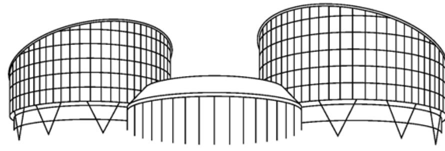

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF BJARKI H. DIEGO v. ICELAND

(Application no. 30965/17)

JUDGMENT

Art 6 § 1 (criminal) • Impartial and independent tribunal • Conviction of applicant, director within a bank, of bank-collapse related offences • Losses sustained in that and another bank's collapse by one of the five judges on the Supreme Court's panel, not sufficient to raise doubts as to his objective impartiality
Art 6 § 1 (criminal) and Art 6 § 3 (a) and (c) • Fair hearing • Existence of a "criminal charge" against the applicant at the time of his questioning as a witness by virtue of him already being considered a suspect • Failure to inform applicant of charges against him and provide him with legal assistance during that interview in relation, *inter alia*, to the investigation ultimately resulting in his indictment and conviction • Overall fairness of criminal proceedings irretrievably prejudiced

STRASBOURG

15 March 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Bjarki H. Diego v. Iceland,

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

Georges Ravarani, *President,*
Robert Spano,
María Elósegui,
Darian Pavli,
Peeter Roosma,
Andreas Zünd,
Frédéric Krenc, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 30965/17) against the Republic of Iceland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Icelandic national, Mr Bjarki H. Diego (“the applicant”), on 5 April 2017;

the decision to give notice to the Icelandic Government (“the Government”) of the complaints concerning the lack of an independent and impartial tribunal and the manner in which the applicant was interviewed during the investigation, and to declare the remainder of the application inadmissible;

the parties’ observations;

Having deliberated in private on 22 February 2022,

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

INTRODUCTION

1. The case concerns the applicant’s complaint that his indictment and conviction for financial offences following the financial crisis of 2008 entailed a violation of his right to a fair trial.

THE FACTS

2. The applicant was born in 1968 and lives in Reykjavik. He was represented before the Court by Mr Þórir Júlíusson, a lawyer practising in Reykjavik.

3. The Government were represented by their Agent, Mr Einar Karl Hallvarðsson, State Attorney General.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

BACKGROUND TO THE CASE

5. In the autumn of 2008, the global liquidity crisis affected the Icelandic banking sector. From 7 to 9 October 2008 the Financial Supervisory Authority (*Fjármálaeftirlitið*) appointed a resolution committee for each of the three largest Icelandic banks, which took over the banks' operations. The collapse of each of the banks had major effects on the other banks left standing. One of the banks that failed was Kaupþing Bank hf. (hereinafter "Kaupþing"), which collapsed on 9 October 2008. Following these events, the office of a Special Prosecutor (hereinafter "the Special Prosecutor") was established.

6. The applicant, who is a lawyer licensed to practise before the Supreme Court of Iceland, held the positions of director of the loan division and member of the group credit committee of Kaupþing until the bank's collapse.

CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

7. By a letter of 1 October 2009, the Financial Supervisory Authority sent a complaint to the Special Prosecutor regarding alleged market manipulation of shares in Kaupþing between June 2005 and October 2008. Several investigations were subsequently launched into the trading practices of Kaupþing, during which twelve of its former employees were investigated for alleged violations of the Act on Securities Transactions in relation to several individual transactions and trading practices by Kaupþing prior to its collapse. The applicant was among those investigated.

8. In connection with the investigation of those cases, the Vesturland District Court granted the Special Prosecutor several warrants to tap all telephone calls made to and from the telephone numbers registered to or used by the applicant. In his initial request dated 9 March 2010, the Special Prosecutor cited four substantial investigations relating to Kaupþing's activities prior to its collapse: the "Al Thani", "Holt", "CLN" and "Desulo" investigations. The Special Prosecutor stated that "there is suspicion that [the applicant] took part in decisions concerning allegedly criminal conduct in connection with [Kaupþing's] activities". That assertion was mirrored in a subsequent Vesturland District Court ruling granting a warrant to tap telephone calls, and in the Special Prosecutor's subsequent requests to continue the telephone tapping. On the basis of those warrants, the applicant's telephones were tapped from 9 March to May 2010. Reports on the progress of the telephone tapping refer to the subjects of the tapping, including the applicant, as "suspects" (*sakborningar*) and refer to, *inter alia*, the applicant's conversations with others during which Desulo Trading Ltd., Mata Investment Company Ltd. and Holt Investment Group Ltd. were mentioned.

9. On 19 April 2010 the applicant was questioned in relation to the Al Thani investigation. He was ultimately not prosecuted in that case.

10. On 14 May 2010 the applicant was questioned in relation to the Holt investigation, one of the investigations referred to by the Special Prosecutor in his application for a warrant. The applicant was questioned as a witness and, as such, was notified of his obligation to testify truthfully and his right not to incriminate himself (see paragraph 21 below). He was informed that the investigation concerned suspicions of criminal behaviour on the part of the directors and employees of Kaupþing in connection with stock purchases by Holt Investment Group Ltd. and that the allegedly criminal behaviour might concern violations of the financial crimes chapter of the General Penal Code, the market manipulation provisions of the Act on Securities Transactions, the Act on Public Limited Companies and the Act on Financial Undertakings. He was not accompanied by a legal representative during the interview, nor does it appear that he was given any notification as to the right to have such a representative present.

11. On 12 November 2011 the applicant was again questioned in relation to the Holt investigation, this time as a suspect. He was accompanied by his chosen defence counsel and was notified of his right to remain silent and his obligation to testify truthfully, should he choose to answer questions. On 17 November 2011 the applicant was again questioned as a suspect.

12. On 15 March 2013 the applicant was indicted, along with several others. He was charged with seven counts of fraud committed through abuse of position (*umboðssvik*). Three counts concerned allegations of loans improperly granted to Holt Investment Group Ltd. Four counts concerned allegations of loans improperly granted to Desulo Trading Ltd. In both instances, the applicant was accused of having taken part in decisions to grant the companies in question loans from the bank, in disregard of the bank's own rules and without properly ensuring the bank's interests.

13. During the course of the subsequent proceedings before the Reykjavik District Court, the applicant submitted two requests to have the case against him dismissed, referring to the telephone tapping and the submission into evidence of transcripts of phone calls between him and two named lawyers. Both requests were dismissed by the District Court and again on appeal to the Supreme Court on the basis that the lawyers in question had not been the applicant's defence counsel and that the submission of the transcripts had therefore not violated his right to a fair trial.

14. By a judgment of 26 June 2015 the Reykjavik District Court convicted the applicant on six counts of fraud through abuse of position, but acquitted him on one of the counts concerning Holt Investment Group Ltd. He was sentenced to two and a half years' imprisonment.

15. The applicant appealed against his conviction by way of an appeal to the Supreme Court of Iceland lodged by the Director of Public Prosecutions at his request.

16. Before the Supreme Court, the applicant submitted that the case against him should be dismissed because he had been questioned as a witness on 14 May 2010 while actually being considered a suspect in the case.

17. By a judgment of 6 October 2016 the Supreme Court partly overturned the Reykjavik District Court's judgment and convicted the applicant on all seven counts of fraud through abuse of position. The Supreme Court upheld the sentence imposed by the District Court.

EMERGENCE OF NEW INFORMATION

18. On 5 December 2016 confidential information regarding the financial interests of the judges of the Supreme Court came to light in the media (see *Sigríður Elín Sigfúsdóttir v. Iceland*, no. 41382/17, §§ 13-14, 25 February 2020). A series of news reports on television, in newspapers and on the Internet disclosed that some of the judges had owned shares in the Icelandic banks before their collapse in 2008. The reports stated that the shareholdings had, at least in some cases, not been disclosed to the Committee on Judicial Functions (*nefnd um dómarastörf*). As a result of the news coverage, discussions arose about possible conflicts of interest of the judges on account of their investments in Icelandic stocks and funds, and whether the judges in question had adjudicated cases concerning the events leading up to the collapse of the banks despite such possible conflicts of interest. The applicant submitted that this was the first time he had learned about the shareholdings of a judge who had adjudicated in his case, namely Justice V.M.M.

19. It transpired from the news coverage and information later provided by the Committee on Judicial Functions that Justice V.M.M. had owned shares in Kaupþing and another bank, Landsbanki Islands hf. (hereinafter "Landsbanki") before they went bankrupt. In October 2008 Justice V.M.M. had owned thirty-six shares in Kaupþing with a nominal value of 360 Icelandic krónur (ISK – approximately 2 euros (EUR) at the time of the bank's collapse). The documents submitted indicate that their real value was approximately EUR 140 at the time (thirty-six shares with a closing price of ISK 654 per share on 3 October 2008, amounting to a total value of ISK 23,544). Furthermore, Justice V.M.M. had acquired shares in Landsbanki with a total nominal value of ISK 428,075 from 8 March to 26 September 2007. The purchase price was ISK 14,753,256, but on 3 October 2008 the shares had been valued at ISK 8,518,692 (approximately EUR 62,860). Those shares were lost when Landsbanki collapsed on 8 October 2008. Justice V.M.M. was appointed to the Supreme Court in September 2010.

RELEVANT LEGAL FRAMEWORK

20. Article 70 of the Constitution of the Republic of Iceland provides that in the determination of his or her rights and obligations or of a criminal charge

against him or her, everyone is entitled, following a fair trial and within a reasonable time, to a decision by an independent and impartial court of law.

21. The relevant provisions of the Criminal Procedure Act (*lög um meðferð sakamála*) read as follows:

Section 6

"(1) A judge, including a lay judge, shall be disqualified from sitting as judge in a case where:

...

g. there are other circumstances or conditions that may justifiably raise questions about his or her impartiality.

..."

Section 116

"(1) Anyone who has reached 15 years of age, is subject to Icelandic jurisdiction and is neither the accused nor her or his representative is obliged to appear in court as a witness to answer questions regarding the facts of a case.

..."

Section 118

"(1) A witness is entitled not to answer a question if the answer could be expected to involve a confession or an indication that the witness has committed a criminal offence, or aspects which would damage the witness's moral repute or cause the witness substantial financial loss. The same applies if an answer could be expected to have the same consequences for someone connected to the witness, as referred to in the first and second subsections of section 117.

..."

Section 122

"(1) When a witness appears before a court, the judge shall first request that the witness indicate his or her name and identity number and then determine, if necessary, whether he or she should or is obliged to testify. ... The judge shall then solemnly remind the witness of his or her obligation to answer truthfully and accurately, omitting nothing, and shall draw the attention of the witness to the criminal and moral responsibility arising from deliberate or negligent false testimony, and the fact that he or she may be required to affirm the testimony by an oath or solemn affirmation."

22. The relevant sections of the Judiciary Act and the Rules on Additional Functions of District Court and Supreme Court Justices and their Ownership in Companies and Enterprises, as in force at the material time, are set out in detail in *Sigríður Elín Sigfúsdóttir* (cited above, §§ 25-27).

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

23. The applicant complained that the participation of Justice V.M.M. in his case constituted a violation of his right to a fair trial by an independent and impartial tribunal as provided in Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ..."

A. Admissibility

24. The Government submitted that the complaint was inadmissible as manifestly ill-founded.

25. The applicant disagreed.

26. The Court finds that this complaint is not manifestly ill-founded. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

27. The applicant contended that he had had an objective fear that Justice V.M.M. lacked the requisite impartiality to hear his case on account of his holdings in Kaupþing, combined with his substantial holdings in Landsbanki. In that connection, the applicant submitted that all three of the major Icelandic banks had collapsed within a three-day period in a series of events which had been publicly regarded as a collective collapse of the banks; the Supreme Court itself had referred in many of its judgments to the collapse of the banks in autumn 2008, without any distinction between the banks. The applicant argued that Justice V.M.M.'s financial holdings, which had led the Court to find a violation on account of a lack of impartiality in *Sigríður Elín Sigfúsdóttir* (cited above), should therefore likewise have been considered to render him insufficiently impartial to sit on the bench in the applicant's case.

28. The Government submitted that the applicant could not have objectively harboured doubts as to Justice V.M.M.'s impartiality in respect of his case, as the latter's financial interests in Kaupþing had been minimal – they had not reached the ISK 3,000,000 threshold for his holdings to have been subject to the approval of the Committee on Judicial Functions – and in any event they had predated his appointment to the Supreme Court. The Government further contended that Justice V.M.M.'s holdings in other banks or related losses could not have had a bearing on the assessment of his impartiality concerning Kaupþing, as those financial interests had not been directly related to the subject matter of the applicant's case.

2. The Court's assessment

29. The Court reiterates that impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, for example, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII; *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009; and *Morice v. France* [GC], no. 29369/10, § 73, ECHR 2015).

30. In *Sigríður Elín Sigfúsdóttir*, the Court held that in order for a judge's impartiality to be called into question in such a context, the financial interests of the judge concerned had to be directly related to the subject matter of the dispute at the domestic level (see *Sigríður Elín Sigfúsdóttir*, cited above, § 53). On that basis, the Court held that Justice V.M.M.'s losses from the collapse of Landsbanki had affected his impartiality *vis-à-vis* the criminal prosecutions of former managers of that bank, but that other judges' financial losses resulting from the collapse of other banks had not affected their impartiality as regards Landsbanki prosecutions. Therefore, although considerable, Justice V.M.M.'s financial losses resulting from the collapse of Landsbanki cannot be considered to have given the applicant an objectively justified fear of a lack of impartiality in the present case (ibid.).

31. Turning to Justice V.M.M.'s holdings in Kaupþing at the time of its collapse, their value, and consequently his loss due to Kaupþing's collapse, amounted to approximately EUR 140 at the time (see paragraph 19 above). This loss was very minimal and quite far removed from the ISK 3,000,000 threshold necessary to trigger the authorisation of the Committee on Judicial Functions (compare *Sigríður Elín Sigfúsdóttir*, cited above, §§ 54-55). The Court therefore also finds that Justice V.M.M.'s financial interests in Kaupþing could not reasonably have led the applicant to call into question V.M.M.'s impartiality in deciding his case.

32. There has accordingly been no violation of Article 6 § 1 of the Convention in respect of the requirement of an independent and impartial tribunal.

ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (a) AND (c) OF THE CONVENTION

33. The applicant alleged that he had given testimony to the Special Prosecutor as a witness in the case while he was already considered a suspect,

without enjoying the rights of the defence with which he should have been provided pursuant to Article 6 § 3 (a) and (c) of the Convention, in violation of his right to a fair trial under Article 6 § 1. Article 6, in so far as relevant, reads as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by [a] tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require ...
>
> ..."

A. Admissibility

34. The Government submitted that this complaint was inadmissible, as the applicant had failed to exhaust domestic remedies. They argued that he had not raised this issue during the proceedings before the District Court and that he had insufficiently raised it before the Supreme Court, where, they contended, he had primarily relied on an issue concerning certain tapped telephone conversations in support of his request to have his case dismissed, and had only mentioned the issue of questioning as a secondary argument. The Government further submitted that the complaint was manifestly ill-founded.

35. The applicant disputed the Government's assertion and argued that he had raised this complaint before both the District Court and the Supreme Court.

36. The Court reiterates that, in order to be considered to have exhausted domestic remedies, an applicant must raise her or his complaint "at least in substance" at the domestic level, in a manner which affords the national courts the opportunity to redress the alleged breach (see, among many authorities, *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 117, 20 March 2018).

37. The Court notes that the applicant's submissions before the Supreme Court, which he also submitted to the Court along with his observations, show that he argued that his questioning as a witness in the case at a time when he had clearly been considered a suspect should in and of itself have led to the dismissal of the charges relating to the Holt case. The Court considers this sufficient for the applicant to be considered to have invoked his fair trial rights

in that regard (compare and contrast *Unseen ehf. v. Iceland* (dec.), no. 55630/15, §§ 15-20, 20 March 2018).

38. The applicant must therefore be considered to have exhausted domestic remedies concerning this complaint as required by Article 35 § 1 of the Convention. The Court further considers that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

39. The applicant submitted that there had effectively been a "criminal charge" against him at the beginning of the interview on 14 May 2010 at the latest, at which time he had not been officially notified of the charge or provided with legal assistance. The applicant argued that, owing to the presence of a "criminal charge" against him during the interview in question, the conduct of the interview had violated his rights as a suspect to remain silent, not to self-incriminate and to avail himself of legal assistance during the interview. He submitted that it was "impossible to ascertain that the violations had no effect on the final conclusion of the domestic courts to convict" him.

40. The applicant emphasised that his knowledge as a Supreme Court lawyer should not have affected the scope of the rights afforded him under the criminal limb of Article 6. He further maintained that he could not be considered to have waived his right to legal assistance despite not having requested to have a legal representative present at the interview on 14 May 2010; his legal knowledge had, on the contrary, led him to believe that he was not a suspect in the case and thus had no reason to have a legal representative present.

41. The Government submitted that there had been no "criminal charge" against the applicant until his questioning as a suspect in the case on 12 November 2011, at which time he had been notified of the charges against him and represented by legal counsel in accordance with his rights under the criminal limb of Article 6. The Government maintained that prior to that date, there had been no specific suspicion against the applicant in respect of the Holt investigation and that his questioning had been aimed at uncovering how his superiors and other employees at the bank had been involved in the transactions. Thus, the Government argued, the applicant had not been substantially affected by actions taken by the authorities as a result of a suspicion against him on 14 May 2010, when he had been questioned as a witness. Incriminating evidence against him had not been obtained by the prosecutor until some months after that interview, after which he had been given the status of suspect and represented by legal counsel in subsequent interviews.

42. Should a "criminal charge" be considered to have existed against the applicant during the interview on 14 May 2010, the Government submitted that the exceptional circumstances of the Special Prosecutor's numerous and extensive investigations into the events leading up to the 2008 financial crisis, coupled with the applicant's knowledge of the law, should have constituted "compelling reasons" for the temporary restriction on his access to a lawyer. The Government further pointed out that the applicant could have asked for legal assistance when he was questioned on 14 May 2010, as domestic law neither guaranteed nor disallowed the presence of a legal representative when a witness was questioned. Considering this and the applicant's knowledge as a Supreme Court lawyer, the Government contended that he had effectively waived his right to legal assistance. The Government maintained that, in any event, he had not made any incriminating statements during the course of the interview on 14 May 2010 or at later stages, and that his statements had not been used as evidence to support his conviction. The Government submitted that the overall fairness of the criminal proceedings against him had not therefore been affected by the manner in which the 14 May 2010 interview had been conducted.

2. *The Court's assessment*

(a) Whether there was a "criminal charge"

43. At the outset, the Court reiterates that the protection afforded by Article 6 §§ 1 and 3 (a) and (c) applies to a person subject to a "criminal charge", within the autonomous Convention meaning of that term. A "criminal charge" exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him (see *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 249, 13 September 2016, and *Simeonovi v. Bulgaria* [GC], no. 21980/04, §§ 110-11, 12 May 2017).

44. Although the applicant was not officially declared a suspect in the criminal investigation for the purposes of the 14 May 2010 interview, this is not a decisive factor to be taken into consideration by the Court when determining whether the protection of the criminal limb of Article 6 extended to the applicant at the time (see *Kalēja v. Latvia*, no. 22059/08, § 38, 5 October 2017, and the sources cited therein).

45. The Court notes that the applicant was one of eight individuals whose telephones were tapped, pursuant to warrants, for two months prior to his questioning on 14 May 2010, and that those individuals were repeatedly referred to as "suspects" in progress reports on the telephone tapping (see paragraph 8 above). The Court further notes that in the warrant requests pertaining to the applicant, the Special Prosecutor stated repeatedly, as early

as 9 March 2010, that there were suspicions that the applicant had taken part in decisions concerning allegedly criminal behaviour in the cases under investigation. Those cases included the Holt investigation, which was the subject of the 14 May 2010 interview, and which ultimately resulted in the applicant's indictment and conviction.

46. The Court appreciates that at the time, there were several ongoing investigations pertaining to Kaupþing's activities, that the investigators did not have all the required information to determine the facts and the possible culprits in each case and that ultimately the applicant was not charged in all the cases to which the Special Prosecutor had referred in his warrant requests.

47. However, as explained above, contemporaneous documentation submitted to the Court reveals that the Special Prosecutor took the action of tapping the applicant's telephones in relation to several investigations, including the ones which ultimately led to his prosecution, as a result of a suspicion that the applicant had taken part in decisions concerning allegedly criminal conduct in the matters under investigation. That is sufficient for the Court to conclude that the applicant was at that time affected by actions taken by the authorities as a result of a suspicion against him, and that therefore a "criminal charge" against him existed for the purposes of Article 6. Consequently, the applicant should have been afforded the protection of the criminal limb of that provision as of 14 May 2010 at the latest, including the specific rights afforded to the defence pursuant to Article 6 § 3.

(b) The requirements of Article 6 § 3 at the investigative stage

General principles relating to the application of Article 6 § 3

48. The requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, and therefore the complaints under paragraphs 1 and 3 of Article 6 should be examined together (see *Gäfgen v. Germany* [GC], no. 22978/05, § 169, ECHR 2010, and *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 94, 2 November 2010).

49. The general principles concerning the right to be informed of charges under Article 6 § 3 (a) of the Convention have been summarised in *Sejdovic v. Italy* ([GC], no. 56581/00, §§ 89-90, ECHR 2006-II). The general principles concerning the right of access to a lawyer under Article 6 § 3 (c) of the Convention and its relevance to the overall fairness of proceedings have been summarised in *Beuze v. Belgium* ([GC], no. 71409/10, §§ 120-50, 9 November 2018). The various factors to be taken into account when assessing the impact of procedural failings at the pre-trial stage on the overall fairness of criminal proceedings have been enumerated in *Ibrahim and Others* (cited above, § 274).

(c) Application of these principles in the present case

50. The Court notes that at the outset of the 14 May 2010 interview, the applicant was informed of the subject of the investigation and was notified of his obligation to testify truthfully and of his right not to incriminate himself. He was not, however, notified that the charges under investigation were directed at him among others, although as the Court has found above, a "charge" against him already existed at that time. There was thus a failure to inform the applicant of the charges against him at the outset, although it is undisputed that he was informed of the relevant charges later on. This failure must be assessed in the light of the more general right to a fair hearing under Article 6 § 1, and will be addressed in the assessment of the overall fairness of the proceedings (see *Sejdovic*, cited above, § 90).

51. The applicant was also not notified during the 14 May 2010 interview of his right to be accompanied by legal counsel – a right which is not explicitly provided for in domestic law in respect of those testifying as witnesses, although it is not prohibited either, as the Government submitted. The Court does not accept the Government's argument that it can be inferred from the fact that the applicant did not ask to be accompanied by legal counsel that he in effect waived his right to legal counsel during the interview, since the requirements under the Court's case-law for the waiver of Article 6 fair-trial rights were clearly not met (see *Murtazaliyeva v Russia* [GC], no. 36658/05, §§ 117-18, 18 December 2018). Thus, the Court considers that during that interview there was a failure to provide the applicant with legal assistance.

52. The Court cannot accept, moreover, that there were "compelling reasons" for the temporary restriction on the applicant's right to legal assistance. That restriction stemmed simply from the applicant's classification at that time as a witness rather than a suspect, and was as such not the result of a purposeful decision to the effect of restricting access for a specific purpose pursuant to legislation allowing for such restrictions in exceptional circumstances.

53. This situation leads the Court to apply very strict scrutiny in its assessment of the impact of this failure on the overall fairness of the proceedings (see *Simeonovi*, § 118, and *Ibrahim and Others*, §§ 265 and 273, both cited above). In the present case the Court must seek to ascertain whether the absence of a lawyer at the 14 May 2010 interview had the effect of irretrievably prejudicing the overall fairness of the criminal proceedings against the applicant (see *Simeonovi*, cited above, § 132).

54. Applying such scrutiny in accordance with the factors which its case-law has determined should be taken into account (see paragraph 49 above), the Court first notes that the applicant was not particularly vulnerable on account of his age or mental capacity. He was, moreover, not in police custody, and so could freely confer with legal counsel both before and after his interview (see *Kalēja*, cited above, § 68). The importance of access to

legal assistance for an accused in police custody has been emphasised by the Court in its case-law (see *Salduz*, cited above, § 54; *Ibrahim and Others*, cited above, § 255; and *Simeonovi*, cited above, § 112). All of these elements serve to decrease the unfairness of the delay in access to legal advice.

55. The Government submitted that the right of access to a lawyer had been less important to the applicant since he was a Supreme Court lawyer himself and should therefore have been aware of his rights. In this connection, the Court considers that although the applicant's knowledge of the law may have put him at less of a disadvantage than other suspects in a similar situation, it does not deprive him of the defence rights protected by Article 6 § 3 and does not have a significant effect on the assessment of the alleged unfairness of the proceedings.

56. The Government further submitted that the applicant had not made any incriminating statements during the course of the 14 May 2010 interview and that, although a transcript of the interview had been submitted to the court during his trial, it had not been referred to in the domestic judgments to support his conviction.

57. In its case-law, the Court has sometimes given weight to whether or not the applicant made incriminating statements in an interview during which his or her defence rights were not properly ensured; whether the interview was submitted as evidence before the domestic courts; and whether or not the applicant subsequently had the chance to retract or contest the statements (see, for example, *Ibrahim and Others*, cited above, § 274; *Akdağ v. Turkey*, no. 75460/10, §§ 67-71, 17 September 2019; and *Sitnevskiy and Chaykovskiy v. Ukraine*, nos. 48016/06 and 7817/07, § 131, 10 November 2016). In the present case, taking account of the nature of the charges levelled against the applicant in the field of complex financial offences, these elements cannot be established so clearly. The Court reiterates that the applicant was indicted for, among other things, having taken part in deciding to grant Holt Investment Group Ltd. loans from the bank, in disregard of the bank's own rules and without properly ensuring the bank's interests. The 14 May 2010 interview dealt extensively with those transactions. Thus, the applicant was asked detailed questions about the decision-making procedures within the bank by which the incriminating loan decisions had been made, and about his role in the process. The applicant answered all questions without invoking his right not to incriminate himself.

58. Importantly, the transcript of the interview was then submitted by the prosecution to the domestic courts (see, for example, *Beuze*, cited above, § 193, and *Ibrahim and Others*, cited above, §§ 307-11). The domestic courts proceeded to find the applicant guilty on the basis of his role and involvement in the decision-making, which was among the matters discussed in the interview in question, as they found the applicant, together with other persons, to have been responsible for granting the loans in question in violation of the bank's internal rules and without sufficiently guaranteeing

the bank's interests. In these circumstances and owing to the factually complex, financial nature of the charges, concerning an area of law where illegality and criminal responsibility are often not clear-cut issues, it cannot be readily determined whether or not the applicant's answers during the course of the interview constituted directly incriminating statements. The Court recalls, however, that the privilege against self-incrimination is not confined to actual confessions or to remarks which are directly incriminating; for statements to be regarded as self-incriminating it is sufficient for them to have substantially affected the accused's position (see *Beuze*, cited above, § 178). Moreover, and importantly, the Court cannot lose sight of the fact that the prosecution had been tapping the applicant's telephone for over two months prior to the 14 May 2010 interview in connection with, *inter alia*, the Holt investigation – the very investigation which served as the basis for the applicant's subsequent prosecution. The Government have contested that the purpose of this covert surveillance of the applicant, prior to his questioning on 14 May 2010, was, *inter alia*, to lay the groundwork for the scope and content of his questioning. In the light of the very strict standard of scrutiny applied in these circumstances, the Court considers that the Government have failed to demonstrate convincingly that these investigative measures, viewed as a whole, did not undermine the overall fairness of the proceedings against the applicant, taking account of the nature and scope of the charges levelled against him and the particular situation described above.

59. Moreover, the applicant challenged, at least before the Supreme Court (see paragraph 37 above), his questioning as a witness whilst having already been suspected of criminal offences as evidenced by the telephone tapping as from March 2014. He submitted that this circumstance should have led to the dismissal of the charges. However, the Supreme Court did not address this particular issue in its judgment. The applicant was therefore not provided with a possibility of remedying a situation that was contrary to the requirements of the Convention (see *Türk v. Turkey*, no. 22744/07, § 54, 5 September 2017, and *Mehmet Zeki Çelebi v. Turkey*, no. 27582/07, § 51, 28 January 2020). Thus, in its assessment, the Court does not have the benefit of an assessment by the domestic courts as to whether and to what extent these particular circumstances of the applicant's interview affected the fairness of his trial (see *Akdağ*, cited above, § 68, and compare *Doyle v. Ireland*, no. 51979/17, §§ 94-95 and 101, 23 May 2019).

60. As explained above, the Court applies very strict scrutiny in the present case, which requires the Government to convincingly demonstrate that the overall fairness of the applicant's trial was not irretrievably prejudiced by the failure to inform him of the charges against him and by the delay in his access to legal advice. In the light of the above, the Government have not discharged this burden (see *Sitnevskiy and Chaykovskiy*, cited above, § 86). There has therefore been a violation of the applicant's rights under Article 6 §§ 1 and 3 (a) and (c) of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. 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

62. The applicant did not claim an award in respect of pecuniary damage, but claimed an award at the Court's discretion in respect of non-pecuniary damage.

63. The Government submitted that the finding of a violation in itself would constitute just satisfaction in respect of any non-pecuniary damage.

64. Taking account of the particular circumstances of the present case, the Court agrees with the Government that the finding of a violation of Article 6 § 1 of the Convention constitutes in itself sufficient just satisfaction in respect of any non-pecuniary damage. The Court further notes that it is for the respondent State to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation or violations found by the Court and to redress as far as possible the effects. In this connection, the Court observes that sections 228 and 232 of the Criminal Procedure Act provide that the Court on Reopening of Judicial Proceedings can, when certain conditions are fulfilled, order the reopening of criminal proceedings that have been terminated by a final judgment given by the Court of Appeal or the Supreme Court (see, *mutatis mutandis*, *Ibrahim and Others*, cited above, § 315, and *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 222, 6 November 2018). In this connection, the Court emphasises the importance of ensuring that domestic procedures are in place whereby a case may be re-examined in the light of a finding that Article 6 of the Convention has been violated. As the Court has previously stressed, such procedures may be regarded as an important aspect of the execution of its judgments and their availability demonstrates a Contracting State's commitment to the Convention and to the Court's case-law (see *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 99, 11 July 2017).

B. Costs and expenses

65. The applicant claimed 30,812,295 Icelandic krónur (ISK) in respect of legal costs incurred during the domestic proceedings, as well as compensation for costs incurred during the proceedings before the Court, to be decided at the Court's discretion. The applicant did not submit any invoices to prove that he had incurred costs at the domestic level or before the Court, but merely

pointed to the Supreme Court's ruling on legal fees at the domestic level, whereby he had been obliged to pay the legal fees he incurred during the proceedings before the District Court and the Supreme Court amounting to ISK 25,232,295 and ISK 5,580,000 respectively.

66. In respect of costs at the domestic level, the Government did not contest the amount claimed in respect of legal fees which the applicant had incurred, but submitted that the amount of the award should be reduced significantly. In respect of the costs incurred before the Court, the Government objected to the claim, noting that no invoices had been adduced.

67. 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 were reasonable as to quantum. Regard being had to the above criteria and the absence of any evidence that the applicant has incurred costs in the proceedings before the Court, the Court dismisses the claim for costs in that regard. In respect of the claim for costs related to the domestic proceedings, in view of the absence of any invoices and keeping in mind that the Court has found a violation in respect of only one out of the five complaints which the applicant raised in his application, the Court cannot ascertain either whether the costs have actually been paid by the applicant or to what extent the costs were incurred in order to prevent or remedy the violation found. The Court therefore also dismisses this claim.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention in respect of the requirement of an independent and impartial tribunal;

3. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (a) and (c) of the Convention;

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

Done in English, and notified in writing on 15 March 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Georges Ravarani
Registrar	President