

FAIR TRIALS INTERNATIONAL



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Advisory Panel Meeting (London, 28 November 2012)

Vulnerable suspects in the European Union


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Fair Trials International and the Legal Experts Advisory Panel

1. Fair Trials International (**FTI**) formed the Legal Experts Advisory Panel (**LEAP**) in 2008 to provide an opportunity for experts in criminal justice, fundamental rights and access to justice in the EU to meet and discuss issues of mutual concern and to provide advice, information and recommendations to inform FTI's European policy position. LEAP now comprises more than 80 members from 24 Member States.
2. Due to LEAP's expansion, since April 2012 FTI has chosen to hold smaller, specialist LEAP meetings focusing on topics in which attendees are recognised experts in their field. On 28 November 2012 a meeting was held at the London office of Clifford Chance of 11 experts from the field of law, psychology and prison reform, to discuss the safeguards required to ensure the fair trial rights of vulnerable suspects and to look at how these might best be promoted by action at EU level.

Context – the Roadmap

3. In November 2009, the European Union adopted the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings (the **Roadmap**). This gave a mandate for a series of laws designed to ensure stronger protection of fair trial rights, which are not adequately protected in many EU countries. The first two measures under the Roadmap have now been adopted, the first guaranteeing the right to interpretation and translation and the second the right to information during criminal proceedings. The third measure, which will guarantee the right to access a lawyer and to communicate on arrest, is currently being negotiated between the European Parliament, Council and Commission. Previous LEAP meetings have discussed each of these three measures.
4. A legislative proposal for the next measure, which will introduce special safeguards for vulnerable suspects or accused persons, is expected to be published by the European Commission during 2013. The Roadmap states that "in order to safeguard the fairness of the proceedings, it is important that special attention is shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition."
5. The Roadmap goes on to identify potentially vulnerable groups as:
 - Foreign nationals, who are vulnerable by virtue of their nationality, linguistic disadvantage and other factors;
 - Children defined as all persons under the age of 18;
 - Mentally or physically handicapped persons;
 - Persons who have children or dependants (such as pregnant women and single parents of young children);
 - Persons who cannot read or write;
 - Persons with a refugee status under the 1951 Refugee Convention, other beneficiaries of international protection and asylum seekers; and
 - Persons addicted to alcohol or drugs.

6. Criminal proceedings are a daunting prospect for all suspects. However, children and vulnerable adults are especially likely to be overwhelmed by the experience. They may be unable to understand or follow the content or the meaning of proceedings, which can seriously undermine their ability to receive a fair trial. FTI has recently conducted a survey, together with Dutch NGO EuroMoS, of over a hundred defence practitioners from across the EU, including many LEAP members, about the barriers to a fair trial in practice in their country. The survey of lawyers was questionnaire-based. Practitioners were not asked to set out legal rules, but to concentrate on what happens in practice.
7. This research suggests that, in many Member States, there are inadequate safeguards in place to ensure that children, suspects with mental or physical conditions, or those who are otherwise vulnerable, understand the proceedings in which they are involved and are treated fairly. If suspects cannot understand what is happening then they cannot exercise their rights effectively and cannot receive a fair trial.
8. This meeting sought to identify the main areas of consensus among the group as to the key problems with the treatment of vulnerable suspects and defendants in the EU and what should be covered by the draft legislation. It is hoped that this summary of the key points discussed will assist the European Commission and Members of the European Parliament and Council in their work on the draft directive and any accompanying best practice guidelines.

Training in recognising and working with suspects with vulnerabilities

9. One of the biggest problems that vulnerable suspects face at the early stages of criminal proceedings is the failure of the authorities to recognise the vulnerabilities of those suspected or accused of a criminal offence. Whilst some vulnerabilities are hard to identify, it is important that procedures are in place to identify any issues that may affect the suspect's ability to participate effectively in the key elements of the trial process, including during police interviews.
10. Everyone agreed that there is insufficient training on recognising and working with vulnerable suspects. There is a need for more training and for useful information to be more effectively disseminated. In the UK there are 'checklists' in police custody suites which help lawyers and police identify vulnerable suspects. These are considered very helpful and are a good example of an existing practice that could be introduced in other Member States. It is also very important that the police have access to relevant professionals who can assist with assessment of the suspect if necessary. While checklists are not a complete answer, they do ensure that there is awareness about how to identify basic signs of vulnerability.
11. In the current economic climate, lawyers are under pressure to take on as many cases as possible. This has led to people acting in cases involving children and other vulnerable suspects when they are not appropriately trained or experienced. Judges and prosecutors often have special training to handle specific types of cases, for example cases involving sexual offences or family proceedings. However, there is no parallel requirement for judges, prosecutors, police or defence lawyers to undergo training on

how to handle cases against children and vulnerable adults. It was concluded that a system of accredited professionals or other quality mark could make a considerable difference. Accreditation for court staff could also be introduced, although any such scheme must ensure that the people involved understand their role and do not try to replace that of a lawyer.

Definition of ‘vulnerable’

12. There were mixed views about whether it is necessary to have a definition of vulnerability in a directive. It is important that the legislation is focussed on those whose vulnerability is such that they may not receive a fair trial without additional safeguards, and any definition should provide examples of potential vulnerabilities rather than an exhaustive list. If every possible vulnerability is included then almost any suspect could fall within the definition. It was agreed, for example, that non-nationals or pregnant women should not be automatically considered vulnerable. There was general agreement that children should always be considered vulnerable, but that a definition for adults is more difficult to formulate. There was agreement that any definition needs to be wide enough to include mental, social and physical difficulties.
13. There was support for the idea that instead of an exhaustive definition of the word ‘vulnerable’, a recommendation be made that the scope of the directive reflect the concept of effective participation, as set out by the European Court of Human Rights in the case of *SC v UK*¹:

“...effective participation in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witness and, if represented, to explain to his own lawyers his version of events, point out any statement with which he disagrees and make them aware of any facts which should be put forward in his defence”

14. EU legislation should look to set minimum standards to be met by domestic legal systems to enable effective participation of all suspects in criminal proceedings. This could be combined with a definition comprising a non-exhaustive list of factors that may indicate that special measures are required.

The ability of vulnerable suspects to waive their right to a lawyer

15. It was agreed that vulnerable suspects should only be able to waive their rights if there are adequate safeguards in place to ensure that they are capable of making, and have made, an informed decision and are aware of the consequences. There was a suggestion that vulnerable suspects should always have to seek advice before any waiver, for example by speaking to a lawyer before police questioning.

¹ [2004] ECHR Application No. 60958/00

16. Provided that adequate procedures are in place to determine informed consent, there was concern about the idea of taking the generally available right of waiver away from such a wide group of people as vulnerable suspects. It was considered essential that any such waiver is revocable at any point in the proceedings and that there are regular checks to ensure that suspects have not changed their mind.
17. The possibility of allowing vulnerable adults to waive the right but not children was discussed, but most people expressed the view that such a distinction could operate arbitrarily. The example was given of a 17 year old who is a child and therefore would not be able to waive his or her right to a lawyer and an 18 year old with severe learning disabilities who is. The 17 year old is more likely to be capable of making an informed decision but would not be allowed to do so if the distinction was introduced.

Audio and video taping of police interviews with vulnerable suspects

18. It was reported that in some Member States audio and video recording of police interviews with children is carried out. However, in general this is very rare. There was agreement that this should be introduced in cases involving both children and vulnerable adults as it is a good way of assessing how well suspects have understood the proceedings and provides a record of what is said during interviews. This practice also ensures that there is a record of the questions that vulnerable suspects are asked.

Separate measures for children and vulnerable adults?

19. There was an exchange of views on whether it would be preferable to have one measure for children and then a separate one for vulnerable adults. Generally, people did not feel that this was the right approach but did appreciate that the different needs of children compared with other vulnerable suspects must be taken into account. There is material such as the Convention on the Rights of the Child that could be used to draft the sections dealing specifically with children.

Conclusion and key recommendations

20. Participants agreed that action is needed at EU level to address the treatment of vulnerable suspects in criminal proceedings. It is important to remember that having adequate measures in place, while potentially entailing costs for some EU countries, would result in costs savings in the long term as they avoid mistrials and appeals. They will also address the widespread concern that many vulnerable suspects and defendants in the EU today are unable to receive a fair trial.
21. The following matters need to be addressed by the Commission as it completes its legislative proposal and considers accompanying best practice recommendations:
 - Recognition of vulnerabilities is key and more training and practical information is needed to make sure that they are identified early in proceedings. Checklists should be introduced in police stations to help lawyers and police identify vulnerable suspects. It is important to ensure that checklists are not solely relied

upon; the police should have access to relevant professionals who can assist with assessment of the suspect if necessary.

- A system of accreditation for lawyers and other professionals working with vulnerable suspects and defendants should be considered.
- Effective participation is at the heart of any work on special safeguards for vulnerable suspects involved in criminal proceedings and this should be reflected in the scope of the directive. It is essential to ensure that vulnerable suspects have effective access to justice and a fair trial.
- In conjunction with effective participation, a definition of what constitutes a vulnerable suspect may be helpful to ensure awareness and prevent Member States avoiding applying measures, but it must not be too prescriptive and must be clearly stated to be non-exhaustive.
- Vulnerable suspects should only be able to waive their right to a lawyer when adequate safeguards are in place to ensure that the suspect can give, and has given, informed consent. This decision should be revocable at any point in proceedings.
- Audio and video recordings of police interviews with vulnerable suspects should be introduced to monitor and assess the level of understanding by vulnerable suspects and defendants of the proceedings.

List of participants

Felicity Gerry

Felicity Gerry is an international barrister from 36 Bedford Row, London who specialises in dealing with the young and vulnerable. She has been described in the Legal 500 as “an expert in the field of sexual offending” and “tenacious in court”. She recently made submissions to the European Commission DG Justice on the treatment of vulnerable defendants. She has represented children and vulnerable adults with severe physical, mental and social difficulties in serious and complex cases using a range of measures to assist them to effectively participate in the trial process. This has included picture boards and intermediaries to assist communication. She is a preferred counsel for the UK Equality and Human Rights Commission and has written extensively in the legal press in relation to the treatment of vulnerable suspects.

Diana-Olivia Hatneanu

Diana-Olivia Hatneanu is a Romanian lawyer at the Association for the Defence of Human Rights in Romania – the Helsinki Committee (APADOR), www.apador.org. Diana has extensive experience of cross-border criminal defence cases in which fundamental rights issues have arisen.

Shauneen Lambe

Shauneen is the Executive Director of Just for Kids Law, a charity providing support, information and advice to young people who find themselves in difficulty. Shauneen established and manages the Youth Justice Department at Lawrence & Co. solicitors. She is qualified as a barrister in the UK and as an attorney in Louisiana, USA, where she worked for Clive Stafford Smith at the Louisiana Crisis Assistance Centre. She is a founder member and board member of Reprieve, a UK charity that fights for the rights of people facing the death penalty. She was awarded a Shackleton Fellowship in June 2011.

Sinead MacCann

Sinead is a solicitor at the Howard League for Penal Reform. The Howard League is the oldest penal reform charity in the UK and campaigns for a wide range of issues including shorter prison sentences, real work in prison, children in prison and community sentences. Sinead represents children and young people in custody and in the community on a range of prison and public law issues including their treatment in prison, parole, recall, adjudications, early release and resettlement.

Gabor Magyar

Gabor Magyar is a partner at Magyar György és Társai, a law firm based in Budapest, Hungary, www.magyarugyved.hu. He has worked for the European Court of Human Rights, the European Court of Justice and the European Commission. He has experience with human rights law, the European Arrest Warrant, data protection, criminal procedure and tort law.

Katerina Mantouvalou

Katerina Mantouvalou is a former researcher at Fair Trials International and visiting lecturer in politics at Birkbeck College, London. She is currently a senior consultant at GHK Consulting Limited where she is leading the impact assessment for the European Commission into the proposed law to introduce special safeguards for vulnerable suspects involved in criminal proceedings.

Amina Memon

Professor Amina Memon has carried out extensive research into studies of cognitive techniques in investigative interviewing since the 1990s and has highlighted the importance of conducting rigorous experimental research with sound control procedures. Professor Memon is internationally recognised for her work and her findings have had a considerable impact in the field. Her theory-driven research on interviewing continues to influence both policy and practice.

Anna Ogorodova

Anna Ogorodova is a researcher at the University of Maastricht, www.maastrichtuniversity.nl. Her research focuses on defence rights, criminal legal aid and criminal procedure in the EU. Previously Anna worked as Associate Legal Officer for the National Criminal Justice Reform program of the Open Society Justice Initiative.

Vania Costa Ramos

Vania Costa Ramos is a criminal lawyer at Carlos Pinto de Abreu's law firm in Lisbon, Portugal, where she specialises in international and European criminal law, mutual legal assistance and extradition. Vania lectures on criminal law at the University of Lisbon, and is completing her PhD thesis on evidence exchange in the EU. She is currently secretary of the European Criminal Bar Association.

Sinéad Skelly

Sinéad works at the Irish Council for Civil Liberties specialising in EU criminal justice. She holds an LLB from Trinity College Dublin and an MSc in Criminology and Criminal Justice from the University of Oxford. In the summer of 2010 Sinéad completed an internship with

the Irish Department of Justice and Equality. As part of this internship, Sinéad was engaged as legal researcher to the Advisory Committee on Garda Interviewing of Suspects.

Wafa Shah

Wafa is a criminal law barrister at Garden Court Chambers and former caseworker at Fair Trials International.

Jenny Talbot OBE

Jenny joined the Prison Reform Trust in 2006 and is currently Director of the trust's *Care not Custody* programme, which is concerned with people with mental health problems and learning disabilities who are in contact with the criminal justice system as suspects, defendants and offenders. The programme focuses on the development of liaison and diversion services for these individuals, and the Government's commitment for all police custody suites and courts to have access to such services by 2014. In June 2011 Jenny received an OBE in recognition of her work on behalf of offenders with special needs in the criminal justice system.