

**ADMINISTRATIVE COURT
VIENNA**

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GZ: VGW-103/048/3227/2021-2 A.

Business Department: VGW-M

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ON BEHALF OF THE REPUBLIC

The Vienna Administrative Court, through its judge Dr. Frank, ruled on the complaint of A., represented by lawyer, against the decision of the Vienna Provincial Police Directorate, Security and Administrative Police Affairs, SVA Department 3 - Association, Assembly, Media Law, of 30.01.2021, GZ: ..., by which the assembly announced for 31.01.2021 was prohibited:

I. The appeal is upheld and the contested decision is repealed. The prohibition was unjustified.

II. According to § 25a VwGG, an ordinary appeal against this decision to the Administrative Court is inadmissible under Art. 133 para. 4 B-VG.

Reasons for decision

With the contested decision, the authorities prohibited a meeting on the topic of "General Information of A.", which had been announced by A. on 29 January 2021 and was to be held on 31 January 2021 from 2.35 p.m. to 6 p.m. in Vienna, B.-Platz. The reason given for this was the expected illegal behaviour of the participants and the resulting epidemic as well as a "straw man tactic" described in more detail. It was expected, thus also by "A", that well-reputed straw men would be sent forward in order to conceal the true illegal background.

In the complaint directed against this, a heightened duty of control and justification for the prohibition of meetings was argued, according to which the constitutional provision of § 1 (3) PartG the activity of a political party may not be subjected to any restriction by special legal provisions. In this respect, the authority concerned had not attempted, in agreement with the complainant, a modification in the sense of a less restrictive means by changing the type and location of the meeting. The reasoning of the "unknown straw man" was completely closed to the complainant's meaning. Since the prohibition of an assembly could only be a last resort (VfGH 14.3.2013, B 1037/11 mwN), the authority concerned had had to initiate contact in order to ensure the holding of the assembly in cooperation with the organiser due to the fact that it had been known for weeks that there would be a high density of assemblies on 31 January 2021. In this respect, the prosecuting authority had a positive duty to protect. For example, if the complainant feared that the place of assembly was too cramped, the authority concerned had had to take the initiative to offer an alternative, equivalent place of assembly. The accusation indirectly made by the authority was completely rejected when the complainant, a political party that had been represented in parliament for decades, was denied any organisational efficiency. This was evident from the distrust if the complainant was not trusted to comply with the epidemic regulations in advance. Moreover, the authority itself contributed to the escalation, because it fanned the flames of spontaneous meetings. The service (LVT) was aware of the highly explosive mood against the government measures from the social networks.

In summary, a weighing of conflicting fundamental rights should not per se lead to a complete prohibition. Thus, the public welfare of health was not weighed against the fundamental right of freedom of assembly. Since A., as a party represented in the National Council, had a reputation which had to be maintained at all costs, it had rigorously monitored the provisions of § 12 para. 2 of the 3rd COVID-19 NotMV. In this regard, it was noted that the assessments of the health service as well as the LVT had been carried out in general for all assemblies registered for 31.1.2021 by then and before the registration of the assembly in question. Thus, a prognosis for the specifically intended assembly was already impossible.

To date, there has been no evidence from the epidemiological side for clusters at an assembly. The peer review for the protective effect of FFP 2 protective masks was inconsistent, and even the WHO and the European Commission responded negatively with regard to the benefits of the protective effect.

Since the authority in question had not given any consideration with regard to lesser means and its own actions to minimise the danger of an acute epidemic, the constitutionally guaranteed procedure of a mere notification of assemblies amounted to a licensing system. A permit within the framework of a concession system for assemblies was incompatible with the fundamental right to freedom of assembly (VfSlg.11.651/1988 and 11.866/1988 on the prohibition of subjecting an assembly to prior official authorisation mWN).

Why it was to be assumed that a meeting of a political party represented in parliament should necessarily result in violations of § 12 para. 2 of the 3rd COVID-19 NotMV remains completely open. This provision would thus become the basis for a completely arbitrary and arbitrary restriction of Article 12 of the Austrian Constitution, Article 11 of the ECHR and the Assembly Act. In addition, § 12 para. 2 of the 3rd COVID-19 NotMV lacks the relevance for assemblies according to the Assembly Act. This equates assemblies with events, which is a complete misunderstanding of the legal situation. An assembly, and this was the case here, enjoyed the highest protection under Article 12 of the Austrian Constitution and Article 11 of the ECHR, which prohibited a restriction by mere regulation.

In assessing the expected violations of the epidemic regulations, the complainant referred to "numerous media reports" by the prosecuting authority. In doing so, the prosecuting authority revealed that it had failed to carry out investigations and had thus failed to provide evidence. A basis for conclusion was thus lacking, so that there was not only a lack of reasoning, but also a lack of justification. The assessment of the LVT Vienna of 28 January 2021 was not a suitable basis for a decision, because it was made before the registration of the meeting and something could not be assessed that had not even been communicated. Furthermore, in VfSlg. 5.087/1966, the Constitutional Court required that "concrete, ascertained, objectively ascertainable circumstances" be referred to in order to assess a "health hazard". The Public Health Service of the City of Vienna, which had been contacted by the authority in question, only answered in a very general manner and did not address the specific event. If these arguments were followed, all future meetings could be prohibited without further ado. As an individual recommendation of the health service, it should be emphasised that there was only an increased risk of transmission if contacts were not made without keeping the necessary distance and wearing mouth-nose protection. The authority in question based its prohibition on an alternative absence.

The Administrative Court of Vienna has ruled:

Facts:

On 26.1.2021, police president ... sent an email to the Chief Physician of the City of Vienna, ..., concerning "Demonstrations on WE 30./31.1" with the request for information from a health perspective on the following questions:

- 1) "In the case of a gathering of several hundred to several thousand people who do not keep the prescribed minimum distance of 2 metres and who, moreover, predominantly do not wear tight-fitting NMS, is it to be expected that, taking into account the fact that the people usually chant loudly and thus give free rein to their demands - also in view of the newly emerging mutation variants of the virus (and related media reports)? that people usually chant loudly and thus give free rein to their demands - also in view of the newly emerging mutation variants of the virus (and the associated alarming media reports) - a considerable risk of infection among the participants in the meeting will arise and thus an uncontrollable further spread of the virus in the population can be expected?"
- 2) "Would such crowds significantly thwart the health department's efforts to further reduce the 7-day incidence?"

On 27.1.2021, the Health Service of the City of Vienna sent an email reply to the Police President personally with the following content:

"Dear Mr. State Police President...,

In its latest recommendation of 21.1.2021, the Corona Commission, as an advisory body of the Federal Minister of Health, points out the increased transmissibility of the SARS-CoV-2 virus mutant B. 1.1.7 and the resulting danger of a renewed very strong exponential increase in the number of cases. Against this background and the still high number of cases, the Corona Commission recommended that the preventive measures taken to reduce contact be continued. It was also noted that the acceptance of the population is necessary in order to be able to continue to achieve the necessary reductions in the number of cases. The epidemiological situation with an increasing number of infections, where initial test results indicate mutated variants of the SARS-CoV-2 virus, has led to the mandatory wearing of FFP2 protective masks in wide areas

to protect against infection, and the mandatory minimum distance has been extended to 2 metres. Current surveys show that with the new virus variants, contacts without observing the necessary distance and without wearing protective masks can lead to more subsequent cases in a few days than previously observed due to the increased transmissibility. Against this background, if persons excreting the virus participated in the meeting without keeping the required distance and without wearing a mouth-nose protection, transmissions can occur which, specifically also due to the lack of traceability of contacts, counteract the efforts to reduce the number of cases."

The drawing and the email address are blacked out in the file, so that a personal assignment was made impossible.

On the official homepage of the "Corona Commission" (Evaluation Criteria | Corona Traffic Light (corona-ampel.gv.at)) you can find a current risk assessment and evaluation criteria.

On 28.1.2021, the State Office for the Protection of the Constitution and the Fight against Terrorism sent a file note on the "Assessment regarding Corona demonstrations on 30 and 31.1.202". This essentially stated that - referring to previous meetings - there would be violations of the Covid 19 measures at further meetings. Unknown "straw men" would be sent forward for the registrations, who would be used to circumvent an official ban due to their innocence. Furthermore, the "leading figures of the scene" had called for as many meetings as possible to be registered in order to keep the authorities busy and to tie up as many police officers as possible in a decentralised manner. Only by prohibiting all assemblies could it be ensured that one or the other unprohibited assembly would not become a gathering place for presumptive participants of other assemblies. Finally, the situation was summarised literally as follows:

"Due to the large-scale mobilisation and the great success of the "Corona-Demos" on 16.1.2021, a very large number of participants (several thousand) can be expected. It therefore seems impossible to keep the prescribed minimum distance of 2 m from the ha. seems impossible from a ha. point of view. In addition, based on the impact of calls and experiences at past events, it is to be expected that a large proportion of participants will **deliberately and intentionally disregard the** COVID-19 provisions (distance and MNS protection)".

The editor and drawer were blackened again in the nude.

Both the statement of the LVT and the information of the Public Health Service of the City of Vienna were issued in general and above all before the notification of an intended assembly by the A. (sic!).

The A. brought a meeting (dicte rally) to the attention of the Vienna Provincial Police Directorate on 29.1.2021 on the topic "General Information of the A." on 31.1.2021 from 14:34 to 18:00. The protection zone and distance were observed. Shortly afterwards, a change of location from C.-platz to B.-Platz was communicated.

The Vienna Provincial Police Directorate, Department for Association, Assembly and Media Law Affairs, then brought the report to the attention of the Municipal Department 15 of the City of Vienna and asked for "further instructions". It is requested that any objections to the holding of the meeting from the point of view of the health authorities be communicated.

On 30 January 2021, the head of the department for association, assembly and media law matters of the Vienna Provincial Police Directorate notified A. of the intended prohibition of the assembly. The reason given was the feared disregard of the prescribed minimum distance and mouth/nose protection. This in turn was based on the expected large number of participants of at least 10,000 people. The A. assumed that there would be 2,000.

Subsequently, the prohibition notice was issued.

This finding is based on the documents in the file.

Legally follows:

Pursuant to section 6 subsection 1 of the Assembly Act, Federal Law Gazette No. 98/1953 as amended by Federal Law Gazette I No. 63/2017, assemblies the purpose of which contravenes criminal law or the holding of which endangers public safety or public welfare shall be prohibited by the authorities.

Under Article 11(1) of the ECHR, Federal Law Gazette No. 210/1958, as amended by Federal Law Gazette III No. 30/1998, everyone has the right to freedom of peaceful

assembly and to freedom of association, including the right to form and to join trade unions for the protection of their interests.

According to para. 2 first sentence leg. cit., the exercise of these rights may not be subject to any restrictions other than those provided for by law, which are necessary in a democratic society in the interest of national and public security, the maintenance of order and the prevention of crime, the protection of health and morals or the protection of the rights and freedoms of others.

The statements in the complaint are to be agreed with in all points. Furthermore, the decision lacks a tenable justification for a prohibition for the following reasons:

All questions were already asked before the announcement of the meeting that was the subject of the proceedings. The answers in no way take into account the specific meeting of the A..

In addition, the following is to be said about the commissioned "information from a health perspective":

The Public Health Service of the City of Vienna uses the words "number of cases", "test results", "number of cases" and "number of infections". This confusion of terms does not do justice to a scientific assessment of the epidemic situation. For the WHO (WHO Information Notice for IVD Users 2020/05, Nucleic acid testing (NAT) technologies that use polymerase chain reaction (PCR) for detection of SARS-CoV-2, 20 January 2021), the decisive factor is the number of infections/ill people and not the number of people tested positive or other "case numbers". Thus, it remains open which numbers the "information" is based on. The "information" refers to the recommendation of the Corona Commission of 21.1.2021. Due to the lack of information, it is not comprehensible whether the figures on which this recommendation is based only include those persons who were examined according to the WHO guidelines for the interpretation of PCR tests of 20.1.2021. Specifically, it is not shown what CT value a test result had, whether a person tested without symptoms was retested and subsequently clinically examined. With this, the WHO follows the inventor of PCR tests, ... (<https://www.youtube.com/watch?..Jhttps://www.youtube.com/watch?..Ji> Mutatis mutandis, he is saying that a PCR test is not suitable for diagnosis and therefore does not in itself say anything about the disease or infection of a person.

According to a 2020 study (Bullard, J., Dust, K., Funk, D., Strong, J. E., Alexander, D., Garnett, L., ... & Poliquin, G. (2020). Predicting infectious severe acute respiratory syndrome coronavirus 2 from diagnostic samples. *Clinical Infectious Diseases*, 71(10), 2663-2666.) CT values greater than 24 are no longer capable of detecting replicating virus and a PCR test is not suitable for determining infectivity.

Based on the definitions of the Minister of Health, "Case Definition Covid- 19" of 23.12.2020, a "confirmed case" is 1) any person with evidence of SARS-CoV-2 specific nucleic acid (PCR test, note), regardless of clinical manifestation or 2) any person with SARS-CoV-2 specific antigen who meets the clinical criteria or 3) any person with evidence of SARS-CoV-2 specific antigen who meets the clinical criteria.), irrespective of clinical manifestation, or 2) any person with SARS-CoV-2 specific antigen who fulfils the clinical criteria, or 3) any person with evidence of SARS-CoV specific antigen who fulfils the epidemiological criteria.

Thus, none of the three "confirmed case" defined by the Minister of Health meet the requirements of the WHO term "sick/infected person".

The sole reliance on the PCR test (confirmed case 1) is rejected by the WHO, see above.

The reference to an antigen determination with clinical criteria (confirmed case 2) leaves open whether the clinical determination was made by a doctor, to whom it is exclusively reserved; maW: whether a person is ill or healthy **must be** decided by a doctor (cf. § 2 para. 2 no. 1 and 2 Arztegesetz 1998, BGBl. No. 169/1998 as amended by Federal Law Gazette I No. 31/2021).

It should also be noted that antigen tests are highly erroneous in the absence of symptoms (<https://www.ages.at/...>). Nevertheless, the Corona Commission relies exclusively on antigen tests for the current analyses (see Monitoring of Covid-19 protection measures, summary report 21.1.2021).

An antigen test confirms a case (3) even if contact tracing to the person to be confirmed was successful. This means that two antigen-positive persons meeting each other become a confirmed case at once, even without clinical manifestation and without a PCR test using the WHO guidelines.

Should the Corona Commission have used the case definition of the Minister of Health, and not that of the WHO; then any determination of the numbers for "sick/infected" is wrong.

Furthermore, it is pointed out that even when using the case numbers according to the WHO definition, the respective models of the epidemic and the relevance of the numbers are decisive for a correct assessment. Both the evaluation criteria and the current risk assessment of the Corona Commission of 21.1.2021 only contain secondary sources. Reference is made to AGES (Österreichische Agentur für Gesundheit und Ernährungssicherheit GmbH) and GÖG (Gesundheit Österreich GmbH). Communications from these are apparently used without verification and the scientific sources used by them for this purpose as well as statistical prognostic methods are not mentioned. It was to be particularly emphasised that strongly increasing case numbers are not least due to strongly increasing tests.

All in all, with regard to the "information" provided by the Public Health Service of the City of Vienna and the reasons given for the prohibition notice based on it, it must be stated that there are no valid and evidence-based statements and findings on the epidemic.

This is underlined by the Corona Commission's "Limitations", according to which "No conclusion can be drawn about the effectiveness of individual measures, as it must be assumed that they interact with each other and influence each other's effects.

For the legal assessment of non-usable information on the epidemic situation and the assessment of the LVT, it should be added:

The mere, abstract fear of an operation contrary to the consensus cannot lead to a prophylactic refusal of a permit - in this case in the law on business facilities (cf. VwGH of 21 December 2004, 2002/04/0124; of 30 June 2004, 2001/04/0204).

This is all the more true for a fundamental right and freedom, the freedom to assemble. As the Constitutional Court has consistently ruled (cf. Constitutional Court of 30 June 2004, B491/03; of 30 August 2008, B663/08, starting with Supreme Court of 23 January 1905, 691/1904), mere general fears are not sufficient to prohibit an assembly.

The prohibition of the meeting was unjustified, which is why the decision was in accordance with the ruling.

The ordinary appeal is inadmissible, as no legal question of fundamental importance within the meaning of Art. 133 (4) of the Federal Constitutional Law had to be assessed. The decision in question neither deviates from the previous case law of the Administrative Court, nor is there a lack of case law. Furthermore, the existing case law of the Administrative Court is not to be judged as inconsistent. There are also no other indications of fundamental importance of the legal question to be resolved.

Instruction

It is possible to lodge an appeal against this decision with the Constitutional Court and/or an extraordinary appeal with the Administrative Court.

The appeal or the extraordinary appeal shall be filed by an authorised lawyer within six weeks from the day of service of the decision and the appeal to the Constitutional Court and/or the extraordinary appeal to the Administrative Court shall be filed with the Administrative Court of Vienna.

For the appeal and the extraordinary appeal, respectively, a filing fee of 240 euros each is to be paid to the Tax Office for Fees, Transfer Taxes and Gambling. A receipt for this is to be attached to the submission.

It is possible to apply for procedural assistance for the proceedings before the Administrative Court (see section 61 VfGG) or the Constitutional Court (see section 35 VfGG in conjunction with section 64(1) ZPO).

Dr Frank

Judge