FAIR TRIALS
INTERNATIONAL

COMMUNIQUÉ

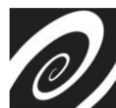
issued after the meeting of the

FAIR TRIALS INTERNATIONAL LOCAL EXPERTS' GROUP (POLAND)

4 December 2012

at the offices of Clifford Chance LLP, Warsaw:

PRE-TRIAL DETENTION IN POLAND



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Introduction

1. On 4 December 2012, Fair Trials International brought together leading experts in criminal justice from across Poland to learn about 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 Experts' Group (Poland) met for a full day at the offices of Clifford Chance in Warsaw.

2. Prior to the meeting, the Group was provided with a detailed discussion pack and asked to reflect on several themes: the standards of pre-trial detention decision-making by the Polish courts, the reasons underlying excessive remand periods, and 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 Polish criminal 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 a full range of alternatives provided for in law.[1] The problem is how these laws are applied and the practice of the courts, which means that detention is the general rule, not the exception.

4. Judges nearly always follow the recommendation of the prosecutor to order detention.[2] Participants agreed that in cities and higher courts practice has improved over the past few years, but it is still rare for defence arguments for release pre-trial to succeed.[3] The situation is worse in small towns, rural regions and lower courts which follow the prosecutor almost without exception. There was concern that this is partly due to the fact that training of local judges is inadequate, meaning that they are unaware of ECHR standards and of EU laws that they are supposed to be implementing.

5. Courts often fail adequately to review motions relating to pre-trial detention. Courts are often overloaded with applications and, even in routine cases, will be provided with large numbers of case files. Police and public prosecutors can hold someone for 48 hours after arrest following which courts must make a decision on continuing detention within 24 hours. They will therefore not usually have time to review the case files in sufficient detail to make an informed decision. Courts do provide a written decision when imposing pre-trial detention, but this is often very short with minimal detail about the specific case. A recent Constitutional Court case reiterated that it is unconstitutional not to give specific reasons for prolonging pre-trial detention, confirming that it is practice rather than the law itself that it is a problem.[4]

[1] See Articles 249 to 277 of the Polish Code of Criminal Procedure
[2] In 2007, the court accepted 87.9 % of motions of prosecutors applying for detention on remand; in 2008 the court accepted 88.1% of motions; in 2009 the court accepted 89.4 % of motions; and in the period January to June 2010 the court accepted 90. 31 % of motions (Source: Polish Ministry of Justice website).
[3] A report by the Polish Helsinki Foundations has found that bail in district courts was accepted in 2,411 cases in 2005 but that this rose to 7,174 cases in 2010.
[4] See judgment of the Polish Constitutional Court in case no. SK 3/12, 20 November 2012.

6. Participants felt that reasons given for imposing pre-trial detention were often not adequate and did not take into account the specific circumstances of the case. Release pending trial is often refused on the basis of the severity of the offence and the probability of conviction, with little consideration of the facts of the case or the personal situation of the suspect. Where a case involves multiple defendants, the court will usually impose the same detention order on all defendants without taking into account their different personal circumstances. Some participants had seen cases where decisions had been made due to media pressure rather than a proper review of the case file.

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

7. It is very difficult for the defence to prepare an effective case to argue against detention. The court has access to the entire case file from the start of proceedings, but this is not available to the defence, which is not even provided with the evidence on which the court is basing its decision. Participants hoped that proposed reforms to the penal code, as well as the implementation of the new Directive on the right to information in criminal proceedings, will help address this inequality of arms.

8. Participants were concerned that the legal aid rules in Poland mean that suspects rarely have effective representation in detention hearings. Legal aid lawyers are paid a flat rate and are appointed for the duration of the case. The low rates and minimal chances of success mean that lawyers often file papers in advance of detention hearings but do not attend them in person. Where someone does appear, it is usually a trainee who does not always put forward the most effective arguments. It was reported that more than 90% of suspects in Warsaw are not represented by a lawyer at their first detention hearing.

C. Use of alternatives to pre-trial detention

9. While it is not impossible to persuade the court to use alternatives to pre-trial detention, it is very difficult and is usually only successful where the suspect has clear health problems or other vulnerabilities. Where an alternative is used, it is almost always in the form of monetary bail surety. It was agreed that the other alternatives available under Polish law (such as restrictions on certain activities and obligations to report regularly to the police and to avoid contact with specified persons) should be more widely used. Participants felt that in some cases courts lack knowledge about what other options are available to them and are often unwilling to use these due to concerns that this will cause delays in proceedings and the risk that defendants will not appear at their trial. Electronic tagging is not currently available as an alternative to pre-trial detention in Poland, although it is used post-sentencing. Participants agreed that its use should be expanded to the pre-trial stage, although there was concern about the resources needed for this.

10. The European Supervision Order (**ESO**) has been implemented into Polish law. Participants generally agreed that this is a good instrument that could have a positive impact in Poland. Participants thought that the Polish authorities would be happy to comply with an ESO issued elsewhere in the EU. However, there was concern that judges would be unwilling to issue an ESO due to the complicated procedure and fear that the suspect would fail to return to face trial. Participants agreed that judges, prosecutors and lawyers will need practical guidance on the

types of case and situations where an ESO may be appropriate. It is important to make sure that the ESO operates well from the start, as a few failures could mean that judges lack confidence in using it going forward.

D. The links between investigation and detention on remand

11. While prosecutors and courts do prioritise cases where people are in pre-trial detention, these can still take months or years to come to trial. Most participants were concerned that the courts often rubber-stamp applications by the prosecutor to extend pre-trial detention and that prosecutors habitually file for extensions without good reason.

12. It was acknowledged that some judges, particularly in the higher courts and in the major cities, are increasingly willing to challenge prosecutors for unjustified delays in a case and sometimes extend pre-trial detention on the condition that progress is made in identified areas. While this is welcome, some participants expressed concern that courts will rarely take any action if the prosecutor fails to make the required progress, meaning that there is little motivation to move the case forward. It was felt that, if prosecutors really believed that a defendant would be released if they failed to meet a deadline, cases would proceed to trial much more quickly.

E. Reform outlook

13. Reforms to the Polish Code on Criminal Procedure, in which some participants are heavily involved, are likely to come into force in January 2014. If these are passed in their current form they will make far-reaching changes to Polish criminal procedural law, including on pre-trial detention. The reforms will bring about a move to an adversarial style with a more active role for the court and more opportunities for both sides to present and challenge the evidence at trial and in pre-trial proceedings.

14. The specific reforms that will impact on pre-trial detention are:
    - courts would have to make any evidence on which decisions to impose or extend pre-trial detention are based available to suspects and their lawyers to enable challenges to be made;
    - everyone arrested and detained at a police station will be provided with clear information in writing about their right to apply for legal aid and their right to access a lawyer before police questioning. This will help ensure that all suspects have a lawyer available at their pre-trial detention hearing;
    - prosecutors seeking an extension to pre-trial detention would need to provide new evidence as to why the extension is necessary and would no longer be able to rely on their original arguments; and
    - if pre-trial detention has already lasted for two years, the court would not be able to order a further extension unless the likely sentence if convicted were lengthy and the offence alleged were very serious.

15. Participants agreed that these reforms would be a big step in the right direction. However, there were concerns that the law at the moment is not followed in practice and that further reforms would not necessarily affect the mentality of prosecutors and judges and therefore may not make the differences they are designed to achieve.

16. There were a variety of reactions to the suggestion of taking more cases before the ECtHR, even though several of the problems identified clearly raised arguable human rights issues. Participants generally expressed the view that Poland has been held in violation of Article 5 ECHR numerous times by the ECtHR and the main focus now should be making sure that courts and prosecutors change their practice to reflect the ECtHR's judgments.

17. There was some disagreement as to Poland's record of implementation of ECtHR judgments. Some participants considered that courts did take ECtHR decisions against Poland on Article 5 into account and that this had led to the steady decline in the length of pre-trial detention in recent years, as well as to the number of ECtHR violations against Poland decreasing. Other participants have tried to use ECtHR judgments in submissions but have been told that they do not bind the court. It was agreed that a rule clarifying that ECtHR decisions are binding on the national courts would be useful.

F. 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 is needed of judges and prosecutors. 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.
- A handbook should be produced containing best practice from other EU countries about the use of alternatives to pre-trial detention. This should include worked examples to assist the court in making use of the possibilities available. This is something that Fair Trials International could put together and that participants could help disseminate.
- 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.
- Lawyers should always attend the pre-trial detention hearings of their clients. This is essential to ensure that the court is aware about information relating to the suspect's personal circumstances and to enable it to make an informed decision.
- Training is needed to educate judges, prosecutors and lawyers about the ESO and when it should be used.

b. Excessive periods of detention on remand

- Courts should require better reasons for the extension of pre-trial detention and should not automatically approve requests for extensions by prosecutors. There should be a presumption of release if no new reasons for detention are put forward.
- Where an extension is conditional on specific progress being made then courts should not further extend pre-trial detention if the prosecutor fails to meet the conditions without giving good reasons.

c. General recommendations

- The Committee in charge of the reforms to the penal code should keep the legal profession, academics and NGOs informed to ensure that they can put pressure on the Government to

make sure that the laws retain the current draft provisions to improve pre-trial detention practice.

- The national bar association should make more use of its power to intervene before the Council of Ministers at the Council of Europe.

FTI Local Expert Group (Poland)
13 February 2013

ANNEX

PARTICIPANTS

(alphabetical order)

Adam Bodnar PhD is an assistant professor at the Human Rights Chair of the Warsaw University Faculty of Law and Administration, and a visiting professor at the Central European University in Budapest. Since 2008, he has been the Head of the Legal Division and a member of the Management Board at the Helsinki Foundation for Human Rights. He is also the Senior Legal Expert within the FRALEX network of the EU Agency for Fundamental Rights.

Paweł Brożek is a qualified Polish advocate and works as a criminal defence lawyer in Gdańsk.

Marcin Cieminski is a qualified Polish advocate, holder of a PhD degree from the University of Warsaw and a partner in Clifford Chance's Litigation and Dispute Resolution Team in Warsaw. He also leads the criminal and healthcare/life sciences practices. He has substantial experience in civil, commercial and arbitration proceedings, healthcare/life sciences related matters and regulatory investigations, compliance and criminal matters.

Piotr Kosmaty is a Chief Prosecutor in the Division for Organised Crime and Corruption at the Appellate Prosecutor's Office in Kraków, Poland. His work largely covers the prevention of organised crime, terrorism and drug trafficking. Since 2011 he has been a lecturer at the Polish National School of Judiciary and Public Prosecution. He has published numerous articles concerning criminal law and operational activities.

Bartosz Kruzewski is a qualified Polish advocate and a partner at the Warsaw office of Clifford Chance. He heads the Warsaw Litigation & Dispute Resolution Team and co-heads the Restructuring & Insolvency Practice. He is also a member of the firm's International Commercial Arbitration Practice. Bartosz Kruzewski has extensive experience covering local and international arbitration as well as commercial litigation.

Maciej Kuśmierczyk is an academic in the area of criminal law, cross-border proceedings and human rights and is a practising defence lawyer at Małecki & Rychłowski, Warsaw. He also teaches criminal procedure at the University of Warsaw with a focus on comparative studies in defence rights.

Bolesław Matuszewski is an advocate in private practice representing clients in criminal, civil and administrative cases. Prior to entering private practice, he was employed as a commercial lawyer in the Warsaw office of Weil, Gotshal & Manges and has also worked as a trainee advocate at Warsaw firm I&Z s.c., where he specialised in criminal, civil and administrative litigation.

Paweł Osik is an associate at Pietrzak & Sidor, Warsaw. He was formerly a coordinator of Human Rights and Settlements with the Past programme run by the Helsinki Foundation for Human Rights.

Irmina Pacho is a lawyer at the Helsinki Foundation for Human Rights in Warsaw.

Mariusz Paplaczyk is a barrister and a specialist in criminal cases including criminal international relations. Since 2005 he has been practising as a lawyer and a managing partner of the law firm Wiza Paplaczyk & Partners Advocates Partnership. In October 2010 he was elected President of the Association of Polish Lawyers. In 2011 he became a member of the team appointed for the purposes of the Polish Commission of Criminal Law Codification. He takes part, together with the representatives of the UN office in Poland, in the training of police officers and border guards in human trafficking, slavery and illegal border crossing.

Mikołaj Pietrzak is a partner at Pietrzak & Sidor in Warsaw, where he specialises in a wide range of legal work, including defending European Arrest Warrant cases. He has a master's degree in law at the Faculty of Law and Administration of the University of Warsaw. He has been a member of the Warsaw Advocates' Chamber since 2001 and a deputy member of the Warsaw Advocates' Council since 2010. He has participated in proceedings before the Constitutional Tribunal of Poland and before the European Court of Human Rights.

Jacek Potulski PhD is a solicitor at Kopoczyński Solicitors and Legal Advisers, Gdynia. He is a penal law expert and has worked as a defence lawyer specialising in financial crimes. Jacek Potulski has been a lecturer and researcher at the Faculty of Law and Administration, University of Gdańsk since 2003. He has published widely on penal law and is the co-author of the Lex Legal Information System.

Zuzanna Rudzinska is a lawyer at the firm Wardyński and Partners in Warsaw, Poland. She has a particular interest in cross-border criminal justice and defence rights.

Agnieszka Serzysko PhD is an academic specialising in European criminal law and justice, cross-border proceedings and human rights. She has worked on projects with the Helsinki Foundation for Human Rights and with the European Research Academy in Trier. She has published numerous articles about European criminal law and justice.

Dominika Stępińska-Duch is an advocate and a member of the Dispute Resolution and Arbitration Practice Group at Wardyński and Partners law firm in Warsaw, Poland. She specialises in criminal litigation and is a member of the European Criminal Bar Association.

Jakub Tamborski is a graduate of the Faculty of Law and Administration at the University of Warsaw and a Ph.D. student. He is an advocate of the Warsaw Bar Council and specializes in criminal law and human rights. Jakub Tamborski is also an Advisor to the Polish Parliament in the areas of justice and human rights.

Janusz Tomczak is a lawyer at the firm Wardyński and Partners in Warsaw, Poland. He practises in cross-border criminal cases in which fundamental rights issues arise and has

experience of representing non-nationals accused of business crime. Janusz is a member of the European Criminal Bar Association and the International Bar Association.

Marcin Warchoł PhD works in the criminal law department of the Polish Ombudsman's office and is a specialist in temporary arrest issues.

Małgorzata Wąsek-Wiaderek PhD is a leading criminal procedure academic at the Catholic University in Lublin and has published numerous articles on pre-trial detention in Poland. She is also a member of the Research Office of the Polish Supreme Court and a member of the Polish Commission of Criminal Law Codification.

Prof. Paweł Wiliński is a Professor of law and Chief of the Department of Criminal Procedure at Adam Mickiewicz University in Poznań, Poland. He is the Senior Counsel and Vice-director of the Constitutional Complaints Department at the Constitutional Court of Poland and a member of the Polish Commission of Criminal Law Codification. Since 2010 he has been an ad-hoc judge at the European Court of Human Rights, Strasbourg, France. He has previously worked at the European University Viadrina, Frankfurt and is the author of more than 100 publications on criminal procedure, criminal law, international criminal procedure.

FAIR TRIALS INTERNATIONAL STAFF

Catherine Heard is Head of Policy at FTI and is responsible for FTI's campaigning, lobbying and networking activities. Catherine produced the 2011 Reports on Pre-Trial Detention and the European Arrest Warrant, and has published widely on EU criminal justice and extradition. Catherine previously worked as a solicitor in commercial litigation, and has an LLM in Human Rights Law from Birkbeck College, London.

Emily Smith is Policy Officer at FTI, 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 at SOAS, University of London in 2011.

Alex Tinsley is Strategic Caseworker at FTI. Alex produced the 2012 Guide to the European Supervision Order. Before joining FTI, Alex worked at the Legal Service of the European Commission and the Court of Justice of the European Union, and volunteered the immigration detention charity BID.