FAIR TRIALS

INTRODUCTION

1. This opinion is produced by Fair Trials in the context of pending criminal proceedings in the case of [---], which we understand to raise an issue as to the interpretation of Article 7(1) of Directive 2012/13/EU on the right to information in criminal proceedings (the '**Directive**'). As an expert on EU criminal justice issues, we provide this opinion as an independent entity with no interest in the outcome of the specific case.

About Fair Trials

2. Fair Trials is an independent human rights organisation based in London and Brussels which works for respect for the right to a fair trial according to internationally-recognised standards of justice. It is the coordinator of the Legal Experts Advisory Panel ('**LEAP**'), a network of 130 criminal justice experts from all 28 Member States of the European Union.

3. Fair Trials works with LEAP to obtain current information on the protection of defence rights within the European Union. For instance, in 2013-14 LEAP 56 members from 25 countries met in six different meetings to discuss the situation of defence rights covered by the directives adopted under the EU Roadmap for strengthening procedural rights of suspects and accused persons in criminal proceedings[1] (the '**Roadmap**'), discussed further below, including the Directive and the specific question of access to the case-file.

4. Fair Trials also convenes regular roundtables of LEAP to discuss strategic priorities and issues of common concern, with access to the case-file identified as one of four key areas of focus. LEAP also provides knowledge on the implementation of the directives adopted under the Roadmap through roundtable meetings, questionnaire-based surveys and regular telephone calls.

The issue

5. We understand this case to raise the question of the meaning of the requirement in Article 7(1) to 'make available' documents and, in particular, whether this should be interpreted as precluding the application of a rule whereby a person subject to an arrest warrant is refused both the right to take copies of evidence on which they intend to rely to challenge their detention and the ability for their lawyer to take notes when consulting such documents.

[1] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (OJ 2009 C 295, p. 1).

Assumptions

6. We assume, for the purposes of this opinion, that the existence of an arrest warrant is sufficient to trigger the obligations of the Member State whose authorities issued that arrest warrant under Article 7(1), irrespective of whether the person is actually detained further to it.

7. We also assume that the person subject to that arrest warrant has full standing to avail themselves of any procedural rights available to persons detained in the ordinary course of criminal proceedings in that Member State, irrespective of where they are physically located.

Content of this opinion

8. This opinion makes the following points:

    a. Article 7(1) of the Directive was adopted to facilitate compliance with the requirement arising under Article 5(4) of the European Convention on Human Rights ('**ECHR**') for access to the file to the extent necessary to ensure equality of arms in proceedings for challenging the lawfulness of detention.

    b. A review of the case-law of the European Court of Human Rights ('**ECtHR**') on Articles 5(4) and, by analogy, 6 of the ECHR shows that there is a certain flexibility within the ECHR as to how such access is provided, but that the modalities chosen must in any case enable an effective opportunity to prepare a challenge to the lawfulness of detention, a rule which may in certain cases be infringed by practical arrangements which limit the opportunity for lawyer and client to consult on the basis of the evidence in the file.

    c. Article 7(1) of the Directive, at least, reproduces this requirements. It also entails additional effects including (i) the requirements for legal certainty and clarity in implementation of directives, which means that practical restrictions upon this right should have a clear legal basis; (ii) national courts must do all that lies within their jurisdiction to give effect to the Directive; and (iii) the provision needs to be read together with the Charter of Fundamental Rights of the EU (the '**Charter**'), the requirements of which in this context are not clear.

    d. A review of some of the ways in which access to the case file is made available to suspects or their lawyers at the pre-trial stage in criminal cases in different Member States of the EU shows that there seem to be different views among the Member States as to the requirements of Article 7(1), and that there exist various practical ways of providing such access, some of which produce difficulties when it comes to challenging detention.

e. In the event of doubt as to the proper meaning of Article 7(1) and the extent to which it may prescribe certain minimal procedural modalities, a reference to the Court of Justice of the EU ('**CJEU**') is available (or, as the case may be, mandatory). A refusal to refer by a court of final must be adequately reasoned, in accordance with Article 6 ECHR.

A. ARTICLE 7(1): OBJECT AND PURPOSE

9. Article 7(1) of the Right to Information Directive (the 'Directive') has not yet been interpreted by the CJEU. For the time being, we think it helpful to state what we understand to be its purpose.

10. Article 7(1) appears to be closely related to the requirement in the case-law of the ECHR based on Article 5(4) ECHR according to which the review of detention 'must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" (...) Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention' (*Schöps v. Germany* App. No 25116/94 (13 February 2001), paragraph 44).

11. The ECtHR also states: 'information which is essential for the assessment of the lawfulness of a detention should be *made available* in an appropriate manner to the suspect's lawyer' (our emphasis) (*Garcia Alva v. Germany* App. No 23541/94 (13 February 2001), paragraph 42).

12. Article 7(1) appears to replicate this, requiring Member States to 'ensure that documents (…) which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers'. The relationship between the rules is confirmed by recital 30, which specifies that such documents must be made available at the latest before the hearing envisaged by Article 5(4) ECHR.

13. That is consistent with the general objective of the Roadmap, which called for 'further action on the part of the European Union to ensure full implementation and respect of Convention standards, and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards' (recital 2).

14. Article 7(1) thus seems to be intended to protect the right to liberty by ensuring that sufficient access to evidence is provided to enable compliance with the equality of arms requirement inherent in Article 5(4) ECHR and, thereby, ensure effective judicial review of detention.

15. However, the specific meaning of the requirement to 'make available' documents is not clear. The expression does not appear elsewhere in Article 7 of the Directive, and appears to be a reference to the expression of the ECtHR reproduced above at paragraph 12. The Directive further states that 'the provisions of this Directive that correspond to rights guaranteed by the ECHR should be

interpreted and implemented consistently with those rights, as interpreted in the case-law of the [ECtHR]'. Accordingly, it is necessary to examine the ECtHR case-law

B. THE ECHR'S EQUALITY OF ARMS REQUIREMENT

1. The practical requirements of equality of arms under Article 5(4)

16. Most of the findings of violations of Article 5(4) ECHR concern cases in which substantive restrictions on access to the file are concerned. The case-law establishes that, although the efficient conduct of criminal investigations may imply that evidence be kept secret, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence, so the essential documents must be made available (*Chruscinski v. Poland* App. No 22755/04 (6 November 2007), paragraph 56). At this point, as access has been restricted outright, the question of modalities does not arise, so the ECtHR's analysis stops there.

17. However, in discussing the equality of arms requirement under Article 5(4), the ECtHR specifies that '[w]hile national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party will be aware that observations have been filed and will have a *real opportunity to comment thereon*' (emphasis added) (*Lietzow v. Germany* App. No 24479/94) (13 February 2001). In so doing, it refers to the more general requirements of a fair trial Article 6 ECHR, which form the basis for the requirements of Article 5(4) ECHR. Accordingly, inferences can be drawn by analogy from that case-law concerning Article 6 where, by contrast, the question of modalities usually arises more clearly.

2. Modalities of access to the file and equality of arms under Article 6 ECHR

18. In relation to Article 6 ECHR, the ECtHR states clearly that 'unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, [are] important guarantees of a fair trial in criminal proceedings (*Dolenec v. Croatia* App. No 25282/06 (26 November 2009), paragraph 218). On that basis, the ECtHR finds restrictions upon the ability to take copies of documents to lead to an infringement of the requirement for an adversarial procedure (*Dolenec v. Croatia*, see paragraphs 215-218).

19. The case-law on Article 6 ECHR further shows that a person will not enjoy 'adequate time and facilities to prepare a defence', as protected by Article 6(3)(b) ECHR, if for practical reasons their ability to access the file and consult with their lawyers on that basis is restricted and undermines their ability to prepare for trial.

20. Thus in *Öcalan v. Turkey* App. No 46221/99 (12 May 2005), the ECtHR found that the inability of lawyers to obtain copies of the case file to pass to the client, with only the most limited

opportunity for the client to consult the documents and instruct his lawyers on this basis once the restriction was lifted, meant a violation of Article 6(3) arose (paragraphs 138-149). Conversely, where counsel has the opportunity to obtain copies and pass them to the client, the ECtHR finds no violation (*Kamasinski v. Austria* App. No 9783/82 (19 December 1989), paragraph 91).

21. Indeed, more broadly, the ECtHR finds that the right to a fair trial is denied in civil cases where authorities refuse to provide physical copies of documents (namely medical records) which are needed in order to form a view as to the merits of a potential civil claim (against the hospital concerned), as lawyers and client need to be able to consult upon the content effectively in order to assess the legal situation (*K.H. v. Slovakia* App. No 32881/04 (28 April 2009).

22. This approach, we suggest, reflects the assumption that, in order to be able to comment effectively upon the contents of the file, a person must have meaningful access to it and the ability to discuss it with their counsel. Practical restrictions (on time, ability to make copies etc.) may undermine this and lead to an infringement of the requirement for equality of arms.

a. Appropriate conclusions concerning Article 5(4) equality of arms

23. Of course, though the ECtHR states that the proceedings under Article 5(4) need not possess all the guarantees of a criminal trial, such a procedure 'should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial' (*Schöps v. Germany*, cited above, paragraph 44).

24. The analysis as to whether a proceeding for the review of the lawfulness of detention is fair thus proceeds on much the same basis as the assessment whether there were sufficient time and facilities to prepare a trial defence. For instance:

    a. In *Shulenkov v. Russia* App. No 38031/04 (17 June 2010), the ECtHR found a violation of Article 5(4) due to the practicalities, noting that a last-minute replacement lawyer 'did not have time to travel to Moscow to take instructions from the applicant or discuss the matter with him' but that the domestic court 'did not consider the possibility of adjourning the hearing with a view to (…) [the lawyer] sufficient time and facilities *to confer with the applicant and to study the case file*' (paragraph 53) (our emphasis).

    b. In *Černák v. Slovakia* App. No 36997/08 (17 December 2013), an extradition case, the Court noted that 'the applicant's lawyers were summoned to the remand hearing only a few hours before that hearing, despite there being a considerable distance between their chambers and the court, and that at that hearing, they were served with a copy of the EAW and allowed to inspect the case file and to consult with the applicant for about

twenty minutes. The Court is of the view that the *time and facilities* thus available to them for the preparation of the applicant's case were considerably limited' (paragraph 80).

c. The questions communicated to the respondent Government in *Apostu v. Romania* App. No 22765/12 (communicated 18 December 2012) ask whether the requirement for a detainee and his lawyer to consult through a glass partition, limiting their ability to discuss confidential documents, infringed the applicant's right under Article 5(4) ECHR, showing that practical restrictions can raise an issue under that provision.

25. Accordingly, the requirement for equality of arms under Article 5(4) ECHR should be approached on the same basis as Article 6 ECHR: it matters not how access to the file is organised, provided that there is at least be an effective opportunity for counsel and client to discuss the content in order to be able to make submissions regarding detention. Practical limitations relating to the making of copies and ability to make notes may infringe this requirement.

C. EU LAW OBLIGATIONS FLOWING FROM ARTICLE 7(1) OF THE DIRECTIVE

26. Article 7(1) of the Directive, as discussed above in paragraphs 11-14, seeks to ensure compliance with the requirements that exist in the Article 5(4) case-law. As a minimum, it must therefore be taken to require that the arrested person has an effective opportunity to consult the contents of the case file and confer with his/her lawyers on that basis. However, it is worth considering the additional characteristics of Article 7(1) as a provision of EU law.

27. Under Article 288 TFEU, a directive is binding as to the result to be achieved but leaves the Member State the choice of methods to achieve it. And indeed, beyond the requirement to 'make available' documents, Article 7(1) does not prescribe a particular method for making documents available. In addition, directives adopted under Article 82(2) TFEU (such as the Directive) do not 'harmonise' criminal justice systems: they impose only 'minimum rules' and respect the legal traditions of the Member States.

28. In principle, therefore, the modalities for access to the file fall to the Member State to decide. However, this is subject to (1) the requirement for legal certainty in implementation; (2) the requirement to ensure the effectiveness of the provision in question; (3) overriding requirements of the Charter which have not yet been explored in this context.

1. Legal certainty and precision in implementation of Directives

29. The CJEU has stated that 'each Member State should implement the directives in question in a way which fully meets the requirements of clarity and certainty (…) *Mere administrative practices, which by their nature can be changed as and when the authorities please and which are*

not publicized widely enough cannot in these circumstances be regarded as a proper fulfilment of the obligation imposed by article 189 [now 288 TFEU] on Member States to which the directives are addressed' (our emphasis) (Case 102/79 *Commission v. Belgium*).

30. Within the framework of Article 7 of the Directive, Article 7(1) is subject to no derogation, reflecting the irreducible nature of the requirement for disclosure under Article 5(4) ECHR (see, in this regard, *Dochnal v. Poland*, where the ECtHR found that even documents relating to national security could not be withheld at the expense of this requirement). This makes it clear that a practical restriction on the consultation of such documents impinges upon the enjoyment of an irreducible aspect of a fundamental right, and such restrictions should therefore be clearly provided in law and not left to prosecutorial discretion.

2. Requirement to ensure the full effect of Article 7(1)

31. Secondly, even if Article 7(1) simply restates the equality of arms rule in Article 5(4) ECHR, this comes with the added injunctive force of a provision of EU law. The CJEU states that 'EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it' (Case C-69/10 *Diouf*). Accordingly, provisions of national law relating to access to materials, and any other general powers of the court, should be interpreted in such a way as to ensure that the person subject to the arrest warrant has an effective opportunity to prepare a challenge to the lawfulness of detention.

32. In addition, even if the national law appears to achieve the aims of the Directive, it falls to the court having jurisdiction to ensure the benefit of the Directive is enjoyed by the person concerned. 'The adoption of national measures correctly implementing a directive does not exhaust the effects of the directive. Member States remain bound actually to ensure full application of the directive even after the adoption of those measures. Individuals are therefore entitled to rely before national courts, against the State, on the provisions of a directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise whenever the full application of the directive is not in fact secured [including] where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it' (Case C-62/00 *Marks & Spencer*, paragraph 27). Article 7(1) is clear, precise and unconditional and appears specifically intended to confer an enforceable right upon the person concerned. Accordingly, it falls to the national court to ensure, in the specific case, that the practical arrangements adopted further to the relevant national law ensure a sufficient opportunity to prepare a case to challenge the arrest warrant.

3. The right to an adversarial proceeding under Article 47 of the Charter

33. Thirdly, it should be observed that the Article 7(1) should be read together with the Charter of Fundamental Rights of the EU, in particular Article 6 (right to liberty) and Article 47 (right to an effective remedy). The latter provision incorporates the right to an adversarial proceeding, requiring that 'the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them' (Case C-300/11 *ZZ*, paragraph 55). The *ZZ* case effectively established that principles developed by the ECtHR under Article 5(4) ECHR applied to decisions excluding an EU citizen from a Member State, but the CJEU has not had occasion to comment upon the application of those principles in the criminal justice context when a person presumed innocent is deprived of liberty. As explained below, the disparity in practices in the EU suggest that the requirements of the right to an adversarial proceeding in this context require further clarification..

D. SYSTEMS OF ACCESS TO THE FILE IN THE EU

34. A study which Fair Trials has been undertaking through consultation with LEAP shows how systems of pre-trial disclosure operate in other EU Member States. Some Member States appear not to have sufficiently complied with the substantive right of access conferred by Article 7(1), allowing access to the file itself to be restricted in order to protect the effectiveness of the investigation:

    a. In **Estonia**, the law specifically implementing the Directive permits the prosecutor to withhold access to documents which are essential for challenging detention. Thus, irrespective of modalities, in some cases there will simply be no access to the file. Estonian lawyers consider this contrary to the Directive.

    b. In **Bulgaria**, too, access is provided only at the conclusion of the pre-trial investigation, and prior to then the possibility to challenge detention is undermined. Earlier access may be provided but only on a sporadic basis by informal agreement with the prosecutor but this is not subject to specific requirements and may take the form of ad-hoc arrangements close to the hearing which do not provide an effective opportunity to prepare a challenge to detention.

    c. In **Portugal**, if no order has been issued to protect the secrecy of the investigation, copies of the file can be obtained at the pre-trial stage. However, if such an order has been issued, copies can be requested but may not always be granted. Only after the completion of the pre-trial investigation is full consultation of the case file provided, with the lawyer

able to make copies and take scans. This, ultimately, can mean that in some cases it becomes difficult effectively to challenge detention at the pre-trial stage.

d. In **Lithuania**, the law enables the prosecutor to withhold access to the file, but also to grant access but restrict the ability to make photocopies. Consultation takes place at the prosecutor's office and copies are made there if allowed. Certain documents, including as to the private lives of participants in the proceedings, cannot be copied. However, in any case, the law entitles the lawyer to take notes, with the exception only of documents considered a state secret.

35. However, the enquiry reveals more examples of practices enabling relatively free access to documents, with the possibility to access physical evidence in the form of copies or scans:

a. In **Romania**, consultation of the criminal case file is governed by Article 94 of the new Code of Criminal Proceedings, which entered into force in February 2014. This entitles the lawyer of the person subject to criminal proceedings (inculpat) to consult the file and to take photocopies. If the person is deprived of liberty, there is a right to consult the whole file. A formal document issued by the prosecutor's office in March 2014 explained how prosecutors would be approaching this provision, stating that photocopies would be provided but that specific information, such as the personal data of third parties, might be redacted on a case by case basis in order to protect those data from circulation in the public domain. The result is that a person detained pre-trial is – if not immediately, due to delays in obtaining copies, then reasonably soon thereafter – able to consult the full file and retain possession of a copy of it.

b. In **Germany**, pursuant to Article 147 of the Criminal Procedure Code (which is federal law applicable in all the Länders), defence counsel has the right to inspect the case file. While restrictions apply to the right in order to protect the purpose of the investigation, where a person is deprived of liberty, 'information of relevance for the assessment of the lawfulness of such deprivation of liberty shall be made available to defence counsel in suitable form; to this extent, as a rule, inspection of the files shall be granted'. The LEAP Advisory Board member for Germany explains that, in cases involving lower volumes of information, a copy of the original file is made available, or the original file is made available to the lawyer who may make a copy for his client. In cases involving a larger volume of information, a CD/DVD with an electronic version of the file is made available. As a result, there is not a major issue challenging detention effectively. Another LEAP Member has, in fact, given the example of the courts ordering the authorities to provide a personal computer, at the state's expense, to enable a detained client to consult

vast amounts of electronic evidence in order to prepare for trial, showing the extent to which courts are prepared to use their jurisdiction to ensure practical, effective access.

c. In the **United Kingdom (UK)** (which is bound by the Directive), pre-trial disclosure is regulated by Part 10 of the Criminal Procedure Rules 2013, which provides that at the first court hearing the prosecution must provide 'initial details of the prosecution case', which include a summary of the evidence and any statement or document on which the prosecution case will be based. Such disclosure is provided in the form of a copy of the evidence, though there is a move towards digitalisation. If a copy cannot be supplied, the defence must be allowed to inspect the original. This disclosure is provided to the lawyer at court, or if no lawyer is present the prosecution would be under a duty to give the papers to the accused directly. As proceedings progress, the Criminal Justice and Procedure Act 1996 provides that, on an ongoing basis, any evidence which could assist the case of the accused or undermine the prosecution case must be disclosed, in which case, the same modalities apply.

d. In **Austria**, at the police station, the lawyer may consult the file and take pictures or copies, if the facilities are available. Thereafter, the file is accessed at the public prosecutor's office on the same basis. The request to consult the file is made in writing to the prosecutor, ordering copies there and then as the case may be. There is no legal basis for consultation only, without the right to take pictures or copies. The copies, when provided, can either be provided in paper or as data on a disc, depending on the facilities available to the particular prosecutor's office. There is a cost associated with copies (per file for electronic ones, or per page for hard copies, making the former cheaper). The right of access to the file applies to both defendants and their lawyers.

e. In **the Netherlands**, access is provided to the file within three days of arrest. At this stage, this is usually a paper copy of the file. Electronic files are then supplied later. This is currently organised through a CD, with an online system being piloted. The lawyer retains the file and is free to provide a copy to his client any time. Consequently, this aspect does not produce a difficulty in challenging detention.

36. On the basis of the above, we would suggest that it is clear that there is a lack of agreement, at least between the Member States' legislative authorities, as to the precise requirements of Article 7(1) of the Directive. This is presumably why the Roadmap sought to 'ensure full implementation and respect of Convention standards, and, *where appropriate, to ensure consistent application of the applicable standards*' (recital 2).

E. REFERENCE TO THE COURT OF JUSTICE OF THE EU

37. To the extent that the Court has doubt as to the proper interpretation of Article 7(1) of the Directive and, in particular, the concept of documents being 'made available' to arrested persons or their lawyers, we would underline that there is the possibility (and potentially the obligation) to make a reference for a preliminary ruling to the CJEU. For convenience, we summarise key relevant principles:

    a. Further to Article 267 TFEU, the CJEU has jurisdiction to give preliminary rulings concerning issues of EU law. Any court or tribunal *may*, if it considers that a decision on the question is necessary to enable it to give judgment, request the CJEU to give a ruling. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal *shall* bring the matter before the [CJEU] (our emphasis).

    b. The facility to refer a question belongs to any court or tribunal which considers that the interpretation of a question of EU law is necessary to enable it to give judgment. Thus, the *Amstgericht Laufen*, a first-instance court in Germany, has referred questions concerning the Directive and Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, seeking a ruling as to whether those measures are to be interpreted as precluding certain national procedural rules relating to the calculation of time limits and the submission of appeal documentation (Case C-216/14 *Covaci*, reference for a preliminary ruling lodged on 30 April 2014, OJ 2014 C 253, p. 17).

    c. The obligation to make a reference which applies to courts of final instance is subject to the rule that a question need not be referred if it is *acte clair*, the conditions for which were specified in the CILFIT case. In particular –

        i. 'the correct application of community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other member states and to the [CJEU]. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the court of justice and take upon itself the responsibility for resolving it' (Case 283/81 *CILFIT*, paragraph 16). Whilst this obligation does not require the national court to consider the position of administrative authorities in other states, we would suggest that the variety of approaches discussed in Part D above,

unlikely to be inconsistent with national jurisprudences, show there is no consensus on the requirements of Article 7(1).

ii. It is necessary to bear in mind the characteristics of EU law, including, inter alia, the fact that provisions of EU law must be interpreted in light of EU law as a whole, regard being had to the objectives thereof and to its state of evolution at the material time (CILFIT, paragraph 20). We would point out that the relationship between Article 7(1), Article 5(4) ECHR, and broader fundamental rights and principles of EU law is an incidence of the 'complex and evolving' relationship between the EU and the ECHR (*European Human Rights Law Review*, 2012 4 363) and for that reason alone cannot be considered acte clair.

38. We would further highlight the fact that Article 6 ECHR imposes obligations upon courts which are requested to make a reference for a preliminary ruling to the CJEU. The principles were summarised in *Vergauwen and Others v. Belgium* App. No 4823/04 (admissibility decision of 10 April 2012), paragraphs 89 and 90). In particular:

    a. Article 6(1) requires domestic courts to give reasons, in light of the applicable law, for any decision refusing to refer a question for a preliminary ruling;

    b. In the specific context of the third paragraph of Article 267 TFEU, national courts against whose decisions there is no judicial remedy under national law, and which refuse to request a preliminary ruling from the CJEU on a question raised before them concerning the interpretation of EU law, are required to give reasons for such refusal in light of the exceptions provided in the case-law of the CJEU.

39. In *Dhahbi v. Italy* App. No 17120/09 (Judgment of 8 April 2014), the ECtHR found a violation of Article 6(1) on this basis, noting that the Italian Court of Cassation, which had refused to make a preliminary reference to the CJEU in a particular case, was the court of last instance but provided no reasons for its refusal to refer.

CONCLUSION

40. Fair Trials hopes that the observations in this opinion are of assistance to the court and will be happy to clarify any of the information if requried.

Fair Trials

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