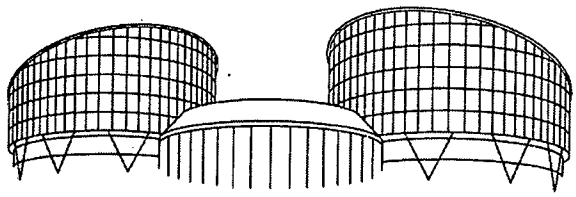

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF K.M.C. v. HUNGARY

(Application no. 19554/11)

JUDGMENT

STRASBOURG

10 July 2012

Request for referral to the Grand Chamber pending

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 K.M.C. v. Hungary,

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

Françoise Tulkens, *President,*
Danutė Jočienė,
Isabelle Berro-Lefèvre,
András Sajó,
Işıl Karakaş,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 19 June 2012,

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

PROCEDURE

1. The case originated in an application (no. 19554/11) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Ms K.M.C. ("the applicant"), on 22 March 2011. The President of the Section acceded to the applicant's request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Mr A. Kádár, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr L. Höltzl, Agent, Ministry of Public Administration and Justice.

3. The applicant submitted under Article 6 of the Convention that her dismissal could not be effectively challenged in court for want of reasons given by the employer.

4. On 12 September 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1973 and lives in Pécel.

6. The applicant was a civil servant working in the service of an administrative inspectorate. Applying Act no. LVIII of 2010 on the Legal

Status of Government Officials (see below), her employer dismissed her from service on 27 September 2010 without giving any reasons for that dismissal.

7. The applicant did not challenge this measure in court, considering that in the absence of reasons for her dismissal, she could not sue her former employer with any prospect of success. The statutory time-limit in this respect expired on 26 October 2010.

8. On 18 February 2011 the Constitutional Court annulled as unconstitutional the impugned section 8(1) of Act no. LVIII of 2010, as of 31 May 2011 (see paragraph 16 below).

9. On 6 May 2011 the Constitutional Court gave a decision (see paragraph 17 below) concerning the non-applicability of laws, declared unconstitutional, in cases still pending before an ordinary court.

II. RELEVANT DOMESTIC AND INTERNATIONAL TEXTS

10. Act no. XX of 1949 (the Constitution in force at the material time) provided as follows:

Article 57

"(1) In the Republic of Hungary, everyone shall be equal before the law and entitled to have any charges brought against him as well as his civil rights and obligations determined in a fair and public trial by an independent and impartial court established by law."

Article 70

"(6) All Hungarian citizens shall have the right to hold a public office in accordance with their suitability, qualifications and professional knowledge."

11. Section 8(1) of Act no. LVIII of 2010 on the Legal Status of Government Officials, as in force between 6 July 2010 and 31 May 2011, provided that a civil servant could be dismissed from service, with a notice period of two months, without the employer giving any specific reasons for the dismissal.

12. Act no. CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities provides as follows:

Section 8

"Provisions resulting in a situation where one person or group is treated less favourably than another is, has been or would be treated in a comparable situation on account of their real or presumed

a) sex, b) racial origin, c) colour, d) nationality, e) belonging to a national or ethnic minority, f) mother tongue, g) disability, h) state of health, i) religious or ideological conviction, j) political or other opinion, k) family status, l) motherhood (pregnancy) or fatherhood, m) sexual orientation, n) sexual identity, o) age, p) social origin, q) financial status, r) the part-time nature of an employment or other work

relationship, s) membership in an interest representation organisation, t) other status, attribute or characteristic (hereinafter collectively: characteristics)

shall amount to direct negative discrimination."

Section 19

"(1) In proceedings instituted on account of a violation of the equal treatment requirement, the injured party or the party entitled to assert public interest claims shall substantiate that:

a) the injured person or group has suffered a disadvantage, or – in case of asserting public interest claims – an imminent danger thereof exists, and

b) the injured party or group did at the time when the violation of law was committed – actually or according to the presumption of the violator – possess a characteristic specified in Article 8.

(2) If the case described in subsection (1) has been substantiated, the other party shall bear the burden of proving that:

a) the circumstances substantiated by the injured party or the party entitled to assert public interest claims did not exist, or

b) the party complied with the equal treatment requirement, or in respect of the given relationship he was not obliged to comply with the equal treatment requirement."

Section 22

"(1) The following shall not amount to violation of the equal treatment requirement:

a) proportionate discrimination justified by the nature or characteristic of the work and based on all the relevant and lawful conditions that are to be taken into consideration for the employment,

b) discrimination on the ground of religious or other ideological conviction or national and ethnic origin directly flowing from the spirit basically determining the nature of the organisation, justified in view of the content or nature of the occupational activity at issue, and amounting to genuine occupational requirement."

13. Act no. XXII of 1992 on the Labour Code provides:

Section 4

"(2) The exercise of a right shall, in particular, be construed improper if it is intended for or leads to the impairment of the rightful interests of other persons, the limitation of other persons' potential for interest assertion, their harassment, or the suppression of the expression of their opinion."

Section 89

"(2) With the exceptions specified in subsection (6), employers shall be under a duty to give reasons for a dismissal. The reasons given shall clearly indicate the cause of dismissal. In case of dispute the genuineness and adequacy of the reasons given for the dismissal shall be proved by the employer.

(6) The employer shall be under no duty to give reasons for the ordinary dismissal of an employee if the employee is to be considered a pensioner within the meaning of section 87/A (1) *a)-g)*."

Section 90

"(1) Employers shall not terminate an employment by ordinary dismissal during the periods specified below:

a) incapacity for work due to illness ...,

b) for the period of sick leave granted for caring for a sick child,

c) unpaid leave taken for nursing or caring for a close relative (section 139),

d) during a treatment related to a human reproduction procedure specified under a separate Act, during pregnancy, for three months after giving birth, and maternity leave [subsection (1) of section 138],

e) during unpaid leave taken for the purpose of nursing or caring for children [subsection (5) of section 138], until the child reaches the age of three, during the period of eligibility for child-care allowance, irrespective of taking any unpaid leave,

f) during regular or reserve army service, from the date of receiving the enlistment orders or the notice for the performance of civil service,

g) the entire period of incapacity for work of persons receiving rehabilitation benefits under a separate Act of Parliament."

14. Act no. XXXII of 1989 on the Constitutional Court (as in force at the material time) provided:

Section 38

"(1) Observing the unconstitutionality of a law applicable in a case before him ... the judge shall ... submit a motion to the Constitutional Court.

(2) Anyone alleging that a law applicable in his case pending before a court is unconstitutional may file a request initiating the judge's action specified under subsection (1)."

Section 48

"(1) Anyone who suffered a violation of law on account of the application of an unconstitutional law and has exhausted all other available legal remedies or no other legal remedy is provided for him may, on account of the violation of his rights enshrined in the Constitution, file a constitutional complaint with the Constitutional Court.

(2) The constitutional complaint shall be filed in writing within sixty days from the service of the final decision."

15. Act no. III of 1952 on the Code of Civil Procedure provides as follows:

Section 262/A

"According to the decision of the Supreme Court, a final judgment shall be subject to reopening if a constitutional complaint is sustained by the Constitutional Court with

retroactive exclusion, in the given case, of the applicability of the law declared unconstitutional."

16. Constitutional Court decision no. 8/2011. (II.18.) AB contains the following passages:

"IV. 1. ... Within the confines of the Constitution, the legislator enjoys great freedom in regulating public service relationships. ... In 1992 in the public sector – where the legal positions of both the employers and the employees are determined by their dependence on the State budget – public-law regulations, basically corresponding to the characteristics of the closed public service system, were introduced. The legal status of the individuals who perform work in the service of the State was – according to the specific features of the activities performed – governed by the legislature in separate Acts of Parliament. ... The basic feature of the closed public service system is that the content of the public service relationship and the rights and duties of the subjects of the legal relationship are governed not by the parties' agreement but by statutes, by law. ... The content of the public service relationship is regulated under the law, regard being had to the fact that public servants carry out the tasks of the State, and, in performing their tasks, they exercise public powers, consequently – compared to other employees – additional statutory requirements must be imposed on them. The activity of public servants must serve the interest of the public, it must be professional, impartial, devoid of influence and bias, therefore public servants must meet up-to-date and high-standard professional requirements, must bear particular responsibility for their work and are subject to strict conflict-of-interest rules; however, the incomes earned in the public service remain below the wages that can be obtained in the private sector, since the source of public servants' remuneration is the State budget. The starting point for the closed public service system ... is that « additional requirements – compliance with which may and must be demanded from persons engaged in public service – may only be imposed in return for additional entitlements ». Such additional entitlements include the career system regulated and the salary guaranteed in an Act of Parliament, the predictable and safe 'public service life career' system and the additional allowances. A basic characteristic of the closed public service system is the stability of public service relationship, namely that a public servant may be removed from office only where the conditions specified in an Act of Parliament are met. While until the 1980s the public service systems of various States were characterised by the gradual extension of the closed public service system, since then a strongly critical approach to the closed systems has become more and more dominant. As a consequence, in almost all European States, public service reform processes have been launched in order to enhance the efficiency, performance and standards of the public administration. The direction of the reforms is to loosen the rigidity of the closed system, and to bring it closer to the regulation of private sector labour relations. The method generally applied for the loosening of the rigidity of the closed system is the loosening of the previously strictly interpreted concept of 'non-dismissibility' and the widening of the grounds of dismissal.

The Hungarian Act on the Legal Status of Public Servants ("Ktv.") has never been based on the principle of 'non-dismissibility', as it has widely recognised the possibility of dismissing public servants from office and the grounds and conditions of dismissal have even been widened in the period having elapsed since 1992. ...

2. ... The Act on the Legal Status of Government Officials ("Ktjt.") – with its rules on the termination of government official legal relationship – introduced essential changes in the system of public service as it had been created under the Ktv. and

terminated the relative stability of the public service relationship guaranteed under the Ktv. ... The Ktv. rules on the termination of the legal relationship by dismissal from office not being applicable ... the government officials' legal relationship may be terminated by release from office by the employer without giving reasons. ...

3. ... In the context of labour relations as regulated under the Labour Code ("Mt.") ... the Constitutional Court [...] evaluated the duty of giving reasons – interpreted as a restriction on the employer's right freely to dismiss an employee – as a privilege providing additional protection for employees, to which protection no person had a constitutional right. The employer's right freely to dismiss an employee can only be interpreted in the context of employment relationships based on contract, not in the context of civil service relationship based on the Ktjt. In public service relationships the right of dismissal from office is based not on the freedoms of contract but an Act of Parliament; in case of dismissal from office by the employer the duty to give reasons cannot be regarded as a "preference rule"; on the contrary, it is a guarantee flowing from the nature of the legal relationship. ... In public service relationships, the statutory regulations concerning the grounds of dismissal from office constitute an issue of constitutionality, it being a guarantee corresponding to the specific features of public service relationships. [These] regulations and, consequently, the obligation to give reasons for dismissal has ... been regarded by the Constitutional Court ... as a guarantee having constitutional significance ...

4. ... The special features of public-servant and government-official legal relationships ... are determined by the fact that ... officials hold public offices, perform State duties, adopt and prepare State decisions ... therefore those relationships are basically public-law relationships by their nature.

Article 70(6) regulates the right to hold a public office as citizens' fundamental right. The protection of the right to hold a public office shall primarily mean that the State cannot make employment to public offices dependent on conditions which exclude, without constitutional reasons, Hungarian citizens from the possibility of acquiring a public office or make it impossible for a citizen or a group of citizens to hold a public office. ... The constitutional protection flowing from the right to hold a public office does not mean that the holder of a public office cannot be dismissed from office. ... Within the confines of the Constitution, the legislature enjoys a wide margin of freedom in regulating the grounds for release from office; this freedom, however ... shall not extend to granting free and unrestricted power to the person exercising the employer's rights to dismiss an incumbent from office. Free decisional power granted without any statutory limitation to the person exercising the employer's rights ... restricts, according to the Constitutional Court, in an unconstitutional manner the right to hold a public office, provided for by Article 70(6) of the Constitution. [It is required] that the substantive-law framework of the employer's decision be determined in an Act of Parliament. ...

5. ... As to government officials' dismissal from office, the absence of grounds for dismissal and the lack of any statutory rules concerning the employer's obligation to give reasons endangers the 'party-neutrality', the independence from political influence, the impartiality and, therefore, the lawfulness of decisions of the public administration. Officials working in the organisation of public administration perform their tasks in a strictly hierarchical organisation. [If] government officials are not granted protection from dismissal from office, the person exercising the employer's rights may, at any time and without giving reasons, discontinue their employment, [and] they cannot be expected openly to stand up for their professional and legal position, if they risk losing their jobs. ...

6. ... The general judicial legal protection enshrined in Article 57(1) of the Constitution is also guaranteed by Article 6 § 1 of the European Convention on Human Rights. In its recent case-law, the European Court of Human Rights – which has gradually extended the applicability of Article 6 § 1 to labour disputes concerning the service of civil servants (*Frydlender v. France* [GC], no. 30979/96, ECHR 2000-VII; *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, ECHR 2007-II; *Iordan Iordanov and Others v. Bulgaria*, no. 23530/02, 2 July 2009) – considers the right to effective judicial review as part of the right to a fair trial included in the right to access to a court. For the European Court of Human Rights, the judicial legal protection is not effective if there is a procedural or substantive obstacle to a genuine judicial examination of the parties' claims on the merits (*Delcourt v. Belgium*, 17 January 1970, Series A no. 11; *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, Series A no. 146). ...

The Constitutional Court holds that by failing to regulate the statutory conditions of dismissal from office by the employer and by allowing for the possibility of not giving reasons for the decision, the legislature disproportionately restricted the right of government officials to judicial legal protection, guaranteed under Article 57(1) of the Constitution. In the absence of an obligation to give reasons and of any rules providing guidance for the determination of the lawfulness of a dismissal, the scope of cases (nullity of and barrier to dismissal, violation of equal treatment, misuse of rights) in which a government official may turn to court with any prospect of success and in which the court can decide on the merits of a dismissal has become significantly reduced. Under the Ktjt., in public service-related legal disputes the unlawfulness of a dismissal by the employer must be proved by the government official. An exception to this rule is made in cases when the legal dispute is based on a violation of the equal treatment requirement; in such proceedings – under section 19 of Act no. CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities – the injured party needs only to substantiate the violation, and it is for the employer to prove that he complied with the equal treatment requirement. Public servants may also turn to court for improper use of rights, violating section 4 of Mt.

... As it can be concluded from the reasoning of the Act, section 8 (1) of the Ktjt. allows – in the interest of simpler realisation of government endeavours – for the possibility of the termination by the employer of government officials' legal relationship without any legal limits.

... The Constitutional Court holds that this vulnerable position of government officials, their being treated as "means" for resolving State tasks, is contrary to human dignity."

17. Constitutional Court decision no. 35/2011. (V.6.) AB contains the following passages:

"1. The Constitutional Court holds that it is a constitutional requirement that legal disputes put before a judge be determined on the basis of constitutional laws. If a judge perceives the unconstitutionality of a law applicable in the case pending before the court, he shall ... be obliged to initiate proceedings before the Constitutional Court, under section 38(1) of Act no. XXXII of 1989 on the Constitutional Court ("Abtv.").

2. In the 'concrete norm control' proceedings instituted upon a judge's initiative, the Constitutional Court may pronounce a general prohibition of the application of the law found unconstitutional in all civil actions with identical factual basis, to be determined under the same law. If only specific, rather than general, prohibition of application has been ordered by the Constitutional Court, the latter shall – upon a

further initiative of the judge – conduct the proceedings motioned by the judge solely in respect of the prohibition of application of the law. The legal consequences of the Constitutional Court ruling on the general or specific prohibition of application shall be drawn by the judge in charge who shall deliver a decision in the action in compliance with the ruling.

3.1. An essential objective of the Constitution-protecting tasks of the Constitutional Court is to prevent the prevalence of unconstitutional norms in the legal system. The judge authorised to determine individual legal disputes ... is bound to adopt a decision on the basis of the constitutional interpretation of the applicable law. However, in case of unconstitutionality irresolvable by the interpretation of the law, the judge – lacking the power to set aside the law – shall necessarily cooperate with the Constitutional Court, on the basis of his statutory obligation. To put it another way, in case of unconstitutionality irresolvable by the interpretation of the law, the litigant's right to a lawful judge shall only prevail in the course of the Constitutional Court proceedings. ... The judge turning to the Constitutional Court shall, on the basis of his obligation flowing from Article 50(1) of the Constitution, act in order to protect the individual rights of the parties concerned in the legal dispute, but he can only comply with this constitutional obligation upon the Constitutional Court's decision on the merits of the case. ...

3.5. Thus, the purpose of the institution of the judge's initiative is partly to enforce the litigant's fundamental right to a lawful judge, and – beyond the abstract protection of constitutionality – partly to prevent that any individual legal dispute be determined ... on the basis of an unconstitutional law.

Thus, when in a given litigation the judge – complying with his constitutional obligation – initiates an examination of the constitutionality of the applicable law, the scope of the unconstitutionality found by the Constitutional Court shall, as a rule, extend to all pending litigations having the same factual and legal basis as the one giving rise to the Constitutional Court proceedings. The legal consequences of the unconstitutionality found and of the general prohibition of application imposed as a result of the examination of the constitutionality in the 'concrete norm control' proceedings shall be drawn by the judges sitting in those pending legal actions which do not form part of the Constitutional Court proceedings but have arisen from an identical factual basis and have to be determined under the same law. ...."

18. The European Union Charter of Fundamental Rights provides as follows:

Article 30 – Protection in the event of unjustified dismissal

"Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices."

According to the Explanations relating to the Charter of Fundamental Rights [2007/C 303/02)], Article 30 draws on Article 24 of the revised European Social Charter.

19. The revised European Social Charter provides as follows:

Article 24 – The right to protection in cases of termination of employment[1]

"With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:

a. the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;

b. the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.

To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

20. The applicant complained that by not having been given reasons for her dismissal her right of access to a court was effectively frustrated in breach of Article 6 § 1 of the Convention, which reads as relevant:

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

21. The Government contested that argument.

A. Admissibility

1. The Government's arguments

22. The Government submitted that the applicant's claim was of a public-law nature and fell outside the material scope of the application of Article 6 of the Convention, therefore it was incompatible *ratione materiae* with its provisions, within the meaning of Article 35 § 3 (a). They stressed that although access to a court was not excluded expressly in respect of the right claimed by the applicant, this could not create a substantive right under Hungarian law, to be recognised as a civil right for the purposes of Article 6 of the Convention.

23. Furthermore, the Government argued that the applicant had not exhausted domestic remedies in that she had not instituted proceedings before the labour court; had she done so, an eventual final judgment against her could have been challenged before the Constitutional Court. In the light of the Constitutional Court's decision of 18 February 2011(see paragraph 16

[1]This provision has not been accepted by Hungary.

above), read in conjunction with the one of 6 May 2011 (see paragraph 17 above), the Constitutional Court would have most probably delivered a decision excluding the applicability of the unconstitutional law in the applicant's case, resulting in the re-opening of the labour-court proceedings.

Moreover, if the applicant's would-be labour action had been pending at the material time, the labour court would have had the duty – in accordance with the Constitutional Court's decision of 6 May 2011 – to initiate proceedings before the Constitutional Court in order to have the non-applicability of the unconstitutional law examined in that pending litigation.

24. Finally, in the Government's view, the applicant's right of access to a court in order to protect her eventual reputational or pecuniary rights related to her employment was not affected by the removal of the employer's obligation to give reasons for her dismissal. Since no reasons had been given for the dismissal at all, the latter could not possibly imply inaptitude on the employee's side or prejudice the applicant's reputation in any manner. Moreover, the alleged pecuniary interests had remained claimable in court, independently of the absence of reasons; in any case, they were not sufficient to create a civil right to remain employed as a civil servant.

2. The applicant's arguments

25. The applicant argued that, in the absence of express exclusion of access to a court for legal disputes of civil servants, the issue was not excluded from the ambit of Article 6 of the Convention. In addition, she submitted that a labour dispute related to the dismissal of a civil servant inevitably carried pecuniary consequences that obviously fell into the category of "civil rights and obligations".

26. As to the exhaustion of domestic remedies, the applicant pointed out that a constitutional complaint could not be considered as a means of direct and speedy protection of the rights guaranteed by the Convention, especially in that a complainant must have lost a labour law action prior to a constitutional procedure. Moreover, the Constitutional Court would have decided on the non-applicability of an unconstitutional provision within its discretionary powers, therefore a complaint to it was no effective remedy.

27. In addition, the applicant submitted that both Constitutional Court decisions in question post-dated the deadline for her to initiate labour court proceedings, that is, thirty days after the communication of dismissal. Thus she could not possibly benefit either from the annulment of the impugned law (see paragraph 16 above) or from the change of the Constitutional Court's interpretation of non-applicability (see paragraph 17 above). In any case, to the applicant's knowledge, the labour courts' practice was not in line with the Government's suggestion in that no referrals to the Constitutional Court were put in place by the labour courts.

3. The Court's assessment

28. The Court notes that the Government reproached the applicant for not having filed a labour action, available in the circumstances, which would have subsequently enabled a Constitutional Court scrutiny of the non-applicability of the impugned provision in her particular case. However, the Court notes at the outset that such an action – in which the applicant should have challenged her dismissal, whose reasons were entirely unknown to her – could only have been a formal motion. For the Court, the applicant cannot be expected to have made such an attempt in the circumstances.

Moreover, the Constitutional Court decisions referred to by the Government undisputedly post-dated, by several months, the time-limit relevant for the applicant's potential labour-law action and cannot therefore be attributed any relevance.

In any case, the Court takes the view that it cannot speculate about the labour-court judge potentially referring the case to Constitutional Court scrutiny and then about the latter's decision concerning the non-applicability of the annulled provision in the applicant's case.

The Court is therefore satisfied that the application cannot be rejected for non-exhaustion of domestic remedies.

29. Furthermore, the Court observes the parties' diverging views on the question of applicability of Article 6 § 1 in the case. It notes that since the dispute at issue related to the applicant's dismissal from her employment, it concerned a "civil" right (see e.g. *Cudak v. Lithuania* [GC], no. 15869/02, §§ 44 to 47, ECHR–2010). It further notes that it has not been disputed by the parties that under Hungarian law the applicant as a former government official had the formal right to challenge her dismissal in court. This consideration alone allows the Court to find that Article 6 § 1 is applicable in the circumstances (see *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, §§ 62-63, ECHR 2007-II); and the extent to which the applicant's reputational or pecuniary interests were prejudiced by the absence of reasons are immaterial in this context.

The application thus cannot be rejected as incompatible *ratione materiae* with the provisions of the Convention or as manifestly ill-founded, within the meaning of Article 35 § 3 (a). The Court further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

30. The Government have not disputed the applicant's allegations on the merits.

31. The Court recalls that, according to its well-established case-law, Article 6 § 1 of the Convention may be relied on by individuals who

consider that an interference with the exercise of one of their (civil) rights is unlawful and complain that they have not had the possibility of submitting that claim to a court meeting the requirements of Article 6 § 1 (see *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 44, Series A no. 43). In the words of the Court's *Golder* judgment, Article 6 § 1 embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18).

32. However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Osman v. the United Kingdom*, 28 October 1998, § 147, *Reports of Judgments and Decisions* 1998-VIII).

33. The Court would add that Article 6 § 1 of the Convention leaves to the Contracting States the choice of the means of ensuring that the right of access to a court is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial. In this respect, it must be remembered that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and that the maintaining in the domestic law of the right to bring a labour-law claim does not in itself ensure the effectiveness of the right to access to a court, if that possibility is devoid of any substance and thus of any prospect of success (see, *mutatis mutandis*, *Imbrioscia v. Switzerland*, 24 November 1993, § 38, Series A no. 275).

34. In the particular case, the Court observes that the applicant as a former government official dismissed from service was in principle entitled to challenge that dismissal in court. However, since the employer was under no obligation to give any reasons for that dismissal, the Court takes the view that it is inconceivable for the applicant to have brought a meaningful action, for want of any known position of the respondent employer. For the Court, this legal constellation amounts to depriving the impugned right of action of all substance. The Court also notes that the Constitutional Court, whose approach was partly based on the Court's relevant case-law, annulled the underlying domestic provision for, among others, similar considerations

(see paragraph 16 above), largely in line with the spirit of the European Union Charter of Fundamental Rights (see paragraph 18 above) and the revised European Social Charter (see paragraph 19 above).

35. The foregoing considerations are sufficient to enable the Court to conclude that, in disputes concerning civil rights such as the present one, such a limited review cannot be considered to be an effective judicial review under Article 6 § 1. There has therefore been a violation of the applicant's right of access to a court (see *Obermeier v. Austria*, 28 June 1990, § 70, Series A no. 179; and, *a contrario*, *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, §§ 57 to 67, 27 September 2011).

There has accordingly been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

37. The applicant claimed 19,590 euros (EUR) in respect of pecuniary damage and EUR 15,000 in respect of non-pecuniary damage.

38. The Government contested these claims.

39. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it considers that the applicant must have suffered some non-pecuniary damage and awards her EUR 6,000 in respect of non-pecuniary damage.

B. Costs and expenses

40. The applicant also claimed EUR 5,000 for the costs and expenses incurred before the Court. This sum corresponds to 36 hours of legal work billable by her lawyer at an hourly rate of EUR 135 including VAT as well as EUR 140 of miscellaneous expenses.

41. The Government contested these claims.

42. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its

possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,000 covering costs under all heads.

C. Default interest

43. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Hungarian forints at the rate applicable at the date of settlement:
      (i) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (iii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 July 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Françoise Tulkens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Pinto De Albuquerque is annexed to this judgment.

F.T.
S.H.N.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

I agree with the finding that there has been a violation of Article 6 of the European Convention on Human Rights (the Convention). Nonetheless, I feel bound to append this concurring opinion in order to explain, and expand on, the reasons why I consider that the respondent State did not comply with the Convention. In view of the facts of the case and the applicable legal framework, the fundamental question that must be formulated is the following: is it legitimate to interpret Article 6 of the Convention in the light of Article 24 of the revised European Social Charter in a human rights case against a State that is not bound by the latter provision? In other words, can the Court, in interpreting Article 6 of the Convention, apply the standard laid down in Article 4 of ILO Convention No. 158 to a country which has not ratified this latter Convention? These questions require a thorough answer which must take into consideration the protection of social rights by the Convention and the contemporary interconnection between international human-rights law and international labour law[1].

Termination of employment in international labour law

ILO Convention No. 158 and Recommendation No. 166 concerning termination of employment provide for the following basic guarantees: valid reason for dismissal and the enunciation of non-valid reasons for dismissal, an opportunity for workers to be aware of and respond to allegations, the right of appeal, the sharing of the burden of proof and the right to compensation. Pursuant to Articles 4-6 of ILO Convention No. 158, a worker's employment is not to be terminated unless there is a valid reason for such termination, connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service. The following, *inter alia*, do not constitute valid reasons for termination: (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours; (b) seeking office as, or acting or having acted in the capacity of, a workers' representative; (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion,

[1] I have expressed my thoughts on these two important topics in a partly concurring and partly dissenting opinion joined to the Grand Chamber case *Konstantin Markin v. Russia* [GC], no. 30078/06, ECHR 2012 (extracts).

political opinion, national extraction or social origin; (e) absence from work during maternity leave. Temporary absence from work because of illness or injury does not constitute a valid reason for termination. Thirty-five countries have ratified this Convention worldwide, but Hungary is not one of them.

The ILO Committee of Experts on the Application of Conventions and Recommendations has stated that the need to base termination of employment on a valid reason is the cornerstone of the above-mentioned ILO Convention's provisions, since it "removes the possibility for the employer to unilaterally end an employment relationship of indeterminate duration by means of a period of notice or compensation in lieu thereof"[1]. In the light of Article 4 of the ILO Convention, termination of employment "does not merely require the employer to provide justification for the dismissal of a worker, but requires, above all, that, in accordance with the 'fundamental principle of justification', a worker's employment is not to be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking"[2]. The same Committee of Experts has acknowledged, in broad terms, that: "Because the [ILO] Convention supports productive and sustainable enterprises, it recognizes that economic downturns can constitute a valid reason for termination of employment. The Committee stresses that social dialogue is the core procedural response to collective dismissals - consultations with workers or their representatives to search for means to avoid or minimize the social and economic impact of terminations of employment for workers."[3] Thus, the scope of Article 4 is arguably broad enough to accommodate reasons related to non-disciplinary conduct by a worker and to an enterprise's strategic needs.

Articles 8-10 of the ILO Convention deal with the appeal procedure. These provisions do not merely provide workers with a right to appeal, but they also ensure that workers do not have to bear alone the burden of proving that the termination was not justified. Moreover, it is stipulated that the adjudicatory body, in addition to having power to declare a dismissal invalid, must have competence to award the full spectrum of remedies, including reinstatement, adequate compensation or "such other relief as may be deemed appropriate".

Article 2, paragraph 2, of the ILO Convention sets out the exclusions which may be made in view of the nature of the contract of employment. It

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[1] CEACR, General Survey – Protection against unjustified dismissal (1995), para. 76.

[2] CEACR direct request – Luxembourg (2007). See report of the ILC at its 67th Session in which it was stated "Thus, today the justification principle has become the centrepiece of the law governing termination of employment by the employer...", ILC, 67th Session, 1981, Report VIII(1), p. 7.

[3] CEACR - General observation concerning Convention No. 158 (CEACR, 79th Session, November-December 2008).

provides that a "Member may exclude the following categories of employed persons from all or some of the provisions of this Convention: (a) workers engaged under a contract of employment for a specified period of time or a specified task; (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration; (c) workers engaged on a casual basis for a short period[1]."

Termination of employment in international human-rights law

In its General Comment No. 18 on the Right to Work, the UN Committee on Economic, Social and Cultural Rights noted that violations of the right to work can occur through acts of omission, for example when States parties do not regulate the activities of individuals or groups to prevent them from impeding the right of others to work. Thus, the Committee on Economic, Social and Cultural Rights considered that "violations of the obligations to protect follow from the failure of States parties to take all necessary measures to safeguard persons within their jurisdictions from infringements of the right to work by third parties. They include omissions such as ... the failure to protect workers against unlawful dismissal"[2]. Hungary is bound by Article 6 of the International Covenant on Economic, Social and Cultural Rights and in particular by the prohibition of unlawful dismissal derived from it. Dismissal which is not grounded on valid reasons that are specifically provided for by law is unquestionably unlawful.

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[1] The Tripartite Committee established to consider a representation brought under Article 24 of the ILO Constitution by the *Confederation Générale du Travail-Force Ouvrière* with regard to the French Ordinance no. 2005-893, concluded that two years was not a reasonable period of time for the purposes of Article 2, paragraph 2 of ILO Convention no. 158 (Governing Body doc. GB.300/20/6), thus contradicting the decision of the *Conseil d'Etat* of 19 October 2005. The Committee also found that the Ordinance departed from the basic requirements of Article 4 of the relevant ILO Convention, insofar as workers whose employment was terminated for reasons of performance or conduct did not need to be provided an opportunity, prior to or at the time of termination, to defend themselves against the allegations made, as required by Article 7 of the [ILO] Convention, and the requirement under Article 4, read with Article 7, of the [ILO] Convention that the employee must be given a valid reason, prior to or at the time of termination, at least in cases relating to conduct or performance, needed similarly to be complied with only where the termination is of a disciplinary nature. Subsequently, the French legislation on "contracts for new employment" was changed. The French Court of Cassation, in its judgment of 1 July 2008, confirmed the Committee's opinion.

[2] General Comment No. 18 on the Right to Work, UN Committee on Economic, Social and Cultural Rights (E/C.12/GC/18), adopted on 24 November 2005, at paragraph 35. See also paragraph 11 of the general comment in which explicit reference is made to Article 4 of Convention No. 158.

Termination of employment in European Human-Rights Law

Termination of employment concerns a civil right under the protection of Article 6 of the Convention[1]. In *Vilho Eskelinen and Others*, the Court extended this protection, in principle, to all civil servants, the exception being those cases where national law does not confer a right of access to the court to a category of civil servants and such exclusion of the Convention protection is justified[2]. While the Court gave a list of non-exhaustive examples of "ordinary labour disputes" to which Article 6 should in principle apply, it did not exclude other labour-related proceedings from applicability of that article. Later, the Court held that the approach developed in the case of *Vilho Eskelinen and Others* also applied to access to a public office[3] and termination of public office[4], assessing issues such as the unfairness of proceedings concerning removal from office[5], or the excessive overall length of the dismissal proceedings[6]. This broad protection afforded to employees by Article 6 was complemented by other Articles. Termination of employment has also been assessed from the perspective of other Convention rights and freedoms, such as the freedom to hold religious beliefs[7] and freedom of expression[8].

Pursuant to Article 24 of the Revised European Social Charter, all workers have the right not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service; the Parties undertake to ensure the right of workers whose

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[1] The Court's case-law on this topic started with disciplinary proceedings in which the right to continue to practise a profession was at stake, giving rise to disputes over civil rights within the meaning of Article 6 (see, among other authorities, the following judgments: *König v. Germany*, 28 June 1978, Series A no. 27, and *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, Series A no. 43).

[2] *Vilho Eskelinen and Others v. Finland (GC)*, no. 63235/00, §§ 62-63, ECHR 2007-II.

[3] *Majski v. Croatia* (No. 2), no.16924/08, 19 July 2011, *Kübler v. Germany*, no. 32715/06, 13 January 2011, and, implicitly, *Josephides v. Cyprus*, no.33761/02, 6 December 2007, and *Penttinen v. Finland* (dec.), no. 9125/07, 5 January 2010.

[4] *Sabeh el Leil v. France*, (GC) no. 34869/05, 29 June 2011, and *Cudak v. Lithuania (GC)*, no. 15869/02, 23 March 2010.

[5] *Hrdalo v. Croatia*, no. 23272/07, 27 September 2011, and *Lesjak v. Croatia*, no. 25904/06, 18 February 2010.

[6] *Mishgjoni v. Albania*, no.18381/05, 7 December 2010, and *Golenja v. Slovenia*, no. 76378/01, 30 March 2006.

[7] *Ivanova v. Bulgaria*, no.52435/99, 12 April 2007, on the applicant's dismissal from her job as swimming-pool manager at the River Shipbuilding and Navigation School because of her religious beliefs.

[8] *Heinisch v. Germany*, no. 28274/08, 21 October 2010, on the applicant's dismissal, without notice, from her job as a geriatric nurse for a limited liability company specialising in health care of the elderly which is majority-owned by the Land of Berlin, on the ground that she had lodged a criminal complaint against her employer, and the refusal of the domestic courts in the ensuing proceedings to order her reinstatement.

employment is terminated without a valid reason to adequate compensation or other appropriate relief and the right to appeal to an impartial body when they consider that their employment has been terminated without a valid reason. This provision has been accepted by 24 Member States of the Council of Europe, but not by Hungary. Article 30 of the Charter of Fundamental Rights of the European Union reinforced this consensus, by drawing on the above-mentioned provision, as the respective "Explanations" show[1].

Taking into account the significant European consensus on protection in cases of termination of employment, there is a positive obligation for the Contracting Parties to the Convention to implement the principle of justification for termination of employment, i.e. a legal system of justified termination of employment. The Court has already established that a social right can legitimately be derived from a Convention provision, even when such a right is foreseen in the European Social Charter and the Contracting Party is not bound by the relevant provision of the Charter[2]. This jurisprudence is also valid in the case of the right of all workers not to have their employment terminated without valid reasons for such termination and the concomitant right to appeal the decision of termination of employment to an impartial body.

In European human-rights law, the right to protection in cases of termination of employment applies to all categories of employees, including civil servants and public officials. The Contracting Parties may, within their margin of appreciation, consider that workers engaged under a contract of employment for a specified period of time or a specified task, workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration, and workers engaged on a casual basis for a short period do not benefit from this guarantee.

In any event, no termination of employment is acceptable under European human-rights law based on discriminatory reasons, such as union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours; seeking office as, or acting or having acted in the capacity of, a workers' representative; the filing of a complaint or participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or

[1] See Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02). See also Directive 2001/23/EC on the safeguarding of employees' rights in the event of transfers of undertakings, and Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer, as amended by Directive 2002/74/EC.

[2] *Demir and Baykara v. Turkey (GC)*, no. 34503/97, §§ 153-154, ECHR 2008.

social origin; absence from work during maternity, paternity or parental leave[1].

In sum, the right to protection in the event of termination of employment has a minimum content in European human rights law, consisting of four core requirements: a formal written notice of termination of employment given to the employee, a pre-termination opportunity to respond given to the employee, a valid reason for termination, and an appeal to an independent body. The right of appeal against any termination of employment to an independent body requires that this body has the powers to verify the factual and legal aspects of the appealed decision and to remedy it, if it is found illegal[2].

The application of the European standard to the present case

Given that Article 24 of the Revised European Social Charter and Article 30 of the European Union Charter of Fundamental Rights are invoked by the Chamber to shed light on its interpretation of Article 6 of the Convention, and both those Articles are inspired by Article 4 of ILO Convention No. 158 on termination of employment, the question of the legitimacy of this interpretation may be raised, bearing in mind that Hungary is not a party to ILO Convention No. 158, nor has it accepted Article 24 of the Revised European Social Charter.

In view of the aforementioned European standard based on the principle of justification of termination of employment, the answer must be in the affirmative. This answer is strengthened by the circumstance that Hungary is bound by Article 30 of the EU Charter of Fundamental Rights, which enshrines the said principle, and Article 6 of the International Covenant on Economic, Social and Cultural Rights, which includes such a principle by virtue to General Comment No. 18 on the Right to Work. It is not acceptable for one and the same State to advocate a double standard on termination of employment in respect of different international organisations, claiming to be held to a lower standard vis-à-vis the Council of Europe when it is already subject to a more demanding standard vis-à-vis the United Nations and the European Union.

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[1] Specifically referring to Article 5-c of ILO Convention No. 158, see *Heinisch*, quoted above, § 39, which found that the applicant's dismissal without notice on the ground that she had lodged a criminal complaint against her employer and the refusal of the domestic courts in the ensuing proceedings to order her reinstatement infringed her right to freedom of expression as provided in Article 10 of the Convention.

[2] This right to protection of workers is an obligation of result which the state is bound to achieve within a reasonable period of time through adequate legislative, judicial and administrative instruments, including the approval of a suitable legislative framework, an efficient judicial structure and supervisory administrative machinery. This right may be restricted or even annulled in exceptional circumstances, as long as retrogressive measures pursue general welfare aims and are implemented progressively and proportionately.

The respondent Government themselves demonstrated that the applicant enjoyed a limited right of access to a court under national law "in cases of discriminatory dismissal or in breach of the special protection afforded by law on objective grounds (see Article 90 of the Labour Code)". This is sufficient to consider Article 6 of the Convention applicable to the instant case, making redundant and even contradictory the Government's additional allegation that the exclusion of Article 6 rights for the civil servant was justified "because of the public-law nature of the dispute and because the subject matter of the dispute calls into question the special bond between the State and its employee" (page 9 of the Government's observations).

Given that the first *Vilho Eskelinen* criterion is satisfied, Article 6 is fully applicable to the case and the applicant benefits from its protection, since she was a civil servant working in the environmental inspectorate, not engaged under a contract of employment for a specified period of time or a specified task, nor serving a period of probation or a qualifying period of employment, nor engaged on a casual basis for a short period. Thus, the termination of her employment breached her rights to know the reasons for her dismissal and to have her dismissal fully assessed by an independent body, as provided for by Article 6 of the Convention.