



OBSERVATORY ON THE RESPECT FOR FUNDAMENTAL RIGHTS IN EUROPE

Newsletter n. 101

15 November 2023

Below are the main updates concerning case-law and acts relevant to the protection of fundamental rights, as published in the web site www.europeanrights.eu

For the acts of the **European Union** we have included:

- the Directive (EU) 2023/1544 of 12.07.2023 laying down harmonised rules on the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings;
- the Regulation (EU) 2023/1543 of 12.07.2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings.

For the **Court of Justice**, we added the decisions:

- 26.10.2023, C-307/22, *FT (Copies du dossier médical)*, on personal data processing, the right to access to one own's data and on the right to obtain the first copy of such data free of charge;
- 19.10.2023, C-660/20, *Lufthansa CityLine*, on the principle of non-discrimination of part-time workers;
- 12.10.2023, C-726/21, *INTER CONSULTING*, on the principle of *ne bis in idem*;
- 12.10.2023, C-57/22, *Ředitelství silnic a dálnic*, on the right to paid annual leave;
- 12.10.2023, C-45/22, *Service fédéral des Pensions*, on social security of migrant workers;
- 05.10.2023, C-565/22, *Verein für Konsumenteninformation*, on the membership to a learning platform and on consumers' protection;
- 05.10.2023, C-496/22, *Brink's Cash Solutions*, on the procedure of information and consultation of workers in the event of a project for collective dismissal;
- 05.10.2023, C-219/22, *QS (Révocation du sursis)*, on judicial cooperation in criminal matters;
- 28.09.2023, C-133/22, *LACD*, on consumers' protection;
- 21.09.2023, C-568/21, *Staatssecretaris van Justitie en Veiligheid (Carte diplomatique)*, on the criteria and mechanisms of determination of the Member State competent to examine the request of international protection;
- 21.09.2023, C-164/22, *Juan*, on the European arrest warrant and the principle of *ne bis in idem*;
- 21.09.2023, C-151/22, *Staatssecretaris van Veiligheid en Justitie (Opinions politiques dans l'État membre d'accueil)*, on the conditions in order to benefit of the status of refugee;
- 21.09.2023, C-143/22, *ADDE and others*, on the temporary reintroduction by a Member State of border controls at its internal borders;

- 14.09.2023, C-113/22, *TGSS (Refus du complément de maternité)*, on equal treatment between men and women in the matter of social security and on the principle of non-discrimination on grounds of sex;
- 14.09.2023, C-71/21, *Sofiyska gradska prokuratura and others (Mandats d'arrêt successifs)*, on judicial cooperation in criminal matters;
- 14.09.2023, C-55, *Bezirkshauptmannschaft Feldkirch*, on the principle of *ne bis in idem*;
- 14.09.2023, C-27/22, *Volkswagen Group Italia and Volkswagen Aktiengesellschaft*, on the application of the principle of *ne bis in idem* to penalties imposed for unfair trade practices qualified as administrative penalties of criminal nature;
- 07.09.2023, C-216/21, *Asociația "Forumul Judecătorilor din România"*, on the independence of judges;
- 07.09.2023, C-209/22, *Rayonna prokuratura Lovech, TO Lukovit (Fouille corporelle)*, on the effective exercise of the right of defence by the suspected and accused persons on the occasion of the judicial review on the measures to obtain evidence;
- 07.09.2023, C-162/22, *Lietuvos Respublikos generalinė prokuratūra*, on personal data processing in the electronic communications sector;
- 05.09.2023, C-689/21, *Udlændinge- og Integrationsministeriet (Perte de la nationalité danoise)*, on the loss of the status of Union national;
- 24.07.2023, C-107/23 PPU, *Lin*, on the fight against the fraud against financial interests of the EU.

For the **European Court of Human Rights** we would like to highlight the judgments:

- 16.11.23, *A.E. and T.B. v. Italy* (n. 18911/17, 18941/17 and 18959/17), and *W.A. and other v. Italy* (n. 18787/17), on the violation of article 3 of the Convention in the case of nine Sudanese nationals arrived in Italy during the summer of 2016 and the attempted or actual removal of them from Italy by the authorities;
- 16.11.23, *Džibuti and others v. Latvia* (n. 225/20 and other two), according to which the increase of teaching of Latvian language in schools has not led to a discrimination against Russian-speaking people;
- 16.11.2023, *G.T.B. v. Spain* (n. 3041/19), on the violation of the Convention because of the long wait to register, at the Central Civil Registry in Spain, the birth of a baby in Mexico;
- 14.11.2023, *Nika v. Albania* (n. 1049/17), according to which Albanian authorities should have identified and punished the persons responsible for the death of the applicants' relative during a political protest in 2011 in front of the office of the Prime Minister;
- 09.11.2023, *Legros and others v. France* (n. 72173/17 and other 17), according to which, while the introduction by law of a new time limit for lodging applications with the French administrative courts does not limit excessively the right to access to a court, its immediate application to ongoing proceedings violates article 6(1) of the Convention;
- 31.10.2023, *Bild GmbH & Co KG v. Germany* (n. 9602/18), according to which the injunction to take down the unpixelated video concerning the arrest in a night club in Brema from the "Bild" website violated the Convention;
- 26.10.2023, *Plechlo v. Slovakia* (n. 18593/19), on the lack of guarantees for a top-ranking official of the National Property Fund for whom the Court authorised tapping of telephone conversations to which the applicant was randomly a party, in the context of a criminal investigation which did not directly concern him: the Court found the violation of the Convention;
- 24.10.2023, *A.M.A. v. the Netherlands* (n. 23048/19), according to which the Dutch authorities did not carry out a rigorous enough assessment of the risk when expelling a Bahraini national to his country of origin;
- 24.10.2023, *Pajak and others v. Poland* (n. 25226/18, 25805/18, 8378/19 and 43949/19), according to which the law establishing a lower retirement age to 60 years old for female judges is in violation of the Convention;

- 19.10.2023, *Locascia and others v. Italy* (n. 35648/10), which established that waste pollution following the crisis of waste collection, treatment and disposal services in the region of Campania and coming from a landfill violate human rights;
- 12.10.2023, *Total S.A. and Vitol S.A. v. France* (34634/18 and 43546/18), according to which the conviction of Total S.A. and Vitol S.A. for bribing foreign public officials in contravention of United Nations' "oil-for-food" programme did not breach Article 7 of the Convention;
- 10.10.2023, *I.V. v. Estonia* (n. 37031/21), on the violation of the father's rights in a case concerning the adoption of his son in Estonia, while the paternity proceedings were pending in Latvia;
- 03.10.2023, *El-Asmar v. Denmark* (n. 27753/19), on the excessive use of force and the lack of adequate investigations, in violation of the Convention, with regard to the deployment of pepper spray against a prisoner by prison guards;
- 26.09.2023, Grand Chamber judgement, *Yüksel Yalçınkaya v. Turkey* (n. 15669/20), according to which Turkey must address the systemic problem of convictions for terrorism offences based decisively on the accused's use of the ByLock messaging application;
- 14.09.2023, *Valiullina and others v. Latvia* (n. 56928/19 and other 2), according to which the increase of teaching of Latvian language in schools has not led to a discrimination against Russian-speaking people;

and the decision:

- 09.11.2023, decision of inadmissibility, *Rivadulla Duró v. Spain* (n. 27925/21), which declared inadmissible the application lodged by the rapper Pablo Hasél against his conviction on charges of public praise or justification of terrorism, insult and slander against the Crown, and insult and slander against State institutions.

For the **extra-European area** we have included:

- the decision of the Supreme Court of Georgia (United States) of 24.10.2023, which reverted the decision of the District Court, which found null the law of the State on abortion "Living Infants Fairness and Equality Act" ("LIFE Act"), confirming the prohibition of the interruption of pregnancy when the heartbeat of the foetus can be detected;
- the decision of the Supreme Court of Mauritius of 4.10.2023, which found the constitutional illegitimacy, deeming it as a discriminatory norm, of section 250(1) of the Criminal Code, where it provided for the crime of sodomy and criminalized sexual acts between consenting adults;
- the decision of the Supremo Tribunal Federal (Brazil) of 21.9.2023, which pronounced itself against the introduction of a time limit for the demarcation of indigenous lands, in particular if there had been the traditional occupation of the land by the community from the date of the promulgation of the constitution, i.e. from the 5 October 1988;
- the decision of the Suprema Corte de Justicia de la Nación (Mexico) of 6.9.2023, which found the constitutional illegitimacy of the norms of the Criminal Code which criminalize the voluntary interruption of pregnancy;
- the decision of the Court of Final Appeal of the Hong Kong Special Administrative Region of 5.9.2023, according to which the Govern must establish an alternative legal framework for the recognition of the relations between persons of the same sex and which also analyses the jurisprudence of the Court of Strasbourg;
- the decision of the Inter-American Court of Human Rights of 29.8.2023, case *Bendezú Tuncar vs. Peru*, which excluded the international responsibility of the State for the violation of the right to an effective remedy in a proceeding for dismissal; the decision of 23.8.2023, case *Guzmán Medina y otros vs. Colombia*, which found the violation of the right to life, to personal integrity, to an effective remedy and the right to know the truth, in relation to the forced disappearance of Arles Edisson Guzmán Medina during the operation "Operación Orión", promoted by the State in 2002 in the territory of

Comuna 13 of Medellin; and the decision of 22.8.2023, case *María y otros vs. Argentina*, which recognizes the responsibility of the State for the removal of a child from his mother, of 13 years old, at the time of the birth and the custody to a different family following an irregular proceeding, in violation of the rights of children, the right to the respect for family life, to the protection of the family, to an effective remedy, personal integrity, to identity and the right to live without violence.

As far as **case law of national courts** is concerned, the following decisions must be highlighted:

- **Belgium:** the decision of the *Cour constitutionnelle* n. 131/2023 of 12.10.2023, which quashed several norms of the law of 25 December 2016 concerning the processing of passengers' data, which transposed Directive 2016/681/EU ("PNR Directive"), in the light of the decision of the Court of Justice in the case C-817/19, *Ligue des droits humains*, issued following the preliminary referral ordered by the same Constitutional Court; and the decision n. 117/2023 of 14.9.2023, on the concept of dependent child in relation to the reunification of a family member of a Belgian national, pursuant to the norms of the law of 15 December 1980 on the access to the territory, the stay, establishment and the removal of foreigners, which recall the ECHR, EU legislation relevant in such matter, and the jurisprudence of the Courts of Strasbourg and Luxembourg; and the decision of the *Conseil d'État* of 13.9.2023, which, also recalling the norms of Directive 2013/33/EU, suspended the execution of the decision of the *Secrétaire d'État à l'Asile et la Migration* with which the Secretary of State temporarily excluded single men from reception measures for asylum seekers;
- **Bosnia and Herzegovina:** the decision of the *Ustavni sud* (Constitutional Court) n. AP-267/23 of 13.7.2023, which finds the violation of article 5 of the ECHR against a minor detained in an immigration centre in virtue of the time passed between the beginning of detention and the notification of the reasons of such detention, of the whole length of the proceeding, and of the delay in the examination of his condition of vulnerability as an unaccompanied minor, also in the light of the jurisprudence of the Court of Strasbourg; the decision n. AP-270/21 of 13.7.2023, on the balance between the right to reputation and the right to freedom of expression also in the light of the jurisprudence of the Court of Strasbourg, which finds the violation of article 10 of the ECHR; the decision n. AP-476/21 of 13.7.2023, on the violation of the right to property within a procedure of dispossession, in the light of article 1 of Protocol n. 1 to the ECHR and of the jurisprudence of the Court of Strasbourg; and the decision n. AP-581/21 of 13.7.2023, on the violation of the right to a fair trial, pursuant to article 6 of the ECHR, in virtue of the excessive length of the proceeding;
- **Czech Republic:** the decision of the *Ústavní soud* (Constitutional Court) of 7.9.2023, in the matter of foster care of a minor, which, also recalling the jurisprudence of the Court of Strasbourg, confirms the decision of the lower Court with regard to the custody in favour of the grandparents, which was considered in the best interest of the child, although the Court found the violation of the right to the respect for family life of the applicants from whom the minor had been unlawfully removed; and the decision of 31.7.2023, which rejects the request of compensation in a case concerning the responsibility of a hospital for the doctors' order *Do-Not-Resuscitate* (DNR) with regard to a patient who died from cardiac arrest, without previously informing the patient or her relatives, also recalling the guidelines of the Council of Europe and the jurisprudence of the Court of Strasbourg;
- **France:** the decision of the *Cour de cassation* n. 1093/2023 of 25.10.2023, on time contracts for temporary work, which recalls EU legislation; and the decision n. 2001/2023 of 25.10.2023, in the matter of working time, which recalls the norms of Directive 2003/88/EC;
- **Germany:** the decision of the *Bundesverfassungsgericht* (Federal Constitutional Tribunal) of 31.10.2023, in the matter of multiple criminal investigations, which recalls articles 50 and 52 of the Charter of Fundamental Rights of the European Union; the decision of 18.10.2023, in the matter of retirement age for notaries, which several

- times recalls article 21 of the Charter of Fundamental Rights of the European Union; and the decision of 16.10.2023, on the alleged lack of reasoning concerning the possible violation of fundamental rights caused by the restrictions imposed during pre-trial detention, which recalls the jurisprudence of the Court of Strasbourg;
- **Ireland:** the decision of the Court of Appeal of 20.10.2023, on the procedural requirements for the issue of an administrative decision revoking a residence permit obtained through the marriage to a European Union national, which recalls EU legislation and the jurisprudence of the Courts of Strasbourg and Luxembourg; and the decision of the High Court of 4.9.2023, on the deficient implementation of EU norms in the matter of organization of working time, in violation of articles 20 and of the EU Charter of Fundamental Rights, and on the principle of interpretation consistent with Union law;
 - **Italy:** the decision of the Corte costituzionale n. 192 of 26.10.2023, on the "case Regeni" with regard to the prosecution of the trial against accused persons of different nationality for whom, lacking the collaboration of the authorities of their State, there is no evidence that they know about the existence of the proceeding, which recalls national, European and international constitutional principles; the decision of the Corte di cassazione n. 28320 of 10.10.2023, on the calculation of the "constitutional minimum salary" and of the treatment for paid leaves, establishing that also overtime and night work must be considered when they are inborn in that type of work, recalling the jurisprudence of the Court of Justice and the Union Directive of 2019 on "adequate minimum salaries"; the decision n. 27711 of 2.10.2023, on the matter of "constitutional minimum salary", which recalls the criteria of international source for the calculation of an adequate salary, according to article 5 of the Union Directive of 2019 on "adequate minimum salaries"; the decision n. 26801 of 19.9.2023, which deems inhuman and degrading the detention conditions at the Centre of identification and expulsion (Cie) of Bari Palese also in the light of the two European Charters of rights; the decision n. 34533 of 7.8.2023, which finds null the decision for the lack of translation of the decree of summons to trial in the language of the accused person, and which recalls the jurisprudence of the Court of Strasbourg; the decision n. 30277 of 12.7.2023, on the obligations for the State of execution to ascertain the serious risks of inhuman and degrading treatments against the prisoner transferred to other States, which recalls the jurisprudence of the Court of Strasbourg; and the decision n. 36407 of 12.4.2023, which establishes that the justification of the exercise of the right to information only covers the crimes committed by publishing the news, not even those committed in order to obtain such news, also in the light of the jurisprudence of the Court of Strasbourg; the decision of the Tribunale di Catania of 29.9.2023, which did not validate the measure of detention imposed to a Tunisian national, considering the national legislation incompatible with the norms of Directive 2013/33/EU as interpreted by the Court of Justice; the decree of the Tribunale di Firenze of 20.9.2023, on the question of the concept of "safe Country" and of the duty of update of the assessment of such concept and which recalls the supranational norms in the matter of repatriation; and the decision of the Tribunale di Milano of 28.9.2023, which finds the illegitimacy of the withdrawal notified to hundreds of riders "false self-employed workers" because in violation of the norms on collective dismissal, according to the EU Directive;
 - **Portugal:** the decision of the Tribunal Constitucional n. 652/2023 of 10.10.2023, which finds the constitutional illegitimacy of articles 196 and 235 of the Code of execution of penalties and measures of deprivation of liberty (*Código de Execução das Penas e Medidas Privativas de Liberdade*), where they did not provide for the claim against the decision rejecting the request of permit in order to go out prison, also recalling the jurisprudence of the Court of Strasbourg;
 - **Slovenia:** the decision of the Ustavno Sodišče (Constitutional Court) of 8.6.2023, in the matter of extradition and assessment of the circumstances which, according to article 3 of the ECHR, may lead to the refusal of execution by the Minister, which determines the constitutional legitimacy of the norms of the Criminal Procedure Code relevant in such matter;

- **Spain:** the decision of the *Tribunal Constitucional* n. 94/2023 of 12.9.2023, which rejects the claim lodged against Organic Law 3/2021 regulating euthanasia, also in the light of the jurisprudence of the Court of Strasbourg;
- **The Netherlands:** the decision of the *Rechtbank Den Haag* (District Tribunal of The Hague) of 13.10.2023, which rejected the claim lodged by Extinction Rebellion against the use by the police of water cannons during pacific demonstrations, also in the light of articles 10 and 11 of the ECHR.

For what concerns **comments**, we have included the following texts:

Articles:

[Giuseppe Bronzini](#) "Contribution of the Court of Cassation to solve the question of 'indecent salaries'"

[Vincenzo De Michele](#) "The issue of bathing concessions after the decisions of the administrative court of Lecce and of the joined sections of the Court of Cassation"

[Lucia Tria](#) "Can contracted public employment be really assimilated to the private sector?"

Notes and comments:

[Gabriella Cappello](#) "Comment on the decision of the ECHR, case *Calvi v. Italy*, of 6 July 2023, on the respect for private and family life"

[Antonella Di Florio](#) "Direct and indirect discrimination and hate language"

[Monia Giovannetti](#) "Prism of reception: the legislation in such matter in the light of law n. 50/2023"

[Deborah Tripiccion](#) "Comment to the decision of the EUCJ of 7 September 2023, C-162 of 2022, on gathering and processing of phone records"

[Deborah Tripiccion](#) "Comment to the decision of the ECHR, *Yusel Yalçinkaya v. Turkey*, of 26 September 2023, on the circumstantial value of the use of the encrypted i-message app named "Bylock" in a proceeding against a terrorist group"

Documents:

[Study](#) of the University of Essex and of the United Nations High Commissioner for Human Rights "Digital Border Governance: A Human Rights Based Approach", of 18 September 2023