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

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Criminal proceedings against former Kaupþing Bank executives were largely fair but led to one violation related to a judge's impartiality

In today's **Chamber** judgment[1] in the case of **Sigurður Einarsson and Others v. Iceland** (application no. 39757/15) the European Court of Human Rights held:

unanimously, that there had been **a violation of Article 6 § 1 (right to a fair trial)** of the European Convention on Human Rights on account of a judge's lack of impartiality,

by six votes to one, that there had been **no violation of Article 6 §§ 1 and 3 (b)** of the European Convention in respect of the alleged denial of access to data, and,

unanimously, that there had been **no violation of Article 6 §§ 1 and 3 (d)** in respect of the alleged failure to summon witnesses.

The case concerned criminal proceedings against four business executives linked to a share transaction in Kaupþing Bank before its collapse in 2008.

The Court found in particular that one of the Supreme Court judges in the case had a son who had worked for Kaupþing both before and after its collapse. That link meant that the applicants could have had a justified fear that the judge lacked impartiality.

It found that the authorities' decisions on access to the evidence collected during the investigation and their actions related to the attendance of two witnesses on behalf of the defence had not breached the applicants' right to a fair trial.

Principal facts

The applicants, Sigurður Einarsson, Hreiðar Már Sigurðsson, Ólafur Ólafsson, and Magnús Guðmundsson, are Icelandic nationals born in 1960, 1970, 1957 and 1970 respectively. They live in Reykjavík (Mr Einarsson), Luxembourg (Mr Sigurðsson and Mr Guðmundsson), and Pully, Switzerland (Mr Ólafsson).

Mr Einarsson was the chairman of Kaupþing, Mr Sigurðsson was chief executive officer, Mr Ólafsson was the majority owner of a company which indirectly owned another company which was Kaupþing's largest shareholder, while Mr Guðmundsson was the chief executive of the bank's Luxembourg subsidiary.

In September 2008 Kaupþing announced that a company owned indirectly by Sheik Mohammed bin Khalifa Al Thani, a member of Qatar's royal family, had bought 5.01% of its shares. An investigation revealed that the funds for the purchase had been provided in loans by Kaupþing itself. None of the loans had had the necessary approval of Kaupþing's Credit Committee and no or insufficient security had been provided for them.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

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The Financial Supervisory Authority lodged a complaint with the Special Prosecutor, appointed to investigate possible crimes linked to the collapse of Iceland's banking sector. In February 2012 the Special Prosecutor issued an indictment against the applicants.

After proceedings in the District Court and the Supreme Court, which ended in February 2015, Mr Ólafsson was found guilty of market manipulation while the others were convicted of that offence and of breach of trust. Three of them sought to have the proceedings reopened, but in January 2016 the Committee on Reopening Judicial Proceedings rejected their applications.

During the criminal proceedings the applicants complained about denial of access to documents collected during the investigation, about not being able to question two particular witnesses, and that the authorities had tapped their conversations with their lawyers.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair trial / independent and impartial tribunal) of the European Convention, the applicants complained of a lack of impartiality because the wife of one of the Supreme Court judges had been on the board of the Financial Supervisory Authority while it was investigating Kaupþing, and because the same judge's son had worked in Kaupþing's legal department before its collapse and then afterwards while it was being wound up.

They also complained about denial of access to evidence and not being able to examine witnesses under Article 6 § 1 and 3 (b) (right to a fair trial and right to adequate time and facilities for preparation of defence) and Article 6 §§ 1 and 3 (d) (right to a fair trial and right to obtain attendance and examination of witnesses). They alleged that the tapping of their telephone conversations with their lawyers had breached Article 8 (right to respect for private and family life, the home, and correspondence).

The application was lodged with the European Court of Human Rights on 10 August 2015.

Judgment was given by a Chamber of seven judges, composed as follows:

Paul **Lemmens** (Belgium), *President*,
Julia **Laffranque** (Estonia),
Valeriu **Griţco** (the Republic of Moldova),
Stéphanie **Mourou-Vikström** (Monaco),
Arnfinn **Bårdsen** (Norway),
Darian **Pavli** (Albania) and,
Ragnhildur **Helgadottir** (Iceland)*, ad hoc Judge*,

and also Stanley **Naismith**, *Section Registrar.*

Decision of the Court

Article 6 § 1

The Court observed that the applicants had had the right under domestic law to challenge the Supreme Court judge whose wife had been on the board of the Financial Supervisory Authority until January 2009, indeed, they had been given an express opportunity to do so.

However, their lawyers had explicitly stated that they had no objections to the judge on that ground, which had amounted to an unequivocal acceptance of his participation. This part of the complaint was therefore manifestly ill-founded and had to be declared inadmissible.

In contrast, the defence had never been officially notified that the same judge's son had worked at the bank before and after its collapse. The fact the applicants' lawyers had known the son or that

Iceland's financial community was small, as submitted by the Government, did not amount to the defence having been put on notice of an issue of a lack of impartiality.

Nor had the defence expressly stated that it had no objection to the judge taking part in the case despite this particular family link. This complaint was therefore admissible. The Court reiterated its tests of subjective and objective impartiality, the first concerning a judge's personal interest, the second relating to whether a court or its composition provided sufficient guarantees of impartiality.

The Court noted that the judge's son had worked at Kaupþing from 2007. He was subsequently the head of the legal department of the Resolution Committee and the Winding-Up Committee from 2008 to 2013, during the investigation into the applicants, their trial and civil proceedings brought by the bank against two of them. He had continued as a consultant to the bank while the applicants' case was being dealt with by the Supreme Court.

That family link was enough to create objectively justified fears about the Supreme Court judge's impartiality in the applicants' criminal appeal proceedings, a doubt that could have been harboured by all the applicants, even if civil proceedings by the bank had only been brought against two of them. There had therefore been a violation of Article 6 § 1.

Article 6 § 1 and 3 (b)

The case had involved several sets of documents: a "full collection" of all the documents and data gathered by the prosecution; "tagged documents" found to be relevant to the case after a search of the full collection by investigators using the Clearwell e-Discovery system; and documents which had been further searched manually and with Clearwell and included in the investigation file. Lastly, there had been a file created as the evidence in the case for the trial court.

The Court noted that the applicants had not been denied access to the actual evidence used in court. Their complaint focussed rather on a lack of access to the full collection and the fact that the prosecution alone had determined the relevance of the filtered or "tagged", documents.

It accepted that the full collection had been massive and that the prosecution had had to reduce it. In principle, the defence in such circumstances should also have the opportunity to define criteria of what might be relevant. However, the applicants had not pointed to specific issues which more searches could have resolved and it was difficult to accept a "fishing expedition" had been justified.

The Court reiterated that prosecution authorities should disclose all the evidence they have for or against defendants. However, in this case the prosecution itself had not known what was in the full collection and so there had been no withholding of evidence or "non-disclosure" in the classic sense.

The situation was different with the "tagged" data as it had been searched and subsequently selected by investigators. The criteria for the searches had been defined by the prosecution itself, without the supervision of the courts, a way of proceeding which the Court had previously found to be incompatible with the Convention (*Rowe and Davis v. United Kingdom*).

Furthermore, the prosecutors had refused to provide the defence with lists of documents, particularly those which they had tagged, on the grounds in particular that the lists did not exist.

While the Court agreed with the Supreme Court's findings that domestic law did not require the police to create documents which did not exist, it found that it would have been possible and appropriate to allow the defence to carry out further searches in the tagged data. A refusal of such a search could therefore impinge on the right to adequate facilities to prepare a defence.

However, despite their complaints about this issue, the applicants had never sought a court order for access to the full collection of data or for further searches and had never suggested more investigative measures. The Supreme Court had rejected their complaints about this issue for the very reason that they had not sought a court order for such actions. Indeed, a court review of such a request was an important safeguard in deciding whether access to data should be granted.

The Court noted that the applicants had not provided any specific details about the type of evidence they had been seeking and held that the lack of access to the data in question had not been such as to deny them a fair trial. There had therefore been no violation of this provision.

Article 6 § 1 and 3 (d)

The applicants complained that the authorities had not done enough to ensure that two possible defence witnesses, Sheik Al Thani and his relative and adviser Sheik Sultan, testify in court or by video-link. The men had given statements to the authorities, but had refused to be further involved.

The Court examined this complaint under its case-law on the rights of defendants to call witnesses on their behalf, as recently clarified in the Grand Chamber judgment *Murtazaliyeva v. Russia*.

Using that case's three-pronged test, the Court found that the applicants' reasons for having the men testify had been vague and unsubstantiated. The Supreme Court had also considered the relevance of the testimony and had provided adequate reasons for not examining them. There had been nothing arbitrary or manifestly unreasonable in the domestic decision not to rely on their statements in a case where a large amount of other evidence had been taken into account.

The Court concluded that there had been no violation of this provision of the Convention.

Article 8

The applicants complained that telephone calls to their lawyers had been tapped. The Court first found that neither Mr Einarsson nor Mr Ólafsson had supplied specific details, thus declaring their complaint unsubstantiated and inadmissible as manifestly ill-founded.

Mr Guðmundsson had not complained in the domestic courts under Article 8, either to the Supreme Court or in a civil action. Mr Sigurðsson had relied on that provision before the Supreme Court, but that body could not provide an effective remedy for any such violations in criminal proceedings. He had brought a civil action, which could provide a remedy, but it was not clear whether he had appealed against a first-instance judgment rejecting his claim.

Both men's complaints were therefore inadmissible for non-exhaustion of domestic remedies.

Just satisfaction (Article 41)

The Court held that the finding of a violation was sufficient just satisfaction for any non-pecuniary damage. It awarded 2,000 euros (EUR) to each applicant in respect of costs and expenses.

Separate opinions

Judge Pavli expressed a partly dissenting opinion.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.