



## OBSERVATORY ON THE RESPECT FOR FUNDAMENTAL RIGHTS IN EUROPE

### **Newsletter n. 79**

15 March 2020

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](http://www.europeanrights.eu)

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

- the European Parliament resolution of 16.1.2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary.

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

of the **Parliamentary Assembly**:

- the Recommendation 2173 of 31.1.2020, "Combating trafficking in human tissues and cells";
- the Resolution 2327 of 31.1.2020, "Organ transplant tourism";
- the Resolution 2326 of 31.1.2020, "Democracy hacked? How to respond?";
- the Resolution 2324 and the Recommendation 2172 of 30.1.2020, "Missing refugee and migrant children in Europe";
- the Resolution 2323 and the Recommendation 2171 of 30.1.2020, "Concerted action against human trafficking and the smuggling of migrants";
- the Resolution 2322 and the Recommendation 2170 of 30.1.2020, "Reported cases of political prisoners in Azerbaijan";
- the Resolution 2321 and the Recommendation 2169 of 30.1.2020, "International obligations concerning the repatriation of children from war and conflict zones";
- the Resolution 2318 of 29.1.2020, "The protection of freedom of religion or belief in the workplace";
- the Resolution 2317 and the Recommendation 2168 of 28.1.2020, "Threats to media freedom and journalists' security in Europe";
- the Resolution 2316 of 28.1.2020, "The functioning of democratic institutions in Poland".

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

- 05.03.2020, C-135/19, *Pensionsversicherungsanstalt (Prestation pour la rééducation)*, on social security for migrant workers;
- 03.03.2020, C-717/18, *X (Mandat d'arrêt européen - Double incrimination)*, on the execution of a European arrest warrant and the removal of the verification of the double criminality of the act;

- 03.03.2020, C-482/18, *Google Ireland*, on freedom to provide services;
- 27.02.2020, C-836/18, *Subdelegación del Gobierno en Ciudad Real*, on the temporary residence permit for a third-country national, spouse of a Union national who has never exercised the freedom of movement;
- 13.02.2020, C-688/18, *Spetsializirana prokuratura (Audience en l'absence de la personne poursuivie)*, on the presumption of innocence, the right to be present at the trial in criminal proceedings and the right to a fair trial;
- 12.02.2020, C-704/18, *Kolev and others*, on the implementation of a preliminary ruling of the Court and the observance of the rights of the defence;
- 04.02.2020, joined cases C-515/17 P and C-561/17 P, *Uniwersytet Wrocławski/ REA*, on the representation of parties in direct actions before the Courts of the European Union;
- 30.01.2020, C-524/18, *Dr. Willmar Schwabe*, on nutritional and health claims made on foods and on consumer protection;
- 22.01.2020, C-32/19, *Pensionsversicherungsanstalt (Cessation d'activité après l'âge du départ à la retraite)*, on freedom of movement and residence and on the entitlement to an old age pension;
- 22.01.2020, C-175/18 P, *PTC Therapeutics International/ EMA*, and C-178/18 P, *MSD Animal Health Innovation and Intervet International/ EMA*, both on the access to documents of the European Union in the context of a marketing authorisation application for a medicinal product for human use;
- 22.01.2020, C-177/18, *Baldonado Martín*, on compensation in the event of terminated employment relationship and on the principle of non-discrimination;
- 18.12.2019, C-447/18, *Generálny riaditeľ Sociálnej poisťovne Bratislava*, on freedom of movement for workers and social security.

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

- 25.02.2020, *V. I. v. Russia* (n. 68868/14), on the removal of the parental authority of a mother, because she was a drug addict, which was deemed disproportionate, since the child had not been ill-treated, nor he was in danger and the other two younger children had been taken into public care;
- 25.02.2020, *Abukauskai v. Lithuania* (n. 72065/17), on the alleged inadequacy of the criminal investigation into an arson attack on the applicant's house;
- 20.02.2020, *M.A. and others v. Bulgaria* (n. 5115/18), on the illegitimate extradition to China, in absence of effective guarantees, of Muslims, who would risk an arbitrary detention, inhuman and degrading treatments and possibly death;
- 18.02.2020, *Cinta v. Romania* (n. 3891/19), on the restriction of the applicant's contact right on the grounds of his mental health, without a serious assessment of his condition nor of the possible impact on the safety of the minor;
- 13.02.2020, *Ibrahimov and Mammadov v. Azerbaijan* (n. 63571/16 and 5 others), on the many violations of the ECHR for the arrest of the members of the civil society movement in order to punish them for having painted political graffiti on the statue of a former president, for the lack of an effective investigation, because of the kind of applicants and the timing of events, and for the arbitrary criminal investigation for drug trafficking as an answer to political demonstrations;
- 13.02.2020, *Gaughran v. the United Kingdom* (n. 45245/15), on the disproportionate measure of the indefinite retention, and without any real possibility of review, of the DNA profile, fingerprints and photographs of a person convicted of a minor offence;
- 13.02.2020, *Sanofi Pasteur v. France* (n. 25137/16), on the account of the method for calculating the starting point for the limitation period in respect of the compensation proceedings: the court set the starting point at the date of stabilisation of the illness;
- 11.02.2020, *Vovk and Bogdanov v. Russia* (n. 15613/10), on the lack of an effective investigation into the explosion of a grenade in a residential area, which caused many victims;
- 11.02.2020, *Buturugo v. Romania* (n. 56867/15), on the lack of criminal investigation into domestic violence;

- 11.02.2020, *Atamanchuk v. Russia* (n. 4493/11), on the conviction and ban from journalistic activities of a businessman for hate speeches inciting against ethnic groups;
- 04.02.2020, *Alexandru Mrian Iancu v. Romania* (n. 60858/15), on the alleged incompatibility of a judge, who had been involved in two sets of connected proceedings against the same applicant;
- 18.02.2020, *Judic v. Romania* (n. 45776/16), on the legitimacy of the non-application of the more lenient new law, on grounds of the lack of the circumstances provided for by the said law;
- 30.01.2020, *Breyer v. Germany* (n. 50001/12), on the legitimacy of the obligation for telecommunication companies to storage personal data of prepaid SIM card users and keep them at the disposal of the authorities;
- 30.01.2020, *Vinks and Ribicka v. Latvia* (n. 28926/10), on the search, carried out by a special police department early in the morning at the domicile of the applicant within an investigation into economic offences, which was deemed illegitimate;
- 30.01.2020, *Studio Monitori and others v. Georgia* (n. 44920/09 and 8942/10), on the legitimacy of the Courts' denial of the applicants' unmotivated request to access information of a criminal proceeding in which they did not take part, since such access was not essential for the exercise of their right to freedom of expression;
- 30.01.2020, *J.M.B. and others v. France* (n. 9671/15), on the preventive, but ineffective, application aiming at putting an end to inhuman and degrading detention conditions due to overcrowding: the Court recommends to the respondent State that it considers the adoption of general measures aimed at eliminating overcrowding and improving the material conditions of detention, while putting in place an effective preventive remedy;
- 30.01.2020, *Sukachov v. Ukraine* (n. 14057/17), according to which the State must reduce overcrowding, must increase detention conditions and make available effective preventive and compensatory remedies;
- 20.01.2020, Grand Chamber judgment, *Magyar Kétfarkú Kutya Párt v. Hungary* (n. 201/17), on the violation of freedom of expression following the fine to a political party, which put at the disposal of voters a mobile phone application for the anonymous exchange of photographs of the votes expressed during a referendum;
- 14.01.2020, *Rinau v. Lithuania* (n. 10926/09), on the illegitimate political and procedural attempts to prevent the return of the applicant's daughter from his former Lithuanian wife, after the court had ordered in his favour;
- 14.01.2020, *Beizaras and Levickas v. Lithuania* (n. 41288/15), according to which articles 8, 13 and 14 of the Convention were violated following the lack of an effective investigation into the serious homophobic comments and incitement to violence posted against the applicants on Facebook.

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

- the decision of the United States Court of Appeals for the Fifth Circuit of 20.2.2020, which found the constitutional illegitimacy of the "Senate Bill 2116" of the State of Mississippi prohibiting abortion (with few exceptions) from the moment that the heartbeat of the foetus can be detected;
- the order of the High Court of Australia of 11.2.2020, according to which aboriginal persons are not included in the concept of "aliens", according to section 51(xix) of the Constitution, even if born abroad and without Australian citizenship;
- the order of the International Court of Justice of 23.1.2020, case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, which asked Myanmar, pending the decision on such matter, to adopt temporary measures aiming at preventing conducts provided for by article 2 of the Convention on the prevention and punishment of the crime of genocide in respect of the Rohingya community living on its territory;
- the decision of the United States District Court for the District of Maryland of 15.1.2020, which blocked the application of the presidential Executive Order n. 13888 giving the

power to veto to States and local Governments on the relocation of refugees in their jurisdictions;

- the decision of the *United Nations Human Rights Committee* of 7.1.2020, according to which, without robust national and international efforts, the effects of climate change may expose individuals to a violation of their rights under articles 6 (right to life) or 7 (prohibition of torture or cruel, inhuman or degrading sanctions or treatments) of the International Covenant on civil and political rights and trigger States' *non-refoulement* obligations of asylum seekers.

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

- **Belgium:** the decision of the *Cour constitutionnelle* n. 27/2020 of 20.2.2020, which rejects the claim for annulment lodged, for the alleged violation of the right to the respect for private life, against the law of 21 March 2018 on the use of surveillance cameras by the police, in the light of the norms of the ECHR, of the EU Charter of Fundamental Rights, of Directive (EU) 2016/680 and the jurisprudence of the Courts of Strasbourg and Luxembourg; the decision n. 18/2020 of 6.2.2020, which finds the constitutional legitimacy of article L4146-17 of the Walloon Code of the local democracy and decentralisation with regard to the register of the voters and the enrolment in the electoral list of non-Belgian European Union nationals, following the total or partial annulment of a former local election, in the light of article 20 TFEU and of the norms of Directive 94/80/EC; the decision n. 7/2020 of 16.1.2020, which rejected the claim lodged against the law of 23 March 2019 amending the Judicial Code and adopted in order to give execution to the recommendations of the Group of States against corruption (GRECO) of the Council of Europe on the system of substitute judges, also recalling the jurisprudence of the Court of Strasbourg; and the decision n. 2/2020 of 16.1.2020, which judges in the matter of paternity dispute, in the light of article 8 of the ECHR and of the jurisprudence of the Court of Strasbourg;
- **Bosnia and Herzegovina:** the decision of the *Ustavni sud* (Constitutional Court) of 4.10.2019, which found the constitutional illegitimacy of article 11(2) of the Constitution of the Serb Republic of Bosnia and Herzegovina (*Republika Srpska*), where it provided that death sentence could be imposed only for capital offences, in the light of Protocol n. 13 to the ECHR concerning the abolition of the death sentence in all circumstance;
- **Czech Republic:** the decision of the *Ústavní soud* (Constitutional Court) of 1.10.2019, which annulled the amendments to the "Act no. 586/1992 Coll. on Income Taxes", aiming at imposing tax levy onto financial compensations given to churches and religious communities, also recalling article 1 (protection of property) of the Additional Protocol to the ECHR;
- **France:** the decision of the *Cour de cassation* n. 246/2020 of 26.2.2020, in the matter of representation of workers, which applies EU directives in such matter; and the decision n. 245/2020 of 26.2.2020, in the matter of health and security of workers at work, which recalls article 31 of the EU Charter of Fundamental Rights;
- **Germany:** the decision of the *Bundesverfassungsgericht* (Federal Constitutional Tribunal) of 26.2.2020, which, also recalling the norms of the ECHR and the jurisprudence of the Court of Strasbourg, annulled section 217 of the Criminal Code, where it prohibited the support to assisted suicide, because in contrast with the right to a self-determined death, as expression of the more general right to the free development of the personality, according to article 2(1) of the Constitution; and the decision of 23.1.2020, on the agreement between Japan and the European Union;
- **Great Britain:** the decision of the *England and Wales Court of Appeal* of 21.1.2020, in which the Court defines the content of the obligation of public authorities to reserve adequate space for the settlements of Roma and Sinti communities; the decision of the *England and Wales High Court* of 28.2.2020, on the obligation for health authorities to highlight probable genetic risks to a pregnant woman, even in the absence of the consent of the third interested (the father of the woman, in the case examined by the

Court): such obligation is not absolute, but it raises, in the specific case, after the balance assessed in each case; the decision of 14.2.2020, in the matter of freedom of expression and hate speeches, in which the Court reaches the opposite conclusion of the below mentioned case of the Employment Tribunal of 18.12.2019; and the decision of 30.1.2020, in the matter of objective responsibility of thirds in a case of sexual violence; the decision of the Upper Tribunal of 20.2.2020, in which the court finds the well-founded fear of persecution of an Iranian national, asylum seeker on grounds of his Christian belief; the decision of the Employment Tribunal of 21.1.2020, in which the Tribunal finds that veganism is included in the personal belief protected by norms in the matter of non-discrimination; and the decision of 18.12.2019, in which the Court does not find discriminatory the lack of renewal of a contract of collaboration with a researcher who expressed – through her twitter account – opinions deemed transphobic;

- **Ireland:** the decision of the Supreme Court of 4.2.2020, on the possibility to extend the terms to appeal within the proceeding concerning the fairness of the conditions of a mortgage loan, which analyses the norms of Directive 93/13/EC and the jurisprudence of the Court of Justice relevant in such matter; and the decision of 19.12.2019, on the interpretation of the requirements which classify the “household”, as provided for by section 20 (1) of the “Housing (Miscellaneous Provisions) Act 2009”, in order to forward the request for a social housing, also in the light of article 8 of the ECHR; the decision of the High Court of 12.2.2020, in the matter of compensation to passengers in case of cancellation of the flight, which analyses the concept of “exceptional circumstances” according to article 5(3) of the Regulation (EC) 261/2004, in the light of the relevant jurisprudence of the Court of Justice; and the decision of 11.2.2020, which judges in the matter of non-discrimination, according to the “Equal Status Act 2000” (as modified), analysing the norms of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin;
- **Italy:** the decision of the Corte costituzionale n. 32/2020 of 26.2.2020, in the matter of retroactivity of measures against corruption, which examines the jurisprudence of the Court of Strasbourg; the decision of the Corte di cassazione n. 2313/2020 of 31.1.2020, in the matter of taxation of dividend between mother company and subsidiary, which recalls the jurisprudence of the Court of Justice and EU Directives; and the order of the Tribunale di Roma of 23.2.2020, which finds the legitimacy of the cancellation by Facebook of pages attributable to Casa Pound, recalling the jurisprudence of the two European Courts, the Union law and several sources of international law;
- **Lithuania:** the decision of the Konstitucinis Teismas (Constitutional Court) of 31.10.2019, which found the constitutional illegitimacy of certain norms of the “Law on Employment”, where they provided for that the acquisition and maintenance of the status of unemployed was incompatible with the fact that a person followed a full time course at a secondary school, also recalling the norms of the Regulation (EC) 1897/2000; and the decision of 7.6.2019, on the constitutional legitimacy of article 21 of the “Law on Political Parties”, in the matter of allocation of the State budget aiming at financing the activity of political parties, which also recalls the guideline of the Commission of Venice;
- **Poland:** the resolution of the Sąd Najwyższy (Supreme Court) of 23.1.2020, on the lack of legitimacy and independence of the judges appointed on a proposal from the National Council of the Judiciary, pursuant to the norms of the “Act amending the Act on the National Council of the Judiciary and certain other acts” of 8 December 2017, also in the light of articles 47 of the EU Charter of Fundamental Rights and 6 of the ECHR;
- **Portugal:** the decision of the Supremo Tribunal de Justiça of 10.12.2019, which judges on the balance between the freedom of expression and information and the right to reputation, recalling articles 10 of the ECHR and 11 of the EU Charter of Fundamental Rights and the jurisprudence of the Court of Strasbourg;
- **Spain:** the order of the Tribunal Supremo of 17.2.2020, which rejected the request by Oriol Junqueras i Vies, former vice-president of the *Generalitat de Catalunya* and president of the party *Esquerra Republicana de Catalunya* (ERC), of precautionary

suspension of the decision issued on 3 January 2020 by the *Junta Electoral Central*, in which such body declared the loss of the condition of deputy of the European Parliament followed by the annulment of his mandate; the order of 3.2.2020, which, in the light of the jurisprudence of the Court of Justice, recognized to Clara Ponsatí i Obiols, former counsellor for education of the Government of Catalonia, the immunity provided for by article 9 of Protocol 7 to the TFEU, soliciting the European Parliament to suspend such immunity in order to give execution to the arrest warrants issued against her; and the order of 29.1.2020, which rejected the appeal lodged by Oriol Junqueras i Vies against the order issued on 9.1.2020 by the same tribunal rejecting the claimant's request, lodged pursuant to the decision of the Court of Justice in the case *Oriol Junqueras Vies* (C-502/19), to be freed in order to be able to travel to the European Parliament in virtue of his condition of elected Member; and the decision of 17.12.2019, which, also applying the jurisprudence of the Court of Strasbourg, annulled the appeal decision, referring back the question to the same court for a new decision, with which was rejected the claim lodged by a transsexual minor aiming at obtaining the amendment of the registration of his sex and name in the birth register;

- **The Netherlands:** the decision of the *Rechtbank Den Haag* (District Court of the Hague) of 5.2.2020, which found the legislation concerning the SyRI (*Systeem Risico Indicatie*) – a system provided for by the Government in order to prevent and fight against frauds within the social security system, in the tax and insurance contribution system and of labour law, through the processing of data from several public administrations – in contrast with the right to the respect for private life according to article 8 of the ECHR; and the decision of 29.1.2020, in which the judge found the lack of jurisdiction with regard to the claim for compensation lodged by a Dutch national, native of the Palestinian Territories, against two Israeli commanders of the army for the consequences of the airstrike of 20 July 2014 within the military operation in the Gaza Strip "Operation Protective Edge": the Court, also recalling the international jurisprudence and the jurisprudence of the Court of Strasbourg, established that the defendants enjoy functional immunity from its jurisdiction, pursuant to international customary law.

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

#### **Articles:**

[Michele De Luca](#) "Collective dismissals in European Union law and the Italian legal system: from a remote very important decision of the Court of Justice which sentenced Italy to the double prejudice for our national penalty regime (minimum notes)"

[Sergio Galleano](#) "Differences between men and women, part-time and full-time in fixed-term contracts: with the decision in the case *Schuck Ghannadam* the EU Court of Justice explores the principle of non-discrimination and the related burden of proof"

#### **Notes and comments:**

[Giuseppe Cataldi](#) "The impossible "interpretation in conformity" of the decree "security bis" to the International norms in the matter of rescue at sea"

[Luca Masera](#) "The Court of Cassation confirms the illegitimacy of the landing ban imposed by the Minister Salvini during the months of his mandate"

[Antonio Scarpa](#) "The prohibition of the *bis in idem* in the jurisprudence of the civil sections of the Court of Cassation"

[Andrea Venegoni](#) "Comment on the decision n. 2313/2020 of the Italian Court of Cassation"

[Fulvio Vassallo Paleologo](#) "The request of the authorization to proceed in the case *Open Arms* (1-20 August 2019). Note to the Court of Palermo. Committee for ministerial crimes, 30 January 2020"

**Reports:**

[Tullio Scovazzi](#) "The worst aspects of Italian politics in the matter of irregular migration by sea"

[Lucia Tria](#) "EU model of principle of non-refoulement in the relation between the Geneva Convention of Geneva and the Charter of Fundamental Rights of the European Union in the light of the jurisprudence of the EUCJ"

**Documents:**

[The "Corruption Perceptions Index \(CPI\) 2019"](#) by Transparency International, of 23 January 2020

[The "World Report 2020 - Events of 2019"](#) by Human Rights Watch, of 14 January 2020