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Introduction

1. This submission is concerned with detention rights in Spain as a whole. Detention rights are those stemming in particular from Articles 5 and 3 ECHR and from the European Prison Rules of the Council of Europe. The submission covers the contributions of others on incommunicado detention in an earlier review, but goes further on the grounds that if a detainee is incommunicado, there is no outside control of how that person is being treated and without that control, abuses are facilitated.

2. As regards incommunicado detention for terrorist suspects, Human Rights Watch expressed regrets *"that Spain rejected recommendations during its 2010 UPR to review the incommunicado detention regime. Severely curtailed rights for certain suspects, including terrorism suspects, remain in place despite repeated calls from the UN Committee against Torture, UN special rapporteurs on torture and on counterterrorism and human rights, and the Council of Europe Commissioner for Human Rights and the European Committee for the Prevention of Torture (CPT)"* **(Annex 1).**

3. In 2017 the CPT reported that little progress had been made in Spain in respect of the incommunicado detention regime and that the practice was still lawful under Spanish law. The CPT concluded that the incommunicado detention regime should be repealed, to prevent ill-treatment of suspects. However, the CPT also noted that Spain considers *that it is necessary to retain such a measure in the context of the fight against terrorism"* **(Annex 2).**

4. Incommunicado detention carries the risk of abuse by the authorities. It has, however, a further and a pernicious effect. An analogy may be helpful. Torture is prohibited absolutely under international human rights law. In particular, torture is not legal even if it might extract life saving information. The necessity or ticking bomb test does not apply. Indeed, a necessity exception must never be admitted to justify torture because the line between justified and unjustified torture is impossible to draw. Also the very

act of allowing torture, even in limited circumstances, recognises the utility of torture and this recognition would encourage and even hasten its use in much broader circumstances. Exceptions would thus destroy the norm.

5. Returning to pre-trial detention, incommunicado detention is unlawful under the ECHR and the ICCPR, being incompatible with respect for dignity and the right to be treated humanely. Thus, one purpose of prison visits from the outside is to ensure that the detainee is being properly treated, and if not to raise the alarm or take the appropriate steps. This control is indispensable. Where incommunicado detention is allowed, it is likely that other violations, including torture, will be committed. Again, exceptions would destroy the norm.

6. Since Spain does allow incommunicado detention, the question is whether or not this departure from international human rights standards, masks and/or leads to other violations of detention and related rights. If so recommendations for change beyond the incommunicado regime would seem appropriate.

Article 5 Cases against Spain before the ECtHR

7. The following cases against Spain for infringement of Article 5 ECHR are reported:

   i) *Drozd & Janousek v France and Spain*, 26 June 1992 (no violation);

   ii) *Scott v Spain*, 18 December 1996 (violation)

   iii) *Riera Blume v Spain*, 14 October 1999 (violation)

   iv) *Dacosta Silva v Spain*, 2 November 2006 (violation)

   v) *Mangouras v Spain*, 28 September 2010 (no violation) GC

   vi) *Del Rio Prada v Spain*, 21 October 2013 (violation) GC.

8. Of the six cases reported four resulted in a finding that Article 5 had been violated. One of these cases, the most recent, was decided by the Grand Chamber (GC). Spain thus has a record of violating Article 5 since 1996. Both the most recent cases have gone to the Grand Chamber.

Del Rio Prada

9. This case is particularly relevant. The Applicant had served her sentence for various lawful convictions and was due for release. However, following a retrospective change in the case law of the Supreme Court, she was detained for almost a further nine years, according to the ECtHR. The Applicant's detention beyond her release date was found to be unlawful in terms of Article 5(1) of the Convention. Substantial damages were awarded.

10. In that case there was a manifest and total disregard for the rights of the individual's right to release after serving a lawfully imposed sentence. The cases examined below go to the right to liberty of non-convicted detainees. The disregard for the rights of the individual remains constant throughout, however.

Illustrative cases reported by Fair Trials International

11. Note that the case studies and the FTI comment below are edited versions of passages in a report published by FTI in 2011 commenting on the European Commission's Green Paper on Pre-trial Detention. Unedited quoted passages are in italics. The FTI Report is available at **Annex 3**

12. By way of introduction FTI states in the above report that its *"cases regularly demonstrate the damaging impact of excessive pre-trial detention. (…). In over 10% of (…) cases our clients complained about excessive time between charge and trial.* ***By far the most complaints about this were received from clients who had been arrested in Spain.*** *40% of the clients who cited issues surrounding pre-trial detention complained that there was excess time between reviews, while 20% said that no reasons were given when they were refused release pending trial. Almost a third of our clients who have been arrested in the EU complained about being denied access to a lawyer at the pre-trial stage. FTI receives the most complaints about denial of access to a lawyer from clients in France, Greece and* ***Spain****"* (our emphasis).

Anthony Reynolds

13. Anthony Reynolds was arrested in Tenerife in December 2006. Spanish police told him that if he did not admit to drug charges, his wife would be put in prison and their one-year-old daughter taken into care. Mr Reynolds denies any involvement in drug offences and believes he was targeted for resisting local police extortion.

14. Mr Reynold's case was dealt with under the "*secreto de sumario*" regime. This means that a judge imposed secrecy on the investigation. Under this regime defendants and their lawyers are denied access to information regarding the charges or the evidence until just before trial. This results in defendants being denied effective legal assistance during detention, making it impossible to prepare a defence or argue effectively for release pending trial.

15. Mr Reynolds was eventually released after spending almost four years in pre-trial detention. Once he was freed, he had to sleep rough as he was not allowed to work or receive benefits. He was acquitted at trial in June 2011.

Comment

16. Mr Reynolds was held in detention for four years despite an apparent absence of evidence. It seems that there was no objective need to deny access to the case file. If there was any need it must have been subjective, presumably to hide the lack of evidence and if so it was abusive. In any event detention was imposed without regard to the circumstances of the individual or his family. Nor was there, it seems, any special diligence. In the result Mr Reynold's detention amounted to punishment without trial.

Mohammed Abadi (not his real name)

17. Mohammed Abadi was arrested in Malaga in 2005 for alleged terrorist activities. Immediately after his arrest, Mr Abadi claims he was taken to a place, where he was stripped naked and humiliated. He was then driven in a car from Malaga to Madrid. During the journey he was interrogated without a lawyer, subjected to verbal abuse from police officers and threatened with a gun. Once in Madrid, Mr Abadi was denied access to a lawyer and consular assistance.

18. Over the course of five days he was kept in a cold cell and subjected to sleep deprivation. He was refused water and all food except pork (which he cannot eat for religious reasons). He was interrogated during this period (again with no access to a lawyer) and was frequently beaten. After five days in these conditions Mohammed was brought before a judge at a hearing where he was represented by a court-appointed lawyer. Mr Abadi was not allowed to speak to the lawyer before or after the proceedings. He was then moved to another prison where he spent two years in pre-trial detention. During this time he was again denied legal assistance. Mr Abadi was kept in solitary confinement in a cell without air conditioning or heating.

19. When Mr Abadi was finally granted release it was under stringent conditions, including the confiscation of his passport, weekly reporting at a police station in Madrid, and not being allowed to work. He had difficulty finding accommodation. When he did the police raided his lodgings and confiscated his belongings. In 2010, he was acquitted of all charges, apparently on the basis that there was no evidence against him.

Comment

20. In this case Mr Abadi was treated as terrorist, although there was no evidence against him. He was mistreated physically. He was denied sustenance. He was denied legal advice and consular assistance. He was deprived of his dignity and harassed. Above all, though, he was denied access to persons who would have noticed the degrading or even inhuman way in which he was being treated. Thus the first violation was his being held incommunicado. Had the incommunicado regime not applied the other violations would not have been possible or would have been exposed. This case suggests, in conclusion,

that detention rights in Spain in general are fragile, incommunicado being a marker of more widespread violations of detention rights.

Summary of Pre-trial Detention in Spain in the FTI Report

21. FTI concludes on Spain as follows:

> *"The maximum period of pre-trial detention in Spain is four years. Practitioners report that decisions on pre-trial detention are generally taken* ***without a full consideration of whether detention is proportionate.*** *(…). Defendants facing serious charges, such as terrorism, can be held in incommunicado detention. Under this regime, the defendant can be held for up to 13 days during which certain fundamental rights are severely curtailed: no visits or communication with the outside world; no right to notify family or friends of detention or whereabouts; no right to choose own lawyer or have meaningful communication with state-appointed lawyer during the incommunicado period. In 2008 the International Commission of Jurists noted that 'Prolonged incommunicado detention can itself amount to torture or cruel, inhuman or degrading treatment.' Another feature of Spanish pre-trial detention includes the use of secret legal proceedings, or "secreto de sumario", which severely restricts access to the details of the case, including the charges and evidence in the case until up to 10 days before the closing of the investigative phase"* (our emphasis).

A further illustrative case: The Kokorev Family

22. Spain requested the extradition from Panama of Vladimir, Yulia and Igor Kokorev, (father, mother and son respectively) in 2015 on a vaguely worded suspicion of money-laundering. They did not resist extradition. However, they did not waive their right to protection from self-incrimination, nor did they waive their protection under the

specialty principle. They were held for two years in pre-trial detention, although the duration of their respective detentions varied. No formal charges were laid, nor could they be laid because there was no evidence that the Kokorevs had handled illicitly generated money. Towards the end of these two years detention was extended for a further two years, still in the absence of a formal charge and of evidence of a predicate crime. On appeal this was commuted to territorial confinement which restricted the family to Gran Canaria and required them to report weekly to the local court. This confinement is ongoing and no charges have been brought.

23. For much of their incarceration the Kokorevs were unable to see the case file as it was subjected to the *secreto de sumario*. This prevented them from contesting their detention effectively.

24. All three were detained under a special regime for particularly dangerous criminals, initially designed for convicted terrorists (FIES), although they were not convicted and none of them even had a criminal record.

25. This FIES status meant frequent changes of cell, the use of mechanical restraints when being moved, restricted visits and allowing the prison administration to monitor and record without judicial authorisation all of their communications and visits. They were also denied the benefit of European Prison Rules, such as the right to be detained separately from convicted prisoners. Day release was not available. Contact between the family was also severely restricted. Bail was refused. Alternatives to incarceration were not considered or offered. Articles 3 and 5 ECHR seem to have been violated.

26. The absence of a predicate offence meant that the facts as alleged to ensure extradition did not describe a criminal offence in Spain. This meant that there was, under the ECHR, no "*reasonable suspicion*" to justify the family's detention. Furthermore, the authorities failed to act with the "*special diligence*" which is required under the ECHR for detainees, so that where there is detention, cases are brought forward with a sense of urgency. Instead, the family was left to languish in prison, rather than being brought to trial and would have languished for a further two years had the Appeal Court not ordered confinement instead.

27. The question has to be asked why the family was held so long in prison. No attempt was made to bring the case to trial. In the absence of evidence they should have been released, but the prosecution wanted instead to have them detained for the maximum of four years. It may tentatively be concluded that one purpose of the incarceration was to induce a waiver of the protection against self-incrimination. Another purpose might simply have been to punish the family, because the authorities deemed them guilty and believed that the fatal impediments to a trial should not result in an absence of punishment.

28. Whatever the purpose, though, the fact is that the family's rights as detainees were simply disregarded across the board and that the presumption of innocence was not applied. Such a wholescale denial of rights in this one single case indicates that the protection of detention and other related rights in Spain is defective **(Annex 4).**

Conclusion and submission

29. Concern has been expressed for a long time about pre-trial detention in Spain, most recently in Opinion 6/2019 of the UN Working Group on Arbitrary Detention of 27 May 2019 concerning the detention of certain Catalan politicians, which the Working Group found to be arbitrary. The cases summarised here do not, therefore, seem to be isolated examples of system failure. On the contrary they seem to be representative of an ingrained and systemic problem, especially when read in conjunction with the ECtHR case law listed and partially discussed above. The problem is much wider than incommunicado detention.

30. In the light of the foregoing it is submitted that Spain should be called upon to:

    i) repeal the law on incommunicado detention;

    ii) cease holding detainees without formal charge;

    iii) make much more extensive use of alternatives to prison detention;

    iv) cease using the FIES classification for non-dangerous inmates;

    v) abolish the *secreto de sumario*;

vi) cease using pre-trial detention as a means of punishment, and

vii) respect the presumption of innocence

viii) respect the special diligence obligation.

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