

26 March 2015

BACKGROUND BRIEF

Maldives: grossly unfair Nasheed conviction highlights judicial politicization

Former President Mohamed Nasheed was convicted on 13 March 2015, after approximately 10 hearings conducted in quick succession over the course of 19 days.

The Maldivian Constitution has an extensive fundamental rights chapter, encompassing many internationally recognized fair trial and due process rights. Among others, Article 42 provides the right to a fair, public, independent, impartial and transparent hearing. Article 48 enshrines the right to *habeas corpus*. Articles 51 and 53 ensure the right to adequate time and facilities to prepare a defense, and the right to legal counsel, respectively. Article 56 of the Maldivian Constitution ensures the right to appeal.

The Maldives has signed or ratified all of the major international human rights treaties, including the ICCPR and its First Optional Protocol (acceded to in 2006), CAT (2004), CED (2007), CEDAW (1993), CERD (1984), ICESCR (2006), CRC (1991) and CRPD (2010). Article 14 of the ICCPR, in particular, sets out fundamental guarantees for the right to a fair trial, and article 9 sets out guarantees against arbitrary detention. The proceedings against Mr. Nasheed, as described in more detail below, have involved a range of violations of these articles of the ICCPR, which cumulatively amount to a gross violation of his right to fair trial and his right to liberty.

Arbitrary Conduct of the Arrest and Trial

Mr. Nasheed was first charged in 2012 with unlawful arrest under Section 81 of the Maldivian Penal Code, for the alleged unlawful detention of the Chief Judge of the Criminal Court, Mr. Abdullah Mohamed. After a handful of hearings during that period, the court indefinitely postponed further proceedings in the case around mid-2013.

On or about 15 February 2015, after nearly three years, the prosecutor-general withdrew the pending charge of unlawful arrest against Nasheed, without explanation.

Then, on 22 February 2015, Mr. Nasheed was arrested under a new arrest warrant, this time under the new charge of terrorism under the Prevention of Terrorism Act 1990 (Act No. 10/1990) (PTA), which carries a significantly higher penalty for conviction than the unlawful arrest charge. Section 2(b) of the PTA, under which Mr. Nasheed was charged and convicted, defines terrorism to include “[t]he act or the intention of kidnapping or abduction of person(s) or of taking hostage(s).” The PTA carries a minimum sentence of 10 years for any person found guilty of terrorism without the loss of life.

On the morning of 23 February 2015, a court summons was issued instructing Mr. Nasheed to be brought under police custody to the court that same day. Mr.

Nasheed's defense team was denied adequate time or notice to consult their client or to attend the hearing. Their request to appear in court as Mr. Nasheed's defense counsel of record was denied on the ground that they must have registered with the court 48 hours prior to the hearing (though the hearing was only called the same morning).

Article 48 of the Maldives Constitution requires that a remand hearing take place before a judge within 24 hours of an individual's arrest, to determine the lawfulness of the arrest and the need for detention pending the outcome of the trial.

However, when Mr. Nasheed was brought to court for the first time on 23 February, formal charges were presented against him, marking the commencement of the trial itself as opposed to a pre-trial remand hearing as per normal practice. The court also ordered that Mr. Nasheed be held in detention for the duration of the trial, without giving Mr. Nasheed the opportunity to argue for bail.

Lack of Fairness in Access to Evidence and Opportunity to Prepare Defense

Following the 23 February hearing, the defense team was given three days to answer the charges and prepare for the next hearing date of 26 February. The defense team's request for more time to prepare in light of the new charges and the large volume of documentary prosecution evidence, which was provided only on the day of the hearing, was denied by the court on the grounds that these charges were based on the same alleged facts and evidence as the earlier charges and, therefore, the defense team had had enough time to review them.

In the Maldives, there is no provision for pre-trial discovery. Normal practice is that the trial begins when the charges are read in the presence of the defendant at the first trial date. At this same hearing, court hands over to the defense the prosecution documents to be used as evidence. Customary practice is that the subsequent hearing timetable is scheduled with due consideration to ensure that adequate time is afforded for the defense team to prepare its defense. It is highly irregular to afford the defense only three days to prepare, particularly in a case such as this with this complexity and magnitude involving a former head of state.

While the defense was given a large volume of documents as part of the prosecution evidence after the 23 February hearing, they were denied full access to many of the evidence actually presented during the trial, including audio and video evidence played in court.

The defense team recused itself on 9 March 2015, claiming unfairness in the conduct of the trial. Mr. Nasheed's repeated requests for the opportunity to obtain new counsel were denied and the court decided to proceed with the trial without legal representation present.

Post-Conviction Right to Appeal

Approximately six weeks prior to Mr. Nasheed's arrest, the Maldives Supreme Court issued a circular amending the statutory appeal period under the Judicature Act from 90 days to 10 days. This unusual and unexpected change has also hampered Mr. Nasheed's capacity to appeal his verdict.

While there is no constitutional or statutory provision explicitly proscribing the Court's ability to issue decisions on proposed amendments to laws, customary

practice is that the Supreme Court reviews legislation only when the issue is brought before it through a constitutional challenge. It is highly irregular, and contrary to the separation of powers principle enshrined in the Maldives Constitution, for the Supreme Court to issue an amendment to a legislative enactment on its own motion via a circular.

While the defense can technically file an appeal for the purposes of meeting the accelerated deadline, calculated to be 26 March 2015, its ability to do so effectively is severely hamstrung. Following the defense recusal on 9 March, no legal counsel were present in any of the subsequent hearings, so the court record is the only means for the defense to know what further evidence or witness testimony was presented by the prosecution. The scope of the appeal hearing is confined to those issues raised at the trial and itemized in the appeal petition; no new arguments may be presented. So the defense would need the court record to be able to fully ascertain the arguments and evidence presented, and prepare an appeal.

The defense team, following the verdict, is yet to receive the full court record of proceedings in order to prepare its appeal. A copy of a summary of the judgment alone was provided to the defense team. The defense team was told that the court record would only be available after 7 to 14 days. Given that the appeal period is 10 days, this puts the defense team at a severe disadvantage in preparing an effective appeal.

Lack of Impartiality and Conflicts of Interest Among Judges

The trial court repeatedly denied defense cross-examination of prosecution witnesses aimed at challenging their credibility by pointing out inconsistencies between oral testimony and written statements. The defense team was also denied the opportunity to call its own defense witnesses, based on the court's own determination that none of the defense witnesses would negate the prosecution witnesses' testimony.

There was a clear conflict of interest on the part of the prosecutor-general and two of the three judges trying the case, given their respective relationships with Chief Judge of the Criminal Court Abdullah Mohamed who was arrested in 2012, and their involvement in the 2012 investigation against Mr. Nasheed. The current prosecutor-general as well as two of the Criminal Court judges hearing the present case, Judge Didi and Judge Abdul Bari Yoosuf, submitted witness statements for the 2012 investigation which were re-submitted as evidence in this trial. The court refused defense requests for the two judges to recuse themselves.

Underlying Political Context

The overall political context of the justice system in the Maldives is important to understand the circumstances surrounding this case. The vast majority of the judges currently sitting on the bench today were appointed by the former president Gayoom prior to the democratic transition and new constitution in 2008. Mr. Gayoom's brother, Mr. Yameen, is currently president of the Maldives.

The constitutionally mandated vetting process of the lower judiciary by the Judicial Services Commission, itself a constitutional body whose composition has been criticized for being politicized, never transpired during the transition period. The ICJ has previously documented the politicized nature of the justice system, characterized by entrenched political allegiances. (See *Maldives: Securing an*

Independent Judiciary in a Time of Transition (February 2011)). These vested interests and entrenched political loyalties have not diminished to date.

Human Rights Commission of the Maldives Under Duress

Meanwhile, the Human Rights Commission of the Maldives (HRCM) has also come under attack from the judiciary. In its July 2014 submission to the UN Human Rights Council for the Maldives' 2015 UPR review, the HRCM noted that the Maldivian judicial system was controlled and influenced by the Supreme Court, weakening the lower judiciary.

In response, the Supreme Court initiated a "suo moto" proceeding into the HRCM in September 2014 and "charged" the statutory body with "undermining the Constitution" and "High Treason." Following the two hearings in September 2014, in which members of the HRCM were summoned before the Supreme Court for questioning, the suo moto investigation has been indefinitely on hold. But the charges alleged by the Court against the HRCM are still out there.

The Supreme Court took the extraordinary step of promulgating "suo moto regulations" in February 2014, granting itself the power to initiate, prosecute and pass judgment on cases on its own.

In its 2014 annual report published on or about 19 March 2015, the HRCM noted that the judiciary, and in particular the Supreme Court, was the HRCM's biggest challenge in carrying out its mandate last year.

Most recently, the HRCM was denied permission by the Criminal Court to monitor Mr. Nasheed's trial.