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FLASH NEWS

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COVID-19

OVERVIEW OF DECISIONS IN THE PERIOD OCTOBER - DECEMBER 2020

ORGANISATION OF JUSTICE

France – Court of Cassation Constitutional Council

Fundamental rights - Public health - COVID-19 - Organisational arrangements for hearings - Use of videoconferencing - Non-compliance with the Constitution

In a judgment handed down on 6 October 2020, the Court of Cassation ruled on the legality of a provision providing, because of the COVID-19 pandemic, for the possibility of using an audiovisual means of telecommunication before all penal courts, other than criminal courts, without the need to obtain the agreement of the parties. It considered, in the context of the extension of pre-trial detention, that the use of an audiovisual means of telecommunication is not contrary to Articles 5 (right to liberty and security) and 6 (right to a fair trial) of the European Convention on Human Rights, since another provision requires the judge to organise and conduct the proceedings in such a way as to ensure respect for the rights of the defence and to guarantee the adversarial nature of the proceedings.
However, by a decision of 15 January 2021, the Constitutional Council ruled that this provision was unconstitutional. It noted that the use of audiovisual telecommunications is not subject to any legal condition and is not regulated. Having regard to the importance of the guarantee that may attach to the physical presentation of the person concerned before the penal court, it held that such a provision infringed the rights of the defence, which could not be justified by the health context.

*Cour de cassation, judgment of 6/10/2020, No 20-84.171 (**FR**)*
*Conseil constitutionnel, decision of 15/01/2021, No 2020-872 QPC (**FR**)*
Press release (FR)

Lithuania – Šiauliai Regional Court

Fundamental rights - Public health - COVID-19 - Failure to comply with the deadline for regularisation of an application as a result of measures taken in the context of the fight against the pandemic - Priority given to the right of access to justice

By order of 25 November 2020, Šiauliai Regional Court ruled on the consequence of the failure to regularise an application in connection with measures taken by the national authorities in the context of the fight against COVID-19. In the present case, neither the applicant nor his legal representative had paid the stamp duty within the prescribed time limit as a result of those measures.
The said court gave priority to the fundamental right of access to justice and, taking this particular context into account, annulled the decision of the court of first instance that had dismissed the applicant's appeal.

*Šiaulių apygardos teismas, Civilinė byla, order of 25/11/2020, No e2S-802-368/2020 (**LT**)*

Poland – Supreme Administrative Court

Fundamental rights - Public health - COVID-19 - Organisational arrangements for hearings - Public hearings - Legality of restrictions introduced on the right to such hearings

The Supreme Administrative Court, in an appeal concerning a building permit, decided in camera and ruled on the legality of restrictions introduced on the right to a public hearing.
The high court held that the right to a public hearing is not absolute and may be restricted by law under Article 31, paragraph 3, of the Constitution, thereby limiting the exercise of constitutional rights and freedoms in order to protect public health.
In this respect, as the objective of the Act of 2 March 2020 on the prevention of COVID-19 is to protect human life and health, the said Act could be applied by the judges in the case in question to restrict the right to a public hearing.

*Naczelny Sąd Administracyjny, decision of 30/11/2020, II OPS 6/19 (**PL**)*

PUBLIC HEALTH

Spain – Supreme Court

Fundamental rights - Public health - COVID-19 - Right to physical integrity - Protection of health - Obligation to provide protective equipment for healthcare staff

On 30 March 2020, an action for failure to act against the Ministry of Health was brought before the Supreme Court through a procedure for judicial protection of fundamental rights. That action, brought by the National Confederation of Medical Trade Unions, sought a declaration that, by failing to provide sufficient protective equipment to healthcare staff, the Ministry had failed to fulfil its obligations under Royal Decree 463/2020 of 14 March 2020 declaring a state of emergency, which established, among other things, the obligation of the health authorities to ensure the proper distribution of technical resources throughout the national territory.
The Supreme Court found that not only the Ministry, but also all the health authorities of the Spanish Autonomous Communities had, at the beginning of the pandemic, disregarded their obligation to provide the necessary means of protection, which had led to a risk to the right to physical integrity and protection of health of healthcare staff.

*Tribunal Supremo, Sala de lo Contencioso-Administrativo, judgment of 08/10/2020, No STS 3024/2020 (**ES**)*

France – Council of State

Fundamental rights - Public health - COVID-19 - Vulnerability criteria allowing employees to benefit from short-time working - Suspension of the restrictions in question

The interim relief judge suspended the articles of the Decree of 29 August 2020 that restricted from 11 to 4 the criteria of vulnerability to COVID-19 allowing employees to benefit from short-time working. He stressed that the government could not exclude pathologies or situations that present a risk equivalent to or greater than those maintained in the decree that still allow for short-time working. Thus, the interim relief judge considered that the government had not sufficiently justified the consistency of the new criteria chosen, in particular the fact that diabetes or obesity were retained only when they are associated in a person over the age of 65.

*Conseil d'État, juge des référés, order of 15/10/2020, Nos 444425, 444916, 444919, 445029, 445030 (**FR**)*
Press release (FR)

Bulgaria – Constitutional Court

Fundamental rights - Public health - COVID-19 - Access to traffic data to locate sick people - Illegal and disproportionate measure

The Bulgarian Constitutional Court was asked by deputies of the National Assembly to review the constitutionality of certain provisions of the Electronic Media Act of 24 March 2020 allowing access to traffic data.
According to the high court, the possibility for the bodies of the Ministry of the Interior to have access to these data, collected in a general and non-selective manner, for a period of six months and not limited to the duration of the state of emergency, in order to locate sick people, was illegal and disproportionate. Moreover, the Constitutional Court allowed access to the data of people suffering from communicable diseases and objecting to their isolation or compulsory treatment only until their recovery or the end of their isolation and only with the consent of the person concerned.

*Конституционен съд, judgment No 15 of 17/11/2020, 15/2020 (**BG**)*

Spain – Supreme Court of Justice of Madrid

Fundamental rights - Public health - COVID-19 - Restrictions on freedom of movement - No valid legal basis

The Supreme Court of Justice of Madrid refused, by an exceptional procedure, to ratify the measures limiting the entry and exit of ten municipalities, adopted by the regional government's Decree of 1 October 2020. The Supreme Court recalled the case law of the Constitutional Court concerning Articles 53 and 81 of the Constitution, according to which fundamental rights can only be limited by a law, whether organic or ordinary, respecting the conditions of legal security and predictability of the law. The Supreme Court thus examined Article 65 of the Act on the Cohesion and Quality of the National Health System invoked as the legal basis for these measures. It concluded that this provision did not fulfil these conditions and therefore did not constitute a valid legal basis for introducing limitations to fundamental rights.

*Tribunal Superior de Justicia de Madrid, Sala de lo Contencioso, order of 8/10/2020, No 128/2020 (**ES**)*
Press release (ES)

Spain – Supreme Court of Justice of Castile and León

Fundamental rights - Public health - COVID-19 - Freedom of movement - Measures not in conformity with the enabling provisions of the law

The Supreme Court of Justice of Castile and León ruled, by an exceptional procedure, that Order 73/2020 imposing a restriction on the free movement of persons could not be upheld. This order authorised the movement of persons only during certain hours or on the occasion of certain well-defined activities. The Supreme Court found that these measures involving deprivation of liberty did not comply with the enabling provisions of Act 3/1986 on special measures in the field of public health.

*Tribunal Superior de Justicia de Castille y León Sala de lo contencioso, judgment of 25/10/2020, 273/2020 (**ES**)*
Press release (ES)

Spain – Supreme Court of Justice of Castile and León

Fundamental rights - Public health - COVID-19 - Right to freedom of movement and freedom of assembly - Discrimination against residents of old people's homes - Refusal to ratify the measures in question

The Supreme Court of Justice of Castile and León refused to approve an exceptional preventive health measure, adopted as a state of alert by the government of that region, which was aimed at restricting certain fundamental rights of residents of old people's homes. They were prevented from going out and receiving visits, regardless of the level of contagion in the centre.
According to the judges, this measure did not meet the criteria of necessity, adequacy and proportionality required by constitutional case law. No justification had been presented for restricting the fundamental rights of these people beyond the restrictions imposed on the entire population of the region. The vulnerability of the residents of these centres due to their age alone, mentioned in this respect, was not enough to allow them to be treated differently in terms of their fundamental rights compared with other citizens of the region of Castile and León.

*Tribunal Superior de Justicia de Castilla y León, Order of 6/11/2020, 297/2020 (**ES**)*
Press release (ES)

France – Council of State

Fundamental rights - Public health - COVID-19 - Ceiling of 30 persons - Infringement of freedom of religion

The interim relief judge considered that the 30-person ceiling imposed on all religious establishments, regardless of their size, was disproportionate to the objective of preserving public health.
He found that by retaining it, the government had seriously and manifestly unlawfully infringed the fundamental freedom of religion.

*Conseil d'État, juge des référés, order of 29/11/2020, Nos 446930, 446941, 446968, 446975 (**FR**)*

ECONOMIC ACTIVITY

Poland – Voivodship Administrative Court in Opole

Fundamental rights - Public health - COVID-19 - Containment measures - Infringement of freedom to conduct business

The Voivodship Administrative Court in Opole, having received an appeal from the owner of a hairdressing salon, annulled the decisions of the first- and second-instance health control bodies challenged before it. These concerned a fine for non-compliance with temporary restrictions on the exercise of economic activity during the COVID-19 pandemic, provided for in the Council of Ministers' Regulation of 19 April 2020 on containment measures.
In its unpublished decision, this court held that, while the above-mentioned restrictions were justified on the merits, the legislative technique by which they were introduced had resulted in a violation of fundamental constitutional rights regarding the freedom to conduct business.

*Wojewódzki Sąd Administracyjny w Opolu, judgment of 27/10/2020, I SA/Op 219/20 (**PL**)*

Poland – Supreme Administrative Court

Freedom to conduct business - Public health - COVID-19 - Situation liable to jeopardise the existence of a company - Suspension of payment of wrongly obtained funds

An appeal was lodged with the Supreme Administrative Court concerning a refusal to suspend an administrative decision to pay wrongly obtained funds. The applicant, a private company, argued that it had suffered losses in connection with the COVID-19 pandemic and that recovery of the unpaid amounts would have an impact on its liquidity, which would subsequently lead to its liquidation and the redundancy of its employees. According to the court of first instance, the company had not demonstrated, to the requisite legal standard, significant risks or irreversible effects related to the payment obligation, since it had continued its economic activity thanks to subsidies, among other things.
The high administrative court, having recognised the existence of risks to the financial viability of the company, annulled the decision of the court of first instance and suspended the contested decision.

*Naczelny Sąd Administracyjny, order of 27/10/2020, I GZ 294/20 (**PL**)*

CONFINEMENT MEASURES

Belgium – Council of State

Fundamental rights - Public health - COVID-19 - Measures restricting freedom of movement - Curfew - Dismissal of appeal

The Council of State received a request to suspend, as a matter of extreme urgency, ministerial decrees establishing a curfew between midnight and 5 a.m. This request was submitted by Belgian citizens who claimed, among other things, a violation of the freedom of movement and the right to privacy.
The Council of State dismissed the appeal on the grounds that the condition of the existence of serious grounds likely, prima facie, to justify the annulment of these decrees was not met in this case. According to the Council of State, the curfew has a legitimate objective, i.e. to limit social contacts in order to preserve the healthcare system, which cannot be achieved by a less restrictive measure, such as, for example, a ban on gatherings.

*Raad van State, judgment of 30/10/2020, No 248.819 (**NL**)*
Press release (***NL*** / ***FR***)

Czech Republic – Prague Municipal Court

Fundamental rights - Public health - COVID-19 - Obligation to wear a protective mask outside and in schools - Insufficient reasoning

Prague Municipal Court annulled, for lack of reasoning, an emergency measure of the Ministry of Health imposing the obligation to wear a protective mask outdoors, in municipalities and in certain schools during school hours, under certain conditions.
It found that the measure in question lacked concrete and well-founded reasons that would justify such a reinforcement of the obligation to wear a mask.

*Městský soud v Praze, judgment of 13/11/2020, No 18 A 59/2020 (**CS**)*
Press release (CS)

Slovenia – Constitutional Court

Fundamental rights - Public health - COVID-19 - Lack of publication in the Official Journal and of entry into force of government decisions and measures in question - Fixing of a time limit for publication

The Constitutional Court, considering a constitutional initiative introduced by pupils with special educational needs, represented by their parents, found that neither the government decisions on the extension of the measures concerning the fight against COVID-19 nor the measures themselves had been published in the Official Journal. These measures included a temporary ban on gatherings in educational institutions, including institutions for children with special educational needs. Although the absence of such publication means that these measures could not have entered into force, the high court noted that the epidemiological situation in Slovenia was worrying and did not allow the establishments concerned to be opened without the adoption of protective measures. It therefore set a time limit of three days for the government to publish the decisions and measures in question in the Official Journal. The government published them in the Official Gazette within the time limit set.

*Ustavno sodišče Republike Slovenije, partial decision and order of 3/12/2020, U-I-445/20-13 (**SI**)*

Belgium – Council of State

Fundamental rights - Public health - COVID 19 - Measures restricting freedom of religion - Prohibition of religious ceremonies - Disproportionate measure

The Council of State received a request to suspend, as a matter of extreme urgency, a ministerial order prohibiting the collective practise of religion, except in three strictly limited cases. This application was submitted by persons of the Jewish faith. The latter were of the opinion that this prohibition constituted a disproportionate restriction on the freedom of religion.
The Council of State granted the request and ordered the Belgian State to modify this arrangement, at least provisionally. It considered that this restriction on freedom of religion was disproportionate, since it had not been provided for that the collective practise of religion could take place at least in certain cases, exceptionally and under conditions, where appropriate, on request with indication of the place and time.

*Raad van State, judgment of 08/12/2020, No 249.177 (**NL**)*
Press release (***NL*** / ***FR***)

Slovenia – Constitutional Court

Fundamental rights - Public health - COVID 19 - Temporary ban on gatherings in educational institutions - Suspension of the measures in question

The Constitutional Court suspended the execution of the government order as well as the ministerial decree concerning the temporary prohibition of gatherings in special education institutions. In this regard, the high court ordered the government to reopen the schools concerned by 4 January 2021 at the latest. In pointing out that the reopening of these establishments had to take account of epidemiological data, the court stressed that it was not necessary for them to operate normally. Although they must provide pupils with individualised treatment, these establishments may, however, exempt them from certain school activities, taking into account the danger of infection by COVID-19, which constitutes a serious health risk.

*Ustavno sodišče Republike Slovenije, decision of 21/12/2020, U-I-473/20-14 (**SI**)*

PREVIOUS DECISIONS

Ireland – High Court

Fundamental rights - National legislation concerning COVID-19 - Constitutionality

The High Court, considering a judicial review of various pieces of legislation adopted to curb the spread of COVID-19, rejected the argument that these were allegedly unconstitutional or disproportionate.
The High Court held that legislation enacted to deal with COVID-19 had restricted the constitutional rights of individuals, but stressed that these rights were not absolute. The High Court found that the unsubstantiated opinions put forward to challenge these regulations by persons with no medical qualifications or expertise, as well as the unsubstantiated arguments seeking to draw a historical parallel with Nazi Germany, were both absurd and offensive and could not replace the facts. In the absence of facts or a sworn statement, the said Court held that it was not possible to prove that the restrictions introduced were disproportionate.

*High Court, judgment of 13/05/2020, [2020] IEHC 209 (**EN**)*

Portugal – Constitutional Court

Fundamental rights - Public health - COVID-19 - Resolution of a regional government - Provisions imposing a mandatory 14-day confinement period on any passenger arriving by air - Unconstitutionality

An appeal was lodged with the Constitutional Court to assess the conformity with the Constitution in particular of the provisions of the resolution of the Council of the Regional Government of the Azores, which imposed a compulsory 14-day period of confinement on all passengers arriving by air in that region.
It considered that insofar as the rules in question introduced a restriction on the fundamental right to liberty, enshrined in Article 27 of the Basic Law, they fell within the competence of Parliament and in no way within that of the regional government.

*Tribunal Constitucional, judgment of 31/07/2020, No 424/2020 (**PT**)*

The e-Justice portal of the European Commission contains further information on the impact of the COVID-19 pandemic on justice.