

COVID19 crisis

Template application for the urgent release from pre-trial detention

Template application to seek the urgent release of people held in pre-trial detention or to resist detention orders. It draws together key human rights standards.

If you need support, including translations, contact: covid19updates@fairtrials.net

Context

The grip of COVID-19 across the globe has made the liberty of arrested people take on a new urgency. Incarcerated people are some of the most vulnerable to infectious disease due to poor access to sanitation and health facilities, unsanitary conditions and often overcrowded detention facilities, making physical distance and isolation impossible. One of the most important public health measures to combat COVID-19 is restriction of physical contact and proximity. But the very nature of incarceration makes this practically impossible.

The only way to preserve public health and safety and protect the right to life, is to reduce the number of people in detention facilities. With pre-trial detainees making up a third and more of the prison population in many countries, reducing the use of pre-trial detention would protect the health not only of detained persons, but also the many professionals who come into contact with people in detention (including detention staff and lawyers) and the families and communities to which both staff and prison residents return.

We hear that some judges are starting to make fewer pre-trial detention orders, which is helping put fewer new people into detention and reduce prison population. But this is not the case everywhere. People continue to be sent into prison, including as a result of the newly introduced offences related to the COVID19 crisis, such as spitting on a police officer. And there are many people who have been in detention before the crisis started, and whose release should be considered.

Lawyers play a key role in resisting pre-trial detention orders by highlighting the risk to health and life of putting someone in detention during the pandemic. This is also a time to make urgent applications for release of clients who've been held up in pre-trial detention since before the crisis started. Criminal defence lawyers of [Conférence des avocats du barreau de Paris](#) and Christophe Deprez (the associate of Belgian LEAP Advisory Board Member Christophe Marchand) in Brussels developed template applications for the urgent release of persons held in pre-trial detention, based on the relevant standards set by the European Convention of Human Rights (ECHR) as interpreted by the European Court of Human Rights (ECtHR).

We are keen to support similar initiatives in other countries. Based on the templates developed by lawyers in Paris and Brussels, we've put together an outline application for release from pre-trial detention, with the relevant human rights standards in English. Let us know if you need further support. We're also keen to look beyond individual applications for release, so please contact us if you'd like to share views on requesting a systemic review of pre-trial detention orders.



Fair Trials, 2 April 2020



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Structure for application for release

We've highlighted in yellow the sections that need to be complete with specific details about the case. Please amend as necessary the document.

[Insert details: Court, address, date]

Application for urgent release from detention due to sanitary conditions

[Insert name of proceedings, file number and other relevant case information]

[Sir, Madam],

I represent [name], who is currently being held [police station/penitentiary institution] in the context of the above-mentioned investigation.

In view of the current health crisis linked to the spread of Coronavirus in [name country] and the difficulties in implementing the health measures adopted by the government in prison, the present application for the immediate release of my client is of vital urgency.

A. Factual background

1. [Details about your client's situation: date of arrest, place of detention, order to be placed in detention]
2. [State of play in ongoing proceedings, identifying in particular any delays due to COVID19 (e.g. illness of lawyer; closure of court)]
3. [Refer to the number of confirmed cases of COVID-19 (including any cases in jails in your country) and the measures adopted by the government to prevent the spread of COVID19 in your country]
4. The protective health measures against the infection recommended by health authorities, including regularly washing hands, social distancing and cleaning clothing regularly, are addressed to the general population and impossible to implement effectively in prison facilities where close contact between detainees and between detainees and prison staff cannot be fully avoided.
5. [Where the person is/may be held in a prison suffering from overcrowding, which prevents, for instance, the possibility to isolate a person who presents symptoms of COVID19, refer to the overcrowded situation].
6. Recently published guidance from the World Health Organisation (**WHO**) recognises that people deprived of their liberty are more vulnerable to the coronavirus disease outbreak than the general population because of the confined conditions in which they live together for prolonged periods of time: *"close proximity may act as a source of infection, amplification and spread of infectious diseases within and beyond prisons."* As such, the



World Health Organisation recommends that enhanced consideration should be given to resorting to non-custodial measures at all stages of the administration of criminal justice, including at the pre-trial, trial and sentencing as well as post-sentencing stages.ⁱ

7. [Refer to any reports about the poor sanitary conditions/access to health services in prisons in your country, which would prevent a person infected by the virus to obtain adequate health care in prison].
8. [Where applicable, refer to outbreaks of violence in jails linked to concerns about the spread of the virus and the restrictive measures (such as limitation of visitation rights) being adopted, as occurred in Italy].
9. In conclusion, the penitentiary administration does not have the necessary means to prevent the spread of the virus in jail. In view of the current health crisis, placing [my client] in detention puts [his/her] life at risk, as well as the lives of other detainees and prison staff. This application for release is, therefore, of vital urgency.

B. Principles that apply to maintaining pre-trial detention (or ordering pre-trial detention): Right to liberty

1. According to settled case-law of the European Court of Human Rights, Article 5 of the European Convention of Human Rights requires that judicial authorities demonstrate convincingly that each period of detention, however short, is justified.
2. To decide whether a person needs to be detained or released, the court must assess whether there are any other ways to ensure the person's appearance in court. The ECtHR considers that a person can be placed in detention only where there is a risk of absconding, tampering with evidence, collusion or pressure on witnesses, repeat offending or disruption to public order or where necessary to protect the person subject to deprivation of liberty. The ECtHR has stated that: *"The presumption is always in favour of release [...]. Until conviction, he or she must be presumed innocent, and [Article 5 of the ECHR] is essentially to require his or her provisional release once his or her continuing detention ceases to be reasonable. Continued detention can be justified in a given case only if there are actual indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty"*.ⁱⁱ
3. The ECtHR further specified the duty of the national courts: it *"primarily falls to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. Accordingly, they must, with respect for the principle of the presumption of innocence, examine all the facts militating for or against the existence of the above-mentioned requirement of public interest or justifying a departure from the rule in Article 5, and must set them out in their decisions on applications for release. It is essentially on the basis of the reasons given in these decisions and of the well-*



documented facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3.”ⁱⁱⁱ

4. The Committee of Ministers of the Council of Europe published on 27 September 2006 a recommendation^{iv} to member states on the conditions to resort to remand in custody, including the following recommendation:

“3. [1] In view of both the presumption of innocence and the presumption in favour of liberty, the remand in custody of persons suspected of an offence shall be the exception rather than the norm. (...)

[3] In individual cases, remand in custody shall only be used when strictly necessary and as a measure of last resort; it shall not be used for punitive reasons.

4. In order to avoid inappropriate use of remand in custody the widest possible range of alternative, less restrictive measures relating to the conduct of a suspected offender shall be made available.

5. Remand prisoners shall be subject to conditions appropriate to their legal status; this entails the absence of restrictions other than those necessary for the administration of justice, the security of the institution, the safety of prisoners and staff and the protection of the rights of others and in particular the fulfilment of the requirements of the European Prison Rules and the other rules set out in Part III of the present text. (...)

8. [1] In order to establish whether the concerns referred to in Rule 7b. exist, or continue to do so, as well as whether they could be satisfactorily allayed through the use of alternative measures, objective criteria shall be applied by the judicial authorities responsible for determining whether suspected offenders shall be remanded in custody or, where this has already happened, whether such remand shall be extended.

[2] The burden of establishing that a substantial risk exists and that it cannot be allayed shall lie on the prosecution or investigating judge. (...)

11. In deciding whether remand in custody shall be continued, it shall be borne in mind that particular evidence which may once have previously made the use of such a measure seem appropriate, or the use of alternative measures seem inappropriate, may be rendered less compelling with the passage of time.

5. In conclusion, the court must, when assessing the reasonableness of detention, take into consideration the public interest requirement to take all possible measures to avoid a spread of this serious and unprecedented epidemic. Moreover, the confinement measures restricting the movements of the general population limit the risk of repeat offences, which must be taken into account when assessing the need for pre-trial detention. The court must take into account the exceptional circumstances which mean that placing the suspect in detention will present the suspect to a serious health risk.



C. Other principles of human rights relating to detention conditions – access to health services

1. Article 2 of the ECHR protects the right to life and 3 of the ECHR prohibits torture, and "inhuman or degrading treatment or punishment". These provisions are both relevant to the right to access health services in detention.
2. The ECtHR has repeatedly indicated that: *"under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance"*.^v
3. The spread of the COVID19 virus creates an imminent risk to the health of detained persons. Penitentiary institutions are not in a position to address the threat in the same way as persons who are not deprived of liberty. Penitentiary institutions do not have the capacity to identify promptly symptoms of COVID19 and adequately isolate affected detainees from other detainees and from staff in order to prevent a spread of the virus.
4. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) noted, in relation to contagious diseases, that: *"[t]he spread of transmissible diseases and, in particular, of tuberculosis, hepatitis and HIV/AIDS has become a major public health concern in a number of European countries. Although affecting the population at large, these diseases have emerged as a dramatic problem in certain prison systems. In this connection the CPT has, on a number of occasions, been obliged to express serious concerns about the inadequacy of the measures taken to tackle this problem. Further, material conditions under which prisoners are held have often been found to be such that they can only favour the spread of these diseases."*^{vi}
5. Accordingly, the ECtHR requires states to prevent the spread of diseases: *"the spread of transmissible diseases and, in particular, of tuberculosis, hepatitis and HIV/Aids, should be a public health concern, especially in the prison environment. On this matter, the Court considers it desirable that, with their consent, detainees can have access, within a reasonable time after their admission to prison, to free screening tests for hepatitis and HIV/Aids."*^{vii}
6. In another case, the ECtHR specified that Article 3 ECHR requires states to protect the physical integrity of persons in detention and that in sufficiently serious circumstances, a good administration of justice can require that measures of humanitarian nature be adopted.^{viii}
7. The provision of health care for people in prisons and other places of detention is a State responsibility. Placing a person in detention means placing a person's life and health under



the responsibility of the state. If a person is in good health when placed in detention and no longer in good health when released, it is up to the State to provide explanations, failing which a violation of Article 3 ECHR may be established.^{ix}

8. A 2019 report by the UN Human Rights Council (HRC) underlines that “[b]y depriving persons of their liberty, States assume the responsibility to protect the life and bodily integrity of such persons.”^x The HRC expressed its concern regarding tuberculosis in prisons in Moldova: “[i]t reminds the State party of its obligation to ensure the health and life of all persons deprived of their liberty. Danger to the health and lives of detainees as a result of the spread of contagious diseases and inadequate care amounts to a violation of article 10 of the Covenant and may also include a violation of articles 9 and 6”.^{xi}
9. [Refer to any relevant ECtHR rulings in respect of your country.]
10. In conclusion, placing [the applicant] in detention in the context of the current health crisis would violate Articles 2 and 3 of the ECHR.

D. Conclusions

1. Taking account of the exceptional circumstances, the courts must balance the interests of public safety and the rights of the applicant to enjoy basic rights to health services, which would be seriously compromised. In view of the current health crisis resulting from the COVID19 pandemic, placing [the applicant] in detention would be a violation of Articles 2, 3, 5 and 6 of the ECHR.
2. I request the release of [the applicant] [and that the court order the following conditions [TO COMPLETE IF APPLICABLE] as an alternative to detention].

ⁱ *Preparedness, prevention and control of COVID-19 in prisons and other places of detention*, Interim guidance, World Health Organisation, 15 March 2020.

ⁱⁱ ECtHR, 5 July 2016, Buzadji v. Republic of Moldova, paragraphs 89 and 90.

ⁱⁱⁱ ECtHR, 5 July 2016, Buzadji v. Republic of Moldova, paragraph 91.

^{iv} Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse (Adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers’ Deputies).

^v ECtHR, Kudla v. Poland, Grand Chamber, 26 October 2000, paragraph 94.

^{vi} 11th general report of the CPT (CPT/Inf (2001) 16, paragraph 31.

^{vii} Cătălin Eugen Micu v. Romania, 5 January 2016, 55104/13, paragraph 56:
<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-159788%22%5D%7D>.

^{viii} See, Poghosyan v. Georgia, 24 February 2009, 9870/07, § 49 (only available in French, Georgian and Russian).

^{ix} Dobri v Romania, 14 December 2019, 25153/04, paragraph 45.

^x Human Rights Council, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, *Human rights in the administration of*



justice, 2019, p. 2, available at:

https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/session42/Documents/A_HRC_42_20.docx.

^{xi} See paragraph 9, Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : concluding observations of the Human Rights Committee : Republic of Moldova, CCPR/CO/75/MDA, 5 August 2002.



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