



Neutral citation [2019] CAT 3

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos: 1297/3/3/18

Victoria House
Bloomsbury Place
London WC1A 2EB

6 February 2019

Before:

ANDREW LENON QC
(Chairman)
PETER FREEMAN CBE QC (HON)
SIMON HOLMES

Sitting as a Tribunal in England and Wales

BETWEEN:

MR DAVID HENRY T/A SBC TV

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

Heard at Victoria House on 10 January 2019

RULING (JURISDICTION AND COSTS)

APPEARANCES

The Appellant appeared in Person.

Ms Julianne Kerr Morrison (instructed by Ofcom Legal) appeared on behalf of the Respondent.

INTRODUCTION

1. On 26 June 2018, the Office of Communications (“Ofcom”) issued a decision entitled “BBC Scotland Competition Assessment: Final determination” (the “Decision”). The Decision concluded that the BBC may carry out its proposal, published in November 2017, to launch a new television channel for audiences in Scotland. The Decision followed a public consultation in April 2018 in which Ofcom had invited views on the launch of the proposed BBC Scotland Channel.
2. On 28 August 2018, Mr David Henry filed a Notice of Appeal in respect of the Decision before this Tribunal (the “Appeal”). Mr Henry had previously submitted a response to Ofcom’s consultation objecting to the proposed new channel. The relief sought by Mr Henry in the Appeal was a direction that Ofcom reopen their consultation and revoke the licence for the launch of the new channel until they had fulfilled their statutory duty to secure sufficient plurality of TV and radio services in Scotland and solutions to offset the damage to media plurality can be put in place.
3. On 28 August 2018, the Tribunal wrote to Mr Henry requesting information regarding the statutory provision under which the appeal was brought as required under Rule 9(4)(d)(i) of the Competition Appeal Tribunal Rules 2015 (SI 2015 No.1648) (the “Tribunal Rules”). The Tribunal explained that the Tribunal would have no jurisdiction to hear an appeal if there was no statutory provision giving rise to a right of appeal.
4. On 30 August 2018, a letter and revised Notice of Appeal was received by the Tribunal from Mr Henry in which he identified the provisions on which he relied as being section 58 of the Enterprise Act 2002 (“the 2002 Act”) and section 3 of the Communications Act 2003 (“the 2003 Act”).
5. On 3 September 2018, the Tribunal wrote to the parties inviting written submissions on the question of whether the Tribunal has jurisdiction to hear the Appeal.
6. In their response dated 6 September 2018, Ofcom submitted that the Tribunal should strike out the appeal under Rule 11(1)(a) of the Tribunal Rules on the basis that the Tribunal had no jurisdiction to hear or determine the appeal. Ofcom also explained that they were content for the Tribunal to determine the matter on paper.

7. In his response dated 11 September 2018, Mr Henry submitted that the Tribunal had jurisdiction because the appeal was based on a failure by Ofcom to comply with their own statutory duties under section 3 of the 2003 Act, and section 192(2) of the 2003 Act confirmed the existence of a right of appeal to the Tribunal.
8. On 21 September 2018, the Tribunal wrote to the parties again explaining that pursuant to rule 11(1)(a) a Tribunal panel would determine the jurisdiction point. Additionally, the Tribunal asked Mr Henry to confirm his position as to whether the jurisdiction point could be determined on the papers. In response, Mr Henry requested an oral hearing.
9. By Order of 5 October 2018, communicated to the parties on 8 October 2018, the Chairman extended the time for the filing of the defence until further order. On 9 October 2018, the Tribunal wrote to the parties as follows:

“The Chairman has indicated that, in his view, and bearing in mind the governing principle under the Competition Appeal Tribunal Rules that cases must be dealt with justly and at proportionate cost, it would be appropriate to deal with the issue of jurisdiction in this case on the papers rather than at an oral hearing.

The Chairman notes that Mr Henry has requested an oral hearing. In that regard, the Chairman would wish to establish that Mr Henry clearly understands that if a hearing did proceed, and the Tribunal were to determine that it did not have jurisdiction in this matter, Mr Henry would be on risk of having to pay Ofcom’s costs of preparing for and appearing at such a hearing. In light of that risk, Mr Henry should indicate whether he still wishes to proceed with an oral hearing.”
10. Initially no response was received from Mr Henry. On 12 November 2018, the Tribunal wrote to Mr Henry informing him that, in the absence of any response from him to the letter of 9 October 2018, the Tribunal would determine the matter on the papers. However, by an email dated 21 November 2018, Mr Henry objected to the Tribunal’s decision to dispense with a hearing. In response, by its letter dated 23 November 2018 the Tribunal explained that in proceedings before it appellants may be liable for costs if unsuccessful and asked Mr Henry to confirm whether he wished to proceed to an oral hearing. By an email dated 30 November 2108, Mr Henry confirmed that he did request a hearing, submitting that Ofcom’s decision raised a matter of important public interest and that an order to pay Ofcom’s costs would undermine access to justice by members of the public with limited resources.

11. In the light of Mr Henry’s position, a hearing was arranged to take place on 10 January 2019, following an exchange of written submissions from each party, at which Mr Henry appeared in person and Ofcom by Counsel.
12. After hearing the parties’ submissions on jurisdiction, the Tribunal announced its conclusion that it did not have jurisdiction, for reasons to be given later. The Tribunal then heard the parties’ submissions in relation to costs of the appeal on which it reserved judgment. This ruling sets out the Tribunal’s reasons in relation to jurisdiction and its decision on costs.

LEGAL FRAMEWORK

Ofcom’s function as regulator of the BBC

13. Ofcom’s function to regulate the BBC is set out in section 198 of the 2003 Act, which is contained in Part 3 of the 2003 Act. Section 198(1), as amended by the Digital Economy Act 2017, provides as follows:

“It shall be a function of OFCOM, to the extent that provision for them to do so is contained in –

 - (a) the BBC Charter and Agreement, and
 - (b) the provisions of this Act and of Part 5 of the 1996 Act, to regulate the BBC.”
14. Section 198(2) goes on to explain that for the purposes of carrying out the function set out in section 198(1), Ofcom:

“[...] are to have such powers and duties as may be conferred on them by or under the BBC Charter and Agreement”.
15. “The BBC Charter and Agreement” is defined in section 362(1) of the 2003 Act as meaning, amongst other things, an agreement between the BBC and the Secretary of State entered into for purposes that include the regulation of activities carried on by the BBC.
16. The BBC was first incorporated on 20 December 1926 by Royal Charter. The current Charter, the 2016 Charter, is complemented by a framework agreement entitled ‘An Agreement between Her Majesty’s Secretary of State for Culture, Media and Sport and

the British Broadcasting Corporation (Cm 9366)’ (the “2016 Framework Agreement”). Under the Royal Charter and the 2016 Framework Agreement, Ofcom became for the first time the independent external regulator of the BBC. In this new role, Ofcom has the power, conferred by Clauses 10 and 11 of the Framework Agreement, to carry out a competition assessment of any proposed material changes to the BBC’s public services and the power to make a determination in respect of those proposed changes. Thus, it was pursuant to section 198 of the 2003 Act and the Framework Agreement that Ofcom made the Decision concerning the BBC’s proposed new television channel for Scotland.

Rights of appeal

17. The 2003 Act provides for appeals against decisions of Ofcom, as follows:

(i) Section 192

18. Pursuant to section 192(2), which is contained in Part 2 of the 2003 Act, a person affected by a decision to which section 192 applies may appeal against it to the Tribunal. A list of appealable decisions is set out at section 192(1) (as amended):

“(a) a decision by OFCOM under this Part or any of Parts 1 to 3 of the Wireless Telegraphy Act 2006 that is not a decision specified in Schedule 8;

(b) a decision (whether by OFCOM or another) to which effect is given by a direction, approval or consent given for the purposes of a provision of a condition set under section 45;

(c) a decision to which effect is given by the modification or withdrawal of such a direction, approval or consent;

(d) a decision by the Secretary of State to which effect is given by one of the following –

(i) a specific direction under section 5 that is not about the making of a decision specified in Schedule 8;

(ii) a restriction or condition set by regulations under section 109;

(iii) a direction to OFCOM under section 132;

(iv) a specific direction under section 5 of the Wireless Telegraphy Act 2006 that is not about the making of a decision specified in Schedule 8.

(e) a decision by the CMA to which effect is given by an order made under section 193A.”

(ii) Section 317

19. Section 317(6), contained in Part 3 of the 2003 Act, provides that a person affected by an Ofcom decision to exercise any of their Broadcasting Act powers for a competition purpose may appeal to the Tribunal against so much of that decision as relates to the exercise of that power for that purpose.

(iii) Schedule 11

20. Schedule 11 to the 2003 Act deals with the appeal rights of a regional Channel 3 licence holder. Pursuant to Paragraph 9(1) of Schedule 11, a regional Channel 3 licence holder may bring an appeal to the Tribunal against a decision made by Ofcom pursuant to sections 290 to 294 (concerning the competition aspects of networking arrangements) of the 2003 Act.

THE PARTIES’ CONTENTIONS ON JURISDICTION

21. Ofcom’s case that the Tribunal does not have jurisdiction to hear the appeal can be simply stated. The 2003 Act provides for certain rights of appeal against their decisions, as set out at paragraphs 18 to 20 above but these rights do not include a right of appeal against the exercise by Ofcom of their function to regulate the BBC pursuant to section 198 of the 2003 Act, which was the function that Ofcom were exercising when publishing the Decision.

(1) With regard to section 192, the Decision did not involve the exercise by Ofcom of any powers under Part 2 of the Act nor did Ofcom give effect to the Decision by giving, modifying or withdrawing a direction, approval or consent for the purposes of a provision of a condition set under section 45, and nor was it one of the decisions specified in section 192(1) (d) or (e);

(2) With regard to section 317, the Decision did not involve the exercise of any Broadcasting Act powers;

- (3) With regard to paragraph 9(1) of Schedule 11, the Decision did not concern the approval, imposition or modification of networking arrangements, nor is Mr Henry a regional Channel 3 Licensee.

It follows, according to Ofcom, that the Tribunal has no jurisdiction to entertain the appeal.

22. Mr Henry's case on jurisdiction was as follows.

- (1) Ofcom's general duties in performing their functions are set out in section 3 of the 2003 Act:

3 General duties of OFCOM

(1) It shall be the principal duty of OFCOM, in carrying out their functions—
(a) to further the interests of citizens in relation to communications matters;
and

(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

- (2) The things which Ofcom are required by section 3(2)(c) and (d) of the 2003 Act to secure in carrying out their functions include, in particular, the availability throughout the United Kingdom of a wide range of television and radio services and the maintenance of a sufficient plurality of providers of different television and radio services.
- (3) In reaching their decision, Ofcom had failed to comply with their duty under section 3 to protect the public interest in ensuring media plurality. Moreover, the decision to allow the BBC to launch a new channel when it already has over 40 per cent of market share in the provision of news in Scotland was inconsistent with the position previously adopted by Ofcom in relation to the proposed merger of 21st Century Fox and Sky, which would have resulted in Murdoch family interests providing 10% of UK news coverage, and which Ofcom had considered gave rise to public interest concerns.

- (4) Ofcom had also failed to take account of his response to their consultation, supported by a petition signed by 721 members of the public, which had proposed various solutions to the issue of media plurality.
- (5) Ofcom had misdirected themselves by treating the Decision as being taken pursuant to section 198 of the 2003 Act while ignoring their principal duty under section 3.
- (6) Section 192(2) confers a right of appeal on persons affected by a decision to which section 192(1) applies. Mr Henry is affected by the Decision in that the Decision will damage the market place and deter new entrants into the market including his interest in launching a new television channel in Scotland.
- (7) The effect of the Decision was to grant a licence to the BBC to use additional capacity pursuant to the Wireless Telegraphy Act 2006. This engaged the right of appeal under section 192(1) (a) of the 2003 Act.

23. In response Ofcom submitted as follows.

- (1) Ofcom disputed Mr Henry's case as to the substance of his appeal, i.e. that they had acted in breach of their general duty under section 3 of the 2003 Act, but they had not sought to address the matters raised in any detail as these matters were not relevant to the question of jurisdiction which was before the Tribunal. Ofcom accepted that their general duty under section 3 was engaged by the Decision but submitted that they had complied with that duty in exercising their powers under section 198 of the 2003 Act and the Framework Agreement.
- (2) There was no freestanding right of appeal in relation to an alleged breach of section 3. Section 3 is not within Part 2 of the 2003 Act as referred to in section 192(1)(a). Rights of appeal under the 2003 Act arise in relation to certain types of decision specified in section 192(1), not in relation to duties, and the Decision was not one of those specified decisions.

- (3) The Decision did not involve any decision under the Wireless Telegraphy Act 2006. Section 192(1)(a) of the 2003 Act was therefore irrelevant.
- (4) The absence of a right of appeal under the 2003 Act had not left Mr Henry without possible recourse to the Courts. Ofcom, as a public body, were subject to judicial review in the High Court. Mr Henry could therefore have applied for judicial review of the Decision.

CONCLUSION ON JURISDICTION

24. The Tribunal is a creature of statute (section 12 and Schedule 2 to the 2002 Act). Unlike the High Court, it does not enjoy inherent jurisdiction but rather derives its jurisdiction principally from the 2002 Act, the Competition Act 1998 and the 2003 Act. In order to establish the jurisdiction of the Tribunal, it is not enough for Mr Henry to assert that Ofcom has acted in breach of duty or that the Decision raises competition issues. It is necessary to identify a statutory provision conferring jurisdiction on the Tribunal to determine the appeal.
25. Ofcom's submission that rights of appeal under the 2003 Act only arise in relation to specified functions is plainly right. The publication of the Decision was a measure taken by Ofcom in the exercise of their function of regulating the BBC pursuant to section 198 of the 2003 Act. Mr Henry refers to the rights of appeal conferred by section 192 of the 2003 Act but these rights of appeal do not apply to that function. The Decision was not a decision under Part 2 of the Act nor was it a decision under the Wireless Telegraphy Act 2006 nor any of the other decisions referred to in section 192(1). Mr Henry was therefore not a person affected by any such decision with a right of appeal to the Tribunal under section 192(2). Mr Henry's argument that a separate right of appeal to the Tribunal exists in relation to an alleged breach of Ofcom's principal duty under section 3 is incorrect. There is no such right of appeal. Mr Henry could, however, have applied for judicial review of the Decision in the High Court, as noted by Ofcom. We make no comment as to the policy reasons behind this arrangement which are entirely a matter for Ministers and for Parliament.

26. It follows that the Tribunal has no jurisdiction to determine this appeal, which we strike out pursuant to Rule 11 (1) of the Tribunal's rules.

COSTS

27. Rule 104 of the Tribunal Rules confers a discretion on the Tribunal to make any order it thinks fit in relation to the payment of costs of proceedings and that in making an order and determining the amount of costs, it may take account of a range of factors including the conduct of parties and what is proportionate and reasonable.
28. Ofcom sought payment of their external legal costs in the sum of £1,608 inclusive of VAT which were incurred as a result of holding an oral hearing as opposed to the matter being dealt with on the papers. Ofcom did not claim any of their internal legal costs as Mr Henry was a litigant in person but they considered that it was reasonable and proportionate to seek their external costs on the basis that Ofcom's costs are effectively recovered from stakeholders and therefore the public, the issue of jurisdiction was clear cut and the oral hearing took place at Mr Henry's request after he had received Ofcom's submissions.
29. Mr Henry resisted an order for costs on the basis that the relevant legislation is complex, that he brought the case because there was an important public interest at stake and that it was reasonable to request an oral hearing in order to ensure that he got his case across to the Tribunal and could answer any questions that came up. When asked by the Tribunal why he had not obtained any legal advice on the question of jurisdiction, Mr Henry's response was that he had been busy with his job running a pub and had not had time to do so.
30. In the Tribunal's view, it would be reasonable and proportionate to require Mr Henry to make some contribution to Ofcom's costs. We take into account the importance of access to justice, the fact that the appeal raised a matter of public interest and the efficient way in which Mr Henry presented his case at the hearing. We also take into account the fact that Mr Henry requested an oral hearing, having been warned that he might face a costs order if his appeal was dismissed and the fact that he did not appear to have a valid reason for failing to seek any legal advice in relation to his appeal which,

had it been obtained, would probably have avoided the need for an oral hearing. In all the circumstances, a fair order would be for Mr Henry to pay £800 towards Ofcom's costs (being in round figures half of the amount claimed by Ofcom) and that is the order that the Tribunal makes.

Andrew Lenon QC
Chairman

Peter Freeman
CBE QC (Hon)

Simon Holmes

Charles Dhanowa OBE QC (Hon)
Registrar

Date: 6 February 2019