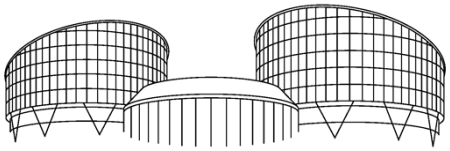

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

# CASE OF BAYDAR v. THE NETHERLANDS

*(Application no. 55385/14)*

JUDGMENT

STRASBOURG

24 April 2018

**FINAL**

24/07/2018

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of Baydar v. the Netherlands,**

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

Helena Jäderblom, *President,*
Branko Lubarda,
Helen Keller,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides,
Jolien Schukking, *judges,*

and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 22 September 2015 and on 3 April 2018,

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

# PROCEDURE

1. The case originated in an application (no. 55385/14) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr İlkay Baydar ("the applicant"), who holds both Dutch and Turkish nationality, on 1 August 2014.

2. The applicant was represented by Mr Th.O.M. Dieben and Ms G.A. Jansen, lawyers practising in Amsterdam. The Dutch Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker of the Ministry of Foreign Affairs.

3. The applicant alleged that his right to a fair trial under Article 6 § 1 of the Convention had been infringed in that the Supreme Court refused to refer his request for a preliminary ruling to the Court of Justice of the European Union ("CJEU") and that this refusal was not adequately reasoned.

4. On 22 September 2015 the application was communicated to the Government.

5. In accordance with Article 36 § 1 of the Convention and Rule 44 of the Rules of Court, the Registrar informed the Turkish Government of their right to submit written comments. They did not avail themselves of this right.

6. On 28 September 2015 the European Commission was invited to intervene as a third party in accordance with Article 36 § 2 of the Convention and Rule 44 of the Rules of Court. In its reply the Commission informed the Court that it did not intend to submit written observations.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1968 and lives in Apeldoorn.

8. In a judgment of 29 October 2008, the Zutphen Regional Court (*rechtbank*) convicted the applicant of the transportation of 2,800 grams of heroin and of seven counts of people trafficking (*mensensmokkel*) as defined in Article 197a of the Criminal Code (*Wetboek van Strafrecht*), committed jointly with other perpetrators. It sentenced him to a partially suspended term of 40 months' imprisonment.

9. Both the applicant and the prosecution appealed against the Regional Court's judgment.

10. On 19 July 2011 the Arnhem Court of Appeal (*gerechtshof*) gave its judgment, upholding the conviction for the offence of transporting heroin and also of four counts of people trafficking, and acquitting him on the three other counts. It sentenced him to 40 months' imprisonment less the time spent in pre-trial detention. Based on the evidence submitted, the Court of Appeal found established that the applicant and his co-perpetrators had, for purposes of financial gain, between 10 November 2006 and 17 January 2007 facilitated the unauthorised residence of a total of 20 Iraqi migrants in the Netherlands, Germany and Denmark.

11. The applicant lodged an appeal in cassation (*cassatie*), the scope of which is limited to procedural conformity and points of law, with the Supreme Court (*Hoge Raad*). In his written grounds of appeal of 8 August 2013, the applicant raised, *inter alia*, a complaint regarding the four counts of people trafficking of which he had been convicted by the Court of Appeal. The applicant contended that the Court of Appeal had convicted him of facilitation of unauthorised "residence", as defined in Article 197a § 2 of the Criminal Code, whereas the evidence relied on by the Court of Appeal to uphold that conviction did not prove that the Iraqi migrants had had "residence" in the Netherlands, Germany or Denmark. Instead, the evidence demonstrated that the applicant had organised and financed the Iraqi migrants' transportation to Denmark *via* the Netherlands and Germany, which had been intercepted on each occasion in Germany. As the migrants' stay in the Netherlands and Germany had only been brief and transitory, and given that they had never even entered Denmark, there was, according to the applicant, no proof of "residence" in those countries. In that regard, the applicant referred to European Union law, namely Council Directive 2002/90/EG of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (hereinafter "the Directive") and Council Framework Decision 2002/946/JBZ of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of

unauthorised entry, transit and residence (hereinafter "the Framework Decision"). Submitting that Article 197a of the Criminal Code had been amended in order to implement the Directive, the applicant argued that the notion of the facilitation of unauthorised "residence" within the meaning of Article 197a § 2 should be understood as entailing a long-term stay, to be distinguished from "transit" or "entry" as defined in the first paragraph of Article 197a, which had been added to Article 197a when the Directive was implemented. The applicant's grounds of appeal in cassation did not include a request that the Supreme Court put a question to the CJEU for the purpose of obtaining a preliminary ruling.

12. In his advisory opinion of 10 December 2013, the Advocate General (*advocaat-generaal*) to the Supreme Court expressed his view that the applicant's appeal should be dismissed with the exception of the first of the grounds of the appeal, which pertained to the length of the proceedings: the duration of the cassation proceedings had exceeded a reasonable time within the meaning of Article 6 § 1 of the Convention, for which a reduction of sentence was to be applied. With regard to the applicant's complaint that the evidence did not show that there had been any "residence" of the migrants in the countries at issue, the Advocate General was of the opinion that Article 197a § 2 of the Criminal Code called for a broad interpretation of "residence", as had been the case prior to the implementation of the Directive and the Framework Decision. Since that implementation was intended to broaden the scope of Article 197a of the Criminal Code, the second paragraph of that provision retained its broad meaning of "residence", thereby encompassing "transit". The separate penalisation in the first paragraph of Article 197a of the facilitation of unauthorised "transit and entry" did not change the broad scope of paragraph 2. The Advocate General thus concluded that the applicant's complaint in this matter should be dismissed.

13. On 24 December 2013, the applicant submitted written comments in reply to the Advocate General's advisory opinion (a so-called "Borgers letter"[1]) in which he made a tentative request for questions to be referred to the CJEU for a preliminary ruling about the interpretation of "residence", "entry" and "transit" within the context of the Directive and whether the Directive contained minimum rules or constituted a general framework of terms, if the Supreme Court were to concur with the Advocate General.

14. On 4 March 2014 the Supreme Court gave its judgment, which read:

1. In the procedure before the Netherlands Supreme Court, "Borgers letter" is the colloquial name given to a written response to the advisory opinion of the Procurator or Advocate General which the defendant in a criminal case is allowed to submit. It takes its name from this Court's *Borgers v. Belgium* judgment of 30 October 1991, Series A no. 214B, in which the absence of such a possibility led to the finding of a violation of Article 6 § 1 of the Convention.

"[the applicant's counsel] have submitted written grounds of appeal. That document is annexed to this judgment, of which it is a component part.

The Advocate General [...] has advised that the impugned judgment be quashed − but only as regards the prison sentence imposed, reducing it due to the violation of the right to adjudication within a reasonable time − and that the remainder of the appeal be dismissed.

Counsel [for the applicant] have submitted a written reply."

15. The Supreme Court went on to hold that the applicant's complaint that the cassation proceedings had exceeded a reasonable time within the meaning of Article 6 § 1 of the Convention was well-founded and that the sentence imposed on the applicant should be reduced as a consequence thereof. The Supreme Court further considered:

"4. Assessment of the remaining grievances

The grievances cannot lead to cassation [of the impugned judgment] (*de middelen kunnen niet to cassatie leiden*). Based on section 81 (1) of the Judiciary (Organisation) Act (*Wet op de rechterlijke organisatie*), this requires no further reasoning as the grievances do not give rise to the need for a determination of legal issues in the interests of legal uniformity or legal development."

16. The Supreme Court thus quashed the Court of Appeal's judgment as regards the imposed sentence, reduced the sentence to 34 months' imprisonment, and dismissed the remainder of the grounds of appeal. No further appeal lay against the Supreme Court's judgment.

## II. RELEVANT DOMESTIC AND EUROPEAN LAW

### A. The Judiciary (Organisation) Act

#### *1. Section 80a of the Judiciary (Organisation) Act*

17. Section 80a of the Judiciary (Organisation) Act entered into force on 1 July 2012. It provides as follows (references to other domestic legislation omitted):

"1. The Supreme Court may, after having taken cognisance of the advisory opinion of the Procurator General (gehoord de procureur-generaal), declare an appeal in cassation inadmissible if the complaints raised do not justify an examination in cassation proceedings (de aangevoerde klachten geen behandeling in cassatie rechtvaardigen), because the appellant party obviously has insufficient interest in the cassation appeal (klaarblijkelijk onvoldoende belang heeft bij het cassatieberoep) or because the complaints obviously cannot succeed (klaarblijkelijk niet tot cassatie kunnen leiden).

2. The Supreme Court shall not take a decision as referred to in the first paragraph without first having taken cognisance of:

a. [in civil cases:] the summons or request [introducing the cassation appeal] ... and the memorandum in reply (conclusie van antwoord) or the statement of defence (verweerschrift), if submitted;

b. [in criminal cases:] the written statement of the grounds of the cassation appeal (de schriftuur, houdende de middelen van cassatie) ...; or, as the case may be,

c. [in tax cases:] the written statement introducing the cassation appeal (het beroepschrift waarbij beroep in cassatie wordt ingesteld) ... and the statement of defence, if submitted.

3. The cassation appeal shall be considered and decided by three members of a multi-judge Chamber (meervoudige kamer), one of whom shall act as president.

4. If the Supreme Court applies the first paragraph, it may, in stating the grounds for its decision, limit itself to that finding."

### *2. Section 81 of the Judiciary (Organisation) Act*

18. Section 81 of the Judiciary (Organisation) Act reads:

"1. If the Supreme Court considers that a complaint does not constitute grounds for overturning the impugned judgment and does not give rise to the need for a determination of legal issues in the interests of legal uniformity and legal development, it may, in giving reasons for its decision on such complaint, limit itself to that finding.

2. The appeal in cassation shall be considered and determined by three members of a multi-judge Chamber (meervoudige kamer), one of whom shall act as president."

### *3. Relevant case-law*

19. In a judgment of 11 September 2012 (ECLI:NL:HR:2012:BX0129) the Supreme Court clarified its understanding of sections 80a and 81 of the Judiciary (Organisation) Act as applicable in criminal cases, which reads, as far as relevant to the present case:

"2.1.2. The explanatory memorandum (*memorie van toelichting*) to the Bill that led to this Act (Parliamentary Documents, Lower House of Parliament (*Kamerstukken II*) 2010/11, 32 576, no. 3), includes the following:

'1. Introduction

Aim pursued by the Bill

This Bill aims to strengthen the role of the cassation procedure (*versterking van de cassatierechtspraak*) by establishing different and new requirements for lawyers who act as representatives before the Supreme Court and by introducing the possibility for the Supreme Court to declare inadmissible a cassation appeal at the beginning of the procedure. The Bill is intended to enable the Supreme Court to concentrate on its core tasks as a court of cassation. The adequate execution of these core tasks is under pressure as a result of cassation appeals being lodged in cases that do not lend themselves to a review in cassation, and because certain issues about which it would be desirable for the Supreme Court itself to pronounce do not reach the Supreme Court in time or at all. The establishment of quality requirements for counsel is aimed at ensuring that cassation appeals are accompanied by statements of grounds of appeal that are of decent quality.

...

Accelerated inadmissibility

Another measure [in addition to establishing new quality requirements for legal representatives] is the introduction of a mechanism for disposing of cases that goes beyond that of the current section 81 of the Judiciary (Organisation) Act. Section 81 of the Judiciary (Organisation) Act enables the Supreme Court to limit the reasoning of the rejection of a cassation grievance to the finding that the complaint raised therein "does not constitute grounds for overturning the impugned judgment and does not give rise to the need to determine legal issues in the interests of legal uniformity and legal development".

Section 81 of the Judiciary (Organisation) Act has in recent years played an important part in keeping the workload of the Supreme Court manageable. The Supreme Court now applies this provision in approximately half of its cases. However, the limits of its application are discernible. Moreover, section 81 is applied only at the end of cassation proceedings and, (invariably, in civil and criminal cases) after an advisory opinion from the Procurator General. However, the possibility of rejecting cases that have no prospect of success at an earlier stage of the proceedings and in a simple manner would constitute a considerable alleviation for the parties to the proceedings and the Supreme Court alike. ...

Pursuant to Article 118 § 2 of the Constitution (*Grondwet*), the Supreme Court is charged, in the cases and within the limits prescribed by law, with overturning judicial decisions that are contrary to the law (*de cassatie van uitspraken wegens schending van het recht*). The Bill explicitly does not seek to change the Supreme Court's task. Nor does [the Bill] involve a leave-to-appeal system in which a court has to give prior permission before a legal remedy can be used. The freedom of parties to lodge cassation appeals remains unimpaired. What is new is the latitude given to the Supreme Court to declare an appeal inadmissible on the (substantive) finding that the grounds of appeal submitted do not justify a detailed review in cassation proceedings (*geen nadere beoordeling in cassatie rechtvaardigen*). The appeal may, for instance, be manifestly ill-founded (*klaarblijkelijke ongegrondheid*), because the impugned ruling rests on two grounds, each of which is capable of supporting the decision by itself but only one of which is challenged, or there may be a lack of interest, for example because a ground for the appeal, although well-founded, cannot, after the overturning of the impugned ruling, lead to an outcome other than the one to which that ruling had led.'

...

2.2.2. Section 80a of the Judiciary (Organisation) Act does, however, bring about a change in cases in which an omission hitherto necessitated the overturning of the impugned ruling, even though the person bringing the cassation appeal did not actually have a sufficient interest − deserving to be respected in law (*niet voldoende in rechte te respecteren belang*) − in such an overturning and a possible rehearing after remittal or referral of the case. In this context, it is to be noted that the mere possibility – regardless of the reason for which the appeal is considered well-founded – that in that situation a different, and possibly more advantageous, ruling could be given (for example, a reduction of sentence pursuant to the length of the proceedings before and after remittal or referral of the case, or in relation to changed personal circumstances) cannot be considered an interest that deserves to be upheld in law in cassation proceedings.

...

Consequences for the content of the statement of grounds of appeal in cassation and the 'Borgers letter'

2.6.1. Pursuant to the second paragraph of section 80a of the Judiciary (Organisation) Act the Supreme Court will not issue a decision of the kind referred to in the first paragraph without first having taken cognisance of the written statement of grounds of appeal in cassation ... If the 'selection at the gate' (*selectie aan de poort*) which the legislature has introduced by way of section 80a of the Judiciary (Organisation) Act is to achieve its intended aim, then the lawyer who acts as legal representative, or the public prosecution service as the case may be, can reasonably be expected – in the words of the explanatory memorandum – to submit 'statements of grounds of appeal ... that are of decent quality'.

...

2.6.3. Section 80a of the Judiciary (Organisation) Act provides that in the cases referred to therein, the Supreme Court may declare the cassation appeal inadmissible after having heard the Procurator General. It must be presumed that the Procurator General will express his point of view as to the applicability of section 80a of the Judiciary (Organisation) Act on a hearing day set by the judge in charge of the Supreme Court's list of cases (*rolraadsheer*) and also that if the Procurator General is of the opinion that the case lends itself to the application of section 80a of the Judiciary (Organisation) Act, he will express this point of view in writing. In that case, counsel for the person by whom or on whose behalf the appeal has been lodged may respond in writing to that point of view within a period of two weeks thereafter."

20. In its judgment of 26 May 2015 (ECLI:NL:HR:2015:1332) the Supreme Court explained its practice as regards the application of sections 80a and 81 of the Judiciary (Organisation) Act in relation to a request for referral to the CJEU made in that case. It held, as far as relevant to the present case:

"2.1. The Supreme Court finds that the complaints raised do not justify an examination in cassation proceedings because the appellant party obviously has insufficient interest in the cassation appeal or because the complaints obviously cannot succeed. The Supreme Court will therefore – based on section 80a of the Judiciary (Organisation) Act and after having taken cognisance of the advisory opinion of the Procurator General − declare the appeal in cassation inadmissible.

2.2.1. It is inherent therein (daarin ligt besloten) that the request contained in the written grounds of appeal to put a preliminary question to the Court of Justice of the European Union cannot be granted (voor inwilliging vatbaar). The reasons are as follows.

2.2.2. A judgment in which the appeal in cassation is declared inadmissible or dismissed by application of and with reference to section 80a or 81 of the Judiciary (Organisation) Act contains an abridged reasoning of that decision. Furthermore, such a judgment contains the conclusion that no issues arise that justify an examination in cassation proceedings or give rise to the need for a determination of issues in the interests of legal uniformity, legal development or legal protection. Since preliminary questions within the meaning of Article 267 of the Treaty on the Functioning of the European Union concern the interpretation of Community law and are issues of law (rechtsvragen), it is inherent in such a judgment that there is no need to put preliminary questions. The judgment also implies that the case in question concerns one of the situations where there is no need for such referral of preliminary questions,

namely when the preliminary question raised is not relevant for the resolution of the dispute or can be answered in the light of the case-law of the Court of Justice [of the European Union] or that no reasonable doubt exists as to the manner in which the question concerning the rules of Community law was to be resolved."

## B. European Union law

### *Article 267 of the Treaty on the Functioning of the European Union*

21. Article 267 of the Treaty on the Functioning of the European Union ("TFEU")[2] provides as follows:

"The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union ...;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court."

22. On 25 November 2016, the CJEU published its (updated) Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2016/C 439/01), which reads, as far as relevant to the present case:

"3. The jurisdiction of the Court to give a preliminary ruling on the interpretation or validity of EU law is exercised exclusively on the initiative of the national courts and tribunals, whether or not the parties to the main proceedings have expressed the wish that a question be referred to the Court. In so far as it is called upon to assume responsibility for the subsequent judicial decision, it is for the national court or tribunal before which a dispute has been brought – and for that court or tribunal alone – to determine, in the light of the particular circumstances of each case, both the need for a request for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court."

### *Relevant case-law of the CJEU*

23. In the case of *S.r.l. CILFIT and Lanificio di Gavardo S.p.a. v. Ministry of Health* (C-283/81, ECLI:EU:C:1982:335), the CJEU received a request from the Italian Court of Cassation for a preliminary ruling. This request concerned the question as to whether the third paragraph of Article

2. Formerly, Article 177 of the Treaty establishing the European Economic Community ("EEC Treaty") and then Article 234 of the Treaty Establishing the European Community ("EC Treaty").

177 of the EEC Treaty[3] laid down an obligation to refer a matter which precluded the national court from determining whether the question raised was justified, or whether it made that obligation conditional on the prior finding of a reasonable interpretative doubt.

24. In its judgment of 6 October 1982 the CJEU explained, firstly, as follows:

> "... 6. The second paragraph of that article [current Article 267] provides that any court or tribunal of a Member State may, if it considers that a decision on a question of interpretation is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. The third paragraph of that article provides that, where a question of interpretation is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.
>
> 7. That obligation to refer a matter to the Court of Justice is based on cooperation, established with a view to ensuring the proper application and uniform interpretation of Community law in all the Member States, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice. More particularly, the third paragraph of Article [267] seeks to prevent the occurrence within the Community of divergences in judicial decisions on questions of Community law. The scope of that obligation must therefore be assessed, in view of those objectives, by reference to the powers of the national courts, on the one hand, and those of the Court of Justice, on the other, where such a question of interpretation is raised within the meaning of Article [267].
>
> 8. In this connection, it is necessary to define the meaning for the purposes of Community law of the expression 'where any such question is raised' in order to determine the circumstances in which a national court or tribunal against whose decisions there is no judicial remedy under national law is obliged to bring a matter before the Court of Justice.
>
> 9. In this regard, it must in the first place be pointed out that Article [267] does not constitute a means of redress available to the parties to a case pending before a national court or tribunal. Therefore the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of Article [267]. ..."

25. The CJEU went on to observe that courts or tribunals against whose decisions there was no judicial remedy had the same discretion as any other national court or tribunal to ascertain "whether a decision on a question of Community law [was] necessary to enable them to give judgment". It concluded that they were not obliged to refer a question of interpretation of Community law raised before them in the following situations: (1) where the question was not relevant, in the sense that the answer to the question, regardless of what it might be, could in no way affect the outcome of the case; (2) where the question was materially identical to a question which had already been the subject of a preliminary ruling in a similar case, or

3. Now Article 267 of the Treaty on the Functioning of the European Union (see paragraph 21 above).

where previous decisions of the Court had already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue were not strictly identical; or (3) where the correct application of Community law was so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised was to be resolved (bearing in mind that before it came to this conclusion the national court or tribunal had to be convinced that the matter was equally obvious to the courts of the other member States and to the Court of Justice, and only if those conditions were satisfied could the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it).

26. The judgment then concluded as follows (point 21):

> "... the third paragraph of Article [267] of the [Treaty on the Functioning of the European Union] is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court [of Justice], unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community."

27. In the case of *György Katz v. István Roland Sós* (C-404/07, ECLI:EU:C:2008:553), the CJEU delivered its judgment on 9 October 2008 which, as far as relevant to the present case, reads:

> "37. [...] It is for the national court, not the parties to the main proceedings, to bring a matter before the Court of Justice. The right to determine the questions to be put to the Court thus devolves on the national court alone and the parties may not change their tenor [...]."

28. In its judgment of 9 November 2010 in the case of *VB Pénzügyi Lízing Zrt. v. Ference Schneider* (C-137/08, ECLI:EU:C:2010:659), the CJEU stated, as far as relevant to the present case:

> "28. [...] the system established by Article 267 TFEU with a view to ensuring that European Union law is interpreted uniformly throughout the Member States instituted direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiative by the parties [...]."

29. In the case of *Lucio Cesare Aquino v. Belgische Staat* (C-3/16, ECLI:EU:C:2017:209), the CJEU gave judgment on 15 March 2017, stating, as far as relevant to the present case:

> "43. It follows from the relationship between the second and third paragraphs of Article 267 TFEU that the courts referred to in the third paragraph have the same discretion as all other national courts as to whether a decision on a question of EU law is necessary to enable them to give judgment. They are not therefore obliged to refer a question of the interpretation of EU law raised before them if the question is not

relevant, that is to say, if the answer to that question, whatever it may be, cannot have any effect on the outcome of the case [...].

44. Consequently, if in accordance with the procedural rules of the Member State concerned, the pleas in law raised before a court referred to in the third paragraph of Article 267 TFEU must be declared inadmissible, a request for a preliminary ruling cannot be regarded as necessary and relevant for that court to be able to give judgment."

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

30. The applicant complained that the Supreme Court had refused to refer a question to the CJEU for a preliminary ruling, despite his request in that regard and, by only providing summary reasoning based on section 81 of, the Judiciary (Organisation) Act, had failed to provide adequate reasons for its refusal, in breach of his right to a fair hearing within the meaning of Article 6 § 1 of the Convention, which in its relevant part reads as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

31. The Government contested that argument.

### A. Admissibility

32. The applicability of Article 6 § 1 of the Convention was not in dispute between the parties, and the Court also has no doubt that the proceedings at issue fall within the scope of this provision.

33. The Government argued that the applicant had failed to exhaust all available domestic remedies by not bringing an action in tort (*onrechtmatige daad*) against the State before the civil courts on the grounds that the Supreme Court's judgment was unlawful. According to the Government, since the alleged violation of Article 6 of the Convention occurred at the very last stage of the criminal proceedings in question, no domestic court had had the opportunity to consider the applicant's claim that his rights under Article 6 had been violated by the Supreme Court's summary reasoning, which should, therefore, have been argued before the civil courts.

34. The applicant contested this argument, pointing out that the Government had failed to provide evidence, through legal provisions or case-law, of such a civil action being available and effective both in theory and practice. According to the applicant, civil tort proceedings did not in

fact constitute an effective remedy as they could never have resulted in the reopening of the criminal case against him.

35. The Court reiterates the relevant principles concerning exhaustion of domestic remedies set out in its judgment of 28 July 1999 in *Selmouni v. France* ([GC] no. 25803/94, §§ 74-77, ECHR 1999-V), including the principle that it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time. In their brief remarks about the remedy before the civil courts, the Government have not referred to any domestic case-law showing that that remedy would have been effective for the applicant's complaint. In these circumstances, the application cannot be rejected for failure to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention.

36. The Court further finds that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

## B. Merits

### *1. Argument before the Court*

37. The applicant alleged that the refusal of the Supreme Court to seek a preliminary ruling from the CJEU upon his request violated his rights under Article 6 of the Convention. He submitted that it follows from the Court's case-law that the Supreme Court had a duty under Article 6 of the Convention to provide reasons for denying his request for a referral to the CJEU by indicating which of the *Cilfit* grounds (see paragraphs 23-26 above) was applicable, accompanied by an explanation. In the applicant's view, a mere reference to section 81 of the Judiciary (Organisation) Act, as contended by the Government, could not be accepted as adequate in this regard. The applicant contested the Government's argument that it followed from *Hansen v. Norway* (no. 15319/09, 2 October 2014) that the refusal of a request for a preliminary ruling without providing specific reasons is compatible with Article 6 of the Convention when a legal provision allowing summary reasoning by an appellate court has been applied. He noted that *Hansen* did not concern a request for a preliminary ruling by the CJEU but a filtering procedure on appeal. Furthermore, according to the applicant, unless the Court unequivocally decided otherwise, the "*Cilfit* obligation" was a special obligation to provide reasons, with its own requirements.

38. The Government argued that it could not be inferred from this Court's case-law that Article 6 of the Convention requires domestic courts to refer a case to the CJEU or to provide specific reasons for refusing such a

referral, irrespective of the content or grounds of that request. According to the Government, the duty to provide reasons when refusing to refer a question to the CJEU for a preliminary ruling is "a specific element of the general duty of courts to give reasoned decisions" and, referring to *Hansen* (cited above, § 80), an appellate court was not required to provide more detailed reasoning when it applied a specific legal provision to dismiss an appeal in cassation as having no prospects of success, without further explanation. Therefore, in the Government's view, the Supreme Court's judgment containing a summary reasoning based on section 81 of the Judiciary (Organisation) Act was compliant with Article 6 of the Convention and it should be read as that court's conclusion that the applicant's request for the referral of a question to the CJEU did not relate to a point of law that required answering.

*2. The Court's assessment*

39. The Court recalls that it is for the national courts to interpret and apply domestic law, if applicable in conformity with EU 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,* nos. 3989/07 and 38353/07, 20 September 2011, §§ 54-59). As the Court has often noted, the rule of law and the avoidance of arbitrary power are principles underlying the Convention (see, among many other authorities, *mutatis mutandis*, *Roche v. the United Kingdom* [GC], no. 32555/96, § 116, ECHR 2005-X). 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).

40. 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 *Borovská and Forrai v. Slovakia*, no. 48554/10, § 57, 25 November 2014; *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I; *Kok v. the Netherlands* (dec.), no. 43149/98, 4 July 2000; and *Ruiz Torija v. Spain*, no. 18390/91, § 29, 9 December 1994).

41. These principles are reflected in the Court's case-law where the issue of due reasoning by domestic courts when refusing a request for a referral to the CJEU has been considered in the light of Article 6 § 1 of the Convention.

42. For example, 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) or for lack of prospects of success without dealing explicitly with the request (see *Wallishauser v. Austria (No. 2)*, no. 14497/06, § 85, 20 June 2013; see also *Rutar Marketing D.O.O. v. Slovenia* (dec.), no. 62020/11, § 22, 15 April 2014 and *Moosbrugger v. Austria*, no.44861/98, 25 January 2000).

43. Furthermore, in the case of *Stichting Mothers of Srebrenica and others v. the Netherlands* (no. 65542/12, § 173, ECHR 2013) the Court found that the summary reasoning used by the Supreme Court to refuse a request for a preliminary ruling was sufficient, pointing out that it followed already from a conclusion reached in another part of the Supreme Court's judgment that a request to the CJEU for a preliminary ruling was redundant. In *Astikos Kai Paratheristikos Oikodomikos Synetairismos Axiomatikon and Karagiorgos v. Greece* ((dec.), nos. 29382/16 and 489/17, § 47, 9 May 2017) the Court observed that the preliminary ruling requested by the applicant in that case would not have changed the conclusion reached by the Council of State of Greece since his appeal had been declared inadmissible due to the non-compliance with statutory requirements for the admissibility of appeal.

44. In other cases, not concerning a context of domestic accelerated proceedings, the Court has held that national courts against whose decisions there is no remedy under national law are obliged to give reasons for their

refusal in the light of the exceptions provided for in the case-law of the CJEU (*Ullens de Schooten and Rezabek*, cited above, § 62). In *Dhahbi v. Italy* (no. 17120/09, § 31, 8 April 2014; see also *Schipani and others v. Italy*, no. 38369/09, § 42, 21 July 2015), the Court formulated the following principles regarding the domestic courts' duty under Article 6 of the Convention when a request is 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."

45. Turning to the present case, the Court observes that the Supreme Court partly dismissed the applicant's appeal in cassation, including his request for a referral to the CJEU for a preliminary ruling, using a summary reasoning based on section 81 of the Judiciary (Organisation) Act (see paragraph 15 above). It is the applicant's contention that Article 6 § 1 of the Convention militated against the Supreme Court's confining itself to that summary reasoning in respect of his request for a referral of a question to the CJEU.

46. The Court recalls that it has previously held that it is acceptable under Article 6 § 1 of the Convention for national superior courts to dismiss a complaint by mere reference to the relevant legal provisions governing such complaints if the matter raises no fundamentally important legal issue (see *John*, cited above). It has also considered that it is likewise not contrary to that provision for these courts to dismiss an appeal on points of law as having no prospect of success, without further explanation (see *Wnuk v. Poland* (dec.), no. 38308/05, 1 September 2009, and *Gorou v. Greece (no.2)* [GC], no. 12686/03, § 41, 20 March 2009). This principle was reiterated by the Court in *Talmane v. Latvia* (no. 47938/07, § 29, 13 October 2016 with further references). It must, 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 *Talmane*, cited above, § 31).

47. The Court accepts that, in line with the aim of the legislature (see paragraph 19 above), section 81 of the Judiciary (Organisation) Act – which allows the Supreme Court to dismiss an appeal in cassation for not constituting grounds for overturning the impugned judgment and not giving rise to the need for a determination of legal issues – and section 80a of the same Act – which allows the Supreme Court to declare an appeal in cassation inadmissible for not having any prospect of success – are aimed at keeping the length of proceedings reasonable and also allow courts of cassation or similar judicial bodies to concentrate efficiently on their core tasks, such as ensuring the uniform application and correct interpretation of the law.

48. Taking into account the Supreme Court's explanation that it is inherent in a judgment in which the appeal in cassation is declared inadmissible or dismissed by application of and with reference to section 80a or 81 of the Judiciary (Organisation) Act that there is no need to seek a preliminary ruling since the matter did not raise a legal issue that needed to be determined (see paragraph 20 above), the Court furthermore accepts that the summary reasoning contained in such a judgment implies an acknowledgment that a referral to the CJEU could not lead to a different outcome in the case.

49. The Court also notes that the CJEU has ruled that the domestic courts referred to in the third paragraph of Article 267 TFEU are not obliged to refer a question about the interpretation of EU law raised before them if the question is not relevant, that is to say, if the answer to that question, whatever it may be, cannot have any effect on the outcome of the case (see paragraph 29 above).

50. The Court therefore considers that, in the context of accelerated procedures within the meaning of section 80a or 81 of the Judiciary (Organisation) Act, no issue of principle arises under Article 6 § 1 of the Convention when an appeal in cassation which includes a request for referral is declared inadmissible or dismissed with a summary reasoning where it is clear from the circumstances of the case that the decision is not arbitrary or otherwise manifestly unreasonable (see paragraph 46 above).

51. The Court observes that pursuant to section 81(2) of the Judiciary (Organisation) Act (see paragraph 18 above), an appeal in cassation is considered and decided by three members of the Supreme Court. The Court further observes that, in the case at hand, the applicant's request for a question to be referred to the CJEU, which he raised in his written reply to the Advocate General's advisory opinion, was dismissed by the Supreme Court with summary reasoning on the basis of section 81 of the Judiciary

(Organisation) Act, after having taken cognisance of the applicant's written grounds of appeal, and both the Advocate General's advisory opinion and the applicant's written reply thereto (see paragraph 14 above).

52. In these circumstances the Court is satisfied that the Supreme Court has duly examined the grounds of the applicant's appeal on points of law. The Court can thus discern no appearance of unfairness in the proceedings before the Supreme Court.

53. There has accordingly 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 24 April 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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|---|---|
| Stephen Phillips | Helena Jäderblom |
| Registrar | President |