



# Foreign & Commonwealth Office

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## **Legal procedures in criminal cases**

Prepared by

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## **BACKGROUND**

1. The Spanish legal system is different from that of the United Kingdom although, as in Britain, the Judiciary is independent of the Executive and all foreigners, like Spaniards, have rights guaranteed under article 17 of the Spanish Constitution. See Annex A.

2. An offence normally first comes to the notice of the police when the injured party makes a report or complaint (*denuncia*) or when the police are called to the scene of a reported crime. However, in some instances (e.g. as a result of enquiries or traffic offences) the police themselves make the initial complaint (*atestado policial*). Under the terms of the UK-Spain Bilateral Convention the Police should inform the nearest British Consulate of the arrest of a British Citizen if he/she agrees to them doing so. A consular officer will then offer consular assistance to the detainee as soon as possible after receiving notification of his/her arrest.

## **ARREST**

3. Upon arrest a person should be informed of the reason for his/her arrest and of his/her rights. If they have insufficient knowledge of Spanish an interpreter should be insisted upon. He or she is then likely to be held temporarily in a police cell until a formal statement answering the alleged offences can be taken. After this, but in any event within 72 hours of arrest, (24 hrs in case of minors) the accused will be brought before a Judge (*Juez de Instrucción - Examining Magistrate*) or released. A lawyer<sup>1</sup> and, if necessary, an interpreter (*if you speak sufficient Spanish to understand basic legal terminology you could waive your right to an interpreter*) must be present when the statement is taken and when the accused appears before the Judge. If the accused is unable to pay for, or doesn't know of one, a lawyer will be assigned to him or her at no charge (although a bill may be presented later if it transpires that the accused has means to pay) from a duty roster of the local Bar Association (*Colegio de Abogados*). But it is important to note that, at this stage, the lawyer is present solely to ensure that the accused's Constitutional rights are guaranteed and that the correct legal procedures are followed. He is not there to "defend" the prisoner against the substantive allegations or help the accused to prepare a declaration before the police. He/she will be allowed, however, to speak privately with the lawyer after declaring or declining to declare before the Police.

4. In certain very special circumstances (primarily offences concerning terrorism or major drug trafficking) a prisoner can be held *incomunicado* for up to 72 hours. Also in exceptional cases a Judge can extend the 72-hour period by up to another 2 days. (Article 384 of the Criminal Prosecution Act).

5. When appearing before the Examining Magistrate the accused will be asked to confirm or deny any statement that may have previously been made to the police or to make a further

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<sup>1</sup> Unless it is a "juicio de faltas" i.e. a trial for a minor offence.

statement. This initial appearance is a brief oral examination of the accused by the Judge and in the presence of the Public Prosecutor and will normally be based on evidence submitted by the police. From this he will determine whether there is a case to answer and, if so, decide whether the accused should be released without charges, placed on provisional liberty with or without bail (fianza), or remanded in custody (prisión preventiva) pending further investigation. The decision by the Examining Magistrate is subject to appeal by both the defendant and the prosecutor (Fiscal).

### **REMAND IN CUSTODY (Prisión preventiva) Articles 503,504 LEC**

6. There is a maximum period during which an accused person can be held in prison without trial. This could be up to 12 months where the alleged offence is punishable by a term of imprisonment of three years or less, and up to 24 months where it would be punishable by a term of three years and one day or more. But if the investigating Judge is satisfied that there are valid reasons for the police not being able to complete their case against the accused within the time, or there is reason to believe that the accused will escape the Court's jurisdiction if released, the Judge may extend the pre-trial detention period by a further 6 and 24 months respectively. This means in effect that a person can be held on remand up to 4 years. If a sentence is passed and appealed against, the accused can be held waiting appeal up to half the sentence imposed. If the appeal has not been heard by this time the accused must be released pending the result of the appeal.

## **STRUCTURE OF THE PROCEEDINGS**

### **INVESTIGATION PHASE**

7. The Examining Magistrate is in charge of investigating the crime, its circumstances, perpetrators and any other matters relating to the offence. He is assisted in this by the judicial police (members of the national police force assigned to his office). The State Prosecutor, defence lawyer (and, if appointed, private prosecuting counsel) may ask the Judge to follow specific leads in the investigation. The Prosecutor is at the same time charged with the legal duty of ensuring the defendant's rights are respected and the victim's rights protected. When the investigation is completed, if there is a prima facie case, it is the prosecutor (Fiscal) who lays the formal accusation based on the evidence and he will eventually present the case for the prosecution in court. During the investigation stage all evidence, including police documents and witnesses' statements, are reserved documents and copies will not normally be released to interested parties or their representatives although, of course, defence lawyers and, if appointed, private prosecuting lawyers do have the right of access and examination. A judge can, nevertheless, in exceptional cases, e.g. those involving state security, severely restrict the access to papers, stating that the investigation shall be declared secret. (*Secreto de Sumario*)

## **INTERMEDIATE PHASE**

8. Once the investigation activities have been carried out, the Examining Magistrate will end the investigation phase and an intermediate phase before the eventual trial will start. For this purpose the Examining Magistrate will issue one of the following orders:

- i) declaring that the offence has not been committed or that the identification of the culprits was impossible and ordering the closure of the file;
- ii) declaring that there is enough circumstantial evidence of the commission of the crime and the identification of the culprits to proceed. This order may be appealed, although the appeal does not suspend proceedings. In the latter case, the Examining Magistrate will grant a five day term to the Public Prosecutor and to the private accusation and the defence, in which they can submit one of the following Briefs i) that they wish to continue with the proceedings (accusation writ): they accuse and propose the evidence steps to be carried out during the main hearing); ii) that they do not wish to continue with the proceedings (a dismissal brief) or iii) that they think it is necessary to carry out additional investigations before taking this decision.

9. The Examining Magistrate ends this phase and issues one of the following orders:

- i) if no facts of a criminal nature result from the investigation: closing and filing the proceedings with a discontinuance order; or
- ii) transfer of the file to the Trial Court if there is enough evidence of the possible existence of a criminal offence.

This order can only be appealed if the Magistrate decides to close and shelve the proceedings. Should the Public Prosecutor or the private accusation file an accusation brief, the Examining Magistrate will most probably issue an order of type ii), i.e. ordering that the proceedings should continue. In this case, the accusing parties are granted a ten-day term to file their accusation writs and propose the means of evidence for the trial. The defendant is also given a ten-day period to determine its position on the accusation, and propose means of evidence for the trial. If not already carried out, The Examining Court can also require the accused to give a financial bond in order to secure possible future civil liabilities.

In certain cases where the alleged crime is punishable by less than 6 years' imprisonment, it is possible for a defendant to admit guilt by signing a formal brief stating that he/she is in agreement with the Prosecutor's allegations.

## **FAST TRIALS**

10. By means of Law 38/2002, October 24, some provisions were introduced in the Spanish Criminal Procedure Code regarding the so called Fast Trials (Juicios Rápidos) in cases where the accused has been caught "in flagrante" or in cases of domestic violence, robbery, thefts and traffic offences or even in relation to other offences if the investigation phase is

likely to be straight forward. The offences to be judged must not be punishable by a term of imprisonment of more than five years and the existence of a police report (atestado policial) is also necessary. The investigation steps are carried out by the Police Court (Juzgado de Guardia), which is also in charge of the intermediate phase of these proceedings and it will then send the file to the local Trial Court, which will be in charge of the trial phase.

## **MINORS**

11. A special regulation entered into force through Law 5/2000, January 12, regarding the criminal liability of minors with ages of between 14 and under 18 years. The offences committed by minors are investigated and judged by Minor Courts (Juzgado de Menores). The Public Prosecutor has an important presence throughout the whole proceedings and especially during the investigation phase. The measures that can be imposed in the Sentence, if the minor is found guilty of the offence, are above all aimed to re-educate the minor in order to avoid the commission of future offences, although they may involve custodial punishment in serious cases. (Minors Detention Centres)

## **LEGAL AID**

12. The Legal Aid Law (1/1996, January 10), which came into effect in September 1996, provides Legal Aid in all legal cases to persons who can show insufficient income and wealth. This is evaluated by Provincial Commissions and, if a case is won with substantial economic compensation, a claimant may be required to reimburse Legal Aid costs already provided.

Anyone resident in the UK seeking help to pursue a criminal case in Spain should contact and apply at the local Spanish Legal Aid office in the area of Spain where the incident took place (Colegio de Abogados). Applicants will be expected to provide documentation as proof of their financial circumstances. The Spanish Provincial Commissions make the decision on the application and any appeals, to grant legal aid.

The Legal Services Commission in the UK assists residents in the UK but **only in civil cases.**

## **TRIAL PHASE**

13. In cases where the maximum penalty prescribed by law is five years imprisonment or less, the competent Court for the Trial will be the local Criminal Court (Juzgado de lo Penal), and in cases where the maximum penalty is over five years, the appropriate Provincial Court (Audiencia Provincial). However, serious cases which are deemed to be crimes against the State (e.g. major drug trafficking and certain monetary offences), crimes committed abroad by Spanish citizens or crimes in which there is an universal jurisdiction principle (genocide, crimes against the Humanity, extradition hearings etc) are dealt with by the Central Courts at

the National Court (Audiencia Nacional) in Madrid. The attached Annex B details the various Courts in Spain.

#### **a. Trial by Judges**

Trials held at a Juzgado de lo Penal (Local Criminal Court) are heard by a single professional Judge and legal representation for the accused is mandatory. Those held at the Audiencia Provincial or the Audiencia Nacional, Juzgados Centrales de lo Penal (Provincial or National Courts) are heard by a panel of three professional Judges and legal representation for the accused is again mandatory. The victim, or aggrieved party, is entitled to be represented in the prosecution by a private lawyer, but there is no provision for those costs to be recoverable.

#### **b. Trial by Jury**

Trials by jury were introduced under the law - Ley Orgánica 5 of 22.5.95. Juries are appointed for trials dealing mainly with crimes against persons, breach of trust/confidence by civil servants, defamation, personal freedom and the environment. Such trials are held only at provincial courts and the jury is composed of nine members and one presiding Judge. The jury will simply declare guilt or innocence, and the judge then passes sentence. Seven out of the nine votes are needed to "prove" a verdict by majority. 5 votes are needed for "not guilty" verdicts.

The trial itself will normally be significantly shorter than its equivalent in the UK because much of the evidence and the examination of witnesses will already have been covered by the investigating judge. It will usually take place in open Court and judgement (Fallo) is normally announced within a month through official notification to counsel and defendant. The accused must personally appear at the trial. If he/she fails to do so the case will be kept active and a search and arrest ("busca y captura") warrant issued which can be applied at any future time the person is traced. When a person is arrested on such a warrant the lawyer can present a submission that the case has lapsed and the judge can then decide to close the case indefinitely and release the accused or send him to face the Court which issued the warrant of arrest. The European Convention on extradition provides for extradition between Spain and other signatory countries. There is also a European Arrest Warrant applicable since 1 January 2004. In some cases, where the maximum penalty for the offence does not exceed one year and where the accused has been properly summoned, he or she can be tried in absentia. If found guilty the sentences will be enforced at a later date whenever the person can be found.

### **ENFORCEMENT PHASE (Ejecución de sentencia)**

14. This is the phase during which the enforcement of the punishment takes place. Depending on the severity of the crime which has been found to have been committed, the following penalties may apply:

- i.) Fine and/or victim compensation
- ii.) Exclusion orders, or orders not to approach a person (orden de alejamiento)
- iii.) Disqualification (such as driving or public office etc) (Inhabilitacion)
- iv.) Prison (sentences of less than 2 years' imprisonment may be suspended).

## **APPEAL PHASE**

15. A judgment issued by the Local Criminal Court can be appealed (recurso de apelación) before the Provincial Court (Audiencia Provincial) by either the defence or the prosecution. If the trial has taken place at the Provincial Court (i.e. if the penalty could be over five years' imprisonment), the judgement would be subject to a "cassation" appeal (recurso de casación) at the Supreme Court (Tribunal Supremo). Any such appeal must be filed within five days from the notification of the judgement. to the Procurator Decisions of the Supreme Court are final. Only if it is asserted that a Constitutional right has been violated can an appeal be lodged with the Constitutional Court. Should new evidence come to light after a person has been found guilty there is a provision for the original judgement to be reviewed. A petition for Revision can, in these circumstances, be lodged with the Ministry of Justice who, if it accepts that there is a case, would instruct the Public Prosecutor to pursue the Petition before the Supreme Court.

## **Annex A**

### **RIGHTS GUARANTEED UNDER ARTICLE 17 OF THE SPANISH CONSTITUTION**

1. Every person has a right to freedom and security. Nobody may be deprived of his freedom except in accordance with the provisions of this article and in the cases and in the manner provided by the law.
2. Preventive detention may last no longer than the time strictly required in order to carry out the necessary investigations aimed at establishing the facts: in any case the person arrested must be set free or handed over to the judicial authorities within a maximum period of seventy-two hours.
3. Any person arrested must be informed immediately, and in a manner understandable to him, of his rights and of the grounds for his arrest, and may not be compelled to make a statement. The arrested person shall be guaranteed the assistance of a lawyer during the police enquiries or judicial investigations, under the terms to be laid down by the law.
4. A habeas corpus procedure shall be regulated by law in order to ensure the immediate handing over to the judicial authorities of any person arrested illegally. (Ley Organica 6/1984). Likewise, the maximum period of provisional imprisonment shall be stipulated by law.

## Annex B

### TYPES OF COURTS IN SPAIN

**Juzgados De Paz (Justices of the Peace):** Becoming obsolete and now only operating in small communities with no other courts. They are presided over by a single lay Justice appointed on an honorary basis by the Provincial Court and only hear minor civil cases.

**Juzgados de 1ª Instancia (Civil) e Instrucción (Penal) (Courts of the 1st Instance and Instruction):** Found in all towns with a population of more than 20,000 and divided into two parts.

a) Courts of the 1st Instance are concerned with civil and commercial cases as well as supervising the work of Civil Registrars.

b) Courts of Instruction act as Examining Magistrates investigating and preparing criminal cases to be tried in other courts. They may also try lesser misdemeanour cases (where the maximum penalty does not exceed 30 days imprisonment) and hear appeals against judgements handed down by Justices of Peace.

**Juzgados de lo Penal (Criminal Courts):** Presided over by a single professional Judge they hear cases where the maximum penalty prescribed by law does not exceed five years imprisonment.

**Juzgados de Menores (Minors' Courts):** Presided over by a single professional Judge they hear all cases, including criminal charges, involving minors under the age of 18.

**Juzgados de lo Social (Labour Courts):** Presided over by a single professional Judge they hear all labour and work-related cases.

**Juzgados de lo Mercantil (Commercial Courts):** Hear commercial cases including insolvencies, intellectual property, unfair competition, transport and disputes on Standard Terms.

**Juzgados de Vigilancia Penitenciaria (Courts of Prison Vigilance):** Provide Judges who look after the operation of prisons and the legal rights of detainees. Responsible for granting parole and any conditions attached to it.

**Juzgados Centrales de Instrucción (Central Instruction Courts):** Act as Examining Magistrates investigating and preparing cases to be tried in either the Central Criminal Courts or the Criminal Chamber of the National Court.

**Juzgados Centrales de lo Penal (Central Criminal Courts):** Located only in Madrid at the National Court and presided over by a single professional Judge they hear cases involving crimes against the State which are punishable by less than five years imprisonment. They also deal with all European Arrest Warrants submitted to Spain.



**Audiencia Provincial (Provincial Court):** One in each province and presided over by a panel of three professional Judges. Named after the Province, its jurisdiction extends throughout that Province. They try all criminal cases where the prescribed sentence could exceed five years imprisonment and hear appeals against sentences by the lower courts.

**Audiencia Nacional (National Court):** Constituted as the Provincial Courts but with National jurisdiction. It tries all cases involving crimes (including major drug trafficking and monetary offences) which are deemed to have been committed against the State and may attract a sentence of over five years imprisonment. It also decides on extradition requests and hears appeals against sentences by the lower central courts. It also deals with transfers of sentences which have been imposed in other countries where the sentenced person serves sentence in Spain.

**Tribunal Supremo (Supreme Court):** The highest level of justice in the Spanish system. It is divided into five Chambers (Civil, Criminal, Labour, Military & Public Affairs) and hears appeals for the annulment, or revision, of sentences handed down by the National or Regional High Courts. It would also try civil or criminal cases against the President of the Government, Ministers, Members of Parliament etc.

**Tribunal Constitucional (Constitutional Court):** Limits itself to considering constitutional matters and cases in which it is alleged constitutional rights have been infringed. If so, decisions are returned to the offending Court for correction.

**Tribunal Superior de Justicia de las Comunidades Autonomas (Regional High Courts):**

*Each Autonomous Community also has one of these courts. They have no direct involvement in criminal cases unless these infringe the privileges and immunities of local government officials or the judiciary. Generally involved in commercial disputes and litigation against Public Sector bodies.*

**Juzgados de Violencia contra la Mujer (Courts for violence against women):**

*There is one Court per judicial district throughout Spain specialising in cases of neglect and violence against women, such as domestic violence.*

