



INFORMATIVE NOTE No. 27/2016

THE TC REITERATES THAT A BREACH OF THE RIGHT TO EFFECTIVE JUDICIAL PROTECTION CANNOT ALWAYS ENTAIL THE RETROSPECTIVE APPLICATION OF JUDICIAL PROCEEDINGS

Chamber Two of the Constitutional Court (TC) has upheld an order delivered by the Provincial Appellate Court of Madrid, refusing to repeat the procedural measures conducted in proceedings underway against an underage delinquent, despite acknowledging a breach of the victim's right to effective judicial protection (Art. 24.1 Spanish Constitution (CE)), in this case, another minor who was studying at the same school. The judgment considers that the pronouncement with which the Appellate Court has acknowledged a breach of this right in itself entails reparation and that, as the accused is another minor, it is not necessary to retrospectively recommence the proceedings for recovery. Juan José González Rivas acted as Reporting Judge.

The facts giving rise to the appeal for constitutional protection are summarised below:

The underage appellant was injured by a schoolmate. Once the relevant proceedings were filed, the state prosecutor agreed that the damage be repaired "*out of court*", consisting of "*educational activity*", which eventually amounted to 25 hours' work as an assistant and caregiver, as well as help in collecting toys during the Christmas campaign. Upon completion of these activities, and after a report was issued by the Agency of the Region of Madrid to Re-educate and Reinsert Underage Offenders, the Juvenile Court ordered a stay of proceedings.

The remedy of appeal against this stay (filed by the father of the injured minor) was partly upheld by the Provincial Appellate Court of Madrid, which acknowledged a breach of the right to effective judicial protection and to not be left defenceless (Art. 24.1 Spanish Constitution (CE)), on the grounds that the private prosecution, acting on behalf of the injured minor, had not been given the chance to take part in the proceedings. However, the Appellate Court considered that proceedings did not have to retrospectively recommence as of the date of the parties' appearance, as claimed by the appellant, given prevalence of the right of the accused minor to not be subject to double criminal prosecution ("*non bis in idem*"), particularly as the community service ordered had already been satisfactorily completed.

This appeal for constitutional protection has allowed the Constitutional Court to pronounce itself on another side of the right to effective judicial protection, on which there was no case-law.

Chamber Two of the Constitutional Court considers that repair of a fundamental

right by retrospectively recommending proceedings may cause a conflict between such right and “*other constitutional rights, assets and values also worthy of protection*”. This is why it does not agree that repair of the infringed right “*inexcusably, without exception, requires nullity of the judicial procedure and its recommencement*”. In certain cases, adds the judgment, a pronouncement such as the one delivered by the Madrid Appellate Court “*constitutes per se a repair of the fundamental right upheld, without its declaratory nature depriving it of remedying effects*”. This is because, in addition to providing “*moral damages*” it may “*potentially generate future indemnification*”, as in the case of the court order challenged here.

The judgment evidences that the conflict has arisen further to juvenile delinquency proceedings. This means that the “*higher interest of the minor*” will prevail, consequently “*adjusting the intensity of the rights held by the private prosecution*”. As established by the UN, “*the juvenile justice system should not only guarantee that a response to underage delinquents be proportional “to the circumstances of the delinquent and the crime”, but should also take the minor’s wellbeing into account*”. These principles also underlie Spanish Public Act 5/2000, of 12 January, regulating the criminal liability of underage offenders [Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores].

In this specific case, the decision to stay the criminal proceedings was preceded, explains the Chamber, by “*satisfactory compliance by the charged minor of the educational activity ordered*”; this activity, as manifested in the challenged resolution, “*could be equivalent to any measure ordered had the process continued until its ordinary completion with a judgment*”. In addition, the Provincial Appellate Court of Madrid pointed out “*the time elapsed since the date of the events*” and “*the negative consequences*” arising from overextended proceedings for the accused minor.

To conclude, the judgment considers that, in this specific case, “*the reasoning made by the Provincial Appellate Court of Madrid (...) is not arbitrary and does not manifest any clear mistake*”, which is why “*it is constitutionally sufficient to uphold a decision contrary to retrospective effects which, consequently, has not harmed the right to effective judicial protection of the private prosecution*”.

Madrid, 29 March 2016.