

CASE STUDY: The lawyer of the absent

Facts of the Case

On 20 April 2018, the police in Badalona (Spain) filed a report in respect of alleged offences of driving without a license and forgery of documents with regard to VW, following a roadside check, during which he presented an Albanian driving license.

On 19 May 2018, the expert report concluded that that document was a forgery.

By order of 11 June 2018, the Juzgado de Instrucción No 4 de Badalona (Court of Preliminary Investigation No 4, Badalona, Spain), before which the criminal proceedings against VW were brought, decided to hear VW. An officially designated lawyer was appointed for that purpose. After several attempts to summon the person concerned were unsuccessful, because his whereabouts were unknown. A warrant was issued on 27 September 2018 for his arrest and for him to be brought before the court.

On 16 October 2018, a lawyer sent, by fax, a letter in which she stated that she was entering an appearance in the proceedings on behalf of VW, together with a signed authority to act and consent to let her take on the case given by the officially designated lawyer of the person concerned. She requested that future procedural documents be sent to her and that the arrest warrant issued against her client be suspended, stating that her client wished in any event to appear before the court.

Arguments to be considered

Since VW did not appear when first summoned and is subject to an arrest warrant, the referring court asks whether the former's right of access to a lawyer may be delayed until that warrant has been executed, in accordance with the national rules on the rights of the defense.

According to that case-law, the requirement for the person concerned to appear in person is considered reasonable and does not have a significant impact on the rights



of the defense. In essence, the presence of the person under investigation is an obligation. Moreover, in the event of persistent absence on the part of that person at the conclusion of the investigation, the hearing cannot be held and judgment cannot be given, so that the proceedings are paralyzed to the detriment of both the individuals concerned and the public interests at issue.

Legal Framework

Those rules are based on Article 24 of the Constitution. In criminal matters, the rights of defense of the person under investigation are governed by Article 118 of the Code of Criminal Procedure. Those provisions have been interpreted by the Tribunal Constitucional (Constitutional Court, Spain) and the Tribunal Supremo (Supreme Court, Spain) as meaning that the right of access to a lawyer may be subject to the obligation, for the person accused, to appear in person before the court. In particular, in accordance with the settled case-law of the Tribunal Constitucional (Constitutional Court), the benefit of such a right may be refused when that person is absent or cannot be located.

Furthermore, the court observes that that case-law has been maintained notwithstanding the reform which took place in 2015, in particular in order to ensure that Directive 2013/48 is transposed into Spanish law. That court also observes that, under Article 118 of the Code of Criminal Procedure, the right of access to a lawyer is limited solely in the cases referred to in Article 527 of that code, which is expressly cited in that provision.

Therefore, that court raises the question of the scope of the right of access to a lawyer provided for in that directive. In particular, it has doubts as to whether that case-law complies with Article 3(2) of that directive and Article 47 of the Charter.

Questions

- Which of the Directives are related to this case?
- Which articles?
- Is there a similar legal rule or jurisdictional practice in your country?
- Do you find a contradiction between the Spanish legal framework and the applicable Directives?
- If there is a contradiction, how could it be solved by the Spanish court?
- How could it be solved if it happened in your country?
- If the Spanish judge issued a European Arrest Warrant, how would you act if you were the court that should decide on it?

