OFFICE OF THE COMMISSIONER
FOR HUMAN RIGHTS

BUREAU DU COMMISSAIRE
AUX DROITS DE L´HOMME

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 15th March 2004

CommDH(2004)8
Original version

# OPINION

# OF THE COMMISSIONER FOR HUMAN RIGHTS, MR. ALVARO GIL-ROBLES,

## on the procedural safeguards surrounding the authorisation of pre-trial detention in Portugal

## Introduction

1. During his visit to Portugal in May 2003, the Commissioner for Human Rights' paid particular attention to the administration of justice. Though generally of a high standard, the Commissioner identified a number of concerns relating to the length of judicial proceedings and pre-trial detention. The Commissioner was able to discuss these concerns with NGOs, lawyers, the Bar Association, the Prosecution Service, judges of the Constitutional and Supreme Courts and the Minister of Justice. The Commissioner's conclusions on these issues are recorded in his report on the human rights situation in Portugal, which was published in December 2003.

2. One issue of particular complexity and much national debate was not treated in the report. Whilst it addresses the excessive length and application of pre-trial detention, it refers only in passing, and in anticipation of the current Opinion, to the procedural guarantees relating to custody on remand.

3. This opinion examines the provisions of the Portuguese Code of Criminal Procedure relating to the confidentiality of the criminal enquiry, the "*segredo de justiça*", which condition the access of the defence to the files prepared by the prosecution. It concludes that these provisions may give rise, in practice, to excessive limitations of the right to liberty and security as guaranteed by article 5 of the European Convention on Human Rights[1].

4. It is the primary, albeit difficult, task of prescribed criminal procedures to establish a balance between the requirements of effective criminal prosecution and the respect for fundamental rights. Whilst criminal activity must, certainly, be combated effectively, a residual core of essential rights must be respected in all circumstances and, especially, when the deprivation of liberty is at issue. It is worrying to note, therefore, that increased security concerns have led to a shift in the procedural provisions of many European countries facilitating the prosecution of criminal activity at the expense of the rights of defendants. In the face of this tendency it is necessary to stress that all criminal activity, whether ordinary, organised or, indeed, of a terrorist nature, must and can be combated effectively through the forceful application, with the necessary resources, of procedures respecting the rule of law and fundamental rights.

5. It is should be noted, in this context, that this tendency has not been manifest in Portugal. It continues to be, as noted in the Commissioner's original report, a country with a particularly high commitment to the respect for human rights. This opinion is not provided, therefore, in response to new and restrictive measures but with the aim of examining a number of long-standing procedural shortcomings, which the current Portuguese authorities have already demonstrated a desire to address.

[1] The Commissioner submits this opinion in accordance with Articles 3(e) and 8 (1) of Resolution (99) 50 of the Committee of Ministers on the Commissioner for Human Rights. Article 3(e) instructs the Commissioner to "identify possible shortcomings in the law and practice of member States concerning the compliance with human rights as embodied in the instruments of the Council of Europe". In accordance with Article 8(1) "the Commissioner may issue recommendations, opinions and reports."

## I. The current procedure relating to detention on remand in Portugal

6. In the Portuguese criminal system, charges must be brought against all persons in respect of whom criminal allegations have been made before a judicial authority (art 58(1)(a), Portuguese Code of Criminal Procedure [hereafter CCP]). The individuals concerned must immediately be notified of the fact that they are the subject of a criminal enquiry and be attributed the status of an "*arguido*", an 'accused', before the investigation may commence. This status confers a number of rights and obligations on the accused, which are laid out in Article 61 CCP. These include the right to be present at all procedural moments directly concerning him, the rights to legal representation and legal aid if necessary, and the presence of a lawyer at all times. The accused is obliged, in turn, to appear before the judicial authorities whenever duly summoned. The Public Prosecution Service ("Ministério Público"), assisted by the judicial police, is responsible for all aspects of the investigation from its inception.

7. A number of special features result from this system. There is, firstly, no conceptual separation between an investigation, conducted by the police, and a criminal enquiry conducted by a prosecution service. There is, equally, no division of competences between the investigation and the prosecution, both functions being fulfilled by the Public Prosecution Service, which is entirely independent from the executive and other State bodies. Lastly, information obtained in the course of the investigation led by the Public Prosecution Service (the "*inquérito*", 'enquiry') remains, as a general rule, confidential, i.e. withheld from all parties except the judges involved, until such time as a formal accusation is made. This is procedural feature is referred to as the "*segredo de justiça*", the confidentiality of the enquiry.

8. Individuals detained on the suspicion of having committed a criminal offence must immediately be conferred the status of "*arguido*" [Article 58(1)(b), CCP]. They must be brought before an examining judge[2] ("*juiz de instrução*") within 48 hours of their arrest [Article 141(1), CCP and Article 28(1) of the Constitution]. The examining judge conducts the first examination ("*primeiro interrogatório*") at the end of which he must decide whether to authorise the continued detention of the accused on remand.

The first examination

9. This first examination is not intended as part of the investigative process. It is essentially a jurisdictional procedure; the role of the examining judge being to safeguard the rights of the accused and to ensure the legality of continued detention on remand.

10. Thus, during the first examination, only the examining judge may put questions. Neither the prosecutor nor the suspect's lawyer may intervene [Article 141(6), CCP] though the latter may clarify the statements made by his client. At the end of the examination the defence lawyer and the prosecution may request that the examining judge ask further questions of the accused that either party believes to be relevant to the establishment of truth [Article 141(6), CCP].

[2] The European Court of Human Rights has translated the term "*juiz de instrução*" as investigating judge. However, in the light of the magistrate's functions, the term 'examining' judge is perhaps closer to the reality and will therefore be used in this Opinion.

11. The examining judge bases his decision as to whether to authorise the detention on remand of the accused on two elements; firstly, the answers received to the questions put to the suspect during the examination and, secondly, the information contained in the file prepared by the prosecution service, which the examining judge may request to see in its entirety.

The "*Segredo de Justiça*"

12. The accused does not, as a general rule, have access at this stage to any of the material contained in the enquiry prepared by the prosecution. The denial of such access is conditioned by the "*segredo de justiça*", which covers, up till the formulation of an accusation, all the material contained in the enquiry but not the declarations and requests made by the accused and civil parties nor such proofs as they may introduce [Articles 86(4) & 89(1), (2), CCP]. In cases in which the accused is held on remand, the prosecution will normally have six months in which to formulate precise charges, though this period may be extended to 8, 10, or even 12 months depending on the degree of complexity of the case [Article 276, CCP].

13. During the first examination, the examining judge must inform the accused of the reasons for his detention and the facts imputed to him. [Articles 141(1) and 141(4), CCP]. The decision to detain the accused pending trial must, moreover, be accompanied by an order ("*despacho*") elaborating the facts motivating the decision [Article 194(3), CCP], i.e., in practise, the specification of the article/s of the Penal Code infringed, an indication of the facts supposedly constituting an offence, and an explanation of why detention has been authorised instead of a measure less restrictive of individual liberty.

14. At the moment of the authorisation of continued remand in custody, the accused is therefore only aware of such information as he has been informed of at the moment of his arrest, as he has received during first examination and as is, often only cursorily, recorded on the remand order. The examining judge may, at his discretion, disclose such items as are contained in the prosecution's file, and are covered by the "*segredo de justiça*", as he considers necessary for the establishment of the truth.

Criteria for authorising pre-trial detention

15. The examining judge will authorise pre-trial detention, only as an exceptional measure [Article 28(2) of the Constitution], if

1. There are serious indications that a crime has been committed [Article 202(1)(a), CCP]
2. There is a real likelihood of the course of the investigation being corrupted, of the flight of the suspect, or a continuing danger to public safety [Article 204, CCP].
3. Other measures less restrictive of individual liberty are inadequate [Article 193(2) CCP].
4. The accused is suspected of a crime carrying a minimum sentence of three years imprisonment [Article 202, CCP].

Challenging the detention order

16. The accused may seek to contest the decision to detain pre-trial[3]. He has 15 days in which to lodge such a request with the Court of Appeal ("*Tribunal de Relaçao*") [Article 411(1), CCP]. The prosecution has a further 15 days in which to prepare its response [Article 413(1) CCP]. The Court must deliver its judgment no later than 30 days after the receipt of the appeal.

17. Access to the prosecution's file, the enquiry, is not granted for the purposes of contesting the detention as the provisions relating to the "*segredo de justiça*" remain in force until a formal accusation has been made [Article 89(2), CCP]. The accused is, therefore, able to obtain no more information for the purpose of challenging his detention on remand than he has already been made aware of up to and during the first examination.

## II. The requirements of the European Convention on Human Rights

18. The procedural guarantees relating to pre-trial detention are covered in Article 5 of the European Convention for Human Rights (ECHR). These require that individuals be informed promptly of the reasons for their detention [Article 5(2)], that they be brought promptly before a judge [Article 5(3)] and that they be entitled to contest the lawfulness of their detention [Article 5(4)].

19. The required guarantees vary depending on the stage of the procedure[4]. It is not necessary that the proceedings resulting in the authorisation of pre-trial detention be adversarial, though such a decision must be taken by a judge, or similarly independent authority[5]. Nor would it appear necessary, at this stage of the proceedings, that all the information justifying the decision be communicated to the detainee. It is sufficient, as is, indeed, currently the case in Portugal, that the relevant facts and the legal facts justifying the detention are made clear to the suspect. It would appear, therefore, that the procedure under which the first examination is conducted in Portugal satisfies the requirements of Articles 5(2) and 5(3) of the ECHR. It is rather, in respect of Article 5(4) of the Convention that difficulties are liable to arise.

20. Article 5 (4) requires that proceedings for contesting pre-trial detention be adversarial in nature and provide for the equality of arms[6]. Whilst the Portuguese system provides, on appeal, for the former, the provisions relating to the *"segredo de justiça"* may, in so far as they continue to deny access to the prosecution's enquiry, limit the ability of the defence to contest essential elements on which the decision of the examining judge to detain the suspect may have been based.

21. To contest such a decision effectively, the detainee's counsel must have access to the information on which the decision is based. Under the provisions of the Portuguese Criminal Code, the accused is able to obtain such information from three sources: the questions put by the examining judge, the oral expose during the first examination of the facts imputed to him and the written record on the detention order. This cannot, in all cases, be sufficient.

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[3] The possibility of filing a claim under Habeas Corpus is foreseen by the Constitution and can be made, under certain circumstance at any moment following the initial detention [Article 31 of the Constitution, Articles 220 and 222, CCP].

[4] *E v. Norway*, A 181-A, para 64 (1990)

[5] *Schiesser v. Switzerland* A 34, para 36 (1979)

[6] *Lamy v. Belgium*, A 151 (1989)*; Weeks v. UK*, A114 (1987); *Nikolov v. Bulgaria* (2003); *Nikolova v. Bulgaria* (1999); *Magalhaes Pereira v. Portugal* (2002); *Schöps v Germany* (2001).

22. The effective exercise of the right to contest detention on remand requires that that the defendant be able to challenge both the accuracy of the facts supposedly constituting a criminal offence and the necessity of continued detention pending trial. In so far as elements contained in the enquiry prepared by the Prosecution may be central to either of these decisions, access to this information may be essential to the ability to effectively contest a remand order.

23. The European Court of Human Rights has already addressed the particular issue of the defence's access to files, notably in *Lamy v. Belgium*, in which it noted that:

" *… during the first thirty days of custody the applicant's counsel was, in accordance with law as judicially interpreted, unable to inspect anything in the file, and in particular the reports made by the investigating judge and the Verviers police. This applied especially on the occasion of the applicant's first appearance before the chamber du conseil, which had to rule on the confirmation of the arrest warrant. The applicant's counsel did not have the opportunity of effectively challenging the statements or views, which the prosecution based on these documents*

*Access to these documents was essential at this crucial stage in the proceedings, when the court had to decide whether to remand in custody or to release him. Such access would, in particular, have enabled counsel for Mr. Lamy to address the court on the matter of the co-defendants statement and attitude. In the court's view, it was therefore essential to inspect the documents in question in order to challenge the lawfulness of the arrest warrant effectively.*"

24. Certain limitations to the regular procedural guarantees may, however, be justified by the need to ensure the effective investigation and prosecution of suspected offenders. Such considerations most obviously apply in respect of suspected terrorist activity or the involvement in organised crime, for which exceptional measures are regularly foreseen. More particularly, the effective administration of justice may require in a wide variety of cases that certain elements in the enquiry be withheld from the knowledge of the suspect at the investigative stage of criminal proceedings. There may, for instance, be concerns regarding the protection of witnesses requiring their identity to be withheld, or regarding sensitive information obtained from informants or under-cover agents, whose disclosure would jeopardise the success of subsequent investigations or charges against other potential suspects. Procedures for withholding such information, under the strict control of judicial authorities, are indeed envisaged in the criminal procedures of all countries.

25. It is to be noted, however, that there are limits to the scope of the information that can be withheld. The defence cannot entirely be denied access to information that is essential to the decision to detain on remand. The European Court of Human Rights has noted, in *Garcia Alva v. Germany*[7],

" *… the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer.*"

[7] *Garcia Alva v. Germany*, (2001) para 42

26. It would appear from the rulings of the European Court of Human Rights that suspects must be granted access to as much information as is necessary, and no more than is sufficient, to justify the imposition of detention on remand.

## III. Rulings of the Portuguese Constitutional Court

27. The Portuguese Constitutional Court has delivered a number of judgments examining the adequacy of the information obtained for the purposes of challenging a detention order as well as the compatibility of the provisions relating to the "*segredo de justiça*" with both the Portuguese Constitution and the ECHR.

28. Thus, the Constitutional Court has ruled that the restriction of the "statement of facts with which the accused is charged", [Article 141(4), CCP] to abstract and general questions without specifying the time, means and location of the offence alleged, and without supporting evidence, would violate article 32(1) of the Constitution on the safeguards applicable to criminal proceedings.[8]

29. The Constitutional Court has, moreover, indicated that the absolute maintenance of the "*segredo de justiça*", and the corresponding denial of access, in all circumstances, to all the elements contained in the Prosecution's enquiry, would clearly violate the provisions of 5(4) of the ECHR[9]. In a recent case[10], the Constitutional Court has examined the scope of the disclosure of information contained in the prosecution's enquiry that is necessary for conformity with the ECHR. The ruling can be read as requiring that sufficient information to justify the decision to detain on remand be disclosed to the accused:

"*The question is not to allow the accused unrestricted access to the entire enquiry, but only to the specific elements of the evidence that were relevant to the accusation, the order of detention and the proposal to apply coercive measures – the remand in custody.*"

30. The ruling goes on to indicate that the judge must weigh "*the prejudice that its* [information covered by the "*segredo de justiça*"] disclosure might cause to the investigation against the prejudice that keeping it confidential might cause to the defence of the accused."

## IV. Findings

31. The recent Constitutional Court judgments would appear to offer an interpretation of the relevant provisions of the Portuguese Criminal Code that renders them compatible with the requirements of the ECHR. The import of these judgments is considerable, as they would appear significantly to erode the rigid application of the "*segredo de justiça*" that is, on the face of it at least, required by the Code of Criminal Procedure and which would, as noted, constitute a violation of Article 5(4) of the ECHR.

32. It is submitted, however, that the current procedure, as laid down by the Portuguese Code of Criminal Procedure and elaborated on in the rulings of the Constitutional Court, remains insufficiently precise adequately to safeguard against violations of article 5(4) of the ECHR in practice.

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[8] Decision no. 416/2003 of the Constitutional Court
[9] Decision no. 121/97 of the Constitutional Court
[10] Decision no. 416/2003 of the Constitutional Court

33. The disclosure of information covered by the "*segredo de justiça*" to the accused remains the exception; conditional, in each case, on the examining judge's appreciation of the competing interests of an effective investigation and the protection of the rights of the accused.

34. Clear indications of the extent and nature of the right of the accused to access information contained in the prosecution's enquiry are not to be found in the Code of Criminal Procedure, but only in a number of rulings of the Constitutional Court. All depends, therefore, on the aptitude of individual judges and their willingness apply the general principles laid down by the Constitutional Court.

35. It would greatly improve legal certainty, facilitate the task of judges and clarify the situation for the defence, if, at the very least, the rulings of the Constitutional Court were reflected more precisely in the Code of Criminal Procedure.

36. This might minimally be achieved by adding to the Code of Criminal Procedure the requirement that the accused be guaranteed access to such information as may be covered by the "*segredo de justiça*" as is necessary and sufficient to justify detention on remand.

37. It is recommended, however, that serious consideration be given to more comprehensive procedural reforms that would outline in greater detail the rights, duties, and functions of the accused, the prosecution, and the examining magistrate respectively.

## V. Conclusion

38. Detention on remand represents an extreme limitation of individual liberty and ought therefore to be imposed exceptionally and subject to the appropriate procedural guarantees. Though frequently applied in Portugal, the criteria laid down for the detention on remand in the Code of Criminal Procedure are sound. The problem arises rather in respect of the suspect's knowledge of the elements motivating the decision, and consequently his ability to challenge it effectively.

39. Greater precision in the formal motivation for such decisions in the remand order (the "*despacho*"), than is currently required and, in practise, often given, would certainly go some way rectifying this shortcoming. Such orders might be expected to contain both substantial elements regarding the offence allegedly committed and a detailed reasoning of the strict necessity of detention on remand.

40. Such a welcome development would not suffice to resolve, but would, indeed, itself continue to be vitiated by, the difficulties liable to arise as a result the provisions relating to the "*segredo de justiça*" and the absence of clear indications regarding extent of the information that must be disclosed to the accused. The occasional need to keep certain elements of the enquiry confidential in order to guarantee the effectiveness of the investigation is not in question. Nor, therefore, is the notion of the "*segredo de justiça*" itself; it is a perfectly valid procedural feature, analogues of which are, moreover, employed in other countries. The problem arises only in respect of its potentially excessive and lengthy application to cases in which the subject is detained pending the formulation of an accusation.

41. The current system renders the confidentiality of the enquiry, in its entirety, the norm. Information contained in the enquiry may, indeed, in the light of the rulings of the Constitutional Court, exceptionally be disclosed, but this sits awkwardly with fact that it ought only exceptionally be necessary to withhold it. Consideration might be given, therefore, to inverting the current practise such that, in the event of the application of detention on remand, the maintenance of the "*segredo de justiça*" would constitute, as in other member States of the Council of Europe with analogous provisions[11], not the rule, but the exception. Whilst provision must, in any event, be made for the obligatory disclosure of sufficient elements to challenge the decision effectively, regard must also be had to the effectiveness of the criminal proceedings. The examining judge might still, therefore, be able to maintain the confidentiality of the remainder of the enquiry through a motivated decision. The maintenance of the "*segredo de justiça*" ought to continue only for so long as is strictly necessary for the effectiveness of the investigation. The current delays for the formulation of charges by the Prosecution Service are not, in themselves, excessive, but might constitute, if extended without motivation to the maximum twelve-month period provided for, a rather lengthy period for the retention of important confidential elements from the defence. Consideration might also be given to introducing a provision requiring the lifting of the "*segredo de justiça*" sufficient time in advance of the formulation of charges to permit the introduction, at the investigative stage, of additional elements by the defence in response to the information and claims previously covered by "*segredo de justiça*".

42. A wide variety of reforms improving the respect for the fundamental rights of suspects might equally well be entertained. It is not the purpose of this Opinion, nor the role of the Commissioner, to propose such alternatives in detail. The concern of this opinion has rather been to identify the procedural shortcomings liable to arise in the application of the current provisions and to indicate the principles to be respected in their resolution.

43. Foremost amongst these principles is the right to liberty and security, the respect for which constitutes the mainstay of democratic criminal justice systems. Portugal's real and longstanding commitment to the respect for fundamental human rights is not question. Improvements in line with this commitment might still be made, however, in respect of the guarantees surrounding the application of pre-trial detention. It is for the Portuguese authorities to consider, and decide on, the reforms that are deemed to respect best the rights of suspects, the effectiveness of criminal investigations and the Portuguese legal tradition.

[11] See Article 302 of the Spanish Code of Criminal Procedure.