



## FLASH NEWS

7/19

# NATIONAL DECISIONS OF INTEREST FOR THE UNION

## OVERVIEW FROM SEPTEMBER AND OCTOBER 2019



### Sweden – Supreme court

#### ***Judicial cooperation in civil matters - International child abduction - Concept of “permanent residence”***

The Supreme court ruled that, considering all the circumstances of the case, the permanent residence of a child aged 4 years, should be with her mother, in Sweden, and not with her father, in Belgium. In this case, the child was born in Belgium, in June 2015. At that time, the parents lived in Belgium and exercised joint custodial rights. In January 2018, the mother left for Sweden along with the child, with the consent of the father. However, in February 2019, the father requested that the child be returned, claiming that the refusal of the mother constituted a case of “wrongful retention”, within the meaning of regulation no. 2201/2003. The Supreme court dismissed the father’s request after stating that, in light of the said regulation and the case-law of the Court, the determining factors justified the establishment of the permanent residence of the child in Sweden.

Högsta domstolen, [judgment of 6.09.2019, no. Ö 2300-19 \(SV\)](#)



### Portugal – Constitutional Court

#### ***Processing of personal data and the protection of privacy in the electronic communications sector - Access to information by agents of the Security information service (SIS) and Strategic defence information service (SIED) - Constitutional review***

The Constitutional court was required to rule on the constitutionality of certain provisions of the national legislation governing the specific procedure of access by the SIS and SIED agents to data concerning telecommunications and the use of the Internet by the citizens

The Constitutional court ruled that, firstly, the national legislator should meticulously and precisely specify the criteria to justify access by these public entities to the basic information and information about the location of the citizens’ equipment. Secondly, it held that, in the context of the fight against terrorism and espionage, the measures of prevention provided for by the national legislation required a limitation to the right to inviolability of communications that are not authorised by the Constitution and a disproportionate limitation on the right to privacy.

Tribunal Constitucional, [ruling of 18.09.2019, No. 464/2019 \(PT\)](#)





## United-Kingdom – Supreme Court

### ***Suspension of Parliament - Legality - Judicial review***

Following two different decisions of the High Court (England and Wales) and the Court of Sessions (Scotland), the Supreme court ruled on the legality of the suspension of the British parliament, for a period of five weeks, which constitutes a royal prerogative exercised by the Queen on the recommendation of the Prime Minister. Confirming that the royal prerogatives are subject to judicial review, the Supreme court held that the suspension of the Parliament was illegal insofar as it was detrimental, without any reasonable cause, to the capacity of the Parliament to exercise its constitutional functions. Consequently, the Supreme court revoked the said suspension and invited the members of Parliament to adopt immediate measures so that the it can resume work.

UK Supreme Court, [judgment of 24.09.2019, R \(on the application of Miller\) v. the Prime Minister and Cherry and others v. Advocate General for Scotland \[2019\] UKSC 41 \(EN\)](#)

[Press release \(EN\)](#)



## Spain – Supreme court

### ***Fundamental rights - Citizenship - Right of entry and residence - Limitations***

The Supreme court denied a residence permit to a criminally convicted national of a third state, who was in charge of a minor child, who is a citizen of the Union, after having examined, on the one hand, the impact on law and order and public security of the criminal convictions in question and, on the other hand, whether the personal conduct of the applicant could constitute a genuine threat to the society. The Supreme court also assessed his personal and family background. The Supreme court thus ruled within the meaning of the case-law of the Court, particularly in case C-165/14, in which the Court ruled that the granting of a residence permit cannot automatically be denied on the sole basis of the criminal past of the person concerned and must follow a concrete assessment of all the circumstances of the case (including the age of the child, health, and the family and economic status) in light of the principle of proportionality, the best interests of the child and the fundamental rights of which the Court ensures compliance.

Tribunal supremo, [ruling of 3.10.2019, STS 3300/2019 \(ES\)](#)



## Germany – Federal Constitutional Court

### ***Asylum policy - Dublin Regulation III - Prohibition on arbitrariness***

The Federal constitutional court accepted the constitutional appeal of an Afghan national against the decisions of an administrative court that had dismissed the requests for suspensive effect of the appeals that this person had filed against the decision of the Federal office for migration and refugees dismissing, on the one hand, his request for asylum as inadmissible and, on the other hand, ordering his expulsion to Greece.

It concluded that the administrative court violated the prohibition of arbitrariness enshrined in Article 3, paragraph 1, of the fundamental law by blatantly infringing the Court Order delivered in the Jawo case (C-163/17). According to the Federal constitutional court, as soon as the applicant had provided the elements establishing the existence of a serious risk of the latter suffering from inhuman or degrading treatment due to his transfer to Greece, it is the responsibility of the administrative court to assess the actual presence of such a risk, on the basis of objective, reliable, precise and duly updated elements and with regards to the standard of protection of the fundamental rights guaranteed by the law of the Union.

Bundesverfassungsgericht, [order of 7.10.2019, 2 BvR 721/19 \(DE\)](#).



## France – Council of State

### ***Protection of personal data – Means of expression of consent for online cookies and tracers - Continued browsing***

The Council of State ruled that the Commission Nationale de l'Informatique et des Libertés (CNIL) [National data protection authority] did not commit any obvious error of assessment by giving the operators a period of adaptation of 6 months in the context of an action plan seeking to mainly specify the practical terms of collecting consent for placing cookies. During this period, the continuation of browsing as an expression of consent will not lead to the exercise by the CNIL of its repressive power insofar as the fixing of such a period allows the operators to comply with the requirements of the provisions of Article 4, point 11, of regulation 2016/679 (GDPR) and Article 82 of the law of 6 January 1978, concerning information technology, data files and civil liberties. In fact, the CNIL will continue to monitor the compliance with the rules relating to prior consent, possibility of access to the service and the availability of a provision to easily withdraw consent for access and use.

Council of State, [ruling of 16.10.2019, no. 433069 \(FR\)](#)



## Italy – Constitutional Court

### ***Non-discrimination - Life imprisonment without parole - Presumption of social danger***

The Constitutional court ruled that Article 4bis, paragraph 1, of the law on prison organisation is partially unconstitutional insofar as, for the crimes listed therein (including, among others, terrorism and associations with the mafia), this provision prohibits convicts who do not cooperate with the justice system from benefitting from parole, even when the convicts no longer have any connection with a criminal association and organised crime. However, the Constitutional court grants parole if the convict participates in a rehabilitation course. Under the said ruling, the presumption of “social danger” of the convict is thus no longer absolute but relative and can be refuted by the judge responsible for the conviction after an evaluation on a case-by-case basis.

*Corte costituzionale*, [ruling of 23.10.2019, 253/2019 \(IT\)](#)  
[Press release \(IT\)](#)



## Netherlands – Council of State

### ***Border controls, asylum and immigration - Application for international protection - Transfer to Greece***

The competent Dutch authorities not having verified whether a Syrian national, subject of a decision of transfer to Greece, pursuant to regulation no. 604/2013, was able to arrange for legal assistance in that country in the context of his application for asylum, the Council of State upheld the judgement of the court that had annulled the decision in question. The Council of State stated, in this regard, that the legal assistance necessary for a judicial review of the administrative decisions delivered on the applications for international protection, within the meaning of the directive 2013/32, is inextricably linked with the access to an effective remedy. The Council of State stated that there was no guarantee that the Syrian national would have access to legal assistance in Greece and that there was thus a risk of him being treated in a manner that is contrary to Article 4 of the Charter of Fundamental rights of the European Union.

*Afdeling bestuursrechtspraak van de Raad van State*, [judgment of 23.10.2019, 201904035/1/V3 \(NL\)](#), [summary \(EN\)](#)  
[Press release \(NL\)](#)



## Denmark – Supreme Court

### ***Immigration policy - Respect for family and private life - Directive 2004/38/EC***

The Supreme court was referred a question concerning the expulsion of a minor Pakistani national, who was convicted of repeated acts of violence. Being the son of a British national, he had lived almost half his life in Pakistan, but was legally living in Denmark for approximately 8 years where he had obtained a permanent residence permit. The Supreme court ruled that his expulsion did not constitute a violation within the meaning of the directive 2004/38, of Article 8 of the European Convention on Human Rights and of Article 7 of the Charter of Fundamental Rights of the European Union. As a result, the expulsion was not contrary to the European and international obligations of Denmark.

*Højesteret*, [ruling of 28.10.2019, Sag 68/2019 \(DK\)](#)