FAIR TRIALS INTERNATIONAL

Communiqué issued after the Fair Trials International Legal Experts Advisory Panel Meeting (London, 22 September 2011)

Pre-trial detention in today's European Union

Criminal Justice 2010
With financial support from
Criminal Justice Programme
European Commission –
Directorate-General Justice

OAK FOUNDATION

Introduction

1. Fair Trials International ("FTI") formed the Legal Experts Advisory Panel ("LEAP") in 2008 to provide an opportunity for experts in criminal justice, fundamental rights and access to justice in the EU to meet and discuss issues of mutual concern and to provide advice, information and recommendations to inform FTI's work. The eighth meeting of LEAP under the current EU action grant took place at the London offices of Clifford Chance LLP on 22 September 2011. 52 LEAP members representing 18 European jurisdictions attended.

2. Since the February 2011 meeting when detention issues were last discussed by LEAP, the European Commission has launched a Green Paper consultation on detention. This was issued in June 2011 and ends on 30 November 2011. It is designed to establish what action is required at EU level to raise standards across all EU countries in the whole area of detention.

3. FTI has since undertaken significant research on pre-trial detention in the EU and has been working on a detailed report to submit in response to the Green Paper. The report was circulated in draft before the meeting. It contains comparative research on the pre-trial detention laws of 15 EU Member States,[1] undertaken in collaboration with Clifford Chance LLP and LEAP members in those 15 EU jurisdictions.

4. Europe's excessive use of pre-trial detention is ruining lives and costing billions every year. The European Supervision Order could save billions and ease the severe overcrowding in prisons in over half of all Member States. However, many EU countries' systems do not yet have the requisite mechanisms in place in order to make full use of it.

5. Due to the large number of LEAP attendees the meeting was divided into three smaller workshop groups which discussed the Green Paper and FTI's draft report, focusing on the following issues:

    i. Should the EU legislate to set minimum standards for the use of pre-trial detention?

    ii. Should the EU take steps towards establishing a maximum pre-trial detention limit and, if so, what is the correct length?

    iii. What practical steps can be taken to ensure Member States apply the European Supervision Order fully and consistently?

    iv. In EAW cases, is deferred extradition appropriate when the case is not 'trial-ready'?

(i) Should the EU legislate to set minimum standards for the use of pre-trial detention?

a. Problems identified in use of pre-trial detention in EU jurisdictions

6. It was widely acknowledged that pre-trial detention offers valuable safeguards to ensure justice is served, evidence and witnesses are protected, and suspects do not evade prosecution. However, it should only to be used where necessary as it conflicts with the presumption of innocence, infringes the right to liberty and to family life, and tends to impair a person's ability to prepare for trial. During discussions among the panel members the following problems were identified in the use of pre-trial detention.

[1] The Czech Republic, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden and the United Kingdom.

7. Pre-trial detention is being used when not strictly necessary, and often for too long, at huge cost to both individuals and the state. Some countries, including the UK, are incarcerating women charged with very minor offences such as shoplifting. This has a huge knock-on socio-economic effect when children are taken into care. Several members were concerned with these wider socio-economic costs of pre-trial detention.

8. Few Member States have an adequate system for the regular and reasoned review of pre-trial detention. In many countries the right to a review exists in legal theory but is not protected in practice. In others, review hearings amount to a rubber-stamping exercise, rather than a genuine reassessment of the need for detention with the opportunity to present arguments in favour of release. Often no alternatives to detention are considered and insufficient reasoning is given for detention decisions. Inappropriate factors are often taken into account in the detention decision such as the seriousness of the offence

9. Non-nationals are more likely to be detained than nationals on the basis that they present a flight risk. Some Member States' laws allow for people to be detained for years before trial, meaning people are being extradited only to be locked up in a foreign country for significant periods. This has been exacerbated by the introduction of the European Arrest Warrant (EAW). No transparency exists in a number of Member States (e.g. Spain, Romania and Belgium) in the way detention decisions are taken and reviewed.

10. Across the EU, people who have not been convicted of any crime are being detained without good reason for months or years, often in conditions unconducive to trial preparation. Legislation in some States allows individuals to be detained for years pre-trial: some have no maximum limit. Some countries lack adequate review systems. Non-nationals are more likely than nationals to be subject to arbitrary or excessive pre-trial detention and to be deprived of key fair trial rights. This problem is exacerbated by the European Arrest Warrant, under which growing numbers are being extradited.

11. There is increasing use of pre-trial detention, rather than appropriate alternatives, for fear of negative media (and political consequences) if an individual accused of an offence is released pending trial. In the UK, members saw this after the August 2011 rioting. In Spain, the '*secreto de sumario*' regime, intended for especially complex and serious cases, has become widespread in cases where the accused is a non-national. Individuals held under this regime are at greater risk of an unfair trial and have insufficient disclosure for there to be effective custody review hearings.

b. What are the essential features of a pre-trial detention review?

12. The panel agreed it is essential that an accused has the right to have the lawfulness of his detention determined by a court that is independent of the prosecution, at regular intervals. This review should be a genuine reassessment. The onus should be on the prosecution to show, with evidence, why the continued detention is necessary.

13. The presumption of innocence should be paramount and, to reflect this, there should be a presumption in favour of release pending trial. Reasons should not focus on the seriousness of alleged offences but on the factors laid down in the case law on Article 5, including the need to preserve evidence, protect witnesses and ensure the accused does not abscond. A proper appraisal of these matters requires the court to take into account the defendant's own circumstances, as well as the overall interests of the prosecution. Stereotypical reasons such as the non-national status of the accused should not be relied on. The court should ensure the prosecution has considered available alternatives such as electronic tagging or regular reporting at the police station. A further factor that

could be taken into account is the length of possible sentence on a finding of guilt. Any length of pre-trial detention should not exceed this.

14. The review process must ensure that the accused can present arguments in favour of release, that all relevant alternatives to detention are considered, that reasons are given for a refusal to release and that a person's means are taken into account when fixing a financial surety. In particular, the fact that an individual is a non-national or does not have community ties should not mean that he is automatically considered a flight risk. The seriousness of the offence should also not be used as a sole ground for refusal.

15. Review hearings should be transparent, with impartial judges hearing both sides before giving clear reasons for decisions to hold a person in pre-trial detention. Hearings should be held in public unless privacy is requested by the accused. It was agreed that the following are essential to a fair review process: sufficient disclosure prior to the review hearing (including both of the charges and the nature of the case against the defendant, and of the evidence relied on by the prosecution of the need for detention); legal representation, legally aided where necessary; and an interpreter and translation of key documents where necessary.

16. Finally, it is the role of the court to take a pro-active approach to monitoring the progress towards trial. Prosecution authorities should conduct the preparation of a case with special diligence where the accused is being held in pre-trial detention. Therefore, where the state has previously relied on the needs of the investigation as a justification for detention, the reviewing court should be proactive in ensuring that the necessary diligence is indeed being applied.

c. How often should detention reviews take place?

17. Most members agreed that monthly reviews of detention would be preferable. However, busy court schedules and lack of resources in some states mean that monthly review hearings are usually no more than a rubber-stamping of earlier decisions. This is the case, for example, in Italy and Romania, countries which do conduct monthly reviews but often to little effect in terms of shortening the delays to trial or periods in pre-trial detention. Some members therefore considered that three-monthly reviews and/or a right to appeal a detention decision to a higher court would allow for a more effective review hearing, enabling new facts and the overall progress of the matter to trial to be assessed and fully reasoned arguments given by the court for the decision to continue detention or to release.

d. What is the legal basis for minimum standards of pre-trial detention?

18. All Member States, as signatories to the ECHR, must ensure that the principles espoused by the European Court of Human Rights ("ECtHR") in relation to pre-trial detention are observed in their domestic systems. However, this is not happening in practice. EU Member States are consistently found to have breached Convention rights. Given the importance of Article 5 rights, the fact that Member States often do not comply with them and the lack of a sufficient remedy at the ECtHR, it is necessary to have stronger compulsory and enforceable methods, through EU legislative action.

19. The Commission notes in its Green Paper that detention issues "come within the purview of the EU as ... they are a relevant aspect of the rights that must be protected in order to promote mutual trust".[2] Under Article 82(2)(b) of the Treaty of the Functioning of the

[2] Strengthening mutual trust in the European Judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM(2011) 327 final, 14 June 2011, p.3.

European Union, there is a clear legal basis for legislating in this area, as pre-trial detention entails ”the rights of individuals in criminal procedure”.

20. It was widely agreed that due to the existence of mutual recognition instruments such as the EAW, there is a need for mutual trust at EU level. Poor standards of protection for basic rights across the EU erode the trust and confidence necessary for mutual recognition measures. In many Member States, including Germany and Poland, domestic legislation exists that requires compliance with Article 5. However, in reality, Article 5 is not being complied with consistently and there is no effective remedy for its infringement, which can also lead to separate infringements under Article 6. The ESO, although it has the potential to limit pre-trial detention, may not be a sufficient safeguard, as it is a discretionary regime and some countries are not yet equipped to use it fully (see below under (**iii**)).

21. Many members cautioned that the introduction of legislative minimum standards should not be allowed to permit Member States to *reduce* standards where their current standards are higher (at least on paper) than those to be proposed under a future EU Directive. A non-regression clause could be included to deal with this, but the key goal of EU legislation must be to make ECHR rights more practical to enforce and monitor.

e. Should there be a remedy for breach of minimum rules on pre-trial detention?

22. It was widely felt that there should be an effective remedy, including an enforceable right to compensation, in the event that minimum rules on the use or review of pre-trial detention are breached. Some members considered that, for compensation to be payable, there would need to be fault and/or negligence by the prosecution in the way the case was conducted, leading to the case being dropped, or to a finding of miscarriage of justice. Compensation should reflect losses suffered by the individual (for example lost earnings, collapse of a business, and loss of liberty and family life).

(ii) Should the EU take steps towards establishing a maximum pre-trial detention limit and, if so, what is the correct length?

23. The panel agreed that steps should be taken at EU level to address the extreme variance in different countries' legal systems concerning periods of pre-trial detention. In a number of EU countries, legislation permitting lengthy periods of pre-trial detention (or the absence of a legal limit) can allow prosecutors to drag their feet and can operate to put pressure on the accused to plead guilty in cases where the sentence likely to be imposed is less than the time an accused could spend on remand. Some members were concerned about extra time spent in prison following a *not guilty* verdict, when the prosecutor appeals. In some Member States these periods are very long and wholly unacceptable.

24. It was widely felt that EU action was necessary to address this, given that those countries which tend to allow long periods in pre-trial detention rarely if ever demonstrated any good objective reasons for the practice. However, most members felt the solution was not, for the time being, legislation. Instead the panel agreed that the EU should examine the viability of establishing a maximum pre-trial detention limit. Some members felt that six months was a suitable maximum to aim for, others considered a year to be more realistic given the complexity of some cases. Some suggested that if 6 months had passed, there should be a greater onus on the prosecution to show why continued detention was necessary.

(iii) What practical steps can be taken to ensure Member States apply the European Supervision Order fully and consistently?

25. Effective implementation of the ESO will require proper resources and training. It will be necessary to ensure that effective alternatives to pre-trial detention, such as tagging, regular reporting or conditional release are available. In many Member States, the only available alternative to pre-trial detention is money bail, which is impossible for most suspects to provide.

(iv) Is deferred extradition appropriate when the case is not 'trial-ready'?

26. The panel agreed that this was a good idea in principle but that, in practice, it was often difficult to obtain the necessary information on the status of the investigation at the extradition stage. Where there are reasonable grounds to believe that the case is not trial-ready (for example where evidence requests have been sent overseas and will therefore cause long delays to proceedings, as happened in the Greek prosecution of Andrew Symeou, who spent almost a year in pre-trial detention and who was extradited almost two years before his eventual trial), the executing state should be able to defer extradition, unless satisfied that there is no prospect of protracted pre-trial detention.

Conclusion

27. Following wide-ranging discussions on the topic of pre-trial detention in the EU, members expressed the following views:

- given the widespread misuse of pre-trial detention and its impact on trial preparation and the rights to liberty and family life, as well as wider socio-economic cost, EU action is necessary to set minimum standards for its use and regular review and ensure an effective remedy when these rights are infringed;
- common minimum standards would assist judges and ensure consistency of approach to pre-trial detention;
- the proposals contained in FTI's draft report for an EU Directive setting minimum standards were appropriate;
- resources and training are required for full use to be made of the ESO system when it is implemented in December 2012;
- deferred extradition should be used to prevent lengthy periods on remand after surrender under an EAW; and
- in addition to limiting the length of pre-trial detention, cutting out delay between charge and trial is essential and judges carrying out review hearings should take a pro-active approach to ensuring diligence in the prosecution of cases, particularly where a person is in pre-trial detention.