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Enclosed information material is submitted by Human Rights Without Frontiers

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Rule of Law II : Protection of Human Rights and Fighting Terrorism

SPAIN: The abuse of human rights in the fight against terrorism

Guaranteeing the safety of its population from terrorist acts and other forms of crime is a major responsibility of and duty on the state but not at the price of denying human rights. There has to be a balance.

In Spain, an emblematic case, where no balance existed and human rights were discarded altogether is the treatment of the Kokorev family: Vladimir Kokorev and his wife Yulia, both in their sixties and their 33-year old son Igor. In this case Spain held three family members in lengthy pre-trial detention, combined with no access to their case file (a regime called "*secreto de sumario*"), and subject to particularly harsh prison conditions reserved for terrorists, terrorist suspects and violent criminals. Under Spanish law, this system of surveillance of terrorists, terrorism suspects and violent criminals is known as **FIES**, or **Ficheros de Internos de Especial Seguimiento**.

According to Scott Crosby, of the Brussels Bar, who submitted an application in July this year on behalf of Vladimir Kokorev to the European Court of Human Rights, all three family members were imprisoned in late 2015 and detained until late 2017 in two cases and until early 2018 in the other on a vaguely worded suspicion of money-laundering. No formal charges were laid, nor

"could they be laid because there was no evidence that the Kokorevs had handled illicitly generated money", Crosby says in his submission.

Towards the end of the first two-year period, detention was extended for a further two years, still in the absence of a formal charge and 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. These restrictions are ongoing.

Serious denial of human rights and FIES-based discrimination

Under the FIES status, the Kokorev family were deprived of their basic human rights during their detention because they were treated in the same way as terrorists or terrorist suspects although they enjoyed the presumption of innocence. In this regard, several flaws in Spain's justice system need to be highlighted:

1. The secrecy of the judicial procedure concerning their case

After their arrest, the Kokorevs were subjected to the *secreto de sumario* regime. For 18 months, the proceedings remained secret. This meant that during this time, their counsel had no access to the investigation files, no access to basic information on the reasons for their arrest, no access to a description of the offence and to the evidence against them.

Repeated recommendations from various quarters inside and outside Spain, including the European Parliament, have called on Madrid to abolish the *secreto de sumario* and the FIES system, to respect the presumption of innocence, and to reform the practice of lengthy pre-trial detention, which, however, Spain ignores.

In our recent submission to the UN Universal Periodic Review of Spain, we stressed that : "Significantly, this case offers a unique corroboration that the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (which should prevent the *secreto de sumario* from being used in the context of pretrial detention), has not been properly implemented by Spain via the *Ley Orgánica* 5/2015 of 27 April 2015."

2. The use of interrogation techniques amounting to torture, inhuman or degrading treatment

Another joint submission to the UPR process by a number of Spanish law firms that specialise in criminal and penitentiary law, contends that pretrial imprisonment is used by Spanish judges to "soften" the person under investigation.

Indeed, when people are held without charge for two years extendable to four years, this is clearly a means of forcing confessions, true or false. This is not compatible with human rights law.

3. Guilt by association

The Kokorevs were treated as a single entity, the "Kokorev family", no distinction being made between the three of them, thus suggesting the presumption of guilt by association.

4. Detention conditions: inhuman and degrading treatment

Earlier this year, our NGO *Human Rights Without Frontiers* interviewed the Kokorevs in Las Palmas about their detention conditions. According to the family, they were treated worse than convicted criminals.

Vladimir Kokorev was not allowed to be housed with his son. When he requested reasons, he was told it was because they were under active investigation. However, many other inmates also under active investigation were housed together and in any event this was an insufficient response.

In addition, day release from the prison or a regime of 'semi-liberty', (i.e. nights only in prison) were granted to convicted criminals on certain conditions after they had served a part of their term. This right was denied to each of member of the Kokorev family, although they had not been convicted and were still enjoying the presumption of innocence. Yet they had spent substantially more time in prison than required of convicted prisoners to make use of these benefits.

Combining detention without charge with FIES treatment is degrading treatment in aggravated form and it might even amount to inhuman treatment. Should the mental strain on the detainee be severe enough it might include torture.

Defence counsel was unsuccessful in obtaining their release on bail. Their personal circumstances were not taken into consideration by the authorities: Vladimir Kokorev's health seriously deteriorated, requiring him to undergo

heart surgery, and his son was an expectant father who missed the birth of his child while in pre-trial detention.

Further Observations

When exceptional measures designed to combat terrorism are used indiscriminately the risk is that they cease to be exceptional but become the norm or the standard.

Over the last fifteen years, the European Parliament[1] and the Council of Europe[2], in particular the Committee of Prevention of Torture (CPT), have expressed serious concerns and issued stern warnings about the FIES system, including a particular aspect thereof, namely incommunicado detention.

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 such a regime should be repealed to prevent ill-treatment of suspects. However, Spain considers "that it is necessary to retain such a measure in the context of the fight against terrorism"[3].

As regards incommunicado detention for terrorist suspects, *Human Rights Watch* also 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)"[4].

As the Kokorev case demonstrates, the FIES system seems to be implemented in an indiscriminate and inconsistent manner without proper supervision and control. In addition, this Kokorev case underscores other equally important concerns, expressed in prior cycles regarding pretrial detention in Spain, such as

[1] http://www.europarl.europa.eu/doceo/document/E-8-2016-004686_EN.html ; http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2006-0571&language=HU
[2] https://rm.coe.int/pdf/168076696b ; https://rm.coe.int/16806db842
[3] https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-acknowledges-some-positive-steps-in-spain-but-calls-for-ending-fixation-in-prisons-and-juvenile-centres
[4] https://www.hrw.org/news/2014/12/19/spain-upr-submission-2014

its excessive length[5] and the continuing existence of the *secreto de sumario* regime[6], under which the evidence imposing pretrial detention may be withheld from the detainee.

Recommendations

Considering that in Spain parts of the anti-terrorist legislation are now being imposed on non-violent and non-dangerous persons who are not even terrorism suspects and result in unfair detention conditions and extensive pre-trial detention periods;

Considering that Spain rejected recommendations during its 2010 UPR to review the incommunicado detention regime and contends that this regime is necessary;

Considering that several mechanisms of the United Nations and the Council of Europe as well as of the European Union have repeatedly called for detention conditions in line with international standards;

Considering that the Venice Commission cooperates closely with the OSCE and especially with the OSCE/ODIHR, both institutions refer to each other's acquis regularly and that the OSCE/ODIHR and the Venice Commission have often published joint documents;

Human Rights Without Frontiers recommends that the Spanish authorities

repeal the law on incommunicado detention;
cease holding detainees without formal charges;
make much more extensive use of alternatives to prison detention;
cease using the FIES classification for non-dangerous inmates;
abolish the *secreto de sumario*;
cease using pre-trial detention as a means of punishment;
respect the presumption of innocence;
respect the special diligence obligation;

[5] CCPR/C/ESP/CO/5, p. 15
http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqX7R5nHBFqJOu4nx7MjbHIQGRVVU9lYMm7%2fVNRMQDQGFNX4tfS%2f2GVjoUvq1PfNmfs6EDcgUT1eQlxtxhEEN3DQz6o4Ev0FGnsaY2TBcV7U
[6] CCPR/C/ESP/CO/5, p. 18

and comply with the recommendations of the United Nations and the Council of Europe.

Human Rights Without Frontiers also recommends that

The OSCE/ODIHR approach the Venice Commission with a view to addressing jointly the incompatibility of misapplication of the FIES detention regime in Spain with human rights law and the human rights infringements of other unlawful aspects of pre-trial detention there more generally.