United Nations Mission in Bosnia and Herzegovina

Judicial System Assessment Programme (JSAP)

INTERIM REPORT ON DELAYS AND DETENTION

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Introduction

In late 1999, JSAP began investigating various aspects of delay in the judicial system. As part of its consideration of delays in the criminal process, JSAP Banja Luka made an assessment of the effect of delayed proceedings on the actual length of detention of accused persons against whom there is no final verdict. In particular, the team visited the Tunjice Prison in Banja Luka on 20 December 1999 and obtained information on the current status of persons held there.

It was discovered that there are a substantial number of people detained without a final verdict, some of whom had been there for a period of several years. Many cases raise concerns about the ability of the judicial system to prioritise and deal with cases promptly and about the effective application of the European Convention on Human Rights (ECHR). The ECHR is directly applicable in Bosnia and Herzegovina by virtue of Article II (2) of the Constitution of Bosnia and Herzegovina and takes precedence over all other law.

In order to determine whether these problems existed solely in either the RS or are more widespread, the work in Banja Luka was complemented by JSAP research in the Federation (Mostar).

The purpose of this brief report is to set out the legal and factual issues surrounding lengthy detention and to make some brief recommendations and conclusions. JSAP will continue to inquire into the question of delays in the court system in general and will issue more substantive reports on the different aspects of the issue. However, in the light of the urgency of this matter in principle and because of the ongoing reviews of criminal procedure legislation in both entities, this report does not fully traverse all the issues in depth but aims to raise the broader issues as soon as possible.

DELAYS AND DETENTION

The legal basis for detention

Under both RS and Federation law, a person is considered in preliminary detention within the meaning of article 5.1 of the ECHR[1] from the moment of the initial decision on detention until a final verdict is given by first or second-instance court. In this report, the term detention is used to describe deprivation of freedom before a final court verdict i.e. before the person concerned is actually serving an imposed sentence as a result of a guilty verdict.

In practice, detention can be ordered at three stages of procedure in criminal cases. The first is during the investigation stage, before the indictment is filed. The second is following filing of the indictment and the third on pronouncement of a guilty verdict imposing a sentence of imprisonment but before that verdict becomes final.

The criteria that must be met before detention during the investigative phase can be ordered are found in the Criminal Procedure Codes (CPC)[2] of each entity and are almost identical. Briefly, they are that there is suspicion that the person concerned has committed a crime for which the law prescribes the sentence of long-term imprisonment, or that, if the crime involved is not of that nature, that there is a risk that the accused will flee, that he will destroy or tamper with the evidence, that he will repeat or attempt to commit the crime or another serious crime or if detention is necessary to protect the public.[3]

There are no particular grounds given in the CPCs for ordering detention during the trial, but the grounds for detention following the verdict are the same as for detention during the investigation.

Detention in Banja Luka and Mostar prisons

In December 1999, there were 101 persons detained in Banja Luka prison. Of these, 84 are kept in the detention section of the prison. Fifteen others, against all of whom there is a non-enforceable first instance verdict, requested and received permission from the court to be transferred to the section of the prison for convicted persons. Of the total, 40 persons were found to have been detained for a period of more than two years without a final verdict.

According to the prison authorities, the major reasons for the delay in the relevant proceedings are the complexity of the case, lack of access to expert psychiatrists in the RS, problems with changes in the jurisdiction of the courts with the creation of the inter-entity boundary line (IEBL) and the generally slow nature of court proceedings.

1 The text of provisions of the ECHR referred to in this report can be found in the Appendix.
2 Federation Official Gazette 43/98. The RS carried over the CPC of the former SFRY, published in the SFRY Official Gazette 26/86 – 789 plus amendments.
3 Federation CPC, article 183 and RS CPC article 191.

In particular, JSAP found[4] that:

- In 25 of the 40 cases of persons detained for more than two years, the second instance court had annulled the first instance decision and returned the case to that court for rehearing. Three such returns have resulted in detention for more than seven years.
- The fifteen persons detained in the section for convicted persons face a possible return to the detention section if their cases are send back for rehearing as a result of their appeal.
- Twelve cases relate to the problem of shifting territorial jurisdiction of the courts. In the most egregious example, a man has been detained for seven years without an enforceable sentence because of this.
- Two cases are delayed as a result of requests for psychiatric examination by experts in Yugoslavia.

To assess whether the situation in Banja Luka is repeated in the Federation, as a sample on 18 and 19 January 2000 JSAP carried out an investigation of length of and reasons for detention in the two Mostar prisons.

The situation in Mostar is not similar to that in Banja Luka. East Mostar prison has six persons in detention, only one of which is awaiting a decision on appeal. The longest period of detention, of approximately one year, is for three men currently on trial in the Cantonal Court for murder. This was previously charged as a war crime.

The prison in West Mostar has twenty detainees, there for periods of between five days and seventeen months. Almost all are in the pre-trial phase of proceedings.

Although not the focus of this report, two cases are worth mentioning. Both detainees were found guilty of murder in separate cases, but because of their mental illness the security measure of mandatory psychiatric treatment was imposed. There is only one institution in the Federation that is qualified to effect this measure, located in Zenica. In response to requests by the governor of the Mostar prison to admit one of the two detained for this purpose, the Federation Ministry of Justice replied that the institution is already working beyond its capacity. Thus the two men remain in detention indefinitely.

The conditions of detention

There is a marked difference in conditions between the detention and the convict section. Detainees are isolated, and have limited rights to physical exercise, limited visits from and contact with family and friends, limited rights to engage in activities, no movement outside the cell, no socialising, etc.

Once the first instance court has made a decision imposing a sentence of imprisonment, a detainee may request the court to approve his transfer to the convict section to serve his or her sentence voluntarily in advance. If the second instance court returns the case to the lower court for rehearing, however, the detainee is then retransferred to the detention section and must face again its disadvantages.

4 The figures given are the result of a quick overview and may be incorrect. It should also be noted that the reasons for delay in some of the categories overlap and in some cases more than one of the reasons indicated applies.

The prison authorities in Banja Luka have been sufficiently concerned about the situation to have addressed the RS Minister of Justice on the issue. Meetings followed and some improvement resulted. However, this issue raises a number of legislative and systemic problems that should be properly resolved, not simply on an ad hoc basis.

Reasons for detention in practice

The initial decision on detention as well as the consequent continuation of detention depends in large measure on the charges against the accused rather than on the likelihood of his escape, on danger of recidivism or on interference with evidence. In practice, the necessity to detain appears to be conceived of as routine and even as the preliminary serving of a sentence rather than as a precautionary measure to secure the appearance of the accused before the court and to prevent interference with the proper administration of justice. One judge also stated that detention is sometimes ordered for the protection of the accused. The legal justification of this is probably the ability to prescribe detention for the purposes of the preservation of public order, a wide-reaching concept, but in practice this may run contrary to the admissable restrictions on personal liberty under article 5.1 c of the ECHR.

The detention of all persons accused of committing crimes punishable by long-term imprisonment is the best illustration of this concept. In both the Federation and RS, anyone accused of committing a crime punishable by long-term imprisonment must be detained until the final verdict regardless of circumstances of the specific case, such as the danger of absconding or interfering with the evidence. This is clearly contrary to the restriction on personal liberty permitted by articles 5.1 c and 5.3 of the ECHR.

Possible Length of Detention

The maximum length of pre-trial detention is formally limited to six months, but this is only in respect of the investigation stage of the proceedings. There is no limitation on detention after the indictment is filed. In practice trials take place over a long period of time with frequent small hearings and many adjournments and detention may continue throughout.

The courts are only required to make decisions on detention at certain points in the proceedings, rather than at fixed intervals. They are made *ex officio* and are reportedly formal and automatic, especially in the case of serious crimes. Once a person is detained, clearly that detention may, and in many cases does, last for a long time.

Unlike other legal systems, in Bosnia and Herzegovina first instance sentences are not enforceable on delivery. This may be a result of the possibility that on appeal the second instance court will annul the verdict and refer the case back to the lower court for rehearing. This practice is quite common and seems, in fact, to be at least as normal as the rendering of a final verdict by the second instance court. An accused person may be brought to trial an unlimited number of times. It is quite possible for the verdict from the rehearing to be challenged on appeal, for the case to be referred back again to the first instance court, for there to be a third appeal, etc.

In Banja Luka, there are three persons in detention for more than seven years without a final verdict as a result of this practice. All were found guilty by military courts and the verdicts were annulled on appeal. Two await the rehearing at first instance and one is now waiting for the verdict on appeal from the rehearing. In all three cases there was a period of between two and three years between the first instance verdict and the decision on appeal.

The slowness of proceedings in general as well as the frequent and unlimited possibility of returning cases for rehearing raises two problems in relation to the application of the ECHR and detention. The first is that there is a breach of the right under article 5.3 to trial within a reasonable time or release. The second is the right under article 6 to final determination of charges within a reasonable time.

While detention continues, accused persons remain in a state of uncertainty and anxiety heightened by the fact that the period of detention is indefinite. The charges against them could remain pending until the limitation period expires. This places detainees in a position of excessive dependence on the efforts of the judicial system and the law allows the unlimited and ungoverned protraction of the work of the courts. Taken together with the usual difficulties related to deprivation of liberty, as well as the lack of adequate living conditions and medical help, this uncertainty may be considered a factor contributing to completed and attempted suicides of detained persons - despite the efforts of the prison authorities to show humane attitudes.

The right to challenge detention

As stated above, decision on detention are made by courts on an ex officio basis. The right to bring court proceedings to review the procedural and substantive grounds used to justify any deprivation of liberty is a basic guarantee against possible arbitrary detention but although explicitly required by article 5.4 of the ECHR, no habeas corpus procedure is provided under the legislation of either entity that would enable a detainee to challenge the necessity of continuing detention or to raise arguments against it on his own motion.

Without such a guarantee, detention can become a penalty without sentence. The many months of pre-trial detention without a final verdict and often without a hearing as in the over 40 cases of persons detained in Banja Luka for more than two years, clearly violate this entitlement.

As the ECHR overrides domestic law, detainees may technically be able to challenge their continued detention under article 5.4, but without specific procedures to enable this so their practical ability to do so is limited.

The effect of detention on the final verdict

The court practice of continuing detention after filing of the indictment also indicates a possible assumption on the part of the court that the prosecution will finally succeed in supporting the charges with necessary evidence, thereby disregarding the rights of the individual. This raises concerns about the presumption of innocence, guaranteed by both the RS and Federation CPC and also article 6.2 of the ECHR.

If acquitted or finally sentenced to imprisonment for a period shorter than the one spent in detention, persons who were detained may claim damages in civil litigation as compensation for the time spent in detention. It has been difficult to obtain definite information on whether these judgements are paid from government or from court budgets. Whatever the answer, given the parlous state of the local economy, this may create, to a greater or lesser degree, some motivation to justify detention by convicting the accused, especially in cases of lengthy detention, and imposing a sentence of imprisonment as least as long as the time already spent in detention. Thus, the right to compensation under article 5.5 of the ECHR may conflict with the right to a fair trial under article 6.

Taken as a whole, the absence of the guarantees required by article 5 of the ECHR combined with the failure of the courts in all cases to provide a fair trial within a reasonable time result in a de facto punishment. This punishment is, in fact, imposed with the consent of the court but prior to its final decision and (in some cases) even despite the court's finding of insufficient evidence, leaving the impression of an ex ante assumption of guilt prior to passing even an enforceable first instance sentence.

Thus detainees become hostages to the slow administration of justice and securing the rights granted by articles 5 and 6 of the ECHR may therefore be thwarted.

Changes in jurisdiction

A further reason for the lengthy periods of detention in Banja Luka is the uncertainty over second instance jurisdiction arising from the creation of the IEBL in 1995. For example, prior to that date, cases decided by the court in Sanski Most at first instance went on appeal to the District Court in Banja Luka in the RS. Now the second instance court for Sanski Most is in Bihac in the Federation. There is no legislation specifying the steps to be taken in respect of second instance cases arising from Sanski Most before 1995 but not completed. At present, these cases are not dealt with by the Bihac Cantonal Court and have not yet been dealt with by the Banja Luka District Court.

The accused are still detained without a final verdict. The worst example of this found were two persons in Banja Luka prison who were both initially detained in 1993 for separate offences, were sentenced by the Sanski Most court in 1994 at first instance to seven years and twelve years of imprisonment respectively, and whose appeals have not yet been heard. They have now been deprived of liberty for almost seven years.[5]

5 As the convictions were for murder, the legislation on amnesty does not apply.

Experts

The alleged lack of psychiatric expertise as a reason for continued and lengthy detention is a curious one and without more information it is difficult to speculate authoritatively on why this might cause such delay. In separate research into the use of court experts, JSAP become aware that psychiatric expertise is available within the RS as well as elsewhere in BiH. Even if the courts require expertise from Belgrade for particular reasons, this can usually be obtained a shorter period of time than two years.

One possible cause of delay is that the courts do not have the funds to pay the expert fees and so the reports are held up as a consequence but two years would be an exceptional period if that is the sole reason.

Whatever the reason, under the European Court case law on the ECHR, neither a lack of expertise nor a lack of funds to pay for it would excuse the breach of the detainees' rights to have their cases heard within a reasonable time. The ECHR imposes a duty on States to organise their legal systems in a way that their courts can meet each of the obligations of the Convention.

Conclusions

- In ordering detention, the courts take greater account of the nature of the alleged crime than the pertinent circumstances and are therefore in breach of the provisions of the ECHR. In addition, the requirement for mandatory detention is in some cases contrary to the ECHR and the imposition of detention for the protection of the accused breaches both the CPC and the ECHR.

- The fact that an accused may be in detention for a period of several years while waiting for a final verdict, breaches both articles 5 and 6 of the ECHR.

- The lengthy periods that elapse between filing an appeal and the decision on it can lead to excessive detention, as can the lapse of time between the appeal and any necessary first instance rehearing.

- The absence of habeas corpus provisions means that detainees are effectively penalised without a sentence.

- The absence of adequate psychiatric facilities in the Federation has led to persons being detained instead of properly treated.

- The potential liability to pay compensation in respect of periods in detention may create an incentive to find an accused guilty and impose a sentence of imprisonment.

- Uncertainty over second instance jurisdiction following creation of the IEBL in 1995 has resulted in some cases still not having been dealt with continued detention as a consequence.

Recommendations

- Both entities must urgently address the question of cases of split jurisdiction following the creation of the IEBL.

- Federation authorities must urgently take steps to address the question of provision of facilities to treat persons subject to mandatory psychiatric treatment.

- The ongoing review or drafting of legislation on criminal procedure in both entities should, inter alia, take account of the need for proper habeas corpus procedures including the right for persons to challenge detention orders and a requirement for periodic and regular review of detention orders regardless of the current stage of the procedure. It should also require rehearings to be conducted within a fixed period of time from the decision on appeal. Consideration should also be given to the grounds for detention and especially the requirement for mandatory detention in certain cases.

- There should be a requirement in relevant legislation for courts to deal with cases in few, preferably one, concentrated hearings rather than the present practice of numerous short hearings over a long period of time.

- There is a need to eliminate or amend the present practice of second instance courts consistently referring cases back to the lower court for rehearing rather than rendering final and enforceable verdicts. Further investigation of this aspect is currently being undertaken by JSAP.

- The judiciary and counsel should receive training on both the ECHR and in particular on the notion of personal liberty.

- Entity authorities need to address the problems that cause cases to be delayed by lack of appropriate expertise.

APPENDIX

European Convention on Human Rights

Article 5

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

a. the lawful detention of a person after conviction by a competent court;
b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of person of unsound mind, alcoholics or drug addicts or vagrants;
f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom the action is being taken with a view to deportation or extradition.

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

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

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

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly, but the press and public may be excluded in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with the criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b. to have adequate time and facilities for the preparation of his defence;
c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient mean to pay for legal assistance, to be given it free when the interests of justice so require;
d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.