Case No: CO/481/2014

Neutral Citation Number: [2015] EWHC 406 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/02/2015

Before :

MR JUSTICE OUSELEY

- -

Between :

TRAVELLER MOVEMENT	**Claimant**
- and -	
OFCOM	**Defendant**
-and-	
CHANNEL 4	**Interested Party**

- -
- -

Christopher Jacobs and Charles Banner (instructed by **Howe & Co Solicitors**) for the **Claimant**
Dinah Rose QC and Iain Steele (instructed by **Ofcom**) for the **Defendant**
Adrienne Page QC and Nigel Abbas (instructed by **Wiggin LLP**) for the **Interested Party**

Hearing dates: 28th November 2014

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Judgment

MR JUSTICE OUSELEY :

1. On 4 November 2013, the Office of Communications, Ofcom, which is the broadcasting regulator for independent television and radio, reached two decisions, rejecting a complaint made by the Travellers Movement, TM, then known as the Irish Traveller Movement in Britain, a registered charity. The complaint was about the Channel 4 broadcast in 2012 of the second series of "Big Fat Gypsy Weddings", BFGW, with one episode from its first series, and also about its broadcast of a series called "Thelma's Gypsy Girls", TGG. Channel 4 described these series as observational documentaries: BFGW, in the language of Ofcom, "followed individuals and families from the Irish Traveller, English Traveller, Gypsy and Romany ("ITG&R") communities of Great Britain as they prepared for, celebrated and reflected upon key events in their lives (notably weddings)." TGG "followed ten young women from the ITG&R communities as they undertook a six-month apprenticeship with a dressmaker, Thelma Madine, who specialised in designing and making elaborate dresses" for ITG&R women and girls.

2. On 1 August 2012, TM, which described itself as a principal representative body of travellers and gypsies in the UK, made a complaint on grounds which Ofcom took to contain allegations of possible breaches of its Standards Code, and also of its Fairness and Privacy Code, both of which are published as part of the Ofcom Broadcasting Code. This was a substantial complaint that the programmes were unfair, and portrayed ITG&R in a negative and racially stereotypical way, causing harm particularly to children and young persons. The complaint was supported by a schedule of examples. Ofcom accepted that TM had standing to make a complaint under the Fairness Code in its "Entertainment Decision", in which it agreed to entertain the Fairness complaint. No standing is required to make a Standards complaint. TM submitted expert evidence about the harm which it said the programmes had done. Much concern was expressed about the effect of advertisements for the programmes which had led TM to make a successful complaint to the Advertising Standards Authority, ASA.

3. Ofcom dealt with those aspects of the complaint which it considered raised Standards Code issues in accordance with its procedures for such a complaint, and with those aspects of the complaint which it considered raised Fairness Code issues in accordance with the different procedures for that sort of complaint, before issuing the two decisions on the same day. The Fairness procedure involved Ofcom reaching a Preliminary View, having received representations from Channel 4. It sent its Preliminary View to TM and Channel 4 on 27 September 2013, stating that its preliminary view was not to uphold the complaint. Further representations were invited relating to the existing complaint and the Preliminary View. TM made no further representations, beyond complaining at the length of time Ofcom had taken to reach its "indefensible" decision, which showed that travelling communities could not "look to Ofcom for protection of any kind". Channel 4 made no representations either. Shortly after, there followed the Final Decision on the Fairness and Privacy Code complaint. There is no challenge to that decision.

4. This challenge concerns only the Standards complaint decision, issued on the same date. Pursuant to its Standards complaint Procedure, Ofcom received representations

from Channel 4 in response to the complaint. These were not sent to the complainant; that was not part of the Procedure. The Preliminary View in that complaint was then sent, as the Procedure required, for reasons to which I shall come, to the broadcaster only and not to the complainant. Channel 4 had no comments to make and the Final Decision was issued, again rejecting the complaint.

5. TM challenges that Final Decision on the grounds that the procedure adopted was unfair, whether in general in not enabling complainants to comment on the Preliminary View whereas broadcasters were given that opportunity, or in the particular circumstances of this case, where Ofcom had a discretion to give TM that opportunity. TM should have been given that opportunity because it was a body representative of the affected groups of people, and because of the gravity of its complaint. Had it been given that opportunity, it would have produced further evidence to correct the view formed by Ofcom, and to show the harm which the broadcasts had done, particularly to children and young persons. Ofcom should have used its powers to seek further information to enable it to reach a properly considered decision. It also contends that Ofcom acted irrationally in not accepting the proffered help of the Equality and Human Rights Commission in considering the complaint, unlike the ASA which had accepted its help. Finally, TM contends that the decision not to accept TM's expert evidence as adequate evidence of harm was irrational.

The statutory and procedural framework

Statute: General

6. Ofcom's duties are set out in the Communications Act 2003, section 3. It is required as part of its principal duty to "further the interests of citizens in relation to communications matters." It is required to secure by s3(2) a number of "things" which include:

> "(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."

7. Ofcom must also have regard to the principles under which regulatory activities should be transparent, accountable, proportionate and targeted only at cases where action is needed. S3(4) also requires Ofcom to have regard to certain other factors including:

> "(a) the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom;…
>
> (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;
>
> (h) the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection;…
>
> (l) the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural and in urban areas;…"

8. Licensed public service broadcasters are required by the licence to fulfil their statutory public service remit. S265 (3) sets out Channel 4's remit:

> "(3) The public service remit for Channel 4 is the provision of a broad range of high quality and diverse programming which, in particular—
>
> (a) demonstrates innovation, experiment and creativity in the form and content of programmes;
>
> (b) appeals to the tastes and interests of a culturally diverse society;
>
> (d) exhibits a distinctive character."

9. Channel Four Television Corporation has further duties of a similarly broad nature in s198A, inserted by the Digital Economy Act 2010, but emphasising a duty to stimulate debate and to promote alternative views and new perspectives.

Fairness Provisions

10. Part V of the Broadcasting Act 1996 deals with Ofcom's code for avoiding unjust or unfair treatment. This case is not concerned with breach of privacy. By s107(1):

> "(1) It shall be the duty of OFCOM to draw up, and from time to time review, a code giving guidance as to principles to be observed, and practices to be followed, in connection with the avoidance of—
>
> (a) unjust or unfair treatment in programmes to which this section applies...."

11. It has a statutory duty to consult on the Code and revisions to it.

12. S111 of the 1996 Act deals with complaints of unfair treatment. By s111(1):

> "(1) A fairness complaint may be made by an individual or by a body of persons, whether incorporated or not, but, subject to subsection (2), shall not be entertained by OFCOM unless made by the person affected or by a person authorised by him to make the complaint for him."

13. It was pursuant to that provision that Ofcom decided in the Entertainment Decision that TM should be treated as a person affected. S130 defines a "person affected" as one who was a participant in the programme who was the subject of the alleged unfair treatment or had a "direct interest in the subject-matter" of the alleged unfair treatment.

14. The general functions of Ofcom in relation to unfair treatment complaints are in s110: it is its duty "to consider and adjudicate on complaints which are made to them in accordance with section 111...and relate – (a) to unjust or unfair treatment in programmes to which s107 applies….". S107 applied to these programmes.

15. S326 of the Communications Act 2003 imposes an obligation on Ofcom to include licence conditions to secure observance of the Fairness code, issued under s107.

Standards Provisions

16. It is Part 3 of the 2003 Act which deals with the Standards Code. S319(1) provides:

> "(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—
>
> (a) that persons under the age of eighteen are protected;
>
> (b) that material likely to encourage or to incite the commission of crime or to lead to disorder is not included in television and radio services;…
>
> (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;…"

17. Subsection (4) continues:

> "(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;
>
> (e) the desirability of securing that the content of services identifies when there is a change affecting the nature of a service that is being watched or listened to and, in particular, a change that is relevant to the application of the standards set under this section; and
>
> (f) the desirability of maintaining the independence of editorial control over programme content."

18. S325 imposes a requirement that the licence conditions for every Broadcasting Act licence secure observance of the standards code and require licensees to establish and maintain procedures for handling standards complaints. However, by s325(2), Ofcom itself is under a duty to establish procedures for handling complaints about standards.

The Broadcasting Code

19. Section one of the Broadcasting Code deals with the protection of those under eighteen. The first principle is "To ensure people under eighteen are protected". The rules to give effect to that include scheduling and content information. Rule 1.2

provides that "In the provision of services, broadcasters must take all reasonable steps to protect people under eighteen". Other provisions including rule 1.3 deal with the "watershed" and times when children are particularly likely to be listening. Other sections deal with the coverage of offences involving those under 18, drugs, smoking, solvents and alcohol, and violent and dangerous behaviour likely to be easily imitated by children. Offensive language and sexual material form another part of the same section. Rules 1.28-1.30 deal with the care to be taken of the physical and emotional welfare of people under 18 who take part or are involved in programmes. This is irrespective of any consent which they or parents may give.

20. Section 2 of the Broadcasting Code deals with harm and offence. The principle in rule 2.1 is that generally accepted standards are to be applied to the content of programmes so as to provide adequate protection for members of the public from the inclusion of harmful or offensive material. By rule 2.2, factual programmes or portrayals of factual matters "must not materially mislead the audience". Rule 2.3 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, but is not limited to, offensive language, violence, sex, sexual violence, humiliation, distress, violation of human dignity, discriminatory treatment or language…." The rule also sets out what is meant by "context". This includes but is not limited to editorial content and the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally or of a particular description. Ofcom's guidance on generally accepted standards (in rule 2.1) says: "We recognise that some programming may include material that has the potential to be harmful or offensive. This puts a responsibility on the broadcaster to take steps to provide adequate protection for the audience." Guidance on the use of offensive language in the context of rule 2.3 states that "Racist terms and material should be avoided unless their inclusion can be justified by the editorial of the programme. Broadcasters should take particular care in their portrayal of culturally diverse matters and should avoid stereotyping unless editorially justified. When considering such matters, broadcasters should take into account the possible effects programmes may have on particular sections of the community". The complaint drew particular attention to that guidance.

21. Section 7 of the Broadcasting Code deals with fairness. The foreword to section 7 says that it and the section on privacy (section 8) are different from other sections of the Broadcasting Code. "They apply to how broadcasters treat the individuals or organisations directly affected by programmes, rather than to what the general public sees and/or hears as viewers and listeners". The first principle is "To ensure that broadcasters avoid unjust or unfair treatment of individuals or organisations in programmes". The issues to which those principles may give rise are elaborated further in guidance notes.

Complaints Procedures

22. I turn to the procedures established by Ofcom for handling complaints. These were revised in June 2011 following statutory consultation. Two revisions should be mentioned. First, a key change was the introduction of the Preliminary View. This drew a distinction between the Fairness complaints Procedures and the Standards complaints Procedures: this process "will enable broadcasters (and complainants in fairness and privacy complaints) to prepare and provide their representations having had sight of Ofcom's "preliminary view"." Second, there had been insufficient

certainty about the procedures which would apply: complainants and broadcasters should know in advance the procedures which would apply to them: "2.23 Accordingly, we have made clear in each of the Procedures that, where Ofcom considers that it is necessary to depart from the Procedures, we shall write to the parties concerned setting out the nature/extent of the departure, our reasons for doing so and seeking the relevant parties' response." This is relevant to TM's argument that Ofcom should have adopted a different procedure from the one set out in the Procedure for Standards complaints, though TM did not ask it to do so.

23. The Fairness complaint Procedures point out that standing is required for a Fairness complaint. The procedure requires Ofcom to seek the broadcaster's response, which is provided to the complainant. (In this case, it received TM's response to Channel 4's response before sending out its Preliminary View.) The Preliminary View is then sent to the complainant for its representations upon both of which the broadcaster can comment before the Final Decision is made. The complainant has the opportunity to comment on the Preliminary View in a Fairness complaint. The Fairness complaints Procedure also makes it quite clear that they deal only with Fairness and Privacy complaints; paragraph 1.2. They are quite clearly distinct in procedure and topic from the Standards complaints Procedures.

24. The Standards complaint Procedures also explain, paragraph 1.8, that Fairness complaints are dealt with under different statutory provisions and different procedures. The absence of an opportunity for the complainant to comment on the broadcaster's response and on the Preliminary View, because the complainant is not sent it, is obvious from a straightforward reading of the two procedures. Mr Jacobs for TM accepted that the passages dealing with representations from third parties did not include the complainant, but were intended to cover those such as the programme makers, presenters or producers who might have different interests from the broadcaster. Paragraph 1.26 was however relied on by Mr Jacobs: "If in any case where Ofcom considers that it is necessary to obtain further information to ensure that it can fairly and properly prepare its preliminary view, Ofcom may seek such information before preparing that view". Paragraphs 1.27 and 1.28 provide for Ofcom to send its preliminary view to the broadcaster, and any relevant third party, and request representations, before reaching its final decision.

The complaint

25. The complaint of August 2012 alleged that Channel 4 intended to create programmes that would be "racist, harmful, offensive, harmful to children" or were "reckless as to this obvious and foreseeable outcome". This particular very serious allegation was based on an email of January 2012 from within Channel 4's advertising to a photographer urging her to take photographs, apparently stills, for a billboard campaign to advertise BFGW series 2, to get "gypsier results", of, some might think, an eye catching but perhaps mocking or demeaning nature. Mr Jacobs drew this email to my attention but his submissions focussed on the complaint about the nature of the programmes, intentional or otherwise.

26. The general complaint about the broadcaster was that the two series were offensive because they were racist, and denigrated and portrayed ITG&R in a "negatively stereotypically way"; they depicted negative stereotypes, endorsing prejudice against them; and they were likely to cause physical and mental or moral harm to ITG&R

children, including those featured in the programmes, because children and young people made up most of the central characters and were portrayed in a negatively stereotypical way. The complainant provided a report from a participant in TGG saying that she thought both series were untrue and misleading as portrayals of traveller and gypsy life, showing only one section of the community but then using it as a stereotype. She had received a lot more racial bullying at school as a result of BFGW. Concern was raised that one minor traveller child was employed to work on TGG; and one 17 year old participant complained that she had been manipulated so as to portray her as a "freak", violent, tarty and stupid. The complaint also alleged that the series depicted children "repeatedly and at length in a highly sexualised manner which was harmful, offensive and irresponsible" to participants and viewers: very scantily clad young girls, dancing and posing.

27. Both series had also advanced the "untrue and highly damaging new racial stereotype that ITG&R people engage in and endorse the violent sexual assault of ITG&R female children". This is known as "grabbing", and involves a young man who, taking a fancy to a girl, grabs her against her will, perhaps dragging her away, to force her to kiss him or to accept kissing from him, portrayed sometimes as a form of rough courtship. The programmes, continued the complaint, made this seem like an accepted norm. A contrived and negative picture had been presented.

28. The complaint drew attention to the different ethnic groups within those described as Travellers, Gypsies and Romanies, which the use of the single word "gypsy" misleadingly ignored; most of those featured were Irish Travellers and not "Gypsies", a term which should also be contrasted with English Travellers and Romanies.

29. The complaint then gave examples of incidents in the series creating harm and offence under various headings: the normalisation of and condoning of violent sexual assault on female children, voyeurism and sexualisation of minor children, the portrayal of ITG&R males as violent and criminal, and of young people and children as "wild, uncontrollable, foul mouthed, illiterate, uneducated, violent and dangerous". This would entrench their negative and racist stereotype. The solicitors attached a schedule of examples of breaches of the Broadcasting Code. The expert evidence, it said, showed that harm was clearly and quantifiably caused to ITG&R children directly by these programmes. Negative and pejorative language was used to describe ITG&R people.

30. Evidence presented in support of the complaint included two expert reports. The widespread harm and offence created by the two series was elaborated in the complaint by substantial extracts from those reports, referring to teachers and Traveller Education Support Services staff across the UK reporting abuse, and physical and sexual abuse of ITG&R children in their schools, "as a direct result and consequence" of the programmes. The "grabbing" behaviour was mimicked by non-Traveller children on Traveller children. Statements were provided. The complaint also said that Channel 4's commissioning editor for factual entertainment had said that Channel 4 were not responsible for the actions of others who watched those programmes.

31. The Rules of the Standards or Broadcast Code, as set out in the Broadcasting Code principally relied on in relation to harm and offence were Rules 1.3 (scheduling), 1.6, 2.1 and 2.3 together with the guidance notes.

32. The complaint then referred to section 7 of the Broadcasting Code. The complaint under the head of fairness contended that many of those featured in the programmes would have been too young to know the nature or purpose of the series, which was to make money out of mocking "the weak and voiceless", through "exceptionally negative racial" stereotyping. Informed consent was probably not sought or obtained from the contributors. One girl who featured in TGG was shown in a very negative light, as violent and uncontrollable, but also with subtitles for what she said, implying that her English was unintelligible.

The decisions

33. Before turning to the two substantive decisions, I need to refer further to the Entertainment Decision of 14 November 2012. There were two areas of the complaint which this decision dealt with: unjust or unfair treatment of ITG&R communities because of their racially stereotyped portrayal, and the absence of informed consent from some individuals. The latter was held at that stage not to give rise to a case for the broadcaster to answer. But the Claimant was held to have a sufficiently direct interest in the former to be "the person affected" for the purposes of making a complaint under s111 of the 1996 Act. However, the decision made it clear that the complaint which Ofcom stated that it was prepared to entertain as a Fairness complaint did not include any allegations that harm had been caused by the programmes; that was an issue for the Standards complaint. It noted the separate complaint and team considering it. The Entertainment Decision said that Ofcom "considered that these letters set out not only a complaint of unfair or unjust treatment in the programmes as broadcast but also a separate complaint of harm and offence. This harm and offence complaint is being considered by Ofcom's standards team." The accompanying email referred to the Fairness Procedures.

34. I accept the submission of Ms Rose QC for Ofcom that the two substantive decisions show that Ofcom did indeed take the complaint very seriously. It dealt meticulously with the complaint both in relation to standards and in relation to fairness. The many and varied issues raised are painstakingly considered. The Standards complaint decision is some 50 pages long, quite closely typed, and the Fairness complaint decision is some 35 pages long. The decisions were reached after Ofcom had viewed all 14 hours of broadcast material, considered the representations from TM and Channel 4, and applied its own experience and expertise, bearing in mind the balance to be struck between various aspects of its duties, including the broadcaster's and the audience's right to freedom of expression, and protecting the public from harmful or offensive material, and those directly affected from unfair and unjust treatment in the programme.

35. Its summary of the Standards decision was:

> "The main complaint was that the broadcasts presented negative, racist or damaging stereotypes or endorsed prejudice against the ITG&R communities. Ofcom therefore investigated these broadcasts. After careful consideration Ofcom was satisfied that the programmes did not breach the Code because in summary:

- The steps taken by Channel 4 were sufficient to ensure that due care was taken of the emotional welfare of under-eighteens featured in the programmes, including the young women contributors featured involved in 'grabbing'.

- The programmes did not contain material that could be reasonably considered harmful or likely to cause harm in terms of presenting negative, racist or damaging stereotypes or endorsing prejudice against ITG&R communities.

- While Ofcom recognised that some of the portrayals of ITG&R contributors (e.g. showing them engaged in behaviour that some viewers might regard as inappropriate) had the potential to cause some offence, we considered that there was sufficient context to justify any potential offence which might have been caused by this material.

- The portrayals of ITG&R communities in the programmes were not materially misleading. BFGW and TGG were observational documentary series highlighting aspects of the life of particular ITG&R people and did not depict negative stereotypes applicable to ITG&R communities as a whole."

36. The conclusion to the decision was:

> "Broadcasters have the editorial freedom to produce challenging and innovative factual programming that portrays particular communities and groups. Provided the Code is complied with, and acknowledging the importance of the right to freedom of expression, there is no requirement at all that such portrayals should be 'sanitised' versions of reality. A key premise of observational documentary-making, of which both series in this case were examples, is that in principle programme makers must be able to select, edit and show on screen what they have seen while filming particular individuals or communities."

37. Its summary of the fairness decision was:

> "Both series considered distinct aspects of the lives of some of the people from the ITG&R communities and in particular the difficulties they can face in their relationships with people from outside these communities. Taking the complaint of unjust or unfair treatment in the programmes as broadcast overall, Ofcom's decision is that the broadcaster had taken reasonable care to satisfy itself that the facts (as detailed in the heads of complaint below) were not presented, disregarded or omitted in a way that portrayed the ITG&R communities (whose interests

the ITMB represents) unfairly in the programmes as broadcast."

38. The only aspect of the Standards decision with which Mr Jacobs took issue, because he submitted that it showed the prejudicial effect of the alleged unfairness, and showed the decision to have been irrational, was the way in which Ofcom dealt with the evidence, and the expert evidence in particular, submitted by TM on harm to children. The relevant part of the decision is as follows. Mr Jacobs focussed on the penultimate paragraph cited, but that needs to be read in its context:

> "In reaching a decision under Rule 2.1, Ofcom must assess the nature of the potentially harmful material and either its potential effect or what actual harm has occurred. Ofcom has for example previously recorded breaches of Rule 2.1 against programmes presenting treatments for particular diseases and illnesses (such as cancer) in a way that had the potential to cause harm i.e. where as a result of what has been broadcast direct harm may be caused because conventional medical treatment might not be tried at all or may be abandoned. We considered that it can be a relatively straightforward exercise in cases like these to assess the potential direct causal link between material in a programme and either actual harm or the reasonable likelihood of harm.
>
> Such judgements are much more complex in cases where programming is alleged to have caused harm indirectly by changing particular attitudes and opinions so as to cause harm, e.g. in assessing whether broadcast content might lead to a change in public attitudes to a particular ethnic or social group that may encourage prejudice or discriminatory conduct towards them or prevent them from participating fully in society. Programmes that portray particular communities or groups of people will have the potential to elicit a range of responses, both positive and negative, amongst the audience, which will in turn depend on a wide variety of factors, including viewers' existing beliefs, attitudes and prejudices.
>
> What is crucial in relation to Rule 2.1 is whether broadcasters have provided sufficient context in the editorial content so that harm and/or offence is unlikely to be caused as a result. Accordingly, if it is to find a programme in breach of Rule 2.1, Ofcom must satisfy itself that there is a sufficient causal link between the editorial content in question and instances of actual or potential harm. Ofcom must also take proper account of the broadcaster's right to freedom of expression.

> We took into account the two reports submitted to us by the ITMB. In our view the instances of harm caused to ITG&R children and young people referred to in these reports were not detailed, substantiated or verifiable. The weight that we put on these was therefore limited. In our view, there was no easily definable link between the reported instances of harm, and the effect that the content included in the BFGW and TGG series may have had on public attitudes towards ITG&R communities. In other words, it was not clear the extent to which any actual or potential instances of harm may have arisen as a result of pre-existing prejudice against members of the ITG&R communities, rather than as a direct effect of the content included in the programmes. It may be the case that there were some incidents of negative behaviour towards members of the ITG&R communities at the time or after the programmes in question were broadcast. However, we were not presented with sufficient evidence that indicated that such negative behaviour was widespread, or that this behaviour was directly caused by material included within BFGW or TGG.
>
> In summary, we considered that overall the portrayal in the programmes of different groups of the ITG&R communities was balanced and made clear that the ITG&R communities are not a homogenous group, i.e. overall the programmes were not seeking to stereotype or present them as representative of the ITG&R communities as a whole. Furthermore, we considered that at no point did the programmes condone or encourage any harmful or negative behaviour to the ITG&R communities.
>
> In particular, as we discuss in more detail below, there were several examples of the programmes tackling prejudice directly and exploring the negative effects that it had on people from the ITG&R communities. We considered these would have been likely to help dispel certain stereotypes and encourage sympathy towards members of the ITG&R community."

39. Both Ms Rose QC for Ofcom and Ms Page QC for Channel 4 emphasised the narrowness of the challenge in the light of the breadth and gravity of the complaint. There was notably no challenge to the conclusions that there had been no negative racial stereo-typing, and that "grabbing" had not been portrayed as a general practice. Ms Page emphasised that lawyers had been involved throughout the programmes, that showing "grabbing" had been considered at the very top of Channel 4, and was a real phenomenon, and that those participating in those scenes shown had made no complaint about their portrayal. I also point out that the narrow scope of the challenge cannot obscure the breadth of the complaints considered under the Fairness Complaints Procedure. The two aspects overlap considerably and are not readily compartmentalised, but importantly there was no challenge that a "fairness" aspect had been wrongly ignored and dealt with as a "standards" aspect.

Ground 1: fairness in the Standards decision

40. Mr Jacob's first submission was that the Standards complaint Procedure was unfair and lacked rational justification, in that the nature of the complaint and the allegations of harm to the children required the application of the Fairness complaint Procedure or a modification of the Standards procedure to the same effect, so that the complainant like the broadcaster had an opportunity to comment on the Preliminary View. TM did not complain that it had not been shown the broadcaster's representations.

41. Mr Jacobs submitted that the unfairness was not justified by any policy document from Ofcom; the flexibility in Ofcom's procedures had not been applied when it should have been, especially when the complainant had been accepted as made by a representative body. The upshot contravened s3(3) in that Ofcom had not had regard to principles under which regulatory activities should be transparent, accountable, proportionate and consistent, nor could they have had regard to "best regulatory practice".

42. Mr Jacobs also contended that TM had been prejudiced by this difference in procedures. Substantial further representations would have been made, and further evidence would have been provided. He submitted that Ofcom had found that there was harm to children but had been equivocal on the cause of the harm. TM would have sought the assistance of the Equality and Human Rights Commission (EHRC), which had already shown an interest in the matter. With this evidence, there was a reasonable prospect that the complaint would have been upheld. He referred me to a further statement from Mr Foster dated 31 January 2014, expressing surprise that Ofcom, in view of its conclusions and the absence of contrary evidence from Channel 4, had not asked for further evidence from him; he could have provided further details of the individuals whose evidence and comments he had cited in his report for Ofcom. Mr Jacobs said that Ofcom would have been reminded of the detail in the evidence of Ms Purcell which was before Ofcom, and demonstrated what she and her brother experienced at school as a result of the programmes. Further evidence had been obtained from leading figures in the Traveller and Gypsy communities in the UK and Ireland. I have considered the further evidence which Mr Jacobs sought to have admitted for the purpose of showing what TM might have obtained and placed before Ofcom if it had been shown the Standards Preliminary View. I am not reaching a view at this stage on whether or not TM would in fact have submitted this or any further evidence.

43. Mr Jacobs referred me to *Kanda v Government of Malaya* [1962] AC 322, 337-338, Lord Denning, in support of the proposition that it was unfair for an adjudicatory body to receive evidence or representations from one side behind the back of another. The risk of prejudice was enough to make such action unfair; it was not necessary to examine specific evidence establishing that the unfairness had prejudiced the Claimant. That principle, stated broadly as it was, was not essentially contentious. But its application to the task of Ofcom here was. Mr Jacobs accepted that what fairness required or permitted depended on the context, and was "essentially an intuitive judgment"; *R v SSHD ex p Doody* [1994] 1 AC 531, 560D, Lord Mustill.

44. Ms Rose QC for Ofcom pointed to the similarities between the position of Ofcom and the position of the Ombudsman in *R v Parliamentary Commissioner for*

Administration ex p Dyer [1994] 1 WLR 621, p628H-629E, although in that case, unlike the position for which she contended here, the Court had treated Ms Dyer's rights as affected by the Ombudsman's decision. The Ombudsman's draft report on a complaint against the Department of Social Security was sent to that Department for its response, but not to the complainant. Simon Brown LJ noted three reasons for that statutory structure: the Department would have to answer to the Select Committee and could not correct inaccuracies in the Ombudsman's report at that stage, so it needed to be able to do so earlier; it enabled the Department to give notice of any document which should not be disclosed in the public interest; and it enabled the Department to propose the remedy, on the effectiveness of which the Ombudsman could comment in his final report. Those reasons did not apply to the complainant. Natural justice did not require an equivalent opportunity for the complainant to be grafted on to the statutory provisions, although it was accepted that the Ombudsman's decision affected the rights of the complainant. Simon Brown LJ cited Lord Bridge in *Lloyd v McMahon* [1987] AC 625, 702: "The so- called rules of natural justice are not engraved on tablets of stone: to use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates."

45. Mr Jacobs sought to distinguish *Dyer* on the grounds that, although the provision of the Preliminary View to the broadcaster enabled it to make representations on matters on which it, but not the complainant, had a legitimate interest, it also enabled the broadcaster to make representations on the merits of the Preliminary View. The complainant had, and in this case particularly so, an equivalent interest in making representations on those merits.

46. The problem, in my judgment, with taking *Kanda* as a sufficient statement of principle, applicable universally, is that it was not purporting to be such a statement, but dealing with the unfairness of a disciplinary procedure in which the police officer had been dismissed as a result of the findings of an Adjudicator, who had considered a report which was not provided to the officer in question. There is no complaint that the broadcaster's representations on the Preliminary View were not provided to the complainant, not least because there were none. Nor was the complainant in the same position as the officer facing dismissal; rather it was the broadcaster and not the complainant who faced potential censure and sanction if the complaint were upheld. The statement of principle from *Dyer* set out above was not at issue and it reflects the fact that if *Kanda* ever were intended to be a universally applicable and sufficient statement of principle, judicial consideration of what is procedurally fair in the many differing contexts, statutes, and bodies in which it is at issue, has moved on.

47. I do not accept Mr Jacobs' submission that the procedure for a Standards complaint is unfair and that showing the Preliminary View only to the broadcaster and third parties has no rational justification. I start from the premise that it is not necessary in the interests of fairness for parties to have sight of a preliminary or provisional view of an adjudicatory body, judicial, administrative or otherwise, in order for its decision, or for the process as a whole, to be fair. The issue is whether it becomes unfair when the opportunity to comment on it is provided to one party only. That rather depends on the purpose and effect of its being made available to one party only, though I accept

that it is a procedure which requires justification, since at first blush it appears unfair for only one party to be given that opportunity, especially as a different procedure is adopted for Fairness complaints. The key, however, is not whether there is a justification in principle for the difference, but whether the Standards complaints Procedure is itself fair for the sort of complaints it deals with, and whether its application here was fair. But the reason for the difference shows why the procedure for Standards complaints is rational and in principle fair, with the opportunity to comment on the Preliminary View given only to the broadcaster.

48. The two procedures differ for good reason: the Fairness complaint is only entertained when it is made by "the person affected." So the procedure is dealing with someone who is actually affected by the unfairness alleged in the programme. The Preliminary View concerns that affected complainant as much as it does the broadcaster; each is affected by the outcome, albeit in different ways, whether the complaint is upheld or not. Public censure and sanction may be visited on the broadcaster. The grievance that a person, directly affected, has been treated unfairly, may not receive proper consideration or redress. A Standards complaint can be made by anyone, even by someone who has not seen the programme, or by someone who makes no claim to have been affected by it at all. Everyone is entitled to see that standards are maintained, whereas only those affected can complain of unfairness in their involvement in the programme. The broadcaster is directly affected by the outcome of the Standards complaint, including again public censure and sanction, but the complainant may well not be affected at all. Although complainants play an important role in alerting Ofcom to potential breaches of the Standards Code, Ofcom, perfectly reasonably, does not regard Standards complaints as involving adjudication on or determination of the grievances and rights of individual complainants. Its task, as it sees it, is to resolve "the objective question of whether a broadcaster has breached" a standards requirement of the Code, for which it may well face censure or sanction.

49. The revised complaints procedures, as I have said, distinguish between the Fairness and Standards Procedures as regards the opportunity to comment on the Preliminary View. Ofcom's duty in relation to Standards is to secure adequate protection to "members of the public (as a class) from the inclusion of offensive and harmful material…." The task of Ofcom in a Standards complaint is therefore to judge objectively whether there has been a breach of a Standard. As the Review made clear, once the Standards complaint had been properly made, Ofcom would not normally have any further correspondence with the complainant. It is not deciding an issue between parties, complainant, broadcaster and third parties, as an adjudicator. The identity of complainants is not usually made known to the broadcaster in a Standards complaint. As Ms Rose put it, they are not parties to an adversarial process; it is the broadcasters who are being investigated, the investigation triggered by the complaint, to see if they breached the requirements of the Code and their licence obligations which may lead to censure or sanction. The focus is on what was broadcast and how it measured against the Code.

50. This is in marked contrast to the "person affected" concept in a Fairness complaint. The task of Ofcom in relation to a Fairness complaint is to determine the grievance and right of the individually affected complainant. In that context, their position is very different from that of complainants in the Standards complaint Procedure, who, having drawn attention to their concern, may well have little that can be added to the

appreciation of what was broadcast or why. They may have something to say on harm, but that would be part of the complaint in the first place. The broadcaster may well wish also to comment on how any findings relate to possible sanction. Channel 4's Article 10 ECHR rights were also engaged.

51. Mr Jacobs submits that Ofcom nonetheless is performing the important function of promulgating and enforcing standards to protect the public from harm in which complainants play a significant part. That does not take him far. The fact that the complainant, and the same would be true of other members of the public, has an important role to play as initiator of the Standards complaints process, does not make it an essentially adversarial process. Ofcom does have power to seek further information in relation to a Standards complaint but it is for the complainant to raise matters for Ofcom then to consider. If there is not enough to show a breach, even before the broadcaster's comments are sought, it is not for Ofcom to try to find the basis for one, merely on the grounds that if a process is not adversarial, it must be investigatory, and thus imposes on Ofcom a duty to take over the complaint, and assemble all the evidence which it can, carrying out inquiries of its own, or asking the complainant for more evidence if the complaint is not made out on what has been provided.

52. I have dealt with the Procedures as if applying to broadcasters alone because that is where the issue here lies, but there is another group of people, "third parties", which do not include the complainants, who may be affected by the Decisions in both sets of procedures: those, other than the broadcaster, who may be involved in the production process, notably independent programme makers. They also see the Preliminary Views. The reasons why they do, but not the complainants in Standards complaints, are essentially the same as those applying to the broadcaster.

53. Moreover, I accept the evidence of Mr Close, Ofcom's Director of Content Standards, Licensing and Enforcement, about the difficulties which would be created for the handling and determination of Standards complaints if Ofcom's Preliminary View had to be sent to each complainant, and their further comments considered. A programme may elicit one or thousands of Standards complaints; one popular programme generated 45000 complaints, an episode of another generated 4000 complaints. In 2013, 10 programmes led to over 100 complaints each. Mr Close said that "it would be impossible for Ofcom to perform its statutory complaints-handling functions in an efficient and effective manner if we were required to provide a copy of the preliminary view to every one of those complainants and to consider all responses received before making a final decision. A very significant increase in Ofcom's resources would be required." As Ms Page submitted, were such a change to be adopted, the broadcasters and third parties would seek the opportunity to comment on those further representations. Such a process may have to happen in Fairness complaints, but it is not necessary to extend it to the generality of Standards complaints.

54. I was unpersuaded by Mr Jacobs' submission that Ofcom was exaggerating these problems. I see no reason to suppose that it was, nor that Mr Jacobs, Mr Enright of Howe & Co, solicitors for TM, or TM itself knew the business of Ofcom better than it did itself. Mr Jacobs said that the problem of notifying complainants in Standards complaints of the Preliminary View would only arise in a very small percentage of cases, 262 cases or 1.62 percent of those brought in 2012-3. The figure of thousands

of complainants was said by Mr Jacobs to be misleading, but the number of complainants in the 262 cases or investigations is unknown. Mr Jacobs' riposte that the answer to this sort of practical problem should not lie in an unfair procedure is only persuasive to the extent that the procedure is inherently unfair. I do not think that it is. The Procedures have to deal with what is fair for the generality of Standards complaints. There is scope, in the right case, for a departure to be considered, and notified with reasons. But that reduces further the scope for argument that the Standards complaints Procedure is inherently unfair. The fact that BFGW attracted one complaint, when the number of people affected, as represented by TM, could have led instead to many individual complaints, does not show that the procedure is inherently unfair or irrational. Nor does it require a difference of approach to a departure from the normal Procedure. I recognise that there are circumstances in which it could work unfairly, in the absence of a specific departure from the Procedures. But those do not arise here.

55. I infer from Ofcom's approach to Standards complaints, i.e. that it is seeking to establish objectively whether there has been a breach of the Standards Code, that it would not usually expect to find further representations, from whomsoever had made a complaint, of assistance anyway in reaching its conclusion. There would be no advantage in giving them the opportunity to provide material which did not assist the decision-maker. I can see very good sense in its approach. There is nothing unfair or irrational in the Standards complaints Procedure in principle; and it is rationally differentiated from the Fairness complaints Procedure, for the reasons which I have set out earlier.

56. These published procedures and their application, as to which the Claimant could not reasonably have been in any doubt, were properly applied according to their terms.

57. Mr Jacobs' next submission is that Ofcom should have departed from this procedure in the circumstances of this case. The Introduction to the Standards complaints Procedures contains a provision upon which Mr Jacobs put much weight:

> "If Ofcom considers it is necessary to depart from these Procedures in any material respect in a particular case for reasons of fairness and/or in order for Ofcom properly to consider a complaint(s) or carry out an investigation, it shall write to the broadcaster concerned (and any other relevant parties) in advance setting out the nature/extent of its departure, its reasons for doing so and seeking the relevant parties' response."

58. This, I accept, was intended not to increase flexibility but to reduce uncertainty over the procedure which would be adopted. It was also intended that the departure should be decided at the start of the Procedure. There is every reason for Ofcom, having consulted on and reviewed its procedures and established them publicly, to adhere to them unless very particular circumstances required them to depart from them. One of the points made in the consultation, which the Review accepted, was that the application of the procedures in the past had not been certain enough for those affected to know where they stood. There had been a tendency for the procedures to

be ad hoc and adjusted unpredictably to meet what was seen as the requirement of the complaint. The procedures are transparent, published and were altered following consultation to provide greater certainty. The fact that another regulatory body may proceed differently cannot of itself show that Ofcom's process falls below best practice, which obviously has to be judged against the nature of the complaints it is required to consider.

59. I do not accept Mr Jacobs' contentions. Obviously, the starting point is that fairness did not in principle require the complainant to be shown the Preliminary View so that it could make comments and further representations, simply because the broadcaster was given that opportunity. The test in the introduction to the Procedure for a departure from that procedure is a lawful one.

60. Mr Jacobs contended that the procedure applied to the decision on the Fairness Code aspects of the complaint should have been applied to all aspects of the complaint, essentially because that is the impression the Claimant and its solicitors gained from the Entertainment Decision, which they said treated the whole complaint as covered by the Fairness procedure. The email from Ofcom to TM's solicitors dated 14 November 2012 which accompanied the Entertainment Decision set out the procedure which would be followed, which included the opportunity for both broadcaster and complainant to submit representations on the Preliminary View. The Fairness complaint was to deal not just with the position of those who participated in the programmes but with the unfair treatment of Travellers in general. Ofcom had acknowledged the overlap between the standards and fairness aspects of the complaint in an email of 18 April 2013, when replying to a query on behalf of TM as to when its decision on the Standards complaint would be reached.

61. Mr Jacobs' contention is entirely at odds with the facts, including all the correspondence between the parties. The structure of the complaint itself appears to recognise the difference between a Fairness and a Standards complaint. The Claimant does not dispute that Ofcom referred it to the existence of separate procedures under which the Standards complaint Preliminary View would be sent to the broadcaster alone. The Standards complaint Procedure itself makes the position clear. The Entertainment Decision could only apply to the Fairness aspects of the complaint, since no such decision was required for the Standards aspects of the complaint to be considered by Ofcom. The email of 14 November 2012, accompanying the Entertainment Decision, could only have been dealing with the Fairness Code aspects of the complaint, and therefore what it said about the provision of Ofcom's Preliminary View could only apply to its Preliminary View in relation to the Fairness complaint; I have set this out already in paragraph 33 above. The two different procedures were publicly available on Ofcom's website.

62. It was made clear by Ofcom to TM's solicitor on a number of occasions during the process that the two aspects of what TM saw as one complaint were being dealt with by Ofcom as two complaints, to be dealt with under separate procedures because of the different aspects raised. The differences in the two procedures were identified and explained. In emails of 10 and 24 August 2012, and, though not so explicitly, in an email of 22 August, the Ofcom Standards Executive handling the Fairness complaint said as much, and in an email of 16 August 2012, the Standards Executive handling the Standards complaint said that "the fairness aspects of your complaint and the other aspects are handled separately here at Ofcom because they are dealt with by different

teams of colleagues, governed by different sets of published procedures and governed overall by different legislation." The one team should not be contacted about the other aspects of the complaint. This was reiterated by both teams in emails of 18 October 2012.

63. The differences in the procedures were further made clear by Ofcom in emails to the Claimant's solicitors on 26 November 2012, 3 April 2013 and 2 September 2013. In the first, Ofcom explained that the issues of harm and offence were being dealt with under the Standards complaints Procedure which did not provide for the broadcaster's comments to be sent to the complainant, that this differed from the Fairness complaints Procedure, and that Ofcom saw no reason at that stage to change the procedure. The second and third emails emphasised that the Standards complaint Preliminary View, unlike the Fairness complaint Preliminary View, would only go to the broadcaster. The Claimant's solicitor's reply of 4 April 2013 to the 3 April email, appears to recognise this point. The position was thus made clear beyond a peradventure. It is simply misconceived for Mr Jacobs to say that TM never consented to two separate procedures: those were the two procedures which Ofcom had in place to govern the complaint made. The complaint was pursued, and TM was fully aware of those procedures. Moreover it never complained about the Procedures, even in its response to the Fairness Preliminary View, nor did it request the Standards Preliminary View, knowing as it must have done from reading the Fairness Preliminary View that the issue of harm had not been dealt with in the latter.

64. There was no suggestion from TM's solicitors that this was an unfair procedure in principle, or that in this case there were specific reasons why the complainant should be allowed to see and respond to the Standards complaint Preliminary View, whether because of the nature of the complaint, or because it had not put forward what it wished to say in support of the complaint. It only said that Ofcom needed to look not just at the two aspects of the complaints separately, but it needed to take a view of the two as a "whole and together".

65. Ofcom's letter of 18 April 2013, dealing with the overlap between the two aspects of the complaint, pointed out that they were being treated as two complaints, that separate decisions would be reached, following consideration of the two sections of the Code. But they were being considered in tandem and on the same time line to ensure consistency.

66. Mr Enright may not have accepted in his own mind what he described as the unilateral decision by Ofcom to split the complaint into two parts because of the overlap between the two, but it is difficult to see that he in fact protested at what in reality was the inevitable result of the application by Ofcom of its own rules. If he did think that the two aspects of the complaint were being treated as one, so that there would be no procedural differences attached to the two parts, it is difficult to see that he had a reasonable basis for that view.

67. There is nothing unfair, so as to require a change to the Standards complaints Procedure, in not treating TM differently because it was a representative body complainant. This in reality means no more than it represents a number of people who could otherwise have been individual complainants, making complaints about the breach of the Standards Code which they thought the programmes contained. It does not undermine the rationale for the distinction, nor of itself make the procedure unfair.

The Standards decision did not directly affect the rights of complainants or those of "potentially vulnerable children", whom TM said it represented. They would not face censure or sanction as a result of the Standards decision, though the broadcaster and third parties might well do so, and would probably do so if the complaint had been upheld. No allegation of unfair treatment by an affected person was at issue in it.

68. The contention here is not that TM should have been shown the representations on the Preliminary View by the broadcaster, not least because the broadcaster made no comment on it at all. It had made representations about the complaint before the Preliminary View. The Preliminary View was already adverse to the complaint. TM could not therefore contend that the broadcaster had made comments which caused Ofcom to change its mind and reject a complaint which it had, until then, been minded to uphold.

69. The complainant would have been in precisely the same position, even if no opportunity had been given to the broadcaster to comment at all. The source of the alleged unfairness in fact caused no unfairness at all, as no advantage was taken by the broadcaster of the opportunity afforded it, and obviously none could have been which was adverse in effect to the complaint. The contention that the complainant was not given the opportunity to make comments, adverse to the broadcaster, on the decision-maker's Preliminary View has to meet the response that it is for the complainant to put his complaint forward, and there was no reason for it to be given a second bite at the cherry, or even to suppose that it would be.

70. In reality, submitted Ms Rose, that is exactly what underlies this challenge: the Claimant was trying to have a second bite at the cherry. It had suffered no unfairness or prejudice at all from not seeing the Preliminary View. I agree. It should have submitted with the complaint all the material it relied on in support, and could properly be taken by Ofcom to have done so, at least in the absence of any specific alert to the contrary. It would be quite wrong to describe as unfair an adjudicatory system in which the complainant had no chance to consider the adjudicator's provisional views on what had been submitted, so as to have the chance to submit more, if its first efforts had failed. It would encourage delay, uncertainty, and inefficiency in decision-making if such a procedure were regarded as generally necessary for fairness. I can see no reason for Ofcom to be required to adopt a process providing a second bite for complainants.

71. The reasons given in *Dyer* for the Ombudsman's procedure and those which underlie the Standards Procedure and are of a like order, but for one point. I accept that in *Dyer*, there is no indication that the Department could respond on the merits of the report, nor was that an issue; here, the broadcaster can do just that, and may succeed in overturning an adverse Preliminary View, but the complainant does not have that chance, nor the chance to bolster a View already in its favour. If the broadcaster had made representation on the merits of the Preliminary View, which had caused Ofcom to change its mind, I can see that there might be a case that it would be unfair in certain circumstances not to give a complainant, perhaps a representative complainant, the opportunity to make some comment on the change in mind, and to adjust the procedure to accommodate it, as set out in the Introduction. I do not need to form a view on that. That is simply not the position here.

72. Ms Rose submitted that there was no reason to suppose that TM would have submitted any further material had it be shown the Standards Preliminary View. After all, it had submitted nothing in response to the Fairness Preliminary View. That had dealt for example with "grabbing", an important issue which overlapped with Standards. This aspect of the programmes was said to be "unfair" because of the way the programmes "endorsed violent sexual assault" and treated it as a cultural norm. Yet, TM had not responded at all to those adverse findings when it had the opportunity.

73. I point out that the Fairness Decision dealt carefully with each type of negative racial stereotyping and rejected the claims; this was the overall theme of the complaint dealt with in the Fairness Decision, as the summary of the complaint being considered showed: ITG&R communities were "unfairly portrayed in an untrue and damaging racially stereotypical manner". This was the basis for Mr Ivatt's very general report. It was also a common theme of what Mr Foster had to say: neither was drawing any hard and fast line between the overlapping aspects. Paragraph 2.1 of the Standards Code was dealt with in the context of negative racial stereo-typing; it considered harm in the context of the allegation of negative racial-stereotyping. If the Fairness Preliminary View drew no response, I am unable to conclude that TM would in fact have responded in any more substantive a way to the Standards Preliminary View.

74. Mr Jacobs submitted however a variety of material to show what TM would have said, to show it had been prejudiced. These include a witness statement from Mr Foster of 31 January 2014 expressing surprise that Ofcom had not sought further information from him or TM before "rejecting" his report, especially as Channel 4 had not challenged it. But it was not rejected; Ofcom's conclusion simply was that it did not demonstrate harm. His witness statement of 31 January 2014 does not contain further evidence itself, other than of his surprise at various events; rather it says that further evidence could have been obtained. I do not know what difference this would have made as it is unspecified; it is not obvious that it would have strengthened the complainant's evidential position on harm allegedly caused by the programmes. Ms MacNamara's evidence as Chief Executive of TM adds nothing on this point. There were also five witness statements, mostly dated 29 October 2014, including one from a Romany police officer, which provide general comments about how the programmes have increased negative attitudes because the portrayal of life in the two series had been taken as typical. There were a few more examples of incidents especially at school or involving school children who had been abused, mocked or bullied, especially over "grabbing". Much of it related to the giving of offence, which is not where the challenge on this point lies. I cannot tell how Ofcom would have reacted to this further material. I am not prepared to conclude that it could have made no difference. But the terms of Ofcom's conclusions on harm make it unlikely that they would have been materially altered in relation to harm of itself, its causation, degree or widespread nature and very unlikely that that would have led to a different view about the adequacy of the steps taken to protect against potential harm caused by a legitimate form of programme, the observational documentary, and which, on its unchallenged conclusions did not do so in a way which reinforced negative racial stereotyping. I do not accept TM has shown it was prejudiced by the alleged unfairness.

75. Mr Jacobs also submitted that, had TM had the Preliminary View, it would have pressed Ofcom to use the assistance proffered by the EHRC, which I consider further in Ground 3.

76. Accordingly Ms Rose submitted that, as the Claimant had been aware from the outset of the procedure, had never complained about it as unfair, it was not now open to it to say that it was unfair; there had simply been no unfairness and there was no need for consideration of waiver; the procedure had simply been accepted: *Hill v Institute of Chartered Accountants* [2013] EWCA Civ 555, [2014] 1 WLR 86 paragraphs 30-31. It would not be right for the complainant's confusion, if such it was, which could not be laid at the door of the decision-maker, to enable a challenge now to be made after the procedure had concluded and a decision had been made. I agree. This is a case in which the alleged potential source of unfairness was known about at the outset, was made clear throughout, to which no variation was even sought and to which no objection was taken.

77. Ms Rose submitted further, that even if there had been some unfairness in procedure, the facts showed that the Claimant had waived the unfairness, with full knowledge of the procedures which Ofcom was adopting, and with legal representation. Waiver of a breach of the rules of natural justice required "voluntary, informed and unequivocal agreement"; *Hill* above. Whatever unfairness there was had been known to the Claimant since the outset of the procedures, and emphatically not at the moment when it received the Standards complaint Final decision, as it now claimed. She referred to *R (DM Digital) v Ofcom* [2014] EWHC 961 (Admin), in which, applying *Hill* on waiver, Stuart-Smith J had held, paragraph 43, that there was no reason in principle why agreement or consent on an issue of that sort should not be inferred from conduct or even silence provided that the conduct or silence was voluntary, informed and unequivocal.

78. There are a number of emails from Mr Enright to Ofcom, notably 9 and 27 November 2012 and 18 December 2013, in which he asked to see the Preliminary View of the Standards Decision, not appearing to realise that he had been told that the procedures were different or that he would not be doing so. There was no request for an alteration as such to the procedure accompanied by a reasoned justification. Mr Jacobs submitted that this showed that the "voluntary, informed and unequivocal" agreement to the process was not present here: the Claimant had at no time agreed to the unfairness, nor to be excluded from disclosure of Ofcom's Preliminary View on the Standards complaint. That could not be inferred simply from the fact that it continued with the complaint, making no protest as to the procedure. This is not a case in which a procedure had been agreed only later to be complained about, nor one in which the process continued in seeming agreement, after the unfairness later challenged had occurred.

79. I accept that if an unfair procedure is the only available procedure for the resolution of a dispute, the fact that it is pursued is very unlikely to amount to a waiver of the unfairness. I do not consider that this should be regarded as a waiver, if the procedure had in fact operated unfairly and prejudicially. But it did not.

80. I reject this ground of challenge.

Ground 2: the failure to apply paragraph 1.26 of the Standards complaints Procedure

81. This ground contended that Ofcom unlawfully failed to apply this paragraph which provides: "If in any case where Ofcom considers that it is necessary to obtain further information to ensure that it can fairly and properly prepare its preliminary view, Ofcom may seek such information before preparing that view".

82. Mr Jacobs submitted that Ofcom ought to have used this provision to draw the Claimant's attention to what it was concluding on a preliminary basis about the weaknesses of the complaint. Ofcom had expressed uncertainty in the Final Standards Decision over whether the reaction experienced by children was caused by the programmes rather than some other cause such as pre-existing prejudice against Travellers. This power should have been used in order to obtain information, including from the complainant, in order to resolve that issue. There was a similar provision in the Fairness complaints Procedure, which operated after the provision of the Preliminary View to the complainant and the broadcaster. The two could have been used in combination.

83. There is nothing in this point. There is no basis for saying that the only reasonable decision Ofcom could make was that it needed further information in order to reach a proper decision on a preliminary basis on the Standards complaint. This is simply a misinterpretation of a provision which reflects that the Standards complaint Procedure has investigative elements and powers, as does the Fairness complaints Procedure, and a misinterpretation with the aim of achieving a result which fairness in the Standards Procedure did not require. If there was unfairness, this misinterpretation is quite unnecessary.

84. It cannot be the case, where Ofcom is not persuaded by the evidence submitted by a complainant that a breach of the Code has been made out, that it should then undertake further investigations so as to ensure that there was no additional evidence of a breach which the complainant had failed to put forward. It is not for the broadcaster or Ofcom to disprove an allegation of breach. It is not incumbent on Ofcom to resolve all issues in such a manner that there is no issue which cannot be resolved with greater certainty. It had no reason to suppose that the complainant, putting forward expert evidence as it did, had not put forward all that it could, or that it had declined to do so because it entertained the misguided belief that all it said would be accepted without reservation. It is absurd for a complainant to put forward some of its case and then complain that it would have put forward more, if it had been told that what it had put forward so far was not enough. Nor is it as though Ofcom defended itself against the alleged unfairness by saying that it lacked the powers to do what was fair, or that it could not obtain further material even if it had thought it necessary to do so in order to reach its full and carefully considered Preliminary View. There is no evidence to support Mr Jacobs' suggestion that Ofcom had felt constrained by the Standards Procedures from seeking further information.

Ground 3: other powers to resolve the cause of the harm done to children

85. This ground is closely related to Ground 2. Mr Jacobs contended that Ofcom was under a duty to ensure that children were not harmed by broadcasts. The conclusion as to the cause of the harm to the children was equivocal, and so Ofcom was obliged to take steps to establish that harm had not been caused to children by the programmes.

This in reality was a submission that Ofcom ought to have sought the assistance of the EHRC, recognising that the EHRC had a statutory duty to monitor the effectiveness of equality and human rights enactments, and possessed a high level of expertise and knowledge of minorities and racism, that it had assisted the ASA on a similar topic, and that TM was not a large or wealthy body.

86. The EHRC had written to Ofcom on 8 July 2013 asking when the investigation would be concluded, referring to the part it had played in the ASA decision and saying: "If Ofcom would like the Commission to provide any input please let me know and I will be happy to help". This drew the reply on 17 July 2013 that the complaint was being investigated in the two parts by the two different Ofcom teams. Ofcom explained the position. The issues were complex, and the case was taking longer than usual to conclude. The letter drew attention to the different procedures applicable to the two Decisions. Ofcom, concluded by thanking EHRC for its offer of assistance on the investigation of the complaints but adding that it did not consider it necessary at this time. TM had provided lengthy submissions and expert evidence. Ofcom said: "Should this situation change, we will be in contact."

87. I can see no reason for holding that response to be unlawful, and requiring Ofcom to seek assistance in dealing with its specialist statutory functions. There was nothing irrational in its response, which is the error of law which has to be alleged here. It is more notable that the EHRC did not submit a complaint or evidence in support of or commenting on the complaint, which TM could have shown and may be did show to it. The evidence did not need clarification; it was simply adjudged to be insufficient to show that harm had been done and the Code breached. There is no evidence that it would have intervened at TM's request, nor about what it would have said, particularly in the light of the absence of complaint from it in the first place.

88. Mr Jacobs submitted that there was a more general duty to investigate an allegation that a programme had done harm to children, since it was contended by Ofcom that the Standards complaints Procedure was not an adversarial one, and therefore had to be investigatory. It does not follow in my judgment that Ofcom had a duty to investigate complaints in that way, by carrying out its own investigations and research. It was entitled to take the view that the complainant had put forward the relevant material, backed as it was by expert reports. Besides, the Procedure is not for a complainant just to make an allegation and then to require Ofcom to investigate it. The fact that there is an investigatory element, and a power to obtain further information, does not mean that the Procedures place the larger part of this onus on Ofcom. They do not.

Ground 4: the irrationality of the conclusion that the Claimant had not adduced sufficient evidence that harm had been caused to children by the programmes

89. Mr Jacobs submitted that the evidence of Mr Foster, submitted with the complaint, was compelling and related directly to the broadcasts. Ofcom had no choice rationally but to accept it, and therefore to accept that the programmes had caused harm; and harm to children in particular.

90. Mr Foster's evidence, as I read it, drew together and commented on observations from others, notably the Traveller Education Support Services staff about changes in behaviour by non-Traveller school children to Traveller school children after the

programmes were broadcast. Almost all of these were at a very general level, such as a "distinct increase in bullying/negative stereotyping since this programme, particularly in secondary schools, resulting in Traveller children feeling much more defensive…."; reports of "general questioning based on themes developed in BFGW…which force Traveller children to defend apparent aspects of their culture to which their family do not subscribe"; reports that Traveller girls had been the subject of "grabbing" by non-Traveller boys. There had been widespread anger among Traveller parents. The problems in Shropshire, and in two schools in particular where there had been no problems before, were cited to illustrate what had happened. The advertising campaign by Channel 4 for BFGW, not part of the Ofcom complaint, had "played its part" and "to some extent exaggerated the effect of the programmes." Mr Foster's report was, it said, based on a "wealth of evidence". But he later produced the email which he had sent out to obtain such evidence. Ms Rose is right to say that he sought only negative feedback, and did not seek a reply if there were to be no adverse response. There had been only five responses, without any indication of how many had been sent the emails. All five were included in the substance of Mr Foster's original report.

91. Ms Page QC for Channel 4 pointed to the parts of the Decision which recognised the importance of Article 10 ECHR, protecting freedom of expression for broadcaster and audience, which had to be balanced with protecting the public from harmful and offensive material, and its recognition of Channel 4's "unique public service remit to provide programming that is challenging, diverse and likely to provoke debate." Channel 4 had recognised that it was legitimate to explore the lives of ITG&R communities, but the Code had to be complied with.

92. Ms Rose submitted that Ofcom had to and did assess harm against its own detailed assessment of the programmes' content, and the context which the programmes as a whole provided. The summary of the decision and its conclusion, both of which have been set out earlier, needed to be read along with the whole of the passage dealing with the evidence of harm, in order for the decision as a whole to be understood.

93. I disagree with Mr Jacobs' submission. It is important to understand the question ultimately asked in such a complaint: did the programmes comply with the Code, including whether generally accepted standards had been applied to the programmes, so as to provide adequate protection for members of the public from harmful material, but in the context of the Article 10 ECHR rights of audience and broadcaster. The primary question is whether there was adequate protection for the public in the context of the programmes as a whole from the potential for harm. The question of whether harm was actually caused is only part of the issue. The Final Decision, and what it says about harm, has to be understood in that context. I also accept the importance of reading that conclusion in the context of the decision as a whole that there was no breach of the Standards Code. Ms Page was right to submit that it would have to be a very clear case in order for the judgment of the specialist regulator, on a topic involving harm, context and freedom of expression, to be held irrational and so unlawful. This is nowhere near such a case.

94. But just taking the decision on whether harm was caused as a part of that judgment, the decision is plainly rational. I have set out what Ofcom decided in relation to that evidence. The approach to the evidence required to establish harm is reasonable and proper. The assessment of the content of the evidence is perfectly rational. I have

already commented on the nature of the evidence of Mr Foster. It was on that evidence, with that of Mr Ivatt, that Mr Jacobs' arguments focussed. Mr Ivatt's evidence was very general and its focus was very much on the effect of the advertisements on the billboards. The evidence of Ms Purcell and her mother, a Community Traveller Liaison Officer, which did give evidence of bullying, mockery, and of her and her brother being picked on at school also drew very substantially on the effect of the advertising. The evidence of Ms Corcoran and Ms Vale had been directed almost entirely at that. That was not a matter for Ofcom but for the ASA which had ruled on it.

95. The conclusion that there was no clear evidence of harm attributable directly to the broadcasts, though there might be evidence of incidents of negative behaviour towards members of the ITG&R communities and of some pre-existing prejudices at work, that harm was neither widespread, nor shown to be directly caused by the programmes, that the programmes had not encouraged or condoned harmful or negative behaviour, and that other aspects of the programmes could help dispel certain stereotypes, even if perhaps not the only possible assessment of the evidence, was certainly rational.

Conclusion

96. This application is dismissed.