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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1297/3/3/18

Victoria House,
Bloomsbury Place,
London WC1A 2EB

10 January 2019

Before:

MR ANDREW LENON QC
(Chairman)
PETER FREEMAN CBE QC (Hon)
SIMON HOLMES
(Sitting as a Tribunal in England and Wales)

BETWEEN:

MR DAVID HENRY

Appellant

- and -

OFFICE OF COMMUNICATIONS

Respondent

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APPLICATION

APPEARANCES

The Appellant appeared in Person.

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

1 THE CHAIRMAN: Good morning. Thank you very much for your written submissions. This
2 hearing has been fixed to consider the issue of whether the Competition Appeal Tribunal
3 has the necessary jurisdiction to determine Mr Henry's appeal against Ofcom's decision that
4 the BBC may launch a new television channel for audiences in Scotland.

5 The jurisdiction of the Competition Appeal Tribunal is fixed by statute. Miss Kerr
6 Morrison has set out in her skeleton argument Ofcom's case that the Competition Appeal
7 Tribunal does not have jurisdiction to hear this appeal. That case is, in summary, that the
8 decision against which Mr Henry is appealing was taken pursuant to section 198 of the
9 Communications Act 2003, and that decision is not the kind of decision against which any
10 right of appeal to the Competition Appeal Tribunal exists. Her skeleton argument identifies
11 the provisions in the 2003 Act which she submits confer a right of appeal, and she says that
12 those provisions do not cover a decision taken pursuant to section 198. She goes on to deal
13 with Mr Henry's argument that Ofcom owed a duty under section 3 of the 2003 Act which
14 it has broken. She accepts that that duty was owed by Ofcom in reaching the decision in
15 this case, but submits that section 3 does not confer any right of appeal - in other words,
16 there is no free-standing right of appeal.

17 I hope that is a fair summary of Ofcom's case.

18 Mr Henry's case is, as I understand it, that section 3 does effectively confer, or should be
19 taken to confer a right of appeal, and that is really where the main battle line exists.

20 I am going to invite Mr Henry to kick off, and to respond to Ofcom's case on jurisdiction.

21 I will then ask Miss Kerr Morrison to reply, and then if there is anything further that
22 Mr Henry wants to say, and that it is a relevant submission, then of course he is free to put
23 that to the Tribunal. If, at any point, you have any questions about the procedure,
24 Mr Henry, being a litigant in person, and this is an unfamiliar environment, then feel free to
25 ask.

26 With that introduction, I am going to ask you to reply to Ofcom's case.

27 MR HENRY: First of all, I would like to thank everyone for their time and effort. I am indeed a
28 litigant in myself and I have a full time occupation in Edinburgh, which means I have not
29 had as much time as I would have liked to have had to research this.
30 This dates back to indeed a decision or a consultation Ofcom announced, and I became
31 aware of, a year ago - it was last January. I realised that my concerns were purely on media
32 plurality issues, that there was need for additional voices supplying news, especially in the
33 Scottish media, in which there is very few providers of news, and in particular broadcast
34 news.

1 I was also aware of previous rulings and decisions made by Ofcom, in particular one
2 concerning the merger, or proposed merger, a number of years ago of Rupert Murdoch's
3 Sky Television, and work was undertaken by Ofcom and they came to the conclusion that a
4 10 per cent market share, as it was deemed the Murdoch Trust would have after a merger,
5 was against the public interest, and it raised public interest issues, and in particular media
6 plurality. So 10 per cent was deemed by Ofcom to be a barrier.

7 Ofcom has published many documents and reviews of different segments of the market
8 covering media plurality in particular. This derives from, I understand, section 3 of the
9 Communications Act which states that Ofcom has a principal duty to ensure there are
10 sufficient services in the market place.

11 It would appear that this decision, while I accept they have made it under section 198,
12 would appear to be at odds with previous rulings that Ofcom has done on this subject.

13 I raised during the consultation period, I managed to garner about 721 other signatures
14 supporting my view that this potential announcement and new service by the BBC was
15 going to increase the BBC's market share in provision of news in Scotland. According to
16 Ofcom's own data it already has over 40 per cent of the market share. Ten per cent was too
17 high for the Murdoch Trust, so the question is how can more than 40 per cent be in the
18 public interest?

19 I believe Ofcom has misdirected itself from its main case by focusing just on section 198,
20 which directs to regulating the BBC under some new rules which started in 2017 after the
21 Royal Charter renewal. Previous to that, Ofcom did not have this role, but Ofcom did have
22 throughout all this period the role of ensuring the public interest. The public interest is
23 ensuring that there are sufficient providers of news. Ofcom has stated in public documents
24 that it is against the public interest to allow any media owner to have a significant market
25 share and create and unduly influence public opinion.

26 This is specifically focused on news, it is not focused on the channel itself. It is the fact that
27 the BBC have announced that they will launch their channel in a few weeks' time and they
28 will be broadcasting an additional hour of news every night at nine o'clock. They have
29 announced what their annual budget is for programming. There has also now been the loss
30 of another news provider since the announcement by the BBC. STV has closed the STV2
31 channel that had a one hour news programme every evening which was quite well
32 resourced. So we have lost an independent news voice in Scotland, and what we are now
33 proposing, if this was to go ahead, is more news from the same source that is already the
34 dominant source in Scotland.

1 Now, this would appear to be at odds with Ofcom's principal duty. Their principal duty is
2 to ensure media plurality, and that there is a variety of news sources. By focusing purely on
3 section 198 they do not deal with the issue of media plurality. In fact, in their decision I do
4 not believe they mention the term once.

5 During the consultation period I put forward that there could be a number of solutions that
6 would resolve this potential conflict. One of them was that if the BBC was to sub-contract
7 the production of that news programme that they are proposing to launch to an independent
8 producer - perhaps a new producer in the market, who knows, but certainly a different voice
9 in the market place - then that would be some way of offsetting the potential damage to the
10 public interest. Ofcom do, I believe, mix the term 'public value' in the decision instead of
11 'public interest'. They clearly state 'public value for the BBC licence payers'. That is not
12 the same as public interest.

13 So the issue here is that Ofcom appears to have focused on section 198. It is against public
14 interest if there is no appeal. They have not dealt with my submission, which was quite
15 widely supported, that we needed an alternative news provider, not more from the same
16 provider.

17 So I believe that if they had followed a decision based on their principal duty, then the
18 answer would either have been different, or I certainly would have had the right of appeal
19 and we would not now be having a discussion on jurisdiction because the decision they
20 have made impacts people personally and all the people that signed the petition for the
21 consultation. That has not been dealt with by Ofcom. They failed to refer to it, they failed
22 to show how they have taken it into account. They have treated other submissions during
23 the decision process differently. They go into some detail on STV Group's submission,
24 they go into some detail on MG ALBA's input, both of which were hostile to this
25 announcement it should be said, but when it came to my submission, which was purely
26 focused on media plurality, purely on the issue of news, they do not actually refer to it or
27 show how they dealt with it. That tells me they have been inconsistent.

28 THE CHAIRMAN: I hesitate to interrupt, Mr Henry, I understand what you are saying, but this
29 really goes to the substance of the decision and the reason why you disagree with it, rather
30 than the question of jurisdiction, which is what we are concerned with today. I am not
31 going to stop you from saying what you are saying, but I would ask you to, in due course,
32 focus on that issue.

33 MR HENRY: I believe that, one, Ofcom misdirected itself. This decision is made under section
34 198. That is not its principal duty. Its principal derives from section 3. It also claims that

1 they must treat decisions consistently, and if they are not going to treat it consistently they
2 must show why they have decided it.

3 There are also requirements for a conflict. There is clearly a conflict of interest here.
4 Ofcom has focused on section 198 and referred itself to how it would regulate the BBC.
5 What they have not done is their principal duty, which is to look out for the market as a
6 whole. If they had done, certainly it would have been under section 192, and I would have
7 had the right to appeal because this decision affects me and affects many people, in fact. It
8 is in the public interest that this is dealt with.

9 I have touched on the substance because the substance drives you to where there is a clear
10 conflict in Ofcom's thinking on this.

11 I have to be fair to Ofcom. This is the first time they have ever had to do this with the BBC.
12 They did not have these powers until 2017, so this is the first time this set of circumstances
13 has appeared, which may well be why I am questioning whether there is an appeal process
14 on jurisdiction.

15 So I think, in a nutshell, Ofcom, yes, indeed has made a decision based on misdirecting
16 itself to just one section, and has totally ignored its principal - and it is so described by
17 Ofcom - its principal duty. Its principal duty is derived from section 3 not section 198, so
18 that is where I believe they have misdirected themselves and therefore there is an appeal
19 process, and this court would have the jurisdiction, because, of course, Ofcom, if they had
20 done the decision correctly and done it on both in parallel, we would not be having the
21 question of jurisdiction.

22 THE CHAIRMAN: You say that. I do not follow that, Mr Henry. Ofcom says there is no free
23 riding right of appeal under section 3. What do you say in response to that?

24 MR HENRY: Well, one, I disagree with that. Section 3 shows that Ofcom must be consistent,
25 transparent, proportionate, in all the complaints or decisions that it comes to. It has not
26 been, because it came to a different conclusion with Sky News ten years ago, or eight years
27 ago, compared with Sky. I think the question goes back to, is the BBC a broadcaster? If the
28 answer to that is yes, then it is section 3, because section 3 means that Ofcom must regulate
29 all broadcasters. It is in the legislation, it says all broadcasters. Previously the BBC was
30 treated completely separately as if it was in a different universe, but it is not treated that way
31 any more. The issue of media plurality has been raised as a serious issue by Ofcom. They
32 now have a media framework, they reported to the Secretary of State how important this is,
33 that is goes to the heart of a functioning democracy. If you have one media owner

1 controlling most of the media, it can control and influence public opinion. That is what this
2 comes down to.

3 Section 198 makes no mention of media plurality. They have made a mistake, and it goes
4 to the heart of, they should have been focusing in parallel 198 plus their section 3 principal
5 duty. They have not dealt with their principal duty.

6 Then, once we get past the jurisdiction, if we agree that this has jurisdiction and there is a
7 right of appeal - because decisions have been made here that are impacting me, which is
8 why I am fighting this, because I believe strongly the public are being short changed here -
9 if it had been dealt with in parallel, then this opens up that Ofcom did not treat my
10 submission consistently with the other submissions during the decision process. That is in
11 their own document. My document was published, but there is no reference to it, how they
12 dealt with it, how they considered media plurality. It has just never been dealt with. It is
13 almost an admission that they just have not dealt with their principal duty. If Ofcom, the
14 only regulator that regulates now the BBC and this market area, is able to make decisions
15 and they cannot be appealed then that is not, I think, what Parliament expected when they
16 laid down these processes and that there was a route to an appeal.

17 MR HOLMES: Mr Henry, can I ask you a question? I understand the importance of those views,
18 but my question would be this. Section 192 does deal with various rights of appeal, so that
19 leaves two possibilities in my mind: either your right to appeal is somewhere within section
20 192, in which case the question is where; or it lies somewhere else and you refer to section
21 3, in which case the question would be where in section 3, or some other provision referring
22 to section 3, is there a right of appeal?

23 MR HENRY: Section 3 lays down Ofcom's obligations and how they should operate. Obviously
24 it was what was put down by Parliament before Ofcom existed. So it is meant to operate
25 under basically section 3. Section 3 requires it to operate transparently, proportionately and
26 consistently. It also requires, if its changes its position from one decision to another, it must
27 publish why it has chosen to come to a different answer. It has not done that in this
28 decision.

29 That tells you what Ofcom should be doing. If Ofcom makes a decision that has an impact
30 on, for instance, myself, and has done so by not applying the section 3 requirements, it has
31 failed in its statutory duty, its principal statutory duty to ensure media plurality. They have
32 also published media framework documents and advice to the Secretary of State over the
33 last few years. They are required to do it every three years. They have done it every three
34 years for the last number of years, again reinforcing the importance that no one media

1 organisation - that means they are giving advice to the Secretary of State. They are required
2 to follow their own advice unless they publish a reason why they have diverged from that.
3 They have not done that. They have not come up with any reason why they have not
4 followed their own advice that they gave to the Secretary of State that no media owner
5 should be in a position to have undue influence. This is purely on the supply of news, and
6 the BBC is the biggest provider of news, certainly in Scotland, and one of the largest in the
7 UK, certainly much higher. So that gets to the issue that media plurality is the central issue,
8 and Ofcom has a duty to ensure that no one organisation, if you like, gets too large in that
9 market share. It is against the proper functioning of a democracy. They have not done that
10 in this case.

11 I think this is why I believe they have misdirected themselves: The BBC, when it had the
12 BBC Trust, never had any requirement to look at media plurality. It only worried about the
13 BBC's content, the BBC services. So this is not something that Ofcom can say, "Oh, well,
14 the BBC will deal with this". The BBC does not have that competence. It is Ofcom's
15 competence to deal with this.

16 So my thoughts on this are that section 198, and they agree they have made their decision
17 based on that, was an error. That is incorrect because it is glaringly obvious that they did
18 not mention media plurality at all. They do not go into it. They do mention in their
19 decision that there will be damage to competition in the market place, and I think, if
20 I remember rightly, it says, "However, this may be offset by the extra value to the licence
21 payer". That is nothing to do with it, it is not the same thing. The value has got nothing to
22 do with plurality.

23 So I believe that is where we are. They have used the wrong section, which means no one
24 can effectively challenge it, and I believe that is incorrect. It is quite obvious that media
25 plurality is an important issue. It is required. Ofcom has given guidance to Government
26 Ministers and to the Secretary of State and yet does not follow its own guidance. I believe
27 it is not allowed to do that either without stating why they have diverged from that. So
28 I believe, because this was made, and should have been made, under section 192, so
29 I should have had a right of appeal because this decision they have made will affect me, will
30 affect everyone in Scotland, for instance, and it is in the public interest that it is resolved.
31 Unfortunately, I am not an expert on jurisdiction of the Competition Appeal Tribunal. It
32 slipped passed me that they were only using section 198, and I was surprised when they
33 came to their decision, because there was virtually no support for this BBC channel - all the
34 other operators in the market place, and since then we have lost a commercial competitor.

1 So, far from this increasing and being - in fact, Ofcom's decision goes against its stated
2 public aim, which is to ensure that there are as many voices in the market place as possible.
3 This decision that they have come to flies against that. It cannot possibly be allowed to
4 stand. There should be a process to correct this.

5 The other thing I would say, if Ofcom had dealt with my submissions or my concerns
6 during the consultation process, I would not even have had to have written to the Tribunal,
7 but there was just a wall of silence. They accepted it, they published it, and they made no
8 mention of it. They do not show how they dealt with it. I believe that is inconsistent and
9 I believe they should have used other legislation.

10 MR FREEMAN: Mr Henry, can I just ask: what you are asking us to accept, I think if I have
11 followed this right, there is a regime under which Ofcom has regulated the BBC and it is
12 fairly new?

13 MR HENRY: Yes.

14 MR FREEMAN: And it has got this special section in the Communications Act since 2017.

15 MR HENRY: Yes.

16 MR FREEMAN: And that was the regime which Ofcom used to issue their statement.

17 MR HENRY: Yes.

18 MR FREEMAN: And you are saying what they ought to have done, because the BBC is a
19 broadcaster, is actually go back to their general duties and make decision----

20 MR HENRY: Absolutely, it should have been in parallel, yes.

21 MR FREEMAN: And what you are saying is that they if they had done that then there would be a
22 right of appeal?

23 MR HENRY: Yes.

24 MR FREEMAN: I think you are going on to say that, because there does not appear to be a right
25 of appeal, there is an injustice - is that right?

26 MR HENRY: That is a much better way of summing up what I have said.

27 MR FREEMAN: I just want to understand what you are saying.

28 MR HENRY: Yes, that is indeed what I am saying. If they had done in parallel - I understand it
29 is the first time this question has ever had to be answered by Ofcom, so they directed
30 themselves to these new powers which are detailed in section 198, which then refers to the
31 BBC Charter and some other framework document. However, that does not, and there is no
32 mention in there or requirement for the BBC to worry about media plurality. The BBC in
33 this case is exactly the same as Rupert Murdoch's Sky TV. They are an Ofcom licensed
34 news provider, and they are meant to be impartial, and there meant to be balanced, etc, the

1 same with all the others. That is the only thing that has effectively changed for Ofcom, they
2 are now the decider of whether the BBC is complying with its programming code and its
3 broadcasting code. That is all it seems to have focused on. It has not looked at potential
4 damage to competition. It mentions that there will be some, it says that in its decision, there
5 will be some damage to competition. That has already been delivered, STV2 closed last
6 June. Twenty-five journalists were made redundant. So that news service has already gone.
7 It is totally against what principled policy is meant to be.

8 They should have done it under both. They should have looked at the market as a whole,
9 BBC as a broadcaster - I do not think anyone could sensibly claim they are not. Are they a
10 part of the market? Ofcom confirms they are part of the market. They do market research.
11 It shows that Ofcom finds the BBC, I think it was 2015, had an 80 per cent reach, it is over
12 40 per cent of the audience in Scotland. Now we have lost an independent voice already
13 because of this announcement. Going forward, the BBC will have a bigger percentage,
14 because this is an additional channel. It has got additional news and current affairs planned.
15 So their market share is going to go up, not down, and that is against the principle that they
16 are meant to be enforcing.

17 So they should have used both sets of regulations. They should have used the specific 198
18 to look at the BBC's proposals, and they should have then done their principal duty under
19 198, and this would have been very clear that you do indeed have jurisdiction over this.
20 This is Ofcom's regulating the broadcast market as a whole. It is the fact that they have
21 directed themselves to section 198 specifically and ignored everything else, and I do not
22 believe that is correct. They should have done both, in which case I might have got an
23 answer to my response to their consultation, in which I specifically asked them to look
24 specifically at market share - is this going to damage competition? There were signs of that
25 a year ago in the public domain. The chief executive of STV Group in his annual report
26 from the year before highlighted a strategic review of STV2's operations based on the
27 BBC's announcement for this new channel which was coming down the line with a
28 £32 million budget. The budget for their channel was £2.5 million a year. They could not
29 possibly compete. We now know what the reaction is. They closed it, so we do not have
30 that news programme any more. It was quite a well resourced new programme. Ofcom
31 should be looking to protect that and encourage it. In fact, it is duty is to promote
32 competition. It has done the opposite in this decision.

33 So clearly they have made a mistake. 198 is only a part of the solution. The rest of their
34 requirement comes from section 192, and I am affected by this, which would give me a

1 right - I think it is (d) that gives me a right to an appeal if I am specifically affected by a
2 decision made by the regulator, which I am, and so were all the other members of the
3 public.

4 Sir, I think that is as helpful as I can be on my understanding of where Ofcom's decision
5 came from, but I believe it should have been in parallel.

6 THE CHAIRMAN: (After a pause) Can we just look at section 192? Which bit of section 192
7 do you say should have been available to give you a right of appeal?

8 MR HENRY: I believe it is section 2:

9 "A person affected by a decision to which this section applies may appeal against it
10 to the Tribunal."

11 THE CHAIRMAN: That takes you back to subsection (1) then, does it not?

12 MR HOLMES: Which specifies what this section applies to.

13 THE CHAIRMAN: Mr Henry, you might want to come back on that.

14 MR HENRY: Yes, I would.

15 THE CHAIRMAN: I think the difficulty from your point of view is that they are quite specific.

16 It is a complicated bit of legislation, but they are quite specific provisions. The most
17 general one would appear to be 1(a), and that, as I understand it, only applies to decisions
18 under this part, which is part 2 of the Act, and that would appear not to include section 3,
19 but you may want to come back to me if I have got that wrong.

20 That is very helpful, Mr Henry. Thank you for those submissions, and I am now going to
21 Miss Kerr Morrison to reply.

22 MISS KERR MORRISON: Thank you. As you mentioned at the beginning, we have already put
23 our submissions in a lot of detail in writing because obviously we appreciated that
24 Mr Henry, as a litigant in person, should be put in the best position possible in order to
25 address what our case is. So for the purposes of this morning, I am going to focus on three
26 main points that come out of our submissions taking into account what Mr Henry said this
27 morning, and try and state clearly how we say we meet each of the points made by
28 Mr Henry on jurisdiction.

29 THE CHAIRMAN: Yes. It might be helpful - you may have been planning to deal with this
30 anyway, but I think it would be helpful if you were able to reply - it may not be entirely
31 relevant to jurisdiction - to Mr Henry's complaint that there has been sort of injustice here
32 in that he feels deprived of any right of appeal.

33 MISS KERR MORRISON: Yes, sir, I will come on to that as part of part three of my
34 submissions. How I intend to deal with it this morning is to talk first about the scope of the

1 hearing and the substantive issues that have been raised and what we say about the
2 relevance or not to that today. I will then deal with the submissions, particularly of
3 Mr Henry this morning, about the power that we exercised and we somehow went under the
4 wrong power or ignored, or failed to make a decision under section 3 and that is why he
5 does not have a right of appeal. Then, finally, as part three, I would address section 192 and
6 the specific points made by Mr Henry, particularly about this idea of it being an injustice, it
7 having an effect on an individual - he is not able to bring an appeal on behalf of the public
8 interest, is I think how it is essentially put this morning, that there should be a right of
9 appeal under section 192.

10 THE CHAIRMAN: Yes, and whether he does have any other right - whether he has or did have
11 any other right of redress.

12 MISS KERR MORRISON: Yes.

13 MR FREEMAN: I think his case is where there is a right there should be a remedy.

14 MISS KERR MORRISON: Yes, sir, and I will certainly deal with that at the end. I can
15 understand where Mr Henry is coming from, but obviously in this forum we are dealing
16 with a creature of statute, and so we need to be able to pinpoint it, and I will try and address
17 that as we go through the submissions this morning.

18 Sir, if I can just start with the scope of the hearing issue, I appreciate Mr Henry has a lot of
19 concerns about the decision and he has set out some of those concerns this morning
20 focusing on the issue of media plurality. I would like to underscore two things: one, it does
21 not accept the substance of Mr Henry's case, but it has not sought to set out its answer to
22 that either in writing, and nor when I try to do so this morning, because those matters only
23 arise if this Tribunal is seised of the appeal against the decision actually made.

24 One matter that I should clarify and make totally clear is that Ofcom does accept that
25 section 3, the general duty, was engaged, and its position would be if an appeal went ahead
26 that it had complied with that duty, even if it did not mention section 3 specifically in the
27 decision, because, as the decision made clear, it was taking into account all of its general
28 duties in exercising the specific powers it is granted under section 198 of the
29 Communications Act 2003, read together with the Framework Agreement.

30 Pausing there, I think it is important to deal with an issue that seems to be at the nub of
31 Mr Henry's case this morning, which is that section 3 is somehow a free-standing issue
32 from the carrying out of Ofcom's other functions that are specified in others parts of the
33 Act, specifically this morning parts two and three. Section 3 is a principal duty on its face
34 that Ofcom has to comply with in carrying out its functions. It is a *sui generis* duty in a

1 sense that arises whenever Ofcom is exercising other specified functions. It is not a
2 decision making power. For example, it is not a power to make directions to any particular
3 body, it is not a power to make a decision granting a licence, for example, it is a general
4 duty that arises where Ofcom has specific statutory functions. So it is part and parcel of a
5 decision, it is not a free-standing decision making power, and that is critical, in our
6 submission, to understanding why we have focused for jurisdictional purposes on section
7 198, as Mr Henry highlighted this morning, and it is critical to understanding why we say
8 there is no right of appeal in this case, because you have to look to the function that Ofcom
9 is exercising under the Act, and look to see if that function is specified in the provisions
10 which govern what jurisdiction the Tribunal can exercise over Ofcom.

11 So the core question for the Tribunal today is, can the Tribunal be seised of this appeal
12 when it is a decision that was made in accordance with the functions of Ofcom under
13 section 198, and I will go on to explain, building on my written submissions, as to why we
14 say that that is not the case.

15 I should note at the outset that, of course, the reason why this issue arises is because we are
16 a statutory body. There are other forums that are not subject to those limitations. As we
17 noted in our written submissions, Ofcom, as a public body, as a regulator, is subject to
18 judicial review in the High Court. It may be that the High Court would have granted
19 permission to hear a judicial review. Obviously Ofcom would have contested that, but---

20 MR HOLMES: Sorry, did you say it would have?

21 MISS KERR MORRISON: It would have contested that, because we say that there is no
22 substance in the concerns raised, but the point is that there is a forum. For today's purposes,
23 the key issue is that this particular forum is a statutory one, and unless you can find that the
24 decision or the appeal of the decision is within the four corners of the Tribunal's
25 jurisdiction, you cannot be seised of the matter, even if there was not another forum, but
26 I am just noting that there was another forum.

27 MR FREEMAN: You are not suggesting that forum is available now?

28 MISS KERR MORRISON: No, sir, I am simply saying that I have noted in our submission that
29 the contrast here is that the statutory body is limited by the scope of the statute. We are not
30 in a similar position as you would be if you were the High Court, if we were in the RCJ, that
31 there are no such statutory limitations on the scope of the decisions that you can hear. You
32 do not have inherent jurisdiction to decide, for example, that if Mr Henry's appeal does not
33 fall within one of the provisions of section 192, but if you consider that it should be you do
34 not have inherent jurisdiction to hear that appeal regardless.

1 THE CHAIRMAN: Yes, I understand that, but the availability of judicial review might be said to
2 meet Mr Henry's point about the absence of any right or recourse?

3 MISS KERR MORRISON: Sir, I was going to come on to that as part three, but obviously this is
4 not a situation where there were absolutely no other options available to Mr Henry. While
5 I appreciate he may feel that there is an injustice in it not being dealt with, I will come on to
6 outline why section 192 does not apply a test of, is there an injustice here and should the
7 Tribunal therefore hear it, and neither does the High Court look to see whether there is a
8 legal breach. But you are right that this is not a situation in which, but for the Tribunal,
9 there is nobody that could have heard this matter if it was decided that it was appropriate to
10 do so on the substance.

11 That is all I wanted to say as part one.

12
13 But I just want to be very clear, in some of Mr Henry's correspondence he suggested that either
14 Ofcom had conceded that section 3 did apply, that it had failed to apply section 3, and the
15 suggestion this morning is that by conceding that, in sort of making parallel decisions under
16 section 3 and section 198, we have only focused on section 198, and therefore it follows
17 that, because of that error, that is why Mr Henry does not have jurisdiction. I am going to
18 try and deal with that point in two parts now.

19 The second part of my submissions is to focus on the types of powers, or decision making
20 powers that are in issue here, and why that is important. Ofcom, in the same way as the
21 Tribunal, is also a statutory body, so it has to identify its functions under the Act, and, as
22 I have already explained, section 3 is not a function *per se*, and it is not a decision making
23 power. It is a general duty that feeds into the decision making under those other powers.
24 So it is section 198, and it might be easier to go to my written submissions on this because
25 the provisions are set out within that at paragraph 4. The reason why this is the key
26 provision is because it sets out that it shall be a function of Ofcom to regulate the BBC in
27 accordance with specific provisions. But for that power Ofcom would not be able to
28 regulate the BBC in that way. That is why, for the purposes of what is the power Ofcom is
29 exercising, section 198 is the focus and is critical, and that is why it is the focus of our
30 submissions on the issue of jurisdiction that I will come on to.

31 As I have already highlighted, this was not a case of ignoring section 3, failing to apply it in
32 parallel, or anything else, it is that it is the key function to which the section 3 duty was
33 engaged.

1 MR FREEMAN: Section 198 says that the entitlement to regulate the BBC, the duty to regulate
2 the BBC, is to the extent that provision for them to do so is in the Charter or the Framework
3 Agreement. Are you going to address on whether the Charter and the Framework
4 Agreement limit the ability of Ofcom to apply its general duties under section 3, do they cut
5 across that in any way?

6 MISS KERR MORRISON: No, sir, in a sense those duties run in parallel, so what the BBC
7 Charter and Agreement do is set out, as is set out in paragraph 5, the determination process
8 can make in respect of competition assessments where the BBC proposes a material change
9 to its public services, or if that is a critical point of the Agreement. There is no dispute that,
10 as primary legislation and section 3 says, in doing that you must comply with these
11 generalised duties that sit alongside it, but these Framework Agreements do specify a sort of
12 structural approach that would be part and parcel of it. So, for example, sir, when you read
13 through the decision, this is going into it just briefly, you will see a lot of discussion of fair
14 and effective competition. That is because that is the language used in the Framework
15 Agreement, but it is essentially doing what section 3 requires, looking at the impact of the
16 proposals on competition. It is just using the language in the framework that is specified for
17 this particular decision making process. There are other such frameworks for other decision
18 making processes.

19 MR FREEMAN: I think Mr Henry's complaint is----

20 MISS KERR MORRISON: We accept that is how it is dealt with.

21 MR FREEMAN: Sorry to interrupt, I think Mr Henry's complaint is that it does not mention
22 media plurality.

23 MISS KERR MORRISON: Sir, that is going into the substance, but I think, in a nutshell, what
24 we would say on that is a generalised term for talking about how many people are available,
25 what services are available, and that is all addressed as part and parcel of looking at the fair
26 and effective competition of public value as part of the decision. That is what Ofcom's case
27 would be if we went on to the substance. The prior question is, for the purposes of
28 jurisdiction, not whether or not Ofcom failed to apply section 3, if that was arguable, not
29 whether or not they failed to comply with it if it was engaged, or if they have not dealt with
30 it properly in the decision, or if it is not properly addressed in the consultation responses.
31 All of those types of questions only arise in a substantive appeal. What we are saying is
32 when you are thinking about, does the Tribunal have jurisdiction, the key question is which
33 function are you talking about? What function is Ofcom exercising because unless you
34 have jurisdiction over decisions made pursuant to that function, it is not a matter for the

1 Tribunal irrespective of the rights or wrongs of any other substantive argument made
2 alongside that.

3 The reason why I stress the function as being important, if we go through the written
4 submissions and go to paragraph 10, we set out section 192 there in full and try to
5 emphasise the key passages of section 192. I think it was put to Mr Henry, essentially how
6 the Act works, if you generalise the section at the front, part 1, which includes the general
7 duties, are slightly generalised duties in terms of consumer research and matters like that.
8 Part 2 deals with the very specific functions of Ofcom in respect of the communications
9 market. Then Part 3 goes on to television services and that is where you find section 198.
10 Section 192 sits at the end of Part 2, and it makes clear that the Tribunal's jurisdiction is
11 delimited by the type of decision or function in issue. So what type of decision is made,
12 what power has it been made pursuant to, what part of the Act does it fall within.

13 I will take you through 1(a) to (e), but what you will notice is what is not there is a
14 generalised power to hear an appeal because an individual is affected by a decision made by
15 Ofcom. What is also not there are the generalised powers to hear any alleged breach of
16 section 3 or any of the other duties included in Part 1 of the Act. The Tribunal's
17 jurisdiction, like many of the other statutory tribunals, is delimited by the nature of the
18 decision and whether or not it can hear appeals against that decision.

19 So if we take the provision in steps, just to make that very clear and make that point good,
20 you start with the key provision which is subsection (1), which says:

21 "This section applies to the following decisions ..."

22 and I obviously underscore "decisions" for the purposes of Ofcom's submissions on this
23 point. (1)(a) is the pivotal one, which says:

24 "a decision by OFCOM under this Part ..."

25 which is Part 2, given the structure of the Act -

26 "... or any of Parts 1 to 3 of the Wireless Telegraphy Act 2006 that is not a
27 decision specified in Schedule 8."

28 Section 198's home is in Part 3, it is just not included in Part 1, it is just not within the
29 scope.

30 To just run through the others, section (1)(b) is not a decision made under section 45, and it
31 is not a decision which is given effect by modification or withdrawal of such a direction,
32 approval or consent.

33 Then:

1 “... a decision by the Secretary of State to which effect is given by one of the
2 following ...”

3 This is obviously not a decision of the Secretary of State, and (e) is a decision by the CMA.
4 You can see that every single one of the sub-paragraphs starts with “a decision”, so you are
5 looking for the decision and what it is made under. That is the pivotal question. It is not
6 saying which duties applied and if you breach section 3 or breach any of the duties included
7 in the Communications Act 2003 you can bring an appeal. That is where we say section
8 192(2) makes clear that the person affected test is tied to whether or not the particular
9 decision is within the scope of section 1, because it says:

10 “(2) A person affected by a decision to which this section applies may appeal
11 against it to the Tribunal.”

12 If “to which this section applies” was not there and it said instead, “a person affected by a
13 decision made under the Communications Act 2003 may appeal against it to the Tribunal”,
14 the Tribunal would have a very different jurisdiction, but it does not.

15 So, in fact, taking Mr Henry’s submissions this morning, he says well, if we had complied
16 with section 3 and made a separate decision under section 3 you would have had
17 jurisdiction. Even if that was right in terms of being a decision making power in section 3,
18 there could be such a decision----

19 MR FREEMAN: Sorry, there is one thing, you are not suggesting that the final determination of
20 June was not a decision, you are just saying it is wrong sort of decision?

21 MISS KERR MORRISON: It is not the wrong sort of decision, it is not a decision which this
22 Tribunal can hear an appeal against.

23 MR FREEMAN: It is a decision, even though it is called a “statement”?

24 MISS KERR MORRISON: Yes.

25 MR FREEMAN: I have come across that in other contexts, but it is a decision?

26 MISS KERR MORRISON: It is a decision, and Ofcom regularly calls them statements and if it is
27 a decision it is the final decision. It is just the language used. There is no issue but that this
28 is a decision made by Ofcom under the Communications Act 2003, but it is not a qualifying
29 decision for the purposes of sections 192(1) and (2). The Tribunal does not have *sui generis*
30 jurisdiction to hear any appeal against a decision made by Ofcom. That is not the scope of
31 the power, it is clearly more delimited than that.

32 MR FREEMAN: It is not a very comfortable position, telling a Tribunal it does not have
33 jurisdiction, is it?

1 MISS KERR MORRISON: No, sir, jurisdiction hearings are never fun for that very reason.

2 I appreciate that the Tribunal may wish to hear certain types of appeal but that is just, in a
3 sense, the lay of the land when it is a statutory body.

4 That brings me, sir, neatly on to this issue of injustice and somebody affected and they feel
5 that the public is short changed, there should be jurisdiction. As a lawyer, sir, there are
6 many situations in which you think the law should be something but we are always, in a
7 sense, stuck with what the law is and, as a statutory tribunal, this Tribunal has to focus on
8 the pure legal question of whether or not this is not in scope appeal, and for the reasons
9 given it is not.

10 There may be situations where that leads to an injustice or a lack of appeal in some
11 circumstances, but that is the regime enacted by Parliament and that is the scope of the
12 Tribunal's jurisdiction. As I said at the outset, this is not such a situation where there was
13 absolutely no other recourse. To the extent that that provides comfort to the Tribunal then
14 that is correct, there is always the inherent jurisdiction of the High Court in respect of
15 judgment review if it grants permission on the substance. The reality is, this is a pure
16 question of law of whether or not you are within the four corners of section 192, which I am
17 focusing on now, and I outlined the reasons why Ofcom says that it is not.

18 Being mindful of the fact that Mr Henry is obviously a litigant in person, we did not expect
19 - it takes us lawyers some time to navigate these provisions, never mind a litigant in person,
20 and so we appreciate that. I have set out in section (d) the other provisions that really deal
21 with the Tribunal's jurisdiction, other cases in which the Tribunal can exercise jurisdiction
22 over a decision made by Ofcom. This is essentially for completeness, so - not section (d).

23 It would be section (e). I can run through them if that would assist, but each of them
24 mirroring the approach taken in section 192 effectively sets out the other very specific types
25 of decision made by Ofcom in which the Tribunal can hear a substantive argument that that
26 decision was right, wrong, unlawful or otherwise. They are very specific.

27 In 25 I set out section 317 which deals with even more circumscribed scopes of appeal
28 which is against the exercise by Ofcom of powers awarded to it under Broadcasting Acts of
29 1990 and 1996, but only when it is for competition purposes. So there is a sort of purpose
30 test there as well as whether or not it is qualifying decision. That is obviously not what
31 Ofcom was doing here.

32 At paragraph 27 of Ofcom's submission we have dealt with paragraph 9.1 of schedule 11,
33 which deals with the very specific types of decision, listed in (a), (b), (c), that are made in
34 respect of a person holding a regional channel 3 licence, so obviously that is not in issue.

1 Just finally Mr Henry also mentioned, not this morning, but in his written submissions at
2 some at some point, some references to the old provisions dealing with consumer claims
3 under the Competition Act, prior to the changes brought in in October 2015. Those are
4 about damages claims that used to be in the Tribunal purely limited to follow on damages
5 claims from infringement decisions made by European Commission or other competition
6 regulators. That is not applicable here either in its previous form under the pre-October
7 2015 version or the post-October 2015 version, but we wanted to, for completeness, and in
8 all fairness to Mr Henry, ensure that we had addressed any other avenue that should be
9 addressed at this hearing.

10 In summary, sir, essentially what Ofcom is saying is that it does not accept the substance of
11 the case against it, but the reality is we have to put that to one side for a moment and ask the
12 pure question of law whether this Tribunal has jurisdiction. Our submission is that the
13 answer is this is not a qualifying decision for the purposes of section 192 or any other
14 provision of domestic statute that deals with the Tribunal's decision. Whilst there was no
15 absence of any type of recourse, the reality is injustice or whether we think the Tribunal
16 should or should not have jurisdiction is not the question for today. The question is the
17 second point, that it is a pure question of law and it is not a qualifying decision.

18 So those were the issues that I intended to cover in my oral submissions. Are there any
19 further questions?

20 MR FREEMAN: Can I just get this clear - I am not saying this has happened: if Ofcom gets it
21 wrong in coming to a decision about something the BBC has done, then if somebody in
22 Mr Henry's position, a member of the public, feels aggrieved, it is a judicial review or
23 nothing? Is that it?

24 MISS KERR MORRISON: Precisely, sir, as is the situation with many regulators.

25 MR FREEMAN: And a Tribunal that is meant to know about these things, or some people say
26 that it knows about these things, has no jurisdiction in relation to decisions taken where
27 Ofcom is regulating the BBC - that is what you are putting to us?

28 MISS KERR MORRISON: That is the legal position. That is the statutory provision. The same
29 applies, sir, under the old Competition Act regime where the Tribunal's jurisdiction was
30 limited to only hearing follow-on damages claims and could not hear stand-alone claims,
31 and they had to go to the High Court. Many people may have thought that that was slightly
32 bizarre, and that is something that has been remedied now. As the expert forum one would
33 expect those kind of things can be brought here, but it is a feature of statute, it is not about
34 what it should be. It is about what, in fact, is a matter of law. I have no instructions as to

1 what Ofcom thinks about whether or not you should have jurisdiction. That is not the
2 question and that is not----

3 MR FREEMAN: I am not asking you that. I would not ask you to go there.

4 MISS KERR MORRISON: That is not the question and that is not the issue. The legal question
5 is purely, is it a qualifying decision, and it is not.

6 THE CHAIRMAN: Thank you very much. Mr Henry, did you want to come back on anything?

7 MR HENRY: Yes, on a couple of points. I think it is important to understand what Ofcom has
8 actually done is effectively grant a licence to a broadcaster. The fact that it is the BBC is
9 almost immaterial. It has granted a licence for the BBC to launch an additional service to
10 use wireless telecommunication capacity to deliver this service, and this is where it derives
11 its requirements from for the Telegraph Act 2006, I think it is. They claim that they did not
12 use this power, but actually they have used this power, because the BBC is going to use
13 capacity, as defined in the Wireless Telegraphy Act 2006, to deliver this additional service.
14 By doing so that raises the question of whether the use of this bandwidth again is in the
15 public interest, and does it actually represent innovation? Could it be used another way?
16 This is not just the BBC changing its operator's licence, it is launching a new service. It is
17 taking up capacity that could be used for something else or by someone else.

18 At the same time they have admitted there will be competition damage. This does indeed
19 raise other issues outside of section 198, which is they admit there will be damage to
20 competition. However, their answer to that was to claim, "However it was difficult to scope
21 what that damage is". We now know it was the closure of another channel, all things that
22 were raised to it before it came to its final decision and before it published it. It published a
23 preliminary finding, which I think is when I then submitted further evidence and others did
24 too. It was expected they would not make their final decision because they had claimed in
25 public they had serious concerns about some aspects of what the BBC was planning.

26 Throughout all of this process, so it does bring in competition issues because it is reducing
27 competition in the market.

28 Section 198, in fact, I think there was a key point that was raised earlier. One, I believe that
29 the Tribunal should have jurisdiction over this for the simple fact that this is a complex
30 specialist area and the Tribunal deals with communications, and in fact decisions made by
31 the regulator Ofcom, and has done for many years. Perhaps other courts will not have that
32 speciality information and background.

33 I believe what Ofcom has done by awarding this new licence to the BBC without any
34 competitive tender, without looking into competition issues, which is what effectively this

1 decision is, is to award permission to launch another service. So it is an additional
2 broadcast licence. So they have actually.

3 They refer to section 198 as if somehow it is completely separate. What they have done is
4 issue a broadcast licence to the BBC. The BBC used to, when they did their own, before
5 this change in legislation, have a single licence for each service. The BBC Trust did what
6 Ofcom's job was, or is now. They would issue a new licence for BBC3 and BBC4, and in
7 that would detail what the channel was going to be, etc.

8 It was touched on earlier, the BBC has no remit whatsoever to look at media plurality. That
9 is Ofcom's job, to look at media plurality. They have published themselves guidelines and
10 information and directed two the Secretary of State for Culture, Media and Sport that media
11 plurality is essential to have more voices in the market place. They have gone against their
12 own published advice.

13 MR HOLMES: Mr Henry, can I just come back to you on your point about the Wireless

14 Telegraphy Act specifically on the jurisdictional question: does that mean that you are
15 implicitly answering the Chairman's question about which part of section 192 might be in
16 play?

17 MR HENRY: Yes, because what they have done is, effectively, instead of just granting a change
18 for the BBC, they have actually issued a new licence.

19 MR HOLMES: So they have made an implicit decision which would fall within - I think this is
20 what you are saying - section 192(1)(a), which refers to the Wireless Telegraphy Act 2006?

21 MR HENRY: Yes, and that is exactly what the BBC will be doing. They have not issued a
22 specific licence, they have given the BBC permission to launch a service to use capacity
23 that is currently not used, and it could have been used by an independent or a commercial
24 operator?

25 MR HOLMES: So that decision, or implicit decision under the Act----

26 MR HENRY: Yes, they have made a decision to allow, and in fact it goes further than that
27 because the BBC is not adding anything new or innovative, it is just another outlet. This
28 whole question comes back to the public interest is in more voices delivering news.
29 Ofcom's decision in section 198 has covered a multitude of sins, if I am allowed to say that,
30 which is that they have allowed the BBC to get a licence to broadcast a new service, they
31 have allowed public money to be used to fund this service. They have identified correctly
32 in their decision process that it may damage competition in the marketplace. They say so.
33 I would certainly agree that has been damaged, and while doing that they have indeed
34 allowed wireless telegraphy capacity to be used, I would argue not in the most efficient

1 way, because it is not furthering the interests of the public, which is to have a multitude of
2 services. That capacity could be used for something else.

3 So they have actually, under this section 198 decision, used multiple different facets of
4 different bits of legislation to allow this BBC service to be created. My argument would be
5 that the reason that this Tribunal should have jurisdiction over a case like this is you already
6 have jurisdiction over many aspects of it, which is the Telegraphy Act, Broadcasting Act,
7 decisions by Ofcom.

8 I totally accept and I do not blame in any way Ofcom's process, they took what I think is a
9 very simplistic, simple look at the BBC's announcement and request, and looked at, "Well,
10 how do we now regulate the BBC?" It is the first time they have ever been asked this
11 question, I totally understand that. This is the first time Ofcom has had to answer it. It is
12 not straightforward and it brings in multiple different aspects and specialities that Ofcom
13 have regulation over, and I would suggest that because we are dealing with broadcasting,
14 because it is a digital service, a new service it is launching, indeed the licence has been
15 granted and capacity to use that licence has also been granted. They just do not put it in
16 those words, but that is indeed what they have done and that is why I think, from a specialist
17 point of view, the Tribunal has dealings with the Communications Act, it has some overlaps
18 with competition issues, it should not be a great stretch of the imagination...

19 I should also say that, as a litigant myself, I gave every opportunity to Ofcom to come back
20 and engage with me when I was submitting my response and I got nothing. I spoke to them
21 before they came out with it and I said I would be appealing this if they went down this
22 route, I got no feedback from them at all. If there had indeed been, or I had been pointed in
23 the right direction, "Well, the only way you can appeal this is, if you do not like it, is to take
24 it to the High Court of the Quarter Session in Scotland", then that is maybe what I would
25 have done, but there was no response from Ofcom until we get into this process.

26 I would say that this court does have jurisdiction because their decision is not restricted, it is
27 just section 198. It crosses all segments of their regulatory regime - competition, capacity,
28 then their own public announcements on media plurality. At the end of the day it is about
29 media plurality. I proposed a solution. The solution is the BBC sub-contract, or Ofcom
30 ensure that the BBC sub-contract news and current affairs to an independent producer that
31 currently is not in the market place. Then the public interest is protected.

32 I think it is essence to focus that they have granted a licence, and a licence to allow the BBC
33 to use wireless telegraphy, which does give you a right of appeal, especially if it is not the
34 most efficient way or innovative way of using that capacity. I would argue an extra

1 television channel, a linear channel at that, only part time is probably not the best way of
2 using that capacity in this day and age.

3 Sir, I think that is all. Thank you.

4 THE CHAIRMAN: Thank you very much, Mr Henry.

5 Miss Kerr Morrison, did you want to come back on that new point raised by Mr Henry
6 relating to the Wireless Telegraphy Act?

7 MISS KERR MORRISON: Yes, sir, just briefly on the new point that has been raised this
8 morning that this is somehow a licensing decision, that we varied the terms of the BBC's
9 licences, the BBC is subject to a number of what are called 'Multiplex' licences under the
10 Wireless Telegraphy Act, in which it can use the wireless spectrum it has been granted.
11 There has been no decision as part of this statement that impinges on or in any way alters
12 that. There has been no decision made under the Wireless Telegraphy Act. Effectively,
13 what happens is the Framework Agreement governs how the BBC can provide UK public
14 services, commercial services, and that was the process which was engaged here, which is a
15 process under section 198 of the Communications Act 2003. There was no decision made
16 on anything about BBC's licensing under the separate provisions of the Wireless
17 Telegraphy Act.

18 MR FREEMAN: Is there going to be such a decision----

19 MISS KERR MORRISON: No.

20 MR FREEMAN: -- because the BBC can fit this into its current----

21 MISS KERR MORRISON: Precisely, sir. You have licences that are dealt with under the
22 Wireless Telegraphy Act and the BBC's ones are called 'Multiplex' licences. That is one
23 issue.

24 Then under section 198 and the Charter Agreement, Ofcom now has a new role, as
25 Mr Henry has explained, in actually regulating what they do with that, but that is
26 circumscribed by the Act together with the Framework Agreement which provides separate
27 different processes for dealing with different types of services the BBC provides, which are
28 either public services or commercial services, or some other kinds of services, and that is
29 the process that we are dealing with here.

30 This is not - I think Mr Henry said that this decision encompasses all kinds of different ills -
31 was I think his language - but I think what he is trying to say is that as part and parcel of this
32 statement there must have been all kinds of decisions on licensing and other Acts, and that
33 is just not accurate.

1 MR HENRY: Can I just make one brief point? I think this gets to the heart of the issue. Section
2 193 has been used in isolation, but - and the reason why this Tribunal should have
3 jurisdiction over----

4 MR FREEMAN: 198.

5 MR HENRY: Sorry, 198 - should have jurisdiction over this decision in particular is because
6 Ofcom has admitted that they have not actually done, if you like, the due process, because
7 there has been no looking at whether what the BBC was proposing is the best use of the
8 capacity that is gifted to them. There has been no competition review of what is the damage
9 that could be caused to other commercial operators, or how this may put other commercial
10 operators off from entering the market. There is no mention in the decision process again
11 on media plurality. So they do not show how they even considered any of these other
12 implications.

13 Under the Wireless Telegraphy Act 2006 Ofcom is required to ensure that the capacity is
14 used efficiently and it benefits consumers and citizens with new services, etc. They have
15 now admitted that this proposal by the BBC, which is to launch an additional service using
16 public funds, so this brings in the whole question of state aid being used, they have not done
17 the competition review to ensure that it did not damage commercial operators. They were
18 warned by commercial operators. I understand it is public record, STV Group submitted
19 that this will damage their business. It turns out it has. Ofcom does not seem to be
20 concerned with that. Instead they appear to have said, "Oh, well, the BBC wants to add this
21 new service, they have got the capacity so we will just let them."

22 MR FREEMAN: I thought what you were putting to us was that they had actually made a
23 licensing decision.

24 MR HENRY: They have, and this is what I was going to get to. What they have done now, and
25 the regime has changed recently, because I noticed that Ofcom and the BBC, they no longer
26 have individual licences for each service, whereas under the BBC Trust they did. So what
27 Ofcom has done is, in fact, issue a new licence. All they have done is change the
28 framework licence, which details all the different BBC services that they have - whether it
29 is radio or internet, or whatever capacity they are using, and that has allowed them, and now
30 they have added in that there is going to be additional service, and the budget, etc. Ofcom
31 has a duty as the regulator to ensure that it does not damage competition and that it
32 complies with all the other parts of its expertise. They have not done this. Section 198 has
33 been used as a get-out. They have simply allowed the BBC to change its framework
34 documents so that they now have a statement which includes all the BBC services.

1 Previously they were individually licensed. The BBC Trust issued a BBC licence for each
2 channel, each radio station, and now it is one. Effectively Ofcom has changed and has
3 issued a licence. They can say whatever they like, but that is what it is. They have issued a
4 licence to the BBC to launch an additional service, because the BBC Trust no longer issues
5 licences. It is now Ofcom's duty as far as I am aware.

6 MISS KERR MORRISON: I really have to correct this, I think you are confusing two things.
7 There are licences under the Wireless Telegraphy Act that deal with capacity. There is then
8 a different decision making process, again under section 198, that deals with operating
9 licences under the Framework Agreement. While there may be some changes to the
10 operating licence, that is not a part and parcel of a decision under the Wireless Telegraphy
11 Act, and so we end up back again in section 198, where you have no jurisdiction in terms of
12 a decision made under that.

13 I would just like to be very clear with the Tribunal, the decision in issue here is about
14 decisions made under the Framework Agreement, and there may be consequential
15 amendments to the operating licence under the Framework Agreement, but there is no
16 separate alteration or decision to be made under the Wireless Telegraphy Act, and certainly
17 that is not the decision that is in front of you. There is no separate power of function and
18 issue under the Wireless Telegraphy Act over which there is a qualifying decision to which
19 you could be seised to hear an appeal about.

20 MR HOLMES: Can I ask: if we were to assume - and I am not assuming this, but just for the
21 purposes of the question - that Mr Henry was right that the Wireless Telegraphy Act was
22 engaged, would schedule 8 be relevant, because that then excludes a decision from section
23 192?

24 MISS KERR MORRISON: It would be. You would have to consider - first of all, you would
25 have to consider which power under the Wireless Telegraphy Act the multiplex licences for
26 capacity were being altered, which I am afraid I did not look into for the purposes of today
27 because this has never been suggested before. And then you would have to look whether it
28 was in the right part, whether it was Parts 1 to 3 of the Wireless Telegraphy Act, and then
29 you would have to go through schedule 8 to consider whether or not it is an in-scope or out-
30 of-scope Wireless Telegraphy Act decision. In my submission, sir, we do not need to go
31 down that line because that is not the nature of the decision that we are dealing with here.
32 There is still no qualifying decision to which this Tribunal can hear an appeal about.

1 MR FREEMAN: So we cannot sort through the statement looking for decisions under other
2 statutes that might lurk there even though they are not specifically identified? That is your
3 submission, is it?

4 MISS KERR MORRISON: Well, sir, my submission is in two parts: one, that there is no
5 decision lurking there. There is no other decision there.

6 MR FREEMAN: That is important, so Ofcom did not make a decision under the Wireless
7 Telegraphy Act?

8 MISS KERR MORRISON: There is no decision under the Wireless Telegraphy Act.

9 MR FREEMAN: As you said before, it is not needed because there was no increased use of
10 existing capacity.

11 MISS KERR MORRISON: There was no alteration to the multiplex licences. We appreciate that
12 a operating licence, which is a different creature----

13 MR FREEMAN: That is a different sort of licence.

14 MISS KERR MORRISON: -- but that is again part of the Framework Agreement process that is
15 dealt with under section 198.

16 MR FREEMAN: Operating licences do not fall under the Wireless Telegraphy Act?

17 MISS KERR MORRISON: No. Obviously Ofcom performs a very specific function with regard
18 to the BBC now. That regulatory function in regard to what services the BBC can provide
19 is dealt with by section 198.

20 MR FREEMAN: Right.

21 MISS KERR MORRISON: And section 198, coupled with the new Framework Agreement
22 which was published in December 2016.

23 MR FREEMAN: And if Ofcom did make a decision under the Wireless Telegraphy Act, then
24 subject to reading through the----

25 MISS KERR MORRISON: (Interrupting) That is an even more complicated question----

26 MR FREEMAN: -- we might have jurisdiction.

27 MISS KERR MORRISON: Yes, but there would be a whole new decision making process being
28 made about whether or not the Tribunal had jurisdiction, which has the added complications
29 of not only is it just referring to part of the Wireless Telegraphy Act, but you would also
30 need to compare----

31 MR FREEMAN: It is not the most straightforward of statutes, I have to say.

32 MISS KERR MORRISON: No, sir, and that is why we do appreciate that it is not an easy statute
33 to navigate. That is why I made the decision to provide the written submissions that we did
34 on Monday, because we were hoping that would help us navigate it. I am afraid I did not

1 see the Wireless Telegraphy Act point coming, so we have not dealt with that in writing.

2 But the simple answer is that there is no decision under that.

3 THE CHAIRMAN: Thank you very much. We are now going to retire to consider our decision
4 on jurisdiction.

5 (Short break)

6 THE CHAIRMAN: The Tribunal has given careful consideration to the submissions made by
7 both parties and has reached the conclusion that the Tribunal does not have jurisdiction to
8 determine Mr Henry's appeal. The reasons for that conclusion will be given subsequently.

9 I now invite the parties to make submissions in relation to costs.

10 MISS KERR MORRISON: Sir, I hope you have got our letter of yesterday which set out the
11 amount of costs that we were seeking, but I will go through anyway what we are seeking.
12 As was foreshadowed at the very end of our written submissions, Ofcom is only going to
13 seek its external costs in respect of this application, which is essentially the costs of myself
14 for the purposes of the hearing.

15 Just to explain Ofcom's approach in this regard, it has sought, in accordance with the power
16 of the Tribunal to grant costs, to adopt a proportionate and a reasonable approach to this
17 issue taking into account all of the relevant circumstances. So, first of all, in approaching
18 this issue, Ofcom has taken account of the fact that the appellant is a litigant in person. That
19 is essentially why we are not asking for Ofcom's internal costs. However, at the same time,
20 Ofcom, in carrying out its function, including defending decisions before the Tribunal, has
21 to be mindful that it is a publicly funded statutory body, whose costs are effectively
22 recovered from stakeholders and therefore the public.

23 So, on balance, Ofcom has reached the view that on the particular facts of this case where
24 there really was no jurisdiction for the Tribunal to hear the appeal, it is appropriate for it to
25 seek to recover what is, in effect, a contribution towards the costs incurred specifically as a
26 result of the oral hearing, as opposed to this being dealt with as a matter on the papers.

27 As I flag in the written submissions, Ofcom is therefore only seeking its external costs.

28 To give you what the amount of that would... that is £1,608, inclusive of VAT. We are not
29 seeking to recover the internal costs which, on a preliminary estimate - these are both
30 preliminary estimates, but we are asking for £1,608 = on a preliminary estimate Ofcom's
31 internal costs would have been about £5,874. We are, in effect, asking for just over a fifth
32 of the total costs Ofcom has incurred in dealing with this issue. Ofcom has focused on
33 recovering the additional costs that arose as a result of the need for an oral hearing -
34 external only.

1 THE CHAIRMAN: And that is essentially on the basis that costs should follow the event - in
2 other words, the winner should receive the costs?

3 MISS KERR MORRISON: Ofcom accepts that the Tribunal has a slightly different power under
4 rule 104. It is not the standard approach of it necessarily follows the event. The Tribunal
5 does have to do what is deemed reasonable and proportionate in the circumstances. So we
6 have not really started from we should definitely get our costs. We have looked at what is
7 reasonable and appropriate in the round in line with rule 104 of the Tribunal's rules.

8 THE CHAIRMAN: Would it be appropriate for the Tribunal to take into account that the
9 legislation is complex for a litigant in person to decipher, or is that something that...

10 MISS KERR MORRISON: Sir, there is a variety of factors you can take into account, effectively
11 all the circumstances of the case. In fact, that is precisely what we have taken into account
12 by taking into account in a substantial way the fact that Mr Henry is a litigant in person.
13 One would imagine that our position might be quite different if Mr Henry was represented
14 by a lawyer and had run this argument at the hearing. We would have been probably
15 seeking all of our costs, but we have reduced it by four-fifths as a result of the fact that we
16 do appreciate that Mr Henry is a litigant in person, who is dealing with a complex regime on
17 his own. Given that this matter did have to come to an oral hearing and the fact that Ofcom
18 is not a big commercial company, it is a statutory public regulator, a contribution on these
19 particular facts is appropriate.

20 MR FREEMAN: Are we allowed to ask how the internal costs were calculated?

21 MISS KERR MORRISON: What essentially we did, we did produce a preliminary schedule, but
22 what we did not want to do was bombard you with paper in case you did not deal with this
23 today.

24 MR FREEMAN: I am not asking for the details, just the principle on which it was done.

25 Assumed commercial rates or actual internal costs?

26 MISS KERR MORRISON: I am just looking at the detail here, sir. We have not included at all,
27 I should clarify, any involvement of Ofcom's general counsel. It has been the main two
28 lawyers on the case dealing with the appeal, not the wider senior lawyers. But the hourly
29 rates were based on Her Majesty's Courts and Tribunal Service for a guideline hourly rate,
30 London, grade 3, so the standard----

31 MR FREEMAN: Notional assumed?

32 MISS KERR MORRISON: Notional assumed, because it is internal costs, yes, sir.

33 MR FREEMAN: So I am allowed to ask that.

1 MISS KERR MORRISON: Yes, you are allowed to ask that, sir, and I should probably have
2 explained it, but because we are not claiming it, what we really tried to do was avoid
3 spending lots and lots of time scheduling. What we have done is come up with a
4 preliminary estimate. Also, sir, my estimate is an estimate, because Ofcom does not work
5 in the way a commercial body does of instructing counsel via brief fees, it is an hourly rate,
6 which is a reduced rate because it is a governmental body. What we have done is applied
7 the governmental rate for the purposes of my fees, which is £80 an hour, as opposed to,
8 thankfully, what I earn sometimes from other people.

9 MR FREEMAN: I am very glad to hear it.

10 MISS KERR MORRISON: What we did was use the standard rates for notional internal rates.

11 MR FREEMAN: Thank you.

12 THE CHAIRMAN: Thank you. Mr Henry?

13 MR HENRY: Thank you. I appreciate Ofcom's offer of reducing the costs. I would simply say
14 that it has already been accepted by Ofcom and I think the Tribunal that there is indeed a
15 very complex set of regulations which are not clear, and this is a new set of circumstances,
16 and my time and efforts started a year ago engaging with Ofcom's consultation. I believe
17 that if Ofcom had been more forthcoming in responding to my consultation, this whole
18 process may have been avoided, but there was no correspondence from Ofcom or
19 engagement on my substantive issue of media plurality. So I would certainly ask that the
20 Tribunal take that into account.

21 For my own part, I have kept my costs to a bare minimum and I was not looking to, even if
22 I was successful, recover costs from Ofcom, because that is not why I brought this case.

23 I believe it is an important public interest question that has arisen in this process.

24 So I would simply ask that the Tribunal take that into account.

25 I asked for a hearing because I had not had much correspondence from Ofcom up until that
26 point, so there was very little for me to go on, and I did not believe that I would get my
27 points across purely quoting chapter and verse, and therefore I would not be able to answer
28 any questions that came up. So I believe this was the most efficient way of dealing with
29 issue.

30 So I thank everyone for their time, and I do not think I have got much more to add on that.

31 I would ask that, if you have got the ability to offset costs, I think Ofcom - I have kept
32 Ofcom's engagement to a minimum. It is not created on a whim. It is an important issue.

33 Unfortunately the legislation does not come up with a clear answer.

34 I thank everyone for their time.

1 THE CHAIRMAN: Thank you. Did you want to come back on anything?

2 MISS KERR MORRISON: Just on one minor point, sir, just to say that Mr Henry started again
3 with some of the substantive points, and obviously those cannot be prayed in aid in support
4 of an assessment for costs, which was in respect of a hearing all about the jurisdiction issue.
5 As a second point, sir, in tab 5 is Ofcom's original submissions on the issue of jurisdiction.
6 We do actually say that this issue is clear cut, we have just taken into account the fact that
7 Mr Henry is a litigant in person, and therefore, whilst it is taken into account in heavily
8 cutting down what costs Ofcom might otherwise seek, we would submit it would not be
9 reasonable and proportionate to say that because it was difficult for a litigant in person
10 Ofcom should not be able to recover at all when it is, in effect, a publicly funded body.

11 MR FREEMAN: What do you say to his point that if Ofcom had communicated with him earlier
12 on, none of this would ever have happened.

13 MISS KERR MORRISON: Well, sir, as I said, that is essentially going into the substance of
14 whether Ofcom should have engaged with----

15 MR FREEMAN: No, it is about the process by which----

16 MISS KERR MORRISON: The process was followed. Ofcom put out its consultation.
17 Stakeholders responded and then you can see from the decision and the detailed annexes, if
18 you would like to look them up on line, that Ofcom then took the stakeholders - I mentioned
19 some specific ones - and then it dealt with the stakeholder responses. If I was in front of
20 you today, sir, dealing with the substance, I would be defending Ofcom saying it cannot
21 engage in a special way with individual stakeholders. It was not incumbent on Ofcom to
22 somehow specifically address Mr Henry separately as part of that process.
23 In terms of forecasting on what we were dealing with today, from 6 September onwards
24 Ofcom had set out in fairly clear terms what its position was on jurisdiction. The Tribunal
25 had already found that there was an issue on jurisdiction, and we are here today because
26 Mr Henry wanted an oral hearing of this issue. We have taken into account the concern that
27 he is a litigant in person in asking for only just over a fifth of our costs.

28 THE CHAIRMAN: Yes, thank you.

29 Mr Henry, you may think this is an unfair question. You knew this was a complex legal
30 point, this question of jurisdiction. Did it not occur to you to get legal advice, professional
31 legal advice about it?

32 MR HENRY: It was part of my plan, but in my day job I run a local pub in Edinburgh now,
33 which has taken me seven days a week. I have only had it for the last six months, so it is
34 quite a recent development. I have had literally no time off, even over Christmas, to seek

1 any advice from anybody. In fact, I would have very much liked to have been able to - if
2 we had had another few weeks I would have been able to pick up after the Christmas
3 holiday and would have probably sought legal advice from a specialist in this area. But the
4 Christmas holiday got in the way, there was nobody open that I could get in touch with to
5 get clarity on this.

6 Certainly section 198 and the decision process, I did engage in the decision process, I did
7 engage in the decision process, and it was not just me. My submission was supported by
8 721 members of the public that signed the online response. I was not asking Ofcom to just
9 communicate with me. The question was there right from the very beginning, it was all
10 about media plurality. It is not mentioned, there is no answer to it. If there had been some
11 form of response from Ofcom telling me, "We do not believe we have to deal with this
12 under this section", that might have satisfied me, or I would have gone and sought more
13 advice. They never responded to it. It was as if I had never sent it. So that is why I have
14 had to have a hearing so that at least my voice was being heard, because it certainly did not
15 seem to be heard when I was dealing with Ofcom during the consultation process.

16 Yes, Ofcom is quite correct, they did publish online what my submission was. They also
17 failed to answer it. So I am here because, effectively, I was given no other alternative.

18 MISS KERR MORRISON: I would just like say, the answer to the consultation responses is
19 Ofcom's decision. Whether or not Mr Henry then agrees with that decision or feels that
20 points in his consultation response were not adequately with, or they should have been
21 somehow specifically addressed, that is the decision that this Tribunal cannot hear. It was
22 in no way incumbent on Ofcom to come back and give a personal response to Mr Henry, to
23 himself or to those he was acting with the support of. This costs application relates to an
24 application for appeal that was made many months ago, that the Tribunal flagged almost
25 immediately that there was a potential jurisdiction issue and invited submissions. Mr Henry
26 has had Ofcom's submissions in succinct form at least from 6 September, and asked for a
27 hearing in, I think, November. So, in my submission, it would not be fair to hold against
28 Ofcom some broader criticism of how it did or did not deal with the consultation process.
29 This application relates to costs of this specific issue. On this issue Mr Henry has been on
30 notice that there was a potential costs application against him for some time.

31 THE CHAIRMAN: The Tribunal is going to reserve its decision on costs. We thank you very
32 much.