



OBSERVATORY ON THE RESPECT FOR FUNDAMENTAL RIGHTS IN EUROPE

Newsletter n. 92

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

- 28.04.2022, C-804/21 PPU, *C and CD (Obstacles juridiques à l'exécution d'une décision de remise)*, on the European arrest warrant and the concept of "force majeure";
- 28.04.2022, C-319/20, *Meta Platforms Ireland*, on the protection of personal data and consumer protection;
- 26.04.2022, C-401/19, *Poland v. Parliament and Council*, on copyright, freedom of expression and freedom of information;
- 26.04.2022, joined cases C-368/20 and C-369/20, *Landespolizeidirektion Steiermark, Bezirkshauptmannschaft Leibnitz (Durée maximale du contrôle aux frontières intérieures)*, on temporary reintroduction of border control at internal borders with other Member States and on the right of free movement of persons;
- 07.04.2022, C-385/20, *Caixabank*, on unfair terms in consumers' contracts;
- 07.04.2022, C-249/21, *Fuhrmann-2*, on consumers' protection with regard to contracts concluded by electronic means;
- 07.04.2022, C-236/20, *Ministero della Giustizia and others (Status of Italian magistrates)*, on the status of Italian magistrates, on equal treatment in employment and occupation and on paid annual leave;
- 05.04.2022, C-140/20, *Commissioner of the Garda Síochána and others*, on the processing of personal data in the electronic communications sector;
- 31.03.2022, C-472/20, *Lombard Lizing*, on consumer protection in loans denominated in foreign currency;
- 31.03.2022, C-231/21, *Bundesamt für Fremdenwesen und Asyl (Placement d'un demandeur d'asile dans un hôpital psychiatrique)*, on the transfer of the asylum seeker to the Member State responsible for examining the application for international protection;
- 31.03.2022, C-96/21, *CTS Eventim*, on consumer protection and the right of withdrawal for distance and off-premises contracts;
- 29.03.2022, C-132/20, *Getin Noble Bank*, on the independence and impartiality of judges;
- 24.03.2022, C-533/20, *Upfield Hungary*, on the provision of food information to consumers;
- 24.03.2022, C-245/20, *X and Z v. Autoriteit Persoonsgegevens*, on the protection of natural persons with regard to the processing of personal data;
- 22.03.2022, C-117/20, *bpost*, and C-151/20, *Nordzucker and others*, both on the principle of *ne bis in idem*;
- 15.03.2022, C-302/20, *A v. Autorité des marchés financiers (AMF)*, on freedom of the press.

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

- 17.02.2022, *D'amico v. Italy* (n. 46586/14), on the violation of the Convention for the lack of a sufficiently compelling reason justifying the retrospective application of a law determining the substance of pensions disputes in pending proceedings;
- 15.02.2022, *Anatoliy Marinov v. Bulgaria* (n. 26081/17), on the violation of the Convention for the automatic withdrawal of the right to vote of the applicant, who had been placed under partial guardianship owing to psychiatric problems, without any individual judicial review;
- 15.02.2022, *Y. v. Poland* (n. 74131/14), on the refusal to alter the full birth certificate following the gender reassignment: according to the Court there was no violation of the Convention;
- 10.02.2022, *A. and B. v. Georgia* (n. 73975/16), on the violation of the Convention for not having prevented violence on grounds of sex committed by a policeman and for not having inquired on the lack of investigation by the police;
- 08.02.2022, *Plazzi v. Switzerland* (n. 44101/18), and *Roth v. Switzerland* (n. 69444/17), on the violation of the Convention for the cancellation without judicial review of the suspensive effect of fathers' appeals, thereby enabling their children to leave the country with their mothers and removing the jurisdiction of the domestic courts;
- 08.02.2022, *Q and R. v. Slovenia* (n. 19938/20), on the violation of the Convention for the unreasonable length of the proceeding for grandparent requesting foster care of grandchildren without parental care, not justified by Covid-19 related measures;
- 03.02.2022, *Advance Pharma SP. Z O.O v. Poland* (n. 1469/20), on the violation of the Convention, because the procedure for appointing judges to the Civil Chamber of the Supreme Court had been unduly influenced by the legislative and executive powers. That amounted to a fundamental irregularity that adversely affected the whole process and compromised the legitimacy of the Civil Chamber of the Supreme Court, which had examined the applicant company's case;
- 03.02.2022, *Šeks v. Croatia* (n. 39325/20), according to which there was no violation of the Convention with regard to the denial of access, on national security grounds, to classified records relating to a sensitive part of the country's recent history;
- 03.02.2022, *N.M. and others v. France* (n. 66328/14), on the refusal to award compensation in respect of the financial burdens arising from the disability of a child, born disabled as a result of a fault during the prenatal diagnosis, through retrospective application of the law;
- 01.02.2022, *Manannikov v. Russia* (n. 9157/08), according to which there was no violation of the Convention regarding the 14 euros fine imposed to a demonstrator who, with his behaviour, was likely to cause unrest;
- 01.02.2022, *Kramareva v. Russia* (n. 4418/18), on the fair balance between parties in proceedings on employment termination which was not upset by the participation of a prosecutor, an independent officer having no special powers and not attending court deliberations: according to the Court there was no violation of the Convention;
- 25.01.2022, *Negovanović and others v. Serbia* (n. 29907/16), on the discriminatory denial to blind chess players of financial awards granted to sighted players as national sporting recognition for winning similar international accolades: according to the Court there was violation of the Convention;
- 18.01.2022, *Faysal Pamuk v. Turkey* (n. 430/13), on the violation of the Convention for the conviction based on written statements of absent witnesses heard only by the Court of the place of residence, with no reasonable measures adopted by the authorities to guarantee their presence;
- 18.01.2022, *Atristain Gorosabel v. Spain* (n. 15508/15), on the use, during the proceeding, of the confession of a person suspected of terrorism, who was secretly detained, and received the unjustified refusal to choose a lawyer or to have access to legal aid: according to the Court there was violation of the Convention;

- 18.01.2022, *Sy v. Italy* (n. 11791/20), on the detention for two years, in an ordinary detention regime, of a person suffering from quite serious psychiatric disorders and without a therapeutic strategy for his illness: according to the Court there was violation of the Convention;
- 11.01.2022, *Freitas Rangel v. Portugal* (n. 78873/13), on the violation of the Convention for the conviction and the unjustified and not proportioned sanctions imposed to a journalist for certain statements made at a Parliamentary Commission;
- 11.01.2022, *Ekimdzhiiev and others v. Bulgaria* (n. 70078/12), on inadequate safeguards against abuses in the matter of retention and accessing of data: according to the Court there was violation of the Convention.

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

- the order of the *Federal Court of Australia* of 15.3.2022, which reversed the previous decision of first instance of 27 May 2021, according to which the Minister of Environment must adopt reasonable measures in order to avoid personal damages to children, deriving from CO2 emissions in the atmosphere, when deciding whether to approve the development of a project of coal extraction;
- the decision of the *Supreme Court of the United States* of 3.3.2022, which, overturning the decision of the Court of Appeal, established that the state secrets privilege applies to the request of information which can confirm or deny the existence of CIA sites of detention in Poland;
- the decision of the *Supreme Court of Texas* of 24.2.2022, which rejected the claim lodged against the Texan law on abortion (Senate Bill 8), establishing that State executive agencies summoned as a defendant in the proceeding cannot, pursuant to the norms of the Senate Bill 8, impose the restrictions to abortion provided by such law, which can instead may be enforced by a private civil action;
- the decision of the *Corte Constitucional de Colombia* of 21.2.2022, which decriminalised the crime of abortion, establishing a sanction only after the 24th week and excluding, in any case, from such time limit the three hypothesis provided for by the decision of the same Court n. C-355 of 2006, i.e.: 1) danger for the life or health of the mother, 2) serious malformation of the fetus, 3) pregnancy caused by a non-consensual act;
- the decision of the *International Court of Justice* of 9.2.2022, case *Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, which, following its own decision of 19 December 2005 in which it established the violation by Uganda of international humanitarian law and of international human rights law in the Congolese province of Ituri and concluded in favour of the compensation for the caused damage, has determined such compensation in 325 million dollars;
- the decision of the *Interamerican Court of human rights* of 25.11.2021, case *Digna Ochoa y familiares vs. México*, on the State responsibility for the lack of effective investigations into the homicide of the human rights lawyer Digna Ochoa y Plácido; the decision of 24.11.2021, case *Palacio Urrutia y otros vs. Ecuador*, on the violation of the right to freedom of expression for the conviction of 2011 imposed to a journalist for the crime of slander against the authorities, following the publication of an article on the newspaper "El Universo"; the decision of 17.11.2021, case *Extrabajadores del organismo judicial vs. Guatemala*, which found the violation of the right to an effective remedy and to trade union freedom and freedom of association, in virtue of the dismissal of 65 employees of the judicial body after their participation to a strike, which was then declared unlawful; the decision of 15.11.2021, case *Maidanik y otros vs. Uruguay*, on the State responsibility for the forced disappearance of two persons during the military dictatorship in Uruguay between 1973 and 1985; the decision of 10.11.2021, case *Profesores de Chañaral y otras municipalidades vs. Chile*, on the lack or irregular execution of decisions issued in favour of 846 professors and concerning the payment of a special allowance by some municipalities, in violation of the right to an effective remedy and to property; the decision of 3.11.2021, case *Masacre de la Aldea Los Josefinos vs. Guatemala*, on the State responsibility for the violation of the rights to life, to personal integrity, freedom, protection of the family, freedom of movement and

residence, to an effective remedy and the right of the child, in relation to the massacre committed by the army in the village of *Los Josefinos* between 29 and 30 April 1982, during the armed conflict in Guatemala; the decision of 2.11.2021, case *Manuela y otros vs. El Salvador*, in violation of several articles of the Convention, in relation to the sentence issued against "Manuela" for the homicide aggravated in the legal context of the total criminalization of abortion, to the health treatment received and to her death when she was under the State's custody; the decision of 6.10.2021, case *Pueblos Indígenas Maya Kaqchikel de Sumpango y otros vs. Guatemala*, on the access to means of communication by indigenous populations and the impossibility to exercise the right to freedom of expression and their cultural rights because of the legislation in the matter of broadcasting; the decision of 1.10.2021, case *Vera Rojas y otros vs. Chile*, on the end of the insurance regime of home hospitalization in virtue of a State circular which excluded from its application any chronic illness, in violation of several norms of the Convention; and the decision of 28.9.2021, case *Cuya Lavy y otros vs. Perú*, on the violation of the right to an effective remedy, in the matter of proceedings for the evaluation and ratification of judges.

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

- **Belgium:** the decision of the *Cour constitutionnelle* n. 33/2022 of 10.3.2022, which rejects the claim against the law of 22 May 2019, amending several norms on police information, also lodged according to Directive (EU) 2016/680, the EU Charter of Fundamental Rights and the ECHR, and which recalls the jurisprudence of the Courts of Strasbourg and Luxembourg; the decision n. 26/2022 of 17.2.2022, which rejected the claim lodged against some norms of the law of 15 March 2020, amending the legislation on euthanasia, also recalling the jurisprudence of the Court of Strasbourg; and the decision n. 1/2022 of 13.1.2022, on international judicial assistance in criminal matters and jurisdictional guarantees in virtue of acts of execution of a request of assistance issued by a foreign authority, which recalls the norms of the ECHR and the jurisprudence of the Court of Luxembourg;
- **Bosnia and Herzegovina:** the decision of the *Ustavni sud* (Constitutional Court) of 3.12.2021, on the violation of the right to a fair trial according to article 6 of the ECHR, which applies also the jurisprudence of the Court of Strasbourg; and the decision of 2.12.2021, according to which article 12(2) of the Army Rules is in contrast with the State Constitution and articles 8 and 9 of the ECHR, where it prohibits members of the army to have a beard;
- **Czech Republic:** the decision of the *Ústavní soud* (Constitutional Court) of 31.3.2022, which rejected the claim for annulment, lodged by a non-binary person, against sections 29(1) of the Civil Code and 21(1) of the Specific Health Services Act, which provide for the modification of the gender only by surgery, and the request to amend Section 13(3) of the Population Register Act, concerning the identification numbers at birth, recalling the jurisprudence of the Court of Strasbourg; and the decision of 17.2.2022, in the matter of European arrest warrant, in the light of the relevant jurisprudence of the Court of Justice;
- **Estonia:** the decision of the *Vabariigi Riigikohus* (Supreme Court) of 15.3.2022, in the matter of rights of disabled people, in particular on the violation of the right to equal treatment in the matter of employment for the dismissal, provided for by a government regulation, of a security guard because of the loss of hearing, which recalls Directive 2000/78/EC and the jurisprudence of the Court of Justice;
- **France:** the decision of the *Cour de cassation* n. 333 of 13.4.2022, on the legal value of a European certificate of succession, in the light of supra-national legislation; and the decision n. 553 of 12.4.2022, on the execution of an international arrest warrant and the alleged violation of article 6 of the ECHR;
- **Germany:** the decision of the *Bundesverfassungsgericht* (Federal Constitutional Tribunal) of 18.3.2022, on the constitutional claim concerning the salary of judges according to the age, which recalls supra-national sources; the decision of the

Bundesgerichtshof (Federal Court of Justice) of 27.1.2022, on anonymity in the internet, which recalls the European Union legislation and article 8 of the EU Charter of Fundamental Rights; the decision of the *Oberlandesgericht Düsseldorf* (Court of Appeal of Düsseldorf) of 27.1.2022, on the jurisdiction for communication through electronic mail, which recalls supra-national sources;

- **Great Britain:** the decision of the *England and Wales Court of Appeal* of 1.4.2022, on the expulsion of an Afghan minor from the United Kingdom to Germany, pursuant to the Dublin III Regulation within the procedure for the request of asylum, in which the Court recognizes the right to compensation of the disabled minor following the violation of the norms of the Regulation and also because of the damages deriving from the violation of the right to private and family life, according to article 8 of the ECHR; and the decision of 16.3.2022, in which the Court does not find indirectly discriminatory the norm excluding the cumulation of the economic benefit granted to foreign female asylum seekers with the support recognized to mothers victims of human trafficking; the decision of the *England and Wales High Court* of 4.4.2022, on the compatibility with article 8 of the ECHR of the regulation of English intelligence on the sharing of information gathered together with foreign intelligence agencies; and the decision of 11.3.2022, on the balance between the right to freedom of expression and association and the demands of public health during the pandemic;
- **Ireland:** the decision of the *Supreme Court* of 21.2.2022, which makes a reference for a preliminary ruling to the Court of Justice on the interpretation and application of articles 3(a) and 3(c) of the Regulation (EC) 469/2009 on the conditions for the issue of a complementary protective certificate for medicines; the decision of 18.2.2022, which decides to refer preliminary questions to the Court of Justice on the concept of "judicial authority" in view of the application of article 27 of the Framework Decision 2002/584/JHA on the European arrest warrant; and the decision of 8.2.2022, which, also recalling the jurisprudence of the Court of Justice, refuses the handover of the covenant to Poland, pursuant to a European arrest warrant, because of the impact that the surrender would have on his rights according to article 8 of the ECHR; the decision of the *Court of Appeal* of 7.4.2022, on the criteria for the expulsion of a EU national, pursuant to articles 27 and 28 of Directive 2004/38/EC, in the light of the jurisprudence of the Court of Justice; the decision of 31.1.2022, on the alleged violation of the rights provided for by EU legislation deriving from a wrong interpretation of the jurisprudence of the Court of Justice, which analyses the decisions of the Court of Luxembourg in the cases *Köbler* (C-224/01) and *Dowling* (C-41/15); the decision of 19.1.2022, on the application of article 17(1) ("Discretionary Clauses") of the Regulation (EU) 604/2013 ("Dublin III Regulation"), in the light of the jurisprudence of the Court of Justice; and the decision of 11.1.2022, on the principle of the direct effect of EU law and the wrong transposition of some provisions of Directive 2001/82/EC; the decision of the *High Court* of 31.3.2022, which makes a reference for a preliminary ruling to the Court of Justice on the interpretation of the concept of "transfer decision" provided for by the Regulation (EU) 604/2013 ("Dublin III Regulation") for its relation with articles 17 and 27 of the said Regulation; the decision of 11.3.2022, in the matter of the right to an effective remedy, which makes a reference for a preliminary ruling to the Court of Justice on the interpretation of article 11(1)(a) of Directive 2011/92/EU (Environmental Impact Assessment Directive), in combination with article 47 of the EU Charter of Fundamental Rights and/or articles from 9(2) to 9(4) of the Aarhus Convention; the decision of 14.1.2022, in the matter of EU environmental law and access to justice, which makes a reference for a preliminary ruling to the Court of Justice, also in the light of the case law of the Court of Luxembourg; and another decision of 14.1.2022, of preliminary referral to the Court of Justice on the interpretation of articles 12 and 16 of Directive 92/43/EEC (Directive "Habitat"), read in combination with article 9(2) of the Aarhus Convention;
- **Italy:** the order of the *Consiglio di stato* of 6.4.2022, of preliminary referral on the clarification concerning the cases in which the last instance judge is obliged to make a reference for a preliminary ruling, which recalls article 47 of the EU Charter of Fundamental Rights; the decision of the *Corte di cassazione* n. 18044 of 5.5.2022, in the matter of extradition to Russia if there are no risks of inhuman or degrading

treatments, in the light of the two European Charters; the decision n. 16226 of 27.4.2022, according to which also the action which become devoid of purpose for the Court of Strasbourg, for having the State accepted the violation, produces binding effects even if it is not a conviction; the decision n. 7798 of 3.3.2022, on the inadmissibility of the request of review of a conviction with regard to a more favourable sanction, also in the light of article 6 of the ECHR; the decision n. 10631 of 2.3.2022, which, in the matter of *ne bis in idem*, excludes the applicability of the principle in relation with a custodial sanction, which consists in the execution of the sanction, also in the light of the jurisprudence of the ECHR; the decision n. 8208 of 10.1.2022, on the concept of "fame" of public persons in the offence of defamation, which recalls the jurisprudence of the Court of Strasbourg; the decision n. 8982 of 13.1.2022, on the principle of proportionality of the precautionary asset seizure, also in relation with private property, which recalls the jurisprudence of the Court of Strasbourg; and the decision n. 7505 of 2.3.2022, on the principle according to which the silence of the accused person cannot be the reason of the conviction, in the light of the jurisprudence of the ECHR; the order of the *Tribunale di Milano* of 22.2.2022, which deems discriminatory the exclusion of third-country nationals from the issue of the family-charter, in the light of the jurisprudence of the Court of Justice and recalling article 21 of the EU Charter of Fundamental Rights;

- **Poland:** the decision of the *Trybunał Konstytucyjny* (Constitutional Court) of 10.3.2022, which finds the constitutional illegitimacy of article 6(1) of the ECHR, where the words "civil rights and obligations" establish the right of the judge to cover a managerial position in the Polish courts, and where the requirement of the "tribunal established by law" allows the European Court or national Courts to overlook the Polish constitution and the decisions of the Polish Constitutional Court, to create norms – interpreting the Convention – on the procedure of appointment of judges, and to assess the conformity to the Constitution and to the ECHR of the organizational structure of the judicial system, of the jurisdiction of the courts or of acts concerning the National Council of the Judiciary;
- **Portugal:** the decision of the *Tribunal Constitucional* n. 83/2022 of 26.1.2022, in the matter of protection of biological diversity, in particular on the alleged constitutional illegitimacy of the norms of certain decrees on the juridical regime for the Iberian wolf with regard to the norms on compensation, also in the light of EU legislation relevant in such matter and the jurisprudence of the Court of Justice;
- **Spain:** the decision of the *Tribunal Constitucional* n. 31/2022 of 7.3.2022, in the matter of processing of personal data, in the light of the jurisprudence of the Court of Justice; the decision n. 25/2022 of 23.2.2022, which rejects the claim lodged by Joaquim Torra i Pla against the decision of the Tribunal Superior de Justicia de Cataluña of 19 December 2019 which convicted him for the offence of disobedience, also recalling the norms of the EU Charter of Fundamental Rights and the jurisprudence of the Courts of Strasbourg and Luxembourg; the decision n. 23/2022 of 21.2.2022, on the alleged violation of the right to the protection of personal data, in the light of the publication of a conviction in the Official Journal, which recalls the norms of the EU Charter of Fundamental Rights and EU relevant legislation in such matter; and the decision n. 13/2022 of 7.2.2022, on the violation of the right to an effective remedy in relation to the authorities duty to carry out adequate investigations following the report for torture or inhuman or degrading treatments, also in the light of the jurisprudence of the Court of Strasbourg; the decision of the *Tribunal Supremo* of 31.3.2022, on the appeal against a decision which recognized filiation in favour of a person different from the biological mother of the child born through surrogacy: the Court, in accordance with its previous case-law and also recalling the jurisprudence of the Court of Strasbourg, established that the surrogacy contract breaches the fundamental rights of the expectant mother and of the child and is in contrast with public order; the decision of 27.1.2022, in the matter of unfair clauses, in the light of Directive 93/13/EEC and the jurisprudence of the Court of Justice; and the decision of 17.12.2021, which analyses the requirement of "sufficient grade of integration", pursuant to article 22.4 of the Civil Code, in virtue of which Spanish nationality was denied to the claimant, also recalling EU Directives in the matter of equal treatment for men and women;

- **The Netherlands:** two decisions of the *Raad van State* (Council of State) of 13.4.2022, according to which the Secretary of State for Security and Justice must investigate whether the transfer of asylum seekers to Croatia, pursuant to the Dublin Regulation, may lead to situations in violation to article 4 of the EU Charter of Fundamental Rights and article 3 of the ECHR.

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

Articles:

[Giuseppe Bronzini](#) "The proposal for the Directive on employment in digital platforms between the need of immediate protection and the challenges of "digital humanism""

[Marco Cappai and Giuseppe Colangelo](#) "The Grand Chamber of the Court of Justice finally writes a consolidated law on the *ne bis in idem*"

[Vincenzo De Michele](#) "The new decision of the Court of Justice on Italian honorary judges"

[Sergio Galleano](#) "The decision DS of the Court of Justice of 13 January 2022: on the importance of the period of paid leave as working time from the law and contract point of view"

[Roberto Rivero](#) "Autumn symphony for European social law. Brief considerations on the constitutional decisions number 54 and 67 of 2022"

[Lucia Tria](#) "Harassment in the employment relationship"

Notes and comments:

[António Cluny](#) "Rule of law and rule by law"

[Roberta Barberini](#) "Oligarchs' funds freezing"

[Pier Virgilio Dastoli](#) "Between continental Confederation and European Federation: the future of relations between Slavic world and European Union"

[Luigi Ferrajoli](#) "Pacifism and global constitutionalism"

[Maria Rosaria Guglielmi](#) "Rule of law vs rule by law: a new challenge for democracy and jurisdiction"

[Franco Ippolito](#) "A new agreement on international coexistence is needed"

[Federica Resta](#) "From generalized to targeted and rapid retention: the Court of Justice defines again the outlines of data retention"

Documents:

[The document by the European Federalist Movement](#) "The European Union and the resurgence of the war. The urgent need to create a federal, sovereign and democratic Europe, of April 2022

[The third part of the Sixth Assessment Report](#), by the Working Group III of the Intergovernmental Panel on Climate Change (IPCC) "Climate Change 2022: Mitigation of Climate Change", of 4 April 2022