



Former Kaupping Bank executive's trial for fraud unfair owing to use of transcript of his questioning while still a witness

In today's Chamber judgment¹ in the case of [Bjarki H. Diego v. Iceland](#) (application no. 30965/17) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights in respect of the requirement of an independent and impartial tribunal, and

a violation of Article 6 §§ 1 and 3 (a) and (c) (right to be informed promptly of accusation / right to legal assistance of own choosing)

The case concerned the trial of Mr Diego – a former Kaupping bank official – for fraud by abuse of position following the 2008 financial crisis. He had been questioned without being informed of his status as a suspect. Details of one of the judge's (V.M.M.) shareholdings in Kaupping were revealed only following the final judgment in his case.

The Court found that Justice V.M.M.'s losses in Kaupping had been minimal and certainly not at a level to call into question his impartiality.

However, the Court did find that the Icelandic authorities had been negligent with regards to the investigation against Mr Diego. In particular, the prosecutor had interviewed Mr Diego as a witness in the case, despite his effectively having been treated as a suspect at the time, his phone having been tapped as a result, and the transcript of that interview subsequently being introduced as evidence before court. The Government were unable to show that this had not undermined the fairness of the trial.

Principal facts

The applicant, Bjarki H Diego, is an Icelandic national who was born in 1968 and lives in Reykjavik.

The liquidity crisis and criminal proceedings

In 2008 the global liquidity crisis began to affect the Icelandic banking sector. The three largest banks failed, including Kaupping Bank hf. Mr Diego was director of the loan division and a member of the group credit committee until Kaupping's collapse.

A special prosecutor's office was established as a result of the banking crisis. It launched several investigations into Kaupping, including investigating Mr Diego. As part of the investigation, the special prosecutor wire-tapped Mr Diego's phone.

The applicant was questioned as a witness in relation to two of those investigations. In questioning in the Holt investigation in 2010, he was not aided by counsel, and apparently had not been informed that he had that right. When questioned the second time in 2011 in connection with that investigation he had his lawyer present and he was informed he was a suspect. At each interview Mr Diego was informed of his right to silence and not to self-incriminate when being questioned.

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.

In 2013 Mr Diego was charged with seven counts of fraud committed through abuse of position (*umboðssvik*). He twice failed to have the case dismissed owing to having been wiretapped and the transcripts of his conversations having been submitted in evidence.

On 26 June 2015 the Reykjavik District Court convicted Mr Diego on six counts of fraud, giving him a custodial sentence of two and a half years. The applicant appealed, later submitting that he had been questioned as a witness rather than a suspect and thus the case should be dismissed.

The Supreme Court partially overturned the lower court's judgment, convicting Mr Diego on all seven counts.

New information since final conviction

In 2016 the media revealed information concerning the investment portfolios of Supreme Court judges, with some of the shareholdings not having been declared by some members of the court. One member who had been on the bench in the applicant's case, Justice V.M.M., had owned shares in Kaupþing, along with significant holdings in Landsbanki. The value of those shares had been effectively wiped out when those banks had gone bankrupt.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 and 3 (a) and (c) (**right to a fair trial / right to be informed promptly of accusation / right to legal assistance of own choosing**), the applicant complained that by having Justice V.M.M. on the bench in his case his right to a fair trial by an independent and impartial tribunal had been violated, and that he had given witness statements to a prosecutor without knowing he had been a suspect and so without being able to avail of his defence rights.

The application was lodged with the European Court of Human Rights on 5 April 2017.

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

Georges **Ravarani** (Luxembourg), *President*,
Robert **Spano** (Iceland),
María **Elósegui** (Spain),
Darian **Pavli** (Albania),
Peeter **Roosma** (Estonia),
Andreas **Zünd** (Switzerland),
Frédéric **Krenc** (Belgium),

and also Milan **Blaško**, *Section Registrar*.

Decision of the Court

[Article 6 § 1 in respect of the requirement of an independent and impartial tribunal](#)

The Court reiterated that bias could be found in the beliefs or behaviour of an individual judge, or in the composition of the bench and the trial overall not providing the guarantees necessary to ensure fairness. Specifically, it had held in *Sigríður Elín Sigfúsdóttir v. Iceland* (no. 41382/17) that in order for a judge's impartiality to be called into question, the financial interests of the judge concerned had to be directly related to the case.

For the Court, Justice V.M.M.'s losses in Kaupþing had been minimal (approximately 140 euros at the time) and certainly not at a level to call into question his impartiality. Moreover, his losses in other banks could not call into question his impartiality in relation to Kaupþing.

There had been no violation of the Convention in terms of the independence and impartiality of the tribunal.

Article 6 § 1 and 3 (a) and (c)

Given that the special prosecutor had taken the step of tapping the applicant's phone, based on a suspicion that he had been involved in allegedly criminal activity, and ultimately brought proceedings against the applicant, the Court was satisfied that the applicant had been a suspect when he had been questioned. He should have had the criminal protections of Article 6 § 3.

The Court observed, specifically, that although the applicant had been informed of the obligation to give truthful statements and the right not to self-incriminate, he had clearly not been informed of his status as a suspect. Nor had he initially been informed of his right to have the aid of counsel during interviews, leading the Court to hold that there had been a failure to provide him with legal assistance. There had been no compelling reason to restrict such access to counsel.

The Court noted the Government's statement that the applicant had not made directly incriminating statements in the interviews. However, the applicant had given statements concerning decision-making in the bank and his role in it. The Court reiterated that the privilege against self-incrimination was not confined to actual confessions or to directly incriminating remarks; it was sufficient for them to have substantially affected the accused's position. Noting, also, the tapping of the applicant's phone by the special prosecutor, the Court held that the Government had failed to show how the investigation had not undermined the fairness of the proceedings. In addition, the domestic courts had never ruled on the applicant's complaint that he had not been informed of having been a suspect when being interviewed.

Given this, there had been a violation of Article 6 § 1 and 3 (a) and (c) of the Convention.

Just satisfaction (Article 41)

The Court held that the finding of a violation constituted sufficient just satisfaction in respect of non-pecuniary damage, but that it was for the respondent State to choose how to put an end to the violation.

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.