

**Spain, Court of Preliminary Investigation nº 4, Badalona, Spain, Decision of 19 October 2018, ordinary**

Member State

 Spain

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Topic

Rule of law (access to justice)

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Deciding Court Original Language

Juzgado de Instrucción nº 4 de Badalona

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Deciding Court English translation

Court of Preliminary Investigation nº 4, Badalona, Spain

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Date Decision

19 October 2018

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ECLI (if available)

N/A

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National Follow Up Of (when relevant)

N/A

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EU legal sources and CJEU jurisprudence

Article 47 Charter and Article 3(2) Directive 2013/48/EU

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Subject Matter

Reference for a preliminary ruling – Judicial cooperation in criminal matters – Right of access to a lawyer – Circumstances in which the right of access to a lawyer must be guaranteed – Non-appearance – Derogations from the right of access to a lawyer – Right to effective judicial protection

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## Legal issue(s)

In accordance with the Spanish Constitutional Court case law interpreting Article 24 of the Spanish Constitution and the Code of Criminal Procedure, it could be delayed the access to a lawyer in case of a suspect that, despite being summoned, fails to appear before the court in pre-trial proceedings (investigation phase). In that regard, the access to a lawyer will be possible once the suspect voluntarily appears or a national warrant is executed, and the suspect is brought to court by the police.

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## National Law Sources

Article 24 of the Spanish Constitution (due process clause); Article 118 of the Code of Criminal Procedure; Article 527 of the Code of Criminal Procedure.

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## Facts of the case

VW was accused by the police of driving without a licence and forgery of documents. By Order of 11 June 2018, the Court of Preliminary Investigation nº4, Badalona, Spain, decided to hear VW before the criminal proceedings were brought. After several attempts to summon VW were unsuccessful, a national warrant was issued for his arrest. The lawyer of VW stated the will to appear in the proceedings on behalf of VW. However, the Court of Preliminary Investigation stay the proceedings and decided to send a preliminary reference to the Court of Justice of the European Union. The Court of Preliminary Investigation decided to act in that way because the case law of the Spanish Constitutional Court denies the access to a lawyer in case of non-appearance in the pre-trial phase (investigation phase). In accordance with this case law, the right to access to a lawyer will be only effective with the appearance of the suspect, either because his/her voluntarily appears or with the execution of the warrant and, therefore, his/her arrest. The Court of Preliminary Investigation doubted about the compatibility of this case law with Article 47 Charter and Article 3(2) Directive 2013/48/EU.

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## Reasoning (role of the Charter or other EU, ECHR related legal basis)

The Court of Preliminary Investigation focuses the attention on the Spanish Constitutional Law case law on the interpretation of Article 24 of the Spanish Constitution and Article 118 of the Spanish Code of Criminal Procedure. Since the 80's (judgments of Spanish Constitutional Court nº 87/1984, of 27 July and nº 149/1986, of 26 November), the Spanish Constitutional Court has interpreted the right to access to a lawyer in a way that prohibits the representation and defence of a lawyer in the pre-trial case in case of no-appearance of the suspect.

In accordance with Spanish criminal procedural law, a trial in absentia is not possible for alleged crimes of more than two years. However, in the pre-trial phase (investigation phase), regardless of the crime and its penalty, it is possible to investigate and to conduct investigative acts, also in case of absentia. In this context, the Spanish Constitutional Court case law has not allowed, since the 80's, the access to a lawyer in the pre-trial phase if the suspect is in absentia. Only in case of personal appearance, either voluntarily or because of his/her arrest, the suspect can access to a

lawyer in the pre-trial phase. Therefore, in case of absentia, the lawyer cannot be present in the acts of investigation or lodge appeals during the pre-trial phase. The Spanish Constitutional Court has established that this is a correct balance between the integrity of the criminal judicial investigation and the rights of the suspect. That is, it considers that in the investigation phase is determinant the presence of the suspect for the success of the judicial investigation. The use of a lawyer without the presence of the suspect tips incorrectly the balance in favour of the suspect.

The Court of Preliminary Investigation of Badalona doubts about the compatibility with EU law of the Spanish Constitutional case law. The Court uses Directive 2013/48/EU as the key EU law source for questioning national case law. In that way, the Court alleges that the interpretation of the right to access to a lawyer by the Spanish Constitutional Court is contrary to article 3(2) of the Directive 2013/48/EU. In that way, the Court alleges that EU law does not allow the exception provided by the Spanish Constitutional Court and, therefore, the access to a lawyer should be possible in the pre-trial phase in accordance to article 3(2) Directive 2013/48/EU.

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### Relation of the case to the EU Charter

The Court of Preliminary Investigation of Badalona does refer to Article 47 of the Charter. However, it is a mere quote for supporting the interpretation of article 3(2) of the Directive 2013/48/EU. In this context, Article 47 of the Charter is clearly relevant, but it has a minor role in the argumentation of the Court of Preliminary Investigation. Article 47 only is quoted as a support of the Directive and all the argumentation of the Court relates to the latter. Moreover, there is no reference to the case law of the Court of Justice of the European Union (neither in relation to Article 47 of the Charter nor Directive 2013/48/EU).

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### Relation between the EU Charter and ECHR

There is a clear relationship between the right to access to a lawyer established in Article 47 of the Charter and the defence rights enshrined in Article 6.1 of the ECHR. There is a well-established case law of the Strasbourg Court on the right to access to a lawyer in cases of absentia. In short, the Strasbourg Court has established a strict test ('compelling reasons') to be applied in case of denial of the access to a lawyer, also in cases of absentia (the so-called Ibrahim test, see Ibrahim and Others v the United Kingdom, App nos 50541/08, 50571/08, 50573/08, 40351/09 (ECtHR, 13 September 2016). This strict test is in line of the "exceptionality" test established by Article 3 of Directive 2013/48/EU: the right only could be denied based on an exhaustive and limited exceptions.

Thus, Article 47 of the Charter and Article 6.1 of the ECHR should be brought together in the analysis. However, the Court of Preliminary Investigation of Badalona does not carry out this analysis and it does not make any reference to the ECHR or the Strasbourg case law.

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### Use of Judicial Interaction technique(s)

Preliminary reference

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Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

N/A

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Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

In the VW case (C-659/18, of 12 March 2020, EU:C:2020:201), the Court of Justice answers the preliminary reference sent by the Court of Preliminary Investigation nº 4 of Badalona.

First, the Court analyses whether the Directive 2013/48/EU is applicable. On the one hand, the scope of application of the Directive is broad and it applies in any national criminal procedure, regardless of being EU law affected. Article 47 of the Charter, therefore, is also applicable in connection with Directive 2013/48/EU. On the other hand, the Directive applies also in absentia suspects. The Spanish Government alleged that there were doubts about the applicability of the Directive to suspects that have been unsuccessful summoned. However, the Court established that the Directive is applicable to all kind of suspects, including in absentia suspects.

Second, the Court of Justice of the European Union analyses the possibility to deny the access to a lawyer to a suspect in absentia in the pre-trial phase. The Court establishes that there is an exhaustive list of compelling reasons laid down in the Directive which allows the denial of the right. This is quite a strict test and only these “compelling reasons” can justify the denial. The Court concludes that no compelling reasons have been alleged in the case at hand. Therefore, the Court of Justice of the European Union answered to the Court of Preliminary Investigation nº 4 of Badalona that is contrary to Article 3(2) Directive 2013/48/EU and Article 47 Charter national legislation, as interpreted by national case law, which does not allow the right to access to a lawyer to suspects in absentia in the pre-trial phase.

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Strategic use of judicial interaction technique (purpose aimed by the national court)

The Court of Preliminary Investigation nº4 of Badalona pursued a change of the case law of the Spanish Constitutional Court. Presumably, this first instance court did not rely on internal national procedures to change the case law which considers contrary to EU law. The contradiction between EU and national law was not at the level of legislation -constitutional or with the rank of law- but in the interpretation of the highest court of the national system. The Court of first instance believed that a change of the national case law of the highest court could be slow and, maybe, there can be resistance to it. The preliminary reference and the assistance of the Court of Justice of the European Union seem a convenient door for challenging the position of the highest national court and, also, a fast way to move forward and to accommodate national case law to EU law.

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Impact on Legislation / Policy

There is no formal problem about the Spanish Constitution (Article 24, the due process clause)

and the Code of Criminal Procedure (Article 118). The problematic issue is the interpretation of the constitutional provision and national criminal procedural legislation done by the Spanish Constitutional Court which is not consistent with Article 47 of the Charter and Article 3(2) Directive 2013/48/EU.

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#### Notes on the national implementation of the preliminary ruling by the referring court

It is still open the national case before the Court of Preliminary Investigation nº 4 of Badalona in which the preliminary reference was originated. Therefore, there has not been a formal national decision implementing the preliminary judgment of the Court of Justice.

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#### Impact on national case law from the same Member State or other Member States

The impact of the preliminary ruling is clear for the Spanish Constitutional case law. It is contrary to EU law its well-established case law which do not allow the access to a lawyer, in pre-trial proceedings (investigation phase), to a suspect which has been summoned but does not appear before the court. However, the national case is still open and now there are no other similar cases that can trigger actions before the Constitutional Court and capable of changing its case law.

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#### Other

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#### (Link to) full text

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