

Response

**of the Spanish Government
to the report of the European Committee
for the Prevention of Torture and Inhuman
or Degrading Treatment or Punishment (CPT)
on its visit to Spain**

from 17 to 19 February 2016

The Spanish Government has requested the publication of this response. The CPT's report on the February 2016 visit to Spain is set out in document CPT/Inf (2016) 35.

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MINISTERIO
DEL INTERIOR

Response of the Spanish Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Spain from 17 to 19 February 2016

In pursuance of Article 10 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, on July, 21 2016 the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) presented the Government of Spain the report on its visit to Spain from February 17th to 19th 2016.

The visit was carried out to a Joint Return Operation (JRO) coordinated and co-financed by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), with Spain as Organizing Member State (OMS) and Germany as Participating Member State (PMS), and with destination to Bogota (Colombia) and Santo Domingo (Dominican Republic).

The information that the Spanish authorities wish to provide, within the set time period of three months and before October 21st, regarding the recommendations and requests for information by the CPT, is the following:

Part I. Introduction.

Section B. Cooperation between the CPT and the Spanish authorities.

Paragraph 5, on the role of monitoring bodies in future readmission agreements.

In most readmission agreements, especially in most recent EU readmission agreements, provision is made for respecting the rights, obligations and responsibilities derived from international law. Additionally, it is by international law that most monitoring bodies are created.

Spain agrees with this recommendation, understanding that the participation of national or international mechanisms of control in return operations needs to be facilitated, always taking into account the absolute respect for the sovereignty of the authorities of the country of destination. Therefore, negotiations of future bilateral readmission agreements or bilateral implementing protocols of EU readmission agreements will have the mandate to include a reference to the participation of control mechanisms.

Part II. Facts found during the visit and action proposed.

Section 8. The joint flight: preparation, execution and handover.

1. Safeguards in the context of the preparation for removal

Paragraph 17, on timely notification of the removal.

The CPT recommends that the Spanish authorities adopt the necessary measures, including of a legislative nature, to ensure that all persons being removed, and their lawyer, if applicable, are officially informed in writing, in a language they understand, at least several days in advance of the flight (see also paragraph 22).

Spain is aware of this request and, consequently, it has been established that removals shall be notified in writing at least 12 hours in advance. Although a longer period would be desirable, it cannot be guaranteed due to reasons related to the organization of flights or the availability of returnees.

Paragraph 18, on access to a lawyer.

In the CPT's opinion, access to a lawyer should not only be granted by law but also actively facilitated in practice. The authorities are strongly encouraged to take the necessary measures in this regard.

Spain is committed to this principle and practice. The Spanish legal system already foresees the legal guarantee of the right to free legal assistance and interpretation for all foreign citizens subject to administrative procedures which may lead to refusal of entry or to return. This right is set out in article 22 of Organic Law 4/2000 on the rights and freedoms of foreigners in Spain, and must be read together with article 520 of the Criminal Procedure Act, which regulates the rights of detainees in general.

Furthermore, the right to legal assistance is reinforced in detention centres, according to article 15 of Royal Decree 162/2014, passing the Regulation on the functioning and internal regime of detention centres for aliens. Following this provision and in order to provide legal counselling to those detainees who demand it, agreements are signed with the Lawyers' Bar Associations. Article 16.2 h) states that, in urgent cases, inmates can meet their lawyers beyond the general visit hours.

Paragraph 22, on medical examinations prior to removal.

The Committee recommends that returnees subject to a removal operation should undergo a medical examination several days before the decision to remove them is implemented both for Joint Return Operations coordinated by Frontex and for removal operations organised by the Spanish authorities. The medical forms to be completed following such examinations should record the doctors' conclusions notably regarding relevant IATA inadmissibility criteria. Further, appropriate medical information, including fit-to-fly certificates, should be communicated to on-board health-care staff.

Matching the CPT's recommendation, Royal Decree 162/2014 guarantees assistance and medical examination of the alien as a right and an obligation. Thus, art.16.2 e) and f) set the inmate's right to receive adequate medical and sanitary assistance.

Additionally, article 18.1 e) establishes medical examinations as an obligation, to which every inmate should be subject both, on arrival and departure, as well as for reasons of collective health appreciated by the health service and at the behest of the Director of the Centre, In case of refusal by the inmate, a judicial authorization must be obtained to carry out the medical examination.

It must be noted that with an average detention period of 20-30 days, the abovementioned medical examinations don't leave considerable gaps as to the knowledge of the inmate's health state.

Medical examination reports take into consideration the exclusion criteria laid down in the IATA rules, and they must be communicated to the medical personnel participating in the flight.

Paragraph 23, on the right to inform third person (s) of the removal.

The CPT recommends that the authorities offer each person to be removed the possibility to make at least one telephone call, free of charge if necessary, in the period immediately following the notification of the removal.

Stay in the detention centres, even though it affects the freedom of movement, does not affect the right to communication. Inmates are able to use public telephones as well as individual mobile phones.

Previously, upon arrival at the centre, Royal Decree 162/2014 guarantees, in articles 16.2 g) and m), the right to have a designated person, his/her lawyer and the Consulate informed about this fact, as well as the right to make two free telephone calls.

2. Transport to Barajas Airport

Paragraph 25, on seatbelts and luggage transport.

*25. The delegation observed that in two of the vehicles, a large number of returnees' suitcases and belongings were piled up inside the secure compartment in the middle of the vehicle, effectively blocking the only door through which the returnees could exit. In the event of an accident, the luggage could impede both the occupants exiting the vehicle and the emergency services from accessing it. Consideration should be given to transporting luggage and returnees separately. Further, the vehicles were not equipped with seatbelts for each person being transported. **The CPT recommends that the Spanish authorities ensure that all passengers have a seatbelt while being transported and that the means for transporting the luggage be reviewed.***

This recommendation of the CPT is considered relevant. Road safety must be ensured for the returnees. Both the use of safety belts and the unobtrusive placement of luggage in the vehicles will be checked in all transfers of people under custody.

3. Execution of removal and handover.

Paragraph 33, on independence of health-care staff.

The Committee encourages the authorities to consider the possibility of reinforcing the independence of the health-care staff on board return flights.

Medical staff although hired by the National Police, remains completely independent and acts following professional criteria exclusively and according to their professional ethical code.

Paragraph 34, on recording medical interventions and communicating them to the authorities of the country of destination.

The CPT recommends that every significant medical intervention be recorded in writing by the on-board medical team and a copy of this record be communicated to the authorities of the country of destination and to the returnee concerned.

Whenever considered necessary by health professionals, as well as when requested by the returnee, the medical report is delivered to the returnee. However, in order to guarantee the right to privacy, medical reports are not directly delivered to the authorities of the country of destination, unless it is required by the returnee.

Section C. Other issues related to the CPT's mandate.

1. Use of force.

Paragraph 41, on the need to set common rules for the use of means of restraint.

*In the CPT's opinion, more in-depth discussions among Frontex State Parties on the subject of promoting more precise common rules on the use of means of restraint (through a regular exchange of experience, and/or the organisation of joint training sessions) is important. These common rules should be included in the "Guide for Joint Return Operations by Air coordinated by Frontex" (see paragraph 8). **The CPT would like to receive the comments of the Spanish authorities on the above and would encourage the Spanish authorities to bring this matter to the attention of Frontex and its State Parties.***

Although a full harmonization of the use of means of restraint has not yet been reached at Frontex level, there are common rules for their use, such as:

- Joint Return Operation participants must respect the principles of strict necessity, proportionality, and respect for the returnee's dignity, as well as the right to physical integrity and the prohibition on inhuman or degrading treatment or torture in relation to all aspects of the use of force in JROs.
- A list of authorized means of restraint and equipment allowed during the JRO is set up by the Organising Member State, together with Frontex, in accordance with its national legislation, international law and EU law and in particular the Charter of Fundamental Rights. This list is included by the OMS in the standardized form called "Offer of Joint Return Operation by Air Information Sheet". In the following step, it is included by Frontex in the Implementation Plan for each specific JRO. However, no PMS should use coercive measures that its own legislation does not allow, even if those measures are accepted by the OMS for that particular operation.
- The use of force is always a last resort and must be the minimum level required to achieve the legitimate objective. The use of force must be reasonable and necessary attending to the circumstances, as well as proportional to the assessed risk of harm. Every case has to be assessed individually.
- Returnees must not be physically assaulted or threatened in order to force them to board a means of transport or as a punishment for not having done so.
- The use of coercive measures must not be systematic and should be justified case by case attending to an individual dynamic risk assessment.

Even so, Spain is ready to advance towards harmonization. This is one of the reasons why it has immediately authorized the transmission of the CPT's report to Frontex.

Paragraph 42, on recording the use of the means of restraint.

The CPT invites the Spanish authorities to set up a designated register and systematically record any use of means of restraint in it.

After every operation, a report is drawn up by the Head of Operation. This report includes the use of means of restraint.

2. Staff-related issues.

Paragraph 44, on training of escort staff.

The CPT recommends that all escort staff involved in a removal operation receive prior training. The Committee would like to receive information as to the training currently provided to escorts. Further, due attention should be given to the psychological aspects of escort duty, including during selection, training and after return from an escort assignment.

The National Police has a specialized unit dedicated to the return of foreign citizens: the Central Return Unit (UCER in Spanish). Training its staff is one of its priorities. Continuous training at internal level is complemented by courses organized by the Training Division of the Directorate General of the Police, aimed at professionals who carry out these tasks on a regular basis.

As for the Public Security Units (UIPs), specific training on return operations is provided at least to its senior staff.

3. Complaints and monitoring procedures.

Paragraph 47, on the setting up of effective complaints procedures

The CPT would like to receive the comments of the Spanish authorities on the above remarks and would encourage this matter to be brought to the attention of Frontex and its State Parties.

The establishment of a complaints mechanism has also been a recommendation by the Spanish Ombudsman, as National Mechanism for the Prevention of Torture and as forced return monitoring mechanism.

In accordance with Spanish regulations, returned persons can lodge their complaints and petitions through the Spanish Consular offices or directly to the Spanish Administration.

Royal Decree 162/2014, in article 19, lays down an adequate complaints mechanism for detention centres.

Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, which was still being negotiated when the CPT's report was adopted, has entered into force on October 6th 2016. Its article 72 establishes the complaints mechanism:

Article 72 Complaints mechanism

1. The Agency shall, in cooperation with the fundamental rights officer, take the necessary measures to set up a complaints mechanism in accordance with this Article to monitor and ensure the respect for fundamental rights in all the activities of the Agency.

2. Any person who is directly affected by the actions of staff involved in a joint operation, pilot project, rapid border intervention, migration management support team deployment, return operation or return intervention and who considers him or herself to have been the subject of a breach of his or her fundamental rights due to those actions, or any party representing such a person, may submit a complaint in writing to the Agency.

3. Only substantiated complaints involving concrete fundamental rights violations shall be admissible.

4. The fundamental rights officer shall be responsible for handling complaints received by the Agency in accordance with the right to good administration. For this purpose, the fundamental rights officer shall review the admissibility of a complaint, register admissible complaints, forward all registered complaints to the executive director, forward complaints

concerning members of the teams to the home Member State inform the relevant authority or both competent fundamental rights in a Member State and register and ensure the follow-up by the Agency or that Member State.

5. In accordance with the right to good administration, if a complaint is admissible, complainants shall be informed that a complaint has been registered that an assessment has been initiated and that a response may be expected as soon as it becomes available. If a complaint is forwarded to national authorities or bodies, the complainant shall be provided with their contact details. If a complaint is not admissible, complainants shall be informed of the reasons and, if possible provided with further options for addressing their concerns.

Any decision shall be in written form and reasoned.

6. In the case of a registered complaint concerning a staff member of the Agency, the executive director shall ensure appropriate follow-up, in consultation with the fundamental rights officer, including disciplinary measures as necessary. The executive director shall report back within a determined timeframe to the fundamental rights officer as to the findings and follow-up made by the Agency in response to a complaint, including disciplinary measures as necessary.

If a complaint is related to data protection issues, the executive director shall involve the data protection officer of the Agency. The Fundamental rights officer and the data protection officer shall establish, in writing, a memorandum of understanding specifying their division of tasks and cooperation as regards complaints received.

7. If a complaint is registered that concerns a border guard of a host Member State or a member of the teams including a seconded member of the teams or seconded national expert the home Member State shall ensure appropriate follow-up, including disciplinary measures as necessary or other measures in accordance with national law. The relevant Member State shall report back to the fundamental rights officer as to the findings and follow-up made in response to the complaint within a determined time period, and if necessary, at regular intervals thereafter. The Agency shall follow-up the matter if no report is received from the relevant Member State.

8. Where a border guard or a seconded national expert is found to have violated fundamental rights or international protection obligations, the Agency may request that the Member State remove that border guard or seconded national expert immediately from the activity of the Agency or the rapid reaction pool.

9. The fundamental rights officer shall report to the executive director and to the management board as to the Agency's and Member States' findings and follow-up made in response to complaints. The Agency shall include information on the complaints mechanism in its annual report.

10. The fundamental rights officer shall, in accordance with the provisions set out in paragraphs 1 to 9 and after consulting the consultative forum draw up a standardised complaint form requiring detailed and specific information concerning the alleged breach of fundamental rights. The fundamental rights officer shall also draw up any further detailed rules as necessary. The fundamental rights officer shall submit that form and such further detailed rules to the executive director and to the management board.

The Agency shall ensure that information about the possibility and procedure for making a complaint is readily available, including for vulnerable persons. The standardised complaint form shall be made available on the Agency's website and in hardcopy during all activities of the Agency in languages that third-country nationals understand or are reasonably believed to understand. Complaints shall be considered by the fundamental rights officer even when they are not submitted in the standardised complaint form.

11. Any personal data contained in a complaint shall be handled and processed by the Agency including the fundamental rights officer in accordance with Regulation (EC) No 45/2001 and by Member States in accordance with Directive 95/46/EC and Framework Decision 2008/977/JEIA.

When a complainant submits a complaint, that complainant shall be understood to consent to the processing of his or her personal data by the Agency and the fundamental rights officer within the meaning of point (d) of Articles of Regulation (EC) No 45/2001.

In order to safeguard the interests of the complainants, complaints shall be dealt with confidentially by the fundamental rights officer in accordance with national and Union law unless the complainant explicitly waives his or her right to confidentiality. When complainants waive their right to confidentiality, it shall be understood that they consent to the fundamental rights officer or the Agency disclosing their identity to the competent authorities or bodies in relation to the matter under complaint, where necessary.

This mechanism is open to the affected persons as well as to any party representing them. The standardized complaint form shall be available in languages that third-country nationals understand or are reasonably believed to understand, during all activities of the Agency, including return flights. Inadmissibility must be reasoned. The Executive Director and the Member States shall report back on the complaints assigned to them.

The drawing up of the standardized complaint form had been identified by the Council and the Commission as one of the priorities in the implementation of Regulation 2016/1624. It is now available at <http://frontex.europa.eu/complaints/>, and further work is being carried out to liaise Frontex' Fundamental Rights Officer (FRO) with the adequate national bodies to study these complaints.

4. Risk Assessment

Paragraph 49, on the risk assessment

The CPT would like to receive more details regarding the risk assessment and how it is carried out, in particular if it takes place on an individualised basis.

For each person subject to a forced return measure, an individual risk analysis is performed. Several parameters are taken into account which may affect the safety of the flight and the integrity of the returnee. A proportionality evaluation of coercive measures is made. The background of the person is assessed, taking into account if he/she has frustrated or hindered previous removal attempts, the personal criminal records, prison and police reports regarding his/her violent nature and self-harm attempts. Equally, medical opinion is also considered so as to evaluate the means of restraint which may be applicable and proportional.

Paragraph 50, on the revision of the use of means of restraint.

50. Given the significant numbers of persons classified as high risk, the flight as a whole was considered to be a "high risk flight". Therefore, every returnee was accompanied by two escorts. Further, as a standard procedure, all returnees were restrained during certain phases of the operation: transfer from the Aluche facility to the airport; the waiting period at Barajas Airport; during embarkation; and during the first 20 minutes of the flight.

In this context, it should be recalled that guideline 19 of the 2005 Council of Europe Twenty guidelines on forced return provides that "the only forms of restraint which are acceptable are those constituting responses that are strictly proportionate responses to the actual or reasonably anticipated resistance of the returnee with a view to controlling him/her". Further, the Guide for JROs by air coordinated by Frontex indicates that "the use of coercive measures must not be systematic and must be justified in each case by an individual dynamic risk assessment".

The CPT recommends that the Spanish authorities review their current practice regarding the use of means of restraint bearing in mind the above-mentioned guidance.

The use of means of restraint is permanently subject to re-evaluation based on risk analysis.

The use of means of restraint on all returnees at certain phases of the return operation should not be considered as a systematic use of these means on return operations, but are based on risk analysis made not only for individual returnees, but also for different phases of the return operation. The number and type of incidents experienced in the past on flights to the same destinations may recommend the use of means of restraint on all returnees for relatively short periods of time. On the other hand, a differentiated use of means of restraint risks having the effect of "pointing a finger" at those most severely restrained, provoking defensive violent behavior.

Madrid, 14th October 2016