FAIR TRIALS INTERNATIONAL

Communiqué issued after the Fair Trials International Legal Experts Advisory Panel Meeting (11 September 2009)

Discrimination against non-national and non-resident defendants in the EU

Criminal Justice 2008

With financial support from Criminal Justice Programme
European Commission – Directorate-General Justice, Freedom and Security

Introduction

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 work. The third meeting of LEAP took place at the TMC Asser Institute, The Hague, Netherlands on 11 September 2009. Sixteen LEAP Members representing nine European countries attended and the meeting was chaired by HH Dennis Levy QC.

2. FTI regularly receives requests for assistance in cases where real disadvantage is suffered as the result of a person being non-national or non-resident. The meeting focused on the problems faced in the various Member States represented, particularly in interpreting/translation facilities and bail.

3. Members agreed that the main areas where non-nationals face discrimination in criminal justice are: translation and interpretation; bail; failure to understand the legal system, making them unable to participate or exercise their rights; failure to obtain legal advice, especially in cross-border cases; and finally, direct discrimination by some criminal justice agencies in investigations and proceedings, as well as in policy formulation.

4. It was agreed that more should be done by practitioners whose clients suffer such discrimination, whether as non-nationals or as non-residents, to make use of legal developments and European Court of Justice rulings on the free movement of persons and other European treaties. For example, in relation to bail, where a citizen of an EEA country is seen as a flight risk, their passport can be taken and they can be required to attend a police station weekly: refusal to allow this in appropriate cases violates the Citizens' Directive, which gives all EEA citizens the unconditional right to remain in the State of their choice and move freely between States.

Injustice arising from the lack of interpreting and translation

5. It is clear that the right to legal interpreting and translation exists to ensure that no one facing criminal proceedings in the EU should suffer significant disadvantage by reason of their lack of competence in the language of the proceedings. Members agreed there is significant divergence between different Member States' provision of these facilities. Non-nationals commonly face difficulties at the police station getting legal assistance and a quality interpreter. Following a wide-ranging discussion with input from several jurisdictions and from members of the legal and interpreting professions, the following key points were identified:

   i. Assessing linguistic needs: Careful thought must be given to who carries out the assessment and how it should be appealed. Courts are often not competent to make the assessment, although training would help. Defence lawyers should also be trained on assessing linguistic competence and challenging decisions on it. Proper time must be set aside to assess linguistic needs and for any appeals.

   ii. Preservation of original recordings: All Member States should have rules requiring the preservation of recordings when police/prosecuting authorities have conducted interviews with the aid of an interpreter, or where court proceedings are interpreted.

   iii. Time limits: Procedural rules should take account of the time needed to translate documents and transcribe recorded interviews or other proceedings. The rules should allow time extensions where necessary.

iv. Training: Professionals must be qualified in both legal *interpreting* and *translation*: these are distinct skills and both are required in the criminal justice context. Training must cover assessment of linguistic competence. Efforts should be made to identify best practice in the field. (Recently the Netherlands have introduced provisions modelled on Austrian law dealing with recruitment, registration and training.)

v. Technology: Careful consideration should be given to the use of technology such as video-linking where, for example, personal attendance is impossible or there is an emergency situation. The legal and interpreting professions should be consulted on appropriate conditions and facilities. Regarding rarer languages and dialects, telephone and internet access could be a solution until sufficient interpreters have been trained and registered. Audio-taping should be used whenever interpreters are involved and video-recording should be considered.

vi. Information to suspects: The reasons for detention or arrest should be explained well enough to enable the non-national suspect to understand *in detail* the nature and cause of the accusation. This should be in writing, translated if necessary.

6. Role of interpreters – independence, standards, pay, and security

i. The code of ethics for legal interpreters should make it clear the interpreter is independent and does not represent the defendant or the prosecution, but is there to serve the interests of justice by faithfully rendering words spoken from the source into the target language.

ii. Interpreters are often under-paid (for example, in Greece, €15 per case in police investigations). Some interpreters claim to speak several languages yet do not reach the necessary standards in any.

iii. In Germany, interpreters in police stations are engaged and paid by the police and can become biased towards the prosecution, due to dependency on work from this single source.

iv. The problem of interpreters' and translators' independence is serious in Central and Eastern European countries because of the greater role of State agencies, particularly during the pre-trial investigation phase.

v. Great caution should be used around subcontracting interpreting/translation services to agencies, as costs are likely to increase and independence could be compromised.

vi. Interpreters' identities should be kept confidential and not shown on documents provided to defendants, for security reasons, unless strictly necessary.

Discussion of Framework Decision Proposal

7. General reception: A Framework Decision on interpreting and translation would be a positive development, providing defence lawyers with a valuable tool to get the facilities their clients need. It would raise awareness of the need for good facilities and high professional standards. Raising standards will result in costs savings and fewer delays, appeals and quashed convictions.

8. Scope of interpreting and translation facilities

i. The Explanatory Memorandum should state that interpretation is needed: *at the police station*; at all *meetings between the lawyer and the client*; *in court proceedings;* and in *detention*, to ensure prisoners can also exercise rights effectively.

ii. The text should cover the interpreting of interviews with witnesses, not merely suspects; and the provision of interpreters and readers for blind and/or illiterate suspects and defendants.

iii. It should provide that clients will have their legal advice translated *as of right* rather than having to apply for this, as the proposal currently envisages; and that documents the legal adviser cannot understand should be translated so s/he can advise on their content.

9. Quality, pay, training, ethics

i. The Reflection Forum on Multilingualism and Interpreter Training made detailed recommendations to the Commission in its report: these should be followed in the Proposal and Resolution on best practice.

ii. Registration should impose an obligation on interpreters to abide by the Code of Conduct. The Code should form part of the compulsory syllabus for interpreters.

iii. Registration should only last a fixed period, with extension dependent on attested CPD or other quality assurance or monitoring systems. An online directory of qualified and registered legal interpreters would be useful.

iv. Adequate remuneration is crucial. Becoming qualified, obtaining and maintaining registration will be expensive for legal interpreters/translators.

10. Adequate time and facilities: The Explanatory Memorandum and Framework Decision should refer to the need for *adequate time and facilities* for interpreting and translation, reflecting the need for the defendant to understand *in detail,* in a language he understands, the nature and cause of the accusation (Article 6).

11. In summary, Members welcomed the proposal for a Framework Decision on translation and interpretation, though its detailed provisions will need further work to ensure it is capable of preventing significant disadvantage due to lack of linguistic competence. It will be an important tool for achieving better facilities for defendants. Practical issues need addressing, such as satisfactory time allowance and the need to record interviews and testimony to allow for mistakes in interpretation to be identified and the record corrected.

Disadvantages faced by non-nationals in applications for bail

12. Bail is rarely granted to non-nationals. When non-custodial supervision orders *are* made they are usually more coercive than those against nationals/residents. Most Member States use two criteria in deciding bail applications: the likelihood of further criminal behaviour; and the risk of absconding. When bail is denied, both effective defence and future rehabilitation are harder to achieve. The practice in a number of States was discussed:

i. Greece: Judges dealing with bail applications can either order conditional release or pre-trial custody for up to 18 months. Non-nationals are generally deemed ineligible for conditional release. Greek courts consider *all* non-residents potential fugitives from justice, particularly when they have resisted extradition.

ii. Germany: Courts have ruled that given the EAW's ability to bring fugitives back easily, the lack of an address in Germany is no longer a ground to refuse bail. Bail money is seen by German courts as the best way to address flight risk.

iii. France: Decisions on bail use the same criteria as those on pre-trial custody, ie: is there a risk that evidence or witnesses will be interfered with, or will public opinion be shocked by releasing the person or granting bail pending trial? A new scheme is being piloted with the UK, with Prisoners Abroad acting as "civil protection officers", undertaking to the French judge to monitor the defendant's conduct and contact the court about any non-compliance. If effective, it could be introduced in other States.

iv. Netherlands: Technically, the system resembles Germany's. However, since Dutch courts will only order a defendant's extradition on condition that the requesting State: (1) guarantees they will be returned to Holland after trial; and (2) agrees it will permit the sentence to be converted, in practice Dutch nationals rarely get bail overseas, because other States know Dutch courts frequently convert lengthy sentences to much shorter ones. This has made it harder for Dutch people to get bail. Italy is required under its constitution to refuse to return Dutch nationals on bail because it cannot accept these two conditions.

v. Romania: As in some other Central and Eastern European Member States, there is no general concept of bail in Romania. Suspects are either held until trial or granted liberty. If there is a risk of absconding or witness interference, custody is imposed, ranging from 29 to 180 days.

vi. Italy: Bail is not granted if there is a risk of reoffending, evidence manipulation or absconding. Non-nationals are seen as a flight risk, despite the EAW and Schengen systems effectively guaranteeing their return.

vii. UK: In minor cases, defendants are often given the choice between pleading guilty and paying a fine, or being refused bail and held in custody for a week.

European Supervision Order ("ESO")

13. The Framework Decision on the ESO is expected to be adopted at the 23 October 2009 Justice and Home Affairs Council meeting. Members consider it to be a positive development which could provide a helpful tool for defendants to seek release in appropriate circumstances. The following general points were made:

i. As the system is discretionary it is hard to predict how national courts will apply it, how it will interact with the EAW, or with the "Roadmap" measure on pre-trial detention.

ii. Clearly the system could work well for low level offences, given the obvious appeal for judges to be able to send defendants back if they are sure the proceedings would not be compromised by subsequent absconding or the other State's failure to re-surrender the person. But where there was a risk of reoffending in serious offences, there is little chance judges would risk using the ESO. There may also be practical and resourcing difficulties in meeting conditions, for example, insufficient bail hostels.

iii. For the ESO to function properly, courts will need to know about other countries' arrangements for monitoring bail conditions. Making effective use of the ESO system will also cause extra work for defence lawyers, for example collecting evidence that bail conditions can be complied with or probation services have capacity.

14. In terms of specific provisions:

i. Contradictory terms are used regarding decision-making: "issuing authority" (in the ESO) and "judicial authority" (in the Explanatory Memorandum, section 3). Members agreed that only judicial authorities should take decisions on bail and custody. If prosecutors decide such matters, there is a risk of conflict of interest.

ii. The prospect of “medical treatment” being imposed as a condition also raises concern.

15. In summary, Members agreed non-nationals have less chance of getting bail and less understanding of legal proceedings and their rights by virtue of being non-nationals. Members broadly welcomed the ESO Framework Decision proposal, while questioning the extent to which it would be used and highlighting concerns over non-judicial authorities taking decisions on bail or imposing constraints on liberty. Over time, as defence lawyers seek to maximize its potential for clients, test cases in the ECJ might emerge, for example regarding freedom of movement.