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**IN THE COMPETITION**  
**APPEAL**  
**TRIBUNAL**

Case No: 1712/3/3/25

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Tuesday 8<sup>th</sup> July 2025

Before:  
Andrew Lenon KC  
John Alty  
Professor Rachael Mulheron KC (Hon)  
(Sitting as a Tribunal in England and Wales)

BETWEEN:

**Mr David Henry**

**Applicant**

**V**

**Office of Communications**

**Respondent**

**- and -**

**(1) Comux UK Ltd**  
**(2) That's TV Channels Ltd**

**Intervenors**

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**A P P E A R A N C E S**

Mr David Henry representing himself

Anneliese Blackwood representing Office of Communications

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**Tuesday, 8 July 2025**

**(10.30 am)**

THE CHAIRMAN: I'm going to start with the customary warnings to those joining us livestream on our website. An official recording is being made and an authorised transcript will be produced but it's strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings. Breach of that provision is punishable as contempt of court. Yes, thank you.

MS BLACKWOOD: I appear on behalf of Ofcom today and Mr Henry, as you will be aware, is representing himself. I understand that Mr Henry may be wishing to make a McKenzie friend application --

THE CHAIRMAN: Yes.

MS BLACKWOOD: -- so perhaps that's the first order of business.

THE CHAIRMAN: Yes. Mr Henry, I have been handed up a form for completion. Unfortunately, it does not seem to have been completed. There's no indication of the name or address of your hoped for McKenzie friend and the McKenzie friend hasn't filled in the form either, so who is your McKenzie friend?

MS MUNRO: My name is Pat Munro.

THE CHAIRMAN: Pat Munro?

MS MUNRO: Yes.

THE CHAIRMAN: Yes.

MS MUNRO: I am just here really to support him.

THE CHAIRMAN: Yes. Have you seen this form?

MS MUNRO: (Inaudible words)

THE CHAIRMAN: Have you read the form?

MS MUNRO: I haven't, I just signed it. Sorry, I thought it was filled in, my fault.

THE CHAIRMAN: The main point to bear in mind with McKenzie friends is that they

1 can provide moral support, they can take notes and they can quietly give advice but  
2 they may not address the court. Do you understand that?

3 MS MUNRO: I do.

4 THE CHAIRMAN: Have you acted before as a McKenzie friend?

5 MS MUNRO: I have.

6 THE CHAIRMAN: You have. All right. What do you say Ms Blackwood?

7 MS BLACKWOOD: We have no objections.

8 THE CHAIRMAN: All right. Thank you. I'm going to start by just making some  
9 observations about the timing of this hearing. I don't know whether the parties have  
10 had any discussion about timetabling but it seems to the tribunal that it would make  
11 sense for Mr Henry to start and that he should have an hour to make his submissions.  
12 Ofcom should then have an hour to respond, with 30 minutes at the end for Mr Henry  
13 to make any responsive submissions and for the tribunal to ask any questions of either  
14 side. Given the time constraints, it's important that the parties' submissions are very  
15 focused and it's important that the parties should understand that the tribunal has  
16 carefully read all the submissions that have been provided and so there should be no  
17 repetition of what's already been given to us in written form. It seems to us that we  
18 would be assisted by Mr Henry addressing us on the following five topics. First of all,  
19 the strike out argument. That's to say the argument raised by Ofcom that the appeal  
20 should be struck out on the grounds that the decisions appealed against are not within  
21 its jurisdiction.

22 Second, that Mr Henry should address the argument that the appeal is out of time.

23 Thirdly, Mr Henry should address the scope of his interim relief application and the  
24 principles which have been set out by Ofcom as being applicable to the grant of interim  
25 relief.

26 Fourthly, the argument raised by That's TV that the appeal should be struck out under

1 rule 11(d), on the basis of what is said to be Mr Henry's past track record of vexatious  
2 proceedings.

3 And finally, the question of costs, whether Mr Henry should pay the costs of Ofcom  
4 and the interveners, in the event that the appeal and the application for interim relief  
5 are unsuccessful.

6 So those are the broad areas. We will see how we get on but it may be that the tribunal  
7 will encourage you to move on if it seems to us you are spending too much time on  
8 one of those topics, which will not leave enough time for the others.

9 Submissions by MR HENRY

10 THE CHAIRMAN: So Mr Henry, the floor is yours.

11 MR HENRY: Thank you. First of all, thank you everybody, for your time, for hearing  
12 what I think is an important public issue. This goes back, as the court will know, over  
13 many years, from when local TV was first created in 2012. 2012 clearly laid down that  
14 local TV is extremely important for local democracy and that part of the process was  
15 to include a minimum requirement for local programming and that was to form the  
16 character of the service. It was meant to have many benefits, not least to create  
17 opportunities for people to get training and skills in creating programmes, as well as  
18 local journalism. So local TV was created in 2012 with that in mind.

19 When it comes to the application from or the response from Ofcom to have the case  
20 struck out, they do this under, I believe, a false premise, that this case is similar to one  
21 that I was involved in in 2018 against a BBC Scotland channel being granted  
22 permission to broadcast in Scotland. It was a different case completely. My concern  
23 in 2018, funnily enough, was linked to the possibility that the STV2 channel, the local  
24 channel that was already in existence, may well close because there had been  
25 highlighted in the media that that was likely to be one of the outcomes. Turns out that  
26 is exactly what happened. So it was potentially damaging competition.

1 And more seriously, the BBC had over 40 per cent market share in news and current  
2 affairs in Scotland at the time, according to Ofcom published data and they were  
3 proposing to increase the number of news programmes they made on the new service,  
4 meaning their share would be much higher than 40 per cent.

5 So with those two things in mind, I believed it was against the public interest for that  
6 to go ahead which is why I submitted, along with 720 signatures from the public, who  
7 were against that proposal as it stood. So the two case are not linked, even though  
8 they did obviously involve Ofcom and myself but they were completely different cases.

9 The difference between this application and the application in 2018 was in 2018, the  
10 BBC was not being granted any new radio spectrum. They were using existing  
11 spectrum that was already under licence to them. It was just a change of use. They  
12 were closing BBC 3 they were opening a BBC Scotland channel and I think closing  
13 a couple of radio stations to make bandwidth for it. So it was a separate issue, there  
14 was no bandwidth involved. Local TV does involve radio spectrum. It's specifically  
15 granted for each licence operated by Comux. The Comux licence is only issued if,  
16 indeed, there is a successful local television programme licence issue. The two  
17 licences are one and the same transaction.

18 In the statutory details from Ofcom, Ofcom clearly makes the character of the service  
19 central, ie it must have localness, that Comux's requirement is laid down in the Comux  
20 DTT Mux licence, it details exactly what is allowed to be broadcast, and it details that  
21 once -- so there are four things listed on the licence. The first one is it must deliver  
22 a standard definition, local television programme service. It must also include EPG  
23 data and other signal data to ensure that the television system works because it has  
24 to transmit not just its own material but programming details for all DTT channels must  
25 be included, otherwise the system doesn't work. So you press a remote control and  
26 you go to the channel, you want to see what is on now and next and you keep going

1 forward, forward. You go to BBC 1, Channel 4. All that data has to be included,  
2 including on the Comux transmission. So there is a requirement for interoperability  
3 and to collect data from other source and to include it. So that is the second thing that  
4 must be included in the DTT local Mux. The third thing --

5 THE CHAIRMAN: Forgive me, I hesitate to interrupt you but it's important, as I say,  
6 that your submissions are focused.

7 MR HENRY: Yes --

8 THE CHAIRMAN: -- and there is a fundamental point raised by Ofcom that the CAT,  
9 the tribunal, does not have jurisdiction to determine your appeal. I'm looking at your  
10 letter dated 8 July in which you deal with jurisdiction by saying that the application is  
11 made under various statutory provisions.

12 MR HENRY: Yes.

13 THE CHAIRMAN: Could you help the tribunal by just expanding on that first paragraph  
14 and dealing with each of the sections in turn, so that the tribunal understands your  
15 case.

16 MR HENRY: Yes, certainly. Thank you.

17 THE CHAIRMAN: Starting with section 192 of the Communications Act.

18 MR HENRY: Section 192 is clearly linked to -- I think it's part 3 of the Communications  
19 Act, I think it comes under which is not directly appealable to this tribunal under certain  
20 circumstances. However, section 195 refers to a decision made by the Secretary of  
21 State. In fact. It's appealed now --

22 THE CHAIRMAN: Well shall we just have a look at section 195.

23 MR HENRY: Sure.

24 THE CHAIRMAN: That's in the authorities bundle. Page 139.

25 MR HENRY: My point would be that under section 195, the Secretary of State has  
26 passed -- has made a decision on 19 December --

1 THE CHAIRMAN: All right but hang on, section 195 is essentially dealing with  
2 procedure, it's not an additional basis of jurisdiction. It's saying how the tribunal should  
3 determine an appeal against certain decisions of the Secretary of State. How does  
4 that help you?

5 MR HENRY: My understanding is that the Secretary of State has made a decision  
6 which relates to radio spectrum which is the renewal of the local television service  
7 licences which confirms that the same decision has to extend and renew the DTT Mux  
8 licence, as the two are one and the same process. Without one, you cannot have the  
9 other.

10 And that decision was passed on 19 December, granting very specific additional  
11 powers for Ofcom to extend these licences in a two stage process, the first one being  
12 that they must put in an application to notify they want to have them renewed and that  
13 must have been in by 31 March 2025.

14 My question on this arises that it can't be possible that the Secretary of State meant  
15 for this power to be granted to a company that's been found in breach of operating its  
16 licences.

17 THE CHAIRMAN: Why do you say that the decisions which you say were taken were  
18 decisions of the Secretary of State?

19 MR HENRY: No, the decision of the Secretary of State, he passed a piece of  
20 legislation that Parliament had passed a Statutory Instrument order, Order 2/20/24 on  
21 19 December which gave Ofcom new powers to renew and extend these licences. So  
22 a decision has been made to grant those extra powers to Ofcom. My contention is  
23 Ofcom has not acted in this manner the way Parliament intended.

24 THE CHAIRMAN: All right but hang on, Mr Henry -- again, I don't want to interrupt you  
25 but do you have a copy of Ofcom's skeleton argument?

26 MR HENRY: I do, yes. (Pause)

1 THE CHAIRMAN: Paragraph 12 summarises what are said to be the decisions taken  
2 by Ofcom which are the subject of the appeal. (Pause)

3 And Ofcom goes on to explain in paragraph 17 onwards, why it is that those decisions  
4 do not fall within section 192. They don't deal with section 195 because that wasn't  
5 a provision you were originally relying on but it seems that that provision, if Ofcom is  
6 right, is also redundant because there was no decision by the Secretary of State. But  
7 they also deal with section 45, that's at paragraph 22. Section 45 is concerned with  
8 the setting of conditions and they say that no conditions have been set. So that section  
9 is not engaged. The Wireless Telegraphy Act would also appear to be not relevant  
10 because that's not concerned with TV licences.

11 Can you, in a short time, explain why you contend that Ofcom is wrong.

12 MR HENRY: Yes. Ofcom is wrong because section 45 is about telecommunications  
13 networks and associated facilities. And while I understand why they don't think local  
14 TV transmissions may be part of a telecommunications network service, in fact they  
15 are and they require -- in their licence details they require the licence holder to  
16 co-operate with other telecommunication network services and associated facilities.  
17 That's the term under section 45.

18 The reason why -- and it's a very simple -- and I think I have -- I include it in my  
19 additional submission the other day. There's a nice little graph that I managed to grab  
20 from that television which showed them broadcasting commercials which have QR  
21 codes on them. Now the QR code, this is something that is quite recent but it's done  
22 on many channels now. It's to be used with your mobile phone. You place your phone  
23 in front of the screen, you press the button on your camera, it scans the QR code,  
24 you're now linked via a mobile telecommunication network which connects you to the  
25 Internet, which connects you to the company's website. You have just completed  
26 a circuit. That is a telecommunication network service, so local television services for



1 any channel that broadcast such commercials or such messages on screen becomes  
2 part of a public telecommunications network service and therefore is regulated under  
3 section 45, therefore the court has jurisdiction to hear the case.

4 THE CHAIRMAN: I'm sorry, Mr Henry, but that seems to be a bit of a *non sequitur*.  
5 Even if you are right in terms of your first point about networks, why does it follow that  
6 the tribunal has jurisdiction to determine the appeal which is concerned with these  
7 various decisions taken or what you would say were decisions taken since 2018,  
8 what's the link?

9 MR HENRY: Well the link is that the local TV service shares reserved bandwidth,  
10 spectrum bandwidth under the Wireless Telegraph Act and that that is granted, for  
11 them to be able to be transmitted. It's not existing bandwidth that was there before,  
12 it's part of getting a local television service licence. And it is used to deliver data, not  
13 just moving pictures and sound. It can indeed be EPG data which is collected from  
14 other telecommunication network service providers and, therefore, it's part of a circuit.  
15 It is not a television service on its own, we are not dealing with analogue television  
16 anymore and the other condition has been put into both licences by Ofcom, requiring  
17 both licence holders to use best endeavours to clear 700 megahertz of bandwidth.  
18 This was to be sold to -- and used for Mobile telecommunication networks. So there  
19 has been an instruction, meaning that a decision has been made. So I contend that  
20 because they transmit commercials with QR codes which are one part of the signal in  
21 a telecom service, and for you to get the return path, you have to use your mobile  
22 phone, and it connects to a mobile network and then to the Internet, you have in fact  
23 created a telecommunication network service. Maybe Ofcom doesn't see it that way  
24 but that, in practice, is what it is, it forms part of a telecoms service. And that means,  
25 of course, section 45 is engaged because the general direction that Ofcom has given  
26 to a condition that they have imposed on both Comux in the licence and on the local

1 television programme service licences is that they must work with others to ensure  
2 noninterference with other telecom service users, that's the mobile phone contracts,  
3 and because of the way television is delivered, they are required to set up a virtual  
4 telecom system to deliver the signals to the transmitter sites. You can't get the signals  
5 there without it. So Ofcom, whether it likes it or not, has actually licensed a company  
6 to create a virtual telecommunication network service, to be able to deliver its  
7 television signals to the transmitters. The only way that wouldn't have been the case  
8 is if Comux and the local licence had dug up all the roads and streets and laid their  
9 own physical cable. They don't do that, they contract with third parties to buy capacity  
10 across telecom networks to get them across from here to wherever the transmitter site  
11 is.

12 THE CHAIRMAN: All right. Mr Henry, I'm going to move you on in a minute to the  
13 next topic. But I mean, just looking at section 45 of the Communications Act,  
14 I mean -- so what if Ofcom had set a condition. You don't seem to be saying that  
15 there's anything particularly wrong with that condition, and it's not clear to me how that  
16 feeds into your appeal.

17 MR HENRY: The appeal is that this is part of the telecommunication network service  
18 under section 45 and because of that, that does indeed mean that the tribunal has  
19 jurisdiction to hear the question that is raised, which is that the telecommunication  
20 network service is being misused. Ofcom highlights that the character of the service  
21 is brought under one section and somehow doesn't affect Comux operating the DTT.  
22 That is not the case because the licence under the Wireless Telegraph Act which is  
23 issued to Comux specifically details that it must deliver the local television programme  
24 service which in itself has minimum requirements to secure the character.

25 The other purpose it has is it's meant to create job opportunities and training which, of  
26 course, if you haven't got any production staff or any facilities or any production office,

1 | you are not going to fulfil that requirement either. So local TV is just part of the  
2 | telecommunication network service.

3 | THE CHAIRMAN: All right. I'm going to move you on, Mr Henry, to the question of  
4 | delay and what's said by Ofcom, in terms of your appeal not having been brought  
5 | within two months of the date upon which the appellant's notified of the disputed  
6 | decision or the date of publication of the decision, whichever is the earlier. And I will  
7 | remind you that at page 79 of the bundle, what is said by Ofcom is that you were aware  
8 | of the transfer of the Scottish LDTPS licences to That's TV from as early as 2 July  
9 | 2018, as evidenced by an email exchange referred to by Ofcom, that the 2019 decision  
10 | was published on 9 July 2019 and the 2021 decision was published in  
11 | November 2021. So that's between seven and four years ago. What do you say about  
12 | that? I mean would you accept that you did know about these events, as alleged by  
13 | Ofcom? And if so, why do you say there are exceptional circumstances which would  
14 | justify the tribunal in extending the normal two-month time limit?

15 | MR HENRY: First of all, Ofcom doesn't mention that the last decision it made which  
16 | was December 16, 2024, so definitely within that period. And my original application  
17 | was made after what appeared to be a final decision by Ofcom, dated 23 September,  
18 | from their director of legal, which confirmed as of that date that they had made no  
19 | decision to open an investigation into the evidence that I'd sent, the complaint I'd  
20 | submitted in February 2024, with ample evidence of ongoing breaches.

21 | When it comes to the transaction in 2018, nothing was published. No details of what  
22 | the deal was, how it was -- I found out very late in the day that an exclusive negotiating  
23 | period had been entered between STV and That's TV and they couldn't discuss the  
24 | matter with me any further at that point. So I was basically none the wiser of what sort  
25 | of negotiations but it wasn't open to a competitive tendering process. I think the issue  
26 | here is --

1 THE CHAIRMAN: You did know about the transfer?

2 MR HENRY: Well, I had contacted STV and they told me that they had an exclusive  
3 period. That was all I actually knew. I didn't know that the deal had gone through  
4 until -- I think there was a press item on it. So there was never anything published by  
5 Ofcom. There was no decision published by Ofcom. So there cannot be a decision  
6 that you can appeal against Ofcom, if they never -- or to publish one and they tell me  
7 and I think you will find it in the documents, that they claim they never made a decision.

8 THE CHAIRMAN: Well that is indeed their primary case.

9 MR HENRY: So, therefore, if they never made a decision, how can you appeal  
10 a decision that they claim they never made and then how can it be out of time?

11 THE CHAIRMAN: Well I think their point is if they are wrong about that, you were  
12 notified of the decision on the dates they've referred to.

13 MR HENRY: Not by Ofcom -- but no one from Ofcom had been part of the process.  
14 I had a meeting at some point after that with the chief executive of That's TV which  
15 was what -- I was looking to see if we could work together. I had clear plans of what  
16 a Scottish channel should look like and type of programmes that were needed,  
17 et cetera, and would be happy to work for them to do that, if that was the case. That  
18 never went anywhere, beyond one meeting. I never heard back from them and over  
19 a period of time, and it did take time, I think I have detailed this in one of my  
20 submissions, it was quite clear that all the original programming commitments that  
21 STV had put in which were quite substantial, hence why they had won the licences  
22 against three other competing bidders, were being stripped out bit by bit, until there  
23 was nothing left, there was no news. It has to be said that STV had committed quite  
24 a substantial amount of funding and support for these local channels and they had,  
25 I think, 29 staff just making news and current affairs. That vanished.

26 So clearly, no channel that's got no staff and no commitment to news and journalism

1 is going to be able to provide the character of the service that originally won the  
2 licence.

3 Ofcom should have, and this has been my argument, taken that licence back,  
4 considered, when they were approached by That's TV, what the likely effect of  
5 transferring it to That's TV without a commercial tendering process, because that is  
6 how these licences were set up, what effect that might have on the character of the  
7 service. That never happened.

8 We now know, as history can show, that the service disappeared and the character of  
9 service was radically changed, to the point that it no longer fulfils the minimum criteria  
10 for local television.

11 When it comes to the 2019 decision, there were quite a lot of submissions that were  
12 against it. I think I might have been one of them that opposed it, I believe. Ofcom  
13 ignored those complaints or objections and granted it on the basis that the promises  
14 were being made by streaming down the production facilities. Even though this is  
15 a firm commitment in the original 2012 local television statement by Ofcom. It clearly  
16 states localness, production facilities are essential. Ofcom deems it essential to  
17 protect the character of the service. So even though that's the original of local  
18 television --

19 THE CHAIRMAN: The point I'm on, Mr Henry, is why did you wait five years before  
20 bringing an appeal?

21 MR HENRY: Well I didn't wait five years, as it is. 2019 which obviously I objected to,  
22 clearly, and then by about 2020, I understand, because I was in touch with Ofcom over  
23 a period of time, they informed me that they had set aside the localness requirement  
24 during Covid. That had been set aside for over a year. So there was no longer any  
25 requirement for local TV channels to deliver any local news because of Covid. So that  
26 is an exceptional circumstance that nobody could foresee - so that set it aside for the

1 year 2020 to 2021. By the end of 2021, when there is another decision by Ofcom  
2 which would appear to have been a further reduction in the minimum- requirement,  
3 which still meant that every local channel had to make one hour of news, nonrepeating,  
4 in prime time. That is still the case today. That has never been delivered. In all  
5 these years. I submitted the evidence to Ofcom. They choose not to investigate the  
6 complaint, even though the evidence is there for anyone who bothers to tune in and  
7 record and watch that so- called one hour of news, they will find it's not being fulfilled.  
8 Ofcom has the evidence in their files I've sent them. They've- done nothing about it,  
9 hence why we are now here.

10 So from 2021, the chief executive of That's TV gave an interview to the BBC which is  
11 in the files as well and on 9 February 2021, he promises, after being heavily criticised,  
12 local TV, for not fulfilling its minimum requirement, he promises that as of now, going  
13 forward, the minimum requirement will be delivered. As we now know, because  
14 Ofcom, after I had complained and sent the evidence in February, I think it was  
15 6 February 2024, in Ofcom's finding, That's TV was in breach which was published on  
16 16 December 2024. They had used the return data for 2022 and deemed that That's  
17 TV was in breach of 13 out of the 20 licences but it had taken till 2024 for that to be  
18 officially accepted by Ofcom. They have never investigated my complaint and they've  
19 never dealt with the evidence I sent them which was much more recent. That was  
20 2023 to 2024. Clear evidence that they are in breach and they are not delivering the  
21 minimum.

22 THE CHAIRMAN: That's a separate point, Mr Henry. The point I'm on is why has it  
23 taken you six years -- or four years to appeal against the decisions made by Ofcom to  
24 first of all, aggregate the studios and production bases for the L-DTPS licences and  
25 later, to further reduce the number of studios and production bases. Why is it you  
26 haven't appealed at an earlier time?

1 MR HENRY: It's essentially because I had raised it with Ofcom. I had a meeting about  
2 two years ago, I think, maybe three years ago, with Ofcom and we raised the issue of  
3 potentially putting in a complaint. We were sort of warned off the complaint process  
4 and it doesn't really help and -- I was also told that Ofcom's approach is they need  
5 a full year's worth, so that they basically look at a full year's worth of output. So  
6 a channel can produce no news at all for, let's say, 11 months but as long as they have  
7 fulfilled the average hour in the last month, that year would -- they would tick the box.  
8 That's what we were told. So you have to wait the whole year to find out if they are  
9 going to fulfil this magical quota of one hour per day. In other words, 365 hours need  
10 to be produced per year. Yes, but they could put it in the last couple of months of the  
11 year or in the middle of the night which some of them were doing that. 3 to 4 o'clock  
12 in the morning, they were running it for four hours. No one is watching at 4 o'clock in  
13 the morning, so again, it does point that in another part of the undertaking that it should  
14 be in prime time and it details what prime time means. So you've --

15 THE CHAIRMAN: But again, I don't understand the logic, Mr Henry. If, as you say,  
16 the decision to shut the -- to aggregate the studios or reduce the number of studios  
17 was wrong in law, there was no need to wait for Ofcom to provide further data or  
18 anything like that, you could have brought the appeal.

19 MR HENRY: It would only be wrong in law if they were not delivering what they were  
20 promising that they were going to do and what they had actually promised in these -- to  
21 get to this(?) request, which was then agreed to, was it would save them financial  
22 expenditure, and therefore, they would be able to spend more on actually creating  
23 local content. What they were really promising was they were going to centralise their  
24 production in Manchester and create more news than they would have if they had had  
25 half a dozen production offices in Scotland, with staff, et cetera. Now logically,  
26 financially, that sounds like it might make sense. It would reduce your physical

1 buildings, costs, you know, rates, rents, electricity and all of that. But if you don't  
2 actually employ any staff, then you are not going to be able to produce the news which  
3 of course, as we now know, that is exactly what's being going on. They have not  
4 produced the minimum one hour, they never have, and it would appear that they have  
5 no intention of doing it, despite the promises and undertakings to Ofcom. So Ofcom,  
6 I think, to give them the benefit of the doubt, were misled. They were misled into  
7 thinking that if they agreed to the reduction in the production facilities, this would help  
8 the company increase their -- spend the money more productively on actual original  
9 content. That is not, of course, what's happened.

10 So I'm not a policeman. My main focus was I knew the licences were coming up for,  
11 potentially, renewal. There was no guarantee a few years ago of them even being  
12 renewed. The legislation to renew them only got passed in December 2024. But I kept  
13 a keen interest in it and built a business plan going back ten years. I registered SBC  
14 as a registered trade mark ten years ago. It's a registered trade mark. The business  
15 plan is very well developed, has offers of support and so I happen to know how much  
16 it was going to cost to run five channels in Scotland and do it properly. And it's  
17 significantly more than what That's TV is spending. So preparing for when these  
18 renewal notices came up, I would have expected Ofcom -- there were three options  
19 Ofcom could have done. It could have done what they have done which is offer an  
20 automatic renewal which you would have expected. That would be sensible if  
21 companies were complying with their licences. Why would you question it?

22 However, for companies that are not complying with the minimum requirement and  
23 are clearly abusing the system, then you would expect Ofcom to say: well we are  
24 putting them back on the market for commercial tender which is how they started. So  
25 I expected there would be a competitive tendering process, as any channel that isn't  
26 required -- and there is, I think, one that's not been renewed or has applied not to



1 | renew theirs. Notts TV I think is not renewing theirs. So that, potentially, is going to  
2 | be put back on the market for Nottingham but the others have all been given an  
3 | automatic renewal.

4 | THE CHAIRMAN: Yes, all right. Can you just hold it there, Mr Henry.

5 | PROFESSOR MULHERON: Mr Henry, may I just ask, the tribunal obviously has to  
6 | apply the law as it has been established and the reasons that you are giving for the  
7 | delay, would you accept that they didn't apply for the entirety of the period of six years,  
8 | five years, et cetera, that they applied for part but not all of the period? The  
9 | explanation you have been giving shows that there were periods of flux, as you  
10 | described it. Would you say that the reasons have applied for part but not all of the  
11 | delay period?

12 | MR HENRY: I think the way I look at this, which is why I think I refer to the BSkyB  
13 | (inaudible words) gave permission for -- to extend their period. I know it was only for  
14 | a few weeks but it established the principle. All of these decisions are interlinked, they  
15 | are all linked to each other. They may have been made for different reasons and they  
16 | were -- but the first one, there was no actual decision published, so how could I appeal  
17 | something that I wasn't aware of what the contents were? I actually was just recently  
18 | searching for where is the published decision from 2018? And I was informed there  
19 | is no published decision, they didn't make one.

20 | PROFESSOR MULHERON: I think we've got that point, Mr Henry, but can you  
21 | answer yes or no, was the delay reasons that you give applicable for the entire period  
22 | or just part of it, can you answer that?

23 | MR HENRY: It's difficult to answer it simply because I think the delay is different for  
24 | each decision. So in 2019, I had engaged in that process and I was against them  
25 | reducing it, I could see the potential danger. But that was granted anyway. Ofcom, in  
26 | their reasons for making that, said they believed it would increase the amount of local

1 content, so I was prepared to give them the benefit of the doubt, maybe that was what  
2 they were going to do --

3 PROFESSOR MULHERON: I understand but -- I think we have understood that and  
4 yes -- so thank you, I don't think that you can assist further on that, thank you. We will  
5 move on.

6 MR HENRY: The only thing -- can I come back on is the potential issue between 2020  
7 and 2021, when they closed the system down, effectively, because of Covid. So even  
8 though an application had been accepted, I contacted Ofcom, was told: oh, we are not  
9 holding the channels to the localness because of Covid emergency legislation. So  
10 that meant there was no minimum requirement being enforced. So that meant there  
11 was no point in me appealing the decision if, of course, under emergency legislation,  
12 there was no minimum requirement anymore.

13 So I had to wait. I had to wait till about 2023 for a full year of data, keeping an eye on  
14 it, monitoring what was going on, to prove that in fact, there was no one hour day of  
15 news being delivered. But you had to wait till the end of a year before you could do  
16 that which is a bit similar to what Ofcom has to do. They have to wait for the data to  
17 be delivered to them which is about 18 months after the beginning of the year they are  
18 reporting which is why it has taken Ofcom till December 2024 to find that 2022 was in  
19 breach.

20 THE CHAIRMAN: All right. Mr Henry, I'm going to move you on now to the third topic  
21 which is the question of interim relief.

22 MR HENRY: Yes.

23 THE CHAIRMAN: If I can remind you what is said by Ofcom on that subject, at  
24 page 83 of the bundle. They start off by saying there's no prima facie case on the  
25 appeal. We don't need to deal with that because we have effectively covered that  
26 already. They then say there's no urgency. And they say that the pace at which you

1 brought the appeal, these appeals, undermines your case for urgency. You made  
2 complaints about the substance of the appeals as early as February 2024, but didn't  
3 take any concrete steps to issue a Notice of Appeal until 22 November 2024. And  
4 then further on, you were told by the tribunal that you hadn't complied with certain  
5 requirements, you didn't provide the necessary information until February 2025, nearly  
6 three months later, which indicates that the interim relief sought is not urgent.

7 They then go on to say that you haven't established that you would suffer any damage  
8 if the interim relief sought was not granted.

9 Perhaps it would be helpful if you could explain to the tribunal precisely what it is that  
10 you want by way of interim relief and by interim relief, we are talking about relief that  
11 will come into effect as of now, until the time when there could be a full hearing of the  
12 case. So we are not talking about permanent relief, we are talking about interim relief.

13 MR HENRY: Yes, thank you. I'm aware of Ofcom's submission on the no urgency.  
14 Well as the tribunal will be aware of the documentation that I've already submitted,  
15 I was extremely active in the last year, attempting to get some action. One, from  
16 Ofcom themselves, they never really came back to me, telling me that they weren't  
17 investigating. What I thought was telling is the December 16, 2024 decision by Ofcom,  
18 finding That's TV in breach of 13 out of the 20 licences and in it, it highlights that -- it  
19 stood out to me that they had written to That's TV to raise concerns on -- I think it was  
20 9 February 2024, just three days after I had sent them the evidence of a detailed  
21 complaint, off air recordings, EPG files for most of 2023, showing clear and deliberate  
22 breaches every month, for a period of a year. So they hadn't opened the complaint,  
23 so it cannot be claimed that I didn't act urgently. I then contacted my MP, that was  
24 Joanna Cherry KC, who wrote to the chairman of Ofcom. So there was multiple  
25 communications going on, including extra communications with Ofcom. They hadn't  
26 made a decision. At no point did they tell me that they had launched an investigation

1 into 2022, the data. They had never mentioned it.

2 I wrote to them, letter before action, because I was advised that you have to do that  
3 before you go any further, so I did that at the beginning of September 2024. And giving  
4 them -- I said seven days or ten days. They wrote back, saying it allows them 14 days,  
5 so they needed 14 days to reply. They replied exactly 14 days later, on 23 September.  
6 Gwen Morgan, the director of legal, confirmed that they had not yet made a decision  
7 to open any investigation into my complaint. That's been now some eight months and  
8 yet behind the scenes, they now claim in public that they had started to investigate.  
9 But only the 2022 data, not the more recent stuff that I'd sent them. So they were  
10 given that.

11 Then, of course, events overtook my initial application. So you are quite right,  
12 the tribunal wrote to me very helpfully and reminded me I needed to have a witness  
13 statement, so I started putting all the documents in date order and writing a witness  
14 statement. Then before I even had a chance to put it in, the decision on 16 December  
15 got published and then the other decision by the Secretary of State, passing the new  
16 legislation, was passed on the 19th which came as a surprise. I had been keeping  
17 an eye to see what was happening with this. The original piece of legislation, statutory  
18 instrument, I had a draft of from last summer. I had been down to London, I met with  
19 Ofcom, I met with the Department of Culture, Media and Sport to express my concerns  
20 and wondered what was happening with the renewal because there was no news that  
21 there was going to be any renewal and then, of course, the last passing comment  
22 I made leaving their offices was: I do hope the fools over there in the House of  
23 Commons don't call a snap election.

24 Well guess what, that's exactly what they did. Snap election was called I think three  
25 weeks after that meeting. That piece of legislation failed, it didn't go through in time,  
26 so the government was folded. So the original statutory instrument that was going to

1 offer a renewal process, didn't pass.

2 THE CHAIRMAN: All right.

3 MR HENRY: So all of that was going on last year. The idea that it wasn't urgent is  
4 simply not true. Ofcom didn't take it urgently and they didn't take any action but I had  
5 written to everybody you could possibly imagine.

6 THE CHAIRMAN: What is it you are trying to achieve by your application for interim  
7 relief?

8 MR HENRY: Very simple. I would like to see a fair level process that is open to  
9 anyone to put in an application, just like how it was originally set up, which was Ofcom  
10 would put these on the market and create a process that anybody can apply and put  
11 their best bid in and it's a competitive tendering process. That is in the public interest.

12 THE CHAIRMAN: So you want to basically stop the process that Ofcom has initiated  
13 for -- it's already extended the licences, as I understand it, until November 2026 --

14 MR HENRY: Yes.

15 THE CHAIRMAN: -- and is now in the process of considering whether to renew the  
16 existing licences. What are you seeking to do? You are seeking to bring that process  
17 to a stand still?

18 MR HENRY: There are two things. One, I believe the legislation was passed by  
19 Parliament which was aimed at basically renewing law-abiding operators, okay? No  
20 one can argue against that. That seems perfectly fair. If they have been providing the  
21 minimum service, they should be able to continue. But a company that's not been  
22 doing that and not doing it over a long period of time is damaging the public interest.  
23 It's not in the public interest that they continue to have them exclusively. These are  
24 exclusive licences. So -- the competition would be best served by having a fair and  
25 open process that anyone can apply for. That doesn't stop That's TV or anyone else  
26 applying but the person that wins that licence process should be the one that has the

1 financial resources to do it, the best programming commitment and is going to offer  
2 exactly what the public are requiring.

3 What Ofcom has done is, I believe, misuse the legislation that was passed which says  
4 they may extend them for 12 months. Yes. That to me, I believe, may mean they  
5 should have taken all the criteria into account. They should not have treated all of  
6 them exactly the same, as if they are all fulfilling the public interest, when some of  
7 them are not.

8 THE CHAIRMAN: But on what basis do you say that the tribunal has jurisdiction to  
9 interfere with Ofcom's processes, in terms of considering whether to extend the  
10 licences?

11 MR HENRY: Because I believe Ofcom has acted outside the report(?). That power  
12 that was given to it is conditional. It says "they may." It doesn't say "they should" or  
13 "they will", it says "they may", and it can't possibly be right that Parliament would have  
14 passed a piece of legislation that would effectively support breaching the public  
15 interest. That doesn't sound like it's even legally competent. So I don't believe  
16 Parliament meant for that to be misused, I believe it meant to be used for companies  
17 that are providing the service as required and delivering the minimum programming  
18 commitment. And if a company is not doing that and it's been -- or -- it's not  
19 hypothetical, we can prove it hasn't, Ofcom has found it hasn't. What Ofcom has not  
20 done is looked at 2023 data and 2024 data which I sent them evidence on. But they  
21 choose not to look at it. So I believe that the true damage to the public interest is much  
22 more than what is being reported by Ofcom in 2022.

23 Being in Scotland ... (Pause)

24 MR ALTY: Thank you for the explanation. But I think the question was, how is it within  
25 the responsibility of this tribunal to take a decision about the points you are making?  
26 I'm not clear how that's relevant to the work of the tribunal.

1 MR HENRY: My understanding is the Tribunal has power to hear appeals on Ofcom's  
2 decisions under certain criteria, section 45 of the Telecommunications Act and also  
3 under the Wireless Telegraph Act. The local television programme service licence is  
4 directly linked to radio spectrum licence. The one - you only get the radio spectrum  
5 licence issued if you have agreed a local . So this engages both the Wireless  
6 Telegraph Act, for radio spectrum. It's being misused. That's why. And on section 45  
7 of the Communications Act, as I've explained previously, the tribunal needs to  
8 understand how the signal and the pictures and that get from the playout centre to  
9 your television at home. It is not analogue TV we are dealing with which, of course,  
10 the 1996 legislation Broadcasting Act was based around analogue technology from  
11 1990 Act, therefore it's not really up- to- date and that is easily identifiable now  
12 because we can now broadcast a digital signal with a QR code on it and you use your  
13 mobile phone on it. That changes it completely. It is now part of - it might as well be  
14 a mobile phone network. You've- just sent a message via the Internet from your  
15 mobile phone, connected to the television picture.

16 PROFESSOR MULHERON: Mr Henry, may I just interrupt.

17 MR HENRY: Yes.

18 PROFESSOR MULHERON: Again, the tribunal has to apply the law and one of  
19 the features of interim relief is that the applicant must show damage to himself and  
20 significant damage. You've talked about the public interest being damaged but could  
21 you just help the tribunal by explaining what the damage and significant damage to  
22 you is, should the interim relief not be granted.

23 MR HENRY: Absolutely. So on me, one, there is a limited company being set up and  
24 people wanting to invest and a very well researched detailed business plan. Three  
25 financials. 80 jobs would be created, £700,000 a year will be sent creating news just  
26 for the channel in Scotland. 24 jobs.

1 So the fact is these licences are exclusive, and the only benefit they have, because  
2 this is -- making news is actually a cost. It's not a benefit, it's a cost for the company.  
3 However, the benefit is that you get "must carry". So Sky's platform, Virgin Media's  
4 platform, must carry the channel and you get a priority listing, so that you get a high  
5 EPG number, channel number, so you are easily found. So that's the benefit of having  
6 it. The cost is you've got to make a minimum of 1 hour of news, non-repeating. And  
7 that will cost, according to my calculation, £700,000 a year in salaries, for 24 staff to  
8 do that commitment.

9 So the cost to me and damage to me if interim relief is not in is that there is no  
10 opportunity to launch a local channel because the licences have already been  
11 renewed to a company that's currently and has been in continuous breach of the  
12 minimum requirement and shows no sign that it wants to change its opportunity and  
13 the way it operates. There's nothing in their response to the tribunal shows how they  
14 are going to do better in the future. They haven't offered any. So the damage to me  
15 is ten years of my life wasted on building a business opportunity that will create jobs  
16 for up to 80 staff, will be the heart of our Scottish media which we don't really have  
17 any main Scottish media. And the same process can be rolled out across the UK. So  
18 the rest of the channels -- I recently purchased the trade mark ATV, the old ITV brand,  
19 and that would be used in England and Wales. The main programmes that we buy  
20 and licence from Hollywood studios, et cetera, and sport, that will be made available  
21 to the whole network. So this is a potential much bigger than my opportunity. But it's  
22 not available the way Ofcom is currently operating which is to blanket renew, even  
23 when they know a company is in breach of the minimum requirement, has shown no  
24 sign in many years to actually deliver what is required.

25 THE CHAIRMAN: So what you are, in substance, asking for is an order that --

26 MR HENRY: Open the market up, level playing field.



1 THE CHAIRMAN: -- Ofcom declines to renew the licences that it's given to That's TV  
2 and gives you the opportunity to bid for a licence.

3 MR HENRY: Not just myself

4 THE CHAIRMAN: You and other potential -- competitors.

5 MR HENRY: Basically, it's a level playing field promoting competition and the best  
6 bidder wins which is what happened originally. That is how STV got it. STV put in a  
7 very

8 THE CHAIRMAN: All right. But I think what's troubling the tribunal is the difficulty in  
9 seeing how there is any legal basis for that application to be granted. Where is the  
10 basis for the tribunal being able to interfere with Ofcom's decision-making process and  
11 to substitute a different process.

12 MR HENRY: My understanding is Ofcom has acted outside of its powers.

13 THE CHAIRMAN: I see. All right.

14 MR HENRY: So, therefore, it's acted ultra vires. It has, instead of making  
15 conditional -- yes, and if the tribunal was not to grant this, then the damage to the  
16 public interest continues.

17 THE CHAIRMAN: All right.

18 MR HENRY: So I believe I'm protecting the public interest. The tribunal should grant  
19 this and in fact, it does not put That's TV in any different position than it is at the  
20 moment. It means its licences would -- I'm not asking for them to be cancelled  
21 or -- you know, I'm simply saying they don't get automatically renewed. So it becomes  
22 a level playing field, it promotes competition and basically creates an opportunity.  
23 There will be other bidders that will put bids in. For all I know, STV might put in a bid  
24 again, who knows. That would be up to Ofcom for the beauty contest which is how  
25 they describe it --

26 THE CHAIRMAN: Mr Henry, we are running slightly behind.

1 MR HENRY: Okay, sorry.

2 THE CHAIRMAN: My timetable, it's probably my fault. Can we move on now to the  
3 question raised by That's TV as to whether this application is vexatious and in  
4 particular, if I can draw your attention to what's said at paragraph 19 of the written  
5 submissions submitted on behalf of That's TV, where they say the various cases that  
6 they refer to:

7 "...show a pattern of disregard for the proper processes of litigation and a willingness  
8 to invoke the jurisdiction of a tribunal and put other parties to substantial cost and  
9 inconvenience, without taking sufficiently seriously the obligations on a litigant to  
10 pursue its case in an orderly way which is said to be the essence of vexatious  
11 conduct."

12 And you will recall that they refer to an email exchange, where -- this is at  
13 paragraph 21. I will read it:

14 "Mr Henry's correspondence with a TT shareholder similarly suggests that he  
15 considers the tribunal processes to be a means by which he can inflict or threaten pain  
16 and thereby obtain leverage. On 2 November 2021, Mr Henry emailed Jeff Henry, no  
17 relation, a minority shareholder in TT's ultimate parent company, That's Media Limited.  
18 The email stated: 'Our group's approach to That's TV has remained unanswered.  
19 I wonder if you could help arrange a meeting with Daniel Cass before I launch a world  
20 of pain for him and his That's TV in Scotland'. Since then Mr Henry's own filed  
21 materials show he has intermittently complained to Ofcom about TT's group, its control  
22 of Scottish licences and has now commenced proceedings in the tribunal, apparently  
23 seeking an order preventing Ofcom from renewing TT's licences. Such steps are  
24 plainly part of the implementation of his threat to cause TT a world of pain."

25 What do you say to that?

26 MR HENRY: First of all, the communication with Jeff Henry was confidential and he

1 was one of my business advisers I had met many years ago, so I wasn't aware that  
2 he was going to - and he certainly didn't have my permission to send it to That's TV.  
3 However, I think That's TV is -- first of all, they are failing to address the central issue  
4 which is that they are in breach of their licences. And it's certainly true I had reached  
5 out a number of times to try and engage with That's TV, to see if there was a way of  
6 moving forward, especially in Scotland. Because, effectively, the channels are  
7 invisible in Scotland. There's no marketing, there's no local advertising process. It's  
8 not even carried on cable, even though it has a must carry. There is no support to turn  
9 them into what they are meant to be. So the public's interest is being damaged  
10 because if you are on cable, you are not going to see it at all, so there's been no  
11 attempt to establish a local programme, as required under the legislation.

12 The process way back then, there was no renewal process in place. So there was  
13 a big question mark whether they were going to be renewed. I had heard that That's  
14 TV may not be renewing them, that's what I had heard through a third party, that they  
15 didn't seem very interested in it. And certainly they haven't supported it. The email  
16 itself taken out of context, I was not making a threat at all and it's quite objectionable  
17 that it was then used when it was actually a private communication.

18 THE CHAIRMAN: Could I put another point to you, Mr Henry.

19 MR HENRY: Yes.

20 THE CHAIRMAN: The tribunal, in its judgment following your previous case against  
21 Ofcom, said this:

22 "Mr Henry did not appear to have had a valid reason for failing to seek any legal advice  
23 in relation to his appeal which had it been obtained, would probably have avoided the  
24 need for an oral hearing."

25 May I ask whether you sought any legal advice in relation to this application?

26 MR HENRY: Yes, I did. And I sent the original submission that came to the tribunal

1 to a group of lawyers I've used before in Manchester and the advice came back is they  
2 said -- they clearly encapsulated the issue, they could understand what the question  
3 was, et cetera.

4 The issue of -- it was going to be quite a lengthy process to try and get someone to  
5 take all the documentation and, effectively, time -- so I think -- I'm trying to remember  
6 the timescale. That was -- that was -- yes, that was in Cyprus in November and I got  
7 advice while I was there. The deadline for writing to yourself was the two months from  
8 the 23rd because that was a decision, as far as could I tell, from Ofcom, that they  
9 weren't going to open an investigation. That was the decision. So that's why it was  
10 sent within two months of 23 September. That was a decision that they had said that  
11 they weren't going to be opening an investigation.

12 So within two months of that, I submitted -- I think it was on 11 November.

13 THE CHAIRMAN: Have you sought any advice since these proceedings started?

14 MR HENRY: Yes, I have which was round about several months ago. The issue  
15 became that it required about £20,000 just to go through the files to get an expert  
16 opinion to then raise the money to fund a full case.

17 THE CHAIRMAN: But the answer is you haven't.

18 MR HENRY: No, I had, I just -- the problem is that events started to kick in, the  
19 legislation was renewed in December, the decision against Ofcom was December.

20 THE CHAIRMAN: You don't seem to be claiming anything in terms of legal costs in  
21 your costs schedule.

22 MR HENRY: Sorry?

23 THE CHAIRMAN: You are not claiming anything in respect of legal costs in your costs  
24 schedule.

25 MR HENRY: No, I haven't. I couldn't engage with them in the short period of time.  
26 They needed a lot longer time than we actually had, so I had to get the appeal in,

1 otherwise we were out of the two months.

2 THE CHAIRMAN: But you had had several months since the appeal started and since  
3 you were told by Ofcom that as far as they were concerned, the appeal was hopeless,  
4 did that not prompt you to think: well maybe -- bearing in mind what the tribunal said  
5 on the last occasion, it might be sensible for me to get some legal advice?

6 MR HENRY: My understanding is the case is quite different because it engages radio  
7 spectrum and the argument that I've put forward in this case is completely different.  
8 What was put forward in 2018, the two -- they look similar but they are not but the BBC  
9 service was not using new bandwidth. It couldn't be argued that it was  
10 a telecommunication thing because they don't have commercials, so --

11 THE CHAIRMAN: One common feature was that Ofcom were saying that the tribunal  
12 didn't have jurisdiction to determine the appeal. Did it not occur to you that it might be  
13 good to -- given that you are not a lawyer yourself, to get a second opinion on that, as  
14 to whether Ofcom was right? Because if they were right, this was just going to cause  
15 a lot of wasted cost and time.

16 MR HENRY: Ofcom's response was under section 192, it was not on anything else in  
17 their initial response. It was on section 192. It's not enough for me to point out that  
18 they breached and made the wrong decisions, et cetera. However, the fact is that  
19 things have changed during the process which is that the legislation was passed by  
20 the Secretary of State, granting them a process for renewing, including the auto  
21 renewal which I believe they have misused.

22 THE CHAIRMAN: On any view, these are difficult legal issues for a litigant in person.

23 MR HENRY: Indeed.

24 THE CHAIRMAN: Did it not occur to you to get legal advice on these matters?

25 MR HENRY: Well it did because I did actually approach a lawyer in Manchester on  
26 more than one occasion. I sent them the synopsis and I sent them the thing. Their

1 response was they would need a significant amount of money on account which I just  
2 don't have available to me at the moment.

3 THE CHAIRMAN: Okay.

4 MR HENRY: And I did approach a funder and because the licences were being  
5 renewed and Ofcom was -- until you've got the licences, nobody wants to fund it. So  
6 you are caught in Catch 22 and all the time the public interest is being damaged.

7 THE CHAIRMAN: Could I raise another point with you from the That's TV submission.

8 MR HENRY: Yes.

9 THE CHAIRMAN: They refer to a case in which you were involved with the Inland  
10 Revenue Commissioners.

11 MR HENRY: Yes, Customs and Excise.

12 THE CHAIRMAN: They say that following that case, you were subject to an eight-year  
13 disqualification from acting as a company director. And they go on to say at  
14 paragraph 30 that at the time of the change of control in 2018 that is the foundation of  
15 your complaint, you were not legally in a position to act as a director of the company,  
16 seeking to operate a Broadcasting Act licence. Even if there had been open  
17 competition, no company of which you were a director would have been able to  
18 participate in it.

19 And they go on to say that an eight-year disqualification is substantial, reserved for  
20 cases of serious misconduct and that that would remain highly relevant to the question  
21 of your fitness and propriety to control a Broadcasting Act licence. Why wasn't that  
22 raised by you? Why wasn't that dealt with by you in your application?

23 MR HENRY: Sorry, what --

24 THE CHAIRMAN: That background, the fact that you were subject to a disqualification  
25 which would have prevented you from, according to Ofcom, acting as a director in  
26 a company seeking to operate a Broadcasting Act licence.

1 MR HENRY: Yes, but if it was during the period of the suspension, I wouldn't be  
2 a director of the company. I wouldn't -- but that doesn't stop me being a shareholder  
3 in a company. So that's one issue. Where does it say that the -- this is That's TV,  
4 I think, is it not?

5 THE CHAIRMAN: Yes. Page 99.

6 MR HENRY: Yes. So the consequences -- so in 20 -- first(?) it means in 2018. So  
7 effectively, yes, there would still be one year left but it does not stop me being  
8 a shareholder in a company, it doesn't stop me building a business plan either. Other  
9 people would be running the company and I would have been a shareholder of  
10 the company. And no doubt employed as an employee. So it's almost a non-point  
11 that they are trying to raise as if somehow that would exclude you from bidding or  
12 being part of a bid to take over a licence. It would not. It's an administrative issue and  
13 I have complied with it throughout the process. It's now ended a number of years ago.  
14 I think it ended in 2019 -- 2018/2019 it came to an end.

15 THE CHAIRMAN: All right. Could I also raise with you your crowd funding page. This  
16 is dealt with at paragraph 46.8. And I know that Professor Mulheron wants to ask you  
17 something about this but could I just raise with you the passage that's quoted there  
18 from your crowd funding page, where you say:

19 "Having submitted the legal appeal against Ofcom, we have the first hearing on 8 July.  
20 This will decide if Ofcom, who argued against the Competition Appeal Tribunal having  
21 jurisdiction and my interim relief application for an injunction against That's TV from  
22 benefiting from an automatic 12 month renewal of the local broadcasting licences, as  
23 That's TV has been found in breach of the majority of the licences, including those in  
24 Scotland and arguments against the public interest for a company in breach to benefit  
25 from an auto renewal. If I'm successful, then That's TV will see all of their broadcast  
26 licences end on 25 November this year."

1 What That's TV goes on to say is:

2 "...your apparent focus is on securing the termination of a broadcasting licence this  
3 year through the grant of interim relief, without proper regard to the fact that 12-month  
4 licence extensions have already been granted."

5 So on the face of it, what you say there is simply not true.

6 MR HENRY: What's that? It was true at the time it went out. I understand it was only  
7 in Ofcom's response that I found small -- at the bottom of one of their pages, that on  
8 11 April, they had automatically renewed for 12 months, all L-DTPS licences.

9 THE CHAIRMAN: So you say you didn't know.

10 MR HENRY: I didn't know until I think the other day, when I spotted it. So no. It's not  
11 been publicly announced anywhere, as far as I'm aware.

12 THE CHAIRMAN: Right.

13 MR HENRY: And on the crowd funder, it is not as they are trying to insinuate, the  
14 subtotal support for the business. It certainly isn't. That was a reaction to some of the  
15 demands for costs which I thought: well, this could ruin me, you know. The fact is it's  
16 in the public interest and what we are asking for is a fair, reasonable process that  
17 encourages competition. You know. There's nothing to stop That's TV putting in  
18 an application for all or some of the same licences, putting in their best offer along with  
19 everybody else. The difference is they are using what is an exclusive position while  
20 they have been in breach of the licences and that isn't in the public interest. And it  
21 doesn't support competition in the market either.

22 PROFESSOR MULHERON: Yes, Mr Henry, just coming back to your crowd funding  
23 page, it's an entirely legitimate way of raising funds for litigation to use crowd funding  
24 and there's quite a lengthy history of it in the United Kingdom. But there has to be  
25 a great responsibility on the part of the crowd funder litigant in the pitch that one  
26 conveys on the website. And looking at that particular website, it says that:



1 "Ofcom has been in breach of its statutory duties by allowing a company, That's TV,  
2 to operate 20 local TV licences, including five in Scotland, that do not deliver  
3 a minimum statutory requirement of local news."

4 Then it goes on to say that Ofcom's fighting against the case, even though the  
5 evidence is very clear. Would you accept that those statements are indeed  
6 embellishments? Just can you point the tribunal to where Ofcom has been found by  
7 a court to be in breach of its statutory duties in relation to this matter?

8 MR HENRY: Ofcom, I think my reference was meant to refer to the fact that Ofcom  
9 had found That's TV in breach.

10 PROFESSOR MULHERON: That's not what this website says and then carries on to  
11 say the evidence is very clear, it imputes that Ofcom is fighting with respect to itself.  
12 At the point -- these pictures have to be accurate. That's the responsibility of the  
13 litigant who is using crowd funding. It's a very useful resource but so with it go  
14 responsibilities.

15 MR HENRY: At the time, I believed it was a fairly accurate description of what Ofcom  
16 was doing because what Ofcom has not done after finding them in long-term breach  
17 in 2022, is issued any sanctions or taken any action to stop the breaches continuing.  
18 I know that from 2022 they continued. Ofcom knows because I have submitted them  
19 the evidence, they just choose not to investigate it. And I think -- I think overall -- I'm  
20 happy to go back and change the wording and look at it again. These were done  
21 online, while you log into their system, so it's not actually ideal for planning what you  
22 want to put into it. You would have to basically write it elsewhere and have it  
23 somehow -- imported.

24 PROFESSOR MULHERON: Indeed, but do you accept the point that people are  
25 contributing their money in support of a piece of litigation which must be accurately  
26 described?

1 MR HENRY: Yes, I know it was checked by the platform itself before it publishes it.  
2 They check it. And the people that I know that have submitted some support are there  
3 because they believe Scotland needs to have a local television service that supports  
4 job creation and training, et cetera, and fulfils the minimum requirement and that isn't  
5 there at the moment. I mean it's a great shame because the whole process has been  
6 wasted for ten years. They've been transmitting and hardly anyone watches it and  
7 nobody even knows it's there because there's no marketing for it, there's no promotion,  
8 there's no listing in any TV guides. It's effectively used as a screen saver because  
9 money can be made out of the DTT Mux because you can deliver two other channels  
10 and they pay to be delivered and that is what the model was created originally in 2012,  
11 it's meant to help fund local television production.

12 THE CHAIRMAN: All right. I'm going to move you on to the final topic which is that of  
13 costs. We haven't, obviously, decided whether your appeal application for interim  
14 relief succeeds but in the event that we are against you, what do you say about having  
15 to pay the costs of Ofcom and the cost of the interveners?

16 MR HENRY: First of all, interveners, I didn't object to them joining because I felt they  
17 deserved their named parties in it anyway, one way or the other, they are associated  
18 with the process. So I didn't object to it but all interveners go in knowing that they may  
19 be paying their own costs and I believe that is quite normal for the tribunal, is not to  
20 allow interveners to claim costs, whether they win or lose.

21 Ofcom is a well funded and we wouldn't be here -- I wouldn't be here if they had done  
22 their job. If they had protected the public interest, and if they had ensured that local  
23 TV is run the way it was originally set up to do and if they had dealt with the complaint  
24 I put in in proper time which was back last February, a year ago, February 2024, none  
25 of us would be here. I didn't come to the tribunal as a first resort, I came at the end of  
26 nearly a year, where Ofcom had eventually decided they weren't -- they hadn't made

1 a decision yet whether to investigate, even though the evidence was piling up, even  
2 though MPs had written to them, all of this. So Ofcom is the reason we are here.

3 THE CHAIRMAN: All right. Have you had an opportunity to look at the cost  
4 statements that have been provided by Ofcom --

5 MR HENRY: Yes, I think the one from That's TV is totally over the top and if they had  
6 spent that amount of money instead of on legal costs, they should have spent it on  
7 making local programmes, which is what the licences say they should do. So I do not  
8 think they should be awarded a penny. They also are trying to mislead the tribunal  
9 about myself by submitting defamatory claims that I was misleading the tribunal on my  
10 family's emergency support and care which I've submitted some things to the court,  
11 so you can see I haven't made that up at all and there's been multiple things while  
12 I have been trying to engage and fulfil your timeline, where I was called away  
13 to -- because another ambulance had been called and I had to go back -- so because  
14 of all of that, I was put under extreme pressure and, therefore, I do not think it's -- I also  
15 think it would be a chilling effect on access to justice if somebody cannot bring what is  
16 a clear breach of the regulations and Ofcom appears to hide under: oh well, you can't  
17 bring it. In fact, they claim, as does That's TV, that you should have a judicial review.  
18 It should be a judicial review and not come to the tribunal.

19 THE CHAIRMAN: All right. What about Comux's costs? The same point, presumably,  
20 that they are interveners and therefore --

21 MR HENRY: I believe --

22 THE CHAIRMAN: -- they should pay their own costs.

23 MR HENRY: First of all -- yes, both of them are engaged. I have come here with  
24 clean hands, the other three do not. And we have That's TV that's been found to be  
25 in breach of its licence, so we are only here because they have been breaching their  
26 licence. They can't claim that they are not. Ofcom has found they are in breach. So

1 they don't come to the court with clean hands but they want to claim costs. I think that  
2 would be totally inappropriate.

3 THE CHAIRMAN: Do you have anything specific to say about the amount of costs,  
4 the level of costs claimed by either Ofcom or the interveners? You've said, obviously,  
5 that That's TV costs are excessive. Do you have anything to say about the Ofcom's  
6 costs?

7 MR HENRY: Yes, regulators have a duty to -- one, they should have -- there seems  
8 to have been a pattern, actually, which happened the last time. You contact Ofcom  
9 about something and they just blank you. They don't reply, they don't open  
10 an investigation, they don't give any reasons why either. So they seem to sit silently,  
11 either hoping that you will go away or if you do take action, it's going to cost you a lot  
12 of money to take them to task, when in fact they sit here with public funds, millions of  
13 pounds of public funding, as an organisation, substantially funded, and yet not fulfilling  
14 the legislation.

15 THE CHAIRMAN: All right.

16 MR HENRY: So I believe it would be inappropriate to award any of the -- because  
17 they don't come here with clean hands.

18 THE CHAIRMAN: Yes.

19 MR ALTY: Sorry, I only wanted to put to you that you obviously think Ofcom haven't  
20 done their job properly. However, the point about costs in this case is -- and the  
21 question to you is whether you think it was a sensible way to tackle that problem by  
22 coming to the tribunal which has put, obviously, the legal costs that we've heard about.  
23 So simply saying: well, you don't think Ofcom's done their job properly is not the same  
24 as saying: therefore, none of their costs should be paid for taking a case.

25 MR HENRY: Well effectively, I was left with no other option. The judicial review route  
26 is not a process I have any experience in. I do understand technology, I do

1 understand broadcasting and most of the legislation that covers them. Ofcom has, by  
2 their own admission, failed to monitor and ensure that That's TV is complying because  
3 they found them in December, in breach for the year 2022. I would say that if they  
4 actually had followed my complaint in February last year, they would have found that  
5 much quicker because the evidence was extremely clear. So it cannot be right to  
6 reward a regulator that is failing the public interest. And, therefore, I would ask that  
7 costs are not allowed because Ofcom can certainly afford to pay its legal fees, whereas  
8 I'm not in that position.

9 THE CHAIRMAN: Okay, thank you very much, Mr Henry. The tribunal is now going  
10 to rise for five minutes.

11 (12.02 pm)

12 (A short break)

13 (12.08 pm)

14 THE CHAIRMAN: Yes.

15 Submissions by MS BLACKWOOD

16 MS BLACKWOOD: Sir, I'm conscious of the time, so I will try and take things as  
17 speedily as the --

18 THE CHAIRMAN: Yes, I mean if we overrun a little bit, it's not the end of the world.

19 MS BLACKWOOD: I'm grateful. First I would like to address you on the issue of  
20 jurisdiction. Ofcom's primary position is that the appeal should be struck out, pursuant  
21 to rule 11(1) (a), on the basis the tribunal does not have jurisdiction to hear the appeal.  
22 Mr Henry claims that the tribunal has jurisdiction under section 192 and 195 of the  
23 Communications Act. It would be helpful if we could perhaps open that provision, sir,  
24 which is at tab 11 of the authorities bundle, page 315. Ofcom's position is that none  
25 of the decisions fall within the scope of section 192(1). As should be clear, it's not  
26 a decision of the Secretary of State, it's not a decision of the CMA, so it is not caught

1 by subparagraphs (d) and (e). The decisions that were taken by Ofcom, and I will  
2 come on to show you this briefly in a moment, were either taken under That's TV's  
3 license conditions or under provisions of the Broadcasting Act 1996. So the decisions  
4 do not fall within the scope of subsection (a) and then finally, none of the decisions  
5 were implemented using any of the powers under section 45 of the Communications  
6 Act. So the decisions do not fall within the scope of subsections (b) or (c).

7 So as you are aware, there are four decisions which Mr Henry is seeking to appeal.  
8 The first decision that took place was in June 2018. At that time, That's TV brought  
9 the licenced entity STV2 which held five of the Scottish L-DTPS licences, and as the  
10 licences remained with the original licence holder after the conclusion of the sale, there  
11 was no requirement on Ofcom to make a decision about the transfer of those licences.

12 THE CHAIRMAN: I'm slightly confused by that. Just looking at the Ofcom response  
13 at page 16 --

14 MS BLACKWOOD: (Inaudible words).

15 THE CHAIRMAN: It's the response dated 13 March, it may be the same thing. What's  
16 said there is -- there's a reference to the transfer of the licence to That's TV. This is in  
17 paragraph 5(a):

18 "The transfer of the licence to That's TV."

19 But later on in the same paragraph:

20 "Ofcom did not have to take a decision about the transfer of the licences, as they  
21 remained with the same licence holder."

22 Was there a transfer to That's TV or did they remain with STV2?

23 MS BLACKWOOD: The licence holder remained STV but That's TV purchased STV.

24 THE CHAIRMAN: Yes, okay.

25 Ms Blackwood: So it might have -- it had an impact on the directors, I think potentially,  
26 of STV but the licence holder did not change for those licences. As a consequence,

1 there wasn't a requirement for Ofcom to make a decision about the transfer of licences  
2 from one licence holder to another. What it was required to do was to conduct checks  
3 of the directors of the entity.

4 THE CHAIRMAN: Yes. I didn't follow why it was said at the beginning of 5(a), the  
5 transfer of the licences to That's TV.

6 Ms Blackwood: I think that was an unfortunate error. I should have been clearer, sir.

7 THE CHAIRMAN: Sure.

8 MS BLACKWOOD: The decision -- or the checks that were conducted by Ofcom were  
9 done pursuant to their powers under section 5 of the Broadcasting Act 1996. That is  
10 why we say there is a decision taken then in relation to whether or not the  
11 directors -- new directors were appropriate but there was no decision as to the transfer  
12 of licences because that simply didn't arise on the facts of the case before them. And  
13 so it's for that reason that I say this 2018 decision -- we call it the alleged decision  
14 because the decision which Mr Henry believes took place didn't in fact take place.  
15 There was a decision about the appropriateness of the directors. They checked that  
16 they were suitable but that is under section 5 of the Broadcasting Act 1996. That's  
17 a decision that's in play and that is not caught by subsection (1)(a) of section 192.

18 The next decision that Mr Henry appeals is the 2019 decision. That can be found in  
19 the hearing bundle at tab 15, page 120. In this decision, Ofcom provided consent to  
20 That's TV's proposal to aggregate the studios and main production bases of a number  
21 of the L-DTPS licences that they hold, into one main studio production base that would  
22 serve all the licences within a particular region. And you can see, sir, from the front  
23 page of this letter, that That's TV had to seek written consent from Ofcom to change  
24 these production bases under licence condition 3(2). And so Ofcom is making  
25 a decision under that licence condition. Sir, I thought it might be of  
26 assistance -- Mr Henry has a copy of these -- to hand up the pro forma L-DTPS licence

1 or an extract of it, simply because it shows the powers under which the licence  
2 conditions are originally set, if that's -- (Handed).

3 THE CHAIRMAN: Thank you.

4 MS BLACKWOOD: If you turn several pages on, you will see the licence conditions  
5 are set out. Licence condition 3, "Location and localness", it explains that this licence  
6 condition is included by virtue of a provision of the Broadcasting Act 1996, and since  
7 we have that open anyway, I just want you, sir, to -- licence condition 5 on the following  
8 page, which shows that that licence condition was also made pursuant to certain  
9 provisions of the Broadcasting Act 1996.

10 So, sir, we say that the decision that is made, the 2019 decision, is a decision pursuant  
11 to the licence conditions, licence condition 3, and to the extent that you go back further,  
12 those conditions were set pursuant to the Broadcasting Act.

13 Similarly, if we turn over to tab 16 of the main hearing bundle, this is the 2021 decision,  
14 very similar style of decision, it was a decision --

15 MR ALTY: Which page?

16 MS BLACKWOOD: I'm so sorry, that is page 124.

17 MR ALTY: Thank you.

18 MS BLACKWOOD: Again, it was a decision taken by Ofcom under licence condition  
19 3(2), so again, doesn't fall within subsection (1)(a). It's not a decision under the  
20 Communications Act or the Wireless Telegraphy Act.

21 Finally, the 2024 decision, as we have called it, you can see that at tab 17 of the  
22 bundle, page 131. In this decision, Ofcom found that That's TV had breached licence  
23 condition 5(1), in relation to L-DTPS licences covering 13 licence areas, for failure to  
24 maintain the character of the service. And so this decision was made pursuant to the  
25 licence conditions but also the ability to impose sanctions can be found in section 23  
26 of the Broadcasting Act 1996. So again, not the Communications Act, not the Wireless



1 Telegraphy Act.

2 So our starting position is none of these decisions, as you've seen them, can fall within  
3 any of the subparagraphs of section 192(1) but I think it is helpful --

4 PROFESSOR MULHERON: May I just ask --

5 MS BLACKWOOD: Yes, of course.

6 PROFESSOR MULHERON: -- Mr Henry, this morning, has taken us to section 3 of  
7 the Wireless Telegraphy Act 2006 and that's addressed in paragraph 21 of Ofcom's  
8 skeleton. Mr Henry was referring to radio spectrum functions which, as I understand  
9 it, become incorporated in Mr Henry's submission, within a local television service, by  
10 virtue of the QR codes being posted upon certain sites on the TV and so on and  
11 I notice that in footnote 4 of your skeleton, you refer to -- it's the licensee of the  
12 Multiplex, the local television services who broadcast using wireless telegraphy. Is  
13 that suggesting that it is the Multiplex -- which is again referred to in paragraph 4 of  
14 the licence that you just handed up to us -- is there a distinction to be drawn between  
15 the local -- the licenced local Multiplex service and the L-DTPS licensee? And does  
16 the former deal with radio spectrum functions but not the latter? Is that correct or is  
17 that -- could you just clarify for the tribunal.

18 MS BLACKWOOD: The L-DTPS licences are different from the wireless telegraphy  
19 licences which are regulated under the Wireless Telegraphy Act. Under an L-DTPS  
20 licence, the licence holder is entitled to produce content with a view to it being  
21 broadcast on local television and the local television service providers do not actually  
22 broadcast their services. They then provide that content to the Multiplex operator,  
23 which in this case is Comux, and it is the Multiplex operator who then broadcasts the  
24 service using wireless telegraphy under the authorisation of the wireless telegraphy  
25 licence.

26 So the programming commitments that we see contained in the local television

1 services licences apply to the holders of those licences and cannot then be applied  
2 across to the holders of the wireless telegraphy licences. They have their own  
3 conditions imposed upon them. So you are right, there are two parallel licence regimes  
4 in play.

5 PROFESSOR MULHERON: So section 3 of the wireless telegraphy Act applies when  
6 it refers to section 3(1)(b), that Ofcom must have regard to, say, the demand for the  
7 use of the spectrum for wireless telegraphy in carrying out their radio spectrum  
8 functions. That responsibility does not apply to the licensee of the L-DTPS, that's your  
9 submission, in which case that does not -- which means by default, that it doesn't come  
10 within section 192 (1) (a).

11 MS BLACKWOOD: Yes, that's correct.

12 PROFESSOR MULHERON: Thank you.

13 MS BLACKWOOD: I was going to turn to address briefly Mr Henry's submissions as  
14 to why his appeal does fall within the scope of section 192(1)(a). I have, obviously, just  
15 addressed now the Wireless Telegraphy Act. For the reasons that we have just  
16 discussed, we say that none of the decisions were made under that provision of that  
17 Act. So that does not assist.

18 MR ALTY: Because that's a separate licensing regime.

19 MS BLACKWOOD: It's a separate licensing regime.

20 MR ALTY: Yes.

21 Ms Blackwood: Also, it wasn't particularly raised in his oral submissions today, but  
22 previously Mr Henry has raised allegations of breaches of sections 3, 244 and 319 of  
23 the Communications Act. As we explained in our skeleton argument, none of those  
24 provisions fall within part 2 of the Communications Act and so are not caught under  
25 subsection (1)(a).

26 In relation to subsections (b) and (c), that's the section 45 of the Communications Act

1 implementation point. Ofcom's position is that none of the appealed decisions were  
2 given effect by a direction, approval or a consent given for the purposes of a condition  
3 set under section 45 of the Communications Act. I think if I understand Mr Henry's  
4 submissions correctly, his position is that, simply, Ofcom potentially had the power to  
5 make a condition under section 45 in relation to That's TV, was somehow enough to  
6 bring him within the scope of subsections (b) and (c). We say that's not the case on  
7 the clear wording of subsection (b) which makes it clear that the decisions have to be  
8 given effect to in this way. And that's not the factual case that the tribunal is faced  
9 with.

10 Mr Henry has made allegations that Ofcom has also acted in breach of various  
11 provisions of the Broadcasting Act and the Enterprise Act. However, none of  
12 these -- that does not -- if you turn to section 192, it's only decisions by Ofcom under  
13 the Communications Act, under the Wireless Telegraphy Act that are caught, it's not  
14 decisions under these different pieces of legislation.

15 I don't know if Mr Henry is still pursuing it but just to confirm there is no separate right  
16 to appeal that exists -- in relation to the tribunal -- in relation to an alleged breach of  
17 Ofcom's duty under section 3 of the Communications Act. And, sir, you ruled on that  
18 previously in the former case in which Mr Henry was before you. I can give you the  
19 reference but perhaps ... The reference to that is the authorities bundle tab 2,  
20 paragraph 24.

21 MR ALTY: Can I ask a question, just to make sure I have this section 45 point clear.  
22 Mr Henry, in his amended application of 3 July, talks about section 45 being engaged  
23 as a general condition under section 51 -- this is paragraph 5 -- of the 2003 Act has  
24 been included in the L-DTPS and the local television Mux licences. You were drawing  
25 an earlier distinction between the two different licensing regimes. Are you agreeing  
26 or -- would you agree that section 45 is relevant to the radio spectrum licence but not

1 to the broadcasting licence? Is that what you are saying or are you just saying it's not  
2 relevant to either.

3 MS BLACKWOOD: I think that Ofcom is reserving its position as to whether or not  
4 section 45 of the Communications Act would apply at all to this type of licence. But in  
5 a sense -- because I think that is a complicated issue in defining the scope of its  
6 application that is currently, to some extent, on appeal. I have been instructed that it  
7 is an entirely separate regime (Pause) But in a sense the tribunal doesn't need to  
8 determine that point because as a matter of fact, none of these decisions were given  
9 effect by virtue of section 45.

10 So I'm just aware that there's a contentious point on the application of section 45 and  
11 you don't need to get into that. It's quite clear that none of the decisions were  
12 implemented in this -- by relying on section 45.

13 MR ALTY: Thank you.

14 MS BLACKWOOD: Sir, I think you already addressed section 195 earlier in  
15 conversation, so I will move on. For the reasons, therefore, I have given, we say that  
16 the tribunal has no jurisdiction to hear the appeal in relation to any of the decisions,  
17 and the appeal should be struck out. And just for the avoidance of doubt, there is  
18 obviously -- it's not intended to mean that Ofcom would avoid scrutiny. The avenue of  
19 judicial review is there as appropriate, but it is not a matter that can be appealed to  
20 the tribunal.

21 Next I want to turn to the timing of the appeal. Sir, as you mentioned earlier, the Notice  
22 of Appeal has to be filed within two months of the date on which the applicant was  
23 notified of the disputed decision or the date of publication of the decision, whichever  
24 is earlier. It's quite clear that the 2019 decision was published on 9 July 2019, so over  
25 five and a half years ago, and the 2021 decision was published on 1 November 2021,  
26 over three years and three months ago.

1 There's a slight -- it's a little bit more nuanced when it comes to the 2018 decision, in  
2 the sense there wasn't a formal publication of the approval of the directors under  
3 section 5 of the Broadcasting Act but as far as I could tell from Mr Henry's  
4 submissions, he did accept that he was aware that STV2 had been sold to That's TV  
5 in around June/July 2018. But I can take you to the underlying documentation if that's  
6 helpful, to show you his awareness of the issue.

7 THE CHAIRMAN: You are taking us to what?

8 MS BLACKWOOD: The hearing bundle. It shows you certain email correspondence  
9 that shows that Mr Henry was aware that the licences in STV2 had been sold.

10 THE CHAIRMAN: In 2018.

11 MS BLACKWOOD: In or around 2018.

12 THE CHAIRMAN: We are aware of that exchange. I mean Mr Henry fairly pointed  
13 out that the timing point doesn't assist Ofcom in relation to the alleged 2024 decision.

14 MS BLACKWOOD: Yes, and we accept that.

15 THE CHAIRMAN: Yes.

16 MS BLACKWOOD: Mr Henry has sought an extension of time. As the tribunal is  
17 aware, the tribunal cannot extend the time limit unless it's satisfied that the  
18 circumstances are exceptional. That is rule 9(2) of the tribunal rules and in the  
19 tribunal's guide to proceedings, further information is provided on that -- would it assist  
20 you to turn that up, sir, or do you feel --

21 THE CHAIRMAN: Yes.

22 MS BLACKWOOD: Thank you. At tab 19 of the authorities bundle, page 166,  
23 paragraphs 4.20 and 4.21 discusses the tribunal's limited power to extend the time  
24 limit. Sir, would it be easier for you to read it?

25 THE CHAIRMAN: Yes. (Pause) Okay.

26 MS BLACKWOOD: Then more recently the issue of extension of time was considered

1 in the Lyons v Ofcom case. I just want to take you to a very short point within that  
2 authority. That is at authorities bundle tab 4, page 69 and the paragraph I want to take  
3 you to is paragraph 20. It touches on the point about whether the extension of time  
4 has to be made before the time period expires:

5 "I'm not sure that a requirement for an extension of time before the time limit has  
6 expired can be a mandatory requirement. It's not in the rules and the guide cannot  
7 override the rules but it is certainly a very relevant factor and I think it's fundamental  
8 that any exceptional circumstances must apply for the entire period of the delay."

9 That is picking up on a point that Professor Mulheron noticed earlier, that whilst some  
10 of the points raised by Mr Henry might explain some of the delay, it certainly does not  
11 explain the delay for the entire period.

12 Mr Henry has relied on the Sky Broadcasting Group case which is at authorities tab 1,  
13 page 3. This was a case where the Competition Commission had sent a report to the  
14 Secretary of State in relation to certain conduct - in relation to an acquisition by BskyB  
15 - and then the Secretary of State had 30 business days from the date of that report to  
16 publish a decision. And what the applicants were asking for in that case was that they  
17 shouldn't be required to appeal the report and then appeal the Secretary of State's  
18 decision but rather, they should have an extension of time, so that they could appeal  
19 both the report and the Secretary of State's decision simultaneously, if so advised.  
20 And it's that minor extension of time, with the close linking of the two decisions, that  
21 the tribunal permitted. But it is helpful to note at paragraph 27, which is on page 9,  
22 that nonetheless, the tribunal does reinforce that the extension -- "the cases where  
23 exceptional circumstances are found to exist are likely, by their very nature, to be rare."

24 THE CHAIRMAN: Yes.

25 MS BLACKWOOD: Sir, we would say no exceptional circumstances have been raised  
26 in this present case that would justify an extension of time. As best as I can distil

1 down, I think, Mr Henry's submissions, it was that the full impact of the decisions - he  
2 wasn't actually aware of them or couldn't be aware of them until a later date. But that  
3 doesn't provide a good reason for delaying filing a Notice of Appeal. It's not  
4 an exceptional circumstance. -You can imagine many situations where the full impact  
5 of a decision might not be known until a later date and there is not a carveout for that,  
6 it's not a reason for a late filing of a Notice of Appeal. And in any event, even if you  
7 were with Mr Henry in that regard, it is apparent that by at least 6 February 2024, when  
8 he wrote to Ofcom, he was aware of his concerns about how these decisions were  
9 impacting the localness of the programmes that were being offered by That's TV. And  
10 then there was a gap of approximately, then, ten months between that letter being sent  
11 and then the Notice of Appeal being filed. Sorry, I think eight months. And Mr Henry  
12 cannot explain why there is that delay for such a long period of time, in a context where  
13 the limitation period is a very strict two- month period, where only exceptional  
14 circumstances would be taken into account- for a delay.

15 So Ofcom's position is that the 2018 decision, the 2019 decision and the 2021 decision  
16 have been brought substantially out of time, without any good reason, and that  
17 Mr Henry falls far short of establishing that there are exceptional circumstances which  
18 justify an extension of time. And for this further reason, the appeals in relation to those  
19 decisions should be struck out.

20 Sir, if we could then turn to Mr Henry's interim relief application. I'm conscious of the  
21 time.

22 THE CHAIRMAN: There's no need to repeat what you have set out.

23 MS BLACKWOOD: I have set out the case law in the skeleton argument.

24 THE CHAIRMAN: It's really if anything Mr Henry said today, you consider prompts  
25 any further comment.

26 MS BLACKWOOD: I think the only aspect in which perhaps he augmented his

1 submissions was in relation to damage. No significant damage. And as I understand  
2 it, the height of his submissions was that if the interim relief was not granted, it would  
3 result in a loss of a chance or a loss of opportunity to bid for various licences. We  
4 would say he's not established that he would suffer any significant damage. It's the  
5 loss of a chance which is quite small and there's no evidence that he would win these  
6 licences or the profitability as a result of these licences. He spoke a lot about the costs  
7 of running the services on these licences but not as to any financial damage that would  
8 arise from the loss of the chance of not getting these licences.

9 THE CHAIRMAN: Anyway, we only get there if Mr Henry established the prima facie  
10 case that there is a basis for the tribunal to interfere with the Ofcom decision making  
11 process.

12 MS BLACKWOOD: Yes, sir. Finally, I wish to address you then on the question of  
13 costs. Ofcom seeks --

14 THE CHAIRMAN: Do you have anything to add to the vexatious proceedings  
15 argument, or do you --?

16 MS BLACKWOOD: We consider that a matter for --

17 THE CHAIRMAN: That's TV.

18 MS BLACKWOOD: I don't wish to make submissions on that.

19 THE CHAIRMAN: No.

20 MS BLACKWOOD: Ofcom seeks summary assessment of the costs of the strike out  
21 application and the interim relief application if it is successful. Ofcom filed its costs  
22 schedule on 3 July and I just wanted to check that you'd received a copy of that.

23 (Pause)

24 THE CHAIRMAN: Yes.

25 MS BLACKWOOD: The tribunal has the power to make any order it thinks fit in relation  
26 to the payment of costs pursuant to rule 104(2) of the Tribunal Rules which is at tab 18,



1 page 164 of the authorities bundle. And rule 104(4)(a) indicates that:

2 "In making an order for costs the tribunal may take into account the conduct of all the  
3 parties in relation to the proceedings."

4 So sir, as a starting point, if Ofcom is successful we should say it ought to be entitled  
5 to recover its costs. But I also want to draw to your attention to Ofcom's position that  
6 the appeal is entirely unmeritorious and ought not to have been brought by Mr Henry.  
7 And in this regard we do think it's important that the tribunal should take into account  
8 the previous guidance it provided to Mr Henry on these matters. That can be seen in  
9 authorities bundle 2, tab 2, page 22. In paragraphs 24 and 25 the tribunal  
10 emphasised that:

11 "In order to establish the jurisdiction of the tribunal it was not enough for Mr Henry to  
12 assert that Ofcom has acted in breach of duty or that the decision raises competition  
13 issues. It is necessary to identify a statutory provision conferring jurisdiction on  
14 the tribunal to determine the appeal."

15 Then the following paragraph addresses some of the similar arguments we might have  
16 heard today.

17 Then paragraph 30 of that decision notes that Mr Henry had requested an oral  
18 hearing, having been warned he might face a costs order. And you took into account  
19 the fact that he did not appear to have a valid reason for failing to seek any legal advice  
20 in relation to the appeal which, if it had been obtained, would probably have avoided  
21 the need for an oral hearing.

22 Sir, we would submit that Mr Henry would have been aware before bringing the  
23 present appeal that the tribunal would not have jurisdiction unless he could identify  
24 specific provision within section 192 within which the decisions fell; that it would be  
25 advisable for him to seek legal advice in this regard and that if the appeal was struck  
26 out he was at risk of being liable for costs. And in all likelihood if Mr Henry had heeded

1 the tribunal's guidance and had sought legal advice then this appeal probably would  
2 not have been pursued.

3 In addition, we would say that the costs have been increased as a result of first,  
4 Mr Henry's unsuccessful disclosure and confidentiality ring applications and his  
5 application to renew his disclosure application; secondly, his insistence upon the  
6 matter being resolved at an oral hearing. The tribunal will be aware that it suggested  
7 that this matter be dealt with on the papers and Ofcom, a number of times, has  
8 reiterated that it considered resolution on the papers to be more sensible; and  
9 particularly in its final letter that it would save costs. But Mr Henry nevertheless  
10 pressed for an oral hearing. And also costs have been increased by the iterative  
11 approach with which Mr Henry has set out his case.

12 Given the time I'm not going to flag all the submissions that have been made by  
13 Mr Henry but you will appreciate there are numerous of them and at times repetitive.  
14 Sir, we would submit that Ofcom's costs have been reasonably and proportionately  
15 incurred and would have been avoided if Mr Henry had heeded the tribunal's guidance,  
16 or at least the costs would have been minimised if Mr Henry had conducted the appeal  
17 in a more orderly manner, and in these circumstances it's submitted that the tribunal  
18 should exercise its discretion to order Mr Henry to pay Ofcom's costs, summarily  
19 assessed in accordance with its costs schedule.

20 Sir, those are my submissions.

21 THE CHAIRMAN: I'm just looking at Ofcom's costs schedule.

22 MS BLACKWOOD: Yes. (Pause)

23 THE CHAIRMAN: Can the tribunal take it that you did the bulk of the drafting of the  
24 various arguments that have been advanced? I'm just looking at the fees that have  
25 been incurred in the various periods, first of all up to 13 March, then up to 3 July.  
26 Those fees would presumably include the drafting of the skeleton argument and

1 perhaps the initial response as well?

2 MS BLACKWOOD: Yes, sir. I was involved in drafting the initial response.

3 THE CHAIRMAN: As a matter of impression it seems to me that against that  
4 background the times that have been claimed in respect of solicitors' costs are pretty  
5 high. For Ms Morgan and Ms Dadley Grade A, 31 hours; Charlotte Smith, Grade A,  
6 another 15.6 hours, and then Kayleigh Burbidge Hart, 18.8 hours. Can you cast any  
7 light on that?

8 MS BLACKWOOD: I think there was a certain increase of work on this case, simply  
9 because there were incidences of Ofcom having to chase Mr Henry for engagement  
10 on the bundles, for engagement on skeleton arguments, having to read a lot of  
11 different submissions that came in at various times and having to discern the  
12 arguments that were being advanced therein.

13 THE CHAIRMAN: Yes.

14 MS BLACKWOOD: I appreciate that they might be higher than one might hope in  
15 an ordinary case but this wasn't entirely an ordinary case because of the, at  
16 times -- and I don't want to be unduly harsh on Mr Henry because I appreciate he's  
17 a litigant in person, but in failing to respond to emails, failing to simply put in a set of  
18 submissions but to put in three or four documents which all then had to be considered.

19 THE CHAIRMAN: What about the costs of attendance? This was fixed as a half-day  
20 hearing. That is two and a half hours with two solicitors, each claiming six hours.

21 MS BLACKWOOD: If I may just take instructions.

22 THE CHAIRMAN: Yes. (Pause)

23 MS BLACKWOOD: Those instructing me I think have put these hours down as  
24 an estimate but appreciate that if we are too long in terms of time, that that can be  
25 adjusted accordingly.

26 MR ALTY: Sorry, this isn't on the costs but I just wanted to clarify a point you made

1 earlier, this was about avenues of challenge, you said it was not appropriate for this  
2 case to come to the tribunal and you referred to "judicial review in appropriate  
3 circumstances" or something. I just wanted to ask whether you were saying that if  
4 someone did want to challenge, for instance the licence consents that you gave, would  
5 you be saying that judicial review was the right way to do that? Or is there another  
6 way?

7 MS BLACKWOOD: Sorry, that was a rather cryptic way of my saying that provided  
8 that the judicial review has been brought in time -- obviously there is a very short  
9 limitation period for judicial review of three months as well, and obviously appropriate  
10 grounds have been pleaded. But judicial review is an avenue open to challenging  
11 these sorts of decisions.

12 MR ALTY: Thank you.

13 THE CHAIRMAN: Thank you, Ms Blackwood.

14 Mr Henry, do you want to come back on anything?

15 Submissions in reply by MR HENRY

16 MR HENRY: Yes, a couple of things.

17 I made a number of attempts to contact Gwen Morgan, putting two telephone calls  
18 which went unanswered. And I did indeed try, to my best ability, with the  
19 circumstances I'm dealing with back home, to email responses to Ofcom as fast as  
20 possible.

21 But I come back to the point that section 45 is engaged because the L-DTPS -- and it  
22 was brought up by one of yourselves about whether these are different licensing  
23 regimes. They are not. The two licences are intertwined. In fact the ownership of  
24 Comux is owned by the L-DTPS licence holders. So for each licence they get a vote  
25 on the board: there's 34 licences, there's 34 votes.

26 THE CHAIRMAN: But it's right, is it, that Comux has the wireless telegraphy licence,

1 as opposed to That's TV having the -- or the subsidiary having the TV licence?

2 MR HENRY: Yes. The two are intertwined, and ultimately controlled by the same  
3 operator. Comux is owned by the L-DTPS licence holders. The Mux licence is issued  
4 by Ofcom under the Wireless Telegraphy Act, not under the Broadcasting Act. And  
5 therefore the requirement for the localness from the local television service licence  
6 provider requirement means that the local Mux, Comux's licences, are being operated  
7 illegally, they are unlicensable services because they do not include the minimum local  
8 programming requirement and they are created together.

9 And when you take into account what Ofcom has added into both licences -- so they've  
10 added a general condition to the L-DTPS licence, which again tells the licence holder  
11 they must co-operate with other service providers, they must help clear 700 megahertz  
12 which was to be sold off and used for telecommunications; if they didn't co-operate  
13 with that then mobile networks could be interfered with and that would interfere with  
14 another licence service. And the same general direction is inserted in the local Mux  
15 licence as well, telling the local Mux provider, under the Wireless Telegraphy Act, that  
16 it too must co-operate to clear the 700 megahertz. So this is a general condition issued  
17 by Ofcom into both licences, two licences are in fact the same service.

18 So I would say that they are incorrect when they say that section 45 is not engaged.  
19 It is engaged because -- and Ofcom would know this, being the regulator. The local  
20 Mux provider must engage and contract with other Telecom companies to ensure that  
21 they receive the EPG data as a live feed from the other broadcasters. That includes  
22 the BBC and ITV and everybody else all have to be brought together, retransmit it over  
23 telecommunication network services to the transmitter sites that are being operated  
24 on Comux's behalf. I understand they are installed at Arqiva sites. So this is  
25 a telecommunication network service that we are talking about.

26 THE CHAIRMAN: It doesn't seem to me this is relevant but it wouldn't follow, would

1 | it, that just because the TV licence holder was in breach, that Comux was also in  
2 | breach?

3 | MR HENRY: It is in breach because it clearly states in the DTT licence that the -- so  
4 | they specify what they must carry -- what they must deliver, and if they don't deliver it  
5 | Ofcom has the power to revoke that licence as it's being operated illegally. The DTT  
6 | Mux licence has four requirements listed on it. One is the local TV licence service  
7 | must be transmitted, and it gives technical specs for what must be transmitted.

8 | The second thing is EPG and other data, this is tables data for the programme guide  
9 | which has to connect to all the other broadcasters that are not on that Mux, they are  
10 | across the whole of digital television.

11 | And then the last two things that it specifies in that licence is it can broadcast two other  
12 | national standard definition television channels which they sell at a commercial rate.

13 | So it follows that if the DTT licence is being used to deliver a local service that isn't  
14 | complying with its licence then it too is in breach of its licence. The two are connected.  
15 | It's only legally operating if it delivers the local content.

16 | I wanted to bring back on one other point, which was Ofcom had talked about -- I'm  
17 | just trying to see where it was -- so apart from the damage of an opportunity, which  
18 | she might want to specify, it's not just the costs, the revenue model shows it would  
19 | make about £14 million profit at the end of three years after launch; so that's the  
20 | potential damage.

21 | There was one other -- yes. So the decision in 2018 which they claim they didn't have  
22 | to make a decision, I believe that is incorrect. They had to carry out an assessment  
23 | that the change of control -- they brought two things. It gave That's TV a majority stake  
24 | and significant market power in the supply of local news and local TV because they  
25 | went from 14 licences out of 34, so a minority, to 19 licences out of 34, now a majority.  
26 | They now have control of Comux. They control --

1 THE CHAIRMAN: You have seen what Comux says about that in its evidence.

2 MR HENRY: I saw how it says it operates, yes. However, what it didn't mention is  
3 that the DTT profit that has been generated by selling those two other licences that  
4 Ofcom specifies, that was the revenue stream that was set up under this regime. That  
5 dividend is paid out to the L-DTPS licence holders. So 19 dividends out of 34 means  
6 the majority of the money, of the dividends, is now going to That's TV, and at the same  
7 time they are not providing the minimum service.

8 But it was also by agreeing to the change in control, what they don't seem to have  
9 done, which I believe they should have, is one, look at the impact of competition, and  
10 they haven't referred to that at all. They at least seem to think they don't have to worry  
11 about it, I believe they do. I believe that comes under articles 101 and 102 where it  
12 clearly is starting to control the development of a marketplace; and also the impact on  
13 the character of the service. So it's not just that the directors changed, it's the fact that  
14 a company bought over one company, which had substantial programming  
15 commitments, had won the licences through a commercial competitor tendering  
16 process.

17 There is one interesting, little fact: That's TV bid for the Inverness licence in Scotland.  
18 They were rejected by Ofcom. It was never issued to anybody. And apparently it was  
19 rejected by Ofcom because they deemed that it wasn't commercially viable. So That's  
20 TV had already been rejected for a licence in Scotland and STV won the other five  
21 large ones. I think that was the main point.

22 And I would come back to if Ofcom had engaged, as I would have expected  
23 a regulator, with me in February and come back to me on what are they doing about  
24 the complaint -- it is certainly not true to say that I didn't do anything in a matter  
25 of months. I was in London on the March, I met with the DCMS, I wrote to numerous  
26 MPs, Ofcom, I got my MP to write to the chairman of Ofcom, again asking the same

1 thing: what's happening with local content? What are you going to do to ensure that  
2 these breaches cease? And the final thing that I did, which was a letter before action,  
3 before contacting yourselves, was again to ask Ofcom what are they going to do about  
4 all this evidence? They've had lots of other people write to them on my behalf, my  
5 MP, et cetera: what are you doing about it?

6 I get a letter from Gwen Morgan on the 23 September saying, "We have still not made  
7 a decision whether or not we are going to launch an investigation." It is because of  
8 that that we're here; it is not because I have rushed to judgment to try and somehow  
9 use the tribunal. And I understood that because it is a telecommunication and they  
10 are using reserved radio bandwidth issued under a Wireless Telegraphy Act, that in  
11 fact you did have jurisdiction, and I got no such warning this time, that: we do not  
12 believe you should take legal advice. And if I had had more liquid funds I would have  
13 been able to find a lawyer. But the issue is there's very few lawyers that understand  
14 this legislation north of the border because we don't have any broadcasters, so there  
15 is virtually nobody to ask. You then have to find a lawyer somewhere else and that's  
16 not very easy to do.

17 THE CHAIRMAN: All right, okay. Thank you, Mr Henry. (Pause)

18 MS BLACKWOOD: Sorry to interrupt, sir. I've been instructed just to mention that  
19 Ofcom have opened an investigation into That's TV's local programming obligations  
20 and that has been published in the broadcast bulletins, 524 and 525.

21 THE CHAIRMAN: When was that published?

22 MS BLACKWOOD: June of this year.

23 THE CHAIRMAN: In?

24 MS BLACKWOOD: June 2025, sir.

25 MR HENRY: Can I make one last point now I can remember. I think it's very important  
26 that the tribunal understand I didn't bring this lightly, and unfortunately I would have



1 | been more efficient if I hadn't had all the other issues I've been having to deal with,  
2 | which has made it extremely difficult, which is why I've not been as sufficient at  
3 | responding, because it wasn't my intention at all. But also That's TV, and Comux by  
4 | association, arrive here with dirty hands, they are in breach of their licence.

5 | THE CHAIRMAN: I think you've --

6 | MR HENRY: I think I've made that point, I just wanted to reissue it. So they are not  
7 | here with clean hands and therefore their costs should be resisted.

8 | And when it comes to Ofcom, why has it taken all this time to now find out they are  
9 | now going to launch an investigation?

10 | THE CHAIRMAN: Yes.

11 | MR HENRY: Why didn't you do that when I wrote to you?

12 | THE CHAIRMAN: All right. Thank you, Mr Henry.

13 | Did you want to come back on anything else?

14 | MS BLACKWOOD: No, sir.

15 | MR ALTY: I just have one question for Ofcom. Going back to section 45, and you  
16 | explain why it wasn't relevant, could you just give me an example -- it talks about  
17 | "decisions given effect by a direction, approval or consent, given for the purposes of  
18 | provision of a condition set under section 45", of the sort of decision we are talking  
19 | about where section 45 would be relevant, just to try and give a bit of context. I would  
20 | find that helpful.

21 | MS BLACKWOOD: Can I take instructions?

22 | MR ALTY: Yes. (Pause).

23 | MS BLACKWOOD: Sir, the example I've been provided with is where perhaps  
24 | a physical pay phone needs to be -- there's request to shut that down. And so Ofcom  
25 | would take a decision to give consent for that to occur and that specific consent would  
26 | be given for the purposes of provisions under the condition set under section 45.

1 MR ALTY: Right.

2 PROFESSOR MULHERON: My understanding though is that there are no conditions  
3 set in in your skeleton paragraph 22, that's why section 45 is not engaged, because  
4 there were no conditions set by Ofcom in relation to those decisions.

5 MS BLACKWOOD: Yes.

6 PROFESSOR MULHERON: So if there's no conditions then the direction approval or  
7 consent falls away.

8 MS BLACKWOOD: Yes.

9 PROFESSOR MULHERON: Is that correct?

10 MS BLACKWOOD: Yes, that's correct.

11 PROFESSOR MULHERON: Thank you.

12 MR HENRY: Section 45, I understand -- has a number of different (inaudible), mainly  
13 about telecommunication network services and associated facilities. And under  
14 section 51 I understand -- I have already submitted that I believe that is what engages  
15 the Wireless Telegraphy Act, and that is because Ofcom has inserted a general  
16 condition, in both the L-DTPS licence and in the local Mux licence, that they must  
17 engage with other communication providers to ensure the clearance of 700  
18 megahertz, because otherwise it could interfere with mobile telecommunications.

19 So it is being treated as if it's a telecommunication network service and associated  
20 facility, and I understand it was under section 51 was the type of decision that that  
21 covers, which is Ofcom has insisted these licence holders must comply with clearing  
22 the 700 megahertz we can see which is to be used for mobile phone communications.

23 THE CHAIRMAN: Thank you, Mr Henry.

24 The tribunal will reserve its judgment.

25 (1.09 pm)

26 (The hearing concluded)

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### Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?