IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1102/3/3/08
1103/3/3/08

Victoria House,
Bloomsbury Place,
London WC1A 2EB

26 June 2008

Before:
VIVIEN ROSE
(Chairman)
DR ARTHUR PRYOR CB
ADAM SCOTT TD

Sitting as a Tribunal in England and Wales

BETWEEN:

T-MOBILE (UK) LIMITED — Appellant
Supported by
HUTCHISON 3G — Intervener

- v -

THE OFFICE OF COMMUNICATIONS — Respondent

AND

TELEFÓNICA O2 UK LIMITED — Appellant

- v -

THE OFFICE OF COMMUNICATIONS — Respondent

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HEARING DAY ONE

A P P E A R A N C E S

Mr. Michael Fordham QC and Mr. Meredith Pickford (instructed by Lovells) appeared on behalf of the Appellant (T-Mobile (UK) Limited).

Mr. David Pannick QC, Mr. Tom de la Mare and Mr. Tom Richards (instructed by Ashursts) appeared on behalf of Telefónica O2 UK Limited

Miss Dinah Rose QC, Mr. Josh Holmes and Mr. Ben Lask (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent.

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THE CHAIRMAN: Mr. Pannick, you are kicking off, are you?

MR. PANNICK: I am, thank you very much, Chairman. I appear for Telefónica O2 with Tom de la Mare and Tom Richards. Mr. Fordham and Meredith Pickford represent T-Mobile and Ofcom are represented by Dinah Rose, Josh Holmes and Ben Lask. The Tribunal is considering a preliminary issue, whether it has jurisdiction under s.192 of the 2003 Act to determine the appeals brought by the two Appellants. Mr. Fordham and I have agreed, subject to the consent of the Tribunal. We will divide up the time available for the Appellants and between us we hope to cover all the points without any representation of the issues.

Can I summarise our case at the outset. We say, first of all, that Parliament has decided, and it has rightly decided, that Article 4(1) of the Framework Directive confers a right to an appeal on the merits before a judicial body, and Parliament has decided that this obligation should be implemented by a right of appeal to this Tribunal. That is the first point.

The second point we will make is that Parliament made this choice because it correctly understood that judicial review in the Administrative Court would not have been adequate to give effects to the right conferred by Article 4(1).

Thirdly, we will submit that this Tribunal should give effect to the Article 4(1) to a merits appeal as intended by Parliament either by the interpretation of s.192 read with Schedule 8 or, if that is not possible, by dis-applying any part of Schedule 8 which stands in the way. That is the case we will seek to develop.

The skeleton argument for Ofcom, as the Tribunal will have seen, begins with s.192 read with Schedule 8. We say that the proper starting point is to identify what Article 4(1) and to look at what Parliament intended by way of implementation of Article 4(1). Once those matters have been properly understood then the 2003 Act can be construed consistently both with Article 4 and with the parliamentary intention or, if there is a conflict with EU law then any offending provision of the legislation must be dis-applied. We submit that is the right way to proceed especially in a case such as this where there is no dispute from Ofcom, no dispute, first, that the Decision which we are challenging is within the scope of Article 4(1).

Secondly, there is no dispute from Ofcom that the Decision which we challenge is within the scope of s.192 and therefore the Tribunal does have jurisdiction subject – subject – only to Schedule 8.

Article 4 is at volume 1 of the authorities, if I can invite the Tribunal to go to the bundles. I hope you have received three bundles of authorities from us, there is also an additional bundle of Ofcom's authorities, and there is a core bundle. In volume 1 of the authorities, tab 1, we

have the Framework Directive. Article 4 appears on p.8. Article 4 is headed "Right of Appeal". Article 4(1):

> "Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services …"

- and there is no dispute, of course, that the Appellant satisfies that criterion –

> "… who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved."

As I have said, there is no dispute so far that we are within the scope of Article 4(1) in the present case.

> "This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise.
>
> 2. Where the appeal body referred to in paragraph 1 is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of article 234 of the Treaty."

So there is a choice, as the Tribunal appreciates, a choice for the Member State, whether or not this right of appeal should be to a judicial body. Here, as we shall see, Parliament has decided yes. If it is a non-judicial body then Article 4(2) applies. The decision is subject then to a further process, but it is not an appeal, it is by contrast a review.

The dispute between us concerns what flows from the rights that are conferred in this case by Article 4(1). What does it mean to require that the merits of the case are duly taken into account and does judicial review satisfy that test.

Before turning to those legal issues can I briefly identify the relevant decisions that have been taken. As the Tribunal will have seen, Ofcom has been considering two matters. It has been considering, first of all, the release into the market of unused spectrum in the ranges 2500 to 2690 MHz and 2010 to 2025 MHz. That is the first matter it has been considering. Secondly, it has also been considering what policy it, Ofcom, should adopt in relation to liberalisation and potential re-allocation of already allocated spectrum in the 900 MHz and 1800 MHz ranges. Those are two matters currently on the Ofcom agenda. We say, putting it very simply

indeed, in the Appeals that the two matters are linked because until we know what decisions are taken on issue two, that is the liberalisation and potential re-allocation of already allocated spectrum, we cannot sensibly decide how to respond to an auction under issue one. That is the substance of the appeal, we are not of course concerned with that today, but that is the background.

Our complaint is that Ofcom has now decided that it is going to proceed with the allocation of the unused spectrum despite the continuing uncertainty about the existing spectrum. We say on the appeal that Ofcom should not have rejected, as it did, the suggestion that it should adopt a split auction approach, which we say would have best protected all interests. That would have meant allocating only some of the new spectrum at this stage, which we say would be the part realistically usable by the WiMAX operators.

T-Mobile, our allies, say - and my friend, Mr. Fordham, will put it much more precisely - that the decision to proceed with the new allocation at all was wrong, given, in particular, the uncertainty about the existing spectrum. But, I put it very crudely, but I hope adequately, and I hope accurately for the purposes of this jurisdictional issue. You may have had an opportunity to glance at it already, but you have in the core bundle at Tab 4 you will find the Ofcom statement of 4th April. If you go in that to the second page, p.168, you will see there is a helpful executive summary for busy people. Paragraph 1.1 tells us that this statement sets out 'our decisions' - so, there is more than one of them - on the awards of the various frequency bands. If one goes down the page to 1.6, one can see they made, first of all, a decision on award timing - and we are complaining about that - and then, on p.171 they deal with the method of awarding the spectrum. On p.172 they deal then with license conditions - in particular, non-technical conditions. Over the page, at p.173, technical licence conditions ----

MR. SCOTT: Mr. Pannick, I am slightly disadvantaged in that my copy is not paginated in the way that your copy is paginated.

MR. PANNICK: Sir, you have a very considerable disadvantage. I apologise.

MR. SCOTT: It is all right. I am following you so far, but ----

MR. PANNICK: Would it be helpful if we try to provide you with another copy?

MR. SCOTT: If you simply refer to the paragraph numbers ----

MR. PANNICK: I will do that, sir. Of course, there are also internal page numbers. I will refer to those as well. Sir, if you have followed me so far, then I will carry on. If we go to internal p.18, which is Bundle p.185 we see s.3 of this document - Introduction & Decisions. They tell us at 3.2,

> "In summary, the decisions [again, plural] we have taken are that we should:

award the spectrum bands, in light of our usual practice to make spectrum not being used available to the market ...

We should proceed with the award as soon as possible rather than take a conscious delay.

We should award the 2010 MHz band as part of the same award process and award via auction".

If we go then to internal p.53, p.220 of the bundle, the Tribunal will see in the second half of the page the heading 'Alternative proposal to award only art of the 2.6 GHz band now'.

"One respondent proposed in a confidential response that only the centre 50 MHz be awarded at this point, and that the remaining 140 MHz be awarded at a later date when some of the uncertainties have been reduced ----"

So, that was the split auction suggestion.

At para. 3.183 they say,

"In summary we do not consider that this proposed alternative approach would achieve the same level of benefits as an award as soon as possible of the whole of the band".

Then they give a number of reasons which we do not need to trouble with today, but plainly would be very material if and when this Tribunal were to hear the substantive appeal. But, that is where you find the analysis of the split auction proposal.

We say that the decision to reject the split auction proposal was wrong in substance - this is our case on the putative appeal. It was based on factual errors; it was based on wrong conclusions on the facts, and it was based on flawed reasoning. We also say that it was reached by an unfair procedure. The details are set out at length - possibly at too great length, but they are set out there, at Tab 1 of our Notice of Appeal [sc. At Tab 1 of the Core Bundle]. It is the same bundle. I am not going to take you through that, but that is where you find the material fully set out in that document.

Our submission for today's purposes is that Article 4(1) confers a right of appeal on the merits of the decision. We say, first of all, that the language of the provision so requires. Article 4(1) confers a right of appeal. It is to be contrasted with Article 4(2), as the Tribunal has seen, which recognises, by contrast, a right to a review by a court or Tribunal if there has been an earlier appeal to a non-judicial body. So, Article 4 itself is recognising a contrast, and some meaning must be given, in our submission, to that contrast.

Furthermore, Article 4(1) expressly states that member states are required to ensure that the merits of the case are duly taken into account. The merits of the case are duly taken into

account. So, it is not sufficient to have an appeal to a body which is not concerned with the merits. Article 4(1) expressly requires that the merits of the case must be duly taken into account. If that phrase, we say, did not mean that the appellate body must examine the merits of the decision and allow an appeal on the merits, if appropriate to do so, then we submit that requirement would be quite pointless. The Ofcom submission so far - and I am sure Miss Rose will rise to the challenge – so far Ofcom have failed to identify what in their submission is the purpose and effect of that phrase in Article 4(1) "… shall ensure that the merits of the case are duly taken into account."

There is a third indication on the language of Article 4. The first indication is the contrast between appeal and review. The second point I made is express requirement shall ensure the merits of the case are duly taken into account. The third indication that we are duly concerned with a merits' assessment is that we are also told that Article 4(1) expressly requires that the judicial body shall have the appropriate expertise available to it. Now, why is that? Well we say the reason why the legislator in Brussels has required that the appellant body must have the appropriate expertise available to it is because the intent here was that the judicial body must be able to understand and to engage with the merits of the case, which may be technical and complex, in order to provide the merits' assessment that Article 4(1) requires.

If the appeal body were simply to be performing a review (see Article 4(2) by contrast) then one would not find in Article 4(1) this reference for the need for appropriate expertise.

This argument, from the language of Article 4(1) we say is confirmed when one looks at the legislative history of the European instrument. The background here is that the predecessor provision was Article 5a(3) of Directive 90/387 and we can see the content of the predecessor document if you would turn, please, to tab 18 of vol.1 of the authorities. Tab 18 is the *Connect Austria* case which we will come back to for other purposes, but it helpfully contains at bundle p.498 (p.5226 of the report). The Tribunal sees at the bottom of the page para. 12 of the judgment tells us what Article 5a(3) of the predecessor Directive said:

> "Member states shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of the national regulatory authority has a right of appeal to a body independent of the parties involved."

Plainly, on any view a less tough measure than that which we now find.

When Article 4(1) of the Framework Directive came before the European Parliament for its second reading it was in a much milder form than we now see, and the original form of Article 4(1) can be found in vol.2 of the authorities at tab 53. This was the earlier version and if,

please, you would turn within tab 53 to p.1631 you will see on the right hand side of the page Article 4 of this proposal. Article 4 is headed: "Right of Appeal".

> "Member States shall ensure that effective mechanisms exist at national level under which a user or undertaking providing electronic communications networks and/or services has, where affected by a decision of a national regulatory authority, the right of appeal against the decision to an appeal body that is independent of the parties involved."

So no mention at that stage of merits, no mention of access to appropriate expertise – a much weaker version. Then if you would turn to the next tab, tab 54 you will see the report as we are told it is the report of the European Parliament Committee on Industry, External Trade, Research and Energy. Their report addresses the proposal, and if you turn to p.1658 you see Amendment 12 which is a proposal to amend Article 4(1) and the text of the then version, which I have just read out is on the left hand side and on the right hand side is this Committee's proposal. What the Committee propose is that you should substitute for Article 4(1) this:

> "Member States shall ensure that effective mechanisms exist at national level under which ***any*** user or undertaking providing electronic communications networks and/or services ***who is*** affected by a decision of a national regulatory authority ***has*** the right of appeal against ***that*** decision to ***a*** body that is independent of the parties involved …"

And then the part in italics they want to add in:

> "***and has the appropriate expertise to enable it to carry out its functions.***"

Miss Rose emphasises that at that stage the intention was that the body itself should have the expertise, not simply have access to it. Then this, which we are focusing on:

> "***The appeal body shall be able to consider not only the procedure according to which the decision was reached, but also the facts and the merits of the case.***"

And then there is the suspensive or non-suspensive provision which is carried over into the final version. So for the first time reference to facts and merits, and under that text is justification, the explanation as to why the Committee thinks that these amendments are a good idea and they tell us that:

> "*It is fundamental that the merits of the case can be reviewed in the appeal procedure. This does not impede or preclude a further judicial consideration under the normal rules of procedure in the Member State concerned.*"

So fundamental they think that the merits of the case can be reviewed in the appeal procedure. This fundamental requirement was of course reflected, carried over into the final form of Article 4(1) which you, the Tribunal, have seen. So that is the legislative history in Brussels. Now, the United Kingdom Government agreed that the content of Article 4(1) does require an appeal on the merits before an appropriately qualified Tribunal. That is why it created s.192. Section 192 you have in vol.1 tab 5 of the authorities, and it contains the relevant provisions of the 2003 Act, and the Tribunal of course is very familiar with s.192(1) that is the decision to which s.192 applies, and s.192(2), a person affected by a decision to which this section applies may appeal against it to the Tribunal, and if we turn over the page, 195, Decisions of the Tribunal, 195(2):

> "The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal."

The reason why Parliament adopted that approach is very clear from the pre-legislative material which demonstrates the purpose of these provisions. Would the Tribunal go to bundle 3 of the bundle of authorities, behind tab 57 the Tribunal will find the explanatory notes published by the Department of Trade & Industry when it published a Draft Communications Bill that became of course the 2003 Act. If the Tribunal turns over the page you will see para.258 of this document headed "Appeals", which tells us this:

> "The appeals mechanisms in the Bill have been devised to meet the specific requirements of Article 4 of the Framework Directive. Article 4 of the Framework Directive, in effect, requires that any person who is affected by a decision of Ofcom or the Secretary of State, which relates to networks and services and rights of use of spectrum, must have the right of appeal on the merits against that decision to an appeal body that is independent of the parties involved. The Bill therefore sets out a mechanism for appeal on the merits to the Competition Appeal Tribunal (CAT) against any decision (with specified exceptions) taken by Ofcom [under the relevant statutory provisions]."

So clear beyond argument, that at that stage certainly the Departmental view which informed the legislative process was that, first, it was well understood that Article 4(1) confers a right of appeal on the merits. That is what they say. Secondly, the intention that this right of appeal should be implemented by creating a statutory right to an appeal to this Tribunal, not to judicial review or any other mechanism, a right of appeal to this Tribunal.

That remained the legislative purpose throughout the passage of the Communications Bill. If you turn to tab 60 you will find the Explanatory Notes to the Communications Act once it had

been enacted. If you turn in the bundle to p.1708 you will find para.400 of the Explanatory Notes, which is in essentially the same terms as the Explanatory Notes to the Bill, but I will read it out:

> "400 The appeals mechanisms in the [2003] Act have been devised to meet the specific requirements of Article 4 of the Framework Directive. Article 4 of the Framework Directive, in effect, requires that any person who is affected by a decision … which relates to networks or services or rights of use of spectrum must have the right of appeal on the merits against that decision to an appeal that is independent of the parties involved. The Act therefore sets out a mechanism for appeal on the merits to [this Tribunal] against any decision (with specified exceptions) …"

It is plain, we say, beyond argument, with the greatest of respect of Ofcom should they wish to suggest to the contrary, that their case today has to be that Parliament simply got it wrong, Parliament did not understand when it enacted the 2003 Act what Article 4(1) requires and entitles a person to receive. That is a right of appeal on the merits.

Appendix 3 to the Explanatory Notes, which we have at p.1714, contains transposition tables which helpfully sets out on the left hand side the Article of the Framework Directive, and on the right hand side which sections of the legislation are designed to implement. If you go to p.1715 you will see ---- We are not sure whether they have been inserted in your bundles. There may be some confusion here. Do you have p.1714, in the middle of which page is appendix 3. We have new versions. What was originally in the bundles was erroneous, not just in Mr. Scott's bundle but in everybody's bundle it was not done properly.

THE CHAIRMAN: We will take out the existing pages.

MR. PANNICK: Take out 1714, 15 and 16.

MISS ROSE: Unfortunately we do not seem to have this material.

MR. PANNICK: That is a disadvantage which will be cured immediately. Happily this is not a crucial document in the case, but having taken this time I might as well complete the point. Could I just ask you to look at p.1714. Half way down the page it says Appendix 3 and it contains transposition tables. What has been done, on the left hand side you have got the article number of the Directive; on the right hand side we are told which section numbers of the Act implement those provisions. It is a very short point. On p.1715, half way down the page, you will see "Article 4". That is Article 4 of the Directive, "Right of Appeal". We are told in Article 4(1) how they have implemented Article 4(1). They have done it through ss.192-196 and Schedule 8, and nothing else. They have not done it, for example, by judicial review. If we contrast Article 5, for example, Article 5(3), we are told nothing additional

required covered by common law breach of confidence. So plainly it was not intended that Article 4 should have covered by what is already there.

MR. SCOTT: While you are on this particular page, one of the topics which is going to come up, no doubt, is the potential difference between the meaning of the wordings "Appeal" and "Review" in European law, and the meaning of the words "Appeal" and "Review" in English law.

MR. PANNICK: Yes.

MR. SCOTT: I note, in passing, that they do not cross-refer Article 4(2) to the process used in considering price controls before us, where, as you probably know, we send it to our neighbours in the Competition Commission for a report, which is then subject to judicial review - a procedure which looks as though it is designed to comply with Article 4(2). But, I note that in the transposition table that is not the way that is put.

MR. PANNICK: Sir, you, of course are correct. I am going to deal, if I may, with those provisions in the relevant part of the Communications Act in a few moments because we say that those provisions confirm that Parliament well understood that there is a very real distinction between appeal and judicial review, and where it thought it appropriate to do so, it is said that particular topics, such as price control, should be addressed by another mechanism and that the method of assessment by this Tribunal would then be judicial review standards rather than appeal standards. I will come to that. What we note from this transposition table is that Article 4(2), we are told, does not apply - appeal body in Act is judicial. That, of course, is because Parliament was making the choice that in the mainstream cases with which we are concerned, the decision take was that Article 4 should be implemented by means of an appeal mechanism to a judicial body. So, the non-judicial option with a review to a judicial body that was possible under 4(2) was not the choice of Parliament.

Now, what Ofcom of course rely upon is that they rely upon Schedule 8 to the 2003 Act. If I could ask you to keep open Volume 3, but also turn back to Volume 1 and the Communications Act provisions -- At Tab 5 of Bundle 1, p.52 we find Schedule 8, which Ofcom rely upon. They rely in particular on para.40 on p.55. I will come to that in due course. But, we see that the subject of Schedule 8 is 'Decisions not subject to appeal'. So, these are matters taken out of s.192. Of course, Schedule 8 must be read together with s.192. There is a mention of Schedule 8 in various parts of s.192.

If we go back then to Volume 3 of the materials and we ask the question, "Well, what did Parliament intend by Schedule 8? What was the purpose of Schedule 8?" we find the answer in Tab 60 of Vol.3 - that is, the explanatory notes to the Act.. The explanatory notes deal with

this matter at p.1711, para. 416. There is a heading 'Section 192 - Appeals against decisions by Ofcom'. We are told at para. 416,

> "This section [that is, 192] provides for appeal to the Competition Appeal Tribunal against relevant decisions . . . The specified exceptions are set out in Schedule 8 and are either (i) decisions that do not have immediate effect on a person, but are of a legislative or quasi-legislative nature that require a further act or decision to be given effect, or (ii) decisions on matters which fall outside the scope of the Communications Directives".

So, that is the object and purpose of Schedule 8. It is concerned with excluding cases where you are taking a decision that does not have an immediate effect, but it is a legislative/quasi-legislative type of decision requiring a further act or decision to be given effect, or it is matters which fall outside the scope of the directives. We will come back in due course to how one interprets Schedule 8 in this case. We say, as I have already indicated, in this case we are within the scope of Article 4(1). Therefore we are entitled to a right of appeal on the merits. However, I will come back to this.

These explanatory notes may be used by the Tribunal without any question of offending Parliament. These explanatory notes may - indeed, should - be used as an aid to interpretation because they identify the very mischief at which a statutory provision is aimed, or the purpose of that statutory provision, or they identify the context in which the provision is enacted, and thereby assist on its proper construction. If one needs authority for that proposition one has the observations of Lord Steyn in the House of Lords in the *Westminster City Council* case, at Volume 2 of the authorities at Tab 40.

THE CHAIRMAN: Is that contested, Miss Rose - that we can rely on the explanatory notes?

MISS ROSE: Madam, we do not dispute the reliance on the explanatory notes in order to obtain the context of the legislation. It is our submission that the explanatory notes cannot be used in order to construe the particular provisions. That is a matter of construction of what Parliament said - not what the government said when it presented a bill.

THE CHAIRMAN: Perhaps we do then need to go to it.

MR. PANNICK: I think we probably do. May I very briefly ask the Tribunal to look at Tab 40 of Volume 2? *Westminster City Council -v- The National Asylum Support Service*. Lord Steyn's opinion. There are two short passages. The first at p.1125 of the bundle (the law report at p.2958). Paragraph 5 of Lord Steyn's speech:

> "The question is whether in aid of the interpretation of a statute the court may take into account the Explanatory Notes and, if so, to what extent".

He has explained what explanatory notes are at para. 4. I do not think I need to read all that out. So, that is the question. He answers that question over the page - p.2959 - at B:

> "Again, there is no need to establish an ambiguity before taking into account the objective circumstances to which the language relates. Applied to the subject under consideration the result is as follows. In so far as the Explanatory Notes case light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction".

That is the point. We leave it there. At F:

> "This reflects the actual decision in *Pepper -v- Hart*. What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted".

Precisely so, but that must be understood, read together with B. Of course, you cannot simply say that what the legislation means is dependent upon Government will. When you are asking what the legislation means then, as he said at (b) you are entitled to look at the explanatory notes because they cast light – or they may cast light – on the context and the mischief at which the legislation is aimed. I am asked also to read C:

> " They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like. After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible: see *Cross, Statutory Interpretation*. If used for this purpose the recent reservations in dicta in the House of Lords about use of Hansard materials in aid of construction are not engaged."

Then at 6:

> "If exceptionally there is found in the Explanatory Notes a clear assurance by the executive to Parliament about the meaning of the clause, or the circumstances in which a power will or will not be used, that assurance may in principle, be admitted against the executive in proceedings in which the executive places a contrary contention before the court. This reflects *Pepper v Hart* …

and then: "What is impermissible ..."

So the passage that Miss Rose asks me to emphasise is a passage that is looking at the contrast between cases where the Executive gives an assurance to Parliament about where a power will or will not be used. If it is an assurance against the interests of the Executive it can be binding, but if it is an assurance that assists the Government the Government cannot simply rely upon it as answering the issue of construction.

THE CHAIRMAN: But the issue of construction here is not so much the issue of the construction of the domestic legislation but of Article 4(1), and your point as I understood it was: well, look at the explanatory notes, clearly at that stage the person who wrote the explanatory notes thought, as we submit, that Article 4(1) was making a distinction between an appeal on the merits and a judicial review standard of appeal. But is it your case that in fact, the legislature granted an appeal on the merits because that was what they thought Article 4(1) did, but in fact since they have done that it does not matter whether Article 4(1) says that because they might ----

MR. PANNICK: No.

THE CHAIRMAN: So you accept that the legislation does not go any further than Article 4(1) requires it to go?

MR. PANNICK: I have to satisfy the Tribunal that Article 4(1) means what we say it means and, in relation to that, I have presented a number of arguments, the language of Article 4(1) I rely upon, the development of the legislative purpose in Brussels I rely upon. I say also that it is of some interest, that it is not simply us who adopt this approach, the DTI adopted that approach also. But the point goes this far: if I can persuade the Tribunal that we are right on Article 4(1) and the question is then whether the 2003 Act can be construed, Schedule 8 read with s.192 in our favour, this Tribunal will be, I say, much more willing to do that confident in the knowledge that achieving that result will in fact be consistent with the very intentions of the legislation itself. That is my answer.

MR. SCOTT: Can we draw a slight distinction here. In the case of Parliament considering legislation that flows from a White Paper, a White Paper produced solely by the United Kingdom Government, Parliament is at liberty to do what it likes. In the case of legislation which flows, as in this case, from a series of directives, the High Court and Parliament, as I understand it, has a duty under the Treaty ----

MR. PANNICK: Yes.

MR. SCOTT: -- to give effect to that which has been agreed at the European level. So it seems to me there is a distinction to be drawn between how we treat this material in a European context and how we treat this material in a normal, purely national context.

MR. PANNICK: Yes. Well I respectfully agree with that. There are two issues, the first, as the Chairman I think was putting to me, was what does Article 4(1) mean, and it helps me that our construction is consistent with the views of the experts who were attempting to implement this but they might have got it wrong, it is not an answer to any points that Miss Rose may put forward, it is not an answer but it is helpful material.

The second issue, which is a different issue, is how do you construe the domestic legislation if we are right on the meaning of Article 4(1). I do say that on that second issue, which is a domestic law issue, once the meaning of Article 4(1) has been identified in our favour (if it is) at that stage the explanatory notes are very helpful because our approach is inviting the Tribunal faithfully to implement what Parliament intended (see the explanatory notes) and the case for Ofcom is an attempt to persuade this Tribunal to frustrate the intentions of Parliament as indicated by the explanatory notes. So we are faithful to Parliament, Ofcom are seeking to frustrate its intentions. That is what we get from the Parliamentary material.

The question that then arises is: can it be said by Ofcom that judicial review satisfies the Article 4(1) obligation, and I make the point already that Parliament proceeded expressly on the basis that no, judicial review did not suffice. It chose, understood itself as requiring a merits' review in this Tribunal. Can I also deal with the substance of the point because we say in any event it is wrong in principle to seek to implement Article 4(1) through judicial review; it would not suffice, and that helps to explain why Parliament, in its wisdom, did not seek to implement Article 4(1) through judicial review, and there are three points here. They are linked – at least the first two are linked. Point 1, judicial review is not an appeal. What is required by Article 4(1) is an appeal. A judicial review, we say, is not an appeal.

Point 2 is judicial review does not involve, in any event, an appeal on the merits of the decision, and Article 4(1) requires that the merits be taken into account.

Point 3, if necessary – and it is a separate point – but if necessary we would add that the judges of the Administrative Court, with the greatest of respect to them of course, do not have appropriate expertise available to them to address the merits, but that is a separate point and my case does not depend upon that third limb . My primary points are that judicial review is not an appeal and, in any event, it does not involve an appeal on the merits. The contrast between judicial review which Ofcom are keen on and an appeal to this Tribunal is plain and obvious in our submission. I have already shown the Tribunal s.195(2) of the 2003 Act in vol.1 of the authorities, tab 5. 195(2): "The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal." That is what this Tribunal does. "The Tribunal shall decide the appeal on the merits."

Faithful to that requirement, this Tribunal has stated its obligation in the *Hutchison 3G* case, which is to be found at volume 2 of the authorities, tab 50, a case involving the Chairman and Mr. Scott. This will be very familiar to at least two of the members of this Tribunal. I simply refer to it because of the passage at p.1468, para.164 of the judgment, where the Tribunal said this:

> "However, this is an appeal on the merits and the Tribunal is not concerned solely with whether the 2007 Statement is adequately reasoned but also with whether those reasons are correct. The Tribunal accepts the point made by H3G … that it is a specialist court designed to be able to scrutinise the detail of regulatory decisions in a profound and rigorous manner. The question for the Tribunal is not whether the decision to impose a price control was within the range of reasonable responses but whether the decision was the right one."

The Tribunal will, I hope, accept that if I stand up in the Administrative Court and say, "I am inviting you to assess not merely whether the decision is adequately reasoned, but whether its reasons are correct, I am asking you to scrutinise the detail in a profound and rigorous manner in order to determine whether the decision is the right one", I would receive a very dusty response from the Administrative Court judge. This is plainly a much more intrusive – it is a pejorative word "intrusive" – a much more detailed assessment, a merits assessment, than one could possibly have on a judicial review. Indeed, if there really were no contrast between the two approaches Ofcom, the Tribunal will readily understand, would not be so vigorously disputing that this Tribunal enjoys jurisdiction.

I am grateful, Mr. Fordham also asks me to emphasise that there is the acceptance – accurately of course – that this is a specialist court by contrast with the Administrative Court.

MR. SCOTT: While we are on that paragraph can we just dwell for a moment on the words "adequately reasoned", because, as we are well aware, there is the *Wednesbury* history, and the *Wednesbury* history has been contrasted before us as against obligations of reasonableness and proportionality in European law. I take it that in what you said about what would happen were you before the Administrative Court what you are adverting to is that you would be expected to reach a *Wednesbury* standard not a European standard of reasonableness and proportionality?

MR. PANNICK: No, I am not contrasting this para.164 and the approach of this Tribunal only with a *Wednesbury* approach to judicial review. I am also contrasting, and I will come to it in a moment, this approach, "Are the reasons correct, is the decision the right one?" – that is also to be contrasted with the most intensive form of judicial review in order to assess proportionality.

The court, on a judgment review, if it is assessing proportionality is still not asking itself, "Are the reasons correct, was the decision right one?" That is not what a judicial review, even on a proportionality test, involves, and I will show you the authorities in a couple of moments. That is our submission. I am not simply contrasting *Wednesbury* unreasonableness.

We have two points here, judicial review is not an appeal and judicial review is not a merits assessment, far less an appeal on the merits. There are many examples in the case law. Can I show you some of them. The first of them is at volume 2, tab 34, it is the *Kemper Reinsurance* case. It is an appeal to the Privy Council from Bermuda, and it is concerned with appeals in judicial review cases. It is fascinating but not necessary to go into in the present case. I cite it for the observation of Lord Hoffmann for the Board at p.14 of the law report at H, p.946 of the bundle:

> "In principle, however, judicial review is quite different from an appeal. It is concerned with the legality rather than the merits of the decision, with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than whether the decision was correct."

That is the statement of principle that we draw to your attention. There are many similar statements. I am not going to tire this Tribunal by going through them all. If I may be forgiven just one other citation on the same point, it is tab 31, it is the *Launder* case, concerning extradition. In that case Lord Hope of Craighead for the House of Lords at p.857 of the law report, said just above C:

> "It cannot be stressed too strongly that the decision in this matter rests with the Secretary of State and not at all with the court. The function of the court in the exercise of its supervisory jurisdiction is that of review. This is not an appeal against the Secretary of State's decision on the facts."

So that is the well-established position in relation to the matter.

What Ofcom say in answer to this is, well, the facts of a case are assessed on a judicial review, particularly under a proportionality test – this was Mr. Scott's question to me a few moments ago; or there might be an assessment of whether there has been an error of fact under judicial review. So the facts are not irrelevant on a judicial review application. That is not our case. Of course we accept that a court must always consider the facts. The question is what power does the court have? What is the exercise that it is performing. When will it grant a remedy. The plain answer is that even in a proportionality case the court, on a judicial review, is not hearing an appeal, and it is not conducting a merits assessment.

There is authority that so asserts in the context of proportionality. The authority is volume 2, tab 39, which is the *Daly* case. The *Daly* case was a case under the Human Rights Act where the court is conducting an assessment of the proportionality of the decision at issue in that case. It was a policy in relation to the reading of the correspondence of prisoners. In that case Lord Steyn addresses the question of proportionality, and the other of their Lordships express agreement with him. If, please, the Tribunal go to p.547, at the top of the page you will see he addresses the principle of proportionality. He sets out, by reference to the *de Freitas* case, what proportionality generally requires. Then, at D there is some academic learning referred to. Just after D, he says,

> "The starting point is that there is an overlap between the traditional grounds of review [its illegality, *Wednesbury* unreasonableness, procedural unfairness] and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But [he recognises] the intensity of review is somewhat greater under the proportionality approach. Making due allowance for structural differences between convention rights, a few generalisations are perhaps permissible".

He mentions three concrete differences:

> "First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relevant weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test is not necessarily appropriate to the protection of human rights".

There is a reference to the cases concerning homosexuals in the armed forces. Then, at the top of p.548, in the third line,

> "In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued".

So, so far he has recognised greater intensity of judicial review. But, then at para. 28,

> "The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the

> correct way. This does not mean that there has been a shift to merit review. On the contrary, as Professor Jowell has pointed out, the respective roles of judges and administrators are fundamentally different and will remain so. To that extent, observations in *Mahmood* are correct. As Lord Justice Laws emphasised, 'the intensity of review in a public law case will depend on the subject matter in hand'. That is so even in cases involving Convention rights and law of context is everything".

So, the clearest possible statement that, yes, proportionality under the Human Rights Act - and the same must be true under Community law - does involve a stricter scrutiny -- a greater assessment of the validity of the decision than administrative lawyers of the old school were used to under *Wednesbury* unreasonableness, but as Lord Steyn says at para. 28, it is vital to recognise that:

> "This does not mean there has been a shift to merits review".

This was reiterated with some force by Lord Bingham for the appellate committee at Tab 47, the case of *SB*, the schoolgirl who wished to wear particular dress at school in order to follow the requirements of her religious beliefs. *SB -v- Governors of Denbigh High School*. Lord Bingham deals with this point at para. 30 on p.116 of the law report. This is Lord Bingham speaking for the house.

> "Secondly, it is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting. The inadequacy of that approach was exposed in Smith and Grady -v- United Kingdom [the homosexuals in the armed forces case] and the new approach required under the 1998 [Human Rights] Act was described by Lord Steyn in *Daly* [that is what I have just read] in terms which have never [never] to my knowledge been questioned.[It is being questioned now by Ofcom.] There is no shift [no shift] to a merits review, but the intensity of review is greater than was previously appropriate, greater even than the heightened scrutiny test adopted by the Court of Appeal".

So, the position, we say, on the clearest of House of Lords authority is judicial review, even today, with all the developments that we have seen, is still not a merits review. It is as simple as that. Therefore, once this Tribunal accepts - if it does, on the basis of our submissions - that Article 4(1) of the Directive requires at least a merits review - whether that means a full appeal on the merits of something less than that -- but once you accept that Article 4(1) must require at least a merits review, the House of Lords tells us you do not get that from judicial review.

Therefore, judicial review cannot satisfy the requirements of Article 4(1). If one needs another House of Lords authority we turn to Tab 48 - one of the cases that Ofcom rely upon - to *Tweed -v- Parades Commission for Northern Ireland*, a case about disclosure of documentation. Lord Brown of Eaton-under-Haywood, speaking for their Lordships' house, deals with the matter at p.673, para. 55. Again, he is concerned with proportionality. He says,

> "In addressing the critical question in any proportionality case as to whether the interference with the right in question is objectively justified, it is the court's recognition of what has been called variously the margin of discretion, or the discretionary area of judgment, or the deference or latitude due to administrative decision-makers, which stops the challenge from being a merits review. The extent of this margin will depend, as the cases show, on a variety of considerations and, with it, the intensity of review appropriate in the particular case".

Again, this is not, he says, a merits review -- judicial review is not a merits review even in the context of proportionality. That is my answer to Mr. Scott's earlier question. I am not pinning my case to *Wednesbury* reasonableness. I recognise judicial review has moved on.

Now, the position in our statutory context - and Mr. Fordham makes this point in his skeleton argument, but he will, I hope, forgive me if I just draw attention to it. He may wish to develop it, but I am grateful to him for making the point in his skeleton argument, many of these other points come from his skeleton argument as well. But he makes the point that Parliament in our context understood – well understood – the distinction between an appeal on the merits and a judicial review. Again, this is a point that Mr. Scott asked me about earlier. If we go to vol.1 of the authorities, tab 5 and look at the 2003 Act, it is striking indeed how Parliament has distinguished between those matters which must be dealt with on their merits and those matters which should be dealt with by way of a judicial review test within this Tribunal. I have drawn attention to 195(2) [at page 50 of the Authorities Bundle] in tab 5, the general principle of the appeal on the merits, but if we look at 193: "Reference of price control matters to the Competition Commission".

> "(1) Tribunal rules must provide in relation to appeals under section 192(2) relating to price control that the price control matters arising in that appeal, to the extent that they are matters of a description specified in the rules, must be referred buy the Tribunal to the Competition Commission for determination."

Then if we go down to 193(6):

> "Where a price control matter arising in an appeal is required to be referred to the Competition Commission under this section, the Tribunal, in deciding the appeal on

the merits under section 195, must decide that matter in accordance with the determination of that Commission."

So this Commission is bound by the views of the Commission but subsection (7):

"Subsection (6) does not apply to the extent that the Tribunal decides, applying the principles applicable on an application for judicial review, that the determination of the Competition Commission is a determination that would fall to be set aside on such an application."

So Parliament has well understood the very real distinction between an appeal on the merits and the application of a judicial review test, were these two approaches 195(2) and 193(7) to mean the same, then the provisions make no sense whatsoever, and at least part of the case for Ofcom must be wrong insofar as it suggests there is no distinction between the two. The same point applies under the Enterprise Act, if we go to tab 4 of the same bundle. We are looking at s.120(1) [page 28 of the Authorities bundle] in the specific context of mergers and appeals in relation to mergers, or applications in relation to mergers, and s.120(4):

"In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review."

And there is another example – there may well be many more, but the other one that we are aware of ----

MR. SCOTT: Just pausing there, it was argued very forcefully by Treasury counsel in our first merger case that this made it very clear that under the Enterprise Act this was not an appeal on the merits.

MR. PANNICK: Yes.

MR. SCOTT: So they did make that very clear, in fact they distanced themselves from the explanatory note to the Enterprise Act which they felt was too European.

MR. PANNICK: Well I am simply making the trite, but I hope substantial point that Parliament has recognised a distinction – a very real distinction – and the other example is s.179 [page 30 of the Authorities Bundle] "Review of decisions under Part 4", again s.179(4) requires a judicial review test.

So the thrust of all these submissions is we say that it is very clear indeed that judicial review cannot satisfy the requirements of Article 4(1) of the Directive, it is not a merits' review, which would be bad enough, it would be fatal to its adequacy for Article 4(1) purposes, if necessary we say that in any event it is not an appeal on the merits, but it is not even a merits' assessment.

There is then the further point which, as I have said, is a point that is an optional extra, it is not necessary to our case, but we have also submitted that in any event judicial review cannot suffice for Article 4(1) purposes because the judicial review court does not have the appropriate expertise available to it. The Tribunal well remembers that was the other element of Article 4(1) of the Directive. Now, it is plainly true of this Tribunal that it does have the appropriate expertise available to it that is why there are criteria set out in the Enterprise Act, schedule 2, as to who may be appointed President, who may be appointed Chairman, that is tab 4 of vol. 1, p.32, Schedule 2 to the Enterprise Act, para.1 is dealing with appointment as the President, the person appointed, as well as being a qualified lawyer must appear to the Lord Chancellor "to have appropriate experience and knowledge of competition law and practice". (2) A person is not eligible for appointment as a chairman unless again the chairman appears to have "appropriate expertise and knowledge (either of competition law and practice or any other relevant law and practice)", and of course the chairman sits only with persons who are appointed because of their particular expertise and experience relevant to the determination of the issues in this legal context.

THE CHAIRMAN: There was no amendment and these requirements clearly pre-date the conferring on the Tribunal of the jurisdiction under the Communications Act, was there any amendment to these requirements once the CAT had acquired that jurisdiction.

MR. PANNICK: I will be corrected if I have this wrong, my understanding is no, and indeed we say that is helpful to us because it confirms that the understanding was that the Tribunal does by reason of the provisions already in existence enjoy access to the appropriate expertise that is necessary to comply with Article 4(1).

MR. SCOTT: Just for the record one of the statements made by Lord Hope in *Launder*, and it is on p.857 of the Weekly Law Report. He says:

> "It depends in the end upon the exercise of judgment of a kind which lies beyond the expertise of the court."

He is making the same point.

MR. PANNICK: I am very grateful, sir. Can I just catch up with you?

MR. SCOTT: Yes, tab 31, p.899 of the bundle numbering at D.

MR. PANNICK: I am very grateful, indeed. Mr. De La Mare reminds me that of course this is why judges in the Administrative Court repeatedly tell optimistic advocates that they cannot substitute their judgment for that of the relevant decision maker whose decision is being challenged. They say: "I, the judge, do not have the expertise that is available to the regulator."

THE CHAIRMAN: It is not really a matter of the expertise that is available, it is a matter of the appropriateness of the extent of review of decisions taken by the person upon whom Parliament has conferred the duty or the power. You would say, I suppose, that even though, generally speaking, subordinate legislation made under powers conferred on the Secretary of State, say, a standard of review under judicial review, is an appropriate standard having regard to the relative functions of the courts and the person who has made the regulations. But in this case you would say that the Directive indicates that, actually, it is appropriate to go further than that review standard, somewhat unusually one might say, and have a merits review of what is a legislative function, or potentially a legislative function.

MR. PANNICK: I respectfully agree. There are though two points. I do not need to choose between them. They are both, I say, equally valid. One is the institutional or constitutional principle that a judicial review is not a merits review or assessment or appeal. It is quite wrong that judges sitting in the Administrative Court should exercise such a function. It is not what Parliament has asked them to do. They do not do it, and if Parliament wants there to be a merits assessment it says so, "See s.195(2)". That is one argument.

It is supplemented by a further factor which one does find appearing from time to time in the cases, and the example to which Mr. Scott draws our attention is a good one: the judges of the High Court also say to those advocates who are misguided enough to invite them to enter into a merits assessment, "Not merely is it not my job, but I do not have the ability, the expertise, to be able to decide a merits assessment". That is what they say, and *Launder* is an example. There are many others. I do not have to persuade you that that is also correct.

THE CHAIRMAN: The same issue could arise. Suppose one was talking about the efficacy of some drug or the potential side effects, and one was challenging a decision to authorise it, say, then the court would say, "Well, Parliament has granted the power to authorise that on this particular body and they are the experts and we will not enter into it". If then three years later there was a negligence claim by someone saying that they had suffered side effects from this drug then the court would have to get into the merits of it and decide, "Well, what was the efficacy of the drug, were the side effects X or Y, were the side effects caused by the drug?" In those cases the judge could not say, "Sorry, I am not a doctor, I do not know what the effect of the drug is", they would get together the correct evidence and have to make a decision.

MR. PANNICK: In that type of context, of course, the judge would be deciding a particular factual question of negligence that may be one that is more within his or her competence and expertise, "Did someone act consistently with a duty of care?" by reference to all the material

that is adduced. It may be rather different in terms of expertise to take a regulatory decision, but I see the force of the point.

THE CHAIRMAN: I am just exploring what we mean by expertise here.

MR. PANNICK: I see the force of the point. That is why, when I opened the case this morning, I emphasised, I hope properly, that my case does not depend upon persuading you that a judicial review also – also – does not satisfy the access to appropriate expertise element. I certainly do not abandon that point and I do say there is a very real difference between, with respect, the expertise available to this Tribunal and the expertise available as an institutional matter to the High Court. This is no comment on particular High Court judges, some of whom may or may not have expertise and experience in competition law. As an institution, the Administrative Court necessarily lacks the advantage that is enjoyed by this Tribunal. But I repeat, my case is not founded on this point. My primary point is that Article 4(1) at its lowest requires a merits assessment, review, appeal, whatever you call it, and judicial review simply does not provide that, even on a proportionality test. That is my main point.

MR. SCOTT: Mr. Pannick, can you help us on one point. I have in the past sat on a specialist appeal tribunal in Guernsey. It is now decided to merge that jurisdiction into that of the Royal Court and have the Royal Court sit with expert assessors. In your knowledge, because the words are available to it, has the Administrative Court ever had a practice of having court expertise as distinct from relying upon those sitting in the Administrative Court?

MR. PANNICK: Neither Mr. Fordham, whose knowledge of the case law is panoramic, not simply because of his extensive practice but because he is the author of "the book" on judicial review and therefore he reads, poor man, every case that is decided – neither he nor I are aware of a judicial review case in which an Administrative Court judge has sat with an expert assessor alongside, or an expert assisting him.

MR. SCOTT: I say that because, in our experience on the Tribunal, you will have noted that there is a subtle difference between the wording that describes the President and the wording that describes the Chairman.

MR. PANNICK: Yes.

MR. SCOTT: As you will be aware, all judges of the Chancery Division are *ex officio* chairmen in the Tribunal. It has therefore been our experience that we have sat with members of the Chancery Division but, as you rightly point out, they have always sat with members who have experience of sitting on the Tribunal.

MR. PANNICK: To the extent that there might be gaps in the knowledge, experience, expertise of those High Court judges who have sat in this Tribunal, the institutional means of ensuring that

expertise is catered for is to ensure that there are members of the Tribunal who sit with the Chairman in those circumstances. As I say, this is not the main part of my case, it is a point that I do argue, I do maintain there is a real difference, but I prefer to focus my submissions on the point that I have made earlier.

There is another case that I ought just to mention in this Tribunal, because it is focused upon in Ofcom's own skeleton argument. They refer to the *T-Mobile* case, or one of the *T-Mobile* cases, which we find at volume 3 of the authorities, tab 51, the first authority in volume 3. They draw particular attention – again it is a decision of our Chairman, again Mr. Scott was a member of the Tribunal on that occasion – to p.37 of the report. We see at para.80 under the heading, "The test to be applied":

> "Ofcom accepts, as it must, that the Tribunal's jurisdiction in this appeal is to determine the issues 'on the merits' in according with section 192 of the 2003 Act. However, they argue that it wad be inappropriate for the Tribunal to allow complete opening up of the subject matter of the disputes going beyond the confines of the matters that had been raised by the parties in the course Ofcom's investigations of these disputes. Moreover, Ofcom says, the Tribunal should be 'slow to interfere' where errors of appreciation are alleged as opposed to errors of fact or law. The Tribunal notes that its jurisdiction to consider these appeals on the merits is conferred by the statute in order to implement the requirement imposed by Article 4 of the Framework Directive that there should be an effective appeal mechanism against decisions by Ofcom".

We say, 'Yes'. Ofcom presumably say, 'No'.

> "The Tribunal recognises - and this was common ground among the parties - that the s.185 procedure is intended to provide a relatively swift and certain solution to disputes between the participants in this sector".

So, this is a dispute resolution case under s.185. At para. 82,

> "82. It is also common ground that there may, in relation to any particular dispute, be a number of different approaches which Ofcom could reasonably adopt in arriving at its determination. There may well be no single 'right answer' to the dispute. To that extent, the Tribunal may, whilst still conducting a merits review of the decision, be slow to overturn a decision which is arrived at by an appropriate methodology even if the dissatisfied party can suggest other ways of approaching the case which would also have been reasonable and which might have resulted in a resolution more favourable to its cause.

> 83. But the challenges raised by the appellants in these appeals are more fundamental. It was not suggested by Ofcom that the points raised by the parties were points which it had not been asked to consider during the consultation process. The grounds of appeal go far beyond alleging errors of appreciation. This is not, therefore, a case in which the Tribunal needs to explore further the circumstances in which it is, or is not, appropriate to interfere with the exercise by Ofcom of its discretion".

Ofcom rely on that. As I say, we rely on the first sentence in para. 81 which we say is plainly correct. Again, this is very different from a judicial review approach, even on a proportionality test. The observations at para. 82, as we understand them, are based very much on the s.185 context of dispute resolution. In any event, the Tribunal said at para. 83 that this was not a matter it needed to resolve. Mr. Fordham reminds me that in any event at para.82, line 4, the Tribunal emphasises that it is conducting a merits review of the decision. So, all of that is, we say, not helpful to Ofcom, but that is the case they draw to the attention of this Tribunal.

THE CHAIRMAN: There is a point though where we have considered whether the test to be applied on judicial review can be a flexible test - sometimes it is Wednesbury; sometimes it is proportionality; it can involve different standards within the judicial review category. Is merits review the same, or do you say that a review on the merits, as required by Article 4, always has to mean the same thing, or can a review on the merits still have a flexibility as to how much discretion it gives to the decision-maker?

MR. PANNICK: It is no part of my case today to persuade this Tribunal that a merits review/appeal/assessment consistent with Article 4(1) always must involve the same inflexible standard. I do not make that submission. I confine my submission today to arguing that there is a distinction between that merits assessment that Article 4(1) requires and judicial review. I would respectfully invite this Tribunal to leave for another day the identification of what precisely a merits assessment consistent with s.195(2) demands because the answer to that must depend upon the particular context and the particular facts o a particular case. It would be a folly for my submission to try to invite the Tribunal to lay down some absolute rule at this stage. This may be a question that we need to engage with if and when this Tribunal hears the appeal in the present case -- or, it may be a matter that the Tribunal will have to deal with in other cases.

THE CHAIRMAN: The difference between you and Miss Rose is that you would say however flexible either test is, there is still clear water between them.

MR. PANNICK: Precisely.

THE CHAIRMAN: Whereas Ofcom would say that there is very little between them at the two ends of the ----

MR. PANNICK: They have to say - this is their case - that judicial review satisfies the test that is laid down by Article 4(1), because they accept that there has to be a remedy that accords with the Article 4(1) rights. They say it is judicial review I do not wish to diminish the importance of the point, but I only have to persuade you that that is wrong. I am not seeking to take on the burden of persuading you that a 195(2) appeal on the merits means the same thing in every category of case that is within the jurisdiction of this Tribunal. I am, I hope properly, a cautious advocate. There is absolutely no point in trying to persuade the Tribunal to bite off more than it needs to in relation to these matters. One, in my submission, should proceed cautiously, step by step. All we are concerned with today is whether we have the right of appeal to this Tribunal. If we do, then for another day is the question of how precisely that right of appeal should be applied to the facts of our case. The distinction between us, as the Chairman rightly identifies, is whether Article 4(1) can be satisfied, as Miss Rose, submits by judicial review. I have made my submissions as to why that is not so. Ofcom then argue that if we are right - we, the appellants, are right - and judicial review is inadequate, they, Ofcom, say, "Well, let judicial review be expanded. Let it be developed so as to accord with Article 4(1) rights".

We say that is fundamentally wrong. I will turn to that in a moment. It is fundamentally wrong because Parliament has chosen - and there can be no dispute about this - to implement Article 4(1) through this Tribunal and if - which I do not accept - there is some jurisdictional bar imposed by Schedule 8, then the right answer, as a matter of Community law, is to lift that bar not to manipulate some other procedure of judicial review. But, I will come to that, if I may, in a few moments.

Finally, in relation to the Administrative Court, before I come on to this question of construction and how we deal with the issues I just wanted to mention the other point made by Ofcom in their skeleton argument where they say, "We have not particularised specific examples from our notice of appeal of matters that the Administrative Court will not, on our case, be able to address".

Now, we say - and Mr. Fordham makes the same point in his skeleton argument - that that is not the way in which this Tribunal should address the matter. It is not appropriate, with respect, for this Tribunal to go through our notice of appeal and identify what we could argue in the judicial review court. The point of principle is, if we are right on construction of Article 4(1), that we are entitled to a merits' assessment in this Tribunal, and it is nothing to the point

whether or not there are particular complaints which would be justiciable or not justiciable in the Administrative Court, not least because it is a fundamental principle of judicial review, for which no authority, I hope, is necessary, that judicial review does not lie at all if and to the extent there is an alternative statutory remedy. If you have another remedy conferred by parliament you cannot use judicial review, and therefore if this Tribunal does have jurisdiction as we submit, it would not help Miss Rose, even if we could bring some of our complaints by way of judicial review. But in any event if it matters, and I say it does not, if it matters the notice of appeal which you have ----

THE CHAIRMAN: The jurisdiction of the Tribunal must depend on the nature of the decision, not on the grounds of the decision that is challenged.

MR. PANNICK: I would respectfully agree. If it matters, and I say it does not for the reason the Chairman gives, and the reasons I have offered, if it matters, our notice of appeal, which is behind tab 1 of the core bundle, sets out a number of matters which plainly do go to a merits' assessment of the decision. The position that the Tribunal may have seen from a supplementary bundle that has been filed, I am not sure if it has reached you – does the Tribunal have a very slim volume as well, which is a supplementary bundle of documents?

MISS ROSE: We do not have this bundle. May I ask if there is anything else that has been handed up, or is going to be handed up, that it might possibly be given to us.

MR. PANNICK: Well there is nothing surprising, this is the judicial review material that you have, it has been put in a bundle for everybody's convenience. You have it now? Good. Miss Rose will see that what it contains is material that she is very familiar with: T-Mobile's statement of grounds in the judicial review that they have started. Our grounds for supporting their judicial review, and Ofcom's own grounds – detailed grounds – for contesting the judicial review. The reason, of course, why T-Mobile have started a judicial review – Mr. Fordham will say in due course if I have misunderstood it – is that we have to start to judicial review to comply with the very strict time limits of three months to protect the position, so it is a protective judicial review. The reason for mentioning it is that at tab 2 we have intervened in that judicial review, and we have set out a number of grounds as to why we say the decision is subject to judicial review. What those grounds do not contain, so far as we are concerned, is what you find in our notice of appeal to this Tribunal behind tab 1 of the core bundle, at paras. 65 to 78, and 87 to 125, they are grounds of appeal but they are not matters that we thought it was open to us to raise by way of judicial review. The reason for that is that they go to a merits' assessment of the sort that we are told by all the authorities that we cannot have on a judicial review. So if it

matters there are distinctions, very real distinctions between the grounds that we have raised here, and the grounds that we are raising by way of our intervention.

MR. SCOTT: It seems to me you summarised that very neatly in 125:

> "It follows in the light of all the foregoing considerations that even if the Decision had otherwise been within Ofcom's lawful discretion to make, it is the wrong decision and in O2's submission it should be overturned even on the merits alone."

MR. PANNICK: Precisely so. We say that is an entirely appropriate matter to raise before this Tribunal. It would be an entirely inappropriate matter to raise by way of judicial review, the court would simply strike it out without any serious debate.

I turn then to the final part of my submissions which concerns the application of the principles for which I have contended in relation to Article 4(1).

We put our case in two ways, in the alternative. We say first of all we have a right to a merits' appeal under s.192, as a matter of construction of s.192 read with Schedule 8, whether on ordinary construction of those provisions or by reference to the *Marleasing* European Court judgment, that is that you strain – so far as you possibly can – to construe domestic legislation consistently with Community law. So the first argument is construction. Second, or alternatively, even if it were impossible to construe Schedule 8 to give effect to our Article 4(1) right of appeal we would then say that any offending provision of the 2003 Act, that is Schedule 8, para.40, which is what Ofcom rely on would have to be dis-applied; it would have to be dis-applied so that our rights under Article 4(1) can be enforced.

So going back, if I may, to vol. 1 of the authorities bundles, can I deal first with the construction point. At vol.1 tab 5, s.192 – there is no dispute by Ofcom that, subject to Schedule 8 our case does fall within s.192(1).

THE CHAIRMAN: Well, is that right? Do they not make a point that there is not actually a decision here of the kind which is open to challenge. All that there is are preliminaries to the making of the regulations, unless I have misunderstood.

MR. PANNICK: I think, with respect, Chairman, you have because there is nothing that is said by Ofcom that suggests that we are not within the scope of 192(1) read on its own. If one goes to …

MISS ROSE: It may assist Mr. Pannick to clarify, we do indeed say that, as you have rightly picked up from our skeleton argument it is part of our case that even if this were otherwise within 192(1) it would be premature because under 192(8) the decision is not made until the legislation is made.

MR. SCOTT: I find particularly helpful table 10 [at Tab 4/page 360 of the Core Bundle] I think it is, in the document – we call it the "document" rather than the "decision document" – because table 10 tells you what is going to happen. What I found more difficult was the repeated use of the word "decision" in the document, and there does seem to be a marked contrast between the repeated use of the word "decision" in the document and what you find when you reach table 10, which seems to me supports the line that you are taking now that we are looking at what is going to happen (or at the moment not going to happen) against the timetable in table 10 because it is stayed. There is that tension going on in that document.

MISS ROSE: Sir, yes, and indeed I will come back to this when I make my submissions. What that goes to is the different nature of the two types of decision. What you have had so far is that Ofcom has made a policy decision, and what this document amounts to is an announcement, a public announcement, of policy about how it is going to act. That, of course, is why we say it is not a decision that falls within the scope of 192. 192 is talking about a different type of decision, a regulatory act that affects people's rights and obligations.

THE CHAIRMAN: Do you think, Mr. Pannick, you need to deal with that point, which I think must flow from a point, what is Article 4(1) saying that there needs to be an appeal from? Is it every decision that Ofcom can be said to make, or is it a smaller sub-set of that, which decisions which it is empowered to make?

MR. PANNICK: I will certainly deal with that. I will deal with all points that Miss Rose wishes to make. If we look at her skeleton argument ----

THE CHAIRMAN: Where is that – remind me?

MR. PANNICK: You will probably have it separately. I do not see this in any bundle.

MISS ROSE: Madam, the point is made at para.10.2 of our skeleton argument.

MR. PANNICK: That is a different point, that is the Schedule 8 point. Let us go to my friend's skeleton argument and take it in stages. There is no material in this skeleton argument at all which suggests that the Decision does not fall with Article 4(1). If Miss Rose is making that assertion I would be very grateful if she tells me where in her skeleton argument she so suggests.

MISS ROSE: I was making a different point.

MR. PANNICK: I understand that. I am asking whether or not I have correctly understood that there is no suggestion that Article 4(1) does not apply?

MISS ROSE: The point that I was making in response to the Tribunal was that we do say that this is not a Decision that falls within s.192(1), which I think was where we came in, with Mr. Pannick suggesting to the Tribunal that it was common ground between Ofcom and O2 that

this Decision fell within the scope of 192(1) but for the provisions of Schedule 8. I intervened to say that that was not our position. I will explain our position on Article 4 in due course.

MR. PANNICK: I am very grateful. Let me simply make the assertion. There is nothing in the skeleton argument filed by Miss Rose, or indeed in any other document which disputes that the Decisions with which we are here concerned do not fall within Article 4(1) of the Directive. If Miss Rose wants to make argument I will listen very carefully to it and I will respond in due course. At the moment that is the position. There is nothing in the skeleton argument. If I have misunderstood the skeleton argument on that point Miss Rose will say so and I will deal with it, but that is not the case I am answering.

A different point, a second point, is whether or not Ofcom disputes that the Decision in this case falls within s.192 absence reliance on Schedule 8. If we look at the skeleton argument para.4, the headings para.4, question 1, whether the Tribunal has jurisdiction under United Kingdom law:

> "The Tribunal must first consider its jurisdiction a matter of UK law.
>
> 5 In Ofcom's submission, the correct legal analysis is as follows:
>
> 5.1 The Tribunal is a creation of statute …"

- it is established under the 2002 Act -

> "… and may consider appeals only where jurisdiction to do so is conferred upon it by statute.
>
> The only statutory provision relied on in this case as conferring jurisdiction on the Tribunal is s.192 of the 2003 Act.
>
> Under s.192(1)(a) of the 2003 Act, appeals to the Tribunal may only be brought against '*a decision under Parts 1 to 3 … <u>that is not a decision specified in Schedule 8</u>*' (emphasis added)."

So that is the point that is there being made.

Over the page is a reference to para.40 of Schedule 8. At 5.5 there is a further reference to Schedule 8, an argument about it, and I will deal with that in a moment. Then 5.6:

> "The Tribunal's remedial duties and powers are unsuited to such legislative acts."

That is the legislative acts under Schedule 8.

> "Under s.195(3) [etc. etc.]

Paragraph 6 I do not think takes this point any further. Paragraph 7:

> "The Award Decision will be given effect by regulations made under s.17 of the 2006 Act, and is accordingly a specified decision under Schedule 8 of the 2003 Act, against which the Tribunal has no jurisdiction to hear an appeal.

> In an attempt to avoid this conclusion …"

- that is the conclusion that Schedule 8 is applicable -

> "… the appellants purport to identify separate ancillary decisions … These other supposed '*decisions*' are in fact merely a re-characterisation of the particular grounds on which the Award Decision is challenged … But even if they *are* legally and factually distinct (which they are not), they too will be given effect to by regulations made under s.14 …"

- in other words, the Schedule 8 point.

> "The appellants advance various arguments to avoid the purpose and effect of Schedule 8."

Again it is a Schedule 8 point.

Paragraph 10, to which Miss Rose draws attention, is various answers given by Ofcom as to why our attempts to avoid Schedule 8 are not well founded. That is what follows at 10.1 and 10.2 and following. None of this so far even begins to suggest that if Ofcom are wrong in their approach under Schedule 8, nevertheless this is not a case within s.192. There is simply no argument whatsoever to that effect.

Paragraph 5.4 at the top of p.3 identifies the point:

> "Paragraph 40 [says Ofcom] of Schedule 8 specifies, *inter alia*, decisions given effect to by regulations under s.14 of the 2006 Act. Pursuant to s.192, the Tribunal accordingly …"

- that is the word "accordingly" -

> "… has no jurisdiction to consider such appeals."

In other words, because of Schedule 8 there is no jurisdiction under ----

THE CHAIRMAN: It is not because of Schedule 8, Mr. Pannick, it is because the decisions that you are challenging are decisions under s.14. You have not so far got to the point where you are going to identify what provision you say these Decisions are taken under. What Ofcom are saying is that there is no decision here for the purposes of the Act, other than decisions which are part of the process of arriving at the formulation of the regulations and that, just as in any set of regulations, any statutory instrument is the result of months of work by civil servants and ministers taking 101 decisions which then appear or do not appear in the regulations. One cannot say that those pre-existing decisions on the policy which will be given effect to by the regulations are different decisions taken under some different power. The power to make those preliminary, preparatory decisions is the power to make the regulations.

MR. PANNICK: I understand. With respect, I understand that point. That is a Schedule 8 point. If we go to Schedule 8 -- It is very important to be clear. Bear with me, please, Chairman. Let me ask you to look at the 2003 Act, the final page of Tab 5. Schedule 8 begins on p.52 of Tab 5 - 'Decisions not subject to appeal'. If we turn to p.55, at the top of the page, para. 40: "A decision given effect to by regulations under sections ----" One of them is s.14. If we turn back, s.14, we see from p.54 in the middle of the page, of the 2006 Act.

So, therefore, if this is a decision given effect to by regulations under s.14 of the 2006 Act - which I think is what you were putting to me, Chairman - I entirely accept, as a matter of statutory construction, the case does fall within Schedule 8, and therefore - therefore - s.192 does not apply. But, that is a different point to a suggestion that s.192, read on its own, without Schedule 8 is not applicable in the circumstances of this case. That is all I am saying. I am not seeking to avoid difficulties of statutory construction. I am trying to identify what is the point against me. I have read the skeleton argument to you. Miss Rose is perfectly free to make any other points she wants to make - it is not an estoppel argument. However, the point Miss Rose has made so far - and it may be that she recognises it is not a very good point, and she is desperately looking for other points - is that we are covered by para. 40 of Schedule 8 because this is a decision given effect to by regulations under s.14 of the 2006 Act. That is why attached to Ofcom's defence we have the regulations - the draft regulations which they have published. That is a para.40 point. Therefore, I say that if I am able to satisfy you as a matter of statutory construction that para.40 is not applicable in this case, well, then, that is the end of the problem.

MR. SCOTT: Just pausing there for a moment - and no doubt Mr. Fordham will come to this later - we have got two rather differently characterised decisions with which we are dealing.

MR. PANNICK: Sir, you are absolutely right.

MR. SCOTT: One of these, it seems to me, falls within the proposed regulations; the other of which, when one looks at Table 10, is distinguished from the proposed regulations. What we are faced with at the moment is a decision not to have the auction while we are all discussing this. So, are you going to tease that distinction out?

MR. PANNICK: I am going to deal with this point. I apologise, but I have taken some time trying to identify -- It is important that we identify, of course, what it is that has so far been said by Ofcom. I can only deal with the developed argument that we have. The argument so far advanced by Ofcom - and the Tribunal will tell me if I am mis-characterising it - as I understand it - their case is that we have here a decision which is given effect to by regulations which are made under s.14 of the 2006 Act. That is a matter expressly excluded from s.192 by

Schedule 8. However, Ofcom have never, other than that -- It is a very important point, and I need to deal with it. Other than that, Ofcom have never disputed - nor could they - that this is otherwise a case that falls within s.192(1) which simply covers a decision by Ofcom under this part or any of Parts 1 to 3 of the 2006 Act that is not a decision specified in Schedule 8. If we leave out Schedule 8, it is plain and obvious, we say, that when Ofcom decide that they are going to reject the contention that they should wait until they have resolved the other problem before moving to the auction, and when they reject the split auction proposal, they are taking decisions which are within the scope of their powers under Parts 1 to 3 of the 2006 Act. If they were not within their powers, they have no business making the decision. The only question - the important question - is whether it is a decision specified in Schedule 8. So, we go back to Schedule 8 and we see that the question is whether it is a decision given effect to by regulations under s.14 of the 2006 Act.

Now, on construction we say that the decision to hold an auction before - before - the existing allocation issue is resolved, and the decision not to hold a split auction are not - not - for the purposes of para. 40 'decisions given effect to by regulations under s.14'. Of course - and this is how we put it as a matter of construction - the regulations dealing with the auction are consequential on the decisions already taken (that is, the decision, "We will go ahead") and consequential on the decision, "We won't have a split auction" -- So, they are consequential -- the regulations are consequential to those decisions. However, the decisions of which we complain are not decisions given effect to by the regulations. What para. 40 is concerned with is something more. It is concerned, we suggest, with regulations which actually implement the decision of which complaint is made. Now, that is a different matter. The reason for our distinction is that the purpose of Schedule 8 - as you saw from the explanatory notes earlier - is to exclude by Schedule 8 those matters which are in truth legislative decisions that are being set out in the detail of the regulations. The true position here is that having made the impugned decisions - that is, the decisions, "We will go ahead" and, "We won't have a split auction" -- Having made those decisions, which are over and done with - they are decisions in the past - the regulations which Ofcom rely upon - that is, the regulations in draft which are attached to their defence on the preliminary issue, are regulations which give effect to the other parts of the decision with which we are not concerned today - that is, details of the bidding process, the license conditions -- all the other matters ----

THE CHAIRMAN: By 'decision ' there, you mean the award document?

MR. PANNICK: Yes. Yes - the original decision which we have at Tab 4. Yes, the award document.

MR. SCOTT: Mr. Pannick, you took us to Tab 57, which is the draft Communications Bill explanatory notes. It seems to me that in explaining what was then Clause 140 those providing the explanatory notes sought to address something of the situation with which we are dealing at para.259

MR. PANNICK: It is vol. 3, tab 57, para.259.

> "The specified exceptions are set out in [what was then] Schedule 10 and are decisions that do not have immediate effect on a person, but are decisions of a legislative or quasi-legislative nature that require a further decision to be given effect."

Then they have an example:

> "For example, a decision taken by Ofcom relating to the making or revision of a statement of policy on information gathering under clause 104, would not have an immediate effect on any person. It would only be where Ofcom exercised their powers under s.98 to require the provision of information, in accordance with that statement, that there would be a decision that would actually have effect on any person."

Now, I suppose the question in my mind is: how does that example read on to the circumstances before us today?

MR. PANNICK: We say that the decision of which we are complaining, that is the decision that they will once and for all time decide as a matter of principle we are going to go ahead, we are going to reject the contention that you should have no auction at all on this matter, and to reject the split auction option is a decision which has immediate effect. That is the decision of Ofcom that that is their announced policy. It is not an interim decision, or a decision that is going to be given effect in the future by some implementing measure. That is the decision ----

MR. SCOTT: So what you are saying is this is not a matter of general subordinate legislation, this is a matter which has very particular effects on particular persons?

MR. PANNICK: It is a rejection of the submissions made to Ofcom by particular companies as to the way in which it proceeds and nothing – nothing – that is contained in the draft regulations is going to alter that decision. The purpose of the draft regulations are not to go back on or to affect the content of that earlier decision; the purpose of this exemption is to exclude a decision which is going to be the subject of some detailed, quasi-legislative measure that is under assessment for the future. But it is not Ofcom's position that the decisions that we are challenging are other than final determinative decisions, and they are distinct from the detail that follows hereafter as to what the licence conditions are going to be, and all the other detail

that one finds in relation to the auction, or indeed questions of detail as to precisely when one is going to have the auction and what the timetable is going to be. We are not complaining about any of that. We are complaining about a decision that has been taken by Ofcom. Having had a consultation we reject your proposals as to how this matter should proceed. Indeed, if this were a judicial review, which of course it is not, but were it a judicial review it would be unarguable on behalf of Ofcom that this is a decision which is concrete and which can be challenged – it is either lawful or it is not. It would, in my respectful submission be quite bizarre to arrive at the conclusion on Ofcom's case that we have here for the purposes of the Directive a decision which is challengeable under domestic by reference to judicial review principles, that we can put our points, but we are unable, says Ofcom, to put our points in relation to the same decision by reference to the appeal mechanism because, says Ofcom, there are implementing measures that are outstanding. There are no implementing measures, the decision has been taken and Ofcom, we say, are obliged to defend that decision against the challenge that is made against it.

THE CHAIRMAN: Is that a convenient moment?

MR. PANNICK: It is indeed.

THE CHAIRMAN: We will reconvene at 2 o'clock.

(Adjourned for a short time)

THE CHAIRMAN: Mr. Pannick, before you re-commence, can we just have a word about timing, how much longer you think you are going to be, and then how much time is Mr. Fordham going to take?

MR. PANNICK: I have discussed this with Mr. Fordham. He tells me he will need about an hour maximum, and we intended to finish our part of the case today. I hope, subject of course to questions, to take no longer than an hour and a quarter for my submissions, which would mean we would finish by 4.15 today our side of the case. I hope that is satisfactory, given that we have tomorrow for the rest of the case.

THE CHAIRMAN: Miss Rose, do you have any idea how long you are going to take?

MISS ROSE: Madam, I would expect to be about half a day.

THE CHAIRMAN: Good, that sounds excellent.

MR. PANNICK: Thank you. I was dealing with the Schedule 8, s.192 issue. Can I make this submission: we do say – I want to be absolutely clear about this – that the decision of which we complain, that is the decision not to postpone but to go ahead with the auction in its entirety to reject the argument that we should not go ahead at all, should not go ahead at this stage other than on a split basis, we say that decision adversely affects us now immediately, has an

immediate adverse effect on us. That is why I was submitting before the lunch adjournment that if we did bring a judicial review we would plainly be entitled to do so and the response by Ofcom to the judicial review nowhere suggests that this is a premature judicial review. The decision affects us adversely because we are now making financial decisions – indeed, I am instructed we have made financial decisions – as to expenditure, as to investment priorities in the light of the award which we are challenging as to the timing aspects of it. That decision rejecting our contentions has an impact now immediately on our decisions as to whether to make other investments and what expenditure we can afford.

THE CHAIRMAN: Can I just clarify one thing, Mr. Pannick: the relationship between the decision that you are challenging and the decision that T-Mobile are challenging, your challenge is to the rejection of the splitting of the auction idea; but are you also challenging the same sequencing decision that T-Mobile are challenging?

MR. PANNICK: Yes.

THE CHAIRMAN: So you are challenging what they are challenging plus the rejection of the ----

MR. PANNICK: Indeed, can I put it in this way: both of us, that is T-Mobile and us, are complaining about the decision of Ofcom to go ahead now – by which I mean not today but now without any delay – in relation to the auction, notwithstanding the other matter that remains unresolved.

We are also making a specific point that the timing decision was wrong on the merits, and for various other reasons, because there was another alternative – that is the split auction – which was wrongfully rejected. We are complaining about that in the context of complaining about the decision to go ahead now.

THE CHAIRMAN: Thank you.

MR. SCOTT: Just to complete that point, had Ofcom engaged in the split, would your clients then be content with part of the auction going ahead at this stage?

MR. PANNICK: No, we are complaining about the timing decision.

MR. SCOTT: So it remains the case that even if there was a split you would still be complaining?

MR. PANNICK: Yes, it is an additional point.

MR. SCOTT: I understand.

MR. PANNICK: I am sorry, I am misleading you. I am told that our position – and there is a distinction here between us and T-Mobile – is that if Ofcom had said to us "split auction now", then we would accept that.

THE CHAIRMAN: The reason why you do not want the part of the auction to go ahead which you think should be split off is the same reasoning as the sequencing decision because of the outstanding uncertainty ----

MR. PANNICK: Precisely so. So we are both complaining about timing. We have different aspects of the same decision that we are complaining about. So what we have here, just to complete this point, is an administrative decision on a once and for all basis which we are complaining about. It has an immediate effect on us. It is not a *quasi* legislative matter that is going to be implemented in the future by regulations. It is a once and for all decision to go ahead now. The Draft Regulations which are drawn to the Tribunal's attention by Ofcom can be found tab 3 ----

THE CHAIRMAN: The phrase "immediate effect", remind me where that comes from?

MR. PANNICK: It comes only from the Explanatory Notes. The question was put to me, quite properly of course, by Mr. Scott, who said to me, are we within the reasoning that was offered by the DTI and in the Explanatory Notes. I think, sir, you drew my attention to the Explanatory Notes at the draft stage.

MR. SCOTT: I think they are reflected in the subsequent Explanatory Notes.

MR. PANNICK: Indeed. There is nothing in s.192 that uses that language, nothing in Article 4 that uses that language, but in so far as it is being put to me, might be said against us this is not a decision that has immediate effect, it may have some effect in the future, I say, no, that is simply not the case and obviously not the case.

MR. SCOTT: I think the Continental background to this has been the question whether somebody who is not an addressee of a regulatory decision had any *locus* before any bodies on the Continent.

MR. PANNICK: It is *Tele 2*, is it not? [Case C-426/05 *Telecommunication GmbH v Telekom-Control-Kommission,* Authorities Bundle Tab 21].

MR. SCOTT: Yes.

MR. PANNICK: The broad approach that is adopted by the European court to that issue, we say equally a broad approach on this issue. We are a consultee, we are someone who is inevitably going to be affected as someone who holds existing licences. We have a very real and obvious immediate interest in the decision. It has inevitably so, predictably so, a very real direct, immediate financial impact on us. There is nothing in the Draft Regulations which deals with this issue. They are dealing in terms of timing with the mechanics of the dates by which particular steps must be taken once the auction process starts. That is what the Draft

Regulations are concerned with. They are not concerned with this anterior and separate issue of whether to go ahead at all.

That is why we say if one takes a pure domestic approach to construction we invite you to conclude that these Regulations do not give effect to the decision about which we are complaining. That is simply not the case. We say that even if that submission were not to find favour as a matter of ordinary statutory construction, the *Marleasing* approach requires a more flexible attitude to interpretation to ensure consistency with Article 4(1).

THE CHAIRMAN: Is that what you are moving to?

MR. PANNICK: Yes, subject to questions of course.

THE CHAIRMAN: I do need to press you, I think, as to what power you say the decision you are questioning is taken under, if it is not s.14 of the 2006 Act?

MR. PANNICK: It is a decision taken ----

THE CHAIRMAN: Just looking at your pleaded case for the moment, in para.4 of your notice of appeal the decision which you have defined as the decision to reject the possibility of proceeding with the award by way of split auction you say is taken under ss.3 and 4 of the Communications Act and Parts 1 to 3 of the Wireless Telegraphy Act, in particular s.3. I am not sure whether later on you still maintain the reference to the 2003 Act or whether you were pinning your colours rather more to the 2006 Act.

MR. PANNICK: We are relying in particular in the 2003 Act, which is tab 5 of volume 1, on s.1(3):

> "Ofcom may do anything which appears to them to be incidental or conducive to the carrying out of their functions, including borrowing money."

It must follow, we say, from the power which Ofcom has to grant licences pursuant to the 2006 Act that it can take incidental decisions which are relevant to the exercise of that power. It is quite plain here that what Ofcom has done is to address the question of whether it is, or is not, appropriate now to go ahead with an auction, notwithstanding the existing question that is yet to be determined.

THE CHAIRMAN: Mr. de la Mare is trying to attract your attention.

MR. PANNICK: (After a pause): That is the position. They are acting pursuant to incidental powers in s.1(3) of the 2003 Act.

THE CHAIRMAN: That is not one of the sections that you mention in para. 4.

MR. PANNICK: No, indeed not, but you are asking me the question, and that is the answer I am giving you. S.1(3) confers an incidental power. Read with s.1(1) -- They have functions under 1(1). The functions include (b),

"Such other functions as may be conferred on Ofcom by or under any enactment, including this Act".

That plainly includes the 2006 Act. They then have power, we agree, under the 2006 Act to issue licenses. The power pursuant to which they are issuing licenses is indeed s.14 of the 2006 Act.

MR. SCOTT: Can we clear up one small point? Mr. de la Mare mentioned 2006 1(1)(b).

MR. PANNICK: It is the 2003 Act.

THE CHAIRMAN: Perhaps we should go to these provisions, just to make sure we are all referring to the same thing?

MR. PANNICK: Tab 5 of Volume 1. Section 1, 'Functions of Ofcom'.

"Ofcom shall have the following functions . . . (b) such other functions as may be conferred on Ofcom by or under any enactment (including this Act)".

That plainly includes the 2006 Act. S.1(3),

"Ofcom may do anything which appears to them to be incidental or conducive to the carrying out of their functions, including borrow money".

So, that is the position. What they are doing here is that they are performing a function -- they are doing something which is incidental to the exercise of powers under the 2006 Act, which is Tab 6. The 2006 Act gives them a number of powers, particularly in Part 2, one of which is s.14 powers, which is the power to issue licenses.

THE CHAIRMAN: So, looking at s.1(3) of the 2003 Act is it your case then that the decision that you challenge is something that was done under s.1(3) as being incidental or conducive to the carrying out of their function under s.14 of the 2006 Act?

MR. PANNICK: We would prefer to put it on the basis that it is pursuant to s.14 of the 2006 Act, which must include a power to do something incidental or conducive. It may not matter which way round one puts it, but the two are to be read together. But, yes, the answer is ----

THE CHAIRMAN: I am sorry. I do not understand that. Are you saying that the decision might be a decision under s.14, but it is not a decision which is given effect to under regulation under s.14?

MR. PANNICK: Yes. It is incidental to or conducive to the s.14 function or power. Yes. That is how it works. They have a power under s.14 to issue regulations for the purposes of deciding how they are going to allocate licenses.

THE CHAIRMAN: I see. It is a different part of s.14, you mean. Let us have a look at s.14 ----

MR. SCOTT: I think we probably have to read in from a bit before, because s.14 comes up once you have gone through s.12. Presumably there is a choice between going into s.14 or not going into s.14. Not all spectrum, as I understand it, has been dealt with under s.14.

MR. PANNICK: S.12 charges for the grant of licenses. We see the position in relation to that. S.13 - matters to be taken into account. S.14 - bidding for licenses. It is implicit in all of this -- It cannot be in dispute that Ofcom possesses a power t grant licenses for spectrum. It also, we say, cannot be in dispute that when Ofcom issued its consultation papers, and when it considered what to do in relation to the question of whether now to proceed to hold an auction, it was acting within the scope of its lawful powers. No-one could seriously suggest -----

THE CHAIRMAN: No. No-one is suggesting that they are not. What we are trying to pinpoint is what your case is as to what powers they are exercising. As I understand it at the moment you are saying that it was a power which is part of s.14 that is still outside Schedule 8 exemptions because it is not a decision given effect to by regulations under s.14, or it is the power under s.1(3) of the 2003 Act to do something that is incidental or conducive to the exercise of the powers under s.14 -- Those are the two ways in which you put your case.

MR. PANNICK: There is a third way because we are also relying on s.3 of the 2006 Act which sets out the duties of Ofcom when carrying out their functions. There are a number of factors that Ofcom are required to exercise in carrying out their functions. That is plainly relevant as well to the exercise that Ofcom is conducting.

Now, we say that in conducting the exercise that led to the decisions which we are challenging, plainly Ofcom at that stage was not providing anything by regulations. It was not the exercise of adopting, implementing regulations. It was something that is incidental to the license allocation process that would follow thereafter. We say that given that plainly no-one can dispute Ofcom had power so to act, "Where does one find that power?". That is the Chairman's question to me. The answer to the Chairman's question is that one finds the power to act in that way and take that decision ----

SUE FOLLOWS @ 2.20

… discretion is one finds the power to act in that way and take that decision in s.14 read with the power to make incidental decisions to do what is incidental or conducive, together with also s.3 of the 2006 Act, which deals with the duties of Ofcom when carrying out its functions. What matters for present purposes is that none of that concerns giving effect to a decision for the purposes of para.40 of schedule 8 to the 2003 Act.

MR. SCOTT: So effectively what you are saying is that s.14 is fairly focused in its scope, it is dealing not with the decision on which spectrum you are choosing to allocate, and as we have seen that is a matter which has been disposed of by Europe in any event. So what you are saying to us is that s.14 is quite narrow, and therefore these decisions must be being taken under some other provision and hence you are ----

MR. PANNICK: They must be. The earlier timing decisions are not matters that fall easily or at all within s.14 but it is implicit in the 2006 Act, and if one needs express guidance one finds it in s.1(3) of the 2003 Act, that Ofcom has this incidental power to decide how it is going to proceed, in terms of what it is going to do in the future by the regulations it adopts.

MR. SCOTT: Presumably within the European framework which, as I recall, flows from the radio spectrum decision, and then down to the sub-decisions, what you are saying is that certain matters are left to local discretion and that you would expect that discretion to be exercised when you get to s.14 by local regulations which are distinct from what is happening at a higher level.

MR. PANNICK: Yes, certainly local regulations are required in order to implement matters that have already been decided. We are seeking to distinguish for the purposes of para.40 of Schedule 8 between the content of the regulations and a matter which the draft regulations do not address. They do not address the timing decision by reference to the other policy decision that we are also exercised about. That is simply not the subject of the detailed regulations which we have in draft. Indeed, one can see that by reference to the fact that Ofcom have decided in the light of the challenges to the timing decision that they are going to put off – understandably – they are going to put off the auction that they have decided to go ahead. The draft regulations do not stop them from doing that because the draft regulations do not address the question of when should the auction process start. They are concerned with other matters than that. That is how I put it in answer to the Chairman's question.

So we say that is all a matter of ordinary interpretation of the domestic law, a decision given effect to by regulations under s.14. That is not our case, therefore we say para.40 of Schedule 8 does not apply.

Our second approach to this question is the *Marleasing* approach that, in any event, the Tribunal is obliged, we respectfully submit to seek to construe the domestic material, so far as it possibly can, consistently with Article 4(1). *Marleasing* is vol.1, tab 11, and the relevant passage is at 4159 of the report, and the relevant page in the bundle is 202. At the top of the page the third line is, in fact, para.8 of the ECJ's judgment, and they refer to *Von Colson*, and they say in the final sentence in that first main paragraph on p.202:

"It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty."

So if it is possible to do so then the Tribunal is obliged to construe para. 40 of Schedule 8, read with s.192 so as to implement properly Article 4(1). We entirely accept the point made by Ofcom that there comes a point at which it is not possible to do so, but we say for all the reasons we have given, if we were otherwise wrong on statutory construction it is certainly possible to arrive at our construction without doing violence to the language of the domestic legislation.

The third approach is that if we are right on Article 4(1) and it does require a merits assessment, and if Ofcom were correct that s.192 read with Schedule 8 prevents that, because there is this exclusion of matters covered by regulations under s.14 of the 2006 Act, our position then is that the Tribunal would be required to exclude the offending bit of the domestic legislation, which would be the part of Schedule 8 that stands in the way of this Tribunal having jurisdiction, and that is because we say there is a principle of law recognised both here and in Luxembourg, that where Parliament has chosen a particular Tribunal to hear a particular type of dispute, and has done so pursuant to EU law, then the Tribunal must dis-apply any jurisdictional limit that is imposed by the domestic statute which is inconsistent with EU law even where the Tribunal does not have any inherent jurisdiction.

Can I show the Tribunal the cases to that effect.

THE CHAIRMAN: Can I just ask you, and if you are coming on this later do not let me take you out of your order, but it would be useful I think to focus on how much of Schedule 8, para.40 you say is actually inconsistent with Article 4(1) of the Directive because it is clear that Parliament has intended some decisions of Ofcom to go to judicial review rather than be heard on the merits on this Tribunal, and it would be useful I think to know whether you say that all decisions which are decisions taken flowing from the obligations under the regulatory framework are decisions which must be appealed on the merits ----

MR. PANNICK: Yes.

THE CHAIRMAN: -- or whether you accept that there are some decisions for which judicial review is an appropriate and legitimate avenue for appeal.

MR. PANNICK: Can I come to that? I will come to that, but can I first of all show the Tribunal the authorities?. The first of them is the *EOC* case, which is to be found in volume 2, tab 28. It is

the House of Lords in relation to part-time workers and sex discrimination. If we go to p.23, Lord Keith of Kinkel's speech for the House at 23D tells us what the case is about:

> "What is in issue is those provisions of the [1978 Act] which set out the conditions which govern the right not to be unfairly dismissed, the right to compensation for unfair dismissal and the right to statutory redundancy pay. These conditions require that an employee should have worked a specified number of hours a week … In general, the qualifying periods [are] …"

- and then they are set out, 16 or more hours a week, five years, etc, etc. We see that the complaint was that this had an adverse impact on women and therefore it was indirectly discriminatory and that was the content of this judicial review.

If we turn then to p.24H, the final paragraph on the page, Lord Keith tells us:

> "The principal issue of substance raised by the proceedings is whether the indirect discrimination against the women involved … has been shown to be based upon objectively justified grounds …"

At the top of p.25:

> "A number of procedural points were, however, argued in the courts below and before this House.
>
> It is convenient first to consider whether Mrs. Day is properly joined in the present proceedings against the Secretary of State. Redundancy pay is 'pay' … If the discriminatory measures … are not objectively justified, Mrs. Day has a good claim for redundancy pay against her employers … which by virtue of [the European Communities Act] prevails over the discriminatory provisions of the [Employment Act]. She would also have a good claim under the [Directives] which are directly applicable. Mrs. Day's claim against her employers is a private law claim, and indeed she has already started proceedings to enforce it in the appropriate industrial tribunal, these having been adjourned … The industrial tribunal has jurisdiction to decide questions as to objective justification for discriminatory measures, and has done so on many occasions … I can see no good reason why a purely private law claim should be advanced in the Divisional Court against the Secretary of State, who is not the claimant's employer and is not liable to meet the claim, if sound. The determination of such claims has been entrusted by statute to the industrial tribunal, which is fully competent to deal with them. It is suggested that different industrial tribunals might reach different decisions …"

His Lordship concludes:

"… that the Divisional Court was not the appropriate forum to adjudicate upon what so far as Mrs. Day is concerned is her private law claim …"

In other words, that the provisions of the legislation must be dis-applied by the industrial tribunal in order to deal with the claim for redundancy pay.

THE CHAIRMAN: What had happened procedurally then? Mrs. Day had started her claim in the industrial tribunal and then that had been adjourned and judicial review proceedings were started?

MR. PANNICK: What had happened was that the EOC had written to the Secretary of State challenging whether or not the legislation was compatible with Community law. They had started a judicial review and Mrs. Day had joined in the judicial review proceedings. So the first procedural point is whether or not the courts should entertain not only the judicial review brought by the EOC, but should also entertain and grant relief to Mrs. Day who had an industrial tribunal claim as well. What is being said is, "No, Mrs. Day, your case can be dealt with in the industrial tribunal", and it is implicit in that, necessarily implicit, that Lord Keith regards the industrial tribunal as having the power, if the statutory provisions with inconsistent with Community law, to dis-apply them. Indeed, that was the submission that was made to the House of Lords by the Secretary of State, as we see at pp.11-12. We see at the bottom of p.10 that it was Mr. Beloff and Mr. Richards appearing for the Secretary of State. At 11F their submission was that there were three valid and subsisting methods of challenging the compatibility of domestic legislation with Community law and alleged failures by the UK to comply with its Community obligations. Individuals enjoying directly effective rights can enforce those rights in the appropriate court or Tribunal which must dis-apply the domestic legislation if and in so far as it is inconsistent with those rights. They say:

"One cannot disapply legislation except at the suit of a person with directly effective rights."

Then over the page at 12 just above C, Mrs. Day enjoys directly effective rights, they are private rights, she can claim whatever entitlement is conferred on her. Her appropriate course is to make such a claim against her employer, since it is against the employer that any such entitlement exists. Her claim arises out of the employment relationship. The appropriate forum is the tribunal, where indeed she has already commenced proceedings:

"The industrial tribunal has jurisdiction to consider her claim and to disapply any provisions of national law that stand in her way, such as the qualifying conditions here in issue."

That is what Lord Keith is accepting.

The second case is *Barber*, which is tab 30. In this case – I will return to the facts in a moment if I may, but can I just show the principle in the judgment of Lord Justice Neill for the Court of Appeal. Can we go to p.395B of the report Lord Justice Neill says:

> "I believe the true position to be as was explained by Mummery J. in his valuable judgment in *Biggs* [in the Employment Appeal Tribunal] where he summarised the position as follows:
>
> 'The industrial tribunal has no inherent jurisdiction. Its statutory jurisdiction is confined to complaints that may be made to it under specific statutes …"

And he lists them.

> *'"We are not able to identify the legal source of any jurisdiction in the Tribunal to hear and determine disputes about Community law generally. In the exercise of its jurisdiction the tribunal may apply Community law. The application of Community law may have the effect of displacing provisions in domestic law statutes which preclude a remedy claimed by the applicant. In the present case the remedy claimed by applicant is unfair dismissal. That is a right conferred on an employee by the Act of 1978 and earlier legislation. If a particular applicant finds that the Act contains a barriers which prevents the claim from succeeding but that barrier is incompatible with Community law, it [the barrier] is displaced in consequence of superior and directly effective Community rights. (c) In applying Community law the tribunal is not assuming or exercising jurisdiction in relation to a 'free-standing' Community right *separate* from rights under domestic law. In our view, some confusion is inherent in or caused by the mesmeric metaphor. 'free-standing.' 'Free-standing' means not supported by a structural framework, not attached or connected to another structure. This is not a correct description of the claim asserted by the applicant. She is not complaining of an infringement of a 'free-standing right' in the sense of an independent right of action created by Community law, unsupported by any legal framework or not attached or connected to any other legal structure. Her claim is within the structural framework of the employment protection legislation, subject to the dis-application of the threshold qualifying provisions in accordance with the EOC case'".

So, I will continue in a moment. But, that principle, we say, is very clear indeed - that if you have a Tribunal that is given jurisdiction by Parliament in a particular area, which area is affected by Community law, and if within that structure there is a limitation on the jurisdiction

of the Tribunal, which limitation is itself inconsistent with Community law, then that Tribunal must dis-apply that limitation.

THE CHAIRMAN: So, the case here then is different. Suppose that the Communications Act had not actually conferred any jurisdiction on this Tribunal and had simply provided everything to go by way of judicial review. You would say that that would be an even bigger breach of Article 4 because they are not providing a review on the merits, but because the CAT is not brought into the picture at all, you would not claim that your clients had a directly effective right to come here for their appeal.

MR. PANNICK: No. Precisely so, Chairman. That would be a breach of Community law, but it would not be the business, with respect, of this Tribunal. What makes it the business of this Tribunal is that Parliament has decided to confer plainly an extensive jurisdiction on this Tribunal - indeed, a jurisdiction deliberately designed to implement Article 4(1). If, on the proper construction of the provisions, you find that it has not gone far enough, and it has not gone far enough and it has conferred a jurisdiction which has a limitation, which limitation is in breach of Community law, then it is your task, we respectfully submit, to dis-apply the limitation -- the barrier as Mr. Justice Mummery calls it in his approach -- his analysis as approved by Lord Justice Neil in the Court of Appeal.

Now, *Staffordshire* was a case where the barrier of which Mrs. Barber was complaining was not a barrier in breach of Community law. So, she did not succeed. If we go back to p.391 of this law report we see at C at the beginning of Lord Justice Neil's judgment that he refers to the part-time workers' case - the equal opportunities case:

> "On 3rd May 1994 Mrs. Barber instituted the present proceedings against Staffordshire County Council seeking redundancy payments and awards of compensation for unfair dismissal. The claims were based on the termination of her contracts of part-time employment whereby Mrs. Barber was previously employed as a teacher".

Then, at G, we are told,

> "At the time of her dismissal she was required to work there for three hours a week".

So, plainly under the legislation as it was, she was excluded. Following her dismissal in August 1992 she sought legal advice from her trade union. At H we see that in November 1992 she presented an application to the industrial Tribunal. She was only claiming for redundancy at that stage. Over the page, there was then a hearing, but, as we see at B, there were discussions between her and her former employers as a result of which Mrs. Barber stated she would withdraw her claim. Then there is a bit of detail, and at letter E,

> "The hearing on 5th May 1993 was before a chairman and two lay members. No evidence was heard. It is clear, however, that the Tribunal reached a decision which was signed and recorded".

Then, at F, "As I have already mentioned, following the decision in the *EOC* case", she tried to start again.

She wanted to have her case heard again. The Council were arguing *res judicata*. "You have had your opportunity. You are too late". That is what Lord Justice Neil is considering in this case: could she dis-apply the principle of *res judicata*? Lord Justice Neil has stated the principle by reference to Mr. Justice Mummery in the passage I read. If we go to p.395G what follows the passage I read, Lord Justice Neil says,

> "Article 119 can be relied upon to dis-apply barriers to a claim which are incompatible with Community law. The statutory conditions which have to be satisfied before compensation can be obtained can therefore be dis-applied if they are discriminated contrary to Community law".

Then there is a reference to Emmott. He says,

> "As I understand the matter, the impact of Community law on claims brought before industrial tribunals is that Community law can be used to remove or circumvent barriers against, or restrictions on a claim, but Community law does not create rights of action which have an existence apart from domestic law".

He says, "We are not concerned with Francovich". Just under B, "I turn therefore to the question of estoppel". Then he deals with her argument, and he says at F that he can deal at once with the third argument:

> "I have already considered whether Mrs. Barber has any separate causes of action under Community law and have decided she has not. In these circumstances, as it seems to me, her argument is bound to fail [that is, the argument at F]. Her claims under Community law were not barred by any principle of *res judicata* or estoppel because such principles did not apply to Community claims".

So, her problem was that she could not show that the *res judicata* principle was in any way a breach of her Community law rights. That is why she failed in the circumstances of her particular case. But, the principle is the principle at p.395B to G. There is a further authority which repeats the principle stated by Lord Justice Neil by reference to Mr. Justice Mummery. That is the *Manson* case which is at Tab 45. We see from the headnote what the context was: the claimant was a major in the Territorial Army. He was bringing a claim against the Ministry in an employment tribunal under the part-time workers' regulations. He was

contending that the denial of his right to a pension infringed a particular regulation. An employment tribunal found that his right as a part-time worker not to be treated less favourably than full-time personnel was excluded by a particular regulation for various reasons.

> "The Tribunal refused to consider a submission by the claimant that the regulations were ultra vires because of the exclusion of members of the reserve forces on the ground that the issue had been raised too late. The claimant commenced judicial review proceedings contending that the regulations were incompatible with the directive which they were intended to implement. The judge dismissed the claim for judicial review on the ground that the claimant was seeking to assert a private law claim against his employer, and that by virtue of regulation 8 of the regulations the employment tribunal was the appropriate forum for consideration of all rights asserted under the Regulations and the Directive.
>
> On appeal by the claimant on the ground that the employment tribunal had no jurisdiction to hear his claim because regulation 13(2) put it outwith the Regulations, so that that Tribunal was unable to consider whether the provision should be dis-applied because of a conflict with Community law ----"

Just breaking off there -- You understand here that the claimant was saying, "I am entitled to bring a judicial review". It had been held against him, "You cannot because your complaint should properly be heard in the Tribunal". He, the claimant, is saying, "Well, I can't have it heard in the Tribunal because there is a regulation which excludes me", to which the answer was, "Well, if you're right on Community law, then that domestic regulation must be dis-applied by the Tribunal". So, that is the context.

> "Held, dismissing the appeal, that regulation 13(2) ... did not purport to dis-apply the Regulations entirely in the case of service as a member of the reserve forces, but only in so far as that service consisted in undertaking certain types of training obligations; that under regulation 8(1) the employment tribunal had jurisdiction over complaints that an employer had infringed a part-time worker's right not to be treated less favourably than a comparable full-time worker, and that jurisdiction included jurisdiction to disapply a restriction on that right in domestic law if the restriction was incompatible with Community law; that the claimant's claim was not based on any freestanding right based only on Community law but on a right recognised in domestic law which was subject to a restriction embodied in that law; and that, accordingly, it was open to the employment tribunal to decide whether or not that restriction should be disapplied because of Community law..."

THE CHAIRMAN: So it was, in fact, a private law claim that he was wrongly trying to assert in judicial review proceedings?

MR. PANNICK: Yes, he was trying to bring a judicial review, the Court of Appeal agreeing with the High Court Judge said: "Bring your claim in the Tribunal which will dis-apply the relevant regulation if and to the extent that it is inconsistent with Community law, which is your case." If we go to the judgment of Lord Justice Keene for the Court of Appeal at p.363 of the law Report and I can pick it up there – I do not need all the detail of this, it is just the reasoning that matters. Paragraph 19, we are told "crystal clear that, when Mr. Justice Mummery" – that is the *Biggs* case approved by Lord Justice Neal – when Mr. Justice Mummery was dealing with the limits on the Tribunal's jurisdiction he was concerned to emphasise that claims based on freestanding rights derived from EC law could not be entertained by the Tribunal. He was not referring to the ability of such a Tribunal to dis-apply a restriction or exclusion found in domestic law on a claim based on a domestic law right if the restriction or exclusion was found to be incompatible with Community law. As his reference to the weekly hours restriction shows he regarded the Tribunal as having jurisdiction to dis-apply that if that was necessary", and I do not think I need paras. 20 or 21, which are already covered by the headnote. Paragraph 22:

> "The reality is that employment tribunals are given by statute jurisdiction over complaints that an employer has infringed a part-time worker's right not to be treated less favourably than a comparable full-time worker. That is the effect of regulation 8(1). In the same way, in *Biggs* the Tribunal had jurisdiction over claims for unfair dismissal. In both situations the tribunal has, in my judgment, jurisdiction to disapply a restriction in domestic law on the right relied on if that restriction is incompatible with Community law. The complainant in the present case was not making a claim based on a 'freestanding' right founded only in Community law. His claim was based on a right recognised in domestic law but subject to a restriction embodied in domestic law. It was open to the tribunal to decide whether or not that restriction should be disapplied because of Community law.
>
> 23 Indeed, in my judgment, no other course of action was open to it. Community law is part of the law of this country."

So that is the principle, and we say it is a very clear principle, and it plainly applies here. The 2003 Act, s.192 is a domestic law right. I have made submissions to the contrary but if Ofcom were to be correct that the proper interpretation of s.192 read with Schedule 8 is that it contains a "restriction" (that is the word used in *Manson*) on this Tribunal's jurisdiction and if, as we

have submitted, that restriction is inconsistent with Community law – Article 4(1) – then this Tribunal is obliged to dis-apply that restriction. There is no question here of us contending for free-standing Community law rights.

MR. SCOTT: Just to be clear about this, the pre-supposition behind that is presumably that we find that Article 4(1) could not be effectively exercised by the Administrative Court?

MR. PANNICK: Yes.

THE CHAIRMAN: It seems to me very difficult to escape the conclusion that it depends how you describe the jurisdiction of the Tribunal as to whether you classify a carve-out as being a restriction on the jurisdiction or as just meaning they do not have jurisdiction over that part of whatever you are doing. For example in *Manson* they say that the Employment Tribunal is given by statute jurisdiction over complaints that an employer has infringed a part-time worker's right not to be treated less favourably. Presumably those arguing against what the Court of Appeal held would say that the jurisdiction it has is a jurisdiction over complaints that an employer has infringed a part-time worker's right not to be treated less favourably and then some added-on words which encompassed the exception so that they would treat it as the limitation of the jurisdiction.

Now, apart from just applying a sense of whether something is a restriction on jurisdiction or carving out jurisdiction so that there is no jurisdiction, is there any other yardstick one can apply to decide which side of the line you fall on?

MR. PANNICK: These authorities suggest an expansive approach. They suggest that the principle is that you ask whether in general terms the Tribunal has been conferred by Parliament with (a) jurisdiction that addresses the general obligations of the United Kingdom in the relevant area, and if that is the case any limitation on the role of that Tribunal contained in domestic legislation which is inconsistent with Community law is struck down.

I entirely accept there may be difficult cases at the margins but I do say this is not one of them. It is quite plain we say here that this Tribunal has been given this role and we are concerned, if my friend is right, in her construction of Schedule 8 and the interrelationship with s.14 of the 2006 Act, we are concerned plainly with a case where Parliament has established a limitation which, if it is inconsistent with Community law, this Tribunal is the right body to remove on all the authorities, but I recognise the difficulty as to principle as to where one draws the line.

MR. SCOTT: If one follows that through in the energy field, if we were faced with a similar provision in an energy Directive, the fact that we deal with appeals from the Energy regulator on competition matters would not, I take it, mean that we could then say that we should have

jurisdiction under an equivalent provision in an energy Directive because there is nothing in the energy national legislation that brings appeals before us under regulatory law.

MR. PANNICK: Precisely so. That would be wrongly to rely upon a free-standing Community law right. The power or our case, we suggest, on this point is that this Tribunal is not only given the general jurisdiction it is intended to be given the general jurisdiction of complying, being the means by which the United Kingdom complies with the Article 4(1) obligations, so this is not a difficult case. The same point is made in the ECJ jurisprudence, if I could also ask you to look, please at vol 1, tab 18. This the *Connect Austria* case that we looked at just for the reference to Article 5a(3) of the predecessor Directive. It is a case about the predecessor Directive. We can see the context at p.477 of the bundle, para.10. This is the opinion of the Advocate General:

> "The Telekom-Control-Kommission has been designated as the national regulatory authority.
>
> 11 An appeal against a decision of [that regulatory authority] can be made to the… Federal Constitutional Court … The power of review of the [Federal Constitutional Court] is limited. That Court examines only whether there has been an infringement of a constitutionally guaranteed right or an infringement of a right by reason of the application of an unlawful regulation, an unlawful statute or an unlawful State treaty or convention.
>
> 12 Austrian law as applicable to the main proceedings does not provide for an appeal on grounds other than those listed. Matters on which the [Regulatory Authority] has taken decisions are excluded under Austrian law, from the jurisdiction of the [Federal Administrative Court] …"

Then over the page, the national legislation has since been amended.

So the Tribunal sees the position. You had a right of appeal, but only to a body with very limited powers, and the question was whether or not that was consistent with Article 5a(3) which we have on p.498 – we are now into the judgment of the court – para.12. The court deals with this at p.504, where we see the question that is put by the Federal Administrative Court. They are asking the question at 504:

> "On a proper construction of … the Directive as amended … does that provision have direct effect so as to override a contrary domestic rule of jurisdiction and establish the jurisdiction of a particular 'independent body' at national level to implement a 'suitable mechanism' for dealing with an appeal brought by an aggrieved party against a decision taken by the national regulatory authority."

If we then go to para.37 on p.507, we are told that it is clear that when the Constitutional Court referred the appeal to the Administrative Court, 5a(3) had not been implemented in Austrian law:

> "As the Constitutional Court rightly observed, and contrary to what the Austrian Government claims, a right of appeal such as that available before the [Constitutional Court], limited to cases where the applicant claims to have been injured by the infringement of a constitutionally guaranteed right or by the application of an unlawful regulation … cannot be said to constitute a suitable mechanism … and therefore does not comply with the requirements of that article."

So there is a breach. The question arises then, "What do you do about it?" Over the page at p.508, para.40:

> "Where application of national law in accordance with the requirements of [the Directive' is not particular, the national court must fully apply Community law and protect the rights conferred thereunder on individuals, if necessarily disapplying any provision in the measure the application of which would, in the circumstances of the case, lead to a result contrary to that directive, whereas national law would comply if that provision was not applied.
>
> It follows that a national court or tribunal which satisfies the requirements of Article 5a(3) and which would be competent to hear appeals against the decisions of the national regulating authorities if it was not prevented from doing so by a provision of national law which explicitly excluded its competence … has the obligation to disapply that provision.
>
> Therefore, the answer to the first question … is that to ensure that national law is interpreted in compliance with the Directive and that the rights of individuals are effectively protected, national courts must determine whether the relevant provisions of their national law provide individuals with a right of appeal against decisions of the national regulatory authority which satisfies the criteria laid down in Article 5a(3) …
>
> If national law cannot be applied so as to comply with the requirements of [the Article] a national court or tribunal which satisfies those requirements …"

- that is that it is a court of law or a tribunal -

> "… and which would be competent to hear appeals against decisions of the national regulatory authority if it was not prevented from doing so by a provision of national law which explicitly excluded its competence, such as that at issue in the main proceedings, has the obligation to disapply that provision."

That is very similar to the national cases that I have shown you. Again, we say it plainly applies in the circumstances of this case.

So if, contrary to our submissions, this Tribunal finds itself in the position that it cannot by construction, either normal construction or a *Marleasing* construction, arrive at the results that our Article 4(1) rights are vindicated before this Tribunal, given that judicial review, we say, is not good enough, then you should, with respect you are obliged to, dis-apply which provision of national law stands in the way of our Article 4(1) rights being vindicated.

The question then was put to me by the Chairman, "Well, how much of the national provisions is it necessary to dis-apply?" Of course, our primary answer is that under our earlier submissions none of it needs to be dis-applied, it can simply be construed that if and to the extent that there is a problem, the problem only arises, we say, by reason of Schedule 8 in volume 1, tab 5 – this is the 2003 Act. Our problem on construction, if problem it be, is caused by para.40 at the end of tab 5, a decision given effect to by regulations under – and here it would be s.14 of the 2006 Act. If and to the extent that it is necessary to do so, this Tribunal would be dis-applying para.40, the reference to s.14, in so far as the appellant has an Article 4(1) right, that is that the decision is one which affects it. Just going back to the language of Article 4(1), yes, you must be affected by a decision. There may be cases where people are not affected by decisions. I have made my submission. We plainly are in this case. But, I am not inviting you - nor would it be appropriate for me to do so - to make an order dis-applying generally.

THE CHAIRMAN: What would be the position if you had not brought these proceedings, but had waited until the regulations were made -- or, suppose the regulations are made under s.14 of the 2006 Act and somebody then wants to challenge those regulations for whatever reason? Are you saying that that appeal would also need to come here? Then we are talking about an on-the-merits appeal against regulations, which is a rather odd concept. It may be that you are saying that, or that you say, well, you do not need to go that far.

MR. PANNICK: That is not our complaint. It is not therefore an issue before this Tribunal. But, since I am asked the question, let me seek to be helpful. If someone was aggrieved by the content of the regulations once they are adopted in their final form, and were they to come before this Tribunal and argue that on the merits the content is the wrong content for whatever reason, the issue would arise of whether or not that complaint is a complaint that falls within the scope of Article 4 of the Directive. Are they affected by a decision of a national regulatory authority? I do not want to concede that such a complaint would not be capable of falling within Article 4(1), but it is not necessarily ----

THE CHAIRMAN: There are too many negatives in that sentence, Mr. Pannick! Perhaps you could reformulate .

MR. PANNICK: Let me reformulate it to make sense. My position is that if a person were aggrieved by the content of the regulations and if they were to bring a complaint before this Tribunal saying that the merits of that are wrong, they would be entitled to say to this Tribunal that, "We are affected by a decision of a national regulatory authority for the purposes of Article 4(1). We therefore enjoy a right of appeal pursuant to Article 4(1)". If and to the extent, as would be the case, para. 40 of Schedule 8 stands in their way, it should be dis-applied. But, that is not our case, as the Tribunal appreciates. We are not challenging the content of the regulations. But, I certainly adopt the position that someone in my client's position would be entitled to a merits appeal at that stage. Would you give me a moment, please? (After a pause): So, we must be entitled to challenge, we say, the substance of the regulation. The fact that it is in the form of a regulation would not prevent it from being a decision that we would be entitled to challenge as one that affected us in those circumstances. But, I am not asking the Tribunal to decide that point. That may be for another day.

So, that is how we put the matters. I am very happy to try to answer any other questions, but those, subject to any other points from those behind me, next to me that they ask me to make - and I am sorry to have taken a bit longer than I wanted - are my submissions.

THE CHAIRMAN: That has been extremely helpful. Thank you, Mr. Pannick.

MR. FORDHAM: On the very last point being dealt with, the Tribunal asked my learned friend, "What about the decision further down the line?" There is some assistance in the statute on that, because you have to imagine -- You have got regulations, and there is then going to be a direct effect under a decision made under the regulations. We have already seen a clue because in the explanatory memoranda - both on the Bill and on the Act - it was made crystal clear that the only reason why you are out if you are covered by a decision given effect to by regulations is that you will get your day on the merits, but it is later down the line.

The provision of the statute that gives assistance to my learned friend's answer on that is - if you would not mind turning back to it - at Tab 5 of the first authorities bundle. What Parliament does in this carefully crafted exclusion in Schedule 8 to the Act is to use very deliberate language. Of course, we are focusing in particular at para. 40 on p.55. "Decision given effect to by regulations." That is all that is taken out. There is no indication that Parliament is intending to take out of appeal a decision made under such regulations, if there is an *intra vires* decision of the authority. That would reflect what we saw in the explanatory notes. But, if you look down the page to para. 42,

"A decision given effect to by regulations under s.31 [that is a register of information] and any decision under any such regulations ----"

That is the moment at which Parliament expressly excludes both acts. On that there would not be an appeal down the line, no doubt because it was concluded that s.31 and its subject matter was not within the ambit of Article 4. You have seen the materials that relate to the purpose. But, there is no such indication in relation to the others. So, we would strongly support the answer that was given on that very final point.

Now, from us you have got our grounds of appeal ----

THE CHAIRMAN: Can I just check that I understand the point that you are making? Under the regulations there will then be an award of spectrum after the bids are all collected in. At that point those who have been denied spectrum may well wish to challenge the basis on which the award was made - unless it goes just to the highest bidder. I am not sure.

MR. FORDHAM: That is right.

THE CHAIRMAN: But, there are regulations and then there is regulatory action under those regulations giving, or not giving licenses.

MR. FORDHAM: Yes.

THE CHAIRMAN: I think Ofcom would accept that as far as those decisions are concerned, those are decisions which come to this Tribunal. What I am thinking about is the period before then - after the kinds of decisions that we are dealing with in this appeal have been made, and the regulations are finalised and promulgated, and somebody wants to challenge those regulations on the grounds that they are not the right regulations. Is that an appeal, on your case, that would come to here, or would it go by way of judicial review?

MR. FORDHAM: The answer we would give to that is that if you would be able to appeal on the merits in relation to a decision under the regulations, then you wait. That is the purpose of this exclusion. You have seen that that is the purpose of this exclusion. It is exactly how it was described. Beyond that, if you are covered by Article 4 - and it is common ground in this case that we are - then you could not have an exclusion that took you to the judicial review court. Whether by interpretation or dis-application does not matter. The result has to be the same. But, that makes sense of this formula - 'decision given effect to by regulations' - but it does not go on to say, except in one case - 42 - 'decision made under the regulations'.

Our case is that what matters is that we have a decision which is totally different. We have a decision about not whether there is going to be the auctioning of spectrum, and not by what mode or design, but when - whether it is when in terms of waiting for clarity on the Refarming or whether it when in terms of two stages or one. That is the split auction. Plainly you cannot

wait until the end and get your decision and then say "I am complaining because you did not wait for clarity in relation to Refarming because what will be said about that is that that is not a decision under the regulations. I will show you it in a moment, that was a decision made a long time ago, a decision of principle as to the sequence that was going to be applied. Can I just ensure before I get there, you have our grounds of appeal and our skeleton, we also wrote a letter which I hope you may have seen in relation to the Parliamentary materials. There was one of the two authorities that we referred to which I thought it would be sensible to hand up to you so you have it, may I do that? Our letter referred to two cases but I think it is sufficient if I simply ensure that you have this one. (Document handed to the Tribunal) This is the *Three Rivers* case and, as we explained, the point of the letter was to avoid taking up time so I am not going to defeat that purpose, but can I just show you by inviting your attention to the headnote what this case explains – again it reinforces Mr. Pannick's general point about using materials as regards purpose.

> " If you are seeking to construe a statute purposively and consistently with European legislation …"

Well that is us –

> "… or the object of the legislation under consideration is to introduce into English law the provisions of a Convention or a European Directive …"

Well that is also us –

> "… it is of particular importance to ascertain the true purpose and in those circumstances the court may adopt a more flexible approach to the admissibility of parliamentary material."

So we say that is strong support, it is very important for the Tribunal to have well in mind that these provisions are intended to give effect to Article 4(1). That, of course, is the very point that this Tribunal made a month ago in a case in which my clients were involved, and you have been shown it, and I do not go back to it. It was at para.81 of *T-Mobile* in tab 51, "The jurisdiction to consider the appeals on the merits is conferred by the statute in order to implement Article 4."

As to the relationship between my clients' appeal and Mr. Pannick's clients' appeal, you have heard that they overlap. I ought to bring to your attention that we actually have also made as part of our grounds of appeal a complaint about the split auction decision. Can I just give you the reference, it is para.62 in our grounds of appeal where we too criticise, and will criticise the way in which the Regulator has dealt with that.

May I then deal with three topics. I am not going to repeat what you have heard, or at least I am going to try very hard not to repeat what you have heard. The first topic is the decisions as made by Ofcom, and challenged by my client. In relation to that, if I can ask you to go back to the decision document [at Core Bundle, Tab 4], which is either in I think a core bundle, or in tab 1 of your bundle 1. I can make my points using the executive summary which is at s.1. The crucial point as I will illustrate in a moment, is that Ofcom was deciding different interrelated but distinct matters. That is one of the reasons no doubt – if not the reason – why this document is headed "The document sets out Ofcom's decisions", and para.1.1 explains it is setting out decisions and the first decision in a heading is the decision in the just above 1.6, and that was a "Decision on award timing."

What Ofcom decided in this single and composite document was that there would be a regulated auctioning of bands 2.6 and 2010 and it goes on later in the document to deal with the method of awarding spectrum. So 1.21 in the decision document explains: "We have also decided …" and then various decisions are there set out.

Later in the document they describe the licence conditions as they are going to apply to the regulated auctioning of bands, and the bid requirements that are going to apply to the regulated auctioning of bands. But crucially for our purposes, as I just showed you in the heading at 1.6 they also deal with a distinct topic of whether that regulated auctioning is either going to be before clarity in relation to Refarming on the one hand or after clarification in relation to Refarming on the other hand, and a large part of this document deals with the various points that have been made as to why it would be fundamentally inefficient to proceed with an uninformed auction, and that is the issue that they are grappling with as part of this same document.

In fact, it could have been in a separate document dealing with that issue. They could have said in one document there is going to be regulated auctioning of bands with these licence conditions and these bit requirements. We are dealing now with the distinct question of whether that is going to come after Refarming clarity or before. It could have been a separate decision document. It could have been a different day. They could have dealt with the "Let us have a regulated auction for spectrum" point, and then the question as to when should that be? Should that be in sequence after Refarming has been clarified or before. They could reach a decision tomorrow to revisit the question of sequencing. They could say: "We have seen the light, we now understand, we have seen your expert witness statements, it is inefficient", or "We have seen the light in relation to a split auction. We have reached a decision taking the place of the decision we had previously reached and promulgated, but in fact this auctioning is

only going to happen once we have given you clarity because that will be optimal efficient allocation." There would be no new regulations if they were to do that. That is a separate and distinct matter from those decisions which are embodied in regulations.

THE CHAIRMAN: But could they have not published this document at all, could they have held the consultation and then said "Right, well, here are our draft regulations and if you read those very carefully you will glean from them how we respond to all the points that have been made in the regulations"?

MR. FORDHAM: My answer is "no", they could not. They could defer reaching a decision. They could reach a fresh decision tomorrow. Once they have reached a decision they have to inform people that that is what they have done and they will be held to account in relation to how they have explained their decision and the merits of their decision. So they would not be able to withhold it but they could defer it, that I would entirely accept.

In relation to this distinct decision on sequencing, can I invite your attention to the acceptance by Ofcom in this document, not only is it characterised as a decision, but it is a decision informed by s.3 of the 2006 Act. Can I just show you that on internal p.20? It sets out 3.16 the duties imposed by the 2006 Act. We will come back to this in a moment, but those duties apply when you are carrying out your spectrum functions, and your spectrum functions are the 2006 Act. When Ofcom comes to consider this very important question of sequencing it has regard, as it has to have regard, to its s.3 duties. So, for example, if you turn to internal p.25, the conclusions at 3.49 on this all important question of the timing of the award, based on our statutory duties explains then what is required of it, and at 3.54, for example, on the next page, we are required to secure optimal use of spectrum in the UK. That is all in the context of having explained back on internal p.20 the legal duties relevant to this timing decision. If they have not had regard to s.3 in deciding the sequencing matter they would have been acting unlawfully. That is a very strong clue that Mr. Pannick must be right in relation to his answer as to the *vires* of this decision. If it is a decision and if it is a decision which is *intra vires* it must fall within the ambit of spectrum functions in the 2006 Act.

The only question then is whether it is carved out by virtue of para.40 of the Schedule.

THE CHAIRMAN: Do you adopt what Mr. Pannick says and limit yourself also to what he says as to the potential sources of the power to take the decision which is under challenge?

MR. FORDHAM: I adopt what he says. I place my reliance on the 2006 Act, because those are the spectrum functions, whether it is Part 1 or Part 2 or Parts 1 and 2 read together. I have one footnote that I wish to add, which I do not understand is a divergence, and it is this: let us suppose that, in fact, this power is an ancillary one in Part 2 of the 2006 Act, because

everybody accepts that this is an *intra vires* act. Nobody is going to say that Ofcom has acted *ultra vires* when it has considered timing and had regard to s.3.

Let us suppose that what it is incidental to is s.14. My answer is, it does not matter, we are still right even if it is a power which is incidental to the licensing in Part 2 or, for that matter, s.14. The reason it does not matter is, firstly, because Parliament has chosen a particular framing for the exclusion. The exclusion is not decisions related to s.14 or incidental to it or exercise of powers incidental to s.14. It is decisions given effect to by regulations. That is the first reason. The second reason is that even if it were carved out as a matter of interpretation, you would have to dis-apply it.

THE CHAIRMAN: We will come to that no doubt, but are you contending that one alternative basis of the *vires* which we should consider is s.3 of the 2006 Act or any other section within Part 2 or any other Part of 2006 Act?

MR. FORDHAM: I do rely on s.3, and the reason why I rely on s.3, and perhaps we could look at it. This is tab 6 of the authorities bundle. Section 3 of the 2006, and this was the point I was making on the decision document, is at p.57 in the paginated bundle:

> "(1) In carrying out their radio spectrum functions, Ofcom must have regard, in particular, to …"

Then, of course, optimal efficient allocation is 3(2)(a), which is going to be the nub of much of the merits argument on the appeal if you entertain it.

Once it is accepted, as it is, that s.3 was relevant to this decision, and leaving aside the carve-out that I am going to come back to, what s.3 is clearly indicating is that decisions of this kind are the carrying out of radio spectrum functions. So I rely on s.3.

Even if s.3 is reflective of that which is necessarily implicit to make sense of a licensing scheme, see Part 2, then so be it. We say there is no difficulty in relation to locating this decision within Parts 1 and 2 of the 2006 Act.

THE CHAIRMAN: It is not really helpful, Mr. Fordham, to say it is located in Parts 1 and 2, because powers do not come from parts, they come from section. It would be helpful if you could identify a little more closely which sections in those parts you rely on, even if it is only one of a number of alternative bases for your argument, as the power under which this decision was taken.

MR. FORDHAM: I am not seeking obviously to be unhelpful, and I will answer the question of course, but I do have to root my answer in this observation, which is that if I am right that the exclusion is narrowed to decisions given effect to by regulations and if I am right that nobody says that the decision in relation to sequencing is *ultra vires* and if I am right that is a decision,

the answer is there, that is the answer – I will answer the answer the question, but I do say that all of that is very important ----

THE CHAIRMAN: I fully accept that.

MR. FORDHAM: With that introduction, I rely on s.3 because s.3 tells you that Ofcom has a function, radio spectrum functions, having regard to certain listed matters. That indicates that this sort of decision is the exercise of radio spectrum functions, even if it is only an indicator. As I have explained already, it is common ground that s.3 was applicable to this decision.

MR. SCOTT: I understand that s.3 is applicable to this.

MR. FORDHAM: Even if it is reflective only, rather than a source or an indicator of an incidental power, I then go to Part 2. Part 2 on p.60 is a series of provisions which I would submit do fall to be read together. I am not trying to be unhelpful but that is the position, as I would submit. It is a licensing framework, see Chapter 1. It starts with the need for a licence from the licensing authority and terms and grant and so on, and it ends for our purposes with s.14, bidding for licences. I rely on those provisions read together, because if I am right that the decision is a real decision on sequencing, and it is an *intra vires* decision, and it is the carrying out of a radio spectrum function, this is the location for the decision.

My final position is that if the Tribunal is of the view that a cluster of provisions is not a helpful approach and a particular section is required, well, then I go through them. I will start with the licensing provision of s.8, but I am content even to end with the bidding provision of s.14, because it is not going to help my learned friend Miss Rose unless she can get within the carefully chosen phrase, "decision given effect to by regulations".

Now, all of this has to be approached on the basis that a statute ----

THE CHAIRMAN: Can you give us a moment?

MR. FORDHAM: (After a pause): I was rounding off. I think you have got the point that even if we are located with a particular section, and even if the section is s.14, Miss Rose has still got to answer, "Is she within the exclusionary words?" She either is or she is not. If she is, that the end of the point of interpretation. We still have got the dis-application. But, if she is wrong about it, she has either got to say that they did not make a decision, or she has got to say, "They made a decision, but it was ultra vires", or she has to point to something else. That is the way we would put it. We do not believe that there is a divergence there. If there is, I want to make clear that I am not seeking to disagree with anything that has been said by Mr. Pannick.

THE CHAIRMAN: I was only pressing you on this, Mr. Fordham, because the case that has been put today does differ in some respects from the case as I understood it from the pleadings - for

example, with Mr. Pannick it referred in the notice of appeal to ss.3 and 4 of the 2003 Act, and in your notice of appeal you refer to s.1(1)(b) of the 2006 Act.

MR. FORDHAM: That is right.

THE CHAIRMAN: Do you still adhere to the s.1(1)(b) point? I know you say you do not have to pinpoint where it is, but for the purposes of us ensuring that we understand your case to the court ----

MR. FORDHAM: I am not abandoning anything that is in my written case. I have given the best and most focused answer I can in my submissions to the question, Chairman, that you have put tome.

THE CHAIRMAN: Yes. Thank you.

MR. FORDHAM: Really, the boot will need to be on the other foot because Ofcom is going to have to explain, if it is wrong about 'decision given effect to by regulations', then where is the *vires* for its decision-making -- It cannot submit, or cannot sustain the submission, that everything it does is a decision given effect to by regulations under s.14. You can illustrate that by taking a simple example. What about the decisions it takes when it has made the regulations? Are those *ultra vires*? Are those within this framework of the s.2006 Act? If you were advising Ofcom would you tell it to have regard to s.3, or not? Would it be discharging this statutory function? So, without wanting to be unhelpful, we would submit that the answer must be clear that there is *vires*, and there is actually no disagreement between the parties. The only disagreement is on that magic phrase - 'decision given effect to by regulations'. Even that takes Miss Rose no further than the straightforward dis-application principle on which you have been addressed.

> So, we have got a distinct aspect. It is called a decision. It was a decision. That is why we did not wait for some future or further act. We brought our appeal on the basis of it, and, as we understand it, it is common ground that Article 4(1) applies.

Unless you want me to, I am not going to address you on the merits challenge that we have made to that decision in our grounds of appeal. There are very many concrete merits points taken with expert evidence backing them up. Ofcom, if there is to be this appeal, is going to have to explain so that this Tribunal will decide the appeal, having taken account of those merits. But, it really is not the point. The point is the nature of the decision and the nature of the scrutiny which Article 4(1) plainly calls for.

May I turn to my second topic, which is simply by way of sweeping up what we would say are the very striking ingredients in this case? May I list them? The striking ingredients in this case are, firstly, that Article 4(1) is accepted as being applicable by Ofcom. Secondly, subject to denying they have made a decision, or subject to saying they have acted ultra vires, then

unless they are in the carve-out in para. 40, s.192 applies. That is the second point. The third point is that one looks at those provisions - Article 4 on the one hand; s.190 on the other hand - and you see immediately in them both: firstly appeal; secondly, merits; thirdly, expertise. So, even looking at the statutory scheme there would be no difficulty at all in seeing what Parliament was intending to do when Parliament enacts an appeal on the merits to a specialised Tribunal in the face of a directly effective duty to have an appeal on the merits to a specialised Tribunal. That may be what was behind the straightforward observation, we say entirely correct but now disagreed with by Ofcom in the T-Mobile case at para. 81. So, that is the third point. In an identity parade where the judicial review court and the CAT stand side-by-side and one looks at Article 4(1), it is not difficult, whether you are the Administrative Court or the CAT, to see which one fits and which one does not.

The next point that is striking is that we have seen the materials that confirm what the purpose was - exactly as expressed by this Tribunal a month ago in the other T-Mobile case, in the explanatory notes, both on the Bill and on the Act. The purpose is precisely to give effect to Article 4(1). Here is the phrase: by 'the appeal mechanisms in the Act'. That is how effect is being given - by the appeal mechanisms in the Act. Not a judicial review mechanism in a different Act, the Supreme Court Act..

The penultimate striking point about this case, we say, is that the wording of the exclusion is narrow and particular. It could have said something broader in relation to the discharge of radio spectrum functions. It could have said something broader in relation to s.14. One might like to contrast para. 40 with some of the earlier paragraphs of Schedule 8. If you have got it, p.52 in the authorities at Tab 5, para. 3, "A decision relating to---" paras. 10 and 12. Paragraph 40: "A decision given effect to --" by regulations.

Then, the final point that is striking about this case is that the structure of the key statutory provision is that the competent court or Tribunal - that is, this Tribunal - has the jurisdiction (see s.192(1)(a)) subject to an exclusion". That is how it is framed by the drafter of the Act. "A decision under this part or any of Parts 1 to 3 of the 2006 Act --" It is not a decision specified in Schedule 8. So, you get structurally jurisdiction in relation to Parts 1 to 3, subject to an exclusion, and then you get Schedule 8 itself, which is headed 'Decisions not subject to appeal'.

Now, structurally it is very, very close to the Austrian case because the Austrian case in the same instrument described the jurisdiction of the Austrian Administrative Court, but it was subject to a provision that came further down the page which described the exclusions. The exclusion was 'not if it can go to the Constitutional Court'. Well, the Constitutional Court was

no good because of the 'restrictions on it' approach. That was precisely what fell to be dis-applied under the decision of the ECJ in that case.

MR. SCOTT: Just one small point, you took us briefly to the Supreme Court Act, are you suggesting therefore that judicial review is in fact an alternative statutory mechanism rather than it used to be considered a common law mechanism?

MR. FORDHAM: Judicial review is a common law mechanism, certain aspects of it have been the subject of legislative enactment, that would be the right way to put it, I am sorry if I gave a misleading impression. So that is the final thing. Now, all of these are very strong pointers, we would say overwhelming pointers that the answer to this case is crystal clear. The body that fits Article 4(1) is the Tribunal and not the judicial review court. It fits with the purpose, it fits with the deliberately narrow wording and, if necessary, because of the sensible approach that the drafter of the legislation took it is an exception. If it is incompatible it can be dis-applied because of the formula that is used.

Judicial review, for the reasons that have been given that I do not repeat, does not begin to measure up to Article 4(1) and to say "Then we would have to have a new judicial review jurisdiction tomorrow, is a bit like the Austrian Administrative Court saying "The Constitutional Court will have to change", it is not the point. As the ECJ explained the competent body who is in the position to deliver has the duty of dis-applying the restriction or exclusion if it cannot be read compatibly, and that is the Tribunal.

My third and final topic, because I just wanted to touch briefly on some final aspects of the statutory scheme. First, in relation to "given effect to by regulations under s.14" I have made my submissions on the deliberately narrow phrase that has been used by Parliament there. That connotes regulations as the implementing embodiment of a decision and you can test it by supposing the decision had been reached the other way – would it necessarily mean that you would not have regulations or that you would have different regulations. Well if the sequencing decision is reached the other way, if they reached it the other way tomorrow it would not mean that it would follow you would have no regulations to cover the regulated auctioning when it happens.

This carefully tailored provision certainly is not intended to and does not reach to linked but distinct decisions, and one can test that by taking another example. Suppose the Regulator thinks it is a good idea to liberalise spectrum and have a regulated auction, but suppose there are incumbent licensees, so it says: "Here is our decision, we are going to revoke licences and here are all the notices that go out to the licensees so that the spectrum will be made available. That would be a decision linked to the regulated auction but it cannot seriously be said that that

would not be a decision of a kind that could not be appealed by a licensee who is having their spectral licence revoked.

THE CHAIRMAN: So the Refarming decision, as and when it comes, if it revokes licences that may well be linked with the auction of the new spectrum that you would say is not part of the ----

MR. FORDHAM: It cannot have been intended that Ofcom could say "Our auction is going to be regulated under regulations that will tell you the requirements on the bidders, and it will tell you the licence conditions, this is all with a view to having an auction therefore it is a decision given effect to by regulation. It is not a sensible approach but it simply is not covered by the wording. It is not a decision given effect to by regulation. The regulations are not the implementing embodiment of that, albeit that it is all linked.

THE CHAIRMAN: The difficulty I have is that every decision that is taken is a choice of one among a number of options and can be expressed either as positively accepting one of those options and also as rejecting all the other options. Now, when you see the regulations the only option you see in the wording of the regulations is the one that was accepted. But the question I suppose is, insofar as the decision to accept that one option and put it into the regulations it requires or is a consequence of rejecting all the other options which then do not appear anywhere in the regulations, is the decision not to accept one of the rejected options a decision given effect to by the regulations, even though the regulations of course do not say: "Oh, by the way, these are the ones we have decided not to do and this is the one we have decided to do."

MR. FORDHAM: Can I test that with an example? If you look at our decision document, when they come on to deal with the regulated auction, they deal with the technical conditions and the non-technical conditions, as they are required to do, and the regulations may embody then what technical condition or non-technical condition it is going to be. So to answer the question it might be said by somebody if you have decided to have technical condition A it is implicit that you have rejected a variation technical condition. I do not need to go that far and I do not suggest that that would not be a decision given effect to by a regulator, and Ofcom would have a very powerful argument to be able to say our decision to do X (and therefore by definition not Y), is given effect to by regulations. If the first is right the second must also follow. It is no part of my case to lead the Tribunal into that kind of territory at all. I do not accept that it is a block in any way to the arguments that O2 wish to put forward in t his case, or that T-Mobile wish to put forward in this case. Indeed, in terms of the sequencing, which is really where all of this comes in, should you have gone ahead in a climate of uncertainty, without even finding a compromise, in relation to that, that crucial sequencing decision which is found in the

decision document, and arrived at by reference to s.3 that is not in any way given effect to. If all they had done is say: "Here are some draft regulations" the reader of those regulations would not get the answer to what they had decided to do in relation to sequencing, that is why you need separate and independent reasoning, which is what we have.

The second reference point I just wanted to give on this point was to show you s.14 itself. If you look at s.14, having regard to the desirability of promoting optimal use that reflects what I showed you in the decision document in section 3. It then deals with the regulations, and the regulations deal in specified cases with bidding in accordance with a procedure involving the making by the applicant of a bid, and then it goes on to say: "The regulations may make provision …" this is (2), and then (3) - the grant of the licences, the terms, and then the requirements on the bidder. If you read that alongside para.40 you get a very clear indication of what is meant by decisions that are given effect to in a regulation, so it would be matters such as the licence conditions and the requirements, all of which are set out there in s.14 - the design of the procedure – the procedure involving the making by the applicant of the bid. Putting those two things together, even if we did not have the directive, it is a very clear indication that distinct questions of the sequencing of a regulated auction are outside what would be described as decisions given effect to by the regulations.

THE CHAIRMAN: So, if in the award document there is something that says, "We have decided that the applicant is going to be required to pay a deposit to Ofcom", say, you would accept that that is clearly a decision that is given effect to by the regulations.

MR. FORDHAM: I would accept that on the basis of s.14 The regulations may, in particular, require - and it is (e) - an applicant to pay a deposit to Ofcom and if you ask the question, "Can Ofcom point to that paragraph of their decision document what the deposit is going to be?" as being a decision given effect to by regulations, I would accept that on the basis of this provision..

THE CHAIRMAN: Similarly, if there was a paragraph in the document that said, "We have decided that there will be no requirement to pay a deposit" so that the regulations are silent about that ----

MR. FORDHAM: Read with s.14 there would be a very powerful argument for saying that the conclusion must be the same because read with s.14(3)(e) you would say that in circumstances where you have got a regulatory power to deal in regulations with the question of a deposit - yes or no? To apply the test we were applying a moment ago, if you read the regulations on this point and look at what they have done about deposit, is there any difference in substance between a clause that says that the deposit will be X and a clause that says there will be no deposit -- no deposit will be needed -- or, for that matter, the absence of a clause.

I think it is sufficient for my purposes to make clear that I am not disputing for the purposes of the argument in this case that matters of that discrete auction design kind covered explicitly by s.14(3) would fall within the carefully tailored provision that Parliament enacted in para. 40. But, it is a mile away from what Miss Rose needs to show in order to exclude us even before we get to Article 4(1) or any question of dis-application.

Will you just give me one moment? (After a pause): Unless you have got any further questions for us, and in the light of the time, I think it would be most sensible if I close there. Those are the submissions on behalf of T-Mobile. I have not repeated what Mr. Pannick has said, because I adopt what Mr. Pannick has said.

THE CHAIRMAN: Thank you both very much for the organisation that you have brought to this, and the lack of duplication. We very much appreciate the way you have dealt with your submissions. Thank you, Mr. Fordham.

Miss Rose, do you want to start now, or do you want to finish now and start tomorrow morning?

MISS ROSE: Madam, I would appreciate the opportunity to start in the morning when I have had an opportunity to consider what has been said today overnight. It will probably make matters a bit shorter and a little bit tighter.

THE CHAIRMAN: I think then we will rise now and start again at 10.30 tomorrow morning.

(Adjourned until 10.30 a.m. on Friday, 27th June, 2008)

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