



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

THIRD SECTION

**CASE OF PÉTUR THÓR SIGURÐSSON v. ICELAND**

*(Application no. 39731/98)*

JUDGMENT

STRASBOURG

10 April 2003

**FINAL**

*10/07/2003*



**In the case of Pétur Thór Sigurðsson v. Iceland,**

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

Mr G. RESS, *President*,

Mr I. CABRAL BARRETO,

Mr L. CAFLISCH,

Mr B. ZUPANČIČ,

Mrs H.S. GREVE,

Mr K. TRAJA, *judges*,

Mr David Thór BJÖRGVINSSON, *ad hoc judge*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 20 March 2003,

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

**PROCEDURE**

1. The case originated in an application (no. 39731/98) against the Republic of Iceland lodged with the European Commission of Human Rights under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Icelandic national, Mr Pétur Thór Sigurðsson (“the applicant”), on 23 October 1997.

2. The applicant represented himself before the Court. The Icelandic Government (“the Government”) were represented by their Agent, Ms Björg Thorarensen, Director at the Ministry of Justice and Ecclesiastical Affairs.

3. The applicant alleged that his right to a fair hearing by an independent and impartial tribunal guaranteed by Article 6 § 1 of the Convention had been violated.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Mr Gaukur Jörundsson, the judge elected in respect of Iceland, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr David Thór Björgvinsson to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

5. By a decision of 14 June 2001, the Chamber declared the application admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other’s observations.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is an Icelandic national, born in 1954. He is a practising lawyer and lives in Reykjavik, Iceland.

9. The applicant instituted proceedings against the National Bank of Iceland, claiming compensation under the law of torts, on the grounds that one of the Bank's legally trained employees had made an incorrect declaration in 1992 which was instrumental in the Supreme Court's finding that a certain claim was no longer enforceable. As the District Court found for the defendant bank, the applicant, by a summons of 31 May 1996, instituted appeal proceedings before the Supreme Court.

10. In the course of the proceedings before the Supreme Court the applicant was given various dates between 10 July and 30 October 1996 within which to complete his submissions and the respondent Bank was given until 6 November 1996 to submit its reply. Subsequently the hearing was scheduled to open on 14 April 1997. Meanwhile, sometime between early March and early April 1997, the case was included in the Supreme Court's docket.

11. By a judgment of 25 April 1997, the Supreme Court, by three votes to two, rejected the applicant's claim. The minority found that the applicant's claim should be upheld and that the National Bank was liable to pay him ISK 8,746,319 Icelandic krónur (ISK) in compensation, plus default interest from 30 August 1993.

12. One of the three judges forming the majority was Mrs Justice Guðrún Erlendsdóttir. The applicant submitted that after the delivery of the Supreme Court's judgment, it came to light that Mrs Justice Guðrún Erlendsdóttir and her husband, a Supreme Court lawyer, had a financial relationship with the National Bank of such a nature as to disqualify her from sitting in the applicant's case.

13. In the spring of 1996 Mr Örn Clausen, husband of Mrs Justice Guðrún Erlendsdóttir, had sought a solution to certain financial problems arising from the inability of a debtor, Mr Edvard Lövdal, to pay certain debts with respect to which Mr Örn Clausen was one of the guarantors, and the inability of other guarantors to honour the guarantee. In early May 1996 twenty-one creditors, one of which was the National Bank, possessed claims

under the guarantees amounting to approximately ISK 50,000,000. This included a claim of approximately ISK 16,000,000 by the National Bank. Another large creditor was the Savings Banks' Hedge Fund which, on behalf of the S-Pingeyinga Savings Bank (Sparisjóður Suður-Pingeyinga – “the Savings Bank”), held a claim of approximately ISK 17,500,000.

14. In order to solve these problems Mr Örn Clausen attempted to reach a settlement with each of the creditors. An economic consultant company, Ráð, agreed to examine his financial situation and to look into the possibilities of obtaining full settlement against partial payment, starting with the two largest creditors and thereafter opening negotiations with the smaller ones, to be completed within six months.

A settlement request made by the company to the National Bank's lawyer on 15 April 1996, included the following observations:

“... Mr Örn Clausen has informed us that he had, for the sake of friendship, provided guarantees with respect to Mr Lövdahl's debts, as they have been friends for decades. He also informs us that he owns no property, and that he will foreseeably have to answer for guarantees on account of Mr Lövdahl in an amount of approximately ISK 49,550,000. His other liabilities amount to approximately ISK 10,000,000 around ISK 8,000,000 of which are taxes. Mr Örn Clausen's wife owns [two] real properties ... [These] are owned by her separately under their marriage agreement dating from 1967. She has declared her readiness to use their net value by mortgage or sale for settling the debts, provided that Mr Örn Clausen is released from his personal guarantees and that his bankruptcy is avoided.

We consequently ask you to recommend to your client, the National Bank, acceptance of 25% in final settlement of the total debt to which Mr Örn Clausen must answer as surety. This would release him from his surety liability. The payment would be made simultaneously with the signature of an agreement to this effect.”

15. On 30 May 1996, in order to obtain funds to pay the creditors, the judge's husband Mr Örn Clausen issued four debt certificates to Landsbréf hf, Verðbréfamarkaður Landsbankans (Landsbréf, the Securities Market of the National Bank, a financial institution owned by the National Bank), totalling approximately ISK 13,600,000. The debts were secured on two properties owned by Mrs Justice Guðrún Erlendsdóttir, namely the couple's main residence and one apartment in which her husband had his law office.

16. On 4 June 1996 Landsbréf sold the above four debt certificates to Eignarhaldsfélag Alþýðubankans (People's Bank Holding Company – “the EFA”), a company specialising in high-risk investments. Ever since, the four debt certificates have been in that company's ownership.

17. On 4 June 1996, in accordance with a settlement agreement of the same date between the National Bank and Mr Örn Clausen, he paid approximately ISK 4,370,000, of which ISK 3,677,195 were towards his debts to the National Bank and the remainder covering his lawyer's fees. Moreover, under the terms of the settlement agreement with the bank, he was released from ISK 11,031,584 of debts originating in his guarantees for Mr Edvard Lövdal's debts, which amounted to ISK 14,708,779. The above

settlement was in conformity with a decision taken on 3 June 1996 by the National Bank's Governing Board.

18. As regards the state of Mr Örn Clausen's debts *vis-à-vis* the National Bank, the Government relied on the following information provided on 4 March 2002 by the head of the bank's legal department:

"The National Bank of Iceland hereby confirms that a settlement agreement was concluded with Mr Örn Clausen on 6 June 1996 concerning his undertakings to guarantee the payment of debts to the National Bank, by which the Bank cancelled 75% of its claims against Mr Örn Clausen against a final payment of 25%. We confirm that the Bank did not extend a new credit to Mr Örn Clausen for the said 25%.

On 4 June 1996 Mr Örn Clausen's total debts to the Bank amounted to ISK 17,298,940; his debts that did not come under the settlement agreement were a note issued 12 September 1991 in the amount of ISK 2,090,161.10, and a suretyship obligation for payment of a loan originally in the amount of ISK 500,000, which was not in arrears (remaining amount as at 31 December 1996: ISK 195,656).

Mr Örn Clausen's total debts on 25 April 1997 were a note issued 12 September 1991, in the amount of ISK 2,394,028.60, and a suretyship obligation for payment of a loan originally in the amount of ISK 500,000, which was not in arrears (remaining amount as at 31 December 1997 ISK 27,777)."

19. Under an agreement concluded on 6 June 1996 the Savings Bank too decided to cancel 75% of its claim against a final payment of 25% by Mr Örn Clausen.

20. The fact that the two largest creditors had accepted the settlement arrangements described above was of significant help in Mr Örn Clausen's efforts to obtain settlement agreements with other creditors, all or most of whom accepted debt cancellation against partial payment.

21. The applicant submitted that there was evidence that on 4 June 1996 the debts of the husband of Mrs Justice Guðrún Erlendsdóttir towards the National Bank amounted to more than ISK 31,000,000. Moreover, in April 1997, at the time when the Supreme Court gave its judgment, the debts in question apparently amounted to approximately ISK 29,000,000.

22. The applicant lodged two petitions to the Supreme Court requesting the reopening of the proceedings in his case against the National Bank on the ground of Mrs Justice Guðrún Erlendsdóttir's alleged lack of impartiality.

23. The first petition was submitted to the Supreme Court on 9 June 1997. The Supreme Court, sitting as a full court, unanimously rejected it on 10 July 1997. Its decision reads:

"In support of his assertion relating to the disqualification of Supreme Court Judge Guðrún Erlendsdóttir, the petitioner refers to four debt certificates issued to the name of Landsbréf, which are secured by mortgage upon two real estates owned by the judge. By reason of the National Bank's ownership of Landsbréf, the petitioner considers that this situation disqualified the judge from adjudicating the case. The secured debts in question amount to a total of ISK 13,600,000 which, as stated in the

certificates, corresponds to approximately 55% of the total assessed sale price of the properties. The certificates were issued in May 1996 for a period of twenty-five years. The petitioner does not maintain that the certificates are in arrears.

It is shown from the information provided by the lawyer for the National Bank that the debt certificates are not, and were not at the time when the case was being considered by the Supreme Court, in the ownership of Landsbréf, the National Bank or any [other] company linked to the Bank. Mortgages on the said properties referred to in the petition, which now have been struck out of the records, and secure debts due to other parties are deemed irrelevant here.

Although the above-mentioned letter of [the applicant] does not refer to the particular statutory provisions authorising the reopening of proceedings, it is to be assumed that the petition is based on section 169 of the Civil Procedure Act, Law no. 91/1991. The petitioner has not referred to any new fact or adduced any new evidence having a bearing on the merits of the case, cf. section 169(1), sub-paragraphs (a) and (b) of Law no. 91/1991.

In the light of the above consideration concerning the said mortgages, none of the conditions which provide the petitioner with a reason to believe that the said judge was not impartial and therefore disqualified from adjudicating the case have been fulfilled, cf. section 6, subsections (1) and (9), of the Supreme Court Act, Law no. 75/1973; section 5, subsection (g) of Law no. 91/1991, Article 70 of the Constitution of the Republic of Iceland (no. 33/1944), cf. section 8 of Constitutional Act no. 97/1995, and Article 6 of the European Convention on Human Rights, cf. Law no. 62/1994. Accordingly, since the legal conditions for granting the petitioner's request for reopening of the proceedings have not been fulfilled, the request is rejected."

24. The applicant submitted that, after the Supreme Court had given its decision of 10 July 1997 in the first revision case, he realised that Mrs Justice Guðrún Erlendsdóttir's husband had additional financial ties with the National Bank. During the period from 1988 to 1991 he had assumed large-scale financial obligations *vis-à-vis* the bank and for years his debts to the bank had been seriously in arrears. According to the applicant, although this could not be affirmed with certainty, it was possible that the National Bank had released Mrs Justice Guðrún Erlendsdóttir's husband from a debt of over ISK 11,000,000.

25. On 23 October 1997 the applicant filed a new petition with the Supreme Court, asking for the reopening of his compensation case. The Supreme Court rejected the petition on 20 November 1997 on the ground that, under the relevant provisions of the Civil Procedure Act, a party may apply only once for re-examination of a case.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

26. At the material time of the present case a general rule on the disqualification of judges was contained in Article 5 § g of the 1991 Code of Civil Procedure, which read:

“A judge ... is disqualified from handling a case if:

...

g. Other facts or conditions are at hand which are capable of casting doubt on his impartiality on reasonable grounds.”

The Government have further pointed to a provision in section 6(9) of the Act 1973 on the Supreme Court of Iceland (Act no. 75:1973), which provides:

“A judge of the Supreme Court shall withdraw if:

...

9. His attitude to a party or to the matter in dispute is such as to present a risk that he will not be able to examine the case in an impartial manner.”

Section 7(2) of that Law provides that the court shall decide in plenary session whether a judge is prevented on grounds of lack of impartiality from participating in a given case. It is open to the parties to challenge the participation of a judge on such grounds.

27. Subsequent to the events at issue in the present case, a new Law on the Judiciary was enacted in 1998 (Law no. 15/1998), which in section 18(4) contains the following provision aimed at codifying a practice that applied at the time of the case:

“A request by a judge not to be assigned to deal with a particular case may be granted by reason of the judge’s relationship to the subject matter, the parties, their non-legal representative or their lawyer, even if the judge cannot be deemed to be disqualified from handling the case, provided that the judge’s request is duly reasoned and another judge of the court is available.”

## THE LAW

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

28. The applicant complained that, because of the close financial relationship between, on the one hand, Mrs Justice Guðrún Erlendsdóttir of the Supreme Court sitting in his case and her husband and, on the other

hand, the National Bank of Iceland, his case brought against the bank had not been heard by an independent and impartial tribunal as required by Article 6 § 1 of the Convention, the relevant parts of which read:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ...”

## **A. The parties' submissions**

### *1. The applicant*

29. In support of his allegation that his right under Article 6 § 1 to a fair hearing by an independent and impartial tribunal had been violated, the applicant maintained that documentary evidence conclusively demonstrated that the husband of Mrs Justice Guðrún Erlendsdóttir was not only heavily indebted – directly and indirectly (through Landsbréf) – to the National Bank of Iceland in June 1996, but that those debts still existed to a significant extent in April 1997.

The applicant submitted that Mr Örn Clausen's total debt to the National Bank of Iceland on 4 June 1996 was ISK 31,790,737.60 (ISK 31,239,114 plus ISK 551,623.60). As regards his debts to the National Bank as at 25 April 1997, there was every reason to assume that they were considerably higher than indicated in the statement of the head of its legal department dated 4 March 2002. The husband's debts to Landsbréf amounted to substantial sums, far exceeding the ordinary and reasonable level of personal debts according to generally accepted standards.

30. The applicant further disputed the Government's submissions regarding the nature of the legal relationships established under the four mortgage certificates issued on 30 May 1996. The Government had incorrectly stated that Landsbréf was a securities broker, not a lending institution. The relevant documents proved beyond any doubt that Landsbréf had bought mortgage notes and had engaged in loaning business. It was an irrefutable fact that in the mortgage documents Mr Örn Clausen was specified as debtor and Landsbréf as creditor, that is as the holder of the mortgage notes, who would have to endorse them upon transfer of title. The National Bank's assertion that Landsbréf was not the holder of the mortgage notes was implausible. The single most decisive detail regarding the identity of the holder was the public registration of the mortgage; the certificates of title specified Landsbréf as the claimant. Moreover, Mrs Justice Guðrún Erlendsdóttir had mortgaged her own home and premises occupied by her husband's law firm to Landsbréf.

31. The applicant further submitted that the National Bank was the first claimant to agree to a substantial relinquishment of Mr Örn Clausen's debts, as was unequivocally demonstrated by the documentary evidence adduced.

It did indeed carry enormous significance for Mr Örn Clausen as debtor to be able to show to the other creditors that one of his two largest creditors had been the first to agree unconditionally to the relinquishment of a very large part of the debt.

Finally, according to the applicant, because of the National Bank's massive debt relinquishment and its influence on other creditors to do the same, the couple owed the National Bank a debt of gratitude, for life. For years and still today, it has had a dominating position *vis-à-vis* the judge and her husband.

## 2. The Government

32. The Government disputed the applicant's contention that Mrs Justice Guðrún Erlendsdóttir could not be regarded as an independent and impartial judge and that Article 6 § 1 of the Convention had been violated. They stressed that the resolution of the case had no bearing on the financial situation either for the judge or her husband, neither of whom had any personal interest in the outcome of the case. The only matter that could give rise to an issue was the husband's indebtedness *vis-à-vis* the National Bank.

However, he had sought to resolve his, admittedly serious, financial difficulties in the spring of 1996, involving, among other things, agreements with creditors to release him from a part of his debts. At that time the applicant had not yet lodged his appeal with the Supreme Court, which he did on 31 May 1996. Thereafter, it took ten months before it became evident that Mrs Justice Guðrún Erlendsdóttir would sit in the case. In the Government's view, the judge's ability to sit in the case must be assessed in the light of any financial ties that existed only from the moment when it became clear that she would take part in the adjudication of the case, from 2 March 1997 at the earliest.

33. In this regard the Government, relying on a statement from the National Bank of 4 March 2002 (see paragraph 18 above), maintained that, as from 2 March 1997 until delivery of the Supreme Court's judgment on 25 April 1997, Mr Örn Clausen's debts to the National Bank amounted to ISK 2,394,028.60. The evidence showed that his debts to the National Bank were not unnaturally high at the time when the judge took part in the consideration of the applicant's case and that there were no other financial links between the spouses and the bank that could result in the bank being in a dominant position with respect to them in the event of default. Therefore the judge's financial links were not such as to provide a reason for the applicant to fear that she lacked the independence and impartiality required for adjudicating his case.

According to the Government the applicant's assessment of the husband's debts as at 25 April 1997 had been made by erroneously adding the debts to the National Bank prior to 4 June 1996 to those related to the four debt instruments issued to Landsbréf on 30 May 1996.

34. Contrary to what was suggested by the applicant, there was no contractual relationship between Landsbréf and the judge's husband at the time when Mrs Justice Guðrún Erlendsdóttir adjudicated the applicant's case. More than nine months earlier, on 4 June 1996, Landsbréf had sold to the EFA the four debt certificates, issued to it by Mr Örn Clausen on 30 May 1996. The brokerage relating to the mortgage instruments had taken place in such a manner that they were issued only when a purchaser had been found. So the relevant debt instruments were never in Landsbréf's ownership. This was a typical way of proceeding for a securities company receiving debt instruments issued in its name for sale to a third party. Following their sale, Landsbréf had no claim against Mr Örn Clausen, even though the registration of the original mortgagee remained unchanged in the real estate records.

In this regard the Government emphasised that Landsbréf was not a credit institution, but a securities brokerage firm with the chief purpose of acting as an intermediary in the purchase and sale of securities. According to the relevant national law, the original registration of a creditor was not to be changed when an instrument had been traded in the securities market. The purpose of registration was not to provide information on the identity of the creditor but only to record liens on the property. The original registration of Landsbréf as mortgagee therefore remained unchanged, but, as was usual in the case of transferable debt certificates generally, this provided no reliable indication of their actual owner. Therefore, the registration of an original mortgagee in the real estate records, referring to a debt instrument that was subject to public trade, constituted no proof of a contractual relationship between the mortgagee and the owner of the mortgaged property. The Government therefore rejected the applicant's suggestion that the registration in the real estate records was a decisive factor excluding the judge's participation.

35. Although it could not be denied that the debt cancellations by the National Bank and the Savings Bank involved high amounts, it could safely be assumed that, in the circumstance, these creditors thought their interests best served that way. Such debt settlement agreements were by no means uncommon in such circumstances. Creditors would often find their interests better protected by accepting partial payment than risking even less or no payment in the event of bankruptcy.

36. In April 1996, when Mr Örn Clausen began to seek settlement with his creditors, the applicant's case was still before the District Court. On 25 April 1997, when Mrs Justice Guðrún Erlendsdóttir took part in the Supreme Court's adjudication of the applicant's case, she was not, and had not been, indebted to the National Bank, and her husband's debt to the National Bank was no higher than could be expected of any private individual enjoying ordinary banking services. Thus the judge was by no means dependent on the bank's favour – as may be the case of defaulted

obligations, their settlement or collection – and was under no form of perceived or actual pressure that could reasonably give rise to the inference that the Supreme Court was not independent or impartial within the meaning of Article 6 § 1 of the Convention.

## **B. The Court's assessment**

37. The Court considers that it is essentially the requirement of “impartiality” that is in issue in the present case (see *Langborger v. Sweden*, judgment of 22 June 1989, Series A no. 155, p. 16, § 32). The existence of impartiality for the purposes of Article 6 § 1 of the Convention must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is, by ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see *Wettstein v. Switzerland*, no. 33958/96, § 42, ECHR 2000-XII).

As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary; the applicant has adduced no evidence to suggest that Mrs Justice Guðrún Erlendsdóttir was personally biased (*ibid.*, § 43).

Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the party concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (*ibid.*, § 44).

38. The Court observes that, apart from the existence under Iceland's law of appropriate safeguards to ensure the impartiality of judges, there is nothing to suggest that the judge's personal interests were at stake in the proceedings between the applicant and the National Bank.

However, shortly before and while the applicant's case was pending before the Supreme Court, the judge's husband had serious financial problems, being unable to honour as a guarantor his obligations amounting to approximately ISK 50,000,000 under a debt agreement concluded by a third party with the bank and twenty other creditors. In the view of the Court, it transpires from the evidence submitted to it that there are three sets of circumstances which could give rise to an issue with regard to the requirements of impartiality under Article 6 § 1 of the Convention, namely the husband's debts to the National Bank when the case was being

considered by the Supreme Court in April 1997, the four mortgage certificates which he contracted with Landsbréf on 30 May 1996 and his debt cancellation agreement with the National Bank of 6 June 1996.

39. As regards the first point, the Court notes that on 25 April 1997, when the Supreme Court adjudicated the applicant's case, the Supreme Court judge's husband had certain debts *vis-à-vis* the National Bank, the opposing party in the applicant's case. The size of those debts is disputed between the Government and the applicant. However, the Court sees no reason to doubt the information provided by the Government to the effect that, as at 25 April 1997, the husband owed approximately ISK 2,500,000 to the bank. In the view of the Court, this could reasonably be considered a moderate amount and there is nothing to suggest that this fact, on its own, could have constituted financial pressure capable of affecting the judge's impartiality.

40. Secondly, the Court observes that ten months earlier, on 30 May 1996, the husband issued four debt certificates, for amounts totalling ISK 13,600,000 to Landsbréf. The certificates were sold a few days later, on 4 June 1996, to an independent financial institution, the EFA, which became the creditor with respect to those amounts. The Court accepts the Government's submission that it was the EFA, not Landsbréf, which was the creditor with respect to these amounts after 4 June 1996. After that date it does not appear that the debt certificates as such established any direct financial link between the husband and the National Bank that could shed negative light on the judge's impartiality.

41. However, the Court considers that neither of the two sets of circumstances mentioned can be dissociated from the third factor, namely the wider context of the debt settlement agreement reached between Mr Örn Clausen and the bank on 6 June 1996.

42. In this connection the Court notes in particular the role played by Mrs Justice Guðrún Erlendsdóttir in facilitating the debt settlement achieved by her husband. It would appear that the security in her properties, which she offered to her husband, enabled him to raise the ISK 13,600,000 (currently corresponding to approximately 160,000 euros (EUR)) under the mortgage certificates of 30 May 1996. These funds, so it seems, were destined to cover his part of the debt settlement agreements reached with the National Bank and other creditors. The amounts involved were by no means negligible and the objects offered in security were nothing less than the couple's main residence. Presumably, without the security provided by Mrs Justice Guðrún Erlendsdóttir, the debt settlements in question would not have materialised. Furthermore, the cancellation of the debt was a condition for the judge to provide the security.

43. The Court appreciates that Mr Örn Clausen's difficulties in May 1996 did not stem directly from his own personal financial situation but from that of an insolvent third party, Mr Edvard Lövdal, for whom he was a

guarantor, as well as from the inability of other guarantors to honour their guarantees.

It remains, however, that Mr Örn Clausen had a legal obligation to cover claims from the twenty-one creditors totalling approximately ISK 50,000,000, including ISK 16,000,000 (approximately EUR 190,000) to the National Bank as one of the two major creditors (the other being the Savings Banks' Hedging Fund which had a claim amounting to ISK 17,000,000). The debt cancellation released him from debts amounting to ISK 11,000,000 towards the National Bank, of an even higher sum towards the Savings Banks' Hedge Fund, and of multiple smaller sums owed to other creditors. The stance adopted by the National Bank and the Hedge Fund became a weighty factor in the attempts to make other creditors follow suit. Yet a further consequence was the fact that Mr Örn Clausen's debts to the National Bank had decreased to an ordinary level by April 1997, which state of affairs could not have been unrelated to the settlement with the National Bank in June 1996.

In view of the above, the Court is not persuaded by the Government's argument that the debt settlement agreement between Mr Örn Clausen and the National Bank as well as other creditors, securing the latter recovery of 25% of the debts, was for them an attractive alternative to declaring him bankrupt and one that could not be viewed as a favour towards him personally. On the contrary, even assuming that the solution reached suited creditors, it finds that the cancellation of 75% of such large debts must be considered a favourable treatment of Mr Örn Clausen.

44. It should also be noted that when the four mortgage certificates were brokered by Landsbréf and the debt settlement agreement was concluded with the National Bank, the applicant's case, in which the National Bank was an opposing party, was already pending before the Supreme Court.

45. Against this background, there was at least the appearance of a link between the steps taken by Mrs Justice Guðrún Erlendsdóttir in favour of her husband and the advantages he obtained from the National Bank. The Court will not speculate as to whether she derived any personal benefit from the operation and finds no reason to believe that either she or her husband had any direct interest in the outcome in the case between the applicant and the National Bank. However, the judge's involvement in the debt settlement, the favours received by her husband and his links to the National Bank were of such a nature and amplitude and were so close in time to the Supreme Court's examination of the case that the applicant could entertain reasonable fears that it lacked the requisite impartiality (see, *mutatis mutandis*, *Holm v. Sweden*, judgment of 25 November 1993, Series A no. 279-A, pp. 15-16, §§ 32-33).

46. Accordingly, the Court finds that there has been a violation of Article 6 § 1 of the Convention in the present case.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. Article 41 of the Convention provides:

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

### A. Damage

48. The applicant sought compensation for pecuniary damage caused by the fact that he had lost his case against the National Bank before the Supreme Court on 25 April 1997, which by three votes to two, with Mrs Justice Guðrún Erlendsdóttir voting with the majority, found for the bank. The applicant claimed ISK 41,010,259, which included his principal claim of ISK 8,746,319 in that case, plus accrued default interests. He stressed that there was a causal link between the failure of the Supreme Court to afford him an independent and impartial hearing and that court’s rejection of his claim.

49. The applicant further requested the Court to award him compensation for non-pecuniary damage on account of frustration, suffering and damage to his reputation resulting from the violation. He claimed an amount no lower than ISK 40,000,000 to be assessed by the Court.

50. The Government disputed both of the above claims, arguing, firstly, that there was no causal connection between the violation and the alleged pecuniary damage and, secondly, that the applicant had not suffered any non-pecuniary damage that could not be adequately compensated by the Court’s finding of violation.

51. The Court observes that an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of all the guarantees of Article 6 § 1. It cannot speculate as to the outcome of the trial had the position been otherwise. However, the Court finds that the applicant must have suffered anguish and distress from the matter found to constitute a violation and which this finding cannot adequately compensate (see, *mutatis mutandis*, *H. v. Belgium*, judgment of 30 November 1987, Series A no. 127-B, p. 37, § 60). Deciding on an equitable basis, the Court awards the applicant EUR 25,000.

### B. Costs and expenses

52. The applicant further claimed:

(a) ISK 1,295,000 in respect of costs of translation, photocopying and postage;

(b) ISK 3,999,500 for his own work with the case (421 hours at a rate of ISK 9,500 per hour).

The above figures were the last claimed after having been increased several times in connection with each of the successive pleadings in the case.

53. As regards item (a), the Government expressly accepted to pay approximately ISK 450,000 but omitted to comment on the increased figures claimed by the applicant subsequently in connection with additional pleadings.

As to item (b), the Government invited the Court to reject the claim as the applicant could not be viewed as having incurred any costs for his own work.

54. As to the costs referred to in item (a), the Court notes that the Government have in part expressly, in part tacitly, accepted the claim. It sees no reason to doubt that the applicant has incurred such costs and awards him EUR 15,000.

However, no award can be made with respect to item (b), as the applicant chose to present his own case to the Court (see *Philis v. Greece (no. 1)*, judgment of 27 August 1991, Series A no. 209, pp. 26-27, §§ 77-78, and *Brincat v. Italy*, judgment of 26 November 1992, Series A no. 249-A, p. 13, § 29).

### C. Default interest

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

## FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds* by six votes to one that the respondent State is to pay the applicant EUR 25,000 (twenty-five thousand euros) in respect of non-pecuniary damage;
3. *Holds* unanimously that the respondent State is to pay the applicant EUR 15,000 (fifteen thousand euros) in respect of costs and expenses;

4. *Holds* unanimously

- (a) that the respondent State is to pay the applicant any tax that may be chargeable on the above amounts;
- (b) that these amounts should be paid, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, and are to be converted into the national currency of the respondent State at the date of settlement;
- (c) 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;

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

Done in English, and notified in writing on 10 April 2003 pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER  
Registrar

Georg RESS  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Mr Ress;
- (b) concurring opinion of Mr Zupančič;
- (c) partly concurring and partly dissenting opinion of Mrs Greve.

G.R.  
V.B.

## CONCURRING OPINION OF JUDGE RESS

In this case it may appear that the amount of just satisfaction for non-pecuniary damage is rather high. I have nevertheless voted with the majority in favour of awarding this amount of just satisfaction for reasons which should be explained.

Normally in such a case, where the decision of the national court was taken by a three-to-two majority and it appears that there was a violation of Article 6 § 1 because of a lack of impartiality – at least, according to appearances – on the part of one of the judges, the reopening of the national proceedings would seem to be the appropriate, if not logical, outcome of such a judgment. The Committee of Ministers has urged all Contracting States to introduce into their national legislation the possibility of reopening proceedings in cases where a judgment of the European Court of Human Rights establishes a violation of Article 6 § 1, especially where “the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of” (see Recommendation Rec (2000) 2 of the Committee of Ministers to member States on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, adopted 19 January 2000). I think that that is true of this case. The applicant has already asked for the reopening of the proceedings and has failed, and Icelandic law does not apparently provide for any further possibility of reopening the proceedings (see paragraph 25 of the judgment). If there is a new ground for reopening the national proceedings after a judgment of the European Court, there should always be an appropriate procedure available.

Since this avenue is apparently blocked under Icelandic law, and there may be a long way to go until Iceland has changed its national legislation, there is undoubtedly not only quite a long period to take into account but also the possibility that in this case the applicant will never obtain the reopening of the proceedings.

It is of course a matter of speculation how the Supreme Court would have decided if the violation had not occurred, but a slight element of loss of real opportunities may also be observed in this regard (see, *mutatis mutandis*, *Bönisch v. Austria* (Article 50), judgment of 2 June 1986, Series A no. 103, p. 8, § 11). Therefore I think that a higher amount of just satisfaction for non-pecuniary damage in this case was justified.

## CONCURRING OPINION OF JUDGE ZUPANČIČ

I join Judge Ress in his separate opinion. However, I would take the logic of the arguments – as I did in *Cable and Others v. the United Kingdom* ([GC], nos. 24436/94 et seq., 18 February 1999), *Scozzari and Giunta v. Italy* ([GC], nos. 39221/98 and 41963/98, ECHR 2000-VIII) and *Lucà v. Italy* (no. 33354/96, ECHR 2001-II) – one step further. The compensation for the “loss of opportunities” (*lucrum cessans*) is a classic private-law solution, which together with the compensation for damage (*damnum emergens*), provides a logical remedy in cases where there can be no restitution of the status quo ante (*restitutio in integrum*).

Moreover, it is truly speculative in a case such as we are faced with, to try to guess what kind of “loss of opportunities” the applicant had sustained. There is no apparent correlation between our awarding of compensation and the procedural violation we have established. Consequently, the right and the remedy are not, as they should be, interdependent.

In *Cable and Others* I suggested that this problem turns on the too timid interpretation of Article 41 of the Convention. I still believe that a procedural violation requires a procedural remedy. In *Scozzari and Giunta* the Court at least indicated that a *restitutio in integrum* was necessary. The case before us and *Lucà* are clear proof that this line of reasoning should be maintained and that it should be developed into a consistent doctrine.

On the other hand, in cases emanating from the Contracting States that have already adopted an internal legislative solution foreseeing a reopening of the national procedure, no damages ought to be awarded except (a) those which in fact compensate for the suffering caused by the procedural violation, and (b) those which compensate for the real loss of opportunities.

In turn, this demonstrates what the normal boundary of the two remedies really is.

## PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE GREVE

### *Introductory remarks*

While I share the conclusion reached by the Court in finding a violation of Article 6 § 1 of the Convention in this case, I do not share the reasoning of the majority as expressed in paragraphs 40 to 45 of the judgment. That is to say, I do not share the majority's interpretation of the facts of the case. I find the same facts established, but view them as straightforward.

### *The financial situation of Mr Örn Clausen*

As to the size of Mr Örn Clausen's debts and the description of how it evolved over time, I share the findings made by the majority.

Mr Örn Clausen got into severe financial problems because Mr Edvard Lövdal, for whom he was a guarantor, became insolvent, and also because other guarantors were unable to honour their guarantees. In other words, Mr Örn Clausen's troubles were due primarily to Mr Edvard Lövdal's problems, and secondly to the fact that he was required to pay in accordance with his guarantee at a time when "other guarantors" – meaning a minimum of two other guarantors – were unable to honour their guarantees. There were thus a minimum of four people liable for the original debt in respect of which Mr Örn Clausen had acted as guarantor. The liability was *in solidum* from the point of view of the creditors. There is no indication in the documents provided to the Court in the case that when Mr Edvard Lövdal had become insolvent, liability *vis-à-vis* the creditors was either *pro rata partes* or *pro rata temporis*.

People in general are interested in settling their financial liabilities. Mr Örn Clausen had an additional interest in so doing, linked to the fact that he was a practising lawyer and bankruptcy on his part would be detrimental to his professional life. Furthermore, the fact that his wife was a Supreme Court judge made it socially desirable both for him and for her that the debt should be settled in an acceptable manner. It is appreciated that the spouses kept their financial dealings separate, so that Mrs Justice Guðrún Erlendsdóttir was in no way financially responsible for the guarantee made by her husband.

Mr Örn Clausen sought and obtained a financial settlement with the twenty-one creditors who could invoke the guarantee he had made. Among them, with the second largest claim, was the National Bank of Iceland. Mr Örn Clausen was released from further liabilities by being able to pay 25% of the debt which he had guaranteed, the creditors thereby agreeing not to seek from him the remaining 75% of that very debt. However, the

creditors still had both Mr Edvard Lövdal – the person primarily liable for the entire debt – and a minimum of two other guarantors to hold responsible for that remaining part of Mr Edvard Lövdal’s debt. Being insolvent means being at the material time unable to honour *all one’s obligations*. That, however, is different from being unable to honour *part of one’s obligations*. Most insolvent debtors are able to honour some parts of their obligations; the extent to which they are able to do so varies. It would have been an extraordinary situation – a situation that this Court could expect to be documented if it existed – if neither Mr Edvard Lövdal nor any of the “other guarantors” had been able to pay the creditors anything.

Eventually Mr Örn Clausen will, in theory at least, be able to seek recovery of his payment under the guarantee from Mr Edvard Lövdal.

In order to settle 25% of Mr Edvard Lövdal’s debt to a total of twenty-one different creditors, Mr Örn Clausen needed a loan and got one with security in his wife’s property. That Mrs Justice Guðrún Erlendsdóttir made a debt cancellation *vis-à-vis her husband* a precondition for her offering security was in my opinion not remarkable under the circumstances; it was simply prudent. Socially speaking, I permit myself to think that it was clearly in her personal interest that her husband should handle his financial problems in *the best possible manner vis-à-vis* Mr Edvard Lövdal’s creditors who had turned to him as a guarantor.

As for the loan obtained by Mr Örn Clausen through the intermediary assistance of Landsbréf, I have difficulties in regarding this either as special or as sufficient to create any special links between Mrs Justice Guðrún Erlendsdóttir and the National Bank of Iceland. A loan against security is commonplace and the size of the loan was not so large as to prevent Mr Örn Clausen from later regaining a sound financial situation. If Mr Örn Clausen had been declared bankrupt, he would obviously not have been able or willing, or both, to get a loan of this size to pay the creditors 25% of Mr Edvard Lövdal’s debt in respect of which he had acted as guarantor. The sheer size of the loan is not compatible with the inference that the creditors would have gained financially by declaring Mr Örn Clausen bankrupt.

It is common ground that for creditors debt agreements are financially preferable to bankruptcy. This is no less so where a debtor for one or more good reasons – as in the case of Mr Örn Clausen – has a strong interest in wanting to avoid bankruptcy. Conversely, where a person is eager to avert bankruptcy, the creditors are likely to get a better agreed settlement than where a person is indifferent to bankruptcy (the latter mentality is generally shunned by creditors).

*Conclusion*

In view of the above and all the documents provided to the Court in this case I find no basis for the inferences drawn by the majority of the Court in paragraphs 43 and 45 of the judgment, where it is stated:

“... the Court is not persuaded by the Government’s argument that the debt settlement agreement between Mr Örn Clausen and the National Bank as well as other creditors, securing the latter recovery of 25% of the debts, was for them an attractive alternative to declaring him bankrupt and one that could not be viewed as a favour towards him personally. On the contrary, even assuming that the solution reached suited creditors, it finds that the cancellation of 75% of such large debts must be considered a favourable treatment of Mr Örn Clausen.

...

... However, ... the favours received by her husband and his links to the National Bank were of such a nature and amplitude ...”

The Court has, in my opinion, not been provided with any documentation that supports the conclusions in these quotations, nor has it asked the parties to the proceedings to answer any questions relevant to an in-depth analysis of the extent to which Mr Edvard Lövdal’s creditors may have recovered their dues in respect of which Mr Örn Clausen had acted as one of the guarantors.

For my part, I have reached the conclusion that there has been a violation of Article 6 § 1 solely on the basis of an objective test – that is to say, on the basis of what, on an objective level, could give rise to a reasonable fear that the Supreme Court judge lacked the requisite impartiality in the applicant’s case. As seen from the point of view of an outsider – such as the applicant – the full information about the agreement reached between Mr Örn Clausen and the creditors, and Mr Örn Clausen’s financial undertakings to achieve the agreement, was not transparent.

The issue of impartiality was raised by the applicant after the Supreme Court had adjudicated his case. This was so for the very good reason that the applicant did not have the necessary knowledge to raise the issue while the case was pending. It nonetheless prevented the relevant judge and her colleagues on the bench from ruling on an objection made by the applicant as to impartiality. Under most legal systems such an objection would in itself be an element for the court’s decision on impartiality.

*Non-pecuniary damage*

I have voted against awarding the applicant the amount of EUR 25,000 in respect of non-pecuniary damage as I find this amount to be clearly excessive in relation to the Court’s case-law.

The award is way beyond the level of awards for non-pecuniary damage offered by this Court to people or relatives of people who have even suffered outrageous human rights violations that fall under the provisions of Articles 2 and 3 of the Convention.

In the present case the applicant was given an unfavourable decision by the Supreme Court because the “decisive vote” in his case was cast by a judge who in this Court’s opinion lacked the necessary appearance of impartiality. In other words, the other four judges cast two votes in favour of the applicant and two against him. Under these circumstances, any fifth judge would be as likely to come down on the one side in the case as on the other. It is, as I see it, at best speculation to say that the applicant has suffered any significant injury under these circumstances.