



## OBSERVATORY ON THE RESPECT FOR FUNDAMENTAL RIGHTS IN EUROPE

### **Newsletter n. 103**

15 March 2024

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](http://www.europeanrights.eu)

For the acts of the **European Union** we have included:

- European Commission Notice of 15.12.2023 "Handbook on how to issue and execute a European Arrest Warrant";
- Regulation (EU) 2023/2854 of 13.12.2023 on harmonised rules on fair access to and use of data;
- Regulation (EU) 2023/2844 of 13.12.2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation;
- European Commission Recommendation of 12.12.2023 on promoting the engagement and effective participation of citizens and civil society organisations in public policy-making processes;
- 2023 Annual Report of the European Commission of 4.12.2023 "Effective legal protection and access to justice. 2023 Annual Report on the application of the European Union Charter of Fundamental Rights";
- European Parliament Study of 1.12.2023 "Towards an EU-wide right to politically strike: A constitutional perspective".

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

- 20.02.2024, C-715/20, X (*Absence de motifs de résiliation*), on the difference in treatment in the event of termination of a fixed-term employment contract from the case of a contract of indefinite duration, on the principle of non-discrimination and on the right to an effective remedy;
- 08.02.2024, C-216/22, *Bundesrepublik Deutschland (Recevabilité d'une demande ultérieure)*, on subsequent application for international protection;
- 30.01.2024, C-560/20, *Landeshauptmann von Wien (Regroupement familial avec un mineur réfugié)*, on family reunification of an unaccompanied minor refugee with his or her parents;
- 30.01.2024, C-118/22, *Direktor na Glavna direktsia "Natsionalna politsia" pri MVR – Sofia*, on the limitation of storage and processing of biometric and genetic data of natural persons convicted by final judgement;
- 25.01.2024, C-58/22, *Parchetul de pe lângă Curtea de Apel Craiova*, on the principle of *ne bis in idem*;
- 18.01.2024, C-451/22, *RTL Nederland and RTL Nieuws*, on the confidentiality of details concerning national security;

- 18.01.2024, C-218/22, *Comune di Copertino*, on allowance in lieu of days of paid leave not taken at the end of the employment relationship;
- 16.01.2024, C-621/21, *Intervyuirasht organ na DAB pri MS (Femmes victimes de violences domestiques)*, on the qualification for refugee status and on gender-based violence against women;
- 16.01.2024, C-33/22, *Österreichische Datenschutzbehörde*, on the committee of inquiry set up by the Parliament of a Member State and on the scope of the Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data;
- 11.01.2024, C-231/22, *Belgian State (Données traitées par un journal officiel)*, on the concept of "controller" of the processing of personal data.

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

- 12.03.2024, *Kanatli v. Turkey* (n. 18382/15), according to which the Convention was breached by the absence of legislation allowing conscientious objectors to opt for civilian service as alternative to military service;
- 05.03.2024, *Boškočević v. Serbia* (n. 37364/10), on the violation of the right of application of an employee of a national park;
- 20.02.2024, *Wa Baile v. Switzerland* (n. 43868/18 and 25883/21), on the violation of the principle of non-discrimination during an identity check in the Zürich railway station;
- 20.02.2024, *I.L. v. Switzerland (n° 2)* (n. 36609/16), according to which the detention of the applicant in conditions unsuited to his health and the lack of consideration of the therapeutic measures prescribed violated his right to liberty and security;
- 20.02.2024, *Dede v. Turkey* (n. 48340/20), on the violation of freedom of expression of a bank employee who was dismissed for having criticized a senior executive's management methods;
- 20.02.2024, *Danileț v. Romania* (n. 16915/21), on the violation of freedom of expression of a judge, sanctioned for Facebook posts concerning matters of public interest;
- 15.02.2024, *Škoberne v. Slovenia* (n. 19920/20), according to which the systematic and indiscriminate retention of telecommunications data, amid proceedings against a judge for bribery, breached the right to private life;
- 15.02.2024, *U v. France* (n. 53254/20), according to which all conditions necessary to assess *ex nunc* the individual situation of the applicant were satisfied and the execution of the decision to remove him to Russia would not violate the right of the Convention;
- 13.02.2024, *X v. Greece* (n. 38588/21), on the failure of investigative and judicial authorities to adequately respond to rape allegations by a British tourist in Greece;
- 13.02.2024, *Jann-Zwicker and Jann v. Switzerland* (n. 4976/20), according to which the time-barring of asbestos victim's case violated the Convention;
- 08.02.2024, *Auray and others v. France* (n. 1162/22), according to which the use, by the police, of the "encirclement" technique, which was unlawful at the time of facts, violated the freedom of movement and pacific assembly of the applicants, who could not join a demonstration;
- 30.01.2024, *Cherrier v. France* (n. 18843/20), on a birth with no disclosure of the mother's name: according to the Court, the authorities found a reasonable balance between the applicant's right to know about her origins and the right of the biological mother to maintain anonymity pursuant to article 8 of the Convention;
- 23.01.2024, *O.R. v. Greece* (n. 24650/19), according to which the living conditions of an asylum-seeker and unaccompanied minor, who was left without accommodation for six months, were in breach of the Convention;
- 18.01.2024, *Allée v. France* (n. 20725/20), according to which the conviction for public defamation of the applicant, who reported moral and sexual harassment, violated article 10 of the Convention;

- 18.01.2024, *O.G. and others v. Greece* (n. 71555/12 and 48256/13), which finds the violation of private life of HIV-positive women, whose identity and medical data have been disclosed;
- 16.01.2024, *Al-Hawsawi v. Lithuania* (n. 6383/17), in which the Court pronounced itself on the seventh proceeding against Lithuania with regard to a secret detention programme organized by CIA and found several violations against the State;
- 16.01.2024, *Alkhatib and others v. Greece* (n. 3566/16), according to which the coast guard, by shooting several times against a boat which was transporting people illegally to Greece, used neither absolutely necessary nor strictly proportionate force, pursuant to article 2 of the Convention;
- 11.01.24, *Tena Arregui v. Spain* (n. 42541/18), on the non-violation of the right to correspondence in the context of a political party monitoring one of its members;

and the decision:

- 01.02.2024, decision of inadmissibility, *Ramadan v. France* (n. 23443/23), with which the Court rejected as manifestly ill-founded Mr Ramadan's application under Article 10 in connection with his conviction for disseminating the identity of a victim of sexual assault.

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

- the decision of the Supreme Court of Canada of 1.3.2024, according to which the protection provided for by section 8 of the Canadian Charter of Rights and Freedoms to the right to privacy also includes online privacy, and therefore the IP address cannot be subjected to unreasonable search or seizure;
- the order of the International Court of Justice of 26.1.2024, case *Application of the Convention on the prevention and punishment of the crime of genocide in the Gaza Strip (South Africa vs. Israel)*, which provisionally ordered Israel, with regard to Palestinians in Gaza, to adopt all measures in order to prevent the commission of crimes which may amount to genocide, to prevent and punish the public and direct incitement to commit genocide, and take immediate and effective measures to allow the provision of basic services and humanitarian assistance; and the order of 16.11.2023, case *Application of the Convention against torture and other cruel, inhuman or degrading treatment or punishment (Canada and The Netherlands vs. Syrian Arab Republic)*, which provisionally ordered Syria to adopt all measures in order to prevent tortures and other cruel, inhuman or degrading treatment or punishment, and to guarantee that its own officials and persons and organizations subjected to its control will not commit such crimes;
- the decision of the High Court of Australia of 28.11.2023, which found the constitutional illegitimacy of continuous detention of migrants, according to the *Migration Act 1958*, where there is not an effective possibility to remove such persons from the Country in the reasonably foreseeable future;
- the decision of the Inter-American Court of Human Rights of 27.11.2023, case *Cajahuanca Vásquez vs. Peru*, which excluded the responsibility of the State for violation of the right to an effective remedy and of the principle of legality in a case concerning the dismissal of a judge; the decision of 4.11.2023, case *Córdoba vs. Paraguay*, which finds the responsibility of the State for the violation of the right to personal integrity, to the respect for private and family life, and to freedom to create a family, and of the obligation to compliance with judgements, in a case of international abduction of a minor; the decision of 1.9.2023, case *Rodríguez Pacheco y otra vs. Venezuela*, which finds international responsibility of the State for the violation of the right to personal integrity, to health and to an effective legal protection, caused by deficiencies and excessive length of the legal proceeding regarding the case of obstetric violence and medical negligence, which contributed to the expiration of the statute of limitation of the reported crimes; and another decision of 1.9.2023, case *Baptiste y otros vs. Haití*, which convicts the State for not having adopted protection measures

with regard to a man and his family, in spite of many threats and assassination attempts, as well as for the lack of due diligence in the investigations for the homicide of his brother.

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

- **Belgium:** the decision of the Cour constitutionnelle n. 13/2024 of 25.1.2024, on the reception or not of the notice payment for dismissal in the case of a worker who benefits from a time credit (*crédit-temps*) system or of a worker in parental leave, which finds the compatibility of the law of 3 July 1978 on employment contracts and of the consolidation law (*loi de redressement*) of 22 January 1985 with the norms of Directive 2000/78/EC; the decisions n. 1/2024, 2/2024, 3/2024 and 4/2024 of 11.1.2024, with which the Court annulled some norms of the federal, Walloon, of the region of Brussels and of the French community legislation transposing the Directive (EU) 2018/822, which amends Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, however suspending the decision on other aspects while pending the judgement of the Court of Justice on the preliminary questions raised by the same Constitutional Court with the decision n. 103/2022 of 15 September 2022; and the decision n. 154/2023 of 23.11.2023, which annuls article 41 of the law of 30 July 2022, which amends the law of 7 May 1999 “*sur les jeux de hasard, les paris, les établissements de jeux de hasard et la protection des joueurs*”, with regard to the recording, consultation and conservation of certain personal data in the processing system of information concerning persons to whom the access to some gambling facilities is prohibited, also in the light of the norms of the EU Charter of Fundamental Rights, the ECHR, the General Data Protection Regulation (GDPR), and the jurisprudence of the Courts of Strasbourg and Luxembourg;
- **Czech Republic:** the decision of the Ústavní soud (Constitutional Court) of 10.1.2024, which rejected the application lodged by an energy Company, for the violation of norms on copyright, against the modification of their advertising by an environmental organization in a satirical way and for the purpose of reporting: the Court, also recalling the jurisprudence of the Court of Strasbourg, considered such action falling under the protection of the right to freedom of expression; and the decision of 15.11.2023, on the right to have free access to education without any discrimination on grounds of disability and on the right of a disabled person to be heard during a proceeding, which recalls the European Social Charter and the jurisprudence of the Court of Strasbourg;
- **France:** the decision of the Conseil Constitutionnel of 25.1.2024, which found the constitutional illegitimacy of many articles of the Immigration Law (“*Loi pour contrôler l’immigration, améliorer l’intégration*”) also in the light of Regulation (EU) 2016/399 (Schengen Borders Code) and of Directive 2013/33/EU (Reception Conditions Directive); the order of the Conseil d’État of 6.3.2024 for reference for a preliminary ruling to the Court of Justice on the interpretation of Union law on the access, also by minors, on the web to pornographic material; and the decision of 13.2.2024, on freedom of information which recalls article 10 of the ECHR; and the decision of the Cour de cassation of 14.2.2024, on freedom of information in a case of unintentional disclosure of news, which recalls article 10 of the ECHR and European Union sources;
- **Germany:** the decision of the Bundesverfassungsgericht (Federal Constitutional Tribunal) of 6.2.2024, in the matter of European elections (relation between national and EU rules); and the decision of 4.12.2023, in the matter of re-opening of criminal *res iudicata* after the decision of the ECHR; the order of the Bundesgerichtshof (Federal Court of Justice) of 8.2.2024, on the retransmission of radio programmes in retirement homes: the court refers a question to the Court of Justice for clarification on the concept of communication to the public; and the decision of the Oberlandesgericht Frankfurt am Main (Frankfurt am Main Court of Appeal) of 29.2.2024, in the matter of powers of the European Central Bank;

- **Ireland:** the decision of the Supreme Court of 14.12.2023, which make a reference for a preliminary ruling to the Court of Justice on the interpretation of article 4bis(1) of the Framework Decision 2002/584/JHA on the European arrest warrant, as regard the decisions pronounced at the end of a trial in which the interested person did not appear; the decision of the Court of Appeal of 30.11.2023, which examines the norms of the Regulation (EU) 604/2013 ("Dublin Regulation III"), with regard to the norms in the matter of procedures for the take-back requests, in the light of the jurisprudence of the Court of Justice and the provisions of the EU Charter of Fundamental Rights; and the decision of 14.11.2023, which excludes the use, for an internal disciplinary proceeding of police forces, of materials found in a telephone of one of its members, which was seized in virtue of a search warrant issued during a criminal investigation, also recalling articles 7 and 8 of the EU Charter of Fundamental Rights and the jurisprudence of the Court of Justice; the decision of the High Court of 15.12.2023, according to which the refusal to grant a permit of stay in the State pursuant to section 49 of the International Protection Act 2015 cannot be based only on the assessment of the non-violation of the rights provided for by article 8 ECHR, but be founded on a wider analysis which embraces all the aspects listed at paragraph 3; and the decision of 14.12.2023, on the responsibility for damages of the State, according to the *Francovich* principle, for not having given a compulsory accommodation to the applicants, pursuant to Directive 2013/33/EU (Reception Conditions Directive), which makes a reference for a preliminary ruling to the Court of Justice on the interpretation of the concept of *force majeure* as element in defence of the State from the compliance with its obligations deriving from EU law, and in particular from article 1 of the EU Charter of Fundamental Rights;
- **Italy:** the order of the Corte costituzionale n. 29 of 27.2.2024, for reference for a preliminary ruling to the Court of Justice on the qualification of the social allowance pursuant to Union law with regard to its recognition also in favour of persons with work permit of third countries; and the decision n. 15 of 15.2.2024, which states the constitutional illegitimacy of a regional legislation for contrast with European Union law, because discriminatory against Italian nationals where it requires additional documentation in order to apply for public housing, and which recalls the jurisprudence of the Court of Justice; the decision of the Corte di cassazione n. 5967 of 5.3.2024, on discrimination of military doctors, also in the light of the norms of Union law; the order of the Tribunale di Bergamo of 25.1.2024, which orders the modification of INPS's computer system, because discriminatory (in order to obtain benefits due to parents) against same-sex couples, and which recalls EU legislation and the jurisprudence of the Court of Justice; and the decision of the Courte di appello di Milano of 15.11.2023, which in the matter of discrimination against disabled persons, recalls the jurisprudence of the Court of Justice;
- **Latvia:** the decision of the Satversmes Tiesa (Constitutional Court) of 30.11.2023, which confirms the constitutional legitimacy of the norms on the calculation of the period of time necessary to revoke the citizenship in case the person obtained it in bad faith, recalling the ECHR and the jurisprudence of the Courts of Strasbourg and Luxembourg;
- **Luxembourg:** the decision of the Cour constitutionnelle n. 190 of 31.1.2024, which, recalling also article 33 of the EU Charter of Fundamental Rights, found the compatibility of article 29bis of the law on the statute of State officials, where it states the right to parental leave only for biological and adoptive parents, with the constitutional principle of equality before the law: according to the Court, the exclusion, in this specific case, of foster families in the framework of a judicial measure of a placement of a minor, is not in contrast with the principle of equality in virtue of the temporariness of the placement;
- **Poland:** the decision of the Trybunał Konstytucyjny (Constitutional Court) of 11.12.2023, which found the lack of compatibility with the constitutional norms of article 279 of the Treaty on the Functioning of the European Union, where it allows the imposition of a periodic penalty payment or of a lump-sum payment, and of article 39 of the Court of Justice's Statute, which authorizes the President of the Court or other judge to apply provisional measures; and the decision of 28.11.2023, which finds the

- incompatibility of article 37(3) of the law of 12 October 1990 on the Border Guard, in the matter of compensatory rest, with article 4(1) of the European Social Charter on the right to a fair wage;
- **Portugal:** the decision of the *Tribunal Constitucional* n. 927/2023 of 21.12.2023, which finds the constitutional legitimacy of the norms of laws n. 113/2009 and n. 37/2015, where they do not allow to avoid the registration in the criminal record of a conviction for ill-treatment in the case of a public or private employment relation involving minors, also recalling article 24 of the EU Charter of Fundamental Rights; the decision n. 800/2023 of 4.12.2023, which stated the constitutional illegitimacy of certain norms of Decree n. 91/XV of the Parliament, which rules the access to metadata concerning electronic communications for criminal investigations, transposing Directive 2006/24/EC, since they introduced disproportionate restrictions to the right to informational self-determination and to private life, and which applies articles 7 and 8 of the EU Charter of Fundamental Rights, the EU legislation relevant in such matter and the jurisprudence of the Court of Justice; and the decision n. 747/2023 of 8.11.2023, in the matter of suspension of procedural time limits to bring an action, which recalls the jurisprudence of the Court of Strasbourg on the need of predictability of procedural acts;
  - **Spain:** the decision of the *Tribunal Constitucional* n. 9/2024 of 17.1.2024, on the violation of the principle of *ne bis in idem*, in the light of the norms of the ECHR and of the jurisprudence of the Court of Strasbourg; the decision n. 136/2023 of 23.10.2023, on the violation of the right to freedom for not having considered, in the calculation of the period of provisional detention, the time already passed in a regime of deprivation of liberty pending the proceeding for the execution of the European arrest warrant, which recalls the jurisprudence of the Court of Strasbourg; and the decision n. 130/2023 of 23.10.2023, which annulled the resolution which decided the expulsion of the applicant and the following decisions rejecting the application, in virtue of the wrong application of the norms of Directive 2008/115/EC ("Return Directive"), also in contrast with the jurisprudence of the Court of Justice; and the decision of the *Tribunal Supremo* of 22.1.2024, which also recalling article 4 of Protocol 4 to the ECHR (Prohibition of Collective Expulsion of Aliens), confirmed the decision of the lower court on the expulsion of dozens of unaccompanied minors in May 2021: according to the Court, the expulsion, only based on the Agreement between Spain and Morocco of 2007 *sobre la cooperación en materia de prevención de la emigración ilegal de menores no acompañados, su protección y su vuelta concertada*, was in contrast with national norms according to which the return of unaccompanied minors in unlawful situation must be carried out through an individualized administrative proceeding;
  - **The Netherlands:** the decision of the *Hoge Raad* (Supreme Court) of 1.12.2023, in the matter of the patient's consent to examine its own medical file within an extra-judicial resolution for medical responsibility, which recalls article 8 ECHR with regard to the protection of personal data; the decision of the *Gerechtshof Den Haag* (The Hague Court of Appeal) of 12.2.2024, which ordered the State to block the export of military F-35 airplanes components to Israel, in the light of the Common Position 2008/944/CFSP, which defines common rules governing control of exports of military technology and equipment; and the decision of the *College van Beroep voor het bedrijfsleven* (Appeal Tribunal of Commerce and Industry) of 27.2.2024, which makes a reference for a preliminary ruling to the Court of Justice on the interpretation of articles 3 and 4 of Directive 2014/40/EU on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products.

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

#### **Articles:**

[MEDEL's Conference](#) - Magistrats Européens pour la Démocratie et les Libertés (Several Authors) "L'administration de la justice- un enjeu démocratique"

[Sergio Galleano](#) "The Court of Justice on the dismissal of workers under fixed-term contract"

[Pierpaolo Gori](#) "Overview on the Supreme Court of Austria"

[Mauro Palma](#) "Weaving rights: the national Guarantor of the rights of persons detained or deprived of liberty"

[Lucia Serena Rossi](#) "Principle of primacy as "cohesion rule" of the European legal system"

### **Notes and comments:**

[Giuseppe Bronzini](#) "Challenges of the process for the European regulation of A.I. and of digital technologies"

[Giuseppe Bronzini](#) "The European Parliament puts back on the table the discretion used by the Council and by the European commission in the protection of the "rule of law""

[Gabiella Cappello](#) "Comment on the judgment of the European Court of Human Rights in the case *Podchasov v. Russia* of 13.2.2024 in the matter of privacy"

[Alessandro Centonze](#) "Comment on the judgment of the European Court of Human Rights in the case *Miranda Magro v. Portugal* of 9.1.2024 in the matter of prohibition of inhuman and degrading treatments"

[Andrea Mazelliu, Eralda \(Methasani\) Çani](#) "Agreement between Italy and Albania on relocation of migrants: constitutional challenges and future perspectives"

[Sibilla Ottoni](#) "The International Court of Justice's position on the risk of genocide of the Palestinian population in Gaza"

[Pasquale Serra d'Aquino](#) "Libya is not a safe country"

### **Documents:**

[Green Paper of the European Movement-Italy](#) on the next elections of the European Parliament, of 1 March 2024

[Annual Report](#) by Human Rights Watch "World Report 2024 – Events of 2023", of 11 January 2024

[Round-up 2023](#) by Reporters Without Borders "Journalists detained, killed, held hostage and missing", of 14 December 2023

[Oxfam Report](#) "Climate Equality: A planet for the 99%", of 20 November 2023