

# FAIR TRIALS INTERNATIONAL

## APPENDIX 2

### Pre-trial Detention Comparative Research

#### Thanks and acknowledgement

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This comparative research sets out the law and practice in relation to pre-trial detention in the following countries:

- Czech Republic;
- France;
- England and Wales
- Germany;
- Greece;
- Ireland;
- Italy;
- Luxembourg;
- the Netherlands;
- Poland;
- Portugal;
- Romania;
- Slovakia;
- Spain; and
- Sweden.

## Czech Republic

The maximum length of pre-trial detention which may be imposed depends upon the nature of the alleged offence, for the most serious offences the maximum is 16 months.<sup>1</sup> In 2011 there were approximately 2,500 pre-trial detainees in Czech prisons, who made up 11% of the total prison population.<sup>2</sup> In 2010, 22% of pre-trial detainees were foreign nationals.<sup>3</sup>

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**16 months**

*Maximum length of pre-trial detention in the Czech Republic*

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### ***Release pending trial: the law***

Pre-trial detention (or a supervision measure as an alternative to detention) may be imposed if there is a justified concern that:

- the defendant will flee or hide, so as to avoid criminal prosecution or punishment (in particular if it is difficult to immediately determine his identity, when he does not have permanent residence, or if he is facing a severe penalty);
- the defendant will influence the witnesses or co-accused that have not yet given their testimonies or otherwise frustrate the investigation of facts relevant for criminal prosecution; or
- the defendant will repeat the criminal activity for which he is being prosecuted, or complete the criminal offence which he has attempted, or commit a criminal offence that he has planned to commit.<sup>4</sup>

In deciding whether to release the defendant pending trial or remand him in custody, all circumstances of the case, the nature and seriousness of the criminal act and seriousness of the reasons for remanding the accused person in custody must be considered.<sup>5</sup> The judge must hear

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**22%**

*Percentage of pre-trial detainees in the Czech Republic who are foreign nationals*

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the detained person before he decides whether to impose pre-trial detention.<sup>6</sup> Proposals for an alternative to pre-trial detention may be filed by the defendant, his lawyer, a public interest group,<sup>7</sup> or a trustworthy person deemed able to positively influence the defendant's behaviour.

A defendant can be released rather than detained, where:

- a public interest group, or a trustworthy person, offers a guarantee for the future behaviour of the defendant (the judge must deem the guarantee to be sufficient and acceptable);

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<sup>1</sup> Section 71.8 of the Code of Criminal Procedure

<sup>2</sup> Source: Prison Service of the Czech Republic, Annual Report 2010

<sup>3</sup> Source: Prison Service of the Czech Republic, Annual Report 2010

<sup>4</sup> Section 67 of the Code of Criminal Procedure

<sup>5</sup> Section 72 of the Code of Criminal Procedure

<sup>6</sup> Section 77(2) of the Code of Criminal Procedure

<sup>7</sup> Defined by section 3(1) of the Code of Criminal Procedure as: trade unions, syndicates, and other civil societies except for political parties, charities, churches and other religious societies

- the defendant gives a written pledge to lead an orderly life, not commit any crime and comply with duties and restrictions imposed on him (the judge must deem the pledge to be sufficient and acceptable);
- the defendant will be supervised by a probation officer; or
- a surety of a designated amount is offered.<sup>8</sup>

Communications between a pre-trial detainee and his lawyer (both in person and in writing) may not be subjected to any monitoring by the authorities. The defendant has the right to file complaints to the Czech authorities.<sup>9</sup> The defendant is also entitled to speak to the director of the prison on demand. If the defendant has been held in pre-trial detention and the proceedings against him are discontinued, he is acquitted, or if the case is referred to another authority, then the defendant can claim compensation.<sup>10</sup>

### ***Release pending trial: in practice***

The ECtHR has found the Czech Republic in violation of Article 5(3) for imposing excessive periods of pre-trial detention when “special diligence was not displayed in the conduct of proceedings”.<sup>11</sup> In one case the applicant was held for four years on the grounds that he represented a flight risk because he was a foreign national, had family abroad and was facing a lengthy sentence.<sup>12</sup> The ECtHR held that these reasons could not justify the conclusion he would abscond and there had therefore been a violation of Article 5(3). Concerns about lengthy pre-trial detention were raised by the US State Department in its 2010 Human Rights Report on the Czech Republic.<sup>13</sup>

The CPT has reported that detainees in the Czech Republic are only provided with access to a lawyer once they have been held for some time, and that in some cases questioning takes place before a lawyer is present.<sup>14</sup> Overcrowding is another problem, with Czech prisons operating at 113% capacity.<sup>15</sup> This has a severe effect on conditions. The CPT reported that many of the cells in remand sections of prisons were dilapidated, with broken windows, peeling paint, broken furniture and poor toilet facilities.<sup>16</sup> Overcrowding meant that the ideal of 4m<sup>2</sup> of space per prisoner<sup>17</sup> was not being met in practice. In some prisons four pre-trial detainees had to share 9.6m<sup>2</sup>

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*Most serious pre-trial detention problem in the Czech Republic: lengthy detention and overcrowding*

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<sup>8</sup> Section 73 and s. 73a of the Code of Criminal Procedure

<sup>9</sup> Section 20 of the Detention Act

<sup>10</sup> Section 9 of the Liability of the State Act

<sup>11</sup> *Cesky v The Czech Republic* [2000] ECHR 214, Para 86, see also *Barfuss v The Czech Republic* [2000] ECHR 403

<sup>12</sup> *Tariq v the Czech Republic* [2006] ECHR 440

<sup>13</sup> US State Department, 2011 Human Rights Report: Czech Republic, p.6

<sup>14</sup> Report to the Government of the Czech Republic on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 7 April 2006, published 12 July 2007, p.17

<sup>15</sup> ICPS, 29 June 2011

<sup>16</sup> Report to the Government of the Czech Republic on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 7 April 2006, published 12 July 2007, p.34

<sup>17</sup> Introduced as an amendment to the Confinement Act and to the Remand Act in 2004

of space. Pre-trial detainees also faced limited recreational opportunities, and were often locked in their cells for up to 23 hours a day.<sup>18</sup>

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<sup>18</sup> Report to the Government of the Czech Republic on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 7 April 2006, published 12 July 2007, p.35

## England and Wales

Time limits have been established to limit the maximum length of pre-trial detention in England and Wales, which is set at 182 days.<sup>19</sup> However, this limit can be extended further if the prosecution can justify the time they are taking to bring the case to trial.<sup>20</sup> A 2009 report found that the average length of pre-trial detention was 13 weeks.<sup>21</sup> In 2011

there were approximately 12,266 pre-trial detainees in English and Welsh prisons, who made up 14% of the total prison population.<sup>22</sup> In 2009, 13% of pre-trial detainees were foreign nationals.<sup>23</sup>

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# 182 days

*Maximum length of pre-trial  
detention in England and Wales*

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### ***Release pending trial: the law***

Under English and Welsh law there is a presumption in favour of releasing the defendant pending trial.<sup>24</sup> This is subject to a number of exceptions,<sup>25</sup> including if the court is satisfied:

- that there are substantial grounds for believing that the defendant, if released (whether subject to conditions or not) would: fail to surrender to custody; commit an offence; or interfere with witnesses or otherwise obstruct the course of justice; or
- that the defendant should be kept in custody for his own protection.

(A short period of custodial remand may also be imposed if the court decides that there it has not been practicable to obtain sufficient information for the purpose of taking certain decisions required by the law on release pending trial.)

The legislation sets out a number of factors to be taken into account when the court takes the decision whether to refuse release,<sup>26</sup> including:

- the nature and seriousness of the offence;
- the character, antecedents, associations and community ties of the defendant;
- the defendant's record as respects the fulfilment of his obligations under previous grants of release; and
- any other factors considered to be relevant.

No conditions should be imposed on release pending trial unless it appears to the court that it is necessary to do so for the purpose of preventing the failure of the defendant to surrender to custody, the commission of an offence while released, the interference with witnesses or obstruction of the course of justice.<sup>27</sup> The following supervision measures may be imposed:

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<sup>19</sup> Prosecution of Offences (Custody Time Limits) Regulations 1987 (SI 1987/299)

<sup>20</sup> Section 22(3) of the Prosecution of Offences Act 1985

<sup>21</sup> Short Study on Women Offenders, Ministry of Justice and Cabinet Office Social Exclusion Task Force, May 2009, p.7

<sup>22</sup> Source: ICPS, 29 July 2011

<sup>23</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I

<sup>24</sup> Section 4 of the Bail Act 1976

<sup>25</sup> Set out in Schedule 1 of the Bail Act 1976

<sup>26</sup> Set out in Schedule 1 of the Bail Act 1976

<sup>27</sup> Schedule 1 of the Bail Act 1976

- an order requiring the accused person to inform the competent authority of any change of residence;
- an order that the accused person not enter certain localities, places or defined areas;
- an order that the accused person remain at a specified place during specified times;
- an order limiting the right of the accused person to leave the UK;
- a requirement to report at specified times to a specific authority;
- an obligation to avoid contact with specific persons in relation to the alleged offence;
- an obligation not to engage in specified activities relating to the alleged offence, including work in a specified profession or employment;
- an obligation not to drive a vehicle;
- an obligation to provide a security or surety to the court;
- an obligation to undergo therapeutic treatment or treatment for addiction;
- an obligation to avoid contact with specific objects relating to the alleged offence;
- an obligation to wear an electronic tag; and
- an obligation to surrender travel documents (e.g. passport, ID card) and not to apply for any international travel documents.

Pre-trial detainees should be out of contact with convicted prisoners as far as reasonably possible, unless the pre-trial detainee has consented to share accommodation and participate in activities with convicted prisoners.<sup>28</sup> However, under no circumstances should an untried prisoner be required to share a cell with a convicted prisoner.<sup>29</sup>

While in pre-trial detention a defendant should have the right to communicate with a lawyer, the right to an interpreter and translation of documents, and the right to view codes of practice governing detainee rights.

English and Welsh law provides that, in certain circumstances, where a person has been convicted of a criminal offence and the conviction has been reversed or the person has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice.<sup>30</sup>

### ***Release pending trial: in practice***

The UK's pre-trial detention regime is rarely found to be in violation of the ECHR,<sup>31</sup> although many Article 5 findings against the UK stem from legislation<sup>32</sup> which limits the possibility of release for defendants who have previously been convicted of serious offences such as murder, manslaughter and rape.<sup>33</sup> The UK was also found to have breached Article 5(3) and

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**13%**

*Percentage of pre-trial detainees in England and Wales who are foreign nationals*

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<sup>28</sup> Section 7(2) of the Prison Rules 1999

<sup>29</sup> Ibid.

<sup>30</sup> Section 133 of the Criminal Justice Act 1988

<sup>31</sup> From 2006 to 2010 the UK has been found to be in breach of Article 5 only eight times, source: European Court of Human Rights: statistical information

<sup>32</sup> Section 25 Criminal Justice and Public Order Act 1994

<sup>33</sup> See, for example, *Caballero v UK* [2000] ECHR 53

5(5) in a case where an applicant was held for six days before being brought before a judge.<sup>34</sup>

Defence lawyers and non-national detainees complain of discrimination against foreign defendants in pre-trial detention hearings, with courts deeming them a flight risk despite close ties to the UK.<sup>35</sup> The cursory nature of pre-trial detention hearings was criticised by Lord Justice Auld in his 2001 report on the criminal courts of England and Wales, which found that the average hearing lasted six minutes.<sup>36</sup>

Overcrowding is also a problem, with the prison population rising significantly over the past ten years; from 1995 to 2009 prison rates have risen by 32,500 (66%).<sup>37</sup> This overcrowding has meant that the statutory requirement that remand prisoners are not placed in cells with convicted prisoners has become impractical and is often not observed in practice.<sup>38</sup> In its 2009 report on the UK, the CPT found that 87 out of 142 detention institutions were operating above “certified normal accommodation.”<sup>39</sup> Recent inspections at Wandsworth prison in South London have noted numerous failings, with the Inspector of Prisons stating that conditions were “demeaning, unsafe and fell below what could be classed as decent.”<sup>40</sup> One pre-trial detainee held for three months reported that he has not once had access to a shower.<sup>41</sup>

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*Most serious pre-trial detention problem in the UK: overcrowding*

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Following the widespread riots in England in August 2011, overcrowding in the prison estate has been exacerbated, with the total number of prisoners reaching a record high of 87,120.<sup>42</sup> This is perhaps unsurprising given that courts have handed down sentences which are 25% longer than normal and many suspected offenders have been denied release pending trial.<sup>43</sup> 70% of defendants have been remanded in custody to await Crown Court trial, compared to a normal rate of 2%.<sup>44</sup>

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<sup>34</sup> *O'Hara v UK* [2001] ECHR 598

<sup>35</sup> FTI prison visit, July 2011

<sup>36</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.949

<sup>37</sup> Story of the prison population 1995-2009 England and Wales: Ministry of Justice statistics bulletin, 31 July 2009, p.2

<sup>38</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009 p.954

<sup>39</sup> Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 November to 1 December 2008, 8 December 2009, p.20

<sup>40</sup> Report on an unannounced full follow-up inspection of HMP Wandsworth, 28 February – 4 March 2011, p.6

<sup>41</sup> Ibid p.62

<sup>42</sup> BBC News, Prison numbers in England and Wales reach record high, 16 September 2011

<sup>43</sup> *The Guardian*, Revealed: the full picture of sentences handed down to rioters, 18 August 2011

<sup>44</sup> Ibid.

## France

In principle, the length of the pre-trial detention in France must be "reasonable", given the seriousness of the offence and the complexity of the investigations.<sup>45</sup> The maximum lengths of pre-trial detention in France depend upon the maximum penalty the defendant would face if convicted and range from four months to four years.<sup>46</sup> The average length of pre-trial detention in 2005 was almost 9 months.<sup>47</sup> In 2011 there were approximately 16,007 pre-trial detainees in French prisons, who made up 24% of the total prison population.<sup>48</sup>

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**4 years**

*Maximum length of pre-trial  
detention in France*

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### ***Release pending trial: the law***

Pre-trial detention can only be imposed if the defendant is charged with an offence which is punishable by imprisonment for a minimum term of three years, and if alternative supervision measures are inadequate to fulfil the following objectives:<sup>49</sup>

- preserve evidence;
- prevent interference with victims or witnesses;
- prevent contact between the accused person and his accomplices;
- protect the accused person;
- ensure that the accused person remains at the disposal of the court;
- stop the offence or prevent re-offending; and
- put an end to exceptional disruption of the "ordre publique" due to the seriousness of the offence and of the damage caused.

The accused must be present and represented by a lawyer at the first hearing relating to pre-trial detention,<sup>50</sup> and at each subsequent hearing on the extension of pre-trial detention.<sup>51</sup> Requests for release or alternatives to detention can be submitted at any time by the accused person and his lawyer.<sup>52</sup> They can also be requested by the Public Prosecutor or ordered by the judge.<sup>53</sup>

The following are available under French law as alternatives to pre-trial detention:

- an order requiring the accused person to inform the competent authority of any change of residence;<sup>54</sup>
- an order that the accused person not enter certain localities, places or defined areas;<sup>55</sup>

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<sup>45</sup> Article 144-1 of the Code of Criminal Procedure

<sup>46</sup> Articles 145-1, 145-2 and 145-3 of the Code of Criminal Procedure

<sup>47</sup> Monitoring Committee of pre-trial detention (*Commission de suivi de la detention provisoire*) Report 2007, p.2

<sup>48</sup> Source: ICPS, 1 January 2011

<sup>49</sup> Article 144 of the Code of Criminal Procedure

<sup>50</sup> Article 145 of the Code of Criminal Procedure

<sup>51</sup> Article 145-1 of the Code of Criminal Procedure

<sup>52</sup> Articles 148 and 148-1 of the Code of Criminal Procedure

<sup>53</sup> Article 147 of the Code of Criminal Procedure

<sup>54</sup> Article 138, 4° of the Code of Criminal Procedure

<sup>55</sup> Article 138, 1° and 3° of the Code of Criminal Procedure



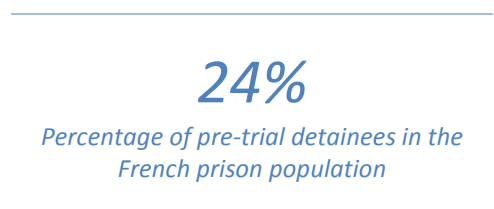
- an order that the accused person remain at a specified place during specified times;<sup>56</sup>
- an order limiting the right of the accused person to leave France (passports can be confiscated if the defendant poses a flight risk);<sup>57</sup>
- a requirement to report at specified times to a specific authority;<sup>58</sup>
- an obligation to avoid contact with specific persons in relation to the alleged offence;<sup>59</sup>
- an obligation not to engage in specified activities relating to the alleged offence, including work in a specified profession or employment;<sup>60</sup>
- an obligation not to drive a vehicle;<sup>61</sup>
- an obligation to deposit money as a guarantee (the amount depends on the financial resources of the suspect);<sup>62</sup>
- an obligation to undergo therapeutic treatment or treatment for addiction;<sup>63</sup>
- a restriction on the possession of weapons,<sup>64</sup> and
- electronic tagging and house arrest.<sup>65</sup>

If an accused person breaches the terms of one of these alternatives to pre-trial detention the judge has discretion to order the pre-trial detention of the person.<sup>66</sup> Pre-trial detainees are held in a *maison d'arrêt*, a prison specially designed for people awaiting trial or people sentenced to terms of imprisonment of less than one year.<sup>67</sup> A person who has served time in pre-trial detention and is finally acquitted has the right to be compensated to the level of his material losses.<sup>68</sup>

### ***Release pending trial: in practice***

The ECtHR has found France in breach of Article 5(3) for imposing pre-trial detention lasting six years.<sup>69</sup> Although the reasons for imposing the detention were valid, the court found that such a long period could not be justified by the ordinary delays in trial preparation. France has also been

found in violation of Article 5(3) for imposing pre-trial detention for four and a half years<sup>70</sup> and almost three years.<sup>71</sup> In the latter case the ECtHR noted that the reasons for imposing pre-trial detention had initially been valid but had ceased to be relevant over time. The CPT has



<sup>56</sup> Article 138, 2° of the Code of Criminal Procedure  
<sup>57</sup> Article 138, 1° and 7° of the Code of Criminal Procedure  
<sup>58</sup> Article 138, 5° of the Code of Criminal Procedure  
<sup>59</sup> Article 138, 9° of the Code of Criminal Procedure  
<sup>60</sup> Article 138, 12° of the Code of Criminal Procedure  
<sup>61</sup> Article 138, 8° of the Code of Criminal Procedure  
<sup>62</sup> Article 138, 11° and 15° of the Code of Criminal Procedure  
<sup>63</sup> Article 138, 10° of the Code of Criminal Procedure  
<sup>64</sup> Article 138, 14° of the Code of Criminal Procedure  
<sup>65</sup> Article 142-5 of the Code of Criminal Procedure  
<sup>66</sup> Article 141-2 of the Code of Criminal Procedure  
<sup>67</sup> Article 714 of the Code of Criminal Procedure  
<sup>68</sup> Articles 149 and following of the Code of Criminal Procedure  
<sup>69</sup> *Naudo and Maloum v France* [2011] ECHR 1260  
<sup>70</sup> *Guarrigenc v France* (App no 21148/02) 10 July 2008  
<sup>71</sup> *Gérard Bernard v France* (App no 27678/02) 8 October 2009

criticised French prison conditions, citing unhygienic conditions,<sup>72</sup> physical abuse by prison staff,<sup>73</sup> and inadequate cell size<sup>74</sup> as particular problems.

Decisions on pre-trial detention were formerly taken by the investigating judge in the case (this is now the role of the specialised Liberty and Security Judge). Research conducted between 1997 and 1999 showed that the decision to order remand was made jointly by the prosecutor and the investigative judge without the involvement of defence counsel prior to the detention hearing.<sup>75</sup> Concerns have been raised that this situation will persist despite the introduction of the Liberty and Security Judge, who tends to have been trained in the same institutions and has close professional contacts with investigative judges and prosecutors.<sup>76</sup>

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*Most serious pre-trial detention problem in France: lengthy pre-trial detention periods*

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<sup>72</sup> Report to the French Government on the visit to France carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 September to 9 October 2006, 15 December 2007, p.17

<sup>73</sup> Ibid. p.12

<sup>74</sup> Ibid. p.19

<sup>75</sup> French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France, Jacqueline Hodgson, 2005, p.215

<sup>76</sup> Effective Criminal defence in Europe, Cape et al, 2010, p.230, also see: French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France, Jacqueline Hodgson, 2005, p.215

## Germany

German law states that normally pre-trial detention should not exceed six months.<sup>77</sup> However, this can be extended, where “the particular difficulty or the unusual extent of the investigation or another important reason do not yet admit the pronouncement of judgment and justify continuation of remand detention.”<sup>78</sup> In 2010 there were

approximately 10,755 pre-trial detainees in German prisons, who made up 16% of the total prison population.<sup>79</sup> In 2009, 44% of pre-trial detainees were foreign nationals.<sup>80</sup>

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# 6 months

*Maximum length of pre-trial detention in Germany (subject to extension)*

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### ***Release pending trial: in practice***

The judge must take the decision whether to release the defendant pending trial taking into account a range of factors including: the risk the person will flee from justice; the likelihood that the person will re-offend unless held in custody; and the risk a person will interfere with witnesses and evidence. One of these factors must be present in order to remand someone in custody; however a lower threshold applies if the defendant is accused of a terrorist offence.<sup>81</sup>

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# 44%

*Percentage of pre-trial detainees in German who are foreign nationals*

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Alternatives to pre-trial detention include:

- an order requiring the defendant to inform the competent authority of any change of residence;
- an order that the accused person not enter certain localities, places or defined areas;
- an order that the accused person remain at a specified place during specified times;
- a restriction on the defendant leaving Germany;
- a requirement to report at specified times to a police station;
- an obligation not to engage in specified activities relating to the alleged offence, including work in a specified profession or employment;
- an obligation to deposit money as a guarantee,<sup>82</sup>
- an obligation to undergo therapeutic treatment or treatment for addiction;
- an obligation to avoid contact with specific objects relating to the alleged offence;
- an order to surrender passport and identity cards;
- an order to freeze the defendant’s bank account; or
- house arrest<sup>83</sup> and electronic tagging (rarely used).

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<sup>77</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.409

<sup>78</sup> Ibid. p.417

<sup>79</sup> Source: ICPS, 30 November 2010

<sup>80</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I

<sup>81</sup> Sections 129a, 129b, section 112 Para 3 StPO, see also the 1965 decision of the German Federal Constitutional Court

<sup>82</sup> Section 116 Para 1 no 4 StPO

<sup>83</sup> Section 116 Para 1 no 3 StPO

The defendant and his lawyer may apply at any time for a review of the decision to remand in custody<sup>84</sup> and propose an alternative to detention. However, once one review has found the detention justified, the defendant has to wait two months before requesting a new hearing.<sup>85</sup> In any event the prosecutor has to check continuously whether the legal requirements for pre-trial detention still exist.

Remand prisoners should be kept separate from convicted prisoners unless exceptional circumstances apply. Untried prisoners should only be subject to restrictions which are necessary to serve the purpose of the detention or to maintain the order of the prison. Pre-trial detainees have to be allowed legal visits and communication with a lawyer must remain confidential. Since 2010 it has been a mandatory rule that pre-trial detainees have the right to a public defender.<sup>86</sup>

If the defendant is eventually acquitted he is entitled to compensation to the value of €25 for each day that he was held in pre-trial detention.<sup>87</sup> However, the defendant will not be entitled to compensation if he has contributed to his detention in a grossly negligent or an intentional way.

### ***Release pending trial: the law***

Lengthy periods of pre-trial detention from three years to five and a half years<sup>88</sup> have been found by the ECtHR to comply with the ECHR, as the German courts had provided adequate reasons for imposing detention and had dealt with the cases expeditiously. Where these elements are absent, however, the ECtHR has found Germany in breach of Article 5(3).<sup>89</sup> German law has recently been reformed in light of ECtHR findings that denial of access to the case file in sensitive cases resulted in unjustifiable restrictions on the defendant.<sup>90</sup>

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*Most serious pre-trial detention problem in Germany: some cases of excessive pre-trial detention*

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Concerns have been raised by German defence lawyers that pre-trial detention is often used as a measure to “motivate” a confession and speed the investigation process.<sup>91</sup> There have also been reports that non-nationals are often remanded in custody in circumstances where German defendants would not.<sup>92</sup> There has been a steady decrease in the number of pre-trial detainees as well as the general prison population in Germany over the past decade,

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<sup>84</sup> Sections 117, 118b StPO

<sup>85</sup> Section 118 Para 2 StPO

<sup>86</sup> Section 140 Para 1 no 4 StPO

<sup>87</sup> Section 7 Para 3 German Code of Compensation for Measures of Prosecution

<sup>88</sup> *Chraidi v Germany* [2006] ECHR 899

<sup>89</sup> See *Erdem v Germany* [1999] ECHR 193 and *Cevizovic v Germany* [2004] ECHR 399

<sup>90</sup> *Lietzow v Germany* [2001] ECHR 89 and *Garcia Alva v Germany* [2001] ECHR 86, See: Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the EU. Ed Cape et al. p.80-81

<sup>91</sup> Effective Criminal defence in Europe, Cape et al, p.271

<sup>92</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.426

which has been attributed to an increase in the use of non-custodial sentences such as fines and community service.<sup>93</sup>

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<sup>93</sup> Sentencing and Sanctions in Western Countries, Eds Tonry and Frase, p.188-221

## Greece

Under Greek law lengths of pre-trial detention vary according to the nature of the alleged offence, ranging from six months to one year. In exceptional circumstances the maximum length of pre-trial detention is 18 months.<sup>94</sup> In 2010 there were approximately 3,500 pre-trial detainees in Greek prisons, who made up 31% of the total prison population.<sup>95</sup> In 2008 64% of pre-trial detainees were foreign nationals.<sup>96</sup>

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**18 months**

*Maximum length of pre-trial  
detention in Greece*

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### ***Release pending trial: the law***

Pre-trial detention may be ordered if there are strong indications that the accused has committed an offence and is deemed a flight risk or it is thought highly likely that he will commit other offences if released (this can be based on previous final convictions for offences of the same kind<sup>97</sup>). A person will be deemed a flight risk if:

- the accused has no known residence in the country; or
- the accused has taken preparatory actions to facilitate his escape; or
- the accused has been a fugitive in the past; or
- the accused has previously been found guilty of helping a prisoner to escape or has violated restrictions concerning his place of residence.

Article 282.2 of the Greek Criminal Procedure Code sets out the conditions which can be attached to release pending trial. These may include: imposing an order which prohibits a defendant from living in, or moving to, a certain place; a restriction on the defendant leaving Greece; an order prohibiting communication with certain persons; and an obligation to pay a financial surety in order to secure release.

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**64%**

*Percentage of pre-trial detainees in Greece  
who are foreign nationals*

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If the pre-trial detention is based on a warrant from the investigating judge, the defendant can appeal against it within five days from the start of his pre-trial detention. The defendant has no right to appear and be heard before the appeal court<sup>98</sup> while it is considering his appeal. If the detention is based on a warrant of the appeal court itself, no legal remedy is provided.<sup>99</sup> If there are specific reasons which justify the use of the pre-trial detention and those reasons have ceased to exist, the defendant can apply for a release. In any event, once the detention has lasted for six months, the court must determine whether the accused should be released or whether there is cause for them to remain in custody. The accused has no right to appeal any such decision.

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<sup>94</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.451-453

<sup>95</sup> Source: ICPS, 1 January 2010

<sup>96</sup> 2008 Council of Europe Annual Penal Statistics – SPACE I

<sup>97</sup> Article 282.3 Code of Criminal Procedure

<sup>98</sup> The “Judicial Council”

<sup>99</sup> Article 285 Code of Criminal Procedure

The Greek Code of Criminal Procedure states that persons who have been detained on remand and subsequently acquitted shall be entitled to request compensation provided it has been established in the proceedings that the detained persons did not commit the criminal offence for which they were detained.<sup>100</sup>

### ***Release pending trial: in practice***

Although Greek law states that pre-trial detention should only be imposed as an exceptional measure,<sup>101</sup> according to defence lawyers pre-trial detention has become the norm,<sup>102</sup> although recent legislative reforms mean that this is beginning to change. It has also been reported that although Greek law expressly excludes the seriousness of the alleged offence as a factor to be considered by the court when making a decision whether to impose pre-trial detention,<sup>103</sup> in practice it is often the main reason for imposing and extending pre-trial detention.<sup>104</sup> Many pre-trial detainees claim that they meet their lawyer for the first time at the initial court hearing<sup>105</sup> and non-national defendants have complained that they have not been provided with court-appointed interpreters.<sup>106</sup>

Prison overcrowding is a serious problem in Greece. In 2009 the occupancy level of Greek prisons amounted to 146% of the official capacity, with Korydallos high security prison operating at 300% capacity.<sup>107</sup> Korydallos is where many pre-trial detainees are held, along with convicted prisoners<sup>108</sup> (see the case of Andrew Symeou above). In its 2010 report on Greece, the CPT stated that “the excessive overcrowding in a number of prisons in conjunction with severe understaffing, poor health-care provision, lack of a meaningful regime and unsuitable material conditions represent an even greater concern to the Committee today than they did in the past”.<sup>109</sup>

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*Most serious pre-trial detention problem in Greece: overcrowding and prison conditions*

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These conditions have led some prisoners to take protest action. In December 2010 approximately 8,000 prisoners detained all over the country refused meals and around 1,200 went on hunger strike, calling for improvements in overcrowding and detention conditions.<sup>110</sup> The ECtHR has found Greece in violation of Article 3 for holding pre-trial detainees in police

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<sup>100</sup> Article 533 Code of Criminal Procedure

<sup>101</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.451

<sup>102</sup> US State Department, 2008 Human Rights Report: Greece

<sup>103</sup> Article 282.3 Code of Criminal Procedure

<sup>104</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.452

<sup>105</sup> Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 29 September 2009, published 17 November 2010, p. 24

<sup>106</sup> US State Department, 2010 Human Rights Report: Greece, p.7

<sup>107</sup> *Material detention conditions, execution of custodial sentences and prisoner transfer in the EU Member States*, Vermeulen et al, 2009, p. 456

<sup>108</sup> US State Department, 2008 Human Rights Report: Greece

<sup>109</sup> Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 29 September 2009, published 17 November 2010, p.13

<sup>110</sup> Amnesty International Annual Report 2011 – Greece

detention centres, and in breach of Article 5(3) on the grounds of excessive periods of pre-trial detention.<sup>111</sup>

The Greek courts have been unwilling to award compensation to pre-trial detainees in practice and have failed to provide sufficient reasons for when refusing to do so. This has led to the ECtHR finding Greece in violation of Article 6(1).<sup>112</sup>

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<sup>111</sup> *Vafiadis v Greece* (App no. 24981/07) 2 July 2009, *Shuvaev v Greece* (App no. 8249/07) 29 October 2009

<sup>112</sup> See, for example, *Karakasis v Greece* [2000] ECHR 483, *Sajtos v Greece* [2002] ECHR 326 and *Dimitrellos v Greece* [2005] ECHR 220



## Ireland

There is no legal limit to the amount of time a defendant can spend in pre-trial detention in Ireland, although time limits do apply in proceedings before lower courts.<sup>113</sup> At the first pre-trial detention hearing before the lower court, detention on remand may be

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*No legal maximum length of pre-trial detention in Ireland*

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ordered for up to eight days. At subsequent hearings before the judge in the lower court, pre-trial detention may be extended for 15 days or, with the defendant's and prosecutor's consent, up to 30 days before review is needed.<sup>114</sup> In 2009 there were approximately 569 pre-trial detainees in Irish prisons, who made up 15% of the total prison population.<sup>115</sup> In 2009, 31% of pre-trial detainees were foreign nationals.<sup>116</sup>

### ***Release pending trial: the law***

Pre-trial detention may be imposed where the court is satisfied that there is a flight risk, or a risk of interference with witnesses or evidence, or that detention is "reasonably considered necessary to prevent the commission of a serious offence by that person". In determining this, it is not necessary for the court to be satisfied that the commission of a specific offence by that person is foreseen.<sup>117</sup>

The court may consider the following factors when deciding whether to impose pre-trial detention:<sup>118</sup>

- the nature and degree of seriousness of the offence with which the accused person is charged and the sentence likely to be imposed on conviction;
- the nature and strength of the evidence in support of the charge;
- any conviction of the accused person for an offence committed while he or she was released pending trial in the past;
- any previous convictions of the accused person including any conviction which is the subject of an appeal; and
- any other offence in respect of which the accused person is charged and is awaiting trial.

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**31%**

*Percentage of pre-trial detainees in Ireland who are foreign nationals*

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Where it has taken account of one or more of the above, the court may also take into account the fact that the accused person is addicted to a controlled drug.<sup>119</sup>

The powers of the court to impose conditions on release are stated to be unlimited.<sup>120</sup> The following supervision measures are regularly imposed:

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<sup>113</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.519

<sup>114</sup> Ibid. p.515

<sup>115</sup> Source: ICPS, 1 September 2009

<sup>116</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I

<sup>117</sup> Section 2(3) Bail Act 1997

<sup>118</sup> Section 2(2) Bail Act 1997

<sup>119</sup> Within the meaning of the Misuse of Drugs Act 1977

<sup>120</sup> Section 6(b) Bail Act 1997

- an order requiring the accused person to inform the competent authority of any change of residence;
- an order that the accused person not enter certain localities, places or defined areas;
- an order that the accused person remain at a specified place during specified times;
- an order limiting the right of the accused person to leave Ireland;
- a requirement to report at specified times to a specific authority;
- an obligation to avoid contact with specific persons in relation to the alleged offence;
- an obligation to deposit money as a guarantee; and
- an obligation to wear an electronic tag (serious offences only).

Normally, the defendant would be present and represented by a lawyer at all hearings in relation to pre-trial detention. Officially under the Irish Prison Rules, defendants who are remanded in custody are housed in the same facilities as sentenced prisoners, but guiding principles of the Prison Service state that they should be separated so far as is practicable. Compensation is available to defendants who have been unlawfully and unnecessarily detained (consistent with Article 5(5) ECHR). In particular, detention is unlawful if the defendant is not informed of the reasons of his arrest. If the detention is lawful, but the defendant is later acquitted, this does not provide a ground for awarding compensation.

### ***Release pending trial: in practice***

In practice it is not unusual for those remanded in custody to spend up to 12 months in pre-trial detention with no intervening legal review of the grounds for detention. Non-nationals are worst affected. While there is provision for tagging in law, in practice it is not yet being used. The most common release condition imposed is surrender of passport.

There have been few cases before the ECtHR in relation to pre-trial detention;<sup>121</sup> however, domestic courts have criticised remand conditions. In one case a pre-trial detainee was held in an isolated padded cell, normally used to house mentally disturbed prisoners who posed a threat to themselves or others.<sup>122</sup> Sensory deprivation was severe in the 3m<sup>2</sup> cell, and the detainee had no access to television, radio, or exercise facilities.

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*Most serious pre-trial detention problem in Ireland: overcrowding in some prisons*

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The severe overcrowding in some Irish prisons has also been criticised. In 2010 the Irish prison estate was operating at just over 100% capacity.<sup>123</sup> The CPT has noted that overcrowding has led to detainees having to sleep on mattresses on the floor,<sup>124</sup> enduring unhygienic conditions and being denied access to sufficient recreational activities.<sup>125</sup> The

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<sup>121</sup> There has only been one case before the ECtHR in relation to Article 5 in the past five years, source: European Court of Human Rights: statistical information

<sup>122</sup> *Kinsella v the Governor of Mountjoy Prison* [2011] IEHC 235

<sup>123</sup> Source: ICPS, 1 March 2010

<sup>124</sup> Report to the Irish Government on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 January to 5 February 2006, 10 February 2011, p.15

<sup>125</sup> *Ibid.* p.16

CPT has also reported regional disparities regarding drug abuse, violence, and gang formation.<sup>126</sup>

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<sup>126</sup> Ibid. p.18

## Italy

The maximum pre-trial detention period varies depending on the phase of the proceedings and the nature of the alleged offence.<sup>127</sup> The maximum period of detention during proceedings at first instance is 18 months.<sup>128</sup> In 2011 there were approximately 28,000 pre-trial detainees in Italian prisons, who made up 42% of the total prison population.<sup>129</sup> In 2009, 26% of pre-trial detainees were foreign nationals.<sup>130</sup>

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# 18 months

*Maximum length of  
detention during the  
proceedings in first instance*

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### ***Release pending trial: the law***

Pre-trial detention or a coercive alternative to pre-trial detention can only be ordered if the judge finds that there is serious circumstantial evidence that a crime has been committed<sup>131</sup> and there is the risk that:

- the suspect may commit further offences;
- the suspect may tamper with the evidence and/or obstruct the investigation; or
- the suspect may abscond.<sup>132</sup>

In the event of serious circumstantial evidence of certain specific crimes, pre-trial detention is mandatory.<sup>133</sup>

Under the Code of Criminal Procedure, pre-trial detention can be ordered only if no other pre-trial measures are appropriate.<sup>134</sup> Alternatives to pre-trial detention are:

- an order to live in a specific city or area;
- an order limiting the right of the suspect to leave the territory of the State;
- an order to report at specified times to a specific authority (e.g. a police station);
- an order to leave the family with whom the detainee lives;
- house arrest and an order to remain at home during certain hours of the day;
- an order that the suspect not enter specific places without previous authorisation of the court;
- an obligation to avoid contact with specific persons in relation to the alleged offence;
- an obligation to stay in a mental institution or drug rehabilitation centre;
- a ban on the exercise of parental authority;
- a ban from the exercise of a public office or service;
- a temporary ban on the exercise of professional or business activity; and
- a ban on being the director of a company.

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# 26%

*Percentage of pre-trial detainees in Italy  
who are foreign nationals*

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<sup>127</sup> Article 303(1)(a) of the Code of Criminal Procedure

<sup>128</sup> Section 303(1)(b)(3)

<sup>129</sup> Source: ICPS, 1 January 2010

<sup>130</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I

<sup>131</sup> Article 274 of the Code of Criminal Procedure

<sup>132</sup> Article 274 of the Code of Criminal Procedure

<sup>133</sup> Article 274 of the Code of Criminal Procedure

<sup>134</sup> Section 275 paragraph 3 of the Code of Criminal Procedure

The decision to impose pre-trial detention and alternatives to pre-trial detention are not taken in open court, but by the judge in chambers. The defendant has no right to take part in this decision making process and is not represented by a lawyer. Once the decision is made the defendant can, within 10 days, lodge an application to the competent “Tribunal of Freedom” for a full review of the decision to impose the particular pre-trial measure. The defendant can also request the judge or the court which issued the original order to revoke or substitute the measure imposed in the event that the relevant requirements are no longer met.

A pre-trial detainee is entitled to compensation if he is eventually acquitted. The acquittal must be on the basis that: the defendant did not commit the alleged act; the alleged act never took place; or the alleged act does not constitute an offence. Compensation is also available if the person obtains a final judgment ruling that the original pre-trial detention order did not meet the requisite legal requirements or that the pre-trial detention was unjustifiable based on the person’s behaviour.

The amount of compensation to be awarded is decided by the judge having regard to the defendant’s financial position and the nature of the damage suffered. In any event the amount of compensation awarded cannot exceed approximately €500,000. If the person is unsuccessful they may appeal to the Court of Cassation. The case can last two to three years.

### ***Release pending trial: in practice***

Italy holds the record for the highest number of applications to the ECtHR in relation to alleged violations of the “reasonable time” requirement in Article 6(1) ECHR.<sup>135</sup> The Council of Europe’s Committee of Ministers intervened most recently on this issue, identifying a total of 2,183 cases lodged against Italy with regard to excessive length of judicial proceedings.<sup>136</sup> As the reasons for imposing pre-trial detention tend to lose their force over time, systemic delays have led the ECtHR to find Italy in violation of Article 5(3).<sup>137</sup>

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### *Most serious pre-trial detention problem in Italy: delays and overcrowding*

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Officially Italian law requires that pre-trial detainees should be kept out of contact with convicted prisoners. However, this has become impractical due to prison overcrowding and remand prisoners are generally mixed into the prison population at large. In 2010 the Italian government declared a state of emergency in relation to its overcrowded prisons.<sup>138</sup> As of February 2011, Italy’s prisons were 49% over official capacity.<sup>139</sup> In 2010 the CPT reported that Brescia prison, which mainly houses pre-trial detainees, was chronically overcrowded.

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<sup>135</sup> Council of Europe Directorate General of Human Rights, The improvement of domestic remedies with particular emphasis on cases of unreasonable length of proceedings, 2006, p.38

<sup>136</sup> Interim Resolution CM/ResDH(2009)42

<sup>137</sup> See, for example, *Labita v Italy* [2000] ECHR 161, *Vaccaro v Italy* [2000] ECHR 614, and *Sardinias Albo v Italy* [2005] ECHR 117

<sup>138</sup> Italy declares state of emergency on jail overcrowding, BBC News, 13 January 2010

<sup>139</sup> ICPS, 28 February 2011

With an official capacity of 206 places, Brescia was accommodating 454 prisoners, of whom 64 were sentenced prisoners.<sup>140</sup>

The CPT has also noted its concerns that access to a lawyer is often denied at the outset of detention and that informal questioning takes place without the presence of a lawyer.<sup>141</sup> While officially foreign prisoners are treated no differently from domestic ones, Italy has been criticised for only providing written information on rights in Italian, thus placing non-nationals at a disadvantage.<sup>142</sup> Furthermore, Italian defence lawyers have complained about an overall lack of effectiveness of the judicial review of pre-trial measures, and a delay before decisions are made by the review Tribunal.<sup>143</sup>

Concerns have also been raised about a special detention regime which only applies to defendants accused of mafia and terrorist offences who are suspected of maintaining links with criminal groups. People detained under this regime are subject to a blanket policy which denies them the right to make telephone calls to relatives or cohabitants for the first six months of detention.<sup>144</sup> This regime also involves cell searches when the prisoner is absent, giving rise to concerns about the confidentiality of legal correspondence.<sup>145</sup>

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<sup>140</sup> Report to the Government of Italy on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 26 September 2008, published 20 April 2010, p.26

<sup>141</sup> Report to the Government of Italy on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 26 September 2008, published 20 April 2010, p.15

<sup>142</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.558

<sup>143</sup> The review Tribunal has no deadlines for returning in writing the legal and factual basis of its decision on pre-trial detention (and without them the detainee may not appeal to the Supreme Court)

<sup>144</sup> Report to the Government of Italy on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 26 September 2009, published 20 April 2010, p.36

<sup>145</sup> Material detention conditions, execution of custodial sentences and prisoner transfer in the EU Member States, Vermeulen et al, 2009, p.581

## Luxembourg

There is no legal limit to the length of pre-trial detention in Luxembourg,<sup>146</sup> however, in practice, detention ends when the time spent on remand equals the expected sentence.<sup>147</sup> In 2010 there were approximately 300 pre-trial detainees in Luxembourg, who made up 47% of the total prison population.<sup>148</sup> In 2009, 85% of pre-trial detainees were foreign nationals.<sup>149</sup>

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*No maximum length of pre-trial detention in Luxembourg*

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### **Release pending trial: the law**

Pre-trial detention is only possible if there are serious indications of the defendant's guilt and if the alleged offence can be punished with a prison sentence of at least two years.<sup>150</sup> In addition, one of the following conditions has to be met:

- there is a risk that the accused will abscond (this risk is presumed if the offence committed is an offence that can be punished with a prison sentence of at least five years);
- there is a danger that the accused will suppress evidence; or
- there is reason to believe that the accused, if released, will commit new offences.

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**85%**

*Percentage of pre-trial detainees in Luxembourg who are foreign nationals*

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A foreigner without residence in Luxembourg can be placed in pre-trial detention if serious indications of his guilt exist and if the alleged offence can attract a sanction reserved for the most severe category of offences or imprisonment.<sup>151</sup>

The judge can order the defendant to comply with one or more of the following supervision measures:

- not to proceed outside a particular area or to refrain from entering certain areas;
- not to leave home or appointed residence, without permission;
- to report on a regular basis to the authorities;
- to cooperate with the process of identification;
- to refrain from driving vehicles;
- to refrain from contacting certain persons;
- to submit to certain control measures, for example in relation to drugs;
- to pay money as a security;
- to refrain from carrying weapons; and
- to comply with financial obligations towards family members.

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<sup>146</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.655

<sup>147</sup> Ibid. p.655, see Article 153 Regulation on the administration and the internal regime of penitentiary institutions

<sup>148</sup> Source: ICPS, 1 June 2010

<sup>149</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I

<sup>150</sup> Article 107 of the Luxembourg Code of Criminal Procedure (“CCP”)

<sup>151</sup> Article 94 CCP

The defendant is always represented by a lawyer at pre-trial detention hearings, as this is generally mandatory (however, this can be waived). The defendant has the right to attend the hearings in person. Pre-trial detainees are not required to be kept separate from convicted prisoners and are held with the general prison population.

Pre-trial detainees are entitled to compensation if they have been detained in a manner incompatible with Article 5 ECHR.<sup>152</sup> Furthermore, those who have been held in detention for more than three days can claim compensation, provided the detention was not their fault and they have been acquitted or the limitation period has been met in their case.<sup>153</sup>

### ***Release pending trial: in practice***

Luxembourg has one primary prison and sole remand centre: the *Centre Pénitentiaire de Luxembourg à Schrassig*. Concerns have been raised about the housing of women and juveniles at this facility.<sup>154</sup> It has been reported that female pre-trial detainees have been held in the prison with their young children, who were forced to endure overcrowded conditions and excessive periods locked in a cell.<sup>155</sup> There have also been numerous reports of violence, racism and criminality within the prison.<sup>156</sup> Luxembourg's prison authorities have also been criticised for using solitary confinement as a disciplinary measure, and holding suspects in cages prior to interrogation.<sup>157</sup>

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*Most serious pre-trial detention problem in Luxembourg: poor conditions in the main remand prison*

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<sup>152</sup> Article 1 of the Law dated 30 December 1981 on compensation in case of ineffective pre-trial detention

<sup>153</sup> Ibid. Article 2

<sup>154</sup> Report to the authorities of Luxembourg on the visits carried out to Luxembourg by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 22 to 27 April 2009, 28 October 2010, p.17

<sup>155</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.660-661, citing 2006 report of the Ombudscommittee on the Rights of the Child

<sup>156</sup> ACAT's Luxembourg and FIACAT's concerns regarding torture and ill treatment in Luxembourg, July 2008, p.2

<sup>157</sup> US State Department, 2010 Human Rights Report: Luxembourg, p.2



## The Netherlands

Once a defendant has been remanded in custody the trial must commence within 104 days.<sup>158</sup> In 2007 the average time between a case being registered with the Public Prosecution Service and dealt with at first instance was 180 days (for a single police judge court) and 248 days (for a three-judge court).<sup>159</sup> In 2010 there were approximately 5,664 pre-trial detainees in Dutch prisons, who made up 36% of the total prison population.<sup>160</sup> In 2009, 24% of pre-trial detainees were foreign nationals.<sup>161</sup>

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**104 days**

*Maximum length of pre-trial detention in the Netherlands*

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### ***Release pending trial: the law***

In order to impose pre-trial detention there must be serious grounds for suspecting that the defendant committed a serious offence (within the meaning of Article 67 Dutch Code of Criminal Procedure). Furthermore, the judge must find that there is either: an imminent risk that the defendant will flee (the judge will assess this risk based on the actions and personal circumstances of the defendant); or that there are public interest reasons why the defendant should be detained, i.e.:

- he is accused of having committed an offence which has seriously disturbed public order and attracts a sentence of 12 years or more;
- there is a serious chance that the suspect will commit another crime that carries a jail sentence of six years or more, or that will endanger the safety of the state, health or safety of persons, or that will cause a general danger to property;
- there is a considerable risk that the defendant will commit a serious offence<sup>162</sup> and he has been convicted of a similarly serious offence in the last five years; or
- his detention is deemed reasonably necessary to uncover the truth.

In addition pre-trial detention should not be imposed if the judge decides that the person is unlikely to receive a custodial sentence if convicted or if the pre-trial detention period is likely to be longer than the eventual sentence passed.

Wider grounds for imposing pre-trial detention apply to non-nationals who do not have a place of residence in the Netherlands. People in this position can be subject to pre-trial detention even if they have not been accused of committing a serious offence (within the meaning of Article 67 Dutch Code of Criminal Procedure).<sup>163</sup>

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**24%**

*Percentage of pre-trial detainees in the Netherlands who are foreign nationals*

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There are no limitations on the kind of conditions the judge can attach to release pending trial. The following are supervision measures which may be imposed:

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<sup>158</sup> Article 66 Dutch Code of Criminal Procedure ("DCCP")

<sup>159</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.170.

<sup>160</sup> Source: ICPS, 30 April 2010

<sup>161</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I

<sup>162</sup> One of those set out in Article 67a(2)(3) DCCP (mostly crimes with a maximum prison sentence of four years)

<sup>163</sup> Article 67 DCCP, please note that this does not apply to less serious offences (misdemeanours)

- an order requiring the accused person to inform the competent authority of any change of residence;
- an order that the accused person not enter certain localities, places or defined areas (e.g. a ban on entering a sports stadium);
- an order that the accused person remain at a specified place during specified times;
- an order limiting the right of the accused person to leave the Netherlands (defendants can be ordered to surrender their passports);
- a requirement to report at specified times to a specific authority;
- an obligation to avoid contact with specific persons in relation to the alleged offence;
- an obligation not to engage in specified activities relating to the alleged offence, including work in a specified profession or employment;
- an obligation not to drive a vehicle;
- an obligation to deposit money as a guarantee;
- an obligation to undergo therapeutic treatment or treatment for addiction;
- an obligation to avoid contact with specific objects relating to the alleged offence; and
- house arrest and electronic tagging.

The court, prosecutor and the defendant himself can apply for an alternative to pre-trial detention to be imposed. Pre-trial detainees must be held in special remand centres. Compensation is available for persons who have been held in pre-trial detention and then have been subsequently acquitted. Compensation is also available if the person has not been acquitted, but the pre-trial detention was imposed without an adequate basis or was unlawful. However, the court is under no obligation to award compensation and will only do so if, taking into account all the circumstances of the case, it considers it reasonable.

### ***Release pending trial: in practice***

There have been relatively few findings against the Netherlands in relation to its pre-trial detention regime, although conditions for remand prisoners held in the maximum security prison in the town of Vught (the Extra Beveiligde Inrichting or “EBI”) have been found to violate Article 3.<sup>164</sup> Although pre-trial detainees are kept separate from convicted prisoners in specialised remand centres, these centres have been criticised for being more severe than regular prisons.<sup>165</sup>

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*Most serious pre-trial detention problem in the Netherlands: discrimination against non-nationals in pre-trial detention decisions*

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The Netherlands is one of the few countries in Europe which has minimal crowding in its prison estate.<sup>166</sup> Despite this, in 2007 the CPT reported that police cells, which lacked the extensive facilities available at remand centres, were being used to house pre-trial detainees

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<sup>164</sup> *Lorsé and others v The Netherlands* [2003] ECHR 59, *Van der Ven v The Netherlands* [2003] ECHR 62, *Salah v The Netherlands* [2006] ECHR 692

<sup>165</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.709

<sup>166</sup> In 2010 Dutch prisons were operating at 86%, source: ICPS, 30 April 2010

for extensive periods in order to ensure that occupation rates on the prison system remained below 100%.<sup>167</sup>

Normally detention on remand is limited to crimes with a possible sentence of four years or more. An additional ground for detention is made available for those who do not live in the Netherlands and whose sentence can be punished by imprisonment of any length.<sup>168</sup>

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<sup>167</sup> Report to the authorities of the Kingdom of the Netherlands on the visits carried out to the Kingdom in Europe, Aruba, and the Netherlands Antilles by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in June 2007, 5 February 2008, p.14

<sup>168</sup> Article 67 DCCP

## Poland

Polish law dictates that pre-trial detention can be imposed for a period of three months, which can be extended by a further nine months.<sup>169</sup> However, the Appellate Court can extend this even further.<sup>170</sup> In 2011 there were approximately 8,500 pre-trial detainees in Polish prisons, who made up 10% of the total prison population.<sup>171</sup> In 2009, 3% of pre-trial detainees were foreign nationals.<sup>172</sup>

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# 9 months

*Maximum length of pre-trial detention in Poland (subject to extension)*

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### ***Release pending trial: the law***

According to Polish law a defendant cannot be held in pre-trial detention where another preventive measure would suffice. The grounds upon which pre-trial detention can be imposed are listed in Article 258 of the Polish Code of Criminal Procedure. They are:

- a justified belief that the suspect would flee or go into hiding, in particular when the identity of the suspect cannot be established or where the suspect does not have a permanent residence; and
- a justified belief that the suspect would interfere with the course of criminal proceedings.

The decision on pre-trial detention may also exceptionally be based on a justified suspicion that the accused would commit a serious offence (i.e. an offence against life, health or common security).

Pre-trial detention should not be ordered if the facts of the case suggest that the sentence following conviction would not be a custodial one, or if the term of pre-trial detention would exceed the expected sentence. According to Article 249(3) of the Polish Code of Criminal Procedure, before making a decision whether to impose pre-trial detention, the court or the Public Prosecutor must hear from the defendant.

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# 3%

*Percentage of pre-trial detainees in Poland who are foreign nationals*

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Article 275 of the Polish Code on Criminal Procedure sets out the conditions which can be attached to release pending trial. These include:

- an order requiring the defendant to inform the competent authority of any change of residence;
- imposing an order which prohibits a defendant from living in, or moving to, a certain place;
- an order that the accused person remain at a specified place during specified times;
- a restriction on the defendant leaving Poland;
- a requirement to report at specified times to a police station;

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<sup>169</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.733

<sup>170</sup> US State Department, 2010 Human Rights Report: Poland, p.6

<sup>171</sup> Source: ICPS, 31 May 2011

<sup>172</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I

- an obligation to avoid contact with specific persons;
- an obligation not to engage in specified activities relating to the alleged offence;
- an obligation not to drive a vehicle;
- an obligation to pay a financial surety in order to secure release; and
- an obligation to undergo treatment for addiction.

According to Polish law the defendant, and his legal representative, may suggest that an alternative to pre-trial detention be imposed at any time. The Public Prosecutor must make a decision on this within three days of the motion being filed. The court itself should order a person's release (even if the defendant has not requested this) if the reasons for placing the defendant in pre-trial detention cease to exist or reasons for releasing the defendant emerge.

Article 41(5) of the Polish Constitution states that "anyone who has been unlawfully deprived of liberty shall have a right to compensation". The Polish Code of Criminal Procedure states that a person may seek compensation for "manifestly unjustified preliminary detention or arrest".<sup>173</sup>

### ***Release pending trial: in practice***

It has been reported that despite the pre-trial safeguards under Polish law, prosecutors and courts impose pre-trial detention automatically, without providing adequate justification.<sup>174</sup> Polish Ministry of Justice figures show that between 2001 and 2007 approximately 90% of the prosecutor's applications for pre-trial detention were allowed by the courts.<sup>175</sup> The ECtHR has consistently criticised Poland for breaching Article 5(3) and Article 6 by imposing excessive lengths of pre-trial detention, failing to provide adequate reasons why pre-trial detention is necessary and failing to consider alternatives to pre-trial detention.<sup>176</sup>

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*Most serious pre-trial detention problem in Poland: inadequate justification for imposing pre-trial detention and poor prison conditions*

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In one case, where the defendant was held for over seven years in pre-trial detention, the ECtHR noted that "numerous cases have demonstrated that the excessive length of pre-trial detention in Poland reveals a structural problem consisting of 'a practice that is incompatible with the Convention'".<sup>177</sup> This echoed concerns raised by the Council of Europe's Committee of Ministers in its 2007 Resolution encouraging Poland to take steps to deal with the "systemic problem concerning the excessive length of detention on remand".<sup>178</sup>

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<sup>173</sup> Article 552(4)

<sup>174</sup> Helsinki Foundation for Human Rights, *Władysław Jamroz v Poland – Written Comments*, 4 March 2008, p.4

<sup>175</sup> Helsinki Foundation for Human Rights, *Władysław Jamroz v Poland – Written Comments*, 4 March 2008, p.3

<sup>176</sup> See. For example, *Kudła v Poland* [2000] ECHR 512, *Olstowski v Poland* [2001] ECHR 759, and *Kulikowski v Poland* [2009] ECHR 779

<sup>177</sup> *Kauczor v Poland* [2009] ECHR 197, Para 60

<sup>178</sup> Interim Resolution CM/ResDH(2007)75 concerning the judgments of the European Court of Human Rights in 44 cases against Poland relating to the excessive length of detention on remand, adopted by the Committee of Ministers on 6 June 2007

The court has also found Poland in violation of Article 3 due to overcrowded prison conditions, and has drawn attention to the connection between lengthy pre-trial detention and overcrowding.<sup>179</sup> FTI clients have described how pre-trial detainees are subjected to appalling prison conditions and held with prisoners convicted of serious offences.<sup>180</sup> We have also received reports that vulnerable pre-trial detainees are targeted for violence by convicts, particularly if they have been charged with a sexual offence. In 2010 the Polish Human Rights Ombudsman received 7,233 complaints about prison conditions, mostly concerning mistreatment by prison staff, poor living conditions, and inadequate access to medical care.<sup>181</sup> (See case of Robert Hörtchner above.)

Although Polish detainees have the right to access a lawyer at an early stage, it is rarely exercised as there is no legal aid available and few detainees can afford to pay legal fees.<sup>182</sup> Suspects can demand that the court appoint an advocate; however, this usually takes several weeks by which time important procedural stages have passed. Where legal advice is accessed, Article 245(1) of the Polish Code of Criminal Procedure allows a police officer to be present during the conversation between the detainee and lawyer for the first 14 days of arrest. Effective legal assistance and trial preparation can also be hampered by the fact that access to the case file for the defence can be limited, thus preventing the lawyer from accessing important information which could be used to challenge continued pre-trial detention.<sup>183</sup>

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<sup>179</sup> *Orchowski v Poland* [2010] ECHR 2280

<sup>180</sup> See, for example, the case of Robert Hörtchner, above

<sup>181</sup> US State Department, 2010 Human Rights Report: Poland, p.4

<sup>182</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.736

<sup>183</sup> Helsinki Foundation for Human Rights, *Władysław Jamroz v Poland – Written Comments*, 4 March 2008, p.8

## Portugal

In Portugal the maximum length of pre-trial detention (before conviction at first instance) is two years and six months, where the case is particularly complex and involves serious crimes.<sup>184</sup> In 2011 there were approximately 2,400 pre-trial detainees in Portugal, who made up 19% of the total prison population.<sup>185</sup>

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*2 years and 6 months*

*Maximum length of pre-trial detention in Portugal*

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### ***Release pending trial: the law***

Pre-trial detention is an exceptional measure which may not be imposed or continued “where it can be replaced by bail or any other more favourable measure provided by the law”.<sup>186</sup> Pre-trial detention can only be imposed if there is a strong indication that an offence has been committed which is punishable by a prison sentence of more than five years and one of the following situations applies:

- the suspect or defendant has fled or there is a risk that he may flee;<sup>187</sup>
- there is a danger of interference with the inquiry and, in particular, with the collection, preservation or veracity of evidence;<sup>188</sup> or
- there is a danger of disturbance of the public order or of continuation of the criminal activity.<sup>189</sup>

If these factors no longer apply the judge must replace pre-trial detention with an alternative measure.<sup>190</sup> Pre-trial detention can be revoked on the initiative of the judge, or on a proposal of the Public Prosecutor or the defendant. The judge must reconsider the grounds for pre-trial detention every three months.<sup>191</sup>

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*19%*

*Percentage of the prison population who are pre-trial detainees in Portugal*

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Alternatives to pre-trial detention include:

- an order requiring the accused person to inform the competent authority of any change of residence;
- an order that the accused person not enter certain localities, places or defined areas (this can only be imposed if the defendant is charged with a crime punishable with a sentence of three years or more);<sup>192</sup>
- house arrest with or without electronic monitoring;<sup>193</sup>
- an order limiting the right of the accused person to leave Portugal, this will involve confiscation of the defendant's passport (this can only be imposed if the defendant is charged with a crime punishable with a sentence of three years or more);<sup>194</sup>

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<sup>184</sup> Article 215 of the Criminal Procedure Code ("CPP")

<sup>185</sup> Source: ICPS, 1 October 2011

<sup>186</sup> Article 28(2) of the Constitution and Arts. 193(2) and 202(1) CPP

<sup>187</sup> Article 204(a) CPP

<sup>188</sup> Article 204(b) CPP

<sup>189</sup> Article 204(c) CPP

<sup>190</sup> Article 212(3) CPP

<sup>191</sup> Article 213(1) CPP

<sup>192</sup> Article 200(1)(a)(b)(c)(d) CPP

<sup>193</sup> Article 201 CPP and Law no. 122 of 20 August 1999

- a requirement to report at specified times to a specific authority (e.g. a police station or probation service);<sup>195</sup>
- an obligation not to contact certain people by any means, (this can only be imposed if the defendant is charged with a crime punishable with a sentence of three years or more);<sup>196</sup>
- an obligation not to engage in specified activities relating to the alleged offence, including work in a specified profession or employment;<sup>197</sup>
- an obligation to deposit money as a guarantee;<sup>198</sup>
- undergoing therapeutic treatment or treatment for addiction (only with consent and where the defendant is charged with a crime punishable with a sentence of three years or more);<sup>199</sup> and
- an obligation not to use or deliver weapons or objects that are capable of facilitating another crime (this can only be imposed if the defendant is charged with a crime punishable with a sentence of three years or more).<sup>200</sup>

A defendant in pre-trial detention has the right to be heard by the court whenever it takes a decision which personally affects him, and the right to be assisted by a lawyer during any such proceedings.<sup>201</sup> While detained a defendant has the right to communicate in private with his counsel. Further restrictions may be imposed on defendants who are subject to incommunicado detention.<sup>202</sup> If acquitted at trial the defendant has the right to claim compensation for time spent in pre-trial detention.<sup>203</sup>

### ***Release pending trial: in practice***

Lengthy pre-trial detention remains a problem in Portugal despite improvements in recent years.<sup>204</sup> Although the average length of pre-trial detention is eight months, approximately 20% of pre-trial detainees spend more than one year on remand.<sup>205</sup>

It has been reported that these lengthy periods of pre-trial detention are a result of delayed investigations and judicial inefficiency.<sup>206</sup> Concerns have also been raised about the high number of allegations of physical ill-treatment of prisoners by custodial staff and the denial of access to a lawyer and a doctor for those in police custody.<sup>207</sup>

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*Most serious pre-trial detention problem in Portugal: lengthy pre-trial detention*

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<sup>194</sup> Article 200 CPP

<sup>195</sup> Article 198 CPP

<sup>196</sup> Article 200(1)(d) CPP

<sup>197</sup> Article 199 CPP

<sup>198</sup> Article 197 CPP

<sup>199</sup> Article 200(1)(f) CPP

<sup>200</sup> Article 200(1)(e) CPP

<sup>201</sup> Article 61 CPP

<sup>202</sup> Article 211(1) CPP

<sup>203</sup> Articles 225 and 226 of the CPP

<sup>204</sup> US State Department, 2010 Human Rights Report: Portugal, pages 5-6

<sup>205</sup> Ibid. p.6

<sup>206</sup> Ibid. p.6

<sup>207</sup> Report to the Portuguese Government on the visit to Portugal carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 25 January 2008, 19 March 2009, pages 12,17-18, 24



Portuguese law expressly provides for the separation of convicted prisoners and pre-trial detainees, with regional prisons designed to house pre-trial detainees and convicted low-level offenders serving sentences of up to six months imprisonment.<sup>208</sup> However, the US State Department<sup>209</sup> and the CPT<sup>210</sup> report that, in practice, remand detainees are often held with the general population of convicted prisoners.

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<sup>208</sup> Article 158 of Decree-Law no. 265 of 1 August 1979

<sup>209</sup> US State Department, 2010 Human Rights Report: Portugal, p.3

<sup>210</sup> Report to the Portuguese Government on the visit to Portugal carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 25 January 2008, 19 March 2009, p.30

## Romania

Under Romanian law the maximum period of detention during the criminal investigation phase is 180 days.<sup>211</sup> There is no specified maximum period for which the defendant can be held in detention during the trial phase. However, as soon as half the duration of the possible sentence for the offence is reached during the first phase of the trial, the defendant is released even if the first phase of the trial is not over.<sup>212</sup> At the end of 2010 there were approximately 4,900 pre-trial detainees in Romanian prisons, who made up 16.4% of the total prison population.<sup>213</sup> In 2009, 0.7% of pre-trial detainees were foreign nationals.<sup>214</sup>

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*No maximum length of pre-trial detention in Romania*

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### ***Release pending trial: the law***

Pre-trial detention may be imposed if there is evidence that the defendant has committed an offence and the judge decides that pre-trial detention is necessary in order to ensure the good running of the criminal trial or to prevent the accused or defendant from evading justice.<sup>215</sup> The judge must take one of the following into account:

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**0.7%**

*Percentage of pre-trial detainees in Romania who are foreign nationals*

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- the defendant has previously fled or there is evidence to suggest that the defendant will flee to avoid the criminal investigation, judgment or enforcement of the sentence;
- the defendant has breached measures imposed as alternatives to pre-trial detention;
- there is evidence that the defendant is trying to impede, directly or indirectly, the criminal investigation;
- there is evidence that the defendant is preparing to commit a new criminal offence;
- the defendant has intentionally committed a new criminal offence;
- there is evidence that the defendant is exerting pressure on the victim or is trying to reach a fraudulent compromise with the victim; or
- there is evidence that the defendant has committed an offence which is punishable with life imprisonment or imprisonment for more than four years,<sup>216</sup> and there is evidence that releasing the defendant would represent an actual danger to public order.

The Romanian Criminal Procedure Code sets out the conditions which can be attached to release pending trial. These include:

- an order requiring the defendant to obtain prior consent from the authorities before changing residence;

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<sup>211</sup> Article 159(13) Romanian Criminal Procedure Code

<sup>212</sup> Article 140 (2) Romanian Criminal Procedure Code. Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, pages 806-807

<sup>213</sup> Source: ICPS, 31/12/2010

<sup>214</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I

<sup>215</sup> Articles 136 and 143 Romanian Criminal Procedure Code

<sup>216</sup> Articles 146 and 148 Romanian Criminal Procedure Code

- imposing an order which prohibits a defendant from living in, or moving to, a certain place (including prohibiting the defendant from attending sports or cultural events);
- a restriction on the defendant leaving Romania;
- a requirement to report at specified times to a police station;
- an obligation to avoid contact with specific persons;
- an obligation not to engage in specified activities relating to the alleged offence;
- an obligation not to drive a vehicle;
- an obligation to pay a financial surety in order to secure release; and
- an obligation to undergo treatment for addiction.

When under a movement restriction order, the defendant can be forced to wear an electronic tagging device. New powers, due to come into force in 2012, will allow courts to impose house arrest as an alternative to pre-trial detention.

Alternatives to pre-trial detention may be proposed by the defendant, his or her lawyer, close family members or the prosecutor. Some of the alternative measures to pre-trial detention can be imposed by the judge of his own motion.

Compensation is available for persons who have been held in pre-trial detention or whose freedom has been wrongfully restricted by alternatives to pre-trial detention. However, compensation is only available if the measure has been taken by the judicial authorities without observing the relevant legal provisions.<sup>217</sup>

### ***Release pending trial: in practice***

Romania's pre-trial detention population has dropped significantly from 10,831 in 1999 to 3,946 in 2009.<sup>218</sup> However, the country has been criticised for the ill-treatment of detainees and the use of brutal mistreatment to extract evidence which has then been adduced in court.<sup>219</sup> According to the 2010 US State Department Report, the regime for release pending trial is rarely used in practice.<sup>220</sup> In 2008 the CPT raised concerns about the use of police cells to house pre-trial detainees.<sup>221</sup>

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*Most serious pre-trial detention problem in Romania: mistreatment of detainees and lengthy periods before judicial authorisation of detention*

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In *Pantea v Romania*<sup>222</sup> the ECtHR made findings of multiple ECHR violations in relation to the applicant's treatment in pre-trial detention, which included being savagely beaten, denied medical treatment and transported for several days in a railway wagon in appalling conditions. It was almost four months before the applicant was brought before a judge, which the ECtHR found violated Article 5(4) ECHR. The *Pantea* case led to widespread reforms in

<sup>217</sup> Article 504 of the Romanian Criminal Procedure Code

<sup>218</sup> Source: Council of Europe Annual Penal Statistics – SPACE I

<sup>219</sup> Amnesty International, Annual Report 2011: Romania

<sup>220</sup> US State Department, 2010 Human Rights Report: Romania, p.6

<sup>221</sup> Report to the Government of Romania on the visit to Romania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 9 June 2006, published 11 December 2008

<sup>222</sup> [2003] ECHR 266

Romania.<sup>223</sup> However, more recently the ECtHR has found Romania in breach of the ECHR due to lengthy delays before judicial authorisation of detention,<sup>224</sup> excessive lengths of pre-trial detention,<sup>225</sup> and inhuman and degrading pre-trial detention conditions.<sup>226</sup>

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<sup>223</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p. 807

<sup>224</sup> *Samoila and Cionca v Romania* (App no. 33065/03), 4 March 2008, *Toma v Romania* (App no. 42716/02), 24 February 2009

<sup>225</sup> *Tanase v Romania* (App no. 5269/02), 12 May 2009

<sup>226</sup> *Ciupercescu v Romania* (App no. 35555/03), 15 June 2010, *Carabulea v Romania* (App no. 45661/99), 13 July 2010

## Slovakia

The maximum period of pre-trial detention in Slovakia is 4 years.<sup>227</sup> In 2010 there were approximately 1,500 pre-trial detainees in Slovakian prisons, who made up 15% of the total prison population.<sup>228</sup> In 2009, 5% of pre-trial detainees were foreign nationals.<sup>229</sup>

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**4 years**

*Maximum length of pre-trial detention in Slovakia*

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### **Release pending trial: the law**

Under the Slovakian criminal code pre-trial detention is only allowed if there is a justified concern that the defendant will:

- flee or hide, so as to avoid criminal prosecution or punishment (deemed particularly likely if: it is difficult to immediately determine the defendant's identity, he does not have permanent residence, or he would face a severe penalty if convicted);
- obstruct the criminal investigation; or
- repeat the criminal activity for which he is being prosecuted, or complete the criminal offence which he allegedly attempted.<sup>230</sup>

When considering whether to impose pre-trial detention the judge must hear from the defendant<sup>231</sup> (whose presence is obligatory) and take into account his assets, the nature of the alleged offence and its consequences, and other circumstances of the case.

If the judge finds that one of the justified concerns exists then the defendant may still be released pending trial if:

- a trustworthy person offers a guarantee for the future behaviour of the defendant (the judge must deem the guarantee to be sufficient and acceptable);<sup>232</sup>
- the defendant gives a written pledge to lead an orderly life, particularly that he will not commit any crime and he will comply with any duties and restrictions imposed on him (the judge must deem the pledge to be sufficient and acceptable);<sup>233</sup> or
- the custody can be replaced by the supervision of a probation officer,<sup>234</sup> or the payment of a surety of a designated amount.<sup>235</sup>

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**5%**

*Percentage of pre-trial detainees in Slovakia who are foreign nationals*

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Alternatives to pre-trial detention include:

- an obligation on the accused to notify to a police officer, a prosecutor or a court of any change in residence;<sup>236</sup>

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<sup>227</sup> Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU, Kalmthout et al, 2009, p.833

<sup>228</sup> Source: ICPS, 31 December 2010

<sup>229</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I

<sup>230</sup> Section 71(1) Code of Criminal Procedure ("CCP")

<sup>231</sup> Section 72(2) CCP

<sup>232</sup> Section 80(1)(a) CCP

<sup>233</sup> Section 80(1)(b) CCP

<sup>234</sup> Section 80(1)(c) CCP

<sup>235</sup> Section 81 CCP

- an order that the accused person not enter certain localities, places or defined areas;<sup>237</sup>
- an order that the accused person remain at a specified place during specified times;<sup>238</sup>
- a ban on travel abroad;<sup>239</sup>
- a duty to report regularly to an office determined by the court;<sup>240</sup>
- a ban on contacting certain people or a ban on approaching a certain person at a distance closer than five metres;<sup>241</sup>
- a ban on executing an activity similar to which led to the commission of the crime;<sup>242</sup>
- a ban on driving a car and a duty to handover a driving licence;<sup>243</sup>
- an obligation to deposit money as a guarantee;<sup>244</sup>
- an obligation to undergo therapeutic treatment or treatment for addiction; and
- a duty to give up carrying a gun and other objects if appropriate.<sup>245</sup>

If one of these obligations is imposed as an alternative to pre-trial detention and is subsequently breached, the judge must reconsider whether pre-trial detention is necessary (i.e. it is not imposed automatically).<sup>246</sup>

Persons remanded in custody have the right to access legal advice without any third party hearing their conversation. Pre-trial detainees must be held in special remand prisons or in separate sections of normal prisons.<sup>247</sup> Once they are admitted to the remand centre, non-national defendants must be informed of their right to contact their consular authority.

The Constitution states: "Everyone shall have the right to compensation for damage caused by an unlawful decision of a court, of other public authority or of a body of public administration or by improper official procedure."<sup>248</sup> A person held in custody on the basis of an unlawful decision or incorrect administrative procedure is entitled to compensation amounting to one thirtieth of the national average salary for each day spent in custody. However, in order for compensation to be awarded the decision to impose pre-trial detention has to be annulled or amended, i.e. a mere acquittal does not suffice.

### ***Release pending trial: in practice***

Numerous violations of Article 5(1) and 5(4) have been found to have occurred as a result of excessive length of pre-trial detention and procedural shortcomings of review of pre-trial detention.<sup>249</sup> The ECtHR has found Slovakia in violation of the Article 5(3) ECHR for imposing pre-trial detention for periods between two and three years without domestic courts

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<sup>236</sup> Section 80(2) CCP

<sup>237</sup> Section 82(1)(c) CCP

<sup>238</sup> Section 82(1)(e) CCP

<sup>239</sup> Section 82(1)(a) CCP

<sup>240</sup> Section 82(1)(f) CCP

<sup>241</sup> Section 82(1)(h) CCP

<sup>242</sup> Section 82(1)(b) CCP

<sup>243</sup> Section 82(1)(g) CCP

<sup>244</sup> Section 81 and 82(1)(i) CCP

<sup>245</sup> Section 82(1)(d) CCP

<sup>246</sup> Section 80(3) CCP

<sup>247</sup> Section 3(1) of the Execution Act

<sup>248</sup> Article 46(3)

<sup>249</sup> See, for example, *Karlin v Slovakia* [2011] ECHR 1050, *Gál v Slovakia* [2010] ECHR 1905, *Stetiar and Sutek v Slovakia* [2010] ECHR 1820, and *Lexa v Slovakia* [2008] ECHR 886

displaying “special diligence” in the conduct of the proceedings.<sup>250</sup> The court has also made Article 5 findings against Slovakia for imposing pre-trial detention without providing sufficient or relevant reasons.<sup>251</sup> Despite the Slovakian constitution containing a right to compensation for pre-trial detainees, the ECtHR has found the country in violation of Article 5(5) ECHR for failing to adequately compensate defendants detained unjustly.<sup>252</sup>

Although detainees have the right to access a lawyer it has been reported that this right is rarely respected in practice, with many people claiming that they were first informed of their right to a lawyer at the first court hearing.<sup>253</sup> Overcrowding in Slovakia’s prisons has improved, although a recent CPT report noted that the average amount of space stood at 3.5m<sup>2</sup> per prisoner,<sup>254</sup> thus falling short of the CPT’s recommended standard of 4m<sup>2</sup>. The lack of recreational activities for remand prisoners has also been criticised by the CPT. However, recent changes have seen the introduction of a “mitigated regime” for 25-30% of remand prisoners which allows them access to the corridor and a TV room for most of the day.<sup>255</sup> Despite this, many remand prisoners face 23 hours a day locked in their cells.<sup>256</sup>

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*Most serious pre-trial detention problem in Slovakia: lengthy pre-trial detention*

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<sup>250</sup> *Pavletic v Slovakia* [2004] ECHR 280, *Rosselet-Christ v Slovakia* [2010] ECHR 1634

<sup>251</sup> *Kucera v Slovakia* [2007] ECHR 609, *Michalko v Slovakia* [2010] ECHR 2078

<sup>252</sup> *Michalko v Slovakia* [2010] ECHR 2078, *Aydemir v Slovakia* [2011] ECHR 224, *Osváthová v Slovakia* [2010] ECHR 2099, *Karlin v Slovakia* [2011] ECHR 1050, *Pavletic v Slovakia* [2004] ECHR 280

<sup>253</sup> Report to the Government of the Slovak Republic on the visit to the Slovak Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 24 March to 2 April 2009, 11 February 2010, p.18

<sup>254</sup> *Ibid.* p.26

<sup>255</sup> *Ibid.* p.43

<sup>256</sup> *Ibid.* p.43

## Spain

The maximum period of pre-trial detention in Spain is four years,<sup>257</sup> although whether or not detention can be extended to this maximum period depends on factors such as the basis for pre-trial detention, the nature of the alleged offence, and the sentence which could eventually be imposed. In 2011 there

were approximately 12,800 pre-trial detainees in Spanish prisons, who made up 18% of the total prison population.<sup>258</sup> In 2009 52% of pre-trial detainees were foreign nationals.<sup>259</sup>

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**4 years**

*Maximum length of pre-trial  
detention in Spain*

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### ***Release pending trial: the law***

The law states that pre-trial detention may not be imposed if alternative measures will be equally effective to achieve the aims of pre-trial detention<sup>260</sup>. In order to impose pre-trial detention there must be a reasonable suspicion that the person has committed a serious offence (i.e. an offence punishable by a maximum prison sentence of two years or more, or a shorter sentence in the event that the accused has a criminal record). Also, detention must be necessary in order to:

- guarantee the presence of the defendant at trial, if it is deemed that the defendant represents a flight risk;
- avoid the alteration, destruction or hiding of evidence which may be relevant to the case;
- prevent the defendant from taking action against the (legal) interests of the victim; or
- avoid the risk that the defendant will commit another offence.<sup>261</sup>

A decision to impose pre-trial detention may be revisited at any time before trial, either by a judge or a court of first instance.<sup>262</sup> The judge or court is not entitled to replace release pending trial with pre-trial detention without a petition from the Public Prosecutor. In order to ensure that the rights of pre-trial detainees are respected, the examining judge must visit the local prisons once a week, without providing the prison authorities with prior warning.<sup>263</sup>

Defendants facing serious charges, such as terrorism charges, can be held in “incommunicado detention”. Under this regime, the defendant is allowed to be held for a maximum of 13 days, during which certain fundamental rights are severely curtailed. For example, during this period the defendant is not entitled to receive visits,<sup>264</sup> communicate with the outside world,<sup>265</sup> or notify family or friends of the fact that they are detained or where they are being detained.<sup>266</sup> Incommunicado detainees are also not allowed to choose their own lawyer; instead they are assigned a legal aid attorney for the duration of the incommunicado period. The role of this lawyer is limited: they are not allowed to confer in

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<sup>257</sup> Article 504(2) Ley de Enjuiciamiento Criminal (“LECrIm”)

<sup>258</sup> Source: ICPS, 29 July 2011

<sup>259</sup> 2009 Council of Europe Annual Penal Statistics – SPACE I

<sup>260</sup> Article 502(2) LECrIm

<sup>261</sup> Article 503(1)(3) LECrIm

<sup>262</sup> Article 539 LECrIm

<sup>263</sup> Article 526 LECrIm

<sup>264</sup> Article 523 LECrIm

<sup>265</sup> Article 524 LECrIm

<sup>266</sup> Article 520(2)(d) LECrIm



private with the client and are unable to address the detainee directly, either to ask questions or to provide legal advice.

Another feature of pre-trial detention in “serious cases” includes the use of secret legal proceedings, or “secreto de sumario”.<sup>267</sup> This measure severely restricts access by defence lawyers to the details of the case, including the charges against their client and evidence in the case. This measure must be lifted at least 10 days before the closing of the investigative phase.

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52%

*Percentage of pre-trial detainees in Spain who are foreign nationals*

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Under Spanish law certain conditions may be attached to release pending trial. These include:

- an order that the accused person not enter certain localities, places or defined areas;
- a requirement to report at specified times to a specific authority, e.g. a police station or court;<sup>268</sup>
- an obligation to avoid contact with specific persons in relation to the alleged offence;
- an obligation not to drive a vehicle;<sup>269</sup>
- an obligation to pay a financial surety in order to secure release;<sup>270</sup> and
- an obligation to undergo treatment for addiction.<sup>271</sup>

Another alternative to pre-trial detention is “prisión atenuada” which is comparable to house arrest. The judge or court may decree that pre-trial detention shall be carried out, under surveillance, at the home of the accused if imprisonment will be of great danger to the accused, because of medical reasons.<sup>272</sup>

A person who has been subject to pre-trial detention is entitled to compensation for the harm caused to him due to his unnecessary stay in prison, if he is found not guilty of the offence, or if the proceedings against him are definitively dropped.<sup>273</sup> These requirements limit the right to compensation. However, a person can also claim compensation for damage caused by judicial errors or irregularities in the administration of justice.<sup>274</sup>

### ***Release pending trial: in practice***

Incommunicado detention raises significant fundamental rights concerns (see the case of Mohammed Abadi above). In 2008 the International Commission of Jurists noted that “Prolonged incommunicado detention can itself amount to torture or cruel, inhuman or degrading treatment.”<sup>275</sup> There is also evidence that, in practice, even the limited rights that incommunicado detainees have are being denied them. There have been reports that incommunicado detainees are subjected to informal questioning before the arrival of the

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<sup>267</sup> Article 302 LECrim

<sup>268</sup> Article 530 LECrim

<sup>269</sup> Article 529bis and 764(4) LECrim

<sup>270</sup> Article 530 LECrim

<sup>271</sup> Article 508(2) LECrim

<sup>272</sup> Article 508(1) LECrim

<sup>273</sup> Article 294(1) of the Organic Law on the Judiciary

<sup>274</sup> Article 121 of the Constitution and Article 292 of the Organic Law

<sup>275</sup> International Commission of Jurists, Submission to the Human Rights Committee regarding the consideration of the 5<sup>th</sup> Periodic Report submitted by Spain, 10 October 2008, p.3

appointed lawyer,<sup>276</sup> that evidence obtained during this questioning is being adduced in court,<sup>277</sup> and that defence lawyers who attempt to put questions to their clients (which they are allowed to do under the law) are being deterred from doing so by police intimidation.<sup>278</sup>

Pre-trial detention in Spain in general has drawn criticism. The US State Department has identified lengthy pre-trial detention periods as a problem,<sup>279</sup> with some sources claiming that extension of pre-trial detention is “practically automatic” in terrorism cases.<sup>280</sup> The CPT has reported that detainees in Spain can face mistreatment at the hands of the authorities.<sup>281</sup> Important safeguards to prevent this from happening have not been observed in practice; in one case a defendant was remanded in custody without the judge having actually seen him.<sup>282</sup>

The CPT has noted that, in the autonomous region of Catalonia, little effort is made to assist non-national detainees to integrate into the prison system.<sup>283</sup> There have also been reports that non-nationals were prejudiced in criminal proceedings because communication was poor and/or they were not properly informed about the functioning of Spanish criminal procedure.<sup>284</sup> Practitioners FTI has spoken to claim that decisions on pre-trial detention generally are taken in an inadequate fashion, without a full consideration of whether detention is proportionate.

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*Most serious pre-trial detention problem in Spain: incommunicado detention and excessive pre-trial detention maximum periods*

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<sup>276</sup> Ibid. p.10

<sup>277</sup> Ibid. p.10

<sup>278</sup> Ibid. p.12

<sup>279</sup> US State Department, 2010 Human Rights Report: Spain, p.5

<sup>280</sup> Human Rights Watch, Setting an Example? Counter-Terrorism Measures in Spain, 1 January 2005

<sup>281</sup> Material detention conditions, execution of custodial sentences and prisoner transfer in the EU Member States, Vermeulen et al, 2011, p.929

<sup>282</sup> Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 12 to 19 December 2005, 10 July 2007, p.20

<sup>283</sup> Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 19 September to 1 October 2007, 25 March 2011, p.51

<sup>284</sup> Better Bail Decisions: A project to improve the quality and consistency of bail decision making by courts in England and Wales, Spain and the Czech Republic, 2003, p.7

## Sweden

There is no maximum period of pre-trial detention in Sweden. However, if no legal action has been taken within 14 days, a new remand hearing is required.<sup>285</sup> In 2010 there were approximately 1,700 pre-trial detainees in Sweden, who made up 24% of the total prison population.<sup>286</sup>

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*No maximum length of pre-trial detention in Sweden*

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### **Release pending trial: the law**

Pre-trial detention may only be imposed on a person who is reasonably suspected on probable cause of committing an offence punishable by imprisonment for a term of one year or more. Furthermore there must be a reasonable risk that the person will:

- flee or otherwise evade legal proceedings or punishment;
- impede the investigation by, for example, destroying evidence; or
- commit further offences.<sup>287</sup>

Any person may also be detained on probable cause, regardless of the nature of the offence, if: their identity is unknown and they refuse to provide it; or, they do not reside within Sweden and there is a reasonable risk that they will avoid legal proceedings or a penalty by fleeing the country.<sup>288</sup> The defendant's age, health status and similar factors must be considered in determining whether release should be granted.

The defendant attends the hearing on pre-trial detention unless there are exceptional reasons for his absence. The defendant may request the right to freedom at any time via his lawyer<sup>289</sup> and has the right to appeal the decision to impose pre-trial detention.<sup>290</sup> Female defendants should be held in specially designated women-only prisons (there are six prisons for female detainees in the Sweden).<sup>291</sup>

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**24%**

*Percentage of the prison population who are pre-trial detainees in Sweden*

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Alternatives to pre-trial detention include:

- a supervision order which requires a suspect to be at a place of residence or work at specified times;
- a prohibition on travel:<sup>292</sup> this may be ordered only if the reasons for the measure outweigh the detriment to the suspect's interests; and
- an obligation to report.<sup>293</sup>

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<sup>285</sup> The Swedish Prison and Probation Service – Basic Facts, p.9

<sup>286</sup> Source: ICPS, 1 October 2010

<sup>287</sup> Chapter 24, section 1 Code of Judicial Procedure

<sup>288</sup> Chapter 24, section 2 Code of Judicial Procedure

<sup>289</sup> Chapter 21, section 8 Code of Judicial Procedure

<sup>290</sup> Chapter 52, section 1 Code of Judicial Procedure

<sup>291</sup> Prison Treatment Act, Section 8a.

<sup>292</sup> Chapter 25, section 1 Code of Judicial Procedure

<sup>293</sup> Chapter 26, section 1 Code of Judicial Procedure

Defendants held for 24 hours or more have the right to compensation if they are eventually acquitted at trial.<sup>294</sup> Compensation can be refused or adjusted if the detainee has caused the detention through his own conduct or “if for other reasons it would be unreasonable to grant compensation”.

### ***Release pending trial: in practice***

In its 2010 human rights report on Sweden, the US State Department noted that although prison conditions generally met international standards, pre-trial detainees were subject to extended isolation and severe restrictions on their activities.<sup>295</sup> These included restrictions on visits, phone calls, correspondence, contact with other detainees, and access to newspapers, radio and television.<sup>296</sup>

These measures are supposed to be imposed when there is a risk that defendants will attempt to contact associates who will tamper with evidence and impede the investigation. However, it appears that they are imposed almost automatically; according to the Swedish Prison and Probation Service approximately 45% of pre-trial detainees in 2010 were subject to restrictions.<sup>297</sup> The court has no say over which restrictions should be imposed. Instead the prosecutor applies for general permission to impose restrictions it deems necessary. There are no means to appeal the decision to impose a specific restriction (e.g. isolation from family members).<sup>298</sup>

The CPT has reported that the issue of restrictions on pre-trial detainees has formed a central part of its ongoing dialogue with the Swedish authorities since the Committee’s first visit in 1991.<sup>299</sup> Many detainees claim that they are provided with no explanation as to why the restrictions have been imposed on them.<sup>300</sup> The President of the International Prison Chaplains' Association has branded Swedish remand prisons as the worst in Europe, claiming that the isolation of pre-trial detainees is impeding their ability to prepare for trial.<sup>301</sup>

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*Most serious pre-trial detention problem in Sweden: restrictions imposed on pre-trial detainees including isolation from other prisoners*

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In 2005 the Swedish government set up a commission to propose new legislation on the treatment of persons arrested or remanded in custody. The commission reported back in 2006, making a range of proposals which included allowing defendants to appeal against the

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<sup>294</sup> Act on Compensation for Deprivation 1998

<sup>295</sup> US State Department, 2010 Human Rights Report: Sweden, p.2

<sup>296</sup> Report to the Swedish Government on the visit to Sweden carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 18 June 2009, 11 December 2009, p.25

<sup>297</sup> US State Department, 2010 Human Rights Report: Sweden, p.2

<sup>298</sup> Chapter 24, section 5a Code of Judicial Procedure

<sup>299</sup> Report to the Swedish Government on the visit to Sweden carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 18 June 2009, 11 December 2009, p.25

<sup>300</sup> Ibid. p.26

<sup>301</sup> Swedish Prisons, Engineering and Technology Magazine, 19 January 2011: <http://eandt.theiet.org/blog/blogpost.cfm?threadid=39294&catid=368>

court's decision to impose restrictions on them while in pre-trial detention. The proposals are still under consideration by the Ministry of Justice.