



The Prosecution of Former Maldivian President Mohamed Nasheed

Report of BHRC's Second Independent Legal Observation Mission

3-4 February 2013

The Bar Human Rights Committee of England and Wales (“BHRC”) is the international human rights arm of the Bar of England and Wales. It is an independent body concerned with protecting the rights of advocates, judges and human rights defenders around the world. The Committee is concerned with defending the rule of law and internationally recognised legal standards relating to human rights and the right to a fair trial.

The remit of the BHRC extends to all countries of the world, apart from its own jurisdiction of England and Wales. This reflects the Committee's need to maintain its role as an independent but legally qualified observer, critic and advisor, with internationally accepted rule of law principles at the heart of its agenda. The BHRC has a membership of nearly two hundred lawyers, including an executive committee of fifteen, comprised primarily of barristers practicing at the Bar of England and Wales, as well as law students and academics. BHRC Executive Committee and general members offer their services *pro bono*, alongside their independent legal practices, teaching commitments, and/or legal studies.

The BHRC has been asked to observe at the high profile trial of Mr Mohamed Nasheed, the former president of the Maldives, who lost power in controversial circumstances in February 2012. The BHRC has sent two independent legal observers to observe at and document the hearings in the Maldives. A record of the first legal observation, conducted by BHRC

member Stephen Cragg QC of Doughty Street Chambers, London, in November 2012 is available on the [BHRC website](#). This report documents the second legal observation, undertaken by Blinne Ní Ghrálaigh, BHRC Executive Committee member, and barrister at Matrix Chambers, London. It is authored by Ms Ní Ghrálaigh, in the first person, on behalf of the BHRC.

Kirsty Brimelow QC, criminal advocate at Doughty Street Chambers, London, and current Chair of the BHRC, acts for Mr Nasheed in a legal capacity in the case under legal observation by the BHRC. Ms Brimelow's professional engagement as co-Counsel for Mr Nasheed is entirely distinct from the BHRC's independent legal observation mission, and has had no influence or bearing on the nature, scope or outcome of the mission itself or on the contents of this report. Neither the BHRC generally, nor Ms Ní Ghrálaigh personally, would have undertaken the legal mission if the position had been otherwise.

ACKNOWLEDGMENTS

The BHRC was enormously assisted throughout its legal mission by the **Maldivian Democracy Network** ("MDN"), which facilitated Ms Ní Ghrálaigh's access to the High Court to observe at the legal hearings on 3 and 4 February 2013, and provided translation during those proceedings. MDN also facilitated Ms Ní Ghrálaigh's meetings with a variety of different individuals, groups and stakeholders, and supplied a significant amount of helpful background material to the issues in question in this report. The BHRC, and Ms Ní Ghrálaigh in particular, are extremely grateful to MDN for its tireless assistance throughout the course of the legal mission.

However, the conclusions reached within this independent report are those of the BHRC exclusively, which assumes sole responsibility for the report's content and for the views expressed within.

SUMMARY

This legal observation concerns the trial of the former President of the Maldives and current presidential candidate of the Maldivian Democratic Party (“MDP”), Mohamed Nasheed.

Mr Nasheed was charged on 15 July 2012 with abusing his office of President of the Maldives, when in power, by ordering the arrest and detention of Judge Abdulla Mohamed, the Chief Justice of the Criminal Court in Malé (the highest criminal court of the Maldives), on 16 January 2012.

Serious concerns have been raised as to whether Mr Nasheed will receive a fair trial. These concerns are fuelled in part by the disputed circumstances in which Mr Nasheed lost power in February 2012, and the subsequent reported deterioration of the human rights situation in the Maldives. Concerns have also been raised that one of the motivations in prosecuting Mr Nasheed is to prevent him from running in the Maldivian presidential elections, scheduled for September 2013: the Maldivian Constitution bars any convicted person sentenced to a prison term of 12 months or more from standing as a presidential candidate¹; the crime with which Mr Nasheed is charged carries with it a penalty of up to three years in custody; conviction would therefore disqualify him from standing. The Maldivian Government refutes any suggestion that the case against Mr Nasheed is politically motivated, asserting that it has no influence or control over the prosecution.

At the time of the legal observation, the criminal proceedings against Mr Nasheed in the Hulhumalé Magistrates’ Court had been adjourned in order for the High Court in Malé to hear a number of procedural challenges concerning *inter alia* the legitimacy of the Hulhumalé Magistrates’ Court. I attended the preliminary hearing that took place in the High Court on 3 February 2013, and the oral judgment given by the High Court the following day, on 4 February 2013. A record of those proceedings and of the context in which they took place is set out below.

This report also contains a record of meetings I had with various stakeholders in Malé, including activists, human rights defenders, journalists, lawyers and politicians, the

¹ Article 109(f) of the 2008 Maldivian Constitution.

Maldivian Attorney General, the deputy Prosecutor General, representatives from various United Nations (“UN”) bodies, members of Mr Nasheed’s legal team and Mr Nasheed himself.

I have continued to monitor the situation since my departure, and have included details of important relevant developments in this report.

HISTORICAL CONTEXT TO THE TRIAL AND JUDICIAL REFORM IN THE MALDIVES

The broad historical context to the trial is set out in the BHRC’s November 2012 legal observation report.² This section focuses primarily on the history of judicial independence and judicial reform, or lack thereof, in the Maldives, which are central issues in the criminal proceedings against Mr Nasheed, both in terms of the substance of the offence with which he is charged, and the procedural challenges raised by his legal team.

From 1965 to 2008: the autocratic presidencies of Presidents Nasir and Gayoom

The Republic of the Maldives, formerly a British Protectorate, gained its independence from Britain in 1965. The State, consisting of 26 natural atolls, comprising a total of 1192 islands, was governed from 1968 to 1978 by President Ibrahim Nasir, and from 1978 to 2008 by President Maumoon Abdul Gayoom. Both regimes were autocratic and authoritarian.

Under President Gayoom’s thirty year autocracy, the president controlled all three branches of power, namely the executive, the legislative and the judiciary. President Gayoom wielded the highest judicial power in the State, with sole authority to nominate and dismiss all judges. Judges were political appointees, many of whom had no secondary or tertiary schooling, much less formal legal training.³ Under the Gayoom regime, reports of human rights violations, including arbitrary arrests, detention and torture of political opponents, were widespread, and intensified following a number of failed violent coups. Mr Nasheed himself

² Available [here](#) on the BHRC’s website.

³ See, e.g., International Commission of Jurists, *Maldives: Securing an Independent Judiciary in a Time of Transition* (February 2011), at paras. 84 and 85.

was detained and tortured on a number of occasions, and was identified in 1991 as an Amnesty International prisoner of conscience.⁴

The torturing to death of a young inmate, Evan Naseem, in prison custody in Malé in September 2003 marked a turning point in the history of the Maldives. In the face of widespread civil unrest and strong national and international pressure, President Gayoom agreed to a number of key political reforms: the establishment of political parties was permitted for the first time in 2007, measures to reform the judiciary were expounded, and a new constitution was ratified in August 2008 (“the Constitution”). The latter provided for the separation of powers between the executive, legislative and judicial arms of the State, and provided for the creation of independent institutions to monitor the three branches of power and to safeguard human rights. These institutions included the Judicial Service Commission (“JSC”), an oversight committee with responsibility for the appointment of judges, the investigation of complaints concerning the judiciary, disciplinary measures against individual judges, and for advising the president and the People’s Majlis (the Maldivian parliament) on matters relating to the judiciary and the administration of justice.⁵ The Maldives also finally acceded to a number of international human rights conventions, including the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).

2008 to February 2012: constitutional reform and the presidency of President Nasheed

In October 2008, Mr Nasheed, head of the MDP, became the first democratically elected president of the Maldives, defeating former President Gayoom in the State’s first ever freely contested elections, adjudged by the international community to have been free and fair.

Mr Nasheed rapidly became an internationally recognized figure for his climate change advocacy (the Maldives, rising no more than 2.4 metres above sea-level, are particularly vulnerable to the effects of climate change, and raising sea levels pose a real and significant threat to the existence of the island nation).

⁴ See, Amnesty International, *Urgent Action 247/10* (26 October 2001), available at: <http://www.amnesty.org/en/library/asset/ASA29/003/2001/en/8801373c-fb1c-11dd-ac08-b50adaf01716/asa290032001en.pdf>.

⁵ Article 157 of the Constitution.

Domestically, Mr Nasheed presided over the constitutionally mandated changes to the legislative branch of government, including the expansion of the unicameral People's Majlis. In 2009, the Maldives' first ever multi-party parliamentary elections, adjudged by the international community to have been free and fair, returned a majority of parliamentary seats for supporters of defeated former President Gayoom. Thereafter, partisan politics and a split parliament served to hinder further constitutional and democratic reform. Key pieces of legislation necessary to reform the legal system and to enact a codified body of law, including the Maldivian Penal Code, the Criminal Procedure Code and the Evidence Act were blocked in the People's Majlis.

Progress on reform of the judicial arm of government, perceived as essential to the establishment of a secure democracy in the State, was also faltering. The Constitution had formally enshrined judicial independence and impartiality into Maldivian law,⁶ and established, for the first time in Maldivian history, mandatory educational, moral and ethical standards for the appointment of judges, based on independent benchmarks rather than political patronage.⁷ The Constitution detailed the mechanism for the appointment of an independent judiciary within two years of the adoption of the Constitution ("the interim period"). Central to the judicial reform process was the removal from office of non-qualified judges: the Constitution provided that Gayoom-regime appointed judges were to remain in office immediately on transition to the new Constitution, but that their suitability for office was to be assessed within two years to determine whether they met the mandatory requirements for judicial appointment specified in the new Constitution: only those judges who met those standards were to be reappointed as judges at the end of the interim period.⁸

⁶ Article 141(c) asserts that "[n]o officials performing public functions, or any other persons, shall interfere with and influence the functions of the courts". Article 142 further provides:

"The judges are independent, and subject only to the Constitution and the law. When deciding matters on which the Constitution or the law is silent, Judges must consider Islamic Sharia. In the performance of their judicial functions, Judges must apply the Constitution and the law impartially and without fear, favour or prejudice".

⁷ Pursuant to Article 149, judges must: possess the educational qualifications, experience and recognized competence necessary to discharge the duties and responsibilities of a judge; be a Muslim and a follower of the Sunni school of Islam; be at least 25 years of age; be of high moral character and sound mind; and must not have been convicted of an offence for which a hadd is prescribed in Islam, criminal breach of trust or bribery. In addition, a judge appointed to the Supreme Court must be at least 30 years old, have at least seven years experience as a judge, practicing lawyer or both, and be educated in Islamic Shari'ah or law.

⁸ Article 285 provided of the Constitution.

The official body constitutionally mandated to assess the judicial qualifications of serving judges was the JSC.⁹ It failed properly “to fulfill its constitutional mandate of proper vetting and reappointing of judicial candidates”,¹⁰ a failure regarding which international bodies, including the International Commission of Jurists,¹¹ have expressed concern. Rather, in August 2010, amidst much controversy, it proceeded to confirm almost every Gayoom-regime judge, qualified or not, in office for life, finding that the constitutional provisions regarding judicial appointment were merely “symbolic”. Consequently, the Maldivian judiciary remains largely unchanged since the country’s transition to a constitutional democracy: the vast majority of judges in office, including Judge Abdulla, are political appointees of former President Gayoom, and many still lack any formal training in law. The blocking in the People’s Majlis of key pieces of legislation including the Penal Code and the Criminal Evidence Act, that would provide for equality and uniformity in the application of a codified body of law, means that mainly untrained judges continue to wield considerable discretion in their determination of cases, “rely[ing] on laws and acts that were passed before the Constitution of 2008 and may contradict it, as well as on principles of Islamic Shari’ah, which is not codified and may be subject to different interpretations.”¹²

The JSC was also subject to significant criticism for its failure properly to oversee individual complaints against individual judges. One judge against whom a number of serious complaints were levied was Judge Abdulla, accused *inter alia* of “implicat[ion] in 14 cases of obstruction of policy duty”, including “strategically delaying cases involving opposition [Gayoom loyalist] members”, “twist[ing] and interpret[ing] laws so they could not be enforced against certain politicians”, “accepting bribes to release convicts”¹³ and “hijack[ing] the whole court”.¹⁴ I was informed that a JSC complaints committee charged in December 2009 with investigating Judge Abdulla, failed to issue any findings,¹⁵ following an injunction

⁹ Article 157 of the Constitution.

¹⁰ International Commission of Jurists, *Maldives: Securing an Independent Judiciary in a Time of Transition* (February 2011).

¹¹ *Ibid.*

¹² UN Office of the High Commissioner for Human Rights (“OHCHR”), *The Maldives: UN expert Warns of Major Challenges Ahead to Ensure Independence of the Judiciary* (26 February 2013), available at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13047&LangID=E>.

¹³ “Chief Judge held “in good condition” at MNDF training center Girifushi”, *Minivan News* (19 January 2012).

¹⁴ Chief Judge “took entire criminal justice system in his fist”: Afeef”, *Minivan News* (18 January 2012). See further Aishath Velezinee, *The Failed Silent Coup* (2012), p.61.

¹⁵ *Ibid.*

sought by, and granted to the judge by the Civil Court, preventing his further investigation by the JSC and/or the publication of any report concerning his conduct.¹⁶

It is against that background that Judge Abdulla was arrested by the Maldives National Defence Force (MNDF) on 16 January 2012. It is alleged that Mr Nasheed, acting as Commander in Chief of the MNDF, ordered then Defense Minister Tholhath Ibrahim Kaleyfaanu, to arrest and arbitrarily detain the judge. It remains unclear what form the order for arrest took; however, what is clear is that no warrant was sought or granted for the arrest by the High Court, leading the Prosecutor General to declare it unlawful. On 17 January 2012, the Supreme Court issued an order for Judge Abdulla's release, stating that the arrest was "not in conformity with the laws and regulations" and that "the acts of the MNDF were outside its mandatory power". A number of international actors issued statements of concern, including the Australian branch of the International Commission of Jurists, the president of which called for the judge's release,¹⁷ and the European Union ("EU") Heads of Mission in Sri Lanka, accredited to the Maldives, who called on the parties to ensure "respect for the constitution, due process, independence of the judiciary [and] the rule of law."¹⁸

The detention of Judge Abdulla led to a period of civil unrest in the Maldives, culminating on 7 February 2012 with the resignation from office of President Nasheed in disputed circumstances. Mr Nasheed was later to contend, and still contends, that his resignation was not voluntary, but that he had been forced to resign at gunpoint in what constituted an armed coup. Vice President Dr Mohammed Waheed Hassan Manik was sworn in as president within hours. Judge Abdulla was released the same day, after 22 days of detention.

February 2012 to March 2013: human rights and the judiciary under President Waheed

Dr Waheed remains the acting president of the Maldives, having rejected international calls for early presidential elections, on the grounds that they would not further stability in the Maldives. Instead, he established a Commonwealth-backed Commission of National Inquiry

¹⁶ "Former Defense Minister denies charges in Hulhumalé Magistrate Court", *Minivan News* (19 February 2012).

¹⁷ "Maldives faces judicial crisis", *Radio Australia* (1 February 2012), available at: <http://www.radioaustralia.net.au/international/radio/onairhighlights/maldives-faces-judicial-crisis>.

¹⁸ "Statement by EU Heads of Mission in Colombo", *EU Press Release* (20 January 2012).

(“CONI”) to “explore the facts, circumstances and causes of the events of 7th February 2012 that resulted in the transfer of power in the Maldives”. The CONI report, published in August 2012, concluded that Mr Nasheed’s resignation had been voluntary. The report was welcomed by international organisations including the UN and the EU. The UN Secretary-General Ban Ki-moon “[u]rged all parties to accept the findings of the Commission and now begin the process of national dialogue aimed at resolving the political problems facing the country”.¹⁹ However, the CONI report has been criticised for adopting uncritically the account of events given by Dr Waheed’s government. Public opinion in the Maldives remains bitterly divided as to whether Mr Nasheed did indeed voluntarily cede power, or whether he was forced out in a violent coup, reminiscent of the State’s troubled past.

Since coming to power, Dr Waheed’s government has been accused of a wide range of human rights violations, leading Amnesty International to note with concern that “there is a real danger that the human rights gains of the recent past have been lost; there are already signs that the country is slipping back into the old pattern of repression and injustice.”²⁰ Particular concerns surround the Government’s handling of pro-MDP protests, including the use of excessive force against protestors, and attacks on journalists reporting on those events.

Serious concerns also remain regarding the independence of the judiciary. In July 2012, the UN Human Rights Committee noted that it was “deeply concerned about the state of the judiciary in the Maldives”, underscoring that “more serious training” and “radical readjustment” was required in order “to guarantee just trials, and fair judgments for the people of the Maldives.” It expressed concern that the composition and functioning of the JSC “seriously compromises the realization of measures to ensure the independence of the judiciary, as well as its impartiality and integrity.”²¹

More recently, the United Nations Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, has added her voice to those concerns. At an oral presentation of

¹⁹ UN Secretary General, *Statement Welcoming Commission of Inquiry’s Report on Maldives Power Transfer*, SG/SM/14482 (30 October 2012).

²⁰ Amnesty International, *The Other Side of Paradise – A Human Rights Crisis in the Maldives* (5 September 2012).

²¹ See, e.g. report of UNHCR proceedings by the Centre for Civil and Political Rights, *UN Human Rights Committee Tells the Maldives: Radical Changes Are Needed* (July 2012), available at: http://www.ccprcentre.org/wp-content/uploads/2012/07/MALDIVES-7.13.12_v2.pdf.

the findings from her eight day mission to the Maldives on 24 February 2013, Ms Knaul described a fundamental “lack of understanding in the delimitation of the respective competences” between the Parliament, the Government and the judiciary, and cautioned that “the ensuing power struggle that [she had] witnessed during [her] mission ha[s] serious implications on the effective realization of the rule of law in the Maldives”. She explained that the proper separation of powers, currently lacking in the Maldives, is an essential requirement for the proper administration of justice in any democracy and constitutes “the bedrock upon which the requirements of judicial independence and impartiality are founded”.²²

Ms Knaul underscored her concerns regarding the lack of judicial independence as follows:

“I... believe that the concept of independence of the judiciary has been misconstrued and misinterpreted in the Maldives, including among judicial actors. The requirement of independence and impartiality does not aim at benefitting the judges themselves, but rather the court users, as part of their inalienable right to a fair trial. Integrity and accountability are therefore essential elements of judicial independence and are intrinsically linked to the implementation of the rule of law. In this context the establishment of mechanisms of accountability for judges, prosecutors and court staff is imperative.”

Ms Knaul highlighted her real “concerns about the apparent lack of transparency in the assignment of cases, as well as the constitution of benches, within all courts, including the Supreme Court”. She cautioned that “when cases are assigned in a subjective manner, the system becomes much more vulnerable to manipulation, corruption and external pressure”. She made clear that “information on the assignment of cases should be clearly available to the public in order to counter suspicions of malpractice and corruption”, adding:

“[T]ransparency in public administration is not an option, but a statutory and obligatory requirement that is fundamental to a democracy. Yet, transparency remains a challenge for the judiciary in the Maldives....”.

²² “UN expert urges greater independence for courts in the Maldives”, *UN News Centre* (24 February 2013).

Ms Knaul noted that the “many challenges to the independence of judges, prosecutors, court officials and lawyers” highlighted prior to the 2008 constitutional reforms had not been dealt with, and continued to “directly affect the delivery of justice”. She urged for those challenges to be “assessed and addressed as a matter of urgency within the parameters laid down by the Constitution and international human rights standards”. She highlighted “[o]ne major challenge for the fair, impartial and consistent delivery of justice” as being the continuing “lack of some basic pieces of legislation, such as the Penal Code, the Criminal Procedure Code, the Civil Procedure Code, or the Evidence Act”. She stressed that “a uniform legal system respecting the principles enshrined in the Constitution is necessary to create consistency in the administration of justice,” and called on the Maldivian Government and the People’s Majlis to develop and adopt these essential pieces of legislation without delay.

Ms Knaul reserved particular comment for the JSC. She voiced particular concern regarding its composition and functioning, and its system of appointing judges. The ten-member JSC is constituted as follows:

- two members of parliament: the speaker of the People’s Majlis (Parliament) and a member of parliament, appointed by it
- one parliamentary appointee: a member of the general public appointed by the People’s Majlis
- one presidential appointee
- the Attorney General (member of the executive)
- the Chair of the Civil Service Commission (an independent body, comprised of members appointed by the president, on the recommendation of the People’s Majlis)
- three judges: one from the Supreme Court, elected by the Supreme Court judges, one from the High Court, elected by the judges of the High Court, and one from the Trial Courts, elected by the judges of the Trial Courts
- one lawyer licenced to practice in the Maldives, elected by lawyers practicing in the Maldives

As such, the JSC comprises two members of the legislative, plus one legislative appointee, and one member of the executive, plus two presidential appointees (including the Chair of the Civil Service Commission). Its current membership includes a number of Mr Nasheed’s

direct political rivals, including Gasim Ibrahim, appointed to the JSC by the People's Majlis, who is currently party leader of, and presidential candidate for the Jumhorree Party.

Ms Knaul criticized the troubling “politiciz[ation]” of the JSC and of the judicial appointment process. She called for the creation of a truly independent “appointment body acting independently from both the executive and legislative branches of government... with a view to countering any politicization in the appointment of judges and their potential improper allegiance to interests other than those of fair and impartial justice”. She was clear that “no political representation should be permitted” on such a body.²³

BACKGROUND TO THE PROCEEDINGS

Arrest and charge

Mr Nasheed was arrested and charged on 8 October 2012 with an offence contrary to Article 81 of the Penal Code for his role in the arrest of Judge Abdulla.²⁴ Article 81 provides:

“It shall be an offence for any public servant to use the authority of his office to intentionally arrest or detain any innocent person in a manner contrary to Law. A person guilty of this offence shall be punished with exile or imprisonment for a period not exceeding 3 years or a fine not exceeding Mrf. 2,000.00.”

Four other former officials have also been charged with the same offence in relation to the arrest, namely former Defense Minister Tholhath Ibrahim Kaleyfaanu (whose trial began on 19 March 2013), former Chief of Defense Forces retired Major General Moosa Ali Jaleel, former MNDF Malé Area Commander retired Brigadier General Mohamed Ibrahim Didi, and former MNDF Operations Director Colonel Ziyad.

Court hearing the case against Mr Nasheed

²³“Judicial Services Commission subject to “external influence”: UN Special Rapporteur”, *Minivan News* (24 February 2013), available at: <http://minivannews.com>.

²⁴ Footage of the arrest is available at: <http://www.youtube.com/watch?v=oYtivsD1KsA>.

The trials of Mr Nasheed and the four other officials charged in relation to the arrest of Judge Abdulla are being heard at the magistrates' court on the island of Hulhumalé (“the Hulhumalé Magistrates' Court”), rather than at the central Malé Criminal Court. The Director of Public Prosecutions (“DPP”), responsible for relocating proceedings to the Hulhumalé Magistrates' Court, has explained that the decision to move the proceedings from the Criminal Court in Malé, of which Judge Abdulla remains the Chief Justice, was made in the interests of ensuring greater fairness in the proceedings.²⁵

The Hulhumalé Magistrates' Court was created by the JSC, with presidential approval, in 2007. It has recently emerged that the JSC itself selected the three-member panel of judges hearing Mr Nasheed's trial, and those of the four other officials.²⁶

The case against Mr Nasheed was listed to begin on 4 November 2012 at the Hulhumalé Magistrates' Court. The four other former officials charged with the offence are being tried separately.

Preliminary hearing of 4 November 2012

In a preliminary hearing at the High Court in Malé on 4 November 2012, Mr Nasheed's legal team advanced a number of jurisdictional challenges to the legitimacy of the Hulhumalé Magistrates' Court, and requested an adjournment of the criminal proceedings in order for those challenges to be heard. They argued that the Hulhumalé Magistrates' Court, created by the JSC in 2007, had no constitutional basis and was not a valid court. They further challenged the criminal jurisdiction of the Court. The High Court agreed to adjourn the criminal proceedings, pending a hearing into the jurisdictional objections raised, listed for 8 November 2012.²⁷

Parallel Civil Court case concerning the legitimacy of the Hulhumalé Court

²⁵ See *e.g.*, the interview with the Maldivian Director of Public Prosecutions described in BHRC's November 2012 report, available [here](#).

²⁶ See further below.

²⁷ For a detailed report of these hearings, see BHRC's November 2012 report, *supra*.

The hearing of 8 November 2012 never in fact took place. Instead, it transpired that there was another case pending, before the Civil Court, raising the same jurisdictional challenge. That case, which had been pending since 2011, was suddenly removed to the jurisdiction of the Supreme Court, on the application of the JSC, and listed for hearing on 17 November 2012. The Supreme Court ordered the High Court to adjourn the hearing in Mr Nasheed's case pending judgment. When I met with the Attorney General in Malé, she informed me that it was she who had ordered that the Civil Court case be expedited. She insisted that her decision to have the case expedited had nothing to do with the trial of Mr Nasheed; rather she had been unhappy to discover that the case had been pending for so long, and felt that it should be dealt with immediately, in the interests of justice.

Meanwhile, the parliamentary Independent Commissions Oversight Committee ("ICOC"), a committee with oversight responsibilities for the JSC, declared that the Hulhumalé Magistrates' Court had been created unconstitutionally by the JSC and was not a legitimate court. On 28 November 2012, the Supreme Court issued an order asserting that it alone had responsibility to determine matters pertaining to the court system in the Maldives. A week later, on 5 December 2012, the Supreme Court, sitting as a full panel of seven justices, ruled that the Hulhumalé Magistrates' Court *was* a valid court under the Constitution, with jurisdiction to hear criminal and other cases. The Court was divided, with four judges finding for the legitimacy of the Hulhumalé Magistrates' Court, and three finding against it. The President of the JSC, Judge Adam Mohamed, who also sits as a Supreme Court judge, cast the deciding vote. By so ruling, the Supreme Court effectively overruled the earlier decision of the ICOC.

Following the Supreme Court decision, the High Court relisted Mr Nasheed's case for 4 February 2013, for the handing down of its judgment in relation to the matters raised by Mr Nasheed's defence team on 4 November 2012.

Ministerial statements concerning Mr Nasheed's trial

On 29 January 2013, a week before the High Court hearings, Home Minister Dr Mohamed Jameel Ahmed, former Minister of Justice under President Gayoom's autocracy, was reported in the Maldivian media as stating that it was "for the sake of national stability, Nasheed's

trial... must be concluded before the presidential election”. The Home Minister asserted that any delays in the trial risked undermining the “national stability” and “political and social fabric of the Maldives”, and called on the courts to “take responsibility”.²⁸ He further asserted that it was “constitutionally mandated for all involved to find methods to expedite such cases”.²⁹

Some weeks later, Minister Jameel was reported as asserting “both a national and a religious obligation” on Maldivians to bar Mr Nasheed from regaining power. Addressing a political rally, he added: “Nasheed... does not have any chance to come to power. We would not give that chance [to him].”³⁰

THE COURT HEARINGS OF 3 AND 4 FEBRUARY 2013

I attended the hearings on 3 and 4 February 2013, accompanied by representatives from MDN, who facilitated my access to the court and provided an interpretation service.

3 February 2013 hearing

The proceedings were very short, with the prosecution and defence given 15 minutes each to make their arguments. Mr Nasheed’s defence team made reference to both English and Maldivian precedent in arguing that the judgment of the Supreme Court of 28 November 2012 had been given *per incuriam* (“through lack of care”), and that the High Court was therefore not bound by the doctrine of precedent, enshrined in the Constitution, to follow the judgment. They urged the High Court to set aside the Supreme Court decision and decide the matter afresh.

²⁸ “Nasheed’s trial must be concluded before the election: Home Minister”, *Haveeru Online* (29 January 2013); “Home Minister accused of influencing Nasheed’s trial”, *Haveeru Online* (30 January 2013).

²⁹ “MDP accuses Home Minister of influencing former President’s trial”, *Minivan News* (30 January 2013).

³⁰ ““Religious obligation” to bar Nasheed from upcoming election: Home Minister Dr Jameel”, *Minivan News* (10 March 2013). Minister Jameel had previously accused Mr Nasheed’s government of “operating under the influence of Jews and Christian priests”. *Ibid.*

In summary, their argument was that in finding that the Hulhumalé Magistrates' Court was a legitimate court, with jurisdiction to hear criminal cases, the Supreme Court had failed to have due regard to two key pieces of evidence before it, namely:

- (1) the official request by the JSC to then President Gayoom to establish a Magistrates' Court in Hulhumalé dated 29 January 2007, stating:

“It is my intention to make the initial service of the court to be established in Hulhumalé, *to hear all cases admissible to an island court, with the exception of criminal cases.*” (emphasis added)

- (2) the official response from the Office of the President, dated 11 March 2007, granting presidential permission for the creation of the Magistrates' Court on the island of Hulhumalé, stating in material part:

“The President has asked me to inform you that... Hulhumalé Court must be *administrated as a branch of the courts of Malé*. The President has further asked me to inform you that he is agreeable to your proposal to hear all cases admissible in the island courts, *with the exception of criminal cases*, in the Hulhumalé Magistrates' Court.” (emphasis added)

The defence team argued that the Court had no criminal jurisdiction prior to the new Constitution, and that that Constitution had conferred no such jurisdiction on it. They further argued that the provisions of the new Constitution deprived the Hulhumalé Magistrates' Court of *any* mandate or legitimacy; this argument is further set out in a press release issued by Mr Nasheed's legal team on 26 September 2012.³¹

Mr Nasheed himself addressed the court stating that the proceedings against him were politically motivated, and requested that the proceedings be adjourned, in the public interest, until after the elections in September 2013. Mr Nasheed reminded the Court that were he to be found guilty of the charge against him, he would be precluded from running in the

³¹ MDP, *Press Statement on President Nasheed's Trial* (26 September 2012), available at <http://mdp.org.mv/archives/35113>.

September 2013 elections, a result that would serve to disenfranchise tens of thousands of Maldivian voters. Mr Nasheed referred to the statements made by Home Minister Ahmed the previous week, and suggested that the Court was being improperly influenced by the government to expedite the case before it. The Court responded that it was subject to no external influences.

The Prosecution made no submissions, save to note that the Attorney General and the JSC, which were the appropriate bodies to respond to the arguments raised, were not in attendance.

Judgment of 4 February 2013

In its oral judgment given the following day on 4 February 2013, the High Court rejected the *per in curiam* arguments, asserting that it was bound to follow the decision of the Supreme Court. It also rejected all other challenges to the jurisdiction and legitimacy of the Hulhumalé Magistrates' Court. Within hours of the judgment, a summons was issued for Mr Nasheed to appear at the Hulhumalé Magistrates' Court the following Sunday 10 February 2013, for the commencement of his criminal trial.

MEETINGS IN MALE

I had the opportunity to meet with a number of stakeholders, including lawyers, journalists and human rights activists, including representatives from the Maldivian Democracy Network and Transparency International Maldives. A number of persons with whom I met asked me not to report on the fact of our meetings and/or the contents of our conversations. This report therefore does not represent a full account of my meetings.

The majority of those with whom I spoke raised concerns about the political ramifications of the legal proceedings, and the fact that Mr Nasheed would be precluded from running in the upcoming elections, if convicted. They were of the view that deferring the proceedings until after the elections would ensure that large sections of the Maldivians were not deprived of the opportunity to vote for the candidate of their choosing.

Many of those with whom I met spoke of their lack of confidence in the impartiality of the courts, and their frustration over the lack of judicial reform. They felt that the JSC was deeply politicized and unable properly to perform its functions, including that of impartially appointing judges and hearing complaints against them. They also spoke of their total lack of confidence in the impartiality or independence of judges. Accounts were given to me of judges refusing to hear claims against political allies, of the Supreme Court issuing orders and handing down “judgments” unrelated to cases before them, and purporting to strike down or overrule parliamentary decisions. A number of those with whom I spoke expressed concern that the Maldives were at risk of becoming a form of “judicial dictatorship”, with judges making and breaking the law, outwith their mandate and with impunity.

The most troubling information conveyed to me concerned the appointment of the Hulhumalé Magistrates’ Court judicial bench to preside over the proceedings against Mr Nasheed. I was informed that the constitutionally compliant nomination by the Head Magistrate at the Hulhumalé Magistrates’ Court of magistrates to hear Mr Nasheed’s case had been disregarded by the JSC. Instead, the JSC had tasked two of its members, Mr Mohamed Saleem, the Presidential representative on the JSC, and Mr Abdulla Didi, judge at the Criminal Court in Malé (the same court of which Judge Abdulla Mohammed is Head) and Vice Chair of the JSC, with nominating an alternative three-judge panel to hear the case. I was informed that such nomination was unconstitutional and *ultra vires*. I was further informed that none of the magistrates selected usually sat at Hulhumalé, but that they had been cherry-picked by the JSC from different island courts to secure a conviction against Mr Nasheed. I was also told that this was the first three-judge – rather than single judge – magistrates’ court panel ever appointed to hear a criminal case in the Maldives. Similar allegations have since been made publicly in the Maldivian press, and before the ICOC of the People’s Majlis.

I also met with the **Attorney General Azima Shukoor**, and the **Deputy Prosecutor General, Deebanaz Fahmy**. The **Attorney General** was keen to make clear that her decisions to expedite the case concerning the Hulhumalé Magistrates’ Court to remove the case to the jurisdiction of the Supreme Court, had nothing to do with the proceedings against Mr Nasheed.

The **Deputy Prosecutor General Deebanaz Fahmy** underscored that the decision to remove proceedings from the Supreme Court in Malé to the Hulhumalé Magistrates' Court had been made out of concern to ensure Mr Nasheed the right to a fair trial. It was felt that the Hulhumalé Magistrates' Court would be a more neutral venue, given that Judge Abdulla, whom Mr Nasheed is charged with unlawfully detaining, is still the head of the Malé Criminal Court. She further emphasized that the Hulhumalé Magistrates' Court had assumed jurisdiction over other criminal cases, and that its assumption of jurisdiction in the proceedings against Mr Nasheed was therefore neither novel nor out of the ordinary. She reiterated the information given previously given to the BHRC by the Prosecutor General that Mr Nasheed was not the first official to be prosecuted for arbitrary arrest, citing the example of an official charged in 1979 with 20 counts of the charge. She further confirmed that the public interest could be taken into account in relation to prosecution decisions, but that the case in question would not be one to which such discretion would apply. Although there is a code of practice concerning prosecutorial decisions, it is not in the public domain.

I also met with **Mr Nasheed's legal team** following the hearing. They informed me that they were concerned about the speed at which the proceedings were unfolding, which they felt underscored the political nature of the charge. In particular, they were concerned at having only been given 15 minutes at the hearing on 3 November 2013 to present what they felt were complex legal arguments, and by the fact that the High Court was to hand down its judgment less than 24 hours after the hearing. They told me that they believed that the High Court had been influenced by the statements made by Home Minister Jameel, and that the decision to speed up proceedings was politically motivated.

I had a brief meeting with **Mr Nasheed**, who reiterated his real concern that the prosecution against him was politically motivated in order to prevent him running in the September 2013 elections.

I also met with two United Nations officials, **Craig Collins, Peace and Development Advisor**, and **Safir Syad, Human Rights Advisor**. They advised me that the international community was keeping a close eye on the legal proceedings.

While I was in Malé, I witnessed a number of pro-democracy protests, related to the ongoing

proceedings against Mr Nasheed. I also had the opportunity to meet with **Fareesha Abdulla**, a lawyer who acts for many of the demonstrators who have been arrested and detained by the police. She informed me that over a dozen people had been arrested and detained following demonstrations on 2 February 2013, the day before the hearing in Mr Nasheed's case. Ms Abdulla said that their detention had been extended by judicial order, on the basis that they posed a security threat to society, despite no basis or evidence for that assertion being provided. She anticipated that they would all be imprisoned following trial.

SIGNIFICANT DEVELOPMENTS FOLLOWING MY DEPARTURE FROM THE MALDIVES

The weeks following my departure from the Maldives have been eventful. Key developments are presented in chronological form below:

- 10 February: Mr Nasheed fails to attend the opening day of his trial at the Hulhumalé Magistrates' Court; a warrant is issued for his arrest.
- 11 February: Mr Nasheed enters the Indian High Commission, explaining on Twitter: "Mindful of my own security and stability in the Indian Ocean, I have taken refuge at the Indian High Commission in Maldives." He remains in the High Commission for 12 days, exiting on 23 February, amidst media reports of a "deal" struck to enable him to participate in the September elections; the Maldivian government denies the existence of any such deal.³²
- 19 February: Trial of Mr Kaleyfaanu, Defense Minister under former President Nasheed, begins at the Hulhumalé Magistrates' Court for the arbitrary arrest of Judge Abdulla contrary to Article 81 of the Constitution.
- 25 February: The Maldivian legal system hits international headlines following the sentencing of a child rape victim to 100 lashes by a Maldivian magistrates' court for having engaged in premarital sexual relations with another man.

³² "Police take Nasheed into custody to produce him in Court", *Haveeru Online* (5 March 2013), available at: <http://www.haveeru.com.mv/news/47792>.

- 5 March: Mr Nasheed is arrested and taken into custody.
- 6 March: Mr Nasheed is produced at the Hulhumalé Magistrates' Court; despite no objection being voiced by the prosecution, his request for the trial to be adjourned until after the elections is rejected by the Court; instead, he is granted an adjournment of four weeks. The Court finds that Mr Nasheed cannot claim to be a presidential candidate, given that presidential candidacies cannot be officially declared until July. The Court states that it may reconsider the request for adjournment if and when the Elections Commission formally declares Mr Nasheed to be a candidate for the presidential election.³³
- 14 March: EU High Representative Catherine Ashton issues a Declaration “tak[ing] note of the acceptance by the prosecution of a defence request to defer the trial until after the upcoming presidential elections in September” and expressing “hope[...] that this would offer the means to ensure that ex-President Nasheed is able to participate in the electoral campaign, under the same conditions as other candidates.” The EU “reiterates its view that the participation of the preferred candidates from all political formations in the Maldives is essential to ensuring the success of the forthcoming elections”, stating that “it would be difficult to consider them credible and inclusive if Mr Nasheed and his party were to be prevented from standing or campaigning”.³⁴
- 16 March: The Maldivian Government issues a statement regretting the “unfortunate and unacceptable” EU Declaration. The Government reiterates its “commit[ment] to ensuring that the Presidential elections will be fair and inclusive of all qualified parties and individuals wishing to participate”, but underscores that

³³ “Hulhumalé Magistrate Court refuses to delay Nasheed’s trial until elections, despite no objection from PG”, *Minivan News* (6 March 2013).

³⁴ “Declaration by the High Representative Catherine Ashton on behalf of the European Union on developments in the Maldives in view of the forthcoming presidential elections”, *European Union Press Release 7543/1/13 REV 1* (14 March 2013).

it must “be given the necessary space to manage and develop an authentic democratic culture in the Maldives without external interference.” The Government further denies that the trial is politically motivated.³⁵

- 19 March: The Independent Commissions Oversight Committee summons members of the JSC to answer questions concerning the process of appointment of magistrates to the Hulhumalé Magistrates’ Court bench to hear the case against Mr Nasheed. JSC public member Sheikh Shuaib Abdul Rahman asserts that the JSC had acted arbitrarily and *ultra vires* in appointing three magistrates from courts across the Maldives to hear Mr Nasheed’s case, after dismissing the nominations made by the court.³⁶ Mr Shuaib has also alleged that the JSC has openly discussed its intent to prevent Mr Nasheed from standing in the upcoming elections, and that it had cherry picked the Hulhumalé Court Magistrates for that purpose.³⁷ He is the second member of the JSC to whistle blow concerning the body’s activities.³⁸ The JSC Chair has since asserted that the JSC is not subject to the ICOC and will not submit to its investigation.³⁹
- 24 March: Mr Nasheed’s legal team files a petition to the High Court seeking adjournment of the criminal trial until after the presidential elections, in light of the lack of objection by the prosecution to such a deferral.
- 31 March: The High Court orders the suspension of Mr Nasheed’s trial at the Hulhumalé Magistrates’ Court pending determination of the legitimacy of the composition of the Court bench. The Hulhumalé Magistrates’ Court duly suspends the trials of all those accused in relation to Judge Abdulla’s arrest.

³⁵ *Statement by the Government of Maldives of 16 March 2013*, website of the Ministry of Foreign Affairs of the Maldives (16 March 2013).

³⁶ “JSC member Sheikh Rahman criticises JSC decisions on Hulhumale’ Magistrate Court in parliament committee”, *The Maldives Chronicle* (9 March 2013).

³⁷ ““JSC politicised, trying to eliminate Nasheed and MDP from elections”: JSC Member Shuaib”, *Minivan News* (6 March 2013).

³⁸ Former JSC member Ms Aishath Velezinee, responsible for blowing the whistle concerning the failures in the judicial reappointments process in 2010 was stabbed three times in broad daylight in Malé in 2011, in an incident which I was informed has yet to be the subject of a public investigation.

³⁹ “JSC Chair refuses to be answerable to parliamentary oversight committee”, *Minivan News* (7 March 2013).

CONCLUSIONS

The charge against Mr Nasheed is that he acted “in a manner contrary to law” in ordering the arrest and detention of a senior judge. Although the details of the prosecution case have yet to be set out, it is clear that the Article 81 offence with which Mr Nasheed is charged is not a trivial one. The BHRC, an organization one of the stated aims of which is “to support and protect lawyers, judges and human rights defenders around the world who are threatened or oppressed in their work”, does not seek to undermine or downplay its seriousness. However, what is clear is that the case is far from straightforward. Central both to the context of Judge Abdulla’s arrest and to the nature of the criminal proceedings against the former president are fundamental questions of judicial independence in the Maldives.

The BHRC notes with concern the increasing number of reports and statements by international bodies, including those referenced in this report, which conclude that the Maldives does not have an independent and impartial judiciary. The BHRC further notes the view inside and outside the Maldives that the failure by the institutions of the State, in particular the JSC, properly to implement constitutionally mandated reforms to create an impartial judiciary, independent from political pressures, and the failure properly to investigate and/or sanction allegations of egregious, unlawful and/or unconstitutional judicial conduct, have served significantly to derail the State’s transition to a functioning constitutional democracy.

It is against that background, and in the context of a number of serious complaints against Judge Abdulla, that the order for his arrest was made. That background is intrinsically bound up in the nature of the charge against Mr Nasheed: the wording of Article 81, which criminalises a public servant for “us[ing] the authority of his office to intentionally arrest or detain an[...] *innocent* person contrary to the law” suggests that the context to the arrest, and in particular the allegations against Judge Abdulla, will necessarily be central to the determination of the charges against the former President.

The criticisms concerning the lack of impartiality and independence of the judiciary from political influence also raise serious doubts as to whether Mr Nasheed can be guaranteed a fair trial in the current heightened political context of the Maldives. These doubts are further compounded by ministerial statements regarding the case, urging the courts to expedite the proceedings. The continuing inadequate separation of powers and the continuing jockeying for power between the different branches of government, including the judiciary, continue to undermine fair trial guarantees and the effective rule of law in the Maldives.

Mr Nasheed, like all Maldivian citizens, has the right to all fair trial guarantees as enshrined in the Constitution,⁴⁰ in accordance with Article 14 ICCPR. The BHRC expresses its serious concern at the accounts of the manner of appointment of the Hulhumalé Magistrates' bench to try Mr Nasheed. Those accounts, if accurate, suggest egregious unconstitutional behaviour by the JSC in selecting the judicial bench to hear Mr Nasheed's case. It is difficult to see how proceedings presided over by a judicial bench, cherry-picked for their likelihood to convict by a highly politicized JSC, which includes a number of Mr Nasheed's direct political rivals, could in any way be deemed to comply with constitutional and international fair trial rights, including the right to an "independent court established by law". The BHRC welcomes the current investigation by the ICOC of the judicial selection process in the case, but notes with concern the refusal by the JSC to cooperate with that investigation. Lack of transparency in the constitution of judicial benches and in the assignment of cases fundamentally undermines the proper administration of justice: fair trial guarantees and the requirements of natural justice demand not only that justice be done, but that it be seen to be done. The BHRC urges the JSC and all other relevant stakeholders to make public without delay the nature and manner of its appointment process in this case.

The BHRC notes that Mr Nasheed has requested that his trial be adjourned until after the September 2013 presidential elections. This request aligns with views expressed by human rights advocates within the Maldives, and by various international bodies, that Mr Nasheed should not be unanswerable to the charges against him, but that his case should be prosecuted in a manner that will not serve to disenfranchise a significant proportion of the Maldivian population in the upcoming elections. The BHRC notes with concern the views expressed by the international community that to debar Mr Nasheed from standing in the 2013 would not

⁴⁰ Article 42 of the Constitution.

be a positive outcome for democracy and stability in the Maldives. In such circumstances, it seems to the BHRC that the request to adjourn is worthy of very serious consideration.

Given those concerns, and given the serious questions concerning the manner of appointment of the Hulhumalé Magistrates' Court bench, it is perhaps surprising that the Court should have decided of its own motion ("*ex proprio motu*") to deny the request made by Mr Nasheed's legal team to postpone the proceedings until after the elections, in the absence of any objection by the prosecuting authorities to such an adjournment. The reported reasons for the Court's decision, namely that Mr Nasheed has not yet been officially declared a presidential candidate by the Elections Commission – a formal process that will necessarily not take place until July 2013 – are equally surprising: there can be little doubt but that Mr Nasheed is MDP's presidential candidate, and that he intends to contest the elections, unless he is otherwise debarred from doing so. Although there is nothing to prohibit courts from making decisions governing their process *ex proprio motu*, the allegations concerning the manner of selection of the Hulhumalé Magistrates' Court panel render the Court's stated reasoning for its decision all the more disquieting.

These are matters with which the higher courts of the Maldives must now grapple. A further application for an adjournment of the criminal proceedings until after the September 2013 elections has been made by Mr Nasheed's legal team to the High Court. Pending a hearing into the application, the High Court has ordered a temporary stay of the criminal proceedings against Mr Nasheed in the Hulhumalé Magistrates' Court. It remains to be seen whether the application will be heard by the High Court, or whether the Attorney General will order it to be heard directly by the Supreme Court, as transpired in 2012 in the case concerning the constitutional legitimacy of the Hulhumalé Magistrates' Court. Were such a situation to occur, it is clear that both international and Maldivian national fair trial standards, and the fundamental principle of natural justice that no man be a judge in his own cause, would preclude the President of the JSC, Supreme Court Judge Adam Mohamed, from sitting on any Supreme Court bench tasked with adjudging the constitutionality and the legitimacy of the JSC-appointed Hulhumalé Magistrates' Court panel.

The BHRC continues closely to monitor developments in this case.

