

Sanction: Decision by Ofcom

Sanction: to be imposed on Al Arabiya News Channel FZ-LLC

For material broadcast on Al Arabiya News on 27 February 2016¹.

**Ofcom's Decision
of Sanction against:**

Al Arabiya News Channel FZ-LLC ("Al Arabiya News" or the "Licensee") in respect of its service **Al Arabiya News** (TLCS100711BA/1).

For:

Breaches of the Ofcom Broadcasting Code (the "Code")² in respect of:

Rule 7.1: "Broadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes"; and,

Rule 8.1: "Any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted".

Decision:

To impose a financial penalty (payable to HM Paymaster General) of **£120,000 (one hundred and twenty-thousand pounds)**;

To direct the Licensee to broadcast a statement of Ofcom's findings on a date and in a form to be determined by Ofcom; and

To direct the Licensee not to repeat the material found in breach again.

¹ The material broadcast on Al Arabiya News and found in breach of Ofcom's Broadcasting Code (the "Code"), as detailed in Broadcast and On Demand Bulletin 327, 24 April 2017:

https://www.ofcom.org.uk/data/assets/pdf_file/0013/101227/Issue-327-of-Ofcoms-Broadcast-and-On-Demand-Bulletin.pdf

² Sections Seven and Section Eight of the Code:

https://www.ofcom.org.uk/data/assets/pdf_file/0005/100103/broadcast-code-april-2017.pdf

Executive Summary

1. Al Arabiya News is an Arabic language news and current affairs channel originating from Dubai, United Arab Emirates, and broadcast by satellite in the UK. The Ofcom licence for Al Arabiya News is held by Al Arabiya News Channel FZ-LLC. The Licensee does not hold any other broadcasting licences.
2. On 27 February 2016, Al Arabiya News broadcast a programme about an attempt in February and March 2011, by a number of people including the complainant, Mr Hassan Mashaima, to change the governing regime in Bahrain from a Kingdom to a Republic. The programme included footage of Mr Mashaima as he explained the circumstances which had led to his arrest and conviction for his participation in these activities.
3. Mr Husain Abdulla complained to Ofcom on behalf of Mr Mashaima about unfair treatment and unwarranted infringement of privacy in connection with the obtaining of material included in the programme and the programme as broadcast by Al Arabiya News on 27 February 2016.

Ofcom's Adjudication

4. In Ofcom's Adjudication ("the Adjudication") published on 24 April 2017 in issue 327 of the Broadcast and On Demand Bulletin (the "Bulletin")³, Ofcom's Executive found that the programme had breached Rules 7.1 and 8.1 of the Code.
5. The Adjudication set out specifically the reasoning as to why Ofcom upheld the complaint of unfair treatment and unwarranted infringement of privacy in connection with the obtaining of material included in the programme and the programme as broadcast.
6. In summary, Ofcom found that:
 - The programme included footage of an interview with Mr Mashaima which had the potential to materially and adversely affect viewers' perception of him and the broadcaster did not make clear what steps it had taken to ensure that material facts had not been presented, omitted or disregarded in a way that was unfair to Mr Mashaima.
 - The broadcaster had not provided Mr Mashaima with an appropriate and timely opportunity to respond to the allegations of wrongdoing being made about him in the programme as broadcast.
 - Mr Mashaima 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 Mashaima'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 broadcaster had therefore unwarrantably infringed Mr Mashaima's privacy in respect of the obtaining of the material included in the programme and in the programme as broadcast.
7. Ofcom put the Licensee on notice in the Adjudication that it considered these breaches to be serious, and that it would consider them for the imposition of a statutory sanction.

³ https://www.ofcom.org.uk/data/assets/pdf_file/0013/101227/Issue-327-of-Ofcoms-Broadcast-and-On-Demand-Bulletin.pdf

The Sanction Decision

8. In accordance with Ofcom's Procedures for the consideration of statutory sanctions in breaches of broadcast licences (the "Sanctions Procedures")⁴, Ofcom considered whether the Code breaches were serious, deliberate, repeated or reckless so as to warrant the imposition of a sanction on the Licensee in this case. It reached the Decision that a sanction is merited in this case since the breach was serious for the reasons set out in paragraphs 74 to 76 below.
9. Ofcom's Decision is that the appropriate sanction should be a financial penalty of **£120,000** (one hundred and twenty-thousand pounds). Ofcom also considers that the Licensee should be directed to broadcast a statement of Ofcom's findings, on a date to be determined by Ofcom, and that it should be directed to refrain from broadcasting the material found in breach again.

Legal Framework

10. Ofcom's principal duty, set out in section 3(1) of the Communications Act 2003 (the "Act"), is to further the interests of citizens in relation to communications matters and the interests of consumers in relevant markets. In carrying out its functions, Ofcom is required to secure a number of other matters. These include the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both:
 - unfair treatment in programmes included in such services (section 3(2)(f)(i)); and
 - unwarranted infringements of privacy resulting from activities carried on for the purposes of such services (section 3(2)(f)(ii)).
11. Under section 107 of the Broadcasting Act 1996 (as amended) ("the 1996 Act"), Ofcom has a duty to draw up, and from time to time review, a code giving guidance as to principles to be observed, and practices to be followed, in connection with the avoidance of:
 - a) unjust or unfair treatment in programmes; or
 - b) unwarranted infringements of privacy in, or in connection with the obtaining of material included in, such programmes.
12. Further, under section 110(1) of the 1996 Act, Ofcom has a duty to consider and adjudicate on complaints which relate to either unjust or unfair treatment in programmes, or unwarranted infringements of privacy in, or in connection with the obtaining of material included in, such programmes. Such complaints are collectively referred to as "fairness complaints" by virtue of section 110(4) of the 1996 Act.
13. In performing these duties, Ofcom is also required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3)); and, where relevant, a number of other considerations, including the need to secure that the application in the case of television and radio services of standards relating to unfair treatment in programmes and unwarranted infringements of privacy is in the manner that best guarantees an appropriate level of freedom of expression (section 3(4)(g)).

⁴ https://www.ofcom.org.uk/data/assets/pdf_file/0030/71967/Procedures_for_consideration.pdf. These procedures took effect on 3 April 2017.

Human Rights Act 1998

14. Under section 6 of the Human Rights Act 1998, Ofcom (as a public authority) has a duty to ensure that it does not act in a way which is incompatible with the European Convention on Human Rights (“the Convention”). In particular, in the context of this case, Ofcom has taken account of the related rights under Article 8 and 10 of the Convention.
15. Article 8 of the Convention provides for a right to respect for one’s “private and family life, his home and his correspondence”, subject to certain restrictions that are “in accordance with law” and “necessary in a democratic society”. Article 8(2) of the Convention states that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
16. Article 10 of the Convention provides for the right to freedom of expression. Applied to broadcasting, this right encompasses the broadcaster’s freedom to impart and the audience’s freedom to receive information and ideas without interference by public authority and regardless of frontiers (Article 10(1) of the Convention). The exercise of these freedoms may be subject only to conditions and restrictions which are “prescribed in law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary” (Article 10(2) of the Convention).
17. Ofcom must exercise its duties in the light of these rights and not interfere with the exercise of these freedoms in broadcast services unless it is satisfied that the restrictions it seeks to apply are required by law and necessary to achieve a legitimate aim.

Ofcom Broadcasting Code

18. The principles and practices set by Ofcom in accordance with section 107(1) of the 1996 Act are set out in the Code.
19. Accompanying Guidance Notes to each section of the Code are published and from time to time updated on the Ofcom website. The Guidance Notes are non-binding but assist broadcasters to interpret and apply the Code.
20. The relevant Code rules in this case are set out in full at the beginning of this Decision.

Remedial action and penalties

21. Under section 326 of the Act, a licence for a programme service issued by Ofcom under the Broadcasting Act 1990 or 1996 must include conditions for securing that the principles and practices set under section 107 of the 1996 Act are observed by the licensee. In the case of a television licensable content service (“TLCS”) licence, Condition 20(5) of the licence requires the licensee to ensure that the provisions of any Code made under section 107(1) are complied with. The Licensee holds a TLCS licence.
22. Where Ofcom has identified that a condition of a TLCS licence has been contravened, its powers to take action are set out in sections 236 to 239 of the Act insofar as relevant to the case.

23. Section 236 of the Act provides Ofcom with the power to direct the holder of a TLCS licence to broadcast a correction or a statement of Ofcom's findings (or both), or not to repeat a programme which was in contravention of a licence condition.
24. Section 237 of the Act provides Ofcom with the power to impose a financial penalty on the holder of a TLCS licence. The maximum penalty which may be imposed in respect of each contravention of a licence condition is whichever is the greater of £250,000 and 5 per cent of the qualifying revenue⁵ from the licensed service for the licensee's last complete accounting period falling within the period for which its licence has been in force.
25. Section 238 of the Act provides Ofcom with the power to revoke a TLCS licence where a licensee is in contravention of a condition of a TLCS licence or a direction which Ofcom has given to them, and the contravention, if not remedied, would justify the revocation of the licence.

Background – The Adjudication

26. In the Adjudication, Ofcom's Executive found that the programme broadcast by the Licensee on Al Arabiya News breached Rules 7.1 and 8.1 of the Code. The Adjudication set out the reasons as to why Ofcom upheld the complaint of unjust or unfair treatment and unwarranted infringement of privacy in connection with the obtaining of material included in the programme and the programme as broadcast.
27. The Adjudication noted that in the programme Mr Mashaima was introduced as having been sentenced to "*life imprisonment*". The programme included footage and transcripts of an interview with Mr Mashaima, carried out by the Special Security Force Command of Bahrain ("SSFC") and filmed by a stringer (freelance journalist) on the broadcaster's behalf, using the broadcaster's equipment, in either May/June 2011 (as Mr Mashaima maintained) or in March 2012 (as the broadcaster maintained). In the footage, Mr Mashaima spoke about his attempt to change the governing regime in Bahrain from a Kingdom to a Republic.
28. On 23 November 2011, the Bahrain Independent Commission Inquiry ("BICI") published its report into, amongst other things, allegations of human rights abuse against prisoners who had been arrested in connection with the events which took place in February and March 2011. The BICI report referred specifically to Mr Mashaima and the events which had led to his arrest. It also stated that 14 political leaders (including Mr Mashaima) had been mistreated, the purpose of which in many cases appeared to be to "obtain statements of confessions incriminating the detainee in question" or in other cases "to obtain statements from the detainee with a view of using the statements against other individuals" and for the purpose of "retribution and punishment".
29. Ofcom understood that during 2012, Mr Mashaima was among a group of people who had sought to have his conviction overturned on the basis that he had made confessions as a result of torture. These proceedings were still pending as at the date that the broadcaster said the stringer had provided the footage to Al Arabiya News. Mr Mashaima's re-trial and subsequent appeal resulted in a Bahraini court upholding his conviction in September 2012 and Bahrain's highest court, the Court of Cassation, confirming that decision in January 2013. We understand that Mr Mashaima currently remains in prison in Bahrain.
30. In relation to Rule 7.1, Ofcom noted that the footage which was broadcast appeared to show Mr Mashaima speaking openly about his attempt to change the governing regime in Bahrain.

⁵ Qualifying revenue consists of all payments received, or due to be received, either by the licensee or by any person "connected" to that licensee, for the inclusion of advertisements or programmes in the licensed service, or in respect of charges made for the reception of programmes included in that service. It also includes any sponsorship monies received in relation to the inclusion of programmes in the licensed service.

In Ofcom's view, the inclusion of this footage, in the context in which it was shown, would have given viewers the reasonable impression that Mr Mashaima was willingly providing his first-hand account of the events which had led to his arrest and subsequent conviction. The programme therefore had the clear potential to materially and adversely affect viewers' opinions of him. Despite this, it did not appear to Ofcom that Al Arabiya News had taken any steps to inform Mr Mashaima as to the nature and purpose of the programme, or to provide him with such information as may have otherwise suggested that he had given his informed consent in making these statements.

31. Further, it did not appear to Ofcom that Al Arabiya News had taken appropriate steps to satisfy itself that material facts had not been presented, disregarded or omitted in a way that was unfair to Mr Mashaima. Whether the footage had been filmed in May/June 2011 (as per Mr Mashaima's representations), or in March 2012 (as per the Licensee's representations), it was Ofcom's view that this made little material difference. Either way, it was not in dispute that the interview had taken place while Mr Mashaima was in prison. In Ofcom's view, even if the footage had been obtained in March 2012 (as Al Arabiya News maintained), the BICI had found only a few months earlier that confessions made in 2011 by individuals including Mr Mashaima had been obtained under torture. Further, even if the footage had been filmed in March 2012, it was still prior to Mr Mashaima's subsequent retrial and appeal, where he had sought to have his conviction overturned on the grounds that his confession had been obtained under torture. Given the high-profile and well-publicised nature of the case, it was Ofcom's view that the broadcaster was aware, or ought to have been aware (at least by the date of broadcast, in early 2016), that the statements being made by Mr Mashaima in the footage may not have accurately or fairly represented his views. Despite this, it did not appear that Al Arabiya News had taken steps to verify with Mr Mashaima (or his representatives) the veracity or accuracy of the footage which was subsequently broadcast.
32. Ofcom also found that the failure by Al Arabiya News to mention the findings of the BICI at all constituted a material omission, in circumstances where such information may have provided viewers with relevant contextual background regarding Mr Mashaima's case. For these reasons (as detailed further in the Adjudication), Ofcom concluded that Al Arabiya News' broadcast of the programme had resulted in unfairness to Mr Mashaima and that the broadcaster was therefore in breach of Rule 7.1 of the Code.
33. In relation to Rule 8.1, Ofcom considered that Mr Mashaima had a legitimate expectation of privacy, in circumstances where it appeared that he was filmed in a private room within the prison in which he was being detained, and was discussing matters of a highly sensitive and confidential nature (particularly given that his re-trial and appeal were still pending). For the reasons set out above, it did not appear to Ofcom that Mr Mashaima had provided his informed consent to being filmed. We took into account that the programme discussed matters which would have been of significant public interest in that they concerned ongoing events in Bahrain, and that it was important for the broadcaster to be able to make a programme of this nature. In our view, however, we did not consider that the public interest warranted filming Mr Mashaima in such a sensitive situation, nor broadcasting that material, without first having taken measures to verify the circumstances which had led to his interview and to ensure his consent had been obtained. For these reasons (as detailed further in the Adjudication), Ofcom found that Al Arabiya News had unwarrantably infringed Mr Mashaima's legitimate expectation of privacy and that the broadcaster was therefore in breach of Rule 8.1 of the Code.
34. Ofcom stated in the Adjudication that the contraventions of Rules 7.1 and 8.1 of the Code were serious and were being considered for the imposition of a statutory sanction.

Ofcom's Decision to impose a Statutory Sanction

35. As set out in paragraph 1.13 of the Sanctions Procedures, the imposition of a sanction against a broadcaster is a serious matter. Ofcom may, following due process, impose a sanction if it considers that a broadcaster has seriously, deliberately, repeatedly or recklessly breached a relevant requirement.
36. In this case, Ofcom issued Al Arabiya News with a preliminary view ("the Preliminary View") that we were minded to impose on it a statutory sanction in the form of: a) a financial penalty; b) a direction that the Licensee broadcast a statement of our finding, on a date and in a form to be determined by Ofcom; and, c) a direction that the Licensee does not repeat the material which was found in breach. Ofcom sent a copy of the Preliminary View to the Licensee on 11 October 2017 and gave the Licensee the opportunity to provide written and oral representations on it. The Licensee provided its written representations to Ofcom on 6 November 2017, which are summarised in paragraphs 38 to 63 below ("the Representations"). The Licensee chose not to make oral representations.
37. In reaching its Decision on whether to impose a statutory sanction and if so, what type and level of sanction, Ofcom was not bound by the Preliminary View. Ofcom took account of all the evidence and representations made by the Licensee, and had regard to the Sanctions Procedures and to Ofcom's Penalty Guidelines ("the Penalty Guidelines")⁶ in reaching this Decision.

Licensee's Representations

38. The Licensee provided three main reasons as to why the imposition of a statutory sanction was not justified in this case. The Licensee said that:
- i) Ofcom had not taken into consideration that, by the time the programme was broadcast in 2016, the events referred to in the interview with Mr Mashaima had been subject to intensive scrutiny by the highest courts in Bahrain. The Licensee said that it was "artificial and unfair" to base a finding of breach and determine that sanctions should be imposed in reliance upon the factual situation in 2012 (i.e. when, as the Licensee maintains, the interview with Mr Mashaima was filmed) rather than in context of the factual situation and information known to the audience when the programme was broadcast in 2016. Al Arabiya News said that Ofcom's findings of unfairness and breach of privacy were unfair and therefore did not justify the imposition of statutory sanctions.
 - ii) Al Arabiya News was not licensed by Ofcom when the filming of Mr Mashaima took place. It said that even if the filming of the interview was undertaken in circumstances that amounted to a breach of the Code (which the Licensee denied), it said it could not be in breach of the Code in respect of events which took place when it was not subject to Ofcom's jurisdiction or Code.
 - iii) Ofcom did not have proper regard to its own precedent Sanction Decisions and the Fairness and Privacy Adjudication published in issue 340 of the Bulletin, in relation to material broadcast on Channel 5⁷. The Licensee said that this resulted in the decision to impose a statutory sanction, and the proposed level of financial penalty in the present case, being inconsistent and unjust.

⁶ https://www.ofcom.org.uk/_data/assets/pdf_file/0017/96101/Penalty-guidelines-2015-Section-392-of-the-Communications-Act-2003.pdf

⁷ Published on Ofcom's website on 30 October 2017 here:
https://www.ofcom.org.uk/_data/assets/pdf_file/0018/107433/issue-340-broadcast-on-demand-bulletin.pdf

Adjudication and Sanction in relation to Fairness

39. The Licensee said that in the Adjudication, Ofcom had assumed that the footage of Mr Mashaima was intrinsically unfair and that there were material facts around the statements that he had made in the footage that were false or presented in a manner which was unfair. It said that this failed to take into account both the context in which the programme was broadcast in 2016 and other facts and statements made by Mr Mashaima in his final civil trial in 2012.
40. Al Arabiya News acknowledged that, at the time the footage was filmed, Mr Mashaima had not yet exhausted the legal process and that there was still a possibility that his conviction would be overturned, pending his retrial. The Licensee stated that, had it chosen to broadcast the footage of Mr Mashaima making a confession in those circumstances, contrary to the arguments he was making in his appeal, this “may well have given rise to concerns around fairness and whether the views expressed properly reflected his point of view.” The Licensee further stated that, had it been subject to the Code at the time, and it had broadcast the programme without satisfying itself that material facts had not been presented, disregarded or omitted in a way that was unfair to Mr Mashaima, a breach of the Code would have occurred.
41. However, Al Arabiya News said that at the time the interview was broadcast in 2016, in a programme looking back at the 2011 uprising, the facts around Mr Mashaima’s involvement had, by that date, been established beyond doubt and the audience would have been aware of these facts. In particular, it said:
- i) Mr Mashaima had been originally tried for offences involving the overthrow of the monarchy in Bahrain in June 2011, in a State of National Safety Court (“SNS Court”), which had comprised one military judge and two civilian judges. Mr Mashaima subsequently appealed to a higher military court against his conviction. The Licensee said that it was widely known that these courts allowed confessions under torture and duress to form part of the evidence of the trials.
 - ii) The facts of such deplorable treatment was brought to light by the BICI report, which was commissioned by King Hamad bin Isa Al Khalida to investigate allegations of mistreatment by those arrested during the state of emergency.
 - iii) In 2011, by Royal Decree, the majority of convictions in the SNS Court, including that of Mr Mashaima, were quashed by order of the King due to the confessions being used in the trial and such courts not following accepted judicial process.
 - iv) Mr Mashaima’s case was initially retried in 2012 in a civilian court with independent legal advisors, where he was found guilty of the offences with which he was originally charged. The Licensee said he then subsequently appealed to the highest civil court, the appeal Court of Cassation and that after a lengthy appeal process, the conviction in the earlier civil court was upheld in January 2013.
42. Al Arabiya News said that the substance of Mr Mashaima’s interview, which was included in the programme, had therefore been established by separate witness testimony from Mr Mashaima⁸ and by four separate courts (two military courts and two civil courts) involving “months of analysis and legal argument as being accurate”. Therefore, it said that, in such a case, it should not be incumbent upon a broadcaster, compiling a factual programme about

⁸ Al Arabiya News provided a website link to Mr Mashaima’s statement to the Court of Cassation dated 29 May 2012: <http://www.ebohr.org/en/?p=1030>

prior events, to independently verify facts which had been established through such an “extensive and exhaustive” judicial process four years earlier.

43. Al Arabiya News noted that in the Adjudication, Ofcom was unable to establish whether the interview with Mr Mashaima had taken place in 2011, prior to Mr Mashaima’s first military trial (i.e. when the BICI found that confessions had been made under conditions of torture or duress) or in 2012. It also noted that this fact was “sufficiently important for Ofcom to review its initial Adjudication”. It also said that Ofcom stated in its Adjudication that the date when the filming took place made little material difference. However, the Licensee said that this contradicted the evidence in the BICI report where it stated that detainees at Al Qurain Prison reported that the abuse ceased and conditions improved dramatically after 10 June 2011.
44. Al Arabiya News said that these facts make the question of whether the interview was in 2011 or 2012 “extremely relevant and clearly important in the context of an editor, looking at archive material at least 3 years old, and seeing the outward appearance of Mr Mashaima displaying openness and freely speaking about his actions”.
45. Al Arabiya News said that in its Adjudication, Ofcom had not sought to establish whether or not Mr Mashaima’s objections to the broadcast of the interview were consistent with his prior public statements and his conduct during the Court of Cassation appeal in 2012. It said that at this hearing, Mr Mashaima’s written statement in his defence “stated clearly that he had given ‘very honest and transparent’ answers when being questioned prior to his first military trial in 2011”. The Licensee said that Mr Mashaima had stated in detail how he was subjected to torture and abuse from March to May 2011 but “he does not claim that he ever confessed to anything he had not done”.
46. The Licensee quoted the following from Mr Mashaima’s written statement to the Court of Cassation:

“After that, and within minutes, my interrogation at the military prosecution started. These interrogations took days and the investigation pages amounted to around 130 pages. **I could have withheld my answers to save time and not incriminate myself, but I was very honest and transparent in my answers and refuted all the malicious charges and made it very clear to the investigator that the reason behind my sincere answers was that I was certain that I don’t feel that I practiced anything wrong or committed any wrongdoing.** I stated that all of my activities were public for all to see and I only expressed my political views and my demands of the rights of the Bahraini people. I also stated that my demands were not sectarian but rather patriotic regardless of right or wrong, and what was called incitement or hatred against the regime is merely political criticism and pinpointing the errors that our country has suffered from, and they are rights to all citizens” (Licensee’s emphasis).
47. The Licensee said that the written statement set out in paragraph 46 showed that Mr Mashaima “did not make any false statements or make any confessions during earlier questioning that he did not subsequently agree with”. It said that at his final trial at the Court of Cassation, he stood by his statements. The Licensee added that the statements were made over a year after Mr Mashaima said that he was filmed.
48. The Licensee also noted Ofcom’s finding in the Adjudication that the failure to mention the findings of the BICI report had constituted a material omission which resulted in unfairness to Mr Mashaima. The Licensee said that Al Arabiya News’ audience would have been aware of the BICI report and the fact that Mr Mashaima’s original conviction was quashed as a result. It said that Ofcom had overlooked that fact that the BICI report, while instrumental in overturning Mr Mashaima’s first conviction, was irrelevant in the context where: the

conviction was quashed, re-tried and appealed in the highest possible civil court which had found the substance and facts behind the charges to be true; and, where Mr Mashaima had said that he was “very honest and transparent” in all his answers. The Licensee said that Mr Mashaima had consistently maintained that he did not incite people to violence. However, it said that nothing in the programme stated that he did incite violence.

49. The Licensee said that in the Adjudication, Ofcom should have focussed on the actions of the editorial team, who were creating an important programme of significant public interest and considering archive footage of more than four years old for inclusion in the programme. It added that it was an understandable and not unreasonable editorial decision to decide not to contact Mr Mashaima to seek his consent or to verify the accuracy of the interview. The Licensee said that this was particularly the case in light of the subsequent and intervening re-conviction of Mr Mashaima, by the highest level civil court, with his own freely given statement in court in 2012, supported by his legal team, which had corroborated the content of the interview. The Licensee said that it should not have been considered as a very serious breach.
50. The Licensee concluded that, in light of all the factors set out above, it did not understand how Ofcom could endorse a decision that the statements in the interview had not been verified as true or that the programme was unfair or unrepresentative of Mr Mashaima’s views. It said that the imposition of the proposed sanction was neither fair nor proportionate in the circumstances.

Adjudication and Sanction in relation to Privacy

51. Al Arabiya News asserted that there was nothing in the footage of the interview with Mr Mashaima which would have suggested to an editor, four years later researching content for a programme on historic political events, that the interview with Mr Mashaima was not given freely and willingly. The Licensee repeated that in Mr Mashaima’s written statement in 2012, he said that he only gave honest and transparent answers and denied all accusations that he disagreed with. The Licensee also said that there was a “striking similarity” between his written statement and the footage of the interview. The Licensee gave the following example from his statement:

“I was shown all of my speeches and interviews on the various TV channels and radios, as well as my speeches in the Roundabout by the Military Prosecution...They all included my political views and criticisms of the political and human rights situation and my demand for freedom and dignity for all, or the call for a serious and purposeful dialogue or the emphasis on national unity and cohesion, and that rights are for all and choosing the ruling regime is the right of people under law”.

52. The Licensee said that in the Preliminary View, Ofcom stated that Mr Mashaima “was discussing matters of a highly sensitive and confidential nature (particularly given that his retrial and appeal were still pending”. However, Al Arabiya News said that it was clear from Mr Mashaima’s written statement in 2012 that he did not seem to regard the matters as sensitive or confidential. In particular, it said it considered that the reason he spoke openly and frankly was because he did not believe his actions should constitute illegal behaviour, “merely the exercise of his right to freedom of speech and political protest”. The Licensee said simply because matters are politically sensitive, does not make them inherently private.
53. Al Arabiya News said that in the Preliminary View, Ofcom had referred to the timing of the filming and the re-trial as “adding weight” to the claim made on Mr Mashaima’s behalf that the material filmed was sensitive or confidential. However, it said that even if such matters were of a sensitive and confidential nature at the time of filming, by the time of broadcast in 2016, those matters were no longer sensitive or confidential. The Licensee said that Mr

Mashaima's statements had been aired in two civil courts and the contents of his 2012 statement to the Court of Cassation in which he said: "I could have withheld my answers to save time and not incriminate myself, but I was very honest and transparent in my answers..." had been published.

54. The Licensee said that based on his statement and the subsequent conviction in the civil courts, the public had the right to know the answers to questions relating to Mr Mashaima's involvement in the 2011 uprising. It added that the attempt to overthrow a country's political regime, by any method, is of "vital national interest". It said that there was not only a genuine public interest, but as Ofcom stated in the Adjudication, the matters were also of significant public interest.
55. Al Arabiya News said that Ofcom acknowledged in the Adjudication that balancing the right of privacy against the public interest is a difficult question of editorial judgement. It said that the decision of the Supreme Court in *Khuja v Times Newspaper Limited and others* [2017] UKSC 49 confirmed that broadcasters were legitimately entitled to exercise editorial judgement. It said that if the Adjudication in this case was revisited, and the balancing exercise carried out again, Ofcom may have found that the public interest required the contents within the interview to be shown.
56. The Licensee said that even if Ofcom continued to disagree with the editorial decision to broadcast the footage, it would be unfair to regard that editorial decision as a "serious" breach of the Code in light of the specific circumstances set out in paragraphs 51 to 55.

Adjudication and Sanction in relation to the Filming

57. The Licensee said that in Ofcom's Adjudication and the Preliminary View, a fundamental flaw had been made in the consideration of the filming of the interview of Mr Mashaima.
58. Al Arabiya said that at the time of filming in 2012, Al Arabiya News was not licensed by Ofcom and so the Rules relating to the filming of the interview would not have been applicable. The Licensee said that it would be "profoundly unjust and improper" for Ofcom to expect a broadcaster to have compliance procedures in place "years before" it was ever subject to Ofcom's jurisdiction and "equally unjust" to impose sanctions in relation to actions or breaches before Al Arabiya News was a licensee.
59. The Licensee said that Ofcom should instead have investigated the allegations from the perspective only of breaches that occurred when Al Arabiya News was under the jurisdiction of Ofcom and subject to Ofcom's Code.

Improper application of precedent cases

60. Al Arabiya News noted that Ofcom had stated in the Preliminary View that its previous sanction decision in Press TV ("Press TV")⁹, was directly comparable to this case. The Licensee stated, however, that the present case was fundamentally different to that of Press TV and that Ofcom had applied the Press TV case in a way that was unfair to Al Arabiya News, namely:
 - i) In Press TV, the Sanction Committee found that the breach was both serious and deliberate. However, in the present case, it was not found to be a deliberate breach nor was there any evidence of the same.
 - ii) Ofcom considered in Press TV that the sensitivity of the complainant was "obvious and observable". In the present case, however, the Licensee said there was no similar finding and no such sensitivity would have been apparent to the journalists considering the

⁹ https://www.ofcom.org.uk/_data/assets/pdf_file/0032/52997/press-tv.pdf

footage. It noted that Ofcom had accepted that Mr Mashaima appeared to be speaking openly and that he was willingly providing detail of the events.

- iii) The Licensee said that it was a feature of the Press TV case that the complainant's professional reputation, as a journalist, was said to have suffered and that he was distressed by the questioning of his impartiality and independence. It said that Mr Mashaima did not make a similar complaint and Ofcom had not been provided with any evidence which suggested that he had suffered or was distressed by the broadcast of the footage. The Licensee said that Mr Mashaima's own statement in the Court of Cassation in 2012, where he gave "'honest and transparent' answers, corroborated his appearance in the interview and confirmed that he did not think he had done 'anything wrong or committed any wrongdoing'".
 - iv) The Sanction Committee referred to ongoing compliance issues with Press TV. In particular, Al Arabiya News noted that Press TV broadcast the footage complained of a further two times after the adjudication recording the breach and Press TV had published several articles on its website criticising Ofcom's decision. The Licensee said that Ofcom noted that in the present case there had been no repetition and that Al Arabiya News had been wholly co-operative.
 - v) In Press TV, Al Arabiya News said that Ofcom had regard to three earlier findings of breaches of the Code. Al Arabiya News said that it had never been found to be in breach of the Code. It said that in this regard, it was "quite wrong and unfair for Ofcom to infer [in the Preliminary View]...that there may have been other breaches if the Channel had been broadcasting for a longer period of time".
 - vi) Al Arabiya News said that Press TV's filming and broadcast were "virtually contemporaneous" and at a time when Press TV was subject to the Ofcom Broadcasting Code. Whereas, the filming of Mr Mashaima's interview took place nearly three years before Al Arabiya News became subject to the Code.
 - vii) Al Arabiya News said that the financial penalty imposed by the Sanction Committee in Press TV was £100,000, and despite the differences set out in i)-vi) above, the Sanction Committee proposed imposing a "substantially higher" financial penalty of £140,000 in this case. The Licensee said that it was "neither consistent nor proportionate to do so even if Al Arabiya News had breached Rules 7.1 and 8.1".
61. The Licensee said that the Preliminary View had made references to the sanctions decisions relating to the BBC (3 April 2009) and Kiss FM (20 June 2006). It said that it was a "strain to suggest that there is any similarity with the present case". It added that, in both of these cases, there was a quite deliberate and flagrant breach of privacy for entertainment purposes to the obvious distress and embarrassment of those concerned. The Licensee said that the Penalty Guidelines required Ofcom to only consider precedents which were "particularly relevant". It said that other than the fact that both cases relate to a breach of Rule 8.1, the cases had no relevance and "as a comparator they are misleading and should be disregarded".
62. Al Arabiya News said that, on 30 October 2017, Ofcom had published a final Adjudication in its Bulletin¹⁰ in relation to the programme, *Can't Pay? We'll Take It Away!*, broadcast by Channel 5, where Ofcom found that:
- i) Channel 5 had unwarrantably infringed the privacy of four people;
 - ii) One person was filmed in scenes of "great personal distress";

¹⁰ See footnote 7.

- iii) This person had a heightened expectation of privacy and Ofcom had regard to “the particularly serious nature of the interference”;
- iv) The interference with the complainants’ rights to privacy was “significant” and of “such a nature and gravity to outweigh the public interest”;
- v) The filming was surreptitious, and the person clearly did not want to be filmed.

It said that despite the above, Ofcom did not propose any statutory sanctions on Channel 5.

63. Al Arabiya News concluded that it did not accept that it should be subject to the proposed sanction. The Licensee added that for all the reasons it set out in its representations, it also considered that there were fundamental flaws in the findings of unfairness and breach of privacy in Ofcom’s Adjudication on the complaint.

Ofcom’s Decision

64. Having carefully considered the Licensee’s representations above, we set out below our Decision of Sanction against Al Arabiya News, taking into account the relevant statutory framework set out above, following our published Sanctions Procedures¹¹, and applying each element of Ofcom’s published Penalty Guidelines in turn below¹².

Serious nature of the breaches

65. As set out at paragraph 35 above, the imposition of a sanction against a broadcaster is serious matter, and Ofcom may, following due process, impose a sanction if it considers that a broadcaster has seriously, deliberately, repeatedly or recklessly breached a relevant requirement. Ofcom considered, for the reasons set out below that the breaches of Rules 7.1 and 8.1 were serious and therefore warrant the imposition of a statutory sanction.
66. Ofcom has a specific duty to put in place principles and practices which are designed to protect against unjust or unfair treatment in programmes and unwarranted infringements of privacy in, or in connection with the obtaining of material included in, such programmes. We are also under a specific duty to include conditions in TLCS licences which ensure that licensees observe these principles and practices. Where a licensee contravenes these conditions, Ofcom has specific powers to impose sanctions on it, including a financial penalty or the revocation of the licence. It is therefore implicit from these powers and duties that a licensee’s failure to observe the principles and practices set out in the Code has the potential to be serious, justifying the imposition of a statutory sanction.
67. In general, contravention of Rules 7.1 and 8.1 are considered serious content breaches because they involve the rights of individuals who are either in, or have been directly affected by a programme.
68. In considering the seriousness of the breach, we took into account the Licensee’s representations, as to why, in its view, the imposition of a sanction is not justified in this case. We considered the Licensee’s argument that Ofcom had failed to have regard to the fact that by the time the programme was broadcast, the events referred to in the interview with Mr Mashaima had been subject to the scrutiny of Bahrain’s highest Court and that Al Arabiya News’ audience would have been aware of the circumstances of his conviction. We also noted the Licensee’s view that, during Mr Mashaima’s re-trial before the Court of Cassation in 2012 (subsequent to the filming of the interview), he had stated that he had given “very honest and transparent” answers when being questioned prior to his first military trial in 2011. Further, the Licensee contended that although Mr Mashaima had

¹¹ See footnote 4.

¹² See footnote 6.

detailed how he had been subject to torture, he did not claim that he had confessed to anything which he had not done.

69. Ofcom does not accept the Licensees' representations on this point. As set out in our Adjudication, and at paragraph 28 above, in November 2011, the BICI had found that Mr Mashaima was amongst a number of individuals who had been mistreated with the specific purpose of "obtain[ing] statements of confessions incriminating the detainee in question". Even if the footage had been filmed in March 2012, as the Licensee maintains, this was only a few months after the BICI had published its findings. In the footage as broadcast, Mr Mashaima expressly states "I made a mistake", and "[t]he Republic is a clear mistake and I am ready to apologize...apologize to the people. I accept to apologize because this was a mistake and shouldn't have happened."¹³ In Ofcom's view, there is a material difference between these confessional statements and the statements Mr Mashaima subsequently makes during his re-trial, such as those specifically cited by the Licensee, "that I was certain that I don't feel that I practiced anything wrong or committed any wrong doing. I stated that all of my activities were public for all to see and I only expressed my political views and my demands of the rights of the Bahraini people. I also stated that my demands were not sectarian but rather patriotic regardless of right or wrong and what was called incitement or hatred against the regime is merely political criticism and pinpointing errors that our country has suffered from, and they are rights to all citizens." Rather than confessing to any wrongdoing or making a public apology, as appears to be Mr Mashaima's stated position in the broadcast footage, he appears in this subsequent statement to be maintaining his innocence. On this basis, Ofcom does not accept the Licensee's view that, in his subsequent statements, Mr Mashaima appears to stand by the earlier statements contained in the footage that was broadcast. It remains our view that the Licensee was aware, or ought to have been aware, that the statements contained in the broadcast footage were not likely to be a fair or accurate reflection of Mr Mashaima's views.
70. We also took into account the Licensee's representations that it is clear from Mr Mashaima's statement of 2012, given at the Court of Cassation, that he did not seem to regard the matters being discussed in the broadcast footage as being "sensitive or confidential". Further, the Licensee stated that simply because matters are politically sensitive does, of themselves, mean that they are inherently 'private'. In any event, even if the matters discussed in the broadcast footage were of a sensitive or confidential nature at the time of the filming, the Licensee maintains that they had ceased to be sensitive and confidential at the time of the broadcast.
71. Again, Ofcom does not accept the Licensee's representations on this point. As set out in the Adjudication, and at paragraph 33 above, Mr Mashaima appeared to be filmed in a private room while detained in prison, in circumstances where (by the Licensee's representations), the BICI had recently published its findings that certain individuals, including Mr Mashaima, had made confessions to the Bahraini authorities under torture. As set out above, the statements made by Mr Mashaima in the broadcast footage are materially different from the statements he subsequently made at his retrial and appeal, where he maintained that confessions were obtained from him under torture. Therefore, in Ofcom's view, it is clear that the broadcast footage was both sensitive and confidential to Mr Mashaima at the time it was filmed and that Mr Mashaima had a legitimate expectation of privacy in it.
72. Further, it is Ofcom's view that the filmed interview continued to be sensitive and confidential when it was broadcast in 2016. Irrespective of the Court of Cassation's final judgment, the fact remains that the statements contained in the footage as broadcast were

¹³ As set out in the Adjudication, Ofcom obtained an independent translation of the programme which was shared with the Licensee. The Licensee raised no objections with the accuracy of the translated transcript.

made by Mr Mashaima while he was detained in prison, against the backdrop of the BICI having found that confessions had been obtained from him under torture, and in circumstances where those statements were materially different from the position he maintained during his retrial and appeal.

73. The Licensee also stated that Ofcom had misdirected itself in the Adjudication by not taking into account that, at the time Mr Mashaima was filmed, Al Arabiya News was not licensed by Ofcom. However, it is important to stress that all aspects of the Code apply from the point a service becomes licensed by Ofcom. As such, Licensees must ensure that any material that they intend to, and do, broadcast complies with the Code. If, having considered the relevant material, the Licensee becomes aware that it may not comply with the Code, it should consider the steps it needs to take in order to ensure compliance. This also applies to the obtaining of material, regardless of who obtained it (i.e. whether it was the Licensee or another programme maker) and when it was obtained by the Licensee. It should also be noted that, in this case, it was the Licensee itself who had obtained the material, through the use of a stringer who had filmed the footage on its behalf. Given this, it is Ofcom's view that the Licensee should have been well placed to check that the material had been obtained in compliance with the Code.
74. Having carefully considered the Licensee's representations, it is Ofcom's view that the breaches were serious. As set out in paragraphs 27 to 33, the footage of Mr Mashaima showed him making highly sensitive confessions as to his participation in criminal activities in circumstances where:
- a) only approximately three months prior to the date on which Al Arabiya News says the footage was filmed, the BICI had found that similar such confessions had been obtained from individuals, including Mr Mashaima, under torture;
 - b) Mr Mashaima was still being detained in prison when the interview took place;
 - c) the allegations made against Mr Mashaima were, at the time of the filming, still subject to subsequent re-trial and appeal hearings, where Mr Mashaima was to maintain that his conviction should be overturned on the grounds that his confession had been obtained under torture;
 - d) it does not appear that Al Arabiya News took any steps to obtain Mr Mashaima's informed consent before filming him making the confessions contained in the footage;
 - e) given the well-publicised nature of Mr Mashaima's case, Al Arabiya News was aware, or ought to have been aware, as at the date of the broadcast, that the footage included in the programme may not have accurately or fairly represented Mr Mashaima's account of events; and
 - f) despite being so aware, Al Arabiya News did not take any steps to verify the veracity of the footage with either Mr Mashaima or his representatives.
75. We considered that the failure by Al Arabiya News to comply with Rule 7.1 of the Code resulted in serious unfairness to Mr Mashaima, where the audience's perception of him was likely to have been severely detrimentally compromised by the omission of important contextual information and the failure by the broadcaster to either obtain Mr Mashaima's informed consent or verify the accuracy of the footage, either with him directly or with his representatives.
76. Further, we considered that the failure by Al Arabiya News to comply with Rule 8.1 of the Code resulted in a serious infringement of Mr Mashaima's legitimate expectation of privacy. As set out above, it was Ofcom's view that Mr Mashaima's legitimate expectation of privacy

was heightened in this case, where it appears that he was filmed in a private room within the prison in which he was being detained, making highly sensitive confessions which went to the heart of his forthcoming re-trial and appeal. Despite these extremely sensitive circumstances, it does not appear that Al Arabiya News secured Mr Mashaima's consent to film him, nor did the public interest warrant the broadcast of this material.

77. In view of the factors set out above, Ofcom considered that the breaches were serious and so warrant the imposition of a statutory sanction. The following paragraphs set out Ofcom's Decision on the appropriate sanction to be imposed.

Sanction

78. As mentioned in paragraphs 22 to 25 above, Ofcom's powers to take action are set out in sections 236 to 239 of the Act insofar as relevant to the present case.
79. In view of the factors set out above, Ofcom considered that the breaches were serious and so warranted the imposition of a statutory sanction. The following paragraphs set out the enforcement action we have considered and the sanctions to be imposed.

Imposition of sanctions other than a financial penalty

Consideration of the revocation of the licence

80. Given the seriousness of this case, Ofcom first considered whether the breaches of Rules 7.1 and 8.1 were such as to justify commencing the statutory procedure to revoke the Licence under section 238 of the Act.
81. This is a matter of judgement for Ofcom, where revocation of a licence is the ultimate enforcement action available to us. Therefore, in considering whether it is appropriate to commence the procedure under section 238 of the Act to revoke the licence, Ofcom must take account of all the relevant circumstances. These include, in this case:
- the nature of the breaches of Rules 7.1 and 8.1 of the Code and the circumstances in which they arose;
 - previous licence breaches by Al Arabiya News (if any), especially any previous occasions where the broadcaster has breached Rules 7.1 and 8.1 in similar circumstances;
 - the explanation and response provided by Al Arabiya News in response to this incident; and
 - the likelihood of further breaches.
82. In summary, Ofcom must ensure that any decision that the breach is such as to merit revocation of the licence is proportionate. A relevant factor for Ofcom to consider in this regard is whether any sanction short of revocation could ensure that Al Arabiya News would comply with the terms of its licence.
83. Ofcom must also have regard to the balance to be given to competing rights under the Convention. In particular, this includes: the right freedom of expression under Article 10 and the right of the audience to receive that information (see paragraph 16 above), against the competing rights and protections necessary in a democratic society for the protection of citizens, including Ofcom's statutory duty to protect against unjust or unfair treatment in programmes, or unwarranted infringements of privacy in, or in connection with the obtaining of material included in, such programmes.
84. Ofcom noted that in this case, several very serious compliance errors were made by the broadcaster in relation to the filming and subsequent broadcast of the interview footage of Mr Mashaima. In particular, Mr Mashaima had been filmed by a stringer on the

broadcaster's behalf, using the broadcaster's equipment, yet the broadcaster had provided the stringer with no instructions about the filming nor had it attempted to obtain Mr Mashaima's informed consent prior to filming him. In addition, the broadcaster did not appear to have taken any steps prior to the broadcast of the footage of Mr Mashaima to verify the accuracy and veracity of the footage with either him or his representatives. This was despite several years having passed between the filming and subsequent broadcast of the footage, during which it had been well-publicised that Mr Mashaima had sought to have his conviction overturned in the Bahraini courts on the basis that his confession had been obtained under torture (as documented in the BICI report published in November 2011). There also appeared to be no consideration given by the broadcaster to Mr Mashaima's legitimate expectation of privacy, in circumstances where he had been filmed in a private room within the prison in which he was detained and had been discussing matters of a highly sensitive and confidential nature.

85. Ofcom noted that the breaches appeared to have only been contained in one programme and had not been repeated and are not ongoing. The Licensee also offered to resolve the complaint with the complainant by stating that it had no plans to broadcast the programme again or that, if it did, it would be edited to include additional commentary (such as interviews or experts' opinion(s)) to address the concerns raised in the complaint. As a general observation, we noted that the Licensee had not previously been found in breach of these Code rules, or the Code more generally. However, we note that the licence has only recently been issued (i.e. 5 February 2015).
86. We also noted that the programme was broadcast on a channel providing a variety of programming to the Arabic speaking community living in the UK and that if this licence was revoked, a number of viewers (and their rights to receive the service) would be adversely affected by them being deprived of this service.
87. Based on all the facts of this case, it is Ofcom's Decision that, while the breaches of Rules 7.1 and 8.1 were serious, the rights of the Licensee and the audience to freedom of expression (i.e. freedom to impart and to receive information) may be disproportionately affected by a decision that the breach justified revocation of the licence under section 238 of the Act, in circumstances where other sanctions may be sufficient to act as a deterrent against future breaches. Ofcom's consideration of those other sanctions is set out in paragraph 88 onwards below.

Considerations in relation to directing the Licensee to broadcast a statement of Ofcom's findings and not to repeat a programme which was in contravention of a licence condition

88. Section 236 of the Act provides Ofcom with the power to direct the holder of a TLCS licence to broadcast a correction or a statement of Ofcom's findings (or both), or not to repeat a programme which was in contravention of a licence condition.
89. Given the seriousness of the breaches, Ofcom considers that directing the Licensee to broadcast a statement of Ofcom's findings is necessary so as to bring the breaches, and Ofcom's actions in relation to those breaches, to the attention of the Licensee's viewers. It is also Ofcom's Decision that we should direct the Licensee not to repeat the programme again. In this case, however, we consider that such directions are unlikely to be a sufficient statutory sanction on their own, given the seriousness of the breaches at issue.
90. Ofcom therefore decided that this sanction should be taken in combination with a financial penalty, which would likely act as a more effective deterrent to discourage the Licensee (and other licensees) from contravening the Code in a similar manner.

Imposition of a financial penalty

91. Under section 237 of the Act, the maximum level of financial penalty that can be imposed on the holder of a TLCS licence in respect of each contravention of a TLCS licence condition is £250,000 or five per cent of the licensee's qualifying revenue relating to its last complete accounting period falling within the period for which its licence has been in force, whichever is greater.
92. In light of the Licensee's qualifying revenue for its last complete accounting period for the Al Arabiya News licensed service, the maximum financial penalty that Ofcom could impose is £250,000 in respect of the contravention of its licence conditions committed by the Licensee in this case.
93. Ofcom's Penalty Guidelines state (in paragraph 11) that: "Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement. Ofcom will have regard to the size and turnover of the regulated body when considering the deterrent effect of any penalty". In reaching its Decision on the imposition of a sanction in this case, Ofcom has taken full account of the need to ensure that any penalty acts as a deterrent and has also taken account of the specific factors set out at paragraph 12 of the Penalty Guidelines.
94. In this case, Ofcom considered that a financial penalty was necessary to reflect the serious nature of the Code breaches recorded against the Licensee, and to act as an effective incentive to comply with the Code, both for the Licensee and other licensees.

Factors taken into account in determining the amount of a penalty

95. In considering the appropriate amount of a financial penalty for the Code breaches in this case, Ofcom took account of relevant factors set out in the Penalty Guidelines, as set out below:

The seriousness and duration of the contravention

96. Ofcom regarded the breaches to be serious for the reasons set out in paragraphs 74 to 76 above. We were particularly concerned with the circumstances in which the complainant was filmed, the potential impact the broadcast would have had on viewers' opinions of Mr Mashaima, and the lack of steps taken by the broadcaster to secure Mr Mashaima's informed consent and to verify the accuracy and fairness of the footage included in the broadcast programme.
97. For the reasons set out in paragraphs 68 to 76 above, we were not persuaded by the Licensee's argument that the programme was not a serious breach and had not resulted in Mr Mashaima being treated unjustly or unfairly and his privacy being unwarrantably infringed.
98. The Adjudication related to material broadcast on 27 February 2016. We are unaware of the material having been broadcast again.

The degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants

99. We considered that the degree of harm caused to the complainant was very serious. The programme was found to be unjust or unfair to the complainant, such that the reasonable viewer would consider that he was confessing to having committed the crimes for which he was convicted and that he was willingly providing details of those events, when that may not

have been the case. The programme was also found to have unwarrantably infringed Mr Mashaima's legitimate expectation of privacy.

Any gain (financial or otherwise) made by the regulated body in breach (or any connected body) as a result of the contravention

100. We have no evidence to suggest that the Licensee made any financial or other gain from these breaches of the Code.

Whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention.

101. In its representations during Ofcom's investigation, the Licensee said that Mr Mashaima had been filmed using Al Arabiya News' equipment in March 2012 by a stringer. Al Arabiya News said that it did not give the stringer any further instructions about the filming.
102. The broadcaster did not provide Ofcom with any evidence that Mr Mashaima had been informed about the nature and purpose for which he was being filmed or that he understood that the material recorded might subsequently be included in the programme as broadcast. On that basis, it did not appear to Ofcom that the broadcaster had taken any steps to obtain Mr Mashaima's informed consent in the filming of the footage.
103. The interview footage was not broadcast until 27 February 2016, approximately four years after Al Arabiya News said that the footage had been filmed. During the time which had elapsed between the filming of Mr Mashaima and the broadcast of the interview, it had been well-publicised that Mr Mashaima had sought to have his conviction overturned in the Bahraini courts on the basis that he had made confessions as a result of torture (as had been documented in the BICI report published in November 2011.)
104. The broadcaster did not provide Ofcom with any evidence to suggest that it had taken any steps during the time which had elapsed between the filming and broadcast of the interview to verify with Mr Mashaima or his representatives whether the interview footage fairly and accurately reflected his position. This was despite it being likely that the broadcaster was aware, or ought to have been aware that, subsequent to the filming of the footage, Mr Mashaima had continued to maintain that his conviction was based on confessions he had made under torture.
105. Taking into account the matters above, it does not appear that the Licensee took any appropriate steps to ensure that the broadcast of the programme would not result in a contravention of the Code, despite having ample opportunity to do so. We therefore considered that this was evidence of seriously inadequate compliance processes for identifying potentially problematic material.

The extent to which the contravention occurred deliberately or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur

106. We have no evidence that suggests the breaches occurred deliberately.
107. The fact that the Licensee does not appear to have put in place adequate compliance procedures to prevent the contraventions from occurring may indicate a reckless disregard of the Code, in particular Rules 7.1 and 8.1. As stated above, it appears that the broadcaster provided the stringer with its equipment to film the interview with Mr Mashaima without giving any further instructions to that individual about the steps required in order to comply with Rule 7.1. In addition, given the time which had elapsed between the filming and subsequent broadcast of the footage of Mr Mashaima, it appears to us that the broadcaster had ample time in which to verify the fairness or accuracy of the footage of Mr Mashaima,

but did not do so. In our view, a reasonably prudent licensee would also have turned its mind to the possibility that Mr Mashaima may have had a legitimate expectation of privacy, in circumstances where he was being filmed while in prison, making statements of a highly sensitive nature. Despite this, the Licensee does not appear to have taken any steps in order to ensure compliance with Rule 8.1.

108. In our view, the Licensee ought to have been aware of the potential issues which may have resulted from the broadcast of this footage. By failing to have adequate compliance procedures in place, it acted recklessly and without due regard to the possibility that it might breach the relevant Rules. Taking into account the Licensee's representations, it was our view that the Licensee did not appear to fully understand its duty, as a broadcaster who has become subject to the UK licensing regime, to ensure compliance with all aspects of the Code. The Licensee did not appear to understand that any material which it intends to broadcast must comply with the Rules, regardless of when it was obtained. Therefore, we considered that the breaches in this case reflected a material degree of recklessness on the part of the Licensee.

Whether the contravention in question continued, or timely and effective steps were taken to end it, once the regulated body became aware of it.

109. It appears that the Licensee only became aware of the potentially serious issue raised by the programme following Mr Mashaima's complaint to Ofcom. We are not aware of whether the programme has been repeated since its first broadcast.

Any steps taken for remedying the consequences of the contravention

110. The Licensee took steps to try to resolve the complaint with the complainant by stating that it had no plans to broadcast the programme again or that, if it did, it would be edited to include additional commentary (such as interviews or experts' opinion(s)) to address the concerns raised in the complaint.
111. The Licensee has not submitted any evidence to Ofcom to indicate that it has taken steps to put in place compliance measures which might prevent a similar breach of Rules 7.1 and 8.1 from recurring again.

Whether the regulated body in breach has a history of contraventions (repeated contraventions may lead to significantly increased penalties).

112. Ofcom noted that the Licensee has held the Licence since 5 February 2015 and does not have a history of contraventions of the Code, prior to the breaches now being considered for statutory sanction.

The extent to which the regulated body in breach has cooperated with our investigation.

113. In Ofcom's view, the Licensee has been cooperative. For example, it attempted to resolve the complaint and provided full representations in response to Ofcom's Entertainment Decision.

Precedent

114. In accordance with Ofcom's Penalty Guidelines, Ofcom has had regard to relevant precedents set by previous cases. However, these cases are now over five years old and were decided under the previous Penalty Guidelines. Ofcom's new Penalty Guidelines place greater emphasis on deterrence.
115. We considered that the below case was directly comparable to this case in that it involved the broadcast of sensitive material about the complainant without his consent, where the

footage had been filmed in a sensitive environment and where the broadcaster was aware, or ought to have been aware, of the complainant's circumstances.

116. **1 December 2011, Press TV Limited ("Press TV")¹⁴** - Ofcom imposed a penalty of £100,000 on the licensee and directed it to broadcast a statement of Ofcom's findings and not to repeat the material found in breach again, for breaches of Rules 7.1 and 8.1. This case concerned the broadcast of interview footage of Mr Maziar Bahari in which he said he had sent a report about the attack against the Basij base in Tehran, Iran, to *Channel 4 News* and to *Newsweek* magazine. Viewers were not informed that the interview of Mr Bahari had taken place while he was being detained in prison which we considered had the potential to affect the way in which viewers regarded the news report and the inferences which they drew from the report in relation to Mr Bahari. Ofcom considered that he was filmed in circumstances in which it should have been clear to Press TV that he was giving an interview under duress and to which he did not consent. It should also have been clear that the broadcast of this interview constituted an unwarranted infringement of his privacy because of the lack of consent and highly sensitive nature of the footage.
117. We considered that the below case was comparable to the extent it involved the issue of broadcasting sensitive material about the complainants without consent.
118. **3 April 2009, The British Broadcasting Corporation ("BBC")¹⁵** - Ofcom imposed a penalty of £80,000 for breaches of Rule 8.1. The case concerned two editions of *Russell Brand* in which offensive references were made to the actor Andrew Sachs and to his granddaughter, Georgina Bailie, which resulted in their privacy being unwarrantably infringed. Ofcom considered that the nature of the information disclosed in the programme was highly personal, intimate and sensitive in which the complainants were clearly identifiable which led to infringements of privacy of the most serious nature.
119. We considered that the below case was comparable to the extent it involved the filming and broadcasting of sensitive material about the complainant without consent and in circumstances where the individual concerned was not informed about the nature and purpose of the programme. It was also comparable to the extent that it showed a lack of compliance systems in place.
120. **20 June 2006, Kiss FM Radio Limited ("Kiss FM")¹⁶** - Ofcom imposed a penalty of £75,000 for breaches of Rules 7.1 and 8.1. In relation to the breach of Rule 8.1, the presenter of the programme telephoned a member of the public (the complainant, who wished to remain anonymous) who had inadvertently left his telephone number on the presenter's voicemail, believing it to be his Human Resources ("HR") officer's voicemail. The complainant had called his HR officer in the hope of discussing redeployment opportunities in the company following his redundancy. The presenter then returned the complainant's call posing as the HR officer. The telephone call was recorded and broadcast without consent.
121. While Ofcom considers that the nature of the content in the cases listed in paragraphs 116 to 120 included are relevant to the current case, we note that, as set out in the Penalty Guidelines, Ofcom may depart from them depending on the facts and the context of the current case. In particular, we will not regard the amounts of previously imposed penalties as placing a lower or upper threshold on the amount of any penalty. As noted earlier, all the sanctions referred to in the cases above were imposed under the previous Penalty Guidelines, which are different from the Guidelines that now apply.

¹⁴ https://www.ofcom.org.uk/data/assets/pdf_file/0032/52997/press-tv.pdf

¹⁵ https://www.ofcom.org.uk/data/assets/pdf_file/0029/77663/bbcradio2therussellbrandshow.pdf

¹⁶ https://www.ofcom.org.uk/data/assets/pdf_file/0026/52973/kiss100.pdf

122. In reaching our Decision, and in calculating the penalty amount, we have taken into account the Licensee's representations that the proposed level of financial penalty was inconsistent with our approach to imposing financial penalties in previous cases, in particular, Press TV, but also in relation to Channel 5's programme, "*Can't Pay? We'll Take It Away!*". We also considered the Licensee's representations that there were very few similarities between the present case and those of the BBC (3 April 2009) and Kiss FM (20 June 2006).
123. Regarding the BBC and Kiss FM cases, Ofcom recognised that although they are not directly comparable on their facts, they show the kind of approach we have taken in previous cases which have involved a breach of Rule 8.1 of the Code. On that basis, it is Ofcom's view those cases are relevant to its deliberations in Al Arabiya News' case.
124. With respect to Ofcom's approach in the Channel 5 programme, the factual circumstances of the present case are, in our view, considerably more serious. It is for this reason that, in the case of Channel 5, we considered it sufficient to record a breach in our Bulletin without the need for a statutory sanction. In the present case, however, we consider it appropriate to impose a sanction on Al Arabiya News, for the reasons set out above.
125. Turning finally to the case of Press TV, we took into account the Licensee's view that there were a number of differences in that case which made it a more serious breach than in the present case. Ofcom acknowledges that there are factual differences between the two cases, however, for the reasons set out in paragraphs 74 to 76 above, we are not persuaded that Press TV is necessarily more serious. As outlined above, we do not regard the level of previously imposed penalties as placing upper thresholds on the amount of any penalty. We note the Licensee's representations, that the penalty imposed on Press TV was £100,000, and therefore less than the sum proposed in our Preliminary View. We have also taken into account, however, the fact that this case is now approximately six years old where, had it been determined today, the penalty may have been higher. It is also of particular concern to Ofcom in the present case, that the Licensee did not appear to understand fully its obligations to comply with all parts of the Code, regardless of when it had obtained the broadcast footage, as set out in paragraph 108.

The size and turnover of the regulated body when considering the deterrent effect of any penalty

126. As set out in our penalty guidelines, the central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to ensure compliance, having regard to the seriousness of the infringement. Ofcom will impose a penalty which is appropriate and proportionate, and which will act as a deterrent, taking into account the size and turnover of the Licensee.
127. We also recognise that the penalty must be proportionate taking into account the Licensee's rights under Article 10 of the Convention. If any financial penalty was to be so high that its effect would be to close a service down, then it might be a disproportionate interference with the Licensee's and the audience's right to freedom of expression and exceed the purposes of imposing a penalty.
128. In reaching its Decision on the imposition and level of a sanction in this case, Ofcom has taken account of Al Arabiya News' qualifying revenue for the last accounting period. We have also taken into account the fact that, on the information provided to us by the Licensee, it receives substantial funding from its parent company (and other companies and entities which are under common ownership or control) in order to carry out its operations, as and when required. We have no reason to believe that Al Arabiya News will cease to receive such funding, or that it will be unable to pay the penalty proposed. We also note that the Licensee has not made any representations that the level of financial penalty proposed

in our Preliminary View would have a severe and detrimental impact on its financial position so as to prevent the service from continuing to broadcast.

Decision

129. In order to achieve Ofcom's central objective of deterrence, we have carefully considered the nature and level of statutory sanction that should be imposed in this case. In doing so, we have taken account of the particular seriousness of the breach, the Licensee's representations, the Licensee's size and financial position, and relevant precedent cases. We have also had regard to our legal duties, as set out above, including the need to ensure that any sanction we impose is proportionate, consistent and targeted only at cases where action is needed.
130. Having regard to all the factors set out above, we consider that the most appropriate and proportionate sanction would be to impose a financial penalty of £120,000 (one hundred and twenty-thousand pounds) on Al Arabiya News (payable to HM Paymaster General). This figure is a reduction on the figure proposed in the Preliminary View, reflecting the representations made by the Licensee in relation to the Press TV case. We also recognise, however, that the penalty in the Press TV case may have been higher if it had been decided today. Further, Ofcom was particularly concerned that the Licensee did not appear to understand fully its obligations to comply with all parts of the Code, regardless of when it had obtained the broadcast footage, as set out in paragraph 108. Ofcom has also decided to direct the Licensee to broadcast a statement of Ofcom's findings on a date and in a form to be determined by Ofcom, and to direct the Licensee not to repeat the material found in breach again.
131. In Ofcom's view, this sanction should send a clear message of deterrence, both to the Licensee and also to other broadcasters.

**Ofcom
25 January 2018**