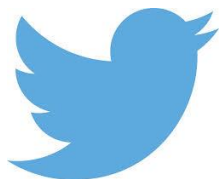


CEP Expert Meeting: Enhancing the Implementation of FDs 2008/JHA/947 & 2009/JHA/829

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The Practice of Pre-trial detention: Monitoring Judicial decision-making and alternatives

Funder: European Commission

Coordinator: Fair Trials

Research partners:

University of West England, England and Wales.

Centre for European Constitutional Law (CECL), Greece

Hungarian Helsinki Committee (HHC), Hungary

Irish Penal Reform Trust (IPRT), Ireland

Antigone, Italy

Human Rights Monitoring Institute (HRMI), Lithuania

University of Leiden, Netherlands

Polish Helsinki Committee (HFHR), Poland

Apador-CH, Helsinki Committee, Romania

Asociacion pro Derechos Humanos de Espana (APDHE), Spain

Research Methodology

- Desk-based research – 10 countries
- Defence practitioner survey – 544 lawyers participated
- Hearing monitoring – 242 hearings attended
- Case file review – 672 cases reviewed
- Interviews – with 56 judges
- Interviews – with 45 prosecutors

Country Reports October – December 2015

Regional Report – May 2016

LEAP Experts Meeting – July 2016

Findings: Pre-trial decision-making procedure

- Inadequate Access to a Lawyer
- Inadequate Quality of Lawyering
- Inadequate Translation and Interpretation
- Insufficient defence access to case materials essential for challenging pre-trial detention
- Limited time/resources for all parties – including prosecutors and judges
- Inequality of arms

Recommendations: Procedure

- Prompt initial hearing and de novo initial review
- Improve access to materials essential for challenging detention
- Enforcement of the right of access to a lawyer
- Ensuring that prosecution and defence arguments are treated equally

Findings: The substance of pre-trial detention decisions

- Presumption of Detention
 - Good example: England & Wales and Ireland
- Detention grounds in tension with ECtHR standards
 - Gravity of offence – flight risk (Hungary, Greece, Spain, Lithuania, Romania, Netherlands)
 - Non-national or insecurely housed– flight risk (Greece, Italy, Spain)
 - Interference with evidence – unsubstantiated and without due diligence in investigation (Hungary)
 - Risk of reoffending – determined by offence type or unrelated/old offences (Lithuania)
- Inadequate case-specific reasoning
- PTD imposed for unlawful purposes: public opinion, to punish the guilty, to extract confessions

Recommendations: The substance of pre-trial detention decisions

- Enforcement of reasonable suspicion and threshold of crime with de minimus standard for imposition of PTD
- Better regulation of lawful grounds for pre-trial detention
- Explicit consideration of all available alternatives to demonstrate that PTD is a measure of last resort
- Requirement to make reference to both prosecution and defence arguments and the specific facts of each case

Findings: Review process & special diligence

- Repetition of previous decision, not effective review
- Suspect not always present at hearing, not always an oral hearing
- Lack of special diligence, time limits and judicial control of the investigation
 - Good example: Netherlands, England and Wales
- Widespread lack of awareness and application of ECtHR-standards

Recommendations: Review process

- Same procedural guarantees as in initial hearing: oral, adversarial hearing at which defendant and counsel can attend, reference to both parties' arguments, reference to enduring strength of reasons for detention
- Regular Review and Hearing: Automatic, regular reviews (monthly?) plus ability to request ad hoc review on the basis of changed circumstances
- Judicial control over investigation through the use of interim time limits in relation to specific investigative acts
- Possibility of judicial review of detention by judge independent of the investigation
- Maximum time limits?

Findings: Use of alternatives to detention

- Lack of trust and experience in alternatives by judges leading to poorly reasoned decisions
 - Good practice: England & Wales
 - Good practice with problems: Ireland
- Inadequate legislation
- Practical obstacles to ordering pragmatic alternatives to detention
- Need for increased enforcement of conditions to build faith



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Recommendations: Alternatives

- Increased investment in development of alternatives: bail hostels, drug treatment programs, to a lesser extent bail and electronic monitoring
- Greater development and use of dedicated pre-trial services, borrowing from probation context, for pre-trial risk assessment, supervision and enforcement of conditions of release
- Judicial oversight of alternatives to ensure they do not overly infringe on liberty
- Sharing of best practices and low-cost, practical solutions like Irish mobile phone monitoring