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# Defence rights: the CoE and EU system



Hungarian Helsinki Committee

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# The Council of Europe system



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# The European Convention on Human Rights (1950)

Catalogue of rights + enforcement mechanism (European Court of Human Rights)

Application:

- State Party's authorities are responsible (directly or through failure to prevent)
  - Exhaustion of domestic remedies (subsidiarity)
  - 6 months
  - No 4th instance doctrine: NO questioning of facts; admission of evidence, interpretation of law, guilt or innocence, UNLESS: flagrantly and manifestly arbitrary findings („flying in the face of justice and common sense”)
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# Process of ECtHR

- Application
  - Admission (single judge or committee)
  - Communication (chamber)
  - Response
  - Counter-observations
  - Judgment (usually written procedure)
  - Referral to Grand Chamber (not a right)
  - Grand Chamber decision
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# Defence rights

## Article 6:

1. In the determination of [...] any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...].
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
  - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - (b) to have adequate time and facilities for the preparation of his defence;
  - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
  - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

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# Additional rights stemming from Article 6(1)

Developed by the ECtHR:

- equality of arms;
  - the right to silence;
  - the prohibition of self-incrimination;
  - Right to a reasoned judgment.
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# Overarching principles

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# Equality of arms

Each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis a vis the opponent. (Coeme v. Belgium case: the primary purpose of procedural rules is to protect the defendant against any abuse of authority and it is therefore the defence which is the most likely to suffer from omissions and lack of clarity in such rules).

**Borgers v Belgium** (12005/86): defence cannot react to submission of prosecutor advising court

**Moiseyev v. Russia** (62936/00): counsel needed special permit for visit from prosecution, access to bill of indictment, files and own notes only in special department of remand center

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# Presumption of innocence

The members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused [...]. Thus, the presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence.

**Telfner v. Austria** (33501/96): applicant convicted on the basis of regular use of car and not spending the night home. No prima facie case against him.

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# Right to silence, prohibition of self-incrimination

Aim: protection against improper compulsion, thus contributing to the prevention of miscarriages of justice.

Applies from the very beginning: **Zaichenko v Russia** (39660/02): two cans of fuel found in applicant's car, made to sign record of inspection without being warned. After that signed a written statement (warning provided) – this does not remedy the initial failure.

Can be limited: **John Murray v. the UK** (18731/91) : was in a house where a police informer was detained and interrogated by IRA members. Police informer claimed to have talked to him. Refused to testify. No violation: no „improper compulsion“, as cautioning was adequate, „formidable case“ against him, law expressly allowing the drawing of inferences from silence.

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# Right to silence, prohibition of self-incrimination (continued)

**Funke v France** case (10828/84): forcing applicant to provide bank statements (sought as evidence of crime) through tax fines (*Being unable or unwilling to procure them by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed – breach*)

**Jalloh v. Germany** (54810/00): applicant swallowing plastic bag with drugs in it. Medical intervention to make him vomit the drug. Violation: to be distinguished from blood sampling (the blood is not the evidence itself, degree of force much greater – also amounting to degrading treatment)

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# Right to an independent and impartial tribunal

## Impartiality:

subjective test -- „personal bias towards defendant”  
(**Werner v Poland**, 26760/95 removal from the list of judicial liquidators then hearing applicant’s case)

objective test – whether there are ascertainable facts which may raise doubts as to his impartiality (**Lavents v. Latvia** (58442/00): trial judge expressing in media interview her astonishment that the applicant totally denied his guilt)

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# Information rights

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# Information about the nature and cause of accusation

„to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”

**Mattoccia v Italy** (23969/94): bus driver transporting pupils accused of forcing one of the disabled pupils to have sex with him. Judicial note only referring to this, the approximate time of the offence and the person of the victim. Applicant's defence: at least 20 pupils and social worker on bus. It turns out only at the trial that it was alleged that this happened in the bathroom of school. Court: *„particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges against him [...]. the accused must at any rate be provided with sufficient information as is necessary to understand fully the extent of the charges against him with a view to preparing an adequate defence.”*

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# Information on defence rights

## Not expressly stated right

**Panovits v. Cyprus (4268/04):** 17-year-old defendant summoned with father in murder case. Only father is warned about right to lawyer, while applicant confesses. At trial: confession was extracted through deceit and threats, applicant never applied for a lawyer. Court: *„given the vulnerability of an accused minor and the imbalance of power to which he is subjected by the very nature of criminal proceedings, a waiver by him or on his behalf [...] can only be accepted where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that he or she is fully aware of his rights of defence and can appreciate, as far as possible, the consequence of his conduct.”* Positive obligation on the authorities to take reasonable steps.

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# Access to case file

Pre-trial:

evidence substantiating detention (**Hagyó v. Hungary** (52624/10): MP charged with corruption. Detained on the basis of evidence the existence of which was never confirmed.

other evidence: **Haxhia v Albania**: *“the notification of the accusation [...] should not necessarily be attended by the disclosure of supporting evidence to enable the accused to prepare for trial [...] The existence of such evidence may still be dependent on the results of an on-going investigation.”*

Trial phase: **Beraru v. Romania** (40107/04): applicant charged with trying to bribe a prosecutor to revoke the arrest warrant issued against him. Applicant's lawyers having hard time to get access to file. Request to photocopy the documents denied without any reasons being given. Later: lack of equipment, suggested that the lawyers prepare handwritten notes (400 pages). Finally: 30 pages allowed. Court: *„unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, are important guarantees of a fair trial”*.

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# Right to legal advice and representation

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„to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”

For a long time not fully recognised for the initial stages: **Brennan v. United Kingdom** (39846/98): *„although Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation, this right, which is not explicitly set out in the Convention, may be subject to restriction for good cause”*

Breakthrough decision: **Salduz v. Turkey** (36391/02): minor suspect charged with aiding and abetting an illegal organisation; state security court - no right to lawyer. Confession of participating in a demonstration and writing a slogan on a banner. Tried to withdraw at trial (referring to duress), but sentenced to 30 months. Court: the investigation stage is very important as it determines the framework of the procedure, at the same time the suspect is in a very vulnerable position. Therefore: *in order for the right to a fair trial under Article 6 § 1 to remain sufficiently practical and effective, access to a lawyer had to be provided, as a rule, from the first police interview of a suspect, unless it could be demonstrated that in the particular circumstances there were compelling reasons to restrict that right. Even where such compelling reasons did exist, the restriction should not unduly prejudice the rights of the defence, which would be the case where incriminating statements made during a police interview without access to a lawyer were used as a basis for a conviction.*

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## Right to legal advice and representation (continued)

**Dayanan v Turkey** (7377/03): here the applicant (charged with membership in an illegal armed organisation) remained silent without the lawyer and still a violation was found.

*“an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned [...]. Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person’s defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.”*

**Artico v Italy** (6694/74): applicant charged with fraud (and in detention). Legal aid lawyer never visits him or does anything in the case (ill and the case is very complex). Applicant requests replacement in vain many times. Court: *“the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective [...]. [M]ere nomination does not ensure effective assistance. If they are notified of the situation, the authorities must either replace him.”* If not, *„free legal assistance might prove to be worthless”*.

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# Rights promoting effective participation

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# Adequate time and facilities for defence

*„to have adequate time and facilities for the preparation of his defence”*

**Natunen v Finland:** *“substantive defence activity [...] may comprise everything which is ‘necessary’ to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings”*

**Öcalan v Turkey** (46221/99): Leader of the Workers’ Party of Kurdistan (“the PKK”), arrested in 1999, sentenced to death for trying to achieve secession of the Kurdish parts from Turkey: 20 days to study 17,000 pages; initial meeting with lawyers in presence of security force members (20 minutes); subsequent visits: twice an hour per week with security force members hearing -- violation

# Right of the defendant to be tried in his presence

Defendant should be able to explain his version of the events and indicate any statements with which he disagrees. Trial in absentia is not in itself incompatible with the right to a fair trial, e.g. if a person receives summons and deliberately does not appear (seen as waiver).

**Colozza v Italy** (9024/80): applicant charged with fraud. Could not be found at old address. Sentenced in absentia (with appointed lawyer): 6 years imprisonment. But: two months before the judgment the police found him at new address in another criminal procedure. Court: *the object and purpose of the Article [6] taken as a whole show that a person 'charged with a criminal offence' is entitled to take part in the hearing.* it is difficult to see how one could defend himself in person or 'to examine witnesses' without being present."

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# Right to call and question witnesses

„to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”

**Al-Khawaja and Tahery v. the United Kingdom** ( 26766/05 and 22228/06):

Case 1: Physician charged with indecent assault on two female patients. One testified before the police but then died. Applicant could not cross-examine before court. Victim’s friends were heard (hearsay)

Case 2: Applicant charged of stabbing a person in gang fight. None questioned at the scene testified against him. 2 days later a witness came forward and implicated the applicant. Claimed to be afraid to testify at trial.

In both cases applicants were sentenced.

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# Right to call and question witnesses (continued)

*Court: „before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle were possible but must not infringe the rights of the defence. As a rule, this required that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness made his statement or at a later stage of the proceedings.”*

Two consequences: (i) good reasons for the admission of testimony of absent witness; (ii) shall not be the sole or primary basis for conviction.

But there can be exceptions even in such cases: are these factors sufficiently counterbalanced?

In the instant case: case 1 – yes (friend testimony was consistent, other victim testified similarly, judge warned jury); case 2 – no (it was not possible for applicant to rebut the statement)



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# Free interpretation and translation

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„to have the free assistance of an interpreter if he cannot understand or speak the language used in court”

**Kamasinski v. Austria:** *The interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events. [T]he obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided”.*

At the same time: while “*the right, [...] to the free assistance of an interpreter applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings*” this “*does not go so far as to require a written translation of all items of written evidence or official documents in the procedure*”.

Quality: **Cuscani v UK** (32771/96): Italian restaurant owner charged with tax evasion in the UK. His English was limited After changing plea to guilty at one of the hearings, professional interpreter arranged, but failed to turn up for next hearing. Applicant’s brother was appointed, but did not provide any actual interpretation. Four years imprisonment. Court: “*the verification of the applicant's need for interpretation facilities was a matter for the judge to determine in consultation with the applicant, especially since he had been alerted to counsel's own difficulties in communicating with the applicant.*”

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Right to a reasoned decision

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National courts must indicate with sufficient clarity the grounds on which they base their decisions. Purpose: (i) preparation for an appeal; (ii) demonstration to the parties that they have been heard; (iii) public scrutiny of the administration of justice possible.

Usual matters raising this problem: (i) failure to give reasons for rejecting defence arguments, or (ii) evidence or (iii) the adding of documents to the case file.

**Gradinar v. Moldova** (7170/02): suspect accused of killing a police officer. Administrative detention, heard as witness in handcuffs without lawyer. Self-incriminating statement. Found guilty (after his death). Applicant: his wife. Moldovan court used confession as decisive evidence. It was completely silent about the fact that the confession was taken unlawfully, and that the suspect had a sound alibi. Court: *„The Court could not find any explanation for such omission in the courts’ decisions and neither did the Government provide any clarification in this respect.”*

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# Fairness as a whole

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Trial must be fair as a whole: errors and breaches occurring in certain phases do not render the whole proceeding as unfair (acquittal remedying all procedural violations).

**Khan v UK** (35394/97): no drugs at airport, later visit at firend's wiretapped place. Admission of participation in drug dealing recorded.

The Court established a violation of the applicant's Article 8 rights (right to privacy), but found that the proceedings as a whole were fair. The applicant had ample opportunity to challenge both the authenticity and the use of the recording. At each level of jurisdiction the domestic courts assessed the effect of admission of the evidence on the fairness of the trial. The fact that the applicant was at each step unsuccessful makes no difference.

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# The EU system

# Development

- Area of free movement;
- Cross-border crime requiring cross-border cooperation (extradition, supervision measures, custodial sentences, etc.): after 1999 bilateral agreements replaced by EU mechanisms;
- European arrest warrant requiring mutual trust in criminal procedures systems
- 2009: procedural roadmap (directives): right to interpretation, right to information, access to a lawyer, legal aid, etc.



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# Relevant EU norms (continued)

## **Charter of Fundamental Rights of the European Union**

### Article 47:

- 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.
  - Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.
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# Relevant EU norms (continued)

## Article 48:

- Everyone who has been charged shall be presumed innocent until proved guilty according to law.
- Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

## Article 52(3):

- In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
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# When can we invoke these?

## **Treaty of the European Union**

Article 6: The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European [...], which shall have the same legal value as the Treaties. [...] The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation.

## **Charter of Fundamental Rights of the European Union**

Article 51: The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.

Thus, when a criminal procedure is conducted, if questions regulated in the directives arise, members states implement union law, so the Charter can be invoked

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# The nature of the directives

**Treaty on the Functioning of the European Union** – fundamental norms on the EU's operation

Article 288: To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. [...]

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

Aim: harmonisation

Deadline for transposition defined.

Example: access to lawyer directive, Article 5: “Member States shall ensure that suspects or accused persons who are deprived of liberty have the right to have at least one person, such as a relative or an employer, nominated by them, informed of their deprivation of liberty **without undue delay** if they so wish.” Hungarian law: within 24 hours – transposition deadline: November 2016, after this: infringement)

# No transposition

Primacy of EU law: when EU law and domestic law collide, domestic law must be put aside, and EU law must be applied.

Can EU law be invoked: *direct effect* -- EU law can be invoked before domestic courts. Directives have direct effect only after transposition period is over, and the provision is unconditional and sufficiently clear (and only vis a vis the state).

Before transposition deadline: domestic law must be interpreted in line with EU law, and member states shall refrain from taking measures that are liable to compromise the objectives of the directive after the deadline for transposition has passed.

If there is the suspicion of a collision, interpretation of EU law is likely to be required: CJEU

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# Court of Justice of the European Union

Numerous functions (e.g. deciding in infringement procedures)

Article 267 of the TFEU:

The Court of Justice of the European Union 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.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

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# Preliminary ruling

- Domestic court suspends the procedure before it and poses the questions
  - Court decides (parties can provide written observations and if there is a hearing, can also provide oral submissions)
  - Case goes back to domestic court that decides underlying case on the basis of the CJEU decision
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# Preliminary ruling (continued)

Example: **Case C-216/14. Criminal proceedings against Gavril Covaci**: Romanian citizen caught driving a car that had no liability insurance on its and its green card was falsified. He was heard by the police and then gave an authorization to receive the documents addressed to him to three employees of the court (who would then forward it to him in a simple letter). Prosecutor motioned summary procedure and a fine. In such procedures if the court delivers a decision then there is a right to request a hearing within two weeks from its serving (appeal). Appeals must be submitted in German.

The court had two questions:

- 1) Is the requirement that the appeal must be submitted in German in line with the Right to Interpretation Directive?
- 2) Is the solution for authorizing persons to receive the decision compatible with the Right to Information Directive (“Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person.”), taking into account the fact that the decision may be final and binding by the time it reaches the defendant?



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# Preliminary ruling (continued)

Advocate-General (legal advisor to the CJEU) formed an opinion:

- (i) it is OK to require German submission if it means that the person can submit it in his own language and then it will be translated into German;
  - (ii) it is OK to authorize persons to receive the decision if there are mechanisms to ensure that the two-week deadline would start running from the time the defendant is in any way notified about the decision.
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# Intersection between the CoE and the EU system

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**Dhahbi v. Italy** (17120/09) The applicant was a Tunisian national who had entered Italy on a lawful residence and work permit. In 2001 he applied for a family allowance, explaining that even though he did not hold Italian nationality, as required by the relevant legislation, he was entitled under the association agreement between the European Union (EU) and Tunisia. Following the rejection of his application, the applicant lodged an appeal. He sought a preliminary ruling from the CJEU on the matter. His appeals to the court of appeal and Court of Cassation were dismissed.

ECHR: National courts whose decisions were not amenable to appeal under domestic law were required to provide reasons based on the exceptions laid down in the case-law of the CJEU for their refusal to refer a preliminary question to that court on the interpretation of EU law (the question was not relevant, or that the provision of EU law in question had already been interpreted by the CJEU, or that the correct application of EU law was so obvious as to leave no room for reasonable doubt).

The Italian Court of Cassation would have been required to give reasons for its refusal to refer the preliminary question. However, it had not referred to the applicant's request for a preliminary ruling or to its reasons for considering that the question raised should not be referred to the CJEU. This finding was sufficient to conclude that there had been a violation of Article 6 § 1 of the Convention.

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