FAIR TRIALS INTERNATIONAL

Hungarian Helsinki Committee

COMMUNIQUÉ

issued after the meeting of the

LOCAL EXPERT GROUP (HUNGARY)

21 February 2013

at the offices of the Open Society Institute, Budapest:

PRE-TRIAL DETENTION IN HUNGARY

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Introduction

1. On 21 February 2013, Fair Trials International and the Hungarian Helsinki Committee brought together leading experts in criminal justice from across Hungary to discuss pre-trial detention in law and in practice (a list of participants is provided in the Annex). Where we identified problems, we wanted to learn about ongoing efforts and new opportunities to challenge these. The Local Expert Group (Hungary) met for a full day at the offices of the Open Society Institute in Budapest.

2. Prior to the meeting, the Group was provided with a detailed discussion pack and asked to reflect on several themes: (i) the standards of pre-trial detention decision-making by the Hungarian courts; (ii) the reasons underlying excessive remand periods; and (iii) the opportunities for law reform and litigation. These topics were then 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

3. The Hungarian criminal procedural code follows the case-law of the European Court of Human Rights (**ECtHR**) under Article 5 of the European Convention on Human Rights (**ECHR**). It has the correct criteria for both applying and extending pre-trial detention and there are some alternatives to detention provided for in law. Judges are granted wide discretion in the law's application.[1] The problem lies in how these laws are applied and the practice of the courts, which means that detention is the general rule, not the exception.

4. In Hungary, suspects are placed in custody prior to any order for pre-trial detention. A 72-hour temporary deprivation of liberty[2] may be ordered by the investigating authority, the prosecutor and the judge if there is a well-founded suspicion that the suspect has committed a criminal offence punishable with imprisonment and it is likely that pre-trial detention will be ordered.[3] After 72 hours, an investigating judge must either make an order that the suspect be held in pre-trial detention, or the suspect must be released. There are two general criteria for ordering pre-trial detention: (i) the crime is punishable by a term of imprisonment; and (ii) there is a well-founded suspicion that the suspect has committed the particular crime. Participants agreed that it is very difficult to challenge that there is a well-founded suspicion since the defence is usually not granted access to the case file at the pre-trial stage.

5. There was acknowledgement that while some judges are careful to make sure that the prosecutor has (as required by law) established a well-founded suspicion that the suspect committed the crime, the majority nearly always follow the motion of the prosecutor to order detention.[4] Participants highlighted that prosecutors often request pre-trial detention when it is not necessary and that judges agree to these requests almost automatically. As judges must rely

[1] See Articles 126 to 135 of Act XIX of 1998 on Criminal Proceedings. As an alternative to pre-trial detention the court may impose a curfew or house arrest, issue a restraining order or impose monetary bail.
[2] Paragraph (1) of Article 126 of Act XIX of 1998 on Criminal Proceedings.
[3] Paragraph (2) of Article 126 of Act XIX of 1998 on Criminal Proceedings.
[4] Research by the Hungarian Helsinki Committee found that in 2011, 5,712 out of 5,980 prosecutorial motions were approved, equivalent to 95.5 percent. Source: National Penitentiary Headquarters upon inquiry by the Hungarian Helsinki Committee.

on the information provided in the prosecutor's file, it can be difficult for them to fully check the facts of the case.

6. Once the court has established that there is a well-founded suspicion that the suspect committed the crime, it must look at whether one or more of the special grounds for imposing pre-trial detention exist.[5] Participants felt that the special reasons given for imposing pre-trial detention are often inadequate. The court usually determines that there is a well-founded reason for pre-trial detention based on the information in the motion submitted by the prosecutor, without giving any detailed reasoning. This is despite a clear requirement from the Supreme Court that if a suspect is held in pre-trial detention due to a risk of absconding, this must be justified by specific conditions relating to the accused.[6]

7. It is very difficult for the defence to prepare an effective case against pre-trial detention. The defence is granted very limited access to the case file at the pre-trial stage. With the exception of any experts' opinions and records of the suspects', and any defence witness' questioning, suspects and their lawyers can only access the case file if it is not prejudicial to the 'interests of the investigation'.[7] This means that the case file is usually only disclosed to suspects after the completion of the investigation. Many participants felt that this made pre-trial detention hearings biased in favour of the prosecution because the defence is unable to: (i) access the information needed to determine whether the decisions for pre-trial detention are in fact justified; or (ii) put forward an effective case against a prosecutor's request for detention. Most of the participants agreed that law reform is needed in this area. In cases where pre-trial detention is being requested or has been imposed, the general rule should be that the information required to challenge the decision on pre-trial detention is disclosed and prosecutors should have to establish why disclosure of specified documents is not in the interests of justice.

8. A suspect's personal circumstances very rarely have an impact on pre-trial detention decisions. Examples were given of people with strong ties to Hungary who had surrendered to the police voluntarily, but who were not granted release pending trial because of a risk of absconding. It is also very difficult for suspects to obtain documents proving their ties to Hungary (such as birth certificates of dependent children) that may support their release pending trial in the initial 72 hour custody period. The Hungarian Helsinki Committee referred to pending cases in the ECtHR challenging this.[8] It was reported that if the suspect has any previous convictions, even if minor

[5] The special grounds are: (i) the defendant has absconded or remains hidden from the court, the prosecutor or the investigative authority; has attempted to abscond; or a new criminal procedure has been initiated against him or her during the proceedings involving a crime subject to imprisonment (Sec. 129(2a)); (ii) if there is reasonable cause to believe that the presence of the defendant cannot be ensured due to the risk of absconding, remaining hidden or other reasons (Sec. 129(2b)); (iii) if there is reasonable cause to believe that he or she would interfere with the course of justice if not held in pre-trial detention (Sec. 129(2c)); or (iv) if there is reasonable cause to believe that the defendant would accomplish the attempted or planned criminal offence, or commit another offence punishable by imprisonment (Sec. 129(2d)).

[6] See Decision no. BH 2009/7 of the Supreme Court.

[7] Paragraph (2) of Article 70/B of Act XIX of 1998 on Criminal Proceedings.

[8] Shortly after the meeting the ECtHR delivered its judgment in X.Y. v. Hungary (application no. 43888/08) and held that the Hungarian Government failed to provide evidence that the requisite access to documents was made available to the applicant. In cases Hagyó v. Hungary (application no. 52624/10), A.B. v. Hungary (application no. 33292) and Baksza v. Hungary (application no. 59196/08) Hungary was also found to be in breach of Article 5 ECHR.

and for offences committed many years ago, or the maximum possible sentence is lengthy, then pre-trial detention will almost always be imposed. Unemployed people and non-nationals are also highly likely to be detained. Where a case involves multiple defendants, the court will usually impose the same detention order on all defendants without taking into account their personal circumstances. Participants agreed that pre-trial detention decisions should be based on the facts relating to the suspect before the court, not made automatically due to past activities or the seriousness of the offence.

9. Many participants were concerned that police regularly put pressure on suspects to cooperate to avoid pre-trial detention. Due to the likelihood that the prosecutor's motion will be followed by the court, this is often successful. In a survey carried out by the Hungarian Helsinki Committee in 2004, a considerable number of suspects questioned claimed that the authorities had exerted some form of pressure on them to obtain the evidence required for a guilty verdict: 35.9 percent claimed the officer promised they would be released if they confessed to the crime and 27.88 percent claimed the interrogator told them that they would be put in pre-trial detention or the detention would be prolonged if they did not confess.[9] It was also noted that in cases with numerous defendants, it was not unusual for one defendant to avoid detention if he or she agreed to give evidence against co-defendants. The poor conditions and lack of basic facilities available in pre-trial detention in Hungary can also put psychological pressure on suspects to cooperate. It was agreed that a good way to reduce this practice would be to record interviews in the police station. This would provide evidence of undue pressure where it was exerted and would also exonerate wrongly accused police officers where the claims are false. There would, of course, remain the risk that investigators would exert pressure on defendants outside of official interviews.

B. Use of alternatives to pre-trial detention

10. Despite the severe overcrowding in Hungarian jails,[10] alternatives to pre-trial detention are rarely used. House arrest is sometimes accepted as an alternative but police and prosecution authorities often complain about the heavy administrative and personnel burden involved in effectively enforcing house arrest (particularly in the absence of electronic monitoring) and this can lead to the court deciding in favour of pre-trial detention. Some participants felt that courts are reluctant to use alternatives to pre-trial detention due to concerns about the risk that this entails if the defendant absconds or reoffends. It was considered that information from other EU jurisdictions on best practice for the use of alternatives would be valuable.

11. Electronic tagging is not currently available in Hungary, and participants felt that courts would be much more willing to use alternatives such as house arrest and curfews if it were introduced. Shortly after the meeting, it was announced that the testing of the electronic bracelets will begin during 2013.[11] Electronic tagging would also give defendants the flexibility to continue with their lives by, for example, going to work or continuing their studies.

[9] András Kádár, Presumption of Guilt, Hungarian Helsinki Committee, Budapest, 2004, p. 70. Available at: http://helsinki.hu/wp-content/uploads/Presumption_of_Guilt.pdf

[10] According to the latest official statistics dated December 31, 2012 Hungarian prisons are on average at 137 percent capacity. Source: http://www.bvop.hu/?mid=77&cikkid=1973

[11] See: http://mno.hu/magyar_nemzet_belfoldi_hirei/a-nyomkoveto-karperec-teszt-elott-1144515

12. The European Supervision Order (**ESO**) has been implemented into Hungarian law, although many participants were not aware of this. However, participants felt that it was unlikely to be used in practice as its application would be difficult and complex and judges would not be willing to use it without proof that defendants subject to an ESO would not abscond. It is most likely to be used in relation to neighbouring countries where the authorities already cooperate on a regular basis. Participants agreed that judges, prosecutors, and lawyers will need practical guidance on the types of cases where an ESO may be appropriate and that more work is needed from the European Commission on implementation.

C. The links between investigation and detention on remand

13. There are regular reviews of pre-trial detention in Hungary, both before and after the indictment is filed.[12] However, it is very rare that an initial decision to detain is reversed. Some judges, particularly in Budapest, are increasingly willing to look at alternatives later in the proceedings but this is not widespread. Courts do not usually make continuing pre-trial detention conditional on the investigation progressing or raise concerns about the length of time that an investigation is taking; indeed, they have no legal obligation to take this into account. Judges also do not have the power to direct the investigation in order to ensure that it takes place efficiently. Participants felt that legislative reform to enable judges to take the length and progress of the investigation into account when deciding on continuing pre-trial detention could be useful. Standards of review may be improved by a recent Ministry of Public Administration and Justice publication[13] circulated among judges, which made it clear that courts should make a fresh decision at each review of pre-trial detention due to recent ECtHR Article 5 cases relating to Hungary.

14. Prosecutors sometimes extend investigations for as long as is necessary to find evidence sufficient to obtain a conviction, with defendants remaining in pre-trial detention in the meantime. This can result in defendants being detained for up to two years during the investigatory phase, which can be extended to four years for the most serious offences as, following charge, defendants may be held for additional lengthy periods in detention before conviction.[14]

D. Reform outlook

15. The number of cases in which Hungary is found in breach of Article 5 ECHR by the ECtHR is increasing.[15] The Government is aware of the issues and is showing some willingness to encourage implementation of the decisions, but progress is slow. In particular, this requires a shift in the attitude of judges and prosecutors, which vary greatly across Hungary. Additional training is needed to ensure that all judges and prosecutors are aware of the decisions and what they mean in practice.

16. Legislative reform is needed to improve the access of the defence to the case file at the pre-trial stage. The limits placed on access under the current law prevent defence lawyers from preparing

[12] See Articles 131 and 132 of Act XIX of 1998 on Criminal Proceedings.
[13] Not publically available.
[14] See Article 132(3) of Act XIX of 1998 on Criminal Proceedings.
[15] In February 2013 there had been four violations found since October 2012 alone.

effectively for pre-trial detention hearings and make the process heavily weighted in favour of the prosecution. This reform should be forthcoming due to the need to implement the Directive on the right to information in criminal proceedings by June 2014.[16] If the required reforms are not introduced, this is an area where a reference to the Court of Justice of the European Union **(CJEU)** may be appropriate.

17. There should also be legislative reform to enable judges to take into account the length of investigations and the progress that is being made when reviewing pre-trial detention. If judges were able to make continuing detention conditional on certain progress being made by prosecutors then proceedings could be concluded more efficiently and effectively.

E. Key recommendations

a. Decision-making standards

- There is a need to change the mentality of judges and prosecutors in relation to pre-trial detention. More training of judges and prosecutors is needed, particularly in relation to ECtHR decisions and international standards. While training programmes are in place, these are not reaching enough people, and it is important to make sure that those working at courts outside of the major cities are engaged in these.
- Judges should be required to provide reasoned decisions which take into account the arguments for and against pre-trial detention in each individual case. This would reduce the excessive weight placed on the prosecutor's motion, as well as on previous convictions and the seriousness of the offence.
- Research should be undertaken into the practicality of recording police interviews to reduce the pressure placed on suspects to cooperate to avoid pre-trial detention.
- 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 CJEU reference may be appropriate.[17]

b. Alternatives to detention

- Work should be undertaken to increase the willingness of judges and prosecutors to use alternatives to detention. Sharing best practice with other EU countries could be valuable in this respect.
- The use of electronic tagging should be available as an alternative to pre-trial detention. While its expansion may have a cost impact, in the long term it will save money as holding someone in pre-trial detention is very expensive. In particular, this would increase the use of house arrest.
- Training is needed to educate judges, prosecutors and lawyers about the ESO and when it should be used.

c. Excessive periods of detention on remand

[16] 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

[17] Ibid

- Courts should require better reasons for the extension of pre-trial detention and should not automatically approve motions for extensions by prosecutors. The use of a recent Ministry of Public Administration and Justice publication, which made it clear that courts should make a fresh decision at each review of pre-trial detention on extension decisions, should be monitored.
- 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.

Local Expert Group (Hungary)
May 2013

ANNEX

PARTICIPANTS

(alphabetical order)

dr. Bencze, Mátyás is an Associate Professor of law at the University of Debrecen. A former judge, he has conducted extensive research in the field of theoretical and sociological problems of adjudication. Professor Mátyás has published extensively on EU and constitutional law.

dr. Bieber, Ivóna is a legal officer in the Detention and Law Enforcement Programme of the Hungarian Helsinki Committee.

dr. Fazekas, Tamás is a human rights and criminal defence attorney who specializes in freedom of expression and drugs related cases. Since 2001, he has worked for the Hungarian Civil Liberties Union as a legal aid service officer. Tamás Fazekas also works with the Hungarian Helsinki Committee's Human Rights Legal Counselling Program to provide legal aid to victims of human rights violations both in Hungary and at the ECtHR and the CJEU, and to monitor prisons and police detention facilities with the Hungarian Helsinki Committee. He was awarded Pro Bono Attorney of the year 2012 by the Hungarian Bar Association.

dr. Magyar, Gábor is a partner at Magyar György és Társai in Budapest. He has worked on cases at the European Court of Human Rights, the European Court of Justice and the European Commission. He has experience with criminal procedure and pre-trial detention, human rights law, the European Arrest Warrant, data protection, and tort law.

dr. Gyalog, Balázs is an experienced defence attorney and has worked for the Hungarian State Treasury and the law firm Bánáti Ügyvédi Iroda. He is also an active member of the Budapest Bar Association, contributing to an initiative to reform the system of public defenders.

Ms. Isobel, Marion is a Legal Officer at the Open Society Justice Initiative (OSJI). In recent years she has worked to promote effective implementation of the European Court of Human Rights judgment in *Salduz v Turkey*. Marion is qualified as a solicitor in Australia.

dr. Kádár, András is a criminal defence attorney and co-chair of the Hungarian Helsinki Committee (HHC). He has been responsible for the HHC's various projects aimed at reforming Hungary's *ex officio* appointment system in criminal cases. He was actively involved in the organisation's advocacy efforts during the drafting process of Hungary's legal aid law in 2003. He has participated in several conferences and seminars dealing with the issue of defence rights and legal aid, and published a number of articles on the topic, with special regard to the need for reform in the criminal field.

dr. Kara, Ákos works at the Criminal Law Codification Department of the Ministry of Public Administration and Justice. He has also served as Head of Delegation and Legal Advisor at the Ministry of Justice.

dr. Ligeti, Miklós is the Legal Director of Transparency International Hungary, an organization dedicated to mitigating corruption, promoting transparency and ensuring accountability in the public sector. He previously worked as Head of the Statistical and Analysis Unit at the Ministry of Justice and Head of the Statistics and Coordination Unit of the Ministry of Interior, where he was responsible for criminal codification and crime statistics.

dr. Lőrik, József is an experience criminal defence attorney in Budapest.

dr. Matusik, Tamás is a Judge at the Central District Court of Buda. He has also served as an expert consultant for the Hungarian Helsinki Committee on the issue of criminal law reform in Hungary. He published an article about ECHR pre-trial detention standards and suggested best practices for Hungarian judges in 2012.

Ms. Omboli, Katalin is a program associate with the Open Society Justice Initiative. Now based in its Budapest office, Ms. Omboli has served as a program coordinator for the Open Society Foundations' Education Support Program in both Budapest and London.

Jámborné dr. Róth, Erika is an Associate Professor on the law faculty at the University of Miskolc.

FAIR TRIALS INTERNATIONAL STAFF

Jago Russell has been the Chief Executive of Fair Trials International (Fair Trials) since September 2008. Before joining Fair Trials, he worked as a policy specialist at the UK human rights charity Liberty, and worked as a Legal Specialist in the UK Parliament. Jago is a qualified solicitor and has published and lectured widely on a range of criminal justice and human rights issues.

Emily Smith is a Law Reform Officer at Fair Trials, where she works on the organisation's campaigning, lobbying and law reform work with a focus on EU criminal justice and extradition. Before joining Fair Trials, Emily worked as a solicitor at the international law firm Linklaters LLP and at the human rights organisation JUSTICE. Emily obtained an LLM in Human Rights Law in 2011.

Alex Tinsley is a Law Reform Officer at Fair Trials. Alex produced the 2012 Guide to the European Supervision Order. Before joining Fair Trials, Alex worked at the Legal Service of the European Commission and the Court of Justice of the European Union, and volunteered at the immigration detention charity BID.
