

NOTE ON THE LEGAL AND POLITICAL CIRCUMSTANCES RELATED TO THE DETENTION AND RELEASE in 2017 OF SEVERAL TURKISH JOURNALISTS IN SPAIN

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1. Introduction

This note was commissioned by the office of the Representative on Freedom of the Media (RFoM) of the Organization for Security and Cooperation in Europe (OSCE).

The aim of this note is to analyze the legal and political circumstances related to the provisional arrest, following an international Red Notice issued by the International Criminal Police Organization (INTERPOL) at the request of the authorities of Turkey, of two journalists at that time present in the Spanish territory. The request aimed at their extradition on the basis of accusations of participating in a terrorist group, which was recently dismissed by the Spanish competent authorities in both cases. These journalists are Erdogan Akhali and Hamza Yalçın (both originally from Turkey).

This note has been prepared on the basis of the freely available information on this case from different online sources, as well as the documents provided by the *Plataforma para la Defensa de la Libertad de Información* (PDLI), a Spanish NGO for the defense of freedom of expression, as well as the lawyers (Mr. Gonzalo Boye and Ms. Isabel Eibal) who defended the two journalists.

2. Spanish legal framework

The regulation of *passive* extradition of individuals (that is to say, from Spain to other countries) is contained in the Law 14/1985 (21 March), which was adopted in order to put the Spanish legal system in line with the different international legal commitments assumed by Spain in this area.

It is impossible to provide a whole picture of the contents of the Law. However, considering the object of this note, it is worth highlighting several elements that it contains:

a) The extradition procedure combines judicial and administrative aspects. The judicial authority is the main responsible body for different phases of the procedure, particularly regarding the temporary detention of the individuals affected by the extradition request). However, the Spanish Government (Cabinet of Ministers) has relevant and decisive competences as, first of all, it can decide on the continuation of the procedure right upon the reception of the international request. If the Government accepts to continue with the procedure, it will then be handled by the judicial authorities, who will take an independent decision on the case, and on the basis of the Law. In any case the extradition request can be finally dismissed by the Government *“in the exercise of national sovereignty, in accordance with the principle of reciprocity, or for reasons of security, public order or other essential interests for Spain”* (article 6 of the Law). It is also important to underscore that this decision cannot be appealed or subjected to judicial review.

b) Apart from the broad and open criteria that can be used by the Government in order to finally accept or dismiss an extradition request, the Law also contains more detailed and precise reasons which may justify the rejection of such petition (either by the Government or the judicial authority). These reasons include, among others:

b.1. Cases of prosecution for exclusively political reasons.

b.2. Cases of crimes committed through communication media and in the exercise of the right to freedom of expression.

b.3. Cases which will be judged by an exception court.

b.4. Cases when the requesting State does not give assurance that the person will not be executed or will not be subjected to treatment that violates his/her physical integrity or is inhuman or degrading.

b.5. Requests affecting individuals whom have been granted asylum.

b.6. Cases where there are reasonable grounds to believe that the request for extradition has been filed for the purpose of prosecuting or punishing a

person on exclusive grounds of race, religion, nationality or political opinions, or that the situation of the requested individual has the risk of being aggravated by such considerations.

In the cases mentioned in this note, the Government decided to dismiss the extradition requests in the first phase of the procedure. Therefore, the decision was, in both cases, “not to continue” with the extradition proceedings by the judicial authorities, who consequently declared the closure of the case and the immediate and unconditional release of the individuals in question. According to the official notes published by the office of the Government, such decisions were grounded on the rationale that the journalists had been previously granted asylum by another EU member State.¹

It needs to be mentioned that the timeframe was quite short, as detentions took place at the beginning of August, and the respective decisions by the Spanish Government were adopted in mid-October and formally executed by the competent Judge a few days later by ordering the unconditional release of the journalists. In general practice, even when the judicial and administrative procedure is followed in its full length, extradition cases used to be decided in less than six months.

Spanish legislation in this area thus contains a series of relevant provisions aiming at preventing the use of extradition procedures in order to arrest, prosecute and sentence individuals on grounds that would not be acceptable in Spain, not only according to national criminal provisions, but also under the rights, principles and values protected by the national Constitution and binding international norms.

It is also worth noting the discretion given by the legislator to the Government in order to assess, in certain cases, and beyond the specific provisions contained in the Law, the impact that an extradition decision may have on national interests.

¹ See the note on and the Agreement adopted on 13 October 2017 (Erdogan Akhanli, which also refers to the case of Hamza Yalçin): http://www.lamoncloa.gob.es/consejodeministros/Paginas/enlaces/131017_enlaceerdogan.aspx

3. Elements of political, international, and social context

Apart from the abovementioned legal elements, the cases commented in this note also need to be explained within the context of a series of additional factors of diverse nature which can be summarized as follows:

a) The two cases triggered important reactions at the international level, and particularly:

a.1. The OSCE RFoM reacted vis-à-vis the arrests of the journalists, calling on Spanish judicial authorities to reach a decision soon².

a.2. International journalists' associations and freedom of expression organizations also reacted to the cases, expressing their concern and urging for the dismissal of the extradition requests³. The European Federation of Journalists also posted the issue as an alert on the Platform to promote the protection of journalism and the safety of journalists, managed by the Council of Europe⁴.

a.3. The cases were widely covered by important international media outlets⁵.

a.4. The debate about the cases was preceded by a comprehensive report by the Commissioner on Human Rights of the Council of Europe precisely criticizing Turkish authorities for using criminal instruments to intimidate and punish journalists⁶.

² <http://www.osce.org/fom/336406>

³ See, for example, the following notes from the European Federation of Journalists: <https://europeanjournalists.org/blog/2017/08/09/spain-must-release-swedish-turkish-journalist-hamza-yalcin/>, the International Federation of Journalists <http://www.ifj.org/nc/news-single-view/backpid/34/article/spain-must-release-swedish-turkish-journalist-hamza-yalcin/>, the European Centre for Press and Media Freedom: <https://ecpmf.eu/news/threats/turkish-swedish-journalist-held-in-spain-on-turkey-warrant>, and the International Press Institute: <https://ipi.media/ipi-urges-spain-to-free-journalist-held-on-turkey-warrant/>

⁴ <https://www.coe.int/en/web/media-freedom/all-alerts/-/soj/alert/28036365>

⁵ See, for example, The Guardian: <https://www.theguardian.com/world/2017/aug/20/german-writer-held-in-spain-on-turkish-warrant-granted-conditional-release-dogan-akhanli>

⁶ <https://www.coe.int/en/web/commissioner/-/urgent-measures-are-needed-to-restore-freedom-of-expression-in-turkey>

b) The case was also closely followed by freedom of expression organizations activists in Spain, whom engaged in a notorious campaign:

b.1. The PDLI published constant updates and press releases on this issue⁷.

b.2. The PDLI addressed the Government, the Parliament, the Ombudsperson and the General Prosecutor in this case.

b.3. In particular, the PDLI sent to the General prosecutor a comprehensive report on the situation of freedom of expression in Turkey⁸.

It would be difficult to make a precise assessment on the impact of these factors on the decision finally adopted by the Government (which was formally based on applicable legal provisions). However, it is also clear that the pressure coming from civil society organizations, some media outlets and the international impact of the cases were particularly relevant in the outcome of the case.

4. Conclusions

a) The Spanish legal system incorporates an extradition procedure which combines judicial and administrative aspects.

b) This procedure gives particular weight to the Government (or Cabinet of Ministers), which may decide on the continuation of an extradition procedure upon the receipt of an international request according to a set of legal criteria, and in particular dismiss the extradition decision adopted by the competent court on the basis of the principle of reciprocity, or for reasons of security, public order or other essential national interests of Spain.

c) The Spanish legal system contains a series of reasons according to which an extradition request shall be dismissed in any case. Such reasons include matters as important as prosecution for pure political reasons or for crimes committed through media as part of one's exercise of the right to freedom of expression, cases which will be judged by a special court or when the requesting State does not give assurance

⁷ Such documents can be found here (in Spanish):

<http://libertadinformacion.cc/?s=periodista+turco>

⁸ Available here (in Spanish): <http://libertadinformacion.cc/la-pdli-entrega-un-informe-a-la-fiscalia-acreditando-las-vulneraciones-de-derechos-humanos-en-turquia/>

that the person will not be executed or will not be subjected to treatment that violates his/her physical integrity or is inhuman or degrading, requests affecting individuals who were granted asylum, or cases where there are reasonable grounds to believe that the request for extradition has been filed for the purpose of prosecuting or punishing a person exclusively on grounds of race, religion, nationality or political opinions, or that the situation of the requested individual has the risk of being aggravated by such considerations.

d) The procedure as regulated by the law is relatively swift and the final decision can be adopted within a short timeframe.

e) In any case, pressure coming from international human rights organizations, media outlets and civil society groups can have a significant impact on the content of final decision. The fact that legal criteria are open and can be interpreted in a significantly discretionary manner probably increases the likelihood of this kind of campaigns and pressures.

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