

TRIAL OBSERVATION REPORT

Public Prosecution

v

Khaled Ali

Dokki Misdemeanor Appeals Court, Cairo Egypt
Case No. 672 for the year 2017 (Petitions of Public Prosecutor)

Report prepared for EuroMed Rights

by

Bar Human Rights Committee of England and Wales

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EuroMed Rights
EuroMed Droits
الأورو-متوسطية للحقوق

1. Introduction

- 1.1. Khaled Ali is a prominent Egyptian human rights lawyer and member of civil society. He is the former head of the Egyptian Centre for Economic and Social Rights (ECESR) and co-founder of both the Front for Defending Egypt's Protesters and the Hisham Mubarak Law Center (HMLC), based in Cairo and Aswan, which is dedicated to human rights through litigation, campaigns and legal research. His work has been recognised both domestically and internationally, in particular for his work on anti-corruption, workers' rights and freedom of expression, association and assembly. Khaled Ali's work as a lawyer and political activities have brought him into regular conflict with the Government and he has been detained and subject to criminal proceedings on a number of occasions. In 2017, he announced his intention to stand as a presidential candidate in the 2018 elections.
- 1.2. This report considers and records observations of appeal proceedings concerning Khaled Ali at the North Giza Courthouse, Cairo, Egypt on 3 January 2018 and 7 March 2018 following his earlier conviction on 25 September 2017 for making an obscene gesture. At present, the appeal remains ongoing and has been adjourned for further hearing to 6 June 2018.
- 1.3. EuroMed Rights invited members of the Bar Human Rights Committee of England and Wales ("BHRC") to undertake this trial observation mission.
- 1.4. BHRC is the international human rights arm of the Bar of England and Wales. It is an independent body, dedicated to promoting principles of justice and respect for fundamental human rights through the rule of law. It comprises barristers practising at the Bar of England and Wales, legal academics and law students. BHRC's eighteen Executive Committee members and general members offer their services pro bono, alongside their independent legal practices, teaching commitments and/or legal studies. BHRC employs one full time executive officer.
- 1.5. BHRC aims to:
 - Uphold the rule of law and internationally recognised human rights norms and standards;
 - Support and protect practising 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;
Support and cooperate with other organisations and individuals working for the promotion and protection of human rights.
- 1.6. As part of its mandate, BHRC undertakes legal observation missions to monitor proceedings where there are reasons to believe that the judiciary may not be independent, impartial and/or that the defendant might otherwise be denied the right to a fair trial.

1.7. The remit of BHRC extends to all countries of the world except for 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.

2. Background

2.1. Following the Egyptian revolution in 2011 ousting President Hosni Mubarak, Khaled Ali played a noted role in supporting civil society and challenging the Government's attempts to suppress popular protest. He was a Presidential candidacy for the 2012 Presidential election as leader of the Bread and Freedom Party, which he founded and ran on a left-wing platform of social and economic justice. He described himself as the '*candidate of the poor*', and ran with a slogan of "*We will fulfil our dream*". As an outsider, he secured less than 1% of the vote in an election that brought Mohammed Morsi to power.

2.2. In July 2013, President Morsi was deposed by the military led at that time by General Abdel Fattah el-Sisi. Morsi was replaced by an interim president, Adly Mansour.

2.3. On 26 March 2014, General el-Sisi retired from his military career, announcing that he would run as a candidate in the 2014 presidential election. He was subsequently elected and sworn in as President on 8 June 2014.

2.4. The next presidential election takes place on 26-28 March 2018.

2.5. In February 2017, Khaled Ali had indicated his intention to run for election as a Presidential candidate. On 6 November 2017, he formally announced his bid to run in the Presidential elections. However he, along with several other potential presidential candidates, have subsequently withdrawn their candidature following detentions, arrests, the institution of criminal proceedings and other aspects of reported state interference.

2.6. These potential Presidential candidates include:

- i. The former Prime Minister, Ahmed Shafik, who announced his candidacy in November 2017 in the United Arab Emirates (UAE), where he fled after losing the 2012 election to Mohammed Morsi. Mr Shafik was subsequently detained and deported back to Egypt by the UAE. On 7th January 2018, he announced his intention to withdraw from the Presidential elections. One of his lawyers is reported as stating that the Egyptian government had coerced him into withdrawing by threatening to investigate old corruption charges against him. They lawyer spoke on the condition of anonymity because of the subject's sensitivity.¹ This followed earlier allegations made by him of kidnap and detention by Egyptian authorities.

¹ See, <https://www.nytimes.com/2018/01/07/world/middleeast/egypt-ahmed-shafik.html>

- i. Ahmed Konsowa, a Colonel in the Egyptian army, was detained, convicted and sentenced to six years imprisonment by a military court following the announcement of his intention to run for President. The offence is reported to have been “stating political opinions contrary to the requirements of military order.”²
- ii. Sami Anan, a retired General, was arrested on 23 January 2018, with reports that other members of his campaign and their families had also been arrested. His arrest followed Anan’s declaration of his intention to run for President. He formerly headed Egypt’s supreme military council for armed forces (SCAF) from 2005 until he was sacked in 2012 by then President Morsi.

2.7 On 24 January 2018, President el-Sisi formally submitted his nomination documents for the presidential elections.

2.8 Khaled Ali withdrew his candidacy the same day. At a press conference, he stated that *“the opportunity for hope in this presidential election has gone”*. Referring to the arrest and detention of Anan, he stated: *“There has been stubbornness by the electoral commission and many violations against the other candidate”*.

2.9 Khaled Ali’s withdrawal from the Presidential election is relevant to the criminal proceedings brought against him which are the subject of this report because he and his lawyers claim that the charges and conviction against him are politically motivated. It is noted that the charges against him relate to an alleged offence committed by him (January 2017) before he declared his intention to run for President (February 2017), but the charges were brought subsequently, in May 2017.

2.10 It is understood that President el-Sisi is now the only remaining candidate in the 2018 presidential elections, following the withdrawal of all other candidates. All other candidates have alleged interference, harassment and intimidation. The use of criminal proceedings appears to be a common denominator in this alleged ill-treatment.

2.11 One further piece of relevant background is noted here: In April 2017, Egypt and Saudi Arabia signed a Maritime Demarcation Agreement transferring two Red Sea islands to Saudi Arabian territory. Khaled Ali led the legal challenge of the Agreement which a Court ruled was unconstitutional. The case itself is the subject of ongoing proceedings.³ Another member of the team led by Khaled Ali in the Red Sea islands case, Malek Adly, was arrested and subjected to 100 days solitary pre-trial detention before being released. BHRC has issued statements condemning his detention and also submitted a

² <http://www.bbc.co.uk/news/world-middle-east-42597803>

³ A summary of the case can be found here:

<https://www.madamasr.com/en/2018/03/04/feature/politics/supreme-constitutional-court-validates-tiran-and-sanafir-treaty-overturms-previous-rulings/>

joint complaint to the UN Special Rapporteur on the Independence of Judges and Lawyers.⁴

2.12 It is also noted that Khaled Ali, along with Malek Adly and several of their team are defendants in the appeal proceedings in Case 173. Case 173 is a case dating back to 2011, in which several human rights lawyers and members of NGO's were charged, convicted and sentenced (mostly in absentia) of taking foreign funds of human rights organizations and NGOs working in Egypt, without license, to destabilise the country after the 2011 Arab Spring uprising.⁵

3 Arrest and Conviction

3.1 On 21 May 2017, Khaled Ali was summoned for questioning concerning events said to have taken place outside the Supreme Administrative Court on 16 January 2017. On 23 May 2017, he presented himself at the Dokki police station for questioning where the North Giza District Attorney ordered his arrest pending investigations into charges of making an obscene gesture.

3.2 On the 24 May 2017 he was released on bail having been charged under Article 278 of Penal Code for violating public decency in relation to the "making of an obscene gesture" outside the Supreme Administrative Court following the celebration of a victory in court, concerning the Red Sea Islands.⁶

3.3 On 25 September 2017, Khaled Ali was convicted by the Dokki Misdemeanour Court. He was sentenced subsequently to 3 months' imprisonment.

3.4 Khaled Ali appealed both his conviction and sentence. He was granted bail pending appeal.

3.5 BHRC did not observe the criminal trial. It is therefore unable to make independent observations on the fairness of the hearings in this trial. His lawyers maintain that the charges and conviction are politically motivated relating to both his work as a human rights lawyer (in particular the Red Sea Islands case) and also his Presidential candidacy. Khaled Ali himself has complained that the court refused to hear the defence requests or submissions and both he and his lawyers have criticised procedural and substantive features of the trial and conviction. The Cairo Institute for Human

⁴ The complaint can be found here: <http://www.barhumanrights.org.uk/bhrc-leads-international-outcry-over-treatment-of-egyptian-lawyers-and-human-rights-defenders/>

⁵ BHRC has previously issued a statement on Case 173: <http://www.barhumanrights.org.uk/bhrc-leads-international-outcry-over-treatment-of-egyptian-lawyers-and-human-rights-defenders/>

⁶ Article 278 Law No. 58 of 1937, "Whoever commits in public a scandalous act against prudence shall be punished with detention not exceeding one year to a fine not exceeding three hundred pounds" The English translation is taken from a copy of the Code held by UNODC: https://www.unodc.org/cld/document/egy/1937/criminal_code_of_egypt_english.html

Rights Studies along with 12 other NGO and political parties issued a statement condemning the conviction as unfair.⁷ Amnesty International has also stated that the prosecution is politically motivated, forming part of a wider crackdown against those who criticise President al-Sisi or the elections.⁸

4 Appeal

- 4.1 The trial and initial appeal proceedings were ongoing when Khaled Ali was a presidential candidate. As outlined above, he now has withdrawn his candidacy. Of importance however, is that according to Article 1 of the Egyptian Presidential Elections Law, were his conviction to be upheld, it would have resulted in the disqualification of Khaled Ali from running in the presidential elections.⁹
- 4.2 This report considers and reports upon observations of the hearings in the appeal on 3 January 2018 and 7 March 2018. The appeal again has been adjourned part heard for further hearing on 6 June 2018.

5 Hearings Observed

- 5.1 The appeal was first listed on 8 November 2017. The prosecution relied on evidence of the gesture in video footage broadcast by Egyptian national television. The defence asserted that the relevant extract was fabricated and that the footage had been tampered with. The defence relied on a number of pieces of video footage from the same incident which did not show the alleged gesture and subsequently expert evidence. On this occasion, it is recorded that the matter was adjourned to summons witnesses from the technical committee of the Egyptian Television Network to give evidence and to be subject to examination by Khaled Ali's lawyers in relation to the video footage of the alleged gesture. No observer was present at this hearing.
- 5.2 The first substantive stage of the appeal proceedings was therefore heard on 3 January 2018 in the Dokki Misdemeanour Appeals Court at the North Giza Courthouse, Cairo, Egypt. This was adjourned to 7 March 2018 owing to the failure of the witnesses from the technical committee of the Egyptian Television Network to attend. An observer was present at this hearing.

⁷ The statement and full list of signatories can be found here, Ruling against Khaled Ali a politicized act of retribution exposing deterioration of Egypt's justice system, Statements and Position Papers by CIHRS, September 26, 2017: <https://cihrs.org/egypt-human-rights-organizations-and-political-parties-ruling-against-khaled-ali-a-politicized-act-of-retribution-exposing-deterioration-of-egypts-justice-system/?lang=en>

⁸ Amnesty International, Egypt: Former presidential candidate Khaled Ali facing trial amid crackdown on political activists, posted 24 May 2017, 16:54 UTC available at: <https://www.amnesty.org/en/latest/news/2017/05/egypt-former-presidential-candidate-khaled-ali-facing-trial-amid-crackdown-on-political-activists/>

⁹ Presidential Elections Law no. 22 of 2014, Article 1, Para. 5, states that "[t]he candidate must not have been convicted of a felony or crime violating honour or integrity"

5.3 The second substantive stage of the appeal proceedings took place, as listed, on 7 March 2018 in the Dokki Misdemeanour Appeals Court at the North Giza Courthouse, Cairo, Egypt. Following the hearing of witness evidence, the appeal was then adjourned to 6 June 2018. It is intended that observers will be present for this hearing and that the appeal will finally conclude on this date.

6 Hearing of 3 January 2018

6.1 At the hearing the prosecutor sat to the right of a panel of 4 judges. The court usher and a secretary/court clerk sat to their left. Defence counsel, Khaled Ali and his team (approx. 15-20 people) approached the front of court, at the foot of the Judge's bench, where the hearing took place. The rows of benches in the well of the court were filled with members of the public, defendants in other matters and their counsel. At this hearing, there were also individuals present who claimed to be members of the police and/or Egyptian Security Services.

6.2 The Court had a number of other cases before it (in excess of 50), including Khaled Ali's matter. All matters were listed for 9.30am and the cases were called on in list order. Khaled Ali's case was heard at approximately 1pm.

6.3 The witnesses from the technical committee of the Egyptian Television Network failed to attend the hearing. Their absence, for a second time, was noted by the defence team.

6.4 The Court heard short submissions from the defence team, and specifically submissions on the case concerning the veracity of the video footage, which Khaled Ali alleged had been edited and falsified. The defence relied on their own expert reports in this regard. The footage was played to the Court, along with commentary. This was paused and replayed at the appropriate times, with commentary. Few questions were asked by the Judges during this process. Full submissions were not made as a consequence of the failure of the witnesses to attend.

6.5 The Judges then retired. The Prosecutor also retired at this time. Information provided indicated that the Judges and Prosecutor retired to the same chambers, although this cannot be verified.

6.6 As a consequence of the failure of the witnesses to attend, the matter was adjourned to 7 March 2018.

7 Hearing of 7 March 2018

7.1 The Court was set up in the same way as with the hearing on the 3 January 2018 (set out above).

7.2 Khaled Ali's case was 72nd in a list of 74 matters, therefore while it was listed to be heard at 9:30, it was not called on until 12:00.

- 7.3 Two expert witnesses from Egyptian Television Network attended court to give evidence. The presiding judge asked the first expert witness to take an oath. This was followed by various questions from the judge about the witness' role within the Egyptian Television Network, his experience of video editing and his conclusion on the question of whether or not the CCTV in question had been edited. The expert expressed his conclusion that, in his view, the video had not been edited, evidenced by the footage moving in a proper way without corrections or additions. At that juncture, it was brought to the judges' attention, by defence counsel, that the second expert witness was present in the courtroom. The defence asked for the second witness to be removed from the courtroom, which was effected immediately. The judge frequently referred to the defence expert report during the course of his examination and asked the witness to comment on the defence expert's conclusions.
- 7.4 Defence counsel and Khaled Ali himself then were given the opportunity to cross-examine the witness. During the course of cross-examination, it transpired that the witness was not an expert in television but in fact a specialist in the field of radio. Defence counsel questioned the witness' job description and alleged that it was fraudulent. At that point, the judge warned the defence about making such accusations against the witness, and counsel therefore stopped that line of questioning. On occasion, the judge requested that defence counsel avoid repetition, ask specific and substantive questions and nominate one member of their team to ask the questions.
- 7.5 The same process then took place with the second expert witness. It was noted by the observer that the judge did not warn the second witness about limiting his evidence to what was within his knowledge rather than that which he heard from the first expert witness in his evidence. The second witness also testified that, in his view, the CCTV had not been edited.
- 7.6 Proceedings were then disrupted by noise from another courtroom, at which point the tribunal decided to retire for a break. The prosecutor and judges retired to the judges' room together.
- 7.7 The court reconvened after an hour. The second expert witness was asked to repeat the oath and this was followed by questions from the judge and cross-examination by the defence. Khaled Ali asked for the expert to be handed a copy of his own report. He wished to refer to it during his cross-examination. For an unknown reason, his request was refused on several occasions, until eventually the judge agreed to hand over the report.
- 7.8 It was observed that the other three judges did not intervene at any point during the proceedings or ask questions of their own.
- 7.9 At the conclusion of their cross-examination, Khaled Ali's team requested for the hearing to be adjourned so that they could have some time to prepare their final submissions. They also requested a copy of the first police report. It

transpired that they had previously had a copy of this report but it had since been lost. Arrangements were made for the defence to be furnished with a fresh copy.

8 Meetings Undertaken

- 8.1 On both occasions, the observer met with the judges and the prosecutor in the judges' chambers on the day of the hearing. A letter explaining the nature and purpose of the proposed observation and seeking permission was placed before them. On both occasions, the judges granted permission for the observer to observe the hearing, take notes and be assisted by an interpreter.
- 8.2 Similarly, on both observations, the observer met with Khaled Ali and a member of Khaled Ali's defence team, Malek Adly. The defence considered that they were fully prepared for the hearings and had been afforded sufficient time to do so.
- 8.3 Khaled Ali expressed to the observers his appreciation for an independent and impartial presence in court. There was little opportunity to discuss his case as he had to be fully engaged with the preparation of his hearing.

9 Compliance of the proceedings with international fair standards

- 9.1 On 25 September 2017, Khaled Ali was convicted of violating public decency in relation to "making of an obscene gesture" and sentenced to 3 months imprisonment.
- 9.2 Amnesty International reported that the original trial was 'riddled with flaws' including the Court's refusal to permit cross-examination relating to the disputed video footage in a case in which the defence was that the material was tampered with and fabricated. The report also raised concern over the failure to allow or consider final submissions on Khaled Ali's behalf.
- 9.3 Khaled Ali appealed both his conviction and sentence. The appeal remains ongoing. At present it is too early to ascertain whether the right to an appeal has been effective.
- 9.4 Prior to the hearings, both observers met with the judges in their chambers in order to introduce themselves and explain their roles as an observer. It was noted that on each occasion the prosecutor was also in the room.
- 9.5 In the hearing, the prosecutor sat at the same level as the judges on the bench. It also appears that on each occasion that the tribunal retired to their room, the prosecutor in the proceedings accompanied them.

9.6 These aspects gave the impression of inappropriate proximity between the judges and the prosecution. This appears to be a systemic issue which BHRC has raised on another occasion.¹⁰

9.7 A fair trial involves an independent and impartial judiciary, in particular where the judges are the finders of fact. The prosecutor did not address the court at all. It is unclear whether this is standard practice or unusual in the context of such appellate proceedings. The absence of prosecutorial participation when combined with the inappropriate proximity may well give rise to at least an *appearance* that the prosecution and judges were acting in concert with no separation of function.

10 General observations

10.1 The following comprises observations concerning the conduct of other cases before the Court on the date of the trial observations. It will be appreciated that the observers were not in possession of any material relating to other defendants/appellants before the court and as such the observations are general in nature and do not deal with the detail of specific cases.

Article 10 ICCPR

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

10.2 Khaled Ali appeared on bail therefore there were no observations or concerns about him in this regard. However, prior to his case being called on in the January and March hearings, the observers had the opportunity to witness over 60 hearings relating to other defendants before the Court.

10.3 Defendants in custody were brought into court handcuffed to each other by their wrists. They enter the courtroom, via the main door, as a chain. They are then effectively paraded in front of an already full courtroom as they are walked to the dock. The dock is a dark concrete cell to the front left of the courtroom. Once the defendants are in the cell, they are enclosed behind a cage door, which is padlocked. There is no seating in the dock therefore, unless the defendants choose to sit on the ground, they must stand.

10.4 This appeared to apply to all defendants in custody regardless of age or health. In the March hearing, the 34th case to be called on concerned an elderly defendant. It was immediately apparent that he had difficulty in walking. When he was released from the dock, he leaned on the security guard as he slowly hobbled towards the front of the courtroom, where he stood alongside his counsel throughout his relatively short hearing.

¹⁰ The report can be found here: <http://www.barhumanrights.org.uk/bhrc-and-euomed-rights-launch-trial-observation-report-on-aya-hegazys-case/>

- 10.5 The observer was particularly concerned to see that neither counsel nor the tribunal of their own accord raised the issue of seating for the defendant in case 34.
- 10.6 The conditions of the dock/holding cell do not meet the requirements set out in Article 10.

Article 14 ICCPR

(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality

...

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

- 10.7 Defendants in custody were able to communicate with their counsel. However, that communication was inadequate since Counsel were only able to speak to their clients whilst they were being brought into court, handcuffed to other defendants, or during breaks in the hearing. On the latter point, consultations took place in the courtroom itself, through the caged door, surrounded by other defendants and their counsel, doing the same. While the courtroom during this time is awash with activity and noise, there was no real sense of confidentiality as others were plainly privy to the consultations. It was not clear what, if any, other consultations had taken place.

11 Summary and Recommendations

- 11.1 As stated above, BHRC was not present at the trial and as such cannot make independent observations on the basis of first-hand knowledge. BHRC notes however the concerns of credible and independent organisations as outlined above.
- 11.2 At present the appeal is ongoing and it would be premature to draw any conclusions as to the overall fairness of the proceedings.
- 11.3 The nature of the charge and fact of the proceedings, particularly when placed in the context of the use of criminal proceedings against other potential candidates in the presidential elections gives BHRC cause for serious concern and it will remain engaged with the appeal as it progresses.
- 11.4 BHRC does, however, take the opportunity to reiterate some of the recommendations it has previously made in relation to the systemic issues identified within the Egyptian criminal justice system.
- The use of cramped cages to hold defendants in the courtroom must be abolished in all courts. The holding of defendants in cages at court, is demeaning and dehumanising and which can negatively influence the presumption of innocence;

- Defendants must be provided with the opportunity to communicate confidentially with their lawyers to enable them to prepare their defence. The lack of provision for confidential client-lawyer communications, both in detention and at court interferes with a defendant's right to a fair trial.
- Evidence which the Prosecutor relies upon must be disclosed to the defendants, as well as presented to the court in a timely manner, to enable a proper defence.
- Case management procedures should be put in place to assist the Court in efficiently managing its case load and avoiding lengthy adjournments.