



INFORMATIVE NOTE No. 48/2016

JURISDICTIONAL CONTROL OVER DECLARED STATES OF ALERT IS ENTRUSTED TO THE CONSTITUTIONAL COURT

The Plenary Meeting of the Constitutional Court (TC) has upheld the decision of the Supreme Court which dismissed an appeal, based on lack of jurisdiction, filed by more than three hundred air traffic controllers against a declared state of alert to normalise air transport, decreed by the Government in December 2010. The judgment, which dismisses the appeal for constitutional protection brought by air traffic controllers against this resolution, states that the decision of Chamber Three of the Supreme Court did not infringe the right to effective judicial protection, as the decree declaring a state of alert is equivalent to an Act, in terms of content and effect, which is why the constitutional jurisdiction is entrusted with its control, rather than the contentious-administrative jurisdiction. The Vice President of the Court, Adela Asua, was the Reporting Judge.

The facts underlying the claim took place further to a declaration by the Government, on 4 December 2010, of a state of alert to normalise air transport as an essential public service. This decision was a result of the “*conflict*” caused by air traffic controllers. On 14 December, the Council of Ministers agreed to request from the Congress of Deputies the necessary authorisation to extend the state of alert until 15 January 2011; once this authorisation was obtained, an extension was agreed on 17 December.

The now applicants for constitutional protection brought a contentious-administrative appeal before the Supreme Court against the Government’s decisions; this appeal was dismissed due to lack of jurisdiction. The issue presented to the Plenary Meeting’s consideration is, consequently, whether the Supreme Court’s decision to exclude Royal Decrees from the scope of supervision of the contentious-administrative courts does or does not breach the right to effective judicial protection foreseen in Art. 24.1 Spanish Constitution (CE).

First of all, the Court has explained what a state of alert consists of, as foreseen in Art. 166 of the Spanish Constitution. The Government is exclusively competent to declare such state, and will immediately inform the Congress of Deputies. On the other hand, an extension must be approved by the Lower Chamber, at the request of the Executive. General Public Act 4/1981, of 1 June, on states of alert, emergency and siege [Ley Orgánica de los estados de alarma, excepción y sitio (LOEAES)] establishes that a state of alert may be declared, amongst other situations, if “*essential public services for the community are halted, and minimum services are not guaranteed*”.

A declaration of a state of emergency may entail a provisional change- over 15 days, extendable to another 15- of “*the exercise of the Administration’s competences*”; consequently, “*all civil authorities of the Public Administration*” in the territory affected may be “*subject to direct orders*” from the Government, or if delegated by the latter, from the President

of the Autonomous Community if the declaration only affects this territory. Measures may also be adopted that entail “*limitations or restrictions*” on the exercise of fundamental human rights, though these may not be suspended.

The core issue analysed by the Plenary Meeting is whether the Royal Decrees foreseen in Art. 116 CE for a declaration of a state of alert may be endowed “*with the rank or value of an Act*” as, in this case, they would be beyond the control of the contentious-administrative courts, as agreed by the resolution of the Supreme Court that is now being challenged.

In this regard, the judgment affirms that a governmental decision declaring a state of alert “*is regulatory, insofar as (...) it establishes the law that will apply whilst it remains in force*”. It adds that the Spanish Constitution and the LOEAES trigger the legal effects that such governmental decision may have over current law. Consequently, “*even if formalised through a decree issued by the Council of Ministers, a decision to declare a state of alert, given its regulatory content and legal effects, is presumed as included in Spanish law as a decision or provision enjoying status or value as an Act*”. This same conclusion is reached by the Court with respect to a decree extending a state of alert.

The judgment clarifies that this decision does not mean that decrees declaring a state of alert are exempt from any judicial control. In fact, they may be challenged before the Constitutional Court “*as they enjoy status and value of an Act, despite adopting the form of a decree*”. As regards any actions and provisions delivered whilst the state of alert is in force, these may be challenged by the citizens affected before the ordinary courts.

Madrid, 11 May 2016.