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SIHRG Uniting Lawyers Around the World for Human Rights
Solicitors' International Human Rights Group

TRIAL OBSERVATION REPORT

Public Prosecution

v

Amal Fathy Ahmed abd El Tawwab ("Amal Fathy")

Case number 1997 of the year 2018 in the Maadi Misdemeanour Court,
Cairo Governorate

September 2018

Report written by:

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of the

Solicitors' International Human Rights Group

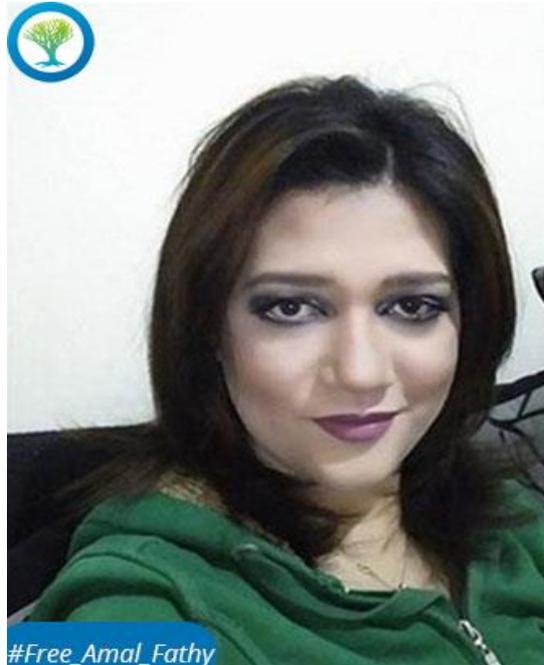


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EXECUTIVE SUMMARY

On 8 and 23 September 2018, observers from the Solicitors' International Human Rights Group ("SIHRG"), commissioned by EuroMed Rights, observed two hearings held in a criminal case brought by the Public Prosecutor in Egypt against Amal Fathy Ahmed abd El Tawwab ("Amal Fathy", "Ms Fathy" or the "Defendant"), case number 1997 of 2018 in the Maadi Misdemeanour Court, Cairo Governorate (the "Court"). This report sets out the observers' assessment as to whether the trial was fair in accordance with international fair trial standards.

The trial observation mission was jointly funded by EuroMed Rights and SIHRG.

Amal Fathy was charged with deliberately spreading fake rumours liable to disturb public security under Article 102(1) of the Egyptian Criminal Code ("the first charge") and with publishing filmed material in which she uttered words which are an outrage to public decency under Articles 171, 178, 306 of the Egyptian Criminal Code (the "second charge"). The state-controlled Banque Misr (or the Bank of Egypt) also brought a civil action against Ms Fathy in relation to the alleged acts seeking payment of a sum of 100,001 EGP (approximately €4,905).

On 29 September 2018, the Court found Amal Fathy guilty of all charges. She was sentenced to:

- One year of penal servitude for the first charge; and
- One year of penal servitude along with a fine of 10,000 EGP (approximately €490) for the second charge.

The Court ordered Amal Fathy to pay the costs of the proceedings.

The penalties were suspended, pending appeal, on payment of a security of 20,000 EGP (approximately €982). The appeal was dismissed on 30 December 2018. Ms Fathy could be arrested and required to serve her sentence at any time.

The Court also ordered the transfer of the civil case, brought by Banque Misr, to the competent civil court.

This report concludes that Amal Fathy's right to a fair trial was not observed by the Court.

On 8 September 2018 the Court ordered the immediate disclosure of the Public Prosecutor's file to the Defence; however the Public Prosecutor did not comply with the order. The Court did not take any steps to ensure compliance with the order and

the file was only disclosed to Ms Fathy's lawyers during the course of the trial on 22 September 2018.

As a result, Amal Fathy's right to be informed in detail of the cause of the charges against her, in accordance with Article 14(3)(a) of the International Covenant on Civil and Political Rights 1966 ("ICCPR"), and her right to prepare a defence, in accordance with Article 14(3)(b) of the ICCPR, were breached.

Ms Fathy was also not granted adequate access to her counsel during the proceedings.

The report details other breaches of fair trial standards and shortcomings in the trial process, which we detail under the headings "Evaluation of the Trial" and "Conclusion and Recommendations", below.

The observers understand that a number of the issues identified in Ms Fathy's trial are systemic within the Egyptian criminal justice system. The observers recommend that in addition to the individual measures relating to Ms Fathy's case, the Egyptian authorities address these fundamental concerns within the wider criminal justice system.

The observers make the following recommendations in relation to the Egyptian criminal justice system:

1. Defendants must be able to communicate and receive visits from their lawyer in full confidentiality;
2. Defendants must be informed in detail of the cause of the charge against them in reasonable time before the trial.

PART I: THE MISSION AND THE REPORT

The Mission's Terms of Reference

The Mission is to report on whether the trial of Amal Fathy complied with the standards set under the ICCPR, which Egypt ratified in 1982. The Constitution of the Arab Republic of Egypt of 2014 (the "Egyptian Constitution") came into effect on 18 January 2014 and the report will also address whether the trial conformed with the Egyptian Constitution where appropriate.

In particular, the Mission will assess compliance with the following rights:

- i. Right to liberty
- ii. Right to fair treatment in pre-trial detention
- iii. Right to an impartial tribunal
- iv. Right to a public hearing
- v. Right to be presumed innocent
- vi. Right to be informed of charges/to disclosure of evidence
- vii. Right to be present
- viii. Right to call and examine witnesses
- ix. Right to legal assistance
- x. Right to prepare a defence
- xi. Right to a timely trial
- xii. Right to legal certainty of criminal charges

The report complies with the following trial observation guidelines:

- Trial Observation Manual for Criminal Proceedings – Practitioners Guide No. 5 (International Commission of Jurists, 2009)
- Guidelines for Human Rights Fact Finding Missions (The Lund-London Guidelines) (The Raoul Wallenberg Institute of Human Rights and Humanitarian Law of the Lund University and The International Bar Association, September 2009)

Composition of the Delegation

EuroMed Rights invited experts from SIHRG to undertake this trial observation mission. SIHRG is a non-governmental organisation based in the United Kingdom, with a membership drawn principally from the solicitors' profession of England and Wales. A solicitor is a qualified lawyer and there are 138,000 solicitors practising in the United Kingdom and overseas.

The objects of SIHRG include raising awareness of international human rights law within the solicitors' profession. It provides training in the UK and overseas on international human rights law.

The observers were both UK-based members of SIHRG:

- Anne-Marie Irwin, Public Law & Human Rights solicitor in England & Wales observed the hearings on 8 and 22 September 2018
- Sandip Basu, solicitor (non-practising) and immigration advisor in England & Wales observed the hearing on 8 September 2018

Acknowledgments

The observers were greatly assisted by an interpreter who provided Arabic-English interpretation at court hearings and meetings.

Lionel Blackman, solicitor-advocate, co-founder of SIHRG and a trial expert, recognised by the Organisation for Security & Co-operation in Europe, co-authored the report.

Funding

The Mission was funded by EuroMed Rights and SIHRG to cover the costs of transportation, accommodation and other necessary expenses of the observations. Neither of the observers were paid.

The Mission's Meetings

The observers met the following people in Cairo:

- Mohammed Lotfy, Amal Fathy's husband;
- Amal Fathy's lawyers; and
- Various embassy representatives and delegates from the European Union

PART II: GENERAL BACKGROUND

Information in this section has been drawn from various public sources¹ in order to provide the reader with a context for the trial.

On 11 May 2018, Ms Fathy was charged with a first charge of deliberately spreading fake rumours liable to disturb public security under Article 102(1) of the Egyptian Criminal Code and with a second charge of publishing filmed material in which she uttered words which are an outrage to public decency under Articles 171, 178, 306 of the Egyptian Criminal Code (case number 1997/2018 – “the first case”).

On 13 May 2018, Ms Fathy was charged with deliberately thwarting the presidential elections, disturbing public opinion, joining a terrorist group, using the internet to spread ideas calling for terrorist acts, and deliberately spreading false news that harmed the public interest (case number 621/2018 – “the second case”).

This report only addresses the detention and trial of Ms Fathy in relation to the first case, (which constituted two charges) although reference is made to the second case where appropriate.

Chronology

9 May 2018	Amal Fathy posts a video on Facebook in which she criticises the failure of the Egyptian government to protect women from sexual harassment
11 May 2018	Amal Fathy is arrested and charged with diffusing false news, inducement to felony, disseminating material against public morals and cursing that comprises no attribution of a specific fact (1997/2018 – “the first case”). She is detained, pending trial
13 May 2018	Amal Fathy is charged with deliberately thwarting the presidential elections, disturbing public opinion, joining a terrorist group, using the internet to spread ideas calling for terrorist acts, and deliberately spreading false news that harmed the public interest (621/2018 – “the second case”). She is required to serve 15 days in pre-trial detention for the second case, to be served following release in the first case
19 June 2018	Amal Fathy’s release is ordered on payment of bail of 10,000 EGP (approximately €490) in relation to the first case. She

¹ <https://www.amnesty.org.uk/actions/amal-fathy-arrested-sexual-harassment> and <https://euromedrights.org/human-rights-behind-bars-in-egypt/#defenders>

	remains in detention in relation to the second case
21 June 2018	Bail decision of 19 June 2018 in the first case upheld following an appeal by the prosecution
4 July 2018	Amal Fathy applies for bail in relation to the second case at every available opportunity, approximately every 15 days. Bail is refused on each occasion and she remains in detention
11 August & 8 September 2018	Hearings regarding the first case
22 September 2018	Trial regarding the first case
29 September 2018	Judgment handed down in the first case. Amal Fathy is sentenced to a year of penal servitude for the first charge and a year of penal servitude and a fine of 10,000 EGP (approximately €490) for the second charge. Bail of 20,000 EGP (approximately €982) is granted for the temporary suspension of the execution of the penalty pending appeal
25 November 2018	Appeal in the first case
18 December 2018	Cairo Criminal Court orders Amal Fathy's conditional release on probation, pending investigation, in the second case. Her probation prohibits her from leaving her home except for medical treatment and requires her to undergo police monitoring one hour every week at a police station
26 December 2018	A Cairo criminal court extends Amal Fathy's probation in the second case for 45 days
27 December 2018	Amal Fathy is released (as a result of the conditional release ordered in the second case on 18 December 2018) and returns home
30 December 2018	Amal Fathy's appeal in the first case is dismissed. She has not returned to prison but could be arrested and required to serve her sentence at any time
9 February	Amal Fathy's probation in the second case is modified. She is allowed to leave home freely but is now required to undergo police monitoring twice a week for four hours

The Defendant: Amal Fathy

Ms Fathy was born on 1 September 1984. She is an actor, mother to a 3 year old son and the wife of Mohammed Lotfy, executive director of the Egyptian Commission for Rights and Freedoms. She is also an activist and has been vocal about human rights violations in Egypt, in particular the arbitrary detention of other activists.

On 9 May 2018, Amal Fathy posted a video on her Facebook account in which she criticised the failure of the Egyptian government to protect women from sexual harassment.

On 10 May 2018, pro-government and state-owned media outlets released articles citing the video, identifying Ms Fathy as an activist connected to the April 6 movement, an Egyptian youth political movement, and accusing her of insulting Egypt and Egyptian institutions.

Amal Fathy was arrested on 11 May 2018 after security forces raided her house, where she was present with her husband and son. Ms Fathy and Mr Lotfy's phones were seized, their house searched and they were both taken to the Maadi police station. While Mr Lotfy was released shortly after, Ms Fathy was referred to the Egyptian Public Prosecutor, who decided that she be held in pre-trial detention on suspicion of having committed the offences with which she was later charged in the first case.

The initial complaint was made by Banque Misr and referred to the Public Prosecutor, who charged Ms Fathy with the criminal offences set out above. In connection with the same events, Banque Misr also made a civil claim for damages amounting to 100,001 EGP (approximately €4,905).

Additionally, on 13 May, Ms Fathy was charged with a second case of deliberately thwarting the presidential elections, disturbing public opinion, joining a terrorist group, using the internet to spread ideas calling for terrorist acts, and deliberately spreading false news that harmed public interest.

PART III: THE TRIAL

The Proceedings before the Maadi Misdemeanour Court

Hearings took place at the Court before Judge Dia Al Qady on 11 August, 8 and 22 September 2018. The observers attended the hearings on 8 and 22 September 2018.

On 19 June 2018, the Judge ordered Ms Fathy's release on bail of 10,000 EGP (approximately €490). The Prosecution in the case appealed the decision and Ms Fathy appeared before a criminal court on 21 June, which upheld the first instance Judge's decision.

Despite the grant of bail, Ms Fathy remained in pre-trial detention throughout the first case, as a result of her pre-trial detention in the second case, in which bail was refused on numerous occasions.

On 29 September 2018, the Court found Ms Fathy guilty of both charges against her in the first case and handed down a sentence of a year of penal servitude for the first charge and a year of penal servitude along with a fine of 10,000 EGP (approximately €490) for the second charge. Bail of 20,000 EGP (approximately €982) was granted for the temporary suspension of the execution of the penalty pending appeal.

On 18 December 2018 the Cairo Criminal Court ordered Ms Fathy's release on probation in the second case and she was released on 27 December 2018.

Ms Fathy's appeal of her conviction in the first case was heard on 25 November 2018 and dismissed on 30 December 2018. She has not returned to prison but could be arrested and required to serve her sentence in the first case at any time.

The Court and the Judge

All of the hearings in Amal Fathy's case have taken place at Maadi Misdemeanour Court in Cairo. The entrance to the court compound was guarded by officers from the Ministry of the Interior.

The Court confirmed, in advance, that the hearing was listed at 10am on each occasion.

It was possible to enter the court building without special permission or provision of a passport or an identity card. There was a courtyard directly behind the entrance where several officers from the Ministry of the Interior were stationed.

Inside the courthouse there was a room immediately to the left where family and friends of defendants were gathered. A flight of stairs led to several Judges' chambers. Lists of the hearings were pinned to the walls outside the court rooms. Ms Fathy's case was 106 of a list of 112. There appeared to be one ante-room with

benches directly outside the Judge's chamber where Ms Fathy was tried and where other family members were waiting. The corridors were crowded with lawyers and supporters of defendants.

Hearings took place in the Judge's chamber. The Judge sat behind a large desk; the Public Prosecutor, Mr Mahmoud Atouhami, was seated directly next to him. The Judge's clerk, Mr Yasser Sami, sat at the desk at a right angle to the Judge. Lawyers stood directly in front of the desk to make representations. There was a couch at a right angle to the Judge's desk, where Amal Fathy was invited to sit during both of the hearings attended by the observers. The room was crowded with observers, court staff and Ms Fathy's family and friends.

On each occasion the interpreter assisting the observers provided their passports to the court clerk, with a written request to observe the hearing. The Judge asked to see the observers on each occasion in advance of the hearing and inspected the observers' passports. He welcomed the observers and gave permission for observation and note-taking, on the condition that the observers made no comments during the hearing.

Although there was a meeting room on the ground floor of the court, this was very crowded and Amal Fathy's lawyers, family and friends habitually waited at a nearby coffee house. Nearer to the time that the hearing was due to start, the lawyers, family and friends of Ms Fathy waited in the crowded corridor outside the Judge's chamber.

The Charges Against Amal Fathy

The Public Prosecutor requested that Amal Fathy be punished under Articles 102(1), 171, 178 and 306 of the Egyptian Criminal Code².

According to the written judgment dated 29 September 2018³, the details of the charges against Amal Fathy were as follows (emphases added):

- The Defendant **deliberately spread fake rumours** in a video that she posted online. In this clip, she spoke about the Egyptian State saying among others: *"Sinai is all gone... the purchase value of the Egyptian pound has gone down the drain... We have the world's second highest rate of sexual harassment."* These words were liable to disturb public security as the investigations show.

²

https://sherloc.unodc.org/res/cld/document/criminal_code_of_egypt_english_html/Egypt_Criminal_Code_English.pdf

³ See original judgment in Arabic in Appendix I and unofficial translation in English in Appendix II.

- The Defendant **published filmed material** which is the video subject of the first accusation, in which **she uttered words which are an outrage to public decency**, inter alia, *“screw you people, you sons of bitches, you riff-raff”* as shown in the investigations.

The relevant provisions of the Egyptian Criminal Code are as follows:

Article 102(1) – diffusing false news

Article 102 (1) of the Criminal Code stipulates that *“Detention and paying a fine of no less than fifty pounds and not exceeding 200 pounds shall be inflicted on whoever **deliberately diffuses news, information/data, false or tendentious rumours, or propagates exciting publicity, if this is liable to disturb public security, cast horror among the people, or cause the harm or damage to public interest”**.*

Article 171 – inducement to felony

Article 171 of the Criminal Code provides that *“Whoever **induces one or more persons to commit a felony or misdemeanour, by talks, shouting in public, a deed or a hint insinuated in public, by writing, drawing pictures/ photographs, marks or symbols, or any other method of representation made in public, or in any other means of publicness, shall be considered an accomplice in doing it, and shall be punished with the penalty prescribed therefor, if such inducement results in actual occurrence of the felony or misdemeanour.***

However, if the inducement results in just an attempt of murder, the judge shall apply the legal provisions on attempt penalty.

Talk or shouting shall be considered publicly made if it is declared openly or reiterated via any mechanical method at a general meeting, on a public road or any other frequented place, or if it is declared openly or reiterated, such as anyone found on that road or in that place can hear it, or if it diffused by wireless or any other method.

The deed or hint shall be considered publicly made if it takes place at a general meeting, on a public road, or at any other frequented place, or if takes place such that whoever is found on that road or at that place can see it.

Writing, drawings, pictures, photographs, signs, symbols and other representation methods shall be considered as publicly displayed, if they are distributed without differentiation to a number of people, or if they are displayed such that whoever is found on the public road or at any frequented place can see them, or if they are sold or offered for sale at any place.”

Article 178 – disseminating material against public morals

Article 178 of the Criminal Code stipulates that ***“whoever disseminates, makes or holds, for the purpose of trade, distribution, leasing, pasting or displaying printed matter, manuscripts, drawings, advertisements, carved or engraved pictures, manual or photographic drawings, symbolic signs or other objects or pictures in general, if they are against public morals, shall be punished with detention for a period not exceeding two years and a fine of no less than 5,000 pounds and not exceeding 10,000 pounds, or either penalty”***.

Article 306 – cursing that comprises no attribution of a specific fact

Article 306 of the Criminal Code provides that ***“any cursing that comprises no attribution of a specific fact, but constitutes in any aspect an outrage of one’s honour or dignity, shall be punished, in the cases prescribed in Article 171, with a fine of no less than 2,000 and not exceeding 10,000 pounds”***.

The Nature of The Prosecution Case

This section of the report draws from the written judgment of the Court. In view of the guilty verdict on all charges it is reasonable to suppose that the judgment does not understate the prosecution’s case. The full judgment is attached to this report. In order to present the prosecution evidence in a readable and logical narrative this section paraphrases and re-orders the high points of the prosecution’s case as stated in the judgment.

The written judgment summarises the nature of the prosecution case as follows:

Mr. Anwar Abd Al Hamid Assayed brought this case on behalf of the Chairman of Banque Misr and of the deputy manager of Maadi branch supported by evidence. The Plaintiff alleged that the Defendant uploaded a video on Facebook, in which she declared having insulted the staff and managers of Banque Misr when visiting Maadi branch for her credit card activation. Mr. Abd Al Hamid attested to that during the investigation. He submitted a USB stick including the clip in question.

When questioned, Ahmed Mohammed Ahmed and the deputy manager of Maadi branch of Banque Misr have confirmed the version previously presented by their attorney.

When questioned, Captain Hussein Samir Hussein, a national security officer, has testified that the results of his secret investigations had ascertained the veracity of these reports. The Defendant had indeed published this video on Facebook, in which she mentioned her going to Maadi branch of Banque Misr, her being subject to mistreatment and her insulting the staff and the guard at that branch.

Whereas the documents have been referred for criminal prosecution and the Defendant has appeared in person before the court in the presence of both her

attorney and that of Banque Misr, who brought a civil action against the Defendant and requested the payment of a sum of 100,001 Egyptian pounds.

The Nature of The Defence Case

The written judgment of the Court states:

When asked about the charges brought against her, the Defendant denied them. However, she admitted saying some of the words attributed to her in the indictment.

The Defence requested her acquittal and pleaded inadequacy of the investigations carried out by the Public Prosecution and the inadmissibility of the criminal proceedings, as they had not been initiated following the route established in law.

Moreover, the Defence challenged the presence of criminal responsibility, the applicability of the legislative model of Articles 102(1), 178 and 306 of the criminal law on the incident as well as the constitutionality of Article 102(1) of the criminal law as it contravenes the texts of Articles 54, 95, 96, 98 of the Constitution.

[The relevant sections of the Egyptian Constitution are set out in Part IV below].

The Defence also raised objections as to the admissibility of civil proceedings since the Public Prosecution description did not characterise the facts as slander.

The Defence pleaded inadmissibility of the criminal proceedings claiming that the initiation of the proceedings had not followed the route laid down in law:

The Defence challenged the constitutionality of Article 102(1) of the Criminal Law as it violates Articles 54, 95, 96, 98 of the Constitution.

[Article 29 of Law 48/1979 on the Constitutional Court stipulates that the Court shall exercise power of judicial control of the constitutionality of laws and regulations as follows:

a. If in the course of the proceedings, a court, or any other competent judicial authority views that a provision of a law or regulation, on which the settlement of the dispute depends, is unconstitutional, the proceedings shall be suspended by the court and the case shall be transferred to the Supreme Constitutional Court without judicial fees for the adjudication of the constitutional issue.

b. If the constitutionality of a provision in a law or regulation has been contested by a party in the course of the proceedings before a court or any other competent judicial authority, and the grounds are found to have been plausible by the court or the judicial authority, it shall ordain the postponement of the case and specify for that party a period not exceeding three months within which the constitutional issue is to

be presented to the Supreme Constitutional Court. Failing to do this, the challenge will be regarded as void].

The Evidence

The written judgment of the Court states:

Whereas the Court unsealed the exhibit attached to the case documents, which appeared to be a USB stick containing a clip, wherein the Defendant was speaking to her friends on Facebook mentioning harassment and intransigence on the part of the management and staff of Banque Misr-Maadi branch when she went to the bank for her credit card activation. 50 seconds into the clip, the Defendant said, "screw Egypt". At four minutes thirty-one seconds, the Defendant shouted: "screw the manager of October branch, screw the manager of the branch, and screw the people inside". At five minutes and 37 seconds, the Defendant added, "screw you people, you sons of bitches". At 8 minutes, she exclaimed "what do we have? Sinai's sand? Sinai is all gone".

The evidence of the veracity of the charge against the Defendant lies in the video annexed to the Public Prosecution investigations carried out by the judicial officer Captain Hussein Samir Hussein and the clip attached to the case documents. The Defendant has as well acknowledged that she had pronounced some of the words when filming herself.

The Defence asked to hear the testimony of the psychiatrist of Defendant Mrs. Sally Thomas More, who testified that the Defendant was suffering from a mental disorder, which manifests itself in hysterical reactions, nervous breakdown and severe depression. This could cause her great fear and hallucinations and place her in a hysterical state. At times, she could see improvement when receiving her treatment. However, soon thereafter, she could relapse when interacting with her surroundings. Her doctor added that the Defendant lacked emotional stability in some situations and that her behaviour subject of the accusation along with the words she uttered, could be due to her illness.

The Legal Proceedings

Hearing on 8 September 2018

The hearing took place at Maadi Misdemeanour Court in Cairo before Judge Dia El Qaady and lasted for approximately half an hour. Two observers from SIHRG attended, together with two other international observers and Ms Fathy's husband and friends.

Ms Fathy arrived at court dressed in white and handcuffed to a prison officer, who led her into the Judge's chamber.

The Judge was seated behind a large desk and a representative from the Public Prosecution was seated to his right.

Ms Fathy and Banque Misr were represented by a team of lawyers. One lawyer took the lead in making submissions on behalf of Ms Fathy.

On being questioned by the Judge, Ms Fathy replied that she had not wanted the video to be published but that it had been stolen from her and published against her will.

The Judge responded to the following applications made by Ms Fathy's lawyers:

- (i) For a complete set of the documents in the case, including the prosecution memo. This was granted.
- (ii) A copy of the hard drive containing the video in question. This was not granted.
- (iii) To call the following witnesses: (a) Mr Anwar Abd Elhameed El Sayed Refaee, head of legal affairs at Banque Misr (b) Mr Ahmed Mohamed Ahmed Sayed Abd Elaleem, Manager of Banque Misr, Maadi branch. This was not granted.
- (iv) The call log for Ms Fathy's telephone number for 8 and 9 May 2018. This was not granted.
- (v) All medical and psychological reports for Ms Fathy from the prison hospital, as they refer to the psychological state of Ms Fathy and the relation of her psychological state to Ms Fathy's responsibility for the video. This was granted.

Ms Fathy's lawyer made a second request for a copy of the hard drive. The Judge replied that this request had to be submitted to the Public Prosecutor.

The lawyer also requested that the prison doctors be asked to interpret Ms Fathy's body language and mental and psychological status relating to why she was doing what she was doing in the video.

The Judge asked why Ms Fathy's lawyers wanted the call log they had requested.

The lawyer explained that they want to prove that Banque Misr had already apologised to Ms Fathy for what happened. They submitted that this would show that their intention at the start was not to find a case against her but to apologise for what had happened.

The lawyer for Banque Misr responded by submitting that Ms Fathy's lawyer's arguments were not valid. In his submission, he said that even if Banque Misr had called Ms Fathy and apologised to her, this was because she was a client and to maintain good client relations. He submitted that it was still documented that Ms Fathy had cursed workers in the bank.

The Judge also said that he wanted to view Ms Fathy's Facebook account and asked her for details of the account, which were provided.

The Judge granted permission to Ms Fathy's lawyers and husband to stay with her and see her outside of court; however, after around 5 minutes, officers from the Ministry of the Interior ushered Ms Fathy into a locked room in the courtyard of the court compound, despite her family's and lawyers' protestations that the Judge had permitted them to spend time with her outside court.

Hearing on 22 September 2018

The hearing took place in the same chamber as the hearing on 8 September, with the same seating arrangements. Ms Fathy was represented by 3 lawyers, who stood in front of the Judge's desk. Banque Misr was represented by one lawyer. One observer from SIHRG attended, together with 3 other international observers. Ms Fathy's family and friends also attended.

Mr Taher Abolnasser, lawyer at the Egyptian Commission for Rights and Freedoms, made submissions on Ms Fathy's behalf.

The Judge confirmed that he would not ask Ms Fathy about the charges, as he had done so at the previous hearing.

Ms Fathy's lawyer confirmed that at the hearing on 8 September 2018, they had asked for the prison medical reports for Ms Fathy and the Prosecution had been ordered to produce them. They had taken an official transcript of the hearing to the prison, but the reports had not been disclosed. They did not know if the reports were with the case papers or not.

Ms Fathy's lawyer submitted that the Judge had also ordered that they be permitted to see the Public Prosecutor's report, but the Public Prosecutor had refused to allow them to see it. The Judge then gave the lawyer the Public Prosecutor's report of the investigations, which was comprised of a small dossier.

Ms Fathy's lawyer also submitted that there was a deficiency in the Public Prosecutor's investigation as it was impossible to know the source of publication of the video.

Ms Fathy's lawyer made 3 defence submissions, which are summarised as follows together with the interventions of the Judge and Ms Fathy:⁴

1. Ms Fathy did not accept the criminal case, as a charge such as this may only be brought by way of a state security prosecution and so there had been a procedural error.

The lawyer submitted that prosecutions by the state security courts have a specific jurisdiction, being jurisdiction over actions that harm the welfare of the country in the interior, or the exterior. Ms Fathy was investigated and questioned by the general prosecution in Maadi, which then passed the case to this court. The lawyer submitted that this proves that the case should lie within the state security jurisdiction rather than the jurisdiction of this court.

2. Ms Fathy lacked criminal responsibility as she had no intention of publishing the video. There is a lack of evidence in the papers to demonstrate whether the rumours are true or false.

The lawyer submitted that the Public Prosecutor did not refer to "abuse" in his report and so there could be no civil case against Ms Fathy. The abuse had already been addressed by Banque Misr.

The lawyer also submitted that there was insufficient information in the Public Prosecutor's investigations to bring the criminal charges. The main charge was of publishing false news. In order to prove this charge, it was necessary to prove "inducement", to which Article 171 of the Criminal Code refers.

Ms Fathy's lawyer queried how the person who raised the charge had obtained the video. He submitted that this had been obtained from Ms Fathy's Facebook account.

Ms Fathy's lawyer stated that since the beginning of this case, Ms Fathy had said that the video had been stolen from her Facebook account. Ms Fathy's lawyers had requested an investigation into the violation of her privacy, since she was publishing privately to a few of her close friends. This act did not meet the definition of "publicity", to which Article 102 (1) and Article 306 of the Criminal Code refer.

The lawyer submitted that he had asked about the confiscation of the flash drive where the video was stored and had asked to know the source of the video. Since then, and from the beginning of the case, he stated there had been insufficient information in the Public Prosecutor's investigations to bring the criminal charges as there was no evidence that Ms Fathy intentionally published the video to the public. This was submitted to be an error in the process.

⁴ The following is a non-verbatim summary of the lawyers' oral representations

The Judge asked Ms Fathy whether she had specified and selected a certain number of friends to see the video; she replied that she had. He asked Ms Fathy whether she had deleted the video afterwards. Ms Fathy replied that she was arrested 4 hours after it was posted and so did not have any chance to delete it.

Ms Fathy's lawyer questioned what the tools of "publicity" were, with reference to Articles 102 and 306 of the Criminal Code. He submitted that the prosecution had prohibited the defence from proving that Ms Fathy did not intentionally and publicly publish the video. Ms Fathy's lawyer submitted that the video had been downloaded and re-uploaded in order to be published again. He submitted that, given that Ms Fathy said that the video was stolen, this was not an original publication by her.

3. Ms Fathy could not be subject to this charge due to her psychiatric status. She lacked responsibility. Ms Fathy's psychological health meant that her responsibility was limited or it could be a reason to decrease any penalty, subject to the Court's jurisdiction. The medical report by the prison states that Ms Fathy had depression and hysteria. These reports were not very different from the reports from Ms Fathy's personal psychiatrist.

On being asked by the Judge, Ms Fathy confirmed that the case had aggravated her symptoms.

Ms Fathy's lawyer submitted that Ms Fathy was also subject to pressure on the day of the incident; she had been subjected to harassment by a taxi driver and the day ended with her also being harassed by a guard at Banque Misr.

In relation to the second charge – that Ms Fathy had deliberately spread false rumours – the lawyer submitted that it was necessary to prove that the information was false; this was not possible, as Ms Fathy had only been giving her opinion.

The lawyer also submitted that there was insufficient evidence in the documents to prove the case against Ms Fathy.

- Oral evidence

Dr Sally Thomas, a psychiatrist at the Shams Medical Centre, gave evidence on behalf of Ms Fathy. She confirmed that she had been employed privately as Ms Fathy's psychiatrist since January 2017.

Dr Thomas explained that Ms Fathy suffers from 'hysterical interaction.' She stated that Ms Fathy had had a nervous breakdown and suffers from severe depression. Dr Thomas explained that, due to the harassment to which Ms Fathy had been subjected several times, Ms Fathy suffers from trauma and fears leaving her home. The symptoms are as if she was experiencing the incident that caused the trauma all of the time. Dr Thomas attested that Ms Fathy suffers from severe anxiety, hysterical

reactions, severe depression and hallucinations. She attested further that Ms Fathy experiences an aggravation of her fears and psycho-somatic symptoms to the extent that she cannot move her arms or legs. She explained that this affects Ms Fathy's actions as any decision-making needs emotional stability, which Ms Fathy does not have. Dr Thomas explained that Ms Fathy is first affected by her psychological status; she feels unsafe and wants first to protect herself from the people she fears.

Dr Thomas confirmed that Ms Fathy is aggressive and cannot control her actions. Dr Thomas attested that Ms Fathy is also defensive and that she is in therapy as well as being prescribed medication to which she initially responded well, but has relapsed due to the pressure to which she has been subjected.

The Judge asked whether, according to Dr Thomas' professional opinion, Dr Thomas thought that what Ms Fathy had done was as a result of her psychiatric status.

Dr Thomas replied that she had known Ms Fathy for years. Dr Thomas understands her pain and recognises that every action she has made is her "screaming" due to the harm to which she has been subjected. Ms Fathy has suffered trauma and part of this trauma is a desire to take revenge.

The Judge asked whether Ms Fathy had acted in that way before.

Dr Thomas responded in the affirmative. Dr Thomas explained that Ms Fathy was subjected to a kidnapping, along with her son. Following this she was severely depressed and stayed at home. She once had a "psycho-physical" issue where she put herself on the ground and hallucinated. She had to be medicated during the session.

The Judge asked why, when Ms Fathy had returned from the bank, she had made the video, given that her experience of the kidnapping was more severe. The Judge asked why she had not made a video after she had been kidnapped.

Dr Thomas explained that, according to Ms Fathy's trauma and diagnosis and aggressive character, it is not possible to know when Ms Fathy will "explode"; it may follow the least severe episode.

Dr Thomas added that if a person has an aggressive character and trauma symptoms such as Ms Fathy, if you subject her to more – for example, being away from her son – this will increase pressure on her and she will need intensive rehabilitation sessions and medication.

The Judge asked Ms Fathy if she wanted to say anything.

Ms Fathy stated that she was raped when she was younger and was not aware at the time. She was 15 and did not realise the effect this had on her psychiatric

situation. Ms Fathy said that she definitely has an aggressive character and had been aggressive towards her husband – sometimes she had a knife in her hand. When she realised that this was not acceptable, she went to a psychiatrist. She attended a private institution – she did not remember the name – and was “OK” but stopped her medication when she was abroad. She admitted that she was aggressive to any man because of what she had been subjected to.

The Judge confirmed that Ms Fathy should be allowed to meet with her mother outside the courtroom.

Ms Fathy met with her family and lawyers after the hearing; however, again, after around 5 minutes, officers from the Ministry of the Interior ushered Ms Fathy into a locked room in the courtyard of the court compound. This was despite her family’s and lawyers’ protestations that the Judge had permitted them to spend time with her outside court.

Verdict Given On 29 September 2018

On 29 September 2018, Amal Fathy was found guilty of all charges, although the Court ordered the transfer of the civil case (brought by Banque Misr) to the competent civil court.

Ms Fathy was sentenced to:

- One year of penal servitude for the first charge; and
- One year of penal servitude for the second charge along with a fine of 10,000 EGP (approximately €490) for the second charge.

The Court ordered against Amal Fathy to pay the costs of the proceedings.

The penalties were suspended, pending appeal, on payment of a security of 20,000 EGP (approximately €982).

PART IV: EVALUATION OF THE TRIAL

The Rights In Question:

- i. Right to liberty
- ii. Right to fair treatment in pre-trial detention
- iii. Right to an impartial tribunal
- iv. Right to a public hearing
- v. Right to be presumed innocent
- vi. Right to be informed of charges/to disclosure of evidence
- vii. Right to be present
- viii. Right to call and examine witnesses
- ix. Right to legal assistance
- x. Right to prepare a defence
- xi. Right to a timely trial
- xii. Right to legal certainty of criminal charges

The applicable legal standards found in the ICCPR are set out below. They are also reflected in relevant sections of the African Charter on Human and Peoples' Rights, which Egypt has ratified, and in the Egyptian Constitution.

This report will also refer to the Egyptian Criminal Procedure Code although the authors wish it to be noted that no official English translation of the Egyptian Criminal Procedure Code can be located online. In 2017 it was announced that the Code would undergo substantial amendment. The authors understand that the amendment has not yet been completed.

This report will also refer to non-treaty instruments where appropriate.⁵

The Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules), adopted by the United Nations General Assembly on 17 December 2015, remain the "universally acknowledged minimum standards for the detention of prisoners".⁶ Since 1971 the UN General Assembly has called on member states to implement these rules.⁷ They are frequently cited by treaty bodies and mechanisms

⁵ Many human rights standards relevant to fair trials are contained in non-treaty instruments. Non-treaty instruments are usually called Declarations, Principles, Rules, Guidelines and so on. The Universal Declaration of Human Rights, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Standard Minimum Rules for the Treatment of Prisoners are examples of non-treaty instruments which set out important fair trial guarantees. *Amnesty International's Fair Trial Manual, Second Edition, 2014*

⁶ UN General Assembly resolution 67/188, §4.

⁷ UN General Assembly resolution 2848; see also UN Assembly resolution 39/118, § 3.

when considering claims related to the treatment of people deprived of their liberty.⁸

i. Right to liberty

- *ICCPR - Article 9*

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

Pre-trial detention should not be the general rule: it should only be used in criminal proceedings as a last resort, and for the shortest possible time period, when required to meet the needs of justice, or of the investigation of the alleged offence or in order to protect society and the victim. Pre-trial detention should be the exception and bail should be granted, except in situations where it is likely that the accused would abscond, destroy evidence, influence witnesses or flee from the jurisdiction of the State. Anyone who is deprived of his liberty as a result of detention has the right to bring proceedings before a court in order for that court to decide, without delay, on the lawfulness of their detention and order his release if the detention is unlawful.

- *African Charter - Article 6*

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

- *Egyptian Constitution - Article 54: Personal Freedom*

Personal freedom is a natural right which is safeguarded and cannot be infringed upon. Except in cases of in flagrante delicto, citizens may only be apprehended, searched, arrested, or have their freedoms restricted by a causal judicial warrant necessitated by an investigation.

All those whose freedoms have been restricted shall be immediately informed of the causes therefore, notified of their rights in writing, be allowed to immediately contact their family and lawyer, and be brought before the investigating authority within twenty-four hours of their freedoms having been restricted.

⁸ For example they were cited by the HRC in *Kurbanov v Tajikistan*, UN Doc. CCPR/C/79/D/1096/2002 (2003) §7.8.

Questioning of the person may only begin once his lawyer is present. If he has no lawyer, a lawyer will be appointed for him. Those with disabilities shall be provided all necessary aid, according to procedures stipulated in the law.

Those who have their freedom restricted and others possess the right of recourse before the judiciary. Judgment must be rendered within a week from such recourse, otherwise the petitioner shall be immediately released.

Facts

Amal Fathy was arrested and held in pre-trial detention from 11 May 2018 until she was granted bail on 19 June 2018. This decision was appealed by the Prosecutor but upheld by the Court on 21 June 2018. However, she remained in pre-trial detention in relation to the second case against her (see explanation under the sub-heading “The Defendant: Amal Fathy” above).

Finding

In relation to the detention in the first case against Ms Fathy and without having heard the arguments at the bail hearings on 19 and 21 June 2018 it is not possible to reach a firm conclusion. If there was a breach of the right to liberty in this case the breach was cured by the grant of bail on 19 June 2018.

The observers cannot comment on the pre-trial detention decision in the second case, as this did not form part of the Mission.

ii. Right to fair treatment in pre-trial detention

- *ICCPR - Article 10*

“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

States must ensure that all persons deprived of their liberty are treated with humanity, with respect for the inherent dignity of the human person and are not subjected to cruel, inhuman or degrading treatment or punishment. Prolonged solitary confinement is prohibited under international law.

- *ICCPR, Article 10(2)(a)*

“Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;”

- *Egyptian Constitution - Article 55: Due process*

All those who are apprehended, detained or have their freedom restricted shall be treated in a way that preserves their dignity. They may not be tortured, terrorized, or coerced. They may not be physically or mentally harmed or arrested and confined in designated locations that are appropriate according to humanitarian and health standards. The state shall provide means of access for those with disabilities.

- *Standard Minimum Rules for the Protection of Prisoners, Rule 111*

“Unconvicted prisoners are presumed to be innocent and shall be treated as such.”

- *Standard Minimum Rules for the Protection of Prisoners, Rule 115*

“The rights of pre-trial detainees include the right to be allowed to wear his or her own clothing if it is clean and suitable. If he or she wears prison dress, it shall be different from that supplied to convicted prisoners.”

Facts

Ms Fathy’s family reported to the observers that she was not mistreated in detention. Ms Fathy’s husband confirmed that he was permitted to see her once a week for one hour at a time.

Although she was permitted to wear her own clothing, Ms Fathy was required to wear white clothing when in detention and during court appearances. The observers understand that the Ministry of the Interior requires all detainees to wear white whilst in detention.

Finding

The observers find that there was compliance with Ms Fathy’s right to fair treatment in pre-trial detention.

Although Ms Fathy was permitted to wear her own white clothing, the restriction on her dress essentially amounted to a requirement to wear a form of prison dress. The observers find that this was arguably a shortcoming in Ms Fathy’s right to fair treatment in pre-trial detention as it may have amounted to a denial of her dignity as provided to detainees in Article 55 of the Constitution. However, this arguable incursion was not, in the opinion of the observers, sufficiently significant to amount to a breach of this right.

iii. Right to an impartial tribunal

- *ICCPR - Article 14(1)*

"In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

The right to an independent, impartial and competent tribunal is an absolute right that may suffer no exception. All tribunals, courts and judges must be independent from the executive and legislative branches of government as well as the parties to the proceedings. The independence of courts and judicial officers must be guaranteed by the constitution, laws and policies of a country as well as being respected in practice by the government, its agencies and authorities and the legislature. The criteria for the appointment to judicial office should be transparent and subject to strict selection criteria.

The *United Nations Guidelines on the Role of Prosecutors* 1990 also provides that:

10. The office of prosecutors shall be strictly separated from judicial functions.

- *Egyptian Constitution Article 186: Judicial independence*

Judges are independent, cannot be dismissed, are subject to no other authority but the law, and are equal in rights and duties. The conditions and procedures for their appointment, secondment, delegation and retirement are regulated by the law. It also regulates their disciplinary accountability.

They may not be fully or partly delegated except to bodies and to perform tasks that are identified by law, provided that all the foregoing maintains the independence and impartiality of the judiciary and judges and prevents conflicts of interest. The rights, duties and guarantees granted to them are specified by law.

- *Egyptian Constitution - Article 189: Public prosecution*

The public prosecution is an integral part of the judiciary. It is responsible for investigating, pressing charges and prosecuting all criminal cases except what is exempted by law. The law establishes the public prosecution's other competencies.

Facts

The case was heard by Judge Dia El Qaady on 8 and 22 September. The identity of the Judge who presided over the hearing on 11 August 2018 is unknown to the observers. The Public Prosecutor, who brought the case against the Defendant, was seated next to the Judge during both of the hearings attended by the observers.

Finding

Although the lack of judicial independence in Egypt has been widely reported⁹, there is no evidence to suggest that the Judge in this case lacked independence or impartiality.

We acknowledge that the physical proximity in courts of prosecutors and judges is commonplace in many legal jurisdictions around the world. Nevertheless, the positioning of the Public Prosecutor next to the Judge could be said to give the appearance of a lack of separation between prosecution and judiciary.

iv. Right to a public hearing

- *ICCPR - Article 14(1)*

"In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

All trials in criminal matters must in principle be conducted orally and publicly. Having a public hearing ensures transparency of proceedings and thus provides an important safeguard for the interest of the individual and society at large. Courts must make information regarding the time and venue of the oral hearings available to the public and provide adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account the potential interest in the case and the duration of the oral hearing.

- *Egyptian Constitution - Article 187: Public sessions*

Court sessions are public, unless, for reasons of public order or morals, the court deems them confidential. In all cases, the verdict is given in an open session.

Facts

All the hearings in this case were held at the Maadi Misdemeanour Court, Cairo. It did not appear to the observers that anyone wishing to attend the hearing was refused entry. The observers (and the other international observers attending the trial) were however required to provide identity documents prior to being granted permission to observe.

As far as access to the courtroom is concerned, it was open and accessible to the public subject to approval by the court security.

⁹ For example, <https://www.icj.org/wp-content/uploads/2016/10/Egypt-Tool-of-repression-Publications-Reports-Thematic-reports-2016-ENG-1.pdf>

Finding

The observers find that there was compliance with Ms Fathy's right to a public hearing.

v. Right to be presumed innocent

- *ICCPR - Article 14 (2)*

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

- *The Egyptian Constitution – Article 96: Due Process*

The accused is innocent until proven guilty in a fair court of law, which provides guarantees for him to defend himself.

Facts

As set out under the sub-heading "Right to liberty" above, Ms Fathy was arrested and held in pre-trial detention on 11 May 2018 and granted bail on 19 June 2018. This decision was appealed by the prosecutor but upheld by the Court on 21 June 2018. However, she remained in pre-trial detention in relation to the second case against her (see explanation under the sub-heading "The Defendant: Amal Fathy" above).

The Public Prosecutor's file was not disclosed to the Defendant until the day of the hearing on 22 September 2018. The Defendant had sought and was granted disclosure at the hearing on 8 September 2018; however, the Public Prosecutor's office did not comply with the order and did not make disclosure. The Defendant's lawyer raised concern with the Judge at the hearing on 8 September 2018 that the Public Prosecutor would not disclose the report in accordance with the order and asked the Judge to intervene; however, the Judge refused to make any further order or take any steps to ensure that disclosure would be effected.

Finding

The failure of the Court to ensure that the Public Prosecutor complied with its order to disclose the Public Prosecutor's file in advance of the trial, was consistent with an assumption of guilt - see section vi "Right to be informed of charges/to disclosure of evidence" below for more detail on non-disclosure. If the court had proceeded on the basis of the presumption of innocence it would have recognised the right of the defence to scrutinise readily available evidence by giving effect to the order for disclosure, which may have assisted the court in finding reasonable doubt about the prosecution case.

For these reasons, the observers find a breach of Ms Fathy's right to be presumed innocent.

vi. Right to be informed of charges/to disclosure of evidence

- *ICCPR - Article 14(3)*

"To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him"

Article 14(3) makes clear that a fair trial requires an accused person to be provided with certain procedural minimum guarantees. This includes the right of the accused to be informed promptly and in detail, in a language that he understands, of the nature and cause of the charges against him. The right to be informed promptly requires that the information provided must give details on both the law and the alleged facts on which the charges are based.

- *Egyptian Criminal Procedure Code - Article 214(A)*

The case file shall be dispatched forthwith to the registry of the court of appeal, and where the defence counsel applies for an adjournment to examine the case file, the head of the court shall specify a maximum period of ten days during which the case file shall remain with the court registry where the defence counsel can examine the file without moving it from the registry. The litigants shall notify, by a process-server, their witnesses who have not been mentioned in the above-mentioned list, so that they attend the hearing scheduled for the case. The litigants shall bear the cost of the notification and shall deposit the witnesses' travel expenses (articles 214 (bis) and 214 (A) bis, added by virtue of Law No. 170 of the year 1981)

- *Egyptian Criminal Procedure Code - Article 236*

Litigants may review the lawsuit file once they receive the summons to appear before the court.

The above Articles, taken from an unofficial English translation, at least imply, if not express, a right for a defendant to access the prosecutor's file in advance of his or her trial.

Facts

Ms Fathy was informed of the charges against her. The charges were also made public.

However, as set out under section v above, the Public Prosecutor's file was not disclosed to the Defendant until the hearing on 22 September 2018. The Defendant had sought and was granted disclosure at the hearing on 8 September 2018,

however, the Public Prosecutor's office did not comply with the order and did not make disclosure. The Defendant's lawyer raised concern with the Judge at the hearing on 8 September 2018 that the Public Prosecutor would not disclose the report in accordance with the order and asked the Judge to intervene; however, the Judge refused to make any further order or take any steps to ensure that disclosure would be effected.

Ms Fathy's lawyers also applied for the following, which were not granted:

- (i) A copy of the hard drive containing the video in question
- (ii) To call the following witnesses: Mr Anwar Abd Elhameed El Sayed Refaee, head of legal affairs at Banque Misr (b) Mr Ahmed Mohamed Ahmed Sayed Abd Elaleem, Manager of Banque Misr, Maadi branch
- (iii) The call log for Ms Fathy's telephone number for 8 and 9 May 2018

The court ordered disclosure of all medical and psychological reports for Ms Fathy from the prison hospital, as they refer to the psychological state of Ms Fathy and the relation of her psychological state to Ms Fathy's responsibility for the video. However, the observers understand from Ms Fathy's lawyers that the prescribed procedure is for the court to make the order and for the court clerk to request that the prison discloses the documents. Ms Fathy's lawyers reported that they had taken an unofficial copy of the order to the prison, which refused to provide the records, on the basis that the court should make the request; however, the court did not make the request. Ms Fathy's lawyers therefore reported this to the police, as a breach of the court order. The police issued an 'official notice' in response but the records were not disclosed.

Ms Fathy's lawyers confirmed to the observers that they had seen the following documents relating to the case:

- i. The police report of the accusation from Banque Misr
- ii. The investigation of the National Security Department
- iii. The interrogations of the Public Prosecutor (this was an investigation requested by the Public Prosecutor by the national security department and the Ministry of the Interior, to check whether Ms Fathy was the person in the video)
- iv. The report of the interrogation of Ms Fathy by the Public Prosecutor
- v. The report made by the criminal evidence institution when they confiscated Ms Fathy's items/evidence

Finding

The failure to ensure that the Defendant was provided with the full Public Prosecutor's file before the trial led to a breach of Ms Fathy's right under ICCPR Article 14(3) to be informed in detail of the cause of the charge against her. The breach meant that Ms Fathy did not have full information about the basis for the charges, nor all of the evidence on which the prosecution relied.

The court's failure to permit disclosure of the hard drive containing the video in question prevented the Defendant from preparing and/or calling evidence in her defence of the charges of diffusing false news (Article 102(1) of the Criminal Code), incitement to felony (Article 171 of the Criminal Code) and disseminating material against public morals (Article 178 of the Criminal Code).

It is arguable that the failure to ensure disclosure also led to a breach of Article 214(A) and Article 236 of the Egyptian Criminal Procedure Code, although the authors ask that the caveats under the transcriptions of the Procedure Code above are noted.

This breach is a central flaw to the trial. If other breaches we observed were refuted then the trial remains an unfair one on account of this breach.

vii. Right to be present

- *ICCPR - Article 14 (3) (d)*

"To be tried in his presence..."

Everyone charged with a criminal offence has the right to be tried in their presence so that they can hear and rebut the prosecution case and present a defence. In principle, the accused should not be tried *in absentia*. Defendants may be tried *in absentia* in certain exceptional circumstances in the interests of the proper administration of justice, for example, when defendants have been given sufficient advance notice of their trial and they decide to waive their right to attend or refuse to do so.

Facts

Amal Fathy attended all hearings.

Findings

We find compliance with this right.

viii. Right to call and examine witnesses

- *ICCPR - Article 14(3) (e)*

"The accused has the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;"

The prosecution should, within a reasonable time, provide the defence with the names and statements of the witnesses that it intends to call at trial so as to allow the defence lawyer sufficient time to prepare his or her case. Everyone accused of a criminal offence has the right to obtain the attendance of witnesses and to examine witness on their behalf "under the same conditions as witnesses against them".

Facts

Ms Fathy's application, at the hearing on 8 September 2018, to call as witnesses Mr Anwar Abd Elhameed El Sayed Refaee, head of legal affairs at Banque Misr and Mr Ahmed Mohamed Ahmed Sayed Abd Elaleem, Manager of Banque Misr, Maadi branch, was refused.

The Judge did not provide reasons to support his refusal, either at the directions hearing or the trial, and so the observers have no information as to the justification for this refusal.

Ms Fathy was granted permission to call her private psychiatrist, Dr Sally Thomas, as a witness.

Finding

The Judge's refusal, without stated reasons, to allow Ms Fathy to call the proposed witnesses led to a breach of her right to call and examine witnesses. If the applications had been granted, the witnesses may have given evidence relevant to the factual matrix of the charges against Ms Fathy. The observers therefore find a *prima facie* breach of this right.

ix. Right to legal assistance

- *ICCPR - Article 14 (3) (d)*

"And to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;"

- *Egyptian Constitution - Article 98: Right to defence*

The right of defence either in person or by proxy is guaranteed. The independence of lawyers and the protection of their rights are ensured as a guarantee for the right of defence.

For those who are financially incapable, the law guarantees the means to resort to justice and defend their rights.

Facts

During all the hearings held in this case Amal Fathy has had access to legal representation.

However, Ms Fathy's lawyers confirmed that they were only able to see Ms Fathy at court and at her detention renewal hearings in relation to the second case, in public, in the few minutes when she was being ushered away at the end of the hearings.

As Ms Fathy was detained on the basis of the second case, the observers understand that the Maadi Misdemeanour Court had no jurisdiction to order that Ms Fathy's lawyers be allowed to see her. Ms Fathy's lawyers reported that they could have made a request to the state security prosecution to see Ms Fathy, but that that the request would certainly have been refused and so they did not, therefore, make such a request.

Our understanding is that Ms Fathy has therefore never been able to communicate with her lawyers in private. The only opportunity for them to communicate and consult was in public, in the very short space of time before being ushered away by court security.

Officers from the Ministry of the Interior prohibited Ms Fathy's lawyers from meeting with her in the short space of time after each hearing as she was quickly ushered away and returned to detention and Ms Fathy's lawyers did not have the opportunity to speak with Ms Fathy at court prior to the hearing.

Finding

Although legal assistance has been permitted, the role of the lawyer has been significantly undermined by the fact that there were no opportunities for lawyer-client confidential communication when Ms Fathy was in detention.

Failure to ensure disclosure also undermines the right to be represented.

The authors understand that this issue is not unique to Ms Fathy's case and is a systemic issue within the Egyptian criminal justice system.

All of the above had a significant impact on Ms Fathy's right to legal assistance, her ability to prepare a defence and therefore on her right to a fair trial more generally.

x. Right to prepare defence

- *ICCPR - Article 14(3) (b)*

"To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing"

The article has two limbs: "time and facilities" and "communication with counsel". The right requires that the accused and his or her lawyers are guaranteed access to all appropriate information, documents and other evidence that the prosecution plans to offer in court against the accused. The accused should be able to communicate, consult with and receive visits from his lawyer without interference or censorship and in full confidentiality.

- *Egyptian Constitution - Article 98: Right to defence*

The right of defence either in person or by proxy is guaranteed. The independence of lawyers and the protection of their rights are ensured as a guarantee for the right of defence.

For those who are financially incapable, the law guarantees the means to resort to justice and defend their rights.

Facts

Please see section 6 ("Right to be informed of charges/to disclosure of evidence") above and section 9 ("Right to legal assistance") for detailed treatment of this issue.

Finding

The Defendant's inability to obtain the Prosecutor's file and the evidence specified above prevented the Defendant from preparing a defence (see section 6 for detailed analysis).

If the information provided to the observers concerning legal consultations is correct, then Ms Fathy's right to prepare a defence was breached.

The observers find that there has been a violation of Ms Fathy's right to prepare a defence and to communicate with her lawyers given that she was never able to communicate with her lawyer in private.

The observers note that this issue is not unique to Ms Fathy's case and is a systemic issue within the Egyptian criminal justice system; as such the observers also recommend that urgent steps be taken by the Egyptian government to address this.

xi. Right to a timely trial

- *ICCPR - Article 14(3) (c)*

"To be tried without undue delay:"

The right of the accused to be tried without undue delay means that he or she must be tried within a reasonable time. The authorities must ensure that the entire criminal proceedings, from the pre-trial investigation stages until the final appeal, are completed within a reasonable time.

Facts

The charges related to incidents on 9 May 2018 and the trial took place on 22 September 2018.

Finding

We find that the Court complied with Ms Fathy's right to a timely trial.

xii. Legal certainty of criminal charges

- *ICCPR - Article 15*

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed..."

Facts

We do not find that the criminal offences charged were applied retrospectively.

Finding

There was no breach of the right to legal certainty of criminal charges.

CONCLUSION AND RECOMMENDATIONS

For the reasons above the observers find that Amal Fathy's trial was not conducted in accordance with international fair trial standards. The standards are set by the International Covenant on Civil and Political Rights 1966, which Egypt ratified in 1982. Egypt ratified the African Charter on Human and Peoples' Rights in 1984, which includes, in Article 7, rights to a fair trial. The 2014 Egyptian Constitution also enshrines the principle of the presumption of innocence.

In particular:

The observers regard the failure to ensure that Ms Fathy had access to the Public Prosecutor's file, and the hard drive containing the video in question, in advance of the trial on 22 September 2018 as a breach of Ms Fathy's right to know the details of the charges against her, to prepare a defence and of her right to be presumed innocent.

The observers regard the inability of Ms Fathy to consult with her lawyers confidentially prior to the trial as a breach of her right to legal assistance and to her right to prepare a defence.

The observers regard the Judge's refusal, without stated reasons, to allow Ms Fathy to call the witnesses she sought permission to call, as a breach of her right to call and examine witnesses.

The observers make the following recommendations in relation to the Egyptian criminal justice system:

1. Defendants must be able to communicate and receive visits from their lawyer in full confidentiality;
2. Defendants must be informed in detail of the cause of the charge against them in reasonable time before the trial.

APPENDICES

Appendix I: Judgment in Arabic

Appendix II: Unofficial translation of the judgment in English