



OBSERVATORY ON THE RESPECT FOR FUNDAMENTAL RIGHTS IN EUROPE

Newsletter n. 89

15 November 2021

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 European Parliament Resolution of 16 September 2021 with recommendations to the Commission on identifying gender-based violence as a new area of crime listed in Article 83(1) TFEU;
- the Regulation (EU) 2021/1529 of the European Parliament and of the Council of 15 September 2021 establishing the Instrument for Pre-Accession assistance;
- the Council Recommendation (EU) 2021/1004 of 14 June 2021 establishing a European Child Guarantee;
- the Annual Report 2021 on fundamental rights by the EU Agency for the protection of fundamental rights of 10.06.2021.

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

- 21.10.2021, joined cases C-845/19 and C-863/19, *Okrazhna prokuratura – Varna*, on the confiscation of instrumentalities belonging to a third party and on the right to an effective remedy and to a fair trial;
- 21.10.2021, C-866/19, *Zakład Ubezpieczeń Społecznych I Oddział w Warszawie Wydział Realizacji Umów Międzynarodowych*, on social security for migrant workers;
- 21.10.2021, C-282/20, *ZX (Régularisation de l'acte d'accusation)*, on the right of the suspects or accused persons to be informed of their rights;
- 06.10.2021, C-561/19, *Conorzio Italian Management and Catania Multiservizi SpA and Catania Multiservizi*, on the scope of the obligation on national courts or tribunals of last instance to make a reference for a preliminary ruling to the Court of Justice;
- 06.10.2021, C-487/19, *W. Ż. () and des affaires publiques de la Cour suprême - nomination*, on the principles of the irremovability of judges and judicial independence and on the transfer without consent of a judge of an ordinary court;
- 06.10.2021, C-338/20, *Prokuratura Rejonowa Łódź-Bałuty*, on the lack of translation of the essential elements of the decision imposing financial penalties and on the observance of the right of the defence;
- 06.10.2021, C-35/20, *A (Franchissement de frontières en navire de plaisance)*, on the obligation imposed by a State to its citizens to carry an identity card or a passport, on the proportionality of the penalties and on the right of Union nationals to move freely within the territories of the Member States;
- 30.09.2021, C-285/20, *K*, on social security systems of Member States;

- 30.09.2021, C-296/20, *Commerzbank*, on the Lugano II Convention concerning the jurisdiction, recognition and enforcement of judgments in civil and commercial matters and consumer protection;
- 09.09.2021, C-107/19, *Dopravní podnik hl. m. Prahy*, on the organisation of working time, on the concept of rest period and on the principle of the primacy of EU law;
- 09.09.2021, C-18/20, *Bundesamt für Fremdenwesen und Asyl (Demande ultérieure de protection internationale)*, on international protection;

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

- 06.10.2021, joined cases C-59/18, C-182/18, C-743/19, *Italy/ Council (Siège de l'Agence européenne des médicaments)*, on the competence of the Court;
- 30.09.2021, C-483/20, *Commissaire général aux réfugiés et aux apatrides (Unité familiale – Protection déjà accordée)*, on international protection, on the protection of family life and the child's best interest;
- 30.09.2021, C-389/20, *TGSS (Chômage des employés de maison)*, on indirect discrimination on grounds of sex in the event of exclusion of domestic workers from unemployment benefits.

We would also like to highlight the Opinion 1/19 of the Court (Grand Section) of 6.10.2021, on the conclusion of the convention on preventing and combating violence against women and domestic violence (Istanbul Convention).

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

- 21.09.2021, *Willems and Gorjon v. Belgium* (n. 74209/16), on the violation of the Convention, because of the excessive formalism by the Court of Cassation in ruling appeals on points of law inadmissible on account of the lawyer's failure to refer to his requisite certification;
- 21.09.2021, *Dareskizb v. Armenia* (n. 61737/08), on the violation of the Convention following the unjustified restriction on the publication of the applicant's newspaper on grounds of the state of emergency during demonstrations after the presidential elections;
- 21.09.2021, *Carter v. Russia* (n. 20914/07), on the homicide of the Russian political dissident committed in England by individuals acting as agents of the Russian State: the Court found the violation of the Convention, since the Russian authorities had not carried out an effective domestic investigation;
- 21.09.2021, *Aliyeva and others v. Azerbaijan* (n. 66249/16), on the Supreme Court's failure to follow its own clear line of case-law resulting in applicants' inability to obtain statutory additional compensation for expropriated property: the Court found the violation of article 1 of Protocol n. 1;
- 14.09.2021, *M.D. and others v. Russia* (n. 71321/17), on the violation of the Convention following the expulsion towards Syria;
- 14.09.2021, *Volodina v. Russia (n. 2)* (n. 40419/19), on the failure of the authorities to protect the applicant from domestic violence and on the lack of an effective investigation: the Court found the violation of the Convention;
- 07.09.2021, *M.P. v. Portugal* (n. 27516/14), on emails that the applicant had exchanged on a casual dating site which had been used without her consent by her husband in some civil proceedings: according to the Court the Convention had not been violated;
- 02.09.2021, *Z.B. v. France* (n. 46883/15), on the criminal conviction of the applicant for having slogans with a terrorist connotation printed on a T-shirt worn at his request by his three-year-old nephew at nursery school: according to the Court the Convention had not been violated;
- 31.08.2021, *Associazione politica nazionale lista Marco Pannella v. Italy* (n. 66984/14), on the imbalance in screen time to the disadvantage of association classed as a

“political subject” in popular news programmes on public television: according to the Court the Convention had been violated;

- 31.08.2021, *Galovic v. Croatia* (n. 45512/11), on the right not to be punished twice for the same fact: the Court found in particular that the two sets of proceedings in the applicant’s case had been part of an integrated and coherent approach to domestic violence under Croatian law and did not lead to the violation of the Convention;
- 27.07.2021, *SIC, Sociedade Independente de Comunicação v. Portugal* (n. 29856/13), on the violation of the Convention following the disproportionate civil defamation judgment against a media firm in respect of television reports on network of child sexual abusers wrongly alluding to the involvement of well-known politicians;
- 22.07.2021, *Reczkowitz v. Poland* (n. 43447/19), on the violation of the Convention because of the serious irregularities concerning the independence of the judges of the Disciplinary Chamber, one of two newly created chambers of the Supreme Court;
- 22.07.2021, *Gumenyuk and others v. Ukraine* (n. 11423/19), on the judges of the former Supreme Court of Ukraine, who were prevented from exercising their functions, without having ever been formally dismissed, because of judicial reform and legislative amendments: the Court found the violation of articles 6 and 8;
- 22.07.2021, *Karimov and others v. Azerbaijan* (n. 24219/16), on allegation of financial incapacity not taken into account in the imposition of administrative detention for non-compliance with judgments ordering repayment of debts;
- 22.07.2021, *E.H. v. France* (n. 39126/18), on the return to Morocco of a Moroccan National, who is an activist in support of the Sahrawi cause and therefore belonging to a group at particular risk: the Court found that articles 3 and 13 of the Convention were not violated;
- 20.07.2021, *Loquifer and others v. Belgium* (n. 79089/13), on the lack of an effective remedy to challenge a decision by the High Judicial Council suspending one of its members;
- 20.07.2021, *D. v. Bulgaria* (n. 29444/17), on the removal of a Turkish journalist, who had expressed fears that he might face ill-treatment, at borders during the coup d’état, without having examined the risks he would run: the Court found the violation of articles 3 and 13 of the Convention;
- 20.07.2021, *Polat v. Austria* (n. 12886/16), which found the violation of the Convention in a case concerning the post-mortem examination and the removal of internal organs of a premature baby affected by a rare and serious syndrome, in the interest of science, despite the lack of consent of the mother and her will to bury the baby, as well as for the hospital’s failure to disclose information to the mother in a so delicate case;
- 20.07.2021, *Varga and others v. Slovakia* (n. 58361/12), on the violation of the Convention, because of the practically unfettered power exercised by the intelligence service implementing surveillance operation, without adequate legal safeguards;
- 20.07.2021, *Polgar v. Romania* (n. 39412/19), according to which the State is obliged to maintain continuity in the reforms aiming at reducing the prisoners and keeping detention at decent levels;
- 13.07.2021, *Fedotova and others v. Russia* (n. 40792/10), on the violation of the Convention for the lack of any opportunity for same-sex couples to have their relationship formally acknowledged;
- 13.07.2021, *Todorov and others v. Bulgaria* (n. 50705/11), on the individual assessment and motivated request to counterbalance the gap of the legislation on seizure of alleged criminal assets: the Court found the violation of article 1 of Protocol n. 1 and established the non-violation for the rest;
- 09.07.2021, *M.A. v. Denmark* (n. 6697/18), on the unjustified delay of three years imposed pursuant to Danish law on the applicant’s right to family reunification owing to the applicant’s temporary and subsidiary protection status and the lack of assessment of the particular case: the Court found the violation of the Convention;
- 08.07.2021, *Maestri and others v. Italy* (n. 20903/15), on the court of appeal’s failure to order a new hearing of the accused persons before the annulment of their acquittal at first instance;
- 08.07.2021, *Tkheldize v. Georgia* (n. 33056/17), on the violation of the Convention for the lack of preventive measures aiming at protecting the victim of domestic violence,

for the lack of adequate investigations due to police inaction and for discrimination on grounds of sex;

- 06.07.2021, *A. M. v. Russia* (n. 47220/19), on restrictions to the applicant's parental rights and deprivation of contact with her children on gender identity grounds: the Court found the violation of the Convention;
- 06.07.2021, *Norman v. the United Kingdom* (n. 41387/17), on the investigation and conviction of a prison officer, who provided information about prison to a journalist in exchange for money: according to the Court there was no violation of the Convention;
- 06.07.2021, *Gruba and others v. Russia* (n. 66180/09), on the right of policemen to parental leave only in the event that the child has been left without the care of the mother: the Court found the violation of the Convention;
- 01.07.2021, *Hajovsky v. Slovakia* (n. 7796/16), on the violation of the Convention following the publication on the newspaper of private information and non-blurred images of the applicant taken covertly and under pretences;
- 01.07.2021, *Association Burestop 55 and others v. France* (n. 56176/18), on the case of an environmental NGO to whom was denied the locus standi to contest the accuracy of information on the management of radioactive waste communicated by a public agency: the Court found the violation of the Convention.

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

- the two orders of the *United States Court of Appeals for the Fifth Circuit* of 14.10.2021 and of 9.10.2021, which restored the Texan law on abortion, "Senate Bill 8 (SB 8)", which provides for the prohibition of abortion when the heartbeat of the fetus can be detected, suspending the order of the *United States District Court for the Western District of Texas, Austin Division* of 6.10.2021, which had temporarily blocked the application of such law;
- the decision of the *United States Court of Appeals for the Sixth Circuit* of 10.9.2021, which confirmed the decision of the district Court, blocking the enforcement of sections 216 and 217 of the Tennessee law on abortion, "House Bill 2263", aiming at criminalizing abortion, respectively during a specific "gestational age", and when the doctor knows that the interruption of the pregnancy is due to the race of the fetus, its sex or the indication of Down syndrome;
- the decision of the *United States Court of Appeals for the Seventh Circuit* of 8.9.2021, which reverted the decision of a district court of Indiana, with which it blocked the enforcement of several norms of the State in the matter of abortion;
- the decision of the *Suprema Corte de Justicia de la Nación* (Mexico) of 7.9.2021, which found the constitutional illegitimacy of the total criminalization of abortion;
- the decision of the *Inter-American Court of Human Rights* of 1.9.2021, case *Garzón Guzmán y otros vs. Ecuador*, which, following the complete recognition of the State's responsibility, confirmed such responsibility in relation to the forced disappearance of César Gustavo Garzón Guzmán on 10 November 1990 by State agents; and the approval decision of 31.8.2021, case *De Los Buzos Miskitos (Lemoth Morris y otros) vs. Honduras*, of the friendly transaction (*acuerdo de solución amistosa*), undersigned by the State and the representatives of the victims concerning the responsibility of the State for the violation of the right to life, dignity, personal integrity, to an effective remedy, the right of the child, to health, to fair and just working conditions, to social security and to the principles of equality and non-discrimination, in relation to the death of 42 persons belonging to the indigenous population Miskito due to work accidents; the decision of 26.8.2021, case *Bedoya Lima y otra vs. Colombia*, which found the responsibility of the State for the violation of the right to personal integrity, personal freedom, honour and dignity, and to freedom of thought and expression of the journalist Jineth Bedoya Lima, following her kidnapping by the paramilitary and for vexatious and violent treatments during the abduction; the decision of 19.8.2021, case *Ríos Avalos y otro vs. Paraguay*, on the violation of the right to an effective remedy and to the reasonable length of the proceeding and of the principle of independence of the judge, in relation to the destitution of two judges of the *Corte Suprema de Justicia*; and

- the decision of 3.6.2021, case *Grijalva Bueno vs Ecuador*, on the violation of the guarantees of the fair trial in relation to a military criminal trial;
- the decision of the *Land and Environment Court of New South Wales* (Australia) of 26.8.2021, which ordered the Environment Protection Authority to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change;
- the decision of the *United Nations Human Rights Committee* of 25.8.2021, according to which the proceedings concerning the former Spanish judge Baltasar Garzón, in the cases *Franco* and *Gürtel*, were arbitrary and in violation of the principles of independence and impartiality of the court.

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

- Belgium:** the decision of the *Cour constitutionnelle* n. 142/2021 of 14.10.2021, which rejected the claim lodged against the decree of the Flemish Region of 17 July 2020 providing for norms in the matter of wind energy, recalling article 37 of the EU Charter of Fundamental Rights, several directives relevant in such matter and the jurisprudence of the Court of Justice; the decision n. 140/2021 of 14.10.2021, in the matter of workers' social security, which also recalls Regulation (EC) 883/2004 and the jurisprudence of the Courts of Strasbourg and Luxembourg; and the decision n. 131/2021 of 7.10.2021, which rejects the claim lodged, also according to article 17 of the EU Charter of Fundamental Rights and of Directive 2001/29/EC, against the law of 2 May 2019 amending the Code of economic rights, aiming at including the early childhood centres in the area of application of the exceptions to copyright;
- Czech Republic:** the decision of the *Ústavní soud* (Constitutional Court) of 30.7.2021, in the matter of medical assessment of the age of young migrants, of right to interpretation, to translation and information and on the violation of the right to an effective remedy and to personal freedom, which recalls the norms of the ECHR and EU legislation relevant in such matter;
- France:** the decision of the *Cour de cassation* of 20.10.2021, which examines the request by the French court of a European arrest warrant concerning the father of four children, also considering the violation – which was excluded – of article 8 of the ECHR; the decision of 20.10.2021 on the claim lodged by a prisoner concerning the indecent detention conditions: the Court annulled the appealed decision referring to the second instance court for the assessment of the detention conditions, deemed in violation of the ECHR norms, in the light of the law of 20 April 2020 – following the decision of the Constitutional Council – in order to give execution to the norms of the ECHR on the detention; and the decision of 19.10.2021, which finds in violation of article 6 of the ECHR the declaration of inadmissibility of the establishment of a civil party by the association of Jewish students in a trial on crimes against humanity; and the decision of the *Tribunal administratif de Paris* of 14.10.2021, which ordered the State to adopt all necessary measures to remedy to the ecological damage caused by the lack of respect of the objectives fixed by France in the matter of reduction of greenhouse gas emissions;
- Germany:** the decision of the *Bundesverfassungsgericht* (Federal Constitutional Tribunal) of 18.8.2021, on article 4 of the EU Charter of Fundamental Rights and the European arrest warrant; the decision of 16.8.2021, which finds inadmissible the claim against measures adopted by Union bodies on grounds of the lack of an adequate object of the claim and insufficient reason; and the decision of 8.8.2021, in the matter of Dublin III Regulation;
- Ireland:** the decision of the *Supreme Court* of 14.9.2021, which analyzes the scope of the authorities' obligation to carry out effective investigations, pursuant to article 2 of the ECHR and of article 40.3 of the Constitution of the State (right to life); the decision of the *High Court* of 4.10.2021, in the matter of development permission and environmental impact assessment, which makes a reference for a preliminary ruling to the Court of Justice on the interpretation of the norms of Directive 2011/92/EU ("EIA

Directive”), in combination with article 41 of the EU Charter of Fundamental Rights and of Directive 92/43/EEC (“Directive Habitat”); and the decision of 16.9.2021, concerning the ratification procedures by the State of the CETA (Comprehensive Economic Trade Agreement), undersigned by the European Union and Canada, and the compatibility of such ratification with the constitutional norms, which also recalls the jurisprudence of the Courts of Strasbourg and Luxembourg;

- **Italy:** the decision of the Corte costituzionale n. 203 of 28.10.2021, which excludes the constitutional illegitimacy of the norm which provides for that the quality of party in a trial is acquired before the establishment of civil party, examining the jurisprudence of the Court of Strasbourg; and n. 197 of 21.10.2021, which excludes the constitutional illegitimacy of the norms providing for the application of measures of suspension of the ordinary detention regime for prisoners (article 41 bis) also for those who are subjected to security measures, excluding the contrast with the norms of the ECHR on the *ne bis in idem*; the decision of the Corte di cassazione n. 24414 of 30.9.2021, on the case of a disciplinary proceeding against a teacher for having removed the crucifix after the majority of the students had voted for keeping it on the wall, which recalls the jurisprudence of the Court of Strasbourg; the decision n. 24413 of 9.9.2021, which, in the matter of recognition of international protection, underlines the important profile of the vulnerability of the person, pursuant to article 8 of the ECHR; and the decision n. 23679/2021 of 31.8.2021, which examines the question of *ne bis in idem* in a case of plea deal of a custodial sentence for the illegal sale of cd followed by administrative sanctions, in the light of the jurisprudence of the Court of Strasbourg; the decision of the Corte di appello di Firenze of 5.10.2021, which establishes that the persons with six-months residence permits for health treatments have the right to an allowance, also in the light of article 14 of the ECHR; and the order of the Tribunale di Matera of 12.9.2021, according to which the requirement of the residence in the Region of Basilicata in order to have access to the competition to purchase computers (for distance learning) amounts to indirect discrimination for reasons linked to the nationality of individuals having children in school age, who, according to the jurisprudence of the ECHR, have the right to stay in Italy;
- **Norway:** the decision of the Høyesterett/Høgsterett (Supreme Court) of 11.10.2021, which, also recalling article 1 of Protocol 1 to the ECHR, annulled the license for wind power plants in the Fosen peninsula, because such plants would interfere with the reindeer herders’ rights deriving from article 27 of the International Covenant on civil and political rights (right to cultural enjoyment);
- **Poland:** the decision of the Trybunał Konstytucyjny (Constitutional Court) of 7.10.2021, which, on the basis of many reasons, found articles 1, first and second paragraph – read in combination with article 4(3) – 19(1), second sub-paragraph and 2 of the Treaty on the European Union in contrast with the constitution of the State;
- **Portugal:** the decision of the Tribunal Constitucional n. 687/2021 of 30.8.2021, which found the constitutional illegitimacy of the norms of article 5 of Decree n. 167/XIV of the Parliament, amending law n. 109/2009 (“*Lei do Cibercrime*”), for the violation of the fundamental rights to inviolability of correspondence and of communication and to the protection of personal data and of the rights of the defence, also recalling the EU Charter of Fundamental Rights and the ECHR and the jurisprudence of the Courts of Strasbourg and Luxembourg;
- **Romania:** the decision of the Curtea Constituțională (Constitutional Court) of 8.6.2021, which rejected the questions of constitutional illegitimacy raised against article 88, paragraphs from 1 to 9 of law n. 304/2004 “*on judicial organisation*” and of the emergency Decree of the Government n. 90/2018 “*on certain measures for the operationalisation of the Section for the investigation of offences committed within the judicial system*”, also in the light of the decision *Asociația “Forumul Judecătorilor din România”* (C-355/19) of the Court of Justice of 18 May 2021;
- **Spain:** the decision of the Tribunal Constitucional n. 156/2021 of 16.9.2021, which finds the partial constitutional illegitimacy of the royal decree-law n. 1/2017, on emergency measures for the protection of consumers in the matter of mortgage loan clauses (“*cláusulas suelo*”), recalling the norms of the EU Charter of Fundamental Rights and of Directive 93/13/EEC and the jurisprudence of the Courts of Strasbourg

and Luxembourg; the decision n. 152/2021 of 13.9.2021, in the matter of social security, which recognizes the violation of the right to an effective remedy in virtue of the lack of the enforcement of EU anti-discriminatory norms, in breach of the principle of the primacy of Union law; and the decision n. 151/2021 of 13.9.2021, on the evaluation of personal and family circumstances in the application of the expulsion of a foreigner from the national territory, in the light of EU legislation relevant in such matter and of the jurisprudence of the Courts of Strasbourg and Luxembourg;

- **The Netherlands:** the decision of the *Rechtbank Den Haag* (District Tribunal of the Hague) of 22.9.2021, which rejected the claim aiming at prohibiting the use of ethnicity in border checks – *Mobiel Toezicht Veiligheid (MTV)* – carried out by the police, also in the light of the norms of the ECHR and the jurisprudence of the Court of Strasbourg; and the two decisions of the *Rechtbank Amsterdam* (District Tribunal of Amsterdam) of 14.9.2021, which, in relation to the execution of European arrest warrants, makes a reference for a preliminary ruling on the procedures for the appointment of judges in Poland and the possible violation of the right to a natural judge established by law.

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

Articles:

[Nicola Canestrini](#) "European precautionary measures: not only European arrest warrant"

[Vincenzo De Michele](#) "Rule of law in the European Union: the national situations of more serious violation of the independence of the courts and the possible consequences on the funds of the Recovery fund between the power of the Commission and the control of the EU Parliament"

[Luigi Ferrajoli](#) "Human rights, inhuman law"

[Fabio Ferraro](#) "Court of Justice and obligation of preliminary referral of the last instance judge: *nihil sub sole novum*"

[Sergio Galleano](#) "Court of Justice 2 September 2021, OD and others v. Inps: extension of the right to childbirth and maternity allowance also to foreigners with working permits"

[Lucia Tria](#) "Health care and obligation of the employer: new horizon for article 2087 of the civil code?"

[Lucia Tria](#) "The end of a working relationship: dismissal for objective justified reason, collective dismissal and related protection. Labour mobility and layoff in labour proceedings"

Notes and comments:

[Matilde Brancaccio](#) "Comment to the decision of the ECtHR, Fifth Section, Sanchez v. France of 2 September 2021 on freedom of expression"

[Giorgio Capra](#) "On the obligation of preliminary referral (note to EUCJ, Grand Section, decision 6 October 2021, Consorzio Italian Management and Catania Multiservizi SpA v. Rete Ferroviaria Italiana SpA, C-561/19)"

[Antonella Di Florio](#) "Human protection and special protection. "Vulnerability" following the decision of the United Sections of the Court of Cassation n. 24413/2021"

[Rita Russo](#) "The United Sections pronounce themselves again on human protection: attenuated comparison between present and future"

[Enrico Scoditti](#) "Brief notes on the new preliminary referral to the Court of Cassation"

[Deborah Tripiccion](#) "Comment to the decision of the ECtHR, First Section, 31 August 2021, Associazione politica nazionale Lista Marco Pannella e Radicali italiani v. Italy"

Documents:

[Resolution of the United Nations Human Rights Council](#) "The human right to a clean, healthy and sustainable environment", of 8 October 2021

[Report of the association Endangered Lawyers](#) "Turkey – distortions of procedural rules where the rule of law does not exist", of 21 September 2021