TRL Judgments

Judgment of the Court of Appeal of Lisbon

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**
Document No.:	**RL**
Agreement Date:	**11/11/2020**
Vote:	**UNANIMOUSITY**
Full Text:	**s**
Partial Text:	**No**
Procedural Means:	**CRIMINAL RESOURCE**
Decision:	**DENIED PROVISION**
Summary:	

I. The ARS cannot appeal against a decision that ordered the immediate release of four people, for illegal detention, within the scope of a habeas *corpus* process (artº 220 als. c) and d) of the CPPenal), asking that *the confinement be validated mandatory for applicants, as they carry the SARS-CoV-2 virus (A….) and because they are under active surveillance, due to high-risk exposure, decreed by the health authorities (B…, C…. and D…..)* for having no legitimacy or interest in acting.

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

A. The prescription and diagnosis are medical acts, the sole responsibility of a doctor, registered with the Medical Association (Regulation no. 698/2019, of 5.9).

Thus, the prescription of auxiliary diagnostic methods (as is the case of viral infection detection tests), as well as **the diagnosis regarding the existence of a disease, in relation to any and all persons, is a matter that cannot be carried out by law. , Resolution, Decree, Regulation or any other normative means** , as these are acts that our legal system reserves for the exclusive competence of a doctor, being certain that, when advising his patient, he should always try to obtain his informed consent (1 of article 6 of the Universal Declaration on Bioethics and Human Rights).

B.In the present case, 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 established facts is that none of the applicants was even seen by a doctor, which is frankly inexplicable, given the invoked severity 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.In the face of current scientific evidence, this test alone is unable to determine, beyond reasonable doubt, that such positivity actually corresponds to a person's infection with the SARS-CoV-2 virus, for

several reasons. , of which we highlight two (to which we add 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;
For this reliability to depend on the amount of viral load present.
III . **Any diagnosis or any act of health surveillance** (such as determining the existence of a viral infection and high risk of exposure, which are covered by these concepts)**carried out without prior medical observation** of the patients and without the intervention of a physician registered with the OM (who would assess their signs and symptoms, as well as the tests he deemed appropriate for their condition), violate **Regulation no. 698/2019, of 5.9 , as well as the provisions of article 97 of the Statute of the Order of Physicians, which may constitute the crime of usurpation of functions, p. and p. by article 358 al.b), of the Criminal Court.**
IV. Any person or entity issuing an order, the content of which leads to the deprivation of physical, outpatient, freedom of others (whatever the nomenclature that this order assumes: confinement, isolation, quarantine, prophylactic protection, health surveillance, etc.), **who does not comply with the legal provisions, namely with the provisions of article 27 of the CRP** , **he will be carrying out an illegal arrest** , because ordered by an incompetent entity and because motivated by a fact for which the law does not allow it.
(Summary prepared by the rapporteur)

Decision Partial Text:

Decision Full Text: **They agree in a conference at the 3rd Criminal Section of the Court of Appeal of Lisbon**
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I – report
1. By decision of 26-08-2020, the request for *habeas corpus* formulated was granted , **as his detention was illegal** , determining **the immediate restitution of liberty to Claimants SH__SWH___, AH___ and NK___. 2.** Then came the **REGIONAL HEALTH AUTHORITY,** represented by the Regional Directorate for Health of the Autonomous Region of the Azores , to present an appeal against such a decision, asking that the final be validated
the mandatory confinement of the applicants, for being carriers of the SARS-CoV-2 virus (AH___) and for being under active surveillance, due to high-risk exposure, decreed by the health authorities (SH__, SWH__ and NK___).
4. The appeal was admitted.
5. The Mº Pº, in his answer, argues that the present appeal should be considered unfounded.
6. In this court, the former PGA affixed visa.
II – previous point.
Since the appeal filed by the appellant must be rejected, the court will limit itself, under the terms of paragraphs 1, paragraph a) and 2 of article 420 of the Code of Criminal Procedure,

to specifying briefly the grounds of the decision.

III – justification.

1.The decision handed down by the court a quo reads as follows:

Proven facts:

1. On 01/08/2020, the applicants arrived on the island of São Miguel, arriving by plane from the Federal Republic of Germany, where, in the 72 (seventy-two) two) hours prior to arrival, they had carried out a test for COVID19, with a negative result and copies of which they presented and handed over to the Regional Health Authority, upon arrival at the airport, in Ponta Delgada.

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

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

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

5. From that day 08/08/2020, applicant AH___ ceased to live together with the remaining three applicants, having always maintained a distance of never 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 attached to pages. 25, 25verso, 26 and 26 verso, signed by the Delegate of Health of the municipality of Lagoa, in office, Dr. Magno José Viveiros Silva, entitled Notification of Prophylactic Isolation – Coronavirus SARS-CoV-2/Disease COVID-19, and two annexes (only one of them in English) and which reads (same content except for the identification of each of the now Plaintiffs):

"Isolation (...)

Notification of

Prophylactic Isolation

Coronavirus SARS-CoV-2/Disease COVID-19

Mário Viveiros Silva Health Authority of Lagoa

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

PROPHYLACTIC ISOLATION

OF

(...)

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

Date 2020/08/10 (...)

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

9. Between the 1st and 14th of August, the applicants stayed 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 applicants SH___ and SWH___.
- In room 501 is the applicant AH___.
- In room 506 is the applicant NK___.
11. The applicants 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 never had any success, since they only answer and respond in Portuguese, which the applicants do not understand.
12.At the hotel, meals are delivered to the room, by the hotel services, at predetermined 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 the 15th of August, while carrying out 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 uses.
14.Having, over the phone to the number 296 249 220, shared this situation with the Regional Health Authority, who requested the necessary medical support.
15. This request was ignored by the said helpline, which did not provide the defendant AH___ with the necessary support.
16. Not seeing any support, two days later, on the 17th of August, duly protected by a mask and gloves, the applicant SWH___ left her room, went to the pharmacy closest to the hotel, where she purchased an ointment to temporarily quell the said situation, having immediately returned to the hotel and to his room.
17. On 08/19/2020 it was sent by the Health Delegate, Dr. JMS___, to the Applicants by e-mail, which in particular reads:
"(...) AH___ is only considered cured after having a negative test and a 2nd negative cure test, when this happens the health delegation will enter into contact (...) (sic).
18. On 08/21/2020, it was transmitted to the four applicants, by the Health Delegate Dr. JMS___, via email the following message: "In other words, when the quarantine is over, they have to take a test and if it is negative, they can leave the house" (sic).
19. On that same day, August 21, the applicant SH___ questioned the aforementioned physician and Health Delegate, Dr. JMS___, by email that he sent, the following (translated into Portuguese freely):
"Dear Dr. JMS___,
We've already done two COVID tests/person, all were negative (SH___, SWH___, NK___).
..and after that we spent 2 weeks in isolation, and none of us had any symptoms!!
We have the documents of Dr. MMS___, 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 was AH___'s COVID test not done yesterday?
Greetings,
SH___"
20.The applicants did not receive any response to this email message, with the exception of

the Applicant AH___, who was notified of a new screening test being scheduled for the next 29/08/2020.
21. On 08/20/2020, applicant AH___ carried out a third COVID19 test, and on the following day (08/21/2020), only by telephone, she was informed that the result had been "detected".
22. The applicant AH___ requested that they send her written evidence of this positive result, which was sent to her via email yesterday, 08/24/2020.
23.The Applicants questioned the reception staff of the hotel where they are staying, having been told that none of the four applicants, without exception, could be absent from their rooms.
24.The applicants do not present, nor have they ever presented, any symptom of the disease (fever, cough, muscle aches, sneezing, lack of smell or taste).
25. The content of the two documents sent to the applicants with the writings listed in point 7 was not explained to the applicants.
26. The applicants have their habitual residence in the Federal Republic of Germany, identified in these records.
Rationale:
The question that arises here, based on the fact that the Applicants are deprived of their liberty (since the last 10th of August until the present date, as shown by the proven facts) and, consequently, being able to avail themselves of the present institute of habeas corpus - as we will show below -, leads back to knowing whether or not there is a legal basis for this deprivation of liberty.
In fact, without even questioning the organic constitutionality of Resolution of the Regional Government Council No. 207/2020, of July 31, 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- 2 in this Autonomous Region, in the situation in question, the detention/confinement of the Applicants since the last 10th of August is materialized by a communication made by email, in Portuguese, in the terms given as proven under point 7.
Now, as shown in point 7 of the proven facts, the regional health authority, through the respective Health Delegate of the territorial area where the Claimants were staying, determined their prophylactic isolation under Normative Circulars nos DRSCINF/2020/ 22 of 03/2020/2025 and DRS CNORM2020/39B of 08/04/2020 of the REGIONAL HEALTH AUTHORITY and Regulation No. 015/2020, of 07/24/2020 of the General Health Directorate. 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, since from the proven facts it derives to satiety that these , in the rigor of the concepts, they 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, also 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 who is in an identical situation - are so limited that the first exit from the rooms where find was to go to this court and give statements (with the exception of the trip to the pharmacy of the Claimant SWH___ in clear desperation to help her daughter's pain in the proven terms).
In short, after analyzing the facts found, 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 their daughter, hereby Applicant, AH___) and, in the case of Applicant NK___, completely alone, without any physical contact with anyone. To say that there is no deprivation of liberty because at any moment they can leave their respective rooms, where they are, is a fallacy, it is enough to pay attention to the communications that were made to them after the 10th of August, none of them in the German language,

Therefore, finding the Applicants deprived of their freedom, given the proven circumstances, it is necessary to trace the path in which we move, 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, fair society and solidary".

From this it is clear that the unity of meaning in which our system of fundamental rights is rooted 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, of the most relevant in view of its structuring nature of the democratic state itself, is the principle of equality, provided for in article 13 of the CRP, where it is provided, 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 due to ancestry, sex, race, language, territory of origin, religion, political or ideological convictions, education, economic situation, social status or sexual orientation.".

And, in what is particularly important here, under the heading "right to freedom and security", article 27º, nº 1, of the CRP states, "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 requirement"), 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 to be the cornerstone of the social building" (Act No. 1166/96)" (aut.cit., in op. Cit., p. 637).

Since human freedom is not one-dimensional, but can take on multiple dimensions, as exemplified in articles 37 and 41 of the CRP, the freedom in question in article 27 is physical freedom, understood as freedom of bodily movement, to come and go, freedom of movement or walking, provided in paragraph 2 of the latter article that " ***No one may be totally or partially deprived of liberty, unless as a result of a condemnatory judicial sentence for the practice of an act punishable by law with imprisonment or imprisonment judicial enforcement of security measures." – our underscore.***

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

" ***Except from this principle is the deprivation of liberty, for the time and under the conditions determined by law, in the following cases:***

a) Arrest in flagrante delicto;

b) Detention or preventive detention for strong indications of the commission of a felony that corresponds to a prison sentence whose maximum limit exceeds three years;

c) Arrest, detention or other coercive measure subject to judicial control, of a person who has entered or remains illegally in national territory or against whom extradition or expulsion proceedings are 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 decision for disobeying a decision taken by a court or to ensure appearance before a competent judicial authority;
g) Detention of suspects, for identification purposes, in the cases and for the time strictly necessary;
h) Hospitalization of a person with a mental disorder in an appropriate therapeutic establishment, decreed or confirmed by the 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 law, pursuant to paragraph 5 of article 27, emphasizing that , in line with article 3 of the CRP:
(...) 2. The State is subject 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 conformity with the Constitution.
Having arrived here, having drawn the legal territory, let's take a closer look at the framework in which the Regional Health Authority moved in the situation under analysis.
Applicants SH__SWH__ and NK_ performed a screening test for the SARS-CoV-2 virus, the result of which was negative for all, with the same positive test result for Applicant AH___, which led to the aforementioned order of prophylactic isolation and consequent permanence of these in the exposed terms and tasted.
Therefore, given the content of the notification made to the Claimants, this court cannot fail to express, ab initio, its perplexity at the determination of prophylactic isolation of the four Claimants.
As follows from the definition given by the General Directorate of Health, "Quarantine and isolation are essential social distancing measures 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 starts from the state of illness of the person who wants to be socially removed. That is:
"quarantine is used on people who are assumed to be healthy, but who 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 make a clean slate of essential concepts, because they delimit the differentiated treatment (because different, pass the pleonasm), of the situations of infected people and those with whom they were in contact, before the order of prophylactic isolation to all applicants, although only one of them had

positive results in the aforementioned screening test. 207/2020 of 31 July, interfering with the mandatory submission of the judicial validation of the competent court decreed that it is mandatory quarantine, when it derives from the satiety of the facts proven that Claimants SH__SWH__ and NK___, if anything, 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 in a longer period - as in the 48 hours provided for in article 254.º, n.º 1, subparagraph a), of the Criminal Procedure Code, 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 SH__SWH__ and NK_ Applicants will always be illegal.
In this step, the aforementioned Resolution of the Council of the Government n.º 207/2020, of July 31, 2020, provides in its point 4 that in cases where the test result for the SARS-CoV-2 virus is positive, the authority of local health, within the scope of 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 to 08/22/2020.
At this point, it is necessary to make it clear that the notification made as proven under point 7, is brought from what is contained in the DGS015/2020 Standard, a rule referred to in the same 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, under the terms of 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 another location defined locally, by the Health Authority, until the end of the active surveillance period, in accordance with the model of Dispatch no. 2836-A/2020 and/or no. 3103-A/20202 (model accessible at http://www.seg-social.pt/documents/10152/16819997/GIT_70.docx/e6940795-8bd0-4fad-b850-ce9e05d80283)
Following this norm of the General Directorate of Health, one can read, among others, the normative circular n.º DRSCNORM/2020/39B, of 2020-08-04 (available for consultation at http://www.azores.gov . pt/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 be screened for SARS-CoV-2. The following are considered high-risk contacts: i. Cohabitation with a confirmed case of COVID-19; (...)
ii. Close Contact Surveillance and Control
3. High-risk close contacts, given that it is currently estimated that the incubation period of the disease (time elapsed from exposure to the virus until the appearance 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 that period, and a test must 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 cohabit with the positive case, they should only be discharged when the cure of the positive case is determined, and, therefore, the respective prophylactic isolation should be

extended.
(...)
13. Compliance with prophylactic isolation
All persons identified as a suspected case, until the negative results are known, undergo prophylactic isolation;
All people who tested positive for Covid-19 and who are discharged after a cure test (inpatient or at home), do not need to carry out a new 14-day isolation period or repeat a new test on the 14th day.
All passengers arriving at airports in the Region from airports located in areas considered to be areas of active community transmission or with active transmission chains for 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 04/08/2020, of the Regional Directorate of Health,*There is no doubt that we enter 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 ius imperium of the State-, CASALTA NABAIS (Fiscal Law, 6th ed., Almedina, p. 197), "the so-called administrative guidelines, traditionally presented in the most diverse forms such as instructions, circulars, circular letters, circulated letters, normative dispatches, regulations, opinions, etc.", which are very frequent in tax law constitute "internal regulations which, as they are addressed only to the tax administration, only the latter owes obedience to them, being, therefore, mandatory only for bodies located hierarchically below the body that authored them.
Therefore, they are not binding either on individuals or on the courts. And this whether they are organizational regulations, which define rules applicable to the internal functioning of the tax administration, creating working methods or modes of action, or interpretive regulations, which proceed to the interpretation of 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 carried out by the administration when applying them. But that does not make them a standard of validity for 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 was interposed between the norm and the act".
Now, the problem of the normative relevance of the (Tax) Administration Circulars has already been raised and considered in the Judgments of the Constitutional Court nº 583/2009 and 42/14, of 11.18. with which we agree, that the provisions contained in the Circulars of the Tax Administration, regardless of their persuasive irradiation in the practice of citizens, do not constitute norms for the effects of the constitutionality control system entrusted to the Constitutional Court.
As underlined in that paragraph (Judgment 583/2009) "(...) These acts, in which the "circulars" stand out, 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 within the respective subjective scope (of the hierarchical relationship) that they are ensured compliance. They incorporate guidelines for future action, transmitted in writing

to all subordinates of the administrative authority that issued them. They are standardized decision modes, assumed to rationalize and simplify the operation of services. This is worth saying that, although they can 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 other than for the doctrinal value they may have, the prescriptions contained in the "circulars" do not constitute norms for the effects of the constitutionality control 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 may be the object of a declaration of formal unconstitutionality - see Judgment of the Supreme Administrative Court, of 21/06/2017 , available for consultation at www.dgsi.pt.

And, this to make it clear that the regulations invoked by the Regional Health Authority that supported the deprivation of liberty imposed on the Claimants through notification of prophylactic isolation are non-binding administrative guidelines for the Claimants.

Indeed. just pay attention to who they are addressed to respectively:

Normative Circular No. DRSCNORM/2020/39B:"To: Health Units of the Regional Health Service, Municipal Health Delegates (C/c Regional Service of Civil Protection and Firefighters of the Azores, Linha de Saúde Açores) Subject: Screenings for SARS-CoV-2 and approach to suspected or confirmed cases of infection by SARS-CoV-2 Source: Directorate Regional for Health (...)

Norm 015/2020, of 07/24/2020: "SUBJECT: COVID-19: Contact Tracing KEYWORDS: Coronavirus, SARS-CoV-2, COVID-19, Contact Tracing, Epidemiological Investigation FOR : Health system (...).

In this sequence, and, by way of synthesis, this court cannot fail to underline that the present case, we allow ourselves to say aberrant, of deprivation of liberty of persons, absolutely lacks any legal foundation, and it does not come up again 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 From the facts found and the foregoing, it follows:

- The Applicants have been confined to the space of a room for about 16 days, based on a notification of "prophylactic isolation" until 22/08/2020, 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 (suffice it to observe the constitutional norms set out above), expired;

- The Applicants were never given any information, communication, notification, as due, in their mother tongue, nor were they provided with an interpreter, immediately in flagrant violation of the European Convention on Human Rights (art. 2 and 6.º, n.º 3, subparagraph a) and criminal procedural norms (cf. article 92 of the Criminal Procedure Code), that is, in our legal system, detaining a foreign person with no domain of Portuguese language interpreter is immediately appointed, and, in the case of the Claimants who merely traveled to this island and enjoyed 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 08/19/2020 it was sent by the Health Delegate, Dr. JMS___, to the Applicants by e-mail, which in particular reads:
"(...) AH___ is only considered cured after having a negative test and a 2nd negative cure test, when this happens the health delegation will enter into contact (...) (sic).
- On 08/21/2020 it was transmitted to the four applicants, by the Health Delegate Dr. JMS___, via e-mail the following message: "In other words, when the quarantine is over, they have to take a test and if it is negative, they can leave the house" (sic);
- The deprivation of liberty of the Applicants was not subject to any judicial scrutiny.
As we said initially, we could still equate the organic constitutionality of the Resolution of the Government Council nº 1207/2020, of 31 June, however, we believe that it is a negligible issue for the object of the decision to be handed down, which is to be swift, because even at In the 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 successively and recently pronouncing within the scope of the present institute of "habeas corpus" in the face of orders issued by the Regional Health Authority, we allow ourselves to subscribe and underline the following excerpt of the first decision of this Criminal Instruction Court:
"The issue of compulsory confinement in the case of contagious diseases, and the terms under which it should occur, is a pressing issue, and which is not supported by article 27, paragraph 3, of the CRP, namely in paragraph h), where only the hospitalization of a person with a mental disorder is foreseen 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 be obeyed, leaving the detailed aspects to derivative law - and only those.
Because, as Professor Gian Luigi Gatta mentions, who we quote here in a free translation, ***"Right now, the country's energies are focused on the emergency. But the need to protect fundamental rights, also and above all in an emergency, requires the Courts to do their part. Because, in addition to medicine and science, law too - 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 all us. Today the emergency is called the coronavirus. We don't know tomorrow. And what we do or do not do today, to maintain compliance with the fundamental principles of the system, can condition our future."*** *(in "I diritti fondamentali alla proof del coronavirus. Perché è necessaria una legge sulla quarantine",)".*
It will not be difficult to admit and accept that the legislative turbulence generated around the containment of the spread of COVID-19 had – and will continue to have – the protection of public health as its raison d'être, but this turbulence can never cause death to the right to freedom and security and, ultimately, the absolute right to human dignity.
It remains to decide accordingly.
(...)
Therefore, in light of the above, as the detention of the Applicants SH__SWH___, AH___ and NK___ is illegal, I decide to uphold the present request for habeas corpus and, consequently,

I determine their immediate return to liberty.
2. The now appellant formulated the following conclusions, which he drew from his motivation:
1. The purpose of this appeal is the decision handed down by the learned Court a quo which considered that "the detention of the Applicants SH__SWH___, AH___ and NK___ was illegal" and decided "to uphold the present request for habeas corpus and, consequently, I order the immediate restitution from them to freedom.";
2. Just as a matter 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, noting, however, that it was based solely on the declarations of the applicants themselves.
3. The contested decision, by invoking that the appellant did not comply with point 6 of Resolution of the Council of the Regional Government of the Azores no. 207/2020, of July 31, 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, as an alternative, any of the procedures, provided for in point 1 of said Resolution;
5. The applicants complied with the procedure provided for in paragraph a) of point 1 of Resolution ° 207/2020, of 31 July 2020, so they could never be subject to mandatory quarantine, under that Resolution and, consequently, there is no 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 people, consequent decree of mandatory confinement of infected people and 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 14;
8. No. 2 of Council of Ministers Resolution No. 55-A/2020, of July 31, 2020, ordered the application of exceptional measures necessary to combat COVID-19 throughout the national territory, namely those provided for in the regime annexed to that resolution;
9. Article 2 of the Annex decreed that:
"Article 2
Mandatory confinement
1 — Persons who remain in mandatory confinement, in a health establishment, at 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 n.º 55-A/2020, had to be in mandatory confinement;
11. The Court a quo, 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. SH__SWH__ and NK_ applicants, in accordance with the rules stipulated by the National Health Authority, contained in Regulation 015/2020, of 07/24/2020, are contacts with High Risk Exposure, and must be subject to: a.Active surveillance for 14 days from the last exposure date;
b.Determination of prophylactic isolation, at home or another location defined locally, by the Health Authority, until the end of the active surveillance period, in accordance with the model of Orders n.° 2836-A/2020 and/or n. .° 3103-A/20202"
13. Applicants SH__SWH__ and NK_ being subject to active surveillance, in compliance with article 2, paragraph 1, point b) of Annex I of Resolution of the Council of Ministers no. 55-A/2020, had to be in mandatory confinement;
14. The Court a quo, by enacting habeas corpus for 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, paragraph b) of Annex I of the Resolution of the Council of Ministers no. 55-A/2020.
15. It is imperative that the contested decision be revoked and replaced by another one that validates the mandatory confinement of the applicants, for being carriers of the SARS virus -CoV-2 (AH___) and for being 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;1.' 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 prior authorization from the Assembly of the Republic, which was not the case of the Resolutions of the Regional Government of the** Azores that imposed a mandatory quarantine, considered that the organic unconstitutionality of the referred norms.*
2 — These norms, declared unconstitutional by the Constitutional Court, are in every material identical to those contained in Resolutions of the Council of Ministers No. 55-A/2020, of 07-31, 63-A/2020, of 08-14 , and 70-A/2020, of 09/11, 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 included in the exceptions provided for in art. 27, no. 3, of the CRP, so these must also be disregarded for violating art. 27, no. 1, of the CRP.
3 — Providing for art. 5, No. 1, Section e), of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms — Rome, 04-11-1950), on the right to liberty and security, 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: (...) a mentally insane person, an alcoholic, a drug addict or a vagrant', we can conclude that the deprivation of liberty of a person liable to spread a contagious disease is a form of detention and that, according to the Convention, it is possible for States provide in their domestic legislation for the detention of these persons.
4 — Bearing in mind the constitutional principle of the typical nature of custodial measures, and not providing for art. 27 of the CRP, in none of its paragraphs 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 person with a mental disorder in an adequate therapeutic establishment —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 arrest of a person likely to propagate contagious disease,

6 — And that the constitutional legislator, neither in the said constitutional revision nor in a later one, added another paragraph to paragraph 3 of art. 27th to provide for this possibility, as it did with regard to the hospitalization of a person with a mental disorder, we can conclude that we are facing a conscious decision by the constitutional legislator not to allow the deprivation of liberty of a person susceptible to spreading a contagious disease, just for that fact.

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 therefore 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 regulations, namely with regard to people with infectious and contagious diseases, whether these deprivations of liberty are confinements, quarantines or prophylactic isolation, without incurring any rules created for this purpose in material unconstitutionality due to violation of the aforementioned constitutional regulations.

8 — Returning now to the legal regime for hospitalization of people with contagious diseases, Law No. 2036 of 09-08-1949 provided for the possibility of promoting the isolation or hospitalization of people with infectious and contagious diseases, but only within this the latter case, in situations where there was a serious danger of contagion, with recourse to an authority for the decision of isolation or confinement.

9 — In turn, art. 17 of Law no. 81/2009, of 21-08, which revoked 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 stipulated by base XX of Law n.° 48/90, of 24-08 (Basic Health Law), namely, «to take indispensable exceptional measures in case of emergency in public health, including the restriction, suspension or closure of activities or the 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— **It follows from this that the present law does not provide for, as provided for in Law No. 2036 of 09-08-1949, the possibility of promoting the isolation or hospitalization of people with infectious and contagious diseases.** On the other hand, given that 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 persons with infectious and contagious diseases, the interpretation to be given to the expression "separation of persons who are not patients, means of transport or goods that have been exposed», in order to be in accordance with the Constitution of the Portuguese Republic, it cannot reach the core of the right to liberty, that is, they 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) Trigger , in accordance with the Constitution and the law, the internment or compulsory provision of health care to persons who otherwise constitute a danger to public health».

12 — Also, 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) Triggering, in accordance with the Constitution and the law, the internment or compulsory provision of health care to individuals in a situation of harming public health».
13 — It follows from this that, given that 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 persons with infectious and contagious diseases, if the interpretation to be given to the expression «hospitalization or the compulsive provision of health care to individuals in a situation of jeopardizing public health", whether in the sense that the health authorities may order the internment, or other restrictive measure of freedom of movement, or the compulsory provision of health care to people with infectious and contagious diseases, such interpretation of the law is materially unconstitutional for violation of art. 27, no. 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, likely to affect people and other beings living beings, goods or the environment, but establishing in art. 5, No. 1, Section a), the principle of prioritizing the public interest relating to civil protection over the interests of national defence, internal security and public health, we can conclude that serious public health situations, 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 — It can also be concluded from this that the Resolutions of the Council of Ministers — and the Resolutions of the Regional Government Council — which were based on the Civil Protection Basic Law to declare "the situation of contingency and alert, within the scope of the disease pandemic COVID-19", namely 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, 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 for in point 2 the «mandatory confinement, in an establishment of health, at their home or in another location defined by the health authorities: (...) «a) Patients with COVID-19 and those infected with SARS-CoV-2; (...**the Civil Protection Law does not apply to situations of danger to public health.***
directly violate art. 27, n.º 1, of the CRP, therefore, being unconstitutional, they should be disregarded in the specific case, contrary to the request by the appellant,
17 — Maintaining the sub judice decision.
4. The applicant is the regional health authority, represented by the Regional Directorate for Health 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 (emphasis added):
Article 1.º
The National Health Service , hereinafter referred to as SNS, **is an ordered and hierarchical set of institutions and official services that provide health care, operating under the supervision or supervision of the Minister of Health** .
Article 3
1 - The SNS is organized into 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 ARS** .
2 - The ARS have legal personality, administrative and financial autonomy and their own assets.
3 - The ARS have functions of planning, distribution of resources, guidance and coordination of activities, management of human resources, technical and administrative support and also of evaluation of the functioning of the institutions and services providing health care.
4 – (…).
In turn, stipulates Decree-Law No. 22/2012
Article 1.º
1 - The Regional Health Administrations, IP, abbreviated to **ARS** , IP**., are public institutes integrated in the indirect administration of the State** , endowed with administrative and financial autonomy and their own assets.
2 - **The ARS, IP, carry out their attributions, under the supervision and guardianship 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 by the Statute of the National Health Service and by other rules that apply to them .
Article 3
1 - The ARS, IP's mission is to guarantee the population of the respective geographic area of intervention access to the provision of health care, adapting the available resources to the needs and fulfilling and enforcing the fulfillment of health policies and programs in its area of intervention.
2 - The attributions of each ARS, IP, within the scope of the respective territorial circumscriptions:
a) Implement the national health policy, in accordance with the global and sectoral policies, aiming at its rational organization and the optimization of resources ;
b) Participate in the definition of intersectoral planning coordination measures, with the objective of improving the provision of health care;
c) Collaborate in the preparation of the National Health Plan and monitor its implementation at regional level;
d) Develop and promote activities in the field of public health, in order to guarantee the protection and promotion of the health of populations;
e) Ensuring the implementation of local intervention programs with a view to reducing the consumption of psychoactive substances, preventing addictive behavior and reducing dependence;
f) Develop, consolidate and participate in the management of the National Network of Continuing Integrated Care in accordance with the defined guidelines;
g) Ensuring the regional planning of human, financial and material resources, including the execution of the necessary investment projects, institutions and health care services, supervising their allocation;
h) Draw up, in line with the guidelines defined at national level, the charter 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 services providing health care integrated or financed by the National Health Service and to private entities, whether or not for profit , who provide health care or act within the scope of the areas referred to in subparagraphs e) and f);
j) Signing, monitoring and revising 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, conclude and monitor, in accordance with the guidelines defined at national level, contracts, protocols and conventions of regional scope, as well as carry out the respective evaluation and revision, within the scope of the provision of health care as well as in the areas referred to in subparagraphs e) and f);
m) Guiding, providing technical support and evaluating the performance of institutions and services providing healthcare, in accordance with defined policies and 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 ensure compliance with the referral network;
o) Allocate financial resources, through the conclusion, monitoring and review of contracts within the scope of integrated continuous care;
p) Draw up functional programs for health establishments;
q) Licensing private units providing health care and units in the area of dependencies and addictive behaviors in the social and private sector;
r) Issuing opinions on master plans for health units, as well as on the creation, modification and merging of services;
s) Issuing opinions on the acquisition and expropriation of land and buildings for the installation of health services, as well as on projects for facilities for health care providers.
3 - In order to carry out their duties, the ARS, IP, may collaborate with each other and with other public or private sector entities, whether or not for profit, under the terms of the legislation in force.
5. **The required measure of *habeas corpus* falls within the provisions of article 220 of the CPPenal, which reads as follows:**
Habeas corpus due to illegal detention
1 - Those detained at the order of any authority may request the investigating judge of the area where they are found to order their immediate judicial presentation, on one of the following grounds: a) The deadline
for surrender to the judicial power has been exceeded;
b) Keep detention outside legally permitted places;
c) The detention was carried out or ordered by an incompetent entity;
d) The detention is motivated by a fact for which the law does not allow it.
2 - The request may be signed by the detainee or by any citizen enjoying 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. Enjoying.
Article 401 of the Penal Code stipulates the following:
1 - The following have legitimacy to appeal:
a) The Public Prosecutor's Office, against any decisions, even if in the exclusive interest of the defendant;
b) The defendant and the assistant, of decisions handed down against them;
c) The civil parties, on the part of the decisions handed down against each one;
d) Those who have been condemned to pay any amounts, under the terms of this Code, or have to defend a right affected by the decision.
2 - Anyone who is not interested 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 a criminal proceeding.
i. We are within the scope of a criminal jurisdiction, the purpose of which 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 in view of this purpose that the Law determines who has the legitimacy to be able to discuss the goodness of a decision handed down by a criminal court.
ii. In this case, we found that the appellant is not a defendant, is not an assistant and has not made any request of a civil nature that, in view of the principle of adherence, would determine her position as a plaintiff or defendant.
iii. Thus, in view of the Law and in view of the list of interveners that the legislator understood may have legitimacy to intervene in a proceeding in this type of jurisdiction, on appeal, we must immediately conclude that the appellant lacks the legitimacy to be able to come and discuss the content of a court decision in this context.
iv. In fact, the practice of any crime or any offense of an administrative nature is not discussed here, given that the question of possible consequences at a criminal level, of 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 investigation 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 appeal the decision handed down by the court a quo.
8. Regardless of the issue of legitimacy, it appears that, likewise, the appellant has no interest in bringing an action.
i.As it follows from the settled jurisprudence and doctrine in this regard, the interest in acting means the need for someone to have to use the appeal mechanism as a way of reacting against a decision that **entails a disadvantage for the interests that he defends or that has frustrated his legitimate expectation or benefit.**
ii. Now, in the present case, the question is – did the decision rendered entail any disadvantage for the interests that the ARS defends? Or is it your legitimate expectation or benefit?
The answer is manifestly negative.
Otherwise, 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, whether in view of the functions entrusted to it, or in view of the

clear hierarchization of the same, before the guardianship, it must be concluded that no ARS pursues its own and autonomous interest, which it must defend. Whoever will pursue it, eventually, 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 function of defending, autonomously and in its own name, in the judicial seat, of any interests that fall within its functions which, in terms of with regard to criminal or administrative offences, there are none...

iv. In turn, the interest that the applicant itself intends to defend and which appears in the request, at the end of this appeal - the validation of the mandatory confinement of the applicants, for being carriers of the SARS -CoV-2 virus (AH___) 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 which goes beyond the purpose and scope of competence of a criminal court.

Contradictory because the appellant does not admit that confinement corresponds to deprivation of liberty. If so, it is unclear where the appellant bases 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 validating infections or diseases…

v . Finally, there is no legitimate expectation or benefit for an entity under the tutelage of a Government body, since it has been frustrated by the decision now being criticized. **saw.** It follows from this that the appellant has no interest in acting, which is why, pursuant to the provisions of paragraph 2 of article 401 of the Penal Code, she cannot appeal against the decision. **9.** The decision issued by the court "a quo" receiving the present appeal is not binding on this court (article 414 of CPPenal), so nothing prevents its rejection. **10.**

However, and for the peace and quiet of consciences, the following will also be added: Even if this were not understood, **the appeal presented would be manifestly unfounded, for the following succinct reasons** :

i. First of all, due to the exhaustive and accurate reasoning set out in the decision, by the court a quo, the content of which is fully endorsed.

In truth,**in view of the Constitution and the Law, health authorities do not have the power or legitimacy to deprive anyone of their liberty - even under the label of "confinement", which effectively corresponds to 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, the Judiciary. It follows that any person or entity issuing an order, the content of which leads to the deprivation of physical freedom, outpatient, of another** (whatever the nomenclature that this order assumes: confinement, isolation, quarantine, prophylactic protection, etc.**), which does not fit the legal provisions, namely the provisions of article 27 of the CRP and without having been conferred such decision-making power, by force of law - from the AR, within the strict scope of the declaration of a state of emergency or of siege ,**

respecting the principle of proportionality - which mandates it and specifies the terms and conditions of such deprivation , will be carrying out an illegal arrest, because ordered by an incompetent entity and because motivated by a fact for which the law does not allow it (it should be said, moreover, that this issue has already been debated over time in connection with other public health phenomena, namely with regard to HIV infection and tuberculosis, for example. And, as far as we know, no one has ever been deprived of their liberty, on suspicion or certainty of suffering from such diseases, precisely because the law does not allow it).

It is within this scope that the situation under consideration in this process is inserted, without any shadow of a doubt, being certain that the adequate means of defense, against illegal arrests, is subsumed to the recourse to the request of habeas corpus, foreseen in the artº 220, *paras* . c) and d), of CPPenal.

And, correctly, the court a quo determined the immediate release of four people who were illegally deprived of their liberty.

ii. Secondly, because **the request made in the appeal itself is shown to be of impossible merit** .

Otherwise, let's see:

11. In fact, it is requested that "the mandatory confinement of the applicants be validated, **for being carriers of the SARS-CoV-2 virus** (AH___) and for being under active surveillance, **due to high-risk exposure** , decreed by the authorities of health (SH__SWH__ and NK_)."

12. It is with great astonishment that this court is confronted with such a request, especially if we bear in mind that the appellant carries out her activity in the health sector.

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

13. As the applicant is more than obliged to know, **a diagnosis is a medical act, the sole responsibility of a doctor** .

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

There it is determined, in an imperative manner (which imposes its acceptance by all, including the appellant) that (emphasis added):

Article 1

Object

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

Article 3

Qualification

1 — **A doctor is a professional legally qualified to practice medicine , qualified to diagnose** , treat, prevent or recover **from 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 registered with the Medical Association in force are the only professionals who can carry out the acts proper to doctors , 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 these regulations.

Article 6
Medical act in general
1 — **The medical act consists of diagnostic , prognostic , surveillance** , investigation, medico-legal expertise, clinical coding, clinical audit, **prescription and execution** of pharmacological and non-pharmacological therapeutic measures. pharmacological, **medical techniques** , surgery and rehabilitation, health promotion and disease prevention in all its dimensions, namely the physical, mental and social aspects 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 tests carried out constitutes a basic procedure in health 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 n.º 36/98, of July 24th, the diagnosis of the pathology that can lead to compulsory hospitalization, is compulsorily carried out by specialist doctors and their technical-scientific judgment - inherent to the evaluation clinical-psychiatric - is subtracted from the free appreciation of the judge (see articles 13 nº3, 16 and 17 of said Law).
15. Thus, any diagnosis or any act of health surveillance (such as the determination of the existence of a viral infection and high risk of exposure, which are covered by these concepts) made without prior medical observation of the applicants, without the intervention of a doctor registered with the OM (which would assess his signs and symptoms, as well as the tests he deemed appropriate for his condition), violates such Regulation, as well as the provisions of article 97 of the Statute of the Order of Doctors, being liable to configure the crime P. and p. by artº 358 al.b) (Usurpation of functions) of the Criminal Court, if dictated by someone who does not have such quality, that is, who is not a physician registered with the Medical Association.
It also violates number 1 of article 6 of the Universal Declaration on Bioethics and Human Rights, which Portugal has signed and is obliged to respect internally and externally, since no document is shown in the case file proving that the informed consent that this Declaration imposes has been given .
It is therefore clear that the prescription of auxiliary diagnostic methods (as is the case with tests for detecting viral infection), as well as the diagnosis regarding the existence of a disease, in relation to any and all persons, is a matter that cannot be be carried out by Law, Resolution, Decree, Regulation or any other normative means, as these are acts that our legal system reserves to the exclusive competence of a doctor, being certain that, when advising his patient, he should always try to obtain the your informed consent.
16. In the present case, 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 established facts is that none of the applicants was even seen by a doctor, which is frankly inexplicable, given the invoked severity 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 presented a positive result in relation to one of the applicants.
i. Now, in view of the current scientific evidence, this test is, by itself, unable to determine, beyond a reasonable 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 (plus 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;
For this reliability to depend on the amount of viral load present.
ii. Effectively, the RT-PCR tests (polymerase chain reaction), 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 carried out by amplification of samples through repetitive cycles.
The greater or lesser reliability of such tests results from the number of cycles of such amplification.
iii. And the problem is that this reliability proves to be, 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.
In this study it is concluded [2] , in free translation:
"At a cycle threshold (ct) of 25, about 70% of the samples remained positive in cell culture (ie they were infected): at a ct of 30, 20% of the samples remained positive; in a ct of 35, 3% of the samples remained positive; and at 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 that a person is infected is less than 3%. The probability that the person will receive 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, first of all, on the threshold of amplification cycles that they contain,** in such a way that, up to a limit of 25 cycles, the reliability of the test 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. However, in the present case, **the number of amplification cycles with which PCR tests are carried out in Portugal, including Azores and Madeira, is unknown,** since it was not possible for us 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 athttps://www.thelancet.com/journals/lanres/article

/PIIS2213-2600(20)30453-7/fulltext , published in the equally prestigious *The Lancet, Respiratory Medicine* , addresses (in addition to the multiple issues that the The accuracy of the test raises, as regards the specific detection of the sars-cov 2 virus, strong doubts as to compliance with the so-called *gold standard*) which (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 carry out 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 the likelihood of another possible diagnosis. " [3] "One of the potential reasons for positive results may lie in the prolonged shedding of viral RNA, which is known to last for weeks after recovery in those who were previously exposed to SARS-CoV-2. **More importantly, however, there are 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 show false positives are increasingly likely, in the current epidemiological climate scenario in the United Kingdom, with substantial consequences at a 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, regarding the reliability of such tests, ignoring the parameters for their performance and there being no diagnosis made by a doctor, in the sense of the existence of infection and risk, it would never be 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 of in articles 401 nº1 al. a), 417 nº6 al. b) and artº420 nº1 als. a) and b), all of the Criminal CP. **iv – decision.** In view of the above, and pursuant to articles 417.º, n.º 6, al. b) and 420 nº1 als. **a) and b), both of the Criminal Procedure Code, the appeal filed by the REGIONAL HEALTH AUTHORITY,** represented by the Regional Directorate for Health of the Autonomous Region of the Azores, is rejected **.**

Under the terms of paragraph 3 of article 420 of the CPPenal, the appellant is sentenced to a procedural penalty of 4 UC, as well as to the TJ of 4 UC and to the costs.
Inform the court a quo of the content of this judgment immediately. Lisbon, **November 11, 2020** Margarida Ramos de Almeida Ana Paramés

[1] [1] 2 - The attributions of each ARS, IP, within the scope of the respective territorial circumscriptions: a) Implement the national health policy, in accordance with the global and sectoral policies, aimed at their rational organization and the optimization of resources;

b) Participate in the definition of intersectoral planning coordination measures, with the objective of improving the provision of health care;
c) Collaborate in the preparation of the National Health Plan and monitor its implementation at regional level;
d) Develop and promote activities in the field of public health, in order to guarantee the protection and promotion of the health of populations;
e) Ensuring the implementation of local intervention programs with a view to reducing the consumption of psychoactive substances, preventing addictive behavior and reducing dependence;
f) Develop, consolidate and participate in the management of the National Network of Continuing Integrated Care in accordance with the defined guidelines;
g) Ensuring the regional planning of human, financial and material resources, including the execution of the necessary investment projects, institutions and health care services, supervising their allocation;
h) Draw up, in line with the guidelines defined at national level, the charter 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 services providing health care integrated or financed by the National Health Service and to private entities, whether or not for profit , who provide health care or act within the scope of the areas referred to in subparagraphs e) and f);
j) Signing, monitoring and revising 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, conclude and monitor, in accordance with the guidelines defined at national level, contracts, protocols and conventions of regional scope, as well as carry out the respective evaluation and revision, within the scope of the provision of health care as well as in the areas referred to in subparagraphs e) and f);
m) Guiding, providing technical support and evaluating the performance of institutions and services providing healthcare, in accordance with defined policies and 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 ensure compliance with the referral network;
o) Allocate financial resources, through the conclusion, monitoring and review of contracts within the scope of integrated continuous care;
p) Draw up functional programs for health establishments;
q) Licensing private units providing health care and units in the area of dependencies and addictive behaviors in the social and private sector;
r) Issuing opinions on master plans for health units, as well as on the creation, modification and merging of services;
s) Issuing opinions on the acquisition and expropriation of land and buildings for the installation of health services, as well as on projects for facilities for health care providers.
[2] *"that at a cycle threshold (ct) of 25, about 70% of samples remained positive in cell culture (ie were infectious); at a ct of 30, 20% of samples remained positive; at a ct of 35, 3% of samples remained positive; and at a ct above 35, no sample remained positive (infectious) in cell culture (see diagram)* ***This means that if a person gets a "positive" PCR test result at a cycle threshold of 35 or higher*** *(as applied in most US labs and many European labs),*
the chance that the person is infectious is less than 3%. The chance that the person received a "false positive" result is 97% or higher . [3] Any diagnostic test result should be interpreted in the context of the pretest probability of disease. For COVID-19, the pretest probability assessment includes symptoms, previous medical history of COVID-19 or presence of antibodies, any potential exposure to COVID-19, and likelihood of an alternative diagnosis.1 When low pretest probability exists, positive results should be interpreted with caution and a second specimen tested for confirmation. [4]

Prolonged viral RNA shedding, which is known to last for weeks after recovery, may be a potential reason for positive swab tests in those previously exposed to SARS-CoV-2. However, importantly, no data suggests that detection of low levels of viral RNA by RT-PCR equates with infectivity unless infectious virus particles have been confirmed with laboratory culturebased methods.7 To summarise, false-
positive COVID-19 swab test results might be increasing likely in the current epidemiological climate in the UK, with substantial consequences at the personal, health system, and societal levels (panel).