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COMPLIANCE WITH *EX LEGE* QUARANTINE LAW

ZGODNOŚĆ Z PRAWEM KWARANTANNY *EX LEGE*

Summary: Health protection, as referred to in article 1 section 68 of the Constitution of the Republic of Poland does not only concern ensuring access to healthcare services for everyone, but also combating epidemic diseases and preventing the negative health effects of environmental degradation. One of the manifestations of a preventive form of health protection are the activities of authorized bodies aimed at ensuring food safety and hygiene. However, this does not mean consent to the lack of respect for other constitutionally guaranteed human rights and freedoms and the principles of correct legislation. The act of imposing a quarantine based on a legal act issued in violation of the above-mentioned legal rules is then ineffective.

Keywords: quarantine, ineffectiveness, public health

Streszczenie: Ochrona zdrowia, o której mowa w art. 68 ust. 1 Konstytucji RP, nie dotyczy jedynie zapewnienia każdemu dostępu do świadczeń opieki zdrowotnej, lecz obejmuje także zwalczanie chorób epidemicznych i zapobieganie negatywnym dla zdrowia skutkom degradacji środowiska. Jednym z przejawów zapobiegawczej formy ochrony zdrowia są działania uprawnionych organów zmierzające do zapewnienia bezpieczeństwa i higieny żywności. Nie oznacza to jednak przyzwolenia na brak respektowania innych konstytucyjnie zagwarantowanych praw i wolności człowieka oraz zasad poprawnej legislacji. Czynność nałożenia kwarantanny realizowana w oparciu o akt prawny wydany z naruszeniem wymienionych reguł państwa prawa jest wówczas bezskuteczna.

Słowa kluczowe: bezskuteczność czynności, zdrowie publiczne, kwarantanna

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Within the framework of the state's actions for the common good, it is necessary to identify those that are related to the protection of human life and health, values of fundamental importance for the existence and functioning of any community¹. For, as A. Zoll rightly remarks, "the right to health care is constitutionally guaranteed, and not only as a right that is granted to its addressees by the state authority, but it is a fundamental right arising from the inherent and inalienable dignity of human, the observance of which the state authority is obliged to protect².

Given the actions taken by the State and its authorities, while aimed at limiting the effects of the COVID-19 epidemic and thus realizing the constitutionally guaranteed right to health care, but at the same time interfering with the essence of other constitutionally guaranteed human freedoms, the issue that needs to be resolved is whether each of them deserves to be acceptable from the point of view of the idea of the rule of law.

This is according to § 5 section 1 of the Regulation of the Council of Ministers of May 6, 2021 on the establishment of certain restrictions, orders and prohibitions in connection with the occurrence of an epidemic condition³, hereinafter: the Regulation. The indicated legal regulation determines how the sanitary inspection authorities will act in the scope of imposing quarantine. Thus, in the case of imposing a quarantine on a person due to exposure to the disease caused by the SARS-CoV-2 virus, isolation or isolation in a home setting by the said authorities, information about this shall be placed in the relevant ICT system referred to in § 2 section 4 point 1. The decision of the sanitary inspection authority shall not be issued. Information on imposing quarantine on a person, isolation or isolation in a home setting - as established under § 5 section 2 of the Regulation - may be communicated to that person orally, through information and communication systems, or by telephone.

Such a designated form and procedure for imposing quarantine has been met with criticism as to its legality and compliance with the current legal order. Complaints to the administrative courts were constructed on such formulated allegations against the actions of sanitary inspection authorities taken under § 5 section 1 of the regulation. Taking into account the fact that imposing quarantine on a person in such a manner constitutes a public administration action that is appealable to an administrative court under Article 3 § 2 item 4 of the Act of 30 August 2002 Law on Administrative Court Proceedings⁴ complaints filed against this action have made it the subject of administrative court review⁵.

¹ W. Lis, *Działania podejmowane w przypadkach zakażeń i chorób zakaźnych ze względu na ochronę bezpieczeństwa obywateli*, "Studia Prawnicze" KUL (2017, 3 (71), p. 32.

² M. Janik, *Rozdział 4. Zadania Państwowej Inspekcji Sanitarnej*, [in:] *Policja sanitarna*, Warszawa 2012, p. 121.

³ Journal of Laws, item 861, as amended.

⁴ Consolidated text Journal of Laws 2022, item 329.

⁵ Judgment of the Voivodship Administrative Court in Gliwice of 27.07.2020, case file no. III SA/Gl 319/20; judgment of the Voivodship Administrative Court in Wrocław of 25.11.2020, case file no. IV SA/Wr 284/20; judgment of the Voivodship Administrative Court in Warszawa of 20.07.2021, case file

PUBLIC HEALTH AS PERSONAL FREEDOM

The analysis of the legal issues of public health protection and the related tasks of state authorities cannot but begin with the solutions adopted on the grounds of the Constitution of the Republic of Poland⁶, hereinafter the Constitution of the Republic of Poland. First of all, attention must be paid to its Article 38 according to which “the Republic of Poland shall provide every person with the legal protection of life.” Based on its content, the Constitutional Tribunal stated that the protection of human life cannot be understood solely as the protection of the minimum biological functions necessary for existence, but as guarantees of normal development and also the acquisition and preservation of a normal psychophysical condition, appropriate to a given developmental age (stage of life). No matter how many factors are considered relevant to this condition, there is no doubt that it encompasses a certain optimal, from the point of view of life processes, state of a person’s body, both in terms of physiological and mental functions. Such state can be identified with the concept of psychophysical health. Constitutional guarantees for the protection of human life must therefore necessarily also include the protection of health⁷. The right to protect human health should be derived from such broadly defined legal protection of life.

Article 68 section 1 of the Constitution of the Republic of Poland, according to which: “Everyone has the right to health care”, is significant with regard to the subject of our analyses. Cited regulation is not declaratory in nature. It is a legal norm from which certain obligations of public authority are derived⁸. On its basis, the subjective right to health care is stipulated, which is a social right that gives rise to an obligation on the part of public authorities to protect it and provide opportunities for its realization⁹.

The right to health care is a subjective right of the individual¹⁰, although Article 68 section 1 of the Constitution of the Republic of Poland does not imply a claim for any benefit, but only a claim to ensure the realization of the essence of this right. The allegations of violations of the right to health care can be the basis of a constitutional complaint¹¹.

In the opinion of the Voivodship Administrative Court in Poznań health protection, as referred to in Article 68 section 1 of the Constitution of the Republic of Poland, is not only about ensuring everyone’s access to health care services, but also includes combating epidemic diseases and preventing the negative health effects of environmental

no. V SA/Wa 2022/21; Judgment of the Voivodship Administrative Court in Opole of 12.07.2022, case file no. II SA/Op 96/22, cf. S. Trociuk, *Prawa i wolności w stanie epidemii*, Warszawa 2021, pp. 33-34.

⁶ Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997 No. 78, item 483.

⁷ Judgment of the Constitutional Tribunal of 28.05.1997, K 26/96, OTK 1997, no. 2, item 19.

⁸ M. Janik, *Rozdział 4. Zadania Państwowej Inspekcji Sanitarnej...*, p. 121.

⁹ Judgment of the Constitutional Tribunal of 23.03.1999, case file no. K 2/98.

¹⁰ Judgment of the Constitutional Tribunal of 23.03.1999, case file no. K 2/98, Judgment of the Constitutional Tribunal of 7.01.2004, case file no. K 14/03.

¹¹ M. Florczak-Wątor [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. II, ed. P. Tuleja, LEX/el. 2021, Article 68.

degradation. One of the manifestations of a preventive form of health protection are the activities of authorized authorities aimed at ensuring food safety and hygiene. The above obligation should be analysed both in view of national law and European Union Community law¹². Consequently, it should be made clear that according to Article 68 section 4 of the Constitution of the Republic of Poland, public authorities have a duty to combat epidemic diseases and prevent the negative health effects of environmental degradation in the sphere of health protection. Implementation of this duty “requires public authorities to take preventive as well as curative measures. Article 68 section 4 indicates the aim of state action, but it does not specify the means to achieve it¹³. In the implementation of the tasks outlined above, M. Janik distinguishes two spheres. The first one is related to the realization of the constitutional right to assistance in case of disease. The second one, due to the subject matter of this discussion, is more attractive, and involves the constitutional right to health care in the strict sense of the word. This is a sphere in which health is a protected good, and not the sole target of restitution measures¹⁴.

RELATION BETWEEN ARTICLE 31 SECTION 3 OF THE CONSTITUTION OF THE REPUBLIC OF POLAND AND § 5 SECTION 1 OF THE REGULATION

There is no doubt that the imposition of quarantine is an interference with basic civil rights. In accordance with article 31 section 3 of the Constitution of the Republic of Poland, all limitations on the exercise of constitutional freedoms and rights may be, established only by act and only if they are necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morals, or the freedoms and rights of others. These restrictions cannot violate the essence of freedoms and rights.

According to the Constitutional Tribunal, the phrase “by way of an act” used in Article 31 section 3 of the Constitution of the Republic of Poland means that the restriction can occur applying an act, without which the construction of the restriction cannot occur. At the same time, this paves the way for restrictions made under the act in regulation. In turn, the phrase “only in and” excludes the possibilities offered by the formula “by way of an act” used in Article 22 of the Constitution of the Republic of Poland¹⁵. This, in turn, means that the act must independently determine the basic elements of the restriction of a given right and freedom¹⁶. Only norms that do not

¹² Judgment of the Voivodship Administrative Court in Poznań of 12.03.2020, case file no. II SA/Po 947/19.

¹³ M. Florczak-Wątor [in:] *Konstytucja Rzeczypospolitej Polskiej...*

¹⁴ M. Janik, *Rozdział 4. Zadania Państwowej Inspekcji Sanitarnej...*, p. 124.

¹⁵ Judgment of the Constitutional Tribunal of July 25, 2006, case file no. P 24/05; Judgment of the Voivodship Administrative Court in Cracow of 2.12.2021, case file no. III SA/Kr 725/21.

¹⁶ Cf. judgment of the Constitutional Tribunal of 12.01.2000, case file no. P 11/98; judgment of the Constitutional Tribunal of 28.06.2000, ref. no. K 34/99; judgment of the Constitutional Tribunal of 20.02.2001,

constitute the basic elements that make up the limitation of constitutional rights and freedoms can be included in a regulation. In other words, only provisions of a technical nature that are not essential to the rights or freedoms of the individual may be included in the regulation. When limiting constitutional rights and freedoms on the basis of Article 31 section 3 of the Constitution of the Republic of Poland, the completeness and specificity of statutory regulation must remain at a much higher level¹⁷.

In view of the findings, the conclusion is that the provision of § 5 section 1 second sentence of the Regulation violated the requirement that the rules and procedures for restricting personal freedom be defined exclusively by law. As a result, the self-imposed law making activity undertaken in this regard has led to the regulation of statutory matter and the violation of a number of fundamental freedoms and rights of the individual. The obligation to undergo quarantine should be classified – due to the cumulative prohibitions and obligations that are imposed on that person, which testify to the significant severity of the interference in the sphere of personal freedom – as a deprivation of liberty in the constitutional sense¹⁸.

This is because, without a doubt, imposing an obligation on a particular person to undergo quarantine is in fact a form of restriction of his freedom. It should be noted here that on the basis of article 41 section 1 and 2 of the Constitution of the Republic of Poland, everyone is guaranteed personal inviolability and personal freedom. Deprivation or restriction of liberty may be carried out only under the rules and procedures established by the act. Anyone deprived of liberty not based on a court judgment has the right to appeal to a court to determine the legality of that deprivation without delay. The family or a person designated by the deprived person shall be immediately notified of the deprivation of liberty. It is worth mentioning

case file no. P 2/00; judgment of the Constitutional Tribunal of 10.04.2001, case file no. U 7/00; judgement of the Constitutional Tribunal of 3.04.2001, case file no. K 32/99; judgement of the Constitutional Tribunal of 11.12.2001, case file no. SK 16/00; judgement of the Constitutional Tribunal of 19.02.2002, case file no. U 3/01; judgement of the Constitutional Tribunal of 8.07.2003, case file no. P 10/02; judgement of the Constitutional Tribunal of 16.03.2004, ref. no. K 22/03; judgement of the Constitutional Tribunal of 29.06.2007, case file no. SK 43/06; judgement of the Constitutional Tribunal of 5.12.2007, case file no. K 36/06; judgement of the Constitutional Tribunal of 5.02.2008, case file no. K 34/06; judgement of the Constitutional Tribunal of 19.06.2008, file P 23/07; judgement of the Constitutional Tribunal of 19.05.2009, case file no. K 47/07; judgement of the Constitutional Tribunal of 7.03.2012, case file no. K 3/10.

¹⁷ Judgment of the Constitutional Tribunal of 19.02.2002, case file no. U 3/01; judgment of the Constitutional Tribunal of 8.07.2003, case file no. P 10/02; judgment of the Constitutional Tribunal of 16.03.2004, case file no. K 22/03; judgment of 29.11.2007, case file no. SK 43/06; judgment of 5.12.2007, case file no. K 36/06; judgment of 5.02.2008, case file no. K 34/06; judgment of Constitutional Tribunal on 19.06.2008, case file no. P 23/07; judgment of the Constitutional Tribunal of 19.05.2009, case file no. K 47/07; judgment of the Constitutional Tribunal of 7.03.2012, case file no. K 3/10; judgment of the Constitutional Tribunal of 4.11.1997, case file no. U 3/97; judgment of the Constitutional Tribunal of 16.01.2007, case file no. U 5/06; judgment of the Constitutional Tribunal of 30.04.2009, case file no. U 2/08; judgment of the Constitutional Tribunal of 31.05.2010, case file no. U 4/09; judgment of the Voivodship Administrative Court in Cracow of 2.12.2021, case file no. III SA/Kr 725/21.

¹⁸ S. Trociuk, *Prawa i wolności w stanie epidemii*, Warszawa 2021, p. 44.

that the proviso placed in the first sentence of Article 41 section 2 of the Constitution of the Republic is of a guarantee nature¹⁹.

The provision of § 5 section 1, the second sentence of the Regulation constitutes a form of restriction of a person's freedom also within the meaning of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950. (Journal of Laws of 1993, No. 61, item 284, as amended - hereinafter the ECHR). According to Article 5 section 1 of this Convention, everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (...) e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (...). In doing so, anyone who has been deprived of liberty by detention or arrest has the right to appeal to a court to have the court determine without delay the legality of the deprivation of liberty and order release if the deprivation of liberty is unlawful (Article 5 section 4 of the ECHR)²⁰. The above coincides with the general position of the European Court of Human Rights, according to which, in order to assess whether there has been a deprivation of liberty or "merely" a restriction of liberty in a particular case, what matters is not so much the substance of the interference as the severity of the restrictions applied. In other words, the difference between deprivation and restriction of liberty is (often) not so much qualitative as quantitative²¹. Thus, the difference is not due to the concepts themselves, rather it depends on the severity of the restrictions applied and their proportionality²². It should be noted that under the guaranteed constitutional provisions (Article 41 section 2, first sentence) and convention provisions (Article 5 section 4), court procedures for reviewing the legality of the applied measure (here: of an administrative and legal nature), bearing the hallmarks of deprivation of liberty within the meaning of Article 41 section 1 of the Constitution of the Republic of Poland and Article 5 section 1 of the ECHR, there must be a real possibility for the court to verify the correctness of detention, both in terms of its factual and legal grounds²³.

¹⁹ Judgment of the Voivodship Administrative Court in Opole of 12.07.2022, case file no. II SA/Op 96/22.

²⁰ Ibidem.

²¹ P. Hofmański [in:] *Komentarz EKPCz*, ed. L. Garlicki, Warszawa 2010, vol. I, Article 5, Nb 7, and ECHR judgments cited therein).

²² L. Bosek, *Stan epidemii. Konstrukcja prawna*, Warszawa 2022, p. 270.

²³ Cf. P. Hofmański [in:] *Komentarz EKPCz...*, p. 212, and ECHR judgments cited therein), the judgment of the Voivodship Administrative Court in Opole of 12.07.2022, case file no. II SA/Op 96/22.

PROBLEMS OF STATUTORY AUTHORIZATION IN ARTICLES 46A AND 46B OF THE ACT ON PREVENTION AND CONTROL OF INFECTIOUS DISEASES IN HUMANS

Notwithstanding the above, legislation enacted at the level of regulation, in addition to not being able to regulate fundamental constitutional freedoms and rights, must also meet the conditions set forth in article 92 section 1 of the constitution of the Republic of Poland. The regulation must therefore be issued by the authority designated in the Polish Constitution, on the basis of the specific authorization contained in the law and for the purpose of its implementation. Violation of even one of these conditions may result in an allegation that the regulation is inconsistent with the act²⁴.

Therefore, provisions enacted at the regulation level apart from the fact that they cannot regulate fundamental constitutional freedoms and rights, they also must also meet the conditions set forth in Article 92 section 1 of the Polish Constitution. The regulation must therefore be issued by the authority designated in the Constitution, on the basis of the specific authorization contained in the act and for the purpose of implementing it. Violation of even one of these conditions can constitute a successful allegation that the regulation is inconsistent with the act. These issues have been repeatedly discussed in the case law of both administrative courts and the Constitutional Court²⁵.

There should be no doubt that the purpose of the regulations issued in implementation of the statutory delegation contained in Articles 46a and 46b of the Act of 5 December 2008 on preventing and combating infectious diseases in humans²⁶ – hereinafter: the Act on preventing and combating infectious diseases in humans was to protect health.

At this point, it is worth pointing out that the provision of Article 46a of the Act on preventing and combating infectious diseases in humans authorized the Council of Ministers – in the event of an state of epidemic or state of epidemic threat of a nature and magnitude that exceeds the capabilities of the relevant government administration and local government authorities – to determine by regulation, on the basis of data provided by the minister in charge of health, the minister in charge of

²⁴ Judgment of the Constitutional Tribunal of 19.02.2002, case file no. U 3/01; judgment of the Constitutional Tribunal of 8.07.2003, case file no. P 10/02; judgment of the Constitutional Tribunal of 16.03.2004, case file no. K 22/03; judgment of the Constitutional Tribunal of 29.11.2007, case file no. SK 43/06; judgment of the Constitutional Tribunal of 5.12. 2007, case file no. K 36/06; TK judgment of 5.02.2008, case file no. K 34/06; judgment of the Constitutional Tribunal of 19.06.2008, case file no. P 23/07; judgment of the Constitutional Tribunal of 19.05.2009, case file no. K 47/07; judgment of the Constitutional Tribunal of 7.03.2012, case file no. K 3/10.

²⁵ Judgment of the Constitutional Tribunal of 4.11.1997, case file no. U 3/97; judgment of the Constitutional Tribunal of 16.01.2007, case file no. U 5/06; judgment of the Constitutional Tribunal of 30.04.2009, case file no. U 2/08; judgment of the Constitutional Tribunal of 31.05.2010, case file no. U 4/09; judgment of the Voivodship Administrative Court in Cracow of 2.12.2021, case file no. III SA/Kr 725/21.

²⁶ Consolidated text Journal of Laws 2022, item 1657.

internal affairs, the minister in charge of public administration, the Chief Sanitary Inspector and voivodeship heads:

1) the area at risk with an indication of the type of zone where the epidemic or epidemic emergency has occurred,

2) the type of solutions used – within the scope of Article 46b – taking into account the scope of solutions used and taking into account the current capabilities of the state budget and the budgets of local government units.

In turn, Article 46b of the Act on preventing and combating infectious diseases in humans provided that the regulation referred to in Article 46a could establish, among other things, the obligation to submit to quarantine (point 5) and the place of quarantine (point 6).

It should be emphasized that the authorization in Articles 46a and 46b lacks guidelines for regulating orders, prohibitions, restrictions and obligations. General and imprecise wording indicating that in issuing a regulation the Council of Ministers should have “regard to the scope of the solutions to be applied” and “the current capabilities of the state budget and the budgets of local government units” does not meet the constitutional requirement under the content of Article 92 section 1 of the Polish Constitution. The authorization referred to in Article 46a of the Act on preventing and combating infectious diseases in humans only refers to the restrictions, obligations and orders specified in Article 46 section 4 of that act, and thus only to the specific scope of that provision, and does not include the conditions for the introduction of those restrictions, obligations and orders²⁷.

Thus, since limitations on constitutional rights and freedoms can only be established by an act, this implies an order for the completeness of the statutory regulation which should independently specify all the basic elements of the limitation of a given right and freedom so that already on the basis of a reading of the provisions of the act, a complete outline of the limitation can be determined. Only provisions of a technical nature that are not fundamental to individual rights or freedoms should be included in the regulation. When restricting constitutional rights and freedoms under article 31 section 3 of the Constitution of the Republic of Poland, the completeness and detail of statutory regulation must be significantly increased. It is unacceptable to adopt blanket regulations in the act, leaving the executive branch free to normalize the final shape of these restrictions, and in particular to determine the scope of these restrictions²⁸.

²⁷ Judgment of the Supreme Administrative Court of 8.09.2021, case file no. II GSK 602/21; judgment of the Supreme Administrative Court in Warszawa of 26.01.2021, case file no. VII SA/Wa 1479/20; judgment of the Supreme Administrative Court in Szczecin of 11.12.2020, case file no. II SA/Sz 765/20; judgment of the Voivodeship Administrative Court in Opole of 27.10.2020, case file no. II SA/Op 219/20.

²⁸ Judgment of the Constitutional Tribunal of 19.05.2009, case file no. K 47/07; judgment of the Constitutional Tribunal of 19.02.2002, case file no. U 3/01; judgment of the Constitutional Tribunal of 12.01.2000, case file no. P 11/98.

In view of the above, the provision of § 5 section 1 second sentence of the regulation went beyond the scope of the statutory authorization specified in article 46a and article 46b of the Act on preventing and combating infectious diseases in humans, interfering with the essence of constitutional rights and freedoms. Thus, the provision violated both the statutory provisions indicated, as well as article 92 section 1 of the Constitution of the Republic of Poland²⁹.

At the same time – and this has been clearly emphasized in the case law - no practical or pragmatic considerations, as well as the expediency of the introduced solutions, justify going beyond the limits of the statutory authorization. Thus, although the assessed prohibitions, orders and restrictions can be considered justified from the point of view of combating the pandemic, the mode of their introduction led to a violation of basic constitutional standards and rights³⁰.

At this point, it is worth mentioning the power of the administrative court to review the constitutionality of sub-statutory acts (regulations) in the course of considering the case³¹. In accordance with article 178 section 1 of the Constitution of the Republic of Poland, judges in the exercise of their office are independent and subject only to the Constitution and the acts. This provision stipulates that judges are subordinate only to the Constitution of the Republic of Poland and acts, and not to any other legal acts, even if they have the character of generally applicable acts. This principle, based on article 8 section 2 of the Constitution of the Republic of Poland, indicating that the Constitution of the Republic of Poland is the supreme law and that the provisions of the Constitution are directly applicable, provides the basis for granting the courts the authority to refuse to apply a provision of the regulation. The court has the right to examine whether the provisions of the executive regulation, which are the basis for the decision, fulfil the requirements of article 92 constitution of the Republic of Poland. If the court finds that a regulation contradicts a higher-order act or was issued beyond the limits of statutory authorization, it may refuse to apply it. The assessment of the administrative court which leads to the recognition that the provision of the regulation that constitutes the legal basis for the administrative decision is inconsistent with the Constitution and the act, and the refusal, based on this assessment, to apply such a provision in the case under

²⁹ Judgment of the Voivodship Administrative Court in Poznań of 25.02.2022 ref IV SA/Po 1022/21; judgment of the Voivodship Administrative Court in Poznań of 24.03.2022, ref. no IV SA/Po 53/22; judgment of the Voivodship Administrative Court in Olsztyn of 20.04.2022, case file no. II SA/Ol 175/22.

³⁰ Judgment of the Supreme Administrative Court of 8.09.2021, case file no. II GSK 606/21; judgment of the Supreme Court of 29.06.2021, case file no. II KK 255/21; judgment of the Voivodship Administrative Court in Cracow of 2.12.2021, case file no. III SA/Kr 725/21.

³¹ Resolution of Supreme Administrative Court of 30.10.2000 case file no. OPK 13/00; resolution of Supreme Administrative Court of 18.12.2000 case file no. OPK 20-22/00; resolution of Supreme Administrative Court of 21.02.2000, case file no. OPS 10/99; judgment of the Supreme Administrative Court of 13.01.2022, case file no. II GSK 2538/21; judgment of Supreme Administrative Court of 8.11.2016 case file no. II GSK 544/15.

review, means that the administrative decision was issued in violation of certain legal provisions of constitutional or statutory rank. Issuing an administrative act citing a provision of a regulation that is inconsistent with the Constitution and the act means issuing an act in violation of higher-ranking regulations, and thus entitles the court to deviate from the application of these regulations in a particular case, without the need for a legal question to the Constitutional Tribunal.

ALLEGATIONS AGAINST THE IMPOSITION OF QUARANTINE *EX LEGE*

The violation of Article 31 section 3 and Article 92 section 1 of the Constitution of the Republic of Poland by the provision of § 5 section 1 of the regulation are the most significant, although not the only allegations. Other irregularities indicating unjustified deviations from established principles in the imposition of public law obligations were also found.

Firstly, the prevailing position in judicial and administrative jurisprudence is that the imposition of the quarantine obligation should be by way of an administrative decision³². A change of a fundamental statutory construction performing guarantee functions – in this case consisting, in fact, in the introduction of the institution of “*ex lege* quarantine”, hitherto unknown to the Act on preventing and combating infectious diseases in humans was to protect health – required a change in statutory regulation, rather than the introduction of such an institution through a lower-order act³³. In view of this, the provision of § 5 section 1 second sentence of the regulation was contrary to the act and could not exempt the issuance of a decision on imposition of quarantine.

Secondly, the provisions of § 5 of the regulation do not contain an exhaustive or even a mere framework regulation of quarantine applied in connection with prior contact with an infected person. In particular, with regard to this type of quarantine, the provisions of the regulation do not regulate at all the prerequisites for imposition of such quarantine, nor the categories of persons subject to it or excluded from its regulation³⁴.

³² Judgment of the Voivodship Administrative Court in Poznań of February 25, 2022, case file no. IV SA/Po 1022/21; judgment of the Voivodship Administrative Court in Poznań of March 24, 2022, case file no. IV SA/Po 53/22; judgment of the Voivodship Administrative Court in Olsztyn of April 5, 2022, case file no. II SA/Ol 1051/21; judgment of the Voivodship Administrative Court in Olsztyn of April 20, 2022, case file no. II SA/Ol 192/22; judgment of the Voivodship Administrative Court in Łódź of April 27, 2022, case file no. III SA/Łd 8/22; judgment of the Voivodship Administrative Court in Łódź of April 27, 2022, case file no. III SA/Łd 44/22; judgment of the Voivodship Administrative Court in Opole of July 12, 2022, case file no. II SA/Op 96/22, LEX no. 3375569.

³³ Cf. L. Bosek, *Stan epidemii. Konstrukcja prawna*, Warszawa 2022, p. 278.

³⁴ Judgment of the Voivodship Administrative Court in Opole of 12.07.2022, II SA/Op 96/22.

Thirdly, the introduction in § 5 section 1 of the Ordinance that the decision to impose a quarantine on a person shall not be issued by the sanitary inspection authority also had the effect of unauthorizedly exempting the sanitary inspection authorities from the obligation to conduct administrative proceedings on the imposition of quarantine, and consequently also deprived, without a proper legal basis, of the guarantees and procedural remedies associated with the general principle of two-instance administrative proceedings (article 15 *in principio* of the Code of Administrative Procedure), including, in particular, the constitutional right to challenge a decision made at first instance (article 78 constitution of the Republic of Poland), by way of appeal (article 127 § 1 of the Code of Administrative Procedure)³⁵.

Fourthly, the imposition of the quarantine obligation was not decided by the sanitary inspection authority, but *de facto* by the entity that arbitrarily determined the need and reported it to the competent authority. It is also worth noting that the imposition of quarantine was not communicated to the person by the sanitary inspection authority - which would follow from the *ex officio* principle of the proceedings - but by the entity that initiated the proceedings to impose quarantine. In practice, it was most often the head of an educational or care facility.

In conclusion, due to the errors found in terms of correct legislation and compliance with the current legal system § 5 section 1 of the Regulation could not be an effective basis for imposing the quarantine obligation. The said regulation does not implement the statutory authorization, but in fact supplements its content with provisions not found in the act and thus interferes with the essence of constitutional rights and freedoms. In such a case, the regulation becomes an autonomous act, thus deprived of its strictly executive nature in relation to the act³⁶. In view of this, the quarantine imposition act issued on its basis is considered ineffective.

References

Literature

Bosek L., *Stan epidemii. Konstrukcja prawna*, Warszawa 2022

Florczak-Wątor M. [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. II, ed. P. Tuleja, LEX/el. 2021, art. 68.

Hofmański P. [in:] *Komentarz EKPCz*, ed. L. Garlicki, Warszawa 2010.

Janik M., *Rozdział 4. Zadania Państwowej Inspekcji Sanitarnej*, [in:] *Policja sanitarna*, Warszawa 2012.

³⁵ Judgment of the Voivodship Administrative Court in Poznań of 25.02.2022 case file no. IV SA/Po 1022/21; judgment of the Voivodship Administrative Court in Olsztyn of 20.04.2022, case file no. II SA/OI 192/22.

³⁶ Judgment of the Supreme Administrative Court of 23.09.2021, case file. no. II GSK 876/21.

Lis W., *Działania podejmowane w przypadkach zakażeń i chorób zakaźnych ze względu na ochronę bezpieczeństwa obywateli*, „Studia Prawnicze” 2017, KUL 3(71).

Trociuk S., *Prawa i wolności w stanie epidemii*, Warszawa 2021.

Normative acts

Constitution of the Republic of Poland of 2 April 1997, (Journal of Laws of 1997 No. 78 item 483).

Act of 30 August 2002 Law on proceedings before administrative courts (consolidated text Journal of Laws 2022, item 329).

Act of 5 December 2008 on the control and prevention of infections and infectious diseases in humans (consolidated text Journal of Laws 2022, item 1657).

Regulation of the Council of Ministers of 6 May 2021 on the establishment of certain restrictions, orders and prohibitions in connection with the occurrence of an epidemic state (Journal of Laws, item 861, as amended).

Case law

Judgment of the Constitutional Tribunal of 28.05.1997, K 26/96.

Judgment of the Constitutional Tribunal of 4.11.1997, case file no. U 3/97.

Judgment of the Constitutional Tribunal of 23.03.1999, case file no. K 2/98.

Judgment of the Constitutional Tribunal of 12.01.2000, case file no. P 11/98.

Judgment of the Constitutional Tribunal of 28.06.2000, case file no. K 34/99.

Judgment of the Constitutional Tribunal of 20.02.2001, case file no. P 2/00.

Judgment of the Constitutional Tribunal of 3.04.2001, case file no. K 32/99.

Judgment of the Constitutional Tribunal of 11.12.2001, case file SK 16/00.

Judgment of the Constitutional Tribunal of 10.04.2001, case file no. U 7/00.

Judgment of the Constitutional Tribunal of 19.02.2002, case file no. U 3/01.

Judgment of the Constitutional Tribunal of 8.07.2003, case file no. P 10/02.

Judgment of the Constitutional Tribunal of 7.01.2004, case file no. K 14/03.

Judgment of the Constitutional Tribunal of 16.03.2004, case file no. K 22/03.

Judgment of the Constitutional Tribunal of 25.07.2006, case file no. P 24/05.

Judgement of the Constitutional Tribunal of 16.01.2007, case file no. U 5/06.

Judgment of the Constitutional Tribunal of 29.06.2007, case file no. SK 43/06.

Judgment of 29.11.2007, case file no. SK 43/06.

Judgment of the Constitutional Tribunal of 5.12.2007, case file no. K 36/06.

Judgment of the Constitutional Tribunal of 5.02.2008, case file no. K 34/06.

Judgment of the Constitutional Tribunal of 19.06.2008, case file no. P 23/07.

Judgment of the Constitutional Tribunal of 30.04.2009, case file no. U 2/08.

Judgment of the Constitutional Tribunal of 19.05.2009, case file no. K 47/07.

Judgment of the Constitutional Tribunal of 31.05.2010, case file no. U 4/09.

Judgment of the Constitutional Tribunal of March 7, 2012, case file no. K 3/10.

Judgment of the Voivodship Administrative Court in Poznań of March 12, 2020, case file no. II SA/Po 947/19.

Judgment of the Voivodship Administrative Court in Gliwice of 27.07.2020, case file no. III SA/Gl 319/20.

Judgment of the Voivodship Administrative Court in Opole of 27.10.2020, case file no. II SA/Op 219/20.

Judgment of the Voivodship Administrative Court in Wrocław of 25.11.2020, case file no. IV SA/Wr 284/20.

Judgment of the Voivodship Administrative Court in Szczecin of 11.12.2020, case file no. II SA/Sz 765/20.

Judgment of the Voivodship Administrative Court in Warsaw of 26.01.2021, case file no. VII SA/Wa 1479/20.

Judgment of the Supreme Court of 29.06.2021, case file no. II KK 255/21.

Judgment of the Voivodship Administrative Court in Warsaw of 20.07.2021, case file no. V SA/Wa 2022/21.

Judgment of the Supreme Administrative Court of 8.09.2021, case file no. II GSK 602/21.

Judgment of the Supreme Administrative Court of 23.09.2021, case file no. II GSK 876/21.

Judgment of the Voivodship Administrative Court in Krakow of 2.12.2021, case file no. III SA/Kr 725/21.

Judgment of the Supreme Administrative Court of 13.01.2022 case file no. II GSK 2538/21.

Judgment of the Voivodship Administrative Court in Poznań of 25.02. 2022 case file no. IV SA/Po 1022/21.

Judgment of the Voivodship Administrative Court in Poznań of 24.03.2022, case file no. IV SA/Po 53/22.

Judgment of the Voivodship Administrative Court in Olsztyn of 5.04. 2022, case file no. II SA/Ol 1051/21.

Judgment of the Voivodship Administrative Court in Opole of 12.07.2022, case file no. II SA/Op 96/22.

Judgment of the Voivodship Administrative Court in Olsztyn of 20.04.2022 case file no. II SA/Ol 175/22.

Judgment of the Voivodship Administrative Court in Łódź of 27.04.2022, case file no. III SA/Łd 8/22.

Judgment of the Voivodship Administrative Court in Olsztyn of 20.04.2022, case file no. II SA/Ol 192/22.

Judgment of the Supreme Administrative Court of 8.11.2016, case file no. II GSK 2965/16.

Judgment of the Voivodship Administrative Court in Opole of 12.07.2022, II SA/Op 96/22.

Judgment of the Voivodship Administrative Court in Poznań of 25.02.2022 case file no. IV SA/Po 1022/21.

Resolution of the Supreme Administrative Court of 21.02.2000 case file no. OPS 10/99.

Resolution of the Supreme Administrative Court of 30.10.2000 case file no. OPK 13/00.

Resolution of the Supreme Administrative Court of 18.12.2000 case file no. OPK 20-22/00.