



Interim Trial Observation Report

The “Entry of parliament” mass trial of
defendants accused of public order
offences relating to anti-corruption
protests at the Kuwait National
Assembly in November 2011

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BHRC Executive Committee Members

About the Bar Human Rights Committee

1. The Bar Human Rights Committee (“BHRC”) is the international human rights arm of the Bar of England and Wales. It is an independent body, distinct from the Bar Council of England and Wales, dedicated to promoting principles of justice and respect for fundamental human rights through the rule of law. It has a membership comprised of barristers practicing at the Bar of England and Wales, legal academics and law students. The BHRC’s fifteen Executive Committee members and general members offer their services *pro bono*, alongside their independent legal practices, teaching commitments and/or legal studies. BHRC also employs a full-time executive officer.

The BHRC aims to:

- uphold the rule of law and internationally recognised human rights norms and standards;
 - support and protect practicing lawyers, judges and human rights defenders who are threatened or oppressed in their work;
 - further interest in and knowledge of human rights and the laws relating to human rights, both within and outside the legal profession;
 - advise, support and co-operate with other organisations and individuals working for the promotion and protection of human rights; and
 - advise the Bar Council of England and Wales in connection with international human rights issues.
2. As part of its mandate, BHRC undertakes legal observation missions to monitor proceedings where there are concerns as to the proper functioning of due process and fair trial rights. The remit of 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.

Introduction

1. Executive Committee members Pete Weatherby QC and Amanda Weston QC undertook a trial observation mission to Kuwait City on 6 and 7 May 2018, at the invitation of a number of Kuwaiti parliamentarians, former and present.
2. BHRC was asked to observe the final stages of the appeal process in the case of more than 70 defendants convicted of public order offences relating to protests at the Kuwaiti National Assembly in 2011. The observation was facilitated by Tahar Boumedra, former chief of the Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI). Funding for the flights, accommodations and transportation were provided by members of the Kuwaiti National Assembly.
3. BHRC had not observed or been any other way involved in the case at the trial or Court of Appeal stages. When we were approached about the case, it was known that the Kuwaiti Court of Cassation¹ was due to announce judgment on 7 May 2018, following the final appeal stage of the trial. In the event, and after the hearings and mission on 6 and 7 May, the Court adjourned judgment until 8 July 2018, indicating that the judges needed more time to consider the case.
4. BHRC have been invited back to observe the proceedings in July and will produce a further report following that observation.
5. BHRC is extremely grateful to all those who gave their time to assist with the mission.

Summary of background facts

6. In late 2011, allegations of corruption were made in a number of Kuwaiti national newspapers against Members of Parliament (“MPs”) from the Kuwaiti National Assembly, in office between 2009 and 2011. The alleged corruption was of bribery on a large scale, involving tens of millions of Kuwaiti dinar². During 2011 there were large scale, peaceful protests outside the National Assembly, attended and addressed by MPs amongst others. The protestors made clear that the protests were against the

¹ The Court of Cassation is the final appellate court

² 1KWD = approximately £2.50

Government, not the Emir of Kuwait³. The protestors demanded that the corruption allegations be fully and impartially investigated, and that those who had paid and received bribes should all be charged and dealt with by the courts.

7. By November 2011, the protests had increased significantly in scale. On the day relating to the arrests, the protest was addressed by around ten MPs. Several hundred police and special forces officers were in attendance. Some of the protestors attempted to walk to the Prime Minister's residence, to protest there, but were stopped by special forces.
8. A section of the crowd then entered the National Assembly building and held a short protest there. The exact circumstances of their entry and behaviour are disputed. There is footage and still photographs of the entry and protest within the National Assembly building, some of which BHRC observers have seen.
9. More than 70 protestors, including a number of MPs, were arrested in the days and weeks after the protests and charged with public order offences and use of force against the police, as a result of the protest. Whatever the exact circumstances of the protest, there are no allegations of significant violence or damage to property.
10. The court of first instance acquitted all defendants in December 2013 (Case Number 383/2011). The prosecution appealed the acquittals. In November 2017, all of the acquittals were reversed by the Court of Appeal, Eighth Criminal Chamber, presided over by Senior judge Ali Mohammad Al-Daria'a, assisted by Judges Adel Mohammad Mansoor and Mohammad Abdel-Wahhab Abou-Alkhair. The protestors were sentenced by the Court of Appeal to prison terms of up to nine years.
11. The defendants appealed their convictions and sentences to the Court of Cassation. They also applied to be released pending their appeal. This application was successful, and they were released in February 2018, after several months' detention. The Judge who heard the applications for release was expected to have been a member of the panel constituted to hear the substantive appeal; however, a short time after the applications were granted, the Judge recused himself from further involvement in the case, without explanation.

³ Kuwait is a constitutional emirate with an elected parliament but a government appointed by the Emir: <http://www.nyulawglobal.org/globalex/Kuwait1.html#thebasicsystem>

12. Under the Kuwaiti Constitution, the Court of Cassation receives an advisory opinion from a High Court judge prior to hearing or ruling on a case. In this case, Judge Abdullatif Al Silmi of the Court of Cassation Advisory Office, has advised that the Court of Appeal convictions should not be upheld because the defendants were not given adequate opportunity to present their case at the Court of Appeal stage.

The trial observation

13. On 7 May 2018, the delegation attended the Court of Cassation hearing. The panel of five Judges came into court and immediately adjourned for further consideration. When they returned to court about half an hour later, the lead judge, Salah Al-Muraisheed, announced that judgment would be adjourned until 8 July 2018. Although no explanation was then given, it was learned later that the judges wanted more time to consider the case.

Meetings attended

14. In advance of the trial observation, BHRC contacted the Embassy of Kuwait in London asking for assistance in arranging for the delegation to meet with prosecution and Department of Justice officials. To date, BHRC has not received a reply to the correspondence.

15. On 6 May 2018, the delegation attended:

- a. An introductory briefing by one of the parliamentarians who addressed the protests outside the National Assembly in 2011. This MP was not present at the time of the protest inside the National Assembly and has not faced any charges.
- b. A meeting with senior members of the Kuwaiti Bar Association. The delegation was informed that there is generally good adherence to the rule of law by courts in Kuwait; however significant concerns were expressed regarding the process of this trial. The concerns related to fears of Executive interference with the judicial process, given the political background to the case. In addition, concerns were expressed regarding the closure of a number of newspapers which had made the allegations of corruption, and interference with the freedom of expression which that represented.

- c. A meeting with ex-Speaker, Ahmed Al Sadoun, and a deputy Speaker of the National Assembly who explained that in their view the prosecutions were politically motivated.
- d. Two meetings with family members, two of the accused and lawyers. During this meeting the delegation was told that the protests were peaceful at all times. Delegates were also shown some footage which is in the public domain. The footage we were shown documented violent acts by police officers against protestors; however, it showed the protestors acting peacefully in their entry to and brief occupation of the National Assembly. Delegates found these short clips of some assistance; however, they were mindful that they did not depict the whole demonstration; further, having not been able to meet with the prosecution, they were not shown the footage on which they relied .

The delegation was informed that, a number of senior state officials gave evidence, under oath, favourable to the defendants, including:

- i. Investigating Officer, Lt Colonel Khaled Al Khamees. He reportedly indicated that a number of defendant MPs intervened to keep the demonstration calm.
- ii. Commanding officer of parliamentary police, General Bassam Al Rafae. He is said to have told the court that one of defendant MPs had not played any role because he was not among those entering the National Assembly. He is further said to have given evidence that he observed the MP trying to convince people to leave the building.
- iii. General Mahmood Al Dosari, now Head Secretary for Security and Special Forces for Kuwait, is said to have given evidence that defendant MPs were urging demonstrators to stay peaceful. General Al Dosari also asserted that no violence had been directed at anyone, including police officers or special forces, by the demonstrators.
- iv. The only property damage was said to have been accidental and amounted to a few hundred dinars.

16. Following the adjourned hearing, delegates were unable to speak with any prosecution officials but were grateful to Judge Abdullatif Al Silmi of the Court of Cassation

Advisory Office who met with them and discussed the process and the basis for his advisory opinion to the court. Judge Al Silmi informed the delegation that the opinion was based upon due process principles: specifically, the fact that the Court of Appeal had not permitted the accused to present a defence. The Judge noted that the Cassation Court was not bound to follow the opinion but if it did, there were a number of options. The accused could simply be acquitted, the case could be remitted to a lower court for rehearing, or the Cassation Court could re-hear the case itself, with witness evidence.

17. The delegation then met with the British Ambassador Michael Davenport, along with Adam Radcliffe MBE (Head of Political Section) and Majdi Al Massaied (Communications Manager), at the Embassy. The delegation discussed the observation mission with the Ambassador and the issues that had been raised and observed on the trip.
18. Following the meeting at the British Embassy, two officials from the Kuwaiti Ministry of the Interior visited the delegates, unannounced, at their hotel. The delegates were told that the Ministry did not object to their attendance at court but that there was objection to one of the meetings they had attended. The officials declined to identify themselves or elaborate further concerning which of the meetings had caused concern. The delegates emphasised that BHRC had written to the Embassy in London, prior to the commencement of the trip, to seek assistance with meetings with the prosecution and Department of Justice and that the mission had been openly referred to by MPs in the National Assembly. Delegates further emphasised that they were anxious to speak with as many relevant sources, official or otherwise, as was possible in the time they were in Kuwait.

Relevant Law

19. The Kuwaiti Constitution guarantees the independence of the judiciary, internationally-recognised fair trial principles, the right to liberty, freedom of assembly and freedom of expression:
 - a. Article 31: right to liberty.
 - b. Article 32: prosecution and punishment only according to law.
 - c. Article 34: the accused is innocent until proven guilty and has the right to advance a defence.

- d. Article 36: freedom to express opinions.
- e. Article 37: guarantee of a free press.
- f. Article 43: the right to form societies and unions.
- g. Article 44: the right to peaceful assembly.
- h. Articles 50-53 define the separation of powers and Articles 53 and 163 guarantee the independence of the judiciary.
- i. Article 165: save in exceptional circumstances, court hearings must be held in public.

20. Kuwait acceded to the International Covenant on Civil and Political Rights (ICCPR) on 21 May 1996, although it has not ratified the first Optional Protocol allowing for individual complaint to the United Nation Human Rights Committee (UNHRC).

21. In its 'Concluding Observations to the Third Periodic Report of Kuwait': 11 August 2016, CCPR/C/KWT/CO/3⁴, the UNHRC welcomed progress in a number of areas, but noted concerns about:

- a. Insufficient independence of the judiciary from the executive, particularly with respect to appointment, promotion and disciplining of judges (para 30).
- b. Reports of arbitrary arrest, detention and trial of persons exercising their freedom of opinion and expression, new laws criminalising legitimate comment by activists, journalists and bloggers, and the termination of licences for audiovisual and print media critical of the government (para 40).
- c. Over broad prohibition on public gatherings without the prior authorisation of the Ministry of Interior, and the excessive and disproportionate use of force to disperse peaceful demonstrations by the security services (para 42).
- d. Continued restrictions on civil society organisations and undue restrictions on freedom of association, to limit dissent (para 44).

22. International NGOs including Human Rights Watch have chronicled individual cases where there have been significant violations of free speech and assembly guarantees⁵.

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http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/KWT/CO/3&Lang=En

⁵ https://features.hrw.org/features/HRW_2016_reports/140_Characters/index.html#en

Comments

23. As set out above, BHRC did not observe this case at the trial or Court of Appeal stages. The delegation attempted to speak with the prosecution and officials from the Department of Justice but without success. The observations made at this stage must be considered in that light.

24. BHRC notes the following general factors which provide context to this interim report:

- a. Kuwait has a Constitution that provides clear guarantees which underpin the rule of law: the separation of powers, independence of the judiciary, protection of the right to liberty, freedom of expression, a free press and freedom of assembly, and fair trial rights. It has also acceded to the ICCPR, enshrining those guarantees as international obligations.
- b. Kuwait has a functioning judicial system which, as a general rule, adheres to the rule of law and due process. However, the evidence indicates that compliance with these basic standards does not extend to cases with a political dimension.
- c. The UNHRC and international NGOs are critical of Kuwait's practical compliance with its constitutional guarantees and international obligations, in particular with respect to freedom of expression and assembly, a free press, and fair trial rights for those accused of dissent or criticising the government.
- d. Kuwaiti lawyers confirm that there are concerns about executive interference in such cases.

25. With regard to the instant case, BHRC makes the following points:

- a. The right to peaceful assembly and freedom of expression are guaranteed in domestic and international law, as discussed above. However, such rights are not unqualified. In particular, the state is entitled to impose some restrictions where exercise of those rights impinges on the rights of

others. Furthermore, the state is entitled to enforce public order and prohibit protests within a parliamentary assembly.

- b. Insofar as the delegation could assess, there were no allegations of significant violence or property damage and a number of senior public officials gave evidence consistent with this, under oath.
- c. The trial court acquitted all defendants. The opinion of the advisory Judge to the Court of Cassation indicates that the reversal of the acquittals by the Court of Appeal occurred after an unfair process where the accused were not permitted to advance a defence. If that is accurate, then the reversal of acquittals in these circumstances would be a clear and significant violation of Article 34 of the Constitution, and of Article 14, ICCPR.
- d. Sentences of up to nine years imprisonment are manifestly disproportionate to the alleged facts, taken at their highest.

Conclusion

26. As set out above, this is a preliminary report. BHRC will publish a final report at the conclusion of the case.

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Why your support matters

BHRC's core operational costs are covered by a grant from the Bar Council. This means that every penny of your membership subscription directly funds our project work, enabling us to send BHRC lawyers wherever they're most needed. Your support is vital to the growth of BHRC, and our ongoing work to protect advocates, judges, human rights defenders and vulnerable communities around the world.

Your support enables us to:

- Produce statements, letters of concern and amicus curiae briefs in support of people facing unfair trials and imprisonment
- Send our Trial Observation Unit to witness and monitor unjust or unfair trials wherever they occur
- Provide international training, support and leadership to lawyers, human rights defenders and civil society groups under threat
- Lead investigations and publish detailed reports into serious human rights abuses
- Lobby governments and other state actors to improve fair trial protections and legal standards

As a member, you will also receive up to date news about BHRC's work, opportunities to assist with our international projects, statements, publications or other human rights work, and invitations to BHRC events.

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BHRC Membership is open to every practising or non-practising member of the Bar of England and Wales, and all law students (including trainees and pupils) in England and Wales. Payment tiers for BHRC membership are set by the length of time since you were called to the Bar.

The minimum amounts requested are:

0 – 5 years since call (includes students, trainees and academics): £25 per year

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