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## Human Rights Council

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Agenda item 3

**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

## **Written statement\* submitted by Coordination des Associations et des Particuliers pour la Liberté de Conscience, a non-governmental organization in special consultative status**

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[26 May 2019]

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\* Issued as received, in the language(s) of submission only.



## Misuse and abuse of the pre-trial detention and the FIES system in Spain & the Kokorevs Case

In 1996, Spain adopted a law introducing a special status and treatment for certain prisoners during their pre-trial detention and possible subsequent imprisonment.<sup>[1]</sup> Known by the acronym FIES, which stands for “The Register of Prisoners requiring Special Surveillance” (*Ficheros de Internos de Especial Seguimiento*), the system originally pursued a legitimate objective.

Since then, however, the law has been misappropriated and is now being imposed on non-violent and non-dangerous persons resulting in unfair detention conditions and considerable extensions of pre-trial detention periods.

As explained in a 2016 report by the European Commission,

“The FIES registry was formally incorporated in the Prison Regulation through the adoption of the Royal Decree 419/2011... The Secretary General of Penitentiary Institutions (SGIP) is entitled to create special registries of inmates in order to guarantee the security and good order of the establishment, as well as the integrity of inmates...

...The specific categories are as follows:

FIES 1 (direct control) includes inmates that have been involved in dangerous perturbation of the prison regime;

FIES 2 (organised crime) includes inmates sentenced or suspected of criminal offences related to the affiliation to organised crime;

FIES 3 (armed terrorist organisations) includes inmates who still belong or have belonged to a terrorist organisation;

FIES 4 (security forces) concerns inmates who previously belonged to security forces of the State;

FIES 5 (special characteristics) refers to inmates classified in accordance with their specific criminological profile such as sex offenders, Islamic terrorists, war criminals, etc.”<sup>[2]</sup>

Over the last fifteen years, the European Parliament<sup>[3]</sup> and the Council of Europe<sup>[4]</sup>, in particular the Committee of Prevention of Torture (CPT), have expressed serious concerns and warnings about the FIES system.

Earlier this year, the Brussels-based NGO *Human Rights Without Frontiers* interviewed three Spanish citizens who were victims of the misappropriation of the FIES system. The unfair judicial treatment of their case and their detention conditions were worse than convicted people. All three were classified under the FIES - 5 status, even though they did not match the above listed characteristics.

### Case Study: Discriminatory and harsher detention conditions of Vladimir Kokorev, Igor Kokorev and Yulia Maleeva

The Kokorev family were arrested in Panama in September 2015 on an international arrest warrant issued by Spain related to an alleged money laundering. The three agreed to their extradition, were released on bail in Panama and transferred to Spain, where they expected the case to be dismissed, or, at least, to be released on bail as in Panama after accepting extradition. They were first incarcerated in Madrid and then in Las Palmas where they spent about two years in detention.

Vladimir Kokorev was born in Moscow on 11 September 1954. He started his pre-trial detention at the age of 61 years and was then suffering from health concerns. Shortly after his 2 years, 2 months and 18 day-long detention (from 31 October 2015 until 18 January), he had to undergo a serious heart surgery.

Yulia Maleeva, his wife, was born on 23 June 1952 in Zhdanov (SSR Ukraine) and spent almost 700 days in prison (from 31 October 2015 until 27 September 2017).

Igor Kokorev, their son, is a lawyer who was born on 27 December 1982 in Moscow. He spent more than 700 days in prison (from 10 October 2015 until 18 October 2017).

The three faced many human rights violations, including that:

Even after their arrest the proceedings remained secret for 18 months; during this time, their counsel was denied access to their files and was not given basic information on the reasons for their arrest, including a description of the offence and of the evidence against them;

They were treated as a single entity, the “Kokorev family”, no distinction being made between the three individuals, suggesting the presumption of guilt by association;

Vladimir Kokorev, his wife and their son were not accused of using violence or inciting violence. However, they were all assigned to a FIES - 5 status;

Their attorneys were unsuccessful in getting their release on bail, their personal circumstances not being taken in consideration by the authorities, including the severe health deterioration of V. Kokorev, or the fact that I. Kokorev became a father whilst in prison and that his partner was diagnosed with acute depression as a result of his absence that was impairing her ability to take care of their child:

Even after substantial time had elapsed from their arrest and the Spanish authorities had become aware that no trial could be held within many years (certainly not within the maximum terms for pretrial imprisonment under Spanish law), the pretrial detention of the whole family continued.

In all probability they spent more time in pretrial detention than the prison term they could be convicted to after a trial.

### **Treated as convicts & Subjected to poor prison conditions**

The Kokorevs were robbed of their presumption of innocence during their pre-trial detention, being treated in all respects as dangerous, convicted prisoners.

They were not released on bail, nor were alternative measures, such as home arrest, ever considered. For a period of six months I. Kokorev was kept in a different prison from his parents. Upon transfer to the same prison, he was detained in a separate module. They filed official requests to be housed together, but all attempts were refused.

The Kokorevs were denied basic information on the status of the court proceedings and on how long the secrecy and the imprisonment would last. They also suffered from the poor prison conditions in Las Palmas and from being subjected to the same living regime and social reinsertion programs as the convicted inmates, except in that which would benefit them.

In that regard, day leaves from the prison or a regime of ‘semi-liberty’, (i.e. only sleeping in prison) were granted to convicted criminals on certain conditions after they had served a part of their term. This right was denied to the Kokorevs, who had not been convicted and were still enjoying the presumption of innocence.

As explained during an interview, Vladimir Kokorev struggled in prison with his health (he suffers from high blood pressure, heart problems, and diabetes) and dignity. He related an episode that is particularly illustrative of the consequences of the FIES status:

After many months of struggling with the prison bureaucracy, he was given permission to be examined by a cardiologist in a hospital, but on that specified day, nobody came to take him to the hospital. At a random later date, V. Kokorev was escorted by half a dozen guards armed with automatic weapons and bulletproof vests to a different hospital to see another doctor. During the ride to the hospital, he was handcuffed in the back of a police riot van. While in the hospital, V. Kokorev remained handcuffed. The armed authorities refused to remove his handcuffs, even when it was requested by a nurse. The doctor was unable to perform a proper examination.

His right to receive visitors was not always respected. For nearly six months, he was denied the right to be visited by representatives of the Jewish community in Las Palmas.

Under FIES - 5 status, Yulia Maleeva and Igor Kokorev faced similar struggles. They remarked in their interviews with *Human Rights Without Frontiers* that they were not treated as innocent persons.

I. Kokorev was not allowed to be housed with his father. When he inquired about the reason why, they responded it was because they were under active investigation. However, many other inmates also under active investigation were housed together.

Y. Maleeva reported that she felt disoriented from being moved to a different cell every 5 to 9 weeks, a security measure prescribed under the FIES-5 status to which in her module only she was being subjected.

After more than 13 years of investigation by the Spanish authorities, on 1 August 2017, judge Ana Isabel de Vega Serrano extended the pre-trial detention of the Kokorevs for further 2 years.

The Audiencia Provincial de Las Palmas quashed the extension in respect of Y. Maleeva and I. Kokorev in September/October 2017, releasing them without bail, but they were confined to the island of Gran Canaria. V. Kokorev was not released until January 2018. The Audiencia Provincial acknowledged in identical terms for each of them that their prolonged detention could amount to punishment without trial, but failed to acknowledge their right to compensation under the terms of the European Convention on Human Rights.

In August 2018 the judge extended the investigation for another 18 months, citing that she is yet to “determine the facts and identify the persons responsible”. It is unlikely that a trial will be held within the next five years; almost 10 years after the arrest of the family and more than 20 years after the start of the investigation.

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[1] <https://web.archive.org/web/20091213211233/http://www.reicaz.es/tofyserv/sop/texdtos/le/i21-96-regimen.pdf>

[2] <https://rm.coe.int/pdf/168076696b>

[3] [http://www.europarl.europa.eu/doceo/document/E-8-2016-004686\\_EN.html](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>

[4] <https://rm.coe.int/pdf/168076696b> ; <https://rm.coe.int/16806db842>

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## **UN 42<sup>nd</sup> Session of the Human Rights Council**

### **Oral Statement about the misuse and abuse of the pretrial detention and the FIES system: the Kokorev case**

In 2019, *Human Rights Without Frontiers* (HRWF) travelled to Las Palmas de Gran Canaria, Spain, to conduct an investigation with regards to the controversial system, *Ficheros de Internos de Especial Seguimiento* (FIES), and the consequences of its misuse in the case of the arrest and imprisonment of the Kokorev family.

In September 2015, the family were arrested in Panama and agreed to be extradited to Spain on charges of alleged money laundering, where they were placed under pre-trial detention. On 1<sup>st</sup> August 2017, a judge tried to extend their pre-trial detention for two additional years.

HRWF discovered that in the case of the Kokorev family, the FIES law has been misappropriated and is now being imposed on non-violent and non-dangerous persons resulting in unfair detention conditions and extensive pretrial detention periods.

The case of the Kokorev family in particular underscores concerns expressed in prior cycles regarding pretrial detention in Spain, such as its appropriateness, its

excessive length<sup>1</sup> and that in Spanish law a *secreto de sumario* regime exists<sup>2</sup>, under which the evidence and the reasoning for decreeing pretrial detention may be withheld from the detainee.

***Human Rights Without Frontiers*** recommends that Spain take the following actions in order to align its practices with its international legal obligations:

- 1) Reform the FIES system by publicly outlining specific criteria for each status from FIES 1 to 5 and clarify a chain of command and decision-making process for the placement of prisoners under each of the FIES statuses;
- 2) Dramatically improve conditions in both prisons in Gran Canaria, including an increase in the number of staff in both facilities;
- 3) Review the implementation of 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 to ensure that the *secreto de sumario* regime does not prejudice any way the rights of the detainees, in particular that no evidence or reasoning on which pretrial detention is grounded is withheld from them.

For more information, see:

[http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=31560](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=31560)

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<sup>1</sup> CCPR/C/ESP/CO/5, p. 15

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqX7R5nHBFqJOu4nx7MjbHIQGRVVU9IYMm7%2fvNRMQDQGFNX4tfS%2f2GVjoUvq1PfNmfs6EDcgUT1eQltxhEEN3DQz6o4Ev0FGnsaY2TBcV7U>

<sup>2</sup> CCPR/C/ESP/CO/5, p. 18

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## **42º sesión del Consejo de Derechos Humanos de las Naciones Unidas**

### **Declaración oral sobre el uso indebido y el abuso de la prisión preventiva y del sistema FIES en España: el caso Kokorev**

En 2019, la organización *Human Rights Without Frontiers (HRWF)* viajó a Las Palmas de Gran Canaria, en España, para llevar a cabo una investigación sobre el controvertido sistema de "Ficheros de Internos de Especial Seguimiento" (FIES), y las consecuencias de su uso indebido en el caso de la detención y encarcelamiento de la familia Kokorev.

En septiembre de 2015, la familia fue arrestada en Panamá y accedió a ser extraditada a España bajo el presunto cargo de blanqueo de dinero, donde fue puesta bajo prisión preventiva. El 1 de agosto de 2017, casi dos años después de haber sido detenidos, un juez trató de prorrogar aún dos años más su prisión preventiva.

HRWF descubrió que en el caso de la familia Kokorev, el sistema FIES ha sido inapropiadamente utilizado y ahora se está imponiendo a personas que no son violentas ni peligrosas, lo que ha dado lugar a condiciones de detención injustas y a largos períodos de prisión preventiva.

En particular, el caso de la familia Kokorev pone de relieve preocupaciones expresadas ya en ciclos anteriores en relación con la prisión preventiva en España, como su idoneidad, su excesiva duración<sup>1</sup> y la existencia en la legislación española del régimen de secreto de sumario<sup>2</sup>, en virtud del cual al detenido se le pueden ocultar las pruebas y el razonamiento por el que decretan la prisión preventiva.

***Human Rights Without Frontiers*** recomienda a España que tome las siguientes medidas para alinear sus prácticas con sus obligaciones legales internacionales:

- 1) Reformar el sistema FIES describiendo públicamente los criterios específicos para cada grupo FIES, del 1 al 5, y aclarar la cadena de mando y el proceso de toma de decisiones para la inclusión de los reclusos en cada grupo FIES;
- 2) Mejorar sustancialmente las condiciones en los dos centros penitenciarios de Gran Canaria, incluyendo un aumento del personal en ambos centros;
- 3) Revisar la aplicación de la Directiva 2012/13/UE del Parlamento Europeo y del Consejo, de 22 de mayo de 2012, relativa al derecho a la información en los procesos penales, para garantizar que el régimen de secreto de sumario no perjudique en modo alguno los derechos de los detenidos y, en particular, que no se les oculte ninguna prueba o razonamiento en que se base su prisión preventiva.

Para más información:

[http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=31560](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=31560)

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<sup>1</sup> CCPR/C/ESP/CO/5, p. 15

<sup>2</sup> CCPR/C/ESP/CO/5, p. 18

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## **United Nations Human Rights Council Universal Periodic Review of Spain**

**Submission: The FIES system, the denial of fair trial to the Kokorev family  
and prison conditions in Gran Canaria**

In 2019, Human Rights Without Frontiers (HRWF) travelled to Las Palmas de Gran Canaria, Spain, to conduct an investigation with regards to the controversial system, *Ficheros de Internos de Especial Seguimiento* (FIES), and the consequences of its misuse in the case of the arrest and imprisonment of the Kokorev family.

During their mission, the HRWF team interviewed the three members of the Kokorev family - Vladimir Kokorev, Igor Kokorev, and Yulia Maleeva<sup>1</sup> - on their experiences in Gran Canaria prisons, their lawyer and representatives of the trade union of the prison guards.

In September 2015, the family were arrested in Panama and agreed to be extradited to Spain on charges of alleged money laundering, where they were placed under pre-trial detention. On 1<sup>st</sup> August 2017, a judge tried to extend their pre-trial detention for two additional years. After the Kokorev case came to the attention of a group of members of the European Parliament, they were eventually released without bail from pre-trial detention over a period of a few months at the end of 2017 and early 2018.

### **Ficheros de Internos de Especial Seguimiento (FIES)**

In 1996, Spain adopted a law introducing a special status and treatment for certain prisoners during their pre-trial detention and possible subsequent imprisonment.<sup>2</sup> Known by the acronym FIES, which stands for The Register of Prisoners requiring Special Surveillance (*Fichero de Internos de Especial Seguimiento*), the system originally pursued a legitimate objective.

Since then, however, the law has been misappropriated and is now being imposed on non-violent and non-dangerous persons resulting in unfair detention conditions and extensive pre-trial detention periods.

As explained in a 2016 report by the Council of Europe,

“The FIES registry was formally incorporated in the Prison Regulation through the adoption of the Royal Decree 419/2011...the Secretary General of Penitentiary Institutions (SGIP) is entitled to create special registries of inmates in order to guarantee the security and good order of the establishment, as well as the integrity of inmates...

The specific categories of the FIES system are as follows:

- FIES 1 (direct control) includes inmates that have been involved in dangerous perturbation of the prison regime;
- FIES 2 (organised crime) includes inmates sentenced or suspected of criminal offences related to the affiliation to organised crime;

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<sup>1</sup> Vladimir Kokorev and Yulia Maleeva are married, Igor Kokorev is one of their children. Vladimir Kokorev was born on 11 September 1954. Yulia Maleeva was born on 23 June 1952. Igor Kokorev was born on 27 December 1982.

<sup>2</sup> <https://web.archive.org/web/20091213211233/http://www.reicaz.es/tofyserv/sop/textdosle/i21-96-regimen.pdf>

- FIES 3 (armed terrorist organisations) includes inmates who still belong or have belonged to a terrorist organisation;
- FIES 4 (security forces) concerns inmates who previously belonged to security forces of the State;
- FIES 5 (special characteristics) refers to inmates classified in accordance with their specific criminological profile such as sex offenders, Islamic terrorists, war criminals, etc.”<sup>3</sup>

Over the last fifteen years, the European Parliament<sup>4</sup> and the Council of Europe<sup>5</sup>, in particular the Committee of Prevention of Torture (CPT), have expressed serious concerns and warnings about the FIES system.

As the Kokorev experience reveals, the FIES system does not appear to have a proper implementation strategy. In addition, this case underscores certain other concerns expressed in prior cycles regarding pretrial detention in Spain, such as its excessive length<sup>6</sup> and that in Spanish law a *secreto de sumario* regime exists<sup>7</sup>, under which the evidence and the reasoning for decreeing pretrial detention may be withheld from the detainee.

### **General prison conditions in Las Palmas**

The island of Gran Canaria is home to two prisons: Centro Penitenciario Las Palmas I “Salto del Negro” and Centro Penitenciario Las Palmas II “Juan Grande”.

Built in 1982, the Centro Penitenciario Las Palmas I became extremely overcrowded in the early 2000s. The Centro Penitenciario Las Palmas II opened in 2011 to alleviate this issue. However, the older prison, where Igor Kokorev spent more than five months, is still housing inmates in poor conditions. In the Centro Penitenciario Las Palmas I, former inmates reported to HRWF multiple structural issues in the buildings; including, extremely thin walls that are crumbling in certain places, doors that are only locked manually from the outside (creating a clear fire hazard), and the creation of bunk-beds by welding metal bed frames together.

In addition, both prisons are vastly understaffed, leaving inmates and staff in danger at the two locations.

In January 2019, it was reported that there were 87 vacant posts within the two prisons combined.<sup>8</sup>

<sup>3</sup> <https://rm.coe.int/pdf/168076696b>

<sup>4</sup> [http://www.europarl.europa.eu/doceo/document/E-8-2016-004686\\_EN.html](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>

<sup>5</sup> <https://rm.coe.int/pdf/168076696b> ; <https://rm.coe.int/16806db842>

<sup>6</sup> CCPR/C/ESP/CO/5, p. 15

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqX7R5nHBFqJOu4nx7MjbiHIQGRVVU9IYMm7%2fvNRMQDQGFNX4tfS%2f2GVjoUvq1PfNmfs6EDcgUT1eQltxhEEN3DQz6o4Ev0FGnsaY2TBcV7U>

<sup>7</sup> CCPR/C/ESP/CO/5, p. 18

<sup>8</sup> <https://confi legal.com/20190119-en-espana-ha-muerto-un-presos-cada-dos-dias-en-el-ultimo-mes-y-medio-informala-apfp/>

In both prisons there have been numerous incidents of attacks on guards and inmate escapes. Between January – May 2019, there were already five inmate deaths in Las Palmas II and at least two deaths in Las Palmas I.<sup>9</sup>

Of particular concern is the administration of medicine to prisoners over holidays and weekends. It has been reported that due to a lack of health professionals, inmates are responsible to self-administer their own medicine over weekends and holiday breaks. With a number of inmates dying of overdoses, such a practice poses a risk to the community. As Francisco Llamazares, the president of *La Asociación Profesional de Funcionarios de Prisiones* (APFP), explains, “medication is being given for three days in a single delivery...[and is] a risk, both for the inmates, as for the officials themselves, when endangering the health of the inmates and the internal security of the inmates.”<sup>10</sup>

Both former inmates as well as a representative from the Workers Commissions of the Canary Islands confirmed these concerns to HRWF.

The Kokorevs were subject to poor prison conditions in Las Palmas. Further exasperating their conditions, Vladimir Kokorev, Yulia Maleeva and Igor Kokorev were all classified under the highest level of the FIES system of special surveillance, which is normally reserved for terrorists, sex offenders, or war criminals. Under their FIES status, they were further restrained in their ability to enjoy their rights during their detention, particularly the right to presumption of innocence, as other inmates and the prison guards were aware of their FIES status and that this status is assigned to particularly dangerous criminals.

The case study of the Kokorev family shows that their rights were grossly violated during their detention in Las Palmas de Gran Canaria despite the international standards protecting the rights of detainees, such as:

- 1) Standard Minimum Rules for the Treatment of Prisoners
- 2) Universal Declaration of Human Rights, Article 11.<sup>11</sup>

### **The combined impact of the FIES system, the prolonged detention and the *secreto de sumario* regime in the Kokorev case**

Vladimir Kokorev, Igor Kokorev, and Yulia Maleeva have never been accused of using violence or inciting violence. However, while in prison in Las Palmas, they were all wrongfully assigned to a FIES - 5 status as they did not fit the listed descriptions of that status.

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<sup>9</sup> <https://www.laprovincia.es/sucesos/2019/05/05/pasa-prisiones-canarias/1171909.html>

<sup>10</sup> <https://confilegal.com/20190119-en-espana-ha-muerto-un-presos-cada-dos-dias-en-el-ultimo-mes-y-medio-informa-la-apfp/>

<sup>11</sup> (1) *Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.* (2) *No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.*

Their pretrial detention was also unusually long; more than 2 years in the case of Yulia Maleeva and Igor Kokorev, and close to 2 years and a half for Vladimir Kokorev.

Moreover, for the larger part of this detention period (more than 18 months) they were subjected to the *secreto de sumario* regime, and neither they nor their lawyers had any access to the Court files, the evidence, or the reasoning being used by the Canarian Courts to keep them in prison.

Most 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.

This corroboration comes from the fact that the detention order in respect of Igor Kokorev was made a day before this law came into effect (the law came into effect on 28 October 2015), and in respect of Vladimir Kokorev and Yulia Maleeva approximately a month later. However, there was no variation in the treatment of any of them: no access was given to the file and the detention orders delivered to the detainees were redacted to erase any particulars of the case, including all reference to the evidence and to the reasoning on which the decisions were grounded<sup>12</sup>. The decision to withhold any information on the reasoning and the evidence for the detention was appealed all the way to the Spanish *Tribunal Constitucional* to no avail.<sup>13</sup>

The Kokorev case also underscores the dangers of the *secreto de sumario* in the context of pretrial detention. Specifically, the detention was after some point largely sustained on digital evidence seized after the arrests and the searches. However, only once the secrecy was lifted and access to the devices was granted to the defence that subsequent forensic examination could reveal irregularities in the handling and signs of manipulation of the devices in question, including a USB drive that was attributed to one of the members of the family and had apparently being created ad-hoc by the police a month after the arrest.

The Kokorevs were robbed of their presumption of innocence during their pre-trial detention, being treated in all respects as dangerous, convicted prisoners.

They were not released on bail, nor were alternative measures, such as home arrest, ever considered. For a period of 6 months Igor Kokorev was kept in a different prison from his parents. Upon transfer to the same prison, he was detained in a different module from his father. They filed official requests to be housed together, but all attempts were refused.

The Kokorevs were denied basic information on the status of the court proceedings and on how long the secrecy and the imprisonment would last. They also suffered from the poor prison conditions in Las Palmas and from being subjected to the same living regime and the social reinsertion programs as the convicted inmates, except in that which would benefit them.

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<sup>12</sup> Source: copies of detention orders provided by the Kokorev family in the course of the interviews

<sup>13</sup> Source: copies of decisions from the *Tribunal Constitucional* declining to consider the *recursos de amparo* provided by the Kokorev family in the course of the interviews

In that regard, day leaves from the prison or a regime of ‘semi-liberty’, (i.e. only sleeping in prison) were granted to convicted criminals on certain conditions after they had served a part of their term. This right was denied to the Kokorevs, who had not been convicted and were still enjoying the presumption of innocence.

As explained during an interview, Vladimir Kokorev struggled in prison with his health (he suffers from high blood pressure, heart problems, and diabetes) and dignity. He related an episode that is particularly illustrative of the consequences of the FIES status:

After many months of struggling with the prison bureaucracy, he was given permission to be examined by a cardiologist in a hospital, but on that specified day, no one came to take him to the hospital. At a random later date, Mr. Vladimir Kokorev was escorted by half a dozen guards armed with automatic weapons and bulletproof vests to a different hospital to see a different doctor. During the ride to the hospital, he was handcuffed in the back of a police riot van. While in the hospital, Mr. Vladimir Kokorev remained handcuffed. The armed authorities refused to remove his handcuffs, even when it was requested by a nurse. The doctor was unable to perform a proper examination.

His right to receive visitors was not always respected. For nearly six months, he was denied the right to be visited by representatives of the Jewish community in Las Palmas.

Under FIES - 5 status, Yulia Maleeva and Igor Kokorev faced similar struggles. They remarked in their interviews with Human Rights Without Frontiers that they were not treated as innocent persons.

- Igor Kokorev was not allowed to be housed with his father. When he inquired about the reason why, they responded it was because they were under active investigation. However, many other inmates who were under active investigation in the same cases, were housed together.
- Yulia Maleeva reported that she felt disoriented from being moved to a different cell every 5 to 9 weeks, a security measure prescribed under the FIES-5 status to which in her module only she was being subjected.

## **Conclusion**

Human Rights Without Frontiers recommends that Spain take the following actions in order to align its practices with its international legal obligations:

- 1) Reform the FIES system by publicly outlining specific criteria for each status from FIES 1 to 5 and clarify a chain of command and decision making process for the placement of prisoners under each of the FIES statuses;
- 2) Dramatically improve conditions in both prisons in Gran Canaria, including an increase in the number of staff in both facilities;

- 3) Review the implementation of 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 to ensure that the *secreto de sumario* regime does not prejudice any way the rights of the detainees, in particular that no evidence or reasoning on which pretrial detention is grounded is withheld from them.

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## **OSCE Human Dimension Implementation Meeting**

Warsaw, Monday 23 September 2019

### **Working Session 11**

#### **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 was 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<sup>1</sup> and the Council of Europe<sup>2</sup>, 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”<sup>3</sup>.

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)”<sup>4</sup>.

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 its excessive length<sup>5</sup> and the continuing existence of the *secreto de sumario*

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<sup>1</sup> [http://www.europarl.europa.eu/doceo/document/E-8-2016-004686\\_EN.html](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>

<sup>2</sup> <https://rm.coe.int/pdf/168076696b> ; <https://rm.coe.int/16806db842>

<sup>3</sup> <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>

<sup>4</sup> <https://www.hrw.org/news/2014/12/19/spain-upr-submission-2014>

<sup>5</sup> CCPR/C/ESP/CO/5, p. 15

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqX7R5nHBFqJOu4nx7MjbHIQGRVVU9IYMm7%2fVNRMQDQGFNX4tfS%2f2GVjoUvq1PfNmfs6EDcgUT1eQltxhEEN3DQz6o4Ev0FGnsaY2TBcV7U>

regime<sup>6</sup>, 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;

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

*Human Rights Without Frontiers* also recommends that

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<sup>6</sup> CCPR/C/ESP/CO/5, p. 18

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.

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## **OSCE Human Dimension Implementation Meeting**

**Varsovia, Lunes 23 septiembre 2019**

### **Sesión de trabajo 11**

#### **Estado de Derecho II : La protección de los derechos humanos y lucha contra el terrorismo**

#### **ESPAÑA: El abuso de los derechos humanos en la lucha contra el terrorismo**

Una de las principales responsabilidades y deberes del Estado es garantizar la seguridad de su población frente a actos terroristas y otras formas de delincuencia. Sin embargo este deber no puede llevarse a cabo mediante la negación de los derechos humanos. Debe haber un equilibrio.

En España, un caso emblemático, en el que no ha existido dicho equilibrio, ha sido el caso Kokorev y el tratamiento sufrido por los miembros de dicha familia. En este caso, España mantuvo a los tres miembros de familia, compuesta por Vladimir Kokorev y su esposa Yulia, ambos de 60 años y su hijo Igor de 33 años, en prolongada prisión preventiva, sin acceso al expediente (bajo el régimen llamado "secreto de sumario"), y en condiciones penitenciarias particularmente duras, reservadas únicamente a terroristas, sospechosos de terrorismo y delincuentes violentos. Bajo la ley española, este sistema de vigilancia se conoce como **FIES**, o **Ficheros de Internos de Especial Seguimiento**.

Según Scott Crosby, del Colegio de Abogados de Bruselas, que presentó ante el Tribunal Europeo de Derechos Humanos una solicitud en julio de este año en nombre de Vladimir Kokorev, los tres miembros de la familia fueron detenidos y encarcelados a finales de 2015 por una sospecha vagamente formulada sobre blanqueo de capitales. No se formularon cargos formales, ni "pudieron formularse ya que no había pruebas de que hubieran manejado dinero generado ilícitamente", dice Crosby en su presentación.

A finales del segundo año de estar detenidos, la detención fue extendida otros dos años más, aún en ausencia de una acusación formal y de pruebas de un delito determinante. En la apelación la prisión se conmutó por reclusión territorial, restringida a Gran Canaria, exigiéndoles presentarse semanalmente ante el tribunal local. Dos de los miembros de la familia fueron puestos en libertad a finales de 2017 y principios de 2018 se produjo la liberación del tercer miembro. Las restricciones territoriales aún están en curso.

## **La grave negación de los derechos humanos y la discriminación basada en el sistema FIES**

En virtud del sistema FIES, la familia Kokorev, aun gozando de la presunción de inocencia, fue privada de sus básicos derechos humanos durante su detención al ser tratada de la misma manera que las personas sospechosas o condenadas por terrorismo. En este sentido, hay que destacar varias deficiencias del sistema judicial español:

### ***1. El secreto del procedimiento judicial***

Tras su detención, la familia Kokorev fue sometida al régimen del secreto de sumario. Durante 18 meses, el procedimiento se mantuvo en secreto lo que llevó a que su abogado no tuviera acceso a los expedientes de la investigación, a información básica sobre los motivos de su detención, a una descripción del delito ni a las pruebas en su contra.

Repetidas recomendaciones de diversos sectores de dentro y fuera de España, incluido el Parlamento Europeo, han pedido a Madrid que suprima el régimen de secreto de sumario y el sistema FIES para que de este modo se respete la presunción de inocencia, y a que se reforme la práctica de la aplicación de largos periodos de prisión preventiva. Sin embargo, estas recomendaciones han sido ignoradas hasta el momento por España.

En nuestro reciente informe presentado al Examen Periódico Universal (EPU) de España a Naciones Unidas, destacamos que: "significativamente, este caso ofrece una corroboración única de que la Directiva 2012/13/UE del Parlamento Europeo y del Consejo, de 22 de mayo de 2012, sobre el derecho a la

información en los procesos penales (que debería impedir que el secreto de sumario se utilice en el contexto de la detención preventiva), no ha sido debidamente aplicada por España a través de la Ley Orgánica 5/2015 de 27 de abril de 2015".

## ***2. La utilización de técnicas de interrogación que equivalen a tortura o tratos inhumanos o degradantes***

Varios bufetes de abogados españoles especializados en derecho penal y penitenciario han presentado también de manera conjunta un informe al EPU, sosteniendo que la prisión preventiva es utilizada por los jueces españoles para "suavizar" a la persona investigada.

El hecho de que una persona pueda permanecer detenida sin cargos durante dos años, prorrogables a cuatro, es claramente un medio para obtener confesiones, independientemente de si son verdaderas, lo que no es compatible con los derechos humanos.

## ***3. Culpa por asociación***

La justicia española utilizó el término "familia Kokorev" durante todo el proceso, lo que sugiere la aplicación de la presunción de culpabilidad por asociación ya que los tres miembros de la familia fueron tratados como una sola entidad sin llevarse a cabo ninguna distinción entre ellos.

## ***4. Condiciones de detención: trato inhumano y degradante***

A principios de este año, nuestra ONG *Human Rights Without Frontiers* entrevistó a los miembros de la familia en Las Palmas acerca de sus condiciones de detención. Según ellos, durante su detención recibieron peor tratamiento que las personas ya condenadas.

A Vladimir Kokorev no se le permitió alojarse con su hijo. La única explicación que recibió fue que no era posible ya que estaban siendo investigados. Sin embargo, muchos otros reclusos en la misma situación eran alojados juntos.

Además, la libertad diurna o régimen de "semilibertad" (acudir sólo por las noches a la cárcel) se concede a personas condenadas que ya han cumplido parte de su condena. A pesar de que habían pasado más tiempo en la cárcel de lo exigido a algunos de los reclusos condenados para hacer uso de este beneficio, este derecho se denegó a los miembros de la familia Kokorev, aun no habiendo sido condenados y a pesar de gozar de la presunción de inocencia.

Consideramos que combinar la detención sin cargos con la aplicación del sistema FIES constituye una forma de trato degradante agravado y puede incluso equivaler a un trato inhumano. Si la tensión mental que sufre el detenido es grave, podríamos incluso hablar de tortura.

El abogado defensor de la familia no logró obtener la libertad bajo fianza ni aduciendo a las circunstancias personales de los miembros de la familia. Vladimir Kokorev padecía problemas de salud y esta se vio deteriorada gravemente, lo que le obligó a someterse a una operación cardíaca. Su hijo, Igor, no pudo acudir al nacimiento de su hijo ya que estaba en prisión preventiva.

### **Observaciones adicionales**

Cuando medidas excepcionales destinadas a combatir el terrorismo son utilizadas indiscriminadamente, el riesgo es que dejen de ser excepcionales y se conviertan en la norma.

En los últimos quince años, el Parlamento Europeo<sup>1</sup> y el Consejo de Europa<sup>2</sup>, en particular el Comité para la Prevención de la Tortura (CPT), han expresado serias preocupaciones y emitido severas advertencias sobre el sistema FIES, y en particular sobre la detención en régimen de incomunicación.

En 2017, el CPT informó que España había hecho pocos progresos con respecto al régimen de detención en régimen de incomunicación y que la práctica seguía siendo lícita con arreglo a la legislación española. El CPT llegó a la conclusión de que ese régimen debía ser derogado para prevenir que se produzca un mal trato. Sin embargo, España considera "que es necesario mantener esta medida en el contexto de la lucha contra el terrorismo"<sup>3</sup>.

En cuanto a la detención en régimen de incomunicación de sospechosos por terrorismo, Human Rights Watch también lamentó

que España haya rechazado recomendaciones durante su EPU de 2010 para revisar el régimen de detención en régimen de incomunicación. Los derechos de determinados sospechosos, incluidos los sospechosos de terrorismo, siguen estando muy restringidos a pesar de los reiterados

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<sup>1</sup> [http://www.europarl.europa.eu/doceo/document/E-8-2016-004686\\_EN.html](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>

<sup>2</sup> <https://rm.coe.int/pdf/168076696b> ; <https://rm.coe.int/16806db842>

<sup>3</sup> Versión original en inglés en <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>.

Traducción realizada por Human Rights Without Frontiers.

llamamientos del Comité contra la Tortura de las Naciones Unidas, de los relatores especiales de las Naciones Unidas sobre la tortura, la lucha contra el terrorismo y los derechos humanos, y del Comisario de Derechos Humanos del Consejo de Europa y del Comité Europeo para la Prevención de la Tortura (CPT).<sup>4</sup>

Como demuestra el caso Kokorev, el sistema FIES parece aplicarse de manera indiscriminada e incoherente sin una supervisión y un control adecuados. Además, este caso pone de relieve otras preocupaciones igualmente importantes, expresadas ya en ciclos anteriores en relación con la detención preventiva en España, como su excesiva duración y la persistencia del régimen de secreto de sumario, en virtud del cual las pruebas que llevan a la prisión preventiva pueden ser ocultadas al detenido.

### **Recomendaciones**

*Considerando* que en España parte de la legislación antiterrorista se está aplicando a personas no violentas ni peligrosas que ni siquiera son sospechosas de terrorismo y que dan lugar a condiciones de detención injustas y a largos períodos de detención preventiva;

*Considerando* que España rechazó las recomendaciones formuladas durante su EPU de 2010 acerca de la revisión del régimen de la detención incomunicada sosteniendo que es necesaria;

*Considerando* que varios mecanismos de las Naciones Unidas y del Consejo de Europa, así como de la Unión Europea, han pedido en repetidas ocasiones que las condiciones de detención se ajusten a las normas internacionales;

*Considerando* que la Comisión de Venecia coopera estrechamente con la OSCE y especialmente con la OSCE/OIDDH, que ambas instituciones se remiten regularmente al acervo de la otra y que la OSCE/OIDDH y la Comisión de Venecia han publicado a menudo documentos conjuntos;

*Human Rights Without Frontiers* recomienda a las autoridades españolas que,

- dejen de retener a personas sin cargos formales,
- hagan un uso mucho más extensivo de las alternativas a entrar en prisión,
- cesen la utilización del sistema FIES para reclusos no peligrosos,

<sup>4</sup> Versión original en inglés en <https://www.hrw.org/news/2014/12/19/spain-upr-submission-2014>. Traducción realizada por Human Rights Without Frontiers.

- abolan el secreto del sumario,
- dejen de utilizar la prisión preventiva como medio de castigo,
- respeten la presunción de inocencia,
- deroguen la ley sobre el régimen de la detención incomunicada,
- respeten la obligación de diligencia debida,
- cumplan con las recomendaciones de Naciones Unidas y del Consejo de Europa.

*Human Rights Without Frontiers* también recomienda que,

La OSCE/OIDDH se dirija a la Comisión de Venecia con el fin de abordar conjuntamente la incompatibilidad del sistema FIES, por su incorrecta aplicación con las normas de derechos humanos y, en general, por las violaciones de derechos humanos que ocurren como resultado de otras prácticas ilegales que se llevan a cabo durante la prisión preventiva.

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## **Abuse of pre-trial detention in the EU: Time for action**

By Índigo Uriz Martínez, *Human Rights Without Frontiers*

HRWF (22.10.2019) - On 10 October 2019, Fair Trials hosted a meeting in Brussels to raise awareness of the problem of pre-trial detention in the EU and to advocate for effective legal assistance in pre-trial decision-making. The event brought together more than 60 criminal justice experts from across Europe and it was the culmination of the two-year project "*Effective Legal Assistance in Pre-Trial Detention Decision-Making*" coordinated by Fair Trials in partnership with organizations from different Member States.<sup>1</sup>

Pre-trial detention is an exceptional measure that entails imprisoning individuals under criminal investigation until the time of their trial.<sup>2</sup> It must be used as a last resort and only imposed in strictly limited circumstances when non-custodial measures do not suffice.<sup>3</sup>

Nevertheless, it is extensively used in the EU. The number of pre-trial detainees in the EU is estimated to be over 100,000. In 2019, this figure comprises of approximately 23% of the total EU prison population, and the percentage per country varies widely from 9.1% in Romania to 31.5% in Italy.<sup>4</sup>

The European Commission and Parliament have repeatedly recognized the need to address pre-trial detention, citing its contribution to over-crowding in prisons as well as the risk of human rights violations.<sup>5</sup> Six directives on criminal procedural rights have been adopted that have led to some changes and promising reforms in different EU Members States:

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<sup>1</sup> Fair Trials, <https://fairtrials.org/news/making-legal-assistance-pre-trial-detention-more-effective> accessed 22 October 2019.

<sup>2</sup> ECtHR, Guide on Article 5 of the European Convention on Human Rights, Right to liberty and security, updated on 31 December 2018, p. 36.

<sup>3</sup> Penal Reform International, 'Pre-trial detention' [https://cdn.penalreform.org/wp-content/uploads/2013/11/Factsheet-1-pre-trial-detention-v10\\_final2.pdf](https://cdn.penalreform.org/wp-content/uploads/2013/11/Factsheet-1-pre-trial-detention-v10_final2.pdf) accessed 17 October 2019.

<sup>4</sup> Data gathered from World Prison Brief, International Centre for Prison Studies. Date of recording of actual varies. See <http://www.prisonstudies.org/map/europe> for more detail.

<sup>5</sup> European Union & Council of Europe, Partnership for Good Governance, *Pre-trial detention assessment tool*.

- The Interpretation and Translation Directive 2010/64/EU;<sup>6</sup>
- The Right to Information Directive 2012/13/EU;<sup>7</sup>
- The Access to a Lawyer Directive 2013/48/EU;<sup>8</sup>
- The Presumption of Innocence Directive 2016/343/EU;<sup>9</sup>
- The Children’s Rights Directive 2016/800/EU;<sup>10</sup>
- The Legal Aid Directive 2016/1919/EU<sup>11</sup>

However, in practice pre-trial detention affects fundamental rights such as the **right to the presumption of innocence, liberty, legal defence** and, to **not testify** and **incriminate one-self**.<sup>12</sup>

Pre-trial detainees are legally **presumed innocent** until proven guilty. However, in reality they are often **treated as if they were convicted**. They frequently share cells with already convicted prisoners and are sometimes, held in worse conditions than inmates for months on end, as they cannot benefit from certain rights such as access to semi-open regime and family visits.<sup>13</sup>

Pre-trial detention also undermines **the right to defence, to not to testify** and to **not self-incriminate**. Since detainees are in prison, a common challenge is **limited access to a lawyer**. In some Member States, there is a maximum of 10 five-minute phone call a week, while a small number of states deny it depending on the case.<sup>14</sup> Detainees’ limited ability to receive assistance **may result in confessions** and **premature reactions** to the accusation. It is common for prisoners to unknowingly provide information that is then used as evidence to negatively impact their case.<sup>15</sup>

In addition, the **reputational damage** from pre-trial detention is irreversible, especially in the professional life of the individual when this measure is accompanied by media coverage.<sup>16</sup>

Although pre-trial detention is permitted as an exceptional measure, instead it is the **most frequently used one**. Subsequently, until there are alternatives to pre-trial detention, such as house arrest or electronic monitoring, the availability and effectiveness of legal assistance during the initial phase of the process is indispensable.<sup>17</sup>

Research conducted by Fair Trials found that lawyers play a key role in limiting the excessive use of pre-trial detention, and European Law grants anyone accused of a crime the right to legal assistance.

<sup>6</sup> European Union, Directive 2010/64 on the right to interpretation and translation in criminal proceedings.

<sup>7</sup> European Union, Directive 2012/13 on the right to information in criminal proceedings.

<sup>8</sup> European Union, Directive 2013/48 on the right of access to a lawyer in criminal proceedings.

<sup>9</sup> European Union, Directive 2016/343 on the presumption of innocence and the right to be present at one’s trial.

<sup>10</sup> European Union, Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.

<sup>11</sup> European Union, Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrants proceedings.

<sup>12</sup> Colaboración de abogados contra el abuso de la prisión preventiva en España, ‘El abuso de la prisión preventiva’, Comunicación al Consejo de Derechos Humanos de las Naciones Unidas, Examen Periódico Universal 2020, España 2019.

<sup>13</sup> Penal Reform International, ‘Pre-trial detention’ [https://cdn.penalreform.org/wp-content/uploads/2013/11/Factsheet-1-pre-trial-detention-v10\\_final2.pdf](https://cdn.penalreform.org/wp-content/uploads/2013/11/Factsheet-1-pre-trial-detention-v10_final2.pdf) accessed 17 October 2019.

<sup>14</sup> Colaboración de abogados contra el abuso de la prisión preventiva en España, ‘El abuso de la prisión preventiva’, Comunicación al Consejo de Derechos Humanos de las Naciones Unidas, Examen Periódico Universal 2020, España 2019.

<sup>15</sup> *Ibid.*

<sup>16</sup> Penal Reform International, ‘Pre-trial detention’ [https://cdn.penalreform.org/wp-content/uploads/2013/11/Factsheet-1-pre-trial-detention-v10\\_final2.pdf](https://cdn.penalreform.org/wp-content/uploads/2013/11/Factsheet-1-pre-trial-detention-v10_final2.pdf) accessed 17 October 2019.

<sup>17</sup> Fair Trials. ‘Effective legal assistance in pre-trial detention decision-making. Regional handbook for lawyers’ (2019).

However, in practice, lawyers typically face serious obstacles in defending their clients effectively. Some of the barriers encountered are the **lack of time and confidentiality**, the **difficulty in accessing files**, and the **inability to have an interpreter**.<sup>18</sup>

In most cases, defence lawyers are **appointed** to detainees **at the last minute** which means meeting for the first time on the morning of the pre-trial detention hearing. They do not have enough time to study the case and talk with the person who they are representing. In some instances, this results in the lawyer and detainee meeting for the first time in the hall of the court before the hearing.<sup>19</sup>

**Confidentiality** is another issue encountered in the implementation of the law. It is crucial that consultations are confidential to enable the lawyer to effectively prepare the defence and participate in the decision-making process of applicable precautionary measures. However, in many cases, this meeting between lawyer and client takes place in the presence of a police officer.<sup>20</sup>

Lawyers' **abilities to access case files** as quickly as possible to develop a defence strategy and challenge pre-trial detention are also impeded in practice. Despite this being stipulated by law, many European states violate this right by permitting prosecutors to refuse access to the file or by not properly addressing administrative obstacles.

Transparency regarding why a person has been arrested and their rights are basic principles under EU law. Furthermore, the **access to an interpreter** during this process is a recognised right in European Law.<sup>21</sup> However, in many Member States, information about the case is only communicated in the country's official language, or, alternatively in English. In practice, there are many difficulties in accessing interpretation services during the pre-trial stage. It is not abnormal for lawyers to rely on other detainees to help with interpretation due to these challenges.<sup>22</sup>

The six directives mentioned above provide safeguards such as allowing an effective defence during the pre-trial detention phase. However, more action is needed and Member States should put more resources into the implementation of EU standards. If lawyers are better equipped and able to effectively defend their clients, then the number of pre-trial detention imprisonment orders could decrease.

Nevertheless, even if the directives and existing safeguards were fully implemented, 'it would not provide a complete answer to the overuse of pre-trial detention across the EU'.<sup>23</sup> The EU should create binding legislation directly addressing pre-trial detention so its utilisation could become to a true measure of last resort.<sup>24</sup>

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<sup>18</sup> *Ibid.*

<sup>19</sup> Fair Trials, Conference on pre-Trial detention, Brussels 10 October 2019.

<sup>20</sup> Fair Trials, 'Where's my lawyer? Making legal assistance in pre-trial detention effective' (2019).

<sup>21</sup> European Union, Directive 2010/64 on the right to interpretation and translation in criminal proceedings.

<sup>22</sup> Fair Trials, 'Where's my lawyer? Making legal assistance in pre-trial detention effective' (2019).

<sup>23</sup> Fair Trials, 'Where's my lawyer? Making legal assistance in pre-trial detention effective'. Page 30 (2019).

<sup>24</sup> For more recommendations, please refer to Fair Trials 'A measure of Last Resort? The practice of pre-trial detention decision making in the EU' [https://fairtrials.org/sites/default/files/publication\\_pdf/A-Measure-of-Last-Resort-Full-Version.pdf](https://fairtrials.org/sites/default/files/publication_pdf/A-Measure-of-Last-Resort-Full-Version.pdf)