

Claim No:

IN THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N:

MARK STEYN

Claimant

and

THE OFFICE OF COMMUNICATIONS

Defendant

and

NAOMI WOLF (1)

GB NEWS LIMITED (2)

Interested Parties

STATEMENT OF FACTS AND GROUNDS

Introduction and Summary

1. This is a challenge to a Final Decision (“the Decision) of the Defendant (“Ofcom”) of 9 May 2023 under Rule 2.1 of the Ofcom Broadcasting Code (“the Code”)¹. The Decision concerned an interview by the Claimant (“C”) with the First Interested Party (Naomi Wolf – “NW”) in his one-hour programme, *The Mark Steyn Show*, broadcast by the Second Interested Party (“GBN”) on 4 October 2022 at 20.00. Pre-action protocol correspondence has been exchanged and the letters are at [p.165] in the PD 54A 4.4 bundle of documents. In response to a request in the pre-action protocol letter Ofcom disclosed copies of its initial letter of investigation to GBN dated 11 October 2022 and the Preliminary View it sent to GBN on 6 February 2023.
2. The exchanges in the interview upon which the Decision was based are at pp.2-7 of the Decision. In summary:
 - a. NW was introduced to viewers as an author and journalist who in 2020 and 2021 had been denounced for reporting on women’s health problems, specifically menstrual problems, subsequent to receiving injections of the Pfizer mRNA vaccine. C said she had been *denounced as a conspiracy theorist*, but that in the past month the National Institutes of Health, Washington Post and CNN had confirmed that women’s menstrual health had been harmed by mRNA injections².
 - b. The interview went on to discuss an investigation that NW had instigated a year before, in which many medical and scientific experts had volunteered to report on Pfizer research and development documents relating to its mRNA vaccine.
 - c. NW said that these experts had been reporting *harms against human reproduction* from the mRNA vaccine and complained that the medical profession had failed to expose this. She argued that the medical establishment in the US, Britain and around the world had had been “purchased” by monies provided by government and NGOs and had “medicalised” dissent about covid vaccination³.
 - d. NW said that the harms identified in the investigation included damage to the Leydig and Sertoli cells of boys; chemicals being found in vaccinated mothers’

¹ The Decision was published in Issue 473 of Ofcom’s Broadcast and On Demand Bulletin

² Decision p.3

³ Decision p.5

breast milk; and damage to placentas. She also referred to other reports of damage to male sperm counts⁴.

- e. The discussion turned to the reluctance of the US and UK governments (contrasted with the Scandinavian governments) to look at these issues and NW expressed the view that: *a mass murder has...taken place...is still taking place disabling people into the future, sterilising the next generation...* and that these governments wanted to *sweep it under the rug*⁵.
- f. C then identified the charge of *mass murder* as a *serious charge* and raised the question of what governments knew about the vaccine, and when. NW responded by saying that the Pfizer documents indicated from a month after its rollout that the mRNA vaccine did not work and that the US Food and Drug Administration had copies of the Pfizer documents, and so knew it did not work; and that: *...They knew three months in that 1,200 people were dead, four of them the day they were injected, and they kept going. They knew in April of last year that children's hearts were being damaged and they kept going.*
- g. This was identified by C as the *most serious charge*. He concluded the interview by saying: *...And we're in this mess because twits like the BBC guy who hosts Radio Three's freethinking show don't think you should even ask about this. It's a, the biggest public scandal this century if Western governments knew about the damage right at the beginning, right in those first weeks, and they still, and they're still insisting right now that everybody gets the third booster shot...*⁶

3. Rule 2.1 of the Code is in Section 2. Section 2 is entitled *Harm and Offence*. Rule 2.1 provides:

Generally accepted standards must be applied to the content of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material.

4. Ofcom's Guidance Note ("the Guidance") for Rule 2.1 identifies *claims or advice in programmes about viewers' and listeners' health...as being potentially harmful...*It identifies a series of primary, secondary and tertiary *factors* affecting the *level of*

⁴ Decision pp.5-6

⁵ Decision p6

⁶ Decision pp.6-7

potential harm. The envisaged *potential harm* appears to be viewers/listeners acting upon claims/advice in programmes. The Guidance observes that there are *various methods* of protecting from potential harm that *might arise from health ...advice and claims in programmes*.

5. The decision will be read by the court and it is therefore not proposed to summarise it in any detail. In essence, however, the decision-taker appears to have reasoned:
 - a. There was no breach of the *offensive material* limb of Rule 2.1; the issue considered was whether there was *adequate protection from potentially harmful material*⁷;
 - b. The *comments made by the guest, Naomi Wolf, in this programme* were characterised as *health claims and advice* within the meaning of the Guidance and potential for harm had to be assessed applying the factors in the Guidance⁸;
 - c. These comments *went beyond a discussion* in which policy decisions made in relation to the pandemic were debated and scrutinised, including as to the efficacy of *Covid-19 vaccines*⁹;
 - d. The serious claims about the possible side effects and safety of *the vaccines* were potentially harmful. Their potentially *harmful impact* was increased by accusations that those providing the vaccine programmes *were said to be involved in the most serious, pre-meditated crimes, ie mass murder*¹⁰;
 - e. The claims were NW's *opinions* but opinion can be material that is potentially harmful and engage Rule 2.1¹¹;
 - f. The harm lay in the potential for the claims *to impact on viewers decisions about their health*¹². The passage at Decision p.13:

...there was a targeted autumn booster rollout aimed at certain people...For these vulnerable people the decision as to whether or not

⁷ Decision pp.10-11 and 14. There is no part of the reasoning thereafter that is concerned with offence, as distinct from potential harm.

⁸ Decision p.11

⁹ Decision pp.11-12

¹⁰ Decision p.14

¹¹ Decision p.14

¹² Decision p.15.

to take up the vaccine might carry significant health implications...[emphasis added]

indicates that the potential harm within the meaning of the Guidance identified by the decision taker would be a decision not to take a *vaccine*.

- g. The programme did not provide adequate protection to its viewers against such harm. Beyond the initial observation by our client that NW had been previously denounced as a *conspiracy theorist*, the programme did not present *any further information to substantiate, challenge or otherwise appropriately contextualise Naomi Woolf's claims made in this interview*¹³.

6. C advances four grounds of challenge:

- (1) Misdirection in law – s.319(2)(f): The statutory standards objective for this decision is in sub-section 319(2)(f) of the Communications Act 2003 (“CA 2003”). It is 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 of offensive and harmful material.

As the application of Rule 2.1 in this decision shows, Ofcom interprets this as allowing rules against, and findings of breach in respect of, potential harm from viewers/listeners being influenced by broadcast material (here in the form of opinions) to act in a way harmful to themselves or others. This is a misconstruction of the sub-section, and the error has led Ofcom to misunderstand and misapply its regulatory powers, exceeding them improperly.

- (2) Material and/or unsustainable finding of fact – Potentially harmful material: The postulated *harmful material* (ie potentially causing injury or damage) could only be the “claims” by NW that the mRNA vaccine had side effects and was unsafe. But for this to be harmful material the claims would have to be wrong, and the vaccine safe and effective. So that being deterred from taking it in reliance on the claims would be damaging/injurious to the viewer. Not only does the decision contain no

¹³ Decision p.16

finding to this effect, even if it is read as containing an implied finding to this effect no evidence is identified in the decision to support such a finding.

(3) Article 10 violation: The decision amounts to a violation of C's right to freedom of expression under Article 10 of the European Convention on Human Rights ("the ECHR").

(4) Breach of the duty of fairness: C had an interest in the outcome of the Ofcom investigation which entitled him to be protected by procedural fairness. He was not given, but should have been given, a fair opportunity to make written representations to Ofcom against the proposed finding of rule breach.

7. The general legislative/regulatory background and the relevant legal principles and submissions in respect of each ground are set out in turn below.

8. Standing: C has standing to bring this judicial review because the decision had an adverse impact on him, and on his reputation as a journalist/broadcaster. In particular the fact that the decision involved a finding of rule breach by the licensee/broadcaster does not preclude C asserting that his ECHR Article 10 rights are engaged by the adverse finding (ie that it was an *interference* with his ECHR Article 10 rights within the meaning of ECHR 10(1)). See **Gaunt v Ofcom** (QBD) [2011] 1 WLR 663 at [36]; (CA) [2011] 1 WLR 2355 [19].

The legislative framework and regulatory background

9. See [6]-[11] in **Gaunt** (CA) above (Lord Neuberger of Abbotsbury MR):

6. Broadcasting standards are now governed by the Communications Act 2003, which also requires them to be implemented, supervised and enforced by Ofcom. In that connection the 2003 Act largely replaces the Broadcasting Act 1996.

7. Section 3(2)(e) of the 2003 Act places a duty on Ofcom to secure the application by all television and radio stations of standards that "provide adequate protection to members of the public from the inclusion of offensive and harmful material" in broadcast programmes. By section 3(4)(g) of the 2003 Act all such stations are required to have regard to "the need to secure" this "in

the manner that best guarantees an appropriate level of freedom of expression”.

8. Section 319 of the 2003 Act obliges Ofcom to set up a “standards code” for radio and television services which is “calculated to secure” the so-called “standards objectives”. These objectives include, at section 319(2)(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”. Ofcom is also obliged by section 325(2) of the 2003 Act to “establish procedures for the handling and resolution of complaints about the observance of [those] standards”.

9. This code, known as the Broadcasting Code, states in terms that it has been drafted in particular in the light of the right to freedom of expression as expressed in article 10 of the Convention, which encompasses a broadcaster's right to disseminate, and an audience's right to receive, creative material, information and ideas without interference, but subject to restrictions prescribed by law and necessary in a democratic society.

10. Rule 2.1 of the code provides that generally accepted standards must be 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 harmful and/or offensive materials. Rule 2.3 of the code states that, in applying generally accepted standards, broadcasters must ensure that material which may cause offence is justified by the context. Such material may include, among other material, offensive language.

11. Any legislation, any code, or any decision which has the aim or effect of limiting any person's freedom of expression must be considered and assessed by reference to article 10...

Ground 1

10. In so far as relevant CA 2003 s.319 provides:

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—

...

(d) that news included in television and radio services is reported with due accuracy;

...

(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;

...

(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented;

...

(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;

...

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

11. The issue C raises under Ground (1): This is whether the inclusion of the words *harmful material* in the standards objective at CA 2003 s.319(2)(f) empowers Ofcom to act against broadcast information that:

- causes viewers to have a particular idea or impression (here concerning the safety and efficacy of the mRNA vaccine);

- and that may, as a result, influence viewers to act in a way that is damaging to themselves.

12. This not the natural and ordinary meaning of the words *harmful material*. This would be material which by the fact of its inclusion in the broadcast causes (or may cause) damage or injury to the viewer/listener:

- a. Directly (ie through viewers seeing/hearing it); for example causing trauma or psychological disturbance or perhaps;
- b. Because it is information which could be harmful if copied or acted upon (eg about ways of committing suicide or self-harming).

On Ofcom's interpretation the material is harmful merely if it may influence viewers to act in a way harmful to themselves or others.

13. There are adverse consequences of this broad interpretation, which suggest it should not be adopted by the court.

- a. It is uncertain in a way that the constructions at [13] above are not. In order to know whether it is breaching Rule 2.1 in this way a broadcaster must consider not just the impact of the words/images *per se*, it must assess whether/the extent to which they may lead viewers to have an idea/impression which may be one which may influence them towards damage to themselves or others. There are penal consequences for broadcasters if they get this wrong, so the interpretation risks uncertain (or doubtful) penalisation. See *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th Ed, Section at Section 26.4.
- b. More particularly the application of the objective, applying this interpretation, restricts the freedom of speech of broadcasters. And this should not happen save with the clear authority of law. See *Bennion* (above) at Section 27.5.

14. Ofcom has therefore misconstrued the statutory objective, giving it a reach (and therefore a power to act against this broadcast) that it does not contain. This has led it to exceed its powers in finding a breach of Rule 2.2 in this case.

Ground 2

15. The reasoning in the Decision does not always clearly distinguish between the postulated *harmful material* and the inadequacy of the protection against it. But is tolerably clear (and must necessarily be the case) that:

- a. the *harmful material* relied on were what are described in the Decision as NW's "claims" that the mRNA vaccine had side effects and was unsafe; see in particular at Decision p.16, the decision taker was concerned about protecting the viewers from *potentially harmful statements*...;
- b. And that the inadequacy of the protection was the supposed failure identified at Decision p.13 to present and contextualise those claims appropriately.

It is also tolerably clear that the claims were identified as harmful because they would deter people, especially vulnerable people, from taking a safe and effective vaccine. This is the thrust of pp.11-12 of the Decision. This approach also accords with Ofcom's "health claims" guidance (see above) which the decision maker purported to apply.

16. But for the claims to be harmful in this way they would have to be wrong, and so wrongly deter people from having the vaccine if relied upon in this way. But there is no finding to this effect in the decision, still less evidence to support such a finding.

17. The response to the pre-action protocol letter indicates that Ofcom will argue that the "potential harm" was viewers being prevented from making properly informed choices about the mRNA vaccine based on *appropriately presented and contextualised information*. But this is not the thrust of the decision. And, in any event, the wording of s.319(2)(f) and Rule 2.1 does not permit this approach. It conflates two different things, namely

- the *harmful material* in issue (and the potential harm that it may cause if not protected against) and;
- protection against it.

These provisions assume inclusion of material which is *harmful* in the programme, and envisage a degree of protection for the viewer *from* that material in consequence. The

latter is to ensure viewers are not prevented from making properly informed decisions, if there is *harmful* material. By definition if the decision is that the programme as a whole does not comply with Rule 2.1 Ofcom will always be able to say that viewers were prevented from making such decisions because there was not *adequate protection*. But to say this does not indicate what the *harmful material* is in any given case, or (more importantly) why the statements in issue were *harmful material*. It is telling that the response letter tries to blur the lack of reasoning on this point in different ways. It suggest that the statements were a *serious, unchallenged conspiracy theory* (which, whatever this may mean, says nothing about whether they were harmful health claims). Ofcom also tries to suggest that the lack of a finding that the mRNA vaccine was safe and effective was not necessary because:

Health authorities (including those in the UK) have continued to recommend the use of the mRNA vaccine...

But the whole point of the criticism raised by NW was that health authorities were wrong to do this because the mRNA vaccine was unsafe. Her statements could only be harmful if she was wrong about this.

Ground 3

Relevant legal principles

18. ECHR Article 10 provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 10 therefore gives rights to receive as well as to impart the information and ideas in issue. See Art 10(1).

19. Engagement of the Article 10 right: The right is engaged where there is an *interference* with it by a public authority. See Article 10(1). In **Gaunt** (above) the Court of Appeal correctly proceeded on the understanding, not disputed by Ofcom, that a regulatory finding by Ofcom which identified broadcast speech by a journalist/presenter as being in breach of the Code was such an interference with their Article 10 rights¹⁴. Its assessment of the case therefore moved straight to the issue of justification for the interference under Article 10(2). See **Gaunt** (CA) [19] and [36] (Lord Neuberger). As Lord Neuberger put it at [36]:

....As Lord Hope's observations in **R v Shayler** [2003] 1 AC 247, paras 59-61 show, the question of whether the finding constituted a permissible interference with Mr Gaunt's article 10 right demands rigorous scrutiny.

An *interference* with a journalist's Article 10 rights may arise out of them conducting a broadcast interview with a third party, and the words spoken by the third party in the interview. See classically **Jersild v Denmark** (1995) EHRR 1.

20. The Decision in this judicial review refers to the Article 10(2) requirements for justification of any interference with the free speech right at pp.10-11 and p.17. In each passage it records that any limitation on the right to freedom of expression must be *strictly considered* but it does not contain any reasoning to a conclusion under Article 10(2), in relation to the free speech rights of GB News or C. This does not matter as the Court must now consider this. Indeed, even if it had, such reasoning is of no avail when the issue of a possible violation comes before the court, if the decision-taker got the answer to the question of justification under Article 10(2) wrong. See eg the judgment of the High Court in **Gaunt** (above) at [22]. Where issues engaging Ofcom's expertise as a regulator are in issue, the Courts will have due regard to its judgment. See eg **Gaunt** (HC) [42] and **R (TV-Novosti) v Ofcom** (CA) [2022] 1 WLR 481 at [62]. But the Court must still make its own assessment on the Article 10(2) issues on the facts of the case, applying Convention principles and case-law.

21. Justifying the interference under Article 10(2): The three requirements of Article 10(2) are well known.

- a. The first two requirements: The measure in issue (here the adverse finding under Rule 2.1) must be *prescribed by law* and it must pursue one or more of

¹⁴ Such a journalist can be a *victim* of an Article 10 violation, see **Monnat v Switzerland** (2010) 51 EHRR 34 [33].

the legitimate aims under Article 10(2). There is no dispute here that the measure is prescribed by law (ie through the regulatory regime described above, and in particular Rule 2.1). Neither the Decision nor the response to the pre-action protocol letter identify a legitimate aim by reference to the wording of Article 10(2). But the passage at pp.10-11 referred to above, and the Decision more generally, suggest that the legitimate aim relied upon will be the protection of the rights of others, in the context of protection of health. In this type of case the European Court of Human Rights ("ECtHR") has emphasised the importance of a careful examination by the domestic court of whether there was a pressing social need for any interference with the expression in issue. It must balance the need to protect the rights of those concerned against the speaker's freedom to express themselves as they did. See eg **Hertel v Switzerland** (1998) 28 EHRR 534 at [47].

- b. The third requirement: The measure interfering with free speech must be *necessary in a democratic society*. This requires that *relevant and sufficient reasons* must be given by the national authority for the interference; it must meet a *pressing social need*; and it must be a measure which is proportionate means of pursuing the legitimate aim. See **R v Shayler** [2003] 1 AC 247 at [58] (Lord Hope of Craighead). And see further:

59. *The principle involves a question of balance between competing interests. But it is important to appreciate that there is a process of analysis that must be carried through. The starting point is that an authority which seeks to justify a restriction on a fundamental right on the ground of a pressing social need has a burden to discharge. There is a burden on the state to show that the legislative means adopted were no greater than necessary: R v Lambert [2002] 2 AC 545, 571h per Lord Steyn. As Sir Sydney Kentridge QC observed in his Tanner Lecture at Oxford, "Human Rights: A Sense of Proportion", 26 February 2001: " 'Necessary' does not mean indispensable, but it does connote the existence of a pressing social need ... It is only on the showing of such need that the question of proportionality or 'balancing' should arise."*

60. *The European Court has not identified a consistent or uniform set of principles when considering the doctrine of proportionality....But there is a general international understanding as to the matters which should be considered where a question is raised as to whether an interference with a fundamental right is proportionate.*

61. *...The first is whether the objective which is sought to be achieved—the pressing social need—is sufficiently important to justify limiting the fundamental right. The second is whether the means chosen to limit that right are rational, fair and not arbitrary. The third is whether*

the means used impair the right as minimally as is reasonably possible. As these propositions indicate, it is not enough to assert that the decision that was taken was a reasonable one. A close and penetrating examination of the factual justification for the restriction is needed if the fundamental rights enshrined in the Convention are to remain practical and effective for everyone who wishes to exercise them.

22. Relevant principles established and applied by the ECtHR under Article 10(2):

- a. Article 10 applies not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.¹⁵
- b. There is little scope for restrictions on freedom of political speech and speech on matters of public interest¹⁶.
- c. The limits of acceptable criticism of political leaders and civil servants are wider than for private individuals¹⁷.
- d. There is a general public interest in receiving reports of the discovery of a potential health hazard¹⁸.
- e. Where measures are capable of discouraging the press and other media from *disseminating information on matters of legitimate public concern, careful scrutiny of the proportionality of the measures is called for...*¹⁹ The potential for discouraging such speech is often referred to as the “chilling effect” on free speech of the measure in issue.
- f. Journalistic freedom of expression allows a degree of exaggeration or even provocation²⁰.

¹⁵ *Handyside v. the United Kingdom* (1976) 1 EHRR 737 at [49]

¹⁶ *Bedat v Switzerland* (2016) 63 EHRR 15 at [49]

¹⁷ *Monnat* (above) [60]

¹⁸ *OOO Regnum v Russia* App No 22649/08; 8 September 2020 [69]

¹⁹ *Bergens Tidende v Norway* (2001) 31 EHRR 16 [52].

²⁰ *Prager and Oberschlick v Austria* (1995) 21 EHRR 1 [38]

- g. Article 10 protects the form as well as the substance of the information and ideas disseminated and it is not for the courts to substitute their own view of what techniques of reporting should be adopted by journalists. Punishing a journalist for assisting in the dissemination of statements made by another in interview hampers the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so²¹.
- h. A careful distinction has to be drawn between statements of fact and statements of opinion, since freedom of opinion is a fundamental part of the Article 10 right. The court will take account of the context in which the statements in issue were made in deciding whether they were opinion. A value judgement without any factual basis to support it may be excessive²². But a value judgment may be protected where it is supported by facts already known to the public²³.
- i. The necessity for an interference must be *convincingly established* by the public authority under Article 10(2)²⁴.
- j. Whilst the severity or otherwise of a sanction is a factor in whether the interference with the Article 10 rights of the journalist is proportionate, a regulatory decision can amount to a form of censorship tending to discourage a television journalist from making criticism of the kind in issue in the future²⁵.

23. Submissions: The Decision does not contain relevant and sufficient reasons for the interference with C's freedom of expression rights which it represents, applying these principles to the facts. There is no reasoning on the facts which convincingly (or otherwise) establishes that the balance falls in favour of interference with the speech, in the form of an adverse regulatory decision, as being *necessary in a democratic society*.

- a. The need to protect the rights of viewers of this programme is barely analysed in the decision. But if it existed at all it was extremely limited.

²¹ *Jersild v Denmark* (1994) 19 EHRR 1, [31] and [35]

²² See by way of example *Jerusalem v Austria* (2003) 37 EHRR 25 [41]-[43]

²³ *Feldek v Austria*, App No. 29032/95; 12 July 2001 [86]

²⁴ *Barthold v Germany* (1985) 7 EHRR 383 at 403.

²⁵ *Monnat* (above) [70]

- i. The opinions of NW about what the analysis of the Pfizer documents showed were presented as journalistic opinion, based on the published reports of the experts who had reviewed the Pfizer documents. They would have been understood as such by viewers. NW was not presented as a scientific or medical expert herself. Nor was she presented as a religious or community leader. Nor was this a documentary or religious programming. Again, all of this would have been easily understood by viewers of the *Mark Steyn Show*.
- ii. Nor were her opinions presented as advice²⁶ or a direction to anyone to take a particular course of action. It was not suggested that viewers should act on her opinions. Nor was she targeting anyone in making her comments, for example particular or particularly vulnerable viewers.
- iii. The attempt to characterise this programme and this interview as failing with the guidance on *health claims and advice* is tenuous at best. C's introduction and conclusion to the interview made quite clear that the NW was being presented as a journalist prepared to criticise government, the medical establishment and civil society for as having attempted to suppress dissent about the mRNA vaccine, rather than ensuring open discussion about risks.
- iv. The Decision seeks to bolster the suggestion that NW's opinions were *potentially harmful* claims about health by suggesting that she had accused governments and medical organisations of being involved in *the most serious, pre-meditated crimes, ie mass murder*²⁷. But this is wholly unsustainable. These statements could not be understood that governments/medical organisations or anyone else had committed the offence of murder. The comments at p.6 of the decision, read in full and in context are clearly a strong polemical formulation of NW's opinion that the mRNA vaccine has damaged reproductive health.
- v. The Decision seeks to suggest that there was a need to protect viewers because NW's comments were not contextualised. But for the reasons

²⁶ Note that although the Guidance speaks of *claims or advice* about health, the decision characterises NW's comments only as *claims* about health.

²⁷ Decision p.14

indicated above this is also unsustainable. It was quite clear that the context was the reports on the Pfizer documents and her views about these.

- b. The importance of the freedom of NW to engage in this expression (and C to enable her to do so) on these matters is, by contrast quite clear. This was political/public interest speech on matters of great public importance. It was, and is recognised by Ofcom to have been, expression of opinion. The viewer was told that her opinions were based on identified material in the public domain, being the expert reports on the Pfizer documents. Viewers would be able to access this material online and much other material put into the public domain by NW about these issues, if they wanted to consider her ideas further. The polemical form of the expression is not a reason for interfering with it and it is to be noted that Ofcom did not make a finding that the speech was offensive speech which required an adverse finding as being excessively offensive. The potential for findings like this to chill expression on topics like this, on television, is obvious.

24. The pre-action protocol response of Ofcom fails, as did the Decision, properly to identify the steps in the Article 10(2) methodology or the relevant principles under Article 10(2). Nor does it contain Article 10(2) reasoning. It simply restates why Ofcom considers the licensee failed to comply with the Code, worryingly suggesting that on this basis *whether Naomi Wolf's statements are properly to be characterised as value judgments is secondary*. But as explained above whether if they are so characterised (as Ofcom itself found in the Decision) this is not *secondary* in Article 10(2) reasoning. It is of fundamental importance in carrying out the balancing exercise. It is also concerning that Ofcom here tries to blur the clear finding at Decision p.14 that GBN was broadcasting NW's *views and opinions*.... See. ...*even if her statements were properly characterisable as value judgment or personal opinions*...

Ground 4

25. The journalistic expression in issue in the investigation was that of C as well as the licensed broadcaster. The ***Gaunt*** decision establishes that C's journalistic right to freedom of expression under ECHR Article 10 is engaged by a decision against the broadcaster under the Code in this situation, for the reasons identified above. Further,

it is to be noted that in *Monnat* (above) at [73]-[76] the ECtHR did not rule out the possibility that the fair trial guarantee under Article 6 of the Convention could be engaged, where a broadcast journalist faced a regulatory decision which interfered with their Article 10 rights.

26. This interest of C entitled him to a worthwhile measure of procedural fairness before the adverse decision was published. It entitled him to receive from Ofcom a copy of the initial letter of investigation sent by Ofcom to GBN (or the equivalent thereof for him as the journalist who presented the show). This would have enabled him to make informed written representations to Ofcom in the investigation in its first stage. Nor was he provided by Ofcom with its Preliminary View of rule breach when that was formulated. If he had been he could have made informed written representations in response to this at that stage. The latter failure is particularly important as the initial letter (now disclosed), strikingly, did not specify an investigation under the *harmful material* limb of Rule 2.1 alone. On the contrary it set out a much smaller selection of statements made by C/NW in the interview than appear in the later decision making documents. These appear to have been identified principally as offensive statements, rather than harmful *health claims* about the mRNA vaccine. It was only in the Preliminary View document that Ofcom advanced the specific case under the *harmful material* limb of Rule 2.1 now in issue, concerning *health claims* about the mRNA vaccine.
27. C was not an employee of GBN and was not (nor could Ofcom assume that he was) involved in the formulation of their written submissions to Ofcom. Plainly their interests and concerns were going to be different. In fact, neither he nor the producer of his show were shown by GBN the Preliminary View of Ofcom or the submissions that GBN made to Ofcom in response to it. It would not have been burdensome or impractical for Ofcom to have given him this measure of protection. The opportunity would have been of value as he could have advanced the case now advanced in this application, on an informed basis, in particular as to the need to respect his Article 10 rights.
28. The Ofcom response in the pre-action protocol correspondence points to the possibility of third parties making early representations where it proceeds to investigate. See as envisaged by paragraph 1.28 of the Ofcom *Procedures for investigating breaches of content standards for television and radio*. But C's point is not that he did not have the possibility of making uninformed representations. It is rather that he was not given the

opportunity to address the case he ultimately had to meet. This was in the Preliminary View document, which differed from the initial letter as above.

Relief

29. C accordingly seeks an order quashing the Decision and any further order/s the court considers appropriate.

GAVIN MILLAR KC