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Submission

Overview of Case Studies relating to Pre-Trial
Detention

Fair Trials International's Submission Following the
Meeting on Minimum Standards in Pre-trial Detention
Procedures held in Brussels on Monday 9 February
2009.

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About Fair Trials International

Fair Trials International (FTI) is a UK-based NGO that works for fair trials according to international standards of justice and defends the rights of those facing charges in a country other than their own.

FTI pursues its mission by providing individual legal assistance through its expert casework practice. It also addresses the root causes of injustice through broader research and campaigning and builds local legal capacity through targeted training, mentoring and network activities.

Although FTI usually works on behalf of people facing criminal trials outside of their own country, we have a keen interest in criminal justice and fair trial rights issues more generally. We are active in the field of EU Criminal Justice policy, and, through our expert casework practice we are uniquely placed to provide evidence on how policy initiatives affect defendants throughout the EU.

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Introduction

FTI welcomed the opportunity to be a part of the experts' meeting on minimum standards in pre-trial detention procedures, held in Brussels on Monday 9 February 2009. We are very pleased that, following the meeting, the European Commission has decided to explore issues relating to pre-trial detention in a Green Paper later this year.

We hope that the following case studies will be of assistance in preparing the Green Paper. They demonstrate some of the recurring issues relating to pre-trial detention which have arisen in cases FTI has been involved in. It is hoped that these case studies will highlight the key issues and principles that need to be addressed by EU legislation.

FTI believes that there are a number of problems in law and practice regarding how Member States enforce pre-trial detention. FTI is particularly concerned with:

1. The length of pre-trial detention in some EU member states;
2. The absence of proper reviews of the decision to remand in custody;
3. The lack of adequate representation in remand review hearings;
4. Discrimination against non-nationals during remand hearings;
5. Inadequate access to legal advice;
6. Limited access for defendants to information about the case against them;
7. The inability to contact family and friends;

8. The lack of access to translation and interpretation facilities.

FTI would welcome any EU initiative which aims to bring pre-trial detention procedures across Europe in line with basic human rights and fair trial principles and which promotes awareness of the treatment pre-trial detainees are subject to in some member states.

Summary

1. The length of pre-trial detention in some EU member states:

FTI regards pre-trial detention as a measure of last resort, the imposition of which necessitates a departure from the guarantees afforded to the accused by virtue of the presumption of innocence. Article 5(3) of the ECHR guarantees the right of everyone remanded in custody to a 'trial within a reasonable period of time'. In light of this, it is quite clear that pre-trial detention should only be imposed when it serves a justifiable purpose and when the duration of pre-trial detention is proportionate to the purpose it serves. Legislation and practice in Member States which allows excessively long periods of pre-trial detention should be amended as a matter of urgency.

All six case studies summarised below demonstrate that prisoners, particularly those held in countries other than their country of nationality or permanent residence, are frequently held in pre-trial detention for an unreasonably long period of time, some for two years and others for up to four years.

2. The absence of proper reviews of the decision to remand in custody;

Prisoners facing trials abroad are already seriously prejudiced, as compared to prisoners on remand in their own country, by their lack of understanding of the justice system, by their lack of knowledge of the language in which they are being interviewed and tried and by the propensity of foreign courts to deny non-nationals bail as they are often perceived as a flight risk. Hearings to review the decision to remand in custody are often lacking in procedural integrity, leading to a number of foreign nationals being forgotten in remand, as their bail applications are repeatedly refused without a proper review. Common problems are that lawyers do not make bail applications for fear of being rejected or due to incompetence [See Case Study 6]; lawyers are not allowed to make oral arguments in remand review proceedings [See Case Study 4]; and the accused is not allowed to be present in all his remand review hearings [See Case Study 4 in which the client was only allowed to attend his two-year pre-trial detention review, after the first hearing].

3. The lack of adequate representation during the interview and in pre-trial hearings:

Adequate legal representation is essential in almost all legal proceedings. When the accused is in a foreign country, where they

do not understand the language, laws and culture, legal representation becomes all the more necessary. Legal representation is vital during bail hearings and all hearings related to alleged breaches of bail conditions as a decision whether or not to grant bail often entails the exercise of judicial discretion, which demands the presentation of a coherent and compelling argument in court. FTI has observed that without proper legal representation, suspects are more likely to be denied bail and placed on remand, often for unreasonably long periods.

FTI has observed a number of cases in which the accused is unfamiliar with the local language and the linguistic barrier is exacerbated when the accused is not given access to a lawyer to make representations on his behalf and explain the law to him. In Case Study 4, the accused was afforded legal representation at his first hearing, but his lawyer was not allowed to speak during the hearing. The accused was asked questions by the investigating judge and then remanded in custody, despite obvious factual circumstances which made it seem likely that the accused would be granted bail. In addition, the accused was not allowed to attend any further review proceedings until his two-year pre-trial detention review was due, when he was finally granted bail.

Case Study 5 and 6 demonstrate that the lack of adequate legal representation during pre-trial detention hearings and at the first interview can result in long, arduous and often disproportionate pre-trial detention periods. Whilst observing both these cases from Malta, and other similar cases, FTI has become increasingly concerned about the repeated failure on the part of those representing the accused to make bail applications. Mr S, whose situation is summarised in Case Study 6, has been in custody since May 2007 and claims that no bail application has been made on his behalf. In addition, those who have been fortunate enough to have had bail applications made on their behalf suffer from the imposition of extremely stringent bail conditions or repeated, 'rubber-stamped' refusals of bail applications for years - a situation perceived to be the result of a combination of inadequate legal representation during the pre-trial stage and the propensity of foreign courts to deny applications for bail made by foreign nationals.

4. Discrimination against non-nationals in remand hearings:

As FTI and others have frequently observed, discrimination against non-nationals on the basis of nationality remains a problem in criminal proceedings in many member states of the European Union (EU). This discrimination can be readily observed in the propensity for courts to refuse bail to non-nationals, yet grant it to nationals in the same or very similar circumstances. Alternative measures to pre-trial detention should be utilised wherever possible, yet they are too frequently out of reach for non-national and non-resident suspects or defendants.

FTI has also observed cases in which disproportionate amounts of money have been set as a surety for bail when the accused is a non-national. In addition, some cases confirm bail conditions

imposed on non-nationals are so stringent that both those accused and their families suffer an excessive amount of strain to fulfil them. Examples of such behaviour towards foreign nationals can be observed by studying Case Studies 2, 4 and 5. The accused in Case Study 2 was made to put up €80,000 as surety for bail after being refused bail for over 2 months, despite the fact that he was hospitalised, severely injured and obviously not a flight risk; the accused in Case Study 4 was made to put up €50,000 as surety after being refused bail for 2 years after his arrest; and the accused in Case study 5 needed his father to move to Malta to reside with him, leaving behind an ailing mother, in order to look after him so that bail conditions could be met.

5. Inadequate access to legal advice:

FTI has observed that in a number of EU member states, particularly Spain and Malta, access to a lawyer and legal advice is often limited during pre-trial detention. In practice, no lawyer is present during police interviews and in some countries during the investigation. This often results in a lack of understanding of the charges and options available before a trial begins which exacerbates the hardship faced by foreign defendants abroad. It is often the case that a lack of competent legal advice right at the beginning leads to complications which prolong pre-trial detention.

6. Limited access for defendants to information about the case against them:

In almost all the case studies summarised below, defendants abroad have had problems acquiring information about the case against them. In cases categorised as 'secret summons' (*Sumario Secreto*) a lack of information about the charges and evidence to support the charges hampers the preparation of successful bail applications. This has led to cases where clients are in pre-trial detention for an unreasonably long period of time [See Case Study 4].

7. The inability to contact family and friends:

Case Studies 1, 2 and 6 highlight instances when a refusal to allow contact with family, friends, MPs and interested NGOs has had particularly severe consequences. Foreigners waiting to be tried abroad are often most in need of access to the outside world as they are frequently forgotten in custody for long periods of time without a trial, bewildered by a foreign criminal justice system and unable to understand what is being said around them. Measures should be taken within the EU to ensure those held in custody in a foreign country are never stripped of their means to access the outside world, often their only means to seek help.

8. The lack of access to translation and interpretation facilities:

It is clear that a lack of adequate interpretation and translation facilities during pre-trial detention is unjust and violates basic human rights and fair trial safeguards. The case

studies summarised below highlight instances where clients have been made to sign confessions in a foreign language [See Case Study 3] and are quite frequently interviewed, in the absence of a lawyer, in a language which is not their native language [See Case Studies 2 and 6].

Furthermore, in some EU countries, for example Spain, legal aid lawyers might not speak the language of the accused yet there is no money allocated for interpretation. As a result there is no communication between the lawyer and the client during pre-trial detention and thus the client is unable to instruct his or her lawyer ahead of the trial.

Concluding Remarks:

FTI acknowledges that a balance must be struck between the need for an expeditious resolution of criminal cases, the need to ensure both the prosecution and the defence have adequate time to prepare their case and the importance of public protection. It is, however, clear that lengthy periods of pre-trial detention often result from a general lack of urgency in dealing with criminal trials in a number of member states. Wherever possible, alternatives to pre-trial detention should be encouraged and pre-trial detention should, in principle and in practice, be used only as a last resort. Adequate standards regarding pre-trial detention are particularly urgent for those facing charges in a country other than their own. These people are especially vulnerable as they do not have access to the support of friends or relatives and often suffer due to language barriers. It is imperative that steps are taken to ensure non-national prisoners are dealt with fairly and efficiently.

CASE STUDY 1.

THE CASE OF MR R: DUTCH NATIONAL DETAINED IN FRANCE

Mr R was a lorry driver and was hired by a Dutch transport company to make several trips between Spain and Netherlands in late 2004 and early 2005. Part-way through what would turn out to be his final journey, he noticed he was being followed by a van. He stopped, checked his load and found cannabis hidden inside one of the containers. His immediate reaction was to notify the Spanish police, but he was unable to make himself understood. He next telephoned his wife, who contacted the Dutch police. They advised him to abandon the lorry and return to the Netherlands and he followed their advice. Meanwhile, Mr R's former boss was arrested in France for possession of 4 tons of cannabis. Subsequently, Mr R was arrested in the Netherlands under a European Arrest Warrant and was extradited to France in the spring of 2005, having been falsely accused by his former boss of being part of the drug-smuggling gang. His accuser has since shown his remorse by admitting he lied about Mr R's involvement in letters of apology written to Mr R's family, but this has unfortunately not led to Mr R's release.

CONCERNS ABOUT FAIRNESS OF PRE-TRIAL DETENTION PROCEDURE:

LENGTH OF PRE-TRIAL DETENTION PERIOD

Having been extradited to France on the spring of 2005, Mr R's trial was not conducted until the spring 2008. During this 3 year period he was remanded in custody.

LACK OF CONTACT WITH FAMILY AND FRIENDS

Whilst being detained for three years prior to his trial, Mr R has suffered mental and physical health problems, his wife and four children have been unable to visit him and his communication with the outside world was severely curtailed by the strict French prison regime.

CASE STUDY 2

THE CASE OF MR X: BRITISH NATIONAL DETAINED IN GERMANY

Mr X was involved in a domestic dispute with his wife in a town in Germany in early 2008. At the end of the quarrel both parties were injured, he had a serious stab wound to his abdomen, and had to undergo two major operations. Both parties gave conflicting statements and blamed each other for the stabbing. Mr X was arrested in early 2008. After some initial delay he was eventually released on bail but only after the payment of a disproportionately large surety. He is still on bail and is yet to be officially charged.

CONCERNS ABOUT FAIRNESS OF PRE-TRIAL PROCEDURE:

INTERVIEW PROCEDURE

Mr X was interviewed by two policemen almost immediately after his surgery for stab wounds. The interview was ten minutes long and Mr X had not been told whether he was being interviewed as a witness or a suspect. At the time Mr X was still strongly under the influence of medication. Neither an interpreter nor a lawyer was present during the initial interview.

ABSENCE OF PROPER REVIEWS OF THE DECISION TO REMAND IN CUSTODY

In early May 2008 the prosecutor offered Mr X bail in exchange for a confession, which he refused. Bail was then denied by the court at the end of May 2008, yet the offer of bail in exchange of a confession remained open. In mid June 2008, Mr X was released on bail but only after putting up a surety of €80.000. Mr X is still on bail despite the fact that a decision on whether or not to charge him is yet to be made, almost a year after his initial arrest.

REFUSAL TO ALLOW CONTACT WITH FAMILY AND FRIENDS

As Mr X was denied bail, his hospitalisation occurred while he was remanded in custody. Despite his severe injuries and no confirmation of charges, hospital staff were prevented from providing updates on his medical condition to his family.

CASE STUDY 3

THE CASE OF MR Y AND MR Z: BRITISH NATIONALS DETAINED IN PORTUGAL

Mr X and Mr Y were exploring the option of opening a diving school in Gambia. In July 1999 their ship was thoroughly searched by the Brigada Fiscal officers in Faro and nothing was discovered. A few days later the Harbour Master in Faro asked the brothers to move their boat 250 metres down the wharf to make way for a larger boat. The next day one of the men dived below the boat and discovered boxes scattered over the sea bed. He began bringing the boxes up and around 15 minutes later officers from the Policia Judiciária arrived. Mr X and Mr Y assisted the police in bringing up the boxes and maintain they were completely unaware of the contents. Shortly thereafter Mr Y and Mr Z were arrested at gunpoint and were accused of importing hashish into the harbour. They were convicted in July 2002.

CONCERNS ABOUT FAIRNESS OF PRE-TRIAL PROCEDURE:

INTERVIEW PROCEDURE

Immediately after their arrests, Mr Y and Mr Z were interrogated in Portuguese with no interpreter present and without a legal representative or advisor present. They were pressurised into signing confessions in Portuguese.

LACK OF CLARIFICATION OF CHARGES AGAINST THE ACCUSED

Mr Y and Mr Z did not see the charges against them in writing for one year after their arrest.

LACK OF ACCESS TO INTERPRETATION AND TRANSLATION FACILITIES

The interrogation conducted by the Portuguese police immediately after the arrest was in Portuguese and the confessions Mr X and Mr Y were coerced into signing were also in Portuguese. The charges, received almost a year after the initial arrest, were in Portuguese and as their defence lawyer did not speak English, Mr Y and Mr X were relying on other prisoners to help them understand the document. Throughout the trial the court appointed lawyer only worked for the benefit of the court; the court proceedings were not translated for Mr Y and Mr X, only their responses to the judge were translated into Portuguese.

CASE STUDY 4

THE CASE OF MR G: BRITISH NATIONAL DETAINED IN SPAIN

Mr G was arrested in December 2006 in Spain on suspicion of drugs smuggling. He was held in custody until December 2008, when FTI was informed that he had been released on bail on the condition that he deposits €50,000 as surety in court. He is still awaiting trial.

CONCERNS ABOUT FAIRNESS OF PRE-TRIAL PROCEDURE:

LENGTH OF PRE-TRIAL DETENTION PERIOD

Having been arrested on 30th December 2006, Mr G's trial is yet to commence. He was held in custody for 2 years pending trial until December 2008, when he was finally released on bail after payment of a very large surety.

INTERVIEW PROCEDURE

Mr G claims he has never been interviewed by the police, even though he was being held in custody for two years after his arrest.

LACK OF ACCESS TO INFORMATION ON CHARGES

Mr G was being held under a 'secret summons' (Sumario Secreto), whereby the prosecution does not need to reveal any details of their investigation to the defence until up to 10 days before the closure of the investigation. The 'secret summons' has seriously hampered the preparation of Mr G's defence and in particular his lawyer's ability to make successful bail applications.

ABSENCE OF PROPER REVIEWS OF DECISION TO REMAND IN CUSTODY

Several bail applications made by Mr G's lawyer were refused. Due to the nature of the charge, under Spanish Law Mr G can be held in pre-trial detention for a total of two years, which may be extended by a further two years after a hearing. On 3 December 2008, at his two-year detention review, Mr G was finally granted bail.

LACK OF ADEQUATE REPRESENTATION AT PRE-TRIAL HEARINGS

Mr. G was allowed to appear before the court on 3 December 2008, at his two-year pre-trial review hearing. This was the first hearing, after his initial appearance in front of an investigating judge 30 days after arrest, where Mr G was actually present. At his first hearing, Mr G had legal representation, but his lawyer was not allowed to speak. At subsequent bail review hearings his lawyer was only allowed to make a written application and Mr G was not present until his two-year pre-trial detention review hearing in December 2008.

CASE STUDY 5

THE CASE OF MR M: BRITISH NATIONAL DETAINED IN MALTA

Mr M was arrested on mid June 2006 for cultivation, importation and trafficking of drugs. He has not denied growing cannabis plants for his own use but denies the more serious charges (importation and trafficking]. There was no lawyer or interpreter present at his first interview and Mr M was told he could not see a lawyer until his first appearance in court. Mr M's statement was compiled from the three interviews he gave before his first appearance; the interviews had not been tape recorded.

CONCERNS ABOUT FAIRNESS OF PRE-TRIAL PROCEDURE:

DELAY AND POSTPONEMENT OF HEARINGS

Almost 33 months after his arrest, Mr M's trial is yet to be heard. Hearings are consistently postponed or cancelled. The last hearing was scheduled for late February 2009. This was the first time in 18 weeks that the police turned up to a scheduled hearing.

DISPROPORTIONATELY STRINGENT BAIL CONDITIONS FOR NON-NATIONALS

Bail was first granted to Mr M in late June 2006. However onerous reporting and curfew conditions were imposed:

- i) He had to adhere to an 8pm curfew;
- ii) He had to report daily to a central police station half an hour away from where he lived when there was a police station two minutes away from him.

These conditions made it difficult for him to find a job, as Mr M is a chef and most restaurants wanted a chef to work after 8 pm. Without a job, Mr M was struggling to make his living. All his identification documents [Passport/ ID/Driving License] were (and continue to be) held by the police, making it impossible for him to prove his identity or manage a bank account.

His bail conditions were eventually amended in November 2007. However, in order for his bail conditions to be relaxed his father had to move to Malta and set up a residence there. FTI believes this is an example of the propensity of foreign courts to impose disproportionately stringent bail conditions on non-nationals, as non-nationals are almost always considered a *flight risk*, often without regard to the individual circumstances of a case.

VIOLATION OF THE DEFENDENT'S BELONGINGS

No receipt was issued when Mr M's belongings were confiscated at the time of his arrest and his belongings have not yet been returned.

CASE STUDY 6

THE CASE OF MR S: A SOMALI NATIONAL DETAINED IN MALTA

Mr S was arrested in Malta in March 2007 and charged with rape. On the night of the alleged offence Mr S was staying at the 'open centre' for immigrants at Marsa, and was staying there due to an appointment at the hospital to receive treatment the following day. The alleged rape took place very close to the 'open centre'. Mr S claims to have been asleep when the alleged incident took place and was arrested in his bed, in a room where the other accused immigrants happened to have beds. According to Mr S all the other accused individuals have denied Mr S was involved in the incident. Since the date of his arrest Mr S has been in custody. He has contracted a number of infections and states that they were not appropriately treated.

The duration of pre-trial detention in this case is excessive, especially considering two vital pieces of evidence:

- i) Due to a medical condition Mr S has been wearing a catheter since March 2005, which inhibits his ability to have intercourse;
- ii) The victim and main witness have failed to identify him twice: once before the arrest and again during the trial.

CONCERNS ABOUT FAIRNESS OF PRE-TRIAL PROCEDURE:

LENGTH OF PRE-TRIAL DETENTION

Since May 2007, for almost 2 years, Mr S has been in jail and alleges that no bail applications have been made for him.

TREATMENT AT POLICE STATION

Mr S was taken to the police station immediately after arrest where he was given the opportunity to call friends and relatives; he was not given the opportunity to call a lawyer.

LACK OF ACCESS TO INTERPRETATION AND TRANSLATION FACILITIES

English was used during the interview and for the purpose of making records. No interpreter was present during the interview to translate the proceedings into Mr S's native language.

LACK OF ADEQUATE LEGAL REPRESENTATION DURING PRE-TRIAL DETENTION

The court had appointed a legal aid lawyer to represent Mr S. However, the lawyer failed to visit Mr S in prison, attend his court hearings or answer his phone calls. As a result, Mr S instructed another lawyer who has only visited Mr S in prison once claiming that if he paid him €800 he would be released immediately. Mr S has not been told whether this money would be used to pay his lawyer's fees; as surety for bail; or to bribe the police. Mr S's lawyer has only attended one of his sixteen court hearings. Mr S also believes that there are many witnesses that can testify in his favour; however neither the court nor his lawyer has called them to testify.