

Court of Justice of the European Union (Grand Chamber), C-107/23 PPU (Effect of the decisions of a constitutional court), ECLI:EU:C:2023:606, in connection with Romanian Constitutional Court, Decision no. 297/26 April 2018, Decision no. 358/26 May 2022, Decision no. 67/2022 of the High Court of Cassation and Justice of Romania

Member State

 Romania

Topic

Rule of law, independence of the judiciary

Sector

Disciplinary Procedures, Preliminary Reference Procedure, Judicial Cooperation, Role of higher courts, Primary of EU law

Deciding Court Original Language

Curtea de Justiție a Uniunii Europene / Curtea Constituțională a României

Deciding Court English translation

Court of Justice of the European Union / Romanian Constitutional Court

Registration N

C-107/23 PPU

Date Decision

24.07.2023

ECLI (if available)

ECLI:EU:C: 2023:606

National Follow Up Of (when relevant)

The Judgment of the Court in the Case C-107/23 PPU represents the response to the request

made by a national ordinary court, Curtea de Apel Brasov (Court of Appeal, Brasov, Romania) as follow-up of the Decision no. 297/26.04.2018 and Decision no. 358/26.05.2022 of the Romanian Constitutional Court and Decision no. 67/2022 of the High Court of Cassation and Justice of Romania, which clarify the way it should be judged a national case as regards the criminal limitation period for criminal liability especially in criminal cases of crimes against financial interest of European Union

EU legal sources and CJEU jurisprudence

Article 2, Article 4(3) and the second subparagraph of Article 19(1) TEU, Article 267, Article 325(1) TFEU, the last sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 2(1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995 and annexed to the Council Act of 26 July 1995 (OJ 1995 C 316, p. 48; 'the PFI Convention'), Articles 2 and 12 of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (OJ 2017 L 198, p. 29; 'the PFI Directive'), Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56) and the principle of the primacy of EU law

Judgment of 12 January 2023, MV (Formation of a cumulative sentence), C 583/22 PPU, EU:C:2023:5, Judgment of 21 March 2023, Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices), C 100/21, EU:C:2023:229, Judgment of 21 March 2023, Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices), C 100/21, EU:C:2023:229, Judgments of 19 December 2019, Dobersberger, C 16/18, EU:C:2019:1110, and of 27 April 2023, M.D. (Ban on entering Hungary), C 528/21, EU:C:2023:341, Judgments of 31 January 2023, Puig Gordi and Others, C 158/21, EU:C:2023:57, Euro Box Promotion and Others, C 357/19, C 379/19, C 547/19, C 811/19 and C 840/19, EU:C:2021:1034, Judgment of 5 December 2017, M.A.S. and M.B., C 42/17, EU:C:2017:936, Judgment of 26 February 2019, Rimševi?is and ECB v Latvia, C 202/18 and C 238/18, EU:C:2019:139, Judgement of March 2022, Commission v United Kingdom (Action to counter undervaluation fraud), C 213/19, EU:C:2022:167, Judgment of 2 May 2018, Scialdone, C 574/15, EU:C:2018:295, Judgments of 9 March 1978, Simmenthal, 106/77, EU:C:1978:49, of 24 June 2019, Pop?awski, C 573/17, EU:C:2019:530, and of 22 February 2022, RS (Effect of the decisions of a constitutional court), C 430/21, EU:C:2022:99, Judgment of 17 January 2019, Dzivev and Others, C 310/16, EU:C:2019:30, Judgement of 11 June 2020, Prokuratura Rejonowa w S?upsku, C 634/18, EU:C:2020:455, Judgment of 11 June 2020, Prokuratura Rejonowa w S?upsku, C 634/18, EU:C:2020:455, Judgment of 7 August 2018, Clergeau and Others, C 115/17, EU:C:2018:651, Judgment of 8 September 2015, Taricco and Others, C 105/14, EU:C:2015:555, Judgment of 26 February 2013, Åkerberg Fransson, C 617/10, EU:C:2013:105, judgments of 28 March 2017, Rosneft, C 72/15, EU:C:2017:236, and of 16 February 2022, Hungary v Parliament and Council, C 156/21, EU:C:2022:97, Judgment of 18 May 2021, Asocia?ia 'Forumul Judec?torilor din Rom?nia' and Others, C 83/19, C 127/19, C 195/19, C 291/19, C 355/19 and C 397/19, EU:C:2021:393, Judgments of 3 February 1977, Benedetti, 52/76, EU:C:1977:16, paragraph 26, and of 22 February 2022, RS (Effect of the decisions of a constitutional court), C 430/21, EU:C:2022:99, Judgement of 13 July 2023, YP and Others (Lifting of a judge's immunity and his or her

ECtHR Jurisprudence

N/A

Subject Matter

Reference for a preliminary ruling – Protection of the financial interests of the European Union – Article 325(1) TFEU – PFI Convention – Article 2(1) – Obligation to counter fraud affecting the financial interests of the European Union by taking effective deterrent measures – Obligation to provide for criminal penalties – Value added tax (VAT) – Directive 2006/112/EC – Serious VAT fraud – Limitation period for criminal liability – Judgment of a constitutional court invalidating a national provision governing the grounds for interrupting that period – Systemic risk of impunity – Protection of fundamental rights – Article 49(1) of the Charter of Fundamental Rights of the European Union – Principle that offences and penalties must be defined by law – Requirements of foreseeability and precision of criminal law – Principle of the retroactive application of the more lenient criminal law (*lex mitior*) – Principle of legal certainty – National standard of protection of fundamental rights – Duty on the courts of a Member State to disapply judgments of the constitutional court and/or the supreme court of that Member State in the event that they are incompatible with EU law – Disciplinary liability of judges in the event of non-compliance with those judgments – Principle of the primacy of EU law

Legal issue(s)

The case deals with the Romanian court of appeal dilemma whether to comply with the case-law of the national Constitutional Court and of the High Court of Justice of Romania, or can disregard such decisions if the judge considers that these decisions are contrary to European Union law, without risking disciplinary sanction due for non-applying the decisions of the Constitutional Court and of the High Court of Justice of Romania.

Request for expedited/PPU procedures

YES. The President of the Court invited the Fourth Chamber, to consider whether it was necessary to deal the case under the urgent preliminary ruling procedure. It was established that the questions referred to as a preliminary ruling concern, *inter alia*, the interpretation of Art. 2(1) of the PFI Convention, which was drawn up based on Art. K.3 TEU. Art. K.3 TEU became Article 31 TEU, the provisions of which were reproduced in Articles 82, 83 and 85 TFEU, fall within Title V of Part Three of the TFEU so it may be dealt with under the urgent procedure. As regards the criterion relating to urgency, which is satisfied when the person concerned in the case is deprived of his/her liberty and the question as to whether he/she may continue to be held in custody depends on the outcome of the dispute in the main proceedings, in the case the appellants K.A. and S.P., were imprisoned and, their detention would be terminated if it were to decide to uphold the extraordinary appeals brought before the referring court against their convictions. Therefore, the Fourth Chamber of the Court decided to deal with the preliminary ruling under the urgent preliminary ruling procedure and to refer the present case back to the Court for allocation to the Grand Chamber.

Interim Relief

National Law Sources

Article 15(2), art. 147 (1) and (4) of the Romanian Constitution, art. 9 of Law No 241/2005 on preventing and combating tax evasion, art. 5 (10), art. 154 (1) letter b), art. 155 (1) of the New Criminal Code entered into force as of 1 February 2014 by Law no. 286/2009, Article 426 of Law No 135/2010 on the Code of Criminal Procedure as of 1 July 2010 applicable as of 1 February 2014, Article 99, art. 271, art. 272 (1) and (2) of Law No 303/2004 on the rules governing judges and prosecutors

Facts of the case

The request of preliminary ruling regarding the interpretation of several provisions of European legislation was made in the context of extraordinary appeals brought by C.I., C.O., K.A., L.N. and S.P. with the object of annulling a final decision by which they were sentenced to prison terms for acts qualified as tax evasion and forming a group organized crime. In the course of 2010, the appellants in the main litigation omitted, in whole or in part, the highlighting, in their accounting documents, of the commercial operations carried out and of the revenues obtained from the sale of diesel fuel purchased under the suspensive regime of excise duty payment to internal beneficiaries, prejudicing in this way the state budget, including with respect to value added tax (VAT) and diesel excises. By criminal decision no. 285/AP of June 30, 2020, the Braşov Court of Appeal (Romania), which is the referring court, ordered the conviction or maintenance of the conviction of the appellants in the main litigation, pronounced by the Braşov Court (Romania) by criminal sentence no. 38/S of March 13, 2018, on prison terms for committing the crime of tax evasion, as well as the crime of forming an organized criminal group. The appellants in the main proceedings were also ordered to pay tax losses, including sums due by way of VAT, totaling 13 964 482 Romanian lei (RON) (approximately EUR 3 240 000). Following Decision no. 297/2018 of the Romanian Constitutional Court were invalidated the national provision governing the grounds for interrupting the limitation period for criminal liability and the Decision no 358/2022 of the Romanian Court validated the first one. So, during 2018 – 2022 no interruption of the period for criminal liability applied. In 2022, the Criminal Code was amended providing that the limitation period for criminal liability is interrupted by any procedural act which must be notified to the suspect or accused person (art. 155 (1)). By the judgment No 67/2022 of 25 October 2022, published on 28 November 2022, the High Court of Cassation and Justice stated that, under Romanian law, the rules relating to the interruption of the limitation period for criminal liability fall within the scope of substantive criminal law and that, consequently, they are subject to the principle of non-retroactivity of criminal law, without prejudice to the principle of the retroactive application of the more lenient criminal law (*lex mitior*), as guaranteed, *inter alia*, in Article 15(2) of the Romanian Constitution. Consequently, the High Court of Cassation and Justice of Romania held that a final conviction may, in principle, be the subject of an extraordinary appeal based on the effects of judgments No 297/2018 and No 358/2022 of the (Constitutional Court as a more lenient criminal law (*lex mitior*). That possibility is, however, precluded where the appeal court has already examined the issue of the limitation period for criminal liability in the course of the proceedings which gave rise to that final conviction. Following and based on these decisions, before the Court of Appeal, Braşov was submitted extraordinary appeals by appellant of a national case seeking the annulment of their criminal convictions, on the ground that they were convicted even though there was evidence of the existence of a ground for discontinuing the criminal proceedings, namely the expiry of the limitation period for their criminal liability. In support of their action, those appellants claim, on the basis of the principle of the retroactive application of the more lenient criminal law (*lex mitior*), that their criminal liability is time-barred following judgments

No 297/2018 and No 358/2022 of the Romanian Constitutional Court. The Court of Appeal, Braşov decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling as regards the application of the Constitution Court Decisions and the High Court Decision if they jeopardize the primary of the EU and the risk of the judge of none applying the decisions from a disciplinary point of view. The Court of Justice of the European Union has ruled, in the decision, that the national judge may disregard a decision of the Constitutional Court (binding under art. 147 para. (4) of the Romanian Constitution), without the judge being subject to any disciplinary consequences, if the judge considers that a decision of the Constitutional Court is contrary to European Union law. The same reasoning is to apply in respect of judgments delivered by the High Court of Cassation and Justice if they consider them to be contrary to European Union law. Also, according to the Court of Justice, the principle of the supremacy of Union law must be interpreted as precluding a national rule or practice according to which the national courts of a Member State are bound by the decisions of the constitutional court as well as by those of the supreme court of that Member State and cannot, for that reason and at the risk of incurring the disciplinary liability of the judges concerned, disapply of their own motion the case-law resulting from those decisions, even if they consider, in the light of a judgment of the Court, that that case-law is contrary to provisions of European Union law which have direct effect.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

For the first and second questions - Pursuant to judgments No 297/2018 and No 358/2022 of the Romanian Constitutional Court during the period from 25 June 2018, the date of publication of judgment No 297/2018, to 30 May 2022, the date on which Government Emergency Ordinance No 71/2022 entered into force, Romanian law did not provide for any ground allowing the limitation period for criminal liability to be interrupted, and that, secondly, according to judgment No 67/2022 of the Romanian High Court of Cassation and Justice, that constitutional case-law can be invoked as a more lenient criminal law (*lex mitior*), including to challenge final convictions, thus as the Romanian law did not provide for any ground for interrupting the limitation period for criminal liability, this would have the result that the 10-year limitation period laid down for the offences at issue in the main proceedings would have expired before the conviction of the appellants in the main proceedings became final, which would entail the discontinuation of the criminal proceedings and would render impossible the conviction. It may be inferred from the foregoing that the legal situation resulting from the application of judgments No 297/2018 and No 358/2022 of the Romanian Constitutional Court and of judgment No 67/2022 of the Romanian High Court of Cassation and Justice entails a systemic risk of offences of serious fraud affecting the financial interests of the European Union going unpunished, in particular in cases whose complexity calls for a longer investigation by the criminal authorities. After analysing the national provisions, the Court concludes that it is apparent from the order for reference that the application of that first national standard of protection is liable to exacerbate the systemic risk that serious fraud affecting the financial interests of the European Union will escape any criminal penalty, in breach of Article 325(1) TFEU and Article 2(1) of the PFI Convention. In the view of the need to weigh the latter national standard of protection against the provisions of Article 325(1) TFEU and Article 2(1) of the PFI Convention, the application of that standard by a national court in order to call into question the interruption of the limitation period for criminal liability by procedural acts which took place before 25 June 2018, the date of publication of judgment No 297/2018 of the Romanian Constitutional Court, must be regarded as being liable to compromise the primacy, unity and effectiveness of EU law, within the meaning of the case-law referred to in paragraph 110 above (see, to that effect, judgment of 21 December 2021, *Euro Box Promotion and Others*, C 357/19, C

379/19, C 547/19, C 811/19 and C 840/19, EU:C:2021:1034, paragraph 212). Consequently, it must be held that the national courts cannot, in the context of judicial proceedings seeking to impose criminal penalties for serious fraud offences affecting the financial interests of the European Union, apply the national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (*lex mitior*), in order to call into question the interruption of the limitation period for criminal liability by procedural acts which took place before 25 June 2018, the date of publication of judgment No 297/2018 of the Romanian Constitutional Court. Therefore, the answer to the first and second questions is that Article 325(1) TFEU and Article 2(1) of the PFI Convention must be interpreted as meaning that the courts of a Member State are not required to disapply the judgments of the constitutional court of that Member State invalidating the national legislative provision governing the grounds for interrupting the limitation period in criminal matters as a result of a breach of the principle that offences and penalties must be defined by law, as protected under national law, as to its requirements relating to the foreseeability and precision of criminal law, even if, as a consequence of those judgments, a considerable number of criminal cases, including cases relating to offences of serious fraud affecting the financial interests of the European Union, will be discontinued because of the expiry of the limitation period for criminal liability. However, those provisions of EU law must be interpreted as meaning that the courts of that Member State are required to disapply a national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (*lex mitior*) which makes it possible, including in the context of appeals brought against final judgments, to call into question the interruption of the limitation period for criminal liability in such cases by procedural acts which took place before such a finding of invalidity.

The third question - In accordance with the Court's settled case-law, the principle of the primacy of EU law establishes the pre-eminence of EU law over the law of the Member States. That principle therefore requires all Member State bodies to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States (judgment of 18 May 2021, *Asocia?ia 'Forumul Judec?torilor din Rom?nia' and Others*, C 83/19, C 127/19, C 195/19, C 291/19, C 355/19 and C 397/19, EU:C:2021:393, paragraph 244 and the case-law cited). As regards, more specifically, the disciplinary liability that judges may incur, under the legislation of a Member State, in the event of failure to comply with the decisions of the constitutional court and of the supreme court of that Member State, the fact that a national court performs the tasks entrusted to it by the Treaties and fulfils its obligations under the Treaties, by giving effect – in accordance with the principle of the primacy of EU law – to a provision of EU law such as Article 325(1) TFEU or Article 2(1) of the PFI Convention and to the interpretation given to it by the Court, cannot, by definition, be regarded as a disciplinary offence on the part of judges sitting in that court without that provision and that principle being infringed ipso facto (see, to that effect, judgments of 21 December 2021, *Euro Box Promotion and Others*, C 357/19, C 379/19, C 547/19, C 811/19 and C 840/19, EU:C:2021:1034, paragraph 260, and of 13 July 2023, *YP and Others (Lifting of a judge's immunity and his or her suspension from duties)*, C 615/20 and C 671/20, EU:C:2023:562, paragraph 85 and the case-law cited). It follows from the foregoing that the principle of primacy of EU law must be interpreted as precluding national legislation or a national practice under which the ordinary national courts of a Member State are bound by the decisions of the constitutional court and by those of the supreme court of that Member State and cannot, for that reason and at the risk of incurring the disciplinary liability of the judges concerned, disapply of their own motion the case-law resulting from those decisions, even if they consider, in the light of a judgment of the Court, that that case-law is contrary to provisions of EU law having direct effect.

Relation of the case to the EU Charter

Yes, the Charter was referred to, according to the national judge as a legally binding parameter, meanwhile in the CJEU judgment; it was used to support reasoning. Thus, although Article 49 (1) of the Charter was relied on by the referring court, the CJEU considered that the obligation for national courts to disapply judgments No 297/2018 and No 358/2022 of the *Curtea Constitu?ional? (Constitutional Court)* and judgment No 67/2022 of the *Înalta Curte de Casa?ie ?i Justi?ie (High Court of Cassation and Justice)* is not such as to undermine either the principle of foreseeability, precision and non-retroactivity of offences and penalties or the principle of the retroactive application of the more lenient criminal law (*lex mitior*), as guaranteed in Article 49(1) of the Charter. Also, in the case, the court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by EU law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (judgments of 26 February 2013, *Åkerberg Fransson*, C 617/10, EU:C:2013:105, paragraph 29; of 5 December 2017, *M.A.S. and M.B.*, C 42/17, EU:C:2017:936, paragraph 47; and of 21 December 2021, *Euro Box Promotion and Others*, C 357/19, C 379/19, C 547/19, C 811/19 and C 840/19, EU:C:2021:1034, paragraph 211).

Relation between the EU Charter and ECHR

The ECHR was not referred in this case

Use of Judicial Interaction technique(s)

The case used preliminary reference, consistent interpretation with EU law of the national provisions towards the European provisions by the national referring courts, disapplication of national law in favour of EU law by the national High Court of Cassation and Justice, Romania, preserving the efficiency of the judicial cooperation mechanism through art. 267 TFEU

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

By a communication sent to the Court on 24 March 2023, the national referring court referred to several judgements, delivered between 15 December 2022 and 8 March 2023, by which the Court of Appeal, Bucharest, Romania and the High Court of Cassation and Justice upheld extraordinary appeals, on the basis of the expiry of the limitation period for criminal liability of the persons concerned, so following the two judgments No 297/2018 and No 358/2022 of the Romanian Constitutional Court and of judgment No 67/2022 of the Romanian High Court of Cassation and Justice.

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

The national referring court invokes the two judgements No 297/2018 and No 358/2022 of the Romanian Constitutional Court and of judgment No 67/2022 of the Romanian High Court of Cassation and Justice which seem to lead a possible breach of EU law and the fact that the Romanian law provides a disciplinary liability of judges in the event of non-compliance with those judgments, but on the other hand there is a duty on the courts of a Member State to disapply judgments of the constitutional court and/or the supreme court of that Member State in the event that they are incompatible with EU law, therefore the national referring court request for a preliminary ruling in the case.

Strategic use of judicial interaction technique (purpose aimed by the national court)

The national referring court most probably aimed to solve a conflict of the national norms with the European norms, in order to make sure that by its decision are observed both national and European provisions and fundamental rights.

Impact on Legislation / Policy

The interactions between courts did not trigger changes to the legislative framework. Still, an important legislative change tangential with the case was made in 2022 when it was introduced in the Romanian Criminal Code the article regarding the interruption of the criminal liability after for years of absence of such provision, which led to a non-unitary jurisprudence, and it is believed that the delay in ruling over this issue was for political reasons, because there were many cases were at the limit of prescription and it was helpful the lack of regulation. Also, as of December 2022, due to Law No 303/2022 on the rules governing judges and prosecutors) there no more in the legislation the sanction for judges for non-applying the Decisions of the Romanian Constitutional Court and of the High Court of Justice of Romania.

Notes on the national implementation of the preliminary ruling by the referring court

Yes, the outcome achieved by the national judge is consistent with the decision of the CJEU. The preliminary ruling was implemented in several national cases.

Did the national court quote case law of the CJEU/ECtHR (in particular cases not already referred to by the CJEU in its decision) or the Explanations?

The national court did not quote case law of the CJEU/ECtHR.

Did the national court quote soft law instruments, such as GRECO Reports, Venice Commission, CEPEJ Reports, or CCEJ Reports?

No, the national court did not quote soft law instruments, such as GRECO Reports, Venice Commission, CEPEJ Reports, or CCEJ Reports.

Did the national court take into account national case law on fundamental rights?

The national court did not take into account national case law on fundamental rights

If the court that issued the preliminary reference is not a last instance court, and the “follow up” was appealed before a higher court, include the information

The Decision of the Appeal Court of Brasov is the last instance court as it was submitted within an extraordinary appeal against a definitive condemnation decision.

Was there a consensus among national courts on how to implement the CJEU's preliminary ruling; and were there divergences between the judiciary and other state powers regarding the implementation of the preliminary ruling?

The CJEU preliminary ruling was considered not clear enough and left to the national court the possibility to apply the national legislation. Thus, the CJUE stated that the courts of a Member State are not required to disapply the judgments of the constitutional court of that Member State invalidating the national legislative provision governing the grounds for interrupting the limitation period in criminal matters, as a result of a breach of the principle that offences and penalties must be defined by law, as protected under national law, as to its requirements relating to the foreseeability and precision of criminal law, even if, as a consequence of those judgments, a considerable number of criminal cases, including cases relating to offences of serious fraud affecting the financial interests of the European Union, will be discontinued because of the expiry of the limitation period for criminal liability. However, those provisions of EU law must be interpreted as meaning that the courts of that Member State are required to disapply a national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (*lex mitior*) which makes it possible, including in the context of appeals brought against final judgments, to call into question the interruption of the limitation period for criminal liability in such cases by procedural acts which took place before such a finding of invalidity.

The state powers did not interfere as regards the implementation of the preliminary ruling, observing the independence of justice, still the Romanian Court of Justice gave its own interpretation of the Decision C-107/23.

Impact on national case law from the same Member State or other Member States

N/A

Connected national caselaw / templates

Decision no. 450/07.09.2023 of the High Cassation and Justice of Romania, Decision 91/12.12.2023 of the High Cassation and Justice of Romania, Decision no. 836/12.12.2023 of the High Cassation and Justice of Romania, Decision no. 558/03.10.2023, Decision no. 626/29.09.2023 of the High Cassation and Justice of Romania.

Other

N/A

(Link to) full text

<https://curia.europa.eu/juris/document/document.jsf?jsessionid=097B2EAE385151C11EC6F0AA06D8DFE>

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History of the case: (please note the chronological order of the summarised/referred national judgments.)

N/A
