



OBSERVATORY ON THE RESPECT FOR FUNDAMENTAL RIGHTS IN EUROPE

Newsletter n. 96

15 January 2023

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:

- 22.12.2022, C-237/21, *Generalstaatsanwaltschaft München (Demande d'extradition vers la Bosnie-Herzégovine)*, on the extradition to a third country of a Union national, who is a citizen of another Member State and who has exercised his right to free movement in the first of those Member States;
- 22.12.2022, C-279/21, *Udlændingenævnet (Examen linguistique imposé aux étrangers)*, on the national rule introducing new more restrictive conditions in the area of family reunification for spouses of Turkish nationals, who hold a permanent residence permit in the Member State concerned;
- 22.12.2022, C-392/21, *Inspectoratul General pentru Imigrări (Acquisition de lunettes par un travailleur)*, on the protection of the safety and health of workers;
- 22.12.2022, C-530/20, *EUROAPTIEKA*, on the ban on advertising encouraging the purchase of non-prescription or non-reimbursable medicinal products on the basis of price or special sales, on the protection of health and of consumers;
- 15.12.2022, joined cases C-40/20 and C-173/20, *Presidenza del Consiglio dei Ministri and others (Chercheurs universitaires)*, on non-discrimination between fixed-term and with no time limit university researchers;
- 15.12.2022, C-311/21, *TimePartner Personalmanagement*, on collective agreements providing for lower pay than that of staff recruited directly by the user undertaking and on the effective judicial protection in order to verify respect for the overall protection of temporary agency workers;
- 08.12.2022, C-180/21, *Inspektor vs Inspektorata kam Visshia sadeben savet (Finalités du traitement de données - Enquête pénale)*, on the lawfulness of the processing of personal data collected in the course of a criminal investigation, on the concept of purpose "other than that for which the personal data are collected" and on data used by the public prosecutor's office of a Member State for the purposes of its defence in an action for damages against the State;
- 08.12.2022, C-694/20, *Orde van Vlaamse Balies and others*, on the validity of article 8 bis ter, paragraph 5, of Directive 2011/16/EU in the light of article 7 of the European Union Charter of Fundamental Rights;
- 08.12.2022, C-731/21, *Caisse nationale d'assurance pension*, on the national legislation making the grant of a survivor's pension conditional upon the entry in the national register of a partnership that was validly concluded and registered in another Member State;
- 08.12.2022, C-460/20, *Google (Déréférencement d'un contenu prétendument inexact)*, on the request for de-referencing made to the operator of the search engine and on the balance between the rights provided for by articles 7 and 8 of the Charter of

Fundamental Rights and those provided for by article 11 of the Charter of Fundamental Rights;

- 01.12.2022, C-564/21, *Bundesrepublik Deutschland (Accès au dossier en matière d'asile)*, on access to information in the file of the applicant requesting international protection and on the right to an effective remedy;
- 24.11.2022, C-638/20, *MCM (Aides financières pour études à l'étranger)*, on requirements in order to have financial aid for higher education studies in another Member State and on freedom of movement for persons;
- 22.11.2022, joined cases C-37/20 and C-601/20, *Luxembourg Business Registers*, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, on the respect for private and family life and on protection of personal data;
- 22.11.2022, C-69/21, *Staatssecretaris van Justitie en Veiligheid (Éloignement - Cannabis thérapeutique)*, on the conditions under which the removal of a third country national, who is suffering from a serious illness, must be postponed;
- 17.11.2022, C-54/21, *ANTEA POLSKA and others*, on the right to an effective remedy and on contract award criteria;
- 08.11.2022, joined cases C-704/20 and C-39/21, *Staatssecretaris van Justitie en Veiligheid (Examen d'office de la rétention)*, on the review of the lawfulness of detention and of the continuation of a detention measure of third country nationals;
- 08.11.2022, C-873/19, *Deutsche Umwelthilfe (Réception des véhicules à moteur)*, on the standing of an association for the protection of the environment to bring an action before a national court against EC type-approval granted to certain vehicles;

and the order:

- 07.11.2022, C-859/19, C-926/19 and C-929/19, *FX and others (Effet des arrêts d'une Cour constitutionnelle III)*, on the principle of primacy of EU law.

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

- 22.11.2022, *D.B. and others v. Switzerland* (n. 58817/15 and 58252/15), according to which the lack of provision in Swiss law, until 2018, for alternative means of recognising children born to same-sex couples through surrogacy violated the children's right to private life;
- 15.11.2022, *A and others v. Iceland* (n. 25133/20 and 31856/20), according to which the Icelandic judge's decision of depriving the parents of the custody was in the children's best interest, despite the father was acquitted of the sexual abuse charges;
- 10.11.2022, *I.M. and others v. Italy* (n. 25426/20), which finds the violation of article 8 of the Convention in virtue of the obligation imposed onto two children to meet their violent father in contrast with the children's best interest;
- 10.11.2022, *Bakirdzi and E.C. v. Hungary* (n. 49636/14 and 65678/14), according to which the Court found the electoral system applied to national minorities in Hungary in contrast with the right to free elections (the case concerns the national elections of 2014);
- 08.11.2022, *Văleanu and others v. Romania* (n. 59012/17), according to which the restitution mechanism for property confiscated or nationalized by the communist regime is ineffective;
- 08.11.2022, *Saure v. Germany* (n. 8819/16), in which the Court finds lawful the authorities' refusal to allow the journalist physical access to the Foreign Intelligence Service records on a former Prime Minister of the Land of Schleswig-Holstein;
- 08.11.2022, *Moraru v. Romania* (n. 64480/19), according to which the criteria of height and weight imposed for the admission to the military medical school is discriminatory and in violation of article 14 in combination with article 2 of Protocol 1 (right to education);

- 08.11.2022, *Aygün v. Belgium* (n. 28336/12), on the impossibility to review the decision of prohibiting the claimants from burying their sons abroad during the criminal investigations: the Court found the violation of articles 8 and 9 of the Convention;
- 03.11.2022, Grand Chamber judgement, *Vegotex International S.A. v. Belgium* (n. 49812/09), in which the Court found the excessive length of the tax proceeding, but not its violation of the Convention;
- 03.11.2022, Grand Chamber judgement, *Sanchez-Sanchez v. the United Kingdom* (n. 22854/20), in which the Court found that the claimant's extradition is not in contrast with the Convention;
- 03.11.2022, *Loste v. France* (n. 59227/12), in which the Court found several violations of the Convention in virtue of the authorities' failure to monitor the conditions of the upbringing of a minor by a foster family;
- 03.11.2022, *Dahan v. France* (n. 32314/14), on the non-violation of the Convention in virtue of the fact that the review by the Council of State of the penalty of compulsory retirement imposed on an ambassador guaranteed a fair trial;
- 20.10.2022, *Dolenc v. Slovenia* (n. 20256/20), according to which the right to a fair trial of an internationally renowned neurosurgeon was violated by the recognition by the Slovenian courts of judgments issued by an Israeli district court concerning a surgery which was carried out in Ljubljana;
- 13.10.2022, *Bouton v. France* (n. 22636/19), according to which the Court found the one-month suspended prison sentence imposed to an activist of Femen for staging a topless protest in a church was in contrast with article 10 and therefore violated the applicant's right of expression;
- 11.10.2022, Grand Chamber judgement, *Beeler v. Switzerland* (n. 78630/12), which considered discriminatory the treatment of widowers, taking care full-time of children, by terminating their survivor's pension when the youngest child reached adulthood;
- 11.10.2022, *Constantin-Lucian Spînu v. Romania* (n. 29443/20), on the one-off refusal, on COVID-19 grounds, of the permission for the prisoner to attend church services outside the prison, which would not violate the Convention;
- 11.10.2022, *Ashot Malkhasyan v. Armenia* (n. 35814/14), on the risk of death of the applicant's son, who was considered fit to undertake compulsory military service, despite his significant health problems;
- 08.10.2022, *Khural and Zeynalov v. Azerbaijan* (n. 55069/11), according to which, in this specific case, the freedom of expression does not justify the publication of inaccurate nor reliable information;
- 06.10.2022, *Juszczyszyn v. Poland* (n. 35599/20), on significant irregularities in the appointment of judges of the Polish Disciplinary Chamber and the violation of the right to a tribunal established by law;
- 06.10.2022, *Liu v. Poland* (n. 37610/18), according to which the extradition of the applicant to China would expose him to the risk of inhuman and degrading treatments and of torture;
- 05.10.2022, *Mustafa Hajili and others v. Azerbaijan* (n. 69483/13 and two others), on the authorities' refusal to a political group to demonstrate, in violation of the Convention;
- 04.10.2022, *Mortier v. Belgium* (n. 78017/17), which found some procedural lacks in the control proceeding following the death by euthanasia of the applicant's mother;
- 04.10.2022, *Besnik Cani v. Albania* (n. 37474/20), on the fairness of the criminal proceeding against the former prosecutor;
- 04.10.2022, *De Legé v. The Netherlands* (n. 58342/15), on the forced supply of documents concerning foreign bank accounts in contrast with the privilege against self-incrimination;

and the decisions:

- 03.11.2022, Grand Chamber decision, *McCallum v. Italy* (n. 20863/21), in which the Court finds that the applicant's extradition to Michigan does not involve the risk of inhuman and degrading penalties;

- 06.10.2022, *Thevenon v. France* (n. 46061/21), on the refusal of the imposition on the applicant of the compulsory vaccination against COVID-19: the application was declared inadmissible for the failure to exhaust all domestic remedies.

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

- **France:** the decision of the *Conseil d'État* of 9.12.2022, on work in protected areas, which recalls supra-national legislation; the decision of 23.11.2022, on the suspension of hunting of certain species of birds, which recalls EU directives; and the decision of 19.11.2022, on the Ocean Viking case, on the right to asylum and measures concerning the zone of temporary stop of the ship, which recalls the European Union legislation; and the opinion of 17.11.2022, on the adaptation of the French legal system to Union law also in the matter of parental leave;
- **Germany:** the order of the *Bundesverfassungsgericht* (Federal Constitutional Tribunal) of 6.12.2022, which rejects the requests of suspension of the ratification, by the Federal German Republic, of the European Union decision concerning its own resources in relation to the so-called Recovery Plan (EU recovery package); and the order of 13.10.2022, which rejects the requests of suspension of the ratification of the new ESM legislation (European Stability Mechanism);
- **Great Britain:** the decision of the *United Kingdom Supreme Court* of 7.12.2022, in which the Court deems compatible with freedom of expression, of demonstration and assembly, the norms of the Abortion Services (Safe Access Zones) Act of Northern Ireland, which prohibit demonstrations against abortion in the areas near the clinics where abortion is practiced; the decision of the *England and Wales Court of Appeal* of 18.11.2022, on the compatibility of the norms of the Diplomatic Privileges Act 1964 and of the Vienna Convention on Diplomatic Relations of 1961 with the prohibition of torture and inhuman and degrading treatments, provided for by article 3 of the ECHR, in a case of abuses on underage children committed by a parent protected by diplomatic immunity; the decision of the *England and Wales High Court* of 7.11.2022, in which the Court finds that the right to privacy of a man affected by Asperger's Syndrome is not violated in a case in which the police authorities kept the registration in their database information on the content of the report done by two women concerning abuses from the man, not followed by any legal action against him; and the decision of the *England and Wales Court of Protection* of 16.11.2022, in the matter of conservation by a medical center of personal biological data of a minor at the end of a procedure of artificial insemination.

We would like to highlight the approval by the Scottish Parliament on 22.12.2022 of the new Gender Recognition Act, which changes the proceeding to obtain the modification of the anagraphic gender, removing the need to satisfy certain medical requirements and extending such possibility also to 16 years old persons;

- **Italy:** the order of the *Consiglio di Stato* of 3.10.2022, on the revocatory error on the failed preliminary referral; the decision of the *Corte di cassazione* n. 39143 of 18.10.2022, on the (excluded) applicability of article 5 of the ECHR to the measure of special supervision with mandatory sojourn; and the decision n. 40905 of 11.10.2022, which reconstructs the jurisprudence of the Court of Strasbourg on pre-trial statements on the consent of the parties and on their eligibility to exclusive and decisive base for the declaration of responsibility; the order n. 37908 of 6.10.2022, on the limit to the right of the accused person to be present at the hearing, in the light of the ECHR jurisprudence; and the decision n. 37349 of 3.10.2022, on the limits with regard to the seizure of a large number of informative data, in the light of article 1 of Protocol 1, as interpreted by the Court of Strasbourg; the order of the *Tribunale di Pordenone* of 27.11.2022, according to which the competition on the assignment of social housing of the Region of Friuli Venezia Giulia is discriminatory, because in violation of article 1 of Directive 2003/109/EC, for having imposed only to non-European nationals the demonstration of the lack of property of any other real estate in the country of origin; the order of the *Tribunale di Bergamo* of 16.11.2022, which makes a reference for a

preliminary ruling on the compatibility with Union law of the norm on citizens' income, according to which also persons with international protection can obtain such benefit, if they have been residing for at least ten years, and which recalls article 21 of the EU Charter of Fundamental Rights, article 14 of the ECHR, Directive 2011/95/EU and the jurisprudence of the Court of Justice; the order of the *Tribunale di Roma* of 9.9.2022, which refuses the indication of two mothers of a minor on his electronic identity card.

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

Articles:

[Luigi Cavallaro](#) "The veil which reveals (the reasons of the market)"

[Sergio Galleano](#) "Subjecting the family reunification to the knowledge of the language of the country of destination does not amount to an unjustified restriction"

[Paolo Ponzano](#) "Conference on the future of the Union: lights and shadows"

Notes and comments:

[Maria Acierno](#) "When the dogma of heterosexuality distorts reality: the strange case of electronic identity cards"

[Alessandro Andronio, Matilde Brancaccio](#) "Comment to the decision of the ECHR, Third Section, in the case *Xenofontos and others v. Cyprus* of 25 October 2022, on the violation of the right to a fair trial"

[Giuseppe Bronzini](#) "The Court of Justice enhances the role of the common judge in guaranteeing migrants' right to freedom and to a fair trial"

[Giuseppe Bronzini](#) "European Commission on the respect of Union law"

[Giuseppe Bronzini](#) "The Court of Justice excludes that an irregular migrant, affected by a serious illness, can be rejected if an adequate therapy in order to protect him from the fast, significant and inevitable increasing of pain is not available in the country of destination"

[Francesco Buffa](#) "Form and formalism between Court of Cassation and ECHR"

[Gabriella Cappiello](#) "Comment to the decision of the ECHR, in the case *Loste v. France* of 3 November 2022, on the violation of the right to an effective remedy in relation to the right to religious freedom"

[Gaetano De Amicis](#) "European Court of Human Rights, case *Liu v. Poland* of 6 October 2022, regarding a case of extradition from Poland to China"

[Chiara Favilli](#) "Season of half-closed ports: selective admission, collective rejections and responsibility of flag States"

[Marco Magri](#) "Refusal of preliminary referral for misrepresentation of the request of the party: revocation of the decision or "mere" obligation for the administrative judge to compensate the damage? (Council of State, order 3 October 2022, n. 8436, referral to the plenary meeting)"

[Erasmus Mancini](#) "Margins and perspective of application of the principle of subsidiarity within CFSP and CSDP"

[Erasmus Mancini](#) "Current events and reform of the criteria for third States' accession to the European Union"

[Gualtiero Michelini](#) "COI and subsidiary protection. The difficult balance between burden of proof and unofficial duty of judicial cooperation"

[Sandra Recchione](#) "Comment to the decision of the European Court of Human Rights, case *Bouton v. France* of 13 October 2022, in the matter of freedom of thought"

[Franco Roberti](#) "European agreements in the matter of immigration"

[Paolo Spaziani](#) "Enlargement of objective jurisdiction and new limit of the *res iudicata* after the decision of the EU Court of Justice of 17 May 2022 (joined cases C-693/19 and C-831/19)"

Documents:

[The statement by Medel](#) (European judges for democracy and freedom) on migration, of 12 December 2022

[Global Wage Report 2022-23](#) by the International Labour Organization (ILO) "The impact of inflation and COVID-19 on wages and purchasing power", of 30 November 2022