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Subject: *Recommendation for immediate cancellation of the entire Order no. 219 dated 19.04.2021 "For quarantine of persons entering to the Republic of Albania from the Republic of North Macedonia and Greece".*

To: **Minister of Health and Social Protection**
Ms. Ogerta MANASTIRLIU

Tirana

To the attention to: **State Election Commissioner**

Tirana

To the attention to: **Interim Committee on the Infection spread of the new Coronavirus**

Tirana

Honorables,

In the People's Advocate institution, a group of Albanian immigrants' associations in Greece have filed a complaint, in which it is expressed the concern about the latest proposal of the Technical Committee of Experts (*Interim Committee on the Infection spread of the new Coronavirus*)¹, for the establishment of 2 weeks period for the Albanian immigrants living in Greece, in case they will come to Albania during this time.

According to the complaint, this proposed measure prevents and in fact denies the right to vote to those immigrants who want to exercise this fundamental right in the general parliamentary elections, that will take place on April 25, 2021. In the complaint, this proposed measure is seen as a discriminatory treatment towards them, as Albanian immigrants living in other countries are allowed to enter in Albania without being quarantined, while Albanian immigrants in Greece are not.

Bringing to attention the provisions of the Constitution of the Republic of Albania, as well as some statistical datas that are against this proposed measure, the

¹ This committee was established based on Order no. 53, dated 31.01.2020 "For the establishment of the Interim Committee on the Infection spread of the new Coronavirus", of the Minister of Health and Social Protection.

representatives of the Albanian immigrants' associations in Greece emphasize the other fact that the Albanian state authorities and the Central Election Commission have not been able to guarantee the right to vote of Albanian immigrants where they live, without the need to physically come to Albania for this purpose, in accordance with the obligations imposed by the Electoral Code of the Republic of Albania.

In these circumstances, the complaint calls for the withdrawal of this proposal made by the Technical Committee of Experts and for this proposed measure to be re-evaluated at a later time, depending on the progress of the Covid 19 pandemic in our country.

As it results from the by-laws issued by the Minister of Health and Social Protection in the framework of the measures against Covid 19, recently it has been issued the Order no.219 dated 19.04.2021 "For quarantine of persons entering to the Republic of Albania from the Republic of North Macedonia and Greece".

According to this order, all citizens entering to the Republic of Albania by air, land or sea from the Republic of North Macedonia and Greece, from date 20.04.2021 until the date 3.05.2021, are obliged to place themselves into self-quarantine for a period of 14 days. This order enters into force immediately and is published in the Official Gazette. This by-law with a normative character enters into force according to the general rules defined in Article 117/1 of the Constitution, where it is determined that laws, normative acts of the Council of Ministers, of ministries and other central institutions, acquire legal force only after they are published in the Official Gazette.

Meanwhile, as far as the duties are concerned and defined in the Order no.53, dated 31.01.2020 "For the establishment of the Interim Committee on the Infection spread of the new Coronavirus", of the Minister of Health and Social Protection, letter "d", and letter "f", point 4, of this order where it is respectively stated that:

"The Interim Committee on Infection spread of the new Coronavirus is in charge of:

d) encouraging state structures, the Institute of Public Health, as well as other local and central structures for the implementation of plans and ordinances, to monitor the progress towards the goals of eliminating the spread of the new coronavirus infection",

f) reporting to the Minister of Health and Social Protection on all issues, documents and decisions taken at the meetings of the Committee".

So, according to this definition, it is the relevant, preliminary decision-making of this Committee that serves as a basis and support for the subsequent decision-making by the Minister of Health and Social Protection, regarding the mandatory decision in order to take preventive measures against the Covid 19 pandemic. The same situation happened with Order no. 53, dated 31.01.2020 "For the establishment of the Interim Committee on the Infection spread of the new Coronavirus", of the Minister of Health and Social Protection, where in the legal basis for the support of issuing this order, it is also expressly cited Decision no. 1892 dated 19.04.2021 of the Temporary Committee for the Infection Spread by the new Coronavirus.

The assessment of the validity of this complaint requires reference to the content and spirit of the provisions of the Constitution of the Republic of Albania, European Convention on Human Rights, its additional protocols, as well as the jurisprudence of the European Court of Human Rights, regarding to freedom of movement and the right to choose and be chosen.

The situation of the Covid 19 pandemic, has affected the way of life all over the world, even in our country, which has brought to attention how these basic human rights and freedoms are being respected in these unusual conditions.

More specifically, the Constitution of the Republic of Albania expressly provides the freedom of movement (individual rights and freedoms), article 38, as well as the right to choose and be chosen (political rights and freedoms), article 45, where respectively it is stated that:

“1. Everyone has the right to choose his place of residence and to move freely to any part of the territory of the state.

2. No one may be hindered from leaving the state freely”,

“1. Every citizen who has reached the age of 18, even on the date of the elections, has the right to vote and to be elected.

2. Citizens who have been declared mentally incompetent by a final court decision do not have the right to vote.

3. According to the rules established by law approved by three-fifths of all members of the Assembly, citizens that are excluded from the right to be elected, are those who have been sentenced to imprisonment with a final decision, for committing a crime. In exceptional and justified cases, the law may provide for restrictions on the right to choose for citizens serving a prison sentence, or the right to be elected before making a final decision or when citizens have been deported for a crime or for a very infringements and serious violation of public security.

4. The vote is personal, equal, free and secret”.

Regarding the exclusion from the right to be elected and the exclusion from the right to vote, point 3 of article 45 of the constitutional provision, it is not expressed in the same way. According to this provision, those who are excluded from the right to be elected are citizens who have been sentenced to imprisonment with a final decision, for committing a crime, which is part of the crimes defined in the law 138/2015,” To guarantee the integrity of persons who are elected, appointed, or exercising public functions”.

Regarding the limitation on the right to vote, the constitutional provision states that, only in exceptional and justified cases, the law may provide for limitations of this right for citizens who are serving a prison sentence. In addition, the Constitution of the Republic of Albania provides that in exceptional and justified cases, the restriction of the right to choose can also be applied to citizens who are in the trial process, before making a final decision, or when they are deported for a crime, or a very infringements and serious violation of public security. It is included here, even the case of citizens declared by a final court decision as mentally incompetent.

Meanwhile, Article 2 of Protocol No. 4, of the European Convention on Human Rights protects the right to freedom of movement within a state and the right to leave a state. This article expressly provides that:

“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.”

Article 3 of Protocol No. 1, of the European Convention on Human Rights protects the right to vote and the right to support elections. It is expressly provided that:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

The constant expressed concern, it exists about the real risks of human rights from the state's reactions to the measures it undertakes against the Covid-19 pandemic, regardless of whether or not it has made a derogation from the European Convention on Human Rights. The catalog of human rights is expandable and all these rights interact with each other, in order to guarantee for everyone a life in which basic human rights are enjoyed in the best and widest possible way. Meanwhile, the question of whether the derogation is justified by the pandemic depends on the nature of the measures taken by the state, if they can be justified under the normal exceptions allowed, if they constitute an effective means of protecting health and if they are used only for the purposes for which they were obtained. On the other hand, these measures must be in a way that achieve the goal (not spreading the virus) in the least harmful way for the other rights.

The Covid-19 pandemic is a situation that affects many human rights, affirmed in the Constitution of the Republic of Albania, as well as in the European Convention on Human Rights. Despite the state's commitment to positive obligations that has to protect life and health as well as other rights, such measures as quarantine, which have previously been implemented to try to prevent the Covid 19 pandemic and protect health, have interfered with a number of legal rights and freedoms of the individual.

Quarantine and social distancing measures that were implemented during the first moment of the outbreak of the pandemic in order to prevent the spread of Covid-19, usually are related to the restriction on freedom of movement. Relevant factors to this assessment include the duration, type and effects of the measure. Depending on the nature, severity and duration of these measures, they may also constitute interference with the right to freedom, which is protected by Article 5 of the European Convention on Human Rights, which in the first part expressly provides that: *“1. Everyone has the right to liberty and security of person”*.

What also matters is the context in which the measures are taken, since there are frequent situations in modern society where there is an expectation that the public can tolerate restrictions on freedom of movement or their freedom, and even deprivations of freedom for a larger public purpose but always for a limited time. All measures that force people to stay at home (such as lockdowns, quarantines, etc.) may constitute a deprivation of liberty rather than a restriction on freedom of movement. This assessment depends on different factors, which must be examined according to the specifics of the case-by-case analysis. Restriction in quarantine, where the person is not allowed to leave under any circumstances is likely to be a deprivation of liberty. Meanwhile, every state authority at the time that undertakes this measure, also must ensure the citizens with active measures for the mitigation of the consequences resulting from such interventions.

Covid-19 has been proven to be a contagious disease, which is dangerous to public health and safety, which means that, in accordance with point 1 of article 5, of the

European Convention on Human Rights, in order to prevent its spread the state can lawfully impose deprivations of liberty.

However, the state must also be able to demonstrate that such measures were taken as a last resort, after other options were being considered and it was concluded that, the spread of Covid-19 could not be brought under control under less stringent conditions.²

As a response to the Covid-19 pandemic, quarantine has been imposed as a preventive measure in many European countries. In situations where this measure does not constitute a deprivation of liberty, it is clear that it does not represent interference with the right to freedom of movement.

In order to understand this point of view, it must be taken into consideration the fact that the rule of law must prevail even in an emergency situation. While the state may need to take unusual measures for the purpose to respond to the emergency situation, these measures must still be in line with the overarching principles of legality and proportionality, which apply in both normal and extraordinary situations. They are relevant, in relation to the Covid-19 pandemic, regardless of whether the Member States have derogated or not, according to the definitions given in Article 15, of the European Convention on Human Rights. These principles, and the way how independent institutions for protection of human rights (and not only) monitor their implementation, in our case are vastly important, for the assessment of compliance with the Constitution of the Republic of Albania and the European Convention on Human Rights, of the measures taken by the responsible state institutions for the prevention and fight against the Covid 19 pandemic. Any restriction taken for this purpose must be in accordance with the law and is necessary in a democratic society.

At the time of issuing Order no.219 dated 19.04.2021 “For quarantine of persons entering to the Republic of Albania from the Republic of North Macedonia and Greece”, of the Minister of Health and Social Protection, a specificity observed is that this by-law, with a normative character, was issued and enters into force just a few days before the general elections, which will be held on April 25, 2021. The persons to whom this by-law determines obligations may be potential voters. If they enter to the territory of the Republic of Albania, within April 25, 2021, they will have to be quarantined, thus not having the opportunity to vote, due to the quarantine as a restrictive measure of free movement.

It is understandable that not all persons who come to the Republic of Albania from the Republic of North Macedonia and Greece can be voters, but at least for those who enjoy the right to choose, in accordance with the provision made in point 1 of article 45 of the Constitution, the possibility to vote under these conditions is "zero".

According to Article 3 of Protocol No. 1 of the European Convention on Human Rights, legislative elections must be held at 'reasonable intervals' and ensure the "free expression of the opinion of the people". The determination of whether elections are held at reasonable intervals must be made by taking into consideration the purpose of parliamentary elections, which is to ensure that fundamental changes in prevailing public opinion are reflected in the opinions of the people's representatives.

² For example, if people are placed under quarantine conditions without being allowed to leave their home under any circumstances, States must be able to provide evidence as to why they have not been allowed to leave their home for a certain period each day, with certain conditions, e.g. wearing a mask and keeping distance from the others. Maybe other solutions have not been assessed as feasible, but States should at least be able to present reasons and evidences for acting so.

In the spirit of the European Convention of Human Rights and the jurisprudence of the Strasbourg Court, it is estimated that the Covid-19 pandemic may interfere with the provision made in Article 3 of Protocol No. 1, of this convention in two aspects:

- i) The risk of postponing the elections enables those in power to continue their mandate undemocratically, when they no longer represent the will of the people, in violation of the right to vote and the criterion to hold elections at reasonable intervals.
- ii) Holding elections during the pandemic risks the capacity of candidates to do campaigns, as a result reduces the number of voters and voters' fearing for their safety. This could potentially undermine the legitimacy of the newly elected legislature, failing to ensure the 'free expression of the people's opinion'.

Any intended purpose of restricting the right to vote must be consistent with the principle of the rule of law and the objectives of the European Convention on Human Rights, and the measure taken to pursue this goal must not be arbitrary or disproportionate.

The legitimate purpose, protection of the health and safety of voters, campaigners, and election workers by postponing the election in order to limit the risk of infection with Covid-19, therefore is likely to constitute a legitimate reason to restrict the right to vote. But this measure is neither comprehensible nor proportionate if we are talking about banning, therefore, the right to vote of those voters, people coming to the Republic of Albania from the Republic of North Macedonia and Greece, practically until April 25, 2021!

Health risks in the voting process can stem from various factors. Many people who come and serve in the polling stations and the voters themselves, whoever they are, pose an eminent risk of Covid 19 infection. Likewise, concern about contracting the Covid-19 virus may affect the number of voters even if groupings in large groups of voters in the voting centers are officially allowed by the responsible state bodies, for the organization and running of the elections.

In the spirit and appreciation of the European Convention on Human Rights, restrictions may be placed in accordance with the criterion of the rule of law. The quality of the decision-making process, before determining the limitation of the right to vote, is decisive for the decision, regarding its justification. This means that the decision-making that determines the limitation must be subject to extensive preliminary debate, by well weighting the competing interests involved, understanding the rights and freedoms guaranteed by the European Convention of Human Rights, before concluding with the imposition of a ban. In accordance with the observance of the principle of proportionality, restrictions on the right to vote should be temporary, and elections to be postponed due to the pandemic and should be held as soon as it is safe to hold them.

Democracy is a fundamental element of the "European public order", and the rights guaranteed under Article 3 of Protocol No. 1, of the European Convention on Human Rights, are essential in defining and maintaining the foundations of an effective and meaningful democracy, governed by the rule of law.

If the state decides to hold elections, while freedom of movement and assembly are limited and while public discussions and debates remain dominated by the Covid-19 pandemic, it must take specific measures to guarantee an electoral process as fair as possible and guarantee the right to vote. Any new voting method must be carefully planned and introduced in accordance with the local law, sufficiently in advance of the election, so that people are not denied the right to vote because of practical problems

arising from implementation of a new system. Voters must also be made aware of the proper way to register and use any new voting system.

While States may not be obliged to introduce a system to ensure the holding of elections during the pandemic, if they decide to do so then it must be done in such a way as to respect the right to vote for all; the existence of obstacles likely does not justify any restriction of the right to vote in this context which is directed against a certain group of citizens.

In fact, the issuance of Order no.219 dated 19.04.2021 “For quarantine of persons entering to the Republic of Albania from the Republic of North Macedonia and Greece”, of the Minister of Health and Social Protection, does not constitute a direct interference in the restriction of the right to vote, but constitutes an obstacle to the restriction of this right.

Mandatory quarantine as a restrictive measure for freedom of movement and why not, also as a deprivation of individual freedom, consequently and as a result leads to restriction of the right to vote of all those voters who must comply with the obligation of quarantine, according to the provisions above mentioned of the order of the Minister of Health and Social Protection.

The decision-making carried out, either by the Interim Committee on the Infection spread of the new Coronavirus, or even by the Minister of Health and Social Protection, at best, it has not taken into account the competability of the rights and freedoms it interferes with in this case, on the part of the state and moreover, it overlooked a very important aspect of "consequential restrictions", which are precisely related to the real restriction of the right to vote.

So, there is no direct concrete decision-making regarding the restriction of the right to vote of persons, voters, who come to the Republic of Albania from the Republic of North Macedonia and Greece, but this right is inevitably limited by the provisions of Order no.219 dated 19.04.2021 "For quarantine of persons entering to the Republic of Albania from the Republic of North Macedonia and Greece", of the Minister of Health and Social Protection.

If there was a decision that would directly limit the right to vote of this group of voters, our state would have to use the opportunity to derogate from its obligations in order to ensure certain rights and freedoms of the Convention, in some very special and limited situations, as it is defined in Article 15 of the European Convention on Human Rights.

In the definitions given in this article, it is expressly stated that:

“1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”

According to the International Court of Justice, derogation as a concept has the effect of ceasing the protection provided by international human rights law. Therefore, those referred to in Article 15 should be considered only when a State concludes that the

exigencies of an emergency situation make it impossible to protect the rights, within the framework provided by the exceptions allowed.

Derogation may represent acceptance that any restriction of rights should be temporary, reviewed and used only for the purpose of combating the impact of the emergency.

However, it is clear that there are real risks to human rights from responses of the state to the Covid-19 pandemic, regardless of whether or not the state has derogated from the European Convention on Human Rights.

The question of whether the derogation is justified by the pandemic depends on the nature of the measures taken by the state, if they can be justified under the normal exceptions allowed, if they constitute an effective tool for health protection and if they are used only for the purposes for which they were obtained.

And in fact, our country has not derogated from the right to vote for any category of persons, according to the provision made in Article 3 of Protocol No. 1, of the European Convention on Human Rights.³ In these circumstances, it is important to note that, according to the European Convention on Human Rights, whatever solution is proposed by its Member States when faced with the pandemic, with or without derogation, their actions must always be in accordance with the context, principles and spirit of the Convention.

One way that the state can try to ensure accountability during the pandemic is through the People's Advocate (Ombudsperson), who can be assigned to the monitoring emergency measures and identifying potential human rights abuses.

The protection of human rights should not be seen as an obstacle to the protection of health. Applying the principles of legality and proportionality can help to ensure that measures taken as a means to respond to the pandemic are efficient and effective in their purpose of protecting health, without infringing on other human rights to an unnecessary degree.

We also bring to your attention the fact that, Order no. 219 dated 19.04.2021 "For quarantine of persons entering to the Republic of Albania from the Republic of North Macedonia and Greece", was approved at a time when the Central Election Commission has not stepped up to guarantee (at least for these elections) the effective exercise of the right to vote of Albanian immigrants in the countries where they live and reside, outside of Albania.

Thereby, it is obviously that our country's relevant and responsible state bodies or institutions have not been able to demonstrate that such measures were taken as a last resort, after considering other options and concluding that the spread of Covid-19 could not have been controlled under less restrictive conditions. The citizens have not been notified in time, so they could have the opportunity to act in the most appropriate way to ensure their right to vote.

³ *In this aspect, it would be appropriate for the Albanian state to make a declaration of derogation to the Secretary General of the Council of Europe according to the provision made in Article 15 of the ECHR, which provides that: "1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7. 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed".*

Furthermore, from the contacts made with senior representatives of the Central Election Commission, we have been informed that it is impossible for those persons, Albanian citizens that are within the territory of the country, to vote on the day of the elections, who turned out to be infected with Covid-19, despite the fact that other neighboring countries have applied successful measures in their previous elections, for this purpose.

On the other hand, it would have been very reasonable that in Order no. 219 dated 19.04.2021, as an option of acceptable restrictive measures, if it was determined that all those persons who, upon entering the border, will have to present a PCR test for COVID-19, or any other laboratory test that proves negative result of infections. Other measures that could be taken from the Albanian state as an approach to its citizens it could be the organization of free tests for these citizens. The main interest of every state is to create trust in citizens that it guarantees their rights effectively, and that it does not line up in any case to show the attention in every decision it takes towards the legitimate interest of every citizen. Even in cases of extreme coercion in which there would be no other way out, the state authority would have to show maximum transparency in decision-making and explain in details that the measure taken was unavoidable and that any other measure would have not been effective.

As a concrete prediction, it could be considered the rapid test for Covid 19, at least for all persons coming to the Republic of Albania from the Republic of North Macedonia and Greece, until April 25, 2021.

Despite these considerations for other completely possible options, none of them have been demonstrated or evaluated to understand that the quarantine measure defined in Order no. 219 dated 19.04.2021, is the last solution to prevent the spread of Covid - 19.

It should be noted that the Constitution of the Republic of Albania, in Article 15, defines the basic human rights and freedoms as "indivisible, inalienable and inviolable" and as the basis of our entire legal order, thus sanctioning equality and the prohibition of discrimination for all individuals who live in the territory of the Republic of Albania.

Order no. 219 dated 19.04.2021 "For quarantine of persons entering to the Republic of Albania from the Republic of North Macedonia and Greece", is a normative administrative act.

In the conditions where this act's content creates this situation, it is necessary to take measures to address and regulate this situation, which leads us to the completely illegal restriction of the right to vote, of persons who come to the Republic of Albania from the Republic of North Macedonia and Greece.

According to the provisions of the Code of Administrative Procedures (articles 113-117), Order no. 219 dated 19.04.2021 of the Minister of Health and Social Protection, can be completely canceled by the administrative body that issued it, in order that the cancellation have retroactive effect and remedy an unreasonable situation created by the effects of the above-mentioned order.

In this perspective, we want to remind the definition already accepted by the European Parliament, regarding maladministration by public administration bodies, according to which:

"Maladministration occurs where a public authority fails to act in accordance with a rule or principle that is binding upon it".

For the above, in order to protect the right to choose, based on Article 1 of the "Universal Declaration of Human Rights", where it is expressly stated that:

“All human beings are born free and equal in dignity and rights”,

in support of point 3, of article 63, of the Constitution, where it is expressly stated that:

“The People's Advocate has the right to make recommendations and propose measures when he notices a violation of human rights and freedoms by the public administration”,

and in accordance with point 1, of article 113, of the Code of Administrative Procedures, where it is expressly stated respectively that:

“An administrative act can be annulled or repealed, mainly by the public body that has the authority to issue the act, by its superior body or by another body expressly provided for in the law”,

R E COMMENDATIONS

The immediate initiation and conclusion of the administrative procedure for cancellation, mainly through the issuance of a new written act, which completely cancels Order no. 219 dated 19.04.2021 "For quarantine of persons entering to the Republic of Albania from the Republic of Macedonia North and Greece", for all the legal reasons cited in this recommendation.

Taking measures to prevent disproportionately of the Albanian citizens, who live or work in the Republic of Greece or the Republic of North Macedonia from the constitutional right to vote.

In accordance with Article 22 of Law no. 8454 dated 4.02.1999 "On the Ombudsman", supplemented by Law no. 8600 dated 10.04.2000, amended by Law no. 9398 dated 12.05.2005, where it is stated that:

“The organs to whom the People's Advocate has submitted a recommendation must review the recommendation and shall reply with within 30 days from the date of the recommendation is delivered”, based on the urgent issue, we ask you to evaluate this recommendation immediately, and please, after reviewing it, do let us know your position on this recommendation.

While believing in your understanding and cooperation,

People's Advocate

Erinda Ballanca