

## LEAP Quarterly Report Summer 2014



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Welcome to the LEAP Quarterly Report for Summer 2014. We want these updates to be useful for you, so please do [let us know](#) what you like or what you don't like. We take the opportunity to wish you an excellent summer holiday.

### CAMPAIGN UPDATES

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[Fair Trials staff update](#) - Sophie Amos joins Fair Trials as Head of Funding

## CAMPAIGN UPDATES

### New era for EU Criminal Justice

- **New policy direction in the Strategic Guidelines** – The European Council’s [Conclusions](#) of 27 June, setting the tone for EU criminal justice policy for the next five years, recognised the need to “continue efforts to strengthen the rights of accused and suspects persons in criminal proceedings” (more [here](#)). This follows concerted lobbying action by Fair Trials and LEAP members in the run-up to the meeting. Having outlined LEAP’s priorities in the March 2014 report [Stockholm’s Sunset](#), Fair Trials met with 13 Permanent Representations of the Member States in Brussels and wrote a [letter to the incumbent European Council President](#), Herman Van Rompuy, to promote the inclusion of those priorities in the new justice agenda. Members of the LEAP Advisory Board also wrote to Ministries of Justice and parliamentarians in Croatia, the Czech Republic, Germany, Ireland Lithuania, the Netherlands and Romania before the European Council meeting in June. The next steps fall to the Italian Presidency, which commenced on 1 July; its priorities are set out in the 18-month [work programme](#) of the ‘trio’ Presidency of Italy, Latvia and Luxembourg, which includes the promising remark that the European Arrest Warrant should be looked at in line with the European Parliament’s report of February 2014, addressing another of the priorities outlined in the Stockholm’s Sunset report.
- **New European Parliament & Committees** – Elections for the European Parliament in May saw some turnover in personnel, including the departure of Fair Trials’ Patron Baroness Sarah Ludford who had authored the report of the Civil Liberties, Justice and Home Affairs (LIBE) Committee calling for reform of the EAW. The elections result in some change in rapporteurs and shadow-rapporteurs on the [new procedural rights package](#), with these responsibilities due to be clarified after the summer. The Committees of the European Parliament have also been reconstituted. On 7 July, the LIBE Committee elected Claude Moraes MEP (London, Socialists & Democrats) as its new Chair by acclamation. Fair Trials is hopeful that the new members of the LIBE Committee will continue the important work of their predecessors – many had supported Fair Trials campaign message “fair trials at the heart of EU justice” in a Twitter campaign during the elections, which reached a total of 120,441 people. We look forward to meeting them, together with Advisory Board members, at an event on 7 October 2014 in Brussels.
- **New European Commission** – The process has begun for the appointment of a new European Commission. Mr Jean-Claude Juncker, of Luxembourg, was selected by the European Council as the next Commission President and confirmed in the role by the European Parliament on 15 July 2014. Ms Martina Reicharts, also of Luxembourg, has been appointed as the interim Commissioner in charge of Justice, Fundamental Rights and Citizenship following the election of Ms Viviane Reding to the European Parliament. Member States are currently putting forward names for Commissioners and decisions will be taken in September-October with a view to the new college taking office on 1 November.

### Implementing the Roadmap

- LEAP and Fair Trials continue to work together to push for effective implementation of the Roadmap Directives through lobbying, training and litigation. If you we think we can assist with any of these in your country, [contact us](#). In addition, **please let us know about your cases** which

raise issues relating the issues addressed under the first three Roadmap Directives – interpretation and translation, the right to information and access to a lawyer.

- **National lobbying** – Following its successful [contribution](#) to the implementation of the Right to Information Directive in Lithuania last quarter, Fair Trials made a [joint submission](#) with UK LEAP member JUSTICE to the UK Home Office on implementation of that Directive, leading the UK to modify the draft to ensure sufficient information is provided before a police interview and irrespective of whether the person is detained. In Spain, Fair Trials worked with new LEAP member, Rights International Spain, and other local organisations on a [joint letter](#) urging the Spanish government to implement the Interpretation and Translation Directive and the Right to Information Directive.
- **Practitioner training** – In June, Fair Trials launched its [new EU-funded project to train 240 lawyers](#) on how to use the Roadmap Directives to their full potential in day-to-day practice, starting with a training in Warsaw in November 2014 in partnership with Polish LEAP member, the Helsinki Foundation for Human Rights (advert [here](#) – please feel free to circulate!). Law Reform Officer Rebecca Shaeffer also spoke (in Spanish) at a [training](#) in Madrid organised by the Asociación Libre de Abogados (representatives of which attended our 2013 training in Strasbourg) on the Roadmap Directives, in a session on the future of criminal defence rights in Europe.
- **CJEU litigation meeting** – In June Fair Trials brought together LEAP members and guest experts to discuss strategies for litigation at the Court of Justice of the EU (CJEU) concerning the Roadmap Directives and the European Arrest Warrant (EAW). After presentations from speakers with experience in key CJEU cases including Case C-411/10 NS (return of asylum-seekers under the Dublin II Convention), Case C-300/11 ZZ (procedural requirements of the Charter), and Case C-396/11 Radu (EAW and fundamental rights), LEAP members worked in groups to develop litigation strategies to obtain rulings from the CJEU on key points such as access to the case file at the police station. For more information, see the [meeting communiqué](#) and our [Guide to the CJEU](#).
- **Commission puts Spain and Slovenia on notice on Roadmap implementation** – On 10 July, the European Commission [announced](#) a package of actions taken in the area of infringement proceedings. This included the initial step of sending letters of formal notice (the first step in an infringement procedure) to Spain and Slovenia for failure to notify it of measures adopted in order to implement the Interpretation and Translation Directive. Discussions with the Commission suggest that Member States' laws are currently being scrutinised for substantive conformity with the Roadmap Directives, though the assessment will take some time.

### **New procedural rights package**

- Work continues on the new Procedural Rights measures [proposed by the Commission in November 2013](#), the last three to be made under the 2009 Roadmap. To support our forthcoming advocacy on these measures, we would like to collate examples of cases which demonstrate the need for robust protection of procedural rights for children, the right to legal aid and the presumption of innocence. Please do [let us know](#) if you have any such cases.
- **Council documents** – The Council of the EU published its [General Approach](#) on the proposed directive on Procedural Safeguards for Children on 22 May 2014. This includes some concerning

departures from the Commission's proposal and we are currently finalising a position paper to be circulated to MEPs before the European Parliament finalises its own position. Working documents relating to the Council's discussions on the proposed directives on [Legal Aid](#) and the [Presumption of Innocence](#) have also been published and will be followed by General Approaches in due course.

- **Trio Presidency priorities** – On 17 June the 'trio' Presidency of Italy, Latvia and Luxembourg published its [18-month plan](#), which made it clear (following the Greek Presidency's prioritisation of the Children measure) that progress would be made on the Legal Aid and Presumption of Innocence measures. The latter measure is thought to be the priority for the Italian Presidency.
- **Fair Trials discusses Legal Aid in South Africa** – Fair Trials' Head of Law Reform, Libby McVeigh discussed the proposed Legal Aid directive in her address to an international [conference](#) in Johannesburg on access to legal aid in criminal justice systems, speaking alongside LEAP members Professor Ed Cape and Zaza Namoradze. The conference resulted in the '[Johannesburg Declaration](#)'. Read more [here](#).

### Pre-trial detention

- **Major new research project launched** – In June, Fair Trials hosted a meeting in London to kick off its exciting new project looking at pre-trial detention decision-making in practice, working with 10 local partners – including seven LEAP members – in their respective Member States (more [here](#)). The project will involve in-depth practitioner surveys, monitoring detention hearings, case file reviews and interviews of prosecutors and judges. The country information will form the basis of a major regional report which will identify differences between countries, examples of good practice and inform EU discussions as to future initiatives in criminal justice. We hope to supplement the results of our research with compelling case studies from across the EU which demonstrate the problems relating to pre-trial detention decision-making, so please do [let us know](#) of any such cases.

### European Arrest Warrant

- **New UK EAW safeguards into force** – Following Fair Trials' active engagement during the passage of the [Anti-Social Behaviour, Crime and Policing Act 2014](#) through the UK Parliament, we are pleased to report that, on 21 July 2014 the new EAW safeguards introduced by that act were brought into force by [statutory instrument](#). These include section 12A, requiring the refusal of extradition in the absence of a decision to prosecute, and section 21A, requiring the refusal of extradition where the EAW is considered disproportionate. A [Practice Direction](#) issued by the Court of Appeal provides guidance on the application of the proportionality test, citing examples such as 'theft of an item of food from a supermarket', 'use of a bicycle whilst intoxicated' and 'non-threatening verbal abuse of a law enforcement officer' which will generally be considered disproportionate.
- **Fair Trials followed on EAW appeals** – Fair Trials submitted a [contribution](#) to the Government consultation on how the new requirement to seek permission to appeal in extradition cases, introduced by the [Anti-Social Behaviour, Crime and Policing Act 2014](#), should be implemented. We had lobbied hard against the adoption of this new requirement, so had sought to ensure that the new regime remained as fair as possible. We were pleased that our suggestion to reduce the

threshold was accepted, so that prospective appellant need only demonstrate that they have an 'arguable case' in order to obtain permission to appeal (see [Part 17 of the Criminal Procedure Rules 2014](#)).

- **Fair Trials Intervention in Belgian EAW case** – In July 2014, Fair Trials worked with LEAP Advisory Board member Christophe Marchand and his colleague in a case before the Belgian Court of Cassation concerning extradition to Romania, where the European Court of Human Rights ('ECTHR') has several times found conditions to infringe Article 3 ECHR. Fair Trials assisted in the case by supplying information in the form of [independent observations](#) (French) discussing the approaches of courts in other countries, providing relevant EU law information and suggesting a reference to the CJEU. The case is pending.
- **CJEU litigation meeting** – The European Arrest Warrant was also on the agenda for discussion at the CJEU litigation meeting hosted on 18 June in London. Participants discussed possible strategies to ensure the CJEU rules on the unresolved issue of refusal of execution of an EAW on human rights grounds (see the [meeting communiqué](#), paragraphs 34 to 40 for more information).
- **European Commission response on EAW** – In a response dated 28 May 2014, the European Commission formalised the response already given by the former Justice Commissioner, Viviane Reding, in response to the European Parliament's report calling for reform of the EAW, stating that this would be premature in view of the Commission's new powers to involve 'flanking' framework decisions such as the ESO which might mitigate some issues with the EAW. Fair Trials does not consider this a complete response by any means (more [here](#)), and hopes that the new Justice Commissioner, once s/he takes over from the stand-in, Ms Reicharts, will revisit the issue.
- **Jago Russell discusses EAW in UK Parliament** – Fair Trials' Chief Executive gave evidence to the [Select Committee on Extradition](#), pointing out the systemic flaws with the system and encouraging the UK to work with the EU to raise standards across the EU (watch it [here](#)).

## INTERPOL

- **Fair Trials intervenes in Bahar Kimyongür case** – Fair Trials made submissions (see [here](#)) to the Commission for the Control of INTERPOL's Files concerning [Bahar Kimyongür](#), a Turkish/Belgian activist who has been arrested three times and spent over 100 days in detention as a result of an INTERPOL alert based on an arrest warrant from Turkey alleging membership of a terrorist organisation on account of Bahar's disrupting a speech of a Turkish official in the European Parliament 14 years ago (watch the protest [here](#) at 7'20"). Fair Trials supplemented Bahar's own request to the Commission, suggesting that after three extradition refusals – in the Netherlands, Italy and Spain, all of which saw no criminal conduct in the allegations – INTERPOL should delete the alert. Bahar, whose case was reported in the print edition of the Belgian daily Le Soir, has been represented by LEAP Members Federico Romoli, Christophe Marchand and Gonzalo Boyé.
- **Fair Trials gives expert evidence in Canada** – Fair Trials' Law Reform Officer gave expert witness testimony to the Federal Court of Canada, in a case raising the question whether reliance can be placed on Red Notices for the purposes of national actions such as the imposition of restrictive anti-terrorism measures. We suggested that, in view of the developing international consensus that the system is vulnerable to abuse, Red Notices should not be treated as lending any

credibility to an allegation put forward by the issuing country. A judgment is expected in late 2014 / early 2015.

- **INTERPOL under spotlight over ‘bounced cheque’ cases** – Fair Trials wrote to INTERPOL to raise concerns over the use of INTERPOL’s systems in respect of ‘bounced cheque’ offences (which relate to the provision, in some cases without fraudulent intent, of blank cheques as security for loans which subsequently bounce when cashed). The Guardian [reported](#) on this issue, including Fair Trials’ new [video](#) of Rachel Baines, a flight attendant who lost her job due to a red notice issued for this type of offence. INTERPOL responded stating that it was unable to differentiate between charges involving fraudulent conduct and strict liability offences.
- **PACE and OSCE turn up heat on INTERPOL** – In June, 20 members of the Parliamentary Assembly of the Council of Europe (PACE) signed a [motion](#) put forward by the Dutch MP Pieter Omtzigt calling for a report to be established on the abuse of the INTERPOL red notice system. A rapporteur should be appointed in October and we aim to follow and contribute to the report process throughout. At virtually the same time, the Parliamentary Assembly of the Organization for Security and Cooperation in Europe, in its 2014 [Baku Declaration](#), called on participating states to push for reform of INTERPOL. Read more [here](#).
- **New Secretary-General named** – INTERPOL has named Mr Jürgen Stock of the German Federal Criminal Police as its next Secretary-General, to take over from the incumbent Mr Ronald K. Noble as he steps down after 15 years in charge. The appointment will formally take place at the INTERPOL General Assembly – the 100<sup>th</sup> – on 3-7 November 2014. The renewed calls for reform from within PACE and the OSCE are therefore particularly timely.
- **Other INTERPOL events** – Continuing our work to raise awareness of the concerning abuse of INTERPOL’s systems, Fair Trials has spoken at related events during the past few months. Jago Russell spoke at the UK Parliament launch of the Foreign Policy Centre essay collection ‘[Shelter from the Storm](#)’ concerning the situation of exiles from the Former Soviet Union, including Fair Trials’ contribution ‘Clawing Back the Dissident?’ (p. 33) on political abuse of INTERPOL. Alex Tinsley also spoke at the Doughty Street Chambers [seminar](#) ‘Challenging INTERPOL Red Notices: a Practical Guide’, alongside former INTERPOL General Counsel Dr Rustel Martha and LEAP members John Jones QC and Ben Cooper.

## LEGAL DEVELOPMENTS

### National – legislation

- **(Non-)access to the file provision adopted in France** – in May, under considerable scrutiny due to the Bar’s campaign to secure access to the file at the police station based on the Right to Information Directive, the French legislature adopted a law implementing the Right to Information Directive. To the disappointment of some, this did not provide for access to documents at the police station, at least pending the report of a more thorough review of criminal proceedings (published in July [here](#)). At least one court had already found that the Right to Information Directive provided for access to the file and that it could be invoked directly to secure this after the implementation deadline, so further news may be forthcoming soon. Read more about this [here](#).

- **Improved access to a lawyer in Ireland** – We reported in the [last bulletin](#) the decision of the Irish Supreme Court of 6 March 2014 in [DPP v. Gormley](#), which established that the Irish system allowing police to proceed with interrogations prior to the arrival of a lawyer was destined to be found unlawful. As reported in this [guest post](#) by LEAP member Dara Robinson, after this decision the DPP unexpectedly issued guidance to the Garda (police) requiring that lawyers be present in interrogations. This came as a surprise to lawyers, who have new functions in the interrogation room, and police, who will have to explain allegations more fully, and the impact upon the system of inferences from silence remains to be seen.

## **National – case-law**

- **Dutch Supreme Court, 1 April 2014 – access to a lawyer** – On 1 April 2014 the Supreme Court of the Netherlands gave judgment in a case giving it the opportunity to revise its position according to which the right to a lawyer includes the right to consultation with a lawyer prior to interview, but not to legal assistance during questioning. Despite both the ECHR case law and the Access to a Lawyer Directive making it abundantly clear that the right of access to a lawyer incorporates this element, the Supreme Court decided that recognising this entitlement was beyond the scope of judicial decision-making, leaving it to the legislator to take this extra step. Read more in the trilogy of guest posts on the judgment by Dutch LEAP members (by [Jozef Rammelt](#), [Wouter van Ballegooij](#) and [Bas Leeuw](#)).
- **High Court (England & Wales), 30 July 2014 – EAW / prison conditions (Romania)** – In this [judgment](#), the High Court decided that, subject to satisfactory guarantees being provided to allay its concerns, it could not allow the execution of an EAW from Romania on account of overcrowding in the prison estate found by the ECtHR to have infringed Article 3 ECHR. This follows a decision earlier this year (reported in the [last bulletin](#)) blocking extradition to Italy on similar grounds (the difference being that whereas in the Italian decision there had been a ‘pilot’ judgment of the ECtHR establishing systematic violations of Article 3, in this case there were various ‘ordinary’ judgments of the ECtHR which were used to the same effect). LEAP member Diana-Olivia Hatneanu gave expert evidence in the case.
- **Spanish Audiencia Nacional, 3 July 2014 – extradition / *ne bis in idem*** – Readers may recall that the August 2013 edition of this bulletin ([here](#)) reported a Spanish case which had applied the *ne bis in idem* principle to reject an extradition to a third country. This month, the same court refused an extradition to a third country relying explicitly on the fact that another EU court had already dismissed an extradition request based on the same arrest warrant. The case was that of Bahar Kimyongür, mentioned above.
- **Westminster Magistrates Court, 1 May 2014 – EAW / prison conditions (France)** – This first-instance decision, which was not appealed, refused execution of an EAW issued by the judicial authority of the French overseas territory Guadeloupe on the basis of Article 3 ECHR, noting expert evidence detailing 10 French administrative appeal court decisions finding violations of Article 3 due to prison conditions in the prisons in those territories. LEAP member Ben Cooper represented the requested person.
- **Irish Supreme Court, 10 December 2013 – EAW / arbitrary detention (UK)** – This [judgment](#) predates the scope of this bulletin but we report it due to its interesting content. The Supreme Court of Ireland refused extradition to the United Kingdom under an EAW on the basis of Article

5 ECHR. The person would have been subject to an indeterminate sentence for public protection under a regime found to violate Article 5 by the ECtHR; the reforms of this system not being retroactive, such that the requested person would have been subject to it, the court found that the person's rights would be infringed by their extradition. The Supreme Court did not suggest anywhere that the infringement amounted to a 'flagrant denial' of Article 5 rights.

### **Regional – European Court of Human Rights**

- **Al Nashiri v. Poland and Husayn (Abu Zaydah) v. Poland, both 24 July 2014** – These judgments were widely highlighted as the first to formally recognise the existence of a CIA 'black site' secret detention facility, and which established that Poland had infringed Article 3 ECHR by exposing persons to detention and torture in such a facility on its territory. They also found that Poland had infringed Article 6 ECHR by surrendering persons suspected of terrorism offences to the jurisdiction of the US in the knowledge that they would risk suffering a 'flagrant denial of justice' in trials before a military commission in the US. This is only the third time that the 'flagrant denial' test – the only basis on which extradition can, under Convention law, be refused on Article 5 or 6 grounds – has been met in an ECHR case since its establishment in 1989. The wholly exceptional cases in which it has been applied show that it is a test designed as an in extremis limitation on cooperation with third countries outside the Convention system – and not an appropriate criterion for judging intra-EU extraditions under the EAW.
- **Dhahbi v. Italy, 8 April 2014** – By this judgment, the ECtHR, for the first time, found a violation of Article 6 ECHR due to the failure of a court of last instance to provide reasons for the refusal of a request to refer an issue of EU law to the CJEU for a preliminary ruling. The decision should be useful to LEAP members seeking to persuade courts to refer questions of EU law to the CJEU, as it will pressure them to provide adequate reasons for not referring the question in accordance with Article 267 TFEU – which, if there is a real doubt about the meaning of EU law, as there is with many Roadmap provisions, may take substantial justification.

## **FTI & LEAP ADMINISTRATION**

### **LEAP administration**

- **LEAP Advisory Board** – Following consultations last year, LEAP has been re-structured with an Advisory Board comprising representatives from each Member State who will act as the key contact point for that jurisdiction. Confirmed Advisory Board members are listed below; we are currently identifying and confirming arrangements with members from some countries. A meeting of the Advisory Board is planned for 7-8 October 2014 in Brussels.

### **LEAP ADVISORY BOARD**

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<b>Austria</b> – Stefan Schuman (Johannes Kepler University)	<b>Ireland</b> – Dara Robinson (Sheehan & Partners)
<b>Belgium</b> – Christophe Marchand (Jus Cogens)	<b>Italy</b> – Federico Romoli (Studio Legale Romoli)
<b>Estonia</b> – Jaanus Tehver (Tehver & Partners)	<b>Lithuania</b> – Karolis Liutkevicius (Human Rights Monitoring Institute)
<b>Croatia</b> – Lidija Horvath (Lidija Horvat Attorney-at-Law)	<b>Luxembourg</b> – Roby Schons (Barreau de Luxembourg)
<b>France</b> – Dominique Tricaud (Tricaud-Traynard Avocats Associés)	<b>Netherlands</b> – Jozef Rammelt (Keizer Advocaten)
<b>Germany</b> – Oliver Wallasch (Wallasch & Koch)	<b>Poland</b> – Mikolaj Pietrzak (Pietrzak & Sidor); Maciej Kuśmierczyk (Kuśmierczyk)
<b>Czech Republic</b> – Ondrej Muka (Advokatni Kancelar Mgr Krutiny)	<b>Portugal</b> – Vania Costa Ramos (Carlos Pinto de Abreu e Associados)
<b>Greece</b> – George Pyromallis (George Pyromallis Law Office)	<b>Romania</b> – Diana-Olivia Hatneanu (Law Office of) & APADOR-CH
<b>Hungary</b> – András Kádár (Hungarian Helsinki Committee)	<b>Spain</b> – Carlos Gómez-Jara (Corporate Defense)
	<b>Sweden</b> – Daniel Roos (Advokatfirman Sederholm)
	<b>UK (England &amp; Wales)</b> – Jodie Blackstock (JUSTICE)
	<b>UK (Scotland)</b> – George Gebbie (Black Chambers)

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- **Terms of reference: final call** – Following requests in April and May 2014, we would be grateful if LEAP members could return the Terms of Reference sent to you by email to confirm your membership. We will remove names from the list for those we do not have forms from in September 2014 so please return the form to us urgently. [Contact us](#) if need be.

#### Fair Trials staff update

- **Sophie Amos joins as Head of Funding** – Following the departure of Robert Jackman, Fair Trials is delighted to welcome Sophie Amos as its new Head of Funding. Sophie ([sophie.amos@fairtrials.net](mailto:sophie.amos@fairtrials.net)), who has previously worked at the UK Supreme Court and Amnesty International, will be based in London and will be responsible for Fair Trials' relationships with funders and pro bono partners.

