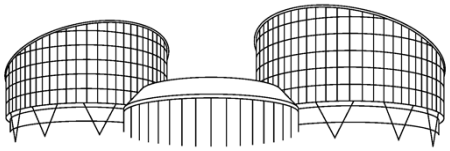

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF REPCEVIRÁG SZÖVETKEZET v. HUNGARY

(Application no. 70750/14)

JUDGMENT

STRASBOURG

30 April 2019

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Repcevirág Szövetkezet v. Hungary,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Jon Fridrik Kjølbro, *President,*
Robert Spano, *ad hoc judge,*
Faris Vehabović,
Egidijus Kūris,
Carlo Ranzoni,
Georges Ravarani,
Marko Bošnjak, *judges,*
and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 2 April 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 70750/14) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a cooperative, Repcevirág Szövetkezet ("the applicant"), on 28 October 2014.

2. The applicant was represented by Mr P. Metzinger, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr Z. Tallódi, Agent, Ministry of Justice.

3. The applicant company alleged that the domestic courts had breached its right to a fair trial when they rejected its requests that the case be referred to the Court of Justice of the European Union ("the CJEU") for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union ("the TFEU").

4. On 1 September 2015 notice of the application was given to the Government.

5. Mr Péter Paczolay, the judge elected in respect of Hungary, withdrew from sitting in the case (Rule 28 of the Rules of Court). The President of the Chamber accordingly appointed Mr Robert Spano, the judge elected in respect of Iceland, to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant is registered under Hungarian law as a cooperative based in Aranyosgadány.

7. The applicant's aim is to support its members in their agricultural activity, in particular by purchasing expensive machines and lending them to its members free of charge. The members pay a regular "contribution fee" to the cooperative.

8. The applicant considered that the lending of machines constituted the very essence of its economic activities. It therefore deducted the value-added tax paid in respect of the machines from the tax which it was liable to pay.

9. In 2008 the Hungarian Tax Authority fined the applicant, having found that the lending of machines to members free of charge was not an "economic activity" within the meaning of Act no. LXXIV of 1992 on Value-Added Tax. As a consequence, the applicant was not entitled to deduct the tax paid on the goods it purchased.

A. The first set of proceedings

10. The applicant challenged the decision of the Tax Authority before the administrative courts. Pointing to the special provisions applying to cooperatives and to the fact that its members paid contribution fees, it argued, on the basis of domestic law, that the service in question was to be considered a genuine economic activity.

11. On 17 February 2009 the Baranya County Court upheld the administrative decision. The Supreme Court, in review proceedings, upheld that judgment on 26 November 2009. In response to the applicant's argument to the effect that the contribution fee paid by members should be taken into account as a "consideration" for the lending of machines, rendering the applicant's activity an "economic" one, the Supreme Court referred to the *Aardappelenbewaarplaats* judgment of the CJEU (C-154/80, EU:C:1981:38), in which that court had held that "a provision of services for which no definite subjective consideration is received does not constitute a provision of services 'against payment' ".

B. The second set of proceedings

12. On 9 December 2010 the applicant, represented by a different lawyer from the one who had represented it in the previous set of proceedings, introduced a second set of proceedings, seeking damages against the

Supreme Court before the Budapest Regional Court. It alleged that the Supreme Court had violated European Union law on account of its failure to apply, of its own motion, Article 17 of the Sixth Council Directive 77/388/EEC (see paragraph 30 below) in its 2009 judgment and on account of the wrongful qualification of the applicant's activity for the purposes of the value-added tax deduction. The applicant argued that the European Union law provision analysed in the *Aardappelenbewaarplaats* case was Article 8 of the Second Council Directive 67/228 (defining the basis for assessment of value-added tax), rather than Article 17 of the Sixth Council Directive 77/388/EEC (concerning tax deduction). It was the latter that should have been directly applicable in the case before the Supreme Court. In the applicant's view, the *Aardappelenbewaarplaats* case was about whether turnover tax should be imposed on storage services provided free of charge for members of a cooperative association, whereas the case before the Supreme Court had concerned a different question, namely the deductibility of input VAT. Alleging the Supreme Court's liability for judicial malpractice, the applicant relied on the *Köbler* judgment of the CJEU (see paragraph 31 below). It requested that the Budapest Regional Court obtain a preliminary ruling from the CJEU as to the conformity of the Supreme Court's judgment with European Union law and the conditions for establishing whether the Supreme Court might be liable for a wrongful judgment.

13. On 31 May 2011 the Budapest Regional Court rejected the applicant's claim against the Supreme Court. It held that in the main proceedings, the Supreme Court had been bound by the applicant company's claim taking issue only with the alleged absence of a "consideration" and the resulting qualification of its service as not being an "economic activity". The Regional Court was of the view that in that respect the Supreme Court had duly examined the relevant European Union law of its own motion.

14. Without requesting a preliminary ruling, the Budapest Regional Court held that the *Köbler* judgment was not relevant in the case because the applicant had sought to sue the Supreme Court on the basis of the Hungarian Civil Code, rather than seeking to sue the Hungarian State itself under European Union law.

15. The applicant appealed and requested the second-instance court to obtain a preliminary ruling also on the question of whether the *Köbler* principles were applicable if the reparation claim was directed against the Supreme Court and not the State.

16. On 28 August 2012 the Budapest Court of Appeal upheld the first-instance judgment, without requesting a preliminary ruling. It accepted the applicant's argument that the reasoning of the first-instance judgment was erroneous with respect to the alleged irrelevance of the *Köbler* case, but held that, in any event, the applicant's claim was ill-founded on other

grounds. Notably, it pointed to the fact that during the first set of proceedings (see paragraph 10 above) the applicant had failed to refer to European Union law, and considered that this fact in itself had rendered the applicant's claim unfounded.

17. Arguing that European Union law was to be applied *proprio motu*, even without an explicit reference from the plaintiff, the applicant requested a review of the final judgment by the *Kúria* (the historical appellation by which the Supreme Court was renamed in 2012, see the first sentence of point 36 of the Constitutional Court's decision cited in *Baka v. Hungary* [GC], no. 20261/12, § 55, ECHR 2016). It also reiterated its request that the case be referred for a preliminary ruling and proposed that the *Kúria* also ask whether the liability of a State under the *Köbler* principles may be subjected to the precondition that an explicit reference to the relevant provisions of European Union law must be made by the plaintiff in the main – in the present case first – proceedings.

18. The questions thus proposed by the applicant for the purposes of a preliminary ruling read as follows:

> "1. Does the reparation claim fall within the scope of European law in civil proceedings, such as actions in damages based on section 349 of the Hungarian Civil Code, brought by an individual against the Supreme Court of the Member State concerned, in which the plaintiff claims that the Supreme Court has violated a right conferred on him by a directly applicable provision of European law in previous administrative proceedings. If so, to what extent?
>
> 2. In the common system of value-added tax, with regard to the specificities thereof, may Council Directive 77/388/EEC, especially its Article 17(2)(a), be interpreted as meaning that a national measure (e.g. a judgment) is incompatible with it if it denies the right of a cooperative, otherwise subject to value-added tax in the Member State concerned, to deduct input VAT paid on machines purchased, for the sole reason that the cooperative handed over those machines to its members, a 'grouping of growers', without consideration?
>
> 3. Is the liability of a Member State's Supreme Court excluded, under the rules of European law, by the sole fact that an individual did not allege explicitly the infringement of a specific provision of European law in the judicial proceedings for the review of an administrative decision denying him the right to tax deduction? Or should the domestic court enforce of its own motion the directly applicable provision of European law (in this case, Article 17(2)(a) of the Sixth Directive)?
>
> 4. Is the infringement sufficiently serious if the Supreme Court of a Member State denies, in administrative proceedings, an individual's right to tax deduction without analysing the underlying provision of European law directly or referring the case for a preliminary ruling, in circumstances where the reasoning of the refusal to refer the case [to the CJEU] is based on the Supreme Court's reliance on a judgment of the [CJEU] adopted on a different subject and where this latter court has not yet adopted a ruling on the issue at hand?"

19. On 2 October 2013 the *Kúria* dismissed in a procedural order (*végzés*) the applicant's request for a preliminary ruling. Firstly, it noted that it was not in dispute between the parties that the case fell within the scope

of European Union law; the referral of the first question would therefore have been futile. Secondly, concerning the second, third and fourth questions, the *Kúria* held that they could have been considered in the first proceedings, but that they fell outside the scope of the action in damages brought against the Supreme Court on account of alleged judicial malpractice. It further held that in the framework of the action in damages, assessment of the consequences of the applicant's failure, in the first set of proceedings, to make explicit allegations of an infringement of European Union law (see question 3 quoted in paragraph 18 above) was the task of the national courts, and that it did not raise any question of interpretation that would fall under the jurisdiction of the CJEU.

20. The applicant complained to the *Kúria* about the above refusal but in vain; on 4 December 2013 it held, in a procedural order (*végzés*), that no appeal lay against such a decision.

21. On 11 December 2013 the *Kúria* upheld, in a judgment (*ítélet*), the final decision of the Budapest Court of Appeal. It reiterated that the applicant could have relied on the Sixth Council Directive and put forward its arguments concerning the allegedly correct interpretation of domestic law in the light of European Union law before the Supreme Court in the 2009 proceedings. Since the applicant had failed to do so, the Supreme Court had indeed been prevented, by force of the applicable procedural rules, from examining such arguments as raised in the subsequent proceedings for damages, concerning the compatibility of the final judgment of 2009 with European Union law. Therefore, the Supreme Court could not bear responsibility for the infringement of European Union law alleged by the applicant. The judgment of the *Kúria* was served on the applicant on 7 February 2014.

22. On 13 March 2014 the applicant lodged a constitutional complaint under section 27 of the Constitutional Court Act (see *Mendrei v. Hungary* (dec.), no. 54927/15, § 13, 19 June 2018), claiming that the proceedings before the *Kúria* had been unfair on account of the latter's allegedly arbitrary refusal to refer the case for a preliminary ruling. Contending that the Constitutional Court should be considered as a "court or tribunal" for the purposes of Article 267 of the TFEU, the applicant also requested the Constitutional Court to turn to the CJEU in order to enquire whether an "arbitrary" refusal of a last-instance jurisdiction to refer a case for a preliminary ruling may violate the party's right to a fair trial guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union (see paragraph 29 below) and, if so, under what conditions such a refusal might be considered arbitrary. The applicant argued, in particular, that the *Kúria* had failed to recognise an issue of fundamental importance, namely that whether a certain legal issue (the consequences of a plaintiff's failure to put forward explicit allegations as to an infringement of European Union law) fell within the ambit of national law or European Union law was itself a

question belonging necessarily to the realm of European law. Ignoring that concept, the *Kúria* had "solved" the problem in an arbitrary fashion, that is, by refusing the reference and barring the applicant's access to a "lawful judge", the CJEU in the circumstances.

23. The applicant's constitutional complaint contained the following passages:

> "The complainant ... does not want to call into question the merits of the *Kúria*'s impugned judgment in the present procedure [but rather complains that] the *Kúria* acted unfairly in the review proceedings ...
>
> The *Kúria*'s procedure was in breach of the claimant's constitutional right to a fair trial, guaranteed by Article XXVIII (1) of the Fundamental Law, in so far as the *Kúria* acted arbitrarily in omitting to refer the case for a preliminary ruling. ...
>
> The *Kúria* failed to explain, in line with the *Cilfit* requirements ... why and how it had deemed itself exempt from the obligation to refer a question [on the interpretation of EU law to the CJEU for a preliminary ruling]. ...
>
> [I]n the light of the above, the *Kúria* failed to comply with its obligation to refer [a question to the CJEU for a preliminary ruling] and that in an arbitrary, grossly unprofessional manner ..."

24. On 19 May 2014 the Constitutional Court rejected the constitutional complaint as inadmissible, without putting forward a preliminary ruling request (see decision no. 3165/2014. (V.23.), referred to in *Somorjai v. Hungary*, no. 60934/13, § 34, 28 August 2018). It held that the question whether a request for reference to the CJEU should be made or not was to be decided by the judges hearing the case in the ordinary courts, and that the Constitutional Court lacked jurisdiction to review such decisions. It further noted that the only claim an applicant might make in constitutional complaint proceedings initiated under section 27 of Act no. CLI of 2011 on the Constitutional Court was that a judgment be quashed. Consequently, no request for a preliminary ruling was possible under that law, and the applicant's request to that effect had to be rejected.

25. The Constitutional Court's decision contained the following passage:

> "[The applicant] was of the view that the rejection by the *Kúria* of his request to have the case referred to the [CJEU] had been arbitrary in that the *Kúria* should have provided professionally appropriate, objective and duly detailed reasons in that respect but, in the applicant's opinion, it had failed to do so. In that connection, the applicant referred to the requirements contained in the [CJEU]'s *Cilfit* and *Köbler* judgments ..."

Apart from that passage, the decision did not address the issue of adequate reasoning by the *Kúria*.

II. RELEVANT DOMESTIC AND EUROPEAN UNION LAW

26. Certain provisions concerning the Constitutional Court's power of review in connection with constitutional complaints were set out in *Mendrei* (cited above, §§ 12-15).

Section 43 of the Constitutional Court Act, which was not quoted in *Mendrei* (cited above), provides as follows:

> "(1) If the Constitutional Court, in the course of proceedings provided for in section 27 and on the basis of a constitutional complaint, declares that a judicial decision is contrary to the Fundamental Law, it shall quash the decision.
>
> (2) Provisions of Acts that contain regulations in respect of court proceedings shall be applied to the procedural consequence of a Constitutional Court decision that quashes a judicial decision.
>
> (3) In court proceedings conducted as a consequence of the quashing of a judicial decision by the Constitutional Court, the decision of the Constitutional Court as to the constitutional issue shall be adhered to.
>
> (4) The Constitutional Court, when it quashes a judicial decision, may also quash judicial decisions or the decisions of other authorities which were reviewed by the given decision."

27. The provisions of the old Code of Civil Procedure (Act no. III of 1952) pertaining to the reference for a preliminary ruling, as in force at the material time, were set out in *Somorjai*, cited above, §§ 28 and 36.

Article 361 of the old Code of Civil Procedure provided as follows:

> "In order to provide redress following a constitutional complaint, the *Kúria* shall decide as follows: ...
>
> (c) if the Constitutional Court has quashed a judicial decision, [the *Kúria*] shall ... remit the case to the first or second-instance court for new proceedings and a new decision; or order the adoption of a new decision in respect of an application for review."

28. The relevant European Union law and the case-law of the CJEU pertaining to the preliminary ruling procedure was outlined in, among other authorities, *Somorjai* (cited above, §§ 38-41) and *Baydar v. the Netherlands* (no. 55385/14, §§ 21-29, 24 April 2018).

29. Article 47 of the Charter of Fundamental Rights of the European Union provides, in so far as relevant:

> **Right to an effective remedy and to a fair trial**
>
> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. ..."

30. Article 17(2)(a) of the Sixth Directive (Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes), as amended by Article 28f thereof, provides:

> "In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:
>
> (a) [VAT] due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person; ..."

31. In its *Köbler* judgment (C-224/01, EU:C:2003:513, point 1 of the operative part), the CJEU ruled as follows:

> "The principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation."

32. In connection with the role of the national courts in application of European Union law, the CJEU held, among other things, as follows (see, respectively, joined cases C-430/93 and C-431/93 *Van Schijndel*, EU:C:1995:441, point 2 of the operative part; and C-2/06 *Kempter*, EU:C:2008:78, paragraph 45):

> "Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim."

> "[W]hile Community law does not require national courts to raise of their own motion a plea alleging infringement of Community provisions where examination of that plea would oblige them to go beyond the ambit of the dispute as defined by the parties, they are obliged to raise of their own motion points of law based on binding Community rules where, under national law, they must or may do so in relation to a binding rule of national law ..."

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

33. The applicant complained of the failure of the domestic courts, namely the *Kúria* and the Constitutional Court, to refer questions raised by its case to the CJEU for a preliminary ruling – in breach of the conditions laid down in the CJEU's case-law. The applicant contended that this failure had violated its right of access to a court, notably the CJEU, which had jurisdiction to give the necessary mandatory interpretation of the European Union law provisions at issue. It relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

1. Compliance with the six-month time-limit

34. The Government argued that the application had been submitted outside the six-month time-limit, which had started to run when the *Kúria*'s judgment had been served on the applicant on 7 February 2014. In the Government's view, a constitutional complaint was a legal avenue to be exhausted when it came to the unfairness of proceedings and, in particular, a lack of appropriate reasoning (see also *Somorjai v. Hungary*, no. 60934/13, § 44, 28 August 2018). However, they contended that in the present case the proceedings before the Constitutional Court could not be taken into account for the assessment of the applicant's compliance with the six-month time-limit, since its complaint had been rejected as inadmissible by the Constitutional Court and thus the proceedings could not be considered an effective remedy for the purposes of Article 35 § 1 of the Convention.

35. The applicant argued that the Constitutional Court had not rejected its constitutional complaint on purely procedural grounds; rather, the decision contained arguments pertaining to the merits of the case. It further contended that the application also challenged the Constitutional Court's decision, and in that respect it had in any event been submitted within the six-month time-limit.

36. The Court has already found that a constitutional complaint is normally an effective remedy to be exhausted for the purposes of Article 35 § 1 of the Convention (see *Szalontay v. Hungary* (dec.), no. 71327/13, 12 March 2019). It further notes that although the Constitutional Court eventually rejected the applicant company's constitutional complaint, it did not do so on formal or procedural grounds; rather, it embarked on an analysis of the case and held that it lacked jurisdiction; in reaching this

conclusion, it in fact partly dealt with the substance of the applicant company's complaint (see *mutatis mutandis Uhl v. Germany* (dec.), no. 64387/01, 6 May 2004; see also *Schwarzenberger v. Germany*, no. 75737/01, §§ 21 and 31, 10 August 2006; and *Storck v. Germany*, (dec.), no. 61603/00, 26 October 2004). Since moreover this outcome cannot be considered foreseeable by the applicant company when it approached the Constitutional Court, the Court is satisfied that the constitutional complaint was a remedy that it could reasonably engage in. The relevant date is therefore the date of the final decision given by the Constitutional Court, that is to say, 19 May 2014, and it is appropriate to reject the Government's objection concerning compliance with the six-month time-limit.

2. Applicability of Article 6 of the Convention

37. The Government further argued that the Constitutional Court's task was to determine issues of constitutional law, rather than those of civil rights and obligations. On that ground, they requested the Court to declare the application incompatible *ratione materiae* with Article 6 of the Convention in so far as it concerned the Constitutional Court's alleged interference with the applicant's rights guaranteed by that provision.

38. In the applicant's view, when the Constitutional Court decided on a constitutional complaint lodged against a civil judgment of the *Kúria*, it was carrying out a civil judicial function. Its proceedings therefore fell within the scope of Article 6.

39. As regards the question of the applicability of Article 6 to the constitutional complaint procedure, the Court notes that in accordance with its well-established case-law the relevant test is whether the result of the Constitutional Court proceedings is capable of affecting the outcome of a dispute before the ordinary courts that otherwise falls within the scope of Article 6 (see, *mutatis mutandis*, *Süßmann v. Germany*, 16 September 1996, § 39, *Reports of Judgments and Decisions* 1996-IV, and *Gast and Popp v. Germany*, no. 29357/95, § 64, ECHR 2000-II).

40. The Court observes that under the old Code of Civil Procedure, the consequence of a successful constitutional complaint directed against a judicial decision under section 27 of the Constitutional Court Act was that the decision in question had to be quashed by the Constitutional Court and the case had to be remitted for new consideration to the first or second-instance court or to the *Kúria* (see paragraphs 26 and 27 above). Therefore, the result of the Constitutional Court proceedings at issue in the present case was capable of affecting the outcome of the dispute before the ordinary courts.

41. It follows that Article 6 of the Convention is applicable to the impugned proceedings before the Constitutional Court and that the Government's objection as to the incompatibility *ratione materiae* of this

part of the complaint with the aforementioned provision of the Convention must be rejected.

42. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

43. The applicant argued that although the *Kúria* had referred, in its decision of 2 October 2013 (see paragraph 19 above), to the CJEU's *Cilfit* requirements and had provided, formally, certain reasons for its decision rejecting the request to refer the case for a preliminary ruling, in substance it had failed to comply with the criteria and methodological requirements set forth in *Cilfit* and in *Ullens de Schooten and Rezabek v. Belgium* (nos. 3989/07 and 38353/07, §§ 56-62, 20 September 2011). The applicant submitted, in particular, that the *Kúria* had not cited any case in which the CJEU had already examined the main issue raised by the present case (notably the exclusion of *Köbler*-type liability when the plaintiff had not invoked the relevant European Union law provision in the previous set of proceedings). It was of the view that the *Kúria* had acted in an arbitrary and abusive manner when it had simply referred to the *Cilfit* judgment but rejected the request to refer the case to the CJEU for a preliminary ruling purely on the basis of considerations pertaining to domestic law.

44. The applicant company further contended that the Constitutional Court had rejected its request for a preliminary reference without providing any reason whatsoever as to how and why it had come to that conclusion and, in particular, without giving consideration to its potential qualification as "a tribunal against whose decisions there is no judicial remedy" for the purposes of Article 267 of the TFEU, thus violating its right to access to a court, notably the CJEU.

45. The Government argued that the *Kúria* had provided ample and appropriate reasons as to why it had considered it unnecessary to refer the relevant questions to the CJEU for a preliminary ruling. They submitted that the CJEU had accepted the possible limitation of the national courts' obligation to examine, of their own motion, issues of European Union law, notably in circumstances where this would have interfered with the principle of those courts being bound by the parties' claims brought before them. In the Government's view, the courts could not be held liable for consequences resulting from the argumentation strategy of the plaintiff's lawyer in any of the European legal systems. The Government contended that in the present case the applicant's claim for damages had been ill-founded on that ground

and therefore the *Kúria* had rightly come to the conclusion, and also provided due reasons in that respect, that reference for a preliminary ruling in connection with the questions proposed by the applicant had not been warranted.

46. The Government further submitted that the Constitutional Court had had no competence to review the content of the reasons provided by the *Kúria*, its competence being limited to verification of whether reasons had been provided or not. In the complete absence of reasons behind the *Kúria*'s decision, the applicant would have been unable to complain about their content before the Constitutional Court; it had therefore been obvious to the Constitutional Court that the *Kúria* had complied with its obligation to provide reasons for its decision. In the light of the above, the Government argued that, given the limits of its competence, the Constitutional Court had not been required to examine the constitutional complaint under the European Union law provisions relied on by the applicant, or to provide reasons in that respect.

47. Lastly, the Government contended that, under Article 6 of the Convention, the applicant had no right as such to have the case referred to the CJEU and that the obligation to provide reasons for refusing to refer a case fell upon the *Kúria*, which had complied with it. In such circumstances, the fairness of the proceedings, as a whole, had not been prejudiced.

2. The Court's assessment

(a) General principles

48. The Court recalls that it is for the national courts to interpret and apply domestic law, if applicable in conformity with European Union law, and to decide on whether it is necessary to seek a preliminary ruling from the CJEU to enable them to give judgment. It reiterates that the Convention does not guarantee, as such, the right to have a case referred by a domestic court to another national court or to the CJEU for a preliminary ruling. The Court has previously observed that this matter is, however, not unconnected to Article 6 § 1 of the Convention since a domestic court's refusal to grant a referral may, in certain circumstances, infringe the fairness of proceedings where the refusal proves to have been arbitrary. Such a refusal may be deemed arbitrary in cases where the applicable rules allow no exception to the granting of a referral or where the refusal is based on reasons other than those provided for by the rules, or where the refusal was not duly reasoned. Indeed, the right to a reasoned decision serves the general rule enshrined in the Convention which protects the individual from arbitrariness by demonstrating to the parties that they have been heard and obliges the courts to base their decision on objective reasons (see *Ullens de Schooten and Rezabek v. Belgium,* cited above, §§ 54-59). As the Court has often noted, the rule of law and the avoidance of arbitrary power are principles

underlying the Convention. In the judicial sphere, those principles serve to foster public confidence in an objective and transparent justice system, one of the foundations of a democratic society (see *Taxquet v. Belgium* [GC], 16 November 2010, no. 926/05, § 90 and the cases cited therein).

49. The obligation under Article 6 § 1 of the Convention for domestic courts to provide reasons for their judgments and decisions cannot, however, be understood to mean that a detailed answer to every argument is required. The extent to which the duty to provide reasons applies may vary according to the nature of the decision. It is necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question of whether or not a court has failed to fulfil the obligation to provide reasons − deriving from Article 6 of the Convention − can only be determined in the light of the circumstances of the case (see, among many other authorities, *Tibet Menteş and Others v. Turkey*, nos. 57818/10 and 4 others, § 48, 24 October 2017 and the cases cited therein).

50. These principles are amply reflected in the Court's case-law. For example, in *Dhahbi v. Italy* (no. 17120/09, § 31, 8 April 2014) and *Schipani and others v. Italy* (no. 38369/09, § 42, 21 July 2015), where violations of Article 6 § 1 of the Convention were found for a total absence of providing reasons for a refusal to ask for a preliminary ruling, the Court formulated the following principles regarding the domestic courts' duty under that provision in situations where an explicit request was made for a referral to the CJEU for a preliminary ruling and where the request was accompanied by a due argumentation:

> "... Article 6 § 1 requires domestic courts to provide reasons, in the light of the applicable law, for any decision refusing to refer a question for a preliminary ruling;
>
> – when the Court hears a complaint alleging a violation of Article 6 § 1 on this basis, its task consists in ensuring that the impugned refusal was duly accompanied by such reasoning;
>
> – whilst this verification has to be carried out in a thorough manner, it is not for the Court to examine any errors that might have been committed by the domestic courts in interpreting or applying the relevant law; and
>
> – in the specific context of the third paragraph of Article 234 of the Treaty establishing the European Community (current Article 267 of the TFEU), this means that national courts against whose decisions there is no judicial remedy under national law, and which refuse to request a preliminary ruling from the CJEU on a question raised before them concerning the interpretation of EU law, are required to give reasons for such refusal in the light of the exceptions provided for by the case-law of the CJEU. They must therefore indicate the reasons why they have found that the question is irrelevant, that the European Union law provision in question has already been interpreted by the CJEU, or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt."

51. By contrast, the Court has held that where a request to obtain a preliminary ruling was insufficiently pleaded or where such a request was only formulated in broad or general terms, it is acceptable under Article 6 of the Convention for national superior courts to dismiss the complaint by mere reference to the relevant legal provisions governing such complaints if the matter raises no fundamentally important legal issue (see *John v. Germany* (dec.), no. 15073/03, 13 February 2007). The Court has come to the same conclusion in a case where the applicant had failed to explicitly ask for a preliminary ruling (see *Greneche and Others v. France* (dec.), no. 34538/08, 15 October 2013). It must however, also in this context, ascertain that decisions of national courts are not flawed by arbitrariness or otherwise manifestly unreasonable, this being the limit of the Court's competence in assessing whether domestic law has been correctly interpreted and applied (see, *mutatis mutandis*, *Talmane v. Latvia*, no. 47938/07, § 29, 13 October 2016).

(b) Application of these principles to the present case.

52. As to the scope of the complaint, the Court notes that, on the one hand, the applicant company complained of a violation of its right of access to a court, whereas on the other, developing that complaint, it mainly addressed the lack of reasoning by the domestic courts for the refusal to make a preliminary reference to the CJEU. The Court, being the master of the characterisation to be given in law to the facts (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports* 1998-I), considers that the essence of the applicant's grievances is a lack of proper reasoning and will examine the application under Article 6 § 1 in that sense.

53. The Court observes that the *Kúria* found the first question proposed by the applicant irrelevant (notably in the absence of any disagreement between the parties), and that it did not find it necessary to refer the remaining questions to the CJEU either.

(i) As regards the Kúria*'s decisions*

54. While in principle the *Kúria* agreed with the applicant that the claim for damages at issue was to be adjudicated in accordance with the CJEU's *Köbler* case-law (see, in particular, paragraph 31 above), it stressed that the Supreme Court had been prevented, under the applicable procedural rules, from examining, in its 2009 judgment rendered in the first set of proceedings, the arguments that had been raised by the applicant in the second set of proceedings. On that basis, the *Kúria* came to the conclusion that the Supreme Court could not bear responsibility for the alleged infringement of European Union law.

55. As regards the procedural rules in question, i.e. the *ne ultra petita* principle according to which the courts are bound by the limits of the claims brought before them, the *Kúria* was of the view that their consequence was

that the applicant's failure to rely on European Union law in the first set of proceedings fell to be assessed by the national courts exclusively. Thus, the *Kúria* considered this issue to belong exclusively to the realm of domestic law and not to raise any question of interpretation that would fall under the jurisdiction of the CJEU.

56. The Court reiterates that it is not competent to assess the merits of the *Kúria*'s interpretative stance in the light of European Union law in the first set of proceedings, in particular whether or not it was in line with the CJEU's case-law (see paragraph 32 above). At any rate, the applicant company's complaint is not directed against the findings of the *Kúria* in this set of proceedings but against its refusal to request a preliminary ruling in the second set of proceedings, allegedly preventing the applicant from the right to access the CJEU.

57. In the second set of proceedings which aimed at finding the State liable for having wrongly applied EU law and at the applicant company being awarded damages in this respect, the Court notes that the *Kúria* gave reasons for which it considered it unnecessary to seek a preliminary ruling as requested by the applicant company, thus applying one of the criteria set out in the *Cilfit* judgment of the CJEU (see paragraph 18 above). The Court's competence is confined to assessing whether or not these reasons are arbitrary or manifestly unreasonable.

58. In this connection, the Court notes that, for liability to be established under the *"Köbler"* criteria, it is not sufficient for a court to have infringed European Union law, such infringement moreover has to be manifest (see paragraph 31 above). In that sense, the second and fourth questions – which, in substance, concerned the adequate interpretation of the relevant European Union law provisions – were considered not relevant as, according to the *Kúria*, they fell outside the scope of the action in damages. As to the third question – which in substance was about whether the sole fact that a party to an action in tort against a State for infringement of European Union law by its courts does not explicitly allege such infringement in the judicial proceedings, upon which the subsequent action in liability is based, excludes the State's liability – the *Kúria* implicitly provided a positive answer by concretely addressing the consequences of the applicant company's failure to raise the question of the correct application of European Union law in the first set of proceedings. It held that, by failing to put forward its arguments concerning the adequate interpretation of European Union law, the applicant company had prevented the Supreme Court from taking into account its arguments. Thus the *Kúria* assessed the alleged wrongful behaviour of the domestic court in light of the applicant's own behaviour. It found that, because of the applicant's own omissions in the first set of proceedings, there was no liability resting upon the competent court for – allegedly – wrongly applying European Union law. The *Kúria* could have explained more explicitly why it refused to make a preliminary

reference. However, an implicit reasoning can be considered sufficient (see *Wind Telecommunicazioni S.P.A v. Italy* (dec.), no. 5159/14, 8 September 2015).

59. The Court reiterates that it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). It is therefore not called on to assess compliance with EU law of the *Kúria*'s approach, according to which there is no liability under EU law of a domestic court which allegedly misapplied EU law when, as in the present case, the applicant company claiming compensation under this head did not itself rely on EU law in the main proceedings and/or make a request for a reference for a preliminary ruling by the CJEU, thus preventing the domestic courts in the compensation proceedings from examining any claims based on an infringement of EU law. Nor can the Court assess whether or not under these circumstances it is open for the party concerned to ask, in the proceedings relating to the claim for compensation, for a reference for a preliminary ruling to be made to the CJEU. The Court notes that, according to the *Kúria,* what was lying at the heart of the case was, by and large, the applicant company's attempt to make good, by its action in damages brought against the Supreme Court, its omission in the first set of proceedings, that is to say, explicitly to refer to the applicable European Union law and to request a preliminary ruling on the EU law provision at stake.

60. The Court therefore does not consider arbitrary or manifestly unreasonable the reasons given by the *Kúria* for not making a reference to the CJEU.

(ii) As regards the Constitutional Court's decision

61. In so far as the Constitutional Court's reasoning is concerned, this court provided reasoning in reply to the request of the applicant company which complained of the *Kúria'*s refusal to approach the CJEU, consisting in holding that it lacked jurisdiction in this respect. Such position cannot be considered arbitrary or manifestly unreasonable either. It is not for the Court to challenge the Constitutional Court's finding that requests for a preliminary reference to the CJEU should be made before the ordinary courts and that it lacked jurisdiction to review such decisions. The Court would stress in this context that Article 6 § 1 does not require a supreme court to give more detailed reasoning when it simply applies a specific legal provision to dismiss an appeal on points of law as having no prospects of success, without further explanation (see *Burg and Others v. France* (dec.), no. 34763/02, 28 January 2003, and *Gorou v. Greece (no. 2)* [GC], no. 12686/03, § 41, 20 March 2009).

(c) Conclusion

62. In these circumstances, the refusal by the domestic courts to make a reference for a preliminary ruling by the CJEU cannot be considered arbitrary or manifestly unreasonable. Accordingly, there has been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 of the Convention.

Done in English, and notified in writing on 30 April 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli
Registrar

Jon Fridrik Kjølbro
President