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FREE SPEECH UNION

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3rd June 2020

For the attention of:

1. Dame Melanie Dawes, Chief Executive: chiefexecutive@ofcom.org.uk
2. Kevin Bakhurst, Group Director: Kevin.Bakhurst@ofcom.org.uk

By email and by post

Dear Mr Bakhurst,

Ofcom guidance

This letter is a letter before claim sent pursuant to the Pre-action Protocol for Judicial Review under the Civil Procedure Rules.

1. Proposed claim for judicial review to

The Office of Communications (“Ofcom”)

2. The Claimant

The Free Speech Union Limited (the “Union”)

85 Great Portland Street

London

W1W 7LT

toby@freespeechunion.org

For the attention of: Toby Young

3. The Defendant’s reference details

For the attention of: Kevin Bakhurst

4. The details of the Claimants’ legal advisers, if any, dealing with this claim

Solicitors: None

Counsel: Mr Paul Diamond, Halcyon Chambers

5. The details of the matter being challenged

The guidance issued by Ofcom in its note headed “Ofcom Broadcast and On Demand Bulletin – Note to Broadcasters” dated 23rd March 2020 concerning SARS-CoV-2 (“**Coronavirus**”) and in particular the wording below (the “**Guidance**”) in the section headed “Broadcast content relating to the Coronavirus”.

“... we remind all broadcasters of the significant potential harm that can be caused by material relating to the Coronavirus. This could include:

...

- Accuracy or material misleadingness in programmes in relation to the virus or public policy regarding it.

We will be prioritising our enforcement of broadcast standards in relation to the above issues. In these cases, it may be necessary for Ofcom to act quickly to determine the outcome in a proportionate and transparent manner, and broadcasters should be prepared to engage with Ofcom on short timescales.

Ofcom will consider any breach arising from harmful Coronavirus-related programming to be potentially serious and will consider taking appropriate regulatory action, which could include the imposition of a statutory sanction.”

6. The details of any Interested Parties

ITV plc

ESTV Limited

7. The issue

The Guidance is *ultra vires* section 319 of the Communications Act 2003 (the “**2003 Act**”).

In issuing the Guidance, Ofcom has acted contrary to section 6 of the Human Rights Act 1998 (the “**HRA**”).

The Guidance must be understood by reference to two subsequent adjudications made by Ofcom.

- a. In an adjudication issued on 13th April 2020, Ofcom considered the following words stated by that presenter, Eamonn Holmes, on the ITV *This Morning* programme

“The only thing I would say, I totally agree with everything you are saying but what I don’t accept is mainstream media immediately slapping that down as not true when they do not know it’s not true. No-one should attack or damage or do anything like that. But it is very easy to say it is not true because it suits the state narrative. That’s all I would say as someone with an enquiring mind.”

Ofcom held that:

“We considered that [Mr Holmes’] statement had the potential to cause harm because it could have undermined people’s trust in the views being expressed by the authorities on the Coronavirus and the advice of mainstream sources of public health information.”

- b. In a further adjudication also issued on 13th April 2020, Ofcom held that an interview on ESTV with Mr David Icke

“While we acknowledged that David Icke has a right to hold these views and to express them, given the current circumstances, they had the potential to cause significant harm to viewers who may have been particularly vulnerable at the time of broadcast.”

In light of these adjudications, the Guidance is to be interpreted (and would be so interpreted) as meaning that the imparting of views on any broadcast medium on public policy relating to Coronavirus which contradict or question any Government policy – or suggesting that such views should be imparted – constitutes “harmful material” from which the public should be protected within the meaning of section 319(2)(f) of the 2003 Act and should be prohibited.

Accordingly, the Guidance is *ultra vires* section 319 in that the imparting of views on a matter of public policy cannot constitute “harmful material” for the purposes of this section. Ofcom have adduced no evidence whatsoever which shows that the imparting of such views causes any harm to individuals or the public in general.

Moreover, Ofcom constitutes a public authority for the purposes of section 6 of the HRA and accordingly must act compatibly with the European Convention on Human Rights (the “**Convention**”). Pursuant to Article 10 of the Convention, to the extent that the Guidance constitutes an interference with freedom of expression, Ofcom acted lawfully in issuing it if and only if:

- a. the interference was prescribed by law;
- b. it had a legitimate aim; and
- c. it was necessary in a democratic society

I will address each of these in turn.

Prescribed by law

The application of the Guidance is arbitrary. As Lord Sumption explained in *Re Gallagher*¹ for a measure to be prescribed by law:

“[it] must not therefore confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself. Nor should it be couched in terms so vague or so general as to produce substantially the same effect in practice.”

During the Coronavirus crisis there has been broadcast a great deal of material which has called into question the policy of the Government. The position of the proposed Claimant is of course that the material is wholly proper and to be welcomed. Indeed, I believe that it may be fairly said that there was insufficient critique within the media of the developing Government policy response to Coronavirus, much of which now appears to be highly questionable.

However, on the rationale of this Guidance, all of this material could be said equally to have undermined the public’s trust in the official view. As far as I am aware, Ofcom have significantly neither investigated nor sanctioned this material. Moreover, Ofcom have offered no rationale or explanation as to how it would determine between material which has been broadcast which may undermine trust in the official view which is (a) nonetheless justified and (b) unjustified.

Accordingly, the Guidance, to the extent that it constituted a restriction on the imparting of views relating to Coronavirus, was not prescribed by law.

Legitimate aim

To the extent that the Guidance constituted a restriction on the imparting of views relating to Coronavirus, it pursued no legitimate aim. The only conceivable legitimate aims under Article 10 would be the “the protection of health or morals” or “the protection of the reputation or rights of others”. However, given that Ofcom have advanced no evidence that the broadcast of views challenging the official view occasions any harm, this cannot be right.

Necessary in a democratic society

¹ [2019] UKSC 3.

Restrictions on political speech on a current issue of public interest require a high threshold to be lawful within Article 10. In this case, Ofcom have proceeded without any evidence of any harm arising, either specifically or generally.

8. The details of the action that the defendant is expected to take

To withdraw the Guidance.

9. ADR proposals

Not applicable.

10. The details of any information sought

All evidence available to Ofcom which suggests that the broadcasting of any matter questioning public policy causes harm or is likely to cause harm to the public.

11. The details of any documents that are considered relevant and necessary

Any document evidencing the matters referred to in 10 above.

12. The address for reply and service of court documents

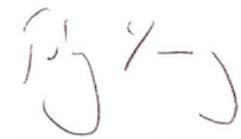
See above.

13. Proposed reply date

17th June 2020.

Finally, please note that if it is necessary to issue proceedings, the Union reserves the right to seek a Protective Costs Order.

Yours sincerely,



Toby Young

General Secretary

The Free Speech Union

toby@freespeechunion.org

cc: Julian Knight, Chair, The Digital, Culture, Media and Sport Select Committee, the House of Commons
Dame Carolyn McCall, Chief Executive, ITV plc
Manish Malhotra, Chief Executive, ESTV