



OBSERVATORY ON THE RESPECT FOR FUNDAMENTAL RIGHTS IN EUROPE

Newsletter n. 88

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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 Commission Communication of 8 July 2021 on the “EU 2021 Justice Scoreboard”;
- the Regulation (EU) 2021/1119 of 30.6.2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’).

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

- 02.09.2021, C-930/19, *Belgian State (Droit de séjour en cas de violence domestique)*, on the difference in treatment between third Country nationals, who have been victims of domestic violence committed by their European Union spouse and third Country nationals, who have been victims of domestic violence committed by their third Country spouse, and on the respect of the principle of equality before law and of non-discrimination;
- 02.09.2021, C-350/20, *INPS () and de maternité pour les titulaires de permis unique*), on the rights for third-country workers, who hold single permits, to have access to a childbirth allowance and a maternity allowance;
- 15.07.2021, joined cases C-804/18 and C-341/19, *WABE*, on the internal rule of a private undertaking prohibiting the wearing of any visible political, philosophical or religious sign or the wearing of conspicuous, large-sized political, philosophical or religious signs in the workplace, on direct or indirect discrimination and on the balance of freedom of religion and other fundamental rights;
- 15.07.2021, C-795/19, *Tartu Vangla*, on discrimination directly based on disability;
- 15.07.2021, C-791/19, *Commission/ Poland (Régime disciplinaire des juges)*, on the condition of judges in Poland, on the rule of law, the independence of judges, effective remedies;
- 15.07.2021, C-742/19, *Ministrstvo za obrambo*, on guard duty in military installations, on the protection of safety and health of workers and on the concept of working time;
- 15.07.2021, C-535/19, *A (Soins de santé publics)*, on the right of economically inactive nationals of a Member State legally residing in the territory of another Member State to be covered by the sickness insurance system of such Member State;
- 08.07.2021, C-71/20, *VAS Shipping*, on the national legislation requiring third-country nationals employed on a vessel flying the flag of a Member State to hold a work permit in that Member State and on freedom of establishment;

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

- 02.09.2021, C-117/20, *bpost*, and C-151/20, *Nordzucker and others*, both on the principle of *ne bis in idem*;
- 15.07.2021, C-261/20, *Thelen Technopark Berlin*, on the disapplication of national law in a dispute between individuals concerning a right deriving from a national norm establishing minimum tariffs in contrast with Directive 2006/123/EC;
- 15.07.2021, C-401/19, *Poland / Parliament and Council*, on copyright and freedom of information and expression;

and for the **General Court** the decision:

- 7.07.2021, T-668/19, *Ardagh Metal Beverage Holdings/ EUIPO (Combinaison de sons à l'ouverture d'une canette de boisson gazeuse)*, on the registration of a sound mark submitted in audio format.

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

- 29.06.2021, *Broda and Bojara v. Poland* (n. 26691/18 and 27367/18), according to which the removal by the Ministry of Justice of the applicants, two vice-presidents of Kielce Regional Court, did not respect their right of access to a court;
- 29.06.2021, *Yezhove and others v. Russia* (n. 22051/05), according to which the Convention was violated because of the hostility towards opinions expressed against the Government in a decision which established custodial sanctions without having analysed the situation of each demonstrator, who had occupied and damaged premises of the Ministry;
- 24.06.2021, *Khachaturov v. Armenia* (n. 59687/17), on the decision to extradite an applicant who was unfit for travel, even with medical supervision, due to his severe health condition: according to the Court, extradition without proper assessment of the transfer risks would entail a breach of the Convention;
- 22.06.2021, *Erkizia Almandoz v. Spain* (n. 5869/17), according to which the authorities violated the right to freedom of expression of a former Basque separatist politician by convicting him for comments he had made at a public ceremony;
- 22.06.2021, *Hurbain v. Belgium* (n. 57292/16), on the lack of violation of the right to freedom of expression following the civil judgment against the newspaper "Le Soir" in order to anonymise the identity of a rehabilitated offender;
- 22.06.2021, *R.B. v. Estonia* (n. 22597/16), which found the violation of the Convention for the lack of information given to a four years' old child on his duty to tell the truth and on his right not to witness against his father, which led to the exclusion of his testimony and to the acquittal of his father from the charge of sexual abuse;
- 17.06.2021, *Miniscalco v. Italy* (n. 55093/13), according to which the disqualification criteria for candidates in Italian regional elections, where a conviction has become final, do not breach the Convention;
- 15.06.2021, Grand Chamber judgment, *Kurt v. Austria* (n. 62903/15), according to which Austrian authorities did not fail, pursuant to the Convention, to protect the applicant and her children's life;
- 15.06.2021, *Ömür Çağdaş Ersoy v. Turkey*, (n. 19165/19), on the violation of the right to freedom of expression of a student following his conviction for the opinions expressed against the Prime Minister;
- 15.06.2021, *Melike v. Turkey* (n. 35786/19), on the violation of the right to freedom of expression of a contractual cleaning lady working in a government service, who was dismissed for having "liked" posts on Facebook;
- 15.06.2021, *Y.S. and O.S. v. Russia* (n. 17665/17), according to which the existence of a "serious risk" had not been correctly evaluated in a decision which established the return of a child in a war zone in East Ukraine, pursuant to the Hague Convention: the Court found the violation of the Convention;

- 10.06.2021, *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway* (n. 45487/17), according to which the ruling, which found a union boycott unlawful under EEA law, was not in breach of the Convention;
- 08.06.2021, *Ancient Baltic Religious Association Romuva v. Lithuania* (n. 48329/19), on the refusal to grant State recognition to the "Ancient Baltic Religious Association", deemed not a neutral and impartial decision, also in consideration of the lack of effective remedies;
- 08.06.2021, *Ilievi and Ganchevi v. Bulgaria* (69154/11 and 69163/11), on the excessive use of physical force by the police during the search at the house of the applicants suspected of financial crimes: the Court found the violation of the Convention with regard to the search, but excluded the violation of the dignity of the family members;
- 01.06.2021, Grand Chamber judgment, *Denis and Irvine v. Belgium* (n. 62819/17 and 63921/17), on the refusal to discharge offenders with persisting mental disorders from compulsory confinement after the new law reserving its use for most serious offences: the Court held the non-violation of the Convention;
- 01.06.2021, *Association ACCEPT and others v. Romania* (n. 19237/16), on a case in which the police failed to prevent the raid and verbal abuse by far-right people during the public screening of a film on the topic of LGBT rights.

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

- the decision of the *Supreme Court of the United States* of 1.9.2021, which rejected the request to block the execution of the Texan law on abortion "Senate Bill 8" (SB 8), which establishes the prohibition to terminate the pregnancy after the detection of the unborn child's heartbeat;
- the decision of the *United States Court of Appeals for the Fifth Circuit* of 18.8.2021, which overturned the decision of 2017 of the District Court of Texas on the constitutional illegitimacy of the norms of the Texas Senate Bill 8, Section 6, where they introduced an additional medical procedure for abortion through the "dilation and evacuation" method (D&E);
- the decision of the *United States Court of Appeals for the Sixth Circuit* of 5.8.2021, which overturned the decision of 2015 of the District Court of Tennessee on the illegitimacy of the legal term of 48 hours before practicing abortion, starting from the moment in which the doctor has given the patient certain information concerning abortion;
- the order of the *United States District Court Eastern District of Arkansas Central Division* of 20.7.2021, which blocked the execution of the Arkansas General Assembly Act 309 of 2021, which prohibits abortion in any situation except from the case of emergency and necessity in order to save the woman's life;
- the decision of the *Inter-American Court of Human Rights* of 3.6.2021, case *Moya Solís vs. Peru*, on the violation of the right to an effective remedy and of the principle of legality within a proceeding of ratification of an officer of the court; another decision of 3.6.2021, case *Guerrero, Molina y otros vs. Venezuela*, on the responsibility of the State for the violation of the right to life, to personal integrity and to an effective remedy, with regard to the extrajudicial execution of two individuals committed by some policemen in 2003; the decision of 26.3.2021, case *Guachalá Chimbo y otros vs. Ecuador*, which recognized the responsibility of the State for the violation of several articles of the Convention, with regard to the disappearance of a mentally disabled person from the hospital where he was kept, to the lack of informed consent concerning his hospitalization and the medical treatment received, as well as to the quality – not acceptable – of such treatment; and another decision of 26.3.2021, case *Vicky Hernández y otras vs. Honduras*, which recognizes the responsibility of the State for the homicide occurred in 2009, of Vicky Hernández, a *transgender* woman, prostitute and human rights activist, on account of her expression or gender identity and in the light of the national context of violence and discrimination against LGBTI persons.

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

- **Austria:** the order of the Verfassungsgerichtshof (Constitutional Court) of 18.8.2021, which established the suspension of the preventive detention of an Afghan national, for whom the European Court of Human Rights on 2 August 2021 requested the suspension of the expulsion for all the month of August; and the decision of the Oberste Gerichtshof (Supreme Court) of 23.6.2021, which makes a reference for a preliminary ruling to the Court of Justice on the interpretation of some articles of the General Data Protection Regulation (GDPR), with regard to the collection and processing of users' data by Facebook;
- **Belgium:** the decision of the Cour constitutionnelle n. 107/2021 of 15.7.2021, which rejects the claim lodged against the law of 23 March 2019 on the organization of prison services and the statute of the penitentiary staff, also recalling the norms of the EU Charter of Fundamental Rights, the ECHR and the European Social Charter and the jurisprudence of the Court of Strasbourg; the decision n. 97/2021 of 1.7.2021, in the matter of medical professions and requirements for the setting-up of pharmacies, in the light of EU relevant legislation in such matter and of the jurisprudence of the Court of Justice; and the decision n. 91/2021 of 17.6.2021, which finds the constitutional legitimacy of article 6(4) of the law of 19 December 2003 "on the European arrest warrant", which transposes the framework decision of the Council 2002/584/JHA;
- **Bosnia and Herzegovina:** the decision of the Ustavni sud (Constitutional Court) of 16.7.2021, which rejects a claim lodged for the alleged violation of the right to a fair trial with regard to the evaluation of proof, also in the light of the jurisprudence of the Court of Strasbourg; the decision of 26.3.2021, which found the partial constitutional illegitimacy and the contrast with article 8 of the ECHR of article 109 paragraph 1, second paragraph, and paragraph 2 of the Criminal Procedure Code, where it provides for the possibility to carry out an exam on other persons – other from the suspected and accused person – even without their consent, in order to find traces or consequences of the crime or to get a blood sample or carry out other medical procedures to analyse and establish relevant facts in the criminal proceeding; and another decision of 26.3.2021, which rejected the claim lodged against the "Law on Republic Administration" of the Serb Republic of Bosnia and Herzegovina (*Republika Srpska*) with regard to the competence in the matter of foreign affairs and, in particular, the area concerning the process of European integration;
- **France:** the decision of the Conseil constitutionnel of 5.8.2021, on the constitutional legitimacy of some norms adopted to curb the spread of the virus Covid-19; the decision of the Cour de cassation n. 705/2021 of 8.7.2021, on the possibility for the judge to examine *ex officio* the unfair term of a commercial contract, which recalls the jurisprudence of the Court of Justice; the decision n. 614/2021 of 8.7.2021 which, in a case of exercise of parental authority, recalls the Hague Convention and the Regulation (EC) n. 2201/2003 on the minor's rights; and the decision n. 1052/2021 of 7.7.2021 which, in a case of dismissal, examines the applicability of the ILO Convention n. 178 (excluded in relation to the duration of the work contract);
- **Germany:** the decree of the Bundesverfassungsgericht (Federal Constitutional Tribunal) of 23.6.2021, with regard to urgent – rejected – claims against the agreement on the unified patent court, which recalls EU legislation in the matter of European patent; and the decree of 8.6.2021, in the matter of *Recovery Plan*; and the decision of the Bundesgerichtshof (Federal Court of Justice) of 15.6.2021, which established, according to article 15 of Regulation (EU) 2016/679, that the controllers of personal data processing shall give information on such processing also with regard to internal already well-known procedures;
- **Great Britain:** the decision of the United Kingdom Supreme Court of 30.7.2021, in the matter of right to freedom, in the light of the jurisprudence of the European Court of Human Rights on article 5 of the ECHR, in a case concerning the reception of minors with particular needs in specialized facilities; the decision of 23.7.2021, on the burden of proof in the matter of discrimination at the workplace on grounds of race; the

- decision of 16.7.2021, on the balance between the right to private and family life and public security, following an expulsion measure and with the prohibition for an Iranian national to enter the territory; the decision of 9.7.2021, in which the Court finds not in contrast with articles 4 and 14 of the ECHR the national norm excluding compensation through a national fund for victims of crimes when the applicants – in this specific case victims of human being trafficking – have been subject of a conviction for which it has not yet passed the term provided for by the “Rehabilitation of Offenders Act 1974”, which allows the cancellation of such measure from the personal criminal record; and another decision of 9.7.2021, on the solitary confinement in prison of under-age prisoners and the jurisprudence of the ECHR on article 3 of the ECHR; the decision of the England and Wales Court of Appeal of 23.7.2021, in which the Court annuls the denial by the competent national authority to the mother’s request of passport for her three under-age children, who are British nationals but resident in an extra EU Country, where the parental responsibility is recognized only to the father: the Court also found the national legislation of the extra-EU Country discriminatory on grounds of gender, pursuant to the combination of articles 8 and 14 of the ECHR; the decision of the England and Wales High Court of 14.7.2021, in which the Court denies the request by the competent health authority to extend the length of the internment of a minor with serious mental disability, since the treatment was brutal and humiliating and not in his best interest; and the decision of 3.6.2021 on the illegitimacy of the detention and on the detention conditions in an asylum seekers center during the Covid-19 emergency;
- **Ireland:** the decision of the Supreme Court of 23.7.2021, which, with regard to two cases of extradition towards Poland, orders the reference for a preliminary ruling to the Court of Justice on the applicability of legal doctrine expressed by the latter in the cases *LM* (case C-216/18 PPU) and *L and P* (joined cases C-354/20 PPU and C-412/20 PPU); and the decision of 20.7.2021, in the matter of European arrest warrant following the withdrawal of the United Kingdom from the European Union, which decided to refer such issue to the Court of Justice for a preliminary ruling; the two decisions of the Court of Appeal of 21.7.2021, which both make a reference for a preliminary ruling to the Court of Justice on the interpretation of the concept of “trial ended with a decision”, pursuant to article 4a(1) of the framework decision 2002/584/JHA on the European arrest warrant, in combination with article 6 of the ECHR and articles 47 and 48(2) of the European Union Charter of Fundamental Rights; and the decision of 1.7.2021, on the application of article 8 of the ECHR with regard to proceedings concerning the European arrest warrant;
 - **Italy:** the decision of the Corte costituzionale n. 150 of 12.7.2021, which recognizes the illegitimacy of some national penalty provisions against journalists responsible of defamation, also in contrast with the ECHR; and the decision n. 157 of 2.07.2021, which finds constitutionally illegitimate the refusal of legal aid for foreigners who do not have any certification about their income, recalling article 47 of the European Union Charter of Fundamental Rights; the order of the Corte di cassazione n. 15118 of 31.5.2021, on the calculation of the workers in the event of collective dismissal, which recalls the jurisprudence of the Court of Justice; the order of the Consiglio di stato of 4.3.2021, making a reference for a preliminary ruling to the Court of Justice with regard to measures against decisions become final in contrast with Union law; the order of the Tribunale di Padova of 13.7.2021, which disregards national law on baby bonus, because in violation of EU legislation on the principle of equal treatment of third country nationals with regard to family benefits, despite the preliminary referral ordered by the Constitutional Court in the same matter in the light of the principle of fair (and fast) trial; and the decision of the Tribunale di Milano of 28.5.2021, which establishes the reinstatement of a worker included in a collective dismissal procedure, whose fixed-term contract had been converted in a no time limit contract, on grounds of the violation of the anti-discrimination clause of the directive on fixed-term contracts and examining the jurisprudence of the Court of Justice;
 - **Latvia:** the decision of the Satversmes Tiesa (Constitutional Court) of 4.6.2021, on the compatibility of articles 3(c), 4(3), 4(4), 12(1) and 14 of the Convention of the Council of Europe on preventing and combating violence against women and domestic violence (Convention of Istanbul) with the Constitution of the State: the Court, also applying the

- jurisprudence of the Court of Strasbourg, established the compatibility of article 4(4) with the Constitution, and closed the proceeding concerning the other issues;
- **Poland:** the decision of the *Trybunał Konstytucyjny* (Constitutional Court) of 14.7.2021, according to which article 4(3), second paragraph, of the Treaty of the European Union – in combination with article 279 of the Treaty on the Functioning of the European Union – is in contrast with the Constitution of the State, where it establishes the obligation for Member States to give execution to provisional measures provided for by the Court of Justice concerning the organization and functioning of national courts;
 - **Portugal:** the decision of the *Tribunal Constitucional* n. 660/2021 of 29.7.2021, in the matter of suspension of the limitation period in administrative proceedings, which recalls article 49 of the EU Charter of Fundamental Rights and the jurisprudence of the Courts of Strasbourg and Luxembourg; the decision n. 491/2021 of 8.7.2021, on the principle of adversarial procedure and the right of defence in criminal matters, which recalls the ECHR and the jurisprudence of the Court of Strasbourg; the decision n. 474/2021 of 29.6.2021, which holds the constitutional illegitimacy of certain norms of article 12 of law 38/2018 “*relativa ao direito à autodeterminação da identidade de género e expressão de género e à proteção das características sexuais de cada pessoa*” for the violation of the principle of rule of law and recalls the Resolutions of the European Parliaments and of the Parliamentary Assembly of the Council of Europe in such matter; and the decision n. 431/2021 of 22.6.2021, which rejects the claim lodged, also pursuant to the EU Charter of Fundamental Rights, against article 75 of law n. 83-C/2013, where it provides for the suspension of pension supplements in favour of retired workers of undertakings in the public sector which gained negative net results in the last three budgets;
 - **Spain:** the decision of the *Tribunal Constitucional* n. 148/2021 of 14.7.2021, on the constitutional legitimacy of the norms adopted to face the health crisis caused by the Covid-19 virus, which also recalls the ECHR and the jurisprudence of the Court of Strasbourg; the decisions n. 122/2021 and n. 121/2021 of 2.6.2021, with which the Court rejects the claims lodged, respectively, by Jordi Cuixart i Navarro and Jordi Sànchez i Picanyol against the decision of the Supreme Tribunal of 14 October 2019, which convicted them of sedition in relation to the facts of Autumn 2017 linked to the referendum for Catalunya’s autonomy, also recalling the norms of the ECHR and the jurisprudence of the Court of Strasbourg; the order of the *Tribunal Supremo* of 22.7.2021, which makes a reference for a preliminary ruling to the Court of Justice on the interpretation of articles 6(1) and 7(1) of Directive 93/13/EEC on unfair clauses in consumer contracts, with regard to the limitation period of the legal action to obtain the refund of sums paid by the consumer as a consequence of an invalid clause; and the decision of 28.6.2021, in the matter of successive fixed-term contracts in the public sector, which analyses the jurisprudence of the Court of Justice on the Framework Agreement CES, UNICE and CEEP on fixed-term work, included in the Annex to Directive 1999/70/EC.

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

Articles:

[Association of Polish Public Prosecutors](#) *Lex Super Omnia* “The stick method – the ‘good change’ system of persecuting independent prosecutors”

[Giuseppe Bronzini](#) “European Union and the protection of self-employment: towards a “turning point” of the Union?”

[Michele de Luca](#) “Protection of health at the workplace: between tradition and innovation during Covid 19”

[Sergio Galleano](#) "Some considerations on the prejudicial order 19598/21 of the Court of Cassation's Jointed Sections, pending the conclusion of the Advocate General at the EUCJ"

[Bruno Nascimbene, Paolo Piva](#) "Preliminary referral and effective jurisdictional guarantees. Comparison between Union law and national law. Comment to the order n. 2327/2021 of the Council of State"

[Stefania Scarponi](#) "The Jobs Act under the spotlight of the Court of Justice (EUCJ 17.3.2021 C-652/2019)"

[Maria Teresa Stile](#) "Gradual opening of the Italian legal system to the recognition of the right to access to the public sector for extra-European nationals, who have family ties with EU citizens: the case *Balayan*"

[Stefano Visonà](#) "Violation of the selection criteria and protection in the Jobs Act: a still open issue"

Notes and comments:

[Gabriella Cappello](#) "Comment to the ECHR Grand Chamber judgment, 01 June 2021, case *Denis and Irvine v. Belgium*, on the right to freedom"

[Michele De Luca](#) "For every complex problem there is a simple solution. Which usually is the wrong one: the dismissal of managers during Covid (Note to the decision of the Court of 15 April 2021)"

[Paola Di Nicola](#) "The ECHR in search of impartiality of judges in front of the "imperfect" victim"

[Sandra Recchione](#) "Comment to the decision of the ECHR, First Section, 8 July 2021, *Maestri and others v. Italy*, n. 20903/15 with regard to the right to a fair trial"

[Andrea Venegoni](#) "The Constitutional Court comes back to the subject of "criminal law": towards a statute of norms on formally administrative, but substantially criminal sanctions"

Documents:

[The first part of the Sixth Assessment Report](#) by the Working Group I of the Intergovernmental Panel on Climate Change (IPCC) "Climate Change 2021: The Physical Science Basis", of 6 August 2021

[Report by Amnesty International](#) "'No one will look for you': Forcibly returned from sea to abusive detention in Libya", of 15 July 2021