

Opinion No. 25/2009 (Egypt): Communication addressed to the Government on 18 May 2009

Concerning: The source has specifically requested that the names of the 10 individuals concerned not be published; the Government was fully informed of their identities.

6. The ten persons were arrested on 2 January 2009 for allegedly engaging in consensual sexual relations with others of the same sex. All 10 men have been charged under case No.169/2009 Al-Agouza Misdemeanours pursuant to article 9, lit. (c) of Law 10/1961 (Law on Combating Prostitution). This provision criminalizes the "habitual practice of debauchery", which is interpreted to include consensual sexual behaviour between men. In addition, one person has been charged with "managing a residence for the practice of debauchery", under Article 8 of Law 10/1961. It may lead to imposition of a sentence of up to three years of imprisonment and a fine of up to 300 Egyptian pounds.

7. It was alleged that their arrest dates were falsified in the police reports to suggest that they were arrested on 4 January 2009. The 10 men were arrested in an apartment rented by one of them in Mohandesine, Giza. The police officers who arrested them allegedly failed to produce any arrest warrants.

8. Initially, the 10 individuals were taken to the Morality Police Department in Mogamma'a al-Tahrir in central Cairo, where they were held until they were taken to al-Agouza prosecution office on 4 January 2009. All were denied the right to inform a person of their choice about their arrest, in violation of article 71 of the Constitution of Egypt and article 139 of the Code of Criminal Procedure.

9. Some of those detained allege that they were ill-treated by police while being held at the Morality Police Department, including by being insulted, beaten on the back with a stick, slapped on the face and repeatedly kicked.

10. On 4 January 2009, the al-Agouza prosecution office ordered their preventive detention for four days, which was extended on 6 January 2009 for a further 15 days. The Prosecutor also ordered the transfer of all 10 men to the Forensic Medical Authority without their consent to be subjected to anal examinations and to the Ministry of Health laboratories for HIV testing.

11. Following their appearance before the al-Agouza prosecution office, the 10 individuals were moved to the al-Agouza police station, where they remained until 6 January 2009. While at the al-Agouza police station, they were reportedly subjected to further ill-treatment, including verbal abuse and physical beatings by police officers. On one occasion, a police officer is reported to have ordered all ten individuals to remove their clothes and then to have beaten them.

12. On 6 January 2009, the individuals were moved to the Giza police station. On 20 January 2009, before the expiration of the initial 15-day extension, they appeared before a district judge who renewed their preventive detention for another 15 days. This order was appealed before the Appellate Court of Misdemeanours on behalf of the defendants by an Egyptian human rights organization. The court dismissed the appeal on 21 January 2009 and upheld the district judge's decision.

13. On 3 February 2009, the 10 individuals' preventive detention was renewed for a further 15 days by the district judge, apparently because the results of the anal examinations and HIV tests carried out had not yet been lodged.

14. On 19 February 2009, the individuals' detention was renewed for a further 45 days by the Appellate Court of Misdemeanours. The individuals are now being held at el-Qatta

prison, where they were transferred following the latest renewal of their preventive detention period. The appeal of the renewal decision on 26 February 2009 before the Giza Criminal Court was rejected.

15. The Prosecutor General argues that the individuals were prostitutes and that while Egyptian law does not criminalize individual sexual orientation per se, it does criminalize promoting or trading in same-sex sexual relations as it criminalizes prostitution. In addition, it was argued that the arrests were carried out in order to protect public health, specifically with relation to HIV/AIDS.

16. The Prosecutor General's Office maintains that the police entered Mr. Mohamed Ragab Mohamed's home on the basis of a warrant issued by the Office of the Prosecution. It further asserts that the individuals confessed during both the police and public prosecutor investigations to having accepted money in exchange for same-sex sexual relations. The prosecution further argues that interrogations took place in the presence of lawyers and that their confessions were voluntary and made in the presence of their lawyers, who did not object or comment on them. Following their confessions, the defendants were subjected to preventive detention and presented before a judge four days after the arrests, who renewed their detention. The prosecution also confirms that the individuals were referred for forensic anal examinations and that this procedure was used to establish whether or not the accused had engaged in same-sex sexual conduct, either to confirm an accusation or to secure an acquittal.

17. In its response, the Government of Egypt states the following: the 10 persons referred to in the request were arrested at a furnished flat in Agouza district by a police officer from the Morality Police Department. They confessed to engaging in sodomy, an offence under Egyptian law, which criminalizes prostitution and all acts of public indecency, in order to preserve public order.

18. Agouza police station crime report No. 169/2009 was filed on the incident. When the accused were brought to the Public Prosecutor's Office, the latter took the following decisions:

(a) To detain the accused for four days pending investigations; to compile files containing background information on them; to request their criminal records; to reimpose the items seized at the time of their arrest and to deposit them in the police depot until the case had been heard;

(b) To designate a forensic doctor to examine the accused in order to establish whether sexual intercourse had taken place and to collect and analyse samples;

(c) To ask a doctor from the Ministry of Health central laboratories to examine the accused and to conduct tests in order to establish whether or not any of them was suffering from a particular disease and, if so, the nature and mode of transmission of the disease;

(d) To ask the Morality Police Department to conduct further investigations into the incident and to identify other suspects, based on information provided by those who had been arrested.

19. When the accused were again brought to the Public Prosecutor's Office, the Office decided to detain them for a further 15 days pending investigation and to reclassify the case as a serious offence, since one of the accused (a minor) had admitted to having sex in exchange for material reward. The reclassification was carried out in conformity with article 291 of the Children's Act No. 126 of 2008, which prescribes a penalty of five years' rigorous imprisonment for crimes involving the sexual exploitation of young persons.

20. On 28 May 2009, the South Giza Assize Court decided to release the accused on condition that they provided it with details of their place of residence.

21. The interviews conducted by the Public Prosecutor's Office with the accused resulted in the following:

(a) Seven of the accused admitted to the charges, while three stated that they had witnessed the other seven engaging in sodomy with one another and with others but that they themselves had not taken part;

(b) One of the accused admitted to renting the furnished apartment and to equipping it for the purpose of paid prostitution;

(c) One of the accused (the minor) admitted to having sex for money and stated that the person renting the flat had previously brought a person there to have paid sex with him (the minor). The minor had also received extra money from the person renting the flat;

(d) The allegations that the accused were beaten or tortured during their detention were not borne out by the test results. Furthermore, due process was followed throughout and the medical examination that the accused underwent was conducted in accordance with a decision of the Public Prosecutor's Office.

22. The source's comment on the Government's reply makes the following points:

(a) The raid on the flat and arrests of these 10 individuals were made without a warrant;

(b) Upon arrest in the flat, they were asked if they confessed to committing debauchery with men 'habitually' and as a practice 'without distinction'. The defendants, not having assistance of a lawyer at the time of this questioning, made confessional statements to this effect, which were later retracted before a judge;

(c) The combination of these terms implies the overriding concern of the arresting authorities relating to homosexuality and their objective to obtain statements along those lines. The Egyptian authorities continue to detain individuals on the basis of their real or alleged sexual orientation on the basis that this is done to protect public order and morality. Private consensual acts of individuals do not fall within this pervue and violate basic human rights of individuals under national and international law;

(d) The source observes that in relation to forced medical examination of the defendants, reports indicate that five of the 10 detainees were subjected to anal examinations without any further detail as to the nature of the tests. The source challenges the scientific use of these tests as well as the intrusive nature of these procedures which violate bodily rights and amount to torture and other ill-treatment;

(e) The only results provided by the laboratory analysing the tests were in relation to AIDS which incidentally were negative. The source argues that an AIDS test does not prove or disprove the crime of debauchery and is thus unnecessary in the offence under which the 10 men were arrested and charged;

(f) The source states that whilst the defendants have been released on bail, two trials are coming up in which they are implicated as follows: all 10 defendants will face the charge of the "habitual practice of debauchery" under article 9(c) of law 10/1961; in the same trial and before the same court, 9 of the 10 defendants will face the additional charge of 'assault on honour without the use of force or intimidation' against the

defendant aged 17 years under article 269 of the Penal Code; the first defendant Mr. Mohammad Ragab will face two additional charges under law 10/1961 i.e., of managing a furnished house for the practice of debauchery, and enticing and assisting the other nine defendants in the practice of debauchery;

(g) The source also mentions that in the approximately five months of preventive detention that the defendants spent, the case was being dealt with as a misdemeanour attracting sentence of upto 3 years of imprisonment. According to the Code of Criminal Procedures and Instructions of the Prosecution of 2006, the maximum period stipulated for preventive detention for a felony, not misdemeanour, is five months. The defendants have spent time in detention beyond that allowed by law for misdemeanours.

23. The Working Group notes that a number of procedural lapses have occurred in the current case. For instance, it appears that the arresting authorities entered the premises without a warrant. The defendants were questioned and asked to record statements without the presence of a lawyer. Third, no apparent distinction appears to have been meted out in the treatment of the arresting and detaining authorities towards the defendant under the age of 18 and those who were adults. Fourth, preventive detention of the defendants was extended for reasons of supposedly obtaining evidence from medical examinations and tests. These tests, forcibly undertaken, are in and of themselves intrusive in nature and violative of bodily rights of the individual under human rights law.

24. The Working Group views with concern that cases where individuals are being detained, prosecuted, imprisoned and discriminated on the basis of their sexual orientation, appear to be of an ongoing nature and one of which the Working Group as well other human rights bodies are being seized of. To this effect, the Working Group brings to the attention of the Government its Opinions (Opinion No. 7/2002 (Egypt) of 21 June 2002 and Opinion no. 42/2008 (Egypt) of 30 May 2008). It also refers to the concluding observations of the Human Rights Committee (Egypt, CCPR/CO/76/EGY; 28 November 2002).

25. The Working Group would like to bring to the attention of the Government of Egypt its concern over the wide margin of discretion given to the Morality Police, which has been charged with oversight of "moral" and "immoral" behaviour. This wide discretion given to the police to determine what constitutes immoral actions, does not bode well for basic human rights such as privacy; freedom; liberty; freedom of opinion and expression.

26. As stated in its Opinion no. 42.2008 (Egypt) 30 May 2008, the Working Group would like to repeat its view that homosexual behaviour appears to be the focus of crackdown by the authorities, even if it is in a private and consensual environment. Further, that there appears to be an incorrect assumption that homosexual relationships are responsible for HIV/AIDS and thus detrimental to public health. "The Working Group is unable to agree with the Government's view that these tests are in the best interests of her citizens, especially in view of the fact that a huge stigma is attached to HIV/AIDS and when seen in conjunction with homosexuality, sufficient to marginalize and victimize a person for life. The investigation and prosecution procedures as well as treatment meted out to such detainees, is one of multiple discriminations and falls far short of a fair trial, equality before law and equal protection of the law".

27. The Working Group would also like to reiterate its position that the provision on public morals and public health and safety for restricting a right, be invoked where undesirable and controversial acts are being committed in the public domain and likely to be disruptive of the public order. The present case does not appear to be of this nature. Furthermore, the Government would be well aware of the social consequences for individuals convicted (or even accused) of being a homosexual in Egyptian society thus

demanding extreme caution and sensitivity when arresting persons on the basis of 'habitual debauchery' and same sex relationship.

28. Accordingly, the Working Group considers that the arrest and detention of these 10 persons is arbitrary, as forced anal examinations contravene the prohibition of torture and other cruel, inhumane and degrading treatment, whether if, like in the present cases, they are employed with a purpose to punish, to coerce a confession, or to further discrimination.

29. In addition, they are medically worthless for the determination whether or not a person has engaged in same-sex sexual conduct or whether the person has been involved in the practice of habitual debauchery or the prostitution of men.

30. The Working Group has been advised of the release of the detainees pending trial but would like to request and urge strongly that all the requirements of a fair trial be ensured and monitored in accordance with national and international human rights law.

31. In light of the above, the Working Group is of the opinion that the detention of these 10 people is arbitrary, and falls under categories I and II of the categories applied by the Working Group detention. The detention of these persons is in violation of article 2 of the Universal Declaration of Human Rights and articles 2 and 26 of the ICCPR.

32. Consequently, the Working Group requests the immediate release of these persons.

33. In addition, the Working Group reiterates its earlier call (vide Opinion No. 42/2008) upon the Government to reconsider the Anti-Prostitution Law and to bring it in conformity with the international human rights obligations undertaken by the State.