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DOI:10.1017/ilm.2020.31

BRIEFLY NOTED

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Judicial and Similar Proceedings

1. N.J.C.M. et al. v. The Netherlands (District Court of The Hague)

<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2020:865> (in Dutch only)

On February 5, 2020, the District Court of the Hague in the Netherlands issued a judgment (currently only available in Dutch) that the U.N. Special Rapporteur on extreme poverty and human rights, Philip Alston, has hailed as a "clear victory for all those who are justifiably concerned about the serious threats digital welfare systems pose for human rights." *N.J.C.M. et al. v. The Netherlands* involved a challenge to the use of a benefits fraud detection tool called "System Risk Indication" or SyRI, which Mr. Alston had criticized in an amicus curie brief for the Court as "pos[ing] significant potential threats to human rights, in particular for the poorest in society" (para. 38). The District Court of the Hague agreed, ordering that the use of SyRI be ceased because it violated international human rights norms. In particular, the Court's human rights evaluation focused on the right to respect for privacy in Article 8 of the European Convention on Human Rights and Article 17 of the International Covenant on Civil and Political Rights (paras. 6.20-6.26) and the right to protection of personal data under EU law (paras. 6.27-6.36). The judgment can still be appealed.

2. Hajiyeva v. National Crime Agency (Court of Appeal of England & Wales – Civil Division)

<https://www.bailii.org/ew/cases/EWCA/Civ/2020/108.html>

On February 5, 2020, the Court of Appeal of England & Wales upheld an Unexplained Wealth Order (UWO) granted by the High Court against the wife of Jahangir Hajiyeva, an Azerbaijani banker jailed for defrauding the International Bank of Azerbaijan in 2016. Mrs. Hajiyeva was the first person to have been served with a UWO, a tool established in Chapter 1 of the Criminal Finances Act 2017. According to a press release by the UK National Crime Agency (NCA), *Hajiyeva v. National Crime Agency* involved a challenge to one of two UWOs granted against Mrs. Hajiyeva, which required her to explain how she and her husband could afford their home in Knightsbridge, London, with legitimately-acquired wealth. Mrs. Hajiyeva unsuccessfully appealed the UWO on four grounds: (1) "that the judge erred in his interpretation of the statutory test for identifying a politically exposed person"; (2) that the judge incorrectly determined that the International Bank of Azerbaijan was a "State-owned enterprise"; (3) that the judge incorrectly concluded that the requisite income conditions were met; and (4) that the judge erroneously held that the UWO does not violate spousal privilege or the right against self-incrimination. The NCA press release includes a comment by Sarah Pritchard, Director of the National Economic Crime Centre that the decision "is a significant result which is important in establishing [UWOs] as a powerful tool helping us to investigate illicit finance generated in, or flowing through, the UK." The decision may still be appealed to the UK Supreme Court.

3. R (Jalloh) v. Secretary of State for the Home Department (U.K. Sup. Ct.)

<https://www.supremecourt.uk/cases/docs/uksc-2018-0137-judgment.pdf>

On February 12, 2020, the Supreme Court of the United Kingdom (UK) issued its judgment in *R (Jalloh) v. Secretary of State for the Home Department*, holding unanimously that domestic common law on false imprisonment should not be aligned with the concept of deprivation of liberty under the European Convention on Human Rights (ECHR). According to a press release from the Court, the respondent had been released from immigration detention on bond, at which point a number of restrictions on his movement were imposed upon him, including requirements to regularly report to an immigration officer, live at a designated address, submit to e-tagging, and abide by an evening curfew. More than two years later, the Court of Appeal held in *R (Gedi) v. Secretary of State for the Home Department* that the Secretary of State did not possess the legal power to impose certain of the restrictions, which led to the respondent's curfew being lifted and to him filing for damages for false imprisonment. The High Court awarded him £4,000 and the Court of Appeal affirmed. The Secretary of State appealed to the Supreme Court arguing that the curfew should not be classified as

https://doi.org/10.1017/ilm.2020.31 Published online by Cambridge University Press

imprisonment under the common law, and that, if it was, the common law concept should be adapted to be in line with the concept of deprivation of liberty under article 5 ECHR. In holding that the curfew did amount to false imprisonment, the Supreme Court further held that to align the domestic law on false imprisonment with the ECHR would be a "retrograde step" that would "restrict the classic understanding of imprisonment at common law to the very different and much more nuanced concept of deprivation of liberty under the ECHR." Whereas "[t]he Strasbourg court has adopted [its] approach because of the need to draw a distinction between the deprivation and the restriction of physical liberty . . . [t]here is no need for the common law to draw such a distinction." The Court therefore dismissed the Secretary of State's appeal.

4. Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2912/2016 (United Nations Human Rights Committee)

<https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/RUS/CCPR_C_127_D_2912_2016_31248_E.docx>

On January 7, 2020, the U.N. Human Rights Committee ruled that a communication lodged against Russia by relatives of Polish nationals allegedly killed in the Katyn Massacre was time-barred and therefore inadmissible. The authors of the communication alleged violations of article 2(3) in conjunction with article 6, 7, 14, 17, and 19 of the International Covenant on Civil and Political Rights (the Covenant) and articles 1 and 2 of the Optional Protocol based on claims of a lack of effective investigation into the execution of their prisoner-of-war relatives by Soviet authorities in 1940, as well as ill treatment by the Russian authorities during judicial proceedings which concluded that there was insufficient evidence to establish that the authors' relatives were, in fact, executed in the Massacre. The Committee reiterated "that it is precluded *ratione temporis* from examining alleged violations that occurred prior to the entry into force of the Covenant for the State party, unless these violations continue after the Covenant and the Optional Protocol became effective for the State party." It noted that, although article 2(3) (right to an effective remedy) and article 6 (right to life) may, in some circumstances require continued investigation into violations that occurred prior to the entry into force of the Covenant, such an obligation will only apply if a violation of article 6 has been "prima facie established or acknowledged." Acknowledging that the rights under articles 2(3) and 6 did not exist before 1976 and were not subject to communication proceedings until 1992, the Committee could not conclude that Russia "still had a continuous obligation to investigate the 1940 killings." The Committee cited the "significant passage of time from the events of 1940 and absence of a formal acknowledgement by the State party of the violation of the authors' relatives[sic] rights in the interim." The Committee further decided that the authors' article 7 arguments were unsubstantiated in view of both the large passage of time and the lack of evidence on file demonstrating treatment by the State party that was "manifestly disrespectful or degrading or otherwise aimed at causing them pain and suffering." Two Committee members dissented on the Article 7 claim.

RESOLUTIONS, DECLARATIONS, AND OTHER DOCUMENTS

1. Status of the Human Rights Treaty Body System (United Nations Secretary-General)

<https://undocs.org/en/A/74/643>

On January 10, 2020, the Secretary-General of the United Nations (U.N.) published its third report on the status of the human rights treaty body system, as requested under U.N. General Assembly resolution 68/268 (2014) on "strengthening and enhancing the effective functioning of the human rights treaty body system". In addition to providing details regarding the implementation of the above resolution, the report includes information on treaty ratifications, state party reporting, and in situ visits to state parties. It also outlines various challenges in implementing treaty body mandates in 2018 to 2019, such as under-staffing and a prior decision of the General Assembly to reduce the travel budget for high-level representatives by twenty-five percent. These were marked as the "biggest challenges facing the treaty body system" during the relevant time period. Finally, the report makes a number of conclusions and recommendations, including the need to better take into account the "needs of least developed countries, landlocked developing countries and small island developing States" so that they can meet their reporting obligations; the need to make better use of

https://doi.org/10.1017/ilm.2020.31 Published online by Cambridge University Press

information and communications technology to make the review process more efficient; and the importance of ensuring that Committee experts "meet the highest level of recognized competence and expertise in the field of human rights and [are of] high moral standing and independent." The Secretary-General is required to report biennially.

2. Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: A Checklist (Council of Europe Commission on Democracy through Law)

<https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)015-e>

On February 5, 2020, the Council of Europe's Committee of Ministers formally agreed a checklist on checks and balances for states adopted by the Commission on Democracy through Law (Venice Commission) in June 2019. According to a press release from the Council of Europe, the checklist "follows a warning by the Venice Commission . . . that some governments, on gaining power in an election, are trying to dismantle democratic safeguards, rushing through laws without genuine political debate, and sacking independent judges and officials to make their own appointments." The checklist consists of ten sections on matters including the establishment of majority and opposition groups in parliaments; parliamentary appointments, certain legislative processes; and immunities of members of parliament. The checklist is non-binding, but the Council of Europe hopes that it will "help legislators in . . . vulnerable democracies to formulate legal rules and develop unwritten 'constitutional conventions' and best practices" and "assist so-called 'established democracies', which face the risk of imbalances undermining the culture of political pluralism" (para. 9).

3. Response by Vice-President Borrell to U.S. Targeted Sanctions on Nord Stream 2 (European Union Commission)

<https://www.europarl.europa.eu/doceo/document/E-9-2019-002880-ASW_EN.pdf>

The European Union Commission has responded to U.S. targeted sanctions on an oil pipeline being built from Russia to Germany, known as Nord Stream 2. The sanctions were provided for in the National Defense Authorization Act for Fiscal Year 2020. The Commission response, among other things, states that "[t]he EU does not recognise the extraterritorial application of US sanctions, which it considers to be contrary to international law." The EU further commented that "the EU opposes the imposition of sanctions against EU companies conducting legitimate business in accordance with EU law" and that any such pipelines must "be operated in line with EU law." Nord Stream 2 is owned by Nord Stream 2 AG, a wholly-owned subsidiary of Gazprom, a Russian state company. Nord Stream 2 AG will operate the pipeline once it is completed.

4. Practical guidance for mediators to protect children in situations of armed conflict (United Nations Special Representative of the Secretary-General for Children and Armed Conflict)

<https://childrenandarmedconflict.un.org/wp-content/uploads/2020/02/FINAL-Practical-guidance-for-mediators-to-protect-children-in-situations-of-armed-conflict-003.pdf>

The United Nations Office of the Special Representative of the Secretary-General for Children and Armed Conflict published on February 18, 2020, "Practical guidance for mediators to protect children in situations of armed conflict." In his foreword to the publication, António Guterres, U.N. Secretary-General, commented that the guidelines "are an important part of [the] Special Representative's work to support Member States in putting children at the centre of initiatives aimed at preventing and ending conflicts." The Special Representative, Virginia Gamba, noted in the front matter that "[g]rave violations against children continue to be perpetrated on an unabated scale by parties to conflict in most countries affected by war" and that the guidance is to be "considered as a first step towards a much more extensive exchange between the child protection and mediation communities." The substance of the guidance consists of four main "guiding principles": (I) identifying child protection issues in situations of armed conflict; (II) conflict analysis focused on child protection and the preparation of mediators for the consideration of child protection issues; (III) Key child protection elements to be considered under each substantive issue of the mediation processes; and (IV) Conclusions, including considerations on child protection issues in the implementation of peace agreements.

https://doi.org/10.1017/ilm.2020.31 Published online by Cambridge University Press

5. Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (as of 20 December 2019) (OSCE)

<https://www.osce.org/odihr/443731>

On January 14, 2020, the Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) published an Urgent Interim Opinion on the publication of a Bill which amends several legislative Acts of Poland relating to the organization of the Supreme Court of Poland. The Opinion was drafted in response to a request from the Polish Commissioner for Human Rights and assesses the Bill's compliance with OSCE and international human rights and rule of law standards, while still recognizing the right of every state to reform its judiciary. The Bill at issue was adopted by the Sejm in the Polish Parliament and is now before the Senate for consideration. The ODIHR Opinion concludes that "several provisions [of the Bill] reviewed are inherently incompatible with international standards and OSCE commitments on judicial independence" and that certain "breaches of these standards are so fundamental that they may put into question the very legitimacy of the Bill, which should be reconsidered in its entirety and should not be adopted as it is." For example, the Opinion highlights its "most significant concern": the Bill prohibits "any review or questioning of the status of any individual appointed by the President of the Republic to a judicial position or of any court, tribunal or other state body." The Senate received the Bill on December 23, 2019, and has thirty days to review it. It can either adopt it, return it to the Sjem with amendments, or reject it completely.

6. Recommendation CM/Rec(2019)11 of the Committee of Ministers to member States on effective guardianship for unaccompanied and separated children in the context of migration (Council of Europe)

<https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680993db7>

On December 11, 2019, the Committee of Ministers of the Council of Europe adopted a Recommendation aimed at making the guardianship of unaccompanied migrant children more effective. A press release issued by the Council of Europe states that the "Recommendation seeks to ensure that unaccompanied and separated children's rights and their best interests are respected in line with international and European standards." The Resolution itself consists of a brief preamble and five main recommendations. Detailed "guiding principles and implementing guidelines" are contained in an Appendix. These principles provide legislative drafting guidance and direction regarding the planning of relevant public policies and institutional measures. They also include principles targeted at effective access to justice and remedies for children. The Council of Europe Committee for the Rights of the Child will be responsible for promoting implementation of the resolution in Council of Europe states.

https://doi.org/10.1017/ilm.2020.31 Published online by Cambridge University Press