Neutral Citation Number: [2020] EWHC 3390 (Admin)

Case No: CO/2264/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9th December 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

FREE SPEECH UNION **TOBY YOUNG**	**Claimants**
- and -	
OFFICE OF COMMUNICATIONS (OFCOM)	**Defendant**

- -
- -

Bruno Quintavalle for the **Claimants**
David Glen for the **Respondent**

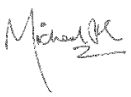
Hearing date: 9.12.20

Judgment as delivered in open court at the hearing

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

Introduction

1. This is an application for permission for judicial review. Permission was refused on the papers by May J on 20 October 2020. She also ordered the Claimants to pay the Defendant (Ofcom)'s costs of £16,732. Also before me are an application for a costs capping order, if permission is granted; and a challenge to that costs order if permission is refused.

Mode of hearing

2. The mode of hearing was a remote hearing by Microsoft Teams. Counsel on both sides confirmed that that mode of hearing did not prejudice the interests of their clients and I agree with them. So far as concerns open justice, I am quite satisfied that the open justice principle has been secured. The case and its start time were published in the cause list. An email address was given that could be used by anyone – any member of the press or public – who wished to observe this public hearing. The hearing has been recorded and this ruling in an approved form will be available in the public domain. By having a remote hearing we eliminated any risk to any person – associated with the parties, the press or a member of the public – from having to travel to or be present in the court room. I am satisfied that this mode of hearing was appropriate and proportionate, and that it was not necessary to have a hearing physically in court.

The claim

3. The claim for judicial review seeks to impugn as its targets two Guidance Notes issued by Ofcom to broadcasters in March 2020. The first was dated 23 March 2020 and the second was a letter dated 27 March 2020. The challenge to the two Guidance Notes is to be seen in context alongside, in particular, the Communications Act 2003, Ofcom's Standards Code issued pursuant to section 319 of that Act, section 2 (harm and offence); and Ofcom's Code Guidance Notes on Section 2 of the Code issued on 18 July 2017. Mr Quintavalle submits, and I will come on to this, that there are other sources that are also of particular relevance. The challenge needs also to be seen alongside the actions and decisions which Ofcom has taken subsequent to the March 2020 Guidance Notes. In his submissions today Mr Quintavalle characterised those decisions, which are documented and publicly available and which had been placed before the Court, as being "illustrative" of the legal problems that he submits arise out of the Guidance. The claim for judicial review asks the Court at a substantive hearing ultimately to give remedies by way of declarations.

The permission stage

4. It is appropriate to explain at this juncture the function of the Court at the stage of permission for judicial review. Permission for judicial review is a threshold stage and it is designed as a safeguard to protect public authorities from having to defend claims which the Courts are satisfied are not properly arguable. Properly arguable means that there is a realistic prospect of the claim succeeding. The requirement for permission for judicial review, recognised by Parliament (in section 31 of the Senior Courts Act 1981), requires a Court at the permission stage to examine whether the claim is properly arguable, as well as whether there is any procedural bar such as delay or lack of standing

or an alternative remedy. It is in the public interest, as well as the interests of justice, that cases which the Court is satisfied are not properly arguable should not proceed. The threshold of arguability is a relatively low one. But it nevertheless serves as an important safeguard and needs to be grappled with. The function of today's hearing has been to grapple with it, as May J did in considering this case on the papers. The Claimants have exercised the right that they have under the rules to ask another judge to look at arguability and to do so having heard oral submissions at a public hearing as well as having read the documents filed by the parties.

The essence of the claim

5. The central proposition that lies at the heart of the claim for judicial review, in my judgment, in essence really comes to this. The Claimants submit that "broadcast material which (i) questions public policy or (ii) could undermine the advice of public health bodies or (iii) could undermine mainstream sources of information and/or (iv) which therefore could reduce trust in government or public institutions" cannot in law be "harmful" material. That means that those things cannot in law be material from whose inclusion Ofcom is entitled to secure adequate protection for the public.

6. Mr Quintavalle puts at the heart of the challenge what he says is a narrow question of law in the interpretation of the 2003 Act. As he put it in his submissions it is only material of the kind which I have just described whose "only fault" is to do one or more of those things – (i) questioning public policy, (ii) undermining advice of public health bodies, (iii) undermining mainstream sources of information or (iv) reducing trust in government or public institutions – that falls outside Ofcom's remit.

7. On Mr Quintavalle's submission Ofcom has approached the concept of "harmful" as one having "no limits" and one which includes where the harm is "speculative".

8. On the premise that the Claimants are right that the broadcast material of the types (i) to (iv) which I have described – at least where its "only fault" is characterised in one of those ways – the consequence that then follows, on the Claimants' argument, is that Ofcom is not entitled to regulate that sort of broadcast material in, under, or by reference to the Code. Ofcom is not entitled to give Guidance Notes or enforce the Code or take action against or in relation to a broadcaster in such a situation. And Ofcom is not entitled to require of broadcasters "protections" where broadcast material of that nature is being communicated.

Reference points in the grounds for judicial review

9. The idea that the claim is concerned with material whose "only fault" is (i) to question public policy or (ii) undermine advice of public health bodies or (iii) undermine mainstream sources of information or (iv) reduce trust in government or public institutions is something that links to what is said by the Claimants in their grounds for judicial review. The way that it is there put is:

> "Ofcom has no power to censor speech which contradicts the official narrative solely on the grounds that such speech is feared to undermine trust in public authorities and the policies that they have adopted".

Elsewhere in the grounds for judicial review the Claimants say this of Ofcom's application of its Guidance Notes:

> "The clear inference is that any discussion contrary to the official narrative is likely to be a breach of the coronavirus guidance. A mere 'enquiring mind' could suffice to be in breach of Ofcom's policy as contained in the [Guidance] Note".

The Claimants submit that the power that Ofcom in this case has arrogated to itself to regulate the broadcast media in relation to material that questions or reduces trust in government or public institutions or public health bodies or public policy or mainstream sources of information has extremely far-reaching and chilling implications.

Freedom of expression

10. Alongside the argument about "harmful material" under the 2003 Act, the Claimants also rely on freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights scheduled to the Human Rights Act 1998. The "narrow" interpretation of the 2003 Act which they urge is, they submit, consonant with, supported by and reinforced by the invocation of freedom of expression. They emphasise freedom of expression both in terms of imparting information through the broadcast media and the right to receive information.

'Nexus' to protection of the public

11. Under questions at this hearing from the Court, Mr Quintavalle accepted that broadcast material of one of the types which I have described – and, I repeat, which (i) questions public policy or (ii) could undermine advice of public health bodies or (iii) could undermine mainstream sources of information or (iv) reduces trust in government or public institutions – could constitute "harmful" content against which Ofcom would then be entitled to secure adequate protection.

    i) The example which Mr Quintavalle gave is broadcast content which related to a suggested link between Covid-19 and 5G. He submitted that content – which did one or other of the four things I have described – and which told people that they had 'no need to isolate' could, in those circumstances, be said to encourage harm including harm to health which would therefore fall, in principle, within the word "harmful" for the purposes of Ofcom's powers.

    ii) A second example discussed at this hearing was the example of broadcast material – which did one of the four things that I have listed – in the context of communicating a message about people drinking bleach (or another household cleaning product) as a response to 'protect them' in the context of Covid-19. Mr Quintavalle made clear that he accepted that, if and insofar as there is a nexus with harm and public harm, Ofcom would in that example be entitled to concern itself with securing that protections are put in place by broadcasters.

12. I am quite sure that Mr Quintavalle was right to recognise that material of the four kinds which the Claimants describe, in context and having a sufficient 'nexus' to protection of the public in relation to public health, would fall within the statutory meaning of "harmful". Mr Quintavalle gave as his benchmark of 'nexus', as to where the line is to

be drawn, the question of whether the broadcast material – which is (i) questioning public policy or (ii) undermining advice of public health bodies or (iii) undermining mainstream sources of information or (iv) reducing trust in government or public institutions – could involve 'direct risk of harm to the viewer'. He gave as an example the 'inciting' of what he called 'objectively harmful behaviour'. He gave as an example 'inaction exposing the viewer directly to harm'.

The main difficulty

13. The main difficulty with this legal challenge, in my judgment, is that Ofcom has not begun to purport to regulate through its Guidance Notes broadcast material "solely" because it (i) questions public policy or (ii) could undermine the advice of public health bodies or (iii) could undermine mainstream sources of information or (iv) reduce trust in government or public institutions. As I will come on to explain, Ofcom has recognised in its Guidance Notes and in the application of those Guidance Notes the contextual link to Covid-19 and harm. In my judgment, once it is recognised, as Mr Quintavalle – in my judgment rightly – does, that Ofcom can properly regulate as harmful broadcast material of this kind depending on context and 'nexus' and implications, it follows that there is a judgment to be exercised by the regulator in the way in which such regulation is approached. The Claimants are quite right, in my judgment, to emphasise the importance of freedom of expression both to communicate views and to receive them. But, in my judgment, it is quite impossible for the Claimants successfully to submit that Ofcom has lost sight of those important considerations in promulgating and in applying these Guidance Notes.

The 'sources' relied on

14. I will turn to the important context within which these arguments arise later in this judgment. But it is important first to grapple with the legal arguments that Mr Quintavalle has advanced, in particular at the hearing today. The starting point as I see it – although it did not feature in the first three 'sources' that were relied on today - concerns some points which were made by Mr Quintavalle towards the end of his oral submissions, about the provisions with which this case is concerned.

    i) "Harmful" is the word that features in the 2003 Act in section 3(2)(e). That provision of the primary legislation requires Ofcom in acting to "further the interests of citizens" to secure in the case of the broadcast media standards that "provide adequate protection to members of the public from the inclusion of offensive and harmful material". There is Parliament identifying as the relevant scope of Ofcom's regulatory activity the concept of "harmful" material, alongside "offensive" material.

    ii) I mention here that Parliament in section 3(4)(g) has spelled out that Ofcom is required to have regard in performing its duties to a number of considerations, as appear to it to be relevant in the circumstances, including "the need to secure … the application … of standards … in the manner that best guarantees an appropriate level of freedom of expression". The 2003 Act, in any event, has to be read alongside the Human Rights Act 1998 and Ofcom's duties to secure that Convention right protected by Article 10 (freedom of expression) is not breached.

iii) Next, Ofcom's Standards Code is required by section 319 of the 2003 Act. Section 319(2)(f) identifies as a "standards objective": "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".

iv) The starting point for the Claimant's argument that Ofcom has exceeded its powers (acting 'ultra vires') in my judgment lies in the submission that Parliament has made specific provision relating to the "accuracy" of "news" (section 319(2)(d)); and Parliament has made specific provision in relation to "misleading" content of "advertising" (section 319(2)(h)), in which context "misleading" is placed alongside the word "harmful". The Claimants submit that it is significant that Ofcom has not been given a regulatory function which concerns the "accuracy" of broadcast content; nor whether broadcast content is "misleading". They submit – as it is put in the Claimants' skeleton argument for today's hearing – that these are all concepts ("accuracy", "misleading", "harmful") which are "separate and non-interchangeable". Mr Quintavalle today called them "very separate". The argument about Ofcom's 'vires' then proceeds on the basis that Parliament cannot have intended Ofcom to regard as "harmful" material which does one of the four things I have described ((i) to (iv)), at least where that is all that it does.

15. Mr Quintavalle sought to rely on three 'sources' in support of what he submits is the 'narrowness' of "harmful" in section 3 and section 319. First, he relied on Ofcom's own Standards Code and the section on "violence, dangerous behaviour and suicide". His submission was that those three specific matters can be taken reliably as characterising the nature of "harmful" in the Code itself. I cannot accept that submission is even arguable. The Code is not describing those three specific matters as exhaustive of what is "harmful". Indeed, if that were the position Mr Quintavalle's own given and accepted examples (5G and bleach) would fall foul of it. Public health and health protection, in my judgment, plainly falls within Ofcom's own Broadcasting Code. It is, moreover, the case that Ofcom's Code recognises that "factual" programming or "portrayals of factual matters" must not "materially mislead" the audience. Mr Quintavalle disavows any challenge to the legality of the Code. But once that point is recognised it follows that these are not "separate" or "very separate" categories, but rather that there is scope for overlap between "harmful" and "materially misleading".

16. The second source to which I was taken today was a different provision of the same 2003 Act: section 368E, introduced in 2009 and amended in 2014. This regulates "on-demand programme services". Mr Quintavalle showed me the focus on "hate speech" (as he called it) and various provisions relating to classification or the equivalents of classification certificates, as well as material that might "seriously impair the physical mental or moral development of persons under the age of 18". He told me – though they were not in the papers – that there have been added to these the following: provisions concerning pornography; terrorism; and child abuse. His point was that since these matters appear in a section in the Act which is headed "harmful material" they can be taken to be an aid to construction when interpreting "harmful" elsewhere in the Act. In my judgment, that is an impossible contention. This is clearly a provision having a distinct function. It does not even purport to be a definition of "harmful", still less a definition for the purposes of Ofcom's Code under section 319. Moreover, were this

argument correct, its logic would necessarily mean that the Code was unlawful, which Mr Quintavalle disavows. And it would mean that his own examples (5G and bleach) are legally incorrect.

17. The third source to which Mr Quintavalle took me at today's hearing was section 329 of the 2003 Act: "proscription orders". That is a provision of the 2003 Act which involves the regulation of "unacceptable" foreign television and radio services. It is a provision which sets out categories of content that can be "unacceptable" as being "objectionable": if it "offends against taste or decency"; or "is likely to encourage or to incite the commission of crime"; or "is likely to lead to disorder"; or "is likely to be offensive to public feeling". Mr Quintavalle then took me to the EU Directive 2018/1808 and Articles 6 and 6a which oblige EU member states to ensure that such protections are in place. He also showed me Article 3(2), which empowers a state – on his submission – to act in the case of "a serious and grave risk of prejudice to public health". His submission was that because section 329 has included the mandatory Article 6 and Article 6a proscription bases, that provides as an aid to interpretation a reliable indication of the meaning of "harmful" for the purposes of the statutory provisions concerned with Ofcom's regulation of broadcasting content and in particular its Code. That suffers, in my judgment, from exactly the same series of difficulties. This is not a provision which even purports to define "harmful", still less for the purposes of the relevant part of the Act; it has a distinct function and shape; it would again have the consequences that I have identified so far as the Code is concerned (which the Claimants disavow impugning) and Mr Quintavalle's own examples of what the logic of his contentions would permit. There was an even more odd consequence, so far as this submission goes. Mr Quintavalle submitted that, had the United Kingdom at any time chosen to introduce the discretionary Article 3(2) "serious and grave risk of prejudice to public health" into section 329 that would then change the meaning of "harmful" for other purposes elsewhere in the statute. Here again, in my judgment, it is not even arguable that these sources provide support for the contention advanced. Finally, in relation to this source, Mr Quintavalle emphasised Article 4a which prescribes, in that context of proscription orders, a need for clarity and not vagueness in regulation. Remembering that one of the fundamental preconditions for Article 10 where freedom of expression is engaged is that intervention be "prescribed by law", in my judgment, it is highly unlikely that Mr Quintavalle would need to resort through so indirect means to a standard for clarity. One of the features of the present case is that what Ofcom has done through its Guidance Notes is to give specific guidance in the context of the pandemic.

18. Mr Quintavalle emphasised that, alongside his narrow interpretation, or series of narrow interpretations, of "harmful" in the 2003 Act did not go the consequence that broadcasters would be engaging in a 'free for all' of untrammelled and unprotected broadcasting of content. The Claimants' position, rather, is that it is or must be for the autonomy of the individual broadcaster to make decisions about what to broadcast and what if any counterbalancing safeguards to broadcast and it is not a matter which is appropriately within the function of Ofcom as the statutory regulator.

19. Those, then, were the 'sources' that were relied on at the hearing together with the other points arising out of the statutory scheme.

<u>Focusing on what Ofcom has done</u>

20. In my judgment the main difficulty with the challenge lies in the way in which it necessarily characterises what it is that Ofcom has done. As I said at the outset of this judgment Mr Quintavalle characterises as beyond Ofcom's remit broadcast material – which (i) questions public policy or (ii) could undermine the advice of public health bodies or (iii) could undermine mainstream sources of information or (iv) reduces trust in government or public institutions – where that is its "only fault". He submits that Ofcom is approaching "harmful" on a basis which has "no limits" and is "speculative". It is very important in this case, in my judgment, to focus with care on what it is that Ofcom has actually done.

Covid-19

21. The first key point is that the two Guidance Notes are not Guidance Notes which are about 'challenging public policy' or 'challenging public health bodies' or 'challenging mainstream sources of information' or 'challenging government or public institutions'. The Guidance Notes concern the coronavirus. The point, in my judgment, is well made in the summary grounds of resistance of Ofcom which says this (underlining in the original):

> "The focus of the Guidance is on issues which may arise where licensees were considering broadcasting claims which contradicted or undermined advice which… official sources considered appropriate to issue to the public about the disease itself."

22. The second Guidance Note dated 27 March 2020 has as a main heading (underlining in quotations hereafter is my emphasis added):

> "Ofcom's approach to enforcing content on the Coronavirus".

It then says this:

> "Ofcom is prioritising cases relating to the Coronavirus which raise the risk of potential harm to audiences. This could include, for example:
>
> - inaccurate or materially misleading content in programmes about the virus or public policy on it;
> - health claims about the virus which may encourage the audience to respond in a way that would be harmful to themselves and others; and
> - medical or other advice which may be harmful if followed, or discourages the audience from following official rules and guidance"

The Guidance goes on to speak of reminding broadcasters:

> "… of the significant potential harm that can be caused by inaccurate or misleading material about the Coronavirus."

It talks about the particular need for "factual statements about Coronavirus to be presented with appropriate care". It speaks of "particular care" in relation to "unverified information about the Coronavirus"; and in relation to "statements that seek to question or undermine the advice of public health bodies on the Coronavirus or otherwise

undermine people's trust in the advice of mainstream sources of information about the disease". In that context it is also important to recognise that what Ofcom is saying, having identified the advice to "take particular care", is found in the next sentence: "this kind of content can be broadcast with appropriate protections… broadcasters should take great care to ensure they provide adequate protection to their audience if this kind of potentially harmful content is broadcast in a programme".

An "illustration"

23. A good "illustration" – to use Mr Quintavalle's characterisation of Ofcom's determinations – is to be found in the example of the adjudication (published on 20 April 2020) in the case of "London Live". That was a case in which there had been an 80 minute interview with a commentator. In its adjudicatory determination, Ofcom said of the commentator (Mr Icke) that he had:

> "… alleged that the steps being taken by the UK Government, other national governments and international health bodies such as the [World Health Organisation] were designed to serve the malevolent ends of a clandestine cult wishing to 'transform the world economic order into this technocratic [Artificial Intelligence] controlled tyranny" rather than to curb the spread of the coronavirus."

Ofcom continued:

> "We were therefore concerned that David Icke's statements, which were provided without scientific or other evidence, had the potential to undermine confidence in the motives of public authorities for introducing restrictions and therefore discourage viewers from following current official rules around social distancing. This was because David Icke proposed that the public were being misled and the measures were being introduced to further the ambitions of a cult seeking to introduce a new economic and social order rather than to combat the spread of the coronavirus. In Ofcom's view, this had the potential to cause significant harm at a time when health care systems around the world are fighting to contain the deadly impact of the Coronavirus and the scientific consensus is that social distancing, and the public's compliance with it, is a key step to restricting the spread of the disease".

24. I agree with Mr Quintavalle's characterisation of the determinations as "illustrations". This is an excellent "illustration" of what the Guidance Note is concerned to identify, in the context of what is "harmful", and when one considers broadcast material which – in the context of Covid-19 – (i) questions public policy or (ii) could undermine advice of public health bodies or (iii) could undermine mainstream sources of information or (iv) could reduce trust in government or public institutions". In my judgment, this is an "illustration" which shows that the Guidance which Ofcom has promulgated and is implementing is not addressing communications whose "only fault" is that they are 'challenging the official narrative', but rather Ofcom is regulating in a way which – in my judgment beyond any reasonable argument – is open to Ofcom, communications through broadcast content of that kind which have a 'nexus' to harm.

25. In my judgment, beyond argument, Ofcom is acting within its 'vires' and compatibly with Article 10 when it regulates in that context. Ofcom is not required to exclude from

its remit conduct (i) which questions public policy or (ii) could undermine advice of public health bodies or (iii) could undermine mainstream sources of information or (iv) could reduce trust in government or public institutions. The context and the 'nexus' lie on the face of the Guidance; and in the contextual way in which it is communicated, applied and understood.

Censorship

26. So far as concerns the Claimants' portrayal of "censorship" (which I identified when considering the reference points in the grounds for judicial review) of the criticism of public policy or advice of public health bodies or mainstream sources of information, the next important point to emphasise is that the Guidance Notes do not purport to prohibit such criticism. Rather, what is stated is that broadcasters are "strongly advise[d] … to take particular care", when broadcasting "unverified information about the Coronavirus" and "statements that seek to question or undermine the advice of public health bodies on the Coronavirus, or otherwise undermine people's trust in the advice of mainstream sources of information about the disease". The Guidance then, as I have explained, clearly states that this kind of content "can be broadcast", but "with appropriate protections", and it advises broadcasters that they need to be ready to provide "sufficiently strong challenge and context in the event of programme contributors making potentially inaccurate or harmful comments about the Coronavirus". The message is this. If it is unverified information about the virus or if it is questioning public health bodies' advice or mainstream sources of information and advice about the virus: you can proceed but you should proceed with care, and be ready to secure appropriate 'protection' through challenge and context in the case of 'potentially' inaccurate or harmful comments. This methodology itself reflects the approach in Ofcom's own Code Guidance Notes on Section 2 of the Code, which addresses the concept of "potential harm" and articulates the need for appropriate and adequate "protection". I repeat: the Claimants do not impugn either the Code or the Code Guidance Notes. Again, a practical "illustration" to understand the point can be taken from the London Live example. That was a case where Ofcom concluded that an 80 minute platform "largely unchallenged" led it to a conclusion that there had been a breach of the Code. But Ofcom's determination concluded with a paragraph which begins as follows:

> "Ofcom stresses that there is no prohibition on broadcasting views which diverge from or challenge official authorities on public health information".

The passage goes on to explain that it was the responsibility of the broadcaster to ensure adequate protection from potential harm by, for example, challenging those views and placing them in context.

Other examples

27. There are other similar examples in the published determinations which are illustrative of the approach taken under and to the Guidance Notes. In the London Live adjudication Ofcom began the reasoned decision section of its adjudicative determination with paragraphs which included the following:

> "We acknowledge that during the Coronavirus pandemic, Ofcom licensees will want to broadcast content about the crisis and that the communication of

> accurate and up-to-date information to audiences will be essential. However, broadcasters should be alert to the potential for significant harm to audiences related to the Coronavirus which could include: harmful health claims; harmful medical advice; and misleading statements about the virus or public policy on it."

The passage then continues with this:

> "We recognised that this broadcast took place during a period in which the Government's lockdown policy to encourage social distancing in response to the Coronavirus crisis has led to an unprecedented restriction on public freedoms in peacetime. In such circumstances, and reflecting the fundamental importance of freedom of expression in our democratic society, it is clearly legitimate for broadcasters to question public policy and the rationale behind it and to robustly hold the Government to account, but in doing so they must ensure compliance with the Code."

The determination goes on:

> "The Code enables broadcasters to include challenging or contentious viewpoints in programmes, as in this case. However, they must ensure they provide adequate protection for the audience from the inclusion of potentially harmful material."

Later on, Ofcom said this:

> "Ofcom emphasises that it is vital that broadcasters are free to hold those making public health and economic decisions to account, particularly during a public health emergency such as the Coronavirus pandemic. We acknowledge, for example, that many programmes have questioned the effectiveness and raised concerns about the consequences of the Government strategy to deal with the pandemic".

In another determination in the context of ITV (published on 20 April 2020) Ofcom said under the heading "Guidance":

> "At a time of serious public health crisis, and reflecting the fundamental importance of freedom of expression in our democratic society, it is clearly legitimate for broadcasters to analyse, discuss and challenge the approach being taken by public authorities."

28. In my judgment, when one takes the content of the Guidance and reads it as a whole, but also when one considers the illustrative examples of the way in which it is applied, it is quite impossible – and beyond reasonable argument – to characterise Ofcom as having depicted as "harmful material" broadcast material whose "only fault" is (i) to question public policy or (ii) undermine advice of public health bodies or (iii) undermine mainstream sources of information or (iv) reduce trust in Government or public institutions. In my judgment, beyond argument, it is also impossible to characterise Ofcom's guidance as treating "harmful" content as being something with "no limits" or which is "speculative".

The Special Rapporteur

29. I turn now to the Special Rapporteur, something which I asked Mr Quintavalle about. Placed before the court by the Claimants was the Report dated 23 April 2020 of the Special Rapporteur of the United Nations General Assembly Human Rights Council on "Disease pandemics and the freedom of opinion and expression", a Report "on the promotion and protection of the right to freedom of opinion and expression" (A/HRC/44/49). Within that Report, is the Special Rapporteur's recognition that:

> "… particularly in the face of a global pandemic, the free flow of information, unhindered by threats and intimidation and penalties, protect life and health and enables and promotes critical social, economic, political and other policy discussions and decision-making."

Importantly, the Report goes on in the very next sentence to say that it:

> "… urges an approach to address the problem of misinformation that fosters public correction of rumours and the calling out of harmful chicanery and that avoids driving such misinformation into places where conspiracy theories defeat rigorous scientific assessments and public health warnings – one rooted in legal frameworks that promote the sharing of reliable information."

30. In my judgment, that observation can be placed alongside Ofcom's Guidance Notes. Ofcom's guidance, in the context of the Covid-19 global pandemic, and freedom of expression, and in the context of public health warnings, and under the appropriate legal framework, while promoting discussion can, in my judgment, clearly properly be said to be concerned with addressing and calling out misinformation. In my judgment, beyond argument, that was legitimately and squarely within Ofcom's vires and squarely compatible with Article 10 freedom of expression under the Human Rights Act and at common law.

31. Later in the same Report the Special Rapporteur says this:

> "Any government efforts to counter… disinformation should be based on the principles outlined above: full, honest and evolving communication with the public, the promotion and protection of an independent press, and the careful and public correction of misinformation that could lead to public health harm".

The report goes on to speak of ensuring:

> "… that measures to combat disinformation [are] necessary, proportionate and subject to regular oversight, including by Parliament and national human rights institutions. Measures to combat disinformation must never prevent journalists and media actors from carrying out their work or lead to content being unduly blocked on the Internet"

The Report goes on to speak of the need to avoid vagueness and ambiguity in regulation. As I have already explained, one of the virtues of Guidance Notes is that they promote clarity on the part of the regulator within an area with which the regulator is legitimately concerned.

Conclusion

32. Mr Quintavalle in his submissions today focused in particular on his 'vires' point and submitted that the Article 10 freedom of expression argument really was supportive or went with the grain of the principal vires argument. I have considered independently the question whether there is any properly arguable basis by reference to Article 10 to impugn the Guidance Notes of Ofcom on the basis that there is no sustainable vires challenge to them. In my judgment, whether the freedom of expression argument is viewed as part of the vires submission or whether it is considered as a freestanding ground of challenge, there is no realistic prospect of this Court concluding that the Guidance Notes can be impugned on judicial review. There is, in my judgment, no realistic prospect that the Court at a substantive hearing would grant this claim for judicial review. There is, in my judgment, no realistic prospect that on this challenge the Court in allowing the claim would grant the declarations that were sought on the judicial review claim form. I have considered this matter 'afresh', in the light of what has been filed and the arguments submitted in writing in a skeleton argument and orally today by Mr Quintavalle. I have not undertaken a 'review' function in relation to May J's refusal of permission for judicial review on the papers. I have however arrived at the same conclusion as May J. In my judgment, this claim is not properly arguable and in the end is premised on a misinterpretation and mischaracterisation of Ofcom's Guidance Notes, alongside a number of what, in my judgment, are untenable arguments in relation to the statutory scheme and the application of Article 10.

Costs

33. Finally, on the question of costs I decided to vary the costs order of May J. She ordered the Claimants to pay £16,732 to Ofcom but with liberty to object, as the Claimants have done at this hearing. The Claimants rightly recognise that they cannot properly contest paying Ofcom's costs of the Acknowledgement of Service and Summary Grounds of Resistance. Ofcom, for its part, also rightly recognises that – for whatever reason – what in its summary grounds was characterised as being "the costs of preparing its acknowledgement of service" in fact, as clarified in a later letter, was a claimed sum in respect of costs which extended further and indeed earlier. The parties sensibly recognise that an appropriate way to deal with that is for me to order, as I do that: "the Claimants shall pay the Defendant's costs of preparing the AOS and Summary Grounds with liberty to apply (promptly) in writing on notice to me to assess those costs if not agreed".

9.12.20