



## NOTA INFORMATIVA Nº 85/2013

### **THE CONSTITUTIONAL COURT HOLDS THAT DEMOLISHING A HOME IN CAÑADA REAL (MADRID) DOES NOT BREACH THE INVIOABILITY OF DOMICILE RIGHT HELD BY ITS OWNER.**

The Constitutional Court had dismissed an appeal filed by a citizen of the local council of Madrid who contended that the demolition of his home located in the neighbourhood of Cañada Real Galiana, breaches his right of non-trespassory invasion by third parties of his home. The ruling given by the Second Division includes a dissenting vote by the Vicepresident of the Constitutional Court, Adela Asúa and the judge Fernando Valdés.

The appeal for constitutional protection refers to subsequent resolutions issued by the Contentious Administrative Court no. 30 of Madrid and the Contentious Administrative Division of the High Court of Justice of Madrid who authorised the entry to the domicile of the appellant and his eviction in order to demolish his home. The judicial instances endorsed the demolition order (conducted in 2011) of the home of the appellant which he had rebuilt some years earlier (in 2007) in the same place when his former home was demolished. The second demolition took place on the basis of an Order issued by the Council of Madrid of June 23, 2005, the same one which was the basis for the first demolition. In other words, the resolutions contested for which constitutional relief is sought considered that there was no need to secure a new Demolition Order from the local council of Madrid because its will was already embodied in the first resolution on this matter.

Judge Enrique López acted as the rapporteur judge in this Constitutional ruling which considers that the right to inviolability of domicile has not been breached *"considering that the actions conducted by the appellant in the sense of rebuilding his home after it had been demolished on the back of the first municipal decree for demolition clearly entails a breach of continuity of the administrative proceedings and it would not be legitimate to invoke constitutional relief for formal and inexistent defects caused by the appellant himself, acting clumsily by rebuilding on the same site a new home which had been demolished the day before, in clear breach of zoning regulations"*.

The Constitutional Court holds that the decision of the appellant to rebuild a new home on the same site where the former property was located may not either at the level of a contentious-administrative appeal or from the perspective of constitutional relief *"reopen the judicial debate on matters which should have been invoked and discussed in a contentious-administrative appeal against certain zoning provisions and not with regard to the enforcement of such provisions (...), considering further that the appellant has not established that any contentious-administrative appeal is pending against the demolition order of the property"*. After having conducted an examination on the proportionate use of force when accessing the domicile of the appellant, the Court considers that *"it was not only commensurate, but it was the only way"* to carry out the demolition.

The ruling dismisses that in order to conduct an examination of proportionality, the provisions included in the Law 2/2011, March 15 enacted by the Government of Madrid, -Cañada Real Galiana Law - should be considered, which contemplates other measures apart from the demolition of homes. And the reason for this, in light of the ruling is that *"this Law was enacted after final administrative resolutions were passed that requested the issue of a judicial warrant to access the property of the appellant"*.

Finally, the Constitutional Court dismisses the argument that the jurisprudence of the European Court of Human Rights should be applied to this case, because in the *"Yordanova Case" against Bulgaria, invoked by the appellant "it is understood that a racial discrimination issue exists which was taken into account by the judgment of the ECHR, but which does not concur in this case"*. The Court also dismisses the argument that a breach of article 8 of the Human Rights European Convention has ensued (which upholds the right of any individual to protection of his personal and family life, domicile and correspondence) because *the "protection of the domicile enshrined by article 8 of the ECHR, is limited, among other matters, by the existence of a final administrative order which takes into account an adequacy in the proportionate force use to access the premises"* a circumstance which has been taken into consideration and complied with in this case.

The two dissenting judges have cast a vote in the sense that constitutional relief should have been granted. They consider that the decision of the majority judges is in breach of the ECHR, and they state that *"the case-law of the Constitutional Court is experiencing a turn regarding fundamental rights"*.

Madrid. December 2, 2013.