FAIR TRIALS INTERNATIONAL

COMMUNIQUÉ

issued after the meeting of the

LOCAL EXPERT GROUP (GREECE)

27 April 2013

PRE-TRIAL DETENTION IN GREECE

This publication has been produced with the financial support of the Criminal Justice Programme of the European Commission. The contents of this publication are the sole responsibility of Fair Trials International and can in no way be taken to reflect the views of the European Commission.

With financial support from the Global Criminal Justice Fund of the Open Society Foundations

Introduction

1. On 27 April 2013, Fair Trials International brought together leading experts in criminal justice from across Greece 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 (Greece) met for a full day at the Radisson Blu Park Hotel in Athens.

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 Greek courts; (ii) the reasons underlying excessive use of remand; 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

Legal Framework

1. Historically, the Greek penal code created a presumption of pre-trial detention, which could be based on the seriousness of the allegations among other factors. However, the law was reformed in the 1981 so that, according to the law, pre-trial detention would be regarded as a measure of last resort which could only be imposed when certain prerequisites were met. This created a legal presumption of release.

2. Pre-trial detention can be imposed if the person is accused of a felony[1] AND one of the following elements is met:
   a. The person does not have either any known residence in the country;
   b. The person has made preparations to facilitate his absconding;
   c. The person has been a fugitive in the past;
   d. The person has been declared guilty for escape from prison or for violations of restrictions regarding his/her place of residence; or
   e. If, by setting the accused free and taking into consideration characteristics of either the accused's life or characteristics of the crime at hand, it is likely the accused will reoffend.[2]

Risk of Reoffending

3. Participants highlighted the final element, allowing judges to impose pre-trial detention on account of vague reference to "characteristics" of the person or the alleged crime, as particularly problematic.

4. Two recent changes in the law were discussed:
   a. In 2009, Article 282 of the Law 3811/2009 (the Criminal Procedure Code) created objective criteria to guide judges on pre-trial detention imposed for the purpose of preventing re-offending. This reform provided that, in order to impose pre-trial detention for the purpose

[1] An exception to the rule that a crime must be a felony in order for PTD to be ordered exists in the case of serial manslaughter, which is technically a misdemeanor yet qualifies a suspect for PTD.
[2] Article 282(3), Criminal Procedure Code.

of preventing re-offending, the possible sentence had to be at least 10 years, and the suspect must have had two prior convictions for the same or a similar offence.

b. This was later amended in 2012 to the current position, stating that a suspect could be remanded in pre-trial detention if faced with at least a 10 year sentence and with reference to the vague provision on consideration of characteristics of the person or the crime at hand.

5. This change, and the lack of criteria for such consideration, brought back an element of discretion, and thus arbitrariness, to judges' decisions about pre-trial detention. The repeated changes, first limiting and later reviving the discretionary power of judges to detain suspects pre-trial, have contributed to a lack of implementation of human rights standards regarding reasoned detention decisions.

Problems in Practice

6. Greek law controlling pre-trial detention, namely the Criminal Procedure Code and Constitution, broadly complies with the standards of the European Court of Human Rights (ECtHR). However, participants raised various problems in practice, which suggest that the law is not being implemented consistently by judges.

Reliance on proscribed reasons for detention:

a. Legal limits on the reasons for the imposition of pre-trial detention are not respected. Many judges have not psychologically and institutionally adapted to the legislature's desire to limit pre-trial detention. It is common for judges to continue to rely on unlawful reasons for an over-use of pre-trial detention, including "to avoid a similar offence in the future," without specific reference to objective characteristics of the accused that create such a risk.

b. Participants noted that judges were often seen to make decisions on pre-trial detention based on the seriousness or nature of the alleged offence, although this is not a permitted reason for detention.

c. Similarly, judges were seen to rely on pre-trial detention in order to satisfy a public appetite for justice, although this reason is not lawful.

Lack of reasoned judgment:

d. Participants expressed concern that judges' decisions about pre-trial detention frequently lack reasoned judgment, repeating sections of the law by rote and making no reference to the specific characteristics of the case or the individual characteristics of the defendant that might suggest risk of flight or likelihood of interference with the evidence.

e. This problem extended to judges on Justice Councils[3] tasked with deciding whether pre-trial detention could be extended first from 6 months to 12 months, and then beyond the 12 month time limit provided by law (to a maximum of 18 months[4]). The extension of detention from 12 to 18 months is intended to operate as an exceptional measure governed by the Constitution (Article 6(4)), which should require a more detailed justification for reasons for the extension, taking into consideration all of the evidence and real events on which the finding of exceptional circumstances are based. However, in these decisions too, there was

[3] Justice Councils are made up of the presidents of the three highest courts (the Supreme Court, the Council of State, and Comptrollers' Council, plus members chosen by lot from among judges who have served in the high courts for at least two years.

[4] Art. 287(2)(b), Criminal Procedure Code.

rarely evidence of reasoned judgment or reference to individual characteristics of the case or defendant.[5]

Routine use of pre-trial detention

7. It is notable that, despite the relatively firm time limits set out in legislation on pre-trial detention in Greece, pre-trial detainees make up roughly a third of total inmates in Greece's prisons, suggesting that the use of pre-trial detention is wide and routine, if not as long as in some other jurisdictions.

8. A number of possible reasons for this were discussed:
   a. The structure of pre-trial detention hearings predisposes judges to agree with the recommendations of prosecutors. Where a judge disagrees with the recommendation of the prosecutor regarding pre-trial detention, the case is referred to a judicial council or special magistrate. In such cases, the imposition of pre-trial detention usually prevails. The accused person has no such automatic right for review of the decision by the Justice Council when there is disagreement between the judge and the defence, creating an inequality in the procedure. Only the public prosecutor of second instance can lodge an appeal against the decision of the Justice Council.[6]
   b. Some judges seem to be using pre-trial detention as punishment for the alleged crime itself, in order to make up for the perceived inevitability of trial delays and lack of convictions. The ECtHR has frequently found violations by Greece due to the excessive length of pre-trial detention and the incompatibility of Greek court procedures with the presumption of innocence and the right to liberty. Since 2007, the EtCHR has found more than 40 violations of Article 6(1) on account of the length of proceedings before the criminal courts.[7]
   c. Pre-trial detention was seen by both the judiciary and to some extent, the public, as a crime-fighting measure rather than solely a way to ensure attendance at trial. This was considered to be the case, for example, with some white-collar defendants who were later acquitted, but had nevertheless been subject to pre-trial detention. The perception was that judges supervising these cases felt that pre-trial detention was necessary to satisfy the public's desire for justice in such cases, given the economic crisis.
   d. The crusading or vigilante mentality prevalent among some members of the judiciary was exacerbated by an overall weakness in social policy. There was a tendency on the part of the Greek legislature to criminalize social problems, so that endemic issues such as financial mismanagement and drug addiction were left to the criminal courts in the absence of supportive civil or social measures, such as harm reduction policies for drug users and sex workers, or systematic reform of financial institutions[8].

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[5] See Lambropoulous, Effi, "Pre-trial Detention in Greece," in *Pre-Trial Detention: Human Rights, criminal procedural law and penitentiary law, comparative law* , ed. P.H.P.H.M.C. van Kempen: "The judicial council in order to decide has to examine all the prerequisites for detention from the beginning; however, the judicial councils in the majority of the cases are restricted to repeating the prerequisites of the law in order to justify their decision, without explaining sufficiently the reasons for that." Pg 428.

[6] *Id* at pg 425.

[7] *Nerratini v. Greece*, ECHR 43529/07, 18 December 2008; see also *Michelioudakis v. Greece*, ECHR 54447/10, 3 April 2012, which has been made a 'pilot case' for review by the court with the aim of addressing the structural deficiencies which lead to excessive delays before the criminal courts. This means that, in the year following the judgment, the ECHR freezes its examination of similar cases, of which there are around 50 currently pending before the Court.

[8] Participants mentioned in particular recent arrests of 31 alleged sex workers, followed by forced HIV testing and pre-trial detention. The suspects were later cleared of all criminal charges. See, eg, UNAIDS letter condemning the action 10 May 2012, available at:

B. Effective participation of the defence in pre-trial detention hearings

9. By law, the defendant has the right to be heard at all stages of the criminal proceedings and, in theory, has a wide range of defence rights at this stage, including the right to be heard[9]; the right to remain silent, deny the charges, and submit a written defence statement[10]; to be informed and receive copies of all the evidence in the case file and for sufficient time to prepare his/her defence[11]; to present evidence in his/her defence and to examine the evidence against him/her[12]; to access a lawyer at any stage of the investigation.[13] However, participants described the detention hearing as lacking basic features of procedural fairness. The hearings are not public and are not adversarial.[14] Adjudication was usually in favour of pre-trial detention. Access of the defence to the case file at this stage was minimal, with defence lawyers often given no more than five minutes to review the documents and prepare arguments.

10. The lack of time to prepare defence arguments and evidence was especially acute for legal aid cases. In the pre-trial phase, the court appoints lawyers for those unable to pay private defence counsel from a list drawn up by the district or city bar association. The list is not differentiated as to speciality, so it often happens that the lawyer assigned to a criminal case does not have a background in criminal law. The lawyers on the legal aid list frequently had no time to examine the case and could not therefore offer appropriate support. Their presence at court was merely a formality and did not amount to an effective defence.

11. Another problem for the effective participation of the defence was the low quality of interpretation for non-Greek speaking defendants, leaving the accused with only a vague sense of the proceedings and an inability to intervene when needed. Court interpretation in Greece is not highly regulated. A list of accredited interpreters is maintained, but in reality anyone can apply to be listed without being obliged to submit any proof of certification as an interpreter. Usually, people wishing to serve as court interpreters simply wait outside the courts and are "on call." In the vast majority of cases, the interpreters are non-professionals who have a certain command of the language needed and attempt to assist the suspect as best they can. There is no established code of ethics or other mode of ensuring quality and impartiality. Participants referred to cases where interpreters were related to the accused and had been convicted of similar crimes. Remuneration is minimal and not sufficient to attract quality professional interpreters.

12. The procedure within the Justice Councils (tasked with adjudicating differences of opinion between prosecutors and judges and with ruling on requests for extension of pre-trial detention) was also generally not public in the experience of participants and neither the prosecutor nor the defence were permitted to attend. The practice of holding Justice Council hearings extending detention in private has been criticised by the ECtHR. In response to this criticism, Law 3346/2005 was adopted, specifically granting the right to be heard by the Justice Council. However, this law has since been replaced, with the justification that the requirement that both

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http://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2012/may/20120510psgreece/

[9] Article 20, Consitution; Article 287(5), Criminal Procedure Code.
[10] Articles 104 and 273, Criminal Procedure Code.
[11] Articles 101 and 102, Criminal Procedure Code.
[12] Articles 104, 273 and 274, Criminal Procedure Code.
[13] Articles 96, 100 and 273(2), Criminal Procedure Code.
[14] Article 241, Criminal Procedure Code.

parties be present was creating further delays in the pre-trial period. The current practice before the Justice Councils in detention extension hearings is for neither of the parties to be present unless the council determines that their presence is necessary. The lack of openness of the procedure contributed to judges' ability to rule on pre-trial detention without providing reasoned judgment, since there are no observers and no one is there to provide a check on the judge's behaviour.

C. Use of alternatives to pre-trial detention

13. Article 282(2) of the Greek Criminal Procedure Code sets out conditions which can be imposed by the court when granting the defendant release pending trial, as an alternative to pre-trial detention. These include imposing an order which prohibits a defendant from living in, or moving to, a certain place; a restriction on the defendant leaving Greece; an order prohibiting communication with certain persons; and an obligation to pay a financial surety in order to secure release. Article 282(3) states that pre-trial detention should be an exceptional measure allowed in serious cases if none of the other restrictive conditions can secure the defendant's presence in the proceedings or prevent him from committing further crimes.

14. Although provided for by law, these alternatives to detention were not used regularly in practice. They were usually requested in written submissions by defence counsel, rather than at the instigation of the prosecution or judge. Further, the fact that the available alternatives are spelled out in the Penal Code makes innovation cumbersome and legislature-led. For example, electronic monitoring/ankle bracelets were not provided for in law (and additionally were perceived to be too expensive, the cost of pre-trial detention notwithstanding).

15. Alternatives such as participation in a residential drug treatment program were sometimes available in lieu of pre trial detention, but were the exception and required extensive work on the part of the defence, for example by locating appropriate programs and ensuring that the defendant was enrolled and complying with the program.

16. The European Supervision Order has not yet been adopted in Greece, though it is under review. The participants considered that this would be of assistance in lessening over-reliance on pre-trial detention in the case of foreign nationals, who are routinely subject to pre-trial detention on the grounds that they do not have a local address, and who make up 64% of all pre-trial detainees in Greece. This was the case even where the foreign national suspect in fact had a local address, but was still perceived to be a flight risk based on their foreign national status alone. Alternatives short of detention, such as the suspect turning in his passport or being subject to residential limits, were available and sometimes used, but rarely. Participants suggested that it might be helpful for judges and prosecutors to learn about the approaches taken in other jurisdictions in relation to alternatives to detention.

D. Links between investigation and detention on remand

17. The Greek Criminal Procedure Code provides for timelines in which investigation must take place, with extensions possible. There was a tendency on the part of prosecutors and judges to make felonies out of relatively small cases that could have been framed as misdemeanours. This allowed judges to impose pre-trial detention more easily, as pre-trial detention cannot be used for misdemeanours (carrying sentences of five years or less).

18. Although there is a strict 18 month time limit on pre-trial detention,[15] in practice it was possible to get around this limit through the fragmentation of cases. For example, a suspect would be accused of 5 counts of an offence, prosecuted for one or two of them and placed on pre-trial detention, then later formally accused of more of the counts arising from the same case or from a different one, and placed on pre-trial detention for those as well. In this way pre-trial detention periods can accumulate and a suspect can be detained for 2 or 3 years in total before a case is tried. This technique has so far been used in serious cases where the investigation cannot be finalised within 18 months.

19. Pre-trial detention is sometimes used to encourage confessions or testimony against a suspect's co-accused. Because there is no formal plea bargain system, prosecutors rely on other means to coerce testimony and confessions. One of these is to offer a suspect release from pre-trial detention in exchange for cooperation with the prosecution.

20. Detention is also used, as mentioned above, to punish offenders when the court believes there are problems with an investigation such that a conviction is not likely or that delays will cause any judgment to be too late to satisfy the public desire for justice.[16] This was the case, for example, in high profile prosecutions of businessmen and bankers prosecuted in the wake of the economic crisis. It was perceived that the defendants were prosecuted mainly to satisfy the public appetite for justice, and that the defendants would in time be acquitted. Therefore participants felt that judges subjected these defendants to pre-trial detention knowing that, if a conviction were to come, it would not be for many years, which would not ameliorate public anger over allegations of economic mismanagement.

21. Police custody in the early days following arrest also occurs,[17] in cases where a suspect is caught red-handed, or if he cannot be brought immediately to court. Police detention can also take place in exceptional circumstances by presidential decree. This authority is sometimes abused. Suspects may be held for days in police stations, without being permitted to notify anyone of their arrest and without access to a lawyer, and are often subject to abusive behaviour by police.[18] Through this process, suspects are often accused of felonies based on no other evidence than the word of a police officer, as no further investigation is done and the formal accusation procedure is not followed. Participants described suspects subject to this procedure as traumatised and in need of rehabilitation after their time in the police station and later on remand.

22. In some cases, suspects who were earlier released on remand would be arrested before the court date to ensure their appearance, without any warning being given to the lawyers of the court date. Participants felt that this was a tactic used by prosecutors to deny lawyers access to the accused in the days leading up to trial.

[15] Article 6(4), Constitution; and Article 287(2), Criminal Procedure Code.

[16] See also Lambropoulous, *infra* pg 437, "Legislative initiatives to shorten the pre-trial detention time and prevent abuses during the last decade caused the reaction of law enforcement agencies which, when they considered that the accused should be detained, they preferred to increase the charges against him/her or the seriousness of crimes committed in order to protect society and have more time for their investigation."

[17] Articles 275-277, Criminal Procedure Code

[18] Council of Europe Committee for the Prevention of Torture, *Report to the Government of Greece*, 10 January 2012, pp. 38-42.

E. Prison conditions

25. Though this was not a focus of the discussion, participants felt it was impossible to discuss pre-trial detention in Greece without commenting on the inhuman conditions in Greek prisons. Pre-trial detainees are usually not kept in separate facilities from convicted prisoners, so the appalling conditions of Greek prisons affect pre-trial detainees just as much as other prisoners.[19] Defence lawyers' practice has changed to include more visits to prison because so many of their defendants are held there. Lawyers are forced to draft memos in police headquarters and in squalid conditions in overcrowded prisons. Despite sustained criticism of Greek prison conditions, there has been no real improvement.[20]

F. Foreign defendants

26. 49% of all prisoners in Greece, and 64% of pre-trial detainees, are foreign nationals.[21] This does not include people detained in immigration centres. Foreign defendants are overwhelmingly subject to pre-trial detention, and suffer throughout the judicial process from a lack of knowledge of Greek language and inability to communicate with counsel, prison staff, and even other inmates, as interpretation services are provided only in the court, and not in prison. Participants considered that the reasons for such a high proportion of foreign national criminal defendants were complex (including the large number of migrants in Greece, the clandestine nature of the lives and livelihoods of many irregular migrants, and xenophobic attitudes on the part of the public, police and prosecutors), but that many of them were likely to have been acquitted if they had proper access to legal assistance in a language they could understand.

G. Reform outlook

27. Legislation around pre-trial detention has been reformed numerous times over the past fifteen years, including changes as recent as 2012. Though some participants felt there was further room for reform, for example by requiring reference to objective criteria for detention (as was required in the 2009 reforms and later reversed in 2012), in general the problems leading to the over-use of pre-trial detention in the Greek justice system had more to do with the implementation of existing law, and some participants were concerned that further changes to the law might serve only to obscure matters further.

28. Participants raised the following reform ideas:

    a. The most serious problem in need of reform was the lack of reasoned judgment by judges and Justice Councils in deciding to order and extend pre-trial detention. As such, there is a need for a change in mindset and culture amongst judges at all levels.

    b. Concrete criteria to determine who constitutes a flight risk should be established and referred to in detail by judges in making decisions on pre-trial detention.

    c. Greater due process guarantees, including a proper open hearing with the opportunity for argument and evidence from the defence, are also required.

    d. Ongoing training for the judiciary on international and domestic legal norms relating to pre-trial justice is needed.

    e. Judgments from the ECtHR criticising the lack of reasoned judgment in Justice Councils in particular should be better implemented.

[19] Council of Europe Committee for the Prevention of Torture, *Report to the Government of Greece*, 17 November 2010, pp. 49, 52, 58, 62-66.

[21] Council of Europe Annual Penal Statistics, *SPACE I: Survey 2008*, 22 March 2010 (most recent statistics available).

[21] Council of Europe Annual Penal Statistics, *SPACE I: Survey 2008*, 22 March 2010 (most recent statistics available).

F. Key Recommendations

Decision making standards

30. Some participants felt that the laws establishing the criteria for imposing pre-trial detention needed to be reformed in order to permit judges less discretion, and to require more detailed reasoning in decisions to detain. Others felt that the repeated changes to the criminal procedural code may have helped contribute to the lack of clearly implemented legal standards in pre-trial detention decision making, and that more emphasis should be placed on enforcement of existing laws and standards.

31. Similarly, legal challenges on both a domestic and international level were needed to address the lack of reasoned judgment in pre-trial detention decisions. However, more important than further litigation was the pressing need to implement existing decisions from the ECtHR, recommendations of the European Committee for the Prevention of Torture, and domestic legislation which already requires such reasoning.

32. Training should be provided to judges and prosecutors on international legal standards and judgments against Greece on issues relating to Article 5 and 6 of the European Convention on Human Rights. Monitoring of reasoning from judicial councils on extensions of detention could also be instituted.

33. Either party should have the right to appeal a pre-trial detention decision to the Justice Councils, rather than an automatic review only when the judge disagrees with the prosecutor.

34. Targets and performance evaluations for judges and prosecutors should have built-in expectations that a certain percentage of cases should be released pending trial. For example, the Inspector of the Supreme Court has the duty to monitor the action of judges, but never in twenty years has a judge been sanctioned for an inappropriate or excessive use of pre-trial detention.

Effective Participation of the Defence

35. Greece should implement legislative and practical reforms to ensure that defence counsel has access to the case file, in particular to evidence used by the prosecution in order to argue that a suspect should be detained, with enough time to ensure that the defence is able to collect evidence and develop arguments in favour of liberty. 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.[22]

36. A larger role for both the prosecution and the defence should be initiated for the extension of detention periods past twelve months. The defendant should be allowed to be present at these hearings if they so request it. As extension of pre-trial detention past twelve months is intended to be an extraordinary measure, the prosecution should be required to put forth fresh arguments based on objective evidence as to why detention should be extended, and the defence should have both the time and faculties to respond to these arguments.

[22] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:EN:PDF

Links between investigation and detention on remand

37. Reforms should be developed to the fast track system for processing suspects caught red-handed, such that suspects are not subjected to long periods in police custody and are afforded the same rights as others.

Alternatives to Detention, Foreign Nationals and Prison Conditions

38. Greece should develop a dedicated pre-trial services linked with social service agencies in order to implement alternatives like house arrest which can be difficult to enforce for indigent and non-resident defendants.

39. It should also pilot programs for innovative alternatives, such as electronic tagging, in which these can be trialed and monitored with a minimum of risk for the judges taking part and with a full cost/benefit analysis so as to address concerns regarding the expense associated with such measures.

40. An exchange of best practices in which jurisdictions successfully employing alternatives to detention share their experiences with others could assist judges and legislators who are hesitant to employ such alternatives.

41. Greece should consider implementing the European Supervision Order, and judges should be trained on its use to reduce over-incarceration of foreign nationals.

42. Greece should also propose and implement improvements to its system of translation and interpretation for non Greek speakers, in line with the need to implement the Directive on the right to interpretation and translation.[23]

43. It should be noted that encouragement of alternatives to detention should be an urgent priority for the Greek government in order to improve prison conditions due to overcrowding.

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July 2013

[23] Directive 2010/64/EU of the European Parliament and of the Council 20 October 2010 on the right to interpretation and translation in criminal proceedings, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:en:PDF

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