Welcome to the second LEAP quarterly bulletin of 2017, which will update you on Fair Trials' and LEAP's work over the past three months and other issues of interest.

You can jump to the different sections using the navigation below.

FAIR TRIALS AND LEAP NEWS

Welcome to Jon

We would like to welcome our new Researcher Jonathan Ewing, aka Jon, who has recently joined our team in Brussels. Jon will lead our efforts to research and document systemic and individual violations of the right to a fair trial. Jon's background is as an investigative journalist, previously serving as the Supervising Editor of the International Desk of the Associated Press. For the past 10 years, Jon has been co-ordinating multi-country research projects for CSOs in Sweden, primarily related to researching to investigate and document the involvement of Swedish corporations in human rights violations around the world.

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LEAP Annual Report

The 2016-2017 LEAP Annual Report is out and available here. The report covers all our activities across Fair Trials' core themes (Access to Justice, Cross-border Justice, Pre-trial Detention, Presumption of Innocence, Equal Justice, and Justice Out of Court). For every area of work, we have included key regional legislative and jurisprudential developments, country focus sections, infographics, and cases taken from some of the LEAP members' daily practice. We think that this publication is a really good round-up of everything that we have achieved together in the past year, make sure you check it out!

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CROSS-BORDER JUSTICE

INTERPOL

Over the last quarter, we have continued to advocate for increased transparency and accountability at INTERPOL, including recently at a UN Office on Drugs and Crime conference. Our advocacy is bearing its fruits, as the Council of Europe added its voice to our calls for reform in early May.

Following our suggestions, INTERPOL has taken some positive steps to limit the abuse of its mechanisms by states around the world. Four years after our latest INTERPOL report, we have taken stock of these reforms in a new document open for consultation, which you can read here.

We have also assisted a number of individuals, including by submitting a Red Notice Deletion Request for Egyptian refugee Sayed Abdellatif and by signing a joint letter to INTERPOL regarding Azerbaijani activists Leyla Yunusova and Arif Yunusov. You can read about our recent and past work on INTERPOL in this post authored by our Chief Executive Jago Russell for Euractiv.

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Mutual Legal Assistance and electronic evidence

Fair Trials will join a coalition of European Universities to look into the use of electronic evidence in cross-border justice cooperation. The project aims at providing an in-depth comparative assessment of promising practices and practical and legal challenges in securing, requesting and obtaining digital information held by IT companies in the context of the European Investigation Order (EIO) and EU Mutual Legal Assistance Treaties (MLATs) with third States like the USA and Japan.

The issue of electronic evidence has also been coming up more and more often within LEAP meetings. Stay tuned to keep abreast of our work in this area!

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PRE-TRIAL DETENTION

Our regional work on pre-trial detention is starting to bear its fruits, as research conducted in the Netherlands by our project partner Bas Leeuw (University of Leiden) is affecting current discussions toreform the pre-trial detention regime in the country. This development is even more positive considering that a similar success story came earlier on from our LEAP member Ed Cape (University of the West of England) regarding England and Wales.

Later this year, the Brussels offices of Fair Trials will be coordinating two new projects concerning different aspects of pre-trial detention.

The first one will focus on effective assistance in pre-trial detention starting from September. This project will essentially aim at increasing understanding of barriers to effective legal assistance in pre-trial detention procedures in five Member States, and at improving the capacity of lawyers to provide effective legal assistance in this context.

The second one will deal with violent crime in detention, including against people in remand. This project will, for the first time, address how far Member States have developed policies, practices and procedures that protect the rights of detained victims.

We also learned that Commissioner for Justice, Consumers and Gender Equality Věra Jourová has taken pre-trial detention legislation off the table. This arguably makes our work on the issue even more important, and we are determined to keep the issue alive.

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ACCESS TO JUSTICE

Accessible Letters of Rights

In May, we marked the end of our project on Accessible Letters of Rights in Europe, which looked into the legislation and practice surrounding Letters of Rights in 5 EU countries: Bulgaria, France, Hungary, Lithuania, and Spain. The resulting comparative report was launched at the European Parliament in Brussels in late May and will be used to advocate for accessible Letters of Rights throughout the EU and the world. We would like to thank all the partner organisations who participated in the research: Bulgarian Helsinki Committee, Human Rights Monitoring Institute, Hungarian Helsinki Committee (which coordinated the project), and Rights International Spain.

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Implementation of Strasbourg judgments

The Parliamentary Assembly of the Council of Europe (PACE) has been investigating the status of the overall implementation of ECtHR judgments across Europe in order to improve the effectiveness of the system. Following up on discussions at the LEAP Annual Conference in Athens, we have providedinformation to rapporteur Pierre-Yves Le Borgn', specifically concerning cases of violation of articles 5 and 6 of the Convention, which protect the right to liberty and the right to a fair trial. Special thanks to our LEAP members Giulia Borgna (Italy), András Kádár (Hungary), Jaanus Tehver (Estonia), Katarzyna Wisniewska (Poland) for sharing cases of failed implementation in their jurisdictions. You can read the full brief here.

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Notes of Advice

A big thank you to those of you who helped us review and update our Notes of Advice. The Notes of Advice are accessible guides on how different countries' legal systems work and can be a really useful document for people arrested abroad and their lawyers. Thank you for the time and effort you put into this. You can find the updated Notes here.

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Access to a Lawyer in Malta

Good news from Malta, as the First Hall of the Civil Court in its Constitutional Jurisdiction sanctioned the right of access to a lawyer in pre-trial proceedings in early May. The jurisprudence of the Maltese courts up until this decision had been to the effect that there is no need for a lawyer to be present when a suspect is testifying before the inquiring magistrate, because the presence of a member of the judiciary was enough to protect and guarantee fair trial rights. Read more about the recent developments in Malta from our LEAP member Anna Spiteri here.

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PRESUMPTION OF INNOCENCE

In the EU, the right to be presumed innocent has been enshrined in Directive 2016/343. With Member States now having to transpose the Directive into national law, we have developed a toolkit to help the reader identify areas where current or proposed national law fails to meet the requirements of the Directive. This would not have been possible without your feedback to the survey about presumption of innocence that we circulated earlier in May. You can find the toolkit here.

Starting from September, we are going to step up our work on the presumption of innocence through a new project that will look into the manner in which suspects and accused persons are presented in court and to the public, including by and through the media. In particular, we will assess the extent to which relevant laws and practices are in line with the Directive's requirements, and will look for ways to remedy any gaps revealed.

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PLEA-BARGAINING

The use of trial waiver systems has risen by 300% since 1990. In some countries, this has become the most common way to settle a criminal proceeding; in the US for example, 97% of the convictions are resolved through guilty pleas.

On 27th April we launched a new report on the global use of trial waiver systems. The report was conducted in cooperation with law firm and pro bono partner Freshfields, and gathers information on the existence and operation of trial waiver systems in over 90 jurisdictions across the world. We are extremely grateful to those of you who were involved in the survey of EU jurisdictions, which was crucial to get reliable information about your countries. You can read the whole report here. Don't have time? Look at the main highlights in our glossy executive summary here.

The report is making its way into the outside world, as we have presented it at the 26th session of the UN Commission on Crime Prevention and Criminal Justice (CCPCJ) in Vienna. Over the next months, we will make sure to make use of more such opportunities to advocate for fair trial waiver systems across the world.

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CASELAW UPDATES

European Court of Human Rights (ECtHR)

Zherdev v Ukraine (no. 34015/07), 27 April 2017

In 2005, at the age of sixteen, the applicant was taken into police custody as a suspect as a suspect of theft and murder of a night security guard at a shop. In custody, the applicant's clothes had been seized for evidence gathering and he was detained in his underwear, for a period of several hours at the police station. He had been placed in police detention with two adult detainees. The applicant was given a lawyer but was not given the choice as to which lawyer he wanted. During his custody, the applicant alleged that he had been pressured and threatened by police officers to plead guilty. They threatened to make sure he got a long prison sentence, to charge him with rape, which would lead to him being raped and harassed in prison by other inmates, and to create "problems" for his family, unless he confessed. Unable to withstand such pressure, the applicant agreed to copy by hand a statement prepared for him by

the police officers, acknowledging his guilt for murder in “self-defence”. However, at a later stage he retracted his confession, alleging it was the consequence of ill-treatment he suffered in policy custody. Even still the applicant was convicted of aggravated murder and robbery.

The ECtHR concluded that the authorities subjected the applicant to “degrading” treatment contrary to Article 3 of the Convention by allowing the applicant, a minor, to remain handcuffed and wearing just his underwear for at least two and a half hours and, subsequently, by placing him in a cell with adult detainees for three days. In view of the applicant, a minor facing the criminal justice system for the first time, being left handcuffed and almost without clothes for at least two and a half hours in a state of uncertainty and vulnerability, could in itself be considered to raise an issue under Article 3. Moreover, the applicant’s placement with adult detainees must have contributed to creating in him feelings of fear, anguish, helplessness and inferiority, diminishing his dignity.

Additionally, several issues were raised under Article 6 ECHR in relation to the right to a fair trial and access to a lawyer. He complained that had been questioned in the presence of a lawyer he had not freely chosen; that the confessions had been used for his conviction; that he had not been assisted by a lawyer at an identification parade and in other investigative actions; and that his pre-trial detention had been unlawful and unreasonably long. Remarkably, most of these allegations were dismissed and the ECtHR found no violation of Article 6.

Asatryan v Armenia (application no. 3571/09), 27 April 2017

The applicant complained that she had not had a fair hearing in criminal proceedings brought against her. In October 2007 she was convicted of attempted murder and sentenced to nine years’ imprisonment, in relation to a 2001 car-bomb attack. The applicant appealed the conviction, but she was ultimately unsuccessful. Relying in particular on Article 6(1) and (3) (d) of the European Convention on Human Rights, she complained that, when rejecting her appeal, the Criminal Court of Appeal had relied on pre-trial witness statements which had not been read out and examined in court at first instance or on appeal, and that she had had no opportunity to challenge the witnesses who had given them at any time during the proceedings.

The Court finds it unclear whether the evidence of witnesses was decisive but it is nevertheless satisfied that it carried significant weight and its admission might have handicapped the defence. The Court notes that there were no procedural safeguards to compensate for the handicaps caused to the defence. In particular, the applicant never had the possibility of challenging the witnesses in question during the investigation nor could she reasonably have been expected to make such requests during the trial given that these witnesses were not included in the witness call list. Furthermore, in the circumstances where the evidence in question was not examined in a public hearing the defence was not even aware that the Court of Appeal intended to refer to that evidence to uphold the applicant’s conviction. Therefore, the Court concluded that there had been a violation of Article 6(1) and (3) (d) of the Convention.

Murtazaliyeva v Russia (no. 36658/05), 9 May 2015

The applicant had been convicted of preparing an explosion, inciting others to commit terrorism and carrying explosives. The conviction was based on forensic examination reports, transcripts of the police

surveillance videotapes recorded at her flat and statements made by her flatmates in open court.

The applicant complained that the overall fairness of the criminal proceedings against her had been undermined because she had not been able to see or effectively examine the surveillance videotapes shown during the hearing on her case as she could not see the video screen in the courtroom. She relied on Article 6(1) and (3) (b) and (d).

In the Court's view, watching the videotapes was not strictly necessary in order to confirm the authenticity of the transcript. It observed that the applicant did not complain before the domestic courts or before the Court that the quality of the audio recordings had been poor, that she or her lawyers had not been able to hear them or that they had not been authentic. The Court found the applicant was not placed at a serious disadvantage vis-à-vis the prosecution in respect of the viewing and examination of the surveillance videotapes and that there had been no violation of Article 6(1) and (3) (b) of the Convention.

Van Wesenbeeck v Belgium, (Nos 67496/10 and 52936/12) 23 May 2017.

On 10 May 2006 the Crown Prosecutor of Hasselt agreed to a proactive investigation against the applicant and a number of other suspects, on suspicion of drug trafficking, participation in an international criminal organisation and money laundering, among other offences. The investigation involved special observation and infiltration methods and separate and confidential case file was constituted. Two reports containing details of the evidence gathered through the use of those special measures were added to the ordinary criminal case file. On 18 September 2008 the Crown Prosecutor requested the investigating judge of the Court of First Instance of Hasselt to open a judicial investigation. The judge then headed a "conventional" investigation. The observation and infiltration continued until 14 June 2009, when a number of suspects, including the applicant, were arrested and remanded in custody.
Relying on Article 6 (1), the applicant complained about the lack of access to the confidential file. Under Article 6(3) (d), he complained that he had been unable to examine the undercover officers, or to have them examined.

The Court observed that the defence's inability to consult a separate, confidential file, containing authorisations and reports on special investigation methods, was compatible with the requirements of Article 6 § 1. The confidential file had been necessary to protect the anonymity and therefore the safety of the undercover officers and to ensure that the methods used were kept secret. Secondly, the Belgian legislature had limited the evidence in the confidential file to documents that were likely to compromise the identity and safety of the individuals concerned and the very use of the special methods. The Court concluded that the restriction of defence rights had been justified and sufficiently compensated for by the supervisory role of the Indictments Division. There had therefore been no violation of Article 6 § 1 of the Convention.

With regards to the refusal of the Belgian courts to grant the applicant's request to call the undercover officers for examination by the defence, the Court examined whether or not there were adequate compensatory elements to counterbalance such restrictions of procedural safeguards during the trial. The Court found that the applicant had been able to challenge the evidence gathered through the intervention of the undercover officers and that there were adequate procedural safeguards to counterbalance the difficulties caused to the defence. Therefore, there had been no violation of Article 6 (1) and 3 (d) of the

Convention.

Frolovs v Latvia (no. 13289/06), 15 June 2017

The applicant complained that criminal proceedings brought against him had been unfair. In July 2003 he was convicted of organising, inciting and aiding various crimes against persons and property, and sentenced to six years' imprisonment. The conviction was made in the applicant's absence and he was not detained to serve his sentence until November 2009. In the meantime, a lawyer claiming to act on his behalf had lodged appeals against the conviction. However, the senior courts had refused to consider the appeals, on the grounds that the applicant had not been present to attend the hearings and could not confirm that he wished to pursue an appeal. Relying in particular on Article 6 § 1 and 3 (c), the applicant complained that the refusal of the appellate courts to examine his appeal inhis absence had violated his right to have his case considered by a court.

In reply to the Government's argument that the applicant had evaded the trial and therefore he had lost his entitlement to rely on Article 6 of the Convention, the Court found that the legislature cannot penalise an accused by creating exceptions to the right to legal assistance, and the legitimate requirement that accused must attend court hearings can be satisfied by means other than deprivation of the right to be defended. The Court noted that an arrest warrant had been issued against the applicant which contained an explicit duty for the accused to be present at the appellate hearing. However, the warrant did not provide for an explicit restriction on the defence lawyer to represent a client who had failed to appear before the appellate court.

The Court stressed that the fact remained that a lawyer's assistance was indispensable for resolving conflicts and his role was necessary in order for the rights of the defence to be exercised. Accordingly, the guarantees of Article 6 required that the applicant's lawyer should have an opportunity to put forward the arguments in the applicant's defence and to have them addressed by the domestic courts, irrespective of the question whether the domestic courts could examine certain issues of their own motion.

Therefore, the Court found that the domestic court's refusal to examine the appeal lodged by the applicant's lawyer against the first-instance judgment was not compatible with the applicant's right to a fair hearing under Article 6 of the Convention.

Court of Justice of the European Union (CJEU)

Case C-278/16
OPINION OF ADVOCATE GENERAL WAHL, delivered on 11 May 2017.

The Landgericht Aachen (Regional Court, Aachen, Germany) asked the Court whether a penal order is to be classified as an 'essential document' in criminal proceedings which, pursuant to Article 3 of Directive 2010/64, must be translated if the person to whom it is addressed does not understand German.
Summary of facts:

1. A Local Court in Germany issued a penal order ('the contested penal order') against the defendant, a Dutch national living in the Netherlands, in which he was fined and had his right to

drive revoked. The contested penal order contained information on the legal remedies available and the time period within to do so. The penal order stated that the written appeal was to be lodged in German.

2. The defendant was notified of the contested penal order in German. Only the information on the legal remedies available was delivered to him in Dutch. Twelve days later, the defendant sent an email to the court in which he objected in Dutch to the contested penal order. The Local Court informed the defendant by letter that letters lodged at the court must be in German. The court dismissed the defendant's objection against the contested penal order as inadmissible on account of its late submission.
3. The referring court decided to stay the proceedings seeking clarification on whether an 'essential document', as referred to in Article 3 of Directive 2010/64, includes a penal order within the meaning of Paragraph 407 et seq. of the of the German Code of Criminal Procedure.

Advocate General Wahl proposed that the Court **answer the question referred in the affirmative** for the following reasons:

- The wording of Article 3(1) of Directive speaks of 'all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings'. However, the enumeration contained in Article 3(2) of Directive is non-exhaustive.
- The Court has held that a penal order is a form of communication of the accusation against the person concerned. The fact that a penal order is a decision issued by a court which acquires the force of *res judicata* if no objection is lodged against it in due time. This presents certain similarities with a 'judgment' under Article 3(2) of Directive. Regardless of whether it is the one or the other, it seems self-evident that the translation of a penal order is essential to ensure that the person to whom it is addressed is able to understand its content and, consequently, to exercise his rights of defence in relation to the penalty which it is set to impose.
- The context of Directive confirms the idea that a penal order is an 'essential document' under Article 3 of Directive. A court decision which may lead to the imposition of a penalty for a traffic offence for a matter which is not simply an instance of speeding, such as the contested penal order, is a typical matter to which the rights provided under the directive apply.
- The aim of the Directive, contained in Recital 14, supports the view that a penal order must be recognised as an 'essential document' which requires translation if the accused does not understand German. That aim is 'to ensure the right of suspected or accused persons to interpretation and translation in criminal proceedings with a view to ensuring their right to a fair trial'. Not to require the translation of a penal order, which may potentially lead to the lasting imposition of a penalty — particularly if the person to whom it is addressed does not understand it because that person does not understand German — would clearly put that person's right to a fair trial in jeopardy. It would in fact be justice denied.
- Therefore, the AG has the view that a document such as a penal order is an 'essential document' within the meaning of Article 3 of Directive 2010/64. Accordingly, it must be translated in the event that the person to whom it is addressed does not understand German.

National Cases

Germany

Case no. Ausl 301 AR 54/17, Decision of 26.05.2017

The Higher Regional Court of Karlsruhe rejected extradition to Hungary as "currently not admissible" based on the fact that Hungary was not able to answer the questions posed by the Court satisfactorily, regarding prison conditions the requested person was to expect.

The questions put to the Hungarian authorities were in essence as follows:

- What prison facility the person was going to be sent to, both in pre-trial detention and after trial if found guilty.
- Assurance that the prison conditions were in line with European minimum standards,
- Description of the prison conditions of the named detention centres, especially with regards to the number of places available, the overall number of inmates, number, size and furnishings of the cells, sanitary facilities and food supply conditions,
- Information whether it might be possible that the requested person, during his detention in Hungary, might be transferred to a different detention facility and if so, an assurance was requested that also this other detention facility would be in line with European minimum standards.

The Hungarian authorities were reluctant to provide specific answer, but only reported that Hungary had reformed its law regarding legal remedies of inmates against prison conditions, that they had renovated and extended prisons and built new ones, and that over 1000 new detention places had been created, so that overcrowding could be reduced, this was not enough to satisfy the Karlsruhe's concern that there still existed a real risk that an extradition would amount to a violation of Art. 3 ECHR / 4 of the Charter of Fundamental Rights. Therefore, extradition was deemed temporarily inadmissible and the requested person was consequently released. In its ruling, the Court referred to the case law of the ECHR in Varga v Hungary, as well as to the Aranyosi/Caldararu decision of the CJEU, and to the judgment of 15.12.2015 of the German Federal Constitutional Court ("Solange III").

Denmark

The Prosecution Service v T, Case no. 267/2016, 31 May 2017.

In a case on the hearing of a request from the Romanian authorities for the extradition of T for enforcement in Romania on the basis of a European arrest warrant, the Supreme Court ruled on 24 February 2017 that a new opinion should be obtained from the Romanian authorities on the conditions under which T would be held in Romania.

The Romanian authorities stated that T would be guaranteed a personal space of at least 3 sq. m. in a multi-person cell when serving his prison sentence in a maximum-security prison. However, if the sentence was to be served in a medium-security prison, he would only be guaranteed a personal space of

2 sq. m. The Supreme Court considered that there was a high probability that T would serve a part of his prison sentence in a medium-security prison, where he was only guaranteed a personal space of 2 sq. m. Therefore, the Supreme Court ruled this conditions would be in contravention of Article 3 of the European Human Rights Convention as interpreted and applied by the European Court of Human Rights in its judgment of 20 October 2016. Extraditing T would thus be in contravention of the Danish Extradition Act, and the Ministry of Justice's decision on his extradition for enforcement in Romania was set aside for not complying with this provision.

SUPPORT US

Surveys

We have recently circulated a query from our Swedish LEAP member Annika Åkerberg (Civil Rights Defenders) on the procedural rights of vulnerable people. Thanks to those of you who responded already. If you haven't done so yet, please contact Silvia at silvia.lorenzoperez@fairtrials.net

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