TRL JUDGMENTS

JUDGMENT OF THE LISBON COURT OF APPEAL

Process: 1783/20.7T8PDL.L1-3

Reporter: MARGARIDA RAMOS DE ALMEIDA

Descriptors: HABEAS CORPUS

INTEREST IN ACT: SARS-COV-2, RT-PCR TESTS

DEPRIVATION OF FREEDOM ILLEGAL DETENTION

Agreement Date: 11/11/2020

Vote: UNANIMOUSNESS

Procedural Means: CRIMINAL APPEAL

Decision: PROVISION DENIED

Summary: I. The ARS cannot appeal a decision that ordered the immediate release of four people, for illegal detention, in the scope of a habeas corpus process (art. 220 als. c) and d) of the CPPenal), asking that the confinement be validated mandatory for applicants, for being carriers of the SARS-CoV-2 virus (A....) and for being under active surveillance, for high-risk exposure, decreed by the health authorities (B..., C.... and D.....) for not having legitimacy, nor interest in acting.

II. The request made would also be manifestly unfounded because:

A. Prescription and diagnosis are medical acts, the exclusive responsibility of a physician, registered with the Portuguese Medical Association (Regulation No. 698/2019, of 5.9).

Thus, the prescription of auxiliary diagnostic methods (such as viral infection detection tests), as well as the diagnosis of the existence of a disease, for any and all persons, is a matter that cannot be carried out by law. , Resolution, Decree, Regulation or any other way rules , as they are acts of our legal system reserves the exclusive competence of a doctor, given that this, the advice of your sick, you should always try to get their informed consent (nº 1 of article 6 of the Universal Declaration on Bioethics and Human Rights).

B. In the case we are dealing with, there is no indication or proof that such a diagnosis was actually carried out by a qualified professional under the terms of the Law and who had acted in accordance with good medical practices. In fact, what follows from the facts given as established is that none of the applicants was even seen by a doctor, which is frankly inexplicable, given the alleged seriousness of the infection.

C. The only element that appears in the proven facts, in this regard, is the performance of RT-PCR tests, one of which presented a positive result in relation to one of the applicants.

D. Given the current scientific evidence, this test alone is unable to determine, without a reasonable margin of doubt, that such positivity in fact corresponds to the infection of a person by the SARS-CoV-2 virus, for various reasons. , of which we highlight two (in addition to the issue of the gold standard which, due to its specificity, we will not even address):

Because this reliability depends on the number of cycles that make up the test;

Because this reliability depends on the amount of viral load present.

III. Any diagnosis or any act of health surveillance (such as the determination of the existence of viral infection and high risk of exposure, which are covered by these concepts)carried out without prior medical observation of patients and without the intervention of a physician registered with the OM (who carried out the assessment of their signs and symptoms, as well as the exams they deemed appropriate to their condition), violates Regulation No. 698/2019, of 5.9. , as well as the provisions of article 97 of the Statute of the Medical Association, being liable to configure the crime of usurpation of functions, p. and p. by article 358 al.b), of the Criminal Code.

IV. Any person or entity that issues an order, the content of which leads to the deprivation of physical freedom, ambulatory, of others (whatever the nomenclature this order takes: confinement, isolation, quarantine, prophylactic protection, health surveillance, etc.), that if it does not fit the legal provisions, namely in the provisions of art. 27 of the CRP , it will be carrying out an illegal detention , because it was ordered by an incompetent entity and because it was motivated by a fact for which the law does not allow it.

(Summary prepared by the reporter)

Partial Text Decision:

Full Text Decision:They agree in a conference at the 3rd Criminal section of the Lisbon Court of Appeal

I – report

1. By decision of 26-08-2020, the request for habeas corpus was granted, as its detention was illegal , and it was determined that immediate return to freedom of Claimants SH__SWH___, AH___ and NK___. 2. Then came the REGIONAL HEALTH AUTHORITY, represented by the Regional Directorate of Health of the

Autonomous Region of the Azores, to file an appeal against this decision, requesting that it be validated.

mandatory confinement of applicants, for being carriers of the SARS-CoV-2 virus (AH___) and for being under active surveillance, for high-risk exposure, decreed by health authorities (SH__, SWH__ and NK___).

4. The appeal has been admitted.

5. The Mº Pº, in his answer, defends that the present appeal should be considered unfounded.

6. In this court, the former PGA applied for a visa.

II – previous point.

Since the appeal filed by the appellant must be rejected, the court will limit itself, pursuant to paragraphs 1, a) and 2 of article 420 of the Code of Criminal Procedure, to summarily specifying the grounds of the decision.

III – reasoning.

1. The decision rendered by the "a quo" court has the following content:

Proven facts:

1. On 01/08/2020 the applicants arrived on the island of São Miguel, coming by plane from the Federal Republic of Germany, where, at 72 (seventy and two) hours prior to arrival, they had performed a COVID test19, with a negative result, copies of which were presented and delivered to the Regional Health Authority, upon arrival at the airport in Ponta Delgada.

2. On 08/07/2020 and already during their stay on the island of São Miguel, applicants AH___ and NK___ performed a second test to COVID19.

3. On 08/10/2020 and also during their stay on the island of São Miguel, applicants SH___ and SWH___ performed a second test to COVID19.

4. On 08/08/2020, applicant AH___ was informed by telephone that her test carried out the day before had accused her of being "detected".

5. As of that day 08/08/2020, applicant AH___ no longer cohabits with the other three applicants, having always maintained a distance of no less than 2 (two) meters from them.

6. On 08/10/2020 applicants SH___, SWH___ and NK___ were informed by telephone that their tests had been "negative".

7. On 08/10/2020, the document was sent to all applicants by e-mail, attached to pages 25, 25verse, 26 and 26 verse, signed by the Health Delegate of the municipality of Lagoa, in office, Dr. Magno José Viveiros Silva, called Notification

of Prophylactic Isolation – Coronavirus SARS- CoV-2/COVID Disease – 19, and two attachments (only one of them in English) and which reads (equal content except for the identification of each of the Applicants herein):

"Isolation (...)

Notification of

Prophylactic Isolation

Coronavirus SARS- CoV-2/COVID Disease – 19

Mário Viveiros Silva Lagoa Health Authority

Pursuant to Normative Circulars No. DRSCINF/2020/22 of 2020/03/25 and DRS CNORM2020/39B of 2020/08/04 of the REGIONAL HEALTH AUTHORITY (attached) and of Standard No. 015/2020, of 24/ 07/2020 of the Directorate General of Health (attached) I determine the

PROPHYLACTIC ISOLATION

OF

(...)

Holder of the Citizen Card/PASSPORT No. (...), valid ... until ... with the number of social security identification for the period from 08/08/2020 to 22/08/2020 due to the danger of contagion and as a containment measure of COVID 19 (SARS-Cov-2)

Date 2020/08/10 (...)

8. The Claimants requested that they send the said results, and the test report was sent to Claimants AH___ and NK___ by email on 08/13/2020 and to Claimants SH___ and SWH___ yesterday, 24/ 08/2020, by e-mail, reports written in Portuguese.

9. Between August 1st and 14th, applicants were accommodated at the Marina Mar II accommodation, in Vila Franca do Campo.

10. From August 14th onwards, applicants are accommodated at "THE LINCE AZORES GREAT HOTEL, CONFERENCE & SPA", in Ponta Delgada (where they are currently located), by order of the Health Delegate under the terms described in 7 as follows:

- In room 502 are the applicants SH___ and SWH___.

- In room 501 is the applicant AH___.

- In room 506 is the applicant NK___.

11. The applicants have tried at least 3 times to contact the telephone helpline they know (296 249 220) to be clarified in their language or at least in English, but they have never had any success, as they only answer and respond in Portuguese, which the applicants do not understand.

12. At the hotel, meals are delivered to your room by hotel services at pre-determined times and according to a choice made by a third party, except during the first 3 days at the Hotel Lynce in which breakfast was served and the remaining meals through room service.

13. On August 15, while complying with the prophylactic isolation determined by the Health Delegate, the applicant AH___ began to suffer from an inflammation in her mouth, apparently resulting from the dental appliance she was wearing.

14. Having, by telephone, to the number 296 249 220, I shared this situation with the Regional Health Authority, who requested the necessary medical support.

15. This request was ignored by the aforementioned helpline, which did not provide the respondent AH___ with the necessary support.

16. Not seeing any support, two days later, on August 17th, duly protected by a mask and gloves, the applicant SWH___ left her room, went to the nearest pharmacy to the hotel, where she purchased an ointment to temporarily overcome the situation, and immediately returned to the hotel and to her room.

17. On 19/08/2020, the Health Delegate, Dr. JMS___, sent an e-mail to the Claimants, which specifically reads:

“(...) AH___ is only considered cured after having a negative test and a 2nd negative cure test, when that happens the health delegation will contact you (...) (sic).

18. On 8/21/2020 the following message was sent to the four applicants by the Health Delegate Dr. JMS___, via email: "In other words, when they finish the quarantine they must take a test and if it is negative they can leaving home” (sic).

19. On that same August 21st, applicant SH___ questioned the aforementioned physician and Health Delegate, Dr. JMS___, by email that he sent, the following (translated into Portuguese language free of charge):

“Dear Dr. JMS___ ,

We have already done two COVID/person tests, all were negative (SH___, SWH___, NK___). ..and after that we spent 2 weeks in isolation, and none of us report any symptoms!!

We have Dr. MMS___'s documents, confirm.

Nobody told us anything about the new tests after the isolation time?!

We have already rescheduled our flights and are planning to leave the island.

Explain the reason for your statement.

Why wasn't the COVID test of AH___ done yesterday?

Greetings,

SH___"

20. The applicants did not receive any response to this email, with the exception of the Claimant AH___, who was informed that a new screening test was scheduled to be carried out, specifically, for the next day of 08/29/2020.

21. On 08/20/2020, applicant AH___ performed a third test to COVID19, and on the following day (08/21/2020), only by telephone, she was informed that the result had been "detected".

22. Applicant AH___ requested that written evidence of this positive result be sent to her, which was sent to her by email yesterday, 08/24/2020.

23. The Applicants questioned the reception staff of the hotel where they are located, having been told that none of the four applicants, without exception, may be absent from the rooms.

24. Applicants do not have, and have never had, any symptoms of the disease (fever, cough, muscle pain, sneezing, lack of smell or palate).

25. The applicants were not explained the content of the two documents sent to them with the writings listed in point 7.

26. The applicants have their habitual residence in the Federal Republic of Germany, identified in these records.

Rationale:

The question raised here is that the Applicants are deprived of their liberty (from the 10th of August to the present date, as follows from the proven facts) and, consequently, can avail themselves of the present institute of habeas corpus - as we will go on to explain –, it leads to knowing whether or not there is a legal basis for this deprivation of liberty.

In fact, without even questioning the organic constitutionality of Regional Government Council Resolution 207/2020, of 31 July 2020, currently in force within the scope of the procedures approved by the Government of the Azores to contain the spread of the SARS-COV- virus 2 in this Autonomous Region, in the situation in question, the detention/confinement of the Applicants since the past

10th of August is materialized by a communication carried out by e-mail, in Portuguese, in the terms given as proven under point 7.

As it is clear from the aforementioned point 7 of the proven facts, the regional health authority, through the respective Health Delegate of the territorial area where the Applicants were staying, determined the prophylactic isolation of these under the Normative Circulars ns DRSCINF/2020/ 22 of 2020/03/2025 and DRS CNORM2020/39B of 2020/08/04 of the REGIONAL HEALTH AUTHORITY and of Standard No. 015/2020, of 24/07/2020 of the General Directorate of Health. And, it was through a communication with the aforementioned support, it should be noted, in normative circulars and a norm of the General Directorate of Health, that the Regional Health Authority deprived the Applicants of their freedom, as the proven facts derive from the satiety that these, in the rigor of the concepts ,were detained from the 10th to the 14th of August 2020 in a hotel development in Vila Franca do Campo and from the 14th of August 2020 to the present date confined, and therefore detained, in a hotel room in this city of Ponta Delgada. We cannot forget, even because it stands out from the list of proven facts, that the power of movement and the right of mobility of the Applicants - or of any other individual in the same situation - are so limited that the first exit from the rooms where they are found was to go to this court and make statements (with the exception of the trip to the Applicant SWH___'s pharmacy in clear desperation to attend to her daughter's pains in the proven terms).We cannot forget, even because it stands out from the list of proven facts, that the power of movement and the right of mobility of the Applicants - or of any other individual in the same situation - are so limited that the first exit from the rooms where they are found was to go to this court and make statements (with the exception of the trip to the Applicant SWH___'s pharmacy in clear desperation to attend to her daughter's pains in the proven terms).We cannot forget, even because it stands out from the list of proven facts, that the power of movement and the right of mobility of the Applicants - or of any other individual in the same situation - are so limited that the first exit from the rooms where they are found was to go to this court and make statements (with the exception of the trip to the Applicant SWH___'s pharmacy in clear desperation to attend to her daughter's pains in the proven terms).that the power of movement and right of mobility of the Applicants - or of any other individual in the same situation - are so limited that the first exit from the rooms where they are found was to go to this court and make statements (with except for the trip to the Applicant's pharmacy SWH___ in clear desperation to attend to her daughter's pains in the proven terms).that the power of movement and right of mobility of the Applicants - or of any other individual in the same situation - are so limited that the first exit from the rooms where they are found was to go to this court and make

statements (with except for the trip to the Applicant's pharmacy SWH___ in clear desperation to attend to her daughter's pains in the proven terms).

In short, after analyzing the ascertained factuality, it is inexorable to conclude that we are facing a real deprivation of personal and physical freedom of the applicants, not consented by them, which prevents them not only from moving, but also from being with their family, living for about 16 days separated (applicants SH___ and SWH___ and her daughter, here Applicant, AH___) and, in the case of Applicant NK___ all alone, without any physical contact with anyone. To say that there is no deprivation of liberty because they can leave their rooms at any time, in which they are, is a fallacy, just paying attention to the communications made to them after August 10th, none of them in German,and the conditions in which they have been living (not forgetting that they are foreign citizens with the inherent language barrier) or requesting their return to their place of origin is a fallacy, and for such a conclusion it is enough to pay attention to the latest communications made in Portuguese, it should be underlined from which the given as proven under point 8 stands out, specifically "In other words, when they finish the quarantine they have to take a test and if it is negative they can leave the house such as the hotel where they are confined in 3 bedrooms.when they finish the quarantine they have to take a test and if this is negative they can leave the house as the hotel where they are confined in 3 rooms.when they finish the quarantine they have to take a test and if this is negative they can leave the house as the hotel where they are confined in 3 rooms.

Therefore, since the Applicants are deprived of their freedom, given the proven circumstances, it is necessary to trace the path on which we are moving, starting the journey through the guiding light of the Portuguese legislative system: the Constitution of the Portuguese Republic.

Thus, in terms of the hierarchy of norms, it is important to remember that, as provided for in article 1 of the CRP, “Portugal is a sovereign Republic, based on the dignity of the human person and on the popular will and committed to building a free, just society and solidary.”. Hence, it is clear that the unity of meaning in which our system of fundamental rights is based is based on human dignity – the principle of the dignity of the human person is the axial reference of the entire system of fundamental rights.

One of them, the most relevant given its structuring nature of the democratic state itself, is the principle of equality, provided for in article 13 of the CRP, which states, in paragraph 1, that "All citizens have the same social dignity and are equal before the law.”, adding paragraph 2, that “No one may be privileged, benefited, harmed, deprived of any right or exempt from any duty on account of

ancestry, sex, race, language, territory of origin, religion, political or ideological convictions, education, economic status, social status or sexual orientation.”.

And, in what is particularly important here, under the heading "right to freedom and security" article 27, paragraph 1, of the CRP provides, "Everyone has the right to freedom and security", referring to José Lobo Moutinho, in an annotation to such article, that "Freedom is an absolutely decisive and essential moment - not to say, the very and constitutive way of being - of the human person (Ac. No. 607/03: "ontic demand"), which lends him that dignity in which finds its granitic foundation in the Portuguese legal (and, above all, legal-constitutional) order (Article 1 of the Constitution). In this sense, it can be said the cornerstone of the social edifice” (Ac. n° 1166/96)” (aut.cit., in op. cit., p. 637).

Since human freedom is not one-dimensional, it can take on multiple dimensions, such as articles 37 and 41 of the CRP, the freedom in question in article 27 is physical freedom, understood as freedom of bodily movement, of coming and going, freedom of movement or mobility, providing in paragraph 2 of this last article that " No one may be totally or partially deprived of liberty, except as a result of a judgment condemning the practice of an act punishable by law with the penalty of imprisonment or judicial application of security measure.” – our underscore.

The exceptions to this principle are typified in paragraph 3, which provides that:

“Deprivation of liberty is excluded from this principle, for the time and under the conditions that the law determines, in the following cases:

a) Detention in flagrante delicto;

b) Detention or preventive detention for strong evidence of the commission of a felony which corresponds to a prison sentence whose maximum limit is greater than three years;

c) Arrest, detention or other coercive measure subject to judicial control, of a person who has entered or remains illegally in the national territory or against whom an extradition or expulsion process is in progress;

d) Disciplinary imprisonment imposed on military personnel, with a guarantee of appeal to the competent court;

e) Subjection of a minor to measures of protection, assistance or education in an adequate establishment, decreed by the competent judicial court;

f)Detention by court order due to disobedience to a decision taken by a court or to ensure appearance before the competent judicial authority;

g) Detention of suspects, for identification purposes, in cases and for the time strictly necessary;

h) Internment of a patient with a mental anomaly in an appropriate therapeutic establishment, decreed or confirmed by a competent judicial authority."

Finally, it should be recalled that, in the event of deprivation of liberty against the provisions of the Constitution and the Law, the State is constituted with the duty to compensate the injured party under the terms established by the law, as follows from paragraph 5 of article 27, noting that , in accordance with article 3 of the CRP:

(...) 2. The State is subordinate to the Constitution and is based on democratic legality.

3. The validity of laws and other acts of the State, autonomous regions, local authorities and any other public entities depends on their compliance with the Constitution.

Having arrived here, having traced the legal territory, let's take a closer look at the situation in which the Regional Health Authority moved in the situation under analysis.

Claimants SH__SWH__ and NK_ performed a screening test for the SARS-CoV-2 virus, the result of which was negative for all of them, with the same positive test being obtained for Claimant AH___, which led to the aforementioned order of prophylactic isolation and consequent permanence of these under the terms set out and tasted.

Therefore, given the content of the notification made to the Applicants, this court cannot fail to express, ab initio, its perplexity at the determination of prophylactic isolation to the four Applicants.

As follows from the definition given by the Directorate General of Health, "Quarantine and isolation are essential measures of social distancing in public health. They are especially used in response to an epidemic and are intended to protect the population from person-to-person transmission. The difference between quarantine and isolation stems from the state of illness of the person who wants to be socially withdrawn. In other words:

"quarantine is used on people who are supposed to be healthy, but may have been in contact with an infected patient;

isolation is the measure used in sick people, so that through social distancing they do not infect other citizens." (at https://www.sns24.gov.pt/tema/doencas-infecciosas/covid-19/isolamento/?fbclid=IwAR34hD77oLCpxUVYJ9Ol4ttgwo4tsTOvPfIa3Uyoh0EJEbCs3jEihkaEPAY#sec-0).

Returning to the present case, the Regional Health Authority decided to erase essential concepts, as they delimit the differentiated treatment (because it is different, pass the pleonasm), of the situations of infected people and of those who were in contact with them, before the order of prophylactic isolation to all applicants, despite only one of them having positive results in the aforementioned screening test. Furthermore, it decided to make a dead letter of the Government Council Resolution No. 207/2020 of 31 July, interfering with the mandatory submission to judicial validation by the competent court decreed that it be mandatory quarantine, when it comes to the satiety of the facts proven that Claimants SH__SWH__ and NK___, at best, are subject to mandatory quarantine.

It did not do so within the 24 hours provided for in point 6 of the aforementioned Resolution, not even within a longer period - as in the 48 hours provided for in article 254, paragraph 1, subparagraph a) of the Code of Criminal Procedure, or in article 26, no. 2, of the LSM – continuing to make any communication and, in this way, the evident restriction of the freedom of the Claimants SH__SWH__ and NK_ will always be illegal.

In this step, the aforementioned Resolution of the Government Council No. 207/2020, of July 31, 2020, provides in its point 4 that in cases where the result of the virus test for SARS-CoV-2 is positive, the authority of within its competences, will determine the procedures to be followed. The Applicant AH___ positive in the screening test for the virus in question was notified, reiterate in the same terms as the other Applicants, of the order of prophylactic isolation between 08/10/2020 and 08/22/2020.

At this point, it should be made clear that the notification made as proven under point 7, is brought from what is contained in the Standard of DGS015/2020, a rule to which it alludes in addition to the normative circulars (available for consultation athttps://www.dgs.pt/directrizes-da-dgs/normas-e-circulares-normativas/norma-n-0152020-de-24072020-pdf.aspx), and tells us, in what matters here: (. ..) Contacts with High Risk Exposure

15. A contact classified as having high risk exposure, in accordance with Annex 1, is subject to:

a.Active surveillance for 14 days from the date of the last exposure;

b.Determination of prophylactic isolation, at home or in another place defined at the local level, by the Health Authority, until the end of the period of active surveillance, in accordance with the model of Dispatches No. 2836-A/2020 and/or n. 3103-A/20202 (model accessible at http://www.seg-

social.pt/documents/10152/16819997/GIT_70.docx/e6940795-8bd0-4fad-b850-ce9e05d80283)

Following this standard of the General Directorate of Health, one can read, among others, in normative circular No. DRSCNORM/2020/39B, of 2020-08-04 (available for consultation at http://www.azores.gov.en/NR/rdonlyres/25F80DC1-51E6-4447-8A38-19529975760/1125135/CN39B_signed1.pdf),

(...)

a.High-risk

close contacts High-risk close contacts are treated as suspected cases until the laboratory result of the suspected case. These close contacts should screen for SARS-CoV-2. The following are considered high risk contacts: i. Cohabitation with a confirmed case of COVID-19; (...)

ii. Surveillance and Control of Close Contacts

3. Close contacts of high risk, considering that, currently, it is estimated that the period of incubation of the disease (time elapsed from exposure to the virus until the onset of symptoms) is between 1 and 14 days, they must comply with 14 days of prophylactic isolation, even if they present negative screening tests during this period, and the test should be carried out on the 14th day. If the test result on the 14th day is negative, they are discharged. If close high-risk contacts coexist with the positive case, they should only be discharged when the positive case is cured, and, in this way, the respective prophylactic isolation should be extended.

(...)

13. Compliance with prophylactic isolation

All persons identified as suspected cases, until the negative results are known, undergo prophylactic isolation;

All persons who tested positive for Covid-19 and who are discharged after a cure test (inpatient or at home) do not need to undergo another 14-day isolation period or repeat a new test on the 14th day.

All passengers arriving at the Region's airports from airports located in areas considered to be areas of active community transmission or with active transmission chains of the SARS-CoV-2 virus must comply with the procedures in force in the Region at the time.

Having arrived here, let us analyze the legal value of norms/guidelines of the General Directorate of Health and normative circular 39B, of 08/04/2020, of the

Regional Health Directorate,leaving no doubt that we have entered the sphere of administrative guidelines.

In this regard, with the specificity of reporting to the Tax Authority - which has the same administrative legal position as the National Health Authority in the State's ius imperium -, CASALTA NABAIS (Tax Law, 6th ed., Almedina, p. 197), "the so-called administrative guidelines, traditionally presented in the most diverse forms as instructions, circulars, circular letters, circular letters, normative orders, regulations, opinions, etc.", which are very frequent in tax law constitute "internal regulations that, as they are only addressed to the tax administration, only this one owes them obedience, being, therefore, mandatory only for the bodies located hierarchically below the authorizing body.

Therefore, they are not binding on individuals or on the courts. And this is either organizational regulations, which define rules applicable to the internal functioning of the tax administration, creating working methods or modes of action, or interpretative regulations, which interpret legal (or regulatory) precepts.

It is true that they densify, explain or develop the legal precepts, previously defining the content of the acts to be performed by the administration when they are applied. But that does not make them the standard of validity of the acts they support. In fact, the assessment of the legality of the acts of the tax administration must be carried out through direct confrontation with the corresponding legal norm and not with the internal regulation, which intervened between the norm and the act".

However, the issue of the normative relevance of the Administration Circulars (Tax) has already been raised and considered in the Constitutional Court Judgments No. 583/2009 and 42/14, of 11.18.2009 and of 12.09.2014, respectively, with that Court having decided, with which we agree, that the prescriptions contained in the Tax Administration Circulars, regardless of their persuasive effect on the practice of citizens, do not constitute norms for the purposes of the constitutionality control system entrusted to the Constitutional Court.

As that edge underlined (Rule 583/2009) "(...) These acts, in which the "circulars" loom large, emanate from the power of self-organization and the hierarchical power of the Administration. They contain generic service orders and it is for this reason and only in the respective subjective scope (of the hierarchical relationship) that compliance is assured. They incorporate guidelines for future action, transmitted in writing to all subordinates of the administrative authority that issued them. They are standardized decision-making modes, assumed to rationalize and simplify the operation of services.

This is worth saying that, although they may indirectly protect legal certainty and ensure equal treatment through uniform application of the law, they do not regulate the matter they deal with in confrontation with individuals, nor do they constitute a decision rule for the courts."

Consequently, lacking heteronomous binding force for individuals and not imposing themselves on the judge except for the doctrinal value they may have, the provisions contained in the "circulars" do not constitute norms for the purposes of the constitutionality review system within the competence of the Constitutional Court.

What has been said, allows us to conclude that the administrative guidelines conveyed in the form of a normative circular, as in the present case, do not constitute provisions of legislative value that can be the object of a formal declaration of unconstitutionality - see Judgment of the Supreme Administrative Court, of 21/06/2017, available for consultation in www.dgsi.pt .

And, to make it clear that the regulations invoked by the Regional Health Authority that upheld the deprivation of liberty imposed on the Claimants through notification of prophylactic isolation are non-binding administrative guidelines for the Claimants. By the way. just pay attention to who they are addressed respectively to:

Normative Circular No. DRSCNORM/2020/39B:"For: Health Units of the Regional Health Service, Municipal Health Delegates (C/c Regional Civil Protection Service and Azores Fire Service, Line de Saúde Azores) Subject: Screening of SRAS-CoV-2 and approach of suspected or confirmed cases of infection by SARS-CoV-2 Source: Regional Directorate of Health (...)

Standard 015/2020, of 07/24/2020: "TOPIC: COVID-19: Contact Tracing KEYWORDS: Coronavirus, SARS-CoV-2, COVID-19, Contact Tracing, Epidemiological Investigation

FOR: Health system (...).

In this sequence, and, in summary, this court cannot fail to emphasize that the present case, we allow ourselves to say aberrant, of deprivation of liberty of persons, absolutely lacks any legal basis, and do not come back with the argument that the defense of public health is at stake because the court always acts in the same way, that is, in accordance with the law, in fact, hence the need for judicial confirmation enshrined in the Mental Health Law in the case of compulsory internment, as from the facts found and from the above results:

- The Applicants have been confined to the space of one room for about 16 days, based on a notification of "prophylactic isolation" until 08/22/2020, a period that has already been exceeded and the notification operated, which in any case

it is illegal as a means of detaining people for the reasons already explained (just paying attention to the constitutional norms set out above), has expired;

- The Applicants were never transmitted any information, communication, notification, as appropriate, in their mother tongue, nor were they provided with an interpreter, immediately in flagrant violation of the European Convention on Human Rights (articles 5, no. 2 and 6, no. 3, subsection a) and of the criminal procedural rules (cf. art. 92 of the Criminal Procedure Code), that is, in our legal system a foreign person detained and without control of the Portuguese language is immediately appointed interpreter, and, in the case of the Applicants who limited themselves to travel to this island and enjoy its beauty, they were never granted such a possibility;

- Applicants after 08/22/2020 are confined to the space of a room based on the following communications:

- On 8/19/2020 the Health Delegate, Dr. JMS___, was sent to the Claimants by e-mail, which specifically reads:

“(...) AH___ is only considered cured after having a negative test and a 2nd negative cure test, when this happens the health delegation will contact you (...) (sic).

- On 8/21/2020, the following message was sent to the four applicants by the Health Delegate Dr. JMS___, via email: "In other words, when they finish the quarantine they have to take a test and if it is negative they can leave from home” (sic);

- The deprivation of liberty of the Applicants was not subject to any judicial review.

As we said initially, we could also consider the organic constitutionality of Government Council Resolution no. 1207/2020, of 31 June, however, we believe it to be a negligible issue for the object of the decision to be rendered, which is intended to be swift, because even the In light of such a resolution, the decision cannot be different, based on the decision of the Constitutional Court, of 07/31/2020, in the scope of case No. 424/2020, and, because the position of the Regional Health Authority in the present circumstances leads to to the application of normative circulars, with the value explained above.

Finally, and because this court has been pronouncing successively and recently within the scope of this institute of "habeas corpus" in light of the orders issued by the Regional Health Authority, we allow ourselves to subscribe and underline the following excerpt from the first decision of this Criminal Investigation Court:

"The issue of compulsory confinement in case of contagious diseases, and the terms under which it should occur, is a pressing issue, and one that is not supported by article 27, paragraph 3, of the CRP, namely in its subparagraph h), where only provision is made for the hospitalization of a patient with a mental anomaly in an appropriate therapeutic establishment, decreed or confirmed by a competent judicial authority. It is urgent to legislate on this matter, clearly establishing the fundamental principles to which it must comply, leaving the detailed aspects to secondary law - and only these.

For, as Professor Gian Luigi Gatta, who we quote here in a free translation, says,"Right now, the country's energies are focused on emergency. But the need to protect fundamental rights, also and above all in an emergency, requiring the Courts to do their part. Because, in addition to medicine and science, also law - and human rights law in the first place - must be at the forefront: not to prohibit and sanction - as is being stressed too much these days - but to guarantee and protect everyone we. Today the emergency is called a coronavirus. We don't know tomorrow. And what we do or don't do today, to maintain compliance with the system's fundamental principles, can condition our future." (in "I diritti fondamentali all the proof of the coronavirus. Perché it is necessary a legge sulla quarantine",)".

It will not be difficult to admit and accept that the legislative turmoil generated around the containment of the spread of COVID-19 had - and will continue to have - in its raison d'être the protection of public health, but this turmoil can never harm the right to death. freedom and security and, ultimately, the absolute right to human dignity.

It remains to decide accordingly.

(...)

Therefore, in light of the above, as illegal the detention of Claimants SH__SWH___, AH___ and NK___, I decide to uphold the present request for habeas corpus and, consequently, I order their immediate return to freedom.

2. The appellant made the following conclusions, which he drew from his motivation:

1. The object of the present appeal is the decision rendered by the learned Court a quo considered "illegal the detention of the Claimants SH__SWH___, AH___ and NK___" and decided to "uphold the present request for habeas corpus and, consequently, I order the immediate restitution from them to freedom.";

2.Only for reasons of procedural economy, that is, because it is of little relevance to the assessment of the merits of the case, the factuality given as proven is not

appealed, however, it should be noted that it was based solely on the statements of the applicants themselves.

3. The contested decision, claiming that the appellant did not comply with point 6 of the Resolution of the Council of the Regional Government of the Azores no. 207/2020, of 31 July 2020, violated the scope of application of the same Resolution, defined in point 1 of the same Resolution;

4. The judicial validation of mandatory quarantine, provided for in point 6 of said resolution, only applies to mandatory quarantine decreed to passengers who do not accept, alternatively, any of the procedures, provided for in point 1 of the aforementioned Resolution;

5. The applicants complied with the procedure provided for in subparagraph a) of point 1 of Resolution 207/2020, of July 31, 2020, so they could never be subject to mandatory quarantine, under that Resolution and, consequently, there is no place for judicial validation, provided for in point 6 of Resolution No. 207/2020, of 31 July 2020.

6. Contrary to what is defended in the contested decision, the Portuguese legal system allows the adoption of exceptional measures, including separation of persons, consequent decree of mandatory confinement of infected persons with a high probability of being infected, through the mechanism provided for in article 17 of Law No. 81/2009, of 21 August;

7. The Council of Ministers legitimately made use of the exceptional regulatory power, provided for in article 17 of Law No. 81/2009, through Resolutions of the Council of Ministers No. 55-A/2020, of July 31, 2020 and No. 63-A/2020, of August 14th;

8.No. 2 of the Resolution of the Council of Ministers No. 55-A/2020, of 31 July 2020, ordered exceptional measures to be applied throughout the national territory, necessary to combat COVID -19, namely those provided for in the regime attached to that resolution;

9. Article 2 of the Annex decreed that:

“Article 2

Mandatory confinement

1 - They are in mandatory confinement, in a health establishment, in their home or in another place defined by the health authorities:

a) Patients with COVID -19 and those infected with SARS -CoV-2;

b) Citizens for whom the health authority or other health professionals have determined active surveillance.

2 – (...)”

10. The applicant AH___ being infected with the SARS-CoV-2 virus, in compliance with article 2, paragraph 1, subparagraph a) of Annex I of the Resolution of the Council of Ministers 55-A/2020, had to be in mandatory confinement;

11. The lower court, by decreeing the habeas corpus of AH___ and allowing its free circulation, violated article 17 of Law no. 81/2009, of 21 August, by reference to article 2, no. 1, paragraph a) of Annex I of the Resolution of the Council of Ministers No. 55-A/2020;

12. Applicants SH__SWH__ and NK_ in accordance with the rules stipulated by the National Health Authority, contained in Norm 015/2020, of 07/24/2020, are contacts with High Risk Exposure, and shall be subject to:

a. Active surveillance for 14 days from the date of the last exhibition;

b. Determination of prophylactic isolation, at home or in another place defined at the local level, by the Health Authority, until the end of the period of active surveillance, in accordance with the model of Dispatches No. 2836-A/2020 and/or n. º 3103-A/20202"

13. The applicants SH__SWH__ and NK_ are subject to active surveillance, in compliance with article 2, paragraph 1, subparagraph b) of Annex I of the Resolution of the Council of Ministers no. 55-A/2020, had to be in mandatory confinement;

14. The lower court, by decreeing the habeas corpus of SH__SWH__ and NK_ and allowing their free circulation, violated article 17 of Law no. 81/2009, of August 21, by reference to article 2, no. 1, subparagraph b) of Annex I of the Resolution of the Council of Ministers No. 55-A/2020.

15. The contested decision must be revoked and replaced by another that validates the mandatory confinement of the applicants, as they are carriers of the SARS -CoV-2 (AH___) virus and because they are under active surveillance, due to high risk exposure, decreed by the health authorities (SH__SWH__ and NK___).

3. In his response, the MºPº drew the following conclusions:

1— The judgment of the Constitutional Court of 07/31/2020 (Proc. 403/2020; 1st Section; Cons. José António Teles Pereira), after concluding that mandatory confinement, either through quarantine or through prophylactic isolation, constitutes a true deprivation of liberty not provided for in art. 27, no. 2, of the CRP, and that all deprivations of liberty require the prior authorization of the Assembly of the Republic, which was not the case with the Resolutions of the

Regional Government of the Azores that imposed a mandatory quarantine, considered the organic unconstitutionality of the aforementioned norms.

2 — These norms, declared unconstitutional by the Constitutional Court, are in all materially identical to those contained in Resolutions of the Council of Ministers nos. 55-A/2020, of 07-31, 63-A/2020, of 08-14 , and 70-A/2020, of 9/11, and No. 88-A/2020, of 10/14, insofar as they provide for deprivations of liberty not provided for in an appropriate legal diploma issued by the competent entity, as well as are not found in the exceptions provided for in art. 27, paragraph 3, of the CRP, so they must also be unapplied for violation of art. 27(1) of the CRP.

3 — Foreseeing art. 5, no. 1, al. e) of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms — Rome, 11-04-1950), on the right to liberty and security, which states that “Everyone has the right to freedom and security" and that "No one may be deprived of their liberty, except in the following cases and in accordance with the legal procedure: (...) "If it is the legal detention of a person liable to spread a contagious disease, a mentally insane person, an alcoholic, a drug addict or a vagabond', we can conclude that the deprivation of liberty of a person likely to spread a contagious disease is a form of detention and that, according to the Convention, States provide in their domestic legislation for the detention of these persons.

4 — Taking into account the constitutional principle of the typicality of measures depriving liberty, and not providing for art. 27 of the CRP, in none of its paragraph 3, the deprivation of liberty of a person "likely to spread a contagious disease", 5 - And having paragraph h) - which provides for the hospitalization of a patient with a mental disorder

in an adequate therapeutic establishment —has been added by art. 11.0, no. 6, of Constitutional Law no. 1/97, of 20 September (4th constitutional revision), at a time when the European Convention on Human Rights already expressly provided for the detention of a person liable to propagate contagious disease,

6 — E que o legislador constitucional, nem na referida revisão constitucional nem noutra posterior, acrescentou outra alínea ao n.° 3 do art. 27.° a prever esta possibilidade, como fez relativamente ao internamento de portador de anomalia psíquica, podemos concluir que estamos perante uma decisão consciente do legislador constitucional em não permitir que se proceda à privação da liberdade de pessoa susceptível de propagar doença contagiosa, apenas por esse facto.

7 — From the analysis of the constitutional regime of the right to liberty and security provided for in art. 27, no. 1, of the CRP, we can thus conclude that it

is not possible for the legislator, even through the Assembly of the Republic or the Government authorized by it, to create deprivations of liberty that are not provided for in no. 3 of the aforementioned constitutional regulation, namely with regard to people with infectious and contagious diseases, whether these deprivations of freedom are confinement, quarantines or prophylactic isolation, without incurring any rules created for this purpose in material unconstitutionality for violation of said constitutional regulation.

8 — Turning now to the legal regime for the internment of patients with contagious diseases, Law No. 2036 of 09-08-1949 provided for the possibility of promoting the isolation or internment of people with infectious diseases, but only in this last case, in situations where there was a serious danger of contagion, with an appeal to an authority for the decision of isolation or internment.

9 — In turn, art. 17 of Law No. 81/2009, of 21-08, which repealed Law No. 2036 of 09/08-1949, allows the member of the Government responsible for the health area a special regulatory power, in accordance with the stipulated by base XX of Law No. 48/90, of 24-08 (Basic Health Law), namely, "take essential exceptional measures in case of public health emergency, including restriction, suspension or closure of activities or separation of people who are not sick, means of transport or goods that have been exposed, in order to avoid the possible spread of infection or contamination".

10— From this, it follows, from the outset, that the possibility of promoting the isolation or hospitalization of people with infectious-contagious diseases is not provided for in this law, as was provided for in Law No. 2036 of 09-08-1949. On the other hand, since the measures taken by the health authorities must respect the Constitution and the law and the Constitutional Law does not provide for the deprivation of liberty of people with infectious diseases, the interpretation to be given to the expression «separation of people who are not patients, means of transport or goods that have been exposed", in order to comply with the Constitution of the Portuguese Republic, it cannot reach the core of the right to liberty, that is, it must not constitute a total deprivation of liberty.

11 — On the other hand, the current Basic Health Law — Law No. 95/2019, of 04-09 — provides in Base 34, on the defense of public health, that the public health authority may «b) Unleash , in accordance with the Constitution and the law, the internment or the compulsory provision of health care to persons who otherwise constitute a danger to public health».

12 – Law No. 82/2009, of 02-04, which regulates the legal regime for the designation, competence and operation of entities that exercise the power of health authorities, provides in its art. 5th the competences of the health authority, namely, «c) To trigger, in accordance with the Constitution and the

law, the internment or the compulsory provision of health care to individuals in a situation of harming public health».

13 — It follows that, since the measures taken by the health authorities must respect the Constitution and the law, and the Constitutional Law does not provide for the deprivation of liberty of people with infectious and contagious diseases, if the interpretation to be given to the expression “hospitalization or the compulsory provision of health care to individuals in a situation of harming public health' either in the sense that health authorities may order the internment, or other measure restricting the freedom of movement, or the compulsory provision of health care from people with infectious and contagious diseases, such interpretation of the law is materially unconstitutional for violation of art. 27(1) of the CRP.

14 — Defining Law No. 27/2006, of 03-07 (Basic Civil Protection Law) "Serious accident" as an unusual event with relatively limited effects in time and space, capable of affecting people and other beings living, the goods or the environment, but establishing in art. 5, no. 1, al. a), the principle of priority of public interest relating to civil protection in relation to the interests of national defense, internal security and public health, we can conclude that serious situations of public health, such as the current pandemic, are not included in the public interest relating to civil protection, therefore, are not included in the concepts of "serious accident" and "catastrophe" referred to in art. 3 of the Civil Protection Law.

15 — From this it can also be concluded that the Resolutions of the Council of Ministers — and the Resolutions of the Council of the Regional Government — which were based on the Basic Civil Protection Law to declare "the contingency and alert situation, within the scope of the disease pandemic COVID-19", namely the Resolutions of the Council of Ministers No. 55-A/2020, of 07/31/2020, of 08/14, 68-A/2020, of 08/28, and 70-A/2020, of 11-09 — revoked by Resolution of the Council of Ministers no. 88-A/2020, of 14-10, currently in force —, which provide in point 2 the "mandatory confinement, in establishment of health, in the respective household or in another place defined by the health authorities: (...) «a) Patients with COVID-19 and those infected with SARS-CoV-2; (...) "b) Citizens for whom the health authority or other health professionals have determined active surveillance", have no legal basis, asthe Civil Protection Law does not apply to situations of danger to public health.

16 - We can thus conclude that the Resolutions of the Council of Ministers No. 55-A/2020, of 07-31, 63-A/2020, of 08-14, 68-A/2020, of 08-28 , 81/2020, of 29-09 - the latter revoked by Resolution of the Council of Ministers No. 88-A/2020, of 14-10, currently in force -, and respective Annex, which were issued by the Government, in use administrative powers, created a regime that restricts

the freedom of citizens with infectious and contagious diseases (quarantines, prophylactic isolation, etc.) and, to reinforce the application of a deprivation of liberty not allowed by the Constitution or provided for in the law enabling situations of people with a contagious disease or danger to public health, established the commission of a crime of disobedience for such violations and the aggravation of the penalty provided for such crime,directly violate art. 27, no. 1, of the CRP, therefore, as unconstitutional, they should be disapplied in the present case, contrary to the request made by the applicant,

17 — The sub judice decision being maintained.

4. The applicant is the regional health authority, represented by the Regional Health Directorate of the Autonomous Region of the Azores.

Decree-Law No. 11/93, of 1993-01-15, in its current version (Statute of the National Health Service) determines that (our underlining):

Article 1.

The National Health Service , hereinafter referred to as NHS, is an ordered and hierarchical set of institutions and official services providing health care, operating under the supervision or supervision of the Minister of Health .

Article 3

1 - The NHS is organized in health regions.

2 - The health regions are divided into health sub-regions, integrated by health areas.

Article 6

1 - In each health region there is a regional health administration, hereinafter referred to as the ARS .

2-the ARS have legal personality, administrative and financial autonomy and own assets.

3-the ARS have functions of planning, distribution of resources, guidance and coordination of activities, human resources management, technical and administrative support and also evaluating the functioning of institutions and services providing health care.

4 – (...).

In turn, Decree-Law No. 22/2012 stipulates

Article 1

1 - The Regional Health Administrations, IP, for short referred to as ARS , IP., are public institutes integrated in the indirect administration of the State , endowed with administrative, financial autonomy and their own assets.

2-the ARS, IP, carry out their duties, under the supervision and supervision of the member of the Government responsible for the health area.

3-the ARS, IP, are governed by the rules contained in this decree-law, by the provisions of the framework law of public institutes and the Statute of the National Health Service and other rules that are applicable to it .

Article 3

1 - The ARS, IP, have the mission of guaranteeing the population of the respective geographic area of intervention access to the provision of health care, adapting the available resources to the needs and complying with and enforcing health policies and programs in their area of intervention.

2 - The responsibilities of each ARS, IP, within the scope of their respective territorial constituencies:

a) To carry out the national health policy, in accordance with global and sectoral policies, aiming at its rational ordering and the optimization of resources ;

b) Participate in the definition of intersectoral planning coordination measures, with the aim of improving the provision of health care;

c) Collaborate in the preparation of the National Health Plan and monitor its execution at the regional level;

d) Develop and promote activities within the scope of public health, in order to ensure the protection and promotion of the health of populations;

e) Ensuring the execution of local intervention programs with a view to reducing the consumption of psychoactive substances, preventing addictive behaviors and reducing dependence;

f) Develop, consolidate and participate in the management of the National Network for Continued Integrated Care in accordance with the defined guidelines;

g) Ensure the regional planning of human, financial and material resources, including the execution of the necessary investment projects, of institutions and services providing health care, supervising their allocation;

h) Draw up, in line with the guidelines defined at national level, the map of facilities and equipment;

i) Allocate, in accordance with the guidelines defined by the Central Administration of the Health System, IP, financial resources to institutions and health care providers integrated or financed by the National Health Service and private entities with or without profit , who provide health care or work within the areas referred to in subparagraphs e) and f);

j) Signing, monitoring and reviewing contracts within the scope of public-private partnerships, in accordance with the guidelines defined by the Central Administration of the Health System, IP, and allocating the respective financial resources;

l) Negotiate, celebrate and monitor, in accordance with the guidelines defined at national level, the contracts, protocols and conventions of regional scope, as well as carry out the respective evaluation and review, in the context of the provision of health care as well as in the aforementioned areas in sub-paragraphs e) and f);

m) To guide, provide technical support and assess the performance of institutions and services providing health care, in accordance with the defined policies and with the guidelines and regulations issued by the competent central services and bodies in the various fields of intervention;

n) Ensuring adequate articulation between health care services in order to guarantee compliance with the referral network;

o) Allocate financial resources, through the signing, monitoring and review of contracts in the context of integrated continuing care;

p) Develop functional programs for health establishments;

q) Licensing private health care units and units in the area of dependencies and additive behavior in the social and private sector;

r) Issue opinions on master plans for health units, as well as on the creation, modification and merger of services;

s) Issue opinions on the acquisition and expropriation of land and buildings for the installation of health services, as well as on projects for the installations of health care providers.

3 - In order to carry out their duties, the ARS, IP may collaborate with each other and with other entities in the public or private sector, with or without profit, under the terms of the legislation in force.

5. The requested habeas corpus measure falls within the provisions of article 220 of the CPPenal, which reads as follows:

Habeas corpus due to illegal detention

1 - Those detained to the order of any authority may request the investigating judge of the area where they are located to order their immediate judicial presentation, on any of the following grounds:

a) The deadline for delivery to the judiciary has been exceeded;

b) Keeping detention outside legally permitted places;

c) The arrest was made or ordered by an incompetent entity;

d) Be the detention motivated by a fact for which the law does not allow it.

2 - The application can be signed by the detainee or by any citizen in the enjoyment of their political rights.

3 — Any authority that raises an illegitimate obstacle to the submission of the application referred to in the preceding paragraphs or to its referral to the competent judge is punishable with the penalty provided for in article 382 of the Penal Code.

6. Appreciating.

Article 401 of the Criminal CP stipulates the following:

1 - The following are entitled to appeal:

a) The Public Prosecutor's Office, of any decisions, even if in the exclusive interest of the accused;

b) The defendant and the assistant, of decisions rendered against them;

c) The civil parts, from the part of the decisions against each one rendered;

d) Those who have been sentenced to pay any sums, under the terms of this Code, or have to defend a right affected by the decision.

2 - Anyone who has no interest in acting cannot appeal.

7. The first question that arises here is that of the appellant's legitimacy, in the context of an appeal in criminal proceedings.

i. We are within the scope of a criminal jurisdiction, whose purpose is to ensure the effective exercise of the State 's jus puniendi , that is, which is dedicated to investigating and deciding on behavior that constitutes a crime or administrative offence.

It is in this context and with such purpose in mind that the Law determines who has the legitimacy to be able to discuss the goodness of a decision rendered by a criminal court.

ii.In this case, we find that the appellant is not a defendant, is not an assistant and has not made any civil claim that, in view of the principle of adhesion, would determine her status as plaintiff or defendant.

iii. Thus, under the Law and given the list of interveners that the legislator understood may have legitimacy to intervene in a process in this type of jurisdiction, on appeal, we must immediately conclude that the appellant lacks legitimacy to be able to discuss the content of a court decision in this context.

iv.In fact, the practice of any crime, nor any illicit offense of an administrative nature is not discussed here, given that the issue of possible consequences at the criminal level, the recognition of the existence of an illegal detention, is a matter that will have to be discussed in its own seat - that is, in an inquiry that may be opened for this purpose, being completely foreign to the decision of the present case.

v. We conclude, therefore, that the appellant lacks legitimacy to file an appeal against the decision rendered by the “a quo” court.

8. Regardless of the question of legitimacy, it appears that, similarly, the appellant lacks an interest in bringing proceedings.

i.As follows from peaceful jurisprudence and doctrine in this regard, the interest in acting means the need for someone to use the appeal mechanism as a way of reacting against a decision that entails a disadvantage for the interests that it defends or that has frustrated one of its legitimate expectation or benefit.

ii. Now, in the present case, the question is – did the decision rendered entail any disadvantage for the interests that ARS defends? Or a legitimate expectation or benefit of yours?

The answer is manifestly negative.

If not, let's see.

iii. The ARS continues its attributions, under the supervision and supervision of the member of the Government responsible for the health area .

Thus, and from the outset, either in view of the functions entrusted to it, or in view of their manifest hierarchy, before the tutelage, it will have to be concluded that no ARS pursues its own autonomous interest, which it is responsible for defending. Eventually, it will be the respective Minister or the Government in which it operates, as the “interests” of the ARS will not be its own, but will be included in the health policy of the ministry that oversees such entity.

It should be noted, moreover, that in the definition of its attributions [1] , it is not assigned any specific defense function, autonomously and in its own name,

in court, of any interests that fall within its functions which, in regarding criminal or administrative offence activities, they are none...

iv.In turn, the interest that the appellant itself intends to defend and which appears in the application, at the end of this appeal - the validation of the mandatory confinement of the applicants, for being carriers of the SARS -CoV-2 (AH___) virus and for being in active surveillance, for high risk exposure, decreed by the health authorities (SH__SWH__ and NK___) – is something in itself contradictory and goes beyond the purpose and scope of powers of a criminal court.

Contradictory because the appellant does not admit that confinement corresponds to deprivation of liberty. If so, it is not clear in which seat the appellant founds the competence of a criminal court to validate "confinements". And outside the scope of action of a criminal court, because it is not responsible for making declarative decisions to validate infections or diseases...

v . Finally, one does not see that a legitimate expectation or benefit has an entity under the tutelage of a Government agency, seen frustrated by the decision now being criticized. saw. It follows from this that the appellant has no interest in acting, which is why, under the provisions of paragraph 2 of article 401 of the Criminal Code, it cannot appeal against the decision rendered. 9. The decision rendered by the "a quo" court to receive this appeal is not binding on this court (article 414 of the CPPenal), so there is nothing to prevent its rejection being determined. 10.

Nevertheless, and for the peace and tranquility of consciences, the following will be added:

Even if it were not understood that way, the appeal presented would be manifestly unfounded, for the following succinct reasons :

i. First, for the exhaustive and correct reasoning set out in the decision, by the "a quo" court, whose content is fully endorsed.

Actually,in view of the Constitution and the Law, the health authorities do not have the power or legitimacy to deprive any person of their freedom - even under the label of "confinement", which effectively corresponds to a detention - since such a decision can only be determined or validated by a judicial authority, that is, the exclusive competence, in view of the Law that still governs us, to order or validate such deprivation of liberty, is assigned exclusively to an autonomous power, to the Judiciary.

It follows that any person or entity that issues an order, the content of which leads to the deprivation of physical freedom, ambulatory, of others (whatever the nomenclature that this order takes: confinement, isolation, quarantine,

prophylactic protection, etc.), which does not comply with the legal provisions, namely the provisions of art. 27 of the CRP and without having been granted such decision-making power, by virtue of Law - from the AR, within the strict scope of the declaration of a state of emergency or siege , subject to the principle of proportionality - which mandates and specifies the terms and conditions of such deprivation , will be carrying out an illegal detention, because ordered by an incompetent entity and because motivated by a fact that the law does not allow (it should be said, in fact, that this issue has been debated, over time, in relation to other public health phenomena, namely with regard to HIV infection and tuberculosis, for example. And, as far as is known, no one has ever been deprived of their freedom, for suspicion or certainty of suffering from such diseases, precisely because the law does not allow it).

It is in this context that, without any shadow of doubt, the situation under consideration in this case is included, given that the appropriate means of defense against illegal detention is subject to the appeal for habeas corpus , provided for in art. 220, als. c) and d) of the CPPenal.

And, correctly, the “a quo” court ordered the immediate release of four people who were illegally deprived of liberty.

ii.Second, because the request made in the appeal proves to be impossible .

If not, let's see:

11. In fact, it is requested that “the mandatory confinement of the applicants be validated, as they are carriers of the SARS-CoV-2 virus (AH___) and because they are under active surveillance, for high risk exposure , decreed by the authorities of health (SH__SWH__ and NK_).”

12. It is with great astonishment that this court is faced with such a request, especially considering that the appellant is active in the health sector.

Since when is it the responsibility of a court to make clinical diagnoses, on its own initiative and based on the eventual results of a test? Or to ARS? Since when is the diagnosis of a disease made by decree or by law?

13. As the appellant has more than an obligation to know, a diagnosis is a medical act, the sole responsibility of a doctor .

This is what results unequivocally and peremptorily from Regulation No. 698/2019, of 5.9 (regulation that defines the proper acts of physicians), published in DR.

There it is determined, in an imperative way (which imposes its compliance by all, including the applicant) that (our emphasis):

Article 1

Object

This regulation defines the professional acts of physicians, their responsibility, autonomy and limits, within the scope of their performance.

Article 3

Qualification

1 — The doctor is the professional legally qualified to practice medicine , qualified for the diagnosis , treatment, prevention or recovery of diseases and other health problems , and able to provide care and intervene on individuals, groups of individuals or population groups, sick or healthy, with a view to protecting, improving or maintaining their state and level of health.

two -Physicians who are currently registered with the Portuguese Medical Association are the only professionals who can practice the actions of physicians , under the terms of the Statute of the Medical Association, approved by Decree-Law No. 282/77, of 5 July, with the amendments introduced by Law No. 117/2015, of 31 August and this regulation.

Article 6

Medical act in general

1 — The medical act consists of the diagnostic , prognostic , surveillance , investigation, medico-legal expertise, clinical coding, clinical audit, prescription and execution of pharmacological and non-pharmacological therapeutic measures. pharmacological, medical techniques , surgical and rehabilitation, health promotion and disease prevention in all its dimensions, namely physical, mental and social of people, population groups or communities, respecting the deontological values of the medical profession.

Article 7

Diagnosis

The identification of a disorder, disease or the state of a disease by studying its symptoms and signs and analyzing the examinations carried out constitutes a basic health procedure that must be carried out by a doctor and in each specific area , by a specialist physician and aims to establish the best preventive, surgical, pharmacological, non-pharmacological or rehabilitation therapy. 14.

Even under the Mental Health Law, Law No. 36/98, of 24 July, the diagnosis of the pathology that can lead to compulsory hospitalization is obligatorily carried out by specialist physicians and their technical-scientific judgment - inherent to the assessment clinical-psychiatric - is excluded from the judge's discretion (see articles 13 nº3, 16 and 17 of the said Law).

15. Thus, any diagnosis or any act of health surveillance (such as the determination of the existence of viral infection and high risk of exposure, which are covered by these concepts) made without prior medical observation to the applicants, without the intervention of a doctor registered with the OM (which carried out the assessment of its signs and symptoms, as well as the exams it deemed appropriate to its condition), violates such Regulation, as well as the provisions of article 97 of the Statute of the Medical Association, being liable to configure the crime P. and p. by article 358 al.b) (Usurpation of functions) of the Criminal Code, if dictated by someone who does not have such quality, that is, who is not a physician registered with the Medical Association.

viola also paragraph 1 of article 6 of the Universal Declaration on Bioethics and Human Rights, which Portugal has subscribed to and is internally and externally obliged to respect, since there is no document in the file proving that the informed consent that this Declaration imposes has been given. .

It is thus clear that the prescription of auxiliary diagnostic methods (such as tests to detect viral infection), as well as the diagnosis of the existence of a disease, in relation to anyone and everyone, is a matter that cannot be carried out by Law, Resolution, Decree, Regulation or any other normative means, as they are acts that our legal system reserves the exclusive competence of a doctor, given that the doctor, in advising his patient, should always try to obtain the your informed consent.

16. In the case we are dealing with, there is no indication or proof that such a diagnosis was actually carried out by a qualified professional under the terms of the Law and who had acted in accordance with good medical practices.

In fact, what follows from the facts given as established is that none of the applicants was even seen by a doctor, which is frankly inexplicable, given the alleged seriousness of the infection.

17. In fact, the only element that appears in the proven facts, in this regard, is the performance of RT-PCR tests, one of which had a positive result in relation to one of the applicants.

i. Now, given the current scientific evidence, this test is, by itself, unable to determine, without a reasonable margin of doubt, that such positivity corresponds, in fact, to the infection of a person by the SARS-CoV-2 virus, by several reasons, of which we highlight two (in addition to the issue of the gold standard which, due to its specificity, we will not even address):

Because this reliability depends on the number of cycles that make up the test;

Because this reliability depends on the amount of viral load present.

ii. In fact, the RT-PCR (Polymerase Chain Reaction) tests, molecular biology tests that detect the RNA of the virus, commonly used in Portugal to test and enumerate the number of infected (after nasopharyngeal collection), are performed by amplification of samples , through repetitive cycles.

From the number of cycles of such amplification, the greater or lesser reliability of such tests results.

iii. And the problem is that this reliability proves, in terms of scientific evidence (and in this field, the judge will have to rely on the knowledge of experts in the field) more than debatable.

This is what results, among others, from the very recent and comprehensive study Correlation between 3790 qPCR positive samples and positive cell cultures including 1941 SARS-CoV-2 isolates , by Rita Jaafar, Sarah Aherfi, Nathalie Wurtz, Clio Grimaldier, Van Thuan Hoang, Philippe Colson, Didier Raoult, Bernard La Scola, Clinical Infectious Diseases, ciaa1491, https://doi.org/10.1093/cid/ciaa1491, at https://academic.oup.com/cid/advance-article/doi/10.1093 /cid/ciaa1491/5912603 , published at the end of September this year, by Oxford Academic , carried out by a group that brings together some of the greatest European and world experts in the field.

This study concludes [2] , in free translation:

“At a cycle threshold (ct) of 25, about 70% of the samples remain positive in cell culture (ie were infected): at a ct of 30, 20% of the samples remain positive; in a ct of 35, 3% of the samples remained positive; and in a ct above 35, no sample remained positive (infectious) in cell culture (see diagram).

This means that if a person has a positive PCR test at a cycle threshold of 35 or higher (as is the case in most laboratories in the US and Europe), the chances of a person being infected are less than 3%. The probability of the person receiving a false positive is 97% or higher”.

iv. What follows from these studies is simple -the eventual reliability of the PCR tests carried out depends, from the outset, on the threshold of amplification cycles they support, such that, up to the limit of 25 cycles, the test reliability will be around 70%; if 30 cycles are performed, the degree of reliability drops to 20%; if 35 cycles are reached, the degree of reliability will be 3%.

v. In the present case, the number of amplification cycles with which PCR tests are carried out in Portugal, including the Azores and Madeira, is unknown, since we were unable to find any recommendation or limit in this regard.

saw. In turn, in a very recent study by Elena Surkova, Vladyslav Nikolayevskyy and Francis Drobniewski, accessible inhttps://www.thelancet.com/journals/lanres/article/PIIS2213-2600(20)30453-7/fulltext , published in the equally prestigious The Lancet, Respiratory Medicine , refers (in addition to the multiple issues that the Lancet itself). The accuracy of the test raises, regarding the specific detection of the sars-cov 2 virus, strong doubts regarding compliance with the so-called gold standard) that (free translation):

"Any diagnostic test must be interpreted in the context of the actual possibility of the disease, existing before its realization . For Covid-19, this decision to perform the test depends on the prior assessment of the existence of symptoms, previous medical history of Covid 19 or the presence of antibodies, any potential exposure to this disease and no likelihood of another possible diagnosis. ” [3] “One of the potential reasons for presenting positive results could be the prolonged shedding of viral RNA, which is known to extend for weeks after recovery in those who were previously exposed to SARS-CoV-2. However, and most importantly, there is no scientific data to suggest that low levels of viral RNA by RT-PCR equate to infection, unless the presence of infectious viral particles has been confirmed by laboratory culture methods .

In summary, Covid-19 tests that accuse false positives are increasingly likely in the current epidemiological climate scenario in the UK, with substantial consequences at the personal, health system and societal level .” [4]

18. Thus, with so many scientific doubts, expressed by experts in the field, which are the ones that matter here, as to the reliability of such tests, ignoring the parameters of their performance and with no diagnosis made by a doctor, in the sense of the existence of infection and risk, it would never have been possible for this court to determine that AH___ was a carrier of the SARS-CoV-2 virus, nor that SH__SWH__ and NK_ had been exposed to high risk.

19.In a final summary, it will be said that, since the appeal filed is inadmissible, due to lack of legitimacy and lack of interest in acting on the part of the appellant, as well as manifestly unfounded, it will have to be rejected, under the provisions in articles 401 nº 1 al. a), 417 nº6 al. b) and article 420 nº 1 paragraphs. a) and b), all from the Criminal CP. iv – decision. In view of the above, and pursuant to the provisions of articles 417, no. 6, al. b) and 420 nº 1 als. a) and b), both of the Code of Criminal Procedure, the appeal filed by the REGIONAL HEALTH AUTHORITY, represented by the Regional Directorate of Health of the Autonomous Region of the Azores , is rejected .

Pursuant to paragraph 3 of article 420 of the CPPenal, the appellant is sentenced to a procedural sanction of 4 UC, as well as in the TJ of 4 UC and in the costs.

Immediately inform the “a quo” court of the content of this judgment. Lisbon, November 11th, 2020 Margarida Ramos de Almeida Ana Paramés