



OBSERVATORY ON THE RESPECT FOR FUNDAMENTAL RIGHTS IN EUROPE

Newsletter n. 90

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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 Union Agency for Fundamental Rights' Report of 9.11.2021 "*Antisemitism: Overview of antisemitic incidents recorded in the European Union 2010-2020*";
- the European Union Agency for Fundamental Rights' Report of 4.11.2021 "*Legal aid for returnees deprived of liberty*";
- Directive (EU) 2021/1883 of 20.10.2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC.

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

of the **Parliamentary Assembly**:

- the Resolution 2411 and the Recommendation 2217 of 26.11.2021 "The impact of the Covid-19 pandemic on education and culture";
- the Resolution 2410 and the Recommendation 2216 of 26.11.2021 "Best interests of the child and policies to ensure a work-life balance";
- the Resolution 2409 of 26.11.2021 "Voluntary relocation of migrants in need of humanitarian protection and voluntary resettlement of refugees";
- the Resolution 2408 of 26.11.2021 "70th anniversary of the 1951 Refugee Convention: the Council of Europe and the international protection of refugees";
- the Resolution 2406 of 26.11.2021 "Fighting corruption – General principles of political responsibility".

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

- 21.12.2021, C-243/20, *Trapeza Peiraios*, on consumer protection;
- 21.12.2021, C-497/20, *Randstad Italia*, on the obligation of Member States to provide sufficient remedies to ensure effective legal protection in the fields covered by Union Law;
- 16.12.2021, C-203/20, *AB and others (Révocation d'une amnistie)*, on *ne bis in idem* and the European arrest warrant;

- 14.12.2021, C-490/20, *Stolichna obshtina, rayon "Pancharevo"*, on the rights of a minor with EU citizenship, whose birth certificate issued by the host Member State mentions two mothers in respect of the child;
- 09.12.2021, C-217/20, *Staatssecretaris van Financiën (Rémunération pendant le congé annuel payé)*, on the right to paid annual leave;
- 25.11.2021, C-102/20, *StWL Städtische Werke Lauf a.d. Pegnitz*, on the concept of "use of electronic mail for the purposes of direct marketing" and on processing of personal data and the protection of privacy in the electronic communications sector;
- 25.11.2021, C-289/20, *IB (Résidence habituelle d'un époux - Divorce)*, on freedom of movement and on the concept of "habitual residence" of a spouse;
- 23.11.2021, C-564/19, *IS (Illégalité de l'ordonnance de renvoi)*, on the primacy of EU law and on the right of the defence;
- 18.11.2021, C-212/20, *A. S.A.*, on consumer protection;
- 16.11.2021, C-479/21 PPU, *Governor of Cloverhill Prison and others*, on the Agreement on the withdrawal of the United Kingdom and on judicial cooperation in criminal matters;
- 16.11.2021, C-821/19, *Commission/Hungary (Criminalisation of the assistance given to asylum seekers)*, on asylum seekers;
- 16.11.2021, joined cases from C-748/19 to C-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim*, on the right to an effective remedy and on the independence and impartiality of judges;
- 11.11.2021, C-168/20, *MH and ILA (Droits à pension en cas de faillite)*, on the pension rights of a EU national, who exercised his right to freedom of movement;
- 11.11.2021, C-214/20, *Dublin City Council*, on the concept of working time;
- 11.11.2021, C-852/19, *Gavanozov II*, on the right to an effective remedy;
- 09.11.2021, C-91/20, *Bundesrepublik Deutschland (Maintien de l'unité familiale)*, on the grant of a parent's refugee status to his or her minor child as a derived right;

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

- 02.12.2021, C-319/20, *Facebook Ireland*, on the protection of persons with regard to the processing of personal data and on the right to an effective remedy;
- 18.11.2021, joined cases C-793/19, *SpaceNet*, and C-794/19, *Telekom Deutschland*, case C-140/20, *Commissioner of the Garda Síochána and others*, and joined cases C-339/20, *VD*, and C-397/20, *SR*, all on the generalized and undifferentiated retention of data and their placement with regard to electronic communications;
- 11.11.2021, C-485/20, *HR Rail*, on non-discrimination and protection of disabled persons.

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

- 19.10.2021, *Vedat Şorli v. Turkey* (n. 42048/19), on the violation of the Convention in virtue of criminal law measures for insulting the President of the Republic on account of defamatory content shared on Facebook;
- 26.10.2021, *Serrano Contreras v. Spain (No. 2)* (n. 2236/19), on the unfairness of revision proceedings before the Supreme Court due to distortion of a European Court judgment, which had found a violation of the applicant's right to a fair trial: the Court found the violation of the Convention;
- 26.10.2021, *Toplak and Mrak v. Slovenia* (n. 34591/19 and 42545/19), on the violation of the Convention due to the lack of an effective remedy for disabled applicants' complaints as to accessibility of polling stations and voting procedure in a national referendum;
- 26.10.2021, *Leon Madrid v. Spain* (n. 30306/13), on the fact that the paternal surname automatically precedes the maternal surname in the naming of the child, where parents disagree, without any consideration of the specific circumstances;
- 21.10.2021, *Selygenenko and others v. Ukraine* (n. 24919/16 and 28658/16), on the discriminatory refusal to allow applicants in the State to participate in local elections at

the place of their actual residence in which they were registered: according to the Court the Convention was violated;

- 19.10.2021, *Miroslava Todorova v. Bulgaria* (n. 40072/13), on the violation of the Convention following the disciplinary proceedings and sanctions against the President of a judges' association in retaliation against her criticism of the Supreme Judicial Council and the executive;
- 19.10.2021, *Danilevich v. Russia* (n. 31469/08), on the unjustified and disproportionate general ban on telephone calls for life prisoners under strict regime in special-regime correctional colonies: according to the Court the Convention was violated;
- 14.10.2021, *M.L. v. Slovakia* (n. 34159/17), on the dismissal of action of the applicant against tabloids, which published unverified tawdry statements on, and pictures of, the applicant's son, a priest convicted of sexual offences, years after his death: according to the Court the Convention was violated;
- 14.10.2021, *Democracy and Human Rights Resource Centre and Mustafayev v. Azerbaijan* (n. 74288/14 and 64568/16), on the freezing of the bank accounts of a human rights defender and his NGO and on the imposition of travel bans for the purpose of punishing them for, and impeding, their work: according to the Court the Convention was violated;
- 12.10.2021, *Bara and Kola v. Albania* (n. 43391/18 and 17766/19), on the violation of the Convention due to the significant delays before the Supreme Court, which were deemed unacceptable despite the context of the far-reaching reform of the justice system;
- 12.10.2021, *J.C. and others v. Belgium* (n. 11625/17), on the refusal by the courts to assume jurisdiction to examine a civil claim for sexual abuse, with request of conviction, against the Holy See, which enjoyed immunity from jurisdiction: according to the Court the Convention was not violated;
- 12.10.2021, *The Association of Investigative Reporters and Editorial Security of Moldova and Sanduța v. the Republic of Moldova* (n. 4358/19), on the violation of the Convention since no compensation was awarded by the domestic court despite the acknowledgment in substance of an article 10 breach on account of defamation liability;
- 07.10.2021, *Zoletic and others vs Azerbaijan* (n. 20116/12), on the lack of effective investigations concerning the trafficking in human beings and forced labour with regard to migrant workers: according to the Court the Convention was violated

and the decision:

- 07.10.2021, decision of inadmissibility, *Zambrano v. France* (n. 41994/21), on the opposition to the health pass and the alleged imposition of the vaccination against Covid-19.

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

- the decision of the Supreme Court of the United States of 10.12.2021, which rejected the request to suspend the execution of the Texan law on abortion, *Senate Bill 8 (SB 8)*, according to which abortion is prohibited when the fetus' heartbeat can be detected;
- the decision of the Court of Appeal of the Republic of Botswana of 29.11.2021, which rejected the appeal against the decision of the High Court of Botswana of 11 June 2019, with which such Court had abolished sections 164(a), 164(c), 165 of the Criminal Code, which provided for the criminalization of sexual acts in contrast with natural order, as well as the crime of obscene acts committed in private, pursuant to section 167, deemed in contrast with the right to freedom, dignity, privacy and non-discrimination, according to the Constitution of the State;
- the decision of the Inter-American Court of Human Rights of 23.9.2021, case *Familia Julien Grisonas vs. Argentina*, which found the violation of the right to the recognition of juridical personality, to life, personal integrity and freedom, with regard to the forced disappearance of Mario Roger Julien Cáceres and Victoria Lucía Grisonas Andrijauskaite during the military dictatorship within the "Operation Condor", and of the right to

personal integrity and to an effective legal protection of their children; the decision of 20.9.2021, case *González y otros vs. Venezuela*, on the violation of the right to personal freedom and to an effective legal protection of certain members of the González family, due to the arbitrary deprivation of freedom they suffered during the criminal proceeding lodged against them, ended with a decision of acquittal; the decision of 7.9.2021, case *Barbosa De Souza y otros vs. Brasil*, in the matter of gender violence and on the criteria for the application or revocation, in the specific case, of procedural parliamentary immunity by the parliamentary body; and the decision of 24.8.2021, case *Villaruel Merino y otros vs. Ecuador*, which found the violation of the right to personal freedom and the principles of presumption of innocence and equality before the law, with regard to the period of pre-trial detention served by six national police officers accused of the crime of embezzlement.

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

- **Belgium:** the decision of the *Cour constitutionnelle* n. 187/2021 of 23.12.2021, in the matter of freedom of movement of Union nationals, which analyses the constitutional legitimacy of certain norms of the law of 15 December 1980 on the access to the territory, the stay, the establishment and the removal of foreigners in the light of the decision of the Court of Justice in the case *Ordre des barreaux francophones et germanophone and others* (C-718/19); the decision n. 178/2021 of 9.12.2021, in the matter of social security and rights of persons with disabilities, which recalls the European Social Charter and the jurisprudence of the Court of Strasbourg; and the decision n. 158/2021 of 18.11.2021, which partially admits the claim for annulment lodged against the law of 1 September 2016, amending the law of 13 June 2005 on electronic communications and the organic law of 30 November 1998 on intelligence and security services, recalling the norms of the EU Charter of Fundamental Rights and of the ECHR, EU legislation relevant in such matter and the jurisprudence of the Courts of Strasbourg and Luxembourg;
- **Bosnia and Herzegovina:** the decision of the *Ustavni sud* (Constitutional Court) of 23.9.2021, which recognizes the violation of the right to the reasonable length of the proceeding, according to the Constitution of the State and to the ECHR, also recalling the jurisprudence of the Court of Strasbourg; and another decision of 23.9.2021, which found the incompatibility of the "Law on Salaries and Other Compensations of Judges and Prosecutors of the Federation of Bosnia and Herzegovina" with the principle of non-discrimination provided for by the Constitution of the State, the ECHR and the International Covenant for Civil and Political Rights;
- **Denmark:** the decision of the *Rigsretten* (Impeachment Court) of 13.12.2021, which sentenced the former Minister for Immigration and Integration Inger Støjberg for the violation of article 5(1) of the *Lov om ministres ansvarlighed* (Law of the responsibility of Ministers), to 60 days of detention, with regard to the administrative procedure – promoted and kept into force between 10/02/2016 and 12/12/2016 - concerning the reception of asylum seekers, which led to the separation of spouses or cohabitant persons in violation of article 8 of the ECHR;
- **France:** the decision of the *Cour de cassation* n. 1440 of 15.12.2021 which, in the matter of right to rest and leisure and agreements between social partners, examines their compatibility with Union law; the decision n. 1387 of 15.12.2021, in the matter of *ne bis in idem*, which examines the jurisprudence of the Court of Strasbourg and the norms of the two European Charters; the decision n. 790 of 15.12.2021, which, in the matter of state of arrest of an asylum seeker, examines the alleged violation (excluded by the Court) of article 41 of the EU Charter of Rights and the jurisprudence of the Court of Justice; and the order n. 1445 of 15.12.2021, which finds inadmissible the question of constitutional legitimacy of measures adopted for health workers in order to fight the epidemy, also in view of the lack of respect for International Conventions;
- **Germany:** the decision of the *Bundesverfassungsgericht* (Federal Constitutional Tribunal) of 16.12.2021, with which the Court established that the Federal Parliament

must adopt clear rules for the access to the National health system considering the limited resources, recalling the UN Convention on the Rights of Persons with Disabilities and article 14 of the ECHR; and the decision of 6.12.2021, of inadmissibility of the constitutional appeal against the order on the measures of protection from infections (Green Pass covid-19) of the State of Berlin, in relation to the election to federal chancellor; the decision of the Oberlandesgericht Stuttgart (Court of Appeal of Stuttgart) of 9.12.2021, on the violation of legislation in the matter of antitrust and on compensation, which recalls the jurisprudence of the Court of Justice; the decision of the Verwaltungsgericht Freiburg (Administrative Tribunal of Freiburg) of 29.10.2021, in the matter of residence permit and right to asylum, which recalls supra-national legislation; and the decision of the Landesarbeitsgericht Düsseldorf (Regional Labour Tribunal of Düsseldorf) of 15.9.2021, in the matter of mass redundancies of short-terms workers, which recalls EU legislation;

- **Great Britain:** the decision of the United Kingdom Supreme Court of 15.12.2021, in which the Court rejects the appeal against the second instance decision, which denied the violation of articles 8 and 14 of the ECHR following the refusal of the competent administration to avoid the indication of the gender on the passport of a genderqueer person; and the decision of 24.11.2021, on the right of persons with intellectual disabilities to have sexual relations; the decision of the England and Wales Court of Appeal of 12.11.2021, in which the Court confirms the first instance decision, which deemed compatible with article 5 of the ECHR the detention of a minor, when it aims at protecting the minor; the decision of 13.10.2021, in which the Court does not find the indirect discrimination on grounds of gender in the mechanism to calculate the family allowance provided for by the so called Universal Credit; and the decision of 24.09.2021, in which the Court confirms the first instance decision, which deemed discriminatory on grounds of sex the policy of an evangelical agency, which excludes homosexual couples from the families who can receive children in foster care; the decision of the England and Wales High Court of 10.12.2021, which admits the call of the United States Government to allow the extradition of Julian Assange; the decision of 3.12.2021, in the matter of freedom of expression and the disciplinary sanctions imposed to a doctor, who expressed very critical views on vaccines and the management from a sanitary point of view of the pandemic emergency; the decision of 12.10.2021, concerning the obligation to recognize the residence permit to the victims of human trafficking, forced labour and exploitation; the decision of 6.10.2021, on the interruption of health treatments for a two years old child, in which the Court recalls the now consolidated English jurisprudence, which considers decisive the supreme interest of the minor, even taking into account the requests and belief of the parents; and the decision of 23.9.2021, in the matter of abortion and rights of persons with disabilities;
- **Hungary:** the decision of the Alkotmánybírósága (Constitutional Court) of 7.12.2021, which, in the matter of the interpretation of articles E (2) and XIV (4) of the Constitution with regard to the implementation of the decision of the Court of Justice in the case *Commission v. Hungary* (C-808/18) of 17.12.2020, established that where the joint exercise of competences deriving from the participation of the State to the European Union is incomplete, Hungary has the right to exercise any competence which is not exclusive of the European Union until the EU institutions adopt the necessary measures to guarantee the effectiveness of such joint exercise;
- **Ireland:** the decision of the High Court of 2.12.2021, on the issue of an Irish passport for a British child born through surrogacy, which also recalls the jurisprudence of the Court of Strasbourg; and the decision of 30.11.2021, which makes a reference for a preliminary ruling to the Court of Justice on the interpretation of articles 2(a) and 3(2) (a) of Directive 2001/42/EC, on the assessment of the effects of certain plans and programmes on the environment, and of article 2(1) of Directive 2011/92/EU, on the assessment of the effects of certain public and private projects on the environment;
- **Italy:** the order of the Corte costituzionale n. 216 of 18.11.2021, of preliminary referral on the European arrest warrant, which asks if article 1, paragraph 3, of the Framework Decision 2002/584/JHA on the European arrest warrant, read in the light of articles 3, 4 and 35 of the European Union Charter of Fundamental Rights (EUCFR), must be interpreted in the sense that the judicial authority of the execution, in case the

surrender of a person suffering from serious chronic and potentially irreversible illness may cause a serious damage to his or her health, must ask the judicial authority, which issued the measure, the necessary information to exclude such risk, and it must deny the surrender until it obtains assurance in such sense within a reasonable time; and the order n. 217 of 18.11.2021, of preliminary referral in a case of European arrest warrant, in which the court asks if article 4, point 6, of Directive 2002/584/JHA, interpreted in the light of article 1, paragraph 3, of the same Framework Decision and of article 7 of the European Charter of Fundamental Rights (EUCFR), precludes a legislation, such as the Italian one, which – within a European arrest warrant aiming at the execution of a penalty or of a custodial sentence – totally and automatically precludes the judicial authorities of the execution from denying the surrender of third country nationals who dwell or reside on its territory, despite the ties they have with it; the decision of the *Corte di cassazione* n. 42654 of 22.11.2021, on defamation also with regard to value judgements, which also refer to facts, recalling the jurisprudence of the Court of Strasbourg; the decision n. 40538 of 9.11.2021, on the principle of legality applied to accessory sanctions, which recalls the jurisprudence of the Court of Strasbourg; the decision n. 39168 of 29.10.2021, concerning preventive seizure aiming at confiscation and the necessary proportionality between the value of the confiscated good and the amount of the unpaid taxes, in the light of the jurisprudence of the Court of Strasbourg and the protection of property, pursuant to the EU Charter of Fundamental Rights; and the decision n. 43592 of 26.10.2021, on the request of extradition towards Ukraine, in relation to which the Court finds that there is a serious risk, regarding spaces of detention, of inhuman and degrading treatments, which is not dispelled by generic statements of compensatory elements, in the light of the ECHR jurisprudence;

- **Lithuania:** the decision of the *Konstitucinis Teismas* (Constitutional Court) of 7.9.2021, which found the constitutional legitimacy of article 6(2) of “Law on Religious Communities and Associations”, concerning the terms for religious communities and associations to request the State’s recognition, recalling the norms of the ECHR, the EU Charter of Fundamental Rights and the TEU and the jurisprudence of the Court of Strasbourg in the matter of freedom of thought, conscience and religion;
- **Poland:** the decision of the *Trybunał Konstytucyjny* (Constitutional Court) of 24.11.2021, according to which article 6(1), first paragraph, of the ECHR is incompatible with the constitution of the State, where the word “tribunal” is interpreted in the sense of including also the Polish Constitutional Court, and where it establishes the competence of the European Court in the matter of review of the legitimacy of the method of selection of the Constitutional Court’s judges;
- **Portugal:** the decision of the *Tribunal Constitucional* n. 825/2021 of 27.10.2021, in the matter of health and safety of workers, which finds the constitutional legitimacy of article 6(2) of Decree 50/2005, on the periodic check of work equipment and which transposes Directive 2001/45/EC, for the violation of the principle of legal certainty;
- **Spain:** the decision of the *Tribunal Constitucional* n. 184/2021 of 28.10.2021, which rejects the claim lodged by Carme Forcadell Lluís against the decision of the Tribunal Supremo of 14 October 2019, which had convicted her for the crime of sedition with regard to the facts of Autumn 2017 related to the referendum for the autonomy of Catalonia, also recalling the norms of the ECHR and the jurisprudence of the Court of Strasbourg; the decision n. 172/2021 of 7.10.2021, in the matter of social security and prohibition of discrimination on grounds of disability, which recalls the norms of the ECHR, EU legislation relevant in such matter and the jurisprudence of the Courts of Strasbourg and Luxembourg; the decision n. 169/2021 of 6.10.2021, which rejected the claim of constitutional legitimacy lodged, also pursuant to article 3 of the ECHR, against the Organic Law 1/2015 amending the Criminal Code, recalling the jurisprudence of the Court of Strasbourg; and the decision n. 166/2021 of 4.10.2021, on the violation of the right to an effective remedy with regard to the obligation of the authorities to carry out adequate investigations following a report for crimes of torture, also in the light of the jurisprudence of the Court of Strasbourg;
- **The Netherlands:** the decision of the *Gerechtshof Den Haag* (Court of Appeal of the Hague) of 16.11.2021, which rejected the claim lodged by *Privacy First* against the

national law in the matter of “ultimate beneficial owner”, transposing the norms of Anti-money laundering Directive, recalling EU legislation relevant in such matter and the jurisprudence of the Court of Justice.

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

Articles:

[Giuseppe Bronzini](#) “Towards the end of the Italic discrimination of migrant regular workers with regard to the access to family services? The Court of Justice stigmatizes Italian legislation”

[Roberta Calvano](#) “Court of Justice, primacy of EU law and honorary judges”

[Bruno Caruso](#) “The Court of Brescia provides an assist to the Constitutional Court and the legislator in order to solve definitively the question of honorary judges as employed workers”

[Gaetano De Amicis](#) “Rule of law and European guarantees on the independence of judges”

[Vincenzo De Michele](#) “The decision of the Court of Justice concerning religion teachers”

[Sergio Galleano](#) “The decision Randstad of 21.12.21: the Court of Justice solves the contrast between the United Sections and the Constitutional Court and censors the Council of State. But not everything is solved”

[Downe Korff](#) “Opinion on the broader and core issues arising in the PNR Case currently before the CJEU (Case C-817/19)”

[Bruno Nascimbene](#) “ECHR and European Union Charter of Fundamental Rights: scope, respective application and (possible) overlaps”

Notes and comments:

[Francesco Buffa, Salvatore Centonze](#) “The family of third country nationals and the prohibition of discrimination in two recent decisions of the Court of Justice”

[Gabriella Cappello](#) “Comment to the decision of the ECHR of 9 November 2021, Ignat v. Romania, in the matter of overruling and right to a fair trial”

[Aldo Cimmino](#) “The case Marinoni on the massacre of Rovetta before the ECHR”

[Angelo Napolitano](#) “Report Court of Justice of the European Union, Tribunal, 10 November 2021, *Google v. Commission* (Case T-612/17)”

Documents:

[Report of Human Rights Watch](#) “Dismantling Detention: International Alternatives to Detaining Immigrants”, of 3 November 2021