 18), but rather, argued it should be up to each broadcaster to decide its own broadcasting content.

Given the nature of the proceedings, the Defendant was not yet required to provide a defence before the Court.

*Legal basis*

The Court must decide as a threshold whether it grants permission to the claimants to allow their claim to proceed to judicial review (as a safeguard against public authorities defending inarguable claims). The Court must be satisfied a claim is properly arguable – meaning “there is a realistic prospect of the claim succeeding” (para 4) – alongside any other procedural bars to judicial review (such as lack of standing or a clear alternative remedy), per section 31 of the Senior Courts Act 1981.

When reviewing the claim, the Court must consider its grounds for judicial review.

In particular, the Court had to consider the interpretation of television and radio services that are “harmful”, within the context of the Defendant providing “adequate protection to members of the public” per section 3(2)(e) and 319(2)(f) of the Act.

Secondly, the Court had to consider the validity of the argument of a breach of freedom of expression obligations under Article 10 of the European Convention of Human Rights and domestic law more generally. It would need to consider whether the Defendant’s interference with the right to freedom of expression was prescribed by law, even if in the legitimate aim of protecting the rights of others, and whether that interference was necessary in a democratic society.

***Courts finding and reasoning***

The Court reasoned that the Defendant did not choose to regulate broadcast material through its relevant Guidance Notes *only* because the material questioned public policy, undermined the advice of public health bodies or mainstream sources of information, or reduced trust in government and/or public institutions.

The Court stipulated that Ofcom can “properly regulate as harmful broadcast material of this kind depending on the context and ‘nexus’ and implications,” so long as it exercises judgment (para 13). Here, the Defendant did not eschew the importance of freedom of expression in broadcasting those kinds of material, but rather, correctly recognised the contextual link to coronavirus and harm.

*Non-exhaustive definition of “harmful”*

The Court rejected the notion that the Defendant had exhaustively defined the term “harmful” by referring to the term in its section on “violence, dangerous behaviour and suicide”. Justice Fordham reasoned that this definition would be unworkably narrow, and that obviously harmful content such as encouraging viewers to drink bleach to cure coronavirus would fall foul of it. As such, public health and health protection “plainly” fell within the Defendant’s Broadcasting Code. The Court also found it “impossible” that a section in the Act referring to pornography, child abuse and terrorism as “harmful” could aid any real interpretation of the term, given it was not constructed as a definition of the term, let alone for the purposes of the Defendant’s Standards Code. Similarly, EU Directive 2018/1808 and section 329 of the Act never purported to define the term “harmful”, particularly in reference to the Defendant’s Code. Indeed, Justice Fordham stipulated that the idea of these sources providing any support for the Claimants “is not even arguable” (para 17). Further, the Court dispelled any notion of separating the categories of “harmful” and “materially misleading”, and rather noted their scope for overlap in factual programming (para 15).

*The Defendant’s Guidance Notes*

The Court then turned its mind to the content of the Defendant’s Guidance Notes. Firstly, Justice Fordham stipulated that the Notes were clearly focussed on broadcasting issues about the coronavirus itself, and were not about challenging public policy, public health bodies, mainstream source of information or government/public institutions. Indeed, it referred to multiple sentences that made it clear it was only concerned with factual statements, unverified information, health claims and inaccurate content about the coronavirus. It also noted that the 27 March Guidance Note’s was titled “Ofcom’s approach to enforcing content on the coronavirus” (para 21). Given that context, Ofcom’s guidance to “take particular care” and to implement appropriate safeguards when broadcasting “potentially harmful content” to their audience could be seen in a different lens (para 22).

*‘London Live’*

Justice Fordham then cited the Defendant’s previous determination in a similar case known as ‘London Live’, whereby commentator David Icke stated in an 80-minute interview that public health initiatives taken by domestic governments and international health bodies “were designed to serve the malevolent ends of a clandestine cult” (para 23). In its determination, Ofcom noted that no other scientific or other evidence was provided during the interview, and Icke remained unchallenged, which could thus cause “significant harm at a time when … the public’s compliance with [public health initiatives such as social distancing] … is a key step to restricting the spread of the disease” (para 23). The Court took this as a helpful example of the kinds of harm the Defendant intended to cover in its Guidance Note - namely broadcast content that questions public policy, undermines advice of public health bodies, mainstream sources of information or reduce trusts in government or public institutions, and which has a ‘nexus’ to harm in the context of the coronavirus.

As such, the Court held there was no valid argument that the Defendant had acted ultra vires in issuing these Guidance Notes, nor that it had violated Article 10 of the Contention, given the context and nexus to harm is clear within them, and given the “contextual way in which it is communicated, applied and understood” (para 25).

*Censorship*

Justice Fordham also rejected any arguments of censorship stemming from any alleged undermining of the public’s rights to challenge the official narrative, mainstream advice or sources of information. Significantly, he pointed to the advice within the Defendant’s Guidance Notes that broadcasters are “strongly advise[d]… to take particular care” when broadcasting those kinds of materials (para 26). This clearly infers that broadcasters can indeed broadcast “potentially” inaccurate or harmful comments about the coronavirus so long as sufficient safeguards are in place (such as strong challenges and context). Additionally, the Court pointed to the Defendant’s commentary in its’ ‘London Live’ decision, which explicitly states that “there is no prohibition on broadcasting views which diverge from or challenge official authorities on public health information” (para 26). Further, the Defendant had openly stated in its determination that any such questioning or challenging of “contentious viewpoints” would be “legitimate… to robustly hold the Government to account… [given] an unprecedented restriction on public freedoms in peacetime … and reflecting on the fundamental importance of freedom of expression in our democratic society” (para 27). However, as above, it emphasised that if it chooses to broadcast content of that nature, that the broadcaster has a responsibility to ensure it protects it audience from potential harm by “challenging those views and placing them in context” (para 26).

When taking into account this wider context and reading the Guidance Notes as a whole, Justice Fordham found it would be “quite impossible and beyond reasonable argument” for the Claimants to argue that the Defendant would label broadcast material whose “only fault” is to question public policy, undermine advice of public health bodies, mainstream sources of information or reduce trust in Government or public institutions as “harmful” (para 28). Similarly, the Defendant’s interpretation of “harmful” content could not be seen as “speculative” or unlimited (para 28).

*The Special Rapporteur – Freedom of Expression*

Finally, Justice Fordham drew attention to a Report dated 23 April 2020 of the Special Rapporteur of the United Nations General Assembly Human Rights Council, which concerned “Disease pandemics and the freedom of opinion and expression”, and was placed by the Claimants before the Court. Rather than aiding any argument that the Defendant had acted ultra vires or contrary to its duties under Article 10 of the Convention, Justice Fordham stipulated that the Report actually supported the Defendant’s actions. In their report, the Special Rapporteur encouraged an approach to curb misinformation that should be “rooted in legal frameworks that promote the sharing of information” through “public correction of rumours and the calling out of harmful chicanery … that avoids driving such misinformation into places where conspiracy theories defeat rigorous scientific assessments and public health warnings” (para 29). Indeed, upon comparison, the Court found that the Guidance Notes repeated the same advice. In the context of the coronavirus, freedom of expression and public health warnings, and under the “appropriate legal framework”, the Defendant’s guidance was “clearly” concerned with identifying and challenging misinformation while still promoting discussion (para 30). Consequently, Justice Fordham found it was “beyond argument” that the Defendant was “legitimately and squarely” within its statutory remit and compatible with its freedom of expression obligations under the Convention and domestic law (para 30).

The Court held that there was no properly arguable basis for any of the Claimants’ grounds for judicial review per their application and as a consequence, that there was no realistic prospect of the Court impugning the Defendant’s Code or Guidance Notes if the case reached judicial review or otherwise grant any of the declarations sought by the Claimants. Stipulating that the Claimants had mischaracterised and misinterpreted the Guidance Notes, Justice Fordham labelled their arguments “untenable” (para 32) and dismissed their application. The costs order was varied, however, to reflect the need for the Claimants to properly reimburse the Defendant for its cost.

**Decision Direction**

Some critics may interpret this decision as somewhat censoring the press or otherwise impinging on their freedom of expression, by the Court favouring guidelines regulating the content they can and cannot broadcast. There has certainly been a [concerning uptick](https://ipi.media/rush-to-pass-fake-news-laws-during-covid-19-intensifying-global-media-freedom-challenges/) in countries such as Brazil, Vietnam, Russia and Hungary, to pass ill-defined 'fake news' legislation in an attempt to curb the 'infodemic' that is coronavirus misinformation. Human rights groups including [Article-19](https://www.article19.org/coronavirus-impacts-on-freedom-of-expression/) and [Amnesty International](https://www.amnesty.org/en/latest/news/2020/05/in-a-post-covid19-world-fake-news-laws-a-new-blow-to-freedom-of-expression-in-algeria-and-morocco-western-sahara/) have been right to construe these moves as excuses to silence and repress government critics and challenging views, by imposing censoring obligations on the media (including social media), and thus impeding on the right to freedom of expression.

However, Justice Fordham's decision does not follow in these footsteps. Indeed, it is likely that this Court decision may actually expand the right freedom of expression in the long run.  What is clear from Justice Fordham's analysis of Ofcom's broadcasting guidance is that expressing information and ideas that challenge or steer from official authorities and mainstream information on the coronavirus pandemic is not in itself problematic. This is the crucial factor here - there is no evidence in neither the Court's reasoning nor the regulator's guidance that either body has an issue with a broadcaster airing statements that undermine the advice of public bodies, government public policy or mainstream sources of information. Instead, as Justice Fordham points out, Ofcom literally stipulates that such freedom of expression is "vital" in a public health emergency (para 27).

Rather than stifling any misleading information or theories about the pandemic that may be harmful to the public, and silencing those who may voice them, both the Court and Ofcom strongly encourage continuing the conversation. That is to say, this decision advocates pairing these broadcasted views with challenges  and context so as not to suppress an idea, but to contextualise it. Indeed, accompanying this information with tools such as scientific evidence, questions, statistics and public health warnings only encourages the unhindered flow of expression in a democratic society. It is this approach to address the problem of public misinformation that promotes the sharing of information, as endorsed by the Special Rapporteur.

London live: <https://www.theguardian.com/media/2020/apr/20/tv-stations-interview-with-david-icke-posed-threat-to-public-health>

<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54>