



Neutral Citation Number: [2010] EWHC 1756

Case No: CO/9919/2009

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**DIVISIONAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 13/07/2010

**Before :**

**PRESIDENT OF THE QUEEN'S BENCH DIVISION**

**MR JUSTICE BLAIR**

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**Between :**

<b>GAUNT</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>OFCOM</b>	<b><u>Defendant</u></b>
<b>- and -</b>	
<b>LIBERTY</b>	<b><u>Intervener</u></b>

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**G Millar QC and M Henderson** (instructed by **Howe & Co**) for the **Claimant**  
**D Anderson QC and D Glen** (instructed by **Ofcom Legal Dept**) for the **Defendant**  
**Ivan Hare** instructed by **Liberty** for the **Intervener**

Hearing dates: 15<sup>th</sup> and 16<sup>th</sup> June 2010  
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**Approved Judgment**

## **President of the Queen's Bench Division:**

### **This is the judgment of the court**

#### **The radio interview**

1. The claimant, Jon Gaunt, claims in these judicial review proceedings that a finding of the defendant, OFCOM, that a broadcast radio interview conducted by him on 7<sup>th</sup> November 2008 breached rules 2.1 and 2.3 of the Broadcasting Code is a disproportionate interference with his freedom of expression and an infringement of his rights under Article 10 of the European Convention on Human Rights. His claim is supported by Liberty, the Intervener.
2. The radio interview was with Michael Stark, the Cabinet Member for Children's Services for Redbridge London Borough Council, who was centrally concerned with his council's controversial proposal to ban smokers from becoming foster parents on the ground that passive smoking has a propensity for harming foster children. The claimant, who had himself been in care as a child and had then had foster parents, strongly opposed this proposal. He wrote a highly critical newspaper article published in the Sun newspaper on 7<sup>th</sup> November 2008 on this topic under the headline "Fags didn't stop my foster mum caring for me". The article was expressed in forceful and at times colourful language. It expressed great appreciation for foster parents generally and the claimant's own foster parents in particular and criticised Redbridge as "health and safety Nazis", with reference to a "master race philosophy" and the Social Services who are referred to as the "The SS". This article did not strike us as unduly offensive.
3. Later that day, at something after 11.00 a.m., the claimant conducted a live interview with Mr Stark on the radio station Talksport. We have been provided with a transcript of the interview and have listened to a recording of it on CD. The first part of the interview was reasonably controlled, giving Mr Stark a reasonable opportunity to explain his council's policy. The claimant then asked him about existing foster parents who only ever smoke in the open air. Mr Stark explained that the council would not drag children away from existing foster parents, but that such smokers would not be used in the future. The trouble was that such people do smoke in the house. Asked by the claimant how he knew this, Mr Stark explained that there were Redbridge councillors who say they never smoke in the building, but in fact do so. To which the claimant said "so you are a Nazi then?". When Mr Stark began to protest, the claimant again said "no you are, you're a Nazi". Mr Stark protested vehemently that this was an offensive and insulting remark, and the interview then degenerated into an unseemly slanging match. When Mr Stark protested that the insult, as he saw it, was probably actionable, the claimant challenged him to "take action if you wish", but then said "you're a health Nazi". The slanging match continued with the claimant asking Mr Stark if he wanted to carry on with the interview, and Mr Stark replying that he would love to if the claimant would just shut up for a minute. It emerged that the claimant had himself been in care. He referred to his column in the Sun that day and again called Mr Stark a "health Nazi" and then "a Nazi". The heated shouting continued with the claimant doing much of the talking. Mr Stark asked him just to shut up for a moment, and said in effect that the conditions of those in care were better than they had been. The claimant regarded this as an offensive insult to his own upbringing and called Mr Stark "you ignorant pig". He later referred to him as a

“health fascist” and an “ignorant idiot”, and shortly after this he ended an interview that by then had got completely out of control.

4. It is scarcely possible to convey the general and particular tone of this interview in a short written summary, and the full transcript is in this respect incomplete. You have to hear it for its full impact. As we have said, it degenerated into a shouting match from the point when the claimant first called Mr Stark “a Nazi”. That first insult was not said with particular vehemence, but “you ignorant pig” was said with considerable venom and was we think gratuitously offensive. The interview as a whole can fairly be described as a rant.
5. There is a factual dispute, which we cannot resolve, about whether, and if so to what extent, Talksport’s broadcasting editors may have encouraged the claimant during the live broadcast itself to moderate its conduct. Whatever the precise position, within 10 minutes of the end of the interview, the claimant apologised to the listeners (but not to Mr Stark) accepting that he did not hold it together. He had been, he said, unprofessional and lost his rag. It was something very close to his heart. He wished that he had not. About an hour after the end of the broadcast, he broadcast a further apology saying “The councillor wants me to apologise for calling him a Nazi. I’m sorry for calling you a Nazi”. The claimant was suspended from his programme by Talksport that day. Talksport terminated his contract without notice by letter dated 17<sup>th</sup> November 2008.
6. The defendant regulator investigated the matter under the Broadcasting Code having received 53 complaints from listeners about the broadcast. On 8<sup>th</sup> June 2009, the defendant issued their Amended Finding, which is challenged in these proceedings.

#### **Legislation and the Broadcasting Code:**

7. By section 6(1)(a) of the Broadcasting Act 1990, broadcasters were regulated so as to require them to comply with a requirement that nothing would be included in their programmes which “offends against good taste or decency or is likely to encourage or incite to crime or lead to disorder or to be offensive to public feeling”. This has been replaced by section 3(2)(e) of the Communications Act 2003, which places the duty on OFCOM to secure the application by all television and radio stations of standards that provide adequate protection to members of the public from the inclusion of “offensive and harmful material”. By section 3(4)(g), they are required to have regard to the need to do this in the manner that best guarantees an appropriate level of freedom of expression. Section 319 of the 2003 Act obliges OFCOM to set such standards for the content of programmes as appear to them best calculated to secure standard objectives. These objectives include, at section 319(2)(f), that generally accepted standards are applied to the content of broadcast programmes to provide adequate protection for members of the public from the inclusion in such programmes of offensive and harmful material. OFCOM is obliged by the Broadcasting Act 1996 and the 2003 Act to draw up a Code for television and radio covering, among other things, standards in programmes. This is known as the Broadcasting Code, which states explicitly that it has been drafted in particular in the light of the right to freedom of expression as expressed in Article 10 of the European Convention on Human Rights, which encompasses the audiences’ right to receive creative material, information and ideas without interference, but subject to restrictions prescribed by law and necessary in a democratic society.

8. Paragraph 2.1 of the Code provides that generally accepted standards must be applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive materials. Paragraph 2.3 provides that, in applying generally accepted standards, broadcasters must ensure that material which may cause offence is justified by the context. Such material may include, among other material, offensive language.

### **The Amended Finding**

9. OFCOM's Amended Finding of 8<sup>th</sup> June 2009 gave details of the interview, quoting parts of it. It referred to the fact that OFCOM had received 53 complaints, a number of them suggesting that the use of the term "Nazi" belittled the sacrifice made in World War 2. It noted that Talksport regretted what had happened and accepted that the interview fell way below the acceptable broadcasting standards that Talksport expects and demands. Talksport totally accepted and regretted that the language used by the claimant was offensive and that the manner in which the interview was conducted was indefensible. Talksport said that the claimant was known to be an outspoken, hard-hitting, opinionated and aggressive presenter. They had encouraged him to be himself, but also made clear to him the requirement always to remain within the law and to abide by the Code. Talksport maintained (but the claimant disputed) that the claimant had been given moderating instructions during the broadcast. Talksport had self-imposed boundaries: first, not to let robust debate descend into an unedifying war of words that included personal insults, offensive language and bullying; and second, to give both callers and guests a fair crack at expressing their views without being subjected to ridicule or abuse. Talksport considered that both boundaries had been crossed. The Finding noted that the claimant had broadcast two apologies to which we have referred. Talksport itself broadcast an apology on 21<sup>st</sup> November 2008.
10. OFCOM's decision noted the importance of freedom of expression in broadcasting and recognised that Talksport specialised in a genre of hard-hitting radio talk, which encouraged robust interaction between its presenters and invited guests. They observed that the fact that material may be offensive to some is not, in itself, a breach of OFCOM's Code. The decision then continued:

"In this case, a well-known talk radio presenter, with a distinctively robust style, conducted an interview with a local councillor, who had been invited onto the programme to explain his council's new policy on foster carers. OFCOM noted that from the outset, not uncharacteristically Jon Gaunt took an aggressive and hectoring tone with Michael Stark. As indicated above, such an approach may well not have been at odds with audience expectation for this programme or station. However, this tone sharpened as the interview progressed. Jon Gaunt gave little chance for his guest to answer his questions, and dismissed those answers he did give. OFCOM noted that this culminated with Jon Gaunt calling Michael Stark, at times, a "Nazi" and an "ignorant pig". The overall tone of Jon Gaunt's interviewing style on this occasion was extremely aggressive and was described by complainants as "oppressive",

“intimidating” and felt the interviewer was “shouting like a playground bully”.

OFCOM recognises that the subject matter in this case may have been a particularly sensitive one for the presenter, given his own experience of being in care as a child. Further, OFCOM noted that Jon Gaunt later qualified his use of the word “*Nazi*” to some extent by subsequently referring to Michael Stark as a “*health Nazi*”. However, following that qualification, he reverted back to the original term “*Nazi*”. The presenter also referred to the interviewee as “*an ignorant pig*” and told him to “*shut up*”.

11. OFCOM expressed concern that Talksport’s compliance procedures did not appear robust enough to deal with problematic material being broadcast live. The broadcaster should retain control over all output to ensure that presenters apply generally accepted standards and protect members of the public adequately from the inclusion of material which is offensive or harmful. The decision concluded:

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

12. It is to be noted, first, that the decision is against the broadcaster, Talksport, who do not challenge it before this court. Indeed they accepted before the decision was made that there had been a breach of the Code. It is to be noted further that no sanction or penalty was imposed.
13. Although the parties have covered a deal of paper on the subject, it is accepted (and we think rightly) that, although the OFCOM decision was against Talksport, the claimant has standing to challenge it in these proceedings. The decision enunciates an inhibition capable of affecting his unrestrained freedom to conduct radio interviews in the way in which he did on this occasion. We need say no more about his standing.
14. Article 10 of the European Convention of Human Rights provides:

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

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

15. Section 6 of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. OFCOM is a public authority.
16. The claimant does not contend in these proceedings that the Broadcasting Code itself offends Article 10 of the Convention.

### **Submissions**

17. Mr Millar QC, on behalf of the claimant, submits uncontroversially that legitimate restrictions on freedom of expression must be prescribed by law and necessary in a democratic society (in this instance) for the protection of the rights of others and they must be proportionate. He accepts that the provisions of the Broadcasting Code are prescribed by law and, in general, necessary in a democratic society. But he says that OFCOM’s Amended Finding here was unnecessary in its particular application and a disproportionate interference with the claimant’s freedom of expression for which there was no pressing social need. OFCOM’s reasons were insufficient to justify the interference under Article 10.2 – see for this approach *R v Shayler* [2003] 1 AC 247 at paragraph 23 (Lord Bingham) and paragraph 61 (Lord Hope). Mr Millar submits that it is for the court to assess for itself the justification for the interference, rather than simply judging whether OFCOM considered all relevant matters and came to a conclusion which was not perverse. On the contrary, a close and penetrating examination of the factual justification is needed – see Lord Hope in *Shayler* at paragraph 61. Mr Millar submits that the medium was a radio broadcast, which has less potential for impact than television. The category of the broadcast was political speech which is to be accorded especial protection. The broadcast was connected with Mr Stark’s defence of his council’s political decision not to have smokers as foster parents. The offensive comments were not gratuitous or unrelated with the subject matter of the discussion. They were explicable by and related to what was being discussed in the interview. They were, moreover, value judgments, not assertions of fact. There was no profanity or sexually offensive language. The use of the word “Nazi” was not in its historical or ideological meaning, but rather a provocative slang use meaning one who imposes his views on others.

18. As to offensive expression, Mr Millar draws attention to *Handyside v United Kingdom* (1976) 1 EHRR 737, where the European Court said at paragraph 59 that freedom of expression was not applicable only to inoffensive material, but also to that which offends, shocks or disturbs the State or any sector of the population. Such are the demands of pluralism, tolerance and broad mindedness without which there is no democratic society. Restrictions must therefore be proportionate to the legitimate aim pursued.
19. Mr Millar submits that the highest importance is given to the protection of political expression by the media, which is widely defined to include speech on all matters of general public concern. The limits of acceptable criticism of broadcast information and ideas on political issues are wider as regards a politician than as regards a private individual. A politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large. He must consequently display a greater degree of tolerance – see *Lingens v Austria* (1986) 8 EHRR 407 at paragraph 41-42 and *Oberschlick v Austria (No 1)* (1995) 19 EHRR 389 at paragraph 59. Expressions of opinion or value judgments are afforded greater protection than statements of fact which are susceptible of proof (see *Oberschlick* at paragraph 63). Expressions of opinion must still be relevant and have a sufficient factual basis.
20. The European Court has said that there is little scope under Article 10.2 for restriction on political speech on questions of public interest. Article 10 protects not only the substance of the ideas and information expressed, but also the form in which it is conveyed. Journalistic freedom covers possible recourse to a degree of exaggeration, or even provocation. However, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive – see *Dichand v Austria* App. No. 29271/95, 26<sup>th</sup> February 2002.
21. Mr Millar submits that the court can and should decide for itself whether the public authority has violated human rights, which will involve deciding for itself whether the interference is proportionate. He refers to *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 and *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420. In the first of these cases, Lord Bingham of Cornhill said that the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated (paragraph 29). The court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted in judicial review in a domestic setting. The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time (paragraph 30). In the latter case, Lord Hoffmann said at paragraph 13 with reference to the *Denbigh High School* case that either the City Council's refusal to licence the claimant's proposed sex shop infringed their Convention rights or it did not. He said at paragraph 16 that this was an area of social policy in which the Strasbourg court had always accorded a wide margin of appreciation to member states, which in terms of the domestic constitution translates into the broad power of judgment entrusted to local authorities by the legislature. Lord Rodger said at paragraph 26 that, where the public authority has carefully

weighed the various competing considerations and concluded that interference with a Convention right is justified, the court will attribute due weight to that conclusion in deciding whether the action in question was proportionate and lawful. Baroness Hale said at paragraph 31 that the role of the court in human rights adjudication is quite different from the role of the court in ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account. Lord Mance said at paragraph 44 that the court's role is to assess for itself the proportionality of the decision-maker's decision. He said at paragraph 46 that that approach interrelated with the court's recognition of a discretionary area of judgment within which the judiciary would defer on democratic grounds to the considered opinion of the elected body or person whose decision is said to be incompatible with the Convention. The existence of a discretionary area of judgment means necessarily that there may be decisions which a court could regard as proportionate whichever way they went. The court may have to strike a balance for itself by closer scrutiny if the court is deprived of the primary decision-maker's considered opinion. In this context, Mr Millar submits that the court should not regard OFCOM as better able than the court to assess what are "generally accepted standards" under the Broadcasting Code.

22. In *R (Nasseri) v SSHD* [2010] 1 AC 1, Lord Hoffmann, with whom the other members of the court agreed, adopted the court's approach in the *Denbigh High School* case. He said at paragraph 14 that, when breach of a Convention right is in issue, an impeccable decision-making process will be of no avail if the decision-maker actually gets the answer wrong.
23. Mr Millar accepts, we think, that there may be cases in which the carefully considered view of the decision-maker which correctly addresses the relevant human rights considerations may be a factor contributing to the court's decision. But he submits that no real weight should be given on an issue concerning a political debate between a presenter and a politician.
24. Mr Millar submits that the fact that a number of listeners who had been displeased or surprised by the programme complained does not of itself constitute a sufficient reason to justify taking action – see *Monnat v Switzerland* (73604/01). In so far as OFCOM took note of complaints on this occasion, it is suggested that they failed to give weight to contrary and supporting views including those of Liberty. Mr Millar submits that research into perceptions about offensive language conducted on behalf of OFCOM does not support a wide perception that "Nazi" is regarded as offensive when it is not used in a political or ideological context.
25. Mr Millar submits that the elements of the interview that OFCOM criticised are value judgments and that in context the word "Nazi" was not used in an ideological sense. It was used to suggest that Mr Stark was being judgmental and authoritarian in imposing a blanket ban on smokers fostering children. In *Scharsach v Austria* (2005) 40 EHRR 22, the European Court concluded that the use of the term "closet Nazi" was justified as a value judgment for which there was a sufficient factual basis notwithstanding its special stigma. In the present case, the use of "Nazi" and "health Nazi" were value judgments sufficiently supported by the facts. Similarly in *Gorelishvili v Georgia* (2009) 48 EHRR 36, the court regarded the phrases

complained of as sarcastic and cynical, but they did not constitute a gratuitous personal attack devoid of any factual basis.

26. Mr Millar emphasises that there was no finding of breach of the provisions about fairness in section 7 of the Code, and further that Mr Stark himself had not complained.
27. Mr Hare, appearing for Liberty, emphasised that freedom of expression is fundamental to the functioning of democracy and that this applies especially to the communication of opinions and argument about the policies which all levels of government should pursue – see Lord Bingham in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312 at paragraph 27. Freedom of political expression includes not only the inoffensive, but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative, provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having – see *Redmond-Bate v DPP* (1999) 163 JP 789. For verbal statements made during live radio broadcasts, the proportionality question must have regard to the fact that the broadcaster cannot reformulate, perfect or retract what is said before it is made public.
28. Mr Hare submits that the radio discussion in this case was on a topic of great public importance with an elected politician promoting a new and controversial policy. Mr Stark was well aware of the claimant’s style of presentation. The words he used were in response to Mr Stark’s statements. The interview was one of political expression and entitled to the highest level of protection. Mr Hare accepts that Strasbourg jurisprudence does not protect gratuitous abuse unrelated to the political content of the discussion, but this is a very limited exception to the broad protection of political expression. In the present case, each of the epithets used was part of the discussion of the issue between the claimant and Mr Stark. In the cases relied on by OFCOM the offensive, provocative or sarcastic speech in question was held to be protected by Article 10. He submits that the margin of discretion to be accorded by the court to OFCOM’s decision should be very limited.
29. Mr Anderson QC, for OFCOM, says that they are highly conscious that restrictions on freedom of expression, however slight or marginal, need to be justified. But the interference in the present case was an entirely proper application of the relevant statutory framework and Code (which are not themselves challenged) taken with Article 10 of the European Convention on Human Rights. He submits that OFCOM’s Amended Finding explicitly recognises the freedom of broadcasters to choose the manner in which they broadcast; the need to apply standards which best guarantee an appropriate level of freedom of expression; the fact that broadcasting offensive material is not in itself a breach of the Code; and the fact that broadcasting offensive material needs to be justified by the context.
30. OFCOM noted that the interview was conducted by a well known radio presenter with a distinctly robust style who adopted an aggressive and hectoring tone from the outset. The interview was with a local councillor to explain the council’s proposed new policy on foster parents. The tone sharpened as the interview progressed and the claimant gave the councillor little chance to answer his questions. The claimant called the councillor a “Nazi” and an “ignorant pig”, later modifying the first of these to “health Nazi” before reverting back to “Nazi”. His overall tone was extremely

aggressive. The subject matter was a sensitive one for the claimant because of his own childhood experiences.

31. Mr Anderson notes that the relevant statutory provisions and the Broadcasting Code are not challenged as not complying with Article 10. It is accepted that the Amended Finding was prescribed by law and that it pursued a legitimate aim under Article 10.2. There is no primary Convention right not to be offended, but the European Court has acknowledged such a right in the context of Article 10.2 – see *Otto-Premmiger-Institut v Austria* (1994) 19 EHRR 34 at paragraph 49 where the court included as one of the obligations in Article 10.2 an obligation to avoid as far as possible expressions that are gratuitously offensive to others, and thus an infringement of their rights. It is not suggested that OFCOM applied the wrong test. The case is, and only is, that there was no pressing social need for the Amended Finding and that it was a disproportionate interference with the claimant’s freedom of expression.
32. Mr Anderson submits that radio and television broadcasters have duties and responsibilities going beyond those imposed on newspapers, because broadcasting is more immediate, pervasive and powerful. He refers, for instance, to *Murphy v Ireland* (2000) 38 EHRR 13 at paragraph 74 and *R (ProLife Alliance) v BBC* [2004] 1 AC 185 at paragraph 21, a case decided under earlier legislation. The responsibilities find expression in the Code. Mr Anderson notes that Lord Walker said in the *ProLife* case at paragraph 121 that in practice the obligation to avoid offensive material is interpreted as limited to what is needlessly (or gratuitously) shocking or offensive.
33. As to the claimant’s submission that the content of the interview was political speech and the relevant offensive language value judgments, Mr Anderson accepts that this was an interview with an elected councillor on an issue of public concern. But OFCOM’s ruling did not interfere with the claimant’s rights as a journalist to express robustly and forcibly to the extent that his employers were prepared to allow it his own view on an issue of public concern. The finding was by its terms directed to the bullying and insulting of the person being interviewed, a form of expression which contributed nothing to any political or policy debate, which on the contrary derailed the interview altogether and caused it to degenerate into a slanging match. The aspects of the interview found to be in breach of the Code were not political comment or opinion at all, but gratuitous and offensive slurs and abuse. Mr Anderson points to the judgment of Collins J in *Livingstone v Adjudication Panel for England* [2006] HRLR 45, where the judge said that Mr Livingstone was not to be regarded as expressing a political opinion attracting a high level of protection when he indulged in offensive abuse of an Evening Standard journalist outside a city hall reception. The facts of that case were different, but the general point validly made was that gratuitous offensive abuse cannot be regarded as the expression of political opinion. Mr Anderson also refers to *Lopez Gomez da Silva v Portugal* (2002) 34 EHRR 56 at paragraph 34 for the distinction between expressions of polemical political opinion and gratuitous personal attack with no factual basis. Mr Anderson accepts that the limits of acceptable criticisms are wider for politicians than private individuals, so that a politician is expected to tolerate robust criticism and scrutiny particularly in defending a controversial policy. That greater tolerance does not constitute an open ended invitation to offend or insult. He submits that, regardless of the forcefulness of political struggles, it is legitimate to try to ensure that they abide by a minimum

degree of moderation and propriety – see *Lindon, Otchakovsky-Laurens and July v France* [2008] 46 EHRR 35 at paragraph 57.

34. As to value judgments, Mr Anderson submits that the cases relied on are concerned with an individual's inability to prove the truth of expressions of opinion which are incapable of objective verification. Such matters were not in issue in the present case. OFCOM intervened, not for this reason, but in part because the term "Nazi" was used for no purpose other than to insult or bully. The same applies to the expression "ignorant pig". These were offensive according to generally accepted standards.
35. Mr Anderson points to *Dichand* for the distinction between a value judgment, where the proportionality of an interference may depend on whether there is a factual basis for the impugned statement, and a gratuitous personal attack where there is insufficient factual basis, where interference may be justified. Mr Anderson refers also in this context to *Lingens v Austria* (1986) 8 EHRR 407 at paragraph 42; *Oberschlick v Austria* (1997) 19 EHRR 389; *De Haes and Gijssels v Belgium* (1997) 25 EHRR 1; *Gunduz v Turkey* (2005) 41 EHRR 5 at paragraph 37; *Malisiewicz-Gasior v Poland* (2007) 45 EHRR 21 at paragraph 66 and *Janowski v Poland* (2000) 29 EHRR 705. He submits that arguments about value judgments and political speech do not provide a justification for the intimidating and bullying atmosphere into which the interview in the present case descended.
36. Mr Anderson accepts that the fact that the ruling was made against Talksport does not preclude the claimant from asserting that his Article 10 rights are infringed. It is, however, he submits, difficult to see how censure of gratuitous insult and a generally intimidating and bullying interview can interfere with his right to express, in forceful terms if he chooses, the views which he espoused in the interview. The restriction articulated was very limited. There was no sanction or punishment, unlike many of the cases on which the claimant relies.
37. Mr Anderson accepts that the court's approach to proportionality under the Convention goes beyond that traditionally adopted by judicial review in a domestic setting. But this does not mean that the court should place itself in the position of the decision-maker and engage in a merits-based review. The court's task is not simply to substitute its own view for that of OFCOM, but to review OFCOM's decision with an intensity appropriate to all the circumstances of the case. Mr Anderson refers to *R (Daly) v Secretary State for Home Department* [2001] 2 AC 532 at paragraphs 27-28 and *ProLife Alliance* at paragraph 139. He submits that the present case is distinctive because, unlike the *Denbigh High School* case, OFCOM have an intermediate role as statutory regulator. Where the relevant statutory body has applied the right principle, the court will be particularly cautious about interposing its own judgment. He refers to Lord Bingham in the *Denbigh High School* case at paragraph 31 and Baroness Hale in the *Belfast City Council* case at paragraph 37. Baroness Hale there said that, had the Belfast City Council expressly set itself the task of balancing the individual's right to sell and buy pornographic literature and images against the interests of the wider community, a court would find it hard to upset the balance which the local authority had struck – see also Lord Neuberger at paragraph 91. It is not, perhaps, a matter of deference but of the extent to which the court in making its own decision will have regard to and give weight to the value judgment of the regulator. Thus considerable weight should be given to OFCOM's expert judgment on what constitutes generally accepted standards on the inclusion of offensive material.

38. Mr Anderson submits that the content of the broadcast was undoubtedly offensive and there was no sufficient contextual justification for it. It was appropriate for OFCOM to rule that Talksport had breached Rules 2.1 and 2.3 of the Code. The Amended Finding, which had no sanction, was plainly a proportionate response. There is no proper basis for the court to interfere.
39. Mr Anderson submits that the court should judge the broadcast by the impression its overall tenor would have on a listener, not by the isolated impact of one constituent phrase. The assessment should not be over-elaborate. OFCOM were entitled to conclude that the broadcast did not comply with generally accepted standards and that its offensive nature was not justified by its context. The general tenor of the interview was extraordinarily abusive which went far beyond an aggressive or hostile critique of Mr Stark's political stance. It descended into unfettered personal abuse which was plainly offensive. The use three times of the word "Nazi" was particularly offensive especially since after the first use Mr Stark made it plain that he found it offensive and insulting. Even the flippant use of "Nazi" to denote a person who imposes his views on others can be regarded as offensive and in very poor taste and can be used to offend out of anger or intentionally. The context in which the expression is used is critical. The claimant had a basic duty to abide by a minimum degree of moderation and propriety (see *Lindon*), which he abused, resorting to insults and bullying. The interview quickly degenerated to the point where really there was no interview at all. The underlying issues ceased to be discussed in a succession of insults. The suggestion that a dialogue of this kind is entitled to a very high degree of protection is misconceived.
40. Mr Anderson submits that the nature and severity of the penalty imposed (none in this case) are important factors to be taken into account when assessing the proportionality of any interference – see *Perna v Italy* (2004) 39 EHRR 28 at paragraph 39. Further OFCOM had a statutory duty to regulate Talksport, who accepted that their broadcast had breached the Code and their own self-imposed standards. There is nothing in the Amended Finding which impinges on the claimant's ability to advance his political viewpoint with emphatic vehemence. The restriction imposed, such as it was, was plainly proportionate.

## **Discussion**

41. For all that the parties have covered much paper and addressed the court at some length, they are not much at issue as to the principles to be applied and the resulting decision for the court is quite narrow.
42. We take it compendiously from the *Denbigh High School* case, the *Belfast City Council* case and the *Nasseri* case that the court's task is to decide for itself whether the Amended Finding disproportionately infringed the claimant's Article 10 freedom of expression. In doing so, we have due regard to the judgment of the statutory regulator who proceeded on correct legal principles.
43. No point is taken to impugn the relevant provisions of the 2003 Act or the Broadcasting Code, so that, in a sense, the narrow question is whether, having regard to the Article 10 rights of freedom of expression, the broadcast failed to achieve generally accepted standards such that members of the public were not protected from the inclusion of harmful and/or offensive material. We regard "generally accepted

standards” in this context as elusive, and the concept of harmful and/or offensive material needs to be moderated in the light of Article 10 and the domestic and Strasbourg case law.

44. The unchallenged statutory basis for the Amended Finding means that it was prescribed by law and, in the abstract, necessary in a democratic society for the protection of the rights of others. The particular application requires us to decide whether the Amended Finding fulfilled a pressing social need and constituted a proportionate interference with the claimant’s freedom of expression. That is the ambit of our consideration.
45. This was a live radio broadcast reaching a wide audience. So far as this may require a degree of moderation, this is set against the fact that the claimant had no opportunity to edit or correct what he had said once he had said it.
46. The subject of the interview was political and controversial and the person interviewed was an elected politician who would expect to receive and tolerate a rough ride. The expressions complained of were not essentially statements of fact, but expressions of value or opinion. It was therefore an interview where the claimant’s freedom of expression should be accorded a high degree of protection and that was capable of extending to offensive expression.
47. His freedom of expression may not however extend to gratuitous offensive insult or abuse, nor, we think, to repeated abusive shouting which serves to express no real content. We take gratuitously offensive insult or abuse to comprise offensive insult or abuse which has no contextual content or justification.
48. Applying these principles and giving due weight to OFCOM’s judgment, we consider that to call someone a “Nazi” is capable of being highly insulting. It may be that the first use of “Nazi” and the soon to follow qualification had some contextual content and justification. It came after a reasonably controlled introductory dialogue and was not expressed with undue vehemence. Just as the claimant’s use of the word in his newspaper article had a contextual content and was not unduly offensive, so this first use (offensive though it was) may be seen as an emphatic and pejorative assertion that Mr Stark was, in the matter of smoking and fostering children, one who imposes his views on others. It was not, in the context, a description of Mr Stark’s wider political or ideological position.
49. However, the tone of the interview degenerated from that point, partly because Mr Stark understandably took offence and because the claimant’s conduct of the interview became increasingly abusive, hectoring and out of control. The claimant’s subsequent uses of the word “Nazi” undoubtedly assumed the nature of undirected abuse. The expression “ignorant pig” had no contextual justification at all and was said with such venom as to constitute gratuitous offensive abuse in the sense we have indicated. The claimant lost control of the interview – “I didn’t hold it together” – and, as he had admitted, lost his rag. The later part of the interview became abusive shouting which served to convey to listeners no real content at all.
50. In these circumstances, and taking full account of the claimant’s Article 10 rights, we consider that OFCOM were justified in their conclusion, the terms of which we have quoted in paragraph 11 above. The broadcast was undoubtedly highly offensive to Mr

Stark and was well capable of offending the broadcast audience. The essential point is that, the offensive and abusive nature of the broadcast was gratuitous, having no factual content or justification. In the result, we accept Mr Anderson's submission that the Amended Finding constituted no material interference with the claimant's freedom of expression at all. An inhibition from broadcasting shouted abuse which expresses no content does not inhibit, and should not deter, heated and even offensive dialogue which retains a degree of relevant content.

51. No sanction or penalty was imposed on the broadcaster, let alone the claimant. This is relevant, though not decisive, to our consideration, because it bears on the proportionality of the interference. The fact that the Amended Finding was against the broadcaster does not disentitle the claimant from advancing his claim, but again is of some relevance. OFCOM's finding, unchallenged by Talksport, that the broadcaster's compliance procedures did not appear robust enough to deal with problematic material being broadcast live, was justified and depended on the proposition that the broadcast breached rules 2.1 and 2.3 of the Code, which we consider it did.
52. For these reasons, the claim for judicial review fails and is dismissed.