SPANISH CONSTITUTIONAL COURT
Cabinet of the President
Press Office

INFORMATIVE NOTE No. 24/2016

THE TC PROVIDES THAT ALL PROCEDURAL DECISIONS DELIVERED BY COURT SECRETARIES MUST BE REVIEWED BY A JUDGE

The Plenary Meeting of the Constitutional Court (TC) has unanimously declared that the failure of a judge or tribunal to review some decisions which, following the creation of a new judicial office, is a task exclusively entrusted to the court secretaries, infringes a fundamental right to effective judicial protection (Art. . 24.1 Spanish Constitution (CE)) and the principle of exclusive jurisdictional power (Art. 117.3 CE). The judgment, where Andrés Ollero acted as Reporting Judge and which settled an internal unconstitutionality issue, has declared unconstitutional and void paragraph one of Art. 102 bis.2 of the Act regulating the Contentious-Administrative Jurisdiction [Ley reguladora de la Jurisdicción Contencioso Administrativa (LJCA)], whereby a judge is not entitled to review the decrees delivered by a court secretary in order to settle the administrative appeals for reconsideration filed against its own decisions.

Chamber Two of the Constitutional Court submitted a constitutionality issue to the Plenary Meeting in order to settle an appeal for constitutional protection where it was claimed that the right to a due process had been infringed. The claim for protection was brought against a procedural measure delivered on 25 April 2011, whereby the judicial secretary of a Contentious-Administrative Court in Madrid scheduled an oral hearing for 22 April 2014. The administrative appeal for reconsideration filed by the today applicant for protection against the scheduling of the hearing was overruled through a decree issued by the judicial secretary; this latter decision, according to Art. 102 bis.2 LJCA, is not eligible for subsequent review by the head of the Court before conclusion of the lawsuit.

The Plenary Meeting explains that, following implementation of a new type of judicial office, decision-making during the lawsuit is distributed between judges and magistrates, on the one hand, and attorneys of the Administration of Justice (the new name given to judicial secretaries), on the other. The former are entrusted with "*a strictly jurisdictional task*", i.e. what the Constitution defines as "*judging and enforcing judgments*", and are relieved from non-jurisdictional tasks, undertaken by judicial secretaries.

The new judicial office has entailed legal reforms, to include the law regulating contentious-administrative proceedings. One of the results of this reform is this disputed Art. 102 bis.2, whereby "*no appeal whatsoever*" is available against a decree delivered by a judicial secretary to resolve an administrative appeal for reconsideration brought against its own decisions. According to the law, a citizen is only able to readdress the matter in an appeal against the judgment settling the lawsuit, if applicable.

As a result of applying said provision in this case, the applicant for protection was unable to challenge before the judge the decision taken by the judicial secretary to schedule a hearing, within a three-year term; it would only have been able to readdress the issue in a future appeal against the judgment delivered following the hearing, when procedural delay was already consummated. In other words, in this case, the judge was unable to review the decision adopted by the attorney of the Administration of Justice, although it affected the fundamental right to a due process.

The judgment has dismissed the possibility of subsequently readdressing the issue, in an appeal against the judgment putting an end to the process, being able to safeguard the constitutionality of the provision, as claimed by the State Prosecution Service. First of all, this option will not always be feasible, as there may be cases where no appeal is possible against judgments of the Contentious-Administrative Jurisdiction. Secondly, in a case such as the claimant's, an appeal for constitutional protection due to a breach of the right to a due process would make no sense if the process has already concluded. According to the Plenary Meeting, "*to force a citizen to wait until final judgment is delivered in the contentious-administrative process in order to be able to address, as an appeal (if this is possible, let us recall), a potential breach of its fundamental right to a due process (Art. 24.2 CE) would void of content the protection that the Constitutional Court may grant in relation to this fundamental right".* According to the case-law, "*there is no point in claiming a breach of the right to a due process when any procedural delay, if this is effectively the case, has already ceased, due to completion of the lawsuit*".

The judgment points out that the fundamental right guaranteed by Art. 24.1 CE "*means that the protection of legitimate rights and interests held by citizens may be dispensed by judges and tribunals, which enjoy an exclusive constitutional reservation of jurisdictional power (Art. 117.3 CE)*". "*This axiom prevents the legislator from absolutely and unconditionally excluding the possibility of a court appeal against decrees issued by attorneys of the Administration of Justice, putting an end to a remedy of appeal, as in the case of this disputed paragraph of Art. 102 bis 2 LJCA*".

To conclude, "*paragraph one of Art. 102 bis.2 LJCA incurs inescapable unconstitutionality by generating jurisdictional immunity that is incompatible with the fundamental right to effective judicial protection and reserved jurisdiction to the judges and tribunals making up the judiciary".* This is because "*it excludes from the possibility of a judicial appeal certain final decrees delivered by an attorney of the Administration of Justice (settling an administrative appeal for reconsideration), it limits (…) a citizen's right to submit to the final decision of a judge or tribunal- exclusively enjoying jurisdictional power- the resolution of an issue affecting its legitimate rights and interests, and may even affect another fundamental right: the right to a due process".* This exclusion, consequently, "*is detrimental to the right to effective judicial protection guaranteed to all by Art. 24.1 CE and the principle of exclusive jurisdictional power (art. 117.3 CE)*".

The Plenary Meeting has decided that, until the legislator reaches a decision on the annulled paragraph, any decrees delivered by an attorney of the Administration of Justice that settle administrative appeals for reconsideration may be reviewed by a judge or tribunal, as foreseen for other situations in Art. 102 bis.2 LJCA.

Madrid, 21 March 2016.