



OBSERVATORY ON THE RESPECT FOR FUNDAMENTAL RIGHTS IN EUROPE

Newsletter n. 67

15 March 2018

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 Recommendation of the European Ombudsman of 9.2.2018 in case OI/2/2017/TE on the Transparency of the Council legislative process
- the European Parliament study of 2.2.2018 "*Prospects for e-democracy in Europe*";
- the European Commission Communication of 24.1.2018 on the guidance on the direct application of the General Data Protection Regulation
- the European Parliament study of 11.1.2018 "*The (ir-)revocability of the withdrawal notification under Article 50 TEU*".

For the **Council of Europe** we would like to highlight the following resolutions and recommendations:

of the **Parliamentary Assembly**:

- the Recommendation 2123 of 26.01.2018 "Strengthening international regulations against trade in goods used for torture and the death penalty";
- the Resolution 2206 and the Recommendation 2122 of 26.01.2018 "Jurisdictional immunity of international organisations and rights of their staff";
- the Resolution 2204 of 25.01.2018 "Protecting children affected by armed conflicts";
- the Resolution 2202 of 25.01.2018 "The Israeli-Palestinian peace process: the role of the Council of Europe";
- the Recommendation 2121 of 24.01.2018 "The case for drafting a European convention on the profession of lawyer";
- the Resolution 2199 and the Recommendation 2120 of 24.01.2018 "Working towards a framework for modern sports governance";
- the Resolution 2198 and the Recommendation 2119 of 23.01.2018 "Humanitarian consequences of the war in Ukraine";
- the Resolution 2197 of 23.01.2018 "The case for a basic citizenship income";
- the Resolution 2196 and the Recommendation 2118 of 23.01.2018 "The protection and promotion of regional or minority languages in Europe";

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

- 22.02.2018, C-328/16, *Commission v. Greece*, on the sentence against Greece following the failure to fulfil the directive on urban waste-water treatment;
- 22.02.2018, C-336/16, *Commission v. Poland*, on Poland's violation of EU law on ambient air quality;
- 22.02.2018, C-103/16, *Porrás Guisado*, on the dismissal of pregnant workers after a collective redundancy procedure;
- 21.02.2018, C-132/17, *Peugeot Deutschland*, on the concept of "audiovisual media service" and freedom to provide services;
- 21.02.2018, C-518/15, *Matzak*, on the concept of "working time" and "rest periods" and the protection of workers' safety and health;
- 6.02.2018, C-359/16, *Altun and others*, on the decision, in cases of fraud, to disregard social security certificates issued to workers posted within the EU;
- 25.01.2018, C-360/16, *Hasan*, on the determination of the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national and on the procedures and periods laid down for making a take back request after the unlawful return of a third-country national to a Member State that has transferred him;
- 25.01.2018, C-473/16, *F*, on the use of psychological tests to recognize the status of refugee and the ascertainment of sexual orientation as proportioned interference in private life;
- 25.01.2018, C-498/16, *Schrems*, on the definition of "consumer" and the assignment between consumers of claims against the same trader or professional;
- 23.01.2018, C-367/16, *Piotrowski*, on the European arrest warrant issued against a minor and the prohibition to surrender him in case he hasn't reached the age to be considered criminally responsible of the facts at the origin of the arrest warrant;
- 18.01.2018, C-270/16, *Ruiz Conejero*, on the dismissal of an employee by reason of intermittent absences, even where justified, resulting from illnesses linked to his disability;
- 16.01.2018, C-249/17, *E*, on the repatriation of a third country national with a regular residence permit, issued by a Member State, by another Member State on grounds of public security and on the rights of the said national;

and the conclusions of the **Advocate General**:

- 11.01.2018, C-673/16, *Coman and others*, on the right to entry and permanent residence of a third Country national, who is spouse of the same sex of a EU national.

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

- 30.01.2018, *Etute v. Luxembourg* (n. 18233/16), on the impossibility to appeal against a decision revoking the applicant's release on licence;
- 30.01.2018, *Sekmadienis Ltd. v. Lithuania* (n. 69317/14), on the fine imposed to a company for having advertised clothes using references to Jesus and Mary;
- 30.01.2018, *Enver Şahin v. Turkey* (n. 23065/12), on the lack of an effective and personalized assessment of the needs of a handicapped student, in order to gain access to the university building;
- 25.01.2018, *J.R. and others v. Greece* (n. 22696/16), on the detention of an asylum seeker for thirty days in a Hotspot, under the EU-Turkey agreement, deemed not in breach of the Convention;
- 25.01.2018, *Bikas v. Germany* (n. 76607/13), on the sentence establishing a sanction which took account of offences of which the applicant had not been found guilty, deemed not in breach of the Convention;

- 23.01.2018, *Magyar Kétfarkú Kutya Párt v. Hungary* (n. 201/17), on the sanction imposed to a party, which put a mobile telephone application at voters disposal, in order to allow to exchange anonymous photos of their voting papers;
- 23.01.2018, *Kuchta v. Poland* (n. 58683/08), on the sentence based on the co-defendant's statements, without any possibility of counter-interrogation;
- 18.01.2018, *National Federation of Sports Associations and Unions (FNASS) and Others/Fédération nationale des associations et syndicats sportifs (FNASS) et autres v. France* (n. 48151/11 and 77769/13), on the whereabouts requirement imposed on targeted athletes for the purpose of unannounced anti-doping controls;
- 16.01.2018, *Čeferin v. Slovenia* (n. 40975/08), on the fine for contempt of court imposed to a lawyer for making critical statements about, in particular, the public prosecutor and the expert witnesses during the trial;
- 16.01.2018, *Ciocodeică v. Romania* (n. 27413/09), on the responsibility of the State for the unsuccessful attempts to enforce a final court ruling against the debtor;
- 11.01.2018, *Cipolletta v. Italy* (n. 38259/09), on a complaint, within an administrative liquidation proceeding, concerning the list of claims: the Court found the applicability of article 6 of the Convention (right to a fair trial);
- 11.01.2018, *Sharxhi and others v. Albania* (n. 10613/16), on the demolition of flats and business premises by national authorities, despite an interim order issued to refrain from any actions that could breach the applicants' property rights: according to the Court the right of property was violated;
- 9.01.2018, *Kadusic v. Switzerland* (n. 43977/13), on an institutional therapeutic measure applied to a prisoner, extending his period of detention, on psychiatric reports deemed not sufficiently recent, and on the detention in an institution which was deemed inappropriate to his mental disorder;
- 9.01.2018, *Catalan v. Romania* (n. 13003/04), on the dismissal of a civil servant for disclosing information for the publication of an article without his employer's permission: the dismissal was deemed not in breach of the Convention;
- 9.01.2018, *López Ribalda and others v. Spain* (n. 1874/13), on the covert video surveillance of the cashiers of a supermarket by their employers;
- 9.01.2018, *GRA Foundation against racism and Anti-Semitism v. Switzerland* (n. 18597/13), on the case of the NGO which had been found responsible, by domestic courts, for defamation of a politician by classifying his remarks at a speech as "verbal racism".

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

- the decision of the *Supreme Court of British Columbia* (Canada) of 17.1.2018, which found the incompatibility of the norms of the "Corrections and Conditional Release Act" ("CCRA"), in the matter of administrative segregation, with the Canadian Charter of Rights and Freedoms, where they allow a prolonged and indefinite confinement of any person;
- the order of the *United States District Court for the Northern District of California* of 9.1.2018, which temporarily blocked the annulment of the program called "Deferred Action for Childhood Arrivals" ("DACA"), aiming at postponing the expulsion of irregular immigrants brought into the territory of the United States by children;
- the order of the *United States Court of Appeals for the Ninth Circuit* of 22.12.2017, which blocked the execution of section 2 (with some exceptions and limitations) of the Proclamation No. 9645 entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats", aiming at suspending or limiting the entry in the United States of citizens from 8 Countries, because it was adopted exceeding the scope of the delegated authority of the President and in lack of a legally sufficient finding on the noxiousness for the interests of the United States of the entry of certain individuals;
- the Advisory Opinion OC-24/17 of the *Inter-American Courts of Human Rights* of 24.11.2017 on "*Identidad de Género e Igualdad y no Discriminación a parejas del*

mismo sexo”, requested by the Republic of Costa Rica, which established that the change of the name and of the public registries and identity documents, in virtue of the self-perceived gender identity, is a right recognized by the Convention, and that the Convention protects the family deriving from same-sex couples, to whom the States must recognize and guarantee all the rights descending from the recognition of such family, as well as the access to all rights provided for by the national legal systems; the decision of 23.11.2017, case *Trabajadores cesados de Petroperú and others vs. Perú*, on the violation of the guarantee of the right to an effective remedy in the event of collective dismissal of the workers of some State companies subjected to privatization and rationalization of the employees between 1996 and 1998; and the decision of 15.11.2018, case *Pacheco León and others vs. Honduras*, on the lack of adequate investigations on the homicide of Ángel Pacheco León, candidate in the Parliamentary elections of 2001 for the *Partido Nacional de Honduras*.

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

- **Belgium:** the decision of the *Cour constitutionnelle* n. 16/2018 of 7.2.2018, in the matter of privation of nationality, which recalls the norms of the ECHR and the EU Charter of fundamental rights and the jurisprudence of the Court of Strasbourg; the decision n. 9/2018 of 1.2.2018, which states the constitutional illegitimacy, and incompatibility with article 6 of the ECHR, of articles 479 and 480 of the Criminal Procedure Code on proceedings concerning violations committed by judges and others officials; the decision n. 8/2018 of 18.1.2018, which states the constitutional legitimacy of article 2 of the law of 20 July 2015, which, aiming at strengthening the fight against terrorism, introduces article 140 *sexies* in the Criminal Code, in order to prosecute those who leave the national territory – or entry into it – in sight of the commission of crimes of terrorism, examining, among others, the norms of the ECHR and of the EU Charter of fundamental rights and EU legislation relevant in such matter; the decision n. 3/2018 of 18.1.2018, on the constitutional legitimacy of article 318(2) of the Civil Code, in the matter of paternity dispute, which applies the ECHR and the jurisprudence of the Court of Strasbourg; and the decision n. 148/2017 of 21.12.2017, which judges on the claim for the partial annulment of the law of 5 February 2016, which amends the criminal law and the criminal proceeding and introduces several norms in the matter of justice, recalling the ECHR and the jurisprudence of the Court of Strasbourg;
- **France:** the decision of the *Cour de cassation* of 16.2.2018, in the matter of surrogacy, which, following the decision of the Court of Strasbourg, rejects the decision of appeal and reverts the issue also for a total compensation, deeming insufficient the compensation provided for by the European Court; the decision n. 178/2018 of 14.2.2018, which applies the principle of the so called “right to be forgotten” – i.e. the obligation, for internet browsers, to avoid putting automatically data concerning the private life of persons at anyone disposal after a certain period of time, and the obligation to, in any case, cancel people who ask for that – recalling the decision of the Court of Justice in the case *Google Spain*; and the decision n. 3/2018 of 10.1.2018, in the matter of immunity of States from civil obligations not related to the exercise of a public power;
- **Germany:** the decision of the *Bundesgerichtshof* (Federal Court of Cassation) of 25.1.2018, which applies the Regulation (EU) n. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; and the decision of 18.1.2018, which mentions the decision of the Court of Strasbourg in the case *Czekalla v. Portugal*, for violation of article 6 of the ECHR; the decision of the *Landgericht Berlin* (Regional Court of Berlin) of 24.1.2018, on Facebook terms on the use and protection of personal data, deemed insufficient to guarantee the informed consent of the users, which recalls EU law and the jurisprudence of the Court of Strasbourg; the decision of the *Verwaltungsgericht Minden* (Administrative Tribunal of Minden) of 13.1.2018, which rejects the request for asylum lodged by Azerbaijani nationals with Latvian visa,

recalling the Dublin III Regulation and the decision of the Court of Justice of 21.12.2011, case C-411; and the decision of the Verwaltungsgericht Köln (Administrative Tribunal of Köln) of 10.1.2018, which rejects the status of refugee applying Directive 2011/95, recalling the jurisprudence of the Court of Strasbourg in relation to article 3 of the ECHR;

- **Great Britain:** the decision of the United Kingdom Supreme Court of 21.2.2018, which states that the prohibition of inhuman and degrading treatments leads to the obligation for the police to carry out effective investigations on violent crimes; and the decision of 8.2.2018, on the limits to the possibility to provide for a caution money, in relation to the right to freedom of foreign nationals, according to national law on immigration; the decision of the England and Wales Court of Appeal of 30.1.2018, in which the Court states that the expulsion of an ill foreign national, when the health treatments necessary to prevent suffer or death are not accessible in his State of origin, amounts to a violation of article 3 of the ECHR; another decision of 30.1.2018, which found the contrast with EU law of Section 1 of the "Data Retention and Investigatory Powers Act 2014" ("DRIPA") – now substituted by the "Investigatory Powers Act 2016" – in the light of the decisions *Digital Rights Ireland* and *Tele2 Sverige AB.*; and the decision of 17.1.2018, in the matter of expulsion and guarantees of fair trial; the decision of the England and Wales High Court of 21.2.2018, which deemed unlawful the new "2017 Air Quality Plan" drawn up by the Department for Environment, Food and Rural Affairs ("DEFRA"), since it included insufficient measures to guarantee an actual conformity to Directive 2008/50/EC on ambient air quality and cleaner air for Europe; the decision of 15.2.2018, on the right to be forgotten; and the decision of 29.1.2018, in which the Court confirms that the decision of the hospital to interrupt the treatments keeping alive an 11 months' old baby against the different will of the parents, was in the child's best interest; and the decision of the Scottish Court of Session, Outer House of 6.2.2018, which refused to make a reference for a preliminary ruling to the Court of Justice on the issue, raised by the claimants, whether Great Britain could unilaterally revoke the notification of withdrawal from the EU, in accordance with article 50(2) of the Treaty on the European Union;
- **Ireland:** the decision of the Supreme Court of 14.2.2018, on the requirements of the right to be heard within the proceedings on the request of subsidiary protection, in the light of the relevant jurisprudence of the Court of Justice; the decision of 13.2.2018, in the matter of European arrest warrant, in the light of the decisions of the Court of Justice in the cases *Sławomir Andrzej Zdziaszek* and *Samet Ardic*; the decision of 1.2.2018, which refused the execution of the European arrest warrant issued by the British authorities, because of the doubts on the legal regime applicable to such matter after the United Kingdom's withdrawal from the European Union, reverting the case to a new hearing with the only aim of outlining the interpretative issues for a preliminary referral to the Court of Justice; and the decision of 21.12.2017, in the matter of right to an effective remedy and subsidiary protection, which recalls the jurisprudence of the Court of Justice; the decision of the Court of Appeal of 31.1.2018, on the principle of equal treatment in the matter of employment and working conditions, in the light of article 5 ("Reasonable accommodation for disabled persons") of Directive 2000/78/EC; and the decision of 6.12.2017, on the alleged right to residence of a third country national, parent of an Irish citizen, in the light of the principles stated by the Court of Justice in the decision *Zambrano* and in the following jurisprudence; the decision of the High Court of 21.11.2017, on the legitimacy and regularity of environmental impact assessments, in the light of Directive 2011/92/EU and of the decision of the Court of Justice in the case *Commission v. Ireland* (C-50/09); and the decision of 27.10.2017, on the wrong application of the concept of economic dependence provided for by article 2 of Directive 2004/38/EC, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, which recalls the jurisprudence of the Court of Justice;
- **Italy:** the decision of the Corte costituzionale n. 24/2018 of 14.2.2018, which excludes the applicability of the jurisprudence of the Court of Strasbourg (after having recalled it in details) with regard to the prohibition of retroactivity, in relation to measures adopted with decree of the President of the Republic, following an extraordinary claim

- to the Head of the State; the decision n. 22/2018 of 14.2.2018, which excludes that the revocation of the driving licence may be in violation of article 7 of the ECHR, assessing the jurisprudence of the Court of Strasbourg; and the decision n. 6/2018 of 18.1.2018, which states the possibility to appeal before the joined sections of the Court of Cassation, as provided for by article 111 of the Constitution, against the decisions of the Council of State and the Court of Audit only with regard to issues concerning jurisdiction, and not on questions regarding the violation of EU law or of the ECHR; the decision of the *Corte di cassazione* n. 4223/2018 of 21.2.2018, which, during the revert by the Court of Justice in the case *Abercrombie*, transposes the decision of the Court of Justice and deems manifestly ill-founded the exception of unconstitutionality of the Italian law on the access of youngsters to the so-called job on call; the order of the n. 3831/2018 of 16.2.2018, which raises question of constitutional legitimacy for violation of article 6 of the ECHR and articles 17, 47 and 49 of the EU Charter of Rights, as well as of the UN Covenant on Civil and Political Rights, with regard to a question of *ne bis in idem* concerning a sanction imposed by Consob (Italian Companies and Exchange Commission); and the order n. 3049/2018 of 8.2.2018, on extenuating circumstances beyond one's control in fiscal matters, which recalls the jurisprudence of the Court of Justice in the matter of proportionality; the decision n. 2286/2018 of 30.1.2018, on the issue of pensions of Italian workers in Switzerland, which transposes the Constitutional Court's guideline in relation to the jurisprudence of the ECHR on such case and deems inapplicable the EU Charter of Rights, because the proceeding is not linked to EU law and the Treaty of Lisbon came into force afterwards, recalling the decision of the Court of Justice in the case *Fenoll*; the decision n. 349/2018 of 9.1.2018, which excludes the contrast of national norms in the matter of prevention with the ECHR and, consequently, profiles of constitutional illegitimacy; the decision n. 31226/2017 of 29.12.2017, which defines the limits to the appeal against the decision of the Council of State before the joined sections of the Court of Cassation for violation of Union law, also in the light of the jurisprudence of the European Courts; and the decision n. 30301/2017 of 18.12.2017, on the appeal against final measures adopted by the Council of State for violation of EU law; the order of the *Corte di assise di Milano* of 14.2.2018, which raises question of constitutional legitimacy also for violation of articles 2 and 8 of the ECHR, examining the jurisprudence of the Court of Strasbourg; and the decree of the *Tribunale di Busto Arsizio* of 29.1.2018, which states, after having ascertained the jurisdiction of the Italian Court in the light of EU law, having Ryanair a national autonomous production branch, the anti-union behaviour of the employer;
- **Lithuania:** the decision of the *Konstitucinis Teismas* (Constitutional Court) of 15.3.2017, which finds the constitutional legitimacy of the norms of article 189, paragraph 1, of the Criminal Code, in the matter of unlawful enrichment, also recalling the jurisprudence of the Court of Strasbourg;
 - **Luxembourg:** the two decisions of the *Cour de cassation* of 11.1.2018, on the case *LuxLeaks* and the recognition of the status of whistle-blower of Antoine Deltour and Raphaël David Halet, in the light of article 10 of the ECHR, as interpreted on such issue by the jurisprudence of the Court of Strasbourg;
 - **Spain:** the decision of the *Tribunal Constitucional* of 22.1.2018, which judges on a case of denial of residential assistance, due to the age of the person, affected by intellectual disability, recognizing a violation of the principle of non-discrimination, also in the light of the EU Charter of Fundamental Rights, the ECHR, Directive 2000/78/EC and the jurisprudence of the Courts of Strasbourg and Luxembourg; and the decision of 11.1.2018, which found the constitutional illegitimacy, in the light of the right to an effective remedy, of article 76 e) of Law n. 50/1980, transposing article 6 of Directive 87/344/EEC on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance; and the decision of the *Tribunal Supremo* of 25.1.2018, in the matter of recognition of the survivor's pension for a de facto couple, which applies the jurisprudence of the Court of Strasbourg;
 - **The Netherlands:** the decision of the *Hoge Raad* (Supreme Court) of 6.2.2018, on the alleged role of under-cover agents in the instigation to commit a crime, which excludes its relevance in relation to the conviction of the accused, also recalling the jurisprudence of the Court of Strasbourg; and the two decisions of 2.2.2018, which,

with regard to Dutch workers in Germany with a “Mini-job” contract, makes a reference for a preliminary ruling to the Court of Justice on the interpretation of the Regulation (EEC) n. 1408/71 on the application of social security schemes to employed persons and their families moving within the Community; and the decision of the *Rechtbank Amsterdam* (District Court of Amsterdam) of 7.2.2018, which makes a reference for a preliminary ruling to the Court of Justice, asking whether Great Britain’s withdrawal from the European Union leads automatically to the loss of the European citizenship for British citizens and of all the rights and freedoms deriving from it.

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

Articles:

[Roberto Conti](#) “The jurisprudence of the ECHR, chosen cases in civil and criminal matters”

[Roberto Conti](#) “Some considerations, after the third reading, on the decision n. 269/2017”

[Giovanni Mammone](#) “Inaugural address of the judicial year”

[Oreste Pollicino](#) “Constitutional perspective on freedom of expression in the internet era”

Notes and comments:

[Giuseppe Bronzini](#) “Minimum wage in the light of the European pillar of social rights”

[Roberto Conti](#) “Comment on the decision of the civil Court of Cassation, Section II, interlocutory order of 19.12.2017”

[Vincenzo De Michele](#) “The plenary assembly of the Council of State on people holding a secondary school diploma and the decision of the Court of Justice in the case Santoro on Sicilian short term school employees: the Euro-unitary protection compensates for the (temporary) lack of the rule of law and of Europe”

[Sergio Galleano](#) “The future of socially useful work after the epoch-making decision n. 17101 of 2017 of the Court of Cassation”

[Luigi Marini](#) “Trafficking in human beings and conflicts: a difficult route between rights, politics and institutions”

[Giovanni Orlandini](#) “The Court of Busto Arsizio sentences Ryanair for anti-union behaviour”

[Francesca Paruzzo](#) “Dj Fabo: the Court of Assizes of Milan raises a question of constitutional legitimacy”

[Michelangelo Strazzeri](#) “Extenuating circumstances beyond one’s control in fiscal matters: comment on the decision n. 3049/2018 of the Court of Cassation”

Documents:

“[World Report 2018 – events of 2017](#)” by Human Rights Watch, of January 2018

[Report of the European Foundation for the Improvement of Living and Working Conditions \(Eurofond\)](#) "Long-term unemployed youth: Characteristics and policy responses", of 14 December 2017

[Report of the International Labour Organization \(ILO\)](#) "Inception Report for the Commission on the Future of work", of 4 December 2017