

FACTSHEET

Spain – Criminal Justice System



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The aim of this fact sheet is to provide an insight into the Spanish legal system. It is intended to be an introduction to the basics, and is not designed to be fully comprehensive. People who need further explanation on certain points of the legislation or of the system itself should seek advice from a lawyer or contact Prisoners Abroad.

NB: People are entitled to an interpreter at each stage of the procedure. If, at any stage, they are denied access to an interpreter, they should tell their lawyer as this may have a bearing on their case.

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1 Legal system

The Spanish legal system is different from that of the United Kingdom although, as in Britain, the Judiciary is independent of the Executive. The penal process consists of three parts:

- Where all the evidence is gathered for the judge to be able to decide whether or not the trial against the accused should go ahead.
- In which the charges and the court (or the tribunal which will hear the case) are established, and against which the defendant's lawyer will defend his client. At this stage, both parties will list the evidence which they intend to use in the trial.
- The trial. The defendant does not have to prove his innocence. It is up to the prosecution to show proof of guilt. It is important that the suspect explains everything which might have a bearing on their defence to the lawyer. It may even be beneficial to plead guilty if this results in a reduction of sentence.

All foreign nationals, like Spanish citizens, have rights guaranteed under article 17 of the Spanish Constitution. These are outlined as follows:

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.

2 Investigation and remand

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.

Upon arrest a person should be informed of the charges against him or her. He is then likely to be held temporarily in a police cell until a formal statement answering the charges can be taken.

It is the right of every citizen, accused or imprisoned, to appear immediately (within 72 hours of arrest) and publicly before a judge (*Juez de Instrucción* - Examining Magistrate) or tribunal to establish whether their arrest was legal or not, and whether an appeal should be lodged. The accused may request this in the following cases:

- When in the arrest the legal requirements have not been met.
- When the accused has been in police detention for more than 72 hours, which in certain cases could be extended a further 48 hours, if a judge so decides.
- When certain of the accused's rights have been violated (interrogation without the presence of a lawyer, torture, etc.)

A lawyer and, if necessary, 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 unwilling to appoint a lawyer, one will be assigned to him at no charge from a duty roster of the 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 rights are not violated and that the correct legal procedures are followed. He is not there to "defend" the prisoner.

When appearing before the Examining Magistrate the accused will be asked to confirm or deny the statement previously made to the police or to make a further statement. This initial appearance is not a hearing on the merits of the case. Rather, it is a brief oral examination by the Judge of the accused 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 committed to prison (*prisión preventiva*) pending further investigation. The decision by the Examining Magistrate is subject to appeal by both the defendant and the prosecutor (*Fiscal*).

In certain very special circumstances (probably only those concerning terrorism or major drug trafficking) a prisoner can be held *incomunicado* for up to 72 hours except for supervised access by a lawyer or consular representative. Also in exceptional cases a Judge can extend the 72-hour period by up to another 2 days.

2.1 Identity Parade

This falls under Article 369 of the Criminal Justice Law. This consists of putting the suspect in view of the victim of the crime together with, at least, two others with similar physical characteristics, to establish recognition. The accused's lawyer will be present as well as the victim and the police.

2.2 Personal Belongings

At the police station all personal belongings are withheld, together with passport and other identity documents. A receipt will be given. On entering custody, a thorough search of the personal effects is carried out, and objects which are not allowed in prison are withheld. If necessary, hygienic measures are adopted, and the prisoner may be given clothes which are appropriate for the time of year (Article 313 of the Penal Code). After completion of the sentence and the payment of fines, aforesaid articles will be returned, although it may be that there is a problem with any belongings which were connected with the crime.

2.3 Interrogation

Following arrest, the police may carry out one or more interrogations and the law prohibits this taking place without the presence of the lawyer. The suspect is not obliged to co-operate. He may decline to give information without prejudicing or altering normal procedure.

2.4 Interpreters

The suspect may request the help of an interpreter for appearances in the police station, before the tribunal, and in court. The interpreter's services are free of charge to the accused. Experience has shown that it can be difficult to obtain competent interpreters especially in smaller towns and cities. Sometimes the interpreter speaks the language fairly competently, but is not able to communicate the conversation exactly. If a person held on remand is required to sign their statements, their contents should be clarified before signing.

2.5 Investigation

Under the Spanish judicial system 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 it is the prosecutor (Fiscal) who lays the formal accusation based on the evidence and he or his assistants who 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.

2.6 Remand

If the Instructing Judge, taking into account the accusation, believes that the suspect should be held in prison for a longer period of time, he can pronounce remand in a detention centre. In making this decision the judge will consider the following:

- whether a crime appears to have been committed;
- the possible length of sentence (more than six months' imprisonment);
- whether the accused has previous convictions; and/or
- if the Judge considers the accused to live at a fixed address.

Generally, in the case of foreign nationals, it is considered that there is a very high risk of absconding (leaving the country in an attempt to avoid trial/conviction) and so bail is less likely to be granted (see below).

Usually, the period of remand before trial is carried out in a penitentiary near to where the trial will take place. At this stage, requests for transfer are not usually granted. It is also highly unlikely that the accused or their family might influence the decision of being placed on remand.

2.7 Limits of Remand

In Spain the maximum period that a person may be kept in prison while awaiting trial is:

- 3 months, when the crime in question carries a custodial sentence of between one month and a day, and six months.
- 1 year, if it entails a sentence of between six months and one day, and six years imprisonment.
- 2 years, when the crime carries a longer sentence.
- Where circumstances dictate that the case may not be heard within the aforesaid period, this can be extended from 2 to 4 years respectively.

The preparation of a case and bringing it to trial is usually a slow process. The length of time it takes Public Prosecutor to draw up the accusation depends on the complexity of the case and the number of witnesses. Every so often the remand prisoner will have to appear before a judge, and the date of the subsequent appearance will be set at that time.

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, he may extend the pre-trial detention. Courts in some of the main cities have provision for accelerated trials (*Juicio Rapido*) in cases where the accused has been caught "in flagrante" (in the act of committing the offence) and the facts are not in dispute. These are often heard within a month of the arrest.

Once all the evidence has been gathered the Examining Magistrate will prepare committal proceedings (*sumario*) which is sent to the local Criminal Court (*Juzgado de lo Penal* - in cases where the maximum penalty prescribed by law does not exceed six years imprisonment) or the appropriate Provincial Court. Cases which are deemed to be crimes against the State (e.g. major drug trafficking and certain monetary offences) are dealt with by the Central and National Courts in Madrid (*Juzgados Centrales de Instrucción & Audiencia Nacional*).

On receipt of the Examining Magistrate's committal proceedings the trial court will pass it first to the Public Prosecutor's Office and, if one has been appointed, to the private lawyer assisting in the prosecution. They must then submit their provisional written observations on the case and their recommendations on sentencing to the Court. These, with the original proceedings, are passed to the defence lawyer who must, usually within 15 days, provide the court with his own written observations. Only after these have been considered will a trial date be set. If the accused has not already engaged a lawyer he will continue to be represented by his first state lawyer throughout the proceedings.

During the period of imprisonment as a remand prisoner, the prison authorities have responsibility for the physical integrity and general health of the accused. They are obliged to comply with any orders or privations which the judge might decree, (for example medical assistance, isolation).

3 Bail

In principle, bail may be granted in Spain for minor offences. The decision to grant bail can only be taken by the Instructing Judge and in certain cases, on payment of a sum of money. Such a decision is only made where there is sufficient reason to believe that the accused will not use bail as an opportunity to evade justice, and that he will meet the requirements of the legal authorities to appear in court at the appropriate time.

It is not easy to obtain bail conditions for foreign prisoners who do not live in Spain; this is due to the lack of a fixed address in that country and their lack of financial income, as it is difficult to find paid employment if no residence permit is held.

4 Legal assistance

A person arrested in Spain and accused of having committed a crime has the right to the legal assistance of a lawyer and to request that he be present when statements are made, at identity parades, or at any other stage of the legal proceedings. If the arrested person does not request a lawyer or if the designated lawyer does not appear at the place of detention within eight hours of the Colegio de Abogados being informed, one will be assigned automatically. The law requires that the defence be in the hands of an authorised lawyer. At the time of contracting a lawyer one must have sufficient information regarding their professional experience as cases have arisen of lawyers who turn up at prisons offering a series of services which they charge for in advance and then are not delivered.

4.1 *Ex officio (legal aid) lawyer*

When the accused lacks the financial means, the Instructing Judge will ask the Colegio to assign a legal aid lawyer, who will be present when the accused makes their statement to the police. If state legal assistance is granted, the accused will not be charged for the lawyer's services and the Spanish government pays the fees instead. As the time spent in custody before trial may be long, the accused may get the impression that their lawyer is not taking much interest in them. In the period between the finalising of inquiries and the trial, the lawyer can do very little. *Ex-officio* lawyers do not generally visit their clients except when a new stage in the proceedings is reached, or there is a change in the circumstances of the case.

Once an *ex-officio* lawyer has been assigned, if the accused later decides, with the financial assistance of a third party, to opt for a private lawyer, the *ex-officio* lawyer will ask the accused to pay their fees for work already undertaken.

5 What happens at the trial?

In Spain there are different judicial procedures, depending on the crime or the person being detained. The two procedures which are most often used are the ordinary judicial procedure and the abbreviated judicial procedure.

5.1 *Ordinary Procedure*

This is the procedure established for crimes which carry a maximum sentence of at least 12 years and one day. The Instructing Judge opens summary proceedings, all investigations are carried out, and if the judge considers that sufficient "rational

indications of criminality" exist, an indictment will be issued. Once summary proceedings have been completed, they are sent to the Provincial Court which will set a date for trial, and where sentencing may be passed.

5.2 Abbreviated Procedure

This is a quicker process to bring to trial crimes which carry sentences of up to 12 years. The abbreviated judicial procedure cuts out some bureaucracy and simplifies some of the formalities. Indictment is not used. The defendant is notified of the use of the Abbreviated Procedure, the necessary formalities required to maintain the prosecution are conducted, and after summoning the accused he will be given the Public Prosecutor's Bill of Accusation which the defence lawyer will reply to with a written plea of defence which will later be cited in court. If the maximum penalty is less than two years, court proceedings may take place in the defendant's absence. Trial will take place before the Penal Judge, or before the Provincial Court at the request of the Public Prosecutor.

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 (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 these costs to be recoverable.

Trials by jury were legislated under *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, one presiding judge and two assistant judges. The jury will simply declare guilt or innocence and the judge will then pass sentence. Seven votes are needed to "prove" a verdict by majority. Five 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 is normally announced about a week afterwards through official notification to counsel and defendant. The accused must personally appear at the trial. If he fails to do so the case will be held over and a search and find (*busca y captura*) order issued which can be enforced at any future time when the person is traced (unless the case has lapsed, usually a few years after completion of the sentence that would have been imposed on the defendant, if found guilty). The European Convention on extradition provides for extradition between the UK and Spain, and an international arrest warrant may be issued. In some cases, where the maximum penalty for the offence does not exceed one year and where the accused has been properly summoned, he can be tried in absentia. If the person is found guilty the sentence will be enforced at a later date, whenever s/he can be found.

5.3 Presence at Trial

It is difficult to say precisely when cases will be brought to trial. Sometimes it is within 3 months, 1 year, or even 2 years of the arrest, depending on the complexity of the case and the number of people involved. Normally, cases where the accused are being held in prison go ahead quicker than those cases where the accused are on

bail. The abbreviated judicial procedures of Penal Courts are quicker than summary proceedings which are judged in the Provincial Court. The latter are not usually heard before 1 year or 18 months.

During the trial the defence lawyer and, if necessary, the interpreter, must be present. The lack of an interpreter may be sufficient reason to request that the trial be heard at a later date.

6 Sentencing

Custodial Sentences: The sentence will depend on the crime. In Spain, sentences for drug trafficking are particularly severe. The judge will determine, taking into account any mitigation presented by the defence, both the sentence and the minimum time to be served in prison. For example, in Spain, sentences of between 3 and 13 ½ years are passed for the trafficking of “hard drugs” (those causing serious damage to health). Sentences of between 3 and 9 years are handed down when the quantity of drugs involved is not considered to be highly significant, and between 9 and 13 ½ years when the quantity is particularly large. In the case of “soft drugs” (which are not seen to pose great risks to health) sentences are imposed of between 1 year and 4 ½ years. Sentences of between 1 year and 3 years for smaller quantities, and 3 to 4 ½ years when large quantities are involved.

7 How can appeals be made?

In the case of misdemeanours, the accused has five days after the notification of sentence to present in writing any mitigating circumstances which they may consider opportune, as well as supplying evidence which was not available at the time of the hearing before the Instructing Judge. In all other cases it is necessary to contact the lawyer who has been dealing with the case, even if ex-officio, so that they can present a statement in writing that they do not agree with the sentence. There is a limit of five days within which the Supreme Tribunal can announce an annulment, which is extended to ten days in the case of hearings dealt with by the Provincial Courts. Only if it is asserted that a Constitutional right has been violated can an appeal be lodged with the Constitutional Court.

8 Reduction of sentence

Sentences cannot be reduced for work, the passing of exams, or for good behaviour.

9 Early release

9.1 *Permission for Leave*

Once a quarter of the sentence has been completed (Article 47 of the Penal Code), prisoners may apply to spend three days per month outside of prison as part of preparation for release. This *permiso* must be applied for each month, and the request may be refused by the prison authorities. Specific regulations regarding prison leave vary from prison to prison. Foreign nationals are also entitled to apply, but may not leave the country. All applicants must give an address at which they will be resident for the full three days. When a prisoner is out on *permiso* he is supposed

to sign every day at the nearest police station (either National Police or Guardia Civil) to where he is staying and normally he must sign at the same police station every day

9.2 Conditional Liberty

This may be granted to those prisoners who are in Third Grade (open prison) who have completed three quarters of their sentence and who have shown good behaviour and whose successful rehabilitation has been predicted. It is granted by the Penitentiary Observation Judge who may impose certain rules of conduct or controls. It is also they who may revoke this favour.

In certain cases, Conditional Liberty may be granted before $\frac{3}{4}$ of the sentence has been completed if certain criteria have been met in Third Grade, and if there has been good conduct and successful rehabilitation is predicted:

- when $\frac{2}{3}$ of the sentence has been completed and as long as continual working, cultural, or occupational development has been observed;
- for those who would reach the age of 70 if their sentence were fully served; or
- for those prisoners who have medical reports confirming that they are extremely and incurably ill.

For foreign nationals who were not resident prior to their arrest the normal procedure is direct expulsion on achieving conditional liberty, paid for by the Spanish authorities.

NB In exceptional cases, Conditional Liberty may be granted to Third Grade prisoners at the halfway stage of their sentence, but this is normally only to Spanish nationals.

9.3 Unconditional Liberty

This will be proposed by the Prison Governor two months before completion of the sentence. Upon release, prisoners are given certification confirming the length of time they were incarcerated or when they were given Conditional Liberty, as well as copies of reports concerning their health and any proposal for therapy.

10 Clemency

Partial or total reprieve may be applied for through the Ministry of Justice when a sentence has been passed. The relative information is to be presented (Court or Tribunal which handed down the sentence, case number, name and number of the Instructing Judge) and details of all circumstances to be taken into account, for example serious illness suffered by the prisoner or a close relative, old age, etc., or alleged breaches of legal procedure. It is not necessary for a lawyer to draw up such a petition as this can be done by the prisoner, their family, or other representatives. Reprieve is granted in very few cases, and it is best not to be too hopeful in order to avoid disappointment. The last exceptional case of reprieve in Spain was in 2000, affecting approximately 1,400 prisoners, on the occasion of the Silver Jubilee of King Juan Carlos I.

11 Financial penalties

11.1 Fines

As well as a custodial sentence, the courts may impose a fine. Being a drug addict is not considered a crime. Nevertheless, the consumption of illegal drugs in public certainly can result in a fine.

11.2 Costs

The convicted criminal may also be required to pay court or tribunal costs. The sum is non-negotiable.

12 Transfer to the UK

Under the provisions of the Council of Europe Convention on the Transfer of Sentenced Persons, a British prisoner in Spain may apply to serve the remainder of his sentence in the United Kingdom. Certain conditions must be met in order to be eligible for a transfer:

- the sentence must be final (no pending appeals)
- there should normally be at least six months left to serve
- the offence for which the prisoner was tried is also an offence in the U.K.
- both the Spanish and British authorities must agree to the transfer

For more information on applying for transfer, please contact Prisoners Abroad.

13 Expulsion

Foreign nationals who have been sentenced to less than six months may be expelled instead of serving the custodial sentence. A similar situation applies to prisoners whose sentence is greater than six years when at least $\frac{3}{4}$ of the sentence has been served. Foreign nationals who have been expelled may not return to Spain within a period of between 3 and 10 years.

If the expulsion order is judicial, by virtue of Article 89 of the Penal Code, the measure would not take effect as it would be a case of the substitution of a custodial sentence for expulsion, and if this did not exist the expulsion could not be carried out. On the other hand, if expulsion were administrative, on being freed from prison the person may be interned in a detention centre for foreign nationals for up to 40 days, within which time his expulsion from Spain must be ordered, and if it is not then the person will be freed.

Expulsion to a third country can only be considered when the authorities of that country confirm in writing that they are prepared to accept the person. When the person being expelled has the financial means, he will pay for the costs of deportation, and when this is not the case the state prescribing sentence (in this case, Spain) will pay.

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