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(subject to editorial corrections) **

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**KING'S BENCH DIVISION
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY SEAN CARLIN
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION OF
THE OFFICE OF COMMUNICATIONS**

**Ronan Lavery KC and Mark Bassett (instructed by Brentnall Legal Ltd) for the applicant
Brian Kennelly KC and Emily Neill (instructed by Pinsent Masons LLP) for the proposed
respondent**

SCOFFIELD J

Introduction

[1] By these proceedings, the applicant seeks to challenge a decision of the Office of Communications ("Ofcom") made on 18 March 2022 by which it revoked the licence held by ANO TV Novosti to broadcast Russia Today ("RT") News to audiences in Northern Ireland. The applicant is a member of the Irish Republican Socialist Party and was formerly a viewer of RT broadcasts.

[2] Mr Lavery KC and Mr Bassett appeared for the applicant; and Mr Kennelly KC and Ms Neill appeared for the proposed respondent. I am grateful to all counsel for their helpful written and oral submissions.

Factual background

[3] As noted above, the applicant was previously a viewer of RT news programmes. He has averred that he believes that they were an important element of understanding the relationship between Russia and Ukraine and the conflict between those countries, amongst other things. He states that he is a trained restorative justice and conflict resolution practitioner who works internationally to

promote conflict resolution. He has travelled to a variety of areas affected by conflict, including Russia; and in 2015 attended the 'Dialogue of Nations' conference in Moscow, where he met with representatives of Russian-speaking separatist activists in the Donbass region of Ukraine. The applicant's view is that the coverage of the conflict between Russia and Ukraine, including its context and causes, is "grossly insufficient in Western Europe", with a dearth of information and poor analysis. He does not think this to have been true of RT and Sputnik Media, which he considered to offer an alternative, legitimate viewpoint in respect of these matters. He has provided evidence of his having enjoyed a number of television shows broadcast on RT.

[4] The applicant has stated in his evidence that RT is "a Russian state-controlled international television network funded by the Russian government" and is a brand of TV Novosti, which is said by him to be an autonomous non-profit organisation founded by the Russian state-owned news agency RIA Novosti in April 2005. (The proposed respondent proceeded on the basis of the information provided to it by ANO TV Novosti, which provides RT, to the effect that it was incorporated under Russian law; founded by an entity called the Association for the Development of International Journalism; and receives annual subsidies from the Russian Federation's state budget in circumstances discussed further below.) RT's television broadcasts were available to viewers in Northern Ireland for several years prior to March 2022.

[5] The proposed respondent is Ofcom, which is the regulatory and competition authority in the United Kingdom for the broadcasting, telecommunications and postal industries. It has wide-ranging powers across these sectors, including in relation to licensing. Ofcom was established by the Office of Communications Act 2002 but its functions relevant to these proceedings are set out in two Acts dealing with broadcasting and in the Communications Act 2003.

[6] The applicant places significant reliance upon a statement made by the former Secretary of State for Digital, Culture, Media and Sport (Nadine Dorries MP, "the Secretary of State") in Parliament on 3 March 2022. In advance of this statement, on 28 February 2022, Ofcom announced that it had received a range of complaints relating to RT broadcasts and stated that some 15 programmes would be investigated. On 2 March 2022, the European Union introduced restrictions on the broadcast of RT within the territory of EU member states. This was explained by the Council of the EU to be intended to last "until the aggression to Ukraine is put to an end, and until the Russian Federation and its associated outlets cease to conduct disinformation and information manipulation actions against the EU and its member states." This had the practical effect of removing RT from broadcast providers in this jurisdiction also (a matter to which I will return).

[7] The Secretary of State made her statement in Parliament the next day, including the following sentiments:

“Mr Speaker, from the moment Putin began his invasion, I was also very clear that he must not be allowed to exploit our open and free media to spread poisonous propaganda into British homes. RT’s own Editor-In-Chief called the network an “information weapon” of the Russian state, and that’s why I wrote to Ofcom last week, urging them to examine any potential breaches of the broadcasting code. Ofcom has since opened 27 investigations into RT, and are now reviewing whether to revoke RT’s licence entirely.

In the meantime, those investigations have been taken over by events and I was very glad to see yesterday that the channel is now officially off air on British televisions, after it was shut down on Sky, Freeview and Freesat.”

[8] When these proceedings were commenced, on 16 May 2022, there had been no formal outcome to the Ofcom investigations of the RT broadcasts referred to above. Nonetheless, on 18 March 2022, the proposed respondent revoked the licence held by ANO TV Novosti (“the Licensee”). In doing so, it issued a detailed decision, which is discussed in further detail below.

[9] The applicant initially sent pre-action correspondence to the Secretary of State in advance of the decision which is impugned in these proceedings. On 14 March 2022, the Crown Solicitor’s Office (“CSO”) responded contending, inter alia, that the statement made in the House of Commons was not a proper ‘target’ for judicial review. Following the Ofcom decision a few days later, the applicant readjusted his focus. Pre-action correspondence to Ofcom was sent on 21 March 2022. It replied on 31 March 2022.

Relevant statutory provisions

[10] In the present case, the Licensee held two licences to provide both the RT and the RT Europe services via satellite and cable television under the Broadcasting Act 1990 (“the 1990 Act”); and held a further licence to provide the RT service on digital terrestrial television under the Broadcasting Act 1996 (“the 1996 Act”).

[11] Section 3 of the 1990 Act applies to the grant of licences under Part I of that Act. Section 3(3) provides as follows:

“OFCOM –

- (a) shall not grant a licence to any person unless they are satisfied that he is a fit and proper person to hold it; and

- (b) shall do all that they can to secure that, if they cease to be so satisfied in the case of any person holding a licence, that person does not remain the holder of the licence;

and nothing in this Part shall be construed as affecting the operation of this subsection or of section 5(1) or (2)(b) or (c).”

[12] Section 3(3) of the 1996 Act is in materially identical terms. The result is that, if Ofcom ceased to be satisfied that ANO TV Novosti was a “fit and proper person” to hold its licences, Ofcom was under an obligation to do all that it could to secure that the Licensee did not remain the holder of the licence.

[13] Section 3 of the Communications Act 2003 (“the 2003 Act”) sets out a number of general duties to which Ofcom is subject in carrying out its functions. Section 3(1) provides for its principal duty in the following terms:

“It shall be the principal duty of OFCOM, in carrying out their functions –

- (a) to further the interests of citizens in relation to communications matters; and
- (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.”

[14] The ‘principal duty’ is fleshed out to some degree by the provisions of section 3(2), which are in the following terms (with the applicant relying, in particular, upon section 3(2)(c) and (d)):

“The things which, by virtue of subsection (1), OFCOM are required to secure in the carrying out of their functions include, in particular, each of the following –

- (a) the optimal use for wireless telegraphy of the electro-magnetic spectrum;
- (b) the availability throughout the United Kingdom of a wide range of electronic communications services;
- (c) the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and

calculated to appeal to a variety of tastes and interests;

- (d) the maintenance of a sufficient plurality of providers of different television and radio services;
- (e) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services;
- (f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both –
 - (i) unfair treatment in programmes included in such services; and
 - (ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.”

[15] Section 3(3) of the 2003 Act provides as follows:

“In performing their duties under subsection (1), OFCOM must have regard, in all cases, to –

- (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
- (b) any other principles appearing to OFCOM to represent the best regulatory practice.”

[16] Further matters to which OFCOM must have regard are prescribed by section 3(4) which provides, in material part, as follows:

“OFCOM must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances –

...

(g) the need to secure that the application in the case of television and radio services of standards falling within subsection (2)(e) and (f) is in the manner that best guarantees an appropriate level of freedom of expression;

...

(k) the opinions of consumers in relevant markets and of members of the public generally;

...

(m) the extent to which, in the circumstances of the case, the furthering or securing of the matters mentioned in subsections (1) and (2) is reasonably practicable."

[17] Chapter 4 of the 2003 Act contains a range of regulatory provisions. Sections 319 to 328 deal with programme and fairness standards for television and radio. Section 319(1) provides that:

"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."

[18] The standards objectives are then set out in section 319(2). They include, significantly in the present case, the objectives "that news included in television and radio services is presented with due impartiality and that the impartiality requirements of section 320 are complied with" and "that news included in television and radio services is reported with due accuracy." The impartiality requirements of section 320, which are referred to in section 319(2)(c), are "special impartiality requirements" which impose heightened impartiality requirements in certain circumstances, including "the preservation, in the case of every television programme service ... of due impartiality, on the part of the person providing the service ..." as respects the matters giving rise to the requirement. These objectives are, in turn, reflected in the Broadcasting Code published by Ofcom, in compliance with section 319(3).

The impugned decision

[19] The decision which is challenged in these proceedings was given in the form of a detailed written determination which was published by Ofcom ("the written

decision"). It is necessary to set out some detail of the determination in order to understand the precise basis upon which the relevant licences were revoked.

[20] The written decision begins with an introductory section. It records that RT is a global news and current affairs channel which is largely produced in Russia and funded by the Russian Federation. The provider of the service, ANO TV Novosti holds three UK broadcasting licences, two for the service called RT (which is a service made for UK audiences and which broadcasts in English in order to provide a Russian perspective on UK and global news and current affairs) and one for a service called RT Europe. The written decision also immediately draws attention to Ofcom's ongoing duty to be satisfied, as the independent UK broadcasting regulator, that broadcast licensees remain fit and proper to hold their licences (see paras [11]-[12] above).

[21] The decision notes that, on Thursday 24 February 2022, Russia launched an invasion of Ukraine which has been internationally condemned, including by the UN General Assembly, and which has resulted in a range of countries having sanctioned Russia for its actions.

[22] Central to Ofcom's decision is a development which is noted at para 5 of the written decision, namely that on 4 March 2022 the TASS Russian news agency reported a change to Russia's Criminal Code in the following terms:

"The Russian Criminal Code is updated with Article 207.3 'Public dissemination of deliberately false information about the use of the Armed Forces of the Russian Federation,' which provides for imprisonment for up to three years or a fine of up to 1.5 million rubles. Provided that the law is breached with the use of official position, for mercenary reasons, or on grounds of political, ideological, racial, ethnic or religious hatred or enmity, the offense will be punishable by imprisonment for up to 10 years or a fine of up to 5 million rubles. Provided that the fake information entails grave consequences, the term of imprisonment will be from ten to 15 years."

[23] The decision goes on to note that reports suggest that Russian authorities regarded it as "fake information" to call the conflict in Ukraine "a war." A large number of reputable international news providers announced the suspension of their coverage in Russia as a result of this new law. The Ofcom decision notes that some of those news organisations have since resumed coverage, which is a matter relied upon by the applicant; but the written decision also notes that those who have recommenced broadcasting from Russia have limited their coverage to "the political, economic and social situation in Russia", with the military situation in Ukraine only being covered by journalists in *other* locations.

[24] At the time of its decision, following its own monitoring of RT's coverage in the United Kingdom of the conflict in Ukraine and in response to some 960 complaints about programmes on RT which had been made since 22 February 2022, Ofcom had opened 29 investigations into the due impartiality of news programmes on the RT News channel which had been broadcast between 27 February 2022 and 2 March 2022. It was acknowledged that these investigations were ongoing. On 2 March 2022, following the imposition of sanctions by the EU which affected the ability of third parties to provide services to the Licensee, RT had ceased to broadcast on regulated platforms in the UK. There were no complaints therefore about broadcasts after that date.

[25] In its written decision, Ofcom went on to summarise the statutory framework governing the function it was exercising, including by making express reference to section 3(2) of the 2003 Act, and subparagraphs (c), (d), (e) and (f) of that subsection.

[26] Ofcom then referred to article 10 ECHR and the protection it affords to a broadcaster's and its audience's right to freedom of expression, including the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

[27] The written decision continues (at paras 17-18) in the following terms:

“As set out above, if a broadcaster is found to be not fit and proper to hold a particular licence, then Ofcom must revoke that licence. The broadcaster cannot broadcast again unless the reasons making it unfit have been fixed. This is a major interference with freedom of expression, as it prevents the broadcaster from broadcasting and restricts the number of voices being heard and the range of programming available to audiences. Ofcom considers that the threshold for finding a broadcaster not fit and proper to hold a broadcast licence is, therefore, high.

The main reason for broadcasting to be regulated is to protect audiences from harm. In judging whether someone is fit and proper to hold a broadcast licence, the central consideration is whether they can be expected to be a responsible broadcaster. When Ofcom is assessing whether an existing licensee remains fit and proper, a key consideration will be that person's compliance with regulatory standards and the conditions of its licence. We may also look at non-broadcasting related conduct where we consider that it is relevant to the likely future conduct of the broadcaster licensee and/or to public confidence in the broadcasting regime as a whole.”

[28] Next, the decision addresses Ofcom’s procedures in this case. Ofcom’s publicly available procedures outline the process which it will normally follow when considering the fitness and propriety of broadcast licensees. Where a person is no longer considered to be fit and proper to hold a licence, Ofcom follows a procedure in which the licensee is given an opportunity to make representations on the proposal to revoke the licence. In this case, Ofcom recounted that it had sent the Licensee a notice on 8 March 2022 informing it that Ofcom was minded to decide that it could no longer be satisfied that ANO TV Novosti was a fit and proper person for the purposes of the 1990 and 1996 Acts. Reasons for this view were set out. The Licensee was permitted to make written representations within a number of days and had the opportunity to attend an oral hearing (either online or in person) on 11 March 2022. On 9 March 2022, the Licensee requested an extension of time for its response; and this was duly granted, with a new deadline of 15 March 2022 and the oral hearing then to be held on 16 March 2022.

[29] In the event, the Licensee declined to provide further representations or to attend the oral hearing, contending that even the extended period for response was insufficient and that (for reasons related to sanctions which had been imposed) it was unable to avail of legal representation in the UK. The Licensee *had* made representations in correspondence to Ofcom in relation to the 29 investigations relating to broadcast complaints. Some of the responses provided in respect of those complaints, where it touched upon the Licensee’s efforts to maintain due impartiality in its service during the current crisis, were taken into account by Ofcom.

[30] Ofcom also recorded that it considered that an expedited procedure was necessary in this case since, although the RT service was not then broadcasting in the UK, it was possible for its services to recommence broadcasting at any time (for example, by coming to an arrangement with a broadcasting platform specific to the UK). It was considered that expedition was required “due to the high public interest in the case and the exceptional circumstances of the case”, alongside the ‘do all that it can’ nature of the obligation in sections 3(3) of the 1990 and 1996 Acts.

[31] The written decision then turns to the Licensee’s relationship with the Russian Federation, which is addressed in some detail at paras 26-34. It records, inter alia, that the Licensee receives annual subsidies from the Russian Federation state budget every year; but that the Licensee described this procedure, which is established by federal law, as prohibiting any state interference in its editorial policy or any role of its founder in the editorial process. The mere fact that the Licensee was state funded and that Russia had committed acts which were inconsistent with international values was not of itself treated as decisive. However, the Russian Federation’s conduct in Ukraine was said to be, in Ofcom’s view, exceptional:

“No other Ofcom broadcast licensee is financially dependent on a state whose head of state, President Putin, has been personally sanctioned by the UK for launching a

war of aggression against the neighbouring state. The Editor in Chief of the service, Margarita Simonyan, is also personally subject to UK sanctions.

In addition, ANO TV Novosti is the state broadcaster of, and funded by, a state which has, in connection with that war of aggression, prohibited the “Public dissemination of falsehoods about the use of Russia’s armed forces”, and the Russian authorities have reportedly made it clear that calling it a “war” is considered fake news. Penalties of up to 15 years in jail are associated with breach of the law.”

[32] The written decision then recounts a statement from the Russian presidential spokesman, quoted by the Russian state news agency, saying that the law referred to above was necessary and “proportionately harsh” on the basis of there being an “information war” against Russia. The decision also notes that that agency published without challenge a suggestion that there were no threats whatever to the civilian population in Ukraine, which is entirely at odds with (for instance) statistics and information published by the UN High Commissioner for Human Rights.

[33] Para 33 of the decision explains that, for so long as the Licensee holds a broadcast licence, there is a clear implication that Ofcom considers it to be a fit and proper person to hold a licence; and that, in the circumstances described above, Ofcom considered this to bring the integrity of the broadcast licensing regime in the UK as a whole into question.

[34] In his submissions, Mr Kennelly identified the following paragraph within the written decision (para 34) as being key:

“In particular, it is difficult to see how any news provider based in Russia could cover the events in Ukraine responsibly in circumstances where a law appears to prohibit with a potential criminal penalty of 15 years imprisonment, for example, the dissemination of information that civilians are being killed by Russian forces or that a war is going on. It is also difficult to see how a Russian state-funded news broadcaster could credibly avoid covering the events in Ukraine, or could expect to remain funded if it failed to convey the narrative that the Russian Federation seeks to impose on its own people and the rest of the world. We therefore are concerned that it is not possible to be satisfied that a news broadcaster based in Russia and which is currently subject to such a law, is fit and proper to hold an Ofcom licence, a condition of which requires its news to be duly accurate and duly impartial.”

[35] The written decision then goes on to consider the issue of due impartiality. As noted above (see paras [17]-[18]), Ofcom has a duty under section 319 of the 2003 Act to set such standards for the content of programmes on television and radio services as appear to it best calculated to secure the standards objectives set out in section 319(2). Due impartiality in UK broadcast media was considered particularly important because other sources of news media, such as social media and the internet, are often partial. Ofcom had set due impartiality standards in the Broadcasting Code, Section Five of which set out principles “to ensure that news, in whatever form, is reported with due accuracy and presented with due impartiality” and that the special impartiality requirements were met in respect of broadcast content covering matters of major political controversy. It is a condition of each of the Licensee’s broadcast licences that the service broadcast complied with that Code. Ofcom considered the conflict in Ukraine to be a matter of major political controversy triggering the application of the special impartiality requirements (and this was not disputed), which therefore required a higher standard of impartiality. The requirements of due impartiality are also considered to be highest for news programming.

[36] Ofcom then turned to consider the Licensee’s compliance history. Between 2012 (when the Licensee acquired its first licence) and 2017, Ofcom recorded 15 breaches of the Broadcasting Code against ANO TV Novosti services. After this, the Licensee engaged with Ofcom regarding compliance with the Code. Notwithstanding this, in 2018, Ofcom recorded a further seven breaches of the Code, all relating to due impartiality. The programmes concerned dealt with the poisoning of Sergei and Yulia Skripal in Salisbury in March 2018, the armed conflict in Syria, and the Ukrainian Government’s position on certain issues. Ofcom regarded these as “a serious and repeated failure of compliance” and imposed a financial sanction of £200,000. It was acknowledged that no further breaches had been found since those recorded in 2018, over a period of almost four years.

[37] The final section of the written decision deals with Ofcom’s continuing duty to be satisfied of the Licensee’s fitness to hold a broadcast licence. Paras 49-50 are particularly important:

“However, RT is a news and current affairs service. We consider that ANO TV Novosti’s position as a state broadcaster, financed by a state which has recently invaded a sovereign state and effectively criminalised independent journalism, and in a context where a journalist can be imprisoned for up to 15 years for failure to adopt the state’s view of the news, means that we cannot be confident that it will be able to abide by the due impartiality rules of the Code.

Ofcom considers that ANO TV Novosti's compliance history to date demonstrates that it has particular difficulty in complying with the due impartiality rules of the Code where they relate to matters of Russian foreign policy, and that this difficulty is particularly acute where the matters concerned trigger the special impartiality requirements of the Code. We are concerned that, in these circumstances, to continue to consider ANO TV Novosti as a fit and proper person to hold a UK broadcast licence risks undermining public confidence in the UK broadcasting regulatory regime as a whole, and undermining audiences' trust in regulated broadcast news."

[38] The written decision went on to note that nothing in the Licensee's conduct since Russia's invasion of Ukraine allayed Ofcom's concerns in the above regard. Although Ofcom had not reached a conclusion on the 29 investigations referred to in para [24] above, the volume and potentially serious nature of the concerns raised within such a short period was considered deeply concerning. (In fact, after the decision at issue in this case, Ofcom subsequently concluded that all of the programmes concerned breached the Broadcasting Code, and that these breaches were serious and repeated, for reasons set out in a later decision on this issue.)

[39] Ofcom directed itself to the importance of freedom of expression, recognising that this encompassed the right of broadcasters to make programmes providing audiences with the Russian viewpoint on news and current affairs, including both viewpoints which are supportive of certain states and critical of others and including challenges to accusations made against Russia. The ultimate conclusion (at para 55 of the written decision) was, however, as follows:

"We have considered the pressures to which all media providers in Russia are currently subject by the Russian state and ANO TV Novosti's particular relationship with the Russian Federation. That state is engaged in a war to which the United Nations has overwhelmingly voted to demand an end. In the circumstances, Ofcom considers that overall, it is not possible to be satisfied, on the facts today, that ANO TV Novosti can be a responsible broadcaster. Therefore, Ofcom cannot be satisfied that the Licensee remains a fit and proper person for the purposes of each of s3(3) of the 1990 Act and 1996 Act and we have decided to revoke the above licences."

[40] This was acknowledged to be a significant interference with the applicant's article 10 rights but was considered to be prescribed by law, in pursuit of a legitimate aim and necessary in a democratic society. The impact of the decision was

noted to be “somewhat mitigated” by the fact that it was not, in any event, then broadcasting on any regulated broadcast platforms in the UK (albeit its content remained available to a limited degree online).

Summary of the parties’ cases

[41] The applicant advances three grounds of challenge, namely that the Ofcom decision was (i) ultra vires section 3 of the 2003 Act in a variety of respects (particularly, although not exclusively, by reason of the decision having been taken in advance of the broadcast investigations having been concluded and by reason of the reduction in the plurality of providers which resulted from the decision); (ii) in violation of article 10 ECHR; and (iii) taken for an improper purpose. As to the last of these contentions, the applicant has made some strident averments as to his view of Ofcom being beholden to the wishes of the executive. He also relies upon the fact that the respondent did not follow its ordinary procedures for consideration of licence revocation, by adopting an expedited process.

[42] The proposed respondent robustly denies any improper purpose or undue government influence; and relies on the detailed terms of the written decision, discussed above. It argues that the applicant’s case fundamentally misunderstands (or mischaracterises) the basis for the impugned decision, namely that it was founded on the *position* in which the Licensee found itself following the invasion of Ukraine and changes in Russian law, rather than concerns arising from the broadcasts which were the subject of incomplete investigations.

[43] I address each of the applicant’s three grounds of challenge below, applying the test for the grant of leave recently confirmed by the Court of Appeal in *Re Ni Chuinneagain’s Application* [2022] NICA 56, at para [42].

The ultra vires challenge

[44] I have little hesitation in concluding that the applicant’s first central ground of complaint is not arguable, such as to have a realistic prospect of success. In substance, it amounts to an irrationality challenge. There is no proper basis for concluding that the proposed respondent failed to have regard to the general duties governing its functions.

[45] The applicant’s suggestions that the impugned decision “is contrary to the duty to further the interests of citizens in relation to communication matters” because it deprives them of an important source of information and that the decision is “contrary to the duty to ensure the maintenance of a sufficient plurality of providers of different television and radio services” fail to give due recognition to the nature of the statutory scheme in two significant respects. First, as explained above, where Ofcom is no longer satisfied that a licensee is fit and proper to hold a licence, it is *required* by statute to take steps to ensure that the licensee does not remain the holder of a licence. Although Ofcom has some degree of discretion in

assessing the fitness of the licensee, where it is no longer satisfied as to fitness, its response is statutorily determined. Second, the general duties set out in section 3(2) of the 2003 Act are not (at least in this case) individually enforceable in the selective manner urged upon the court by the applicant.

[46] The matters which Ofcom is required to secure pursuant to section 3(2) will, in certain instances, pull in different directions. For example, there may well be a tension between maintaining a plurality of providers and a range of services on the one hand and maintaining standards which protect the public from harm or unfair treatment on the other. Regulatory action removing a licensee's ability to broadcast will inevitably reduce choice – but there may be good reason for this which is consistent with one of the further general duties imposed upon the regulator. The possibility of such tension is explicitly recognised, and catered for, in the 2003 Act. Section 3(7) provides:

“Where it appears to OFCOM that any of their general duties conflict with each other in a particular case, they must secure that the conflict is resolved in the manner they think best in the circumstances.”

[47] The matter will then resolve to one of expert regulatory judgment. It is well established both as a matter of general principle, and in this context in particular, that the court will only second-guess an expert regulatory assessment where the regulator has obviously gone wrong: see *R (ANO-TV Novosti) v Ofcom* [2021] EWCA 1534; [2022] 1 WLR 481, at para [62]. There is no statutory guidance as to the threshold to be applied in assessing whether a broadcaster is “fit and proper.” That is a matter for Ofcom's judgement and the courts will not lightly interfere with its regulatory judgement in this regard, given its expertise and experience: see *R (Avaaz Foundation) v OFCOM* [2018] EWHC 1973 (Admin), per Supperstone J, at paras [54] and [65]. It was open to Ofcom to assess the propriety of a broadcaster continuing to hold a licence by having regard to the situation in which it had been placed by external factors, where this is relevant to likely future conduct in its broadcasting, as well as its own characteristics.

[48] The applicant also alleges that the impugned decision is contrary to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, as referred to in section 3(3)(a) of the 2003 Act. These are principles to which the proposed respondent must have regard. However, they do not dictate the substantive outcome in any particular case. More particularly, the applicant's attack in reliance on these principles relates to the respondent having made its decision without full investigation, contrary to its ordinary procedures. But that in turn relates to Ofcom's then un-concluded broadcast investigations, in circumstances where it is entirely clear from a reading of the decision that individual breaches of the Broadcasting Code in certain programmes was *not* the basis for the licence revocation. Rather, the question was one of the fitness and propriety of the Licensee

to continue to hold the licence. The applicant's contention that the proposed respondent rushed to judgement on the basis of undetermined complaints is therefore entirely misplaced.

[49] The applicant further contends that existing television services presented a dominant media narrative and that RT broadcasts in relation to the Russia-Ukraine conflict should be permitted to complement and contradict this narrative, where appropriate. However, that ignores the point made above that where the propriety of a licensee holding a licence is in issue, because of its inability to comply with the licence terms or the unlikelihood of its doing so, the outcome is statutorily prescribed. Moreover, in terms of the applicant's compliance with its due impartiality obligations, both the Divisional Court in England (see [2020] EWHC 689 (Admin)) and the Court of Appeal on appeal (*supra*), in the present applicant's legal challenge to Ofcom's findings of breach in 2018, made clear that due impartiality is to be displayed in the licensee's own programming rather than across the plurality of broadcasters considered as a whole (see, in particular, paras [63] and [65] of the judgment of Sir Geoffrey Vos MR in the Court of Appeal).

[50] In this case, the Licensee is financially dependent on the Russian Federation. Not only has that state's Head of State been personally sanctioned by the UK but so too has the Editor-in-Chief of the RT service. Added to that, the Licensee has a previous history of non-compliance with licence conditions; and, since the outbreak of the conflict in Ukraine, Ofcom has been in receipt of multiple complaints about further compliance issues. Most significantly, the Russian Federation has introduced a new law which Ofcom consider to 'effectively criminalise independent journalism' in relation to a matter of major public interest and controversy which will inevitably be covered by the Licensee's news programmes. Even if it was inclined to report with rigorous impartiality, therefore, the position in which it finds itself (with its programmes largely being produced in Russia) is such that it would be impossible to do so. Further still, the Licensee did not engage in substance with the proposed decision and, in particular, offered Ofcom no material reassurance about compliance with its obligation of due impartiality. In the above circumstances, a conclusion that the Licensee was in the current circumstances not a proper person to hold a licence – conditions of which require it to respect the special impartiality requirements – was entirely understandable, if not inevitable. Certainly, there is no arguable case that it was irrational. As I have already made clear, I also see no proper basis for the contention that the proposed respondent stepped outside the bounds of the obligations imposed upon it by section 3 of the 2003 Act.

[51] In his affidavit evidence, the applicant made the assertion that no adequate comparison had been made with other conflict situations by Ofcom and, indeed, that Ofcom wrongly treated the Licensee in this case less favourably than other licensees in comparable situations (referring to "the partisan broadcasts of CNN, the BBC, Fox News and/or ITV relating to conflict zones around the world"). This element of the challenge was not pursued orally but, in any event, there is patently insufficient evidential material before the court for me to begin to consider that Ofcom had acted

irrationally by reason of illogically differential treatment afforded in materially identical circumstances. Ofcom has understandably represented that it is unaware of facts comparable to those upon which it relied in its decision.

Improper motive

[52] I also have little hesitation in rejecting as unarguable the third strand of the applicant's case, namely the contention that the proposed respondent not merely failed to act independently of the government of the day but compromised its independence to the extent of responding to political pressure and effectively acting under dictation. As Mr Kennelly observed in the course of his submissions, this is a serious accusation to be levelled at a regulator which must jealously guard its independence from the executive. Moreover, it is an allegation which will not lightly be entertained without evidence. Leave to apply for judicial review will not generally be granted upon a ground which is arguable only on a purely speculative basis, in the hope that it may be strengthened when more documents are obtained: see *De Smith's Judicial Review* (8th edition, Sweet & Maxwell) at para 16-049, citing *Sharma v Brown-Antoine* [2007] 1 WLR 780, at para [14](4). This is a kindred principle to the well-known statement in this jurisdiction in *Re SOS (NI) Ltd's Application* [2003] NIJB 252, at para [19], that "there must be some evidence or a sufficient inference" of a public law wrong before a case has been made out for leave to apply for judicial review on a particular ground (in that context, an allegation of having left a material consideration out of account).

[53] The two primary bases upon which this case is mounted are, firstly, the proximity in time between the Secretary of State's statement on 3 March and the impugned decision on 18 March 2022; and, secondly, the fact of the revocation decision arising in advance of completion of the investigations into particular RT broadcasts. In my view, neither of these factors provide a sufficient evidential basis for permitting this aspect of the applicant's challenge to proceed, whether taken individually or cumulatively. When looked at in the full and proper context, neither of these factors is in my view indicative of any failure on the part of Ofcom to exercise its functions conscientiously, independently and in compliance with its legal obligations.

[54] The Secretary of State was quite open about having written to Ofcom urging it to examine potential breaches of the Broadcasting Code. She said that she had published her letter, so it was not sent privately – although it has not been exhibited in the applicant's evidence. The height of the evidence before the court is that the Secretary of State urged Ofcom to examine any potential breaches of the Broadcasting Code. Ofcom's response to the Secretary of State, which has been provided to the court, refers to the actions which it was itself taking and its role as the *independent* communications regulator, charged with both upholding freedom of speech as well as ensuring that TV and radio audiences are protected from harm. The response to pre-action correspondence from the CSO on behalf of the Secretary of State emphasised her understanding that Ofcom was an independent regulator

and that she had no power to direct it. In another debate in the House of Commons where similar issues were being discussed, prior to the impugned decision in this case, the Prime Minister referred to the Secretary of State having asked Ofcom to review the matter and emphasised on behalf of the Government that the UK was a democracy which believed in free speech and that it was important that they (the Government) should leave it up to Ofcom rather than politicians to decide which media organisations to ban (drawing a favourable comparison between the independence of Ofcom in the UK and Russia's actions as respects media organisations there). Ofcom's own response to pre-action correspondence robustly rejects the suggestion that it acted other than independently at all times. The reasoning set out in its detailed decision speaks for itself and, as I have found above, was both rational and readily foreseeable.

[55] The alacrity with which Ofcom addressed the issue is explained in its own decision. It (rationally) considered that expedition was warranted in light of the high public interest in the case, the exceptional circumstances presented by the context in which it arose, and the terms of Ofcom's statutory duties.

Article 10 ECHR

[56] Turning then to the applicant's Convention ground: it is common case between the parties that the right to freedom of expression in article 10 ECHR includes not only the freedom to hold opinions but also to receive and impart information and ideas. The proposed respondent expressly adverted to this right in the course of its determination, noting also that the Convention does not prevent states from requiring the licensing of broadcasting and that article 10(2) allows interference with the right of freedom of expression where this is prescribed by law and necessary in a democratic society for the protection of the reputation or rights of others.

[57] The applicant contended that the interference with his article 10 rights was not in accordance with law by virtue of the matters relied upon in his ultra vires challenge, which I have rejected above. He further contends that the interference was not for a legitimate purpose by reason of his case that the respondent's action was taken simply in order to gratify the UK government. I have rejected that case also. The interference in this case plainly had a legal basis under section 3 of each of the 1990 and 1996 Acts. The Court of Appeal in England and Wales has also held, in its decision referred to above, that the legitimate objective of due impartiality pursued by the 2003 Act and the Broadcasting Code was sufficiently important to justify limiting the applicant's freedom to broadcast.

[58] The meat of the applicant's claim under article 10 is that the revocation decision was disproportionate and cannot be justified on the basis of a pressing social need. He makes this case on the basis, inter alia, that audiences in Northern Ireland are capable of critically evaluating RT broadcasts alongside those

of other broadcasters; and that the effect of the decision is to preclude RT television broadcasts entirely.

[59] The applicant's claim that the revocation is a disproportionate infringement of his article 10 rights in all the circumstances is in my view by far the strongest element of his case. However, I have concluded that it too is not arguable in the sense of enjoying a realistic prospect of success for the following reasons. Primarily, this is because Parliament itself has struck the balance in this context in the provisions of sections 3(3) of the 1990 and 1996 Acts respectively, alongside the enhanced impartiality requirements for broadcasting of this type. The rationale behind what the applicant pejoratively refers to as a 'paternalistic' approach is discussed in detail in the previous ANO TV Novosti challenge referred to above. It was a conscious choice on the part of Parliament; and there is no challenge to the legislation itself in this case. As explained above, if Ofcom is no longer satisfied that a licensee is fit and proper to hold a licence, it is then under a positive duty to do all that it can to secure that the licensee ceases to hold a licence.

[60] The element of discretion available to the proposed respondent is in its judgement as to whether or not the licensee is a proper person to hold a licence; but Ofcom's approach to that question must be exercised in good faith and not by the imposition of such an elevated threshold as to thwart the will of Parliament. In the present case, Ofcom recognised the significance of the interference with article 10 rights which its decision would entail and directed itself accordingly by expressly considering that the threshold for intervention was high. Whilst breach of Convention rights is a substantive matter for determination by the court, independent of the extent or quality of Convention reasoning by the public authority concerned, a careful consideration of Convention issues may warrant the authority's assessment being afforded additional respect by the court: see *Miss Behavin' Ltd v Belfast City Council* [2007] UKHL 19, at paras [37] and [91].

[61] Ofcom appears to me to have carefully considered the circumstances of this case and the matters previously raised by the Licensee which were relevant to its determination. It particularly noted that it would be inappropriate for Ofcom as regulator always to place decisive weight on the actions of States which have acted contrary to UK values or generally accepted international values in determining whether state-funded broadcasters were fit and proper persons to hold broadcast licences. It recognised that such an approach would potentially result in many state-funded broadcasters from states which may not share UK values being held not to be fit and proper to hold a licence.

[62] Nonetheless, it reached its conclusion in the particular circumstances of this case, which it considered to be "exceptional", on entirely defensible grounds, giving rise to the prescribed statutory outcome. Viewed as a whole, I do not consider – in light of the respect which is due to both the regulator's assessment of the facts and Parliament's prescription of the consequences – that the applicant enjoys a realistic

prospect of success in the contention that the revocation of the relevant licences was in violation of article 10 ECHR.

Utility of the application

[63] I would venture that there is a further basis upon which the refusal of the grant of leave may be warranted, that is that the proceedings, even if successful, would presently serve no practical purpose. I recognise that, at the time of its decision, Ofcom, whilst taking this factor into account, did not consider it determinative: it proceeded to revoke the licence on the basis that, in the absence of doing so, the Licensee *could* find a way to re-establish its broadcast service in the UK at any time. However, some seven months on, there has been little or no change in the situation. The war continues; the EU sanctions are still in place; and there is no suggestion that ANO TV Novosti would be in a position to commence RT broadcasting in this jurisdiction if only it regained its licence. In the absence of some significant change in the background context (for instance, if RT France was successful in its challenge before the CJEU to the EU sanctions imposed), it seems to me likely that success in these proceedings, even followed by a different outcome upon reconsideration by Ofcom, would represent a Pyrrhic victory only. In those circumstances, I would not have been inclined to exercise my discretion to hear the case at this point. In light of my view of the merits of the claim, however, I need not determine this issue (on which I heard no argument).

Conclusion

[64] By reason of the foregoing, I do not consider the applicant to have raised a case warranting the grant of leave to apply for judicial review; and I refuse his application accordingly.

[65] I will hear the parties on the issue of costs but provisionally take the view that the usual order should follow, namely that there should be no order for costs at this early stage of the proceedings, save for an order for legal aid taxation of the applicant's costs.