



Neutral Citation Number: [2011] EWCA Civ 692

Case No: C1/2010/1893

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
Sir Anthony May PQBD and Blair J
Case No: CO/9919/2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/06/2011

Before:
THE MASTER OF THE ROLLS
LORD JUSTICE TOULSON
and
LORD JUSTICE EHERTON

Between:

HM The Queen on the application of Jon Gaunt	<u>Appellant</u>
- and -	
The Office of Communications	<u>Respondent</u>
- and -	
Liberty	<u>Intervener</u>

Gavin Millar QC and Mark Henderson (instructed by Howe and Co) for the Appellant
David Anderson QC and David Glen (instructed by Ofcom Legal Department) for the
Respondent

Ivan Hare (instructed by Liberty) for the Intervener made written submissions
Hearing date: 11 May 2011

**Judgment Approved by the court
for handing down
(subject to editorial corrections)**

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Lord Neuberger MR:*Introductory*

1. This is Mr Jon Gaunt's appeal against the dismissal by the Divisional Court of his application to quash the finding made by the Office of Communications ("Ofcom") that the broadcasting of an interview which he conducted ("the interview") was in breach of rules 2.1 and 2.3 of the Broadcasting Code. His case, which is essentially the same as that before the Divisional Court, is that Ofcom's finding was a disproportionate interference with his freedom of expression under article 10 of the European Convention on Human Rights ("the Convention").

The broadcasting of the interview

2. The interview took place shortly after 11.00 am on 7 November 2008, on the Talksport radio channel, on which Mr Gaunt had a regular slot. The interviewee was Mr Michael Stark, the Cabinet Member for Children's Services at Redbridge London Borough Council ("Redbridge"). He was being interviewed in connection with Redbridge's proposal to ban smokers from becoming foster parents on the ground that passive smoking could harm their foster children. When a child, Mr Gaunt had himself had foster parents, and he strongly opposed this proposal.
3. Mr Gaunt had written an article on this very topic, which had been highly critical of Redbridge's policy, and which had been published in the Sun newspaper on the same day, under the headline "Fags didn't stop my foster mum caring for me". The article was expressed in forceful, and at times colourful, language. It praised foster parents generally, and Mr Gaunt's own foster parents in particular; it criticised Redbridge as "health and safety Nazis"; it described Redbridge's approach as involving a "master race philosophy"; and it referred to Social Services as "the SS".
4. Like the Divisional Court, we have been provided with a transcript of the interview, as well as a recording of it on CD. In the judgment of the Divisional Court, given by Sir Anthony May P, on behalf of himself and Blair J, the interview was accurately summarised in the following terms at [2010] EWHC 1756 (QB), paras 3-4:

"3. The first part of the interview was reasonably controlled, giving Mr Stark a reasonable opportunity to explain his council's policy. [Mr Gaunt] then asked him about existing foster parents who only ever smoke in the open air. Mr Stark explained that Redbridge would not drag children away from existing foster parents, but that such smokers would not be used in the future. The trouble was that such people do smoke in the house. Asked by [Mr Gaunt] how he knew this, Mr Stark explained that there were Redbridge councillors who say they never smoke in the building, but in fact do so. To which [Mr Gaunt] said 'so you are a Nazi then?' When Mr Stark began to protest, [Mr Gaunt] again said 'no you are, you're a Nazi'. Mr Stark protested vehemently that this was an offensive and insulting remark, and the interview then degenerated into an unseemly slanging match. When Mr Stark protested that the insult, as he saw it, was probably actionable, [Mr Gaunt] challenged him to 'take action if you wish', but then said 'you're a health Nazi'. The slanging match continued

with [Mr Gaunt] asking Mr Stark if he wanted to carry on with the interview, and Mr Stark replying that he would love to if [Mr Gaunt] would just shut up for a minute. It emerged that [Mr Gaunt] had himself been in care. He referred to his column in the Sun that day and again called Mr Stark a 'health Nazi' and then 'a Nazi'. The heated shouting continued with [Mr Gaunt] doing much of the talking. Mr Stark asked him just to shut up for a moment, and said in effect that the conditions of those in care were better than they had been. [Mr Gaunt] regarded this as an offensive insult to his own upbringing and called Mr Stark 'you ignorant pig'. He later referred to him as a 'health fascist' and an 'ignorant idiot', and shortly after this he ended an interview that by then had got completely out of control.

4. It is scarcely possible to convey the general and particular tone of this interview in a short written summary, and the full transcript is in this respect incomplete. You have to hear it for its full impact. As we have said, it degenerated into a shouting match from the point when [Mr Gaunt] first called Mr Stark 'a Nazi'. That first insult was not said with particular vehemence, but 'you ignorant pig' was said with considerable venom and was we think gratuitously offensive. The interview as a whole can fairly be described as a rant."
5. Within ten minutes of the interview ending, Mr Gaunt broadcast an apology to the audience. He accepted that he had not "h[e]ld it together", and said that he had been "unprofessional" and had "lost [his] rag", and wished he had not, but the topic was "very close to [his] heart". About an hour later, he broadcast a further apology saying "The councillor wants me to apologise for calling him a Nazi. I'm sorry for calling you a Nazi". Mr Gaunt was suspended from his programme that day, and Talksport terminated his contract without notice ten days later, and broadcast its own apology on 21 April.

The legislative and regulatory background

6. Broadcasting standards are now governed by the Communications Act 2003 ("the 2003 Act"), which also requires them to be implemented, supervised and enforced by Ofcom. In that connection, the 2003 Act largely replaces the Broadcasting Act 1996 ("the 1996 Act").
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 324 of the 2003 Act to "establish procedures for handling and resolution of complaints about the observance of [those] standards".

9. This code, known as the Broadcasting Code ("the 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 ("Article 10"), 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. Para 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. Para 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, which, so far as relevant, provides as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to ... receive and impart information and ideas without interference by public authority 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, ... for the protection of the reputation or rights of others"

The Ofcom Finding

12. Ofcom considered the interview, after there had been 53 complaints from listeners about it. On 8 June 2009, Ofcom issued its "Finding" (described as "Amended Finding", but the reason for the amendment is irrelevant for the purpose of these proceedings).
13. The Finding began by referring to the 53 complaints, which, as it recorded, criticised the treatment of Mr Stark during the interview as "an unprovoked personal attack", "oppressive", and "intimidating", and objected to the descriptions of Mr Stark as a "Nazi" and an "ignorant pig". The Finding referred to the fact that some of the complaints suggested that the use of the term "Nazi" belittled the sacrifices made in the Second World War. The Finding then quoted extracts of exchanges during the interview, describing it as "extremely heated", with "tense exchanges".
14. The Finding then turned to "responses", and explained that Talksport had been asked for its view, and had stated that "it regretted what had happened" and accepted that

the interview “fell way below the acceptable broadcasting standards which it expected and demanded”. Talksport “totally accept[ed] and regret[ted]” that Mr Gaunt’s language “was offensive and that the manner in which the interview was conducted was indefensible”. Talksport also said that Mr Gaunt “was known to be an outspoken, hard-hitting, opinionated and aggressive presenter”, and that it had “encouraged him to be himself, but also made clear to him the requirement always to remain within the law and to abide by the Code” (although Mr Gaunt denied this).

15. The Finding explained that Talksport maintained (although Mr Gaunt did not agree) that, before the interview, it had warned Mr Gaunt to remain calm, and that he had been given signals to moderate his tone during the broadcast. Talksport said that it had “two self-imposed boundaries”. The first was not to let robust debate “descend into an unedifying war of words that included personal insults, offensive language and bullying”. The second boundary was “to give both callers and guests a fair crack at expressing their views without being subjected to ridicule or abuse.” Talksport stated that it considered that both boundaries had been crossed by the interview. The Finding also recorded Mr Gaunt’s two broadcast apologies, and Talksport’s subsequent broadcast apology.
16. Ofcom then set out its “decision”, which began by stating that the “freedom of broadcasters to choose what topics to cover ... and in what manner, is fundamental to today’s broadcasting culture.” It also emphasised the importance of freedom of expression in broadcasting, and then referred to rules 2.1 and 2.3, as well as section 3(4)(g) of the 2003 Act. It then recognised that “Talksport specialised in a genre of hard-hitting radio talk, which encouraged robust interaction between its presenters and invited guests.” The Finding pointed out that the fact “that material may be offensive to some is not, in itself, a breach of Ofcom’s Code”, because prohibiting “the broadcasting of offensive material” would be “an inappropriate restriction on a broadcaster’s and the audience’s freedom of expression”.
17. The decision continued:

“[F]rom the outset, not uncharacteristically, Jon Gaunt took an aggressive and hectoring tone with Michael Stark. As indicated above, such an approach may well not have been at odds with audience expectation for this programme or station. However, this tone sharpened as the interview progressed. Jon Gaunt gave little chance for his guest to answer his questions, and dismissed those answers he did give. Ofcom noted that this culminated with Jon Gaunt calling Michael Stark, at times, a ‘Nazi’ and an ‘ignorant pig’. The overall tone of Jon Gaunt’s interviewing style on this occasion was extremely aggressive and was described by complainants as ‘oppressive’, ‘intimidating’ and felt the interviewer was ‘shouting like a playground bully’.

Ofcom recognises that the subject matter in this case may have been a particularly sensitive one for the presenter, given his own experience of being in care as a child. Further, Ofcom noted that Jon Gaunt later qualified his use of the word ‘Nazi’ to some extent by subsequently referring to Michael Stark as a ‘health Nazi’. However, following that qualification, he reverted back to the original term ‘Nazi’. The

presenter also referred to the interviewee as 'an ignorant pig' and told him to 'shut up'."

18. After referring to the steps which Talksport said that it took before and during the interview, and noting the apologies which had been broadcast, the Finding expressed concern that Talksport's procedures were not robust enough to deal with problematic material being broadcast live. The Finding concluded:

"Rule 2.3 of the Code states that offensive material: 'may include ... offensive language ... humiliation, distress [and] violation of human dignity'. Ofcom considered the language used by Jon Gaunt, and the manner in which he treated Michael Stark, had the potential to cause offence to many listeners by virtue of the language used and the manner in which Jon Gaunt treated his interviewee. In this case, the offensive language used to describe Mr Stark, and what would be considered to be a persistently bullying and hectoring approach taken by Jon Gaunt towards his guest, exceeded the expectations of the audience of this programme, despite listeners being accustomed to a robust level of debate from this particular presenter. Even taking into account the context of this programme such as the nature of the service, the audience expectations and the editorial content, Ofcom did not consider that this was sufficient justification for the offensive material. The broadcaster therefore failed to comply with generally accepted standards in breach of Rules 2.1 and 2.3 of the Code."

This application

19. Although (i) the Finding was made against Talksport, (ii) Talksport accepted that the interview had breached the Code, (iii) no sanction, other than publication of the Finding, was imposed by Ofcom, and (iv) it is not suggested that the Code itself infringes Article 10, Mr Gaunt sought to challenge the Finding in the Divisional Court, on the ground that it falls foul of article 10. It is accepted that he had *locus standi* to do so, unsurprisingly since it is obviously possible that the Finding may have had an adverse impact on him and on his reputation as a journalist.
20. The Divisional Court rejected Mr Gaunt's application. At [2010] EWHC 1756 (QB), para 48, it said that Mr Gaunt's first reference to a Nazi "may be seen as an emphatic and pejorative assertion that Mr Stark was, in the matter of smoking and fostering children, one who imposes his views on others". The court immediately went on to say that "[i]t was not, in the context, a description of Mr Stark's wider political or ideological position". The court's reasoning continued:

"49. However, the tone of the interview degenerated from that point, partly because Mr Stark understandably took offence and because [Mr Gaunt's] conduct of the interview became increasingly abusive, hectoring and out of control. The claimant's subsequent uses of the word 'Nazi' undoubtedly assumed the nature of undirected abuse. The expression 'ignorant pig' had no contextual justification at all and was said with such venom as to constitute gratuitous offensive abuse in the sense we have indicated. [Mr Gaunt] lost control of the

interview ... The later part of the interview became abusive shouting which served to convey to listeners no real content at all.

50. In these circumstances, and taking full account of [Mr Gaunt's] Article 10 rights, we consider that Ofcom were justified in their conclusion The broadcast was undoubtedly highly offensive to Mr Stark and was well capable of offending the broadcast audience. The essential point is that, the offensive and abusive nature of the broadcast was gratuitous, having no factual content or justification. In the result, we accept ... that the ... Finding constituted no material interference with [Mr Gaunt's] freedom of expression at all. An inhibition from broadcasting shouted abuse which expresses no content does not inhibit, and should not deter, heated and even offensive dialogue which retains a degree of relevant content.

51. No sanction or penalty was imposed on the broadcaster, let alone [Mr Gaunt]. This is relevant, though not decisive, to our consideration, because it bears on the proportionality of the interference."

21. With the permission of Maurice Kay LJ, Mr Gaunt now appeals to this court.

Freedom of expression

22. Freedom of expression, that is the right to say what one wants and how one wants, and to impart and to receive information and ideas, is a fundamental human right. In the light of the power of language, ideas and information, freedom of expression underpins a free society. It has been described as "the lifeblood of democracy" by Lord Steyn in *R v Secretary of State for the Home Department ex p Simms* [1999] UKHL 33, [2000] 2 AC 115. Freedom of expression is not by any means a purely cosy right. As Sedley LJ said in the Divisional Court, "[f]reedom only to speak inoffensively is not worth having" – *Redmond-Bates v DPP* (1999) 163 JP 789. Freedom of expression is now enshrined in Article 10.1.
23. However, like virtually all human rights, freedom of expression carries with it responsibilities which themselves reflect the power of words, whether spoken or written. Hence the need for some restrictions on freedom of expression, as recognised by Article 10.2, and indeed by the reservation of the right of governments to control broadcasting in Article 10.1. Having said that, as the limited number of circumstances identified in Article 10.2 recognises, any attempt to curtail freedom of expression must be approached with circumspection.
24. In the present case, the Finding that the interview infringed paras 2.1 and 2.3 of the Code was essentially based on the proposition that it caused significant and unnecessary offence. Thus, para 2.1 required Talksport to provide "adequate protection for members of the public from the inclusion in [its broadcasts] of harmful and/or offensive materials", and para 2.3 required Talksport to "ensure that material which may cause offence [including 'offensive language'] is justified by the context". In the light of the importance of freedom of expression, the limited ambit of Article 10.2, and Sedley LJ's characteristically pithy and telling observation, it is important to

observe that para 2.3 recognises that offensive material or language will often be justifiable, but justifiability must be assessed by reference to the context.

The Strasbourg jurisprudence

25. We were taken to a number of judgments of the Strasbourg court, which demonstrated that, as one would have expected, the question whether a particular statement was properly held to be unlawful or the like by a national tribunal is highly fact-sensitive, and must be assessed by reference to all the relevant circumstances of the case. However, certain points of principle do seem to be clear.
26. First, where an applicant contends that his article 10 rights have been infringed by the ruling of a national tribunal, the need for the restriction on freedom of expression “must be established convincingly” - *Janowski v Poland* (2000) 29 EHRR 705, para 30(i). Secondly, the question to be considered is whether the interference with the applicant’s Article 10 rights was “proportionate to the legitimate aim pursued” - *Janowski* 29 EHRR 705, para 30(iii). Thirdly, in deciding that issue, a margin of appreciation is to be accorded to the national authorities - *ibid*, para 30(ii). Fourthly, in deciding whether a national tribunal went beyond the margin of appreciation, the severity of the sanction imposed on the applicant is potentially relevant - *ibid*, para 35, *Malisiewicz-Gasior v Poland* (2007) 45 EHRR 21, para 68, *Perna v Italy* (2004) 39 EHRR 28, para 39.
27. Fifthly, in deciding whether any interference with freedom of expression falls foul of Article 10, the court “will have particular regard to the words used ..., the context in which they were made public and the case as a whole” - *Fuentes Bobo v Spain* (2001) 31 EHRR 50, para 46. Sixthly, the latitude to be accorded to someone who insults another in public is greater if the insulting words are used in the context of “an open discussion of matters of public concern” or in the context of “freedom of the press”, than if the words are used by “a private individual” - *Janowski* 29 EHRR 705, para 32. Seventhly, there is a distinction to be drawn between “harsh words” which constitute “a gratuitous personal attack” and those which form “part of a political debate” - *Malisiewicz-Gasior* 45 EHRR 21, para 66, *Gorelishvili v Georgia* (2009) EHRR 36, para 40, and see *Oberschlick v Austria (No 1)* (1995) 19 EHRR 389, paras 58-60 and *Lindon v France* (2008) 46 EHRR 35, paras 56-7. Eighthly, the fact that there is no “possibility of reformulating, perfecting or retracting” the statement before publication is a relevant factor - *Fuentes Bobo* 31 EHRR 50, para 46. Ninthly, at least “in the context of religious opinions and beliefs” it is legitimate to “include[e] an obligation to avoid as far as possible expressions that are gratuitously offensive to others ... and which ... do not contribute to any form of public debate capable of furthering progress in human affairs” - *Gunduz v Turkey* (2005) 41 EHRR 5, para 37.
28. *Fuentes Bobo* 31 EHRR 50 is of particular interest for present purposes, as it involved insulting words used on the radio. The applicant had been dismissed by the directors of the Spanish national broadcasting company, for describing its directors in a radio interview, as “leeches” who “shit on the workers”. The point at issue was whether the applicant’s dismissal was “proportionate to the legitimate aim pursued” and “answered a ‘pressing social need’” - see 31 EHRR 50, para 44.
29. At 31 EHRR 50, para 47, the court said that the descriptions could be “regarded as insulting and would no doubt have justified a penalty from the aspect of article 10

[sic]". In the next paragraph, the court explained that the words were used "against a background of public and heated discussion of alleged anomalies in the management of ... the Spanish public radio and television service". The court also pointed out that the words had first been used by others, and that "the applicant had merely endorsed them", and that the words "almost seem to have been provoked ... by the presenters ...". The court also mentioned that the directors had taken no action.

30. At 31 EHRR 50, para 50, the court held that there had been a violation of Article 10, as it was not satisfied that "the interference complained of, having regard to the gravity of the penalty, answered a 'pressing social need'". While accepting "the margin of appreciation enjoyed by the national authorities", the court concluded that "there was no reasonable relationship of proportionality between the penalty imposed on the applicant and the legitimate aim pursued."

The domestic jurisprudence

31. As the Divisional Court said at [2010] EWHC 1756 (QB), para 42, the effect of cases such as *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 and *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420 is that "the court's task is to decide for itself whether the ... Finding disproportionately infringed [Mr Gaunt's] article 10 freedom of expression[, and i]n doing so, [the court must] have due regard to the judgment of the statutory regulator who proceeded on correct legal principles." Those principles are, I believe, clear from the Strasbourg jurisprudence referred to above. However, it is worth briefly mentioning two decisions of the House of Lords to which we were referred in argument.
32. In *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247, para 23, Lord Bingham of Cornhill explained that the concept of "necessary in a democratic society" in Article 10.2 "is not synonymous with 'indispensable'", but he immediately added that it does not "have the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'". He also emphasised the central requirement that any restriction of freedom of expression must be "proportionate to the legitimate aim pursued". Lord Hope of Craighead made the same point at [2003] 1 AC 247, paras 28-29.
33. Later in his opinion, at [2003] 1 AC 247, paras 59-61, Lord Hope explained "the process of analysis" which had to be carried out when considering whether a limitation on freedom of expression is justified on the ground of "pressing social need". First, the state must show that "the objective which is sought to be achieved ... is sufficiently important to justify limiting the fundamental right." Secondly, it must show that "the means chosen to limit that right are rational, fair and not arbitrary." Thirdly, it must establish that "the means used impair the right as minimally as possible." As he went on to say, "it is not enough to assert that the decision taken was a reasonable one", and "a close and penetrating examination of the factual justification for the restriction is needed".
34. *R (Pro-Life Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185 was a case concerned with the statutory predecessor of the 2003 Act and of the Code. At [2004] 1 AC 185, para 20, Lord Hoffmann referred to "singling out television and, to a lesser extent, radio for the imposition of standards of taste and decency", and "explained that "[t]he main reason" for this was "the intimate

relationship which these media establish between the broadcaster and the viewer or listener in his home." Later in his opinion, Lord Hoffmann suggested that any restriction on broadcasting should not be "arbitrary or unreasonable" - [2004] 1 AC 185, para 72.

35. In the same case at [2004] 1 AC 185, para 121, Lord Walker of Gestingthorpe suggested that "the various phrases describing offensive material are best taken as a single composite expression". He then went on to say, with implied approval (or at least no implied disapproval); that "in practice the obligation to avoid offensive material is interpreted as limited to what is needlessly (or gratuitously) shocking or offensive." Although the statutory wording has changed, as has the Code, it seems to me that that still represents the general thrust of Ofcom's approach, although it must be applied by reference to contemporary standards and expectations.

Discussion

36. As already mentioned, it is (in my view, rightly) not contended on behalf of Mr Gaunt that the provisions of the Code fall foul of Article 10, and accordingly they do not require particularly close analysis. However, that does not alter that fact that the provisions must be interpreted, as well as being applied in a particular case, so as to comply with the requirements of Article 10. As Lord Hope's observations in *Shayler* [2003] 1 AC 247, paras 59-61, show, the question whether the publication of the Finding constituted a permissible interference with Mr Gaunt's Article 10 right demands rigorous scrutiny.
37. More specifically, there are a number of facts which support the proposition that a tribunal should be slow to hold that what was said in the interview offended the provisions of paras 2.1 and 2.3 of the Code. Quite apart from the importance of freedom of expression and the care which must be exercised before holding that Article 10.2 is satisfied, I have in mind the following facts. (i) The interview was concerned with an issue of general public interest, namely whether it was wrong to exclude tobacco smokers from fostering children, (ii) the interview was a live discussion which was not pre-recorded, (iii) Mr Gaunt was, and was well known to be, a hard-hitting and robust interviewer, who felt strongly about the issue, and (iv) Mr Stark was a politician, and he made no subsequent complaint.
38. Plainly, however, these factors cannot mean that the interview could not be susceptible to a finding that it fell foul of paras 2.1 and/or 2.3 of the Code: the restrictions mentioned in Article 10.2 are plainly capable of applying to the interview. Indeed, the closing part of Article 10.1, reflecting no doubt the sort of concern which Lord Hoffmann articulated in *Pro-Life* [2004] 1 AC 185, para 20, makes it clear that radio and television licensing was an area where a degree of control was to be expected.
39. When considering whether it offended paras 2.1 and/or 2.3 of the Code, the interview must be considered as a whole and in its context, as both Ofcom and the Divisional Court said. It would be wrong to focus too hard individually, let alone exclusively, on (i) Mr Gaunt's specific insults, such as "health Nazi" or "ignorant pig", (ii) his hectoring tone and bullying manner, (iii) his persistent interruptions, (iv) his failure to let Mr Stark develop any argument or even answer the points made by Mr Gaunt, including telling Mr Stark to "shut up", or (v) his treating more than one innocuous

- comment by Mr Stark as an insult. All these points must be considered together, together with the fact that the interview was permitted to run on for many minutes after it had become clear that it had got out of hand.
40. There was some mention in argument about the relevance of the apologies offered by Mr Gaunt and by Talksport. I do not think it is right to treat them as supportive of Ofcom's conclusion. They could, perfectly properly, have been tactical in the case of Talksport, and required by his employer in the case of Mr Gaunt. More broadly, there will, I suspect, be cases where there may well be uncertainty as to whether there has been a breach of the Code, and where it would be desirable to broadcast an apology. To treat such an apology as indicative of an admission that there had been a breach of the Code would therefore be a retrograde step. If anything, it seems to me that the apologies in this case should be regarded as going to mitigation rather than as amounting to some sort of admission, although Mr Gaunt's apology to Mr Stark was, it must be said, somewhat grudging.
 41. In my view, the combination of the five points identified in para 39 above, even bearing in mind the factors in para 37 above, render it impossible to accept the contention that the publication of the Finding, which contained no sanction, other than the stigma of the publication of an adverse finding by the statutory regulator, represented an interference with Mr Gaunt's right to freedom of expression under Article 10.
 42. The point that the topic covered by the interview was of public interest is of limited force, once one considers the actual contents of the interview. Apart from appreciating that Mr Stark and Redbridge believed that tobacco smokers should not be allowed to foster children, which would have been known from the introduction to the interview, a listener would have had no further idea of his views or reasons, because he was not allowed to express them. Having heard the interview, a listener might have concluded that its purpose was to enable Mr Gaunt to make it clear how strongly he disagreed with Redbridge's policy, and to insult, belittle and berate Mr Stark as the representative of the policy.
 43. It is true that the interview was broadcast live, but this was not a case of a relatively inexperienced interviewee being provoked in the heat of the moment (as in *Fuentes Bobo* 31 EHRR 50). Mr Gaunt was an experienced interviewer, who had plainly decided to embark on a particularly aggressive assault on Mr Stark and his opinions. It is also worth bearing in mind that it was Talksport which was the subject of the Finding, and, as Ofcom said, the interview could have been stopped by the producers (with the use of the so-called "dump button") once it had become clear that Mr Gaunt had lost control.
 44. The fact that Mr Gaunt's style of interviewing was well known to most of his listeners and, presumably, to Mr Stark does not provide immunity from the Code, but was rightly taken into account by Ofcom as a relevant consideration when assessing the acceptability of Mr Gaunt's conduct. However, it seems to me self-evident that, at least on its own, this factor is unlikely to render acceptable an interview which would otherwise be unacceptable.
 45. Mr Stark did not register a complaint after the interview was broadcast, but that is certainly not inconsistent with his having been offended or upset by his treatment at

the hands of Mr Gaunt. That is not irrelevant, at least in principle, although Ofcom's Finding was not based on the offence caused to Mr Stark. In any event, I do not attach much weight to his not having complained subsequent to the broadcast. Many people in his position would have preferred to put the whole thing behind them, and he may well have been fully mollified by Mr Gaunt's suspension on the day of the interview and his dismissal ten days later. In any event, his reaction to his treatment during the interview, unsurprisingly, betrays discomfort to say the least.

46. In summary, when one combines the extremely aggressive tone of the interview, the constant interruptions, the insults, the ranting, the consequent lack of any substantive content, and the time which the interview was allowed to run on, it seems to me clear that Ofcom was right to conclude that there had been a breach of paras 2.1 and 2.3 of the Code.
47. I have not so far mentioned in this discussion the fact that, although the decision whether Article 10 is infringed in this case is ultimately one for the court, we should nonetheless "have due regard" to the judgment of Ofcom as the statutory regulator. It is unnecessary to do so, in the sense that I have reached the clear conclusion that paras 2.1 and 2.3 were infringed by the interview. However, the fact that Ofcom reached the same conclusion is a powerful supporting factor, and it would have caused me anxiously to reconsider my view if it had been different.
48. The evidence of Christopher Banatvala, Ofcom's Director of Standards since 2004, who has been involved with broadcast journalism since 1993, was that, as one would expect, "Ofcom regularly has to deal with programmes which involve political or policy issues and frequently has to balance the broadcaster's and the audience's right to freedom of expression against the sometimes competing requirements of the Code". In other words, Ofcom, as the statutory regulator, has the experience and the "feel" which the court lacks. Mr Banatvala also said that he could "not recall having to consider a case where an interviewer had deployed such language in such a way and had also told the interviewee to shut up". That serves to reinforce the conclusion I have reached, in common with Ofcom itself and the Divisional Court.
49. The submissions made in writing by Liberty, who intervene in these proceedings in Mr Gaunt's support, and, albeit to a lesser extent, the submissions on behalf of Mr Gaunt himself, concentrated on the specific insults levied at Mr Stark in the interview, "Nazi", "health Nazi", and "ignorant pig". The suggestion was that Ofcom attached too much weight and too much offensiveness to those insults. In my view, however, Ofcom quite correctly took those insults into account, but only as a factor among others, which, when taken together, rendered the interview in breach of paras 2.1 and 2.3 of the Code.
50. On behalf of Mr Gaunt, attention was also drawn to three rulings of Ofcom in other cases that there had been no infractions of the Code, where there had been many more complaints from members of the public than the 53 in the present instance. In this field at any rate, I suspect that consideration of the facts of other cases normally provide little help, and sometimes can amount to a positive distraction, as each case is so dependent on its particular facts, context and issues. Thus, in two of the cases relied on by Mr Gaunt, the complaint was of unfair treatment of the interviewee, who had made no complaint himself, but, in this case, as I have mentioned, the complaint is not based on concern about Mr Stark, but offensiveness to the audience. In the third

case, although the interview was aggressive, the interviewer was nothing like as offensive in tone, manner or insults as Mr Gaunt. Heated exchanges, impertinent questions and opinionated tone in other interviews are one thing, the combination in this interview of bullying manner, interruption, ranting and insults is quite another.

51. That is not, of course, quite the end of the matter, as it is also necessary to consider whether the sanction imposed was proportionate. In that connection, all that happened here was the publication of the Finding, a fully reasoned decision that there had been a breach of the two paragraphs. It would have been open to Ofcom simply to publish that the complaint about the interview had been "resolved", especially, no doubt, where as here, the channel had apologised both on air and to the regulator, and had not defended the broadcast in question. That course was considered by Ofcom, but it was rejected essentially for two reasons. First, this was not a case of an unexpected or inadvertent error; Talksport had allowed the interview to continue for many minutes after it had plainly got out of control, and had decided not to use the dump button. Secondly, there had been two previous findings against Talksport (one sufficiently serious to warrant a financial penalty) where the producers had effectively lost control of an interview or discussion.
52. Having concluded that Ofcom rightly decided that in broadcasting the whole of the interview, Talksport infringed paras 2.1 and 2.3 of the Code, it seems to me that, given that there were good reasons for not merely recording the matter as resolved, and given that no fine or other sanction, other than publication of the Finding itself, was imposed, it is quite impossible to contend that Ofcom's reaction even got near being disproportionate. Indeed, I would go further: on the basis of the evidence we have seen and the arguments we have heard, publication of the very careful and balanced Finding seems to me to have been the right course to take.
53. From Mr Gaunt's perspective, by the time the Finding was published, he had already been dismissed by Talksport, and there is no suggestion in the evidence or submissions made on his behalf that he has lost any particular work as a result of the Finding. His reputation as a very hard-hitting journalist may mean that the Finding has done him no damage, but, if it has, it does not only appear to be hard to identify, but it would be an inevitable consequence of any system of controlling broadcasts. That point serves to underline the importance of anxiously scrutinising any curb on freedom of expression, but it goes no further than that, and anxious scrutiny is precisely what Ofcom gave the matter.

Conclusion

54. For these reasons, I would dismiss Mr Gaunt's appeal.

Lord Justice Toulson:

55. I agree.

Lord Justice Etherton:

56. I also agree.