FAIR TRIALS INTERNATIONAL

ŽMOGAUS TEISIŲ STEBĖJIMO INSTITUTAS
HUMAN RIGHTS MONITORING INSTITUTE

# COMMUNIQUÉ

**issued after the meeting of the**

## LOCAL EXPERT GROUP (LITHUANIA)

**9 May 2013**

# PRE-TRIAL DETENTION IN LITHUANIA

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## Introduction

1. On 9 May 2013, Fair Trials International and the Human Rights Monitoring Institute ('HRMI') brought together leading experts in criminal justice from across Lithuania in order to learn about pre-trial detention in law and in practice (a list of participants is provided in Annex A.) Where we identified problems, we wanted to learn about ongoing efforts and new opportunities to challenge these. The Local Experts' Group (Lithuania) met for a full day in Vilnius.

2. Prior to the meeting, the participants were asked to reflect on several themes: (i) the standards of pre-trial detention decision-making by the Lithuanian courts; (ii) the reasons underlying excessive use of pre-trial detention; and (iii) the opportunities for law reform and litigation. These topics were discussed at the meeting. The remainder of this communiqué outlines the key points raised in the meeting and the key conclusions reached.

### A. Pre-trial detention decision-making standards

***Procedure***

3. Under Lithuanian law, pre-trial detention decisions are taken by the Investigating Judge at the request of the Prosecutor. The Prosecutor submits a motion to the Judge, which contains only basic information including the background to the arrest of the individual, the charge against them and the grounds for detention.[1] Participants explained that judges generally adopt a "rubber-stamping" approach towards the requests of the Prosecutor, with whom the Judge is more closely connected than with the defence lawyer. One participant expressed it as follows: "When the defence lawyer comes to court, people frown and wonder why he is there. When the Prosecutor comes to court and goes straight into the Judge's room, no-one is surprised".

4. Participants suggested that it is much simpler for judges to order detention when asked to do so by the Prosecutor than to review, in detail, the longer submissions of the defence lawyer. The arguments of the defence lawyer are rarely taken into consideration. Defence lawyers are treated differently from prosecutors. Rather than an equal participant in the process, it was suggested that they are viewed as "obstacles to the justice system".

5. There are very few cases in which all the circumstances are examined, and it is not unusual to see motions from prosecutors which are identical – even containing the same spelling mistakes – demonstrating a failure to address the need for pre-trial detention on a case-by-case basis. Too often, judges appear to ignore the legislation, apply their own understanding of the legal framework and listen only to the grounds presented by the Prosecutor. One participant suggested that prosecutors are able to select the pre-trial judges to whom they submit their motion, and do so strategically in order to obtain a positive decision from those judges who are known to be more inclined towards ordering detention.

6. Pre-trial judges are often new judges without extensive experience. After five years, they will undergo a review of their competence and the quality of their decision-making

[1] Article 123, Code of Criminal Procedure.

could be raised at this stage. Otherwise, aside from the appeal process,[2] there is no oversight of their decisions. Therefore, a judge will not face any repercussions following a decision ordering pre-trial detention, irrespective of how unjustified that decision may have been. Further, participants suggested that judges are not necessarily experts in the application of the law. They have undergone the judicial selection procedure, but they do not approach the law professionally. These young judges are then confronted by prosecutors and defence lawyers with far more extensive experience. They also face political pressure, knowing that their decisions on pre-trial detention will be scrutinised by politicians and this may impact on his or her future career progression.

7. Under the Code of Criminal Procedure, restrictions on the right to access the case file should only apply in "exceptional" circumstances.[3] In practice, however, access is often denied. The defence lawyer is entitled to review the content of the motion but no other part of the case file. The lawyer has access, therefore, to only very limited information which excludes, for example, any mitigating factors which might assist in developing the case against pre-trial detention. In 2004, the Supreme Court Senate published a decision[4] which dealt extensively with the interpretation of various provisions of the Code of Criminal Procedure relating to pre-trial detention. The decision stated, inter alia, that the suspect and his lawyer in all cases have a right to access the portion of the case file which the prosecutor has submitted to the pre-trial investigation judge when pre-trial detention is sought. Prosecutors were thereby prevented from completely refusing the defence counsel's access to the case file. In 2006, however, the Constitutional Court ruled that these decisions of the Senate are not legally binding, as only decisions in the case-law of the Supreme Court constitute precedents. [5] This has resulted in confusion and legal uncertainty.

8. The lawyer is therefore dependent on information obtained from the client. One participant commented that defence lawyers are essentially "blindfolded", and as a result, mitigating circumstances – such as the potential impact of detention upon the life of the individual – are not taken into account. One participant spoke of being able to access the case file in a small number of cases where the extension of detention rather than the initial detention was being considered. These were, however, described as "one-off" cases, and where access to the case file was provided, there was only a very short period of time given in which to review a large amount of material. Other participants referred to having been granted access to the case file only 10 minutes before the commencement of the pre-trial hearing, which is inadequate for the preparation of a meaningful defence.

9. Defence lawyers are able to appeal, on behalf of their clients, decisions ordering pre-trial detention and they do. Under the terms of the CCP,[6] such appeals must be considered and determined within 7 days of reception, and this requirement is generally respected.

10. The participants identified the quality of state defence lawyers as a key factor impacting on the quality of pre-trial detention decisions. State defence lawyers are very poorly

[2] Articles 130-131, Code of Criminal Procedure.
[3] Article 181(1), Code of Criminal Procedure.
[4] Decision No. 50 of 30 December 2004 of the Supreme Court of Lithuania Senate, paragraph 4.
[5] Constitutional Court Ruling of 28 March 2006, available in English - http://www.lrkt.lt/dokumentai/2006/r060328.htm.
[6] Articles 130-131.

paid and there are limits on the number of hours of work for which they can be paid on in relation to any particular case. Participants noted that whilst private defence lawyers will be provided with adequate notice of the pre-trial detention hearing, the same does not apply for state defence lawyers who are sometimes only given an hour's notice before the commencement of the pre-trial detention proceedings. This presents challenges for the state lawyer in obtaining information about the client, who they are unable to meet or speak with prior to the hearing. They are unable to collect any positive information about the individual which could be used to challenge a motion for detention.

***Substance***

11. Under Lithuanian law,[7] pre-trial detention can be ordered where the potential sentence for the offence charged is one year or more and:

    i. there are grounds for believing that the person will escape or abscond, which must be assessed having regard to the defendant's personal circumstances and record of convictions;
    ii. there is evidence that the person will interfere with the investigation; and/or
    iii. there are grounds to believe the person will offend if released.

12. Due to the nature of the process applied in practice, and described above, examples of reasoned pre-trial detention decisions are rare. This makes an assessment of the substantive basis of such decisions difficult to carry out.

13. In reality, the length of the potential sentence is treated as the key determinant of whether pre-trial detention should be ordered as the strictness of the possible sanction facing the individual is treated as an indicator of whether or not that individual will abscond if released. An individual charged with a serious crime is automatically detained based on the presumption that the suspicion of such a crime gives the individual a reason to flee. In some cases, a manipulation of the charges is used to ensure pre-trial detention is ordered. An example was given by one participant of a client who was suspected of committing a large fraud, although no figures had been presented by the Prosecutor as to the extent of the alleged offence. Despite no information as to the extent of the damages, and therefore no clarity as to whether this should be treated as a serious or petty offence, the Prosecutor proceeded on the basis of a serious crime in relation to which the client was subjected to pre-trial detention.

14. Participants noted that pre-trial detention decisions are often based on an assessment of the evidence demonstrating whether or not an individual committed the offence in question. The attitude of prosecutors seems to be that detention is the only way to ensure that an individual tells the investigating authority everything and admits his guilt. The presumption of innocence is therefore not respected.

15. It is rare for the court to look at the detail of the situation on a case-by-case basis. The Judge often simply trusts the data provided by the Prosecutor, and the presumption is that the person will abscond and carry out more criminal activities.

16. Participants noted the particular challenges facing foreign nationals, who are usually deemed to present a risk of absconsion without giving any thought to whether or not

[7] Article 122(8), Code of Criminal Procedure.

they have ties to Lithuania. The Criminal Procedure Code specifies that, when the court assesses whether a particular individual presents a flight risk, consideration should be given to the place of residence of the individual,[8] so if there is no place of residence, as will be the case for many foreign nationals, substantial grounds are found to justify pre-trial detention. Defence lawyers do attempt to demonstrate the close relationships which a foreign national has developed in Lithuania, but more often than not, judges do not take seriously arguments relating to social relationships, despite the fact that the CCP requires that regard be had to the suspect's marital and employment status and other relevant circumstances.[9] They are concerned to establish the relationship to the State and then make decisions on pre-trial detention accordingly.

17. The courts may use the potential for an individual to obstruct an investigation through tampering with evidence as a justification for ordering pre-trial detention. Participants expressed concern that this ground for detention was not being used appropriately. This ground is frequently raised in cases involving financial crimes, in which all relevant papers will have been taken away by the investigating authorities so there is no possibility for the individual to interfere with the evidence. In these circumstances, participants felt that it is not appropriate for individuals accused of financial crimes to be subjected to pre-trial detention.

18. Participants noted that the role of public opinion in shaping the nature of pre-trial detention decisions is significant. The public is often shocked when they read in the press of the pre-trial release of accused persons, and the media plays a key role in shaping this opinion. Judges are influenced by such attitudes and, as a result, feel pressured to make the strictest decision. Detention should be the last resort, but this is not applied in practice.

**B. Use of Alternatives to Detention**

19. Lithuanian law provides for the use of house arrest, residence restrictions, probationary measures, financial security, the seizure of documents, regular reporting at the police station or the provision of a written undertaking not to leave the country as alternatives to pre-trial detention.[10] Participants noted that detention is far more frequently ordered than the available alternatives. Whilst there is a requirement in the law to adhere to the principle of proportionality,[11] this is rarely applied in practice.

20. There are challenges with assessing the patterns of decision-making in relation to alternatives to detention as court documents generally do not indicate where a request for an alternative to be ordered has been made. The court is constrained to making a decision as to whether or not to order detention as requested in the motion submitted by the Prosecutor. Judges are not at liberty to refuse to order detention but apply a less restrictive measure in its place. Whilst the defence lawyer may raise the issue of alternatives, these can only be considered by the Judge if the Prosecutor consents. The Prosecutor may also initiate a request for an alternative measure to be ordered as a response to a judge's refusal of detention. The use of alternatives to detention is, therefore, at the discretion of the Prosecutor.

[8] Article 122, Code of Criminal Procedure.
[9] Ibid.
[10] Article 120, Code of Criminal Procedure.
[11] Article 11, Code of Criminal Procedure.

21. Participants did share examples of house arrest being used as an alternative to detention for foreign nationals. This was, however, expressed to be the exception rather than the rule.

22. Participants had little knowledge of the European Supervision Order, suggesting that there have been no public discussions about the measure nor any evidence of its implementation in Lithuania. There was agreement that the introduction of the ESO in Lithuania would be a welcome development, particularly when cases of individuals such as Michael Campbell – an Irish national who has so far been in pre-trial detention in Lithuania for five years – are taken into account.

23. Concerns were, however, raised that the effective implementation of the ESO would still depend on a change of attitude amongst the Lithuanian judiciary given that this will add a new factor to the decision-making process; judges will be required to consider not only the trustworthiness of the individual in question, but also the trustworthiness of the Member State of which he is a national. It was also suggested that it is unlikely that the investigating authorities in Lithuania would be willing to let go of their suspect given the risk of losing them.

24. It was suggested that the exposure of the Lithuanian judiciary to the practices of their judicial colleagues in other Member States may have a positive impact, particularly in relation to the question of alternatives to detention.

### C. The links between investigation and detention on remand

25. Participants highlighted that there are significant problems relating to the length of pre-trial detention in Lithuania, particularly when organised crime is involved. According to the law,[12] individuals can be held in pre-trial detention for up to 12 months in total, unless the case is recognised as being very complex or particularly voluminous, in which case the maximum period is 18 months prior to the case being referred for trial.

26. Participants suggested that the reason for individuals being held in pre-trial detention for such lengthy periods was that charges are presented at a very preliminary stage in the investigation, when sufficient evidence has yet to be compiled.

27. In addition, participants raised the issue of the lack of competence of investigators. There is a lack of training resulting in pre-trial investigators having neither theoretical nor practical knowledge of the relevant issues on a particular case, which causes delays to the investigation process.

28. As the defence does not have adequate access to the case file, it is impossible to monitor the progress of the investigation and challenge the decision to keep someone in detention for long periods of time. The defence is unable to keep the pressure on the Prosecutor to act efficiently and effectively in relation to the investigation. The law dictates that if there has been no action on the investigation for 2 months or more, the individual must be released. [13] Prosecutors work around this by carrying out minimal activities so as to demonstrate that the investigation is still technically underway.

[12] Article 127, Code of Criminal Procedure.
[13] Article 127(7), Code of Criminal Procedure.

29. Participants also raised concerns about the length of pre-trial detention after the case has been referred to the trial court but prior to the first-instance determination as to guilt or innocence. There is no statutory limit on detention during this period.

30. In addition, participants explained that appeals against first-instance determinations would often take a long time to be heard, during which time the person would also be detained. To the extent that this sort of detention is considered, under Lithuanian law, to be provisional detention and not imprisonment in execution of a final custodial sentence, the authorities' failure to progress appeals quickly represents a failure to exert the special diligence required wherever the presumption of innocence continues to apply.

## D. Reform outlook

31. Given the role that the culture amongst the Judiciary and the Prosecution plays in determining the patterns of pre-trial detention decisions, and the frequency with which practice does not replicate the approaches required by legislation, legislative reform should not be treated as the only answer. Judicial policies, as determined by the Court of Cassation or the Supreme Court, should also be taken into consideration. Participants suggested that obtaining progressive decisions of the highest-ranking officials should be prioritised as a means of initiating change.

32. Legislative reform is, however, under consideration. On 21 February 2013, a roundtable meeting was convened in Parliament in which issues surrounding pre-trial detention were discussed. A bill amending the regulation of pre-trial detention is before Parliament,[14] and is scheduled for consideration in Autumn 2013. The bill seeks to promote the use of alternatives to pre-trial detention by giving the Judge some discretion in deciding which remand measure to grant when pre-trial detention is sought by the Prosecutor. The bill also aims to reduce the maximums terms of pre-trial detention during the pre-trial investigation stage of the proceedings, as well as to guarantee the defence at least partial access to the case file when pre-trial detention is being sought. A further piece of legislation, submitted to Parliament in September 2012, relates to the introduction of electronic monitoring as an alternative to detention. Parliament is contemplating reform and it is therefore the time for advocacy action to take place.

33. There has been no open invitation for public comment on the legislative proposals, but certain parties – including HRMI – have made submissions. There is also a Working Group within the Bar Council working on these amendments, and also on the implementation of the existing Code of Criminal Procedure, but, according to the participants, this group seems to be becoming increasingly passive.

34. The Ministry of Justice has also drafted legislation which will implement the Framework Decision on the European Supervision Order and this will shortly be submitted to parliament for consideration.[15] The approach to the detention of foreign nationals may change as a result of this.

35. Participants suggested that the European Court of Human Rights is no longer viewed as a useful forum in which to raise issues relating to pre-trial detention in Lithuania due to

[14] Bill No. XIIP-109, registered on 6 December 2012.
[15] Draft Bill No. 13-2350-01, not yet submitted.

the length of proceedings and the costs involved. Clients are often not interested in pursuing this course of action.

## E. Key recommendations

### Decision-making standards

36. Steps must be taken to address the problems arising from the judicial practice of "rubber-stamping" the motions for pre-trial detention submitted by prosecutors. There is a need to change the mentality of both judges and prosecutors which may only be achieved through training, particularly in relation to ECtHR decisions and international standards.

37. Judges should be required to provide balanced and reasoned judicial decisions which take into account the arguments for and against pre-trial detention in each individual case and which comply with the requirements of the law. Training is required in order to ensure that judges are aware of factors which should not be taken into account when making a decision regarding pre-trial detention (eg. the seriousness of the offence and the potential length of the sentence) and of how to apply the factors which should be taken into account (eg. the likelihood of the person interfering with the investigation). The National Administration of Courts and the Centre for Education of Judges, which have responsibility for training both judges and prosecutors, should be encouraged to deliver such training.

38. Irrespective of their junior status, judges involved in pre-trial detention decision-making must be encouraged to make robust and legally-justified decisions on pre-trial detention. Targets and performance evaluations should have built-in expectations that a certain percentage of cases should be released pending trial, therefore encouraging career-sensitive judges to avoid the pressures to adopt the conservative approach by applying a presumption of detention rather than liberty.

39. Legislative reform is needed to improve access of the defence to the case file at the pre-trial stage. This should be forthcoming due to the need to implement the Directive on the right to information in criminal proceedings, and if it is not, a reference to the Court of Justice of the European Union may be appropriate. Advocacy should also focus on elevating the content of the 2004 decision of the Supreme Court Senate to legislative or precedential status.

40. Defence lawyers should receive training, perhaps delivered by the Bar Association, which provides them with the tools to insist upon lawful pre-trial detention decisions which demonstrate a more balanced approach. Guidance should also be provided on how to develop effective strategic litigation in order to obtain progressive decisions of the higher courts which complement the legislative reform process. Standards of legal representation should also be evaluated with a view to ensuring that individuals relying upon state representation are not disadvantaged in any way.

41. Media representatives should receive training, perhaps through Lithuania's Journalist and Publication Ethics Commission, to encourage them to understand the defendant's perspective, the presumption of innocence and the need for balanced reporting which does not provide a prejudicial representation of the case. The media should be used to its full advantage to generate awareness of the innocent individuals affected by

excessive pre-trial detention. This would place pressure upon the Government of Lithuania to take the problem seriously.

42. Given the influence which academic writing can have upon the Judiciary, Academics should be encouraged to write about the issues surrounding pre-trial detention, and particularly the difference between law and practice and the problematic procedures which govern decision-making.

**Alternatives to detention**

43. Work should be undertaken to increase the willingness of judges and prosecutors to use the existing range of alternatives to detention available under Lithuanian law, in accordance with the principle of proportionality established by law. Sharing best practices with other EU Member States could have positive impact in this respect.

44. Legislative reform is needed in order to give judges and the defence a more active role in determining whether alternatives to detention should be ordered. The current prosecutor-led system should be replaced by one in which the judge is able to choose an alternative to detention despite the failure of the prosecution to suggest one and the defence is able to propose an alternative in response to a prosecutor's motion requesting detention.

45. Lithuania should consider implementing the European Supervision Order, and judges should be trained on its use to reduce over-incarceration of foreign nationals who are too frequently deemed to be a flight risk without a reasonable assessment of their personal circumstances.

**Excessive periods of detention on remand**

46. Training should be provided to prosecutors to improve competence and reduce delays. Prosecutors should be encouraged to resist presenting charges at preliminary stages in investigations and rather wait until sufficient evidence has been gathered.

47. Steps must be taken to enable the defence to monitor the progress of the investigation so as to participate effectively in detention review hearings, including being granted access to the case file.

48. Similarly, judges should require better reasons for the extension of pre-trial detention and should not automatically approve motions for extensions by prosecutors. Judges should also have an automatic right of review of detention at regular intervals.

49. Prosecutors should be required to provide evidence on the progress of the investigation to establish the need for continuing pre-trial detention at each review hearing, and judges should be given the express power to consider the efficiency of the investigation as a factor relating to the decision about whether to authorise pre-trial detention.

September 2013

**Annex A**

**PARTICIPANTS**
**(alphabetical order by surname)**

**Inga Abramavičiūtė** is a lawyer specialising in criminal law, working at the law firm ADVERSUS. She is a consultant for the Human Rights Monitoring Institute. She is president of Council of Lithuanian Centre for Human Rights; Deputy of the presiding member of Lithuania's journalists and publishers ethics commission; and Presiding member of the Coordination Council of Legal Aid at the Ministry of Justice.

**Ingrida Botyrienė** is a lawyer specialising in criminal law, working at I.Botyrienės ir R.A.Kučinskaitės Vilniaus advokatų kontora. She frequently gives expert evidence on Lithuanian criminal law to courts in other jurisdictions, and has conducted comparative research on criminal law in EU Member States.

**Algamantis Čepas** is a Senior Research Fellow at the Criminal Justice Research Department at the Law Institute of Lithuania. A member of the Lithuanian Association of Criminology, he has published widely on criminal justice and human rights, including on detention and prisoner transfers in the EU.

**Aurelijus Gutauskas** was recently sworn in as a Supreme Court Justice. He lectures at the Institute of Criminal Law and Procedure at Mykolas Romeris University, was formerly a researcher for the Institute of Law and has published the book 'Organized Crime in Lithuania'.

**Artūras Gutauskas** is a lawyer at the Law Firm VARUL (Vilnius). He has a growing criminal practice in white collar and cross-border criminal defence cases. He is a member of the European Criminal Bar Association. He attended in an observer capacity.

**Karolis Liutkevičius** is a Legal Officer at the Human Rights Monitoring Institute. Karolis holds a Master of Laws degree from Vilnius University Faculty of Law. His main areas of expertise include human rights protection in the criminal justice system, with a focus on pre-trial arrest and detention, and the legal regime of right to privacy**.**

**Adomas Liutvinksas** is a lawyer specialising in criminal law, working at the law firm 'Ex Lege'. With over 30 years' experience, he was recently described by the magazine Veidas as one of the best criminal defence lawyers in Lithuania.

**Andrius Nevera** is a lawyer specialising in criminal law and a former Deputy Prosecutor General. He worked at the research department of the Supreme Court of Lithuania for six years and authored the books 'Human Rights in Lithuania' and 'Principles of State Criminal Jurisdiction'.

**Leonas Virginijus Papirtis** is a lawyer specialising in criminal law, working at Advokato L.V. Papircio kontora. He is the current Chairman of the Lithuanian Bar Association (Lietuvos Advokatūra).

**Rolandas Tilindis** is a counsel and advocate, specialising in criminal law, working at the professional legal partnership Baltic Legal Solutions (Lithuania). He is a former Chief Prosecutor and has worked as national representative of Lithuania at Eurojust.

**Regina Valutytė** is vice-Dean at Mykolas Romeris University, focusing on EU law and criminal procedure. She has written on, inter alia, state liability for the failure of national courts to refer questions to the Court of Justice of the EU.

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**FAIR TRIALS INTERNATIONAL STAFF**

**Libby Clarke** is Head of Law Reform at Fair Trials, with responsibility for coordinating the organisation´s campaigning and lobbying work. Before joining Fair Trials, Libby worked as a Senior Consultant at the Humanitarian Organization for Migration Economics in Singapore, the Legal Officer at The Equal Rights Trust and a Strategic Litigation Solicitor at Refugee and Migrant Justice. Libby is a UK qualified solicitor with an LLM in Human Rights Law.

**Alex Tinsley** is a Law Reform Officer at Fair Trials International. Alex produced the Guides to the European Supervision Order and Court of Justice of the EU included in this pack. Before joining Fair Trials, Alex worked at the Legal Service of the European Commission and the Court of Justice of the European Union, and represented detained foreign nationals at the charity BID.

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