SPANISH CONSTITUTIONAL COURT
Cabinet of the President
Press Office

INFORMATIVE NOTE No. 75/2016

THE TC ENDORSES PRACTICALLY THE ENTIRE REFORM OF THE NATIONAL HEALTH SYSTEM

The Plenary Meeting of the Constitutional Court (TC) has dismissed practically the entire unconstitutionality appeal filed by the Parliament of Navarre against various provisions of Royal Decree-Law 16/2012, of 20 April, on urgent measures to guarantee the sustainability of the National Health System and to improve the quality and safety of its services. The judgment considers that the exclusion of foreigners without a residence permit in Spain from free public healthcare does not breach Art. 43 of the Spanish Constitution (CE), as the legislator may modulate the terms in which this healthcare should be provided. Encarnación Roca acted as Reporting Judge; a particular vote was issued by the Vice-President, Adela Asúa, and the Judges Fernando Valdés Dal-Ré and Juan Antonio Xiol.

The plaintiffs have raised two types of challenge: 1) they claim a breach of Art. 43 (right to healthcare) on the grounds that, in their opinion, the new rules of the National Health System (SNS) fail to meet the mandate of "*universalised healthcare*" by excluding Spanish citizens not enjoying status as insured or beneficiary, as well as foreigners without a residence permit.

In this regard, the judgment adds that, according to the General Health Act, the right to the protection of health and healthcare is universal, which means that no-one may be deprived of his right of assistance. However, this right, "*is configured and specified in accordance with the law, regulating the various conditions and terms of entitlement to healthcare benefits and services*", which does not mean that said services "*should necessarily be cost-free for all potential addressees*". The law (acts) will in each case define how this public healthcare should be.

The challenged act, explains the judgment, represents a "*departure*" from former policy which, since the SNS was created, has been directed at a "*progressive extension of cost-free or subsidized healthcare*". The main change has been to introduce SNS insureds or beneficiaries, thereby excluding some social groups. In any case, as the Court has already indicated, this "*legislative proclamation of universalisation has been but an objective*" and its achievement has depended on various circumstances, "*where economic reasons are predominant*". As a result, "*universality (…) cannot (…) be mistaken for a right to cost-free healthcare and services*".

Specifically, first of all, the appellants' complaint refers to the possibility of entitlement to insured status in favour of Spanish citizens who, in principle, hold no links with the Social Security system and can verify that their income does not exceed the regulatory limit (10,000€/year). In their opinion, the rule infringes the right to equality and breaches the obligation to reserve certain matters to laws (acts) derived from Art. 43.2 CE.

The judgment considers that, in this case, this reserve has been infringed, which is why the section referring to annual income ("*provided that they verify that their income does*

not exceed the regulatory limit") should be declared unconstitutional and null and void. The case-law allows an act to refer to a regulation, but only "*to complement legal rules"*, and in those cases where this is "*indispensable for technical reasons or to optimise the achievement of the purposes proposed by the Constitution or the act itself*".

However, in this case, "*the rule makes a blank reference [to the regulation] to determine a component, consisting of a minimum level of income, constituting the core around which the right to access healthcare services financed with public funds is legally configured"* for a specific group of persons. "*With the literality of the rule"*, states the judgment, "*it is impossible to determine who will be so entitled, given the absence of any criteria whatsoever with respect to the income limit required*", which is left in the hands "*not of the legislator, with complementary regulations (…), but exclusively at the discretion of the Government's regulations*".

The second reproach refers to the exclusion from the SNS of foreigners included in the local census, without a residence permit in Spain. In this regard, the Court explains that the right to healthcare is "*legally configured*", which is why the legislator is entrusted with it, and that it may also "*be modulated in the way it applies to foreigners*". According to constitutional case-law, "*the right of foreigners to benefit from healthcare will be determined and may be limited by the relevant rules. The legislator may take into account their legal and administrative situation in Spain and, consequently, demand that foreigners obtain an authorisation for their stay or residence as a requirement for entitlement to some constitutional rights (…)*".

In the former regulations, the right to access healthcare benefits debited to public funds was already linked to a specific legal situation, i.e. registration on the census of the town of residence. Now, following the challenged reform, the right of access is linked to obtaining status as insured or beneficiary. The act also foresees that unregistered foreigners without a residence permit in Spain may receive healthcare assistance in the following situations: "*a) in an emergency situation due to serious illness or an accident, for any cause, until a medical discharge is released; b) to assist in a pregnancy, birth and after-birth. In any case, all foreigners under eighteen will receive healthcare assistance in the same conditions as Spanish citizens*".

To conclude, the Court considers that, within the margin available to the legislator, the new rules "*do not respond to an arbitrary option but are aimed at preserving constitutionally protected goods or interests, such as maintenance of the public healthcare system*". In addition, one should take into account "*the system's possibilities in a very complicated economic situation", "when distinguishing between foreigners with a residence permit and those without, there should be due proportionality and all international obligations in the matter should be fulfilled*".

Finally, the judgment adds that the new rules "*do not exclude access to healthcare services"* for those not in any situations foreseen by law, but that only their legal situation is taken into account "*to demand payment in exchange*".

The other set of challenges refer to a breach of Art. 86.1 CE. One of the claims is a breach of the conditions imposed by the Constitution in order for the Executive to be able to pass emergency legislation. The Court has dismissed this claim because in this case the Executive has offered a "*general justification based on an unprecedented situation of serious economic difficulties since the National Health System was created*", suggesting that the reforms passed are intended to prevent the situation "*becoming irreversible*". Specifically, the

Government alleged that "*the public healthcare system has been undergoing for several years now a huge deficit situation, endangering its viability; this has been aggravated by the current economic crisis at the time the rule was passed, which has increased the uncertainty of its funding*".

Also met is the requirement of a meaningful connection between the urgent situation and the measures approved to remedy the same. "*The purpose*" of the challenged reform "is to specify, in order to save costs and improve the system's efficiency, the persons who may enjoy status as SNS insureds or beneficiaries*"* and to "*define, within this field, any social group left outside the healthcare financed with public funds*". To do this, the positions of "*insured*" *and beneficiary*" were created; this measure, adds the judgment, "*confirms that the necessary consistency and coherence have been met in relation to the problems to be resolved and the negative economic situation it intended to curb*".

In her particular vote, Valdés and Asúa differ from the arguments and ruling of the judgment and state that the appeal should have been upheld for several reasons. One, due to not meeting the requirements imposed by Art. 86.1 CE on the Executive to legislate through emergency channels. Two, because the measures approved affect a matter that is excluded from decree-laws, i.e. the right to healthcare, foreseen in Art. 43 CE, consequently also infringing Art. 86.1 CE. On this point, they state that the judgment has departed from the Court's case-law, whereby the right to healthcare is "*outside the core of fundamental rights*" but is instrumental to the right to life and physical integrity (Art. 15 CE), and is therefore unaffected by any decree-law. And, finally, because it infringes the right foreseen in Art. 43 CE by excluding foreigners without a residence permit from the right to public and cost-free healthcare assistance. In their opinion, the measure approved is reversing a social right already achieved, i.e. a universalised public healthcare system, without quantifying the public savings involved; consequently, the measure is inconsistent with the need to preserve the SNS's sustainability. Furthermore, it does not take into account that the group affected is "*at a risk of social exclusion*" and unable to access any type of healthcare due to insufficient income.

This latter argument is shared by Xiol, who adhered to the particular vote issued by Valdés and Asúa as regards the exclusion of foreigners and consequent breach of Art. 43 CE. In turn, he considers that the Royal Decree challenged does not meet the requirements imposed by the Constitution (Art. 86.1) on emergency legislation, which is why he thinks that the appeal should have been upheld. In his opinion, there is no meaningful link between the objectives pursued by the reform and the measures approved: the new insured and beneficiary status, he affirms, simply exclude foreigners without a residence permit in Spain, but is unable to attain the purpose of the rule which, according to its preamble and the arguments presented in Parliament by the Minister of Health, is to remedy the problems derived from the so-called "*healthcare tourism*" and avoid the SNS covering the cost of healthcare provided to EC citizens who are already covered in their countries of origin.

Madrid, 29 July 2016