

## Complaint by Mr Peter Humphrey about *China 24* and *News Hour*

**Type of case** Fairness and Privacy

**Outcome** Upheld

**Service** CCTV News<sup>1</sup>

**Date & time** 27 August 2013, 12:00 and 14 July 2014, 21:00<sup>2</sup>

**Category** Fairness and Privacy

**Summary** Ofcom has upheld this complaint about unfair treatment in the programmes as broadcast and unwarranted infringement of privacy both in connection with the obtaining of material included in the programmes, and in the programmes as broadcast.

Ofcom also considers that the breach of Rules 7.1 and 8.1 of the Code is serious. We are therefore putting the Licensee on notice that we intend to consider the breach for the imposition of a statutory sanction.

### Case summary

CCTV News broadcast *China 24*, a news programme which reported on the arrest of Mr Humphrey and included footage of him appearing to confess to a criminal offence. It then broadcast a follow up report during *News Hour*, which reported on Mr Humphrey's subsequent conviction and included footage of him apologising for having committed the offence. He was named in both programmes, although his face was blurred.

Ofcom found that:

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<sup>1</sup> CCTV News was renamed as China Global Television Network Channel (CGTN) on 31 December 2016, and the service continued to operate under the same licence.

<sup>2</sup> The complaint was submitted to Ofcom in November 2018.

- The programmes included footage of Mr Humphrey which had the potential materially and adversely to affect viewers' perception of him. The Licensee did not take sufficient steps to ensure that material facts had not been presented, omitted or disregarded in a way that was unfair to Mr Humphrey.
- The Licensee had not provided Mr Humphrey with an appropriate and timely opportunity to respond to the allegations of wrongdoing being made about him in the programmes as broadcast.
- Mr Humphrey had a legitimate expectation of privacy in relation to the filming and subsequent broadcast of the footage of him without his consent. In the circumstances, Mr Humphrey's legitimate expectation of privacy was not outweighed by the broadcaster's right to freedom of expression and the audience's right to receive information and ideas without interference. The Licensee had therefore unwarrantably infringed Mr Humphrey's privacy in respect of the obtaining of the material included in the programmes and in the programmes as broadcast.

### Programme summary

CCTV News was an English language news and current affairs channel. It was renamed as China Global Television Network Channel (CGTN) on 31 December 2016. Provision of the service continued under the same licence held by Star China Media Limited (the "Licensee"). As the programmes were broadcast on the service prior to its rebranding, we have referred to the channel as CCTV News throughout.

#### *China 24, 27 August 2013*

On 27 August 2013, CCTV News broadcast a news programme, *China 24*, which included a story about the complainant, Mr Humphrey, and his wife, who had been arrested in Shanghai for "illegally obtaining personal information and selling it on for profit".

The presenter introduced the story:

*"Let's hear from a problem that's particularly present here now: the illegal acquisition and then the use of personal data is one of fastest growing crimes in this country. Well on Tuesday, police in Shanghai knocked a chink into that, they announced the owners of a foreign private investigation firm have been arrested on charges of illegally selling personal data belonging to Chinese nationals".*

A pre-recorded report was then shown. The reporter said:

*"Personal information can be used by others to generate big business. Two private corporate investigators, Peter Humphrey and his wife, Yingzeng Yu, have been arrested by Shanghai police and now face charges over obtaining and selling personal data for illegal purposes. In 2004 Humphrey and his wife registered ChinaWhys Limited in Shanghai providing services including screening potential employees or business partners. Several dozen reports prepared by Humphrey and Yu contained*

*information that seriously violated the legitimate rights of citizens according to the investigation by Shanghai police”.*

As the reporter spoke, footage was included of the complainant in handcuffs and with his face obscured, being escorted by two police officers down a corridor. The complainant’s wife, also in handcuffs and with her face obscured, was then shown being led down a corridor by a police officer. Footage was also included of what appeared to be the inside of the complainant’s work office showing various ring binders and documents.

A Shanghai police officer was then shown. He said:

*“These reports contain details such as home addresses, family members, real estate and vehicle information”.*

The reporter continued:

*“Humphrey and Yu purchased the detailed personal data, compiled them into reports and, sold them to their clients who included manufacturers, law firms and financial institutions. Each report was sold for over 100,000 yuan. The company’s annual profit was over six million yuan”.*

Footage of Mr Humphrey, speaking in Mandarin and with his face obscured, was included in the programme. He appeared handcuffed and was described as a “suspect” by a caption and an English translation of what he said was broadcast in voiceover:

*“We obtained personal information by illegal means. I regret what I did and apologise to the Chinese government”.*

The reporter continued:

*“The number of such cases in Shanghai increased from one, in the first half of last year, to 30 cases this year. The Chinese government has stepped up measures to protect personal data, pushing for more regulated and clearly defined parameters in order to protect the legitimate rights of its citizens and companies”.*

The pre-recorded report ended, and the presenter and another reporter discussed the case. The presenter commented: *“Each one of us can relate to the selling of our personal data, it happens all the time over here: you get spam calls, people know our names. But, tell us about how lucrative it was for this couple and, what are the details we know other than what the police have already said publicly?”*

The reporter said:

*“According to Shanghai police, on Tuesday the two corporate investigators, a Briton and an American, has been arrested in Shanghai for illegally selling personal information. And, the personal information traded by the two couples included that residents’ addresses and*

*exit/entering information and information related to real estate etcetera. And this is the first case of the Chinese police to crack on foreign registered companies who are operating illegally, research and trafficking personal information. And Peter Humphrey, who came to China more than 30 years ago, worked as a former reporter for the Reuters News Agency and, later he worked as an investigator in the next 14 years. And his wife, Yu Yingzeng, worked or advised in the companies in United States, in China, in Hong Kong SAR, in the technology and medical products. And the couple have confessed their criminal activities, criminal facts to the police and apologised to the Chinese government. And, also, the Shanghai police, they released their latest data on combatting personal information trafficking: in the first ten days of August alone they have arrested more than 126 people and they have solved more than 140 related cases”.*

The presenter spoke about the fact people place personal information and data online, including when they make purchases and commented: *“so obviously there is information out there for people to steal if they really want to”*. He then said: *“talk more about the Peter Humphreys of this world so to speak, are there many more of them and how bad is the situation in China today?”*

The reporter responded:

*“Well, according to the data from the Ministry of Public Security, in early August the Chinese police have arrested more than 1200 people suspected for trafficking personal information data and, more than 700 million pieces of personal information were seized by the police from more than 20 public security organs from across the country including, Beijing, Shanghai and Hebei province. And, since 2012, the country has carried out three nationwide public campaign[s] to crackdown such criminal activities. And, the ministry emphasised that the country will maintain a very tough and harsh stance on issues related to cases like this and also so as to ensure the people’s legal rights are well protected. And also the ministry reminded the people to, well, to increase their awareness of protecting personal information”.*

During the headlines and report, various captions were shown. These were:

*“Privacy infringement”.*

*“Identity theft”.*

*“Personal data protection. Shanghai arrests husband and wife over misuse of personal data”.*

*“Foreign couple detained in Shanghai. Peter Humphrey: former reporter for Reuters”.*

*“Foreign couple detained in Shanghai. Combating personal information trafficking”.*

The report ended and there was no further reference to the complainant.

*News Hour, 14 July 2014*

On 14 July 2014, CCTV News broadcast its lunchtime news programme, *News Hour*, including a further story about the complainant and his wife. The presenter introduced the story:

*“Prosecutors in Shanghai have indicated that a foreign couple, for indict a foreign couple for illegally obtaining private information on the Chinese”.*

A caption said:

*“Personal information trade. GSK China’s private-eye agents indicted in Shanghai for illegal investigation”.*

The presenter then said:

*“The couple, Peter William Humphrey, a 58 year old Briton, and his wife, Yu Yingzeng, a 61 year old American national, were arrested in August. They were hired by GlaxoSmithKline China’s CFO Mark Reilly as private eyes in 2013. It is the first indictment the Chinese prosecutors have brought against foreigners for illegal investigations. Prosecutors have found that the couple illegally trafficked a huge amount of personal data on Chinese nationals to seek profits via a company called ChinaWhys Company Limited. The personal data traded by the couple included: household registration details, the background of family members, real estate, vehicles, call logs, and also exit/entry records. The couple obtained the data by methods including: secret photography, infiltration or by tailing. Humphrey admitted to having used illegal means in his investigations, also expressing regret for his actions”.*

As the presenter spoke, the same footage as in the earlier broadcast was included of the complainant and his wife (in handcuffs and with faces obscured) being escorted down a corridor by the police and of the inside of the complainant’s work office showing various ring binder files and documents.

Footage of Mr Humphrey, speaking in English and with his face obscured, was included in the programme. Unlike in the first broadcast, Mr Humphrey did not appear to be handcuffed. He was described as a “defendant” by a caption. He said:

*“I deeply regret having offended any Chinese law, it certainly was not our intention to violate Chinese law or to cause any harm. And, you know, if we have broken Chinese law then I feel very ashamed about that and I am very regretful about that and I apologise to the Chinese government for this”.*

The report ended and there was no further reference to the complainant.

## Summary of the complaint and Licensee's response

### Complaint

#### *Unjust or unfair treatment*

- a) Mr Humphrey complained that he was treated unjustly or unfairly in the programmes as broadcast because:
- i) The programmes included footage of him which made it appear, falsely, that he was voluntarily confessing to crimes for which, at the time of broadcast, he had been neither tried nor convicted. He said that the purpose of Chinese authorities in requiring him to make the purported confessions was to “subvert due course of justice and deprive me of the right to a fair trial”. He added that the broadcaster was aware that he was being forced to make the statements he did.
  - ii) He was not given an opportunity to contribute to or comment on the programmes either before or after they were broadcast.

#### *Unwarranted infringement of privacy*

- b) Mr Humphrey complained that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programmes because the footage of him was filmed by the broadcaster's journalists without his consent. He said that he had agreed to be interviewed by print media but not to be filmed and that, in order to secure footage of him, the police lied to him and told him that no cameras would be present. In addition, he said that, prior to being filmed, he had been kept for prolonged periods in a detention centre, denied “normal” food, and denied medical treatment. He alleged that, prior to the filming of the first purported confession, he had been sedated. He said that the broadcaster was aware of these circumstances.
- c) Mr Humphrey complained that his privacy was unwarrantably infringed in the programmes as broadcast because the footage of him was included in the programmes without his consent.

### Licensee's response

#### *Background*

The Licensee said that, in 2013, the Chinese police were involved in an operation which targeted the illegal trafficking of personal data. The Chinese government had stepped up measures to protect personal data in order to protect the legitimate rights of people and companies in China, which was reflected in the number of such cases in Shanghai alone increasing by 30 times in a year and that the Chinese police had arrested more than 1200 people suspected of trafficking personal data. The Licensee said it was covering several cases in China around that time in order to educate the public about this type of criminal offence and the kind of punishments involved, which it said was a matter of strong public interest.

The Licensee said that, although Mr Humphrey's case was one of the many cases that the Chinese police were investigating at that time, this was the first to involve foreign suspects. The Licensee therefore considered this case to be of clear public interest to its international audience.

The Licensee said that it covered Mr Humphrey's case on CCTV News from the time of his arrest on 27 August 2013 through to his trial and subsequent conviction on 8 August 2014. It said that Mr Humphrey was a "corporate investigation specialist" with his own business based in Shanghai (ChinaWhys Limited). It noted that the Shanghai No 1 People's Court convicted Mr Humphrey of the unlawful acquisition of personal information of citizens and sentenced him to two years and six months' imprisonment, deportation and a fine. The Licensee provided Ofcom with a copy of the judgment translated into English. It said that the judgment could have been, but was not, appealed by Mr Humphrey within ten days. It added that Mr Humphrey was released seven months early and returned to the UK in June 2015.

The Licensee said that during the trial of Mr Humphrey, he did not object to the facts and evidence underlying the accusations made against him. It said that Mr Humphrey argued that he and his wife were unaware of the illegality of the purchase and use of personal information, but this was not accepted by the court. The Licensee said Mr Humphrey expressed regret for his actions and asked the court for a lesser punishment.

#### *Unjust or unfair treatment*

In relation to the first broadcast which was subject to this complaint (*China 24*, 27 August 2013) the Licensee said that it was invited by the Ministry of Public Security, along with other Chinese media, to interview Mr Humphrey at a detention centre in Shanghai. The Licensee said it asked the police in advance of the interview whether Mr Humphrey had consented to being interviewed, and a short note indicating Mr Humphrey's consent was provided to it and other media outlets. The Licensee provided Ofcom with a copy of the consent which was handwritten, dated 24 August 2013, and appeared to be signed by Mr Humphrey. The consent note said: "I agree to meet Chinese journalists for an interview".

In relation to the second broadcast which is subject to this complaint (*News Hour*, 14 July 2014) the Licensee said that it was again invited, with other Chinese media, by the Ministry of Public Security to interview Mr Humphrey at a detention centre in Shanghai. Again, the Licensee said that, in the absence of direct access to the Mr Humphrey, it asked the police in advance of the interview whether he had consented to being interviewed, and that a slightly longer letter indicating Mr Humphrey's consent was provided to it and other media outlets. The Licensee provided a copy of a letter that appeared to be signed by Mr Humphrey. The letter was dated 12 July 2014 and read:

"Dear Sirs,

I agree to be interviewed by a Chinese media group not exceeding 10 media personnel including writing journalists and authorised journalists. The interview will be conducted in a meeting room environment with no interrogation cage and handcuffs.

I will respond to questions in English and perhaps a few words of

Chinese language.

I understand that the questions will cover the following issues:

- The operational situation of our company
- Relations with GSK
- Private information of Chinese citizens
- Personal conditions in detention centre

I have been told by the PSB<sup>3</sup> that the purpose of this interview is to obtain an outcome of our case which will be favourable and lenient”.

The Licensee pointed out that there was nothing in either note of consent which suggested that Mr Humphrey had agreed to meet print journalists only, or that Mr Humphrey objected to filming.

The Licensee said that, on both occasions, Mr Humphrey would have been aware of the CCTV camera and microphone as both were labelled. It said it was apparent from his complaint that Mr Humphrey was aware that the broadcaster was present, and he did not ask the CCTV journalist to stop filming on either occasion. The Licensee said that, had he done so, the filming would have stopped.

Although the first consent note did not set out areas for questioning, the Licensee said that, as a former journalist himself, it would have been apparent to Mr Humphrey that he was being interviewed by the news media in relation to the allegations he faced and that he was being given the opportunity to address those allegations.

The Licensee said that, in the case of both interviews, the CCTV journalist involved confirmed that Mr Humphrey did not appear to them to be in distress or under duress, nor did he appear to be sedated or drugged. Rather, he answered the questions that were put to him by the journalists in a normal, coherent and calm manner. It said this was consistent with the footage of Mr Humphrey included in both programmes. It added that, although the footage was brief, the complainant did not appear visibly distressed or sedated.

The Licensee said the CCTV journalist also confirmed that no police officers asked questions of Mr Humphrey in the interview, and that the police did not provide it with a script. The Licensee also said that it had no reason to believe that Mr Humphrey was being mistreated in any way as a suspect in custody in a Chinese detention centre. The Licensee said that in neither interview did Mr Humphrey’s appearance and demeanour seem abnormal and he did not say anything in either interview to suggest that he was being mistreated.

The Licensee said that the footage included in the programmes made clear to viewers that Mr Humphrey was being interviewed while in police custody. The Licensee said that although Mr Humphrey disputed that his admission and apology to the Chinese government was voluntary, the words appeared to be voluntarily spoken in a calm and normal way. The Licensee said that the CCTV journalist did not believe that there were any indications that Mr Humphrey was being forced to say any words or was reading from a script. The Licensee said that it did not accept that what Mr

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<sup>3</sup> Ofcom understood this to be a reference to the Public Security Bureau (a Chinese police organisation).

Humphrey said was presented in an unfair or deceptive way as there was no contradiction between what he said in the two broadcasts and what he said in his trial.

The Licensee said that the broadcast of the programmes in the UK would have had no effect on Mr Humphrey's ability to obtain a fair trial in legal proceedings. Further, the Licensee argued that there was no material risk of prejudice from outside sources of information such as the media as the presiding judges were able to come to an independent view. It therefore did not accept that the purpose of the interviews was to deprive the complainant of a fair trial. Instead, it said that the purpose of the interviews was to give him an opportunity to comment on the case against him. The Licensee also denied any suggestion that it was aware prior to the first interview that Mr Humphrey may confess to charges. The Licensee said that, on the basis that they had been provided with Mr Humphrey's consent confirming that he consented to the interviews with groups of journalists, they attended to ask him questions and give him an opportunity to respond.

The Licensee said it was unaware of any mistreatment of Mr Humphrey in custody, and that the prosecution informed the CCTV journalist prior to the second interview that, while Mr Humphrey and his wife had been in custody, he had had regular visits from the UK/US consulate and their legal representation. The Licensee said that the CCTV journalist was also informed that Mr Humphrey's rights to medical treatment and to send and receive correspondence had been exercised.

In relation to providing an opportunity to contribute or comment following the interviews but before broadcast, the Licensee said it did not consider this to be necessary as Mr Humphrey had provided his consent to being interviewed by a group of Chinese news journalists and did not behave in any way during the interview to suggest that he was under duress or no longer consented to being filmed. It added that, as Mr Humphrey remained in custody at the relevant time, it may not have been possible to obtain his reply in the time available before broadcast.

#### *Unwarranted infringement of privacy*

The Licensee repeated its submissions as set out above regarding the steps it took to obtain the consent of Mr Humphrey.

It also said that the news coverage of Mr Humphrey's case, including his arrest, admission to breaking Chinese law, and apology was of strong public interest to the international (and Chinese) audience. The Licensee said it was covering a series of different personal data trafficking cases in China around that time in order to educate the public about this type of criminal offence and the punishments involved. It added that enforcement of laws relating to the protection of personal data remains a topical issue worldwide. It noted that Mr Humphrey's case was the first case that the Chinese police were investigating at that time which involved a foreigner and was therefore of particular public interest. It also reiterated the CCTV journalist's views and its own observations from the footage regarding Mr Humphrey's demeanour, and said that it had no reason to believe Mr Humphrey was being mistreated in custody.

In relation to the *China 24* broadcast, the Licensee also said that the footage of Mr Humphrey included in the programme constituted a total of 15 seconds, of which he spoke for only about eight seconds in a report that was just over five minutes in length, so less than 2.5 per cent of the programme included

footage of Mr Humphrey's admission to breaking Chinese law and apologising.

In relation to the *News Hour* broadcast, the Licensee said that the footage of Mr Humphrey included in the programme constituted a total of 36 seconds, of which he spoke for only about 30 seconds in a report that was just over one minute in length, so about 30% of the report included footage of Mr Humphrey's expression of regret in offending any Chinese law and apologising.

The Licensee said that in both broadcasts, Mr Humphrey's face was blurred at all times.

### **Preliminary View**

Ofcom's Preliminary View was that the complaint should be upheld. Both parties were given the opportunity to make representations on the Preliminary View. Both parties submitted representations which, insofar as they are relevant to the complaint entertained and considered by Ofcom, are summarised below.

#### *Complainant's representations*

Mr Humphrey said that at the time of the broadcast of the programme in August 2013, the Licensee could not have known that there would be no jury at the trial which happened in August 2014. In any case, Mr Humphrey said that it was wrong of the Licensee to suggest that the judicial system in China could not be influenced by the media. Mr Humphrey also said that the "role of the broadcast of forced confessions is to spread a presumption of guilt before trials happen, to send dissuasive messages and to twist public opinion". Mr Humphrey therefore considered it "preposterous" for the Licensee to claim that the broadcast of his alleged forced confessions on CCTV News would not have hindered his right to a fair trial.

With regards to informed consent, Mr Humphrey said that "under condition of extreme duress there can be no informed consent". Mr Humphrey also disagreed with the Licensee's claim that at the time of filming him, he did not appear to be under duress. In doing so, Mr Humphrey provided details of the conditions he was placed in during his detention, and referred to records which provided further details about this. Mr Humphrey said that he did not consider the Licensee's claim that it did not have direct access to him prior to the filmed interrogation was a valid justification for not asking him for his consent once the reporters entered into contact with him. He said that the Licensee's representatives, who were present at the time he was filmed, did not tell him about the nature and purpose of the programme or that footage of him would be broadcast in the UK (as well as China) "confessing to crimes or apologising to the Chinese government".

Mr Humphrey disagreed with the Licensee's statement that it was a reporter who asked him questions in the footage included in the *China 24* programme. He said that it was a police officer who asked him questions and he provided Ofcom with evidence of this.

In relation to heads b) and c) of the complaint, Mr Humphrey said that the public interest of the coverage of his story was not sufficient to justify the inclusion of his alleged forced confessions in programmes, which he said significantly prejudiced his right to a fair trial. Mr Humphrey also said that he was not complaining about general coverage of his story in the media, but the way in which the

Licensee specifically covered it. In particular, he said that other media had covered the story of his arrest without relaying the content of his “so-called ‘confessions’”.

Mr Humphrey also disputed the accuracy of statements made in the broadcast, including that the original arrest was made on charges of “selling personal information” rather than the lesser charge of illegally obtaining personal information. However, we considered these additional allegations to be outside the scope of the original complaint as entertained by Ofcom and therefore they are not covered in this Decision.

### *Licensee’s representations*

The Licensee said the complaints related to historic broadcasts and the service on which the programmes had been broadcast was renamed in late 2016. It said that in the intervening period, the service had changed and evolved considerably, including in relation to its editorial staff, production and practices. It reiterated that, while it had engaged with Ofcom throughout the process, it still maintained its objection to the complaint being entertained by Ofcom in light of the fact that several years had passed between the broadcasts and the complaint being brought, and indeed between Mr Humphrey’s release from prison and bringing a complaint. The issue of delay in bringing the complaint was considered in our decision to entertain the complaint and is not addressed further in this Decision.

With regards to informed consent, the Licensee said it took several steps which it said it believed at the time to be sufficient to meet Ofcom’s test for informed consent. These included checking that Mr Humphrey had provided his consent to being filmed for an interview on both occasions. It also reiterated that Mr Humphrey did not show signs of distress during the interviews and at no time did he ask for the filming to stop, and had he done so, those filming him would have agreed to stop.

In relation to the presentation of material facts in the programmes, the Licensee said that, at the time of broadcast, it considered that it had presented the material facts in a fair way. It said that Mr Humphrey was interviewed directly while in custody and only a very small amount of footage of him was included to illustrate what he said. It reiterated that it would have been clear to the audience that Mr Humphrey had made such statements while in custody and awaiting trial. It also said that the statements which Mr Humphrey made were not contradicted by what he later said in his trial.

With regards to head a)ii) of the complaint, the Licensee said that Mr Humphrey was in custody at the time and the purpose of attending his interview in prison was to gather his response to the allegations against him. It added that since it believed, in good faith, that Mr Humphrey had provided his consent to being interviewed by a group of Chinese news journalists and did not obviously appear to be under duress, it did not consider, at the time, that it was necessary in the circumstances to give Mr Humphrey a further opportunity to respond.

The Licensee disagreed with Ofcom’s balancing of the complainant’s Article 8 privacy rights and broadcaster’s Article 10 rights to freedom of expression. The Licensee said that it covered the case of Mr Humphrey from the time of his arrest on 27 August 2013, through to his trial and subsequent conviction on 8 August 2014. It said that at the time, it believed that the news coverage of Mr Humphrey’s case, including his arrest, admission to breaking Chinese law and apology to the Chinese

government, was of strong public interest to the international (and Chinese) audience. It said that it was covering a series of different personal data trafficking cases in China around that time in order to educate the public about this relatively new type of criminal offence and the kind of punishments involved. It added that at the time the programmes were broadcast, very few people understood or were even aware that personal data trafficking was a criminal offence in China. Such law relating to the protection of personal data and the law enforcement/regulation of the same remain a topical issue worldwide. It said that Mr Humphrey's case was one of the many cases that the Chinese police were investigating, the difference being that Mr Humphrey's case was the first one to involve a foreigner.

## Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unjust or unfair treatment and unwarranted infringement of privacy in, or in connection with the obtaining of material included in, programmes in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching the decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programmes as broadcast, both parties' written submissions and both parties' representations in response to the Preliminary View. After careful consideration of the representations, we considered that the points raised did not materially affect the outcome of Ofcom's Preliminary View to uphold the complaint.

### *Unjust or unfair treatment*

When considering complaints of unjust or unfair treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of Ofcom's Broadcasting Code ("the Code").

In addition to this Rule, Section Seven (Fairness) of the Code contains "practices to be followed" by broadcasters when dealing with individuals or organisations participating in, or otherwise directly affected by, programmes, or in the making of programmes. Following these practices will not necessarily avoid a breach of Rule 7.1, and failure to follow these practices will only constitute a breach where it results in unfairness to an individual or organisation in the programme.

- a) We first considered Mr Humphrey's complaint that he was treated unjustly or unfairly in the programmes as broadcast. In considering the complaint, we had particular regard to Practices 7.3, 7.9 and 7.11 of the Code.

Practice 7.3 sets out that individuals who are invited to make a contribution to a programme should normally, at an appropriate stage, be given sufficient information about (amongst other things): the nature and purpose of the programme; when (if known) and where the programme is

likely to be first broadcast; the kind of contribution the individual is expected to make (for example, whether it will be live or pre-recorded, edited or unedited); the areas of questioning and, wherever possible, the nature of other likely contributions; and any changes to the programme that might affect their decision to contribute. Taking these measures is likely to result in any consent that is given being ‘informed’ consent (which, for the purposes of Rule 7.1 and the Code more generally means ‘consent’).

Practice 7.9 states that before broadcasting a factual programme, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to the individual or organisation.

Practice 7.11 states that if a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond.

As set out in the “Programme summary”, the *China 24* programme included a report on the arrest of Mr Humphrey, and his wife, for *“illegally obtaining personal information and selling it on for profit”* and that they *“face charges over obtaining and selling personal data for illegal purposes”*. The report contained details of Mr Humphrey’s company including the services it provided and explained that, according to the police, reports prepared by Mr Humphrey and his wife included information that *“seriously violated the legitimate right of citizens”*. Further details were mentioned about the information contained in the reports produced by Mr Humphrey and his wife, and the amount of money the company charged for these reports. Footage of the inside of the company’s office was also shown.

The *China 24* programme also included footage of Mr Humphrey in which he was described as a *“suspect”* in a caption. He was shown speaking to the camera in Mandarin and said: *“We obtained personal information by illegal means. I regret what I did and apologise to the Chinese government”*. The programme also said that Mr Humphrey and his wife had *“confessed their criminal activities, criminal facts to the police and apologised to the Chinese government”*.

The *News Hour* programme (as set out in the “Programme summary”) included a report which provided an update on Mr Humphrey, and his wife. The report said that they had been indicted, which was the first indictment to have been *“brought against foreigners for illegal investigations”*. It reiterated details about their arrest and that *“Prosecutors have found that the couple illegally trafficked a huge amount of personal data on Chinese nationals to seek profits”*. Footage of inside of the company’s office was also shown.

The *News Hour* programme also included footage of Mr Humphrey in which he was described as a *“defendant”* in a caption. He was shown speaking to the camera and said: *“I deeply regret having offended any Chinese law, it certainly was not our intention to violate Chinese law or to cause any harm. And, you know, if we have broken Chinese law then I feel very ashamed about that and I am very regretful about that and I apologise to the Chinese government for this”*. The programme also said that Mr Humphrey had *“admitted to having used illegal means in his investigations, also expressing regret for his actions”*.

We considered that the inclusion of the footage of Mr Humphrey in the two programmes would have been understood by viewers as Mr Humphrey confessing to an offence. The comments made about Mr Humphrey were framed as statements of fact, rather than allegations about him and the police's evidence which it had relied upon to arrest Mr Humphrey and search his property was referred to in the programmes. The footage would also have been understood by viewers as showing that Mr Humphrey had chosen to make these statements prior to his trial (the first programme said that he had been arrested and described him as a "suspect" and the second programme said that he had been indicted and described him as a "defendant"). We considered that the programmes had the clear potential materially and adversely to affect viewers' opinions of the complainant.

The complainant referred in his complaint to the intention of the broadcast confessions being to "subvert due course of justice and deprive me of the right to a fair trial" and reiterated his concerns in his representations on the Preliminary View, while the Licensee argued that the broadcast of the programmes in the UK was inherently unlikely to have an impact on the ability of Chinese judges to reach an independent view on the evidence. It is not, however, necessary for Ofcom to determine whether Mr Humphrey was deprived of a fair trial due to the broadcast. The impact of broadcasting a purported confession on Mr Humphrey's personal and business reputation alone was such that the Licensee should have taken reasonable steps to satisfy itself that unjust or unfair treatment was avoided, including through the application of relevant Practices of the Code.

Mr Humphrey alleged he was mistreated in custody and that the Licensee was aware of the mistreatment, which the Licensee denies. Ofcom is not able to, and does not need to, definitively establish details of the complainant's treatment in custody or the Licensee's degree of awareness of the same. It is not disputed that Mr Humphrey and his wife were in custody in China facing serious criminal charges, and as such were in a vulnerable position. It is not disputed that the complainant was handcuffed in the first interview (although not the second). And, while the Licensee set out in its submissions on the Preliminary View other steps it said it took to obtain informed consent, it is not disputed that the Licensee did not discuss with Mr Humphrey his reasons for giving the interview or the nature of his contribution in the absence of those holding him in custody (i.e. people who, if there was undue pressure being placed on Mr Humphrey to give an interview, might reasonably be assumed to be the ones applying pressure). These factors all underlined the particular importance of the Licensee taking reasonable steps to satisfy itself that unfair or unjust treatment was avoided.

Regarding Practice 7.3 on informed consent, in relation to the *China 24* programme the Licensee relied principally on a short, signed note dated 24 August 2013 purporting to be from Mr Humphrey and provided to it (at the Licensee's request) by the police. The Licensee did not argue that it had independently taken steps to inform the complainant of the matters included in Practice 7.3, including the nature and purpose of the programme, any specific areas of questioning, or the nature of other likely contributions. The short note itself did not cast any light on what, if anything, the police had explained to Mr Humphrey about those matters.

In relation to the *News Hour* programme, a longer note was provided to the Licensee via the police, which did set out some areas of questioning. It did not, however, cover other issues in Practice 7.3. The note also stated, “I have been told by the PSB that the purpose of this interview is to obtain an outcome of our case which will be favourable and lenient”. In Ofcom’s view, this clearly implied that failing to consent to the interview would contribute to an outcome which was not “favourable and lenient” for Mr Humphrey, and this information was in the possession of the Licensee.

The Licensee argued that Mr Humphrey’s previous role as a journalist meant he would have been aware he was being filmed in relation to the allegations he faced and being given an opportunity to address them. It also said Mr Humphrey would have been aware that he was being filmed by a CCTV journalist and that at no point did he ask for the journalist to stop filming him. It also noted Mr Humphrey’s demeanour in each interview did not suggest a lack of informed consent.

Ofcom considered that there was nothing in the short signed note provided at the time of the first interview for *China 24* to indicate that the matters in Practice 7.3 had been explained to Mr Humphrey, including the nature and purpose of the programme, when and where it would be broadcast, areas of questioning and any contractual rights and obligations. The fact the complainant had previously worked as a journalist did not remove the need to provide such information about the specific broadcast. The note provided at the time of the *News Hour* interview included a little more on the areas of questioning, but also, in Ofcom’s view, carried a clear implication that the outcome of the case would be less favourable for Mr Humphrey if he did not agree to go ahead with the interview.

Additionally, Ofcom considered that the fact that Mr Humphrey was confessing to offences in advance of trial and in the presence of those holding him in custody was sufficient to create substantial doubt as to whether his consent was genuine and informed. These were concerns that the provision of short notes provided through the police, and observation of the complainant’s demeanour, could not reasonably be hoped to allay in the circumstances of either of the two interviews.

Taking all these factors into account, we considered that insufficient steps had been taken by the Licensee to inform Mr Humphrey about the nature and purpose of the programmes, or to provide him with the information set out in Practice 7.3. Given this, we considered that the Licensee had not obtained Mr Humphrey’s informed consent to contribute to either of the programmes.

Ofcom next considered the application of Practice 7.9 and the extent to which the Licensee had exercised reasonable care in satisfying itself that material facts had not been presented, disregarded or omitted in a way that was unfair to Mr Humphrey. We noted the Licensee’s contention in its statement in response to the Entertained complaint and submissions on the Preliminary View that it would have been apparent that Mr Humphrey was being interviewed while in police custody and that the admission and apology to the Chinese government were voluntary and were Mr Humphrey’s own words. We also noted the Licensee’s statement that Mr Humphrey did not appear to it to be under distress or duress, nor did he appear sedated or drugged, and that it was the journalists, rather than the police, who had asked Mr Humphrey

questions. We also considered the Licensee's submissions on the Preliminary View that only a small amount of footage of him was included to illustrate what he said.

Ofcom considered that the Licensee presented the confession and apologies by Mr Humphrey as being genuine, voluntary, in his own words, and sufficient to conclude (in advance of trial) that Mr Humphrey had committed criminal offences. We do not consider that it was reasonable for the Licensee to have presented the footage of Mr Humphrey in this way because of the evidence that the Licensee had at the time that there was cause to doubt that these were genuine, voluntary admissions to him having committed criminal offences. This included that the invitation to interview Mr Humphrey came from the Ministry of Public Security, that the Licensee had not been able to verify the existence of informed consent (for the reasons set out above) and, in the case of the *News Hour* interview, that the Licensee was aware that Mr Humphrey believed that the outcome of his case was partly contingent on him giving the interview. Failing to present facts which cast significant doubt on whether Mr Humphrey's statements were made voluntarily, and indeed on his guilt, had clear potential to be unfair to the complainant. We did not consider the amount of footage used in this case had a bearing on whether or not material facts were presented in a way which was unfair to him. We therefore considered that the Licensee did not take reasonable care to satisfy itself that material facts were not presented, disregarded or omitted in a way that was unfair to the complainant, as set out in Practice 7.9.

Given the facts set out above, we considered that the Licensee had not followed the requirements as set out in Practices 7.3 and 7.9 of the Code. However, as set out in the Foreword to Section Seven of the Code, a failure to follow Practices will only constitute a breach of Rule 7.1 where it results in unfairness to an individual or organisation in the programme as broadcast. We therefore went on to consider whether the inclusion of the footage of Mr Humphrey in the programmes resulted in unfairness to him.

As stated above, Ofcom considered that the inclusion of the footage of Mr Humphrey in the programmes as broadcast would have given viewers the clear impression that he had given informed consent to appear and was making a genuine, voluntary statement on the basis of which it was safe to conclude that he had committed offences. This constituted unjust or unfair treatment of the complainant because, in our view, the Licensee had substantial grounds to doubt any consent was informed and that the statement was genuine and voluntary, and this was not conveyed in the programmes. We took into account the Licensee's argument that the broadcasts could have had no effect on Mr Humphrey's ability to obtain a fair trial in legal proceedings. As noted above, it is not necessary for Ofcom to conclude as to whether the broadcasts prejudiced Mr Humphrey's trial. However, we also took into account that, in the case of the *News Hour* interview, the Licensee had clear evidence that Mr Humphrey was under the impression his giving an interview would indeed have an impact on proceedings because his note purporting to give consent said: "I have been told by the PSB that the purpose of this interview is to obtain an outcome of our case which will be favourable and lenient".

We also took into account the Licensee's argument that Mr Humphrey was ultimately convicted, and that his evidence did not contradict the content of his interviews with them. The point is somewhat circular in that, having given a broadcast interview, the scope for Mr Humphrey to

present a different account at trial was diminished. However, it is not necessary for Ofcom to determine whether Mr Humphrey's statements broadcast by the Licensee were true, nor whether his conviction was safe. The unfairness in this case derives from the failure by the Licensee to obtain informed consent and to present facts which would have cast serious doubt on the presence of consent and on whether the alleged confession could be taken at face value.

Taking these factors into account, we considered that material facts were presented, disregarded or omitted in a way that was unfair to Mr Humphrey.

In relation to Practice 7.11, we had regard to the Licensee's representations on the Preliminary View that the interviews provided Mr Humphrey with an opportunity to give his response to the allegations. However, given our conclusions above that Mr Humphrey's informed consent to contribute to either programme had not been obtained nor had the Licensee demonstrated that Mr Humphrey had been informed about the true nature and purpose of the programmes, it was our view that the Licensee could not then rely on him having consented to the interview for the purposes of providing his response to the allegations.

We considered that both programmes made allegations of wrongdoing. While, in the broadcast material, Mr Humphrey is heard apparently admitting offences, he does not comment in the broadcast material on the scale and precise nature of these. That detail is instead set out by the reporter and it is stated or strongly implied that the complainant did the things described and his apparent admission relates to all of them (rather than, for example, some of them or to lesser offences). Given this, we did not consider the complainant had been provided with an appropriate opportunity to respond to the claims made in the programmes.

Ofcom considered this resulted in unfairness because viewers would have gained the impression that Mr Humphrey had voluntarily confessed to all the matters included in the report as statements of fact. Taking this into account, Ofcom decided that Mr Humphrey was treated unfairly in that he was not been given an appropriate and timely opportunity to respond to the claims made in the programmes.

### *Unwarranted infringement of privacy*

Having considered unjust or unfair treatment, Ofcom then considered the complaint regarding unwarranted infringement of privacy. The complaint in this respect had two closely linked aspects, allegedly obtaining footage without consent and including it in the programme without consent.

In Ofcom's view, the individual's right to privacy must be balanced against the competing rights of the broadcaster to freedom of expression and of the audience to receive ideas and information without undue interference. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate. This is reflected in how Ofcom applies Rule 8.1 which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

In addition to this rule, Section Eight (Privacy) of the Code contains “practices to be followed” by broadcasters when dealing with individuals or organisations participating in, or otherwise directly affected by, programmes, or in the making of programmes. Following these practices will not necessarily avoid a breach of Rule 8.1 and failure to follow these practices will only constitute a breach where it results in an unwarranted infringement of privacy.

- b) We considered Mr Humphrey’s complaint that his privacy was unwarrantably infringed in connection with the obtaining of material included in the two programmes because the footage of him was filmed by the broadcaster’s journalists without his consent.

Mr Humphrey had said that he had agreed to be interviewed by “print media” but not to being filmed and that, in order to secure footage of him, the police lied to him and told him that no cameras would be present. In addition, Mr Humphrey said that prior to being filmed, he had been kept for prolonged periods in a detention centre, denied “normal” food, denied medical treatment and prior to the filming of the first false confession, had been sedated. Mr Humphrey said that the Licensee was aware of these circumstances.

We assessed the extent to which Mr Humphrey had a legitimate expectation of privacy in the particular circumstances in which the material included in the programmes was obtained. The test applied by Ofcom as to whether a legitimate expectation of privacy arises is objective: it is fact-sensitive and must always be judged in light of the circumstances in which the individual concerned finds him or herself.

We took into account that, in both interviews, Mr Humphrey was filmed at a detention centre in Shanghai, where access to him would have been limited and was likely to be restricted. We considered that this was clearly the case given that the Licensee had only been able to film Mr Humphrey having been invited by the Ministry of Public Security. As recognised in Practice 8.8. of the Code, prisons or police stations are considered potentially sensitive places, and we considered that Mr Humphrey was filmed in a sensitive environment where he was likely to feel vulnerable. We also took into account the circumstances which had led to Mr Humphrey being interviewed namely, in relation to the first interview, that Mr Humphrey had been arrested for illegally obtaining and selling personal data of Chinese nationals, and in relation to the second interview, that following a police investigation Mr Humphrey had been indicted. We acknowledged that it was a potentially serious offence which resulted in Mr Humphrey receiving a custodial sentence of over two years. In addition, we considered that in both interviews Mr Humphrey was filmed disclosing highly sensitive information (i.e. apparently confessing to a criminal offence prior to any criminal trial having taken place).

Taking all these factors into account, Ofcom considered Mr Humphrey had a legitimate expectation of privacy in connection with the obtaining of material included in the programmes.

Next, we considered whether the expectation of privacy had been infringed or whether, as the Licensee contended, it had obtained informed consent for the filming. For the reasons set out above in relation to the heads of Mr Humphrey’s complaint about fairness, we did not consider the notes of consent in relation to either broadcast constituted informed consent. It was therefore

not necessary to reach a conclusion on whether the purported consent extended beyond print media, although we noted that there was no explicit reference to print media in those notes, and we accepted Mr Humphrey would have been likely to have been aware during the course of the interviews that TV recording equipment was being used.

In the absence of informed consent, we considered whether the infringement was warranted. Ofcom had regard to Practice 8.5 which states that any infringement of privacy in the making of a programme should be with the person's and/or organisation's consent or be otherwise warranted. The Code states that "warranted" has a particular meaning. Where broadcasters wish to justify an infringement of privacy, they should be able to demonstrate why, in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest could include revealing or detecting crime, protecting public health and safety, exposing misleading claims by individuals or organisations or disclosing incompetence that affects the public.

Ofcom carefully balanced Mr Humphrey's right to privacy regarding the obtaining of the footage with the broadcaster's right to freedom of expression. We took into account the broadcaster's view that there was a public interest in reporting Mr Humphrey's case, and that an apparent admission to breaking Chinese law and apology to the Chinese government would have been of particular interest to its international audience, partly because Mr Humphrey's case was the first investigation which had involved a foreigner. We also considered the Licensee's submission that it was covering a series of different personal data trafficking cases in China in order to educate the public about this type of criminal offence and the kinds of punishments involved.

We considered that the programmes reported on a serious issue about the misuse of personal data. We also considered that it was important for broadcasters to be able to make programmes which report on news stories with a view to imparting information about such topics to the audience. However, while we recognised the public interest in reporting on Mr Humphrey's arrest, we considered that it did not warrant filming him in such a sensitive situation and discussing his alleged involvement in having committed a criminal offence without having taken further measures to verify the circumstances which had led to his interview and to ensure his informed consent had been obtained.

On this basis, Ofcom considered that Mr Humphrey's legitimate expectation of privacy was unwarrantably infringed in the obtaining of the broadcast footage.

- c) We next considered Mr Humphrey's complaint that his privacy was unwarrantably infringed in the programmes as broadcast because footage of him was included in the programmes without his consent.

We considered the extent to which Mr Humphrey had a legitimate expectation of privacy in relation to the footage of him being included in the programmes, taking into account the context in which he was filmed, as set out in detail in head b) above. For the reasons set out at head b), we considered that the footage of Mr Humphrey included in the programmes as broadcast showed

him in a highly sensitive environment and revealed highly sensitive information about him, i.e. apparently confessing to a criminal offence prior to any criminal trial taking place. We acknowledged that the Licensee had blurred Mr Humphrey's face in the programmes and that taking such steps may limit the extent of the intrusion into a person's privacy. However, in this case, we considered viewers would have been able to easily identify Mr Humphrey from the programmes given that he was named, the name of his company was revealed and details were given about his career. In any case, given the highly sensitive information included in the programmes, the intrusion into Mr Humphrey's privacy was still significant despite the steps taken to obscure his face. We therefore considered that he had a legitimate expectation of privacy regarding the inclusion of the footage in the programmes as broadcast.

As in head b) above, we found that Mr Humphrey's consent to be filmed had not been secured. It also did not appear that the Licensee had subsequently obtained his consent for the interviews to be broadcast.

We next considered whether the infringement was warranted. We had regard to Practice 8.6 of the Code which states that if the broadcast of a programme would infringe the privacy of a person, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

We therefore went on to consider whether the broadcast of the material was "warranted" within the meaning set out in the Code (see above under head b).

We took into account the public interest arguments put forward by the Licensee (as set out under head b)). This included taking into account the Licensee's representations on the Preliminary View that at the time the programmes were broadcast, very few people understood or were aware that personal data trafficking was a criminal offence in China. We also acknowledged that the Licensee said that there was only a small amount of footage of Mr Humphrey included in the programmes and his face had been obscured. However, as with head b) above, although we recognised the public interest in reporting on Mr Humphrey's case and the broadcaster's right to be able to report news stories and impart information to the audience, we considered that it did not warrant the intrusion into his legitimate expectation of privacy in this case. This is because he was shown in such a sensitive situation and footage of him apparently confessing to a criminal offence (in advance of his criminal trial) was included without the Licensee having taken further measures to verify the circumstances which had led to the interview and to confirm that his consent had been obtained.

On balance, we did not consider that the broadcaster's right to freedom of expression and the audience's right to receive information and ideas about the matters explored by the programmes outweighed the very significant intrusion into Mr Humphrey's right to privacy.

Ofcom therefore considered that there was an unwarranted infringement of Mr Humphrey's privacy in the programmes as broadcast.

**Ofcom has upheld Mr Humphrey’s complaint of unjust or unfair treatment and unwarranted infringement of privacy in connection with the obtaining of material included in the programmes and in the programmes as broadcast.**

**Ofcom also considers that the breach of Rules 7.1 and 8.1 of the Code is serious. We are therefore putting the Licensee on notice that we intend to consider the breach for the imposition of a statutory sanction.**