



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

THIRD SECTION

CASE OF JÓHANNES BALDURSSON AND BIRKIR KRISTINSSON v. ICELAND

(Applications nos. 14175/16 and 3 others – see appended list)

JUDGMENT

Art 6 § 1 (criminal) • Impartial tribunal • Conviction of an executive and an employee of a bank, for financial crimes related to transactions between that bank and a company • Losses suffered (in relation to shares and equity funds in the above bank and shares in other banks), by three of the five judges on the Supreme Court's panel that upheld the applicants' convictions, not of such a nature and/or degree to give rise to an objectively justified fear that they lacked impartiality in the applicants' case

Art 6 § 1 (criminal) • Fairness of criminal proceedings against first applicant not prejudiced by the lack of re-hearing oral evidence before the Supreme Court

Art 6 § 1 (criminal) • Fair hearing • Supreme Court's failure to address first applicant's arguments concerning the credibility of a key witness's testimony • First applicant's submissions raised a specific, pertinent and important point in the proceedings against him that called for explicit reply

Art 6 § 1 (criminal) • Fair hearing • Change of second applicant's status from suspect to witness and back to suspect again at pre-trial stage, which he challenged in the court proceedings, did not *per se* seriously prejudice the principle of legal certainty nor prejudiced his right to a fair trial under Art 6 § 1 • Evidence obtained during his second interrogation when he had witness status disregarded by the Supreme Court

Art 6 § 1 (criminal) • Reasonable time • Duration of criminal proceedings not excessive

Prepared by the Registry. Does not bind the Court.

STRASBOURG

21 January 2025

FINAL

21/04/2025

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of Jóhannes Baldursson and Birkir Kristinsson v. Iceland,

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

Ioannis Ktistakis, *President*,

Peeter Roosma,

Lətif Hüseynov,

Darian Pavli,

Oddný Mjöll Arnardóttir,

Úna Ní Raifeartaigh,

Mateja Đurović, *judges*,

and Milan Blaško, *Section Registrar*,

Having regard to:

the applications (nos. 14175/16, 22729/17, 32167/16 and 22720/17) 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 two Icelandic nationals, Mr Jóhannes Baldursson and Mr Birkir Kristinsson (“the applicants”), on the various dates indicated in the appended table;

the decision to give notice to the Icelandic Government (“the Government”) of the applications;

the parties’ observations;

Having deliberated in private on 10 December 2024,

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

INTRODUCTION

1. The applications concern the applicants’ indictment and conviction for financial crimes, following the financial crisis of 2008.

THE FACTS

2. Mr Jóhannes Baldursson (hereinafter “the first applicant”) was represented by Mr Reimar Pétursson, a lawyer practising in Reykjavík. Mr Birkir Kristinsson (hereinafter “the second applicant”) was represented by Mr Ólafur Eiríksson, a lawyer practising in Reykjavík. Further details of the applicants are set out in the appendix.

3. The Government were initially represented by their Agent, Mr Einar Karl Hallvarðsson, State Attorney General, and subsequently by Ms Fanney Ros Thorsteinsdóttir, his successor in that office.

4. The facts of the case may be summarised as follows.

I. THE BACKGROUND OF THE CASE

5. The first applicant was an executive at Glitnir bank hf. (“Glitnir”). The second applicant was an employee of Glitnir’s Private Banking department and the owner of the company BK-44 ehf. (“BK-44”).

6. Following the financial crisis in the autumn of 2008 and the subsequent collapse of the three major Icelandic banks, including Glitnir (which collapsed in early October 2008), the newly founded Office of the Special Prosecutor (“the Special Prosecutor”) initiated a number of investigations into alleged criminal activity in the financial sector leading up to the crisis (see, for further background information, *Sigríður Elín Sigfúsdóttir v. Iceland*, no. 41382/17, § 6, 25 February 2020). Among these was an investigation into a loan granted in 2007 by Glitnir to BK-44 for the purchase by the latter of 150,000,000 shares in Glitnir (“the BK-44 case”). At the time of the sale, the shares were owned by Glitnir itself. The Financial Supervisory Authority (*Fjármálaeftirlitið*) referred the case to the Special Prosecutor on 10 November 2011.

II. THE INVESTIGATION

7. The Special Prosecutor’s office began its questioning of suspects and witnesses in November 2011.

8. On 1 December 2011 the second applicant was interviewed for the first time as a suspect in the BK-44 case. He was informed of his right to remain silent and was accompanied by legal counsel.

9. On 21 December 2011 the second applicant was interviewed for the second time, this time as a witness in the BK-44 case. He was informed of his obligation, under threat of penal consequences, to testify truthfully, and that he had the right to refuse to answer if there was reason to believe that his answer could constitute an admission, or an indication, that he had committed a punishable offence. He was not accompanied by legal counsel. In a report of the interview, it was further stated that the second applicant had been informed that his status could be changed again if called for by the appearance of new evidence or information. According to the second applicant, no such exchange could be heard on a recording of the interview. The Government does not contest the applicant’s submission in this respect but maintains that he was nevertheless so informed.

10. On 18 June 2012 the second applicant was interviewed for the third time, this time again as a suspect in the BK-44 case. He was informed of his right to remain silent and was accompanied by legal counsel.

11. During all three interviews the second applicant discussed the loan to BK-44 and the events surrounding its granting and settlement. The first two interviews broadly concerned the same issues. During the third interview, the second applicant was additionally interrogated about several recorded phone

calls. These included a conversation on 11 December 2007, which the Special Prosecutor received on 29 December 2011, where the second applicant and suspect E.S. discussed that efforts were being made to place “percentages in the bank” with buyers and that such “favours” would have to be remunerated. After stating that the second applicant had nothing to worry about, E.S. explained that the turn of the year was very important in this respect, as this would be when “the picture is taken of the balance-sheet”. He asked the second applicant whether “the contract” could be extended into the next year and the second applicant agreed to that. It emerges from the case file that the loan to BK-44 was due to be paid on 12 December 2007 and that the due-date was subsequently extended on numerous occasions.

III. THE CRIMINAL PROCEEDINGS AGAINST THE APPLICANTS

12. On 28 June 2013 both applicants, along with E.S. and M.A.A., who are not applicants in the present case, were indicted on charges relating to the transactions between Glitnir and BK-44. The first applicant, E.S. and M.A.A. were charged with fraud by abuse of position for having acted beyond their powers and endangered the interests of Glitnir by arranging for the grant of a loan from the bank to BK-44 in the amount of 3,791,340,000 Icelandic krónur (ISK, approximately 44,200,000 euros (EUR) at the material time), without the consent of the bank’s loan or risk committee and without sufficient security for repayment. Additionally, the first applicant and E.S. were charged with fraud by abuse of position for having acted beyond their powers and endangered the interests of Glitnir by verbally agreeing with the second applicant that BK-44 be granted a put option on the Glitnir shares which guaranteed that the entirety of the market risk of the shares’ price rested with Glitnir, to which they made Glitnir adhere in July 2008. Both applicants and co-accused E.S. were, further, charged with market manipulation for having, by means of the above transactions, which concerned shares owned by Glitnir itself, incorrectly indicated the demand for and price of shares in Glitnir. The second applicant was also charged with aiding and abetting in the fraud by abuse of position or, alternatively, for concealment and money laundering, as well as with violations of the Act on Annual Accounts for failing to reflect the above transaction in BK-44’s annual account. The facts referred to in the indictment happened during the period from 7 November 2007 to 22 July 2008 (when the loan was finally settled) and on 16 September 2008 (the date of BK-44’s annual account for the year of 2007).

13. On 4 September 2013, the second applicant petitioned for the charges against him to be dismissed, arguing that there had been no lawful basis to consider him a suspect after his status had been changed to a witness in the case. He submitted that the Special Prosecutor had not received any new evidence, except for two recorded phone calls with co-accused E.S., which had taken place on 12 November and 11 December 2007. He claimed that

they had not concerned the subject matter of the case. Their content could in any event only relate to the charge of market manipulation and could, thus, not be regarded as new evidence in relation to other charges. The Special Prosecutor submitted that the second applicant's *mens rea* had been revealed during the phone calls received after his second questioning as witness, and that they had therefore constituted important new evidence. The petition was rejected by a ruling of 31 October 2013, wherein the Reykjavik District Court held that the phone calls constituted new evidence that justified the reopening of the criminal investigation under section 57(3) of the Criminal Procedures Act (see paragraph 47 below).

14. During the District Court proceedings, over twenty witnesses (including Glitnir's compliance officer) and the four accused were heard by the court in the applicants' and their lawyers' presence.

15. By a judgment of 23 June 2014, the Reykjavik District Court rejected again the second applicant's renewed petition, on the same grounds as before, for the dismissal of the case. The court convicted all four accused, including the two applicants, on all charges. The applicants were sentenced to five years' imprisonment each.

16. As regards the charge against the first applicant of fraud by abuse of position for arranging for the grant of the loan to BK-44, the District Court found that since BK-44 had been registered in risk category no. 6, the loan required approval by a loan or risk committee of the bank. No documents in the case file indicated that any such approval had been granted. The first applicant and co-accused E.S. had both testified that on the morning of 7 November 2007 a meeting had taken place where they and a stockbroker had decided to grant the loan in question to BK-44. In an e-mail later that day to E.S. and the bank's employee responsible for registering credit limits, of which the first applicant received a copy, co-accused M.A.A. had stated that he had received approval for granting a loan of the relevant kind and magnitude to BK-44. In a reply to this e-mail, copied to the first applicant, a staff member had confirmed that this loan had been granted. The District Court held that the first applicant and co-accused E.S. had taken a joint decision on granting the loan to BK-44, and that co-accused M.A.A. had had the necessary credit limit registered. They had all worked at Glitnir for a long time, the first applicant and M.A.A. having held executive positions. They had known the internal rules of the bank and could not have been unaware that a loan of this magnitude had to be approved by Glitnir's risk committee. No security for repayment had been provided, endangering the financial interests of the bank, which had in fact subsequently suffered a loss. The three accused had thus committed an aggravated offence of fraud by abuse of position, punishable under section 249 of the General Penal Code. The second applicant had, further, aided and abetted in the commission of the offence.

17. With respect to the charge against the first applicant of fraud for verbally agreeing that BK-44 be granted a put option which guaranteed that

the entirety of the market risk of the shares' price rested with Glitnir, the District Court found that the first applicant, his co-accused E.S. and the second applicant had testified that upon BK-44's purchase of the Glitnir shares on 7 November 2007, the put option had also been negotiated. By mistake, the put option had not been registered in Glitnir's systems and this had come to light when the shares had been sold back to Glitnir in July 2008. E.S. had testified that in light of the mistake, it had been decided that Glitnir would bear all of the loss on the difference in price of the shares from their purchase to their sale. Glitnir's internal rules stated that agreements on options should be registered, priced and protected by certain securities. Glitnir's compliance officer had, further, testified that co-accused E.S. had called him in for a meeting in July 2008 when it had been discovered that the put option had not been registered. According to the compliance officer, in the end, the first applicant had decided how the put option would be settled. The District Court held that Glitnir had in place various protective mechanisms to safeguard the bank against a risk of losses linked to put options. Upon the settlement with BK-44, these rules had been disregarded and no effort had been made to prevent Glitnir's loss. Glitnir had borne the whole loss resulting from the transaction. The first applicant and co-accused E.S. had taken that decision and E.S. had handled the settlement. They had thus committed an aggravated offence of fraud by abuse of position, punishable under section 249 of the General Penal Code. The second applicant had, further, aided and abetted in the commission of the offence.

18. Finally, with respect to the charges against both applicants for market manipulation, the District Court noted its previous findings of fact and found that the final buy-back of shares by Glitnir had been effectuated at a price far above their market price and that this had not been reported to the Icelandic Stock Exchange. While BK-44's purchase of the shares on 7 November 2007 had been at the market rate, this could not have correctly indicated the price of those financial instruments as the buyer had secured complete indemnity on the transaction and was, thus, in a situation completely different from that of other owners of shares in Glitnir. The District Court held that by not reporting the financing and the complete indemnity of the buyer, deception had been employed in the transaction. The accused had all played a part in effectuating the illegal transaction, and were accordingly guilty of market manipulation under Articles 117(1)(1a) and (2) and 117(2), in conjunction with Article 146 of the Act on Securities Transactions (no. 108/2007).

19. The applicants appealed against this judgment to the Supreme Court seeking acquittal or, alternatively, in the case of the second applicant, the dismissal of the case from the District Court on the basis that he could not lawfully be considered a suspect after his status had been changed to a witness (see paragraph 13 above). During the Supreme Court proceedings, both applicants submitted written observations.

20. Before the Supreme Court the first applicant argued, *inter alia*, that the District Court's premise that he and E.S. had confessed to having decided to grant the loan in question to BK-44 was incorrect. Neither of them had confessed to this and the first applicant had expressly denied having taken that decision. He had, further, not participated in the meeting of 7 November 2007 where the conditions of BK-44's transactions with the bank had been decided, but in a different meeting earlier that morning, with the second applicant and the co-accused E.S., where they discussed transactions of the same kind in general terms and with reference to customers of the bank generally. The District Court's description of testimonies as regards the meeting was, thus, inaccurate.

21. The first applicant, further, submitted that he had not participated in the decision-making on how Glitnir's and BK-44's dealings should be settled in July 2008. His and his co-accused E.S.'s testimony had supported this, unlike the testimony of Glitnir's compliance officer. The first applicant called into question the credibility of the compliance officer's testimony before the District Court. First, the compliance officer had admitted in his police testimony to not having been fully mentally stable at the time of the settlement. Secondly, two contemporaneous e-mails and the compliance officer's police testimony showed that the compliance officer had attributed the settlement decision to two other staff members, that is to say to co-accused E.S. and a witness in the case, rather than to the first applicant. In his police testimony, the compliance officer had, further, described the first applicant's role differently. Thirdly, the compliance officer's consent had been needed to do business with BK-44. Therefore, Glitnir's staff, including the first applicant, could hardly protest against the advice the compliance officer gave on the settlement of the put option.

22. The first applicant also maintained that as the District Court had based its conviction for market manipulation on its findings concerning fraud by abuse of position, that conviction suffered from the same flaws.

23. In his submissions to the Supreme Court, the first applicant did not request that he, his co-accused or any witnesses be heard.

24. Before the Supreme Court, the prosecutor accepted that the finding of the District Court, that the first applicant and co-accused E.S. had both testified that the decision to grant the loan in question to BK-44 had been made during their meeting on the morning of 7 November 2007, was an overstatement.

25. The second applicant argued, *inter alia*, that the decision to interview him again as a suspect during his third interview with the Special Prosecutor (see paragraphs 7-10 above) had constituted the reopening of finalised criminal proceedings against him. No important new evidence capable of justifying the reopening had emerged after his second questioning as a witness. This had seriously affected his interests and curtailed his rights in

violation of section 57(3) of the Criminal Procedures Act as well as the *ne bis in idem* guarantee provided in Article 4 of Protocol No. 7 to the Convention.

26. The Supreme Court held a hearing during which the parties' representatives presented oral arguments. In the proceedings before the Supreme Court, the applicants and the witnesses were not heard again but the case file included transcripts of all statements before the District Court.

27. By a judgment of 3 December 2015, the Supreme Court rejected the second applicant's claim that the case against him be dismissed from the District Court. It noted that section 57(3) of the Criminal Procedures Act stipulated that if an investigation is terminated because the case materials are not considered sufficient as basis for indictment, its reopening is excluded unless new case materials come to light or are likely to come to light. It found that it could not be assumed that the change of the second applicant's status from accused to witness was based on the prosecutor's conclusion that the case materials were insufficient for indictment. The second applicant had, further, not been notified in accordance with section 57(3) of the Criminal Procedures Act that the investigation against him had been terminated. In addition, he had been informed of his privilege against self-incrimination before the second interview. The Supreme Court therefore held that the investigation against the second applicant had not been terminated when his status was changed from accused to witness and that section 57(3) of the Criminal Procedures Act had not been engaged. However, the Supreme Court decided to disregard from evidence his second interview. One judge dissented and held that the investigation against the second applicant had been terminated and that the conditions of section 57(3) of the Criminal Procedures Act for reopening had not been met.

28. The Supreme Court upheld the District Court's conviction of both applicants, but as regards the charge of market manipulation, it held that the first applicant should be convicted only under Article 117(1)(1a) in conjunction with Article 146 of the Act on Securities Transactions. The first applicant's sentence was reduced to three years' imprisonment and the second applicant's sentence to four years' imprisonment.

29. In its judgment, the Supreme Court gave a more detailed description of the documentary evidence mentioned in the District Court judgment. It also described additional documentary evidence, including contemporaneous e-mails and transcripts of telephone conversations, which had been recorded by Glitnir at the time of the transactions in question. The Supreme Court, further, provided a more detailed summary of the testimonies of the four accused and eight witnesses, including Glitnir's compliance officer, while noting that the testimony of the accused and witnesses were otherwise summarised in the District Court's judgment.

30. As regards the first charge of fraud by abuse of position, the Supreme Court held that it was clear from Glitnir's internal rules that the accused had not been authorised to grant the loan in question. It found that the first and

second applicants and co-accused E.S. had all testified that they had attended a meeting together on the morning of 7 November 2007 where BK-44's purchase of the shares in Glitnir had been discussed. Their testimonies had, however, differed as to whether one or two meetings had taken place, whether the first applicant had attended them both and on the level of detail of discussions. Specifically, as regards the first applicant's role in events, the Supreme Court referred to how the first applicant had stated before the District Court that he had attended at least a part of a meeting on the purchase of the shares on 7 November 2007. While E.S.'s testimony had not been clear on the first applicant's participation in the decision-making during this November morning, he had stated clearly that the first applicant had encouraged the second applicant to make the purchase, which the first and second applicants could not have arranged on their own. The second applicant had also testified that the first applicant and E.S. had told him that they would take care of the business as a whole. The Supreme Court, further, found that it was clear from the documentary evidence in the case that the first applicant had had a larger role in the transaction than attending a part of a meeting on 7 November 2007. He had later that day sent an e-mail to have BK-44 registered as a recipient of a loan of the kind granted and had received, on that same day, an e-mail confirming that the necessary credit limit had been registered. On 11 November 2007 he had, further, sent Glitnir's Chief Executive Officer an e-mail confirming the sale of the shares. The following day, he had also received an e-mail confirming the details of and the granting of the loan.

31. As relates to the second charge of fraud by abuse of position in relation to BK-44's put option, the Supreme Court held that the granting and settlement of the put option had been in violation of Glitnir's internal rules. As regards the first applicant's role in events, the Supreme Court noted that the testimonies of the four accused and witnesses varied with regard to his and co-accused E.S.'s role. The first applicant and E.S. had both testified that a put option had verbally been agreed upon already in the beginning, on 7 November 2007. The first applicant had testified that he had only had a minor role at that time and that he had not been involved in the settlement of the put option in July 2008. Co-accused E.S. had testified that he had discussed the settlement with the first applicant and another staff member and that the first applicant had not disagreed with the manner of settlement, which had possibly already taken place at that time. The compliance officer had, however, testified that it had in the end been the first applicant who had decided how the put option would be settled. The Supreme Court concluded that the settlement had been executed with the knowledge and consent of the first applicant. It did not, however, explicitly address the first applicant's challenge to the credibility of the compliance officer.

32. As regards the charge of market manipulation and the charge against the second applicant for aiding and abetting in fraud by abuse of position, the Supreme Court referred to the findings of the District Court.

33. The Supreme Court panel which decided the case was composed of Justices M.S., G.B., H.I.J., Ó.B.Þ. and Þ.Ö.

IV. APPEARANCE OF NEW INFORMATION AND SUBSEQUENT EVENTS

34. As is described in *Sigríður Elin Sigfúsdóttir* (cited above, §§ 13-14) on 5 December 2016 confidential financial information first came to light in the media regarding the Justices of the Supreme Court. The coverage included the disclosure *inter alia* of Justice M.S.'s e-mails on withdrawals from equity funds.

35. On 6 December 2016, Justice M.S. sent the media a statement where he explained that he had received an inheritance in February 2002, which had included shares in three companies, including Glitnir. That same month he had, in accordance with Rules no. 463/2000, sought and received the authorisation of the Committee on Judicial Functions for participating in the division of the estate which owned these shares, and for his related ownership of them. He had, further, notified the Committee when he had sold the shares in 2003 and 2007. Justice M.S. also revealed that he had, following the sale of the shares, entrusted Glitnir with the management of a large part of the funds. They had, *inter alia*, been placed in equity funds, which he did not consider subject to any reporting obligation.

36. On 2 and 9 January 2016, the applicants requested information from the Committee on Judicial Functions on the reported financial interests of those Supreme Court Justices who had sat as judges in their case.

37. The Committee replied to the applicants by letters dated 23 and 25 January 2017. It explained that between 2004 and 2016, Justices G.B. and Ó.B.Þ. had not reported any shareholdings or requested authorisation for such holdings and that Justice M.S. had, by letter dated 28 February 2007, notified the Committee that he had sold his shares in Glitnir and that he no longer held shares in any company. Moreover, the Committee informed the applicants that it had decided at its meeting on 15 December 2016 that assets in equity funds and similar funds were not subject to the reporting obligation under Rules no. 463/2000 (see paragraph 50 below).

38. On 15 February 2017 the Committee on Judicial Functions sent the applicants a letter detailing shareholdings reported retroactively by Justices G.B., Ó.B.Þ. and M.S. in January and February 2017.

39. In parallel, in December 2016, a press release from the Supreme Court stated that as of 2017, the court would publish information about the financial interests of Justices on its website. All parties to cases that had been

adjudicated before that time were invited to request such information directly from the court.

40. By letters to the Supreme Court, dated 2 January and 6 February 2017, the applicants requested certain information about the financial interests of the Justices that had adjudicated their case. By letters dated 31 January and 15 February 2017, the Supreme Court responded to the applicants' requests by providing information for the period between 2004 and 2008. In its reply to the second applicant, the Supreme Court noted that Rules no. 463/2000 did not cover assets in equity funds and similar funds. While shares conferred decision-making power in the affairs of the relevant company on their owners, stakeholders in such funds had no say in how the funds invested, which could moreover change on a daily basis. The two types of financial interests were fundamentally different, the latter being more akin to depositing money in a savings account. The Supreme Court would, therefore, not provide any information on Justices' assets in such funds. In its replies to both applicants, the Supreme Court otherwise referred to the signed declarations of individual Justices, which were enclosed with its letters, and which contained the following information.

41. Justice G.B informed that she had owned shares in the other two major Icelandic banks, Kaupþing Bank (hereinafter "Kaupþing") and Landsbanki Íslands (hereinafter "Landsbanki"), which had lost all of their value in October 2008. She had not held shares in Glitnir.

42. Justice Ó.B.Þ. explained that he had acquired shares in Glitnir in July 2007 by inheritance when their market value had been ISK 14,679,947. Their original purchase value had been ISK 2,313,617. He had sold these shares on 7 December 2007 for ISK 11,532,528.

43. Justice M.S. disclosed that he had acquired shares in Glitnir in 2003, which he had sold in January and February 2007. In March 2007 he had acquired shares in Glitnir again, apparently as dividend payment on the shares previously sold. These shares had been worth ISK 343,034 and had become worthless in October 2008. While noting that he did not consider himself bound to do so, Justice M.S. also disclosed that since January 2007, he had had a contract for asset management with Glitnir. Specifically, in January and February 2008, he had placed ISK 61,450,000 in asset management. The funds appeared to have been placed in equity funds and partly in savings accounts, all without his direct involvement. He had withdrawn some of his funds in 2007 and 2008, but at the end of the latter year ISK 51,485,000 should have remained. At that time, however, ISK 43,878,000 had remained, resulting in a loss of ISK 7,607,000 or 14.78% of his capital after the withdrawals.

RELEVANT LEGAL FRAMEWORK

I. CONSTITUTION

44. Article 70 of the Constitution of the Republic of Iceland provides that everyone shall, for the determination of his rights and obligations or in the event of a criminal charge against him, be entitled, following a fair trial and within a reasonable time, to the resolution of an independent and impartial court of law.

II. CRIMINAL PROCEDURES ACT (No. 88/2008)

45. Section 6(1)(g) of the Criminal Procedures Act (*lög um meðferð sakamála*) reads as follows:

“(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.

...”

46. Section 7(1) of the Act provides:

“A judge shall be responsible for ensuring his own eligibility to hear a case. Parties may, however, require a judge to recuse himself. In the same manner, the presiding judge shall ensure the eligibility of expert lay judges.”

47. Section 57(1) and (3) provides:

“1. When the police consider that the investigation is complete, and that evidence has been revealed that could lead to a prosecution, they shall send the investigation materials to a prosecutor, unless an action may be brought by the chief of police under the first and fourth subsections of section 24. Together with the investigation materials, the police shall send a report covering the investigation in accordance with the first subsection of section 56.

...

3. If an investigation against a suspect has been terminated because the case materials were not considered sufficient as the basis for an indictment, the investigation against the suspect shall not be reopened unless new case materials have come to light or are likely to come to light. If an investigation against a suspect has been terminated, the police shall inform the person, who shall be entitled to have this confirmed in writing.”

48. Sections 196, 205 and 208 at the material time provided the following as regards appeals to the Supreme Court against District Court’s judgments:

Section 196

“With the limits arising from other provisions of this Act, appeal against a District Court judgment lies to the Supreme Court in order to obtain:

- a. a re-examination of the determination of penalties;
- b. a re-examination of conclusions based on the interpretation or application of rules of law;
- c. a re-examination of conclusions based on the evaluation of the evidentiary value of documentation other than oral statements before the District Court;
- d. quashing of the judgment and remittal of the case;
- e. dismissal of the case from the District Court.

When a judgment is appealed against, a re-examination may also be sought of rulings and decisions made during the court proceedings before the District Court.

...”

Section 205

“...

The Supreme Court can decide to hear oral evidence to the extent it considers needed, when the court considers in light of events that such taking of evidence may influence the outcome of the case.”

Section 208

“...

The Supreme Court cannot re-evaluate a District Court’s conclusion on the evidentiary value of oral testimony, unless the witness in question or the defendant have given oral statements before the Supreme Court.

Should the Supreme Court consider that the conclusion of a District Court concerning the evidentiary value of oral testimony in court may be incorrect so as to materially affect the outcome of the case, and the witnesses or defendant in question have not given oral testimony before the Supreme Court, the Supreme Court may quash the judgment of the District Court as well as its procedure to the extent necessary for oral testimony to be given before the District Court, and for the case to be resolved anew. Should a District Court judgment be quashed in such a manner, three judges shall deal with the case in a new trial before the District Court and they may not be the same judges as previously dealt with the case.”

III. THE JUDICIARY ACT (No. 15/1998)

49. Section 26 of the Judiciary Act (*lög um dómstóla*), as in force at the time, provided the following:

“A judge may not accept an occupation or become the owner of a share in a company or enterprise if this is not compatible with his office or carries a risk that he will not be able to discharge his official duties properly.

...

The Committee on Judicial Functions shall issue general rules concerning the extent to which ownership of a share in a company or enterprise is compatible with the office of a judge. A judge shall report any share acquired by him in a company or enterprise to the Committee. If the general rules issued by the Committee do not provide for his right to own such a share, the judge shall seek its permission in advance.

The Committee on Judicial Functions can, by a reasoned decision, prevent a judge from discharging an additional function or owning a share in a company or enterprise. A judge shall be obliged to heed such prohibition, but is entitled to seek a judicial resolution on its legality.”

IV. RULES No. 463/2000

50. Section 7 of Rules no. 463/2000, on Additional Functions of District Court and Supreme Court Justices and their Ownership in Companies and Enterprises of 20 June 2000 (*Reglur um aukastörf héraðs- og hæstaréttardómara og eignarhlut þeirra í félögum og atvinnufyrirtækjum*), adopted by the Committee on Judicial Functions in June 2000, as in force at the relevant time, provided that:

“A judge may own shares in companies or undertakings other than those to which special statutory restrictions apply in terms of ownership.

A judge is obligated to notify the Committee on Judicial Functions about his shareholdings, in a company that has a listed exchange rate, up to the value of ISK 3,000,000. The same applies to other companies in which a judge holds up to 5% shares.

The Committee’s authorisation shall be sought for a judge’s holding in a company exceeding the limits stipulated above.”

51. Section 9 of the same Rules provided that a party to a court case had the right to receive information from the Committee on Judicial Functions regarding a judge’s specified extra work or ownership of shares in a company if this might, in the opinion of the Committee, be significant in respect of the matter of disagreement under resolution or as judged.

V. RULES No. 1165/2017

52. Rules no. 463/2000 were repealed by Rules no. 1165/2017, on Additional Functions of District Court, Appeals Court and Supreme Court Justices and their Ownership in Companies and Undertakings, which entered into force on 1 January 2018 (*Reglur um aukastörf héraðsdómara, landsréttardómara og hæstaréttardómara og eignarhlut þeirra í félögum og atvinnufyrirtækjum og skráningu þeirra*). They set the value of shares triggering the reporting obligation at ISK 5,000,000. In addition, section 7(5) of the rules also provided that:

“A judge investing money in an investment fund, a mutual fund or a comparable fund which grants the judge a share of a fund on joint investment, cf. Act no. 128/2011 on Undertakings for Collective Investment in Transferable Securities (UCITS), Investment

Funds and Professional Investment funds, is not obligated to notify the Committee on Judicial Functions of such disposition of funds.”

THE LAW

I. JOINDER OF THE APPLICATIONS

53. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. ALLEGED VIOLATION OF THE APPLICANTS’ RIGHT TO AN IMPARTIAL TRIBUNAL

54. The applicants complained of a violation of their right to be heard by an impartial tribunal as guaranteed by Article 6 § 1 of the Convention which, in its relevant part, reads as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by an independent and impartial tribunal established by law.”

A. Admissibility

55. The Government, with reference to the Court’s finding in the case of *Sigríður Elín Sigfúsdóttir* (cited above, §§ 34-38), agreed that the applications had been submitted within the six-month time-limit and that domestic remedies had been exhausted.

56. However, the Government submitted that the complaint should be declared inadmissible as manifestly ill-founded. Both applicants contested the Government’s submission.

57. The Court finds 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

(a) The applicants

58. The first applicant submitted that the financial interests of Justices M.S. and Ó.B.Þ. gave rise to legitimate doubt in respect of their impartiality. The second applicant submitted the same about Justices M.S., Ó.B.Þ., and G.B. In addition, the first applicant submitted that it could be assumed that Justice M.S. harboured feelings of ill-will towards Glitnir’s personnel.

59. Specifically, with respect to Justice G.B., the second applicant submitted that the Justice had owned shares in two major Icelandic banks other than Glitnir, that is to say in Kaupþing and Landsbanki, which had lost all of their value in the autumn of 2008 (see paragraph 41 above). According to the second applicant this had affected Justice G.B.’s impartiality in the present case.

60. As regards Justice Ó.B.Þ., the applicants submitted that the Justice’s financial interests had been liable to affect his impartiality in their case. The Justice had acquired shares in Glitnir in July 2007, when their market value had been ISK 14,679,947, and had sold them in December 2007 for ISK 11,532,528, resulting in a loss of around ISK 3,100,000 (see paragraph 42 above). The applicants emphasised the overlap in time of the transactions which formed the subject matter of the BK-44 case, which had taken place between November 2007 and July 2008 (see paragraph 12 above), and the Justice’s ownership and sale of his shares in Glitnir at a loss, in December 2007. The applicants further pointed out that Justice Ó.B.Þ. had failed to disclose his ownership of the shares, as required by the applicable rules (see paragraphs 37 and 50 above), despite their value amounting to five times the threshold which necessitated permission from the Committee on Judicial Functions for the ownership.

61. The applicants further submitted that Justice M.S.’s financial interests had been liable to affect his impartiality. Firstly, the second applicant submitted that the Justice had had a substantial shareholding in Glitnir and that he had sold those shares in early 2007. Upon the bank’s collapse he had nevertheless still held shares worth ISK 343,034, which had become worthless. Secondly, both applicants argued that following the sale of shares in early 2007, Justice M.S. had placed a significant amount in the bank’s equity funds, and that this capital had shrunk by over ISK 7,000,000. The first applicant added that e-mails from the Justice on the funds, displayed in an Icelandic news program, invited the assumption that his loss must have been heartfelt, as he had referred to the funds as his “treasure” and “fortune portfolio”. It was, thus, fair to assume that he must have fostered feelings of ill will towards Glitnir’s personnel. Both applicants further argued that the employees entrusted with the management of the Justice’s funds had worked for Glitnir’s Private Banking department, where the second applicant had also worked. This had compromised the Justice’s impartiality even further.

62. Finally, the second applicant submitted that the Supreme Court had concluded in its judgment of 3 December 2015 that the accused’s actions had been “very serious” and had been “directed both at parties trading in the regulated securities market and the general public”. All the Justices had, therefore, considered themselves among the people who were victims of their actions. The first applicant submitted the same with respect to Justice Ó.B.Þ., since he had owned shares in Glitnir and suffered a loss from trading in them in December 2007. Both applicants also submitted that the losses suffered by

Justices Ó.B.Þ. and M.S. were significant when viewed in light of their monthly salaries. Justice Ó.B.Þ.'s loss had amounted to almost five months' salary and Justice M.S.'s loss had amounted to more than the annual salary of Supreme Court Justices.

(b) The Government

63. The Government submitted that nothing in the case file indicated that the Justices harboured feelings of hostility or ill-will towards the applicants or that there was any objectively justified reason to question their impartiality.

64. As regards Justice G.B., the Government reasoned that she had never owned shares in Glitnir, and that her losses in connection with shares in other banks could not have affected her impartiality in the applicants' case.

65. With respect to Justice Ó.B.Þ., the Government submitted that his shareholdings in Glitnir had not affected his impartiality. They argued that the Justice had not owned any shares at the moment of the collapse of Glitnir and that the alleged loss should be assessed with reference to the difference between the shares' original purchase value of ISK 2,313,617 and the price for which the Justice had sold them in December 2007, resulting in a gain of ISK 9,200,000 (see paragraph 42 above). If seen as a loss, the difference in value of the shares at the time they were inherited and at the time that Justice Ó.B.Þ. had sold them had only passed the threshold of ISK 3,000,000 for requiring authorisation by the Committee on Judicial Functions by a very insignificant amount. If, however, the point in time at which to assess the Justice's impartiality was when the transactions subject to indictment took place, the overlap in time was only from 7 November 2007 until the sale of the shares on 7 December that same year. In that case, the Justice's loss had only amounted to ISK 576,626. The Government further emphasised that as the Justice had acquired the shares by inheritance and had not purchased them from his own capital the loss sustained was less significant. The Justice had also owned the shares for a very short period of time, which indicated that he never intended to keep them. The Government furthermore maintained, with reference to Justice M.S.'s case, that it was apparent that the Justice would have received the Committee's authorisation had he requested it. The lack of a formal notice should, therefore, not have a bearing in the case. Finally, the Government pointed out that the purchase of shares is a risk investment. In light of all of these reasons, the applicants' fears as to Justice Ó.B.Þ.'s lack of impartiality were not justified.

66. As regards Justice M.S., the Government noted that the value of his shares in Glitnir had been insignificant and much less than the domestic threshold of ISK 3,000,000 which would have triggered the obligation to seek authorisation. His impartiality had not been affected by the assets which he had placed in Glitnir's equity funds either. He had given instructions that these funds should not be used to purchase shares in companies, and while this had not been fully complied with until after 2013, the equity funds had

not invested in Glitnir's shares. The Government further argued that the nature of holdings in equity funds was different from shareholdings in companies as owning shares in a company gave their holder a certain power of decision within that company. In contrast, placing assets in an equity fund could rather be likened to owning money in a bank account. According to the Government this meant that Justice M.S. did not have any reporting obligation related to these funds, thus rendering his situation substantially different from that of Justice V.M.M. in the case of *Sigríður Elin Sigfúsdóttir* (cited above, § 56). The Government also emphasised that the Justice had acquired approximately two thirds of the amount placed in the equity funds by inheritance and had therefore not paid for this investment with his salary. If Justice M.S. had kept his previous shareholdings in Glitnir instead of selling his shares and placing money in equity funds, he would have lost everything. Rather than being negatively influenced by the turn of events, he could only have been grateful for his holdings in equity funds.

67. Finally, the Government submitted that account should be taken of the fact that considerable time – seven years – had passed between the collapse of Glitnir in 2008 and the rendering of the Supreme Court's judgment in 2015. It was also clear the Justices' loss had not been significant considering their general financial situation.

2. *The Court's assessment*

(a) **General principles**

68. The general principles relevant to the assessment of judicial impartiality according to the subjective and objective tests applicable under Article 6 § 1 of the Convention have been summarised, for example, in *Sigríður Elin Sigfúsdóttir* (cited above, §§ 45-50).

69. The Court also notes that it has already been called upon to decide on the alleged partiality of judges in the context of the collapse of the Icelandic banks in circumstances where the domestic judges' financial interests were affected to a greater or lesser extent by that collapse (see *Sigríður Elin Sigfúsdóttir*, cited above, and *Bjarki H. Diego v. Iceland*, no. 30965/17, 15 March 2022). In that context the Court has held that in order for a judge's impartiality to be called into question, the financial interests of the judge concerned must be directly related to the subject matter of the dispute at the domestic level (*Sigríður Elin Sigfúsdóttir*, cited above, § 53, and *Bjarki H. Diego*, cited above, § 30).

70. The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor in the Court's assessment of judges' impartiality. Such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns. In addition to ensuring the

absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public. The Court will take such rules into account when making its own assessment as to whether a tribunal was impartial and, in particular, whether an applicant's fears can be held to be objectively justified (see *Micallef v. Malta* [GC], no. 17056/06, § 99, ECHR 2009). Similarly, and while not directly concerning the withdrawal of judges, the Court has taken note of the Icelandic rules concerning judges' obligation to seek authorisation from the Committee on Judicial Functions for shareholdings over a certain financial threshold when assessing the relative impact on objective impartiality of the same shares becoming worthless (see *Sigríður Elín Sigfúsdóttir*, cited above, §§ 54 and 56, and *Bjarki H. Diego*, cited above, § 31).

(b) Application of these principles to the present case

71. As concerns subjective impartiality, the Court notes that there is no indication in the case file that Justice M.S. displayed hostility or ill will towards the first applicant for personal reasons. It is not possible to conclude from the language adopted in the reasoning of the Supreme Court's judgment of 3 December 2015 that the Justice in question demonstrated actual bias towards the applicants. As there is no proof to the contrary, the personal impartiality of the Justice must be presumed (see *Sigríður Elín Sigfúsdóttir*, cited above, § 51).

72. Turning to the three Justices' objective impartiality, the Court is called upon to determine whether losses related to their shareholdings in the collapsed Icelandic banks and investments in equity funds were of such a nature and degree as to give rise to an objectively justified fear that they lacked impartiality in the applicants' case. In its assessment, the Court takes account of the fact that the Supreme Court was called upon to decide on the guilt or innocence of the applicants regarding charges related to fraud by abuse of position and market manipulation based on the loan granted to BK-44 in order to acquire shares in Glitnir (compare *Sigríður Elín Sigfúsdóttir*, cited above, § 52).

(i) Justice G.B.

73. As regards Justice G.B.'s objective impartiality, the Court notes that it is undisputed between the parties that her financial interests were not in Glitnir as she did not own any shares in that bank. In light of the subject matter of the charges against the second applicant (see paragraph 12 above), Justice G.B.'s financial losses resulting from the collapse of Kaupþing and Landsbanki cannot be considered to have given him an objectively justified fear of a lack of impartiality in the present case (see *Sigríður Elín Sigfúsdóttir*, cited above, § 53, and *Bjarki H. Diego*, cited above, § 30, 15 March 2022).

(ii) *Justice Ó.B.Þ.*

74. The Court notes that Justice Ó.B.Þ. came into possession of shares in Glitnir in July 2007. It is undisputed in the case that the value of the shares at that time amounted to ISK 14,679,947. It is likewise undisputed that when the Justice sold the shares on 7 December 2007, their value amounted to ISK 11,532,528. His loss, thus, amounted to ISK 3,147,419 (approximately EUR 34,900 at the material time). The parties agree that Justice Ó.B.Þ. did not request authorisation from the Committee for owning the shares in question.

75. According to section 7(2) and (3) of Rules no. 463/2000 (see paragraph 50 above), judges were obliged seek the authorisation of the Committee on Judicial Functions for holdings in a company exceeding the value of ISK 3,000,000. The Court notes that Rules no. 463/2000 manifested the domestic legal system's concern to remove all reasonable doubts as to impartiality of judges and the domestic authorities' assessment of the relative weight of their financial interests in that context. It further notes that Rules no. 463/2000 were adopted in 2000, and that the threshold triggering the obligation to seek authorisation was raised to ISK 5,000,000 in 2017.

76. While the Justice's financial loss was not insignificant, it must also be directly related to the subject matter of the dispute at the domestic level. On this issue the Court notes that, in contrast to the situation in *Sigríður Elín Sigfúsdóttir* (cited above, § 56), Justice Ó.B.Þ.'s loss did not derive from his shares becoming worthless as a result of Glitnir's collapse. It rather appears to have been the decision of Justice Ó.B.Þ. to sell his shares in Glitnir in December 2007, ten months prior to the bank's collapse, and only one month after the start of the period during which the applicants committed acts for which they were subsequently charged. It was at that point in time that the market price of the shares led to a certain loss in comparison to the shares' value at the time when he inherited them. Moreover, the applicants' conviction for market manipulation focused on how they had, when constructing the business deal with BK-44, created a false demand for shares in Glitnir (see paragraphs 12 and 18 above). Nothing in the case file indicates that the applicants' actions had the effect of lowering the price of shares around the time Justice Ó.B.Þ. decided to sell his shares. In that regard, the present case can be differentiated from *Sigríður Elín Sigfúsdóttir* (cited above, § 56), where the case before the Supreme Court directly concerned the behaviour of the management of the relevant bank immediately before its collapse which, in turn, caused the financial loss of the affected Justice.

77. Without any intention of minimising the importance of the domestic obligation for judges to notify the Committee on Judicial Functions and seek its authorisation for their shareholdings, the Court considers the foregoing considerations sufficient to enable it to conclude that in the particular circumstances of the present case, the applicants could not reasonably call Justice Ó.B.Þ.'s impartiality into question.

(iii) *Justice M.S.*

78. Turning, first, to Justice M.S.’s holdings in Glitnir at the time of its collapse in October 2008 the Court observes that their value, and consequently his loss due to the collapse, amounted to ISK 343,034 (approximately EUR 2,500 at the material time).

79. The Court notes that it has already found in the case of *Sigríður Elín Sigfúsdóttir* (cited above, §§ 54-55) that shareholdings in the value of ISK 1,738,922, which became worthless upon the collapse of the bank in question in October 2008, did not rise to a level which would have given the applicant in that case an objectively justified fear of a lack of impartiality. Noting that Justice M.S.’s shareholdings were of an even lesser value, the Court sees no reason to hold otherwise in the present case.

80. Turning, secondly, to the circumstances of Judge M.S.’s financial loss in relation to his investments in Glitnir’s equity funds, the Court notes that the parties did not dispute that it had amounted to ISK 7,607,000 at the end of the year 2008 (approximately EUR 44,750 at the material time), which amounted to 14.78% of the capital he had placed in these funds (account being taken of withdrawals). It is also undisputed that the equity funds in question did not invest in shares in Glitnir.

81. The Court observes that in this respect the situation of Justice M.S. is substantially different from that of Justice Ó.B.Þ. in the present case, and the Justices in *Sigríður Elín Sigfúsdóttir* (cited above) and *Bjarki H. Diego* (cited above). Notably, under this limb of the Court’s analysis the question is not of the loss that Justice M.S. suffered as a shareholder of a collapsed bank but as a customer whose investments in its equity funds had shrunk in value.

82. The Court takes note of the fact that unlike the obligation to notify the Committee on Judicial Functions and/or to seek its authorisation for owning shares in companies, domestic law was at the time of events silent on investments in equity funds (see paragraph 50 above). The relevant Rules were subsequently modified in 2017 to the effect that investments in such funds were explicitly excluded from the duty to notify and seek authorisation (see paragraph 52 above).

83. However, the crux of the issue before the Court turns on the question of the link between the Justice’s financial interests and the subject matter of the case he was called upon to adjudicate. The Court notes that no arguments or evidence have been put forward to demonstrate that the acts which formed the subject matter of the domestic criminal proceedings (see paragraph 12 above) had any direct bearing on the financial loss that Justice M.S. suffered in relation to his investments in Glitnir’s equity funds. Despite the considerable loss suffered, it cannot therefore be concluded that the financial interests of the Justice were directly related to the subject matter of the dispute at the domestic level. Moreover, although the second applicant was employed in Glitnir’s Private Banking department, which was responsible for Justice M.S.’s asset management, it has not been shown that the Justice had any

reason to believe that the second applicant's actions played a significant role in the decrease in value of the investment in the equity funds. The fact that the Justice had expressed himself on the importance of this investment to him (see paragraph 61 above) does not alter the above finding.

84. The foregoing considerations are sufficient to enable the Court to conclude that the applicants could not reasonably call into question Justice M.S.'s impartiality when deciding their case.

3. Conclusion on the impartiality of the Supreme Court Justices

85. In light of the above, there has been no violation of Article 6 § 1 of the Convention as regards the applicants' right to an impartial tribunal on the account of the financial interests of Justices G.B., Ó.B.Þ. and M.S.

III. ALLEGED VIOLATION OF THE FIRST APPLICANT'S RIGHT TO A FAIR TRIAL ON ACCOUNT OF THE FAILURE OF THE SUPREME COURT TO RE-HEAR ORAL EVIDENCE

86. The first applicant complained that his right to a fair trial as provided in Article 6 § 1 of the Convention had been violated on account of the Supreme Court making new and independent findings of fact and re-evaluating the evidentiary value of oral evidence without re-hearing the accused and the witnesses.

87. The relevant part of Article 6 § 1 of the Convention has been cited above (see paragraph 54 above).

A. Admissibility

88. The Government submitted that the complaint should be declared inadmissible as manifestly ill-founded. The first applicant contested the Government's submission.

89. The Court finds 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

(a) The first applicant

90. The first applicant argued that the prosecutor had acknowledged before the Supreme Court that the District Court's finding that he had confessed to having decided to grant the loan in question was without foundation. This finding had been the fundamental premise for his conviction by the District Court in respect of the first charge of fraud by abuse of position. The same

finding had played a significant role in his conviction in respect of the second charge of fraud by abuse of position, in relation to which he had also challenged the credibility of the compliance officer's testimony about the settlement of the put option. As regards the third charge for market manipulation, his conviction had been based on the findings under the other charges.

91. According to the first applicant the Supreme Court had implicitly agreed that it was incorrect that he had confessed to having decided to grant the loan in question. It had, thus, made completely new and independent findings of fact in the case, mostly based on its own assessment of oral testimonies before the District Court, of which it only had transcripts. The Supreme Court had had full jurisdiction to examine not only questions of law but also questions of fact and the first applicant's right to have his case decided on appeal by a court that had heard the accused and witnesses had been violated. The re-hearing of oral evidence had been particularly important given the number of witnesses, their unclear statements, and the complexity of the facts. The first applicant's challenge to the credibility of the compliance officer's testimony also meant that the Supreme Court had to fully assess it.

92. In addition, the first applicant claimed that the Supreme Court could not have relied on any of the District Court's findings of facts as the District Court's assessment had been manifestly wrong and inadequate. First, the District Court had relied on the false premise that he had confessed to making the decision to grant the loan. Secondly, the District Court had not responded with adequate reasoning to his challenge to the credibility of the compliance officer's testimony.

(b) The Government

93. The Government objected to these arguments and submitted that the Supreme Court had not reassessed testimonies or made new and independent findings of fact. The Supreme Court, like the District Court, had partly based their findings on the first applicant's admission to having attended a meeting on 7 November 2007 where the purchase of the shares had been discussed. Regarding the first charge of fraud, while referring more specifically to testimonies and other evidence in the case, the Supreme Court had essentially endorsed the District Court's findings. As regards the applicant's challenge to the credibility of Glitnir's compliance officer's testimony, it had been deemed irrelevant and without reason by both courts. As a result, it had not been addressed by them.

94. The Government further contended that the case-law of the Court demonstrated that domestic proceedings could comply with the requirements of Article 6 § 1 even if a public hearing was not held or if the accused was not present or heard in person at the appellate stage. The present case had not concerned the overturning of an earlier acquittal. Yet, according to the

Court's case-law, it was the overturning of prior acquittal which was one of the key elements when deciding whether oral evidence needed to be re-heard at the appellate stage. Further, the Government submitted that unlike in the case of *Sigurþór Arnarsson v. Iceland* (no. 44671/98, 15 July 2003), the Supreme Court's upholding of the first applicant's conviction had neither been based only on oral testimonies nor had it predominantly revolved around complex factual issues.

95. Overall, the Government asserted that the first applicant had enjoyed a fair trial within the meaning of Article 6 § 1 of the Convention at all stages. It pointed out that the first applicant had enjoyed full equality with the prosecution as regards the submission of documentary evidence. In addition, no limitations were imposed on his right to call witnesses at first instance and the fairness of the District Court's full adversarial hearing was not disputed. All of those aspects should be taken into account in the assessment of the fairness of the proceedings as a whole.

2. *The Court's assessment*

(a) **General principles**

96. An oral, and public, hearing constitutes a fundamental principle enshrined in Article 6 § 1. This principle is particularly important in the criminal context, where generally there must be at first instance a tribunal which fully meets the requirements of Article 6 (see *Findlay v. the United Kingdom*, 25 February 1997, § 79, Reports of Judgments and Decisions 1997-I), and where an applicant has an entitlement to have his case "heard", with the opportunity, inter alia, to give evidence in his own defence, hear the evidence against him, and examine and cross-examine the witnesses (see *Jussila v. Finland* [GC], no. 73053/01, § 40, ECHR 2006-XIV).

97. The Court reiterates that the personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for the trial hearing (see *Kamasinski v. Austria*, 19 December 1989, § 106, Series A no. 168). The manner of application of Article 6 to proceedings before courts of appeal depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein (see *Ekbatani v. Sweden*, 26 May 1988, § 27, Series A no. 134; *Monnell and Morris v. the United Kingdom*, 2 March 1987, § 56, Series A no. 115; and *Hermi v. Italy* [GC], no. 18114/02, § 60, ECHR 2006-XII).

98. Leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, although the appellant was not given an opportunity of being heard in person by the appeal or cassation court, provided that a public hearing was held at first instance (see, among other authorities, *Monnell and Morris*, cited above, § 58, as regards the issue of

leave to appeal, and *Sutter v. Switzerland*, 22 February 1984, § 30, Series A no. 74, as regards the court of cassation). However, in the latter case, the underlying reason was that the courts concerned did not have the task of establishing the facts of the case, but only of interpreting the legal rules involved (see *Ekbatani*, cited above, § 31).

99. However, even where the court of appeal has jurisdiction to review the case both as to facts and as to law, Article 6 does not always require a right to a public hearing, still less a right to appear in person (see *Fejde v. Sweden*, 29 October 1991, § 31, Series A no. 212-C, and *Hermi*, cited above, § 62). In order to decide this question, regard must be had, among other considerations, to the specific features of the proceedings in question and to the manner in which the applicant's interests were actually presented and protected before the appellate court, particularly in the light of the nature of the issues to be decided by it (see *Helmers v. Sweden*, 29 October 1991, §§ 31-32, Series A no. 212-A) and of their importance to the appellant (see *Kremzow v. Austria*, 21 September 1993, § 59, Series A no. 268-B; *Kamasinski*, cited above, § 106 *in fine*; *Ekbatani*, cited above, §§ 27-28; and *Hermi*, cited above, § 62).

100. However, where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence (see *Hermi*, cited above, § 64; see also, *Dondarini v. San Marino*, no. 50545/99, § 27, 6 July 2004, and *Zahirović v. Croatia*, no. 58590/11, § 56, 25 April 2013).

101. Likewise, where the appellate court is called upon to examine whether the applicant's sentence should be increased and when the appeal proceedings are capable of raising issues including such matters as the applicant's personality and character, which makes such proceedings of crucial importance for the applicant since their outcome could be of major detriment to him, the Court considers that the appellate court cannot examine the case properly without having heard the applicant directly and gaining a personal impression of him (see *Hermi*, cited above, § 67; see also *Kremzow*, cited above, § 67; *Cooke v. Austria*, no. 25878/94, § 42, 8 February 2000; and *Talabér v. Hungary*, no. 37376/05, § 28, 29 September 2009).

102. The Court observes that the above general principles have been applied in circumstances where the central question under Article 6 § 1 has concerned the need to hear not only the defendant but also certain significant witnesses at the appellate hearing (see, for example, *Dan v. Moldova (no. 2)*, no. 57575/14, §§ 62-65, 10 November 2020; *Muttilainen v. Finland*, no. 18358/02, § 26, 22 May 2007; *Sigurþór Arnarsson*, cited above, § 36; and *Júlíus Þór Sigurþórsson v. Iceland*, no. 38797/17, § 42, 16 July 2019).

103. As a rule, the appellate court must take positive measures to secure the possibility for the accused and the relevant witnesses to be heard (see, for

example, *Botten v. Norway*, 19 February 1996, § 53, *Reports of Judgments and Decisions* 1996-I; *Dănilă v. Romania*, no. 53897/00, § 41, 8 March 2007; and *Július Þór Sigurþórsson*, cited above, § 38). This applies, in particular, when the appellate court overturns a finding of acquittal following a full public hearing before the lower court, as the accused in that situation have no particular reason to request that they or the relevant witnesses be re-heard (see *Gómez Olmeda v. Spain*, no. 61112/12, § 32, 29 March 2016, and *Sigurþór Arnarsson*, cited above, § 37). However, when convictions have been confirmed on appeal, the Court has in its overall assessment of the case (see paragraphs 99-101 above) attached more importance to the specific features of the proceedings in question and the manner in which the applicant's interests were actually presented and protected before the appellate court. The question of whether the applicant requested an oral hearing is part of the Court's assessment in cases of this nature. When such requests have been disregarded by the appellate court, this may contribute to a finding of a violation of Article 6 § 1 (see *Muttillainen*, cited above, §§ 25-26; *Talabér*, cited above, §§ 28-29; *R.H. v. Finland*, no. 34165/05, § 32, 2 June 2009; *Sándor Lajos Kiss v. Hungary*, no. 26958/05, § 25, 29 September 2009; *Mtchedlishvili v. Georgia*, no. 894/12, § 39, 25 February 2021; *Deliktaş v. Türkiye*, no. 25852/18, § 51, 12 December 2023; contrast *Ekbatani v. Sweden*, 26 May 1988, §§ 15 and 31, Series A no. 134, where the applicant had made such a request but this was not mentioned in the Court's reasoning). In contrast, when finding no violation of Article 6 § 1 in cases of this kind, the Court may emphasise the fact that the applicant did not make any request for the re-hearing of oral evidence (see *Hermi*, cited above, § 87, and *Zelčs v. Latvia*, no. 65367/16, § 74, 20 February 2020) or did not attend the appellate hearing (*Lazariu v. Romania*, no. 31973/03, § 162, 13 November 2014).

(b) Application of these principles to the present case

104. Turning to the case at hand, the Court notes that the first applicant complained, with reference to the general right to a fair hearing under Article 6 § 1 of the Convention, that the Supreme Court had made new factual findings and re-evaluated oral evidence without re-hearing the accused or the witnesses.

105. In the relevant application form, no reference was made to the right to hear witnesses under Article 6 § 3(d) of the Convention. The Government also centred their arguments on Article 6 § 1. The Court for its part sees no need to examine any part of the complaint under Article 6 § 3(d) of its own motion, as the application does not concern the right to hear witnesses “on the same conditions” as the prosecution, but rather the scope of the general right to a “fair hearing” in Article 6 § 1 (compare *Sigurþór Arnarsson*, cited above, § 29, and *Július Þór Sigurþórsson*, cited above, § 31).

106. It is not in dispute that the Supreme Court had full jurisdiction to examine questions of fact as well as questions of law, including the evidentiary value of documentary evidence. However, under domestic law, it could not re-evaluate a District Court's conclusion on the evidentiary value of oral testimony without rehearing it (see paragraph 48 above).

107. As is borne out by the Court's well-established case-law, Article 6 § 1 of the Convention does not entail an automatic obligation to hold a public hearing or to re-hear oral evidence each and every time a matter comes before a court of appeal which has jurisdiction to examine both questions of fact and law. The question whether this is required essentially depends on the specific features of the proceedings in question and the manner in which the applicant's interests were actually presented and protected before the appellate court, particularly in the light of the nature of the issues to be decided by it and of their importance to the appellant (see paragraphs 99 and 102 above).

108. The question before the Court therefore is whether, in the circumstances of the case at hand, the Supreme Court could, as a matter of fair trial, properly examine the issues to be determined without a direct assessment of the evidence given by the accused and certain significant witnesses in person. That examination will not address whether the Icelandic Supreme Court correctly assessed the factual and legal issues before it but will be confined to whether the proceedings were fair (see, for example, *Sigurþór Arnarsson*, cited above, § 32).

109. The Court notes at the outset that the first applicant was convicted by the District Court after a full adversarial hearing at which evidence, including oral testimony of the accused and witnesses, was taken (see paragraph 14 above). As the Government noted, the first applicant enjoyed full equality with the prosecution as regards the submission of documentary evidence and no limitations were imposed on his right to call witnesses at first instance. The fairness of the District Court's full adversarial hearing has not been disputed.

110. At the hearing before the Supreme Court, the parties' representatives presented oral arguments. The case-file contained transcripts of all the statements of the accused and witnesses before the District Court, and the Supreme Court referred to them in its judgment (see paragraphs 26 and 29 above). The Supreme Court, however, neither heard the accused (including the first applicant) nor the witnesses. On 3 December 2015, it upheld the District Court's conviction of the first applicant on the two charges of fraud by abuse of position and for market manipulation but lessened his sentence from five years to three years in prison.

111. As regards the first charge of fraud by abuse of position, the Court observes that the issues to be determined were predominantly factual in nature. The first applicant and the prosecutor both submitted to the Supreme

Court that the District Court had erred when stating that the first applicant and co-accused E.S. had both testified that they had decided to grant the loan in question to BK-44 at a meeting on 7 November 2007. It is true that the Supreme Court noted that the testimonies of the accused varied and were partly unclear with respect to the first applicant's level of engagement in granting the loan in question. In that connection, the Supreme Court took a different position than the District Court on the issue of the first applicant's involvement at the said meeting. However, the Court notes that this was to correct the District Court's overstatement and functioned *per se* to the first applicant's benefit in the overall assessment of his guilt or innocence. In confirming the District Court's conviction, the Supreme Court, notably, also relied more heavily on the documentary evidence to find that the first applicant was involved in the granting of the loan over and above simply attending a part of a meeting on 7 November 2007. Moreover, in placing in this respect more emphasis on documentary evidence than the District Court had done, the Supreme Court fully exercised its essential role of assessing the evidence before it, the way evidence should be assessed being primarily a matter for regulation by national legislation and the domestic courts (compare *Lamatic v. Romania*, no. 55859/15, §§ 60-61, 1 December 2020).

112. As regards the second charge of fraud by abuse of position, the Supreme Court's findings on the first applicant's involvement were partly based on its findings in respect of the first charge. The applicant, however, also complains that the Supreme Court did not hear Glitnir's compliance officer in order to assess his credibility as witness. In this respect the Court notes that the Supreme Court assigned the same weight to the compliance officer's testimony as the District Court had done and that there was no disagreement between the two courts on the reliability and credibility of this testimony (compare *Ignat v. Romania*, no. 17325/16, § 57, 9 November 2021; *Marilena-Carmen Popa v. Romania*, no. 1814/11, §§ 45-46, 18 February 2020; contrast *Július Þór Sigurbórsson*, cited above, § 42; and *Marcos Barrios v. Spain*, no. 17122/07, §§ 37-41, 21 September 2010). The same applies to the first applicant's conviction for market manipulation, since the Supreme Court confirmed it with reference to the District Court's reasoning.

113. In light of the above and taking into account that the first applicant, who had been convicted at first instance, did not request any re-hearing of oral evidence (compare *Hermi*, cited above, § 87, and *Zelčs*, cited above, § 74; contrast *Sigurbór Arnarsson*, cited above § 37), the Court concludes that the fairness of the criminal proceedings against him was not prejudiced by the failure to re-hear the compliance officer on appeal.

114. There has therefore been no violation of Article 6 § 1 of the Convention as regards the lack of re-hearing oral evidence before the Supreme Court.

IV. ALLEGED VIOLATION OF THE FIRST APPLICANT'S RIGHT TO A FAIR TRIAL ON ACCOUNT OF THE INSUFFICIENT REASONING OF THE DOMESTIC JUDGMENTS

115. The first applicant further complained that his right to a fair trial as provided in Article 6 § 1 of the Convention had been violated due to the fact that both the District Court and the Supreme Court had failed to sufficiently reason their findings by failing to respond to his arguments about the credibility of Glitnir's compliance officer.

116. The relevant part of Article 6 § 1 of the Convention has been cited above (see paragraph 54 above).

A. Admissibility

117. The Government submitted that the complaint should be declared inadmissible as manifestly ill-founded. The first applicant contested the Government's submission.

118. The Court finds 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

119. The first applicant argued that it was inherent in the concept of a fair hearing that everyone was entitled to a sufficiently reasoned judgment in their case. He submitted that despite his challenges to the credibility of Glitnir's compliance officer's testimony, neither the District Court nor the Supreme Court had addressed his arguments. However, this witness' testimony had been a key element for the determination of his guilt under the second charge of fraud by abuse of position and, by extension, under the charge for market manipulation.

120. The Government objected to the first applicant's arguments. They submitted that under Article 6 § 1 of the Convention the assessment of evidence was primarily for the national courts, and that the obligation to adequately state reasons for their judgments did not require a detailed answer to every argument advanced. The first applicant had not been able to discredit the compliance officer's testimony with any reasonable arguments. The courts had, therefore, had no reason to address the issue. The first applicant had, further, not provided the Court with any evidence to support his allegations in this respect. The domestic courts at both instances had adequately stated the reasons on which their judgments were based, which had neither been automatic nor stereotypical. The courts had met the Court's

criteria of giving specific and explicit replies to the arguments which were decisive for the outcome of the proceedings.

1. The Court's assessment

(a) General principles

121. The Court reiterates that according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I). Without requiring a detailed answer to every argument advanced by the complainant, this obligation presupposes that parties to judicial proceedings can expect to receive a specific and explicit reply to the arguments which are decisive for the outcome of those proceedings (see, among other authorities, *Ruiz Torija v. Spain*, 9 December 1994, §§ 29-30, Series A no. 303-A). It must be clear from the decision that the essential issues of the case have been addressed (see *Taxquet v. Belgium* [GC], no. 926/05, § 91, ECHR 2010). In view of the principle that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective, the right to a fair trial cannot be seen as effective unless the requests and observations of the parties are truly “heard”, that is to say, properly examined by the tribunal (see *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, § 305 *in fine*, 26 September 2023, with further references). Moreover, in cases relating to interference with rights secured under the Convention, the Court seeks to establish whether the reasons provided for decisions given by the domestic courts are automatic or stereotypical (see *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 84, 11 July 2017, with further references).

(b) Application of these principles to the present case

122. The Court observes that according to the first applicant, neither the District Court nor the Supreme Court replied to his arguments in support of his challenge to the credibility of Glitnir's compliance officer's testimony.

123. In that connection the Court notes that the first applicant did not put forward any evidence to substantiate that he had raised the issue of the compliance officer's credibility before the District Court. He did, however, clearly raise it in his written submissions to the Supreme Court. The first applicant invoked the compliance officer's statements about his mental state at the time of the settlement of the put option, the inconsistency of his testimony with contemporaneous documentary evidence, his statements to the police – which according to the first applicant did not implicate him in the offence – and the compliance officer's role in relation to the settlement. The

first applicant, further, referred to the inconsistency between the compliance officer's testimony, on the one hand, and his own testimony and that of co-accused E.S., on the other hand (see paragraph 21 above). This was in line with the first applicant's defence that he had been unaware of how the business deal with BK-44 would be settled until after the settlement had taken place.

124. In reply to the Government's argument that the first applicant had not been able to discredit the compliance officer's testimony with any reasonable arguments meriting a response, the Court notes that it is not its task to examine whether the first applicant's arguments were well-founded in substance. It is likewise not for the Court to dictate what conclusions the Supreme Court should have drawn from his arguments. It falls to the national courts to determine questions of that nature (compare *Ruiz Torija v. Spain*, 9 December 1994, § 30, Series A no. 303-A). The Court limits itself to observing that the first applicant's arguments were not vague, submitted in a passing manner or left completely unsubstantiated (compare *Ilyadi v. Russia*, no. 6642/05, § 44, 5 May 2011, and contrast *Čivinskaitė v. Lithuania*, no. 21218/12, § 143, 15 September 2020).

125. The Court notes that the Supreme Court did not address the first applicant's arguments concerning the credibility of the compliance officer's testimony. In the absence of any reply to the first applicant's submissions in this respect, it is impossible to ascertain whether the Supreme Court simply neglected to deal with them or whether it dismissed them upon their examination and, if so, for what reason (see *Ilyadi*, cited above, § 46; *Krasulya v. Russia*, no. 12365/03, § 52, 22 February 2007; and *Hiro Balani v. Spain*, 9 December 1994, § 28, Series A no. 303-B).

126. The Court observes that the compliance officer's testimony related to a core element of the second charge of fraud by abuse of position, namely the first applicant's role in making Glitnir adhere to the put option, which guaranteed that the entirety of the market risk of the shares purchased by BK-44 rested with Glitnir. The first applicant's conviction for the second charge of fraud by abuse of position, further, relied to a significant extent on this testimony. As the first applicant's conviction for market manipulation was confirmed by the Supreme Court with reference to the reasoning of the District Court, which in this respect had referred to its findings based on the compliance officer's testimony, the core of the charge of market manipulation was directly affected as well. Against this background, the Court concludes that the first applicant's submissions, calling into question the compliance officer's credibility, raised a specific, pertinent and important point in the context of the criminal case against him and called for an explicit reply (compare *Cupiał v. Poland*, no. 67414/11, § 63, 9 March 2023; *Rostomashvili v. Georgia*, no. 13185/07, § 59, 8 November 2018; and *Krasulya*, cited above, § 52).

127. In the light of the above the Court concludes that there has been a violation of Article 6 § 1 on account of the Supreme Court not addressing the first applicant's arguments about the compliance officer's credibility.

V. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 7 ON ACCOUNT OF THE MANNER OF THE SECOND APPLICANT'S INTERROGATION

128. The second applicant complained that he had been tried twice for the same offence, in violation of the *ne bis in idem* guarantee provided in Article 4 of Protocol No. 7 to the Convention, which in so far as relevant provides as follows:

“1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case....”

A. The parties' submissions on admissibility

129. The Government submitted that the complaint should be declared inadmissible as manifestly ill-founded. They further argued that the circumstances of second applicant's case did not fall within the scope of Article 4 § 1 of Protocol No. 7 to the Convention. The aim of Article 4 of Protocol No. 7 was to prohibit the repetition of criminal proceedings that had been concluded by a “final” decision. According to the Court's case-law, a decision by a prosecutor not to prosecute could not be regarded as a final decision in the case. Accordingly, the subsequent decision to prosecute, followed by the second applicant's conviction, did not amount to new proceedings falling under the scope of Article 4 § 1 of Protocol No. 7 to the Convention. In addition, the Special Prosecutor's decision when changing the second applicant's status from accused to witness had not amounted to acquittal.

130. The second applicant contested the Government's submissions. He maintained that there had been two sets of criminal proceedings against him for the same offence. The decision of the Special Prosecutor to change his status from a suspect to a witness had constituted the conclusion of the first proceedings on their merits by a final decision and had amounted to an acquittal.

B. The Court's assessment of admissibility

131. Article 4 of Protocol No. 7 states that the *ne bis in idem* principle is intended to protect persons who have already been “finally acquitted or convicted”. The explanatory report on Protocol No. 7 states, as regards Article 4, that “[t]he principle established in this provision applies only after the person has been finally acquitted or convicted in accordance with the law and penal procedure of the State concerned”. For a person to qualify for protection under this Article, a final decision is therefore not sufficient; the final decision must also involve the person's acquittal or conviction. The Court must therefore determine whether there was an acquittal or conviction. If so, it must determine whether it was a “final” decision for the purposes of Article 4 of Protocol No. 7 (see *Mihalache v. Romania* [GC], no. 54012/10, §§ 88-89, 8 July 2019).

132. The Court reiterates that according to its well-established case-law the discontinuance of criminal proceedings by a public prosecutor does not, as a rule, amount to either a conviction or an acquittal, and that therefore Article 4 of Protocol No. 7 finds no application in that situation (see *Marguš v. Croatia* [GC], no. 4455/10, § 120, ECHR 2014 (extracts); *Smirnova and Smirnova v. Russia* (dec.), nos. 46133/99 and 48183/99, 3 October 2002; and *Harutyunyan v. Armenia* (dec.), no. 34334/04, 7 December 2006). This case-law was not called into question in the *Mihalache* judgment, which concerned quite a specific prosecutorial situation where a public prosecutor had decided to discontinue criminal proceedings and had at the same time imposed an administrative penalty in respect of the conduct to which those proceedings related (see *Mihalache*, cited above, §§ 13 and 99-101; see also, for a recent recapitulation of the Court's case-law on the matter in *Decision on a request for an advisory opinion under Protocol No. 16 concerning the interpretation of Article 4 of Protocol No. 7 to the Convention*, request no. P16-2023-002, Supreme Court of Estonia, §§ 21-29, 19 February 2024).

133. Concerning the case at hand, the Court observes that the second applicant did not argue that he was ever formally notified of the discontinuation of the criminal investigation against him (see paragraph 47 above). He only noted that during his interview of 21 December 2011, he had been questioned as a witness instead of as a suspect. Even if the Special Prosecutor took a decision to discontinue the criminal proceedings against him, the second applicant did not put forward any evidence to demonstrate that this entailed some specific features setting it apart from such prosecutorial discontinuance orders which, according to Court's case-law, do not amount to acquittal in the sense of Article 4 of Protocol No. 7.

134. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

VI. ALLEGED VIOLATION OF THE RIGHT TO A FAIR TRIAL ON ACCOUNT OF THE MANNER OF THE SECOND APPLICANT'S INTERROGATION

135. The second applicant complained that the reopening of the criminal case against him had violated his right to a fair trial as provided in Article 6 § 1 of the Convention.

136. The relevant part of Article 6 § 1 of the Convention has been cited above (see paragraph 54 above).

A. Admissibility

137. The Government submitted that the complaint should be declared inadmissible as manifestly ill-founded. The first applicant contested the Government's submission.

138. The Court finds 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*

139. The second applicant complained that the reopening by the Special Prosecutor of the case against him (as described above in paragraphs 8-11), had violated his right to a fair trial as provided in Article 6 § 1 of the Convention. He submitted that while the possibility of reopening a criminal case was *prima facie* compatible with the Convention, the manner in which this occurred should not impair the very essence of fair trial. The resumption of criminal proceedings was, thus, allowed only if serious legitimate considerations outweighed the principle of legal certainty. In the case at hand there had been no legitimate reason to start the "second proceedings" against him, especially in light of how the change of status from witness to suspect (or *vice versa*) had serious consequences. Save for admitting to punishable behaviour, the change of status compelled the second applicant to answer questions under threat of penal consequences. He had, thus, not been guaranteed a fair trial under Article 6 § 1 of the Convention.

140. The Government rejected the second applicant's submissions, referring to their arguments regarding the admissibility and merits of the complaint under Article 4 of Protocol No. 7 to the Convention. They endorsed the reasoning of the Supreme Court (see paragraph 27 above) and submitted that when the second applicant was interrogated for the second time as a witness, there had been nothing to indicate that a final decision had been taken to end the investigation against him. If the Court were to deem that his second questioning had in fact indicated that there had been a decision to terminate

the criminal investigation against him, the continuation of the case had been justified on the basis of new or newly discovered facts, received by the Special Prosecutor between the second and third questioning. As could be discerned from the third questioning, this information had been of value for the investigation. Finally, the Government maintained that all the proceedings had been in conformity with the requirements of a fair trial laid down in Article 6 § 1. The second applicant had been able to present his arguments about the investigation at both court instances, and the proceedings, as a whole, had been fair.

2. *The Court's assessment*

(a) General principles

141. The protection against duplication of criminal proceedings is only one of the specific safeguards associated with the general guarantee of a fair hearing in criminal proceedings. Therefore, the mere fact that proceedings were compatible with Article 4 of Protocol No. 7 is not sufficient to establish compliance with Article 6 of the Convention (see *Nikitin v. Russia*, no. 50178/99, § 54, ECHR 2004-VIII).

142. The primary purpose of Article 6 as far as criminal matters are concerned is to ensure a fair trial by a “tribunal” competent to determine “any criminal charge”. However, the guarantees of Article 6 are applicable from the moment that a “criminal charge” exists within the meaning of this Court’s case-law and may therefore be relevant during pre-trial proceedings if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them. The manner in which Article 6 §§ 1 and 3 are to be applied during the investigation stage depends on the special features of the proceedings involved and on the circumstances of the case (see *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 253, 13 September 2016).

143. The requirement of legal certainty is an important element of fairness under Article 6 § 1 of the Convention. It is nevertheless not absolute. In criminal cases, it must be assessed in the light of, for example, Article 4 § 2 of Protocol No. 7, which expressly permits a State to reopen a case due to the emergence of new facts, or where a fundamental defect is detected in the previous proceedings, which could affect the outcome of the case (see *Nikitin v. Russia*, cited above, §§ 54-56). Thus, the mere possibility of reopening a criminal case is *prima facie* compatible with the Convention, including the guarantees of Article 6. However, certain special circumstances of the case may reveal that the actual manner in which it was used impaired the very essence of a fair trial (*ibid.*, § 57).

144. The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent and presupposes that the prosecution in a criminal case seek to prove their case without resort to

evidence obtained through methods of coercion or oppression in defiance of the will of the accused (*see Saunders v. the United Kingdom*, 17 December 1996, §§ 68-69, *Reports of Judgments and Decisions* 1996-VI; *Jalloh v. Germany* [GC], no. 54810/00, §§ 100 and 102, ECHR 2006-IX; and *Bykov v. Russia* [GC], no. 4378/02, § 92, 10 March 2009). The right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (*see John Murray v. the United Kingdom*, 8 February 1996, § 45, *Reports* 1996-I; *Jalloh*, cited above, § 100; *Bykov*, cited above, § 92; and *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 266, 13 September 2016).

145. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature, such as exculpatory remarks or mere information on questions of fact, may be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial, or to otherwise undermine his credibility. The privilege against self-incrimination cannot therefore reasonably be confined to statements which are directly incriminating (*see Ibrahim and Others*, cited above, § 268). Indeed, according to the Court's case-law, for statements to be regarded as self-incriminating it is sufficient for them to have substantially affected the accused's position (*see Beuze v. Belgium* [GC], no. 71409/10, § 178, 9 November 2018).

146. However, the right not to incriminate oneself is not absolute (*see Heaney and McGuinness v. Ireland*, no. 34720/97, § 47, ECHR 2000-XII; *Weh v. Austria*, no. 38544/97, § 46, 8 April 2004; and *O'Halloran and Francis v. the United Kingdom* [GC], nos. 15809/02 and 25624/02, § 53, ECHR 2007-III). The degree of compulsion applied will be incompatible with Article 6 where it destroys the very essence of the privilege against self-incrimination (*see John Murray*, cited above, § 49). But not all direct compulsion will destroy the very essence of the privilege against self-incrimination and thus lead to a violation of Article 6 (*see O'Halloran and Francis*, cited above, § 53). What is crucial in this context is the use to which evidence obtained under compulsion is put in the course of the criminal trial (*see Saunders*, cited above, § 71, and *Ibrahim and Others*, cited above, § 269).

(b) Application of these principles to the present case

147. Turning to the facts of the present case, the Court notes at the outset that the second applicant was charged with a criminal offence before his status in the investigation was changed to that of a witness. On the District

Court's approach, the investigation was terminated when he was questioned as a witness, and reopened again when his status was subsequently changed to that of a suspect again. The minority of the Supreme Court reached the same conclusion, while the majority held that the investigation had not been terminated. It is not the Court's role to pronounce on the application of domestic law in this respect. It notes, however, that it is well-established case-law under the Convention that even in the event of prosecutorial discontinuation orders, the applicant will not, as a rule, be considered "acquitted" in the Convention sense unless the prosecutor is competent under domestic law to establish and, as appropriate, punish the unlawful behaviour of which the person has been accused (see *Mihalache*, cited above, §§ 95 and 97). As this is not the case with respect to the second applicant, the fact that his status was changed from witness to accused at the pre-trial stage did not *per se* seriously prejudice the principle of legal certainty under Article 6 § 1 of the Convention.

148. As regards the second applicant's submission that the changing of his procedural status during the pre-trial proceedings had prejudicial effect on the fairness of his trial as the change of status compelled him to answer the investigators' questions, the Court notes that the second applicant was obliged during his second interrogation to answer questions in a truthful manner, under threat of penal consequences, except in so far as his answers could constitute an admission to or an indication of the commitment of a punishable act. The privilege against self-incrimination under the Convention is, however, not confined to statements which are directly incriminating (see *Ibrahim and Others*, cited above, § 268). Even so, in the assessment of whether the manner of the second applicant's second interrogation seriously prejudiced his right to a fair trial, the crucial issue is the use to which the evidence thus obtained was put in the course of the criminal trial (see *Saunders*, cited above, § 72, and *Ibrahim and Others*, cited above, § 269). In this respect, the Court notes that during the court proceedings the second applicant was able to challenge, and did challenge, the aforementioned change of status. In that connection, the Supreme Court, by its judgment of 3 December 2015, decided to disregard from evidence his second interview when he had had the status of a witness instead of that of an accused (see paragraph 27 above; compare *Bajić v. North Macedonia*, no. 2833/13, §§ 69-74, 10 June 2021, and contrast *Bjarki H. Diego*, cited above, § 59).

149. In light of the above there has not been a violation of Article 6 § 1 of the Convention due to the manner of interrogation of the second applicant.

VII. ALLEGED VIOLATION OF THE SECOND APPLICANT'S RIGHT TO A TRIAL WITHIN A REASONABLE TIME

150. The second applicant complained that the length of the criminal proceedings against him had violated his right to a fair trial within a reasonable time as provided in Article 6 § 1 of the Convention.

151. The relevant part of Article 6 § 1 of the Convention has been cited above (see paragraph 54 above).

A. Admissibility

152. The Government submitted that the complaint should be declared inadmissible as manifestly ill-founded. The first applicant contested the Government's submission.

153. The Court finds 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

154. The second applicant asserted that the length of proceedings had exceeded the requirement of a hearing within reasonable time as eight years had passed from the transactions in question until the rendering of the judgment of the Supreme Court. The case had not been so complex or the case-materials so voluminous as to justify this length of proceedings.

155. The Government submitted that the time period to be taken into account according to the Court's case-law began when a person was charged and ended with the judgment of the highest national court. In the second applicant's case this period ran between 31 March 2011, when the Financial Supervisory Authority referred the case to the office of the Special Prosecutor, and 3 December 2015, when the Supreme Court rendered its judgment. Consequently, the proceedings had lasted four years and eight months. The investigation against the second applicant had, however, begun on 1 December 2011, when he was questioned for the first time.

156. The Government further submitted that the reasonableness of the length of proceedings had to be assessed in light of the circumstances from which they evolved, namely the financial collapse of 2008. This had led to the establishment of the office of the Special Prosecutor, which had been charged with investigating and prosecuting multiple complex and serious offences. It had, further, created a heavy workload on the court system. During the District Court proceedings, the second applicant had petitioned to have his case dismissed, which had called for a separate hearing and ruling,

and the main hearing in the case had involved over twenty witnesses. At no stage of the proceedings had there been any unexplained delays.

2. *The Court's assessment*

(a) General principles

157. While there is no right under Article 6 of the Convention to a particular outcome of criminal proceedings or, therefore, to a formal conviction or acquittal following the laying of criminal charges, there is indisputably a right to have one's case heard by a court within a reasonable time once the judicial process has been set in motion. That right is based on the need to ensure that accused persons do not have to remain too long in a state of uncertainty as to the outcome of the criminal accusations against them (see *Wemhoff v. Germany*, 27 June 1968, p. 26, § 18, Series A no. 7, and *Kart v. Turkey* [GC], no. 8917/05, § 68, ECHR 2009 (extracts)).

158. In criminal matters, the "reasonable time" referred to in Article 6 § 1 begins to run as soon as a person is "charged". 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 *Simeonovi v. Bulgaria* [GC], no. 21980/04, § 110, 12 May 2017). This period covers the whole of the proceedings in question, including appeal proceedings (see *Vegotex International S.A. v. Belgium* [GC], no. 49812/09, § 150, 3 November 2022).

159. The reasonableness of the length of proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct and the conduct of the competent authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II, and *Vegotex International S.A.*, cited above, § 151).

(b) Application of these principles to the present case

160. The Court notes that there is nothing in the case-file to suggest that the second applicant was notified of the allegation that he had committed criminal offences or that the authorities had resorted to any measures substantially affecting him in the context of the criminal investigation before 1 December 2011, when he was questioned as a suspect for the first time (see paragraph 8 above). The District Court rendered its judgment on the merits of the case on 23 June 2014 and the Supreme Court subsequently rendered its judgment on 3 December 2015. The relevant length of proceedings, from the moment that the applicant was "charged" in the Convention sense until he

was finally convicted, was consequently four years at two levels of jurisdiction.

161. The Court considers that the subject matter of the case involved complex financial transactions in an area of law where illegality and criminal responsibility are often not clear-cut (compare *Bjarki H. Diego*, cited above, § 58). Its investigation involved complicated transactions, four accused and over twenty witnesses, and resulted in several detailed criminal charges. The pre-trial investigation lasted for one year and seven months, counting from 1 December 2011 until the second applicant's indictment on 28 June 2013 (see paragraph 12 above). The proceedings before the District Court lasted for approximately one year, and the Supreme Court proceedings subsequently lasted for one year and five months. The second applicant has not pointed to any particular period of unexplained inactivity on behalf of the authorities, and the Court detects none based on the case file.

162. As regards the second applicant's request before the District Court to dismiss the case against him, the Court observes that it constitutes an objective fact which cannot be attributed to the respondent State and which must be taken into account for the purpose of determining whether or not the reasonable time referred to in Article 6 § 1 has been exceeded (see *Sociedade de Construções Martins & Vieira, Lda., and Others v. Portugal*, nos. 56637/10 and 5 others, § 48, 30 October 2014).

163. In the light of the above considerations, notably the lack of any period of unexplained inactivity attributable to the State, the Court finds that the duration of the proceedings was not excessive (compare *Korkin v. Russia*, no. 48416/09, §§ 105-111, 12 November 2015, and *Hıdır Durmaz v. Turkey*, no. 55913/00, § 42, 5 December 2006).

164. There has accordingly been no violation of Article 6 § 1 of the Convention.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

165. 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.”

166. The first applicant claimed ISK 5,000,000 (approximately EUR 32,000 at the time of lodging the claim) in respect of non-pecuniary damage. The Government objected to the claim as being excessive as to quantum. The finding of a violation should constitute in itself just satisfaction for any non-pecuniary damage.

167. The Court, acting on an equitable basis and having regard to the circumstances and the nature of the violation of the first applicant's rights, awards him EUR 4,000 in respect of non-pecuniary damage.

168. The first applicant also claimed ISK 9,669,668 (approximately EUR 61,800 at the time of lodging the claim) in respect of pecuniary damage while explaining that the claim related to the auctioning of his home to satisfy the cost of the domestic proceedings, as awarded by the Supreme Court. The applicant did not submit invoices, but referred 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 5,233,873 and ISK 4,340,000 respectively. He further submitted documents attesting to the auction. The Government accepted that the auction took place for the above purpose but submitted that even if the Court were to find a violation of Article 6, this would not have changed the first applicant's obligation to pay his defender's fee. The claim was also excessive as to quantum.

169. In so far as the first applicant claims he has suffered pecuniary damage, the Court does not discern any causal link between the violation found and any such damage. As regards costs awarded by the Supreme Court in the domestic proceedings, the Court considers that the applicant has sufficiently established that they were actually incurred (contrast *Bjarki H. Diego*, cited above, §§ 65 and 67). However, as no itemised bills were presented, it is difficult to assess the reasonableness and necessity of the costs claimed. In these circumstances, and taking into account that costs and expenses are only recoverable to the extent that they relate to the violation found (see *Murray v. the Netherlands* [GC], no. 10511/10, § 134, ECHR 2016), the Court considers it reasonable to award the sum of EUR 4,000 in respect of the costs related to proceedings before the domestic courts.

170. The first applicant further submitted an invoice in the amount of ISK 2,480,000 (approximately EUR 15,800 at the time of lodging the claim) for the costs incurred before the Court. The Government considered the claim reasonable, should the Court find a violation of his rights.

171. The Court notes that the invoice submitted was not itemised. However, it is clear that the first applicant incurred some costs related to legal representation in the proceedings before the Court (compare *Ara Harutyunyan v. Armenia*, no. 629/11, § 69, 20 October 2016). The Court considers it reasonable to award the sum of EUR 4,000 in respect of the costs of the proceedings before the Court.

FOR THESE REASONS, THE COURT

1. *Decides*, unanimously, to join the applications;
2. *Declares*, unanimously, the second applicant's complaint under Article 4 of Protocol No. 7 to the Convention inadmissible and the remainder of the complaints admissible;

3. *Holds*, unanimously, that there has been a violation of the first applicant's rights under Article 6 § 1 of the Convention on account of inadequate reasoning of the Supreme Court judgment;
4. *Holds*, unanimously, that there has been no violation of the first and the second applicants' rights under Article 6 § 1 of the Convention in so far as the impartiality of the Supreme Court Justices was concerned;
5. *Holds*, unanimously, that there has been no violation of the first applicant's rights under Article 6 § 1 in so far as the Supreme Court did not re-hear oral evidence;
6. *Holds*, by six votes to one, that there has been no violation of the second applicant's rights under Article 6 § 1 in so far as the manner of his interrogation was concerned;
7. *Holds*, unanimously, that there has been no violation of the second applicant's rights under Article 6 § 1 in so far as the length of the criminal proceedings against him was concerned;
8. *Holds*, unanimously,
 - (a) that, the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State, at the rate applicable at the date of settlement:
 - (i) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable to the first applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
9. *Dismisses*, unanimously, the remainder of the first applicant's claims for just satisfaction.

Done in English, and notified in writing on 21 January 2025, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Registrar

Ioannis Ktistakis
President

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

PARTLY DISSENTING OPINION OF JUDGE PAVLI

1. I have voted with the majority in all respects but one: the finding under operative point 6 that there has been no violation of the second applicant's rights under Article 6 § 1 of the Convention as to the manner of his questioning (see paragraphs 135 et seq. of the judgment). In my view, the Government have not convincingly shown that the manner in which he was interviewed was consistent with the requirements of a fair trial, in particular with regard to legal certainty and respect for the privilege against self-incrimination.

Prosecutorial zigzagging and contested facts

2. Let me start by laying out the relevant facts. The second applicant was questioned for the first time as a suspect on 1 December 2011. Within a mere three weeks, on 21 December 2011, he was questioned again, this time as a witness and without the assistance of a lawyer. Whatever the correct characterisation of this change of status might be under national law, we should assume – or at least the second applicant was reasonably entitled to assume at that point in time – that the prosecution had concluded that the evidence no longer supported the charges on which he was initially suspected.

3. The charges were reinstated six months later, on 18 June 2012, when the second applicant was questioned for a third time, this time as a suspect once more. According to the Government, what precipitated the change was the prosecution's discovery of significant new evidence. This presumably refers to recordings of a dozen telephone calls involving the second applicant, which were made available to the prosecution on 29 December 2011 – that is, only eight days after his status had been changed to that of a witness. A number of additional witnesses were apparently heard between the second applicant's second and third interviews. No convincing explanation has been provided to the Court as to why the prosecution had rushed into a change of status from suspect to witness before all the relevant evidence had been collected or analysed.

4. Furthermore, the parties disagree as to whether the new evidence that emerged, and in particular two supposedly incriminating telephone calls (see paragraph 13 of the judgment), were relevant to all or only some of the charges on which the second applicant was eventually convicted. The parties also disagree as to whether, at the second interview, the applicant was warned that his status could be changed again to that of a suspect (see paragraph 9 of the judgment). In the absence of any assessment of these contested aspects (namely, from the perspective of their impact on defence rights) by the highest national court, the Court is left with little clarity on key considerations relevant to the Article 6 assessment in issue.

Adverse implications for the accused and the nature of the review required

5. Be that as it may, it is obvious (to me at least) that the prosecution’s unusual approach had potentially adverse implications for legal certainty, the preservation of the second applicant’s privilege against self-incrimination, and the overall fairness of the proceedings against him. These aspects of procedural fairness are inter-related and cannot be neatly compartmentalised, thus calling for a comprehensive review of their impact on defence rights. The manner in which the investigation against the second applicant was conducted ought to have led the national courts, and the Supreme Court in particular, to apply particularly careful scrutiny to the reinstatement of the charges, taking account of all relevant circumstances. The Supreme Court opted to exclude the testimony given by the second applicant at his second interview, thus signalling a degree of discomfort with the way it had been conducted. This alone was not sufficient, however, to ensure the level of scrutiny that I believe was required under the circumstances.

6. The Chamber majority have found that there was no lack of legal certainty by relying, essentially, on the fact that the second applicant had not been formally “acquitted” before the charges were reinstated and considering, therefore, that the change of status “did not *per se* seriously prejudice the principle of legal certainty” (see paragraph 147 of the judgment). In so doing, the majority appear to have looked at the issue primarily through the prism of Article 4 of Protocol no. 7 and/or the case-law developed under that provision (*ibid.*). However, my own reading of the case-law is that a less formalistic approach is required under Article 6 § 1 of the Convention: as the judgment itself points out, the mere fact that proceedings did not encroach upon the prohibition of *ne bis in idem* is not sufficient, in itself, to establish compliance with Article 6 (see paragraph 141).

7. The applicable Article 6 principles (see paragraph 143 of the judgment) make clear that the Court should look beyond formalities in assessing the impact on legal certainty and overall fairness. In particular, under the *Nikitin* case-law, the Court must satisfy itself that there has been, in the circumstances, “a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice” (see *Nikitin v. Russia*, cited in paragraph 141 of the judgment, § 57). No such assessment is apparent from the Court’s judgment or from that of the apex national court either.

Inadequate level of Article 6 scrutiny

8. While the *Nikitin* principles were developed in the context of the extraordinary revision of final criminal judgments, the second applicant has argued – with good reason in my view – that they ought to apply, in substance, in the present context as well, where criminal charges were reinstated six

months after he had been questioned as a witness, without legal assistance, and where it has not been shown that it was beyond the control of a diligent prior investigation to uncover the new evidence belatedly obtained (see, *mutatis mutandis*, *Nikitin*, cited above, § 58, where the Court found that the Prosecutor General’s request to reopen criminal proceedings was abusive as it had relied on “defects which it had been entirely within the prosecution’s control to redress before, not after, the final judgment”). One should not underestimate the challenges that the Icelandic authorities may have faced in investigating complex financial crimes in the aftermath of a major banking crisis. At the same time, from the perspective of an individual defendant, prosecutorial choices cannot be free of consequences.

9. Of particular concern is the undermining of the privilege against self-incrimination if the prosecution is allowed to easily slalom between the status of suspect and that of witness. Testimony that is not directly incriminating, but that may have “substantially affected the accused’s position”, is sufficient under the Court’s case-law to trigger protection against self-incrimination (see paragraph 145 of the judgment and the case-law cited therein). The second applicant’s situation bears some similarity to that of the applicant in *Bjarki H. Diego v. Iceland* (no. 30965/17, 15 March 2022), who was questioned as a witness, without a lawyer’s assistance or proper safeguards against self-incrimination, despite being effectively treated as a suspect and having been under surveillance for several months (ultimately leading the Court, unanimously, to find a violation of Article 6 § 1 in that recent case). This suggests that the treatment of the second applicant in the present case, which followed shortly upon the facts in *Bjarki H. Diego* and in a similar procedural context, may not have been an isolated instance of circumvention of defence rights (whether intentional or otherwise). The possibility that the second applicant’s position was “substantially affected” by the second interview – that is, as a witness – cannot be ruled out in the circumstances; this being also an area of the Court’s case-law that may benefit from further development.

10. Lastly, I am prepared to concede that, were one to approach the case as a fourth-instance judge, it could not be ruled out that, all relevant points considered, the significance of the new evidence obtained after the applicant’s second interview *might have been* such as to justify his further prosecution and conviction. That is not, however, a comfortable position for an international court to adopt, even assuming the Court were able to make such a determination, given the important factual and process-based gaps in the record before it.

11. In conclusion, the repeated change in the second applicant’s procedural status was a “fairness red flag” that should have triggered stricter scrutiny, both at national level and before the Chamber. In the absence of such scrutiny, I am unable to agree with the majority conclusion that there has been no violation of Article 6 § 1 as a result of the manner in which the

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second applicant was questioned. A more substantive analysis was necessary to protect the due-process rights not only of the second applicant in the present case, but also of other accused persons who may find themselves in a comparable position in the future.

APPENDIX

List of cases:

No.	Application no.	Case name	Lodged on	Applicant Year of Birth Place of Residence Nationality	Represented by
1.	14175/16	Jóhannes Baldursson v. Iceland	08/03/2016	Johannes BALDURSSON 1971 Reykjavik Icelandic	Reimar PETURSSON
2.	32167/16	Birkir Kristinsson v. Iceland	31/05/2016	Birkir KRISTINSSON 1969 Reykjavik Icelandic	Olafur EIRIKSSON
3.	22720/17	Birkir Kristinsson v. Iceland	17/03/2017	Birkir KRISTINSSON 1969 Reykjavik Icelandic	Olafur EIRIKSSON
4.	22729/17	Jóhannes Baldursson v. Iceland	15/03/2017	Johannes BALDURSSON 1971 Reykjavik Icelandic	Reimar PETURSSON