FAIR TRIALS INTERNATIONAL

Communiqué issued after the Fair Trials International Legal Experts Advisory Panel Meeting (London, 4 February 2011)

(1) Pre-trial detention and bail in today's European Union

and

(2) Prisoner transfer and mutual recognition of custodial sentences

Criminal Justice 2011
With financial support from Criminal Justice Programme
European Commission – Directorate-General Justice

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 European policy position. The sixth meeting of LEAP took place at the offices of Clifford Chance in London on 4 February 2011. 18 LEAP Members and 8 invited guests, representing 13 European jurisdictions, attended. The meeting was chaired by HH Dennis Levy QC.

2. Since its creation LEAP has had a huge impact, allowing FTI to use members' expertise to achieve change. For example, there has been significant progress on the European Arrest Warrant ("EAW"), which has been discussed at two previous LEAP meetings. There is now increasing acknowledgment of the need for reform, as illustrated by the UK Government setting up an independent panel to review the UK's extradition arrangements. A group of LEAP members, together with FTI, has also written to Commissioner Viviane Reding, voicing their concerns about the EAW and calling for reform. Mrs Reding responded, accepting there was "significant room for improvement in the operation of the European Arrest Warrant."

3. Increasing use of the EAW is having the undesirable and unnecessary outcome of ever greater numbers of individuals spending significant time in prison on remand in EU countries other than their own. In the first part of the meeting, members discussed the use of pre-trial detention in their jurisdictions and the apparently discriminatory way bail decisions are made where defendants are non-nationals. As well as discussing problems under the current system, members examined the Framework Decision on the European Supervision Order ("ESO"), discussing its potential for improving the system and foreseeable problems with its operation. The ESO is due to be implemented by all Member States by 1 December 2012.

4. The second part of the meeting was dedicated to discussing prisoner transfer between EU Member States and the expected impact of the Framework Decision on the mutual recognition of custodial sentences, which is to be implemented by all Member States by 5 December 2011, apart from Poland, which has secured a 5 year extension.

1. Pre-trial detention and bail in today's European Union

5. The Panel agreed that non-nationals are frequently discriminated against when it comes to bail decisions. They are more likely than nationals in similar cases to be held in pre-trial detention, which impacts on their ability to prepare for trial effectively. Members explained how bail operated in their jurisdictions and commented on existing practices which can lead to unfairness for non-national defendants.

   Spain: In Spain bail is reviewed before a judge every week or two weeks. For non-nationals, bail is difficult to get. The maximum period of pre-trial detention is 4 years. The length in practice depends on where in Spain the defendant is held. For example, 4 years' pre-trial detention in Madrid is unusual, yet in Tenerife it is frequently served. If the case has not been decided before the four years have elapsed, the person is released on bail. Bail review hearings are mainly dealt with on paper, but lawyers can address the judge in private to negotiate bail.

   Italy: In Italy the judge's decision whether or not to grant bail involves an assessment of the seriousness of the offence. Italy has a maximum pre-trial detention period of 6 years, yet some cases can go unresolved for 10 years or more. (In Italy time is counted as pre-trial detention until all final appeals have been exhausted.)

   Czech Republic: The maximum length of pre-trial detention in the Czech Republic is 16 months. Release is automatic once this limit is met. Bail is available as an alternative: there are no mandatory bail conditions. However, it is almost impossible for non-nationals to get bail. Once a decision to remand in custody is made, the person has a right to

regular review. However, in practice, the original decision is usually rubber-stamped in subsequent review hearings.

England and Wales: If a person is charged with a serious offence the burden of proof effectively rests on the defendant to show why bail is appropriate. This infringes the right to a presumption of innocence. When it comes to non-nationals being granted bail, the same approach is followed in England and Wales as in much of Europe.

Scotland: The trial must start within 140 days of arrest. Monetary bail deposits have been abolished in Scotland, but can still be imposed as a special condition: there are signs that money bail may be brought back. Scottish prisons are full of people who have violated bail conditions and yet, due to prison overcrowding, convicted persons are being released early.

Bulgaria: In Bulgaria pre-charge detention is treated differently to pre-trial detention. Following arrest if no charges are brought within 24 hours, the person must be released. There are two types of measures to prevent evasion from justice: 1) measures which do not restrict the defendant's personal freedom (eg signing in at a police station and bail) and measures either resulting in restrictions on liberty (eg home arrest) or leading to deprivation of liberty (eg detention on remand). The law stipulates that pre-trial detention can be imposed provided there is reasonable suspicion that the person has committed the offence. The rationale is that if reasonable suspicion is shown, there is a risk the person will abscond if the crime in question is punishable with a sentence of more than 10 years' imprisonment. The burden of proving this is not in fact a risk rests in practice, though not in law, with the defence. The bringing of charges is not subject to judicial review and sometimes new charges are formulated in order to ensure more stringent detention conditions are imposed. In most cases, pre-trial detention is not allowed to last for more than one year.

France: The judge decides whether to grant bail or remand in custody and must now give reasons for this decision (following pressure from the European Court of Human Rights ("ECtHR")). This has led to more people being granted bail. Judges try to ensure that non-national suspects do not abscond. In France, a large number of non-national defendants face drugs charges. In such cases the judge is often suspicious about accepting bail deposits, considering that the money may have a questionable source. On average, pre-trial detention lasts for one year in France.

Poland: In the mid-1990s responsibility for bail decisions moved from the prosecutor to the court. Pre-trial detention is supposed to be a last resort, where bail will not suffice to protect the interests of justice. Courts can impose alternatives, such as regular signing in at a police station or electronic tagging. It is difficult to persuade a judge to apply tagging due to functional problems with the tagging system.

Pre-trial detention is only supposed to last for 3 months, with an upper limit of 2 years, but in practice these periods are regularly extended. Review hearings are usually a rubber-stamping of previous bail decisions. The defendant is represented at all the hearings but only attends the first. Courts can order pre-trial detention if the prosecutor indicates that the evidence suggests a high probability of guilt, or where severity of the likely sentence leads to a presumption the person will attempt to evade justice. The Court of Appeal adopts exactly the same approach to pre-trial detention as the lower courts. The ECtHR has frequently found Poland in breach of Art 5 ECHR. Legislation alone cannot produce change: the mentality of judges must also change.

Romania: Following recent reforms in Romania, 10% of the prison population are pre-trial detainees, reduced from 40%. This reduction was brought about by a change in the Criminal Procedure Code which saw pre-trial detention powers removed from prosecutors and given to judges. This was accompanied by a strengthening of *habeas corpus* remedies. Under new time limits, pre-trial detention during the investigation stage can last for a maximum of 180 days. Generally, pre-trial detention can last up to the equivalent of half the maximum sentence for the alleged offence. A shift in the mentality of judges has

taken place and a probation service has been introduced. Conditions can be attached to bail, such as a prohibition on leaving the country or a particular city. These measures have helped reduce the number of pre-trial detainees. The impetus for change was EU accession and general modernization of the justice system.

Germany: In Germany pre-trial detention can last for a maximum period of 6 months. This can only be extended in very serious cases. There is automatic review of detention after 3 months. Pre-trial detention is often used as a bargaining chip by prosecutors. However, there is generally a presumption that bail will be granted.

Ireland: In Ireland most people are granted bail even for serious offences. This is now starting to change, apparently due to the large number of non-nationals going through the criminal justice system. Afro-Caribbean and Roma people often receive discriminatory treatment in bail applications. This has pushed up the number of remand prisoners. What is needed is a bail regime free from discrimination and a fixed time limit for the commencement of trial. So far there have been no European Convention on Human Rights ("ECHR") challenges on this point. The length of the possible sentence is explicitly acknowledged as something which can be considered by the judge when making a decision on bail.

6. The Panel identified the following key problems:
   i. in several EU countries pre-trial detention is, in practice, the norm, even though in legal theory it is only meant for exceptional cases;
   ii. decisions ordering pre-trial detention routinely infringe Article 5 ECHR, being ordered on illegitimate grounds connected with the merits of a case, the length of the sentence attributable to the crime, or the apparent strength of the evidence;
   iii. non-nationals and ethnic minorities are over-represented as a class of pre-trial detainees;
   iv. excessively long periods are being spent in pre-trial detention;
   v. conditions in pre-trial detention are often unacceptable, making effective trial preparation impossible and causing needless infringement of Article 8 ECHR rights for defendants and their families (as well as, in some cases, infringements of Article 3 ECHR rights).

7. It was agreed that the crucial fundamental rights protection in this area – one lacking in several EU jurisdictions – is the right to a regular judicial review of pre-trial detention decisions, with defendants present and legally represented. These reviews must be more than a mere rubber-stamping of previous decisions, but be based on a fresh and objective analysis of all available relevant information, with a reasoned decision by the court. Steps must also be taken to eradicate discriminatory approaches to bail in cases of non-nationals and members of ethnic minorities, to end the use of excessively long periods of pre-trial detention, to introduce effective supervision systems, and to raise standards in detention facilities to an acceptable minimum, ensuring particularly that the European Prison Rules are complied with insofar as pre-trial detainees are concerned.

The European Supervision Order

8. The Panel examined the European Supervision Order ("ESO"). This instrument lays down rules according to which one Member State recognizes a decision issued in another Member State imposing supervision measures, as an alternative to pre-trial detention. This would allow defendants in appropriate cases to remain in their home country at conditional liberty, until trial, with express provision for the European Arrest Warrant to be used to require the person's surrender if supervision conditions were breached. The Framework Decision must be implemented by all Member States by 1 December 2012.

9. Members acknowledged the significant benefits of a system of cross-border supervision, particularly given the unacceptable practices currently seen in many European countries with regard to the excessive use and length of pre-trial detention. The Panel welcomed the fact that Member States had adopted a measure that could substantially reduce the number of non-nationals held in pre-trial detention and safeguard individuals awaiting trial

against unjustified infringements of their fundamental right to liberty, family life and the opportunity to prepare properly for trial. With over-crowding a major problem in many EU prisons and non-nationals and pre-trial detainees both over-represented classes of prisoner, such a system had clear potential advantages.

10. However, Members agreed there were shortcomings with the ESO:
    i. the lack of any express obligation on States to issue ESOs in suitable cases;
    ii. the absence of clear, objective criteria for when an ESO should be issued;
    iii. the prospect of administrative as opposed to judicial authorities taking decisions under ESOs: this is not acceptable in situations where an untried person's liberty and family life are at stake and could also lead to ESOs being issued for inappropriate reasons;
    iv. the absence of provisions about the role and participation of the defence; and
    v. undue complexity around what happens in case of a breach of ESO conditions, which could lead to reluctance on the part of issuing authorities to use ESOs, even in appropriate cases. The ESO could in fact inhibit proactive solutions in cross-border bail arrangements, due to its over-complexity and to the absence of common practices across member states.

11. The Panel recommended that, in order for the ESO to be capable of realising its full potential benefit (both for individuals and member states), further provisions and guidance are needed in the following areas, prior to the ESO's implementation:
    i. clear provisions on when an ESO should be issued, with an obligation on member states to use ESOs in appropriate cases;
    ii. given the disparity between bail regimes and maximum pre-trial detention periods in today's EU, there is an urgent need to raise and harmonise standards of decision-making at remand hearings and to bring about greater approximation of alternative supervision measures between member states, including where necessary setting up suitable supervision and bail systems;
    iii. guidance is required on the role and participation of the defence, to ensure that, in suitable cases, defendants can request the issue of ESOs;
    iv. simplification and greater flexibility around what happens if ESO conditions are breached.

12. Members were concerned that, unless these issues were now tackled, there was a danger that the ESO, once implemented, would operate in a discriminatory and uneven way across Europe and would fail to fulfil its potential and meet its original objectives.

13. Members also agreed that a systematic programme of information and education for judges, prosecutors and legal defence practitioners, is crucial to ensure the ESO is used to the full in all appropriate cases.

2. Prisoner transfer: Framework Decision on mutual recognition of custodial sentences

14. The Panel shared their experience of the current prisoner transfer system in EU countries. It was agreed that enabling foreign prisoners to return to their home States to complete their sentences improves rehabilitation prospects, as prisoners are placed in a more familiar environment to prepare for re-entry into society. Ensuring that prisoners were detained close to home also makes life easier for family members. However, the current transfer system was agreed to be bureaucratic and slow.

15. Unfairness is also frequently seen in connection with the difficulty some countries encounter when deciding how to enforce or convert sentences imposed overseas which would not have been imposed in similar cases domestically. Such decisions often lead to arbitrary and unjust results for the transferred prisoner. For example, in England and Wales, there was a disparity in the treatment of transferred prisoners serving determinate and indeterminate sentences. A person serving a life sentence imposed abroad will, in effect, have their sentence converted after transfer. This often leads to a significant reduction in the amount of time served in prison. However, a prisoner serving a

determinate sentence will not have the same opportunity. Instead, the sentence simply continues to be enforced. This can mean that more serious offenders will spend less time in prison than less serious offenders.

16. Members examined the Framework Decision on the mutual recognition of custodial sentences, which aims to simplify and speed up the prisoner transfer process. Members expressed some major concerns about the human rights implications of the Framework Decision:

i. Material prison conditions and the laws governing the rights of detainees vary widely across the EU. The Framework Decision could be used to send people to be detained in prisons with very poor conditions. There is also a danger that transfers will be used to ease overcrowding in one Member State, exacerbating overcrowding in another Member State. This could be a particular problem where one Member State has a high proportion of prisoners who are nationals of another, perhaps neighbouring, Member State.

ii. Difficulties will also be encountered around sentencing equivalents. For example, in Belgium, electronic tagging is classed as a prison sentence, whereas in most other EU States it is not. Widely divergent rules regarding conditional or early release could become an obstacle to transfer. Determining equivalent sentences will be especially problematic where the offence falls into one of the categories of offence to which dual criminality checks are not required. It will be difficult for an executing State to enforce an equivalent sentence where there is no equivalent offence.

iii. From a procedural rights perspective, the Framework Decision is disappointingly weak. The procedural rights "Roadmap" measures will not apply to the procedures envisaged by the Framework Decision because it is not concerned with the pre-conviction period. However, the fact that the Framework Decision removes the requirement that the sentenced person consents to transfer means that even greater attention must be paid to the possible infringement of fundamental rights, post-transfer. Greater access to information on prison conditions and other States' criminal justice systems is therefore vital. This will enable issuing States to take all relevant factors into account before initiating transfer.

iv. Members considered it unfortunate that the instrument contains no express requirement for prisoners subject to transfer decisions to be given information about prison conditions in the home state, or the transfer process generally. In the circumstances, it is all the more important for the protection of fundamental rights that persons subject to a transfer decision are legally represented and their lawyers are given sufficient time prior to transfer to collect information about prison conditions and advise their clients of the effect of the legislation and potential remedies where it could infringe fundamental rights.

v. Given the apparent lack of research on the number of prisoners who will fall within the ambit of the Framework Decision, members feared that some countries will not be sufficiently prepared for its impact. Different Member States have different conceptions of social rehabilitation and of the factors to be considered when deciding whether transfer would facilitate rehabilitation. The Framework Decision does not provide general criteria. However, if each case is assessed on its merits using different tests, this could lead to uncertainty and unfairness.

vi. Given that the Framework Decision removes the requirement that the sentenced person must consent to transfer, even greater attention must be paid to the possible infringement of fundamental rights post-transfer. Greater access to information on prison conditions and other States' criminal justice systems is therefore vital. This will enable issuing States to take all relevant factors into account before initiating transfer.