

## **Order of the Kúria**

**Case number:**No. Knk.IV.37.222/2016/9

**Members of the Chamber:** Dr. Tibor Kalas, President of the Chamber, Judge Rapporteur, Dr. György Kozma, Judge,

Dr. Erzsébet Mudráné Láng, Judge,

**The applicants:**

Benedek Jávor, first applicant,

(1124 Budapest, Bűrök u. 1., fszt.2.)

dr. Tibor Szanyi, second applicant,

(1132 Budapest, Visegrádi u. 58/A., III/1.)

Magyar Liberális Párt (Hungarian Liberal Party), third applicant,

(5000 Szolnok, Koszorú u. 4.; legal representative: dr. Gábor Fodor, party president)

Zoltán Tamás Vajda, fourth applicant,

(1161 Budapest, Hársfavirág u. 47)

Márton Kozák, fifth applicant

(1028 Budapest, Hideg u. 32.)

dr. Tamás Lattmann, sixth applicant

(1088 Budapest, Szentkirályi u. 10. III./023A.)

**Legal representatives of the applicants:**

dr. Csaba Tordai, attorney-at-law (first applicant)

(1054 Budapest, Vécsei str. 4. 3/4.)

dr. Dávid Sinyei-Márkus, attorney-at-law (second applicant)

(1063 Budapest, Bajnok u. 13.)

dr. István Boglutz, attorney-at-law (third, fourth, fifth and sixth applicants)

(1052 Budapest, Váci u. 25. I/1-2.)

**Requested authority:**

Nemzeti Választási Bizottság (National Election Commission)

(1054 Budapest, Alkotmány u. 3.)

**Intervener:**

Hungarian Government

**Legal representative of the intervener:**

dr. Péter Buczkó, attorney-at-law

(1055 Budapest, Stollár Béla u.. 18., fszt. 1.)

**Subject-matter:** Application for review in a referendum issue

**Parties submitting the application for review:** the applicants

**Decision to be reviewed:** Decision Nr.14/2016 of the National Election Commission

**Operative part**

The Kúria upholds the Decision No.14/2016 of the National Election Commission.

It orders that the first, second, fourth, fifth and sixth applicants pay the State – upon request – HUF 10,000 (ten thousand forint) as court fees. The court fees owed by the third applicant are paid by the State.

The Kúria orders the publication of this decision in the Magyar Közlöny (Hungarian Official Gazette).

No judicial remedy shall lie against this order.

**Statement of reasons**

**The facts which gave rise to review**

- [1] The Prime Minister's chief of staff, representing the Hungarian Government, as the organiser of the initiative for a referendum, submitted the question proposed for referendum, on 24<sup>th</sup> February 2016, to the Hungarian Election Commission (hereinafter: NVB) for authentication in compliance with section 5 of Act CCXXXVIII of 2013 on Initiating Referendums, the European Citizens' Initiative and Referendum Procedure (hereinafter: Referendum Act).
- [2] The NVB authenticated the question for referendum in its Decision Nr.4/2016, which read: 'Do you want the European Union to be entitled to prescribe the mandatory settlement of non-Hungarian citizens in Hungary without the consent of National Assembly?'. The NVB invoked section 11 of the Referendum Act, according to which the NVB authenticates the question if it satisfies the conditions of the Fundamental Law and of the Referendum Act with respect to the question. The NVB stated in its decision that the question proposed for referendum submitted by the Hungarian Government satisfied the conditions set out in the Fundamental Law and in the Referendum Act with respect to the question, therefore decided to authenticate the question.

### **Applications for review**

- [3] Four applications for review have been submitted against the decision of the NVB by the first, second and third applicants, and jointly by the fourth, fifth and sixth applicants. The Kúria merged the applications for review and ruled on them in a single procedure.
- [4] The first applicant requested in his application for review that the Kúria alter the decision of the NVB and refuse to authenticate the question. He based his individual concern – referring to the case law in referendum matters of the Kúria – on the fact that he is a Hungarian resident.
- [5] In his application, the first applicant presented the relevant EU legislation, including sources of primary and secondary law. According to that, Council Decision (EU) 2015/1601 (hereinafter: Council Decision) was adopted on the basis of Article 78 (3) of the Treaty on the Functioning of the European Union (hereinafter: TFEU), which provides – exceptionally in the emergency situation in relation to asylum – for a temporary derogation from the rule set out in Regulation (EU) 604/2013. He explained in his application that referring to settlement in the communication of the petition for referendum was incorrect, since the Council Decision provides for applying a derogation in the asylum process with regard to specific people. This Council Decision has been contested by Hungary before the Court of Justice of the European Union (Hungary v. Council of the European Union, Case C-647/15).
- [6] The first applicant explained, in relation to the interpretation of the definition of settlement, that, in his opinion, one cannot talk about settlement on the basis of the decision made in an asylum procedure. He stressed that the procedure can also end in refusing the application for international protection, although this refusal may be reviewed later; furthermore, the right of residence vanishes if the circumstances giving rise to international protection are no longer present. Hence, in his view, the authenticated question concerns such an issue which does not fall within the competence of the National Assembly pursuant to Article 8 (2) of the Fundamental Law, thus the NVB should have refused to authenticate the question. Moreover, he indicated that a grammatical interpretation of the question shows that it intends to modify the primary law frame, which does not fall within the competence of the National Assembly since, in a larger sense, it falls within the joint competence of all Member States. He contested that the question could be authenticated, invoking Decision No. 191/2010.(XI.18.) of the Supreme Court, according to which the competence of the National Assembly extends at most to giving its consent to be bound by an already ratified international treaty and to its empowerment to do so, but does not extend to initiating the modification of an international treaty, since, within the framework of primary law of the EU, the member state governments are entitled to do so.
- [7] The first applicant, referring also to the relevant provisions of the Treaty on European Union (hereinafter: TEU) beside the TFEU, argued that a member state parliament cannot have a right of veto during the adoption or implementation of an EU decision, except in two sets of cases, detailed in the application.

- [8] The first applicant contested that the question could also be authenticated on the grounds that the referendum question concerns an obligation arising from an international treaty; therefore, according to Article 8 (3) d) of the Fundamental Law, no national referendum may be held on that issue. In this scope, the first applicant referred to the loyalty clause under Article 4(3) TEU, the EU Accession Treaty ratified in the Hungarian legal order by Act XXX of 2004 (hereinafter: Accession Treaty) and its amendments. According to the first applicant, with regard to the interpretation in accordance with the purposes pursuant to Article 28 of the Fundamental Law, Article 8 (3) of the Fundamental Law shall be interpreted in such a way that it excludes the binding obligations arising from the Founding Treaties from the issues on which a referendum may be held. This interpretation is also confirmed, in his opinion, by Article E (2) of the Fundamental Law. According to this Article E, with a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences set out in the Fundamental Law jointly with other Member States, through the institutions of the European Union. This provision, according to the first applicant, does not constitute the basis for the one time transfer of sovereignty, but establishes the general rule for the joint exercise of competences. The first applicant also stated that, according to Decision No. Knk.IV.37.446/2014 of the Kúria, although the Accession Treaty as EU law became part of the internal legal order, its form as an international treaty cannot be ignored.
- [9] The first applicant, still on the basis of Article E of the Fundamental Law, also maintained that the question belongs to the prohibited issues for referendum in that its aim is to impose additional conditions to the execution of EU law, in derogation from the Founding Treaties and effecting indirectly Article E (2). Therefore, authenticating the question would infringe Article 8 (3) a) of the Fundamental Law. In addition, it is in breach of the aforementioned provision of the Fundamental Law, in his view, that the eventually successful referendum would require a binding effect to be conferred on the position of the National Assembly in such a way that it would basically draw the framework of the government actions within the Council of the European Union, where the Hungarian Government is also involved.
- [10] The first applicant, in his application, also referred to his opinion, according to which the question was misleading towards citizens since, under the applicable procedural order, the decisions made on applications cannot give rise to any settlement. On the other hand, the misleading effect results from the fact that, in order to achieve the intention declared through the referendum, it would be necessary to amend the primary law frame of the EU. According to the applicant, it is not possible to determine whether, in the event of a valid and conclusive referendum, the National Assembly is bound by a legislative obligation, or whether it should adopt an individual or a normative act, and this is contrary to the requirement of legislative clarity under section 9 (1) of the Referendum Act.
- [11] Finally, the first applicant mentioned in his application that, within the frame of an even stronger integration, it is essential to declare national sovereignty; however, there has

been established such a decision-making system where in some cases the member state has to implement the decisions adopted by the community of the member states against its will. In his view, with regard to the asylum policy created along the fundamental freedom of movement for persons, the question authenticated by the NVB does not serve to protect national sovereignty, but aims to amend the EU decision.

- [12] The second applicant contesting the decision of the NVB stated that, in his opinion, the issue of the question for referendum could only be solved at EU level. He therefore requested that the Kúria alters the decision of the NVB and refuses to authenticate the signature sheet. He invoked section 6 of the Referendum Act and Order No. Knk.IV.37.721/2015/2 of the Kúria, according to which, pursuant to the provisions of the Referendum Act referred to, this Act provides for a submission in person or by mail, but it is not possible to submit the question through a representative. In accordance to this, the initiative should have been submitted personally by the Prime Minister, or by the Deputy Prime Minister pursuant to section 1 (2) of Government Decree 152/2014 (VI.6.) ratifying Government Decree 306/2015 (X.26.) on the amendment of some government decrees due to establishing the Prime Minister's Cabinet Office, or by the Chancellery of the Prime Minister pursuant to section 126 a) of Government Decree 152/2014 (VI.6.).
- [13] The second applicant invoked Article 8 (2) to (3) and Articles E) and Q) of the Fundamental Law, section 1 of Act CLXXV of 2015 on the action against the mandatory settlement quota in order to protect Hungary and Europe (hereinafter: Quota Act), as well as Decision No. EH2015.01.K3 delivered in case No. Knk.IV.37.446/2014. In his view, the mandatory settlement quota does not fall within the remits of the mission and competence of the Hungarian National Assembly, as it is an issue regulated by an international document through the Council Decision, which has to be implemented pursuant to Articles E (2) and Q (2) of the Fundamental Law, otherwise it would be necessary to amend the Fundamental Law itself.
- [14] The second applicant also referred to that, according to Decision No. 37.446/2014 of the Kúria, beyond the Act ratifying the international treaty, the prohibited issue for referendum effects the obligation arising from the international treaty, hence the Council Decision is such an issue pursuant to Article E (2) of the Fundamental Law. Moreover he argued that the authenticated question, in contradiction with the requirement set out in section 9 (1) of the Referendum Act, is not clear, since it would be unclear even by omitting the part 'without the consent of National Assembly', and it is misleading for the voters in relation to the decision-making body, since the Council Decision was not adopted by the EU, but by the Council of the EU. The second applicant contested the clarity of the question – referring to the reasoning of the Order No. Kvk.IV.37.435/2015/4 of the Kúria – also in that regard that the question proposed for referendum had already been regulated by section 2 of the Quota Act, since the authorisation to bring proceedings before the Court of Justice of the European Union (hereinafter: CJEU) under Article 263 TFEU had been provided. Finally, in his opinion, the question does not meet the requirements of clarity because it cannot be determined how big the group of non-Hungarian citizens is, whose settlement to Hungary would be

carried out due to the Council Decision.

- [15] The third applicant contended that the authenticated question for referendum infringes the Fundamental Law of Hungary, the Referendum Act and EU law. According to him, EU law does not use the notion of settlement, as the Council Decision determines which member state should conduct the asylum procedure. According to that, a derogation from the general rule set out in Article 13(2) of Regulation (EU) No. 604/2013, pursuant to which the first member state of entry into the EU is relevant, the member state determined in the Council Decision shall decide in an asylum procedure. According to the third applicant, no Hungarian law uses the notion of settlement, therefore even in that respect the authenticated question does not meet the requirements of clarity under section 9 (1) of the Referendum Act.
- [16] In the third applicant's view, the authenticated question suggests incorrectly that the transfer of asylum procedures could be made subject to the National Assembly's consent, since the Founding Treaties of the European Union do not guarantee a right of veto to national parliaments in that aspect. On these grounds, the authenticated question infringes international treaties and does not fall within the competence of the National Assembly, therefore it is contrary to the provisions of the Fundamental Law. This is confirmed by the third applicant also with regard to the argument that the authenticated question concerns obligations arising from an international treaty, since it intends to impose additional conditions, with the consent of the National Assembly, to the implementation by Hungary of decisions adopted by EU institutions, in derogation from the Founding Treaties. Finally, the third applicant contends that it is not clear whether, in the case of a negative answer, the National Assembly is bound by a legislative obligation effecting EU law, which for that matter does not fall within its competence, therefore it is contrary to the requirement of legislative clarity under section 9 (1) of the Referendum Act.
- [17] The fourth, fifth and sixth applicants sought to alter the Decision of the NVB in their joint application. They argue that the authenticated question does not meet the requirements of clarity because it is not clear whether the term 'without the consent' is related to the persons to be resettled or to Hungary as a member state. Moreover, according to their application, the notion of settlement is not precise or defined by law, which cannot be used in connection with natural persons; therefore, the requirements of clarity under section 9 (1) of the Referendum Act are not met. Furthermore, it is misleading for the voters that the legal meaning is cut from the linguistic sense of the word, since the question does not concern the processing of the application for asylum. Because of the lack of clarity, in their view, no clear parliamentary decision can be taken in compliance with the content of the question. In case of a valid and conclusive referendum, a binding effect could only then be attached to it, when Hungary would execute the decision of the EU subject to the consent of the National Assembly, which would be contrary according to the joint application to the loyalty clause. Finally they argue that the National Assembly can only adopt a decision in compliance with the valid and conclusive referendum if it decides to leave the EU, which cannot be an issue for referendum according to Article 8 (3) d) of the Fundamental Law pursuant to Decision

of the Constitutional Court No. 35/2007. (VI.6.) and to Decision No. Kvk.37.158/2012/2 of the Kúria.

- [18] As initiator of the referendum, the Government – through its representative – declared its intervention with reference to the second part of the sentence of section 228 (2) of Act XXXVI of 2013 on the electoral procedure (hereinafter: Electoral Act), applicable pursuant to section 332 (5), 327 (4) and 54 (1) of Act III of 1952 on the Code of Civil Procedure, and made observations on the substance of the dispute. The Government sought to establish that the application for review of the first applicant, for lack of personal involvement, is not “suitable” for review. Furthermore, it argued that if the Kúria finds the application for review of the first applicant suitable for ruling on the merits of the case then it should uphold the decision of the NVB.
- [19] With reference to the case law of the Kúria, the initiator explained, that as far as the individual concern of the first applicant is concerned, it does not suffice that the first applicant is a Hungarian resident, because, according to his opinion, individual concern can only be established in such cases where the applicant’s rights and obligations are affected by the alleged breach of law. However it admitted that, according to the approach taken in the relevant findings within the case law of the Constitutional Court, personal involvement in referendum cases shall be subject to broad interpretation, although, in its view, it cannot lead to the lack of substantive examination regarding the existence of personal involvement. It considers that in relation to the first applicant there is no direct connection between the legal position of the applicant and the case.
- [20] It argued that the question for referendum could be authenticated, since – contrary to the position of the first applicant – the question falls within the competence of the National Assembly and it does not infringe any obligations arising from international treaties. It invoked Article 78 TFEU, Article 48 (4) TEU and Article E of the Fundamental Law, as well as Decision No. 143/2010. (VII.14.) of the Constitutional Court. In its view, the transfer of sovereignty was not general in the area of asylum, therefore constitutional minimum provisions, as concerned by the question, were not regulated, not even in relation to the personal scope of Hungarian sovereignty (the manner of determining persons residing in the territory of Hungary). It contested the breach of obligations arising from international treaties, since, according to the case law of the Constitutional Court, the Founding Treaties and their amendments, as well as the Accession Treaty, form part of domestic law, and so, from the perspective of Hungarian constitutional law, they no longer constitute international treaties.
- [21] Furthermore, it contested with reference to the relevant case law of the Kúria and of the Constitutional Court, the applicants’ allegation, according to which the question does not meet the requirements of clarity for the benefit of the voters. The question can be interpreted in one single way, and the legal context of the problem is well known; at the same time, the case law of the Constitutional Court does not require the precise use of the legal terminology set out in the regulations in force. Concerning legislative clarity, the initiator submitting the question meant that the result of the referendum is binding for the National Assembly, in relation to the exercise of sovereignty, as to the content

of the decision and the legal effects it should be capable to produce.

### **Decision and legal reasoning of the Kúria**

- [22] The Kúria stated that applications for review were not founded. The question of the initiator authenticated by the NVB, contrary to the arguments of the applicants detailed in their applications for review, is in compliance with the relevant requirements set out in the Fundamental Law and in the Referendum Act.
- [23] Article 8 of the Fundamental Law regulates the constitutional grounds and limits of a national referendum. According to Article 8 (1), the function of a referendum is to oblige the National Assembly to adopt a decision to that effect, defined by the question proposed for referendum. This direct form of the exercise of power through referendum is exceptional; therefore, the exercise of the right to referendum is subject to a number of cumulative conditions.
- [24] Concerning the alleged formal requirements, the Kúria cannot share the view of the second applicant, according to which the representative of the initiator was not entitled to submit the proposed question for referendum validly to the NVB. Article 8 (1) of the Fundamental Law, as well as section 5 of the Referendum Act, specifically empower the Government to initiate a referendum. Because of its collective operational manner, the right of the Government to initiate a referendum set out in the Referendum Act can only be exercised through the action of its representative. Section 19/B of Government Decree 152/2014 (VI.6.) on the missions and competences of the members of Government (hereinafter: Governmental Decree) referred to by the second applicant, generally defines the mission and competence of the Prime Minister's Chief of Staff in relation to the procedure for honours. This provision does not exclusively determine his mission and competence of the Chief of Staff, further missions and competences can be found in sections 19/C to 19/D of the Government Decree. Point 3 of Decision Nr.2004/2016 of the Government on the initiation of referenda establishes clearly that the Prime Minister's Chief of Staff has responsibility for representing the Government in its initiative for the referendum at issue in the present case.
- [25] The Kúria found, in relation to the individual concern in referendum cases, that the applicants could lawfully request the judicial review of the NVB decision. According to section 1 (1) of the Referendum Act, the general provisions of the Electoral Act shall apply, including its section 222 (1) regulating the scope of persons entitled to apply for judicial review. This provision makes the submission of an application for judicial review subject to individual concern; however, it does not specify the definition of individual concern. The Kúria underlines that, in the case of a referendum, the individual concern is different than in the case of general electoral procedures. In electoral cases under the Electoral Act, litigation is mainly connected to the electoral procedural rules, and there is a procedural and an appeal stage before judicial review. This defines the scope of persons being affected, which renders it possible to apply section 222 (1) of the Electoral Act by following a narrower interpretation. However, referendum cases are different in nature; in these cases, it is very often that constitutional contexts prevail directly without large procedural antecedents. The nature

of the question proposed for referendum defines individual concern, which may be derived from a substantive assessment. The question proposed by the initiator, as far as its content is concerned, no doubt affects all voters and Hungarian residents; therefore, the argument that the conditions for a review are not met is incorrect.

- [26] The Kúria furthermore stresses that, in referendum cases, the eventual lack of individual concern cannot be established with regard to the type of decision rendered in a review procedure, since the Referendum Act does not allow for rejection without any examination as to the merits or rejection due to the lack of capacity to sue.
- [27] Concerning individual concern, the findings in Decision No. 28/2015. (IX.24.) of the Constitutional Court have to be taken into consideration, where the Constitutional Court interpreted individual concern broadly, with regard to the fundamental right and the relevant legal relationships affected by the question for referendum. In the context of this decision, the Kúria also stresses that the persons submitting the constitutional complaint did not participate in earlier stages of the procedure, including judicial review; nevertheless, their individual concern in relation to the question for referendum has been established.
- [28] The limit for the exercise of the right to referendum is the obligation arising from international treaties, pursuant to Article 8 (3) d) of the Fundamental Law. On the grounds of the pleas within the applications for review, the Kúria examined whether EU law constitutes an international treaty for the purposes of the referendum. The first and the second applicant argued that the form of an international treaty cannot be waived in the case of the Accession Treaty. All of the applicants argued that the issue of referendum may result in such decision-making, such as the decision to leave the EU, or the amendment of the clause on transfer of competence under Article e of the Fundamental Law following the intention of the initiator, which either does not meet the clarity requirement, or involves issues that are prohibited for referendum, according to Article 8 (3) a) of the Fundamental Law, such as proposing the amendment of the Fundamental Law.
- [29] The Kúria does not agree with the argument, which examines the possibility of holding a referendum exclusively in the light of the decision-making, organisational and operational order of the EU, and concludes, with reference to Article 8 (3) d) of the Fundamental Law, that holding a referendum is excluded, since it would affect the operation of the EU. Concerning the authentication of the question, in the light of the above, the EU context has relevance as far as it may be examined or interpreted according to section 11 of the Referendum Act. The EU context of the question authenticated by the NVB result partially from the international nature of EU law, and partially from the provisions of the Fundamental Law relating to the EU, especially Article E. The question proposed for referendum is not contrary to Article E (2), since this provision of the Fundamental Law specifies that Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences jointly with other Member States, through the institutions of the European Union. The question, in the light of the Hungarian

regulations on referendum, is not designed to amend the Accession Treaty, or to impose additional conditions to the implementation by Hungary of decisions adopted by EU institutions; as such, it does not raise the question of the breach of Article 8 (2) d) of the Fundamental Law. Accepting the position of the applicants explained in this context would mean that placing non-Hungarian citizens in Hungary – however the legal status may be – would fall within the exclusive competence of the EU, and so not even the joint exercise of competences mentioned in Article E (2) of the Fundamental Law would prevail.

- [30] Ruling on the dispute concerning the authentication of the question can only be given on the basis of the provisions set out in the Fundamental Law and the Referendum Act; a direct application of EU law or its interpretation is not involved. Because of this, the Kúria will react only on the EU legal context invoked in the applications for review by fulfilling its duty to state reasons. With regard to that, the Kúria states, in relation to the question proposed for referendum, that the question authenticated by the NVB concerns the implementation of measures set out in the Council Decision, which belong to secondary EU law. The obligations arising from EU law, such as from the Council Decision as a secondary legal source, and those arising from international treaties cannot be compared. According to the case law of the CJEU, the legal order of the EU is a special and specific one. In that sense, ‘by contrast to ordinary international treaties, the EEC Treaty has created its own legal system which, (...) real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves’ (*Costa v. E.N.E.L*, C-6/64, EU:C:1964:66).
- [31] The special nature of EU law is also supported by the case law of the Constitutional Court. The Constitutional Court, in its Decision No. 143/2010. (VII.14.) carried out an ex post examination of the unconstitutionality of Act CLXVIII of 2007 ratifying the Lisbon Treaty (hereinafter: Lisbon Treaty Act). The Constitutional Court stressed in this Decision that, according to its Decision No. 1053/E/2005, for the purposes of the Constitutional Court competencies, the Founding Treaties of the EC and their amendments are not international treaties (ABH 2006, 1824. 1828.). Pursuant to Article E and Q of the Fundamental Law, the Hungarian constitutional case law attaches different legal effects to EU law and to international law. In its Decision No. 22/2012. (V.11.) on the interpretation of Article E (2) and (4) of the Fundamental Law, the Constitutional Court stated that the term ‘with a view to participating in the European Union as a Member State and on the basis of an international treaty’ is classified differently as an international treaty relating to the EU. For this classification, it is not necessary that the treaty reflects on itself as part of the EU law, or that it belongs to the Founding Treaties. In this respect, the parliamentary empowerment given in Article E (4) of the Fundamental Law to recognise the binding effect of a formally international treaty is different from the rectification pursuant to Article Q (3) of the Fundamental Law. This is also shown by the requirement of a guarantee in Article E (2), which requires the votes of two-thirds of the members of the National Assembly for the empowerment under Article E. In this context, Decision No. 22/2012. (V.11.) of the

Constitutional Court deemed the Treaty on the Stability, Coordination and Governance in the Economic and Monetary Union as an international treaty falling within the scope of Article E of the Fundamental Law, and not within Article Q.

- [32] With regard to the issues exempted from referendum in relation to international treaties under Article 8 (3) d) of the Fundamental Law, the involvement of an obligation arising from an international treaty shall be evaluated differently in relation to the question for referendum if it concerns an international treaty ‘with a view to participating in the European Union as a Member State and on the basis of an in’ under Article E of the Fundamental Law and in relation to an international treaty under Article Q. Through the transfer of power under Article E, the member state, limiting its own sovereignty, allows the creation of a body of law which binds both its nationals and itself. The nature of a guarantee of this legal institution is revealed by the stricter conditions for ratification, as well as the terminology set out in Article Q of the Fundamental Law in relation to the recognition of the binding effect. Therefore, legally speaking, it is incorrect to evaluate both bilateral international treaties and EU treaties as limits, with equal content, for referendum cases.
- [33] According to the Kúria, on the basis of the described distinction, the prohibition under Article 8 (3) d) of the Fundamental Law does not apply in the present case, since the question as initiated for referendum concerns EU law under Article E of the Fundamental Law, which cannot be deemed as an international treaty under Article Q of the Fundamental Law or an obligation arising therefrom. As such the invocation of Decision No. Knk.IV.37.466/2014 of the Kúria by the first and second applicants, is not founded.
- [34] The case law of the Kúria is clear as to the statement that a question proposed for referendum which directly concerns the membership of Hungary in an international organisation or in the EU and aims especially at leaving these, constitutes such an issue, which clearly falls within the scope of prohibited issues for referendum (Knk.37.184/2012/2., Knk.37.185/2012/2., Knk.37.186/2012/2.).
- [35] The Kúria explains that the subject-matter of the present review procedure is to examine whether or not the question submitted for an initiative of referendum may be authenticated. The analysis as to whether, in relation to the decision-making rules of procedure of the EU, the Council Decision involves the modification of the allocation of powers between the member states and EU, or the transfer of responsibilities from the national level, is not an issue of the present review procedure, but the subject of the procedure initiated before the CJEU from Hungary as a member state of the EU (Hungary v. Council, C-647/15). Because of this, the conclusions of the applicants, according to which in the case of a valid and conclusive referendum the National Assembly would be obliged to adopt an individual or a normative act, which would cause the modification of the decision-making procedure of the EU beyond the intention of the Council Decision, the amendment of the primary law frame of the EU and the clause on the transfer of powers under Article E of the Fundamental Law, or would lead to leaving the EU, are incorrect.

- [36] In relation to this argument, all of the applicants take the position in their applications for review that, according to Article 8 (2) of the Fundamental Law, a referendum may be held only on questions that fall within the mission and competence of the National Assembly. On the grounds of the alleged modification of the decision-making process between the EU and the Member States, all of the applicants invoked that argument. The first applicant clearly invoked the lack of competence. In his view, the scope of the Council Decision does not belong to those exceptional cases where the member state parliaments could exercise their right of veto against a decision of the EU. He stressed that the National Assembly has at most competence to recognise *ex post* the binding effect of international treaties on the grounds of Article E (4) of the Fundamental Law. The third applicant also invoked the lack of competence of the National Assembly.
- [37] The Kúria notes in this regard that a question affecting the mission and competence of the National Assembly cannot be an issue prohibited for referendum. To that effect, it can clearly be stated that the subject-matter of the Council Decision is that the asylum procedure under Act LXXX of 2007 on the right to asylum (hereinafter: Asylum Act) in the case of non-Hungarian citizens in question shall be conducted, contrary to the provisions of Regulation (EU) 604/2013, in the member state determined in the Council Decision. According to section 95 (2) of the Asylum Act, its provisions serve compatibility with, *inter alia*, the provisions of Regulation (EU) 604/2013. Moreover, the conduct of asylum procedures of non-Hungarian citizens constitutes a legislative matter, on the grounds of the fundamental rights of the affected persons, which could be settled by the legislator within the framework of the law.
- [38] Concerning the competence of the National Assembly, Hungarian law does not specify the elements of the legislative competence of the National Assembly, nor gives an exhaustive list on the matters of mandatory legislation. The public law framework of legislation is established in Article T of the Fundamental Law and, concerning the constitutional tasks of the National Assembly, Article 6 establishes further provisions. Within this public law system – with regard to the interpretation given by the Constitutional Court in its Decision No. 46/2006 (X.5.) – it can be clearly stated that the legislative competence of the National Assembly shall be seen as open to any social relationship. Thus, within the frame of the Fundamental Law, the National Assembly may draw, within the scope of legislation, any social condition which calls for regulation, and it follows from this that legislative matters, with regard to which other legislation is specified, may also be drawn under its scope of regulation. The assumption according to which the possibility to hold a referendum is excluded with reference to the competence of the Government is therefore incorrect. The Kúria refers in this sense to its Decision No. Knk.IV.37.807/2012/2, in which it underlined that, as to falling within the scope of Article 8 (2) of the Fundamental Law, the Kúria has to evaluate on a case-by-case basis whether the question at issue falls within the competence of the National Assembly.
- [39] This question has other aspects concerning the competence of the National Assembly. The situation in question is not regulated by Hungarian law; only the provisions of national and EU law on asylum and on the right of residence of third country nationals

are liable to be considered as indirect regulations. The notion of ‘settlement’ is new as to the competence of the National Assembly, therefore this legislative matter calls for definition of the content. Determining in what legal relationship or status and for what period third country nationals may reside in the territory of the country is a regulatory matter which affects fundamental rights and, as such, is clearly a legislative matter whether all stages of the exhaustive rules require legislative provisions or not.

- [40] According to section 9 (1) of the Referendum Act, the requirement of clarity applies to a question for referendum, which was originally developed by the Constitutional Court. With regard to the voters, this requirement means that it shall be possible to respond clearly to the question, so that the Parliament may decide unequivocally, on the basis of the result of the referendum, whether it is obliged to take legislative action and, if so, with what content. All of the applicants argued in their applications for review that the question authenticated by the NVB did not meet the requirements of clarity, and several of the applicants referred to the notion of ‘settlement’ not being a legal term and so its interpretation was not clear. Moreover, the applicants also mentioned that the question contains such misleading elements which make it impossible to meet this requirement. The term ‘without the consent’, and the undetermined scope of affected persons were evaluated as these kinds of elements; furthermore, they explained that the asylum procedure, to be conducted pursuant to the Council Decision, allowing a derogation from the EU general rule, cannot be evaluated as ‘settlement’.
- [41] According to the case law of the Kúria, the requirement of clarity for the benefit of the voters means that the question is clear, can be interpreted in only one way, is in compliance with Hungarian grammatical rules, is understandable for the voters and the substance and importance of the question is discernible; hence the voters may cast their votes and thereby exercise their rights consciously and thoughtfully. The right to referendum can only prevail formally, without a deliberate decision, if the question for referendum cannot be interpreted clearly (Kvk.37.300/2012/2., Knk.IV.37.356/2015/2., Knk.IV.37.458/2015/3.). On the basis of Decision No. Knk.IV.37.457/2015/3, a referendum is not legitimate if the voter is not clearly aware of what he is voting for.
- [42] The Kúria notes that, depending on the complexity of the given field of law or regulatory system, the wording and the legal accuracy of the question for referendum may be different. According to the Kúria the term ‘settlement’ can be considered as defining in a sufficiently precise way that the long-term placement of the persons falling under the Council Decision would occur in Hungary. In this regard, beside legal accuracy, it plays at least as important a role, in relation to the measures in question, in enabling the voters to clearly understand the substance of the question, which is ensured through using the term ‘settlement’.
- [43] Concerning the clarity of the question proposed for referendum, the Fundamental Law and the Referendum Act establish two sets of requirements. On the one hand, the question shall use notions that are precise and understandable from a legal point of view; on the other hand, it shall be understandable and unequivocal for the voters. There must be a balance between these two requirements, which can be a challenging task for the

applicant with regard to some questions.

- [44] The question authenticated by the NVB met these legal requirements. The question is sufficiently precise; the terms used allow the organisations involved to be identified and allow for the voters to respond. The term ‘European Union’ covers a well-known notion of a body, which is in this sense a generic term for a body under which the competent decision-making body of the EU shall be understood. Hungarian law and international law do not define the content of the term ‘settlement’; it is a notion relating to a new social phenomenon, the legal definition of which shall depend primarily on the path taken by the relevant EU and domestic regulation. However, for the purposes of the referendum, the term ‘settlement’ covers an understandable content; it represents, for the voter, a situation in which the long-term placement of a large number of non-Hungarian citizens would occur in the territory of Hungary. The initiator of the referendum is asking for the opinion of voters concerning this situation, therefore the use of the term ‘settlement’ cannot be criticised.
- [45] The Kúria also notes that Act CLXXV of 2015 on the action against the mandatory settlement quota in order to protect Hungary and Europe already establishes the term ‘settlement’, which means that the first presentation of this notion in substantive law has already occurred.
- [46] Beside clarity for the voters, legislative clarity plays just as important a role. According to this requirement, on the basis of the question for referendum, the legislator must be able to decide whether or not it is obliged to take legislative action and, if so, with what content (Knk.IV.37.338/2015/3.). In the view of the first applicant, legislative clarity is not present, since it is not clear whether, in the event of a valid and conclusive referendum, the National Assembly would be obliged to take legislative action, or to adopt an individual or normative act. The fourth, fifth and sixth applicants conclude in their joint applications for review that the Parliament can only adopt a decision in compliance with the valid and conclusive referendum if it decides to leave the EU.
- [47] Concerning the legislative clarity, the Kúria refers to its findings developed in relation to the obligations arising from international treaties. In the light of these, it cannot be stated that, in the event of a valid and conclusive referendum, the National Assembly would be obliged to adopt an individual or a normative act with which it should decide whether or not to leave the EU. The Kúria maintains its position, according to which a question proposed for referendum which directly concerns the membership of Hungary in an international organisation or in the EU constitutes such an issue which clearly falls within the scope of prohibited issues for referendum.
- [48] In this aspect, the present initiative of referendum concerns a specific and existing law, namely the Asylum Act, completed by the relevant EU provisions. The Kúria underlines that the category of legislative clarity can be satisfied not only by legislative steps, but also through adoption of public law normative instruments under section 23 of Act CXXX of 2010 on legislation.

### **Closing wording**

- [49] The Kúria, on the grounds of rejecting the applications and upholding the decision, orders that each applicant shall pay litigation fees in compliance with section 43 (7) of Act XCIII of 1990 on fees. The procedure fees owed by the third applicant are paid by the State according to section 5 of Act XCIII of 1990.
- [50] The Kúria orders the publication of this decision in Magyar Közlöny (Hungarian Official Gazette) in compliance with section 30 (3) of the Referendum Act.
- [51] No judicial remedy shall lie against the order of the Kúria, according to section 30 (1) of the Referendum Act.

Budapest, 3rd May 2016

**Dr. Tibor Kalas (signed), President of the Chamber, Judge Rapporteur, Dr. György Kozma (signed), Judge, Dr. Erzsébet Mudráné Láng (signed), Judge**

In witness whereof:

officer of the court