Documentation

IMPROVING CONDITIONS RELATED TO DETENTION

THE ROLE OF THE ECHR, THE STRASBOURG COURT AND NATIONAL COURTS

316DT67 Strasbourg, 25-26 February 2016

Co-funded by the Criminal Justice Programme of the European Union 2014-2020

Table of Contents

Event Number 316DT67

With the support of the Justice Programme 2014-2020 of the European Union

This publication has been produced with the financial support of the Justice Programme 2014-2020 of the European Union. The content of this publication reflects only the author's view and the Commission is not responsible for any use that may be made of the information it contains.

Speakers' Contributions

- Moritz Birk	
	• An overview of detention-related issues in Europe and the level of protection granted by the ECHR
- Vincent De Gaetano	
	The role of the European convention on Human Rights, the Strasbourg Court and national courts
- Jemima Hartshorn	
	• The case for reform and action at European level: the use of pre-trial detention and its impact on individuals within the context of the ECHR
- Karolis Liutkevičius	
	• The use of pre-trial detention and the need for reform from the perspective of an EU Member State: Lithuania
- András Kádár	
	• The role of the courts and case studies in Hungary
- Bas Leeuw	
	• The role of national courts in dealing with detention issues and improving conditions: The Netherlands
- Michaël Meysman	
	• Council Framework Decisions 2009/829/JHA, 2008/909/JHA and 2008/947/JHA and their implementation: state of play and overcoming legal and practical problems
- David Dickson	
	• European Arrest Warrant
- Ioan Durnescu	
	• The European Supervision Order (Framework Decision 829): reducing the need for pre-trial detention

Co-funded by the Justice Programme of the European Union 2014-2020

An overview of detention-related issues in Europe and the level of protection granted by the ECHR

25-26 February, Strasbourg, France

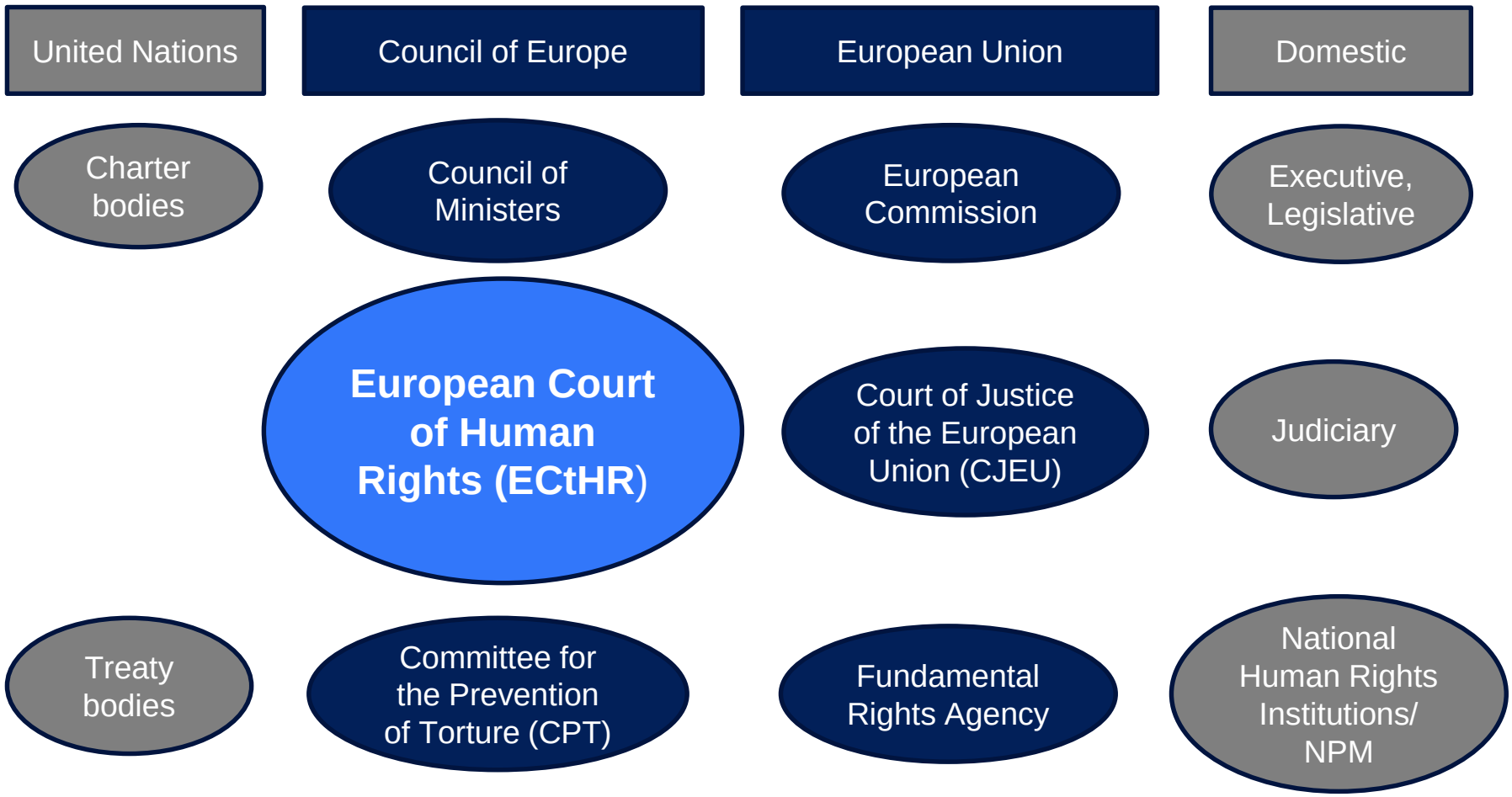
Moritz Birk, Ludwig Boltzmann Institute of Human Rights

Ludwig Boltzmann Institute Human Rights

universität wien

Ludwig Boltzmann Institute of Human Rights Research Association

Protection granted by human rights mechanisms



Ludwig Boltzmann Institute
Human Rights

Protection granted by human rights mechanisms

ECHR developments

- **Extending the prohibition against torture and ill-treatment**
- **Strengthening safeguards and arrest rights**
- **Broadening the protection of prisoners**: recognizing full human rights, prohibiting automatic disenfranchisement; setting new standards for life sentences, etc.
- **Increasing judicial activism**: general measures, pilot judgment procedure

Other relevant developments

- Establishment of the CPT (1989)
- Expansion of the CoE (1990)
- Revision of the European Prison Rules (2006)
- Increase of national detention monitoring - OPCAT (2006)
- Increasing EU cooperation on arrest and detention (2001), strengthening procedural rights (2009)
- Strengthening rights of prisoners by the UN: e.g. legal aid (2013), treatment of prisoners (2015)

Rights of persons in detention

arrest/custody **detention** **extradition/transfer**

- Arbitrary detention
- Torture and ill-treatment: arrest, interrogation, searches, in detention
- Poor physical detention conditions and “impoverished regime”
- Return to a risk for personal integrity

- ➢ Right to liberty (art. 3 ECHR)
- ➢ Arrest rights: right to information, right to legal assistance, right to interpretation etc. (art. 5, 6)
- ➢ Presumption of innocence and fair trial rights (art. 6)
- ➢ Prohibition of torture and ill-treatment, (art. 3)
- ➢ Right to privacy, family, marriage, religion, expression etc.
- ➢ Prohibition of refoulement (art. 3)

Arrest and custody

Right to liberty, art. 5: "highest importance in a democratic society"; substantive and procedural rules to protect against arbitrary detention

Prohibition of arbitrary detention, art. 5 (1)

- **Lawfulness:** conformity with substantive and procedural domestic laws; certainty
- **Permissible grounds** (para. 1) to be interpreted restrictively
- **Proportionality**: necessity and no less severe means available *(Něšťák v. Slovakia, 2007; Witold Litwa v. Poland, 2000)*

➢ EU: Framework Decisions 2008/947/JHA on probation and alternative sanctions , 2009/829/JHA European Supervision Order → application?

Arrest and custody

Right to Information, art. 5 (2):

- information in a language that the suspect understands
  - about any charges against him/her and the reasons for the arrest
  - promptness *(Fox, Campbell and Hartley v. the UK, 1990*)

Right to an interpreter, art. 6 (3) (e)

- From an investigation stage "unless […] there are compelling reasons to restrict this right" *(Baytar v. Turkey, 2014)*

  - EU: Directive 2012/13/EU on the Right to Information
  - EU: Directive 2010/64/EU on the Right on Interpretation and Translation

Arrest and custody

Access to judicial authority, art. 5(3)

as guarantee against any arbitrary or unjustified deprivation of liberty – two limbs:

- **prompt appearance before judicial authorities (arrest period)**
  - Prompt appearance
  - independence, impartiality authority with power to release
  - Automatic nature of the review *(Nikolova v. Bulgaria, 1999)*

- **trial within reasonable time or release (pre-trial/remand)**
  - Restrictive application of pre-trial and remand: presumption in favour of release *(Bykov v.Russia, 2009)*

Arrest and custody

Habeas Corpus, art. 5(4):

- Right to seek judicial review of detention → Substantial and procedural conditions
- Autonomous right: independent from the lawfulness of the detention *(Douiyeb v. the Netherlands, GC, 1999, § 57)*
- Periodic review *(Bezicheri v Italy, 1989)*

Arrest and Custody

Right to legal assistance, art. 6 (3) (c)

- from the first interrogation of a suspect by the police *(Salduz v. Turkey, 2008)*
- presence and choice of lawyer influential on incrimination *(Dvorski v. Croatia, 2015)*
- direct link between art.3 violation art.6 *(Turbylev v. Russia, 2015)*

  - EU: Directive 2013/48/EU on the Right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (see ECHR, A.T v. Luxembourg, 2015); Proposal for a Directive on provisional legal aid
  - UN Guidelines on Access to Legal Aid (2012)

Treatment and conditions in detention

Basic principles

"Prisoners in general continue to **enjoy all the fundamental rights and freedoms** guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention (…) " *(Hirst v. UK [2], 2005)*

- Prohibition of torture and ill-treatment (art. 3)
- Right to privacy and family life (art. 8)
- Freedom of expression (art. 10)
- Freedom of religion (art. 9)
- Right of effective access to a lawyer or to a court (art. 6)

Ill-treatment

- **By officials**: any force not strictly necessary constitutes a violation of art. 3; irrespective of the conduct of the concerned person;
  - ‘slap in the face’, pepper spray and means of restraint may be sufficient (*Bouyid v. Belgium, 2015; Tali v. Estonia, 2014*);
  - unnecessary handcuffing may constitute degrading treatment *(Erdogan Yagiz v. Turkey, 2007)*
  - Deadly use of force to prevent escape *(Nachova a.o. v Bulgaria, 2005)*
- **By cellmates**: positive obligation to adequately secure the physical and psychological integrity and well-being of the applicant *(Premininy v. Russia, 2011)*; authorities have to take all measures that can be reasonable expected

Physical conditions

- **Overcrowding and unhygienic conditions can constitute ill-treatment**, even in absence of an intention on the part of the state authorities *(Dougoz v Greece, Peers v. Greece, 2001; Kalashnikov v Russia, 2002)*
  - Must attain a **minimum level of severity**, which is relative and depends on all circumstances of the case
  - "account has to be taken of the **cumulative effects** of these conditions, as well as of specific allegations made by the applicant" *(Dougoz v. Greece)*
  - Lack of resources irrelevant *(Poltoratskiy v Ukarine, 2003)*

Physical conditions – specific aspects

- **Overcrowding**: less than 3m² p.p. can constitute a violation of art. 3 in itself *(Ananyev v Russia, 2012*); but adequate space depends on many relevant factors such as duration, possibility to exercise, condition of detainee *(Valasinas v Lithuania, 2001; Mursic v. Croatia, 2015);*
- **Segregation** of pre-trial and convicted, male and female adult and juvenile detainees *(Güvec v. Turkey, 2009)*
- **Special accommodation needs**: e.g. juveniles, persons with disabilities *(Price v. UK, 2001; Aerts v Belgium, 1998)*

➢ Specific UN standards: e.g. 'Bangkok Rules', 'Beijing Rules', etc.

Physical conditions – specific aspects

- **Absence of natural light or fresh air** as contributory factors to a violation of art. 3 *(Novoselov v Russia, 2005; Peers v Greece, 2001)*
- **Hygiene**: only weekly access to showers and washing of clothes deemed insufficient *(Melnik v. Ukraine, 2006)*
- **Privacy:** violation of art. 8 where level of severity for an art. 3 violation not reached *(Raninen v. Finland, 1997)*
- **Food:** instrumental and wider cultural function; deprivation of food as punishment as well as the failure to provide a special diet on medical grounds can violate art. 3 (*Ilascu a.o. v Moldova and Russi, 2004)*; failure to respect religious convictions may violate art. 9 *(Jakobski v. Poland, 2010)*

Physical conditions – specific aspects

- **Health care**
  - Positive duty to secure the health and adequate well-being of a detainee by providing the "requisite medical assistance" *(Kudla v. Poland, 2000)* Duty to carry out a medical examination when indicated *(Nevmerzhitsky v. Ukraine, 2005),* ensure regular and systematic supervision of the state of health *(Iacov Stanciu v. Romania, 2012*)
  - Specific duty of care towards mentally ill patients *(Kucheruk v. Ukraine, 2007; Keenan v.UK, 2001; Aerts v. Belgium, 1998)*
  - Force feeding *(Nevmerzhitsky v. Ukraine)* and failure to treat drug withdrawal symptoms may constitute ill-treatment *(McGlinchey v. UK, 2003)*

Prison regime

- **"Impoverished regime" may lead to art. 3 violation** *(Assenov a.o. v Bulgaria, 1998; Alver v Estonia, 2005*) – factors:
  - Exercise and recreation
  - Prison labour
  - Education
- **Rehabilitation**: "the Court would also underline the evolution in European penal policy towards the increasing relative importance of the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence" *(Dickson v. UK, 2007)*
- **Religion**: access to religious services and diet to be respected *(Poltoratskiy v. Ukraine, 2003; Jakóbski v. Poland, 2011)* but no right to 'special status '

Prison regime

- **Maintaining security and good order:**
  - **Strip searches**: must be strictly necessary and justified for security reasons and carried out in an appropriate manner *(Iwanczuk v Poland, 2001; Frérot v France, 2007)*
  - **Restraint:** must be necessary *(Mouisel v France, 2002)*
  - **Solitary confinement:** must be strictly necessary and cannot be imposed indefinitely *(Ramirez Sanchez v France, 2006; X v. Turkey, 2012; Öcalan v. Turkey, No.2, 2014)*
  - **'High security regimes'** *(Lorsé v Netherlands, 2003; Piechovicz v. Poland, 2012)*

Contact with the outside world

- **Right to correspondence**: with lawyer, international bodies, family, journalist and even strangers protected by arts. 6, 8 *(Silver v UK, 1983)* – positive duty to facilitate correspondence
- **Freedom of expression and right to information** *(Yankov v Bulgaria, 2003)*
- **Right to vote**: art. 3, Prot. 1 - no automatic disenfranchisement *(Hirst v. UK, no. 2, 2005; Scoppola v. Italy, no. 3, 2012)*
- **Right to family life**: art. 8 - positive duty to assist in maintaining effective contacts *(Messina v Italy, No. 2, 2000; Płoski v Poland 12 November 2002)*
- **Right to marry:** art. 12 – no automatic restriction *(Jaremowicz v. Poland, 2010)*

Right to an effective remedy

- **Information on internal rules and rights as an important requisite** *(Ciorap v Moldova, 2007)*
- **Duty to carry out an effective investigation** - arts. 2, 3, 13 *(Ribitsch v Austria, 1995; Assenov v Bulgaria, 1998; Labita v Italy, 2000; Edwards v UK, 2002)*:
  - Independence
  - Competence
  - Adequacy and thoroughness
  - Promptness
  - Public scrutiny and victim involvement

Release

- **No right to release** on licence or court review of parole decisions *(Zivulinskas v Lithuania, 2006)*
  - Early release of seriously ill prisoners *(Mouisel v France, 2002)*
  - Temporary release *(Mastromatteo v Italy, 2002)*
  - Conditional release *(Léger v France, 2006)*

- **Life sentences** without prospect of early release violates art. 3 *(Vinter a.o. v UK, 2013)*

- **Detention of mentally ill offenders** only legitimate in a suitable (health) institution and in provision of adequate safeguards *(Aerts v. Belgium, 1998; Bergmann v Germany, 2016)*

Extradition and transfer

Principle of non-refoulement

- Violation of art. 3 “where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country” *(Soering v UK, 1989)*
- Duty to carry out a thorough and individualised examination *(M.S.S. v. Belgium and Greece, 2011; Tarakhel v Switzerland, 2014)*
- Longer de facto term of imprisonment could violate art. 5 *(Szabo v Sweden, 2006)*

➢ EU: European Arrest Warrant 2002/584/JHA; FD on the transfer of prisoners (2008/909/JHA): ´Mutual trust vs fundamental rights? *(CJEU, Radu, C-396/11, 2013; Melloni, C-399/11, 2013)*

Thank you !!

Contact:

Moritz Birk
moritz.birk@univie.ac.at

bim.lbg.ac.at

Improving Conditions related to Detention

The Role of the European Convention on Human Rights, the Strasbourg Court and national courts.

Vincent A. De Gaetano

Seminar organised by ERA (European Academy of Law) in co-operation with the Council of Europe and the European Organisation of Prison and Correctional Services

Co-funded by the Justice Programme of the European Union 2014-2020

Strasbourg 25-26 February 2016

"A convicted prisoner's deprivation of liberty does not mean that he loses protection of the other fundamental rights in the Convention. The enjoyment of those must, however, inevitably be tempered by the exigencies of his situation and the requirement of security will weigh in any balancing exercise of justification. Where ill-treatment is concerned, Contracting States are under an obligation not only to refrain from inflicting treatment contrary to Art. 3 but to take the steps necessary to protect the safety and health of prisoners under their responsibility.

"A large proportion of the cases before the Commission and the Court have been introduced by prisoners, who are perhaps in a particularly vulnerable position, almost, if not all, aspects of their lives being subject to regulation by authority. The potential for interference and restriction in fundamental rights and freedoms is considerable and reflected by the wide number of issues raised in prisoners cases."

Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights*
4th ed. p. 630

- 1. Length of the sentence of imprisonment
  2. Mode of execution of the sentence of imprisonment
  3. Conditions of detention
     i. generally
     ii. given the particular "condition" of the prisoner

  Preliminary remarks:
- The ECtHR is not a policy making body. When it lays down guidelines in a judgment following an individual application, it is always within the context of the resolution of a dispute between an individual and a State signatory to the Convention.
- The purpose of the ECHR is not to impose uniformity of law, practice, conditions of detention – but merely to ensure that these are in conformity with certain minimum requirements as spelled out in the Convention and as interpreted by the ECtHR: > subsidiary role of the ECtHR – Articles 1 and 19 of the ECHR.
- Role of "Pilot Judgments" – Rule 61 "…structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications". Rule 61(3): "The Court shall in its pilot judgment identify both the nature and the structural or systemic problem or other dysfunction…as well as the remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment."
- Contrast with Article 46 procedure and "soft" recommendations.
- Problems of evidence: see *Ananyev and Others v. Russia* 10 January 2012

  1. Shifting of burden of proof
  2. Drawing of inferences

- ***Burden of proof*** *-- Ananyev*

- "122. The Court is mindful of the objective difficulties experienced by the applicants in collecting evidence to substantiate their claims about the conditions of their detention. Owing to the restrictions imposed by the prison regime, detainees cannot realistically be expected to be able to furnish photographs of their cell or give precise measurements of its dimensions, temperature or luminosity. Nevertheless, an applicant must provide an elaborate and consistent account of the conditions of his or her detention mentioning the specific elements, such as for instance the dates of his or her transfer between facilities, which would enable the Court to determine that the complaint is not manifestly ill-founded or inadmissible on any other grounds. Only a credible and reasonably detailed description of the allegedly degrading conditions of detention constitutes a prima facie case of ill-treatment and serves as a basis for giving notice of the complaint to the respondent Government."

- “123. The Court has held on many occasions that cases concerning allegations of inadequate conditions of detention do not lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation) because in such instances the respondent Government alone have access to information capable of corroborating or refuting these allegations. It follows that, after the Court has given notice of the applicant’s complaint to the Government, the burden is on the latter to collect and produce relevant documents. A failure on their part to submit convincing evidence on material conditions of detention may give rise to the drawing of inferences as to the well-foundedness of the applicant’s allegations…”

- “125. The Court emphasised that in every case the Government had to account properly for the failure to submit the original records, in particular those concerning the number of inmates detained together with the applicant. The Government frequently advanced the explanation that the complaint had been communicated to them after a considerable lapse of time and that by then the original prison documentation had been destroyed upon the expiry of the time-limit for its safe-keeping. In this connection the Court noted that the destruction of the relevant documents did not absolve the Government from the obligation to support their factual submissions with appropriate evidence. Moreover, it often found that the Russian authorities did not appear to have acted with due care and diligence in handling the prison records because some of them had actually been destroyed after the Government had been put on notice that the Court was dealing with the case …. In other cases the Government did submit extracts from the original prison records but they were too disparate and spaced out in time to present a credible refutation of the applicant’s claim of severe overcrowding at the material time …”

Pilot judgment procedure

- 1. Identify clearly the systemic problem 2. Make concrete recommendations for legislative or administrative changes 3. (sometimes) Set a time limit for something to be done.

Ananyev:

Operative part:

- … …
- 7. *Holds* that the respondent State must produce, in co-operation with the Committee of Ministers, within six months from the date on which this judgment becomes final, a binding time frame in which to make available a combination of effective remedies having preventive and compensatory effects and complying with the requirements set out in the present judgment;
- ……

- Length of prison sentence:

  Generally speaking the Convention is not directly concerned with the length of a sentence of imprisonment. That is a matter that is left to be dealt with by domestic law and by the domestic courts. The ECtHR will not substitute its own views on the appropriateness of a sentence for those of the national authorities.

In two judgements dating to the nineties – *T. v. the United Kingdom* and *V. v. the United Kingdom* (both 16 December 1999) – the Court held that there was nothing "unlawful", procedurally or substantially, in terms of Art. 5(1), in the conviction for an indeterminate period of detention of two 11 year old boys who had murdered a two year old toddler. Although it was argued on behalf of the applicants that to impose the same life sentence on all child murderers, regardless of the age or the circumstances of the accused, was arbitrary and therefore unlawful, the ECtHR held that since the applicants' sentence complied with English law and followed conviction by a competent court, no issue under Article 5 arose. The Court did indicate however that very long periods of detention in respect of juveniles might be inconsistent with Article 3. There may also be issues of arbitrariness in breach of Art. 5(1) where sentencing provisions in domestic law do not allow the court to take into account the individual circumstances of the offender or of the offence – this was hinted at in *Partington v. the United Kingdom* 26 June 2003.

The "rreducible life sentence"

- Prior to 2008, the Court's case-law was unclear: some judgments and decisions held that a sentence of life imprisonment imposed on an adult could not be considered as in violation of Art. 3; others held that the imposition of an irreducible life sentence on an adult *may* raise an Art. 3 issue.

- In *Kafkaris v. Cyprus* [GC] 12 February 2008 the applicant was sentenced to three mandatory life sentences on three counts of murder. His principal complaint in terms of Art. 3 was that the whole or a significant part of his detention for life was a period of punitive detention that "exceeded the reasonable and acceptable standards for the length of a period of punitive detention as required by the Convention" (§ 78). The ECtHR held (by ten votes to 7) that because under Cyprus law there was the possibility of release through the use of the Presidential Pardon, then it could not be said that the life sentence was irreducible and therefore there was no violation of Art. 3. It had been established that this power of the President had in fact been used on a number of occasions and, although it required the concurrence of the Attorney General, it was not a mere "theoretical" possibility of release for lifers.
- N.B. The ECtHR did find a violation of Art. 7 because of the "poor quality" of the law – the Prison Regulations (subsidiary legislation), which had not been updated, still indicated that a life sentence meant in effect only twenty years.

- "103. Admittedly, it follows from the above provisions that the prospect of release for prisoners serving life sentences in Cyprus is limited, any adjustment of a life sentence being only within the President's discretion subject to the agreement of the Attorney-General. Furthermore, as acknowledged by the Government, there are certain shortcomings in the current procedure (see paragraph 91 above). Notwithstanding, the Court does not find that life sentences in Cyprus are irreducible with no possibility of release; **on the contrary, it is clear that in Cyprus such sentences are both *de jure* and *de facto* reducible. In this connection, the Court notes that from the parties' submissions it transpires that life prisoners have been released under Article 53 (4) of the Constitution.** In particular, nine life prisoners were released in 1993 and another two in 1997 and 2005 respectively ... All of these prisoners, apart from one, had been serving mandatory life sentences. In addition, a life prisoner can benefit from the relevant provisions at any time without having to serve a minimum period of imprisonment. Consequently, it cannot be inferred that the applicant has no possibility of release and he has not adduced evidence to warrant such an inference."

- In a later case – *Iorgov v. Bulgaria* 2 September 2010 – where, after the abolition of the death penalty, the law provided that a lifer could not be considered for a pardon before he had served at least 20 years, the ECtHR was not prepared to draw any conclusion as to whether this was in effect an irreducible life sentence even though no one had up to that time ever been released under the new system.

Vinter and Others v. the United Kingdom (9 July 2013)

Vinter, Bamber and Moore were all serving a life sentence ("whole life orders") which meant that they could not be released other than at the discretion of the Justice Secretary. The latter had made it clear, through policy decisions and subsidiary legislation, that he would only exercise his discretion on compassionate grounds (e.g. in case of terminal illness or serious incapacitation). The possibility of the exercise of this discretion in other circumstances was *de facto* excluded. The GC held:

- For a life sentence to remain compatible with Art. 3, there had to be both a possibility of release and a possibility of review.
- It was for the national authorities when such a review should take place, with no later than 25 after the imposition of the sentence being indicated.
- There was a lack of clarity in the law – although the Justice Secretary could exercise his discretion to release a prisoner in a manner compatible with the Convention, subsidiary legislation provided that release will only be ordered if a prisoner was terminally ill or physically incapacitated (therefore the possibility of a genuine reform of the prisoner and his ceasing to be a danger to society, could not even begin to be considered).
- This lack of clarity, coupled with the absence of a dedicated review mechanism for whole life orders, rendered the applicants' life sentences incompatible with Art. 3.
- The ECtHR however made it clear that its finding should not be understood as giving the applicants the prospect of imminent release, or indeed of release at any time. Release would depend, among other things, on whether at the time of review there were still legitimate penological grounds for the continued detention, and whether the applicants continued to present a risk to the general public. Such considerations and assessments were for the national authorities.

From *Vinter*:

- "119. For the foregoing reasons, the Court considers that, in the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.

- "120. However, the Court would emphasise that, having regard to the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing (...), it is not its task to prescribe the form (executive or judicial) which that review should take. For the same reason, it is not for the Court to determine when that review should take place. This being said, the Court would also observe that the comparative and international law materials before it show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter (...).

- "121. It follows from this conclusion that, where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention."

Other issues considered under Art. 3

In *Strelets v. Russia* 6 November 2012, the issue was the conditions under which the prisoner was transported from prison to court and back for the several hearings in the case. It resulted that on the occasion of 42 transfers from June 2004 to June 2005 (some of these transfers were on consecutive days) the applicant, on every occasion was woken up at 6 a.m. in the morning before breakfast was available in prison, and returned to his cell as late as 10 p.m. well after the prison kitchen had closed. During these transfers he was given no food (the Government failed to prove that he had been provided with a packed lunch). The ECtHR, after noting (**1**) that in the context of lawful deprivation of liberty, to fall under Art. 3 the suffering and humiliation involved must in any case go beyond the inevitable suffering and humiliation connected with detention, (**2**) that in the **manner and method of execution of detention** the State is obliged to respect human dignity by not subjecting the prisoner to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, (**3**) that account must be taken of the prisoner's health and well-being, and (**4**) that when assessing conditions of detention account must be taken of the **cumulative effect** of these condition, the Court held that there was a violation of Art. 3.

"62. Having regard to the foregoing, the Court considers that in the circumstances of this case the **cumulative effect** of malnutrition and inadequate sleep on the days of court hearings must have been of an intensity such as to induce in the applicant physical suffering and mental fatigue. This must have been further aggravated by the fact that the above treatment occurred during the applicant's trial, that is, when he most needed his powers of concentration and mental alertness. The Court therefore concludes that the applicant was subjected to inhuman and degrading treatment contrary to Article 3 of the Convention.

"63. Accordingly, there has been a violation of that provision."

"Cumulative effect"

In the context of conditions of detention, the cumulative effect of a number of situations or conditions may lead to a violation of Art. 3 when individually or singly those situations or conditions may not reach the Art. 3 threshold for inhuman or degrading treatment.

In *Jevšnik v. Slovenia* 9 January 2014, the ECtHR made a distinction between the period that the applicant was held in the "closed section" of the prison and the period when he was held in the "open section" of the same prison. Although in both sections the cells were well below the recommended size, since in the open section these were used only to sleep at night, while during the day the prisoners were allowed to move freely in the corridor, in the living quarters of co-prisoners and in the indoor or outdoor exercise areas, the freedom of movement enjoyed within the prison confines was held to offset or compensate for the restricted space in the sleeping facilities. The Court found only a violation of Art. 3 only in respect of the period that the applicant had been held in the "closed section" of the prison.

Article 9 of the ECHR and Prison

In the context of prison food, the ECtHR in *Jakóbski v. Poland* 7 December 2010 held that the unjustified failure to provide a prisoner with meat-free meals so as to comply with his religious convictions – the applicant was a Buddhist – amounted to a violation of Art. 9 of the Convention. The Court took into consideration that all that the prisoner was asking was that he be given a vegetarian meal, and that this did not require any special cooking process or procedure

Handcuffing and type of dock

Handcuffing of a prisoner is not *per se* a violation of any provision of the Convention. The early case-law of the ECtHR was to the effect that if the measure was justified by security concerns, was limited in duration and the exposure to the public was limited, then no problems should arise. It is generally when handcuffing is coupled with other circumstances or is used in other circumstances without relevant and sufficient reasons being given, that problems under Article 3 (and possibly even under Article 8) may arise.

Erdogan Yagiz v. Turkey 6 March 2007: when the applicant, a medical doctor, was arrested he was manacled in front of his family, neighbours and colleagues. The ECtHR found that the intention was deliberately to humiliate and break his spirit which, together with the mental problems flowing from the incident, amounted to degrading treatment in violation of Art. 3.

This and several other subsequent cases are authority for the proposition that when an arrest, even if justified under Art. 5, is effected in a manner which clearly indicates that the authorities wanted to make a public spectacle out of the arrest (for whatever purpose), issues of Article 3, and possibly also of Article 8, are likely to arise.

Gorodnichev v. Russia 24 May 2007: when the respondent State could not justify the handcuffing of the prisoner in the courtroom by security or administration of justice considerations, the ECtHR found a violation of Art 3 (possible issues of presumption of innocence under Art. 6, especially if a person is being tried not by professional judges but by a jury).

Ashot Harutyunyan v. Armenia 15 June 2010: the applicant was placed in a metal cage in the court room. No specific reason was given by the authorities why this was necessary.

"124. The Court further reiterates that a measure of restraint does not normally give rise to an issue under Article 3 of the Convention where this measure has been imposed in connection with a lawful detention and does not entail a use of force, or public exposure, exceeding that which is reasonably considered necessary. In this regard it is important to consider, for instance, whether there is a danger that the person concerned might abscond or cause injury or damage…"

"125. Thus, a violation of Article 3 was found in a case where the applicants, publicly known figures, were placed during a hearing on their detention, which was broadcast live throughout the country, in a barred dock resembling a metal cage and were guarded by special forces wearing black hood-like masks, despite the fact that there was no risk that the applicants might abscond or resort to violence during their transfer to the courthouse or at the hearings (see *Ramishvili and Kokhreidze v. Georgia*, no. 1704/06, §§ 98-102, 27 January 2009). Furthermore, a violation of Article 3 was found in a case where the applicant, who was not a public figure, was unjustifiably handcuffed during public hearings (see *Gorodnichev v. Russia*, no. 52058/99, §§ 105-109, 24 May 2007). Unjustified placement of an applicant in a cage during public hearings was also considered a factor contributing to a finding of a violation of Article 3 (see *Sarban*, cited above, §§ 88-90). However, even in the absence of publicity, a given treatment may still be degrading if the victim could be humiliated in his or her own eyes, even if not in the eyes of others (see *Tyrer v. the United Kingdom*, 25 April 1978, § 32, Series A no. 26; and *Ramishvili and Kokhreidze*, cited above, §§ 97 and 100). Thus, application of measures of restraint to an applicant in a private setting still gave rise to a violation of Article 3 in a situation where no serious risks to security could be proved to exist (see *Henaf v. France*, no. 65436/01, §§ 51 and 56, ECHR 2003-XI)."

- “126. Turning to the circumstances of the present case, the Court notes that the applicant was kept in a metal cage measuring around 3 sq. m during the entire proceedings before the Court of Appeal. The Court does not share the Government's view that this measure was justified by security considerations. Nor is there any material in the case file to support the Government's position. In particular, contrary to what the Government claim, no specific reasons were given by the Court of Appeal in justifying the necessity of keeping the applicant in the metal cage. Indeed, in refusing the applicant's relevant motion, the Court of Appeal simply made a general reference to security considerations, without providing any detailed reasons as to why the applicant's release from the metal cage would endanger security in the courtroom.

- “127. The Court notes that nothing in the applicant's behaviour or personality could have justified such a security measure. During the entire proceedings before the District Court, where no security measures were applied to him, the applicant showed orderly behaviour and no incidents were recorded. Moreover, the applicant had no previous convictions or any record of violent behaviour and was accused of a non-violent crime. Furthermore, it can be inferred from the statements of the prosecutor and the Court of Appeal that the metal cage in the Court of Appeal's courtroom was a permanent installation which served as a dock and that the applicant's placement in it was not necessitated by any real risk of his absconding or resorting to violence but by the simple fact that it was the seat where he, as a defendant in a criminal case, was meant to be seated ….

- "128. The Court observes that the proceedings before the Court of Appeal lasted from March to May 2004 and at least twelve public hearings were held. The applicant alleged, which the Government did not dispute, that the hearings lasted on average about four hours. During this period the applicant was observed by the public, including his family and friends, in a metal cage. The Court considers that such a harsh appearance of judicial proceedings could lead an average observer to believe that an extremely dangerous criminal was on trial. Furthermore, it agrees with the applicant that such a form of public exposure humiliated him in his own eyes, if not in those of the public, and aroused in him feelings of inferiority. Moreover, such humiliating treatment could easily have had an impact on the applicant's powers of concentration and mental alertness during the proceedings bearing on such an important issue as his criminal liability (see, *mutatis mutandis*, *Ramishvili and Kokhreidze*, cited above, § 100).

- "129. In the light of the above considerations, the Court concludes that the imposition of such a stringent and humiliating measure on the applicant during the proceedings before the Court of Appeal, which was not justified by any real security risks, amounted to degrading treatment. There has accordingly been a violation of Article 3 of the Convention."

More recently, in *Svinarenko and Slyadnev v. Russia* 17 July 2014, the GC unanimously held that placing a person in a metal cage for trial purposes can under no circumstance be justified, and found a violation of Art. 3 as this amounted *per se* to degrading treatment. From a careful reading of paras. 137 and 138 it is clear that not even alleged "security considerations" can justify the use of metal cages in court.

From *Svinarenko*:

"137. The Court does not consider that the use of cages (as described above) in this context can ever be justified under Article 3 (see paragraph 138 below) as the Government have sought to show in their submissions with reference to an alleged threat to security (…).

"138. Regardless of the concrete circumstances in the present case, the Court reiterates that the very essence of the Convention is respect for human dignity and that the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. It is therefore of the view that holding a person in a metal cage during a trial constitutes in itself – having regard to its objectively degrading nature which is incompatible with the standards of civilised behaviour that are the hallmark of a democratic society – an affront to human dignity in breach of Article 3."

The systematic handcuffing of prisoners whenever they have to be moved from one part of the prison to another because they are "automatically" classified as dangerous prisoners (sometimes accompanied by repeated strip searches every time the prisoner passes from one section of the prison to another) has also been found to be in breach of the Convention

- Leading cases:

1. *Kashavelov v. Bulgaria* 20 January 2011
2. *Babar Ahmad and Others v. the United Kingdom* 10 April 2012 *
3. *Piechowicz v. Poland* 17 April 2012, and
4. *Paweł Pawlak v. Poland* 30 October 2012

These cases are authority for the following propositions:

1. While "special security" regimes, involving even some measure of isolation or segregation from the rest of the prison community, may be necessary in connection with prisoners accused of, or sentenced for, certain crimes, such measures must necessarily be limited in time, with the possibility of gradual relaxation.
2. The respondent Government must justify, with relevant and sufficient reasons, the special measures with regard to the applicant who contests them.
3. There must be counterbalancing factors within the prison regime to make up for the adverse effects of the "special prisoner" or "special security" regime.

Piechowicz

"173. …It does not appear that the authorities made any effort to counteract the effects of the applicant's isolation by providing him with the necessary mental or physical stimulation except for a daily, usually solitary walk in the segregated area and access to the television and library. Throughout his confinement in the high-security ward the applicant made numerous – but never successful – requests to the prison authorities, asking them to enable him to take part in any training, workshops, courses or any sports activities organised for ordinary inmates or to give him any unpaid work. No such activity was made available to him. In reaction to his complaints that isolation from other people was putting an exceptionally severe strain on him, the authorities said that the need to socialise with others was not a ground for qualifying for participation in activities in prison … They were similarly inflexible when he asked for permission to have in his cell his own sports equipment, computer games, CD-player and CDs with foreign language courses and music …, even though such a minor concession could by no means threaten prison safety.

"In this regard, the Court would recall that all forms of solitary confinement without appropriate mental and physical stimulation are likely, in the long term, to have damaging effects, resulting in a deterioration of mental faculties and social abilities … Considering the duration of the regime imposed on the applicant and the very limited possibilities available to him for physical movement and social contact, the Court has no doubt that the lack of any meaningful response to his repeated complaints about his solitude and exclusion must have caused him feelings of humiliation and helplessness…"

"174. The negative psychological and emotional effects of his social isolation were aggravated by the routine application of other special security measures, namely the shackling and strip searches. To begin with, the Court is not convinced that shackling the applicant on leaving his cell – which was a matter of everyday procedure unrelated to any specific circumstances concerning his past or current behaviour – was indeed necessary on each and every occasion. Moreover, in contrast to a personal check, which the authorities are expressly obliged to carry out pursuant to Article 212b § 1(5), putting joined shackles on a detainee should be limited only to "particularly justified cases" … It does not appear that there was a permanent need to do so in the applicant's case, given that in the prison he remained in a secure environment and other means of direct and indirect control of his behaviour were at the same time applied…

"175. The Court has even more grave misgivings in respect of the personal check to which the applicant was likewise subjected daily, or even several times a day, whenever he left or entered his cell. The strip-search, involving an anal inspection, was carried out as a matter of routine and was not linked to any concrete security needs, nor to any specific suspicion concerning the applicant's conduct. It was performed despite the fact that outside his cell and the "N" ward the applicant could move around the remand centre only by himself, his mobility was restricted due to his wearing joined shackles on hands and feet all the time and he had to be permanently and directly supervised by at least 2 prison guards. In addition, as already mentioned above, his behaviour in the cell, including his use of sanitary facilities, was constantly monitored *via* close-circuit television …

"176. The Court agrees that strip-searches may be necessary on occasion to ensure prison security or to prevent disorder or crime … However, it is not persuaded by the Government's argument that such systematic, intrusive and exceptionally embarrassing checks performed on the applicant daily, or even several times a day, were necessary to ensure safety in prison … Nor does it share their view that the absence of an intention to humiliate the applicant on the part of the authorities justified that treatment …

"Having regard to the fact that the applicant was already subjected in addition to several other strict surveillance measures, that the authorities did not rely on any concrete convincing security needs and that, despite the serious charge against him, he apparently did not display any disruptive, violent or otherwise dangerous behaviour in the remand centre, the Court considers that the practice of daily strip-searches applied to him for two years and nine months must have diminished his human dignity and caused him feelings of inferiority, anguish and accumulated distress which went beyond the unavoidable suffering and humiliation involved in the imposition of detention on remand …"

*****_Babar Ahmad and Others v. the United Kingdom._

In this case the ECtHR seems to have watered down or modified, even if ever so slightly, its case-law to the effect that if there is a real risk to a person of treatment contrary to Article 3 in a third country, then that person's removal to that country (whether by reason of extradition or otherwise) would itself be in violation of Art. 3.

In *Chahal v. the United Kingdom* 15 November 1996 (deportation of a Sikh political activist and his family to India), *Mamatkulov and Askarov v. Turkey* 4 February 2005 (extardition of suspected terrorists to Uzbekistan) and *Saadi v. Italy* 28 February 2008 (deportation to Tunisia of a politically active fundamentalist) the ECtHR has always maintained that:

"[T]he prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees."

In *Babar Ahmad* (extradition of alleged terrorists) however, the ECtHR said that (§ 177) "…treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation in an expulsion or extradition case."

It then went on to say:

"179. Finally, the Court reiterates that, as was observed by Lord Brown**, it has been very cautious in finding that removal from the territory of a Contracting State would be contrary to Article 3 of the Convention. It has only rarely reached such a conclusion since adopting the *Chahal* judgment (see *Saadi*, cited above § 142). The Court would further add that, save for cases involving the death penalty, it has even more rarely found that there would be a violation of Article 3 if an applicant were to be removed to a State which had a long history of respect of democracy, human rights and the rule of law."

(**in *R (Wellington) v. Secretary of State for the Home Department* [2008] UKHL 72, where the issue was the extradition of a person to the United States to stand trial on two counts of murder and where faced the possibility of an irreducible life sentence. The majority in the House of Lords (which did not include Lord Brown) were of the view that, in the extradition context, a distinction had to be drawn between torture and lesser forms of ill-treatment. According to them, when there was a real risk of torture, the prohibition on extradition was absolute; however, insofar as Art. 3 applied to inhuman and degrading treatment and not to torture, it was applicable only in a "relativist" form to extradition cases.)

More recently, in *Trabelsi v. Belgium* 4 September 2014 (and therefore not yet final), a case of extradition of an alleged terrorist to the United States where he faced an irreducible life sentence, the Former Fifth Section of the Court in effect overruled the relativist approach of *Babar Ahmad* and, applying *Vinter*, held that the extradition was in violation Art. 3

From *Trabelsi*:

- 136. The Court now comes to the central issue in the present case, which involves establishing whether, over and above the assurances provided, the provisions of US legislation governing the possibilities for reduction of life sentences and Presidential pardons fulfil the criteria which it has laid down for assessing the reducibility of a life sentence and its conformity with Article 3 of the Convention.
- 137. No lengthy disquisitions are required to answer this question: the Court needs simply note that while the said provisions point to the existence of a "prospect of release" within the meaning of the *Kafkaris* judgment – even if doubts might be expressed as to the reality of such a prospect in practice – none of the procedures provided for amounts to a review mechanism requiring the national authorities to ascertain, on the basis of objective, pre-established criteria of which the prisoner had precise cognisance at the time of imposition of the life sentence, whether, while serving his sentence, the prisoner has changed and progressed to such an extent that continued detention can no longer be justified on legitimate penological grounds (see paragraph 115 above).
- 138. Under these conditions, the Court considers that the life sentence liable to be imposed on the applicant cannot be described as reducible for the purposes of Article 3 of the Convention within the meaning of the *Vinter and Others* judgment. By exposing the applicant to the risk of treatment contrary to this provision the Government engaged the respondent State's responsibility under the Convention.
- 139. The Court accordingly concludes that the applicant's extradition to the United States of America amounted to a violation of Article 3 of the Convention.

Yardstick(s):

1. Has the prisoner been subjected to distress or hardship exceeding the unavoidable level inherent in detention?
2. What was the length of time over which this situation continued?
3. If there are a number of conditions or circumstances, what was the **cumulative effect** of all these?
4. Were there any specific shortcomings which assumed particular importance (e.g. because of the special physical or mental condition of the prisoner or detainee)?

Among a whole series of offending features that the ECtHR has found as being in breach of Art. 3, the most common (alone or in combination with others) are the following:

- Serious overcrowding
- Insufficient sanitary and sleeping facilities
- Open unpartitioned toilets in shared cells
- Pest infestation

Although many of these cases come from places like Russia, Poland, Bulgaria, Moldova and other central and eastern European countries, you still get cases from the other side of Europe, e.g. *Torreggiani and Others v. Italy* 8 January 2013 and *Payet v. France* 20 January 2011.

N.B. *Torregggiani* was followed by the decision of 16 September 2014 *Stella and Others v. Italy*, where the Court took note of the legislation put into place by the Italian authorities to reduce overcrowding and introduced also a remedy for prisoners to seek redress for such overcrowding, including pecuniary compensation. It declared all 11 applications inadmissible as they had first to seek redress under the new national provisions.

Payet was serving a thirty year sentence and had a history of escapes from prison and of assisting in the escape of others. He was placed in a solitary confinement cell as a disciplinary measure.

- "80. As regards the material conditions of detention in the punishment cell, the Court notes that according to the applicant, the premises were very run-down, very filthy, and partially flooded when it rained. As to the cells themselves, the complainant states that the vital space left for the prisoner was 4, 15 m^2, that the oppressive feeling was accentuated by the absence of external opening leading to the open air and that the insufficient electric lighting did not make up for the lack of natural light to read or write. In addition, the detainee could not get out of his cell except for one hour a day for a walk which, given the configuration of the site, did not allow him to do physical exercise.

81. The Court notes that the Government recognizes that the material conditions of detention in the disciplinary area of the prison of Fleury-Merogis were at the time of the applicant's assignment to the disciplinary cell, "capable to improvements." They added that new wings were opened in 2008.

82. It further notes that, in its judgment of 9 April 2008, the *Conseil d'État* had observed that the judge of the Versailles Administrative Court had "found that the condition of the places of the disciplinary areas of the house Fleury -Merogis [was] particularly poor."

The ECtHR held that the applicant had not been kept in condition of detention which were decent and which respected his human dignity, and that there was therefore a violation of Art. 3.

- Passive smoking:

- This is a relatively new-comer when it comes to conditions of detention. When an applicant enjoyed a single cell and only had to put up with the smoking of others in one communal area, this fact alone did not lead to a breach of Art. 3 (*Aparicio Benito v. Spain* 3 November 2006). But where a prisoner suffered from chronic health conditions and the doctors had recommended that he avoid cigarettes, his confinement for most of the day in an overcrowded cell where most occupants smoked and even the hospital ward was not non-smoking, the passive smoking element was held to be an important factor leading to a violation of Art. 3 (*Florea v. Romania* 14 September 2010). In a more recent judgment against Romania – *Elefteriadis v. Romania* 25 January 2011 – the ECtHR reaffirmed that the State is under an obligation to protect prisoners from passive smoking where their state of health so requires. So far the Court has not gone so far as to state that there is a right not to be subjected to any sort of passive smoking when confined in any part of the prison.

- Asylum-seekers/Immigrants

The ECtHR has found that is not permissible to virtually abandon in a state of limbo asylum-seekers or immigrants in transit zones without taking responsibility for making proper arrangements for their essential needs, when these zones were in reality intended for transitory travellers who would normally be moved on within a question of hours (*Riad and Idiab v. Belgium* 24 January 2008 – the applicants were stranded in a similar zone for more than ten days – Violation of Art. 3).

In *M.S.S. v. Greece and Belgium* 21 January 2011 even short periods of four days or a week in conditions of overcrowding and lack of basic amenities were sufficient for a finding of a violation of Art. 3. In *Rahimi v. Greece* 5 April 2011, the period was even shorter, two days but here the applicant was at the time a minor of just fifteen years.

The ECtHR has in several judgments (e.g. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* 12 October 2006; *Muskhadzhiyeva v. Belgium* 19 January 2010) held that detaining children in closed asylum centres not designed to cater for their needs also infringed Art. 3.

In a very recent decision – *Tarkhel v. Switzerland* [GC] 4 November 2014 – the ECtHR held that there would be a violation of Art. 3 if the applicants were to be returned to Italy without the Swiss authorities having first obtained from the Italian authorities individual guarantees that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together.

- *Aden Ahmed v. Malta* 23 July 2013.

- In this case the ECtHR, apart from finding a violation of Article 3 because of the conditions in which Ms Ahmed was detained pending her asylum application, as well as a violation of Art. 5(4) because Maltese law did not provide for a procedure whereby the lawfulness of an irregular immigrant's detention could be decided **speedily** – recourse to the Immigration Appeals Board or to the constitutional jurisdictions having already been held in previous judgments not to amount to an adequate remedy for the purposes of Article 5(4) – also found a violation of Article 5(1). Although a person may be arrested or detained "with a view to deportation or extradition" (Art. 5(1)(f)), detention in such cases will only be justified for as long as the deportation or extradition proceedings are in progress.

- "144. The Court observes that in the present case the entire duration of the detention complained of was subsequent to the rejection of the applicant's asylum claim in May 2009. It reiterates that under the second limb of Article 5 § 1 (f) detention will be justified only for as long as deportation or extradition proceedings are in progress. Nevertheless, the Government did not submit the slightest detail as to whether any return procedures at all were initiated, let alone pursued with due diligence. Indeed, the Court notes that, to date, a year after her release, it would appear that the applicant is still in Malta and that no steps have been taken towards deporting her, as the Court has not been informed otherwise.
- "145. The Court thus finds that given the total failure of the domestic authorities to take any steps to pursue removal it cannot be said that deportation proceedings were in progress. In consequence, the detention at issue was not permissible under Article 5 § 1 (f). Neither can it be said that that period of detention fell under any other sub-paragraph of Article 5.
- "146. It follows that the applicant's detention for fourteen and half months in Lyster Barracks was not in accordance with Article 5 § 1 of the Convention, which has therefore been violated."

- *Detention on remand of minors*

Most of the cases where the ECtHR found that there had been a violation of Art. 5(1)(c) either alone or read in conjunction with 5(3) have involved charges against the minors which were very low in the seriousness scale, and the finding of a violation can be held to be also a reaffirmation of the principle of proportionality between the measure adopted in the interests of the proper administration of justice on the one hand and the right to liberty of the applicant (minor) concerned.

- In *Nart v. Turkey* (6 May 2008) the applicant – 17 years – was arrested on suspicion of being involved in the armed robbery of a small grocery shop. He was remanded in custody for a period of 48 days. In its judgement the ECtHR held:

1. Whether the length of detention is reasonable or not must be assessed in each case according to its special features.
2. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rules of respect for individual liberty.
3. It is for the national courts in the first instance to examine all the circumstances arguing for or against the existence of such a requirement – these circumstances and arguments for and against must be set out, even if in concise form, in the court decision.
4. When the accused is a minor, attention must be given to international instruments on the pre-trial detention of minors.
5. Detention in the case of minors should only be used as a measure of last resort; it should be as short as possible and, where detention is absolutely necessary, minors should be kept apart from adults.

In the case of *Nart* the ECtHR held that the domestic court had refused bail simply on the basis of generic and vague expressions like “the nature of the offence” and “the state of the evidence”, which alone could not justify the length of the detention in the instant case. Moreover, the applicant’s lawyer had repeatedly drawn the court’s attention to the age of the accused, but the court never took the age into consideration when deciding upon the remand in custody. There was therefore a violation of Art. 5(3).

Güveç v. Turkey 20 January 2009: here the applicant was 16 years at the time of his arrest and later charged with belonging to an illegal association and with criminal damage by fire (arson). He spent in all 4 years 7 months and 25 days as a remand prisoner (of which 4 months when he was 16 years old and 48 days when he was 17 years old). There was also an allegation of ill-treatment (the ECtHR also found a violation of Art. 3). In spite of repeated non-appearances of the applicant’s lawyer at several of the hearings, the ECtHR again found a violation of Art. 5(3):

"106. The Government argued that there had been a genuine requirement of public interest for the continued detention of the applicant, who had been charged with a serious offence. There had also been a high risk of him escaping or destroying the evidence against him.

"107. The applicant maintained his allegations.

"108. The Court observes that the Government, beyond arguing that the applicant's detention was justified on account of the offence with which he was charged, did not argue that alternative methods had been considered first and that his detention had been used only as a measure of last resort, in compliance with their obligations under both domestic law and a number of international conventions (cf. for example *Nart v. Turkey*, no. 20817/04, § 22, 6 May 2008). Nor are there any documents in the file to suggest that the trial court, which ordered the applicant's continued detention on many occasions, at any time displayed concern about the length of the applicant's detention. Indeed, the lack of any such concern by the national authorities in Turkey as regards the detention of minors is evident in the reports of the international organisations cited above (paragraphs 61-64).

"109. In at least three judgments concerning Turkey, the Court has expressed its misgivings about the practice of detaining children in pre-trial detention (see *Selçuk v. Turkey*, no. 21768/02, § 35, 10 January 2006; *Koşti and Others v. Turkey*, no. 74321/01, § 30, 3 May 2007; and *Nart v. Turkey*, cited above, § 34) and found violations of Article 5 § 3 of the Convention for considerably shorter periods than that spent by the applicant in the present case. For example, in *Selçuk* the applicant had spent some four months in pre-trial detention when he was sixteen years old and in *Nart* the applicant had spent forty-eight days in detention when he was seventeen years old. In the present case, the applicant was detained from the age of fifteen and was kept in pre-trial detention for a period in excess of four and a half years.

"110. In the light of the foregoing, the Court considers that the length of the applicant's detention on remand was excessive and in violation of Article 5 § 3 of the Convention."

- ***Old age, illness and medical treatment***

- While old age *per se* is neither a ground for non-incarceration nor a ground for release from prison (see, *passim*, *Papon v. France* 7 June 2001), the medical problems associated with old age may raise issues under Article 3.

- The ECtHR has in general taken a pragmatic approach to issues of medical treatment in prison. While it has so far not gone on record to say that the level of treatment given to a prisoner in prison must be of the same level as that available to the general public outside prison, the rule, laid down in comprehensive terms in *Kudla v. Poland* 26 October 2000 is that the State must provide all detainees with the "requisite medical assistance", and this as a corollary derived from Article 3 which imposes an obligation on States to protect the physical well-being of persons deprived of their liberty. Where, however, it is clear that specialised treatment is necessary and this can only be given outside prison, then the State would be in breach of Art. 3 if failure to make the necessary arrangements placed the prisoner's life at risk or exposed him to severe or prolonged pain. In *Kaprykowski v. Poland* 3 February 2009, the applicant, who was prone to severe epileptic fits, was for more than four years neither prescribed proper drugs nor provided with the necessary specialised medical care suitable for his condition. When he had a fit, it was left up to his cell-mates to look after him (they had become accustomed to these and knew more or less how to handle him). Finding a violation of Art. 3, the ECtHR held that although the Convention does not guarantee a right to receive medical care which would exceed the standard level of health care available to the population generally, "…lack of adequate medical treatment in Poznań Remand Centre and the placing of the applicant in a position of dependency and inferiority *vis-à-vis* his healthy cell-mates undermined his dignity and entailed particularly acute hardship that caused anxiety and suffering beyond that inevitably associated with any deprivation of liberty" (§ 76).

- As to the question of assistance provided by cell-mates (particularly for disabled prisoners) the ECtHR has more recently distinguished between cases where this help is left to the goodwill of those other prisoners and those cases where it is properly organised by the prison administration. In *Zarzycki v. Poland* 12 March 2013 the applicant prisoner had lost both forearms in an accident.

"118. It is true that the Court often criticised the scheme of providing routine assistance to a prisoner with a physical disability through cellmates, even if they were volunteers and even if their help was solicited only when the prison infirmary was closed (see *Farbtuhs v. Latvia*, no. 4672/02, § 60, 2 December 2004). In the particular circumstances of the present case, however, the Court does not find any reason to condemn the system which was put in place by the authorities to secure the adequate and necessary aid to the applicant (see *Turzyński v. Poland* (dec.), no. 61254/09, § 40, 17 April 2012)." –N.B. Two judges dissented.

- In *Turzyński* the applicant prisoner was in a wheel chair, with both his legs and his left arms paralysed as a result of multiple sclerosis. He also suffered from urinary incontinence. For most of the time he was in prison he was kept in the neurology ward of the prison hospital, where he was adequately cared for. When he was moved to the normal prison block, the cell was adapted for the needs of disabled persons. Here he was provided with the assistance of a nurse, and when he refused to co-operate with the nurses he was voluntarily assisted in his daily routine by his inmates who were specifically chosen for that role – complaint declared manifestly inadmissible.

- Where the lack of this "requisite medical assistance" gives rise to a medical emergency placing the prisoner's life at risk or exposes him to severe or prolonged pain, the ECtHR has not hesitated in finding a breach of Art. 3: e.g. in *Pilcic v. Croatia* 17 January 2008 the prison authorities failed to organise the necessary kidney stone operation.

- In *Kupczak v. Poland* 25 January 2011 the applicant had been involved in an accident before his arrest and was a paraplegic, with accompany paralysis of the urethral and anal sphincters. Moreover, because of the severe pain he suffered in his back, he had a special pump which injected morphine into his spinal fluid. Citing his condition, he requested bail several times, but the courts refused. While in the remand centres, the pump stopped functioning and a special operation had to be undertaken to replace the pump. This could only be done at a specialised hospital, and only one or two existed in Poland which could carry it out. The ECtHR found a violation of Art. 3 not so much because the prison authorities had failed to organise the operation – the Court acknowledged the difficulty of doing this – but because the domestic courts, upon whose order the applicant was being detained on remand, repeatedly and without a valid reason refused to take into account his state of health for the purpose of deciding whether or not to release him on bail.

- From *Kupczak*

- "67. ...The Court reiterates that the applicant was detained on the orders of the Regional Court, which had been obliged to display diligence in the examination of the prosecutor's requests for extension of his detention. The authorities conducting criminal proceedings against the applicant continued to extend his detention, relying repeatedly on the reasonable suspicion against him and on the complexity of the investigation as justifying his continued detention. Regard being had to the finding above, the Court concludes that the domestic courts failed to give serious consideration to the applicant's state of health, except for general statements ... or repeatedly justifying his allegedly appropriate medical care by the existence of the morphine pump, which was in fact not working .... Accordingly, the grounds given by the domestic authorities were particularly unsatisfactory, given the serious state of the applicant's health, and could not justify the overall period of the applicant's detention.

- "68. The foregoing considerations are sufficient to enable the Court to conclude that by tolerating the failure of the applicant's morphine pump from the beginning of his detention and for the next two and a half years, given the particular state of health of the applicant, who was suffering chronic pain, the authorities responsible for his detention had acted in breach of their obligations to provide effective medical treatment and that the applicant was subjected to inhuman and degrading treatment in violation of Article 3 of the Convention."

Lack of proper investigation of allegations of ill-treatment in prison

- A number of high profile cases have affirmed that when an individual raises an arguable claim that he has suffered treatment infringing Art. 3 at the hands of the police or other agents of the State, Art. 3, read in conjunction with Art. 1, requires by implication that there should be an effective official investigation. The investigation must be of such quality as to be capable of leading to the identification and punishment of those responsible. Otherwise, the general prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and would lead to abuse of rights with virtual impunity (*El-Masri v. The Former Yugoslav Republic of Macedonia* 13 December 2012, § 182). Such investigations into serious allegations of ill-treatment must be prompt and thorough (§ 183). A similar finding of a breach of Art. 3 "in its procedural limb" was found in *Labita v. Italy* 6 April 2000, the ECtHR commenting as follows:

- "135. The inactivity of the Italian authorities is made even more regrettable by the fact that the applicant's complaint was not an isolated one. The existence of controversial practices by warders at Pianosa Prison had been publicly and energetically condemned even by authorities of the State ….
- "136. In these circumstances, having regard to the lack of a thorough and effective investigation into the credible allegation made by the applicant that he had been ill-treated by warders when detained at Pianosa Prison, the Court holds that there has been a violation of Article 3 of the Convention."

- It is interesting that in *El-Masri* the Grand Chamber also found a violation of **Article 5 in its procedural aspect** because of the failure of the respondent State – FYROM – to conduct an effective investigation into the applicant's credible allegations that he was detained by state agents arbitrarily.

Duration of pre-trial detention and arbitrary detention

- In *Bykov v. Russia* 10 March 2009, the applicant was charged with conspiracy to murder. He was refused bail several times, with the courts (or the prosecutor who extended the detention on remand) always citing "the gravity of the charge" and "the risk of influencing witnesses or obstrcuting the investigation".

- The GC, after reiterating (**1**) that Art. 5(3) does not really give the national judicial authorities a choice between trial within a reasonable time and release on bail pending trial, (**2**) that continued pre-trial detention in a given case can only be justified if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Art. 5(1), and (**3**) that it is primarily the responsibility of the national judicial authorities to ensure that pre-trail detention does not exceed a reasonable time, continued as follows:

- From *Bykov*:

- "65. Turning to the instant case, the Court observes that the applicant spent one year, eight months and 15 days in detention before and during his trial. In this period the courts examined the applicant's application for release at least ten times, each time refusing it on the grounds of the gravity of the charges and the likelihood of his fleeing, obstructing the course of justice and exerting pressure on witnesses. However, the judicial decisions did not go any further than listing these grounds, omitting to substantiate them with relevant and sufficient reasons. The Court also notes that with the passing of time the courts' reasoning did not evolve to reflect the developing situation and to verify whether these grounds remained valid at the advanced stage of the proceedings. Moreover, from 7 September 2001 the decisions extending the applicant's detention no longer indicated any time-limits, thus implying that he would remain in detention until the end of the trial.

- "66. As regards the Government's argument that the circumstances of the case and the applicant's personality were self-evident for the purpose of justifying his pre-trial detention, the Court does not consider that this in itself absolved the courts from the obligation to set out reasons for coming to this conclusion, in particular in the decisions taken at later stages. It reiterates that where circumstances that could have warranted a person's detention may have existed but were not mentioned in the domestic decisions it is not the Court's task to establish them and to take the place of the national authorities which ruled on the applicant's detention ….

- "67. The Court therefore finds that the authorities failed to adduce relevant and sufficient reasons to justify extending the applicant's detention pending trial to one year, eight months and 15 days.

- "68. There has therefore been a violation of Article 5 § 3 of the Convention."

Right of access to a lawyer and to a court – Art. 6

- Several cases have affirmed a prisoner's right of access to a court in the determination of his civil rights and obligations, including issues that may arise in connection with the incarceration. The *locus classicus* is still the dictum in *Campbell and Fox v. the United Kingdom* 28 June 1984:

  - "However, the guarantee of a fair hearing, which is the aim of Article 6, is one of the fundamental principles of any democratic society, within the meaning of the Convention .... As the Golder judgment shows, justice cannot stop at the prison gate and there is, in appropriate cases, no warrant for depriving inmates of the safeguards of Article 6."

1. If "disciplinary proceedings" are, because of the severity of the outcome, in effect criminal proceedings under another name, the prisoner is entitled to legal assistance.
2. A prisoner cannot be barred from taking action in a court on any matter (Art. 6(1)) or to challenge the legality of the detention (Art. 5(4)). Prior consent by the authorities for him to contact a lawyer for this purpose would itself amount to a violation of the Convention.
3. Every prisoner has a right to out-of-hearing visits with his legal adviser (but the close presence of prison officers may be justified by security considerations).
4. Where a prisoner's civil rights are in issue in internal disciplinary proceedings, access to a court to review the imposition of restrictions is required.

- In *Enea v Italy* 17 September 2009 – a case involving restrictions on "high security" prisoners – the GC held that while each State party to the Convention retains a wide discretion with regard to the means of ensuring security and order in the difficult context of a prison, it was not permissible to throw away Art. 6 with the bath water:

"106. Any restriction affecting these individual civil rights must be open to challenge in judicial proceedings, on account of the nature of the restrictions (for instance, a prohibition on receiving more than a certain number of visits from family members each month or the ongoing monitoring of correspondence and telephone calls) and of their possible repercussions (for instance, difficulty in maintaining family ties or relationships with non-family members, exclusion from outdoor exercise). **By this means it is possible to achieve the fair balance which must be struck between the constraints facing the State in the prison context on the one hand and the protection of prisoners' rights on the other**.

"107. In conclusion, the Court considers that the complaint concerning the restrictions to which the applicant was allegedly subjected as a result of his being placed in an E.I.V. unit is compatible *ratione materiae* with the provisions of the Convention since it relates to Article 6 under its civil head. Since this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and no other ground for declaring it inadmissible has been established, the Court declares it admissible."

Protocol 4

Labita v. Italy 6 April 2000

- In the *Labita* case, the applicant had had restrictions imposed upon his movements before his trial. After he was acquitted these restrictions were not lifted. The GC, while acknowledging
- (**1**) that it was legitimate to impose preventive measure, including special supervision, in respect of persons suspected of being members of the Mafia even prior to conviction, and
- (**2**) acknowledging also that an acquittal did not necessarily deprive those measure of their foundation (during the trial concrete evidence may have been gathered which, though insufficient for a conviction, could nonetheless reasonably justify fears that the person concerned may in the future commit criminal offences)

nevertheless went on to say in the instant case there was no real concrete evidence to show that there was a real risk that he would offend. In the instant case there was a clear disproportion between the aim sought to be achieved and the means used, and therefore the restrictions on the applicant's movements could not be "necessary in a democratic society".

The European Arrest Warrant

- Replaced lengthy extradition procedures within the EU's territorial jurisdiction
- Improves and simplifies judicial procedures designed to surrender people for the purpose of conducting a criminal prosecution or executing a custodial sentence or spell in detention
- Provides for faster and simpler surrender procedures
- Brings an end to political involvement
- Implies that EU member-States are no longer able to refuse to surrender (to another EU member-State) their own nationals (who have committed a serious crime or are suspected of having committed such a crime in another EU member-State) on the ground that they are nationals

The European Arrest Warrant

- In *Stapleton v Ireland* 4 May 2010, the applicant was to be extradited from Ireland to the United Kingdom pursuant to a European Arrest Warrant. He complained that, given the delay in prosecuting the charges against him, his surrender to the United Kingdom would violate his rights under Article 6 of the Convention.

The Court held that:

- "25. … the right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society so that the Court does not exclude that an issue might, exceptionally, be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country …

- 26. However, the Court does not consider that the facts of the present case disclose substantial grounds for believing that there would be a real risk that the applicant would be exposed to such a "flagrant denial" of his Article 6 rights in the United Kingdom. The Court notes, in this regard, that the United Kingdom is a Contracting Party and that, as such, it has undertaken to abide by its Convention obligations and to secure to everyone within its jurisdiction the rights and freedoms defined therein, including those guaranteed by Article 6. It has incorporated the Convention's provisions into domestic law by virtue of the Human Rights Act 1998."

Transfer of Prisoners Framework Decision

- Establishes a system for transferring convicted prisoners back to the Member State of nationality or habitual residence (or to a Member State with which they have close ties)

- Should facilitate the social rehabilitation of the sentenced person by ensuring that they serve their sentence in their home country

Transfer of Prisoners Framework Decision

- The diversity in Member States' legislation on the enforcement of custodial sentences poses potential problems for the successful operation of the Framework Decision. Therefore, if a person is sentenced in one Member State to a term of imprisonment that will be served in another Member State, it is relevant for such person to know how much of that sentence he will actually have to serve.

- Member States have different rules regarding conditional or early release and this could become an obstacle to transfers if the person concerned were to end up serving a longer sentence in the Member State to which they are transferred than they would serve in the one in which they were sentenced. There is a risk that the executing (administering) State has a less generous system of early release than the issuing (sentencing) State.

Transfer of Prisoners Framework Decision

- Indeed in *Szabó v Sweden* 27 June 2006, the Court held that, where this was the case, it did not "exclude the possibility that a flagrantly longer *de facto* term of imprisonment in the administering (executing) State could give rise to an issue under Article 5 ECHR (right to liberty and security), and hence engage the responsibility of the sentencing (issuing) State under that Article".

Probation Measures and Alternative Sanctions Framework Decision

- Applicable at the post-trial stage
- Applies the principle of mutual recognition to many of the alternatives to custody and measures facilitating early release.
- Article 1(1) provides that the Framework Decision aims at "facilitating the social rehabilitation of sentenced persons, improving the protection of victims and of the general public, and facilitating the application of suitable probation measures and alternative sanctions, in case of offenders who do not live in the State of conviction … "
- With a view to achieving these objectives, the Framework Decision lays down rules according to which a Member State (other than the Member State in which the person concerned has been sentenced) recognises judgments containing a probation decision or alternative sanctions, and takes all other decisions relating to that judgment.

Probation Measures and Alternative Sanctions Framework Decision

- Alternatives to custody and measures facilitating early release include an obligation not to enter certain localities, to carry out community service and instructions relating to residence, training or professional activities.

- The concept of mutual recognition is based on that of mutual trust, which implies that most of the checks on judicial decisions to be executed abroad take place in the issuing State and not in the executing State. Neveu notes that one of the most critical questions mutual recognition poses concerns the extent of control that States are to exercise. She argues that the European Court of Human Rights has not yet defined a clear position on the intensity of the control to operate in respect of human rights.

Probation Measures and Alternative Sanctions Framework Decision

- Whilst the Court, in *Stapleton v Ireland* 4 May 2010, (a case concerning the European Arrest Warrant) promoted the philosophy of mutual recognition, in *MSS v Belgium and Greece* 21 January 2011, (concerning the Dublin asylum system), it found that the Belgian authorities could not simply assume that the applicant would receive treatment in accordance with the requirements of the Convention. Rather the Belgian authorities had to enquire in advance about how the Greek authorities applied law on asylum in practice.

European Supervision Order

- Concerns provisional release in the pre-trial stage
- Enables a non-custodial supervision measure to be transferred from the Member State where the non-resident is suspected of having committed an offence to the Member State where he is normally resident
- This allows a suspected person to be subject to a supervision measure in his home Member State until the trial takes place in the foreign Member State, thereby providing a way to reduce pre-trial detention of non-resident EU citizens

European Supervision Order

- Provides for several alternative types of supervision to be applied instead of pre-trial detention

- These include an obligation for the person to inform the competent authority in the executing State of any change of residence for the purpose of receiving a summons to attend a hearing or a trial in the course of criminal proceedings, an obligation not to enter certain localities in the issuing or executing State, an obligation to remain at a specified place during specified times, a limitation on leaving the territory of the executing State, an obligation to report at specified times to a specific authority, an obligation to deposit a certain sum of money or to give another type of guarantee or an obligation to undergo treatment for addiction.

European Supervision Order

- In *Litwa v Poland* 4 April 2000, the Court held that

- "The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is executed in conformity with national law but it must also be necessary in the circumstances."

European Supervision Order

- In *Ladent v Poland* 18 March 2008, it held that

- " … detention pursuant to Article 5 § 1 (c) must equally embody a proportionality requirement. It will be recalled that in the case of Ambruszkiewicz v. Poland … the Court applied a proportionality test to detention falling under Article 5 § 1 (c) of the Convention when considering whether the applicant's detention on remand was strictly necessary to ensure his presence at the trial and whether other, less stringent, measures could have been sufficient for that purpose."

European Supervision Order

- Domestic courts cannot simply assume that because the defendant is a non-resident, he is a flight risk and, thus, only detention will suffice to guarantee their attendance at trial. The Court has repeatedly held that "the mere absence of a fixed residence does not give rise to a danger of flight", insisting that courts have to assess the risk of absconding "in light of the factors relating to the person's character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is prosecuted". (*Suloaja v Estonia* 15 February 2005 § 64)

European Supervision Order

- In this regard, the European Supervision Order provides national courts a further option. It allows national courts to consider whether supervision measures would suffice to guarantee the defendant's presence at trial if monitored in the State of residence, where the defendant will have social, family and employment ties, and where supervision measures are likely to be much more effective.

- Thus, national courts must consider this further possibility. Since detention is a measure of last resort which can be justified only "when all other available alternatives are found to be insufficient", national court's duties would not be complete until they have considered whether supervision measures (if enforced in the State of residence by means of a European Supervision Order) would guarantee the defendant's presence at trial. (*Lelièvre v Belgium* 8 November 2007 § 97)

European Supervision Order

- Nevertheless, Min notes that although the European Supervision Order was intended to provide an effective and workable alternative to pre-trial detention, the response from EU Member States was "at best lukewarm". Despite being required to implement the European Supervision Order into national laws by December 2012, less than half of the Member States had done so by the beginning of 2014. This lack of enthusiasm seems to have been worryingly echoed by the judiciary, who are given the discretion to issue European Supervision Orders

European Supervision Order

- As more and more countries implement the European Supervision Order, one might see the European Supervision Order becoming more commonly applied. However, almost three years after the deadline to implement the Framework Decision, practitioners and legal experts from across the EU have reported that courts had demonstrated close to no willingness to make use of the European Supervision Order, and that there had been no known cases of its use.

Co-funded by the Justice Programme of the European Union 2014-2020

The case for reform and action at European level: the use of pre-trial detention and its impact on individuals within the context of the ECHR

Jemima Hartshorn

@fairtrials

www.fairtrials.org

Aims & Objectives

- Introduce Fair Trials
- The rights of individuals and pre-trial detention in context of fair trial rights
- ECHR standards / ECtHR- jurisprudence
- Research project on pre-trial decision-making
  - Methodology
  - Findings
- Outlook for pre-trial detention in the EU

Fair Trials

- Non-governmental human rights organisation
- Promote fair trials rights according to internationally-recognised standards of justice.
- Three areas of work
  - Helping defendants
  - Training and networking
  - Advocacy work on underlying causes of injustice (research, lobbying, litigation)

The rights of individuals and pre-trial detention in context of fair trial rights, Art. 5 ECHR (& Art. 6 ECHR)

(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: […]

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. […]

Fair Trials

Daniela Tarau from Romania

The reality of individuals and pre-trial detention in context of fair trial rights

- Overcrowded prisons and inhumane detention conditions
- Separation from family, loss of job…
- Difficult to access a (good) lawyer & prepare trial
- Lack of access to interpretation/translation for foreign nationals
- Hasty and wrong decisions to detain
- (huge costs to national budgets!)

Background

- Procedural Rights Roadmap
- 2011 Green Paper
- Fair Trials “Detained without trial” – meetings LEAP members
- 2012 – 2013 Country-specific expert meetings in Amsterdam, London, Paris, Poland, Greece, Lithuania

- **Findings:** Problems with decision-making process might be responsible for overuse – depriving individual’s of rights, forcing them to be detained in overcrowded prisons and at great cost for budgets.

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 – April 2015, launch at the European Parliament

Findings: research methodology

- Insufficient statistics, in particular on use of alternatives and breach of conditions
- Closed hearings, no access given for researchers
- Lack of official access to case files
- Few prosecutors willing to be interviewed
- Judges interviews not in person / not all questions

Findings: Pre-trial decision-making procedure

- Inadequate defence access to the case file
  - Good example: Netherlands
- Limited time to prepare for judges (even judges in some countries)
- Lack of effective legal representation
- Short hearing/high pressure on courts
- Unequal treatment of prosecution and defence arguments

Findings: The substance of pre-trial detention decisions

- Presumption of Detention
  - Good example: England & Wales and Ireland
- Detention grounds assumed in non-compliance with ECtHR
  - Gravity of offence – flight risk
  - Non-national – flight risk
  - Interference with evidence
  - Reoffending
- Inadequate case-specific reasoning

Findings: Use of alternatives to detention

- Lack of trust in alternatives by judges – little use of alternatives
  - Good practice: England & Wales
  - Good practice with problems: Ireland
- Inadequate legislation
- Practical obstacles to ordering pragmatic alternatives to detention

Findings: Review process & special diligence

- Repetition of previous decision, not effective review
- Suspect not present at hearing
- Lack of special diligence in the investigation
  - Good example: Netherlands
- Lack of time limits

Widespread lack of awareness of ECtHR-standards and understanding of the relevance amongst judges and prosecutors.

Next steps:

- Country Reports – I have list of websites
- Launch of Regional Report at EP, April 2016
- Reform initiatives at national level
- Impact Assessment Study requested by European Commission on measure on pre-trial detention almost completed (not public)
- Decision by European Commission to initiate next steps?
- EU-legislation?

Thank you!

Jemima.Hartshorn@fairtrials.net

Human Rights Monitoring Institute

Pre-Trial Detention

practice & reform in Lithuania

Co-funded by the Justice Programme
of the European Union 2014-2020

advocates for full compliance of national laws, policies and practices with international human rights obligations.

I am Karolis Liutkevicius

a Legal Officer at HRMI

- Based on the findings of the research project "The Practice of Pre-trial detention: Monitoring Alternatives and Judicial Decision-making"

Co-funded by the Criminal Justice Programme of the European Commission

1

BACKGROUND

Statistics of pre-trial detention in Lithuania

Pre-trial detention is a measure of last resort:

> *detention is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient*

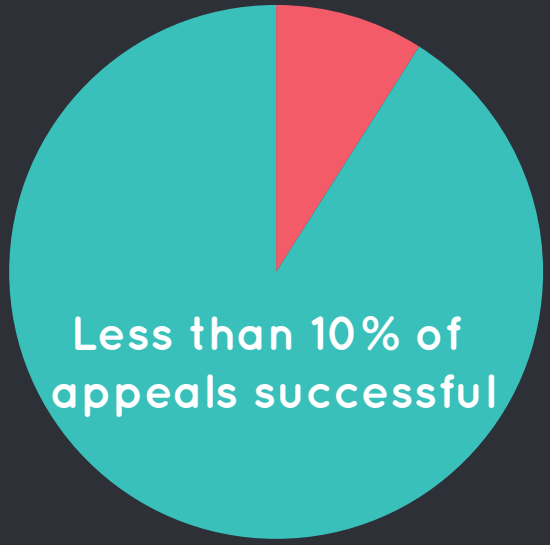
- The European Court of Human Rights

Ambruszkiewicz v Poland, 2006

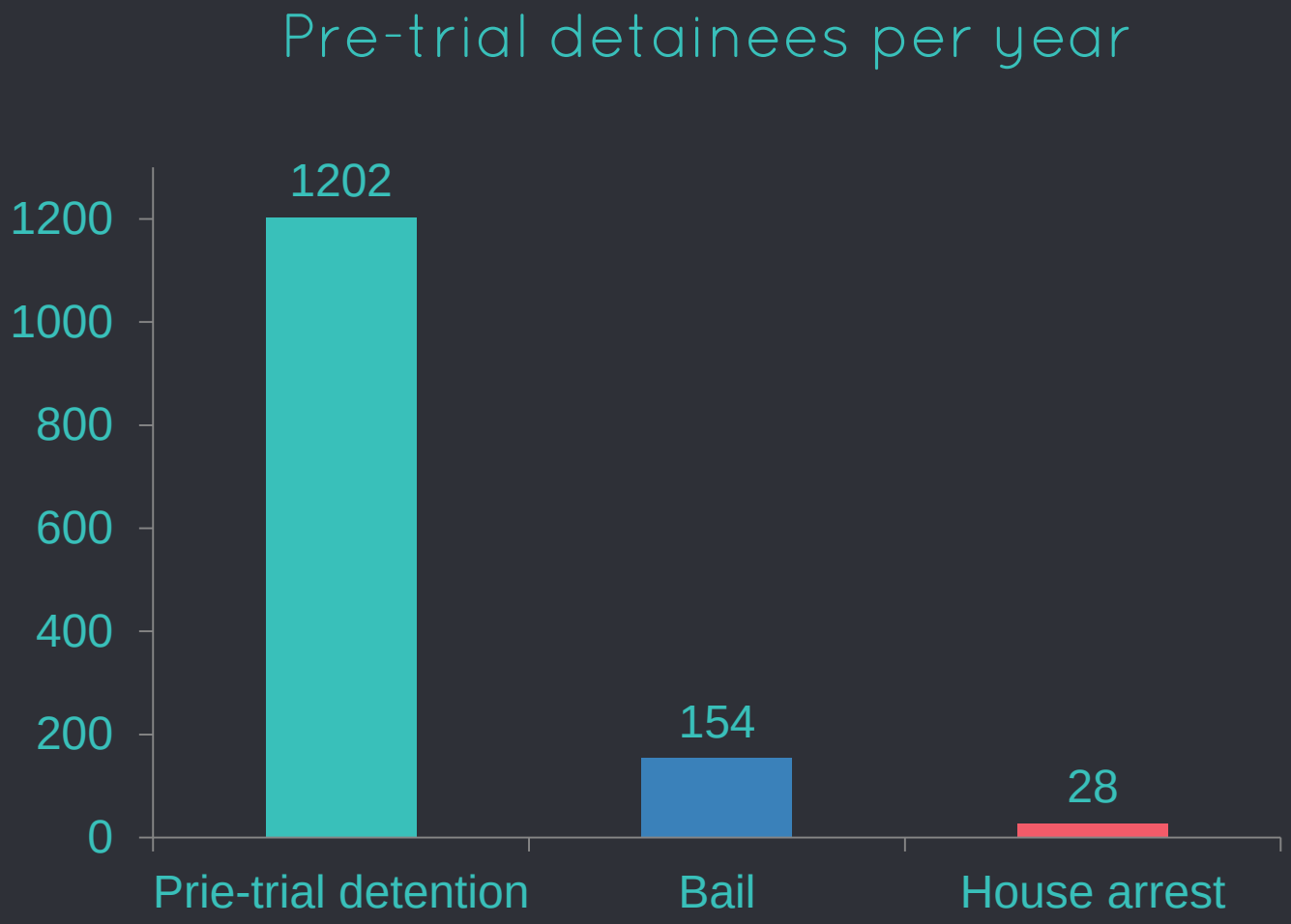
LIKELIHOOD OF DETENTION ORDER

Prosecution's applications for pre-trial detention

Appeals in pre-trial detention cases



OVERUSE OF PRE-TRIAL DETENTION



OTHER PRE-TRIAL DETENTION STATISTICS

A persons spends around 8 months in pre-trial detention on average.

There are currently approx. 41 detainees per 100,000 inhabitants in Lithuania. They make up to 20% of the prison population.

2

DECISION REASONING

Motives for ordering pre-trial detention in court decisions

THE MAIN LEGAL GROUNDS FOR ORDERING PRE-TRIAL DETENTION IN LITHUANIA

Flight risk

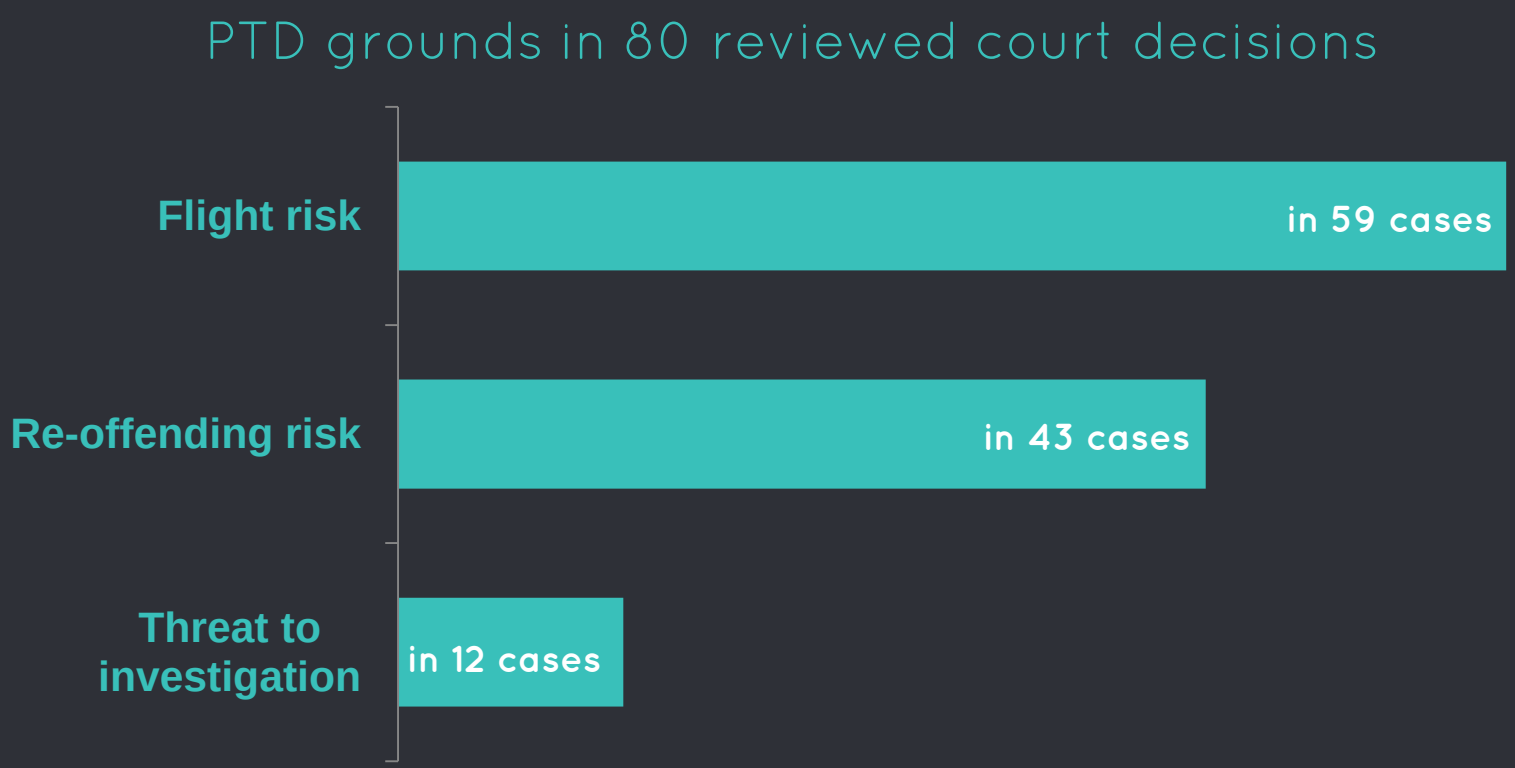
Re-offending risk

Tampering with evidence
(threat to the nvestigation)

Other grounds include pending extradition request or European Arrest Warrant.

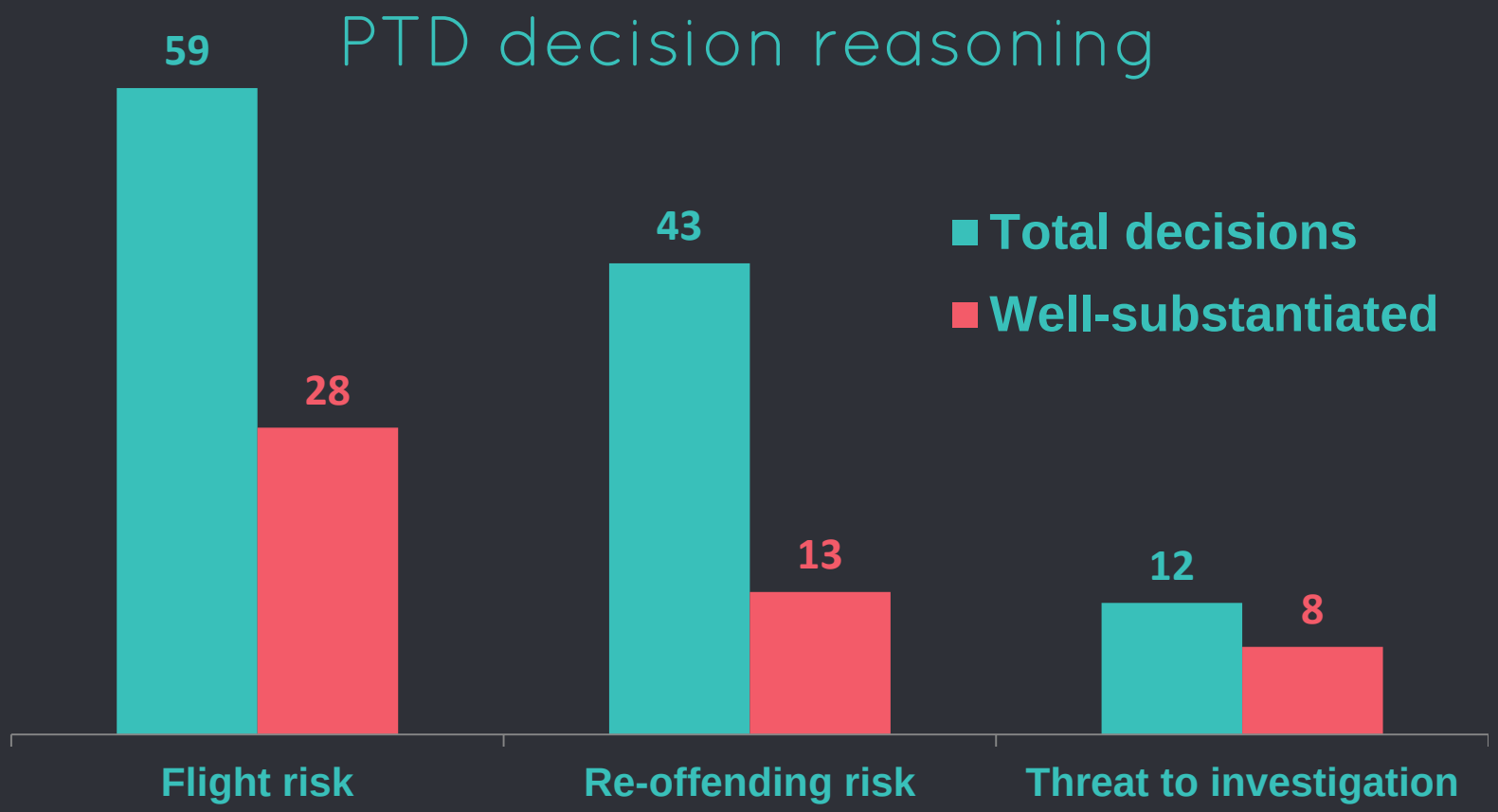
GROUNDS FOR PRE-TRIAL DETENTION OBSERVED DURING RESEARCH

Interviewed prosecutors and judges named risk of flight the most common reason for ordering PTD. This is confirmed by research.



SUBSTANTIATION OF PRE-TRIAL DETENTION DECISIONS

Decisions were evaluated on whether the reasoning was clear and tailored specifically to the case, or formal and abstract.



INSUFFICIENT REASONING IN PTD DECISIONS

Research findings indicate a tendency to rely on poorly substantiated reasons when ordering PTD to counter flight risk and especially reoffending risk.

Typical examples:

- Flight risk: existence of risk established based solely on possibility of a long-term sentence.
- Re-offending risk: allegations of thefts considered sufficient to establish that criminal activity is suspect's source of income with no further proof.

DEFENCE LAWYERS' PERSPECTIVE

Over 80% of interviewed defence lawyers believe to have encountered orders of PTD for unlawful reasons:

- Undue importance attributed to possibility of long term sentence or previous convictions
- Succumbing to media pressure
- **Pressuring suspects into giving evidence**

Investigators often use pre-trial detention as pressure to extract a confession.

- Defence lawyer

3

OUTCOMES OF PTD CASES

Sentences in cases in where the suspect was detained

OUTCOMES OF ANALYSED PTD CASES

Almost 80% of the pre-trial detainees received custodial sentences.

Half of the remaining detainees received non-custodial sentences.

The other half served their full sentences in PTD and were released on sentencing.

4

PTD REFORM IN LITHUANIA

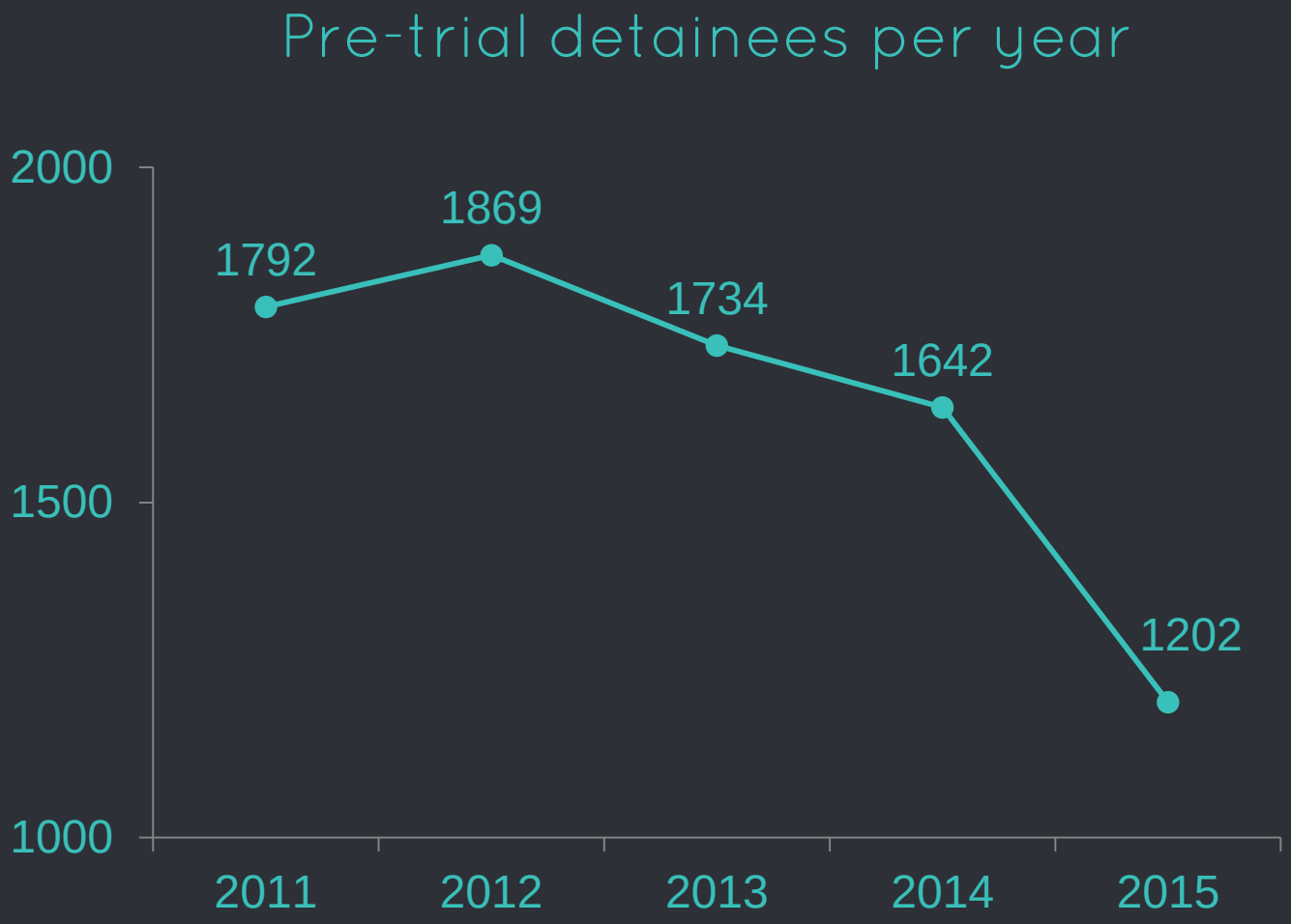
Changes in regulation and use of pre-trial detention

REFORM OF PTD REGULATION

In June 2015 rules governing PTD were amended.

- Alternatives: judges were granted power to order alternative measures when asked for PTD.
- Clear reasons: judges must state facts leading to believe that other measures are unsuitable.
- Shorter PTD terms: max PTD for minor and semi-serious crimes reduced to 9 months.
- Limited max PTD: the PTD period cannot exceed two thirds of the maximum possible sentence.

DECREASE OF DETAINEES IN LITHUANIA



5 CONCLUSIONS

Lack of understanding of human rights standards

The situation concerning PTD in Lithuania is improving. However, research findings indicate a lack of understanding and respect for established human rights standards.

- Lack of knowledge of ECtHR case-law was confirmed in interviews with judges and prosecutors.

Training on ECtHR standards regarding the use of PTD should be organized for practitioners who apply for and decide on PTD.

Judicial practice in detention issues – Hungary

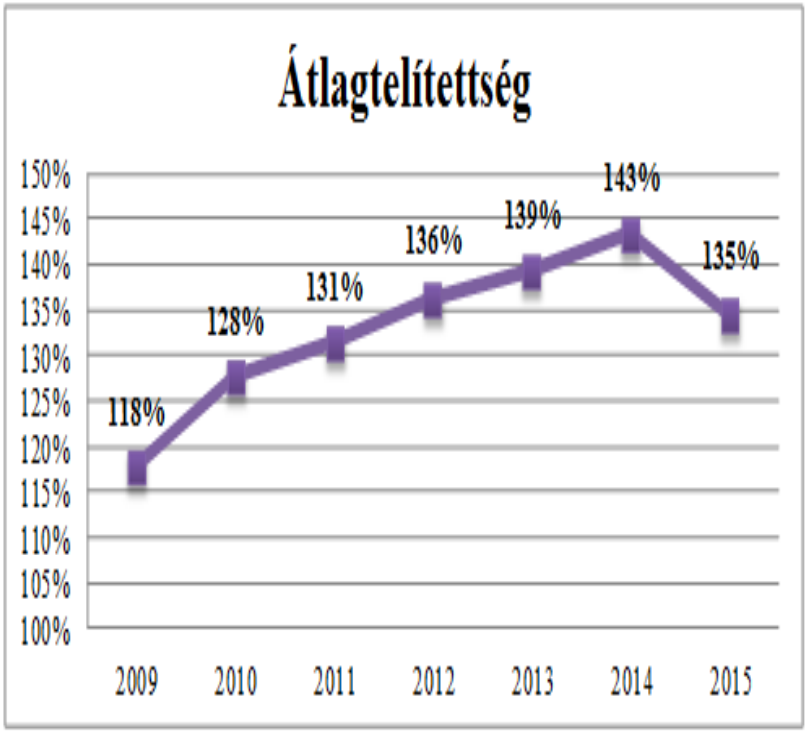
András Kádár
Hungarian Helsinki Committee

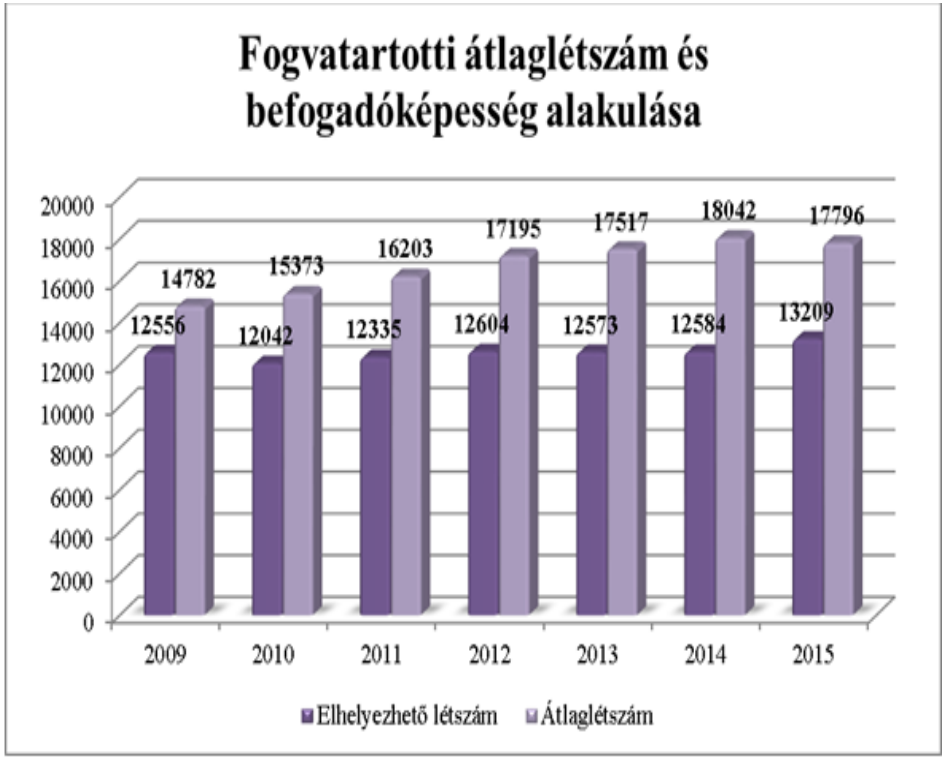
Co-funded by the Justice Programme of the European Union 2014-2020

Overcrowding

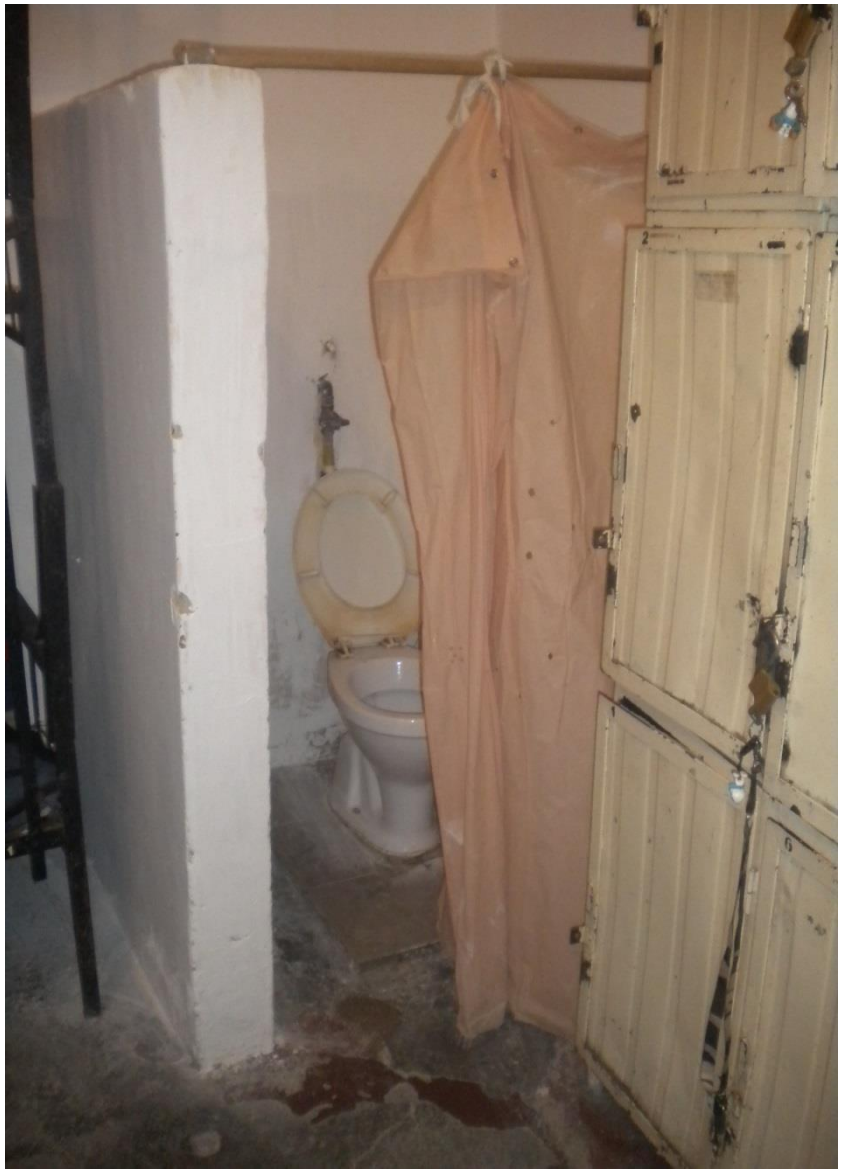
Situation in Hungary

Most severe systemic problem in the Hungarian penitentiary system, stemming from restrictive turn in HU criminal policy





Detrimental effects amplified by bad physical conditions and lack of out of cell time (PTD)



ECHR developments

Szél v. HU (Application no. 30221/06): submitted in 2006, decided in 2011: in the Hungarian prisons concerned the cramped conditions "*failed to respect basic human dignity and must therefore have been prejudicial to [the inmates'] physical and mental state*". Furthermore: "*mindful of the fact that the seriousness of the problem of overcrowding and of the resultant inadequate living and sanitary conditions […] has been acknowledged by the domestic authorities [...], the Court considers that an effective remedy responding to this issue could be offered by taking the necessary administrative and practical measures. In the Court's view, the authorities should react rapidly in order to secure appropriate conditions of detention for detainees*."

Further individual decisions: Kovács István Gábor v. HU, 2012 Hagyó v. HU, 2013, Fehér v, HU, 2013: no change in trends

ECHR developments II

Pilot decision – Varga and Others v. Hungary (10 March 2015): the limited personal space available to all six detainees in different penitentiaries, aggravated by a lack of privacy when using the lavatory, inadequate sleeping arrangements, insect infestation, poor ventilation and restrictions on showers or time spent away from their cells amounted to degrading treatment.

Cca. 450 applications pending at the time against Hungary: the breaches are not the consequence of isolated incidents; they originate in a widespread problem resulting from a malfunctioning of the Hungarian penitentiary system and insufficient safeguards against inhuman and degrading treatment: the problem is of recurrent and persistent nature.

HU is (i) to take steps to reduce overcrowding and (ii) to promptly put in place an effective remedy or combination of remedies, both preventive and compensatory, to guarantee genuinely effective redress for violations originating in prison overcrowding.

Domestic case law (background)

- Decree 6/1996 (VII. 12.) of the Minister of Justice:
  - before November 2010: 3 sq meter moving space shall be provided
  - after amendment of November 2010: shall be provided **if possible**
- Decision 32/2014. (XI. 3.) of the Constitutional Court: addition of „if possible" is unconstitutional, *pro futuro* abolishment of amendment (31 March 2015)
- Decree 16/2014. (XII. 19.) of the Minister of Justice (in effect from 1 January 2015): 3 sq meter moving space shall be provided
- Civil law sanctions of violation of inherent personal rights: objective (establishment of violation; banning from future violation; apology) and subjective (damages – dependant on culpability)
- No unity, but higher courts agree that damages may not be claimed from penitentiaries for overcrowding

Domestic case law II.

Pécs Court of Appeal, Pf. II. 20 390/2010/6. – published as a leading judgment (BDT2011. 2404)

- 13 months in 21.66 sq meter cell: 7-14 persons
- First instance court: HUF 200,000 (EUR 650)
- Court of appeal: the violation was caused by an external factor (overcrowding of the penitentiary system) beyond its control, therefore damages may not be claimed in the absence of culpability.

Domestic case law III.

Curia Pfv. IV.22.372/2011/9. (October 2012)

- Reference to ECHR case law: detention in a crowded cell not providing the legally required minimum space amounts to violation of human dignity.
- But: only objective sanctions are applicable, as the prison has a legal obligation to admit detainees whose incarceration is ordered, so no culpability.

Domestic case law IV.

Curia decision Pfv.IV.20.821/2012/10 (January 2013):

National Prison Administration (deciding on placement of detainees) is not at fault, the Hungarian State may not be sued (not involved in a direct legal relationship with the detained plaintiff: the fact that state bodies decide on the state budget does not create such a direct link).

The crowded nature of the cell and the lack of a partitioned toilette do not add to the inevitable suffering caused by incarceration to such an extent that substantiates the awarding of damages.

Domestic case law V

Metropolitan Court of Appeal, VI.Pf.20.701/2015/4 (November 2015)

- 4 months in PTD, cells with 2.06, 2.28 and 1.78 sq meter free moving space
- First instance court: penitentiary has two normative obligations (admission of inmates and provision of sufficient moving space) – it is free to decide which one it complies with, and if this is the case, it is culpable. The protection of fundamental rights enjoys priority over the obligation of admission.
- Reference to ECHR case law.
- Damages in the amount of HUF 1.2 million (EUR 3900).
- Second instance: obligation of admission prevails, but it is the prison's obligation to try to mitigate the consequences of overcrowding (more out of cell time, etc.). In this case the prison did not present any evidence that it has done so, so it is culpable. Sum of damages upheld.

Additional violations

No exemption if overcrowding results in the violation of other obligations of the penitentiary

Szeged Court if Appeal, Pf.I.20.372/2015/4 (October 2015)

- 240% overcrowding, vulnerable PTD inmate is placed together with convicted prisoners (violation of rules of separation) and raped by a cell mate who remained unknown
- First and second instance decision: prison may not refer to overcrowding and the obligation of admission to be exempted from culpability
- It is the staff's obligation to prevent intra inmate violence
- Separation rules are of guarantial nature with the exact purpose of preventing such violence, thus they must be abided under all circumstances.

Legislative steps needed

- Judicial practice is struggling with the issue
- ECHR requirement of putting in place an effective remedy has not been fulfilled yet.
- Possible solution: special tort responsibility (no requirement of culpability)
- Unreasonably long civil proceedings: already in place

The role of national courts in dealing with detention issues and improving conditions: The Netherlands

Dr. B.J.G. Leeuw | Strasbourg, February 25th 2016

Universiteit Leiden
The Netherlands

Co-funded by the Justice Programme of the European Union 2014-2020

Content of presentation

- Detention issues: role for national courts?
- Pre-trial Detention
- Influence of the ECHR: ‘Salduz’-jurisprudence and the right to access to a lawyer
- EAW and detention conditions in the issuing state

Detention issues: role for national courts?

- No (large) role for the national courts in substantive criminal procedures
- Some attention for detention issues in pre-trial detention procedures
- Rules regarding detention laid down in a special law separate from the Code on Criminal Procedure (*Penitentiaire Beginselenwet/Penitentiary Principles Act)*
- Supervision of detention conditions and complaint system for detainees is carried out by supervisory commissions (*Commissie van Toezicht*), appeal possible to the Council for the Administration of Criminal Justice and Protection of Juveniles (*Raad voor Strafrechtstoepassing en Jeugdbescherming*)

Pre-Trial Detention: main findings from of research

- Dutch procedure generally in line with European standards

- Substantive aspects of pre-trial detention decisions:
  - High amount of pre-trial detention orders
  - Reasoning of decisions is limited
  - Grounds for pre-trial detention are quickly accepted

- Alternatives to pre-trial detention could be used more in practice

- Regular review of pre-trial detention takes place

Grounds for pre-trial detention (art. 67a CCP)

- Suspicion of an offence that carries a maximum sentence of at least twelve years imprisonment and that has shocked the legal order;

- Strong suspicion that the suspect will commit another offence that (a) carries a minimum sentence of six years, (b) or an offence that threatens the health or safety of persons or property if released;

- A suspicion that a suspect has committed one of the listed offences in the article (mainly assault, theft etc.) while having a prior conviction for a similar offence in the previous five years;

- Risk that the suspect will harm the investigation if released;

- Suspicion of an act of violence in a public space or against public servants (for instance police, ambulance staff etc.) while this offence will be tried within a period of seventeen days and fifteen hours after arrest (i.e. before the first phase of the pre-trial detention, the *bewaring*, will expire).

Influence of ECHR: access to a lawyer as an example

- Article 120 Constitution: The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.

- Article 93 Constitution: 'Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published'.

- Article 94 Constitution: 'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons'

‘Salduz’-jurisprudence and the right to access to a lawyer: reaction in the Netherlands

- Supreme Court, 30 June 2009
  - Advocate-General: Static or dynamic interpretation of the ECHR
  - Supreme Court: No right to have a lawyer present during questioning, contact before the first questioning is sufficient (mainly by phone)
- Supreme Court, 1 April 2014
  - Advocate-General Spronken in Nov 2013: Suspect has right to have lawyer present during questioning
  - SC: Granting the lawyer access to the questioning of the suspect goes beyond the judicial powers of the Court
  - SC: No general conclusion can be drawn from the Strasbourg case law regarding the extent of the right to access to a lawyer

Salduz (continued)

• Supreme Court 22 December 2015

- Advocate-General Knigge: preliminary questions to Court of Justice

- SC: 1) Lawyer can be present during questioning from March 1st 2016
2) Not necessarily exclusion of evidence if access is not granted

EAW and detention conditions in the issuing state

- District Court of Amsterdam, 17 November 2015
  - EAW from Hungary
    - Drug offence
    - Suspect is a Dutch national, Hungary has given guarantee that suspect can serve his sentence in the Netherlands (if convicted)
  - Defence lawyer made reference to preliminary questions asked by a German Court to the Court of Justice regarding detention conditions in Hungary
  - Court refuses extradition until the Hungarian authorities provide additional information on the facility where the suspect will be detained once he is extradited

- Questions??

- b.j.g.leeuw@law.leidenuniv.nl

ERA – Improving conditions related to detention

The role of the ECHR, the Strasbourg court and national courts

Council Framework Decisions 2009/829/JHA, 2008/909/JHA and 2008/947/JHA and their implementation: state of play and overcoming legal and practical problems

26 February 2016, Strasbourg

Co-funded by the Justice
Programme of the European Union 2014-2020

Michaël Meysman

t. +32 9 264 69 48
f. +32 9 264 69 71
Michael.Meysman@UGent.be

UNIVERSITEIT GENT

IRCP Institute for International Research on Criminal Policy
Ghent University

829 – 947 – 909: State of play

Implementation of the Framework Decisions:

[Update Commission Report 2014 State of Play: European Judicial Network, Judicial Library (11/02/2016)]

Implementation status:

- FD 829 (Supervision): 22 MS
- FD 947 (Probation): 25 MS
- FD 909 (prisoners): 26 MS

} Various belated implementations by the MS

Usage (Europris/European Commission expert groups, previous ERA conf.):

- FD 829: Little to none (ERA Trier, 16 October 2015: One case pending).
- FD 947: Limited, but increasing (following priority to FD 909).
- FD 909 : Steady and increasing usage (Europris Expert Groups 909)

Michaël Meysman
+32 9 264 69 48
Michael.Meysman@UGent.be

829 – 947 – 909: State of play

- **FD 829 (supervision)**: Alternative to provisional detention (art.1) ⇔ EAW procedures. 'Ultimum remedium' of detention (see ECtHR Litwa v. Poland, 2000)
- But ultimately unwanted & unused
- Future: Uncertain, also in light of European Investigation Order (ERA Trier 16 October 2015)
- **FD 947 (probation):** Alternative to post-trial detention with a view of facilitating social rehabilitation (art. 1) ⇔ FD 909
- Relation FD 909's 'measures involving the deprivation of liberty' & FD 947's 'alternative sanctions': FD 947 Articles 1.3(a) and 2.4: not applicable for the execution of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty which fall within the scope of FD 909 **+** definition of an alternative sanction is limited to a sanction, other than a custodial sentence, a measure involving deprivation of liberty or a financial penalty, imposing an obligation or instruction.
- However: When failed to comply with the obligations and/or conditions imposed following a probation measure or alternative sanction, and the IMS imposes a detention sentence on the individual, with a view of its execution in the EMS: FD 909 is needed. Under FD 947 no legal basis exists to execute a (foreign) prison sentence.

Michaël Meysman
+32 9 264 69 48
Michael.Meysman@UGent.be

Case study: FD 909

FD 909: Post-trial detention and measures deprivating liberty

Application of mutual recognition to sentences deprivating liberty in the EU, various issues:

- Material detention conditions
- Sentence compatibility
- Sentence execution modalities
- Consent
- Implementation modalities
- Social rehabilitation

IRCP Study 2011
+ EC 2014
+ ECtHR/CJEU case law
+ follow up (Europris, Handbook)

Michaël Meysman
+32 9 264 69 48
Michael.Meysman@UGent.be

Mutual recognition. Brief reminder

- Tampere (1999)
  - Enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate co-operation between authorities *and* the judicial protection of individual rights (Milestone 33)
  - MR presupposes mutual trust between MS vis-à-vis their criminal justice systems
  - Based on a shared commitment to …"respect for human rights, fundamental freedoms and the rule of law"

- MR Implementation Programme (2000)
  - "Mutual recognition is designed to strengthen cooperation between Member States but also to enhance the protection of individual rights. It can ease the process of rehabilitating offenders. Moreover, by ensuring that a ruling delivered in one Member State is not open to challenge in another, the mutual recognition of decisions contributes to legal certainty in the European Union."

Michaël Meysman
+32 9 264 69 48
Michael.Meysman@UGent.be

Transferring sentenced persons in Europe: predecessors and FD 909

- Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983
  => Voluntary (art. 3, 1, f.) exequatur, consent
- Additional Protocol to this Convention of 18 December 1997
  => Consent no longer necessary when transfer was sought to a State to which the person had fled (art. 2.3) or
  => when the sentenced person was subject to an expulsion or deportation order to the requested State (art. 3.1)
- Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (FD 909)
  => Since its entry into force, this Framework Decision replaces the CoE Convention and its Additional Protocol, but does not replace multilateral and bilateral agreements where they allow for an enhanced transfer of prisoners or facilitation of the enforcement of sentences (art. 26)

Michaël Meysman
+32 9 264 69 48
Michael.Meysman@UGent.be

FD 909: Key Concepts

- **Voluntary to obligatory:** The right to refuse or agree to a transfer is greatly diminished by prescribing only limited grounds for non-recognition that may be invoked by the executing State when the latter is the Member State of nationality of the sentenced person **(art. 9).**
- **Optional refusal grounds**: All refusal grounds under **(art. 9)** are optional **(⇔ EAW**)
- **Triviality of consent**: FD 909 (further) reduces the requisite of consent of the sentenced person. Already under the Additional Protocol this consent was no longer necessary when transfer was sought to a State to which the person had fled, or when the sentenced person was subject to an expulsion or deportation order to the requested State. Now, a third exemption is provided where the transfer is sought to the Member State of nationality in which the sentenced person lives **(art. 6.2(a))**
- **Double criminality:** The traditional double criminality requirement is omitted for a(n) (expandable) list of 32 offences **(art. 7)**
- **Continued enforcement**: Restricted adaptation options for the executing State **(art. 8)** while allowing the issuing State the final say regarding adaption and the sentence execution modalities **(art. 12, 13 & 17)**
- **Taut timeframe:** Finally, the instrument prescribes a clear and taut timeframe for the entire procedure **(art. 12)**

- **Purpose: The instrument explicitly declares (Article 3.1) that the purpose of the transfer should be the facilitation of the social rehabilitation of the sentenced person.** Therefore, no transfer may proceed unconditionally and it is the continued obligation of the Member States to ensure that the transfer, recognition and enforcement of the sentence will facilitate the social rehabilitation of the sentenced person.

- **Moreover:** Framework Decision respects fundamental rights, observes the principles recognized by Article 6 of the Treaty on the European Union (TEU) and reflected by the Charter of Fundamental Rights of the European Union **(Recital 13)**. Nothing in the Framework Decision shall have the effect of modifying the obligation to respect these fundamental rights and fundamental legal principles **(art. 3, 4.)**

Michaël Meysman
+32 9 264 69 48
Michael.Meysman@UGent.be

IRCP EU-wide Study 2011

Study results. Identified problems:

- Various and often substandard material detention conditions (I)
- Significant variations in MS sentence adaptation
- Significant variation in sentence execution modalities & early/conditional release, earned remission and suspension of sentence provisions (II)
- Poor procedural status (consent, legal representation & legal review) in transfer procedures (III)
- Knowledge and (access to) information for MS *and* prisoner regarding:
    - FD Custodial
    - Foreign material detention conditions
    - Foreign law and practices

In case there is a vast variety between MS' correctional and sentence execution systems as well as material detention conditions, the question should be raised whether or not a pure form of MR could and should work in everyday practice, especially in light of the importance attached to the social rehabilitation of the offender.

Michaël Meysman
+32 9 264 69 48
Michael.Meysman@UGent.be

Material detention conditions: Belgium and the systemic deficiency threshold?

- Belgium: 22 ECtHR convictions regarding the treatment of mentally ill offenders in detention conditions (art. 3 & 5 ECHR).
- 20 Convictions since 2013 (L.B. v. Belgium, definitive ruling) alone.
- ECtHR: clear and continuous reference to structural, long standing and severe issues regarding Belgian internment.
- Vander Velde v. Belgium & the Netherlands: Breach of art. 5 ECHR due to surrender of Belgian internee following Belgian EAW.
- FD 909 applicable? "Any judgment, following a criminal proceeding on account of a criminal offence, and resulting in a deprivation of liberty, may be forwarded under the Framework Decision." (art. 1 (a) & (b))
- ECtHR: M.S.S. v. Belgium & Greece (2011), Tarakhel v. Switzerland (2014).
- CJEU: C-411/10 and C-493/10, N.S. v. Secretary of State for the Home Department **&** CJEU: C-394/12, Shamso Abdullahi v. Bundesasylamt

"Systemic deficiencies doctrine"

Michaël Meysman
+32 9 264 69 48
Michael.Meysman@UGent.be

Example material detention conditions: Belgium and the systemic deficiency threshold?

- Research parallel with asylum procedures (MSS., Tarakhel, N.s., Shamso)
- Non-consenting asylum seeking person to be returned (Dublin) = non-consenting sentenced person to be transfered (909)?
- Why? Because of current wantage of *defining* CJEU ruling vis-à-vis MR & FR (cfr. Radu case) => Awaiting result in CJEU Aranyosi (C-404/15) Hearing 15/02/2016: joined cases with Caldararu (c-659/15).
- What will the Court do?
  - MR/mutual trust (Melloni, Akerberg Fransson, Opinion 2/13)

  or

  - Striking a fair balance (hearing 15/02, Commission)

Michaël Meysman
+32 9 264 69 48
Michael.Meysman@UGent.be

Identified problems: MS legal systems variety

- Sentence incompatibility
  - Basic principle based on mutual recognition: No adaptation of the sentence/sanction (art. 8.1) => "**Continued enforcement**"
  - However: Adaptation of the sentence by executing MS where incompatible in terms of duration and/or nature when irreconcilable with National law (art. 8.2 & 8.3)
  - Safety threshold: adapted sentence may not aggravate o.s. (art. 8.4) **(assessment?)**
  - Information exchange vis-à-vis sentence adaptation (art. 12.1) and IMS withdrawal option (art. 13)

- Significant variations in MS' sentence execution modalities & early/conditional release, earned remission and suspension of sentence provisions

  => Law governing enforcement: executing MS (art. 17.1)

  => However: Issuing state has withdrawal option (art. 17.3) BUT before execution has commenced.

  => Ambiguity/uncertainty regarding the information exchange (art. 13 & 17.3)

Michaël Meysman
+32 9 264 69 48
Michael.Meysman@UGent.be

Identified Problems: Compulsory procedure

A. Poor procedural status of sentenced person

- Triviality of consent (update: Commission Report 2014)
- Consent not required in art. 6.2 (a-c)
- However, MS equivocal stance regarding sentenced person's opinion
- **Article 6.3 deserves specific attention:** when the sentenced person is still in the issuing State, her or she must be given the opportunity to state his or her opinion orally or in writing.
  => This is of utmost importance, as this opinion needs to be taken into account by the competent authorities when assessing the facilitation of the social rehabilitation of the sentenced person, a substantial requirement under Art. 3,1. FD 909.
- Uninformed opinion
  => Acces and organisation of legal represenation (beyond 6.3)
  => Access to information regarding adaptation and execution modalities
- Ambiguity regarding the right to legal review
  => Follow-up EUROPRIS Expert Groups: Confirmed

B. Knowledge & information gap

- FD knowledge & info (Europris Expert Groups) => Improving.
- Knowledge & info on foreign law, practices & material detention conditions

Michaël Meysman
+32 9 264 69 48
Michael.Meysman@UGent.be

Implementation/interpretation/application issues

- Equivocal implementation/application/interpretation issues:

  => Sentence Adaptation ("Some Member States widened the possibilities of adaptation by adding additional conditions. This opens the possibility for the executing State to assess whether the sentence imposed in the issuing State corresponds to the sentence that would normally have been imposed for this offence in the executing State. This is contrary to the aims and spirit of the Framework Decisions." Com (2014) 57 final, part 4.2, 2nd §)

  => Refusal grounds ("Some Member States have not implemented all grounds for refusal as indicated in the Framework Decisions, others have added additional grounds,…,Implementing additional grounds for refusal and making them mandatory seem to be both contrary to the letter and spirit of the Framework Decisions" Ibid. part 4.4, 2nd & 3rd §§)

  => Consent ("From a preliminary analysis of the Member States' implementing legislation, it appears that it is not always expressly provided for that the person should be notified and that he should be given an opportunity to state his opinion, which needs to be taken into account." Ibid., part 4.1, 3rd §)

  => Translation & certificate issues (Europris 2015) (Article 23. 2)

Michaël Meysman
+32 9 264 69 48
Michael.Meysman@UGent.be

Example: Belgium & the Netherlands implementation laws. Refusal grounds

- Belgium: *Wet inzake de toepassing van het beginsel van wederzijdse erkenning op de vrijheidsbenemende straffen of maatregelen uitgesproken in een lidstaat van de Europese Unie* (15 May 2012)
- The Netherlands: *Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties (12 July 2012)*

- Both implementation laws have turned the optional refusal ground for the recognition and execution of a judicial decision when this judgment covers a measure of psychiatric and/or healthcare nature **(art. 9, 1, (k) FD 909)** into a mandatory refusal ground **(art. 12, 7° & art. 2:13)**

Michaël Meysman
+32 9 264 69 48
Michael.Meysman@UGent.be

Identified problems: Social rehabilitation core problem

Aforementioned knowledge & information crux

- MS failure to correctly interpret/apply the social rehabilitation purpose: “33% of the respondents indicated that they assumed that serving a sentence in the prisoner’s home state would automatically facilitate their social rehabilitation, rather than making this assessment on a case by case basis.” (IRCP Study 2011)
- EC 2014: Consent trivial, issues with social rehabilitation purpose.
- **FD 909 ambiguous:** Issuing State should satisfy itself that the facilitation of the person’s social rehabilitation will be achieved: Should take into account the person’s attachment to the executing State, whether he or she considers it the place of linguistic, cultural, social or economic and other links to the executing State **(Recital 9)**. This attachment is based on the sentenced person’s habitual residence and on elements such as family, social or professional ties **(recital 17)**. (Kozłowski C-66/08 & Wolzenburg C-123/08)
- **NO further clarification in the instrument** (and only preamble).

Michaël Meysman
+32 9 264 69 48
Michael.Meysman@UGent.be

Social rehabilitation: the ins and outs

Art. 4.2 requires that the forwarding of the judgment and the certificate may take place where the competent authority of the IMS– where appropriate after consultation with the competent authority of the EMS – is satisfied that the transfer and enforcement of the sentence by the EMS would serve the purpose of facilitating the social rehabilitation of the sentenced person.

Art. 4.4 states that the competent authority of the EMS may present a reasoned opinion to the competent authority of the IMS that the enforcement of the sentence would *not* serve the purpose of facilitating the social rehabilitation of the sentenced person.

EMS retains this option even in a situation where no consultation took place between the competent authorities**. Art. 4.4** determines that such an opinion may be presented without delay after the transmission of the judgment and the certificate.

Recital 10 preamble stipulates that such a reasoned opinion in itself does not constitute a ground for refusal based on social rehabilitation.

Art. 3 and 4.2: IMS has to examine the appropriateness of the sought transfer and satisfy itself that it facilitates social rehabilitation. Therefore, when confronted with the opinion that the enforcement of the sentence would fail to achieve this purpose, the competent authority of the IMS will have to consider this opinion and, should it wish to continue the proceedings, satisfy itself that, notwithstanding the arguments included in the opinion concerned, rehabilitation will be facilitated or enhanced after all, **which implies a convincing (counter) argumentation.**

Recital 10 also applies to the provisions of **Article 6.3** (consent) The opinion of the sentenced person cannot constitute a ground for refusal on social rehabilitation. BUT the opinion needs to be taken into account when assessing the facilitation of the social rehabilitation and the appropriateness of the transfer sought. Moreover, when the sentenced person has availed him or herself of the opportunity to state this opinion, a written record of this opinion shall be forwarded to the EMS so that it may be incorporated in the latter's own reasoned opinion regarding the rehabilitation purpose.

Different regime under **Art. 4.3 and 4.6.** (third member state)= mandatory consultation AND adoption of measures with the purpose to improve social rehabilitation => **ONLY in TMS situation (?)**

An important component of a person's social rehabilitation is the specificity of the sentence (or measure involving the deprivation of liberty) that has been imposed on him or her by the issuing State. Therefore, both under the regimes of optional and mandatory consultation, it is worthwhile to pay attention to the sentence adaptation **(art. 8)** and enforcement modalities **(art. 17)** that may arise under FD 909.

Michaël Meysman
+32 9 264 69 48
Michael.Meysman@UGent.be

Recommendations

Assuring social rehabilitation & individual rights

Necessity of creating a motivational duty for the issuing MS:

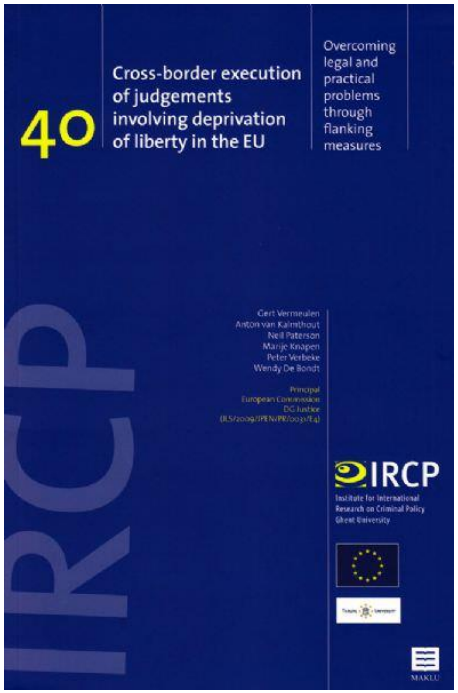
- Based on the issuing state's initiative and consecutive responsibility
- **Issuing state's 'duty to investigate':**
- Research parallel with asylum procedures (ECtHR MSS. v. Belgium & Greece/CJEU NS. Case law)
  => Non-consenting asylum seeking person to be returned (Dublin) = non-consenting sentenced person to be transfered (909)?
  => Why? Because of current wantage of *defining* CJEU ruling vis-à-vis MR & FR (cfr. Radu case)
  => But: 2015 preliminary question: C-404/15. Awaiting CJEU's judgment.
- **Issuing state's 'duty to motivate':** acilitated social rehabiliation not *a per se* assessment.

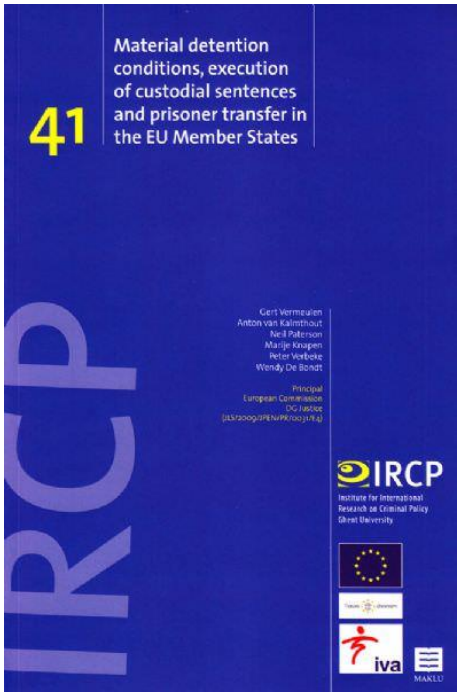
Feasible?

- **Parallel 'relatively easy' to make for fundamental rights**
  => ECtHR applicable, little debate on difference between accomodation (standards) in area of asylum & migration and transfer of measures deprivating liberty => Awaiting CJEU.
- **More difficult for social rehabilitation**
  => How do you define (proper) social rehabilitation (non binding legislative framework, limited case law, no international consensus)
  => And how do you measure an 'enhancement' (discussion between scholars, etc. on what rehabilitation should be and what it should achieve)

Michaël Meysman
+32 9 264 69 48
Michael.Meysman@UGent.be

Further information





European Commission:

Handbook on the Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

(Planned)

Michaël Meysman
+32 9 264 69 48
Michael.Meysman@UGent.be

Thank you

www.ircp.org

Contact

Michaël Meysman

t. +32 9 264 69 48
f. +32 9 264 69 71
Michael.Meysman@UGent.be

IRCP

Ghent University
Universiteitstraat 4
B – 9000 Ghent

UNIVERSITEIT GENT

IRCP Institute for International Research on Criminal Policy
Ghent University

European Arrest Warrant

David J Dickson,

Solicitor Advocate, Prosecutor, Edinburgh

Co-funded by the Justice

Programme of the European Union 2014-2020

Framework Decision: aims

- Preamble 6: “first concrete measure …implementing the principle of mutual recognition …the cornerstone of judicial co-operation.”
- Preamble 7: “replacing the system of multilateral extradition…”
- Preamble 10: “based on a high level of confidence between Member States”
- Preamble 12: “respects fundamental rights…”
- Implemented in terms of national law

Human Rights and the EAW

- Preamble 10: presumption of good faith
- Preamble 12 : ECHR and ChFR inherent in EAWFD
- Application in Member States national law
- Article 2/3/5
- prison conditions
- Assurances
- EAWFD Art 4(6) and 5(3)

Case law

- *Dzhaksybergenov v Ukraine* (12343/10) 11 January 2011 at [37]: the production of material, which disclosed a general problem concerning the observance of human rights in a particular country, did not, on its own, provide a basis for refusing extradition
- *Dzhurayev v Russia* (71386/10) 25 April 2013 at [160-165]: properly informed decision/ anxious scrutiny
- *Aranyosi* C-404/15 and *Cardararu* C-659/15 (CJEU: 15 February 2016)

Offences

- Accusation:
  - Framework list offence (Art 2.2): minimum of 3 years imprisonment;
  - Double criminality: minimum of 12 months imprisonment
- Conviction:
  - Framework list offence (Art 2.2): minimum of 3 years imprisonment
  - Double criminality: minimum of 4 months imprisonment to serve

Art 3

- EAWFD: Preamble 13
- Within an AFJS and free movement of judicial decisions – Preamble 5: tension?
- "the absolute nature of art.3 does not mean that any form of ill-treatment will act as a bar to removal from a Contracting State. As Lord Brown observed, this Court has repeatedly stated that the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other states. This being so, treatment which might violate art.3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of art.3 in an expulsion or extradition case. For example, a Contracting State's negligence in providing appropriate medical care within its jurisdiction has, on occasion, led the Court to find a violation of art.3 but such violations have not been so readily established in the extra-territorial context.": *Ahmad v UK Application* Nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09: 10 April 2012

Prison Conditions

- Council of Europe: Committee on Prevention of Torture
- CPT Handbook
- CPT/Inf (2015) 44: Living space per prisoner in prison establishments

Art 5

- Envisaged swift surrender
- Swift procedure on being surrendered
- Lengthy pre trial detention
- Radu C-396/11: 18 October 2012 (opinion of AG Sharpston)

Appropriate Use of the EAW

- (1) disproportionate use of the EAW for minor offences or in circumstances where less intrusive alternatives might be used, leading to unwarranted arrests and unjustified and excessive time spent in pre-trial detention and thus to disproportionate interference with the fundamental rights of suspects and accused persons as well as burdens on the resources of Member States:

- (2) while recognising the necessity of pre-trial detention under certain criteria, the absence of minimum standards on such detention including regular review, its use as a last resort and consideration of alternatives, coupled with the lack of proper assessment of whether the case is trial-ready, can lead to unjustified and excessive periods of suspects and accused persons in pre-trial detention;

- (3) the unacceptable conditions in a number of detention facilities across the Union and the impact that this has on the fundamental rights of the individuals concerned, in particular the right to protection against inhuman or degrading treatment or punishment pursuant to Article 3 of the ECHR and on the effectiveness and functioning of Union mutual recognition instruments; (2013/2109(INL)): EP Committee on Civil Liberties, Justice and Home Affairs

Extradition Act 2003 s12A

- (1) A person's extradition to a category 1 territory is barred by reason of absence of prosecution decision if (and only if)—
- (a) it appears to the appropriate judge that there are reasonable grounds for believing that—
- (i) the competent authorities in the category 1 territory have not made a decision to charge or have not made a decision to try (or have made neither of those decisions), and
- (ii) the person's absence from the category 1 territory is not the sole reason for that failure, and
- (b) those representing the category 1 territory do not prove that—
- (i) the competent authorities in the category 1 territory have made a decision to charge and a decision to try, or
- (ii) in a case where one of those decisions has not been made (or neither of them has been made), the person's absence from the category 1 territory is the sole reason for that failure.
- (2) In this section "to charge" and "to try", in relation to a person and an extradition offence, mean—
- (a) to charge the person with the offence in the category 1 territory, and
- (b) to try the person for the offence in the category 1 territory.

Assurances

- (1) whether the terms of the assurances have been disclosed to the Court;
- (2) whether the assurances are specific or are general and vague;
- (3) who has given the assurances and whether that person can bind the receiving state;
- (4) if the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them; whether the assurances concerns treatment which is legal or illegal in the receiving state;
- (6) whether they have been given by a Contracting State;
- (7) the length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances;
- (8) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers;
- (9) whether there is an effective system of protection against torture in the receiving state, including whether it is willing to co-operate with international monitoring mechanisms (including international human-rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible
- (10) whether the applicant has previously been ill-treated in the receiving state; and
- (11) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State : *Othman v United Kingdom (*ECtHR 8139/09- 17 January 2012) at paragraph 189

Co-funded by the Justice Programme of the European Union 2014-2020

THE EUROPEAN SUPERVISON ORDER: REDUCING THE USE OF THE PRE-TRIAL DETENTION

FD 2009/829/JHA on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention

PROF. IOAN DURNESCU
UNIVERSITY OF BUCHAREST

CONTEXT

- **Significant proportion of pre-trial** inmates in the EU prisons (flight risk):

E.g.

- Austria – 2010 – 22.5% of prison population - pre-trial
- Belgium – 2010 – 35.1%
- Luxembourg – 2010 – 43.9%

- Released **but required to stay** in the trial state.

MAIN CHARACTERISTICS

- Based on the principle of **mutual recognition** – mutual trust
- Main idea – the decision taken in the trial state shall be recognized and monitored in the ES. Double criminality check – not for 32 categories of crimes
- Decision forwarded to the ES where person **lawfully and ordinary resides** – more later
- 6 standard supervision measures & 5 opt in measures
- **Grounds for refusal** – limited – certificate incomplete, age, immunity, other measures, ne bis in idem, not possible to surrender if breach etc.

MORE CHARACTERISTICS

- Competent authority(es) – judicial but also non-judicial
- also central authority(es) – for administration
- See EJN – for this info: http://www.ejn-crimjust.europa.eu/ejn/
- In case of breach, the IS will take the subsequent decisions
- ES must surrender the person if an arrest warrant was issues – based on EAW FD
- Consultations – before, during and after forwarding and monitoring –a full article (22) !!!!
- Language and costs – ES
- Relationship with other agreements – yes but only if they enlarge or facilitate
- Implementation 1 December 2012.

AIM (S) & OBJECTIVES

- Enhancing the **protection of the general public**
- Enhancing the **right to liberty and the presumption of innocence**

- Promotion, when appropriate, the use of non-custodial measures
- Prevent discrimination in the pre-trial stage between residents and non-residents
- Better observe the principle of proportionality – not going beyond what is necessary to achieve its objective.
- Ensure the due course of justice – person available to stand trial
- Improve the protection of victims (?)

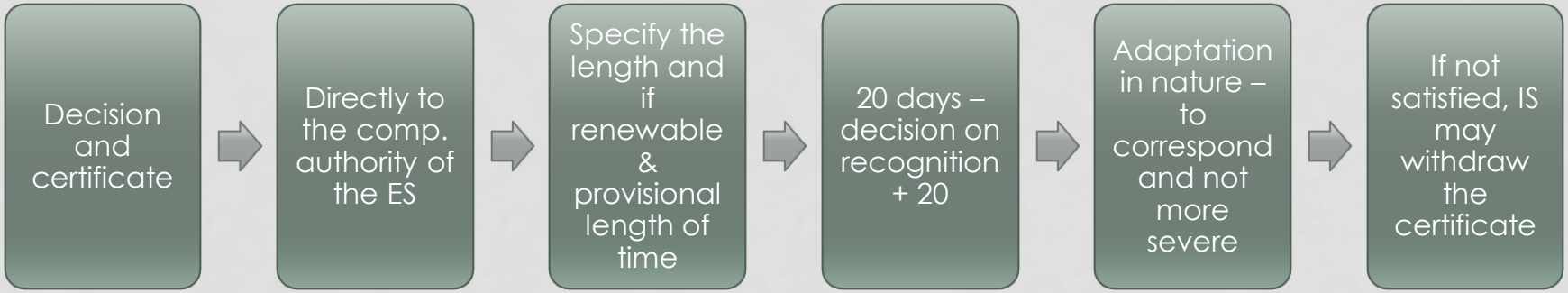
TYPES OF SUPERVISION MEASURES – ART. 8

- Standard measures (6):
  - obligation to inform of change of residence
  - obligation not to enter certain places
  - obligation to remain at a specified place
  - limitations on leaving the territory of the executing State
  - obligation to report to a specified authority (including probations services!)
  - obligation to avoid contact with specific persons in relation with the offence(s) allegedly committed
- Opt-in measures (5):
  - Not to engage in specific activities
  - Not to drive
  - Deposit a certain sum of money or other guarantees
  - Undergo therapeutic or addiction treatment
  - Avoid contact with specific objects

CRITERIA OF FORWARDING – ART. 9

- The decision may be forwarded to the comp authority of the state where the person is lawfully and ordinary residing
- Informed about the measures
- Consents to forwarding
- Other MS if that one consents

PROCEDURE


Decision and certificate
Directly to the comp. authority of the ES
Specify the length and if renewable & provisional length of time
20 days – decision on recognition + 20
Adaptation in nature – to correspond and not more severe
If not satisfied, IS may withdraw the certificate

COMPETENCE

- For monitoring – ES
- For all subsequent decisions (renewal, review, withdrawal, modification, EAW) – IS

- If modified, ES may:
  - Adapt the nature
  - Refuse the monitoring of the modified if grounds for refusal

OBLIGATIONS OF THE AUTHORITIES AND INFORMATION SHARING

- ES – may ask for more information about the person or whether the measures is still needed,
- ES – will notify about breach and other information needed to take subsequent decisions
- IS – estimates for how long the measure will last if renewed.
- IS – if any legal remedy has been introduced against the measure
- ES – will inform the IS of any change in residence, the maximum length of the measure in the ES, the person is not found, some measures cannot be monitored etc.

CASE STUDY

Mr. C. is working in Spain since the end of 2014. His family is still in Romania. He is now suspect of committing shoplifting in Spain. He wants to return to Romania during trial. He has major issues with his drug addiction. The judge in Spain wishes to allow Mr. C to return to Romania but he might have some questions:

1. What is the competent authority in Romania
2. If there are services available for drug addiction
3. If the person is expected to pay for them
4. If the person should consent to this form of treatment
5. Who will monitor these supervision measures in Romania
6. Are there videoconferencing facilities for court hearings in Romania?

POTENTIAL ISSUES

Most of them, typical for the beginning of implementation.

Most of them solved using CONSULTATION and EJN Website

Others:

- Therapeutic and addiction treatment – consent, payment
- The definition of the lawfully and ordinary residing
- Up-tariffing - a Spanish person might be on trial with no preventive measure

POSSIBLE SOLUTIONS

- EJN Website – 22 MS implemented, 3 MS in the process, 3 non- starters – and the comp authorities.
- Learn from the EAW experience
- Some projects:
  - Study on Financial and Other Impacts for an Impact Assessment of a Measure Covering Rights for Suspects and Accused Persons who are in Pre-Trial Detention and Covering Alternatives to Pre-Trial Detention – CSES
  - Towards pre-trial detention as ultimo ratio - ongoing
- CONSULTATION !!!!

Thank you !!

idurnescu@gmail.com
ioan.durnescu@sas.unibuc.ro