Just a formality? Frequency, organisation and practice of pro forma hearings

M.J. Dubelaar, R. van Leusden, J.M. ten Voorde, S.G.C. van Wingerden
Institute for Criminal Law and Criminology, Leiden University

Summary

This study is oriented on the practice of pro forma hearings. In a strict sense, the pro forma hearing is a hearing in a criminal case which is held for the purpose of conforming to pre-trial custody terms. The law prescribes that a case in which the suspect is being held in pre-trial custody the trial must start within 104 days, or that the suspect must be released. If the pre-trial investigation has not been completed in a case, whilst the prosecutor wishes to continue to detain the suspect in pre-trial custody, the law provides for a regulation in which the prosecutor – after he has formally submitted the case – can demand that the court suspends the case. Such a hearing is afforded the label of pro forma on the basis of the fact that the investigation at trial is exclusively opened 'for form's sake'; the content of the case is not dealt with. Questions have been asked in literature with regards to the desirability of the appointment (scheduling) of a hearing for the sole purpose of continuation of pre-trial custody. This is seen as a waste of precious trial capacity and labour. There are also various questions about the scope of the competencies of the trial judge just before or during the investigation at trial (under which the pro forma hearing is included), in the period in which the pre-trial investigation is still in full progress and another judge, namely the investigating judge, may be involved. In practice, the pro forma hearing is namely also utilized by in particular the defence to put forth all sorts of investigation requests, regarding which the trial judge must in principle come to a decision. Sometimes special hearings are held to that end, which are called direction hearings in practice. A current question is how the directing role of the trial judge is related to that of the investigating judge in the pre-trial investigation and how, with an eye on this, the transition from the pre-trial to the trial investigation should be regulated.

Some discussion has taken place in literature about the pro forma hearing, but empirical research of the practice has thus far not taken place. This study fills that void. The research question is as follows.

> *With which frequency are pro forma hearings held at district courts and courts of appeal and what is the organization and practice of pro forma hearings at these courts?*

This research question must be regarded in light of the issue of pre-trial custody and the transition from the pre-trial investigation to the investigation at trial, for which the legislator seeks to provide statutory regulation. The issue of the transition from the pre-trial investigation to the investigation at trial and the accompanying transition of competencies from the investigating judge to the trial judge features in both the pro hearing as well as the direction hearing. As it is difficult to distinguish between both types of hearings in practice, the direction meeting has (as a variety of the pro forma hearing), also been included in this study. Unlike the pro forma hearing, a direction hearing can also take place if the suspect is not or is no longer in pre-trial custody.

The frequency of pro forma hearings in the years 2013-2014 was researched through the data available in the information systems of the Public Prosecution Service and the Judiciary (RAC-min for first and NIAS for second instance). From the data presented in the fourth chapter, it becomes apparent that a pro forma hearing took place in 3% of the total number of hearings in first instance. Looking only at hearings before a panel of professional judges, the percentage of pro forma hearings lies at 17,5% of the total number of hearings. The amount of pro forma hearings is substantially higher in appeal than in first instance. Of the total number of hearings held in appeal,

28% was a pro forma hearing. When the statistics are analysed on a case basis, and only criminal cases in which there was no pre-trial custody are taken into account, it appears that in first instance, one or more pro forma hearings took place in 9% of the criminal cases in which an order for pre-trial custody was given in an earlier phase. In appeal this is 22%. It may be concluded from this that in first instance, in 9% of the cases, the pre-trial investigation is still in progress at the start of the investigation at trial, in any event that a need exists to appoint a pro forma hearing for the purpose of conforming to the terms of pre-trial custody. In 40% of cases, the duration of pre-trial custody at the time of the pro forma hearing is longer than 104 days and in 17% of the cases longer than 194 days. This is mainly caused by the fact that several pro forma hearings can take place in one criminal case. Pre-trial custody was terminated in 5% of the cases in first instance. In appeal that number is at least 24%. Pro forma hearings also took place in cases in which the suspect is not or is no longer in pre-trial custody. These do not occur often in first instance (0,4% of all cases in which the suspect is not or is no longer in pre-trial custody and 1% of the hearings in cases in which the suspect is not or is no longer in pre-trial custody), in appeal that percentage is respectively 5% and 10%. Pro forma hearings appear to mainly take place if the most serious crime of for which the suspect is being prosecuted is a violent crime. The data shows that in violence cases, multiple pro forma hearings are often held. Multiple pro forma hearings also regularly take place in Opium Act and Weapons and Ammunition Act cases. This is true for both first instance as well as in appeal. In all these cases, more pro forma hearings take place in appeal than in first instance. In on average 31% of the first instance cases with a pro forma hearing, multiple pro forma hearings take place. In appeal that percentage lies at on average 45%. The reasons for holding a pro forma hearing are varied; in first instance they are mostly related to the circumstance that the pre-trial investigation has not been completed at the moment that the case is formally submitted. In appeal, the reason for holding a pro forma hearing is also relatively often that the case file has not been received by the court of appeal or is not complete.

The organization and practice of pro forma hearings was studied through written surveys and interviews. In the written survey, courts were asked how pro forma hearings are appointed and what agreements have been reached in this regard between the Public Prosecution Service and the Judiciary. The interviews were held with members of the Judiciary, the Public Prosecution Service and criminal defense lawyers and regarded experiences with pro forma hearings (including direction hearings). A diverse picture of a field in transition arises from the surveys and interviews, which are discussed in the fifth chapter. In the past years, the objective has been to fortify co-operation between the Public Prosecution Service and the Judiciary, in part to increase output and to prevent unnecessary delays. At different courts, appointment is placed in the hands of a so called traffic control tower, in which the Courts and the Public Prosecution Service co-operate physically in order to make appointment as efficient as possible. This particularly takes place in cases in which the suspect is in pre-trial custody, but co-operation is also intensified outside of these cases. At different courts of appeal, co-operation takes place with detainee chambers which direct cases relatively soon after appeal has been brought, so that the content of the case may be dealt with as soon as possible without loss of trial capacity. The problem is however that in most of the cases, judges and prosecutors who conduct or participate in pro forma hearings are not the judges and prosecutors who deal with the content of the case, whilst the former are not accorded much time for a pro forma hearing. This means that several hearing combinations (at least two) must examine a case. Respondents experience this as inefficient, but from a technical scheduling perspective, this cannot be organised in a different manner at the large courts.

The interviewed persons point out that it is important that a pro forma hearing is a public hearing in which clarity is given to the suspect, the victim or the victim's next of kin and society with regards to the progress in a case and the necessary steps in the investigation before the content of a case can be dealt with at trial. The importance and the necessity of holding direction hearings is emphasised, but there is no agreement about the position of the investigating judge vis-à-vis that of the trial judge and the degree of interference which should take place. On the one hand, the investigating judge may possibly have a better understanding of the case and can estimate which

decisions must be taken more quickly. On the other hand, the responsibility for the verdict lies with the trial judge, who must himself be able to determine to what extent the information provided is adequate to reach a factually and legally correct decision. What is clear is that there is a need for playing rules, particularly with regards to the relationship between the investigating judge in the pre-trial investigation and the moment at which the investigation transitions to the trial judge. It is up to the legislator to formulate those playing rules, whereby changes in the position and roles of procedural participants and the relationship between the pre-trial and the trial investigation should not only be well charted, but should also lead to clear choices.