FAIR TRIALS INTERNATIONAL

COMMUNIQUÉ

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FAIR TRIALS INTERNATIONAL LOCAL EXPERTS' GROUP (SPAIN)

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at the offices of Clifford Chance LLP, Madrid:

PRE-TRIAL DETENTION IN SPAIN

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Introduction

1. On 18 October 2012, Fair Trials International brought together leading experts in criminal justice from across Spain in order to learn about pre-trial detention in law and in practice (a list of participants is provided in the Annex). Where problems are identified, we wanted to learn about ongoing efforts and new opportunities to challenge these. The Local Experts' Group (Spain) met for a full day on 18 October 2012 at the offices of Clifford Chance, in Madrid.

2. Prior to the meeting, the Group were asked to reflect on several themes: the standards of pre-trial detention decision-making by the Spanish courts, the reasons underlying excessive remand periods, and the opportunities for law reform and litigation. These were then discussed at the meeting. The remainder of this communiqué outlines the key points raised in the meeting and the key conclusions reached.

A. Pre-trial detention decision-making standards

3. The case-law of the *Tribunal Constitucional* (Spanish Constitutional Court) reflects the case-law of the European Court of Human Rights under Article 5 ECHR, specifying that detention may only be based upon a constitutionally sanctioned reason (to counter the risk of absconding or reoffending and/or to prevent interference with evidence), and must be proportionate. The problem lay in the daily application of the law, particularly by the lower courts, where detention was in practice the general rule, not the exception.

4. Judges, virtually without exception, followed the recommendation of the *Ministerio Fiscal* (Public Prosecutor; '*Fiscal*') to order detention. Participants commented that the judges relied disproportionately on the police report put forward by the *Fiscal*, which would often contain bare factual allegations, with no reasons as to why detention was necessary. This made it very difficult to make any meaningful arguments for release, and the defence's submissions would, in any event, systematically be treated less favourably than those of the Fiscal.

5. Participants underlined that the defence's right of access to the file began, in principle, only at the initial detention hearing, when the person is surrendered to the judge after arrest by police. In this context there was never enough time to prepare an effective defence to detention. At subsequent detention hearings duty judges would be reluctant to interfere with earlier decisions on detention, on account of the associated risks of release and a mutual respect between judges. The result was that a defendant, once detained, would generally remain in detention.

6. Some courts were more diligent, and detention was not automatically ordered in some types of cases. For instance, in private prosecutions, detention would rarely be ordered. However, where detention was requested by the *Fiscal*, it would always be followed, especially at the *Audiencia Nacional* (national first-instance court). There was always the possibility of *recurso de apelación* (appeal to a higher court) or, if this proved unsuccessful, a *recurso de amparo* (constitutional protection petition) before the Constitutional Court, though exercising these rights could exacerbate delays so lawyers sometimes felt it best not to do so.

7. As for compensation for unjustified detention, the legal position was considered to be objectionable: in order to obtain compensation, the person had to show that the facts alleged

had not occurred, not just that they had been found not guilty. They were, effectively, required to prove their innocence, and proving a negative was virtually impossible.

8. Regarding the use of alternatives to detention, it was agreed that, in the purely domestic context, insufficient use was made of electronic tagging, passport confiscation and reporting requirements. It was suggested that the extra administrative work involved in enforcing these alternatives made them unattractive to the courts. Although participants agreed there was a lack of budgetary resources for justice, it seemed that this did not translate into a preference for less expensive alternatives to detention. Participants who had highlighted the costs of pre-trial detention were told by judges that their role was to ensure attendance at trial, not to manage the budget.

9. As regards cross-border cases, participants agreed that Spanish courts were currently still reticent about employing cross-border supervision arrangements. There were examples cited of agreements where defendants had been allowed to report the Spanish Consulates in Germany and Italy (the availability of the European Arrest Warrant helped secure these arrangements). However, in other cases, defendants were being required to remain in Spain to report regularly, despite having family in other countries. The potential for the European Supervision Order to make an impact was likely to depend on the gravity of the alleged offence, as in serious cases pre-trial detention would still be used.

B. The links between investigation and detention on remand

10. In Spain, the general rule is that the investigation is secret as far as third parties are concerned. In principle, the case-file is still open to the parties to the case. However, a power called *secreto sumarial* can be employed to deprive the defence of access to the case-file. This is an exceptional power. It can be applied for only one month, but on a renewable basis. The use of this power has been criticised by the UN Human Rights Committee as a source of concern in Spain's response to terrorism. It is referred to here as '*secreto*'.

11. *Secreto* was said to be very widely used in cases involving terrorism and organised crime tried before the Audiencia Nacional. Some Participants reported that, in certain parts of Spain, it was also frequently used in other, less serious cases presenting no element of organised crime.

12. S*ecreto*, like pre-trial detention, was granted whenever the *Fiscal* requested it. An investigation would typically begin with a telephone wire-tap, with *secreto* granted at the same time in order to preserve the effectiveness of the investigation. Police reports would then present on-going investigation as useful and pertinent, and the *Fiscal* would rely on these reports in requesting extensions of *secreto*, which would be systematically extended over long periods, sometimes up to two years. When *secreto* was eventually lifted shortly before the trial, investigatory steps described as crucial by police reports would turn out to be irrelevant, evidence uncovered would be clearly inadmissible, or it would be plain that very little investigation had actually been done.

13. When *secreto* applied, the defence were not privy to the details of the investigation, so it was impossible for them to challenge the value of any evidence uncovered or, indeed, the legality of aspects of the investigation and admissibility of evidence obtained. Given that pre-trial detention decision-making relied heavily on the strength of the evidence, this represented a

serious inequality of arms when it came to challenging detention. The defence's submissions would therefore be based on the defendant's personal situation, on which less weight was placed than on the state of the evidence.

14. The use of *secreto* was also liable to contribute to delays in the investigation phase, since it insulated the prosecution against close scrutiny of the investigation. This was one reason why defendants often spent extensive periods on remand.

15. Participants were also invited to comment more generally on the reasons explaining the comparatively long time taken for investigations in Spain. In some cases, length was not to be criticised. The example of the 2004 Madrid bombings, which covered several thousand witnesses, letters rogatory to several countries, and much forensic evidence, was cited as one example. This investigation took three years and there was widespread public anger at the delays. However, less high-profile and less-complicated organised crime cases often take up to four years. It was equally true that an average case of, say, a street fight involving just a handful of medical records and witness statements would still often take two years.

16. Participants put forward various reasons for delay:
    a. Time-limits were not rigorously enforced. For instance, the defence might ask to take cognisance of the investigation after expiry of *secreto*, and only then receive a backdated decision extending it.
    b. There was no one independent of the investigation taking charge of the timeframe for preparing for trial. When *secreto* was lifted, it often became clear that very little had, in fact, been done to prepare for trial.
    c. It would often be the case that, once *secreto* was lifted, so much incriminating evidence had been acquired (without the defence being able to suggest steps to obtain exculpatory evidence) that the fairness of the trial would be prejudiced.
    d. The lack of resources in the justice system would generally avail the prosecution if it could not meet deadlines. For instance, the power available in law to extend detention beyond the initial one year (in less serious offences) or two years (in more serious offences) to 18 months or four years respectively, was generally a formality and it was sufficient to say that it had not been possible to bring the case to trial within that time.
    e. There were simply delays in the execution of pre-trial procedural steps. For instance, it might take three months for a witness's statement to be taken once this was granted by the court, or it might take several months for a drug sample to be analysed, during which the defendant would usually be detained.
    f. Finally, it was sometimes in the interests of the defence to delay the investigation but this would not be the case if the defendant is in pre-trial detention.

17. Participants also underlined the lack of any robust accountability mechanism. The *Fiscal* was generally excused by the court for failures to produce information or to comply with deadlines, on the basis of a lack of resources in the justice system. Police would generally present investigations as more pertinent than they actually were; this would in due course be revealed as unfounded when the case came for trial, but there was no sanction.

18. Delays in preparing for trial, pre-trial detention and *secreto* were said to sometimes be used as a tactic to achieve convictions because suspects were less able to defend themselves and more

likely to lose resistance and cooperate or give evidence against co-accused. The Supreme Court had given judgments on *secreto* and pre-trial detention, but its doctrine was itself liable to change over time and was, in any event, not strictly binding on the lower courts. The result was that practice at the first-instance level did not reflect the doctrine.

C. Reform outlook

19. All participants were hopeful that planned legislative reforms of Spanish criminal procedure might lead to some improvements. It was not entirely certain whether the *Anteproyecto de Ley* (draft bill) published by the last Government was still the basis of the current reforms. However, it was certain that the reforms were directed towards a greater separation of prosecutor and court, and that the *secreto* regime would be reviewed.

20. Participants did, however, express concern that redefining the roles of various personnel would not necessarily affect the mentality of justice officials and the way laws were applied in practice. It was noted that there is currently no offence of prosecutorial misconduct, and it was suggested that the reforms must include provisions for sanctions against official personnel for misusing powers, and for procedural sanctions (for instance, if appropriate, the dismissal of the case).

21. It was underlined that these reforms were being steered by a committee sitting in private. Without public proceedings or any consultation, it was difficult to stay informed of progress. This was felt to be a missed opportunity as there was certainly a role for lawyers to play, whether through local bar organisations, universities or NGOs, in ensuring reform discussions took into account the views of practitioners. Although an opportunity to comment would arise once a text was laid before Parliament, there was no formal consultation on the content of the text.

22. There were different reactions to the suggestion of taking more cases before the ECtHR, even though several of the problems identified clearly raised arguable human rights issues. In order to exhaust local remedies, it would be necessary to go through several layers of court hearings, which was likely to take a long time and practising lawyers did not feel that it was always in their client's interests.

23. There was some disagreement as to Spain's record of implementation of ECtHR judgments. Some Participants claimed that in Article 6 cases they had won at the ECtHR, no action had been taken at national level, while others maintained that an ECtHR decision would be implemented if obtained. It was agreed that one of the key points for the forthcoming reforms to adopt would be an automatic review of a criminal case by the national courts wherever the ECtHR found a violation.

24. If prosecutors and judges failed in their duties in relation to pre-trial detention, they should be subject to sanctions. Even without reforms, it was already possible for lawyers to submit a *denuncia* (criminal complaint) and *querella* (interpersonal criminal proceedings) against judicial personnel who had offended against the provisions of the law on pre-trial detention. This would contribute to changing mentalities, which law reform could not bring about by itself. However, this had to be balanced against defence lawyers' need to maintain credibility in order to perform their jobs properly in future cases.

25. As for the use of the media and other channels, Participants noted that in general media took an interest in the arrest and initial detention of an alleged criminal, but rarely in any subsequent stages of the case. This could perhaps be improved.

D. Key recommendations

a. Decision-making standards

- Reforms of the law should provide sanctions for misuse of official powers by judicial officials. These should include professional and pecuniary penalties and procedural penalties (dismissal of the case).
- Existing provisions on compensation for pre-trial detention where the defendant is not proved guilty at trial should be reformed to ensure greater accountability.
- Lawyers should take more cases before the ECtHR under Article 5 in the public interest, provided this coincides with their client's best interests. FTI would be prepared to supply comparative expertise in third-party submissions and/or to assist in the formulation of the European Convention arguments. A favourable decision should be accompanied by lobbying at the Council of Europe level to ensure implementation.
- Lawyers should insist upon a more balanced approach in written applications for release. The difference between practice and theory should be the subject of academic legal comment to heighten awareness of the issues.

b. Excessive periods of detention on remand

- Reforms of the law should address the excessive use of *secreto*, which makes it impossible to challenge detention effectively.
- Time limits should be mandatory and failure to comply with these should result in dismissal of the case.
- Shorter time limits should be set and enforced with longer periods only permitted in the most exceptional cases.
- The defence should engage in dialogue with prosecutors and the courts administration to identify opportunities to reduce the time taken for investigations.

c. General recommendations

- The Committee in charge of the criminal procedure reforms should be encouraged to hold open consultations with the legal profession, academics and NGOs in order to obtain their input on pre-trial detention.
- Greater use should be made of the media to generate awareness of the innocent individuals affected by excessive pre-trial detention. This would place pressure upon Government to take this problem seriously.
- Wherever a defence raises an issue of EU law, courts should be encouraged to make references for preliminary rulings to the Court of Justice of the European Union.

FTI Local Expert Group (Spain)
16 November 2012